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Understanding the CISG System of Remedies from the Latin American Domestic Laws' Standpoint

Edgardo Muñoz
CISG and Latin America: Regional and Global Perspectives
CISG and Latin America: Regional and Global Perspectives

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# Table of Contents

Foreword ix  

Part I General Aspects  

1 Another BRIC in the Wall: Brazil Joins the CISG 3  
*José Angelo Estrella Faria*  

2 CISG and Latin America – A Key for Reducing Transaction Costs 33  
*Luciano Benetti Timm, Carolina Hess Almaleh and Sabrina Raabe de Sá*  

3 The First Glance of Brazilian Companies at the CISG – What Should Foreigners Expect? 37  
*Natália Villas Bôas Zanelatto and Tiago Beckert Isfer*  

*Ruy Rosado de Aguiar Júnior*  

5 The CISG – A Fair Balance of the Interests of the Seller and the Buyer 79  
*Ingeborg Schwenzer*  

6 Understanding the CISG System of Remedies from the Latin American Domestic Laws’ Standpoint 93  
*Edgardo Muñoz*  

Part II Selected Topics of the CISG  

7 Interaction between the CISG and INCOTERMS 119  
*Rafael Villar Gagliardi and Caio Pazinato Ramos*  

8 Brazil’s Accession to the CISG and Transmission of Risk: Some Considerations 135  
*Patricia Galindo da Fonseca*
**Table of Contents**

9   The Exemption from Liability under the United Nations Convention on Contracts for the International Sales of Goods (CISG) – Analysis and Brief Comparison with the Brazilian Civil Code  
    Mariana Guita Campinho  

10  The CISG and the Contractual Freedom of Form and Evidence: A Latin-American Perspective  
    Frederico E.Z. Glitz  

11  Commodities Trade in the Brazilian Experience: Reflections on the Application of the CISG  
    Alberto do Amaral Júnior, Umberto Celli Júnior and Lígia Espolaor Veronese  

12  Examination of the Goods and Notice of Non-Conformity  
    Pedro Silveira Campos Soares  

13  The Applicability of the CISG to the International Sales of Commodities  
    Fabio Alonso Vieira and Fernanda Pires Merouço  

14  Criteria for Application of a Fundamental Breach of Contract in the CISG  
    Giovana Benetti  

15  CISG and E-Commerce  
    Cesar Pereira and Ana Julia Aragão  

16  Seller’s Remedies  
    Florian Mohs  

17  Acceptance of an Offer under the CISG  
    Petra Butler and Bianca Mueller  

Part III The CISG vis-à-vis National Law  

18  The Challenges of Applying the CISG Concept of Conformity in Latin America: The Ordinary and Particular Purpose Approaches  
    Laura Gouvêa de França Pereira  

vi
# Table of Contents

19  Party Autonomy in Brazilian International Private Law  
*Jorge Cesa Ferreira da Silva and Renata C. Steiner*

*Paulo Nalin*

21  Article 1 CISG – The Gateway to the CISG  
*Petra Butler*

22  Using the CISG and International Commercial Arbitration as a Best Practice in Brazil  
*Erika Sondahl Levin*

23  CISG Articles 6, 7, 25 and 79 – *Pacta Sunt Servanda, Rebus sic Stantibus, Force Majeure* and Hardship Principles – Brazilian Civil Code Related Articles  
*José Maria Rossani Garcez*

24  Instalment Contracts and Fundamental Breach in the CISG: A Brazilian Perspective  
*Ana Gerdau de Borja*

25  Written Requirements in Brazil and Argentina: A Comparison under the Applicability of the CISG  
*Rafael Branco Xavier*

Part IV Commercial Law and the Trend for Regional and Global Integration

26  Uniform Sales Law – Brazil Joining the CISG Family  
*Ingeborg Schwenzer*

27  The Lasting Consequences, in a Global Perspective, of the Brazilian Delay in Incorporating the CISG  
*Didier Boden*

28  UNCITRAL Instruments and the Regional Harmonization of International Commercial Law  
*Sieg Eiselen*
<table>
<thead>
<tr>
<th>Page</th>
<th>Title</th>
<th>Authors</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>29</td>
<td>The Applicability of Force Majeure and Hardship to CISG Contracts Due to Trade Restrictions and to Other Government Actions in Latin America</td>
<td>Caroline Cavassin Klamas and Sabrina Maria Fadel Becue</td>
<td>527</td>
</tr>
<tr>
<td>30</td>
<td>Application of the CISG in Latin American Countries: An Overview – Reality and Theory</td>
<td>Ana Teresa de Abreu Coutinho Boscolo</td>
<td>547</td>
</tr>
<tr>
<td>31</td>
<td>Usury as a Cultural Divide and CISG Compromise Rules on Interest</td>
<td>Leandro Tripodi</td>
<td>575</td>
</tr>
</tbody>
</table>
Foreword

Latin America is a CISG-friendly part of the world. The CISG is presently in force in fifteen of the twenty-one sovereign states of the region, with Venezuela also being a signatory to the Convention. The convergence of and compatibility between the rules of the CISG and those of most, if not all, Latin American legal systems has been a frequent topic of discussion in the scholarly literature. Indeed, when confronted with the application of the CISG to cases which were to be decided under their jurisdiction, courts in Latin America have at times demonstrated strong familiarity with the rules of the Convention.

The influence of the CISG in Latin American legal education is likewise firmly entrenched. Of the 290 teams which participated in the twenty-first Willem C. Vis Moot in Vienna, twenty-four came from Latin American Universities, representing six Latin American countries (out of sixty-four worldwide). This is consistent with the percentage of Latin America’s share in the world population (right around 8%), meaning that the continent is proportionately represented in the Vis Moot, although some important countries are still absent from this international competition. Noteworthy conferences regarding the CISG have taken place in the region, including a meeting of the CISG Advisory Council (CISG-AC) in São Paulo in 2011, and the CISG conferences in Curitiba (Brazil) in 2014 (<www.cisginbrazil2014.com>) and 2015 (<www.cisg2015curitiba.com>). This book is a product of the latter in particular, made possible through the sponsorship and organization work of CAMFIEP.

This book aims at demonstrating that the CISG has a high potential for successful application in Latin America. With the accession of Brazil in 2013, approximately 90% of the continent’s GDP now falls under the rules of the CISG for the international sale of goods. The contributions by several authors, which are embodied in this work, collectively show that the CISG undoubtedly has excellent prospects for use by present and future generations of lawyers, judges and arbitrators throughout Latin America.

This work is the result of the efforts of a large number of people. The editors thank each of the authors, all of them enthusiastic participants in this collective enterprise. The editors acknowledge also the great work done by Diane Camacho and Jacqueline Henry-Lucio in editing and proofreading the articles. Special thanks go to Ana Julia Aragão and her UFPR (Federal University of Paraná) colleagues Pedro Penz, Izabela Moriggi and Ana Luciani for their invaluable assistance in the organization and revision of the book, and to Luisa Quintão for her precise and efficient work in the final stages of production of the book. Finally, they thank Eleven International Publishing for having embraced this project.

The Editors
6 \hspace{1cm} \textbf{Understanding the CISG System of Remedies from the Latin American Domestic Laws’ Standpoint}

\textit{Edgardo Muñoz*}

6.1 \hspace{1cm} \textbf{Introduction}

The CISG has been ratified by most Latin American States.\textsuperscript{1} Only Bolivia, Venezuela, Guatemala and Costa Rica are still missing in the CISG list of Latin American countries. The respective laws on contracts of sale of all twelve Latin American Contracting States consist of the CISG.\textsuperscript{2} The CISG applies to the sale of goods between parties whose places of business are in those Latin American States or other Contracting States.\textsuperscript{3} Likewise, the CISG applies to international sales of goods governed by the law of a Latin American CISG Contracting State or other Contracting States.\textsuperscript{4} When companies from these Latin American countries want any domestic code to apply exclusively to their international sale, instead of the CISG, they are required to refer to the respective ‘Código Civil o Código de Comercio’ in a choice of law clause, or must expressly or impliedly exclude the application of the CISG to their contract.\textsuperscript{5}

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\textsuperscript{1} Argentinean law 1 January 1988; Brazilian 1 April 2014; Chilean law 1 March 1991; Colombian law 1 August 2002; Cuban law 1 December 1995; Ecuadorian law 1 February 1993; Salvadoran law 1 December 2007; Honduran law 1 November 2003; Mexican law 1 January 1989; Paraguayan law 1 February 2007; Peruvian law 1 April 2000; and Uruguayan law 1 February 2000; see Status in <www.unicitral.org> (accessed in November 2015).

\textsuperscript{2} ICC Arbitral Award No. 7565 in CLOUT Abstract No. 300; see also ICC Arbitral Award Case No. 6653 in CLOUT Abstract No. 103.


\textsuperscript{4} Art. 1(1)(b) CISG. Absent an agreement as to the applicable law, whenever the application of the conflict of laws provisions of the forum judge leads to the application of any of the CISG Contracting States laws, the CISG would apply in accordance with Art. 1(1)(b) CISG.

