

# The Interpretive Turn in International Sales Law: An Analysis of Fifteen Years of CISG Jurisprudence

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[E]ven when outward uniformity is achieved, . . . uniform application of the agreed rules is by no means guaranteed, as in practice different countries almost inevitably come to put different interpretations upon the same enacted words.<sup>1</sup>

[H]ow [does one] determine which interpretation should be preferred when the CISG itself gives rise to different autonomous interpretations[?]<sup>2</sup>

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<sup>1</sup> R.J.C. Munday, *The Uniform Interpretation of International Conventions*, 27 INT’L & COMP. L.Q. 450, 450 (1978).

<sup>2</sup> Franco Ferrari, *Ten Years of the U.N. Convention: CISG Case Law—A New Challenge for Interpreters?*, 17 J.L. & COM. 245, 254 (1998).

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## I. INTRODUCTION

A hopeful note was expounded 250 years ago by Lord Mansfield when he stated that “mercantile law. . . is the same all over the world. For from the same premises, the sound conclusions of reason and justice must universally be the same.”<sup>3</sup> It is this view of the universality of commercial practice that the success of a uniform international sales law is hinged. Critics of such a view assert that such uniformity efforts are both unwise and doomed to failure. Nonetheless, the United Nations Convention on Contracts for the International Sale of Goods (“CISG”) was adopted on April 11, 1980, under the auspices of the United Nations Commission on International Trade Law (“UNCITRAL”).<sup>4</sup> Critics have argued that the benefits of uniform international business law are minimal,<sup>5</sup> and that national courts will inevitably be the conscious or subconscious victims of *homeward trend*.<sup>6</sup> Homeward trend reflects the fear that national courts

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<sup>3</sup> Pelly v. Royal Exch. Assurance Co., 97 Eng. Rep. 342, 346 (1757).

<sup>4</sup> United Nations Convention on Contracts for the International Sale of Goods, April 11, 1980, 1489 U.N.T.S. 3, 19 I.L.M. 671, available at Pace Law School Institute of International Commerce Law, <http://www.cisg.law.pace.edu> (last updated Sept. 2003) (hereinafter CISG). The CISG was incorporated into the law of the United States on January 1, 1988. See generally E. Allan Farnsworth, *The Vienna Convention: History and Scope*, 18 INT’L LAW. 17 (1984); JOHN O. HONNOLD, DOCUMENTARY HISTORY OF THE UNIFORM LAW FOR INTERNATIONAL SALES (1989) (hereinafter, HONNOLD, DOCUMENTARY HISTORY). The CISG officially went into force on January 1, 1988. As of March 20, 2003, 62 countries had acceded to the CISG. See UNICTRAL at <http://www.uncitral.org/english/status/status-e.htm>. The countries that have ratified the CISG, in alphabetical order, are: Argentina, Australia, Austria, Belarus, Belgium, Bosnia-Herzegovina, Bulgaria, Burundi, Canada, Chile, Colombia, Croatia, Cuba, Czech Republic, Denmark, Ecuador, Egypt, Estonia, Finland, France, Georgia, Germany, Ghana, Greece, Guinea, Honduras, Hungary, Iceland, Iraq, Israel, Italy, Kyrgyzstan, Latvia, Lesotho, Lithuania, Luxembourg, Mauritania, Mexico, Mongolia, Netherlands, New Zealand, Norway, Peru, Poland, Moldova, Romania, Russian Federation, Saint Vincent & the Grenadines, Serbia & Montenegro, Singapore, Slovakia, Slovenia, Spain, Sweden, Switzerland, Syria, Uganda, Ukraine, United States, Uruguay, Uzbekistan, Venezuela, and Zambia. Notable exceptions include Brazil, Indonesia, India, Japan, Malaysia South Korea, and the United Kingdom. In a 1990 article, Professor Farnsworth stated that the internationalization of contract law and the adoption of the CISG was one of the “Top Ten” developments in contract law during the 1980’s. Regarding the CISG he states: “the 1980’s saw the internationalization of contract law—a legislative event that was the culmination of an effort spanning a half century.” E. Allan Farnsworth, *Developments in Contract Law During the 1980’s: The Top Ten*, 41 CASE W. RES. L. REV. 203, 204 (1990).

<sup>5</sup> See generally, Paul B. Stephan, *The Futility of Unification and Harmonization in International Commercial Law*, 39 VA. J. INT’L L. 743 (1999).

<sup>6</sup> For a discussion of the problem of homeward trend see, HONNOLD, DOCUMENTARY HISTORY, *supra* note 4. See also, Harry M. Flechtner, *The Several Texts of the CISG in a Decentralized System: Observations on Translations, Reservations and Other Challenges to the Uniformity Principle in Article 7(1)*, 17 J.L. & COM. 187 (1998). “Perhaps the single most important source of non-uniformity in the CISG is the different background assumptions and conceptions that those charged with interpreting and applying the

will ignore the mandate of autonomous-international interpretations of the CISG in favor of interpretations permeated with domestic gloss. It is most difficult for a court to “transcend its domestic perspective and become a different court that is no longer influenced by the law of its own nation state.”<sup>7</sup>

An example of homeward trend jurisprudence is the Italian case of *Italdecor SAS v. Yiu’s Industries*.<sup>8</sup> The court ignored the interpretive methodology<sup>9</sup> of the CISG by failing to review pertinent foreign cases and arbitral decisions. For example, the court failed to seek guidance from existing cases dealing with the determination of fundamental breach.<sup>10</sup> If any semblance of applied uniformity is to be achieved, it is imperative that courts look to relevant foreign decisions for guidance. Whether as voluntarily binding precedent or as persuasive precedent,<sup>11</sup> courts should

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Convention bring to the task.” *Id.* at 200. One commentator argues that homeward trend can be minimized if the CISG is re-titled, enacted as a piece of federal legislation, and state law [UCC] expressly refers to it. See, James E. Bailey, *Facing the Truth: Seeing the Convention on Contracts for the International Sale of Goods as an Obstacle to a Uniform Law on International Sales*, 32 CORNELL INT’L L.J. 273 (1999). The drafters of the CISG were aware and concerned by the problems of homeward trend: “[I]t is especially important to avoid differing constructions of the provisions of this Convention by national courts, each dependent upon the concepts used in the legal system of the country of the forum.” GUIDE TO CISG, Secretariat Commentary Article 7, available at <http://cisgw3.law.pace.edu/cisg/text/e-text-07.html>.

<sup>7</sup> John E. Murray, Jr., *The Neglect of CISG: A Workable Solution*, 17 J.L. & COM. 365, 367 (1998). See also V. Susanne Cook, *The U.N. Convention on Contracts for the International Sale of Goods: A Mandate to Abandon Legal Ethnocentricity*, 16 J.L. & COM. 257 (1997); Danielle A. Thompson, Commentary, *Buyer Beware: German Interpretation of the CISG has led to Results Unfavorable to Buyers*, 19 J.L. & COM. 245, 263 (2000) (“Perhaps the decision of the Oberlandesgericht [German appellate court] can be explained as a demonstration of the formalism and strictness that pervades German culture.”).

<sup>8</sup> *Italdecor SAS v. Yiu’s Industries (H.K.) Ltd.*, Corte app. di Milano [Regional Court of Appeals][CA] Mar. 20, 1998 (It.), available at <http://cisgw3.law.pace.edu/cisg/wais/db/cases2/980320i3.html>.

<sup>9</sup> See *infra* Part II.A.

<sup>10</sup> Angela Maria Romito & Charles Sant ‘Elia, Case Comment, *CISG: Italian Court and Homeward Trend*, 14 PACE INT’L L. REV. 179, 195 (2002) (hereinafter, Romito & Sant ‘Elia, *Homeward Trend*).

<sup>11</sup> Some have argued that substantive uniformity can be obtained only through the use of foreign case law, especially of upper level or supreme courts, as binding precedent. Others have rejected such a common law view of precedent in favor of the use of foreign cases as persuasive precedent. The later opinion is the correct one given that the CISG fails to provide an express mandate to view foreign cases as binding precedent. Furthermore, the lack of an international appellate body renders such a view impracticable and unwise. My view is akin to the persuasive precedent approach. I believe that courts and arbitral panels have a duty to review all relevant cases on the contested legal issues. It also has a duty to explain its decision using CISG interpretive methodology in the case of diverging interpretations. In this regard, Professor Ferrari misunderstood my (Larry A. DiMatteo) analysis of this subject. He correctly criticizes the binding precedent view as follows:

review CISG jurisprudence before rendering a decision. In the case of diverging interpretations, the interpreter should select, modify, or reconcile such decisions through the proper use of the CISG's interpretive methodology:

[C]ourts [should serve] two primary functions [in their roles as *informal* appellate courts]. First, they would look to decisions of foreign courts for guidance. Second, they would actively unify international sales law by distinguishing seemingly inconsistent prior decisions and by harmonizing differences in foreign interpretations.<sup>12</sup>

Simply put, courts' decisions should separate well-reasoned cases from the poorly reasoned ones, explain why they are so, and give persuasive effect to the cases using the proper interpretive methodology.

One commentator concluded that the Court's decision in *Italdecor SAS* was "cryptic, and parochial, and it is written in a way that is hard to understand, even for an Italian."<sup>13</sup> The court not only failed to review foreign case law on the CISG, but also failed to use relevant articles of the CISG. In one instance, the court applied Article 49(1) without analyzing the related Article 25.<sup>14</sup> Article 49(1) allows for the avoidance of a contract in the event of a fundamental breach. The court held that an untimely delivery was fundamental without applying Article 25 which provides the

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First, from a substantive point of view, stating that uniform case law should be treated as binding precedent does not take into account that a uniform body of case does not per se guarantee the correctness of a substantive result. . . . Second, from a methodological point of view, the suggestion to create a *supranational stare decisis* . . . must be criticized, since it does not take into account the rigid hierarchical structure of the various countries' court systems . . . .

Ferrari, *CISG Case Law*, *supra* note 2, at 259 (emphasis added). I agree. I also admit that I inappropriately fashioned the phrase "supranational stare decisis." By that I did not mean to indicate that all foreign decisions, at whatever level of the judicial system and whatever the quality of the analysis, should be accepted as binding precedent. This is indicated by the fact that the full phrase used was "*informal* supranational stare decisis." Larry A. DiMatteo, *The CISG and the Presumption of Enforceability: Unintended Contractual Liability in International Business Dealings*, 22 YALE J. INT'L L. 111, 133 (1997) (hereinafter DiMatteo, *Presumption of Enforceability*). My major fault lies in not explaining what I meant by informal. Since there is no supranational appellate process to speak of binding precedent is nonsensical. Thus, courts are free to disregard foreign cases that demonstrate poor reasoning and fail to comply with CISG interpretive methodology. In reviewing *Italdecor SAS v. Yiu's Indus.*, Romito and Sant 'Elia conclude that "because of the inconsistencies in the reasoning . . . its opinion will probably have little persuasive value for other CISG cases." Romito & Sant 'Elia, *Homeward Trend*, *supra* note 10, at 203.

<sup>12</sup> DiMatteo, *Presumption of Enforceability*, *supra* note 11, at 136.

<sup>13</sup> Romito & Sant Elia, *Homeward Trend*, *supra* note 10, at 203.

<sup>14</sup> *Id.* at 192.

CISG's parameters for determining whether a breach is fundamental. Without the use of the Article 25 template of "substantiality" and "foreseeability," and without the guidance of foreign cases applying the Article 25 template, there is no deterrent to a homeward trend perspective of fundamentality.

The answer to this debate between the Mansfield view and the "realist critique" is somewhere in the middle. The likelihood of substantive uniformity of application is unrealistic, but the utter failure of the CISG as a device to remove legal impediments to international trade is equally implausible. This middle view is found in the ongoing development of CISG jurisprudence. It is the jurisprudence of the CISG that this article seeks to uncover in gauging the impact of the CISG on international sales law.

The focus of this article is not whether the CISG mandates or should mandate absolute uniformity of application. The literature on this subject is quite extensive.<sup>15</sup> Instead, this article recognizes that many CISG provisions are the product of compromise and thus we ask whether these compromises have proven to be effective or have resulted in a chaotic jurisprudence. How have the articles of the CISG actually been interpreted and applied by the various national courts? At the interpretive level, is there evidence of convergence or divergence among the national courts?

To this end, the remainder of this Introduction will examine the special characteristics of the CISG as an "international code" including the importance of the CISG as an international convention and legal code meant for uniform application. The importance of defining a standard for measuring uniformity of application will be discussed along a continuum between absolute and relative standards of uniformity. The discussion then focuses on the importance of autonomous interpretation, as intended by the drafters of the CISG, to the goal of a relative uniformity of application. The Introduction concludes with a discussion of the more expansive use of the CISG as "soft law." This use of the CISG as evidence of customary international law offers an avenue for courts and arbitral tribunals to bridge differences between domestic law regimes.

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<sup>15</sup> See generally, Michael P. Van Alstine, *Dynamic Treaty Interpretation*, 146 U. PA. L. REV. 687 (1998); Frank Diedrich, *Maintaining Uniformity in International Uniform Law via Autonomous Interpretation: Software Contracts and the CISG*, 8 PACE INT'L L. REV. 303 (1996); Franco Ferrari, *Uniform Interpretation of the 1980 Uniform Sales Law*, 24 GA. J. INT'L & COMP. L. 183 (1994) [hereinafter Ferrari, *Uniform Interpretation*]; Mark N. Rosenberg, *The Vienna Convention: Uniformity in Interpretation for Gap-Filling—An Analysis and Application*, 20 AUSTL. BUS. L. REV. 442 (1992); Amy H. Kastely, *Unification and Community: A Rhetorical Analysis of the United Nations Sales Convention*, 8 NW. J. INT'L L. & BUS. 574 (1988); Michael F. Sturley, *The 1980 United Nations Convention on Contracts for the International Sale of Goods: Will a Homeward Trend Emerge?*, 21 TEX. INT'L L.J. 540 (1986).

The review of CISG jurisprudence in Parts II through VI will highlight the problems of non-uniform applications. This will be done by highlighting poorly reasoned opinions as well as those that are a product of better reasoning. The poorly reasoned opinions are generally characterized by decisions that merely apply the legal concepts of the Court's domestic legal system. The exemplary opinions are characterized by the application of CISG interpretive methodology, as discussed in Part II, in pursuit of autonomous interpretations. Finally, numerous arbitral cases will be examined to assess the application of the CISG by arbitral panels.

Parts II through VI, however, provide a more practical view of the CISG at work. These sections are intended to provide a descriptive review of the jurisprudence that has developed around the major provisions of the CISG as well as the raw material necessary to judge the CISG's functionality in lowering the legal obstacles to the international sale of goods. This review is meant to illustrate the types of issues and interpretation problems encountered by national courts and arbitration tribunals in the 15 years since its adoption. It also recognizes that courts have developed specific default rules to make the CISG more functional. The use or misuse of CISG interpretive methodology and the development of specific default rules will be highlighted throughout the remainder of the article.

Parts III through VI review CISG jurisprudence according to the main substantive areas of the Convention: Contract Formation (Part III), Obligations of Buyers (Part IV), Obligations of Sellers (Part V), and Common Obligations (Part VI). In each of these Parts, the provisions with the largest volume of case and arbitral law are given the most coverage. In Part III, the review focuses on the writing requirements, the use of extrinsic evidence, and offer-acceptance rules, including the battle of the forms scenario. Part IV concentrates on the duty of the buyer to inspect and give timely notice of nonconformity (defect), and the civil law concept of *nachfrist notice* as codified in Articles 47 and 48. Part V discusses sellers' obligations, warranty provisions, and the buyer remedies for seller's breach. Part VI includes the passing of risk, fundamental breach, anticipatory breach, and consequences of breach. The consequences of breach observe the calculation of damages, doctrines limiting damages recovery, and the excuse of "impediment" found in Article 79. Through this analysis, divergent interpretations, CISG interpretive methodology, and the development of specific default rules are highlighted.

Part VII's "Summary and Observations" concludes that the CISG is an evolving legal code. Consequently, its jurisprudence reflects courts' confusion and methodology to contend with the CISG's perceived shortcomings through gap-filling measures. Because case law commonly brings necessary depth and clarity to statutory acts, Part VII offers five examples of such developing jurisprudence and the persistence of



homeward trend reasoning in CISG opinions. This Part further posits that homeward trend reasoning as a solution, despite its long term deficiencies.

Furthermore, this article concludes in Part VII that the level of disharmony associated with divergent national interpretations is acceptable because national interpretations impact the effectiveness or functionality of the CISG. Some divergence in interpretation is expected and acceptable given the difference in national legal systems and in the very nature of codes. This divergence is expected not only because of the codes multi-jurisdictional application, but also because—like the civil and commercial codes of Europe and the United States (“UCC”)—the CISG is an evolving, living law. As such, it provides for the contextual input of the reasonable person,<sup>16</sup> including the recognition of evolving trade usage,<sup>17</sup> in the reformulation and application of its rules. The benefit of such a dynamic, contextual interpretive methodology is that the code consistently updates its provisions in response to novel cases and new trade usages. This process should ultimately overcome the initial divergent interpretations and result in an effective and functional international sales law. The success of the living, contextual nature of the CISG is dependent upon courts balancing the need for flexibility in application against the need to minimize divergent interpretations to ensure that the CISG remains attentive to its mandate of uniformity.

We can look to the UCC as an example. It is held up as an example of a successful harmonization of commercial law among multiple jurisdictions. In fact, different state court systems have rendered divergent interpretations of UCC provisions. Despite such divergence, can we still say that the UCC has served its function of uniformity?<sup>18</sup> The answer depends on one’s definition of uniformity or harmonization. The CISG has worked to harmonize international sales law despite the production of

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<sup>16</sup> “[S]tatements made by and other conduct of a party are to be interpreted according to the understanding that a reasonable person of the same kind as the other party would have had in the circumstances.” CISG, *supra* note 4, at art. 8(2).

<sup>17</sup> *Id.* at 9(2). (“The parties are considered . . . to have impliedly made applicable to their contract or its formation a usage . . .”).

<sup>18</sup> Professor Robert Scott has argued that the Uniform Commercial Code has failed in its quest of substantive uniformity. See generally, Robert E. Scott, *Is Article 2 the Best We Can Do?*, 52 HASTINGS L.J. 677 (2001). Professor Scott states the dilemma of comprehensive code writing: “[T]he pressure to formulate rules that will be uniformly adopted distorts the rules themselves in ways that may, quite perversely, undermine the very objective of a uniform law in the first instance.” *Id.* at 680. In more prosaic terms, he argues that necessitated compromise result in *mushy* drafting at the expense of “precise, bright line rules . . .” that “generate predictable outcomes. . . .” *Id.* at 682. Thus, formal uniformity or adoption uniformity is gained with a loss of predictability or uniformity of application (substantive uniformity). See also Alan Schwartz & Robert E. Scott, *The Political Economy of Private Legislatures*, 143 U. PA. L. REV. 595 (1995) (arguing that the structural forces within the UCC Article 2 drafting process necessarily leads to vague, open-ended rules).

divergent interpretations and despite failing the test of absolute uniformity. Nonetheless, it remains an enduring code that evolves with modern commerce and continues to be an intrinsic part of international trade.

#### A. CISG as International Code

It is important to understand that the CISG is written in the form of a convention-code<sup>19</sup> and not as a uniform or model law. The paramount characteristic of a convention is its international character. This characteristic implies that its overall purpose is the standardization of law at a level above that of national law.<sup>20</sup> This standardization provides the important benefit of the longstanding problem of conflict of laws among national states.

In the short term, however, international conventions often produce a problem referred to by Professors Enderlein and Maskow as the *cleavage of statutes*.<sup>21</sup> This is caused by the fact that although the CISG is not meant to be integrated into national legal systems, it is incorporated and applied by national courts. The presence of two sales laws within a single legal system inevitably produces norm conflict. The differences in the use of general contract and interpretation principles, along with substantive differences in the formal legal rules, cause a degree of conceptual dissonance. It is hoped that with any new trans-jurisdictional standardizing law, whether in the form of a uniform law, model law, or convention, the effect of such dissonance will diminish over time. In the end, it is hoped that a solid jurisprudential framework will develop in which the interpreter will “manage with the standardizing rules”<sup>22</sup> independently of the influence of divergent domestic law.

The international nature of the CISG is demonstrated by the fact that its jurisdiction is transaction-focused and not party-focused. The fact that a transaction crosses national borders is the linchpin of CISG jurisdiction—not the nationality of the parties. For example, Article 10(a) provides that the place of business is that which has the closest relationship to the transaction. The nationality of the parties, the place of incorporation of a party, and the place of its headquarters are largely irrelevant. Article 10(a) states the rule that “the nationality of the parties is not to be taken into

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<sup>19</sup> See *infra* Part I.B.2 (discussing the importance of viewing the CISG as a code).

