THE BREACH OF CONTRACT UNDER CISG

Introduction
The United Nations Convention on Contracts for the International Sale of Goods (hereinafter: ‘CISG’) is a treaty that is a uniform international sales law. The CISG governs contracts for the international sales of goods between private businesses, excluding sales to consumers and sales of services, as well as sales of certain specified types of goods. It applies to contracts for sale of goods between parties whose places of business are in different Contracting States, or when the rules of private international law lead to the application of the law of a Contracting State. The formation of the contract is concluded by the exchange of offer and acceptance. When the contract is concluded, both parties have certain obligations. Obligations of the sellers include delivering goods in conformity with the quantity and quality stipulated in the contract, as well as related documents, and transferring the property in the goods. Obligations of the buyer include payment of the price and taking delivery of the goods. When the buyer or seller has not complied with its certain obligations, CISG provides common rules regarding remedies for breach of the contract. The aggrieved party may require performance, claim damages or avoid the contract in case of fundamental breach. Additional rules under CISG regulate passing of risk, anticipatory breach of contract, damages, and exemption from performance of the contract.

If you would like to terminate the contract under CISG, the breach must be fundamental. The question is what is a definition of ‘fundamental breach’ and if the breach must also be fundamental under Dutch law.

Breach under Dutch law versus breach under CISG
Dutch law states that any breach (iedere tekortkoming) gives a party the right to terminate the contract if the other party has not complied with its certain obligations. Under Dutch law, the breach does not have to be fundamental. The party who wishes to terminate the contract under CISG, that party must prove that the breach is fundamental. The practise shows, that it is often very hard to prove that the breach is fundamental. To terminate the contract under CISG is therefore much difficult then under Dutch law.

When is the breach fundamental?
In CISG there is no definition of fundamental breach. It depends on what parties agreed in their contract as well as the circumstances. There is jurisprudence on this subject. This jurisprudence provides tools / directions when the breach is fundamental, which can be summarised as follows.

- A fundamental breach requires, first, that one party has committed a breach of contract. Breach of any obligation under the contract can suffice - provided the other requirements for a fundamental breach are present - irrespective of whether the duty was specifically contracted for between the parties or if, instead, it followed from the provisions of the CISG. Even the breach of a collateral duty can give rise to a fundamental breach. For example, where a manufacturer had a duty to reserve goods with a particular trademark exclusively for the buyer, and the manufacturer displayed the trademarked goods at a fair for sale (continuing to do so even after a warning by the buyer), the manufacturer was found to have committed a fundamental breach.

- In order to rank as fundamental, a breach must be of a certain nature and weight. The aggrieved party must have suffered such detriment as to substantially deprive it of what it was entitled to expect under the contract. The breach must therefore nullify or essentially depreciate the aggrieved party’s justified contract expectations. What expectations are justified depends on the specific contract and the risk allocation envisaged by the contract provisions, on customary usages, and on the provisions of the Convention. For example, buyers cannot normally expect that delivered goods will comply with regulations and official
standards in the buyer’s country. Therefore, e.g., the delivery of mussels with a cadmium content exceeding recommended levels in the buyer’s country has not been regarded as a fundamental breach (or, indeed, as a breach at all) since the buyer could not have expected that the seller would meet those standards and since the consumption of the mussels in small portions as such did not endanger a consumer’s health. However; the court in that case stated three exceptions from the rule that the seller need not know and observe the standards in the buyer’s country: (1) if the standards in both countries are identical; (2) if, before or at the conclusion of the contract, the buyer informed the seller about these standards, or (3) if due to special circumstances the seller knew or should have known about those standards because, e.g., it particularly specialised in exports to the buyer’s country or has a branch office there.

- The breach is fundamental only if the substantial deprivation of expectations caused by the breach was reasonably foreseeable to the breaching party. However, the provision does not mention the time at which the consequences of the breach must have been foreseeable. It has been expressly stated that the time of the conclusion of contract is the relevant time. It has been held that the term fundamental breach should be interpreted restrictively. One court found that, in case of doubt, no fundamental breach should be accepted.

**Some examples of fundamental breach under CISG**

- When the time for performance is of essential importance either because it is so contracted or due to evident circumstances (e.g., seasonal goods).
- If the non-conforming goods cannot be used or resold with reasonable effort.
- The non-conformity of the goods which resulted from added substances the addition of which is illegal both in the country of the seller and the buyer.
- The sold goods are defective and cannot be repaired.
- Final non-delivery or final non-payment.
- The buyer’s insolvency and placement under administration.
- Buyer’s refusal to open a letter of credit as required by the contract.
- Non-delivery of the first instalment in an instalment sale gives the buyer reason to believe that further instalments will not be delivered, and therefore a fundamental breach of contract is to be expected.
- Etc.

**Conclusion**

The buyer and seller should be aware of the fact that the contract under CISG can only be terminated if the breach is fundamental. It is possible that parties exclude the applicability of the CISG in their contract and choose another applicable law, for example Dutch law.