\textsuperscript{5} Chile Supreme Court, \textit{Sala 1, Rol} 1782-2007, 22 September 2008: upholding that the parties had impliedly excluded the application of the CISG as both parties based their pleadings exclusively on the Chilean Civil Code and the Code of Commerce provisions. The express designation of a domestic law (in this case any of the CISG Latin American Member States laws) cannot be construed as an express reference to the provisions of the law that would apply at the national level, see I. Schwenzer & P. Hachem, in Ingeborg Schwenzer (ed.),
In spite of this wide scope of application in Latin America, very few cases applying the CISG have been reported in Latin American courts.\(^6\) Also very little has been written in the region about the CISG.\(^7\) However, with the entry into force of the CISG in Brazil in April 2014, the interest and need to understand the Convention in Latin America has increased. As the major economic partner of other important economies in the region, Brazil’s adhesion is expected to change the current Latin American lethargy toward the CISG. Specially because the application of the Convention by virtue of Article 1(1)(a), CISG will hardly be excluded from various contracts where a forum selection clause or the relevant conflict of jurisdictions rules designate the courts of Brazil, Uruguay, Paraguay or Colombia.

Certainly, the possibility of successfully excluding the application of the CISG by a positive choice of law that designates either the law of a non-Contracting State (for example, English Law) or the domestic law of a Contracting State (for example, French civil code) depends on the conflict of laws rules of the forum.\(^8\) This possibility does not exist in Brazil and Uruguay. In Paraguay and Colombia it is quite uncertain whether this is possible too.

In Brazil, as a matter of public policy, the judiciary system must follow the rules of the Introductory Law to the Brazilian Civil Code.\(^9\) The Introductory Law has a mandatory character and it does not allow the parties to freely choose the applicable law to their

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6 Schlechtriem & Schwenzer Commentary on the UN Convention on the International Sale of Goods, (2010) Art. 6, para. 14, at pp. 108, 109; Brazil Superior Tribunal of Justice, REsp 3.035/EX, Registry 2008/0044435-0, Minister Fernando Gonçalves, published 20 May 2009: in the Superior Tribunal’s view the choice of Swiss Law as the applicable substantive law to the contract and the Arbitral Tribunal subsequent decision to apply the CISG as integral part of the Swiss National Law did not oppose the Brazilian Public Order; despite the fact that Brazil is not a CISG Member State (May 2009), regardless of whether the application of the CISG resulted from the application of the Conflict of Law rules or the from the parties’ direct choice, because the possibility is in line with Brazil Art. 2 AL.

7 The website CISG in Latin America and Spain reports 41 court decisions from Latin American Contracting States: Argentina 16, Chile 3, Colombia 5, Cuba 4, El Salvador 2, Mexico 14 and Peru 3. The same website reports approximately 200 decision from Spanish courts alone; see also Virginia G. Maurer, Chap. 35 Central and South America, in Larry A. DiMatteo (ed.), International Sales Law, A Global Challenge (Cambridge University Press 2014) p. 580.

8 The work of Alejandro Garro & Alberto Zuppi, Compraventa Internacional de Mercaderías 2nd Edition, (AbeledoPerrot, Buenos Aires, 2012) is perhaps the only constant publishing effort and in recent years the special Latin American edition of the Schlechtriem & Schwenzer CISG Commentary under the name of Comentario sobre la Convención de las Naciones Unidas sobre los Contratos de Compraventa Internacional de Mercaderías edited by Ingeborg Schwenzer & Edgardo Muñoz (Arazandi, 2011) has been added to a short list.

9 Schwenzer & Hachem, supra note 5, Art. 6, para. 4, at p. 105.

contracts. The Introductory Law designates as applicable to international contracts the law at the place of contract conclusion or Brazilian law when the contract is to be performed in Brazil. In Uruguay, the Civil Code expressly establishes that the parties may not modify the rules that determine the applicable law and the competent jurisdiction. The conflict of laws rules of Uruguay establish that issues regarding the existence, validity, nature and effects of contracts are governed by the law of the State where they are or ought to be performed. Thus, the applicable law is the one established by the conflict of law rules and the freedom to choose a different law is not admitted. Under the Paraguayan and the Colombian laws, statutory provisions do not expressly allow the parties to choose the applicable law to their contract nor do they clearly prohibit it. The Civil Codes’ rules on conflict of laws establish that contracts to be performed in the country’s territory shall be (exclusively) governed by the Colombian or the Paraguayan laws respectively. This provision is understood to eliminate the possibility to choose any law other than the law of the place where the contract will be performed. In other words, any choice of foreign law is considered null and void if the contract has to be performed in Colombia or Paraguay. However, some authors consider that according to this rule the possibility of choosing a foreign law is open for every contract that is to be performed abroad.

In view of the current state of affairs, the Latin American jurist must be prepared to apply the CISG. He must understand the CISG and distinguish the features that make this instrument different to his domestic law on contracts of sales. This article aims at contributing to the dissemination and understanding of the CISG in Latin America by comparing

10 Brazil Art. 8 Introductory Law; see also Albornoz, María Mercedes, El derecho aplicable a los contratos internacionales en el sistema interamericano, (Portal Jurídico Peruano, 2008): the author relies on the answers to ‘Questionnaire on International contracts’ produced for the preparatory meeting (CIDIP V) for the Inter-American convention on the law applicable to international contracts. The 1942 Introductory Law was enacted for the Civil Code of 1916. Although a New Civil Code is in force since 2002, the 1942 Introductory Law reminded as the rule of interpretation and conflict of laws of the New Civil Code.
11 Brazil Appeal Tribunal of São Paulo, Registry 1.247.070-7, 18 December 2003: the Judge recognized the agreement of the parties to submit their contract to the laws of the United Kingdom. However, in this case the contract was signed in the United Kingdom.
12 Uruguay Art. 2403 CC (Appendix of the CC).
13 Uruguay Art. 2399 CC (Appendix of the CC).
14 Though some scholars have a different view, see Albornoz, supra note 10: the author relies on the answers to ‘Questionnaire on International contracts’ produced for the preparatory meeting (CIDIP V) for the Inter-American convention on the law applicable to international contracts.
16 Adverb added in Paraguay Art. 297 CC.
17 Colombia Art. 20 (3) CC & Art. 869 Com C; Paraguay Art. 297 CC.
18 See Colombia Monroy Cabra, supra note 15; Paraguay Pisano, supra note 15, at 10-11.
19 See Colombia Monroy Cabra, supra note 15; Paraguay Pisano, supra note 15, at 10-11.
the CISG system of remedies for breach of contract with the system of remedies in place under most Latin American domestic laws. Comparison is an efficient tool for learning. However, the following comparisons shall only serve as a reference point to better understand the CISG’s autonomous system, with its own general principles and its own rules of interpretation.\(^\text{20}\)

Section 6.2 of this contribution compares the structure and interplay of the remedies for breach of contract in both systems. Section 6.3 addresses the differences and similarities of the remedy of specific performance. Section 6.4 compares the remedy of damages under the CISG system and the Latin American domestic laws. Section 6.4 discusses the details of the remedy of avoidance under the CISG and the main differences with the avoidance remedy under Latin American domestic laws. Section 6.5 concludes.

6.2 The Remedies System under the Latin American Domestic Laws and the CISG

In both the CISG and the Latin American domestic laws, different remedies are available to the party who suffers the other party’s breach of any statutory warranty or of any contractual obligation. In this section, we explain how they are interact and how they exclude their concurrent application. In the next sections, we review in detail the elements and mechanisms to access these remedies, as well as their limits.

The Latin American domestic laws establish different grounds for different remedies. This differs from the CISG system of remedies that evades any type of categorization regarding the grounds of breach. The CISG has a unitary breach of contract system that does not distinguish between remedies on the grounds of defect of title, non-conformity, delay, partial-performance or non-performance at all.\(^\text{21}\) With regard to non-conformity, the CISG does not differentiate between hidden and apparent defects. All are considered similar breaches and the same remedies are always triggered regardless of the type of breach. This being said, as further developed in the next sections, the CISG requires the standard of fundamental breach for some of its remedies (see section 6.5 below). For example, for the remedy of avoidance of contract and for the remedy of specific performance in its form of delivery of substitute goods.\(^\text{22}\)

The above is different in the Latin American system of remedies. On the one hand, the general statutory warranty of saneamiento encompasses three actions or remedies available for two different types of breaches. First, the redhibitory action and the estimatory action,

\(^{20}\) Art. 7 CISG.


\(^{22}\) Arts. 49(1), 46 (2), 64(1)(a) CISG.
which are the available remedies for cases of delivery of goods with unnoticed and unknown defects affecting their natural or general use or their agreed use or purpose. Except for Costa Rica, a successful redivhibitory action (actio redivhibitoria) normally results in the avoidance of the contract, while the estimatory action (quanti minoris) grants the buyer a remedy for the reduction of the price of the defective goods. Second, when the goods delivered do not have a clear title and the buyer is defeated in trial by a third party holding a better right of property, use or exploitation over the goods, the Latin American domestic laws grant the buyer a right of compensation against eviction. The remedy against eviction has its own rules and procedure. The CISG does not afford a different treatment to goods affected by third party rights. Under the CISG system, the seller has an obligation to deliver goods that are free of any right or claim of a third party, including intellectual property rights. Failure to comply with this obligation is regarded as a delivery of non-conforming goods subject to the same remedy system for goods containing material defects.