<sup>20</sup> Professors Enderlein and Maskow state that “there is a *difference with uniform laws* insofar as this incorporation elucidates the international character of the perspective rule, underlines its special position in domestic law, and furthers an interpretation and application which is oriented to the standardization of law.” FRITZ ENDERLEIN & DIETRICH MASKOW, INTERNATIONAL SALES LAW 8 (1992) (emphasis in original) (hereinafter, ENDERLEIN & MASKOW).

<sup>21</sup> *Id.* at 11.

<sup>22</sup> *Id.*

consideration”<sup>23</sup> in determining the applicability of the CISG. Therefore, a contract between two nationals of the same country may be subject to the CISG if it involves a trans-border shipment and one of the parties has its CISG “place of business” in another country.<sup>24</sup>

Another example of the international nature of the CISG is its exclusion of types of sales transactions that are more likely to be exposed to the peculiarities of national laws. Article 2 excludes consumer sales, auction sales, sales of ships and aircraft, and forced or judicially mandated sales. The rationale behind excluding these types of sales is that they are subject to special national regulations. Examples of such specialty laws are consumer protection laws and special registration laws (ships and aircraft).<sup>25</sup>

## B. Principle of Uniformity

A recent article is entitled: *Is the United Nations Convention on the International Sale of Goods Achieving Uniformity?*<sup>26</sup> The author correctly replies that the question itself is improper. The answer is yes and no depending on how the word uniformity is defined. If by uniformity one means substantive or absolute uniformity of application, then the answer is a commonsensical no. The better question is: Has the CISG become a functional code? Have functional default rules developed through the application of CISG’s general principles? Has it resulted in at least a manageable level of uniform application to have decreased the legal impediments to international sales?<sup>27</sup> Finally, what is the likelihood of greater uniformity of application in the future?

### 1. *Strict Uniformity versus Relative Uniformity*

The degree that the CISG has been successful at unifying international sales law has been debated. In order to gauge its perceived impact on unifying international sales law, a standard is needed in which to measure CISG jurisprudence. Numerous standards can be offered including the

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<sup>23</sup> GUIDE TO CISG, *supra* note 6, at art. 1.

<sup>24</sup> Should parties whose countries have ratified the CISG wish to opt-out of the convention, they should do so by explicit mention in the contract. *See generally* Paul M. McIntosh, *Selected Legal Aspects of International Sales Transactions: The United Nations Convention on Contracts for the International Sale of Goods*, BUS. CREDIT, Oct. 1, 2001, available at 2001 WL 12570546.

<sup>25</sup> *Id.*

<sup>26</sup> Philip Hackney, *Is the United Nations Convention on the International Sale of Goods Achieving Uniformity?*, 61 LA. L. REV. 473 (2001).

<sup>27</sup> Professor Hackney rejects the argument that the CISG has increased the legal impediments to trade because it produces greater complexity. He responds that “this objection should fade with time, as a body of case law builds around the Convention.” *Id.* at 476.

standards of strict<sup>28</sup> or absolute uniformity,<sup>29</sup> relative uniformity, and the lessening of legal impediments to international trade.<sup>30</sup> “It is generally acknowledged that the existence of different national legal systems impedes the development of international economic relations with complicated problems arising from the conflict of laws.”<sup>31</sup> We believe that the success of the CISG should be measured using a standard of relative uniformity or a standard of the lessening of legal impediments to trade. Thus, a relative or useful level of uniformity<sup>32</sup> should be the benchmark to measure the success of the CISG. This is what Professor Miller has referred to as “a more specific goal [of] uniformity.” The fact that Article 7 prefaces its uniformity mandate with “regard has to be had”<sup>33</sup> implies that a standard below strict uniformity in application was envisioned. The uniformity mandate itself indicates that strict uniformity is not a realizable goal. Instead of using active words like *establish* or *create*, the CISG merely states the “need to promote uniformity in its application. . . .”<sup>34</sup> The benchmark of relative or useful uniformity is superior to the previous system of private international law characterized by the full panoply of different domestic laws and systems.

The CISG was never intended to achieve the lofty goal of absolute uniformity. In the words of Johan Steyn, “[n]o convention can eliminate uncertainties in its application. But a convention such as the Vienna Sales Convention will *tend* to reduce differences and to eliminate uncertainty.”<sup>35</sup> If it helps to relieve the impediment noted above of conflicts of national laws then it is to be considered a progressive, albeit a transitory, step to uniform private international law.

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<sup>28</sup> See generally Fred H. Miller, *Realism not Idealism in Uniform Laws—Observations from the Revision of the UCC*, 39 SO. TEX. L. REV. 707, 721-26 (1998).

<sup>29</sup> Professor Robert Scott discusses the difference between formal uniformity and substantive uniformity. He further discusses the different dimensions of substantive uniformity as being the interpretive function and the standardizing function. The interpretive function involves the uniform interpretation of contract terms. The standardizing function involves the “task of creating broadly suitable default rules.” Robert E. Scott, *The Uniformity Norm in Commercial Law*, in *THE JURISPRUDENTIAL FOUNDATIONS OF CORPORATE AND COMMERCIAL LAW* 149-50 (Jody S. Kraus & Steven D. Walt, eds. 2000) (hereinafter Scott, *Uniformity Norm*).

<sup>30</sup> See also, Flechtner, *supra* note 6, at 206-09 (distinguishing varieties of non-uniformity).

<sup>31</sup> ENDERLEIN & MASKOW, *supra* note 20, at 1.

<sup>32</sup> Hackney, *supra* note 26, at 476.

<sup>33</sup> CISG, *supra* note 4, at art. 7(1).

<sup>34</sup> *Id.*

<sup>35</sup> Johan Steyn, *A Kind of Esperanto?*, in *THE FRONTIERS OF LIABILITY* 14-15 (Peter Birks, ed. 1994) (emphasis added).

## 2. Uniformity through Original or Autonomous Interpretation

The interpretive methodology of the CISG mandates that interpreters seek original or autonomous interpretations. It is hoped that such autonomous interpretations, divorced from the idiosyncrasies of domestic jurisprudence, will result in more truly supranational law. One of our co-authors previously wrote that “[t]he Convention is meant to be interpreted based upon its uniqueness and not its similarities to any one of the legal systems from which it was created.”<sup>36</sup> As discussed earlier, the CISG is an example of a convention *qua* code. The importance of the fact that the CISG is a *convention* pertains to its international character. This international character calls for a non-domestic, autonomous interpretation of CISG rules.

The importance of convention *qua* code is that its international character is to be fused with the interpretive methodology common to all codes.<sup>37</sup> Professor Scott defines a code as “a preemptive, systematic, and comprehensive enactment of a whole field of law.”<sup>38</sup> Thus, problems of interpretation such as gaps in the code are to be solved by means internal to the code. A court or arbitral panel is given the duty “to use the processes of analogy and extrapolation to find a solution consistent with the purposes and policy of the codifying law. In this way, the code itself provides the best evidence of what it means.”<sup>39</sup>

The CISG invites the interpreter to construct autonomous interpretations through its use of nomenclature independent of any domestic legal system. The CISG uses terms such as contract “avoidance,”<sup>40</sup> and language such as “among other things,”<sup>41</sup> “extent of one party’s liability to the other,”<sup>42</sup> and “handing the goods over.”<sup>43</sup> CISG phraseology is relatively vague and abstract, which invites original interpretations. Simultaneously, the CISG’s flexibility enables a wide scope for application

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<sup>36</sup> DiMatteo, *Presumption of Enforceability*, *supra* note 11, at 133.

<sup>37</sup> The uniformity of code application requires that it provide a “built-in methodology.” See John L. Gedid, *U.C.C. Methodology: Taking a Realistic Look at the Code*, 29 WM. & MARY L. REV. 341, 342 (1988).

<sup>38</sup> Scott, *Uniformity Norm*, *supra* note 29, at 171.

<sup>39</sup> *Id.*

<sup>40</sup> See CISG, *supra* note 4, at art. 26 (“declaration of avoidance”), at arts. 49(1) & (2) (“declare the contract avoided”), at art. 51(2) (“contract avoided”), at art. 64 (“declare contract avoided”), at arts. 72(1) & (2) (“contract avoided”), at art. 73(3) (“contract avoided”), at art. 76 (“time of avoidance”), at art. 81 (“avoidance of the contract”), at art. 83 (“contract avoided”), at art. 84(2) (“substantially in the condition”).

<sup>41</sup> *Id.* at art. 19(3).

<sup>42</sup> *Id.*

<sup>43</sup> *Id.* at art. 31(a). See also, *id.* at art. 57(1) (“the handing over”), at art. 58(1) (“handing over”), at art. 58(2) (“not be handed over”), at art. 60(b) (“taking over”), at art. 67(1) (“handed over”), at arts. 69(1) & (2) (“takes over the goods”), at art. 71(2) (“handing over”).

and reasonable but divergent “national” interpretations. This problem of divergent autonomous interpretations will be a focus of our CISG jurisprudential review.

3. *CISG as Soft Law: Uniformity through the Prism of Customary International Law*

One avenue to greater implementation and uniformity is the use of the CISG as *soft law*.<sup>44</sup> Two uses of the CISG as soft law include (1) the voluntary use of the CISG as a choice of law by private parties not automatically subject to CISG jurisdiction and (2) the use by courts and arbitral panels of the CISG as evidence of international customary law. One question posed by CISG jurisprudence is whether the CISG has been used where it is not mandatory law.<sup>45</sup> The major reporting services, CLOUT, Pace Law School, and Unilex, among others, report arbitral panel decisions.<sup>46</sup> These reports, although not comprehensive, indicate CISG usage as a source of soft law or customary international law. Because arbitral panels are often not required to apply a given national law, they are less susceptible to the legal centrality inherent in courts operating within a domestic legal system.<sup>47</sup> To this end, this article’s analysis draws from both case law and arbitral decisions.

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<sup>44</sup> For an example of soft law uses in a different context see, Larry A. DiMatteo, *Contract Talk: Reviewing the Historical and Practical Significance of the Principles of European Contract Law*, 43 HARV. INT’L L. J. 569 (2002) (discussing soft law nature of the Principles of European Contract Law); see generally, Harold J. Berman, *The Law of International Commercial Transactions (Lex Mercatoria)*, 2 EMORY J. INT’L DISP. RESOL. 235 (1988).

<sup>45</sup> The CISG can be used as a compromise choice of law for parties from different national legal systems. This voluntary use of the CISG by international businesspersons is premised on the categorization of the CISG as a neutral set of legal rules. “To adopt the CISG certainty does not give an advantage to either party and is in the true sense a *neutral* system of law.” Bruno Zeller, *The Development of Uniform Laws—A Historical Perspective*, 14 PACE INT’L L. REV. 163, 176-77 (2002) (emphasis added). The CISG can be used to prevent the breakdown of contract negotiations over the issue of choice of law or to prevent the appearance of overreaching by the insertion of the national law of one of the parties. Contract negotiators can opt into the CISG when the contract is not within the jurisdiction of the CISG or elect not to opt out in case of its mandatory default application.

<sup>46</sup> See generally Unilex website available at <http://www.uncitral.org/english/clout/> (last visited Feb. 11, 2004); Pace Law School website available at <http://cisgw3.law.pace.edu/cisgcases.html>.

<sup>47</sup> This is especially true when arbitrators are authorized to decide *ex aequo bonos* or as *amiables compositeurs*.

## II. CISG METHODOLOGY AND JURISPRUDENCE

Parts III through VI offer a selective but comprehensive review of CISG jurisprudence.<sup>48</sup> They allow an assessment of the diverging interpretations problem by national courts. Before assessing the uniformity of CISG jurisprudence relating to its substantive rules of contract, an understanding of the interpretive methodology provided by the CISG is necessary. Failure to understand and apply the CISG's interpretive methodology increases the likelihood of divergent interpretations through the improper use of domestic methodologies and legal constructs. This holds true for any code, domestic or international. Professor Hawkland, referring to the Uniform Commercial Code, asserts that "a court should look no further than the code itself for solution[s] to disputes governed by it—its purposes and policies should dictate the result even where there is no express language."<sup>49</sup> CISG interpretive methodology provides a template for addressing substantive gaps or issues of law not directly (expressly) dealt with by the CISG. This template includes analogical reasoning by using CISG Articles not directly related to the issue at bar and the use of the general principles of the CISG in fabricating default rules.<sup>50</sup>

The notion of analogical reasoning is not expressly mentioned in the general provisions. However, such a methodology is implied in any comprehensive code. Furthermore, Article 7(2) states that "questions concerning matters governed by this Convention which are not expressly settled in it are to be settled in conformity with the general principles on which it is based." A broad interpretation of this methodology would require the use of express and implied general principles. General

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<sup>48</sup> The selectivity is due to a number of considerations including the increasing number of reported cases, especially in countries like Germany, the unavailability of English translations, and the clustering of cases among a number of issues. For example, an in-depth jurisprudence has developed in areas such as determining reasonable inspection and notice under Articles 38 and 39, the calculation of interest alluded to in Article 78, and measuring the nature of a breach as being fundamental or not. Some provisions of the CISG have yet to develop critical mass of cases. See generally, John O. Honnold, *The Sales Convention: From Idea to Practice*, 17 J.L. & COM. 181, 186-196 (1998). Although, CISG jurisprudence has become more comprehensive since Professor Honnold's commentary in 1998 a deeper jurisprudence still needs to be developed in numerous areas of CISG coverage.

<sup>49</sup> D. KING, *THE NEW CONCEPTUALISM OF THE UNIFORM COMMERCIAL CODE* 9 (1968).

<sup>50</sup> "Before the reference to the proper domestic law . . . one may follow two methods . . . first is the analogical application of specific provisions . . . second is the reference to general principles which are explicitly stated . . . or are derived from the set of the Convention's provisions." Anna Kazimierska, *The Remedy of Avoidance under the Vienna Convention on the International Sale of Goods*, in *REVIEW OF THE CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS: 1999-2000* (Pace Int'l Law Review, ed. 2000) at 172 [hereinafter Kazimierska, *Remedy of Avoidance*] (reference to the *REVIEW OF THE CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS: 1999-2000* [hereinafter, *REVIEW OF THE CONVENTION*]).

principles cover all CISG provisions and can be utilized to uncover implied principles that underlie specific provisions. These principles—express or implied—are to be used for guidance in the interpretation of specific CISG provisions. This entails analogical reasoning in order to ensure that article-specific interpretations fit within the framework of the CISG as a whole.<sup>51</sup>

There is a debate as to which priority these rules have in the interpretive methodology of codes. Some argue that general principles are the first recourse to filling in a gap or ambiguity in a code provision.<sup>52</sup> Others argue that reasoning by analogy takes precedent especially when a solution provided in one code provision is analogous to an issue presented under another provision.<sup>53</sup> The best interpretive methodology would include both types of analysis.<sup>54</sup> The two levels of the interpretive discourse are likely to merge in most application. It is the recognition and application of general principles underlying specific CISG articles that make analogical reasoning a functional methodology. The third level of the CISG's interpretive methodology is recourse to private international law. Only after the failure to provide a CISG-generated solution from analogical reasoning or application of general principles should a court resort to private international law (domestic law).<sup>55</sup> The last resort status of domestic sales law is meant to deter the threat of *homeward trend*. This is especially crucial in the case of the CISG due to the fact that its provisions were the product of intense debate and compromise. The temptation exists that in cases of application, especially in areas of ambiguity or gaps, to seek

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<sup>51</sup> *Contra*, HENRY GABRIEL, PRACTITIONER'S GUIDE TO CISG AND UCC (1994). "[I]f the express words of a particular article fails to resolve a conflict, the CISG requires the conflict to be resolved by the underlying principles that led to the adoption of the provision in question." *Id.* at 29.

<sup>52</sup> See generally Michel J. Bonell, *Introduction to the Convention*, in COMMENTARY ON THE INTERNATIONAL SALES LAW 79 (Cesare M. Bianca & Michael J. Bonell, eds. 1987); see also Phanesh Koneru, *The International Interpretation of the UN Convention on Contracts for the International Sale of Goods: An Approach based on General Principles*, 6 MINN. J. GLOBAL TRADE 105 (1997)

<sup>53</sup> "If the Convention failed to anticipate and thus provide a specific solution to an issue, an analogical extension from the existing provisions to the new situation is then appropriate." Koneru, *supra* note 52, at 122, citing JOHN O. HONNOLD, UNIFORM LAW FOR INTERNATIONAL SALES 3 (2d ed. 1991); see also Mark N. Rosenberg, *The Vienna Convention: Uniformity in Interpretation for Gap-Filling—An Analysis and Application*, *supra* note 15.

<sup>54</sup> See generally Kazimierska, *Remedy of Avoidance*, *supra* note 50, at 172 (arguing that both methods are non-hierarchical in application).

<sup>55</sup> The use of domestic law "represents under the . . . uniform law a last resort to be used only if and to the extent a solution cannot be found either by analogical application of specific provisions or by the application of general principles underlying the uniform law as such." Bonell, *supra* note 52, at 83 cited in Franco Ferrari, *Uniform Interpretation*, *supra* note 15, at 228.



the familiarity of domestic default rules.<sup>56</sup>

### A. Interpretive Methodology

As highlighted above, the CISG provides an interpretive methodology for interpreting and applying its substantive rules. The spirit of this methodology is that of excluding recourse to domestic legal methodologies. This is implicit in the view that the CISG directs decision-makers to develop *autonomous interpretations*<sup>57</sup> of CISG provisions. It is only in this way that the CISG can rise above the inherent differences between national contract laws and legal systems. Article 7(1) states that the CISG is to be interpreted in “good faith,” “to promote uniformity,” and with regard “to its international character.”<sup>58</sup> The more difficult questions are not the fabrication of autonomous interpretations of the CISG but the development of different autonomous interpretations. This is especially due to the fact that the CISG is a product of studied ambiguity or compromise and that there are numerous substantive gaps in its rules. The courts and arbitral panels will invariably face issues that are within the *scope* of the CISG but where the CISG fails to provide an express rule.<sup>59</sup> Once again the above described methodology of analogical reasoning and general principles is consistent with the presumption that CISG provisions are to be interpreted broadly. A mandate of broad interpretation is consistent with the code-based interpretive methodology.<sup>60</sup>

### B. General Principles

In order to diminish the frequency of divergent national interpretations, the CISG mandates the use of general principles, both express and implied, found within its Articles. The CISG displays two noticeable characteristics relevant to legal interpretation. First, it fails to

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<sup>56</sup> Professor Miller states the importance of deterring interpreters from acting on such temptation. Uniformity is especially important “where the uniform provision perhaps represents a less desirable position but nonetheless forms an important part of a compromise reflecting a desirable, overall balance and where, if one provision is altered by non-uniformity, significant threat to the overall consensus is posed.” Miller, *supra* note 28, at 722-23.

<sup>57</sup> Ferrari, *Uniform Interpretation*, *supra* note 15, at 198-201.

<sup>58</sup> “In the interpretation of this Convention, regard is to be had to its international character and to the need to promote uniformity in its application and the observance of good faith in international trade.” CISG, *supra* note 4, at art. 7(1).

<sup>59</sup> Ferrari, *Uniform Interpretation*, *supra* note 15, at 215-17.

<sup>60</sup> “[T]he Convention, once adopted, is intended to replace all rules in [domestic] legal systems previously governing matters within its scope . . . . This means that in applying the Convention there is no valid reason to adopt a narrow interpretation.” *Id.* at 202. See also Kazimierska, *supra* note 50, at 160-67 (arguing that the validity exclusion in Article 4(a) should be interpreted narrowly so that the scope of the CISG is more broadly applied).

explicitly enunciate many of its general principles. Article 7(2) states that if “matters governed by [it] are not expressly settled in it [they] are to be settled in conformity with the general principles by which it is based.”<sup>61</sup> The general principles can be characterized as either general or specific and either express or implied. The general, expressed principles are found in Article 7(1). It provides that “[i]n the interpretation of this Convention, regard is to be had to its international character and to the need to promote uniformity in its application and the observance of good faith in international trade.”<sup>62</sup> The general principle of international character is directed at preventing the problem of homeward trend discussed earlier.<sup>63</sup>

An example of an implied general principle is “the principle of favoring the continuation of a contract.”<sup>64</sup> The fact that goods can only be rejected for fundamental defects requires buyers to accept defective goods in most instances. The restrictive nature of fundamental breach is discussed in Part VI.B.1.<sup>65</sup> The importance of completing the transaction in long distance sales, as compared to the broad right of rejection under the perfect tender rule for domestic sales,<sup>66</sup> limits the right of avoidance under the CISG. This is somewhat offset by the incorporation of a uniquely non-common law remedy of price reduction. Thus, the buyer is forced to complete the transaction but is allowed to unilaterally reduce the price by the diminishment of value related to the defect. “The principle [of continuation of performance] can be extracted from Articles 34, 37, 48, 49, 51, 64, 71 and 72 of the CISG.”<sup>67</sup>

The Helsinki Court of Appeals recognized the importance of continuation of contract within the principle of loyalty. “The so-called

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<sup>61</sup> CISG, *supra* note 4, at art. 7(2).