On the other hand, under Latin American domestic laws the breach of other general obligations in a synallagmatic contract grants three main remedies. These remedies are available in case of the debtor’s delay in performing, partially or totally, any of the obligations agreed in the contract. The delay can be temporary or definitive, but delay is always

23 Under Costa Rican law the delivery goods affected by hidden defects does not trigger the right to a redhibitory or estimatory action, but rather to the voidability of the sales contract if such defects in the goods indeed derived from one party’s defective intent such as mistake or fraud, see Costa Rica Art. 1082 CC; Costa Rica, D.B. Carrillo, Los Contratos Traslativos del Derecho Privado – Princípios de Jurisprudencia (Costa Rica 2000) pp. 49-52; M.R. Altamirano, Derecho Civil IV, Vol. II, Los Contratos Traslativos de Dominio (1991) p. 75; both authors referring to the jurisprudence developed on the issue by the Costa Rican Supreme Court.

24 An action instituted to avoid a sale on account of some vice or defect in the thing sold which renders it either absolutely useless, or its use so inconvenient and, imperfect, that it must be, supposed the buyer would not have purchased it, had he known of the vice. Source: Bouviers Law Dictionary 1856 Edition.

25 However, some authors consider a mistake to characterise the redhibitory action as resolutory or rescinding action (action for the avoidance of the contract under CISG) for three main reasons: 1) there is a shorter term to exercise the action; 2) because it does not affect third party rights in good faith; 3) it does not presuppose the breach of obligations, see on this Venezuela J.L.A. Gorondona, Contratos y Garantías: Derecho Civil IV (2008), p. 256.

26 An actio quanti minoris is one brought for the reduction of the price of a thing sold, in consequence of defects in the thing which is the object of the sale. Source: Bouviers Law Dictionary 1856 Edition; see also generally Muriá Tuñón.

27 See express references to these two legal actions: Bolivia Art. 632 (I) CC & Art. 849 Com C; Brazil Art. 442 CC; Chile Art. 1860 CC; Colombia Art. 1917 CC; Ecuador Art. 1827 CC; El Salvador Art. 1662 CC; Guatemala Art. 1561 CC; Mexico Art. 2144 CC; Uruguay Art. 1720 CC; Venezuela Art. 1.521 CC; also Colombia A. Tamayo Lombana, Alberto, El Contrato de Compraventa su Régimen Civil y Comercial (2004), pp. 248-250; Mexico S. León Tovar, Los Contratos Mercantiles (2004), pp. 157-160; Argentina Supreme Court, Inversiones y Servicios S.A. v. Estado Nacional Argentino, 19 August 1999; Brazil Tribunal of Justice of the State of Rio Grande do Sul, Civil Recourse 71000950527, published 28 September 2007.

a key element to access these remedies; namely, the specific performance, the avoidance of the contract or/and the compensation for damages.\textsuperscript{30} Under the redhibitory and estimatory actions there is no such delay required since the seller has performed his main obligation consisting of the delivery of the goods. Thus, the seller cannot be claimed to be in delay. The redhibitory and estimatory actions focus on whether the already delivered goods are fit for the ordinary use or the particular agreed purpose. As we know, neither the redhibitory action nor the estimatory action grant a right to claim the specific performance based on defects of the goods, since they do not contemplate this remedy as such (see Section 6.3 below). Similarly, under the system of eviction, the loss or deprivation of property, use or exploitation over the goods suffered by the buyer is not redressed with the avoidance of the contract or with an order for specific performance. Instead, a defeated buyer will usually be reimbursed with the price and compensated for the costs of the contract conclusion, the improvements made on the goods, the costs of the trial, and the increased value of the goods up to the date of the eviction.\textsuperscript{31} Under the CISG system of remedies, in addition to damages, the buyer has access to the specific performance that may consist of repair of the goods or the delivery of substitute goods, the reduction of the price or the avoidance of the contract irrespective of whether the non-conformity relates to defects of title or function.\textsuperscript{32}

Moreover, the CISG does not make the Latin American domestic laws' distinction between the delivery of goods containing the above mentioned defects (\textit{redhibitory vices}) and the delivery of goods which are completely different to those agreed (\textit{aliud pro alio}). As we know, in Latin American domestic law the delivery of different goods or \textit{aliud pro alio} constitutes in itself a breach of the obligation to deliver.\textsuperscript{33} As further reviewed in the next sections, this distinction affects the remedies available and the standards of non-conformity required by the law for the avoidance of the contract. On the contrary, under the CISG the delivery of goods that are completely different to those agreed is treated as a delivery of non-conforming goods under article 35 CISG which gives access to the same remedies than the delivery of goods containing defects of title or function.

In addition, the CISG system of remedies does not require the existence of negligent conduct by the breaching party. As we know, Latin American domestic laws require the

\textsuperscript{30} See Chile D. Duarte, \textit{supra} note 28, at 176.

\textsuperscript{31} See for example, Chile Arts. 1847, 1845 and 1849-1851 CC; Chile D. Duarte, \textit{supra} note 28, at 159-160; see also Argentina: C. de Caso, \textit{supra} note 28, p. 154; Brazil: O. Gomes, \textit{supra} note 28, at 115-117; Mexico: L. Tovar, \textit{supra} note 27, at 162; Venezuela: A. Gorrondana, \textit{supra} note 25, at 237, 238.

\textsuperscript{32} Arts. 45, 46, 49 and 50 CISG.

\textsuperscript{33} See Brazil Tribunal of Justice of the State of São Paulo, Appeal with Revision 965123400, published 12 April 2006: the Tribunal differentiated the delivery of goods containing hidden defects and delivery of different goods from the ones contractually established, avoiding a contract under which a label company produced a wrong label written 'language' instead of 'languages' for a school of languages.
existence of negligence for the remedy of avoidance, specific performance and damages.\textsuperscript{34} Negligence by one of the parties affects the rules of impossibility, as the debtor may still be liable for damages and loss of profits if the impossibility was caused by his negligence.\textsuperscript{35} In practice, most lawyers know that the requirement of negligence is automatically met and so the latter is of little practical importance since the negligence of the debtor in breach is presumed.\textsuperscript{36} Many Civil Codes expressly state that the debtor bears the burden to prove that he has acted with care and diligence, so that no negligent conduct can connect him with the events.\textsuperscript{37} Be as it may, the CISG does not require the existence of negligence to make a debtor liable for its breach.

Just as the Latin American domestic laws,\textsuperscript{38} the CISG allows parties to contractually define the remedies available for breach of contract and the scope of their liability.\textsuperscript{39} This possibility comes from the law principle of freedom of contract which allows the parties not only to extend, but also to reduce or to completely suppress, the statutory warranty for non-conforming goods. In Latin America this has been recognised by different Civil Codes stating that the parties can restrict, renounce and extend their liability for any redhibitory defect provided that the seller does not act in bad faith.\textsuperscript{40} The same applies regarding the statutory warranty of delivery of goods free of any third party claims or rights. Latin American domestic laws expressly recognise the validity of limitations of lia-


\textsuperscript{35} Argentina Arts. 1728 CC; Brazil Art. 248 CC; Chile Art. 1547 paras. 1, 2 CC; Colombia Art. 1604 paras. 1, 2 CC & Art. 930 Com C; Ecuador Art. 1590 paras. 1, 2 CC; El Salvador Art. 1418 paras. 1, 2 CC; Mexico Art. 2111 CC; Peru Arts. 1317, 1321 CC; Portugal Arts. 546 part 1, 801 CC; Spain Art. 1.104 CC; Uruguay Art. 220 (2) Com C; Venezuela Art. 1.271 CC; \textit{see also} Argentina G.A. Borda, Manual de Contratos 140 (2004): noting that in Argentina the faulty debtor may be released from performing due to the impossibility but he is liable for damages and loss of profits; Argentina R.L. Lorenzetti, \textit{Tratado de los Contratos Parte General} 59 (2004): same opinion; Brazil: O. Gomes, \textit{supra} note 28, at 213 same opinion; El Salvador: A.O. Miranda, \textit{Guía Para el Estudio del Derecho Civil III, Obligaciones} p. 157; El Salvador: Supreme Court, \textit{Cass civ, Kereitz Medrano v. Liceo Centroamericano, S.A. de C.V.}, 11-C-2007, 17 November 2008: the alleged impediment should not result of the faulty conduct of the debtor.


\textsuperscript{37} Chile: Art. 1547 (3) CC; Colombia: Art. 1604 (3) CC; Ecuador: Art. 1590 (3) CC; El Salvador: Art. 1418 (3) CC.


\textsuperscript{39} Art 6 CISG.

\textsuperscript{40} Argentina Art. 1052 CC; Bolivia Arts. 624 (II), 628 (I) CC & Art. 838 Com C; Chile Art. 1859 CC; Colombia Art. 1916 CC; Ecuador Art. 1826 CC; El Salvador Art. 1661 CC; Guatemala Art. 1544 CC; Mexico Art. 2158 CC; Paraguay Art. 1792 CC; Uruguay Art. 1719 CC; Venezuela Art. 1.520 CC.
bility clauses of this type, unless the seller conceals the fact that the goods are affected by a third party’s rights affecting their property, use or exploitation.\textsuperscript{41}

Parties may also limit their liability for damages with a limitation of liability clause of this type. As under Latin American domestic laws,\textsuperscript{42} the CISG also grants the parties the possibility to agree on the amount and the mechanism of compensation for breach of contract within the limits established by law (see Section 6.4 below). Moreover, in both the CISG and Latin American domestic laws, the parties may agree that failure to perform a specified obligation, albeit such obligation may be seen as an ancillary one, would automatically cause the avoidance of the contract (see Section 6.5 below). However, the parties’ freedom, to raise or to lower the standard of breach required for the avoidance may encounter a limit in the duty to act in good faith and the notion of abuse of right.

6.3 The Remedy of Specific Performance

As the Latin American jurist knows, under Latin American domestic laws a party has an automatic right to claim the specific performance.\textsuperscript{43} However, only in some instances a party may access the remedy of the avoidance of the contract, and subsidiary or conjunctly, may claim financial compensation. The rule is based on the civil law principle of \textit{pacta sunt servanda}. Under this principle, the party suffering the breach of contract has, first and foremost, the right to claim performance of the obligation contracted and not its

\textsuperscript{41} See for example, Bolivia Arts. 624, 628 (I) (II) CC; Brazil Arts. 448, 457 CC; Chile Arts. 1839, 1842 CC; Colombia Arts. 1895, 1898 CC; Ecuador Arts. 1806, 1809 CC; El Salvador Arts. 1641, 1644 CC; Mexico Arts. 2121, 2122 CC; Paraguay Art. 1763 CC; Peru Art. 1497 CC; Spain Art. 1476 CC; Venezuela Arts. 1505, 1506 CC.

\textsuperscript{42} Chile Art. 1558 para. 3 CC; Colombia Art. 1616 para. 3 CC; Ecuador Art. 1601 para. 3 CC; El Salvador Art. 1429 para. 3 CC; Mexico Art. 2117 CC; Peru Arts. 1329, 1328; Portugal Art. 800 (2) CC; Venezuela Art. 1.277 CC.

equivalent. A different approach would mean that any obligation would have an optional character. Consequently, no creditor is bound to concede the performance of an alternative obligation that was not in principle agreed. Only when performance is impossible, or when it is possible but unreasonable, the creditor may claim an equivalent performance, namely financial compensation. For instance, the remedy of damages shall be granted to a buyer if the goods no longer exist, or are already the property of a third party. The Bolivian Supreme Court denied specific performance and in lieu of declared the avoidance of a sales contract and awarded damages to the buyer, because the goods that the seller had to deliver were seized and auctioned by the State after the contract conclusion.

The approach taken in Latin American domestic law differs from the common law systems. While the monetary compensation is not the principal remedy for breach of contract under Latin American domestic law but rather a complementary remedy, the general rule under common law dictates that the competent court shall not require the specific performance of obligations if there is another adequate remedy. Namely, specific performance is ordered by the court when financial compensation is inadequate. Hence, the primary remedy for breach of contract in common law is the financial compensation for damages. Nevertheless, in an exceptional basis a common law court may decide to order specific performance. First, when the parties have agreed to it. Second, if the buyer cannot find a replacement somewhere else due to the unique character of the goods; e.g. because the seller is the only manufacturer or because there is a current shortage. Moreover, if the sale of substitute goods is possible and reasonable, then the most economically

44 See expressly stated in Paraguay Art. 557 CC: the debtor must deliver the same goods or perform the obligation that he was exactly bound to fulfil. The performance cannot be substituted with non-performance damages or by any other goods or act, regardless of the fact that these are of a similar or greater value. Similar provision in Costa Rica Art. 470 Com C; Costa Rica Supreme Court, Judgement 108, Segunda Sala Civil, 18 July 1989.


46 Expressly stated in Brazil Art. 461 CPC; Chile Art. 152 Com C; Ecuador Art. 197 Com C; Paraguay Art. 722 CC; Spain Art. 1.124 CC; Uruguay Art. 1431 CC & Art. 246 Com C; see also Argentina Compagnucci de Caso, supra note 28, at 141.

47 Brazil Arts. 461, 287 CPC; Chile Art. 152 Com C; Paraguay Art. 722 CC; Uruguay Art. 544 Com C.

48 Chile Art. 152 Com C; Ecuador Art. 197 Com C; Uruguay Art. 544 Com C; see also Herman, supra note 43, at 1; Uruguay Rodríguez Olivera al., supra note 43, at 211.

49 Bolivia Supreme Court, Severo Vega Veizaga v. René Reyes Reyes y Rosa Rivas de Reyes, 200003-Sala Civil-1-067.


51 L. Pinheiro, supra note 50, at 280.


53 Müller-Chen, supra note 52, Art. 28, para. 2, at 460.

54 Müller-Chen, supra note 52, Art. 28, para. 2, at 460.

55 Müller-Chen, supra note 52, Art. 28, para. 2, at 461.
sensible and less burdensome remedy under the common law is the termination of the contract, but not its specific performance.\textsuperscript{56}

The CISG remedy of specific performance takes into account both the civil law and the common law traditions. On the one hand, the CISG follows the civil law approach as it entitles a party to opt for a claim for specific performance as a primary remedy. The remedy of damages may be accessed jointly to the extent that the indemnity requested is not incompatible with the remedy of specific performance. On the other hand, the CISG also follows the common law approach since in accordance with article 28 CISG a court is not bound to enter a judgment for specific performance unless such court would do so under its own law. In other words, the remedy of specific performance under the CISG will be subject to the requirements set forth under the common law, when a common law court is called to decide the claim for specific performance.

The Latin American domestic laws establish that if the seller does not deliver the goods at the time agreed, the buyer may claim the specific performance of the contract consisting in delivering the goods agreed, together with the compensation for damages and loss of profits.\textsuperscript{57} Similarly, if the seller delivers a quantity of goods less than the agreed, the buyer may require the seller to deliver the rest.\textsuperscript{58} The CISG contains the same solution.\textsuperscript{59} However, the Latin American domestic laws do not follow, by default, the CISG approach under which specific performance may be enforced by requiring the seller to deliver substitute goods or to repair the lack of conformity of the goods delivered.\textsuperscript{60} In other words, the Latin American domestic laws do not grant a default right to specific performance consisting of the delivery of substitute goods or the reparation of the goods affected by defects or non-conformity.\textsuperscript{61}

As mentioned above in section 6.2, if the goods received by the buyer are completely different to those agreed in the contract, one is in front of an aliud pro alio case. In the Latin American systems the delivery of completely different goods or aliud pro alio constitutes a breach to the obligation to deliver.\textsuperscript{62} In such a case, the buyer may require, indeed, specific performance consisting in the delivery of goods of the type that was originally

\begin{thebibliography}{99}
\bibitem{chile} Müller-Chen, \textit{supra} note 52, Art. 28, para 2, at 461.
\bibitem{bolivia} Bolivia Art. 622 CC & Art. 845 Com; Chile Art. 1826 CC & Art. 156 Com C; Colombia Art. 1882 CC; El Salvador Art. 1629 CC; Ecuador Art. 1793 CC & Art. 199 Com C; Mexico Arts. 2283, 1949 CC; Peru Arts. 1549, 1429 CC; Paraguay Arts. 759, 725 CC; Spain Art. 1.096 CC & Art. 329 Com C; Uruguay Art. 1688 CC & Art. 534 Com C; Venezuela Arts. 1486, 1.167 CC; Peru Supreme Court, \textit{Sala civil permanente}, Resolution 000119-1999, 27 March 2000: confirming that the buyer was entitled to require subsequent delivery of the goods that did not arrive at the date agreed plus damages caused by late performance.
\bibitem{chile2} Chile Art. 157 Com C; Colombia Art. 927 Com C; Ecuador Art. 200 Com C; Spain Art. 330 Com C; Uruguay Arts. 537, 534 Com C.
\bibitem{cisel} Art. 46(1) CISG.
\bibitem{cisel2} Art. 46 (2) (3) CISG.
\bibitem{cisel3} Statement sustained in Mexico Leon Tovar, \textit{supra} note 27, at 162.
\bibitem{cisel4} See E.G. Sacarrera, \textit{La compraventa internacional: importaciones y exportaciones} 75 (2001).
\end{thebibliography}
agreed upon or may opt for the avoidance of the contract. However, if the goods delivered contain non-conformity defects, the aggrieved buyer has at his election one of the two available legal actions.\(^{63}\) First, the redhibitory action (actio redhibitoria) which ends in the avoidance of the contract.\(^{64}\) Second, the estimatory action (quanti minoris) grants the buyer a remedy for the reduction of the price of the defective goods.\(^{65}\) However, none of these two remedies allow the claim for the replacement or the reparation of the defective goods.

Similarly, if the seller delivers goods affected by third party property rights and the buyer is defeated in trial, the Latin American domestic laws grant the buyer a right of compensation against eviction.\(^{66}\) The loss or deprivation suffered by the buyer is not redressed with an order for the substitution of the goods. Instead, a defeated buyer will usually be reimbursed with the price of the goods and compensated for the cost of the contract conclusion, the improvements on the goods, the cost of the trial, and the increased value of the goods up to the date of the eviction.\(^{67}\)

The above being said, such does not mean that similar remedies are totally unavailable. Some Latin American domestic laws expressly set forth the possibility for the parties to agree on a warranty clause regarding the fitness of the goods that normally gives the buyer a remedy of repair or substitution of the goods, plus compensation for damages.\(^{68}\)

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63 In principle, the buyer can chose between the redhibitory action or the actio quanti minoris according to his own convenience. However, if the restitution of the goods is not possible the buyer may necessary opt for the readjustment of the price, see for example Bolivia Art. 633 CC; Bolivia: K. Arteaga, supra note 28, Vol. 2, at 149; Guatemala: Art. 1563 CC; Venezuela: A. Gorordon, supra note 25, at 259-261.