<sup>62</sup> *Id.* at art. 9(1). For a discussion of the principles of “international character” and “good faith,” see generally Bruno Zeller, *The UN Convention on Contracts for the International Sale of Goods—A Leap Forward Towards Unified International Sales Law*, 12 PACE INT’L L. REV. 79 (2000).

<sup>63</sup> See generally Lisa M. Ryan, *The Convention for the International Sale of Goods: Divergent Interpretations*, 4 TUL. J. INT’L L. & COMP. L. 99, 100 (1995); Amy Kastely, *Unification and Community: A Rhetorical Analysis of the United Nations Convention*, 8 NW. J. INT’L L. & BUS. 601, 601-02 (1988) (stating that the CISG must be interpreted “as a text that is shared by an international community”).

<sup>64</sup> Kazimierska, *supra* note 50, at 175. See also Romito & Saint Elia, *Homeward Trend*, *supra* note 10, at 200 (“requiring that notice be given by an avoiding party of a remedy as drastic as avoidance to encourage certainty in transactions.”); Article 57(1)’s default rule that place of payment is based upon the general principle that payment should be made at the domicile of the creditor. SCEA des Beauches v. Société TesoTen Elsen, Cour d’appel Grenoble [Regional Court of Appeals][CA], 94/3859, Oct. 23, 1996 (Fr.), available at <http://www.uncitral.org/english/clout/abstract/abstr15.htm>.

<sup>65</sup> See also *infra* Part V.A. (Duty of Delivery).

<sup>66</sup> UCC § 2-601 (1977).

<sup>67</sup> Kazimierska, *supra* note 50, at 175.

principle of loyalty has been recognized in scholarly writings. According to the principle, the parties to a contract have to act in favor of the common goal; they have to reasonably consider the interests of the other party.”<sup>68</sup> In essence, each party owes a duty of loyalty to the other party to preserve the viability of the transaction. From such a duty, the court recognized an implied general principle in an expanded notion of duty to continue a sales relationship beyond the discrete individual sales transactions. The case involved a buyer who purchased carpets for resale on an ad hoc basis. The seller abruptly ended its relationship with the buyer. The court held that on the basis of a two-year business transaction, the buyer’s “operations cannot be based on a risk of an abrupt ending of a contract.”<sup>69</sup> Therefore, the seller was restricted in its right to not sell to the buyer despite the fact that there was no agency or long-term supply contract in place. The court reasoned that the buyer had “obtained *de facto* exclusive selling rights.”<sup>70</sup> Such implied rights, based upon good faith and trade usage, make the seller of multiple discrete transactions susceptible to damage claims under Article 74.<sup>71</sup> In essence, the court held that principles of reasonableness and trade usage require an extended notice of termination where damages to a buyer are foreseeable, regardless of the fact that the discrete contract failed to require such notice.<sup>72</sup>

Many of the CISG’s rules are open-textured and allow application of contextual inputs such as trade usage and custom.<sup>73</sup> For example, it makes repeated use of the “reasonableness standard” in its gap-filling provisions. The authors counted thirty-eight instances where the reasonableness

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<sup>68</sup> Helsingin Hovioikeus [Helsinki Court of Appeals][HO] S00/82, Oct. 26, 2000 (Fin.), available at <http://cisgw3.law.pace.edu/cisg/wais/db/cases2/001026f5.html>.

<sup>69</sup> *Id.* at 12.

<sup>70</sup> *Id.*

<sup>71</sup> A party must pay damages “in the light of the facts and matters of which he knew or ought to have known, as a possible consequence of the breach of contract.” CISG, *supra* note 4, at art. 74.

<sup>72</sup> A French court held that the principle against abrupt discontinuance is applied through an inter-party business usage as permitted under Article 9: “[B]y virtue of Article 9 CISG, [a party is] liable for abrupt discontinuance of business relations between parties bound by long-standing practices.” *Caiato v. S.A.S.F.F. Court d’appel Grenoble* [Regional Court of Appeals][CA], 93/4126, Sept. 13, 1995 (Fr.), available at <http://www.uncitral.org/english/clout/abstract/abstr15.htm>.

<sup>73</sup> For example, the CISG fails to define key terms such as “fundamental breach.” “A breach of contract committed by one of the parties is *fundamental* if it results in such detriment to the other party as *substantially* to deprive him of what he is entitled to expect under the contract . . . .” CISG, *supra* note 4, at art. 25 (emphasis added). See also CISG, *supra* note 4, at art. 46(2) (“fundamental breach”), at art. 51(2) (“fundamental breach”), at art. 64(1) (“fundamental breach”), at art. 70 (“fundamental breach”), at art. 64(2) (“in respect to any breach”), at art. 70 (“committed a fundamental breach”), at art. 71(1) (“not perform a substantial part”), at art. 73(1) & (2) (“fundamental breach”), at art. 82(2) (“substantially in the condition”).

standard is imposed by the rules of the CISG.<sup>74</sup> Open-ended rules derive their content from post-hoc application to real world cases.<sup>75</sup> Such rules allow for expansive interpretations to deal with novel cases and for use in analogical reasoning. The analogical reasoning can be used to fill in gaps within the scope of the CISG. As discussed above, one way this is done is through the deduction of general principles underlying the CISG in order to interpret CISG rules.<sup>76</sup>

Because many of the CISG rules are open-ended, despite the fact that it is in code format, it is important to interpret its provisions as part of a whole. In interpreting an open-ended rule, the interpreter should not only recognize the underlying rationales for that particular CISG provision, but should also interpret general principles and other relevant provisions.<sup>77</sup>

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<sup>74</sup> See generally CISG, *supra* note 4, at art. 8 (“reasonable person”), at art. 18(2) (“reasonable time”), at art. 25 (“reasonable person”), at art. 27 “means appropriate in the circumstances”), at art. 33(c) (“within a reasonable time”), at art. 34 (“unreasonable inconvenience or unreasonable expense”), at art. 35(b) (“unreasonable for him to rely”), at art. 37 (“unreasonable inconvenience or unreasonable expense”), at art. 38(1) (“short a period as is practical under the circumstances”), at art. 39 (“reasonable time”), at art. 43(1) (“reasonable time”), at art. 44 (“reasonable excuse”), at art. 46(2) (“reasonable time”), at art. 46(3) (“unreasonable having regard to all circumstances” and “reasonable time”), at art. 47(1) (“reasonable length for performance”), at art. 48(1) (“without unreasonable delay” and “unreasonable inconvenience and uncertainty”), at art. 48(2) (“unreasonable time”), at art. 55 (“price generally charged”), at art. 60 (a) (“reasonable be expected”), at art. 63 (1) (“time of reasonable length”), at art. 64 (2) (“within a reasonable time”), at art. 65(1) (“within a reasonable time”), at art. 65 (2) (“fix a reasonable time”), at art. 68 (“if the circumstances so indicate”), at art. 75 (“reasonable manner and within a reasonable time”), at art. 76(2) (“reasonable substitute”), at art. 77 (“measures as are reasonable in the circumstances”), at art. 79(1) (“could not reasonable be expected”), at art. 79(4) (“within a reasonable time”), at art. 85 (“takes steps as are reasonable in the circumstances”), at art. 86(1) (“reasonable in the circumstances”), at art. 86 (2) (“without unreasonable inconvenience or unreasonable expense”), at art. 87 (“not unreasonable”), at art. 88(1) (“any appropriate means,” “unreasonable delay, and “reasonable notice”). See, e.g., *infra* Part V.A.2. (time of delivery).

<sup>75</sup> The cases reviewed were taken from abstracts, summaries, and commentaries provided mainly in “CISG Case Presentations” in the Pace Law School website at <http://cisgw3.law.pace.edu/cisg/text/casecit.html>, the UNILEX database at <http://www.unilex.info>, and CLOUT Abstracts at A/CN.9/SER.C/ABSTRACTS or at the UNCITRAL website at <http://www.un.or.at/uncitral>. UNCITRAL regularly releases abstracts of CISG court and arbitral decisions under the name CLOUT. These abstracts are prepared by National Reporters of countries that have ratified or adopted the CISG.

<sup>76</sup> Professor Ferrari states that “most general principles have not been expressly provided for by the Convention. Consequently, they must be deduced from its specific provisions. . . .” Ferrari, *Uniform Interpretation*, *supra* note 15, at 224.

<sup>77</sup> See, e.g., Kazimierska, *supra* note 50, at 79. “The remedy of avoidance should not be analyzed without taking into account the general provisions of the Convention. . . . The Convention constitutes one whole and its general provisions are of the utmost importance while considering particular issues regulated under it.” *Id.* at 155.

This methodology was applied in an Austrian court decision.<sup>78</sup> The court held that the payment of interest was within the scope of the CISG<sup>79</sup> even though it was not expressly explained. The court concluded that any issues regarding the payment of interest should be settled according to the general principles underlying the CISG. The court then recognized “full compensation” as an underlying general principle that required payment of interest.<sup>80</sup> The court further supported its decision by recognizing payment of interest as a trade usage permitted under Article 9(2).<sup>81</sup>

Article 7 requires that CISG interpretations should be accomplished with regard to “the observance of good faith in international trade.”<sup>82</sup> The legislative history of Article 7 demonstrates that the inclusion of a duty of good faith was the subject of contentious debate.<sup>83</sup> The result was the muted compromise of including good faith principle in the interpretive methodology of the CISG. Despite the confinement of the express duty of good faith to CISG interpretation, courts and arbitral panels have implied a general duty of good faith to dealings between contracting parties. The Columbia Constitutional Court enunciated a broad good faith principle by referencing its own *Magna Charta*:

Equally, the exercise of the commercial activity that the individuals develop with other citizens of different States must fit the principle of good faith, just as the Convention stipulates in paragraph number one in article 7. This principle should not only be observed in the contractual relationships or negotiations, but in the relationship between individuals and the State and in the procedural performances. Indeed, . . . good faith, in conformity with article 83 of the Magna Charta is presumed. . . .<sup>84</sup>

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<sup>78</sup> Internationales Schiedsgericht der Bundeskammer der gewerblichen Wirtschaft [Arbital Tribunal Vienna], SCH-4366, Jun. 15, 1994 (Aus.), available at <http://www.cisg.law.pace.edu/cisg/wais/db/cases2/940615a4.html>.

<sup>79</sup> CISG, *supra* note 4, at art. 74 (losses that are a consequence of breach), at art. 78 (buyer must pay interest on payments in arrears), at art. 84 (seller must pay interest on monies refunded).

<sup>80</sup> An Argentine court incorrectly argued that the “CISG contains no express provision recognizing payment of interest.” See *Elastar Sacifia v. Bettcher Industries Inc.*, Juzgado Nacional de Primera Instancia en lo Comercial No. 7 Buenos Aire) [National Commercial Court of First Instance Number 7][JN], 50.272, May 20, 1991 (Arg.), available at <http://www.cisg.law.pace.edu/cisg/wais/db/cases2/910520a1.html>.

<sup>81</sup> “It was also found that in relations between merchants it was expected that the seller, due to delayed payment, would resort to bank credit at the interest rate commonly practiced in its own country.” *Id.* The implication of a principle of full compensation will be further discussed in Part VI.C.2.a.’s discussion of “foreseeability.”

<sup>82</sup> CISG, *supra* note 4, at art. 7(1).

<sup>83</sup> HONNOLD, DOCUMENTARY HISTORY, *supra* note 4, at 369.

<sup>84</sup> Corte Constitucional [Constitutional Court of Columbia] Sentencia C-529/00

A Hungarian arbitration court ruled that “the observance of good faith in not only a criterion to be used in the interpretation of the CISG but also a standard to be observed by the parties in the performance of the contract.”<sup>85</sup> The scholarly literature has generally favored the expanded use of Article 7’s good faith principle to dealings between the parties.<sup>86</sup> One argument is that the use of the reasonableness standard throughout the CISG inherently requires the application of good faith to the conduct of the parties.<sup>87</sup> In support of this argument, the Secretariat Commentary references CISG provisions that are “manifestations of the requirement of the observance of good faith.”<sup>88</sup> The reasonable person is seen as always acting in good faith. Moreover, the recognition of trade usage in the interpretive process has historically been premised upon the commercial norm of good faith and fair dealing.<sup>89</sup> In the area of acceptance, a Swiss court held that good faith is the key to determining whether a sender may assume the recipient of the confirmation letter accepted the terms of the letter.<sup>90</sup> A recent Belgian appellate court characterized Article 40 as the application of “the good faith principle,” noting that if the seller knows of the non-conformity and fails to reveal it, he cannot fall back upon the buyer’s failure to tell him what he knew already.<sup>91</sup>

### C. General Default Rules and Specific Default Rule Creation

Many of the CISG articles provide very general, vague default rules tied to the concept of reasonableness. It is interesting to evaluate whether CISG jurisprudence has begun to fashion more specific, functional default

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Referencia: expediente LAT-154, May 10, 2000 (Colom.), available at <http://www.cisg.law.pace.edu/cases/000510c7.html>.

<sup>85</sup> Arbitration Court of the Chamber of Commerce and Industry of Budapest, VB/94 124, Nov. 17, 1995 (Hung.), available at <http://www.cisg.law.pace.edu/cisg/wais/db/cases2/951117h1.html>.

<sup>86</sup> “It is suggested that the good faith principle, applied in the interpretation of the provisions of the Convention, has at the same time an effect on the contract between the parties to which the Convention is applied.” REVIEW OF THE CONVENTION, *supra* note 50, at 169.

<sup>87</sup> “[T]he general principles underlying many provisions of the Convention collectively impose an obligation of good faith on the parties.” See, e.g., Koneru, *supra* note 52, at 107.

<sup>88</sup> The commentary refers to Articles 16(2)(b), 21(2), 29(2), 37, 38,39, 40, 49(2), 64 (2), 82, & 85-88 as examples of the influence of the principle of good faith on CISG rules. GUIDE TO CISG, *supra* note 6, at Art. 7.

<sup>89</sup> “From the medieval *lex mercatoria* to the present, most specific rules of business can be traced to the norm of good faith and fair dealing.” DiMatteo, *Presumption of Enforceability*, *supra* note 11, at 146.

<sup>90</sup> See *infra* Part III.B.3 and note 253.

<sup>91</sup> S.r.l. R.C. v. BVBA R.T. [Antwerp Appellate Court], 1997/AR/1554, Jun. 27, 2001 (Belg.), available at <http://www.cisg.law.pace.edu/cisg/wais/db/cases2/010627b1.html>.

rules.<sup>92</sup> The alternative approach is a hasty devolution to the rules found in domestic legal systems. An interpreter will be tempted to argue that since the CISG fails to provide specific default rules for defined categories of cases, then recourse to more fully developed default rules in domestic law is appropriate. This would indeed be an inappropriate presumption. The general principles of uniformity and international character enumerated in Article 7 are intended to prevent premature recourse to domestic law.

An exercise akin to the development of specific default rules is the creation of factors that can be applied in the analysis of various types of cases under the scope of CISG provisions. These factors provide substance to the borderless reaches of reasonableness and enable the formulation of specific default rules. A Swiss Court enunciated a number of such factors by quantifying Article 38(1)'s mandate that a buyer must inspect delivered goods "within a short a period as is practicable in the circumstances."<sup>93</sup> The court listed a number of factors that can be used to categorize "in the circumstances." They include:

In determining the time limit for the examination of the goods, one must consider the individual circumstances and the adequate possibilities of the parties. This includes, e.g., the place at which the goods are located and the way in which they are packaged. The nature of the goods themselves is particularly relevant. Goods which do not change their quality or go to waste can be expected to be examined for their quantity and type immediately.

An immediate thorough examination of the quality cannot reasonably be expected if the buyer is busy with other dealings. . . . Where a large quantity of goods is delivered, the buyer does not need to examine the entire load but must test samples. Where an examination may damage the substance of the goods, the buyer must check the weight, appearance, etc. In addition to that, she must also take samples even if the examined goods are destroyed in the process or cannot be used

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<sup>92</sup> As discussed above, the CISG recognizes the right to the payment of interest. However, it fails to provide specific rules as how the interest is to be calculated. Interpreters have had to fabricate more specific default rules. For example, in a case from the Netherlands, a court held that the parties agreed that payment was to be in German currency the rate of interest should be determined under German law. *Nieuwenhoven Viehandel GmbH v. Diepeveen-Dirkson B.V.*, Arrondissementsrechtbank Arnhem [District Court] [RB], 1992/1251, Dec. 30, 1993 (Neth.), available at <http://www.cisg.law.pace.edu/cisg/wais/db/cases2/931230n1.html>. An ICC arbitration panel applied the rate commonly applied to Eurodollar settlements in international trade. *CLOUT Case No. 103*, available at <http://www.uncitral.org/english/clout/abstract/abstr8.htm>.

<sup>93</sup> *Obergericht de Kantons Luzern [Lucerne Appellate Court][OG] 11 95 123/357*, Jan. 8, 1997 (Switz.), available at <http://www.cisg.law.pace.edu/cisg/wais/db/cases2/970108s1.html>.

afterwards. However, the number of samples taken in such cases can be reduced to a few per thousand. This rule also applies to goods in their original packaging which cannot be sold after being opened.<sup>94</sup>

The development of relevant factors is vital to the full functioning of CISG rules. A factors analysis provides the necessary flexibility needed to apply a generally worded default rule to a variety of fact patterns.

Another example can be found in the German Supreme Court's interpretation of the excuse doctrine of impediment.<sup>95</sup> Article 79 allows a party a legal excuse in the event of the unexpected existence of an "impediment beyond his control."<sup>96</sup> The CISG fails to define what it means by an "impediment" and "beyond his control." The court reasoned that the word impediment does not allow for a reallocation of contract risk. In this case, the seller argued for impediment due to the acts of a third party supplier that it had hired to fulfill its contract. The court rejected third-party non-performance as a ground for impediment. It defined "beyond control" more broadly than mere physical control. According to the court, it also included "economic risk control."<sup>97</sup> Since the third-party supplier was within the "seller's sphere of influence"<sup>98</sup> the economic risk remained with the seller. The seller could not argue impediment simply because it could not physically control the actions of a third party.

### III. CONTRACT FORMATION

The CISG embodies a modern approach to contract formation, recognizing that contracts are often concluded quickly and without a formal writing. The CISG provisions dealing with contract formation are found in Part II of the convention which contains the rules of formality and offer-acceptance. The rules of formality refer to the writing requirements, definiteness of terms, and types of admissible evidence. Offer-acceptance rules include issues dealing with the mechanics of formation, the battle of the forms scenario, and the firm offer rule. Article 29, found in Part III of the CISG, is concurrently analyzed for contract modification requirements.

#### A. Writing Requirements and the Parol Evidence Rule

Consistent with its freedom of form approach, the CISG does not require a writing for the formation of a contract. In the area of contract modification, it requires neither a writing nor consideration. Articles 11,

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<sup>94</sup> *Id.*

<sup>95</sup> Bundesgerichtshof [Federal Supreme Court][BGH] VIII ZR 121/98, Mar. 24, 1999 (F.R.G.), available at <http://cisgw3.law.pace.edu/cases/990324g1.html>.

<sup>96</sup> CISG, *supra* note 4, at art. 79(1).

<sup>97</sup> OG 11 95 123/357, Jan. 8, 1997, *supra* note 93.

<sup>98</sup> *Id.*



12, 13, and 29 contain the CISG's writing, evidence, and consideration requirements for formation, modification and termination. Although freedom from formalities is the rule of both Articles 11 and 29, these articles allow Contracting States to preserve writing requirements if they wish to do so. Moreover, the Convention's principle of party autonomy allows parties to impose their own requirements.

Article 11 of the Convention states that a "contract of sale need not be concluded in or evidenced by writing and is not subject to any other requirement as to form."<sup>99</sup> Consequently, under the Convention, oral agreements are valid.<sup>100</sup> Article 12 allows a Contracting State to make a declaration under Article 96 of the Convention in order to exempt itself from the informalities of Articles 11 (addressing issues regarding formation and proof of a contract's existence), Part II (addressing offer and acceptance) and Article 29 (addressing modification and termination).<sup>101</sup> Article 96 declarations are available, however, only to Contracting States "whose legislation requires contracts of sale to be concluded in or evidenced by writing."<sup>102</sup> Moreover, Article 96 requires that at least one of the parties to the contract have its place of business in the declaring State.<sup>103</sup> Because Article 12 refers only to formalities required under Articles 11 and 29 and Part II, other notices or indications of intention unrelated to these Articles are not affected by an Article 96 declaration. CISG default rules on formality not relating to Articles 11, 12, and Part II remain in place.<sup>104</sup>

Article 13 specifies that telegrams and telexes qualify as "writings."<sup>105</sup> Given the drafters' concern for efficient communication, courts interpreting the CISG would most likely recognize more modern forms of electronic communication, not anticipated at the time of drafting.<sup>106</sup> When a

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<sup>99</sup> CISG, *supra* note 4, at art. 11.