64 However, some authors consider a mistake to characterise the redhibitory action as resolutory or rescinding action (action for the avoidance of the contract under CISG) for three main reasons: 1) there is a shorter term to exercise the action; 2) because it does not affect third party rights in good faith; 3) it does not presuppose the breach of obligations, see on this Venezuela: A. Gorordon, supra note 25, at 256.

65 See express references to these two legal remedies in: Bolivia Art. 632 (I) CC & Art. 849 Com C; Brazil Art. 442 CC; Chile Art. 1860 CC; Colombia Art. 1917 CC; Ecuador Art. 1827 CC; El Salvador Art. 1662 CC; Guatemala Art. 1561 CC; Mexico Art. 2144 CC; Uruguay Art. 1720 CC; Venezuela Art. 1.521 CC; and see also T. Lombana, supra note 27, at 175; El Salvador: Miranda, supra note 43, at 248-250; Mexico: L. Tovar, supra note 27, at 157-160; Argentina: Supreme Court, Inversiones y Servicios S.A. v. Estado Nacional Argentino, 19 August 1999; Brazil: Tribunal of Justice of the State of Rio Grande do Sul, Civil Recourse 71000950527, published 28 September 2007.


67 See for example, Chile Arts. 1847, 1845, 1849, 1850, 1851 CC; Uruguay Arts. 552, 553, 554 Com C; Chile D. Duarte, supra note 28, at 159, 160; see also Argentina: C. de Caso, supra note 28, at 154; Brazil: O. Gomes, supra note 28, at 115-117; Chile: D. Duarte, supra note 28, at 156; Mexico: L. Tovar, supra note 27, at 162; Venezuela: A. Gorordon, supra note 25, at 237, 238.

68 See for example, Bolivia Art. 838 Com C; Costa Rica Art. 452 Com C; El Salvador Art. 1021 Com C; Paraguay Art. 753 CC; Portugal Art. 921 CC.
6.4 The Remedy of Damages

The purpose of both the CISG and Latin American domestic laws’ remedy of damages is compensation. In this line of thought, both systems work on the assumption that there must be some injury to the interest of one of the parties to the contract, so that compensation for damages can be granted. In addition, article 74 CISG defines the principle of full compensation with the statement "damages for breach of contract by one party consists of a sum equal to the loss, including loss of profit, suffered by the other party as a consequence of the breach." Therefore, damages are based on the loss caused to the suffering party, and generally not on the gain obtained by the breaching party. Accordingly, the CISG approaches the scope of compensation just as Latin American domestic laws do.

As under Latin American domestic laws, full compensation under the CISG covers all possible forms of damages as a result of the breach. This forms include non-performance loss that may occur when the creditor of the obligation takes reasonable measures to bring about the situation which would have existed if the contract had been duly performed, and to recover the cost of doing so from the debtor. Second, incidental loss includes expenses incurred by the creditor of the obligation, not related with his expectation interest, but rather incurred to prevent any additional disadvantage, for example, the seller’s expenses for taking care of or storing the goods in vain, costs incurred while arranging the payment method, etc. Third, consequential loss includes additional losses beyond the non-performance, such as the creditor’s liability vis-à-vis third parties as a result of the breach, or harm caused to a third person or his patrimony due to defects of quality. Finally, loss of profits is any increase in the assets which the creditor reasonably expected and that were prevented because of the breach of contract.

One of the consequences of the compensatory principle is that there should not be overcompensation of the injury suffered. In other words, the compensation should not

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69 See for example Mexico Art. 2107 CC; Peru Art. 1321 CC; Portugal Art. 798 CC; Art. 74 CISG.
71 Schwenzer, supra note 70, Art. 74, para 3, at 1000.
72 Compensation may be granted for both the loss suffered and the profits prevented: Argentina Art. 1732 CC; Bolivia Art. 344 CC & Art. 845 Com C; Brazil Art. 402 CC; Chile Art. 1556 CC; Colombia Art. 1613 CC; Ecuador Art. 1599 CC; El Salvador Art. 1427 CC; Mexico Arts. 2108, 2109 CC; Paraguay Art. 450 CC; Peru Art. 1321 CC; Spain Art. 1.106 CC; see also Bolivia: G.C. Trigo & S.A. Fuente, Derecho de las Obligaciones en el Código Civil Boliviano (2008) pp. 153-155; ICC Final Award Case No. 13127 Lex Contractus Brazilian Law; Bolivia: Supreme Court, Sala Civil, Carlos Maida y Celinda Pinto de Maida v. Oswaldo Trigo Arispe; noting that may not only be recovered the loss directly caused but also the loss or prejudice that is immediate consequence of the breach; Chile: Supreme Court, No. 4303-05 (Visto 4), 24 de Julio 2007.
73 Schwenzer, supra note 70, Art. 74, paras. 21-26, at 1006-1008.
74 Schwenzer, supra note 70, Art. 74, para. 27, at 1009.
75 Schwenzer, supra note 70, Art. 74, para. 32, at 1012.
76 Schwenzer, supra note 70, Art. 74, para. 36, at 1014.
enrich the party suffering the breach.\textsuperscript{77} In light of this principle, the current state of affairs under the CISG and the Latin American domestic laws is that claims for disgorgement of profits made by the breaching party as the basis for compensation are, in principle, not allowed.\textsuperscript{78}

6.4.1 Non-Financial Damages

Some Latin American domestic laws grant the aggrieved party the possibility of awarding non-financial damages\textsuperscript{79} caused by the breach of contract.\textsuperscript{80} While doing so, regard is to be had to the circumstances that generated the liability of the breaching party and other general circumstances of the case.\textsuperscript{81} An interesting provision of Mexico’s Civil Code illustrates a specific situation. The judge may not take into consideration the affective price of the goods while calculating the amount of damages, unless it is proven that the debtor destroyed or damaged the goods with the intention of hurting the feelings or the affection that the owner had on them.\textsuperscript{82} In addition, a related provision establishes that the increase of the compensation due to moral damages will be determined considering the injured rights, the degree of liability, the economic situation of the offender and the victim, and other related circumstances.\textsuperscript{83} The CISG does not expressly exclude liability for non-financial loss. Accordingly, these are recoverable under article 74 CISG where the intangible purpose of the performance became part of the contract such as reputation. However, damages for mental distress, pain and suffering or loss of amenities can hardly be claimed under article 74 CISG, as parties to international contracts do not contract for peaceful enjoyment of life.\textsuperscript{84}

6.4.2 Loss of Goodwill

Financial damages caused by the loss of goodwill are compensated by article 74 CISG.\textsuperscript{85} The recovery of loss of goodwill is supported by the full compensation principle. Nevertheless, the difficulties in establishing a shared notion of goodwill also makes it difficult to

\textsuperscript{77} Treitel, supra note 34, at 25, § 44.
\textsuperscript{78} Schwenzer, supra note 70, Art. 74, para. 43, at 1017.
\textsuperscript{79} These are commonly known under the Spanish term of daño moral.
\textsuperscript{80} See for example, Argentina Art. 1732 CC; Mexico Arts. 2116, 1916 CC; Paraguay Art. 451 CC; Peru Art. 1322 CC.
\textsuperscript{81} See for example Argentina Art. 1732 CC; Mexico Arts. 2116, 1916 CC; Paraguay Art. 451 CC.
\textsuperscript{82} Mexico Art. 2116 CC.
\textsuperscript{83} Mexico Art. 1916 CC.
\textsuperscript{84} Schwenzer, supra note 70, Art. 74, para. 39, at 1015.
\textsuperscript{85} CISG-AC, Opinion No. 6, Calculation of Damages under CISG Article 74. Rapporteur: Professor John Y. Gotanda, Villanova University School of Law, Villanova, Pennsylvania, USA, Comment 7.1.
prove and measure the financial loss covered under such notion. As commented by the CISG-AC “[L]oss of goodwill can simply refer to a loss of future lost profits. Loss of goodwill has also been defined as a decline in business reputation or commercial image, quantified by the retention of customers …[B]ecause there is no uniform definition, some tribunals have required a higher level of proof for damages resulting from a loss of goodwill” 86

6.4.3 Delay in Performing

Similar to the CISG, the Latin American domestic laws establish that the obligation to compensate the damages caused originates since the moment the obligation concerned accrues. 87 However, a small number of Latin American domestic laws differ from the CISG in one important point. If a debtor is in delay, these laws require the creditor to request the debtor to perform by means of judicial claim or by notice made through a notary before an obligation to compensate ensues. 88

6.4.4 Expectation Interest

Both the CISG89 and the Latin American domestic laws follow the expectation interest rule of compensation. This interest is referred to in Latin American domestic law as interés posítivo or positive interests in the conclusion of the contract; it guarantees that the creditor will obtain the economic benefits that would normally have been obtained through the performance of the contract. 90 Following this principle, two different expectations can arise from the conclusion of a CISG contract, first, that of receiving the performance due in consideration; and second, that of making a profit with the performance promised (article 74 CISG). The distinction between these two kinds of expectations is drawn by the Latin American systems and the CISG which stipulate that compensation for damages

86 Id., Comment 7.3.
87 Argentina Art. 1748 CC; Chile Art. 1557 CC; Colombia Art. 1614 CC; Ecuador Art. 1600 CC; El Salvador Art. 1428 CC; Paraguay Art. 423 CC; Peru Art. 1336 CC; Portugal Art. 804 CC.
88 Under Bolivia and Peru’s laws, the general rule is that there is always a need for a request to perform, by means of notice made to the debtor, unless the parties have agreed in advance that such a notice is not necessary to place the debtor in delay. Bolivia Art. 341 (1) CC; Peru Art. 1333 (1) CC; Bolivia Supreme Court, Sala Civil, Boliviana de Ingeniería S.R.L v. Compañía La Boliviana CIACRuz de Seguros y Reaseguros S.A.: upholding that damages and loss of profits for the breach of contract (monetary obligation to pay insured goods) was fixed to 6% annual of the sum due, paid from the date when the debtor was placed in delay until the enforcement of the decision; Bolivia: C. Trigo, supra note 72, at 148, 149.
89 Schwener, supra note 70, Art. 74, para. 18, at 1005.
90 See definition of protected interests in Spain Supreme Tribunal, 05 June 2008, Id Cendoj: 28079110012008100535.
may include the value of the direct damage caused and the loss of profits incurred by the creditor.\footnote{Argentina Arts. 1738 & 1740 CC; Bolivia Art. 344 CC & Art. 845 Com C; Brazil Art. 402 CC; Chile Art. 1556 CC; Colombia Art. 1613 CC; Ecuador Art. 1599 CC; El Salvador Art. 1427 CC; Mexico Arts. 2108, 2109 CC; Paraguay Art. 450 CC; Peru Art. 1321 CC; Spain Art. 1.106 CC; Uruguay Art. 222 Com C.}

6.4.5 \textit{Limits}

A limitation to the debtor’s liability is found in the principle requiring a causal link between the damages caused and the breach of contract. Such principle is recognised in both the CIGS\footnote{Schwenzer, \textit{supra} note 70, Art. 74, para. 40, at 1015.} and the Latin American domestic laws.\footnote{See for example Argentina Art. 1739 CC; Mexico Art. 2110 CC.} The breaching party is only liable for the damages incurred by his failure to duly perform the contract.

Also the requirement of foreseeability of damages plays an important role in limiting the extent of the debtor’s liability in both the CIGS\footnote{Art. 77 CIGS.} and the Latin American domestic laws. In Latin America, the debtor of the obligation in good faith is only liable for the damages and loss of profits that he foresaw or could have foreseen at the conclusion of the contract.\footnote{Bolivia Art. 345 CC; Chile Art. 1558 CC; Colombia Art. 1616 CC; Ecuador Art. 1601 CC; El Salvador Art. 1429 CC; Peru Art. 1321 CC; Spain Art. 1.107 CC; Portugal Art. 798 CC; Uruguay Art. 223 para. 1 Com C.} Nevertheless, a debtor who with gross negligence (\textit{dolo}) breaches the contract is liable for its breach and bound to compensate the unforeseeable damages caused by his breach.\footnote{Such rule is expressly stated in Uruguay Art. 223 para. 2 Com C; ICC Final Award Case No. 13478 \textit{Lex Contractus} Venezuelan Law: explaining that “\textquote{U}nder the provisions of the Venezuelan Civil Code, Articles 1274-1275, damages for breach of contract are limited at law (save in cases of wilful misconduct) to damages that were foreseen or could have been foreseen at the time the parties entered into the contract. Even in the case of wilful misconduct, damages must be an immediate and direct consequence of the breaching party’s failure to perform its obligations.”} Under the CIGS, gross negligence or fraud in breaching the contract does not give rise to compensation for non-foreseeable loss. However, those damages may be recoverable under tort liability in accordance with the applicable law.\footnote{Schwenzer, \textit{supra} note 70, Art. 74, para. 14, at 1004.}

6.4.6 \textit{Calculation of Damages}

The concrete method of determination of the financial amount of emerging damages and lost profits is the starting point in the Latin American domestic laws and the CIGS. For example, regarding compensation for non-performance loss, where the seller fails to deliver the goods, the concrete method of calculating the emerging damages will take into consid-
eration the actual cost incurred by the buyer in procuring substitute goods.\(^8\) In a case of a buyer’s failure to take delivery and to pay the price of the goods, the concrete method of calculation will look at the amount of money for which the seller has actually resold the goods.\(^9\)

The CISG also stipulates the calculation of damages through an abstract method.\(^10\) This method indemnifies a party with the value that the performance of the obligation would have according with the market. For example, in the case of a seller who fails to deliver the goods, the abstract method of calculating the damages to the buyer will take into consideration the market price at which substitute goods could be obtained at the time of avoidance (Article 76 CISG).\(^11\) In the case of a buyer’s failure to take delivery and to pay the price of the goods, the abstract method of calculation will look to the market price of the goods at which they could have been sold (Article 76 CISG).\(^12\) Where the abstract method is used, the damages are recoverable even if no substitute transaction has been performed.\(^13\)

As the Latin American jurist knows, this method is generally rejected in Latin American domestic law.\(^14\)

\section*{6.4.7 Contractual Stipulations}

As under Latin American domestic laws, the parties are free to contractually regulate the scope of their liability under the CISG.\(^15\) The parties may agree on a penalty clause\(^16\) in

\begin{itemize}
\item \textsuperscript{8} Art. 75 CISG; see expressly Venezuela Art. 142 para. 4 Com C; but the substitute purchase shall be at the regular-current price of the trade concerned and notice of the substitute transaction to the other party is required under the law; ICC Final Award Case No. 13478 Lex Contractus Venezuelan Law: noting that “[Article 142 of the Venezuelan Commercial Code provides that if a seller breaches its obligations to sell, then a buyer has the right to go into the market place and purchase the goods there, and is entitled to claim damages from the seller including the difference in price.”
\item \textsuperscript{9} Art. 75 CISG; See expressly Venezuela Art. 142 para. 3 Com C; but the substitute sale shall be at the regular-current price of the trade concerned and notice to the other party of the substitute transaction is required under the law; Treitel, \textit{supra} note 34, at 44, § 69.
\item \textsuperscript{10} Art. 76 CISG.
\item \textsuperscript{11} Treitel, \textit{supra} note 34, at 44, § 69.
\item \textsuperscript{12} Treitel, \textit{supra} note 34, at 44, § 69.
\item \textsuperscript{13} Treitel, \textit{supra} note 34, at 45, § 69.
\item \textsuperscript{14} See for example, Argentina Supreme Court, \textit{Serradilla, Raúl Alberto v. Mendoza, Provincia de y otro, 12 June 2007}; Chile Supreme Court, No. 4303-05, 24 de Julio 2007; Chile Supreme Court, \textit{Rol 3405-2001 (Visto 4-9)}, 12 August 2008. Mexico Supreme Court, \textit{Quinta Época, Tercera Sala, S/J XCVI}, at 951; Paraguay Supreme Court, 27 December 2002, \textit{Olegario Farrés y Otra v. Bancoplus S.A.I.F.}
\item \textsuperscript{15} Art. 6 CISG.
\item \textsuperscript{16} Argentina Arts. 790-793 CC; Brazil Art. 409 CC; Chile Arts. 1535, 1536 last para. CC; Colombia Arts. 1592, 1593 last para. CC; Costa Rica Art. 426 Com C; Ecuador Arts. 1578, 1579 last para. CC; El Salvador Arts. 1406, 1407 last para. CC; Mexico Arts. 1840, 1481 last para. CC; Paraguay Art. 454 CC; Peru Art. 1341 CC; Spain Art. 1.152 CC; Uruguay Art. 284 Com C; Venezuela Art. 1.257 CC.
\end{itemize}
the sense given by the civil law\textsuperscript{107} or they may limit their liability by a limitation liability clause. However, the issue of whether a penalty clause or limitation of liability clause in a CISG contract is valid or enforceable is dealt with by the domestic law applicable.\textsuperscript{108}

6.4.8 Questions of Proof

Under the CISG, as pursuant to the Latin American domestic laws, since the creditor is the party who claims the existence of damages, he bears the burden of proving that damages and lost profits were caused.\textsuperscript{109} Under article 74 CISG, the burden of proof of demonstrating the foreseeability of the loss is on the aggrieved party.\textsuperscript{110} Finally, the debtor has the burden to prove that the failure to perform or the defecting performance was not due to his fault or negligence or that the failure was due to an impediment beyond his control.\textsuperscript{111}

6.4.9 Mitigation

The CISG expressly establishes a duty on the suffering party to mitigate the damages caused by the breaching party.\textsuperscript{112} Although not expressly stipulated under the Latin American codes, the Latin American jurist knows that the same duty on the creditor exists and imposes certain limits to the amount of damages that can be claimed. As clarified by the Mexican Supreme Court, the damages that the party in breach of the contract shall com-

\textsuperscript{107} Clauses known under the name of ‘Cláusula Penal’. In principle such clauses are valid. The literal English translation of the Spanish term Cláusula Penal i.e. penalty clause in the Anglo-American law is normally used to refer to an invalid stipulation for the payment of a fixed sum in the event of default. Where the clause is valid in the Anglo-American law, it is referred to as a ‘liquidated damage’ clause, see Treitel, supra note 34, at 90, § 119.