<sup>100</sup> Where administrative or criminal law requires that a contract be in writing, sanctions would be enforceable against the offending party, but the contract itself would still be enforceable. See Secretariat Commentary, Guide to Article 11, available at <http://www.cisg.law.pace.edu/cisg/text/secomm/secomm-11.html>.

<sup>101</sup> Although most Western legal systems abandoned the requirement of a writing for the sale of movable property, the UCC § 2-201 requires contracts for the sale of goods over \$500 to be in writing. At the time of drafting, many socialist legal systems also required a writing for a binding contract. CISG, *supra* note 4, at art. 12.

<sup>102</sup> *Id.* at art. 96. Argentina, Belarus, Chile, China, Estonia, Hungary, Lithuania, the Russian Federation, and the Ukraine are countries that may still require a writing, pursuant to the Article 12 exclusion. See Seigfried Eiselen, *Electronic Commerce and the UN Convention on Contracts for the International Sale of Goods (CISG) 1980*, 5 EDI L. REV. 21, 36 (1999) available at <http://www.cisg.law.pace.edu/cisg/biblio/eiselen1.html>.

<sup>103</sup> CISG, *supra* note 4, at art. 96.

<sup>104</sup> See Secretariat Commentary to Article 12, available at <http://www.cisg.law.pace.edu/cisg/text/secomm/secomm-12.html>.

<sup>105</sup> CISG, *supra* note 4, at art. 13.

<sup>106</sup> Eiselen, *supra* note 102, at 35. Article 1.10 of the UNIDROIT Principles extends the

Contracting State makes an Article 96 declaration, private international law determines whether a writing is necessary and what constitutes a writing. If domestic law applies because of a reservation pursuant to Articles 12 and 96, Article 13 demands that “domestic form requirements are always satisfied by the use of telegrams and telexes.”<sup>107</sup>

Although a writing is not required in general, some international conventions may override the CISG with regard to specific provisions in a contract for the sale of goods. For example, the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958 requires arbitration clauses to be in writing and the Brussels Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters requires jurisdiction clauses to be in writing. In such cases, the CISG may apply to determine whether the writing requirement is satisfied.<sup>108</sup>

The CISG contains no express statement on the role of parol evidence. Article 11, however, provides that a contract “may be proved by any means, including witnesses.”<sup>109</sup> This provision indicates that the CISG admits not only oral testimony related to the contract but also evidence such as negotiations, the intent of the parties, prior course of dealing, and conduct. Article 8 of the Convention instructs that a party’s statements and conduct are to be interpreted according to the subjective intent of the party “where the other party knew or could not have been unaware what that intent was.”<sup>110</sup> Otherwise, intent is determined according to a reasonable person standard.<sup>111</sup> To determine intent, courts must consider “all relevant circumstances.”<sup>112</sup> CISG’s permissiveness, demonstrated by Article 8’s instructions to consider “all relevant circumstances” and Article 11’s statement that a contract may be proved by “any means,” is contrary to the common law approach of excluding parol evidence.

Although contracting parties may insist on certain formalities for

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meaning of “written” to “any mode of communication that preserves a record of the information contained therein and is capable of being reproduced in tangible form.” See Seig Eiselen, *Remarks on the Manner in which the Unidroit Principles of International Commercial Contracts May be Used to Interpret or Supplement Article 29 of the CISG*, 14 PACE INT’L L. REV. 379, 382 (2002) (suggesting that Article 13 should be extended to include the modern language of Article 1.10 of the UNIDROIT Principles).

<sup>107</sup> See, e.g., PETER SCHLECHTRIEM, UNIFORM SALES LAW—THE U.N. CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS 45 (1986) available at <http://www.cisg.law.pace.edu/cisg/biblio/schlechtriem.html>.

<sup>108</sup> See, e.g., *Filanto S.p.A. v. Chilewich Int’l Corp.*, 789 F. Supp. 1229 (S.D.N.Y. 1992).

<sup>109</sup> CISG, *supra* note 4, at art. 11.

<sup>110</sup> *Id.* at art. 8(1).

<sup>111</sup> *Id.* at art. 8(2).

<sup>112</sup> *Id.* at art. 8(3).

modification or termination, the CISG does not require any.<sup>113</sup> The CISG makes no reference to consideration which is required for modification under common law. Article 29(1) which states that “a contract may be modified or terminated by the mere agreement of the parties.”<sup>114</sup> If parties have prescribed formalities in a written agreement, however, Article 29(2) makes it clear that such formalities must be observed in order to make the amendment or termination valid. A writing requirement, such as a no oral modification clause, however, will be ignored if one party’s conduct causes the other to rely on oral statements or other conduct.<sup>115</sup>

### 1. *The Writing Requirements of Articles 11, 12, and 13*

The issues that courts have addressed regarding writing requirements include whether there is sufficient evidence that a contract exists, which law applies to determine whether writing requirements must be satisfied when one party is subject to an Article 96 declaration, and how courts should address national parole evidence rules to determine the existence, scope, modification or termination of a contract.

The lack of a writing requirement under the CISG does not pose many problems because so many signatory countries have already abandoned the statute of frauds concept even before adopting the Convention.<sup>116</sup> A notable exception is the United States, where the Uniform Commercial Code still requires that contracts for the sale of goods for more than \$500 be in writing.<sup>117</sup> Although Article 11 makes clear that a contract may be evidenced by “any means,” national courts must still consider whether the evidence provided is sufficient to determine that a contract exists. A U.S. court stated that under the CISG, a “contract may be proven by a document, oral representations, conduct, or some combination of the three.”<sup>118</sup> An unsigned fax,<sup>119</sup> an invoice together with documents for the

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<sup>113</sup> *Id.* at art. 29(1).

<sup>114</sup> *Id.* at art. 29(1). See Alejandro M. Garro, *Reconciliation of Legal Traditions in the U.N. Convention on Contracts for the International Sale of Goods*, 23 INT’L L. 443-83 (1989).

<sup>115</sup> CISG, *supra* note 4, at art. 29(2).

<sup>116</sup> See Garro, *supra* note 114. See also Jacob S. Ziegel, *Report to the Uniform Law Conference of Canada on Convention on Contracts for the International Sale of Goods* (1981) available at <http://www.cisg.law.pace.edu/cisg/test/ziegell11.html> (noting that writing requirements for contracts of sale were repealed in the United Kingdom in 1954 and in British Columbia in 1954 with no adverse consequences).

<sup>117</sup> UCC § 2-201(1) (2003). An exception to the writing requirement is an oral agreement between merchants that is followed by a written confirmation. See UCC § 2-201(2).

<sup>118</sup> See *Geneva Pharm. Tech. Corp. v. Barr Lab., Inc.*, 201 F. Supp. 2d 236, 281 (S.D.N.Y. 2002).

<sup>119</sup> *Handelsgericht [Commercial Court][HG] 45/94, Dec. 5, 1995 (Switz.)*, available at <http://www.unilex.info/dynasite.cfm?dssid=2376&dsmid=13356&x=1>.

carriage of goods,<sup>120</sup> telegrams and telexes,<sup>121</sup> conduct such as the opening of a letter of credit,<sup>122</sup> and witnesses' testimony about the intent of the parties<sup>123</sup> have all been introduced to prove the existence of a contract. A few courts have insisted that the parties should "get it in writing," but such comments appear to be made merely as cautionary statements.<sup>124</sup>

Articles 8 and 9 assist courts in determining whether an oral agreement has been validly concluded. These provisions embody the CISG's emphasis on upholding the parties' intentions and expectations as well as trade usage and industry customs. A case decided by the Helsinki Court of First Instance and upheld by the Court of Appeals found that an oral agreement regarding an exclusive distributorship arrangement was validly concluded and that the one party had failed to give proper notice of termination.<sup>125</sup> In reaching its decision, the court considered "all relevant circumstances" as required by Article 8.<sup>126</sup> This included the incorporation into the contract of any "usage of which the parties knew or ought to have known and which in international trade is widely known to, and regularly observed by, parties to contracts of the type involved in the particular trade concerned."<sup>127</sup> A U.S. court used a similar approach to determine whether, as one party claimed, it was "a well-established custom in the industry . . . to rely on implied, unwritten supply commitments."<sup>128</sup> Although the court did not refer specifically to Articles 8 or 9, it cited the CISG's "strong preference for enforcing obligations and representations customarily relied upon by others in the industry," as well as Article 7(1)'s focus on observing

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<sup>120</sup> Comisión para la Protección del Comercio Exterior de Mexico [Mexican Commission for the Protection of Foreign Trade][Compromex] M/66/92, May 4, 1993 (Mex.), available at <http://cisgw3.law.pace.edu/cisg/wais/db/cases2/930504m1.html>. See also Alejandro M. Garro, *The U.N. Sales Convention in the Americas: Recent Developments*, 17 J.L. & COM. 219-44 (1998).

<sup>121</sup> HO S 00/82, Oct. 26, 2000, *supra* note 68.

<sup>122</sup> Compromex M/21/95, Apr. 29, 1996, *supra* note 120.

<sup>123</sup> Oberlandesgericht [Provincial Court of Appeal][OLG] 7 U 5460/94, Mar. 8, 1995, (F.R.G.), available at <http://www.unilex.info/case.cfm?pid=1&do=case&id=119&step=Abstract>.

<sup>124</sup> See *Alta-Medine v. Crompton Corp.*, No. 00-C-5901 (HB), 2001 U.S. Dist. LEXIS 18107, at \*15, \*16 n.6 (S.D.N.Y. Nov. 7, 2001) (evidence of continuing relationship insufficient so that there was "no agreement for the Court to enforce, written or otherwise"); *Handelsgericht [Commercial Court][HG] 45/1994* Dec. 5, 1995 (Switz.), available at <http://www.unilex.info/dynasite.cfm?dssid=2376&dsmid=13356&x=1>. A dissenting opinion in the Helsinki Court of Appeals stated that "it is apparent that the alleged agreement ought to have been concluded in writing and that it ought to have contained detailed terms on the obligations of both parties." *Id.*

<sup>125</sup> See HO S 00/82, Oct. 26, 2000, *supra* note 68.

<sup>126</sup> *Id.*

<sup>127</sup> CISG, *supra* note 4, at art. 9(2). Further, the court stated that the contracting parties must "reasonably consider the interests of the other party."

<sup>128</sup> See *Geneva Pharm. Tech.*, 201 F. Supp. 2d, *supra* note 118, at 281 (S.D.N.Y. 2002).

“good faith in international trade.”<sup>129</sup>

A major complication in the CISG’s “no writing requirement” regime is Article 12’s allowance that Contracting States may exempt themselves from the informalities of Articles 11 and 29. The use of an Article 96 declaration to exempt a Contracting State from Article 11 does not necessarily dictate that a writing will be required. Two interpretations have been suggested regarding which law applies for Article 12 purposes. The first interpretation is that form requirements will always be preserved if one of the Contracting Parties has made such a declaration.<sup>130</sup>

The second interpretation is that the forum’s conflict of law principles pertain and the applicable national law determines whether a writing is required for a contract to be enforceable. If the applicable law points to the state that requires a writing, then the formalities must be observed. If the private law points to a state that does not have a writing requirement or to the CISG, then no writing is required. For example, let’s look at a Hungarian case because Hungary is a state that has made an Article 96 declaration.<sup>131</sup> Here, the Metropolitan Court of Budapest held that the contract concluded over the telephone was valid because the law of the forum state, Germany, pointed to German law which does not require a writing.<sup>132</sup> Similarly, a Dutch court found that a contract based on an oral offer was valid despite the fact that one of the parties had its place of business in the Russian Federation, a state which had made an Article 96 declaration, because the private international law of the forum pointed to the law of the Netherlands, which required the court to apply the CISG as adopted by the Netherlands.<sup>133</sup>

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<sup>129</sup> *Id.*

<sup>130</sup> See PETER SCHLECHTRIEM, COMMENTARY ON THE UN CONVENTION ON THE INTERNATIONAL SALE OF GOODS (CISG) 91 (2d ed. 1998) (stating that the minority view which would have the rules of the reservation state always prevail must be rejected because “the reservation state’s universal claim to the validity of its formal requirements would then exclude the private international law rules of other Contracting States and make those requirements internationally applicable uniform law.”).

<sup>131</sup> *Hungary*, CISG, at <http://www.cisg.law.pace.edu/cisg/countries/cntries-Hungary.html> (last visited Mar. 11, 2004).

<sup>132</sup> See Fovárosi Biróság [Metropolitan Court][FB] 12.G.41.471/1991/21, Mar. 24, 1992 (Hung.), available at <http://www.unilex.info/dynasite.cfm?dssid=2376&dsmid=13356&x=1>.

<sup>133</sup> See Hoge Raad [Supreme Court] [HR] 16.436, 7 Nov. 1997 (Neth.), available at <http://www.unilex.info/case.cfm?pid=1&do=case&id=333&step=Abstract>. Even where a party has a right to insist on a writing requirement through a reservation, the requirement may be interpreted liberally. Compromex, a Mexican government agency that issues non-binding recommendations in foreign trade disputes, found that the writing requirement reserved by Argentina was satisfied by an exchange of documents between parties. See *Conservas La Costeña, S.A.* (Jul. 16, 1996) (Mex.) translated in 17 J.L. & COM. 427 (1998) (In making its recommendation, the agency found that requiring a formal contract “would be in conflict with the general principles of the CISG.”).

While Article 12 applies only to those States that qualify for an exemption through an Article 96 declaration, parties may impose their own private statute of fraud requirements. In doing so, the party imposing the writing requirement must be sure that the other party is aware of the requirement. An Austrian court held that where the seller had standard terms that required acceptance to be in writing, such terms would apply only if the buyer had knowledge of such standard terms, otherwise the oral acceptance would not prevent the conclusion of a valid contract, under the CISG.<sup>134</sup> This notion of *particularized express consent* is further discussed in Part VII.A.2.

## 2. Parol Evidence: Articles 11 & 29

The parol evidence rule bars evidence of an earlier oral contract that contradicts or varies the terms of a subsequent or contemporaneous written contract. Parol evidence issues may arise under the CISG in two contexts: first, whether parol evidence may be used to prove the existence or scope of a contract, pursuant to Article 11; second, under what circumstances parol evidence may be used regarding the modification or termination of a contract under Article 29.

### a. Admissibility of Parol Evidence

Cases involving the application of the parol evidence rule to the CISG have been limited to United States' courts.<sup>135</sup> The United States instituted a statute of frauds and parol evidence rule in Section 2-201 of the Uniform Commercial Code.<sup>136</sup> Consequently, parties bringing cases in the United States have raised the parol evidence rule, attempting to exclude evidence that a contract existed or evidence of unfavorable contract terms. The majority of U.S. courts have resisted the temptation of homeward trend in barring the application of the parol evidence rule to contract disputes governed by the CISG.<sup>137</sup> Article 11 clearly recognizes the validity of oral

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<sup>134</sup> See Oberster Gerichtshof [Supreme Court][OGH] 10 Ob 518/95, Feb. 6, 1996 (Aus.), available at <http://www.cisg.law.pace.edu/cisg/wais/db/cases2/960206a3.html>.

<sup>135</sup> In a decision by the United States Court of Appeals for the Eleventh Circuit, the court noted its unfruitful search for cases from other Contracting States regarding the parol evidence rule. See *MCC Marble Ceramic Center, Inc. v. Ceramica Nuova D'Agostino, S.p.A.*, 144 F.3d 1384, 1390 n.14 (11th Cir. 1998).

<sup>136</sup> Virtually all states in the United States apply the UCC to contracts for the sale of goods valued at \$500 or more. UCC § 2-201(1) provides: "a contract for the sale of goods for the price of \$500 or more is not enforceable by way of action or defense unless there is some writing sufficient to indicate that a contract for sale has been made between the parties and signed by the party against whom enforcement is sought or by his authorized agent or broker."

<sup>137</sup> See *Shuttle Packaging Sys. v. Jacob Tsonakis, INA, S.A.*, No. 1:01-CV-691, 2001 U.S. Dist. LEXIS 21630, at \*22 (W.D. Mich. Dec. 17, 2001); *Fercus v. Palazzo*, No. 98 CIV.

contracts, which logically would allow parol evidence to prove that a contract has been agreed to by the parties and what the agreement included. Moreover, courts have interpreted Article 8(3) of the CISG which directs courts to give “due consideration . . . to all relevant circumstances of the case including the negotiations. . .” to determine the intent of the parties as a clear instruction to admit parol evidence even in cases where there is a formal written contract.<sup>138</sup> The stronger argument, then, is that given the existence of the provisions in Articles 11 and 8(3), the admissibility of evidence in a contract dispute is within the *scope* of the CISG. Furthermore, application of nation-specific rules like the American parol evidence rule is antithetical to CISG’s general principles of uniformity and international character.<sup>139</sup>

### b. Types of Extrinsic Evidence

The CISG allows a broad spectrum of admissible evidence for construing the terms of the parties’ agreement.<sup>140</sup> Using Articles 8 and 9 as gap fillers, U.S. courts have complied with the CISG’s mandate to admit a broad range of extrinsic evidence in proving the existence of a contract or the content of contracts. In cases involving both written and oral agreements, the CISG allows a court to consider not only the written agreement, but also statements made prior to the agreement and statements that contradict the written documentation.<sup>141</sup> Regardless of whether the

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7728 (NRB), 2000 U.S. Dist. LEXIS 11086, at \*11-12 (S.D.N.Y. Aug. 8, 2000); *MCC-Marble*, 144 F.3d at 1390 & n.17; *Claudia v. Olivieri Footwear Ltd.*, No. 96 CIV. 8052 (HB) (THK) 1998 U.S. Dist. LEXIS 4586, at \*18 (S.D.N.Y. Apr. 6, 1998); *Filanto v. Chilewich Int’l Corp.*, 789 F. Supp. 1229, 1238 n.7 (S.D.N.Y. 1992). *But see* *Beijing Metals & Minerals Import/Export Corp. v. Am. Bus. Ctr., Inc.*, 993 F.2d 1178 (5th Cir. 1993) (applying Texas law, stating that it “need not resolve the choice of law issue, because . . . discussion is limited to application of the parol evidence rule (which applies regardless. . .).”).

<sup>138</sup> *MCC Marble*, 144 F.3d at 1389.

<sup>139</sup> *Id.* at 1391. *See also* Harry M. Fletchner, *Recent Developments: CISG*, 14 J.L. & COM. 153, 157 (1995) (criticizing the *Beijing Metals* opinion and noting that “[c]ommentators generally agree that article 8(3) rejects the approach to the parol evidence questions taken by U.S. domestic law” (citations omitted)). *But see*, David H. Moore, *Note, The Parol Evidence Rule and the United Nations Convention on Contracts for the International Sale of Goods: Justifying Beijing Metals & Minerals Import/Export Corp. v. American Business Center, Inc.*, 1995 B.Y.U. L. REV. 1347, 1361-63 (1995) (arguing that the parol evidence rule could be an appropriate way to discern what consideration is “due” under Article 8(3) and that the parol evidence rule discourages perjury and bad faith thereby promoting good faith and uniformity in the interpretation of contracts as expressed in CISG, article 7). *See generally*, Hackney, *supra* note 26, at 481-82 (discussing *Beijing Metals* and commentators fear that courts will interpret the CISG by reference to domestic law because of the lack of case law).

<sup>140</sup> *See* DiMatteo, *Presumption of Enforceability*, *supra* note 11, at 127.

<sup>141</sup> *See id.*

original agreement was in writing, the CISG allows a court to admit all information relevant to the formation of the contract.<sup>142</sup> In a case where the parties disagreed on the terms of the contract, one U.S. court noted that evidence could include “any negotiations, agreements, or statements made prior to the issuance of the invoices in issue” as well as any prior course of dealings.<sup>143</sup>

The permissiveness of the CISG evidence regime is apparent in cases where courts have admitted not only evidence pertaining to negotiations, and agreements or statements made prior to a written agreement, but also evidence of the parties’ subjective intent.<sup>144</sup> The court in *MCC Marble Ceramic Center, Inc.*<sup>145</sup> stated that “the CISG appears to permit a substantial inquiry into the parties’ subjective intent, even if the parties did not engage in any objectively ascertainable means of registering this intent.”<sup>146</sup> The court held that it had to consider evidence of the parties’ subjective intent that certain terms of a written agreement were not binding.<sup>147</sup> The plaintiff had argued that the defendant was aware of the plaintiff’s subjective intent not to be bound by the terms on the reverse side of the pre-printed form, despite a provision directly below the signature line that expressly and specifically incorporated those terms.<sup>148</sup> This case illustrates the difference in approach between the UCC and the CISG evidence regimes. While parol evidence is generally admissible under the UCC only to resolve patent ambiguities, the CISG allows evidence of the parties’ subjective intent, even when there is no ambiguity in the written contract or reasonable dispute as to an applicable trade usage.<sup>149</sup>

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<sup>142</sup> See *Claudia*, 1998 U.S. Dist. LEXIS 4586.