\textsuperscript{108} Art. 4 CISG.

\textsuperscript{109} See on this Schwenzer, supra note 70, Art. 74, para. 64, at 1025; ICC Final Award Case No. 10299 Lex Contractus Chilean Law: stating that in order to determine contractual liability the aggrieved party must prove that damages have ensued as a result of the said breach; ICC Final Award Case No. 13478 Lex Contractus Venezuelan Law: noting that although the buyer’s evidence and the methodology for calculating its losses was neither contradicted nor attacked by seller by presentation of alternative factual and/or expert evidence, the burden to persuade the Tribunal about the price of the goods had the contract not been breached, rests with buyer.

\textsuperscript{110} Schwenzer, supra note 70, Art. 74, para. 64, at 1026.

\textsuperscript{111} Chile Arts. 1547 (3), 1674 CC; Colombia Arts. 1604 (3), 1733 CC; Ecuador Arts. 1590 (3), 1717 CC; El Salvador Arts. 1418 (3), 1544 CC; Portugal Art. 799 (1) CC; Spain Art. 1.183 CC; Venezuela Art. 1.344 CC (3); see also Argentina R.L. Lorenzetti, supra note 35, at 602; ICC Final Award Case No. 12755 Lex Contractus Argentinean Law.

\textsuperscript{112} Under CISG Article 77 the party entitled to damages is required to mitigate the loss. The specific effect of this rule is that loss resulting from a breach of contract, including the loss of profits, is not compensated to the extent that it could have been reduced by taking reasonable measures and that loss which could have been prevented entirely by taking the said measures cannot be recoverable at all, see Schwenzer, supra note 70, Art. 77, para. 1, at 1042.
pensate are those that the other party had to suffer necessarily. In Latin America, the duty to mitigate the damages is constructed on the basis of the principle of good faith. Contracts are binding on the parties not only to the extent of what has been expressed in them but also in all that emanates from the nature of the obligation, the law, the equity or the usages. This indicates that the breaching party has a good faith duty to take all reasonable measures to prevent loss or to mitigate the extent of the loss caused by the debtor’s breach of contract.

6.5 The Remedy of Avoidance

Pursuant to articles 49 and 64 CISG, a party may only declare the sales contract avoided if the failure by the other party to perform any of his obligations amounts to a fundamental breach of contract. In this light of thought, the CISG is different from the Latin American domestic laws in that it requires the existence of a breach that is ‘fundamental’ under the definition provided by the CISG itself. In addition, the CISG requires a ‘declaration’ of the suffering party’s intention to avoid the contract, which is not necessary under some Latin American domestic laws.

6.5.1 Standard of Breach

According to CISG article 25, a breach by one of the parties is fundamental when such substantially deprives the other party of what he is entitled to expect under the contract. The CISG does not refer to the extent of the damage caused but rather to the importance that such breach has on the interests that the contract actually creates for the affected party. The Latin American domestic laws ignore the notion of fundamental breach as understood under the CISG. However, some comparable standards of breach or non-conformity also limit the possibility to avoid the contract, which might help the Latin American jurist understand what an independent concept developed by CISG case law is.

In the case of defective goods, a particular standard limits the remedy of contract avoidance based on a redhibitory action under Latin American domestic laws. In order to achieve a successful redhibitory action, the buyer must show that the defects of the goods

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113 Mexico: Supreme Court, Quinta Época, Tercera Sala, SJF XCVI, at 951.
114 Argentina Art. 9 CC; Bolivia Art. 803 Com C; Brazil Art. 422 CC; Chile Art. 1546 CC; Colombia Art. 1603 CC & Art. 863 Com C; Cuba Art. 6 CC; Ecuador Art. 1589 CC; El Salvador Art. 1417 CC; Guatemala Art. 17 JOL; Mexico Art. 1796 CC; Paraguay Art. 715 CC; Peru Art. 1362 CC; Portugal Art. 762 CC; Spain Art. 1258 CC & Art. 57 Com C.
make them improper for, or reduce, the function they are usually given.\textsuperscript{116} This requirement could be insufficient in a contract governed by the CISG since the right to avoid the contract under the CISG does not, necessarily, focus on the goods’ characteristics but on the possibility for the buyer to achieve its interest under the contract. For this reason, some courts dealing with CISG claims have denied the remedy of avoidance to buyers if the goods, although improper for the use generally given, can be resold at a lower price or can be given an alternative use in the normal course of the buyer’s business.\textsuperscript{117}

Concerning the breach of agreed obligations, scholars have pointed out that some Latin American courts have recently introduced in domestic law an element that is close to the standard required under the CISG.\textsuperscript{118} That is, the requirement to establish the importance or gravity of the breach in the economy of the contract in order to justify the avoidance.\textsuperscript{119} In other words, the characterization of obligations as principal or as ancillary, or the nature of the defects on the goods may become irrelevant to determine the attaching interest of one of the parties, and thus, to determine whether a breach can lead to the avoidance. On the other hand, the circumstances of the case and the intention of the parties as assumed from the contract are more relevant to establish the importance or gravity of the breach in the economy of the contract.

However, the standard developed by the Latin American jurisprudence may still be lower than the standard contained in article 25 CISG.\textsuperscript{120} For example, a Spanish court considered that the jurisprudential doctrine of \textit{aliud pro alio} was applicable to a non-conformity case, and was compatible with CISG article 25,\textsuperscript{121} in its three grounds: (1) the delivery of goods different to the ones agreed; (2) the delivery of goods totally unfit for the use to which they are intended; (3) the objective dissatisfaction of the buyer.\textsuperscript{122}

\textsuperscript{116} Argentina Art. 1051(a) CC; Brazil Art. 441 CC; Chile Art. 1858 (2) CC; Colombia Art. 1915 (2) CC; Ecuador Art. 1825 (2) CC; El Salvador Art. 1660 (2) CC; Guatemala Art. 1559 CC; Mexico Art. 2142 CC; Paraguay Art. 1789 CC; Portugal Art. 913 (2) CC; Spain Art. 1484 CC; Uruguay Art. 1718 CC; Venezuela Art. 1.518 CC.

\textsuperscript{117} See for example, Bundesgerichtshof (Germany), 3 April 1996, CISG-online 135; Oberlandesgericht Stuttgart (Germany), 12 March 2001, CISG-online 841.

\textsuperscript{118} Chile: V. Olivares, \textit{supra} note 21, at 245-254: referring to the Chilean Jurisprudence and statutory provisions that equal the understanding of ‘grave breach’ to the concept of ‘fundamental breach’ under the CISG.

\textsuperscript{119} \textit{Id.}, Chile: V. Olivares.

\textsuperscript{120} See R.E. Henschel, ‘Conformity of Goods in International Sales Governed by Article 35 CISG: Caveat Emptor, Caveat Emptor and Contract Law as Background Law and as a Competing Set of Rules’, \textit{Nordic Journal of Commercial Law} (2004): “[T]he relevance of the concept of insignificant defects has been rejected both in theory and in practice, since any variance at all from the agreed description of the goods is assumed to mean that the goods do not conform to the contract. The significance of the defect for the buyer is then decided according to the rights of the buyer in the event of lack of conformity of the goods, and this will typically involve compensation or a reduction in the price, although a minor defect will also amount to a fundamental breach in some cases.”

\textsuperscript{121} Audiencia Provincial de Palencia, Sec. 1, 26 September 2005. The Court also held that the doctrine of \textit{aliud pro alio} was compatible with Arts. 30, 35 (1) (2) CISG.

\textsuperscript{122} Audiencia Provincial de Palencia, Sec. 1, 26 September 2005.
in the case at hand it was evident that the buyer was substantially deprived of what he was entitled to expect under the contract,\(^{123}\) the delivery of different goods to those agreed may not always be enough to avoid the contract under article 49 (1) (a) and 25 CISG.\(^{124}\) In the opinion of the CISG-Advisory Council, “one has to take into account whether the buyer can be required to retain the goods because he can be adequately compensated through damages or through a price reduction. The substantiality of the detriment to the buyer may be ascertained by having regard to the terms of the contract, the purpose for which the goods are bought and finally, by the question of whether it is possible to remedy the defect.”\(^{125}\)

Moreover, article 72 CISG entitles a party to avoid the sales contract if prior to the date of its performance it is clear that the other party will commit a fundamental breach of the contract. First, the foreseen breach must be fundamental under the concept established by the CISG,\(^{126}\) e.g. the expected non-delivery of the goods or the failure to pay the price of the goods. Second, such fundamental breach must be foreseeable, i.e. manifest or clear. On this regard, objectively known cases can include the total destruction of the seller’s premises, the enactment of governmental regulations on the transfer of money abroad, the imposition of export or import embargos on the goods concerned, etc.\(^ {127}\) The Latin American domestic laws do not have an independent concept of, or rules on, anticipatory breach, as it exists under the CISG.\(^ {128}\) Since under Latin American domestic laws delay is always a key element to access the remedies for breach of contract,\(^ {129}\) the suffering party may not avoid the contract until a breach has taken place.