<sup>143</sup> See *id.* at \*19-20.

<sup>144</sup> Article 8(1) states that “statements made by and other conduct of a party are to be interpreted according to *his* intent where the other party knew or could not have been unaware what that intent was.” See *MCC-Marble*, 144 F.3d at 1391; *Shuttle Packaging Sys. v. Jacob Tsonakis, INA, S.A.*, 1:01-CIV-691, 2001 U.S. Dist. LEXIS 21630, at \*22 (W.D. Mich. Dec. 17, 2001); *Mitchell Aircraft Spares, Inc. v. European Aircraft Service AB*, 23 F. Supp. 2d 915, 921 (N.D. Ill. 1998).

<sup>145</sup> *MCC-Marble*, 144 F.3d at 1387.

<sup>146</sup> *Id.*

<sup>147</sup> *Id.*

<sup>148</sup> *Id.*

<sup>149</sup> The court admitted evidence of the parties’ subjective intent but stated that, “We find it nothing short of astounding that an individual, purportedly experienced in commercial matters, would sign a contract in a foreign language and expect not to be bound simply because he could not comprehend its terms.” *MCC-Marble*, 144 F.3d at 1387 n.9. The court noted that the CISG’s adoption of subjective intent is a rejection of Holmesian objectivity: “The law has nothing to do with the actual state of the parties’ minds. In contract, as elsewhere, it must go by externals and judge parties by their conduct.” *Id.* at 1387 n.8. Following the lead of the *MMC-Marble* decision, other U.S. courts have found that the parol evidence rule does not apply to agreements governed by the Convention and that the subjective intent of the parties must be considered in determining the scope of the



The lack of knowledge of the inner workings of the CISG in areas such as subjective intent and the use of extrinsic evidence was apparent in *GPL Treatment v. Louisiana-Pacific Corp.*<sup>150</sup> CISG's applicability as the appropriate law was an issue in the case. Applying the UCC, the Oregon Court of Appeals found that an oral agreement followed by a written confirmation was valid due to the UCC's "merchant exception" to the statute of frauds. The merchant exception states that when one merchant receives a written confirmation of an oral contract from another merchant "sufficient against the sender," the contract becomes enforceable unless the recipient objects within 10 days.<sup>151</sup> The dissenting judge disagreed with the sufficiency finding but correctly maintained that the CISG should have applied and that under Article 11 the oral agreement itself would have been valid, thereby eliminating the need for the court to analyze the sufficiency of the written confirmation.<sup>152</sup>

### c. Contract Modification

Article 29 allows contracts to be modified or terminated by the "mere agreement" of the parties. This provision reinforces the principle that no particular form is required for either modification or termination.<sup>153</sup> Oral terminations or modifications, however, are ineffective if the parties have previously prescribed formalities to such acts. National courts will find modifications to be invalid in at least three situations. First, when the modification does not represent "agreement" by the parties. Second, when

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agreement. One court held that the subjective intent of the parties had to be considered where a purchase order was ambiguous. *Mitchell Aircraft*, 23 F. Supp. 2d at 921. Another court held that a non-competition agreement was not invalid for failing to specify the restricted area, because the parties' intent to apply the restriction to the United States' market was evident by its statements and conduct. *Shuttle Packaging Sys.*, 2001 U.S. Dist. LEXIS 21630, at \*22. *Contra*, *Alta-Medine v. Crompton Corp.*, 00 CIV. 5901 (HB), 2001 U.S. Dist. LEXIS 18107, at \*15 & n.6 (S.D.N.Y. Nov. 7, 2001). This case involved a disputed distributorship agreement in which the court focused on an informal writing as significant evidence because it was "the only clear communication between the parties. . . ." It further stated that it was "immaterial . . . whether the . . . CISG applies," the court concluded that there was "no agreement for the Court to enforce, written or otherwise. . . ." The court failed to realize that the CISG treats the admissibility of evidence quite differently and that evidence such as the subjective intent of the parties as well as their prior relationship and course of dealings might have influenced its conclusion.

<sup>150</sup> See *GPL Treatment v. Louisiana-Pacific Corp.*, 894 P.2d 470 (Ct. App. 1995). See generally Charles Sukurs, *Harmonizing the Battle of the Forms: A Comparison of the United States, Canada, and the United Nations Convention on Contracts for the International Sale of Goods*, 34 VAND. J. TRANSNAT'L L. 1481, 1512-13 (2001) (discussing challenges in harmonizing CISG and domestic law).

<sup>151</sup> UCC §§ 2-201 (1) & (2)(1977). The Oregon statute used by the court is a verbatim codification of the UCC section.

<sup>152</sup> See *GPL Treatment*, 894 P.2d at 646 n.4.

<sup>153</sup> CISG, *supra* note 4, at art. 29.

a writing is required because one of the parties has its place of business in a contracting state that made a declaration pursuant to Articles 12 and 96. In such a situation Article 29 prohibits oral modifications.<sup>154</sup> Third, when the parties include a no oral modification clause in a written contract.

Just as intent is critical in determining the existence or scope of a contract under Article 11, so intent is important in examining the validity of a modification. Whether or not the parties have agreed on the modification is a question that incorporates the offer and acceptance rules under Articles 14, 18, and 19, as well as interpretation rules under Articles 8 and 9. A U.S. court in *Chateau des Charmes Wines Ltd. v. Sabate USA Inc.* found that one party's unilateral attempt to modify an agreement failed where there was no indication that the other party accepted or agreed to the new terms.<sup>155</sup> The parties had orally agreed to the essential terms of the contract, but a forum selection clause which was not part of the original agreement, was included in subsequent invoices.<sup>156</sup> According to the court, it would be illogical to make the forum selection clause contained in the invoices part of the contract.<sup>157</sup> The court stated that "[n]othing in the Convention suggests that the failure to object to a party's unilateral attempt to alter materially the terms of an otherwise valid agreement is an 'agreement' within the terms of Article 29."<sup>158</sup> The court took into account the various circumstances recommended in Article 8(3) to determine the parties' intent, but concluded that there was no evidence or conduct that indicated the party had agreed to the modifications added to the invoice.<sup>159</sup> Other courts have also insisted on evidence of an agreement. For example, a French court considered affidavits from the buyers' witnesses who were present at a meeting to determine whether the parties had concluded a valid price modification.<sup>160</sup>

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<sup>154</sup> See Vestnik Vysshego Arbitrazhnogo Suda RF [Highest Court of Arbitration][Vestn. Vyssh. Arb. Suda RF], Information Letter 29, Feb. 16, 1998 (Russ.), available at <http://www.cisg.law.pace.edu/cisg/wais/db/cases2/980216r1.html> (modification by telephone not valid where buyer had its place of business in the Russian Federation and the former U.S.S.R. had made a declaration in accordance with Articles 12 and 96); Vestn. Vyssh. Arb. Suda RF, Res. No. 4670/96, Mar. 25, 1997 (Russ.), available at <http://www.cisg.law.pace.edu/cisg/wais/db/cases2/970325r2.html> (modification of terms of delivery must be in writing); *Vital Berry Marketing NV v. Dira-Frost NV*, AR 1894/94, Rechtbank van Koophandel, Hasselt, May 2, 1995 (Belg.) available at <http://www.unilex.info/case.cfm?pid=1&do=case&id=263&step=Abstract> (attempt to modify price not valid where seller was from Chile, a State which had made declaration under Articles 12 and 96).

<sup>155</sup> *Chateau des Charmes Wines Ltd. v. Sabate USA Inc.*, 328 F.3d 528, 531 (9th Cir. 2003).

<sup>156</sup> *Id.* at 529.

<sup>157</sup> *Id.* at 531.

<sup>158</sup> *Id.*

<sup>159</sup> *Id.*

<sup>160</sup> See *Société Cámara Agraria Provincial de Guipuzcoa v. André Margaron*, CA

Because the affidavits did not mention the seller's agreement to the price, however, the court held that "the modification of a sale price can not result from the general environment of a meeting."<sup>161</sup>

Parties may avoid parol evidence difficulties such as those raised in the previous section by inserting a merger or no oral modification clause that "extinguishes any and all prior agreements and understandings not expressed in the writing."<sup>162</sup> Enforcing such clauses preserves the intent of the parties as well as the Convention's principle of freedom of contract. The exception to Article 29's general rule, however, is that a "party may be precluded by his conduct from asserting such a provision to the extent that the other party has relied on that conduct."<sup>163</sup> Several decisions indicate that national courts respect clauses that prohibit oral modifications or the use of extrinsic evidence, where there is no evidence that one party acted in a manner to induce reliance on oral modifications.<sup>164</sup> Nevertheless, where a no oral modification or merger clause exists, a party is allowed to establish conduct, such as a course of dealing, to override the modification clause.<sup>165</sup> Despite academic concerns about the difficulty of interpreting Article 29(2), cases addressing the issue have yet to surface.<sup>166</sup>

Article 29 allows contracts to be modified or terminated by the "mere agreement" of the parties. The Secretariat's Commentary indicates that this

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Grenoble [Appeal Court][CA] 93/2821, Mar. 29, 1995 (Fr.) available at <http://www.cisg.law.pace.edu/cisg/wais/db/cases2/950329f1.html>.

<sup>161</sup> *Id.*

<sup>162</sup> See CISG, *supra* note 4, at art. 29; *MCC- Marble*, 144 F.3d at 1391.

<sup>163</sup> See CISG, *supra* note 4, at art. 29(2). See also *Graves Import Co. v. Chilewich Int'l Corp.*, 92 CIV. 3655 (JFK), 1994 U.S. Dist. LEXIS 13393, at \*13 n.2 (S.D.N.Y. Sept. 22, 1994).

<sup>164</sup> See *Graves Import Co.*, 1994 U.S. Dist. LEXIS 13393 at \*13; ICC Court of Arbitration—Zurich Arbitral Awards, 9117, (Mar. 1998), available at <http://www.unilex.info/case.cfm?pid=1&do=case&id=399&step=FullText> (arbitral tribunal compared Article 29(2) to UNIDROIT principles, Articles 2.17 and 2.18 to reach conclusion that a party could not rely on oral promises, assurances, or writings not included in the contract and that there was no reason to apply the exception clause which prevents a party from making use of the no oral modification clause if its conduct would lead the other party to rely); *Cong ty Ng Nam Bee v. Cong ty Thuong mai Tay Ninh*, People's Supreme Court, Appeal Division in Ho Chi Minh City, 74/VPPT, Apr. 5, 1996 (Vietnam), available at <http://www.unilex.info/case.cfm?pid=case&id=350&step=FullText> (holding that letter of credit is a type of extrinsic evidence, inadmissible to contradict contract terms where parties had a 'four-corner clause').

<sup>165</sup> CISG, *supra* note 4, at art. 29(2).

<sup>166</sup> See generally, Robert A. Hillman, *Article 29(2) of the United Nations Convention on Contracts for the International Sale of Goods: A New Effort at Clarifying the Legal Effect of "No Oral Modification" Clauses*, 21 CORNELL INT'L L.J. 449 (1988) (reviewing problems raised by no oral modifications and suggesting that new drafters take an approach that compromises less by either enforcing or abolishing such clauses).

provision overcomes the common law requirement of consideration.<sup>167</sup> At least one U.S. court as well as the Court of Arbitration of the International Chamber of Commerce have recognized that under the CISG, a contract for the sale of goods may be modified without consideration.<sup>168</sup> In one recent U.S. decision, however, the court approached the consideration issue as a question of contract validity, which Article 4 of the CISG specifically states is not governed by the Convention.<sup>169</sup> This is a questionable extension of the validity delegation under Article 4. Article 29 brings contract modification within the scope of the CISG. The specific default rules of Article 29, namely no writing or consideration requirements, preempts the more general charge that issues of validity are to be determined by national law.

### B. Offer and Acceptance Rules – Articles 14-24

Despite its general informality and incorporation of flexible, open-ended rules, the CISG provides specific rules of offer and acceptance to determine whether a valid contract has been concluded. The rules of offer and acceptance, concerning the necessary content, timing, and revocation of offers, are contained in Articles 14 through 24. A valid offer must “be addressed to one or more specific persons,” be “sufficiently definite,” and indicate the offeror’s intention “to be bound in case of acceptance.”<sup>170</sup> If the offer is not addressed to “one or more specific persons, it is merely an invitation to offer, unless the contrary is clearly indicated by the person making the proposal.”<sup>171</sup> Identification of the goods, quantity, and price are

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<sup>167</sup> See Secretariat Commentary to CISG art. 29, available at <http://www.cisg.law.pace.edu/cisg/text/secomm/secomm-29.html>.

<sup>168</sup> See Shuttle Packaging, 2001 U.S. Dist. LEXIS 21630, at \*21 (W.D. Mich. Dec. 17, 2001) (citing Michael Van Alstine, 37 VA. J. INT’L L. 1, n.47 (1996)); ICC Arbitration Case No. 7331 (1994) available at <http://cisgw3.law.pace.edu/cases/947331i1.html>; ICC Arbitration Case No. 9474 (Feb. 1999), <sup>169</sup> available at <http://www.unilex.info/case.cfm?pid=1&do=case&id=716&step=FullText>.

<sup>169</sup> See Geneva Pharm. Tech. Corp., 201 F. Supp. 2d at 282-83 (court used New Jersey law to determine whether there was consideration). See generally, Helen Elizabeth Hartnell, *Rousing the Sleeping Dog: The Validity Exception to the Convention on Contracts for the International Sale of Goods*, 18 YALE J. INT’L L. 1, 45 (1993) (proposing that courts seek a middle course in approaching the validity issue, looking to domestic to determine whether an issue is one of validity but also considering the international aspect of the CISG); Gyula Eörsi, *Problems of Unifying Law on the Formation of Contracts for the International Sale of Goods*, available at <http://www.cisg.law.pace.edu/cisg/text/eorsi29.html> (recognizing that lack of consideration could be a validity issue but that it is more likely that contract formation does not require consideration, a conclusion which he maintains is supported by “the fact that the question did not even surface, in connection with the 1964 Hague Convention on Formation (ULF)”).

<sup>170</sup> CISG, *supra* note 4, at art. 14(1).

<sup>171</sup> *Id.*

the essential elements that determine whether the offer fulfills the “sufficiently definite” requirement.<sup>172</sup> An offer does not fail for lack of definiteness, however, if these terms are not expressly fixed. Article 14(1) allows such terms to be “implicitly” fixed or provided for in some other way.

There are numerous, highly specific rules that control the effectiveness of offers and revocation of offers. An offer becomes effective when it reaches the offeree.<sup>173</sup> Article 24 interprets “reaches” to mean that the offer has been communicated orally, delivered personally, or delivered to the offeree’s place of business, mailing address, or habitual residence.<sup>174</sup> If the offer is revoked before it reaches the offeree, it becomes ineffective even if the offer stated that it was irrevocable.<sup>175</sup> If a revocation reaches the offeree at the same time as the offer, the offer does not become effective.<sup>176</sup> Finally, an offeree can not accept an offer until it is received even if he has knowledge of it.<sup>177</sup>

If a revocation reaches the offeree before the dispatch of the acceptance, the revocation is effective.<sup>178</sup> An important exception to the right to revoke prior to acceptance is the CISG’s expanded version of the common law’s firm offer rule. Unlike, the Uniform Commercial Code’s (“UCC”) firm offer rule,<sup>179</sup> a firm offer under the CISG need not fix a time or make an assurance of irrevocability. If an offer does not state a specific period of time for acceptance, the question may still arise whether the offer indicates it is irrevocable or whether the offeree had reasonably relied on the offer being held open.<sup>180</sup>

The CISG’s acceptance and rejection of offer rules are as specified by the offer rules. If an acceptance is withdrawn before it is received, no expectations have been created and the acceptance is not effective upon receipt.<sup>181</sup> An offer, even if it is irrevocable, is terminated when a rejection reaches the offeror.<sup>182</sup> Article 17 may be linked to Article 19 when the

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<sup>172</sup> *Id.*

<sup>173</sup> *Id.* at art. 15(1).

<sup>174</sup> *Id.* at art. 24.

<sup>175</sup> *Id.* at art. 15(2).

<sup>176</sup> *Id.*

<sup>177</sup> See Secretariat Commentary to CISG art. 15, available at <http://www.cisg.law.pace.edu/cisg/text/secomm/secomm-15.html>.

<sup>178</sup> CISG, *supra* note 4, at art. 16(1).

<sup>179</sup> UCC § 2-205 (1977). Section 2-205 states that an offer to be a firm offer must “by its terms gives assurance that it will be held open . . . .”

<sup>180</sup> CISG, *supra* note 4, at art. 16(2)(b).

<sup>181</sup> *Id.* at art. 22. The right to withdraw while an acceptance is in transit is created due to the CISG’s rejection of the common law’s mailbox rule.

<sup>182</sup> See CISG, *supra* note 4, at art. 17. See generally, Commentary to CISG art. 17, available at <http://www.cisg.law.pace.edu/cisg/text/secomm/secomm-17.html>.

rejection is ambiguous, since it may be interpreted as a counteroffer (rejection) or as an acceptance. If a reply is a rejection under Article 17, then a court need not get into the more complicated issues raised by Article 19, because no contract is concluded.

Article 18 specifies the criteria, time and manner for a valid acceptance. Determining if and when there has been a valid acceptance is crucial because a contract "is concluded at the moment when an acceptance of an offer becomes effective. . . ." <sup>183</sup> Either statements or conduct may constitute a valid acceptance. "Silence or inactivity does not in itself amount to acceptance," so that the recipient may ignore an offer, even if that offer states that it will assume acceptance if there is no reply. <sup>184</sup> The "in itself" qualification to this provision leaves open the possibility that in some cases silence or inactivity may amount to acceptance. How assent is indicated is left open but it must be communicated. Just as an offer is not valid until it reaches the offeree, an acceptance is not valid until it reaches the offeror. <sup>185</sup> Furthermore, the acceptance must reach the offeror within the stated period of time or, if no time is fixed, within a reasonable period of time. <sup>186</sup> Performance of an act may also constitute acceptance if it is accepted usage or practice between the parties. <sup>187</sup>

Article 20 provides rules for calculating the time for acceptance "fixed" in the offer. If a period of time rather than a precise date is given, by which the offeror must respond, Article 20 specifies that the time for acceptance begins to run from the time of dispatch in the case of a telegram, from the date given on a letter, or if none is given, by the date on the envelope. <sup>188</sup> If the communication is instantaneous, the time begins to run immediately. <sup>189</sup> Official holidays and non-business days are calculated in the time period, unless the offer cannot be delivered on the last day of the period, in which case "the period is extended until the first business day that follows." <sup>190</sup>

Article 21 addresses issues of late acceptance. In general, an offer must be accepted before it expires. However, the offeror may elect to "accept" a late acceptance by informing the offeree of his acceptance. <sup>191</sup> This rule, in essence, converts, the acceptance into an offer giving the

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<sup>183</sup> *Id.* at art. 23.

<sup>184</sup> *Id.* at art. 18(1).

<sup>185</sup> *Id.* at art. 18(2). According to Professor Honnold, the drafters purposely put the burden on the sender of a communication to assure receipt. See HONNALD, UNIFORM LAW FOR INTERNATIONAL SALES, *supra* note 53, § 162, at 184.

<sup>186</sup> *Id.*

<sup>187</sup> *Id.* at art. 18(3).

<sup>188</sup> *Id.* at art. 20(1).

<sup>189</sup> *Id.*

<sup>190</sup> *Id.* at art. 20(2).

<sup>191</sup> *Id.* at art. 21(1).

original offeror a power of acceptance. A late acceptance is distinguished from a late arrival. The late arrival occurs when some unforeseen delay in transmission occurs through no fault of the offeree. The late arrival will be effective as an acceptance, unless the offeror, without delay, otherwise informs the offeree.<sup>192</sup>

1. *Offer Rules and the Open Price Term: Articles 14 & 55*

Cases interpreting Article 14 appear to rely mostly on the language of the CISG, with a modest amount of cross-references to other provisions in the Convention. Article 14's requirement that a valid offer be addressed to one or more specific persons has spurred academic debate, but it has not surfaced in a meaningful way in litigation.<sup>193</sup> Two areas of contract dispute that have been analyzed in the courts are offeror's intent to be bound upon acceptance of the alleged offer and contract requirements regarding the specificity of quantity and price. Consequently, reference to Article 8's methodology for interpreting intent is a vital component in determining whether a term is *sufficiently definite* under Article 14.<sup>194</sup>

The essential terms of the contract—identification of the goods, quantity, and price—must be specified; there are many methods of determining what the terms are if they are not stated expressly.<sup>195</sup> The degree that an offer fails to specify a sufficiently definite price is the issue that has created the most discussion under Article 14. Article 14's rule that the price may be implicitly fixed was a compromise between countries that

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<sup>192</sup> *Id.* at art. 21(2).