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124 P.P. Viscasillas, supra note 123, at 383.

125 CISG-AC, Opinion No. 5, The buyer’s right to avoid the contract in case of non-conforming goods or documents 7 May 2005, Badenweiler (Germany). Rapporteur: Professor Dr. Ingeborg Schwenzer, LL.M., Professor of Private Law, University of Basel, Comment 4.1.

126 Art. 25 CISG.


128 Paraguay: A.S. Ríos, La Compraventa Internacional de Mercaderías y el Derecho Paraguayo (2000) n. 74; Portugal: L. Pinheiro, supra note 50, at 324; G.H. Jones & P. Schlechtriem, ‘Breach of Contract (Deficiencies in a Party’s Performance)’, in A.T. von Mehren (ed.), International Encyclopedia of Comparative Law, (1999) Vol. VII Contracts, Ch. 15, 90, § 140. CISG article 72 establishes that if prior to the date of performance of the contract it is clear that the other party will commit a fundamental breach of the contract, the other party may declare the contract avoided. The party who intends to avoid the contract must give reasonable notice to the other party, unless there is not time to do so or the other party has already declared that he will not perform his obligation.

129 See Chile: D. Duarte, supra note 28, at 176.
6.5.2 Process of Avoidance

In most scenarios, the avoidance of the contract under the Latin American domestic laws needs to be declared by the competent court so that it produces full effects on the parties’ contractual relationship.\(^{130}\) The judgement rendered by the competent court does not only have a declarative effect but also has an exequatur effect; it orders the restitution of the parties’ respective performances and their fruits.\(^{131}\) Under the CISG, however, a declaration of avoidance of the contract carries full effect if made by notice to the other party pursuant to article 26 CISG. This provision reflects the idea that parties are entitled to dissolve their contract on their own authority without judicial intervention.\(^{132}\)

Let us nevertheless remind the Latin American jurist of some exception to the court base avoidance rules in the domestic laws. Under the Bolivian and the Venezuelan law, the avoidance is automatic for all sales of goods if the buyer does not take delivery of the goods or does not pay the price as agreed in the contract.\(^{133}\) However, such ipso iure avoidance for lack of payment has been expressly denied by Mexican case law.\(^{134}\)

In Brazil and Bolivia, the avoidance of the contract may also work automatically in contracts which establish a critical term for performance without which the aggrieved party would not have entered into the transaction.\(^{135}\) Finally, Bolivia’s Civil Code establishes that in the sale of food and perishable products, the avoidance works automatically, with

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\(^{130}\) See expressly dictated in Bolivia Art. 568 CC; Peru Art. 1428 CC; Chile Supreme Court, RDJ, Vol. 77, Sec. 2, at 77, cited in Chile: D. Duarte, supra note 28, at 333, n 930; Mexico: Collegiate Tribunals, Novena Época, Registry 195’050, SJF VIII, December 1998, at 1030; ICC Final Award Case No. 11722 Lex Contractus Mexican Law: explaining the possibility to avoid the contract as far as the other party is in breach, but if the Tribunal finding is that the other party was not in breach the contract remains existing and being valid; see also Bolivia: C. Arquiqua, supra note 34, at 428; Bolivia: K. Arteaga, supra note 28, Vol. 2, at 159; Brazil: O. Gomes, supra note 28, at 208; El Salvador: Miranda, supra note 43, at 283; Peru: M.C. Freyre, Comentarios al contrato de compraventa: análisis detallado de los artículos 1529 a 1601 del Código Civil 162 (2002): notes that once the declaration is made by the competent court the effects work retroactively to the breach.

\(^{131}\) See expressly Bolivia Arts. 574 (I), 547 CC; Chile Arts. 1487, 1489 CC; Colombia Arts. 1544, 1549 CC & Art. 942 Com C; Costa Rica Art. 457 Com C; Ecuador Arts. 1530, 1532 CC; El Salvador Arts. 1358, 1360 CC; Mexico Art. 2311 CC; Mexico Collegiate Tribunals, Novena Época, Registry 194’993, SJF VIII, December 1998, p 1028; Mexico Supreme Court, Novena Época, Primera Sala, Registry 177’470, SJF XXII, August 2005, p. 142; Peru Supreme Court, Sala civil transitoria, Resolution 000476–2006, 18 August 2006: confirming the effect of avoidance.


\(^{133}\) Bolivia Art. 846 Com C; Spain Art. 1505 CC; Venezuela Art. 1.531 CC & Art. 141 Com C.

\(^{134}\) Mexico Collegiate Tribunals, Novena Época, Registry 195’050, SJF VIII, December 1998, at 1030: upholding that lack of payment does not automatically render the contract avoided, neither it produces the ipso iure avoidance, since the court declaration is needed.

\(^{135}\) Bolivia Art. 571 CC; Brazil: O. Gomes, supra note 28, at 211; Bolivia: Supreme Court, Sala Civil, 3 September 2002, Jorge Arze Murillo y otra v. Aerolínea Varig.
no need of notice from the seller, if the buyer does not take delivery or does not pay the price in the time agreed in the contract.  

In some of the countries which followed the above-mentioned court declaration approach, the first exception comes into play when the parties have previously agreed that failure to perform X’s or Y’s obligations would automatically cause the avoidance of the contract. This agreement is usually called the avoidance clause. With this clause, the avoidance has full effect since the debtor of the obligation is considered to be in delay or in definitive non-performance of the obligation agreed, with no need for a court judgment.

Under some laws, notice of avoidance to the other party is required so that the agreed avoidance clause effectively causes the automatic avoidance of the contract. The aggrieved party must communicate to the other party his intention to avoid the contract.

6.6 Conclusion

The Latin American domestic laws’ system of remedies is evidently different to the unified approach deployed by the CISG. The Latin American domestic laws’ distinction of remedies depending on the grounds of breach, i.e. redhibitory vices, eviction and alio pro alius, etc. and the line dividing these grounds is not always clear. The CISG, on the other hand, has a unitary breach of contract system that does not distinguish between remedies on the grounds of defect of title, non-conformity, delay or non-performance. Under the CISG any type of categorization on this respect is avoided: any type of discrepancy relating to the quantity or the quality, regardless of the type of defect (of functioning or of title), or the delivery of goods which are different to those agreed, is covered by the same parameters of conformity and also entitles the suffering party to the same catalogue of remedies.

In addition, the remedy of specific performance under the CISG system differs from the Latin American domestic laws’ one, in that it offers the possibility to require the

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136 Bolivia Art. 640 CC.
137 Argentina Art. 1083 CC; Bolivia Art. 569 CC; Brazil Art. 474 CC; Chile Arts. 1877-1880 CC; Colombia Arts. 1935-1938 CC; Ecuador Arts. 1844-1846 CC; Mexico Arts. 1940, 1941 CC; Mexico Supreme Court, Novena Época, Primera Sala, Registry 189’425, SJF XIII, June 2001, at 165; Mexico Collegiate Tribunals, Novena Época, Registry 199’343, SJF V, February 1997, at 769; see also Brazil Gomes, supra note 28, at 209.
138 Known in Spanish as Pacto Comisorio or Cláusula Resolutoria.
139 ICC Final Award Case No. 11853 Lex Contractus Mexican Law; ICC Final Award Case No. 13524 Lex Contractus Mexican Law: the Arbitral Tribunal referred to a good number of decisions constructing the principle under Mexican Law.
140 Argentina Art. 1083 CC; Bolivia Art. 569 CC; Paraguay Art. 726 CC; Peru Art. 1430 CC; Mexico Collegiate Tribunals, Novena Época, Registry 199’343, SJF V, February 1997, at 769; Paraguay Supreme Court, Judgement 219, 17 May 2001, Bail De La Felicidad S.A. v. Pony Automotores – Mitsuservice Import S.R.L.: in dissenting opinion of one of the three Supreme Court Judges who decided this case, it was established that the declaration of avoidance based on the avoidance clause lack of effects since the person who executed it was not authorised as representative of the company; Bolivia: C. Aruquipa, supra note 34, at 429.
breaching party to repair the defects in the goods at its own expenses. Likewise, the CISG system offers the possibility for the suffering party to request the delivery of substitute goods if the first delivered goods’ non-conformity amounts to a fundamental breach of contract.

With regard to the damages remedy, the CISG departs from the Latin American domestic laws in that it allows the suffering party to calculate its damages through the abstract method of calculation. In other words, by considering the difference between the price of the breached contract and the price of the same goods at the relevant market and time. This method does not impose a duty on the suffering party to carry out a concrete substitute transaction on the basis of which the latter’s concrete loss could be calculated.

Finally, the requirement and standard set up by the concept of ‘fundamental breach’ in the CISG is evidently different from any standard developed so far in Latin American domestic laws for the remedy of contract avoidance. While Latin American domestic laws focus on the gravity of the defects in the goods that make them improper for the agreed or general use, the CISG is rather concerned by the objective essential deprivation that the breach inflicts on the suffering party’s interest in the contract.