<sup>193</sup> An Austrian court considered an issue regarding to whom an offer was addressed, more precisely, whether a contract existed between an Austrian buyer and an Italian manufacturer, when the buyer made an offer to a German seller. When the Italian manufacturer requested payment, the buyer maintained that it had contracted only with the German seller. The court held that a contract between the buyer and manufacturer could exist only if the German seller acted as a qualified agent acting for the Italian manufacturer and the buyer knew or could not have been unaware that the seller was acting for the Italian manufacturer. See OGH, 512/96, Jun. 18, 1997 (Aus.), available at <http://www.cisg.law.pace.edu/cisg/wais/db/cases2/970618a3.html>.

<sup>194</sup> "A Proposal . . . constitutes an offer if it is *sufficiently definite* and indicates the *intention* of the offeror to be bound in case of acceptance." CISG, *supra* note 4, at art. 14(1) (emphasis added).

<sup>195</sup> Two U.S. courts have held that a distributorship agreement is not covered by the CISG if the goods, quantity, and price are not identified. See *Helen Kaminski Pty. Ltd. v. Marketing Australian Prods.*, 1997 U.S. Dist. LEXIS 10630, at \*2-3 (S.D.N.Y. Jul. 23, 1997) (distributorship agreement did not identify the goods that were the subject of the alleged breach); *Viva Vino Import Corp. v. Farnese Vini S.r.l.*, No. 99-CIV.-6384, 2000 U.S. Dist. LEXIS 12347 (E.D. Pa. Aug. 29, 2000) (distributorship agreement did not cover the sale of specific goods nor did it contain definite terms regarding quantity and price as required by CISG).

supported open price offers and those that opposed such offers.<sup>196</sup> Article 55, on supplying “the price generally charged,” has served as a gap filler in determining whether an offer is “sufficiently definite” as required by Article 14(1). National courts have shown flexibility in finding that a price is sufficiently definite if it can be fixed or determinable in some way, such as a reference to market prices.<sup>197</sup>

National courts have used other CISG articles to fill in missing price and quantity terms. Article 8 determination of intent based upon a *totality of the circumstances analysis*<sup>198</sup> (prior dealings, course of performance, usage), as well as Article 9 (usage, prior dealings), which addresses industry practices and prior dealings between the parties, supplement Article 14 in determining whether the parties intended to be bound and whether the terms of the agreement are sufficiently definite in light of that intent. For example, national courts have held that price and quantity may be impliedly fixed by a long time commercial relationship between the parties.<sup>199</sup> Similarly, the ICC Court of Arbitration found that a contract was sufficiently definite even though the price agreed on by the parties was provisional and subject to revision depending on the price obtained from the final buyer.<sup>200</sup> The court’s finding relied on Article 9(2) which assumes that

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<sup>196</sup> Some countries objected to the elimination of the price requirement because they viewed unilateral price determination as a disadvantage to the weaker party; socialist countries objected because open price terms did not satisfy state planning agency requirements. See Jacob S. Ziegel, “Article 14” in *Report to the Uniform Law Conference of Canada on Convention on Contracts for the International Sale of Goods*, July 1981, available at <http://www.cisg.law.pace.edu/cisg/text/ziegel114.html>. See also Claude Witz, *Case Commentary, The First Decision of France’s Court of Cassation Applying the U.N. Convention on Contracts for the International Sale of Goods*, 1995, available at <http://www.cisg.law.pace.edu/cisg/wais/db/cases2/950102f1.html> (noting that “traditional French case law is very demanding with respect to the determinable character of price” but that it is in the process of abandoning “this harsh position”).

<sup>197</sup> See, e.g., *Fauba v. Fujitsu Microelectronik*, Cour de Cassation, Paris, 92-16.993, Apr. 22, 1992 (Fr.) (term specifying revision of price according to market trends was sufficiently definite), available at <http://www.cisg.law.pace.edu/cisg/wais/db/cases2/940304g1.html>; *OLG Frankfurt/M 10 U 80/93*, Mar. 4, 1994 (F.R.G.), available at <http://www.cisg.law.pace.edu/cisg/wais/db/cases2/940304g1.html> (some items in the order contained prices but as buyer insisted on delivery of total order, the offer was not sufficiently definite under either German Civil Code or CISG Art. 14 because special screws did not contain a price).

<sup>198</sup> For a discussion of the “totality of the circumstances analysis” approach to contract interpretation see generally, Larry A. DiMatteo, *The Counterpoise of Contracts: The Reasonable Person Standard and the Subjectivity of Judgment*, 48 S.C. L. REV. 293, 318-24 (1997); LARRY A. DIMATTEO, *CONTRACT THEORY: THE EVOLUTION OF CONTRACTUAL INTENT* 56-60 (1998).

<sup>199</sup> See AZ 12.G.41.471/1991, Mar. 24, 1992, *supra* note 132. (quality, quantity, and price of goods impliedly fixed by the established practice of parties where seller repeatedly delivered the same type of goods and buyer paid after delivery).

<sup>200</sup> ICC Court of Arbitration – Paris 8324/1995 (Arbitral Award 1995) (flexible price was



parties apply customary trade usage, as well as Article 8(3) which allows all relevant circumstances of the case, including negotiations, usages and practices, to be taken into account in determining the parties' intent.<sup>201</sup> The tendency of national courts to respect industry practice and custom is also reflected in a case where the plaintiff claimed that well-established industry custom was to rely on unwritten supply commitments. Noting that the CISG has "a strong preference for enforcing obligations and representations customarily relied upon by others in the industry," the U.S. court in *Geneva Pharmaceutical Tech. Corp. v. Barr Labs., Inc.*<sup>202</sup> held that a purchase order for "commercial quantities" of a product was sufficiently definite under Article 14 since it was supported by evidence of industry custom.<sup>203</sup>

Article 8(2)'s emphasis on the "reasonable person" interpretation of statements and conduct and Article 8(3)'s inclusion of subsequent conduct to determine intent have also been used by national courts to determine whether parties intended to be bound according to Article 14. Article 8(2) instructs that statements and conduct of a party "are to be interpreted according to the understanding that a reasonable person of the same kind as the other party would have had in the same circumstances."<sup>204</sup> A German court found that a contract for three "truck loads" of eggs was sufficiently definite, based on Article 8(2)'s interpretation of intent, because a reasonable buyer would expect a quantity equivalent to the full load capacity of the trucks.<sup>205</sup> A Hungarian court, although not referencing Article 8, held that the goods were unambiguously identified, and the quantity and price sufficiently definite, even where the offer "allowed unilateral power to the buyer" in choosing the quantity and model types of the products being purchased.<sup>206</sup> Relying on Article 8(2) and 8(3), an Austrian court found that a contract for a "certain quantity" of chinchilla

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valid where no market price established by common exchange institution for manganese) (on file with author).

<sup>201</sup> *Id.*

<sup>202</sup> *Geneva Pharm.*, 201 F. Supp. 2d at 281.

<sup>203</sup> *Id.*

<sup>204</sup> See CISG, *supra* note 4, at art. 8(2). Courts look to a reasonable person interpretation of the language in contracts. See generally HG Aargau, OR.960-0013, Sept. 26, 1997 (Aus.), available at <http://www.cisg.law.pace.edu/cisg/wais/db/cases2/970926s1.html> (wording clearly indicated intention of buyer to be bound); HG St. Gallen, HG 45/1994, Dec. 5, 1994 (Switz.), available at <http://www.unilex.info/dynasite.cfm?dssid=2376&dsmid=13356&x=1> (language such as "order," "we order," and "immediate delivery" indicated intent to be bound); OLG Frankfurt, 9 U 13/00, Aug. 30, 2000 (F.R.G.), available at <http://www.cisg.law.pace.edu/cisg/wais/db/cases2/000830g1.html> (language in fax did not communicate an objective intent to be bound).

<sup>205</sup> See LG Oldenburg 12 O 2943/94, Feb. 28, 1996 (F.R.G.), available at <http://www.unilex.info/case.cfm?pid=1&do=case&id=256&step=FullText>.

<sup>206</sup> See, Legfelsobb Bíróság, Gf.I. 31 349/1992/9, Jan. 10, 1992 (Hung.), available at <http://www.unilex.info/case.cfm?pid=1&do=case&id=43&step=Abstract>.

furs was sufficiently definite as evidenced by the buyer's subsequent conduct of immediately selling the furs delivered.<sup>207</sup> Similarly, a Swiss court, found that when the buyer of fashion textiles requested the seller to send an invoice to the embroiderer of the textiles, this conduct subsequent to the delivery of the goods indicated the buyer's intent to be bound as to the quantity of goods delivered.<sup>208</sup>

When an offeror claims that he intended to be bound, courts evaluating the validity of the offer must also consider whether the other party was reasonably aware of such intent. A German court held that a seller's fax offering to sell yarn did not communicate the requisite intent to be bound because the fax referred to instructions from its parent company.<sup>209</sup> The court found that the communication did not clearly identify who the seller was, as the purported offeror referred to itself as "exporter" not "seller."<sup>210</sup>

There are two issues arising from Article 55 that national courts have addressed in their opinions. These issues are whether the failure of the parties to state a price prevents contract formation and the enumeration of the factors utilized to determine the "price generally charged at the time of the conclusion of the contract for such goods sold under comparable circumstances in the trade concerned."<sup>211</sup> As to the initial issue of contract formation, two divergent views have developed regarding the price requirement, one restrictive and the other liberal. Professor Farnsworth maintains that some method of determining the price must be included in the offer for a valid contract to be concluded. This restrictive view is consistent with established contract law in many states that require the setting of a specific price in order for an enforceable contract to be formed. Under this view, Article 55 would only be used to set a price after an enforceable contract had been determined to exist.<sup>212</sup>

The alternative view argues that the restrictive interpretation of the CISG's provisions with respect to contract formation that requires the existence of a definite or determinable price conflicts with the very existence of Article 55.<sup>213</sup> A more liberal view has been advocated by

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<sup>207</sup> See OGH Ob 547/93, available at <http://www.unilex.info/case.cfm?pid=1&do=case&id=110&step=FullText>.

<sup>208</sup> See Bezirksgericht [BG] St. Gallen [District Court], 3PZ 97/18, available at <http://www.unilex.info/case.cfm?pid=1&do=case&id=306&step=FullText>.

<sup>209</sup> See OLG Frankfurt 9 U 13/00, Aug. 30. 2000, *supra* note 204.

<sup>210</sup> *Id.*

<sup>211</sup> CISG, *supra* note 4, at art. 55.

<sup>212</sup> See PETER SCHLECHTRIEM, UNIFORM SALES LAW, *supra* note 107, at 80.

<sup>213</sup> *Id.* As a result, "a contradiction remains between [this] requirement . . . on the one hand and the possibility of fixing the price after the contract is concluded on the other." Professor Schlechtriem concludes that, although most likely unacceptable to many states, this contradiction may be resolved by interpreting the term "validity" in art. 55 to relate to all contractual requirements other than the determination of price. *Id.* at 80, n.319. If such an

Professor Honnold who maintains that Article 55 allows “the price generally charged at the time of the conclusion of the contract” to cure the lack of a price or a method for determining the price.<sup>214</sup> Professor Honnold insists that as long as the parties’ intention to contract is clear, the construction of the Convention allows the parties to vary the effect of any of the Convention’s provisions, including Article 14’s price provision.<sup>215</sup>

Professor Honnold’s view is supported by the Secretariat’s Commentary to Article 14 which states that as long as there is intent to be bound, the law of sales can supply missing terms.<sup>216</sup> Several national courts have also favored Professor Honnold’s view. A Swiss court in *C. v. W., Bezirksgericht St. Gallen* used Article 55 to interpret the price stated in a seller’s corrected invoice to be the price generally charged under comparable circumstances in the trade.<sup>217</sup> The indefiniteness of the price term was apparently not fatal because the court was convinced that the parties had manifested their intent to be bound.<sup>218</sup> In a dispute concerning the sale of chinchilla pelts by a German seller to an Austrian buyer, the Austrian Supreme Court concluded that the agreement of the parties setting a price range for the pelts depending upon quality did not defeat the formation of a contract.<sup>219</sup> In reaching this conclusion, the court held that pursuant to Article 55 if the parties’ agreement failed to explicitly or implicitly establish a specific price, then the court could imply an agreement based upon the “usual market price.”<sup>220</sup> The court specifically

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interpretation is adopted, “[a]n offer that is indefinite with respect to the price could then be interpreted . . . as an implied reference to the price generally charged for such goods.”

<sup>214</sup> See John E. Murray, Jr., *An Essay on the Formation of Contracts and Related Matters Under the United Nations Convention on Contracts for the International Sale of Goods*, 8 J.L. & COM. 11, 14-17 (1988); Harry M. Fletcher, *Transcript of a Workshop on the Sales Convention: Leading CISG Scholars Discuss Contract Formation, Validity, Excuse for Hardship, Avoidance, Nachfrist, Contract Interpretation, Parol Evidence, Analogical Application, and Much More*, 18 J.L. & COM. 191, 202-06 (1999). Professor Farnsworth disagrees with this interpretation because Article 55 allows this method of determining a price only when “a contract has been validly concluded.” *Id.*

<sup>215</sup> HONNOLD, *UNIFORM LAW FOR INTERNATIONAL SALES*, *supra* note 53, §137.6 at 154. Art. 6 provides: “The parties may exclude the application of this Convention or, subject to article 12, derogate from or vary the effect of any of its provisions.” (emphasis added), CISG at Art.6. Professor Farnsworth disagrees with this interpretation because Art. 55 allows this method of determining a price only when “a contract has been validly concluded.”

<sup>216</sup> See Secretariat Commentary to Art. 14, available at <http://www.cisg.law.pace.edu/cisg/text/secomm/secomm-14.html>.

<sup>217</sup> See *Bezirksgericht [BG] St. Gallen [District Court]*, 3PZ 97/18, Jul 3, 1997 (Switz), available at <http://www.cisg.law.pace.edu/cisg/wais/db/cases2/970703s1.html>.

<sup>218</sup> *Id.*

<sup>219</sup> See OGH Ob 547/93, Nov. 10, 1994 (Aus.), available at <http://www.cisg.law.pace.edu/cisg/wais/db/cases2/941110a3.html>.

<sup>220</sup> *Id.*

noted that the parties did not object to the price of fifty German marks per pelt established by the court of first instance in its initial review of the case.<sup>221</sup> As such, the court concluded that the price was sufficiently definite as to constitute a contract and make the application of Article 55 unnecessary.<sup>222</sup> By contrast, the Russian Tribunal of International Commercial Arbitration rejected the gap-filling role of Article 55 where the parties agreed to fix a price “ten days prior to the beginning of the new year” and were unable to do so.<sup>223</sup> The subsequent failure of the parties to reach an agreement with respect to price went to the heart of the transaction and specifically defeated the formation of a contract.<sup>224</sup>

The second issue addressed by national courts with respect to Article 55 is the enumeration of the factors utilized to determine “the price generally charged at the time of the conclusion of the contract for such goods sold under comparable circumstances in the trade concerned.”<sup>225</sup> Initially, at least one national court has concluded that the reference to market price in Article 55 is overridden by a contrary agreement of the parties as determined by application of the CISG in its entirety.<sup>226</sup> Based upon this opinion, the parties are free to list any number of factors that may be utilized to establish the price. Included on the list of acceptable factors are the price range established by the parties with respect to the goods at issue and individual pricing guidelines dependent upon the quality of the goods.<sup>227</sup> An additional relevant factor is the absence of objection by the buyer within a “short time period” to the price set forth in invoices delivered by the seller.<sup>228</sup> In such a case, national courts assume the buyer’s agreement that the price stated in the seller’s invoice is the price generally charged under comparable circumstances in the trade concerned according to Article 55.<sup>229</sup>

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<sup>221</sup> *Id.*

<sup>222</sup> *Id.*

<sup>223</sup> Tribunal of Int’l Commercial Arbitration at the Russian Federation of Chamber of Commerce 309/1993, Mar. 3, 1995 (Russ.), available at <http://www.cisg.law.pace.edu/cisg/wais/db/cases2/950303r1.html>.

<sup>224</sup> *Id.*

<sup>225</sup> CISG, *supra* note 4, at art. 55.

<sup>226</sup> See CA Grenoble, 93/1613, Apr. 26, 1995 (Fr.), available at <http://witz.jura.unisb.de/CISG/decisions/2604952v.htm>.

<sup>227</sup> See OGH Ob 547/93, Nov. 10, 1994 (Aus.), available at <http://www.cisg.law.pace.edu/cisg/wais/db/cases2/941110a3.html>.

<sup>228</sup> BG St. Gallen, SZ 84-85, Jul. 3, 1997, available at <http://www.unilex.info/case.cfm?pid=1&do=case&id=306&step=FullText> (involving an oral contract for the sale of textiles by a Dutch seller to a Swiss buyer).

<sup>229</sup> *Id.*

## 2. Firm Offers: Articles 15-17 and 20-24

Articles 15 and 17, along with Articles 20 through 24, have not been the subject of judicial attention. Article 16, however, has been subject to judicial and arbitral interpretations.<sup>230</sup> In *Geneva Pharmaceuticals Technology Corp. v. Barr Laboratories, Inc.*,<sup>231</sup> the court addressed the question of promissory estoppel under the CISG. Article 16(2)(b) provides that an offer is irrevocable “if it was reasonable for the offeree to rely on the offer as being irrevocable and the offeree has *acted in reliance* on the offer.”<sup>232</sup> The U.S. court recognized this provision as a “modified version of promissory estoppel that does not require foreseeability or detriment.”<sup>233</sup> More importantly, it stated that other promissory estoppel claims outside the area of firm offers could be preempted by the CISG because “to apply an American or other version of promissory estoppel that does require [foreseeability or detriment] would contradict the CISG and stymie its goal of uniformity.”<sup>234</sup> This is an express statement by a U.S. court against the urge toward homeward trend approaches to CISG interpretation.<sup>235</sup>

## 3. Rules of Acceptance: Article 18

Because Article 23 states that “a contract is concluded at the moment when an acceptance of an offer becomes effective in accordance with the provisions of this Convention,” ascertaining whether an offer has been accepted according to Article 18 is critical in determining the parties’ contract rights and remedies. Professor Honnold emphasizes the theme of open communication that runs through Article 18.<sup>236</sup> Difficult issues of communication arise most frequently in cases involving when silence or inactivity may be a valid method of acceptance, when commercial letters of confirmation indicate assent, and whether standard terms included in the offer and acceptance have been fairly communicated so as to become part of the contract.

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<sup>230</sup> An arbitrator in Austria cited Art. 16(2)(b) as further support for recognition that the principle of estoppel, although not addressed expressly in the Convention, is incorporated by the good faith provision of Art. 7(1). See Internationales Schiedsgericht der Bundeskammer der gewerblichen Wirtschaft [Austrian Int’l Chamber of Commerce Arbitral Body, Vienna], SCH-4318, Jun. 15, 1994 (Aus.), available at <http://www.cisg.law.pace.edu/cisg/wais/db/cases2/940615a4.html>.

<sup>231</sup> 201 F. Supp. 2d at 286-87.

<sup>232</sup> CISG, *supra* note 4, at art.16(2)(b) (emphasis added).

<sup>233</sup> *Geneva Pharm.*, 201 F. Supp. 2d at 287.

<sup>234</sup> *Id.* at 287. See generally, Henry Mather, *Firm Offers Under the UCC and the CISG*, 105 DICK. L. REV. 31 (2000) (predicting that courts will use Art. 16(2)(b) as U.S. courts have used promissory estoppel).

<sup>235</sup> See *infra* Part VII.B.

<sup>236</sup> JOHN O. HONNOLD, UNIFORM LAW FOR INTERNATIONAL SALES §164 at 180 (3d ed. 1999).

Article 18(1) states that silence, by itself, does not constitute acceptance. However, it makes clear that silence or inactivity linked with other circumstances may be enough to indicate assent. If the parties have a practice of accepting without notice, if industry usage has developed, or if other circumstances indicate that silence is reasonable, silence or inactivity may be a valid method of acceptance.

National courts have concluded that silence indicated acceptance when silence *qua* acceptance was reasonable under the circumstances. When a seller offered to terminate a contract after receiving notice of nonconformity and announced that he would resell the goods himself, the buyer's silence and failure to seek remedy for breach was an implied acceptance, according to a German court.<sup>237</sup> While the court recognized that silence or inactivity alone is not enough for acceptance under Article 18(1), it concluded that "together with other circumstances . . . silence can indeed be important and may be interpreted as the acceptance of an offer of cancellation."<sup>238</sup> A French court also found that silence operated as acceptance when a buyer accepted goods without reservation.<sup>239</sup> The buyer subsequently sought to reject the goods, claiming that his silence about the condition of the goods did not indicate acceptance, but the court found that the nonconformity claimed by the buyer was obvious to an expert such as the buyer who had specified the modifications in the goods.<sup>240</sup>

Silence may also be acceptance where the parties have an established pattern or practice in their dealings. If a seller has an established practice of filling orders without expressly accepting them, then the buyer has a right to expect that its orders will be filled.<sup>241</sup> In the French case of *Sté Calzados Magnanni v. Sarl Shoes General Int'l*, the seller maintained that it had never received the orders. The French court was unconvinced and found acceptance of the orders by silence based on the practices established between the parties.<sup>242</sup> The circumstances that indicated acceptance by silence also included the seller's awareness of the buyer's intention to enter the footwear market.<sup>243</sup> A U.S. court also found that silence was acceptance when a seller did not object to an arbitration clause in a contract for a period

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<sup>237</sup> See Oberlandesgericht [Provincial Court of Appeal] [OLG] Köln 22 U 202/93, Feb. 22, 1994 (F.R.G.), available at <http://www.cisg.law.pace.edu/cisg/wais/db/cases2/940222g1.html>.

<sup>238</sup> *Id.*

<sup>239</sup> See *Hughes v. Société Technocontact*, Cour de Cassation [Supreme Court] [CASS.], B 95-19.448, 180 P, Jan. 27, 1998 (Fr.), available at <http://www.cisg.law.pace.edu/cisg/wais/db/cases2/980127f1.html>.

<sup>240</sup> *Id.*

<sup>241</sup> See *Sté Calzados Magnanni v. Sarl Shoes General Int'l*, CA, 96J/00101, Oct. 21, 1999 (Fr.), available at <http://www.cisg.law.pace.edu/cisg/wais/db/cases2/991021f1.html>.

<sup>242</sup> *Id.*

<sup>243</sup> *Id.*

of five months. The court held that the prior practices of the parties placed a duty on the seller to alert the buyer of its objection to the incorporation of the clause.<sup>244</sup> The court supported its conclusion by citing Articles 18(1) and 18(3) of the CISG, the Restatement (Second) of Contracts, and several cases from its jurisdiction.<sup>245</sup>

Commercial letters of confirmation raise special issues regarding acceptance by silence.<sup>246</sup> In some national legal systems, most notably Germany, silence upon receipt of a commercial letter of confirmation indicates acceptance.<sup>247</sup> According to Professor Schlechtriem, the German rule which allows unanswered letters of confirmation to become part of the contract was expressly rejected at the Vienna Convention.<sup>248</sup> Consequently, Professor Schlechtriem maintains that letters of confirmation that modify or add to a contract are ineffective under the CISG, unless the sending of such letters amounts to a usage under Article 9(2).<sup>249</sup>

National courts have differed in how they interpret the trade usage provision regarding commercial letters of confirmation. A Swiss court found that the buyer's failure to respond to a letter of confirmation from the Austrian seller constituted acceptance according to trade usage.<sup>250</sup> The court stated that both parties knew or ought to have known that under both Swiss and Austrian law, silence or inactivity can be regarded as an acceptance when there is no reply to a commercial letter of confirmation.<sup>251</sup> Professor Schlechtriem criticized this ruling on two counts. First, the court misstated the law of Austria, where the purported rule had been rejected. Second, "the usage must apply to the parties in the *particular* trade, and must be observed by them," for the exception to Article 18(1) to apply.<sup>252</sup>

A Swiss court also found that the sender was entitled to regard silence as acceptance to a letter of confirmation even where the letter modified

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<sup>244</sup> *Filanto, S.p.A. v. Chilewich Int'l Corp.*, 789 F. Supp. at 1240.

<sup>245</sup> *Id.*

<sup>246</sup> See generally, Maria del Pilar Perales Viscasillas, *Battle of the Forms, Modification of Contract, Commercial Letters of Confirmation: Comparison of the United Nations Convention on Contracts for the International Sale of Goods (CISG) with the Principles of European Contract Law (PECL)*, 14 PACE INT'L REV. 153 (2002) (describing the variability in legal interpretations of silence).

<sup>247</sup> See EINDERLEIN & MASKOW, *supra* note 20, at 92; Maria del Pilar Perales Viscasillas, *The Formation of Contracts and the Principles of European Contract Law*, 13 PACE INT'L REV. 371, 391 (2001) (discussing legal treatment of confirmation letters in Germany, Austria, and Switzerland. See also, UCC § 2-201 (2) (2003) (written confirmation rule).

<sup>248</sup> See Fletchner, *supra* note 214, at 246-47.

<sup>249</sup> *Id.*

<sup>250</sup> See *W.T. GmbH v. P.*, Zivilgericht [Basel Civil Court][ZG] P4 1998/238, Dec. 21, 1992, (Switz.) available at <http://cisgw3.law.pace.edu/cases/92122sl.html>.

<sup>251</sup> *Id.*

<sup>252</sup> See Fletchner, *supra* note 214.

payment terms.<sup>253</sup> The court stated that good faith is the key to determining whether a sender may assume the recipient of the confirmation letter intended to consent to the terms of the letter.<sup>254</sup> Although the court did not discuss prior practices or usage in this case, the recipient's conduct, accepting the first check that was attached to the letter of confirmation, was sufficient to support a conclusion that the recipient intended to be bound by the terms of the confirmation letter.<sup>255</sup>

Two German cases reiterated the more conservative view that trade usage must be *international* in order for it to be implied into a contract. In one case, the court distinguished the use of letters of confirmation in a national context from the international context.<sup>256</sup> A French buyer and a German seller had concluded an oral contract regarding the price of chocolates. When the buyer was silent as to the different terms in the seller's letter of confirmation, the court held that the terms of the confirmation letter were not part of the contract as such letters could not be considered part of international trade usage as required by Article 9(2). The court concluded that although the practice was well recognized in Germany, it was not so recognized in France.<sup>257</sup> A German court held that a buyer seeking to hold a seller to the modified price contained in a letter of confirmation did not establish that there was a usage known in international trade recognizing silence as acceptance to a commercial letter of confirmation.<sup>258</sup>

When a party seeks to incorporate standard terms into an offer or

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<sup>253</sup> See BG Sissach, A 98/126, Nov. 5, 1998 (Switz.), available at <http://www.cisgw3.law.pace.edu/cisg/wais/db/cases2/981105s1.html>.

<sup>254</sup> *Id.*

<sup>255</sup> *Id.*

<sup>256</sup> Landgericht [District Court][LG] Frankfurt 3/13 O 3/94, Jul. 5, 1995 (F.R.G.), available at <http://www.unilex.info/case.cfm?pid=1&do=case &id=169&step=FullText>.

<sup>257</sup> *Id.* Although the court did not view the buyer's silence regarding the letter of confirmation as acceptance, it did, nevertheless, find that the letter was evidence of the terms of the oral contract and held for the seller.

<sup>258</sup> See OLG Dresden 7 U 720/98, Jul. 9, 1998 (F.R.G.), available at <http://cisgw3.law.pace.edu/cases/980709g1.html>. But see OLG Saarbrücken 1 U 324/99-59, Feb. 14, 2001 (F.R.G.), available at <http://cisgw3.law.pace.edu/cisg/wais/db/cases2/010214g1.html>. In this case, the court held that the CISG applied to the contract for the sale of doors and windows and applied the provisions on notice for specifying a defect, but looked to the German Civil Code regarding acceptance of terms in a letter of confirmation. The court stated, "[i]t is an accepted trade usage that a tradesperson who receives a letter of confirmation has to object to the letter's content if he does not wish to be bound by it. If he does not object, the contract is binding with the content given to it in the letter of confirmation, unless the sender of the letter has either intentionally given an incorrect account of the negotiations, or the content of the letter deviates so far from the result of the negotiations that the sender could not reasonably assume the recipient's consent. The recipient's silence causes the contract to be modified or supplemented in accordance with the letter of confirmation." *Id.*



acceptance, courts consider whether such terms have been fairly communicated to the other party. While the CISG does not specifically address the incorporation of standard terms, national courts generally agree that its provisions on contract formation and interpretation determine whether standard terms have been validly incorporated into the contract. An alternative view is that Article 4 makes it clear that the validity of standard terms is beyond the scope of the Convention, so that validity issues are determined by domestic law.<sup>259</sup> Civil law legal systems have emphasized that a party must be reasonably aware of the terms the other seeks to incorporate but how much information about standard terms must be communicated is less clear from the decisions.

In general, a party that wishes to incorporate standard terms must show good faith efforts to communicate those terms to the other party. Failure to provide standard terms in the other party's language, failure to note that standard terms are listed on the back of a form, and failure to provide the text of standard terms have lead courts to exclude such terms from the contract. In *ISEA Industrie S.p.A. v. Compagnie d'Assurances*,<sup>260</sup> a French court held that where the buyer's standard terms were printed on the back of a form and the seller had signed only the front page, the standard terms were not part of the contract. The court held that the terms of the contract had already been determined and the seller's attempt to impose additional terms was ineffective. A German court, however, held that where standard terms were printed on the back of the order form in both parties' languages and the front side of the order form specifically referred to the standard terms, the terms were validly incorporated into the contract.<sup>261</sup> Likewise, where an offer made reference in bold letters to particular industry standards and the seller made repeated reference to such standard throughout negotiations, the buyer was aware or should have been aware that the general conditions were part of the agreement, according to Articles 8 (1) and (3).<sup>262</sup>

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<sup>259</sup> See Dr. Martin Schmidt-Kessel, *On the Treatment of General Terms and Conditions of Business under the UN Convention on Contracts for the International Sale of Goods (CISG)*, available at <http://www.cisg.law.pace.edu/cisg/wais/db/cases2/011031g1.html> (criticizing interpretation of German Federal Supreme Court of 31 October 2001, VII ZR 60/01 in which the Supreme Court held that "the user of general terms and conditions is required to transmit the text to the other party or make it available in another way").

<sup>260</sup> Cour d'appel [Appeal Court][C.A.] Paris 95-018179, Dec. 13, 1995 (Fr.), available at <http://cisgw3.law.pace.edu/cases/951213f1.html>. In the same case, the court held that standard terms in a confirmation letter from the seller were not valid when the letter was sent after the contract had been performed.

<sup>261</sup> Amtsgericht [Petty District Court][AG] Nordhorn 3 C 75/94, Jun.14, 1994 (F.R.G.), available at <http://cisgw3.law.pace.edu/cases/940614g1.html>.

<sup>262</sup> Bundesgerichtshof [Federal Supreme Court] Tribunal [District Court] de Commerce Nivelles, [Kh] R.G. 1707/93, Sept. 19, 1995 (Fr.), available at <http://cisgw3.law.pace.edu/cases/950919b1.html>.

The Federal Supreme Court of Germany addressed the issue of the type of information needed to prove intent to standard or general terms.<sup>263</sup> Using Articles 14 and 18, supplemented by Article 8's rules on interpretation, the court held that the seller's "Sales and Delivery Terms," which included a notice of warranty exclusion, were not part of the parties' contract. Although the contract referred to such terms, a copy of the seller's Sales and Delivery Terms was never transmitted to the buyer. The court held that "the user of general terms and conditions is required to transmit the text to the other party or make it available in another way."<sup>264</sup> According to the court, the burden to provide the terms was on the party wishing to insert such clauses.<sup>265</sup> The court emphasized the fact that parties to an international contract should not be expected to know the particular terms and conditions that might be familiar to parties that share the same national legal system and business customs.<sup>266</sup> Requiring one party to make general terms and conditions available to the other party, would, according to the court, promote the CISG's goals of good faith and uniformity.<sup>267</sup> Similarly, an Austrian court held that a seller's attempt to incorporate standard terms requiring a contract to be in writing was not valid.<sup>268</sup> Although the seller had proposed such terms as part of a master contract prior to a subsequent sales contract, the master contract was never concluded, so that reference to terms in that agreement could not be binding on the buyer in the subsequent contract.<sup>269</sup> The court recognized that contractual negotiations, prior practices and trade usages may provide evidence that the offeree was aware of the inclusion of standard terms. This transaction was the parties' first together, however, and the court found that

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<sup>263</sup> BGH VII ZR 60/01, Oct. 31, 2001 (Switz.), available at <http://www.cisg.law.pace.edu/cisg/wais/db/cases2/981105s1.html>.

<sup>264</sup> *Id.*

<sup>265</sup> *Id.*

<sup>266</sup> *Id.*

<sup>267</sup> *Id.* Although the court relied on the CISG, it also noted that the Uniform Sales Law requires users of general terms and conditions to transmit the text or make it available in another way. The Supreme Court of Germany's decision to require the terms to be transmitted has been criticized as "contrary to commercial practice." Whether or not the terms should be incorporated in the contract should turn on whether a reasonable party was aware or could not have been unaware of the intent to include such terms. One author maintains that a general duty to transmit standard terms goes too far and is not supported by the Convention. This author fears that the development of a general duty to transmit may prevent even better known standard terms from being included, absent transmission. See Schmidt-Kessel, *supra* note 259 ("The development of a general duty to transmit without recognizable exceptions would have the effect that other, better known standard clauses—such as Incoterms 2000, the several ECE-Terms, or branch-specific terms such as GAFTA 100 or the rules of the Sugar Association of London—could not become the basis of contracts without being transmitted.").

<sup>268</sup> OGH, SZ 10 Ob 518/95, Feb. 6, 1996, *supra* note 134.

<sup>269</sup> *Id.*

the offeree had no reason to be aware that the general terms were to be included in this deal.<sup>270</sup>

### C. Battle of the Forms

Article 19 raises the difficult issue of an acceptance with modification or the exchange of forms containing additional or conflicting terms. Negotiated terms, essential to the contract, may appear on the front of a form while additional terms and general conditions appear on the reverse side. Buyers' and sellers' forms undoubtedly contain provisions that favor their respective positions. The boilerplate terms are routinely ignored until a dispute arises. Forms are exchanged in what one author termed "*une conversation des sourds*" (a conversation of the deaf).<sup>271</sup> Two questions arise when there is dispute. First, was a valid contract formed despite the existence of conflicting, non-dickered terms? Second, if a valid contract was concluded, what are the terms of the contract? Article 19(1) provides that an offer that "contains additions, limitations or other modifications is a rejection of the offer and constitutes a counter-offer."<sup>272</sup> If the additional terms do not materially alter the offer, however, a valid contract is formed and the additional terms enter the contract unless the receiving party promptly objects to their inclusion.<sup>273</sup> This provision prevents a party from escaping from contractual obligations for immaterial differences between the offer and acceptance.

Article 19(3) sets a broad materiality standard by listing "price, payment, quality and quantity of the goods, place and time of delivery, extent of one party's liability to the other or the settlement of disputes" as terms that would materially alter the offer.<sup>274</sup> The breadth of these categories of material terms is susceptible to even further extension by the open-endedness of the introductory phrase "among other things."<sup>275</sup> Article 19 is essentially an adoption of the now-discarded common law mirror image rule with the exception that minor differences do not defeat an otherwise valid acceptance. The breadth of Article 19(3) severely limits the scope of the minor term.

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<sup>270</sup> *Id.* Another Belgian case stated that standard terms regarding contractual damages mentioned in a seller's invoice were not part of the contract because there was no evidence that the buyer had knowledge of the standard terms and so could not accept them. The written contract did not include or even mention the standard terms. See *Rechtbank van Koophandel Veurne* [District Court] [Kh] A/00/00665, Apr. 25, 2001 (Belg.), available at <http://www.cisg.law.pace.edu/cisg/wais/db/cases2/010425bl.html>.

<sup>271</sup> See HONNOLD, *UNIFORM LAW FOR INTERNATIONAL SALES*, *supra* note 53, §165 at 188.

<sup>272</sup> CISG, *supra* note 4, at art. 19(1).

<sup>273</sup> *Id.* at art. 19(2).

<sup>274</sup> *Id.* at art. 19(3).

<sup>275</sup> *Id.*

A battle of the forms arises when parties exchange forms that have inconsistent terms. One commentator explained that the CISG has not been able to “create a consistent pattern that satisfies our basic sense of fairness and justice,” with regard to the battle of forms.<sup>276</sup> Although some theorists maintain that the CISG in general and Article 19 in particular do not apply to the battle of the forms, many national courts apply Article 19 in interpreting and resolving such conflicts, using the rules of offer and acceptance.<sup>277</sup> The drafters considered various methods of treating the exchange of inconsistent forms. Under the common law, the offer and acceptance have to match exactly or create a mirror image to conclude a valid contract. UCC’s § 2-207 tried to rectify injustices that occurred when one party failed to perform under a contract because of some minor discrepancies between the terms in the exchanged forms. Under § 2-207, a written acceptance or a written confirmation is valid “even though it states terms additional to or different from those offered or agreed upon, unless acceptance is expressly made conditional on assent to the additional terms.”<sup>278</sup> Article 19 of the CISG adopts the mirror image rule due to its broad definition of materiality in Articles 19(3).

In considering the battle of the forms dilemma, Professor Schlechtriem states that “the different situations of collision” and the “various possible behaviors of the parties” make it difficult to find “a single formula” that addresses this difficult issue.<sup>279</sup> Courts seem willing to find a valid contract where there is an exchange of forms and a general intent to enter into a binding agreement. The more difficult issue to predict is the courts’ determinations of what terms enter into the contract.<sup>280</sup> Three solutions to the issue of conflicting terms in battle of the forms scenario have been offered. First, the effect of conflicting terms in the battle of the forms scenario is not governed by the CISG. In short, the effect of conflicting terms on contract formation is a validity issue that Article 4 delegates to national law. Second, the existence of conflicting terms creates a gap that the court can fill by recourse to Article 7(1)’s principle of good faith

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<sup>276</sup> V. Susanne Cook, *Symposium—Ten Years of the United Nations Sales Convention: CISG: From the Perspective of the Practitioner*, 17 J.L. & COM. 343, 349 (1998).

<sup>277</sup> See generally Maria del Pilar Perales Viscasillas, “Battle of the Forms” Under the 1980 United Nations Convention on Contracts for the International Sale of Goods: A Comparison with Section 2-207 UCC and the UNIDROIT Principles, 10 PACE INT’L L. REV. 97, 104-36 (2001) (describing various interpretive approaches to the Convention and arguing that the Convention rules are sufficient to solve the battle of the forms conflict)[hereinafter Viscasillas, *Battle of the Forms*].

<sup>278</sup> UCC § 2-207(1) (2003).

<sup>279</sup> See Peter Schlechtriem, *Kollidierende Geschäftsbedingungen im internationalen Vertragsrecht [Battle of the Forms in International Contract Law]*, in Festschrift für ROLF HERBER 70, (Karl-Heinz Thume ed., 1999) available at <http://www.cisg.law.pace.edu/cisg/biblio/slechchtriem5.html> (Martin Eimer, transl., 2002).

<sup>280</sup> *Id.*

(“knock out rule”). A third solution that has been offered is that the terms provided in the acceptance controls (the “second shot rule”).<sup>281</sup> The logic is that the offeror has an implied duty to object to the additional or conflicting terms. Failing to object to additional or conflicting terms and then proceeding to perform on the contract results in a finding of an implied consent to the terms of the acceptance.

Under the knock out rule, if the essential terms of the contract—identification of the goods, quantity, quality, and price—are agreed upon and the parties have commenced performance,<sup>282</sup> then the court will find there was a valid contract and ignore the conflicting terms.<sup>283</sup> Even though the conflicting terms in such cases could be considered material under Article 19(3), courts prefer to dismiss the conflicting terms rather than find that no contract was concluded. Unless there is clear evidence that at least one of the parties did not want to contract without the inclusion of the particular provision in dispute, then “the intent to enter a contract on the part of both parties trumps the Article 19 argument for invalidity.”<sup>284</sup> This approach seems to uphold the intentions of the parties because in these cases the parties usually have at least partially performed.

Two cases decided by the German courts applied the knock out rule. In a case involving the sale of knitwear by an Italian seller to a German buyer, the parties had agreed on the *essential terms* of the contract and had performed.<sup>285</sup> When a dispute arose about whether the goods conformed to

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<sup>281</sup> See Maria del Pilar Perales Viscasillas, *Battle of the Forms and the Burden of Proof: An Analysis of BGH 9 January 2002*, vol 6, no. 2 VINDOBONA J. OF INT’L COMM. L. & ARB. 217-28 (2002), available at <http://www.cisg.law.pace.edu/cisg/biblio/perales2.html>.

<sup>282</sup> If the parties have not performed, there is a greater chance that courts will find no valid contract existed when material terms are in dispute. This was the decision in a German case. The court held that no contract was formed where the parties’ correspondence and oral communications failed to agree on the quality of glass for test tubes. Citing Articles 18(1), 19(1) and 19(3), the court found that there was no subsequent conduct of the parties showing the existence of the contract. OLG Frankfurt 25 U 185/94, Mar. 31, 1995 (F.R.G.), available at <http://www.cisg.law.pace.edu/cisg/wais/db/cases2/950331g1.html>.

<sup>283</sup> See generally Schlechtriem, *supra* note 279. Both Art. 2.22 of the UNIDROIT Principles and Article 2:209 of the European Principles allow a valid contract to be found despite conflicting terms. Common content, terms and conditions become part of a the contract, while conflicting terms are irrelevant or “knocked out.” UCC § 2-207(3) recognizes a contract where the parties’ conduct provides evidence of an intent to contract despite conflicting terms in exchanged forms. Under § 2-207 (3), the contract consists of those terms on which the parties agree; conflicting terms are knocked out. The German Civil Code, sections 154 and 155, follows the “partiell dissens” rule. See Viscasillas, *supra* note 281, at 389.

<sup>284</sup> Martin Karollus, *Judicial Interpretation and Application of the CISG in Germany 1988-1994*, in REVIEW OF THE CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS 51-94 (1995) (CORNELL J. INT’L L., eds.), available at <http://www.cisg.law.pace.edu/cisg/wais/db/editorial/karollus910814g1.html>.

<sup>285</sup> See Amtsgericht [Petty Court] [AG] Kehl 3 C 925/93, Oct. 6, 1995 (F.R.G.), available

the contract, the parties disagreed on whether certain general terms were part of the contract. The German buyer had included in its general terms a forum selection clause that was additional to the terms in the seller's form. Under Article 19, it could be argued that no contract was formed because the forum selection clause was a material alteration to the offer. Article 19(3) identifies differing terms regarding "the settlement of disputes" as material.<sup>286</sup> Because the parties had performed based on the essential terms of the agreement, the court found that there was a valid contract and that the parties had either "waived their claim to the application of their respective standard business terms or derogated from Article 19 in exercise of their party autonomy under Article 6."<sup>287</sup> The court held that neither party's general conditions became part of the contract.<sup>288</sup>

The Federal Supreme Court of Germany confirmed the knock out rule approach to cases where the parties have agreed on the essential terms of the contract for the sale and have performed.<sup>289</sup> Professor Schlechtriem has asserted that the German Supreme Court's message was that "[c]onflicting standard forms [terms] are entirely invalid and are replaced by CISG provisions, while the contract as such remains valid."<sup>290</sup> In that case, a dispute arose when customers of a buyer complained that the powdered milk delivered by the seller had a sour taste. The standard terms exchanged by the parties contained conflicting terms regarding the extent of the seller's liability. The court found that the contradiction in terms "did not prevent the existence of the sales contracts because the parties did not view this contradiction as an obstacle to the execution of the contracts."<sup>291</sup>

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at <http://cisgw3.law.pace.edu/cases/951006g1.html>.

<sup>286</sup> CISG, *supra* note 4, at art. 19(3).

<sup>287</sup> See AG Kehl 3 C 925/93, Oct. 6, 1995 (F.R.G.), available at <http://cisgw3.law.pace.edu/cases/951006g1.html>.

<sup>288</sup> *Id.*

<sup>289</sup> See BGH VIII ZR 304/00, Jan. 9, 2002 (F.R.G.), available at <http://www.cisg.law.pace.edu/cisg/wais/db/cases2/020109g1.html> (powdered milk). Professor Viscasillas disagrees with the theory that there is a tacit derogation from Art. 19 when parties have agreed on the essential terms and performed despite contradictory terms, maintaining that "performance by the recipient of the counter-offer indicates objective, subjective, and reasonable assent to the offer." Viscasillas, *Battle of the Forms*, *supra* note 277.

<sup>290</sup> Schlechtriem, *supra* note 279. Professor Schlechtriem, BGH VIII ZR 304/00, *supra* note 289, states that the last shot doctrine "seems to be the most-followed" but that the German Federal Supreme Court (BGH) considers the knock out rule to be the prevailing view. *Id.* Article 209(1) PECL also follows the knock out rule, excluding conflicting terms from the contract. The European Principles make specific reference to conflicting general conditions, which will ordinarily not be part of an otherwise valid contract. According to Article 2:209(2) PECL, however, no contract will be formed if one party has indicated in advance, explicitly, and not by general conditions, that it does not intend to be bound by a contract on the basis of paragraph (1) or if he informs the other party without delay that he does not intend to be bound by such a contract.

<sup>291</sup> See BGH VIII ZR 304/00, Jan. 9, 2002 (F.R.G.), available at <http://>

The seller argued that the CISG was derogated by a clause in its standard forms and that under the applicable German Civil Code, no damages could be claimed. In concluding that neither the buyer's nor the seller's standard forms were included in the contractual arrangement, the court refused to single out some clauses which might be beneficial to one side or the other.

The *Cour de Cassation* in France also applied the knock out rule regarding conflicting jurisdiction clauses.<sup>292</sup> Recognizing that jurisdiction provisions are material terms according to Article 19(3), the court, instead of invalidating the contract, applied traditional conflict of law rules to determine jurisdiction.<sup>293</sup> A U.S. court addressing a similar issue, found that a forum selection clause was not part of a contract because UCC 2-207 requires "express consent of the parties."<sup>294</sup> Without explanation, the court stated that the "same conclusion" would be reached under the CISG.<sup>295</sup>

Some national courts have used the last shot doctrine to resolve cases involving the battle of the forms. According to this approach, courts interpret an action or performance by one of the parties as an indication of assent to additional terms. The last shot doctrine can be seen as evolving from rules of offer and acceptance, with each new offer being a counter-

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[www.cisg.law.pace.edu/cisg/wais/db/cases2/020109g1.html](http://www.cisg.law.pace.edu/cisg/wais/db/cases2/020109g1.html) (powdered milk).

<sup>292</sup> See CASS, Cour de Cassation, J 96-11.984, Jul. 16, 1998 (Fr.), available at <http://cisgw3.law.pace.edu/cases/980716f1.html>.

<sup>293</sup> *Id.*

<sup>294</sup> PrimeWood, Inc. v. Roxan GmbH & Co. Veredelungen, No. A3-97-28, 1998 U.S. Dist. WL 1777501, at \*3 (D.N.D. Feb. 19, 1998).

<sup>295</sup> *Id.* Two cases from Argentina upheld forum selection clauses in standard forms, but the rationale employed by the courts regarding the CISG is not clear. In one case, an Argentine buyer maintained that a forum selection clause was invalid because it was written in a foreign language on the back of the seller's invoice. See Cámara Nacional de Apelaciones en lo Comercial [Second Instance Court of Appeal] [CN], Division C, 44.786, Mar. 15, 1991 (Arg.), available at <http://www.cisg.law.pace.edu/cisg/wais/db/cases2/910315a1.html>. The trial court found that the clause was part of the agreement. On appeal, the buyer argued that Argentine law required express written acceptance of such provisions. The appellate court, however, stated that forum selection clauses are valid even if contained in a standard form, under the law of Argentina, unless there is a disparity of bargaining power between the parties. *Id.* A subsequent case in Argentina reached the same result. In that case, however, a Procurator noted that Article 4 of the CISG excludes questions of validity and decided the validity of the case according to the *lex fori*, referring to the CISG only for further support that the clause was enforceable. See Cámara Nacional de Apelaciones en lo Comercial [Second Instance Court of Appeal], Div. E., 45.626, Oct. 14, 1993, available at <http://www.cisg.law.pace.edu/cisg/wais/db/cases2/931014a1.html>. According to one commentator, Article 4, which states that validity issues are beyond the scope of the Convention, and Article 81(1), which "provides a clause for the settlement of disputes with a certain degree of autonomy vis-à-vis the other contractual terms," should have steered the Argentine tribunals away from considering the CISG in these cases. See Garro, *Recent Developments*, *supra* note 120, at 236 (maintaining that neither the *Quilmes* nor the *Inta* decision addressed whether a contract was validly concluded under Article 19 of the CISG as the forum selection clause was a material alteration of the offer).

offer until the last one is accepted when one party indicates assent by performance or other conduct.<sup>296</sup> Therefore, if a party fails to object to an additional or modified term, performs, or partially performs, then he has accepted the additional or modified term. Whereas the knock out rule would ignore conflicting terms, the last shot approach incorporates the terms of last communication. Some commentators maintain that the last shot rule is out of touch with commercial reality and encourages parties to act in bad faith by producing numerous forms with standard terms in hopes of controlling the contract through the last shot.<sup>297</sup> Others consider the last shot rule to be the best approach to a difficult situation because it provides "certainty and legal security."<sup>298</sup>

A German court held that an 8-day notice of defects provision in a confirmation letter was enforceable at the time the buyer took delivery of the goods.<sup>299</sup> The notification terms contained in the seller's confirmation letter were additional material terms that amounted to a counter-offer under Article 1(1), but the court found that the buyer accepted those terms by accepting delivery.<sup>300</sup> Another German court found that a buyer of cashmere sweaters accepted the seller's additional terms which incorporated the "Standard Conditions of the German Textile Industry" by performing under the contract.<sup>301</sup> The court merely cited Articles 18 and 19 without comment.<sup>302</sup> Similarly, another German court held that acceptance of delivery indicated assent to a material modification. When the buyer claimed to have ordered a certain quantity of shoes and the seller delivered a different quantity, the court interpreted the delivery of a different quantity as a material alteration under Article 19(3). The court held, however, that the delivery was a counter-offer which the buyer accepted by taking the goods.<sup>303</sup> In contrast, a U.S. court in *Claudia v. Olivieri Footwear Ltd.*<sup>304</sup>

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<sup>296</sup> See Sukurs, *supra* note 150.

<sup>297</sup> See Henry D. Gabriel, *The Battle of the Forms: A Comparison of the United Nations Convention for the International Sale of Goods and the Uniform Commercial Code*, 49 BUS. LAW 1053 (1994); Sukurs, *supra* note 150, at 1487; HONNOLD, UNIFORM LAW FOR INTERNATIONAL SALES, *supra* note 53, at 192 (stating that "'last shot' theories have been rightly criticized as casuistic and unfair").

<sup>298</sup> See Viscasillas, *Battle of the Forms*, *supra* note 277, at 183 (arguing that "the mirror-image and last shot rule provide a certainty and legal security for the parties," though rigid, "it provides adequate protection to the parties in the majority of cases and permits enterprises to more perfectly plan their standardized transactions").

<sup>299</sup> See OLG Saarbrücken 1 U 69/92, Jan. 13, 1993 (F.R.G.), available at <http://www.cisg.law.pace.edu/cisg/wais/db/cases2/930113g1.html>.

<sup>300</sup> *Id.*

<sup>301</sup> OLG München 7 U 4427/97, Mar. 11, 1998 (F.R.G.), available at <http://www.cisg.law.pace.edu/cisg/wais/db/cases2/980311g1.html>

<sup>302</sup> See *id.*

<sup>303</sup> OLG Frankfurt/M 5 U 209/94, May 23, 1995 (F.R.G.), available at <http://www.cisg.law.pace.edu/cisg/wais/db/cases2/950523g1.html>.



held that even though the goods had been delivered, it could not hold as a matter of law that a valid contract had been concluded when the parties disagreed on a delivery term subsequent to an oral agreement.<sup>305</sup> The court considered the parties' prior course of dealings, which included thirteen transactions, but found insufficient evidence to conclude that they had always used the same delivery term.<sup>306</sup>

If a party continues to perform, or fails to object in a timely manner, to additional terms, she runs the risk that her conduct, silence, or act of performance will be interpreted by a court as an acceptance of the disputed term.<sup>307</sup> This was the issue in *Filanto v. Chilewich*,<sup>308</sup> where the court found that a manufacturer accepted an arbitration provision as part of the agreement, because he failed to object in a timely manner and commenced performance by opening a letter of credit. This was despite the fact that it repeatedly objected during negotiations to the incorporation of an arbitration clause and that such a clause is a material term under Article 19(3). In *Magellan Int'l Corp. v. Salzgitter Handel GmbH*, the court found that a contract was formed when a distributor indicated assent by opening a letter of credit.<sup>309</sup> The court held that the terms of the contract were those agreed on at the time the letter of credit was opened.

Despite Article 19(2)'s distinction between material and non-material terms in contracts, courts, using the knock out and last shot rules, have generally disregarded the distinction between material and non-material terms. The Austrian Supreme Court rationalized the diminishment of the distinction by arguing that Article 19(3) list of examples of materiality are merely general presumptions that may be rebutted. The presumption of materiality may be rebutted by evidence including the practices between the parties, trade usages, conduct during negotiations, and other relevant circumstances. For example, modifications that are favorable to one party do not require counter-acceptance by the benefited party.<sup>310</sup>

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<sup>304</sup> See *Claudia*, No. 96 CIV. 8052, 1998 U.S. Dist. LEXIS 4586, at \*18 (S.D.N.Y. Apr. 6, 1998).

<sup>305</sup> *Id.* at \*26-\*28.

<sup>306</sup> The court refers to Article 19 only in a footnote, but evidently considered alteration of a delivery term to be a material modification and thus a counteroffer, not an acceptance. *Id.*, at \*25, n.7.

<sup>307</sup> See *Filanto v. Chilewich*, 789 F. Supp. 1229, 1240 (S.D.N.Y. 1992) (prior dealings accompanied by silence and commencement of performance by opening a letter of credit were acceptance of agreement, including arbitration clause).

<sup>308</sup> *Id.*

<sup>309</sup> *Magellan Int'l Corp. v. Salzgitter Handel GmbH*, No. 99 Civ. 5153, 1999 U.S. Dist. LEXIS 19386 (N.D. Ill. Dec. 7, 1999).

<sup>310</sup> See Oberster Gerichtshof [Supreme Court][OLG], 2 Ob 58/97, Mar. 20, 1997, available at <http://www.unilex.info/case.cfm?pid=1&do=case&id=254&step=FullText> (remanding a case to determine if a modification by the seller regarding specifications of the product was favorable to the buyer).

The illusiveness of CISG jurisprudence in the interpretation of materiality is evident in a German case in which the court held that a notice provision which limited the time for rejection of goods was not a material term.<sup>311</sup> Interpreting the provision in the invoice as a modified acceptance of the contract, the court held that the notice provision became part of the contract, according to Article 19(2) which puts the burden on the offeree to reject non-material modifications.<sup>312</sup> Since the buyer did not object, the court found that the provision was valid. Several commentators disagreed with the decision, arguing that the notice provision was clearly material under the broad language of Article 19(3).<sup>313</sup>

A French court in *Fauba France FDIS GC Electronique v. Fujitsu Microelectronik GmbH*<sup>314</sup> held that a purchase order that altered price and delivery terms did not materially alter the terms of the offer. On appeal, the Court of Cassation held that a valid contract was formed because the offer which allowed prices to be modified “according to market increases and decreases” was sufficiently definite. Unfortunately, both the Court of Appeals and the Court of Cassation failed to discuss the fact that Article 19(3) specifically declares price and delivery terms as material alterations.<sup>315</sup>

A Hungarian court in *Technologies Int’l Inc. Pratt & Whitney Commercial Engine Business v. Magyar*<sup>316</sup> distinguished between the insertion of a material, additional term and “a simple request” for a material modification. A letter of acceptance contained a provision requesting that the letter be treated confidentially until the parties made a joint announcement regarding the purchase of jet engines was a valid acceptance. The plaintiff’s offer had a paragraph whereby the defendant agreed to allow the plaintiff to publish a press release announcing defendant’s choice of engine. The court found that the letter was an unambiguous acceptance, not an amendment, restriction, or other change that would amount to a rejection under 19(1).

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<sup>311</sup> See Landegericht [District Court][LG] Baden-Baden 4 O 113/90, Aug. 14, 1991 (F.R.G.), available at <http://www.cisg.law.pace.edu/cisg/wais/db/cases2/910814g1.html>.

<sup>312</sup> *Id.*

<sup>313</sup> See, e.g., Martin Karollus, *Judicial Interpretation and Application of the CISG in Germany 1988-1994*, in CORNELL REVIEW OF THE CISG, 51-94 (1995); DiMatteo, *Presumption of Enforceability*, *supra* note 11, at 154-55.

<sup>314</sup> See CASS, 92-16.993, Jan. 4, 1995, *supra* note 197.

<sup>315</sup> Claude Witz, *Case Commentary, The First Decision of France’s Court of Cassation Applying the U.N. Convention on Contracts for the International Sale of Goods*, (1995), available at <http://www.cisg.law.pace.edu/cisg/wais/db/cases2/950102f1.html> (criticizing the lack of rigor with which both the Paris Court of Appeals and the Court of Cassation treated the issues raised by the case).

<sup>316</sup> See Fovárosi Biróság [Metropolitan Court][FB] Budapest 3 G 50.289/1991/32, Jan. 10, 1992 (Hung.), available at <http://www.cisg.law.pace.edu/cisg/wais/db/cases2/920110h1.html> (airplane engines).

It is important to understand the reach of Article 19. It is limited to issues of contract formation and not to modifications of contract. Thus, it is universally accepted that where a contract has been validly concluded, one party may not change a material term in the contract without the acceptance of the other party. The court in *Chateau des Charmes Wines Ltd. v. Sabate USA Inc.* found that where an oral agreement did not contain a forum selection clause, one party's attempt to include such a provision in subsequent invoices did not alter the contract.<sup>317</sup> Because the contract had already been concluded, any new terms were merely offers which required express assent and did not create an obligation to reject the term. The court noted that the mere performance of obligations under the oral contract did not indicate assent to what would be additional material terms under Article 19(3).<sup>318</sup>

As found in the other areas of contract formation, a review of CISG jurisprudence involving the battles of the form scenario finds courts struggling to devise a unified framework for applying CISG rules. Most troubling is that courts seldom use cases from other Contracting States. Because these battles are so prevalent in international transactions and Article 19 offers the flexibility for courts to adopt several approaches, Article 19 is one of the areas where the CISG could most benefit from the adoption of official comments, examples, and guidance that some commentators have suggested.<sup>319</sup>

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<sup>317</sup> See *Chateau des Charmes Wines Ltd. v. Sabate USA Inc.*, 328 F.3d 528 (9th Cir. 2003).

<sup>318</sup> *Id.* at \*8. The Supreme Court of Spain took a similar approach in a case where one party attempted to renegotiate the price of a concluded contract and the proposed modification was not accepted. See *Internationale Jute Maatschappij BV v. Marin Palomares S.L.*, Tribunal Supremo, [Supreme Court] 454/2000, Jan. 28, 2000 (Spain), available at <http://www.cisg.law.pace.edu/cisg/wais/db/cases2/000128s4.html>. Finding that the original contract was not impaired by the subsequent attempt to modify, the court cited Article 19: "a reply to an offer which purports to be an acceptance but contains additions, limitations or other modifications is a rejection of the offer and constitutes a counter-offer." *Id.* The court's reasoning is difficult to ascertain as it referred primarily to Spanish civil law and its previous rulings throughout the opinion, but approach appears consonant with that of the U.S. court.

<sup>319</sup> See, e.g., John E. Murray, Jr., *The Neglect of the CISG: A Workable Solution*, 17 J.L. & COM. 365, 378-79 (1998) (endorsing Professor Michael Bonell's idea that UNCITRAL should create a board similar to that of the National Conference of Commissioners on Uniform State Laws for the Uniform Commercial Code to provide interpretations and illustrations for each Article.); see also Bailey, *Facing the Truth*, *supra* note 6, at 276 (arguing that the CISG undermines its goal of uniformity for a variety of reasons including the obscurity of its rules on interpretation, its provisions on contractual freedom, and its allowance for reservations and suggesting that uniformity would be improved by measures such as UNCITRAL review of CISG court decisions as well as the official adoption of the Secretariat Commentary to the 1978 draft).

#### IV. OBLIGATIONS OF BUYERS

This part focuses on the duties of buyers in the CISG-governed transaction. Given the limited right of rejection (avoidance) provided to the CISG, the buyer is burdened with numerous duties including the duty to inspect, give notice of non-conformity, give notice of avoidance, duty to preserve the goods, duty to pay the price, and duty to take delivery. The following analysis reviews how courts and arbitral panels have defined the duties enunciated in the CISG. It will also review the buyer's right to time extensions, along with its associated obligations as provided in Article 47. Finally, this part will examine the buyer's reciprocal obligations to the seller's right to cure under Article 48.

##### A. The Duty to Inspect, Give Notice, and Preserve Goods

The CISG requires buyers to inspect goods, and provide adequate and timely notice, with respect to any defects in the seller's performance and preserve the goods in the event the buyer elects to reject the seller's tender. These obligations are set forth in Articles 38, 39, 44 and 86. The initial obligation of all buyers is the duty of inspection. Article 38 provides that the buyer "must examine the goods, or cause them to be examined, within as short a period as is practicable in the circumstances."<sup>320</sup> Special rules apply in the event the contract involves the carriage of goods or their redirection in transit. Examination *may* be deferred until after the goods arrive at their destination in the event the contract involves carriage.<sup>321</sup> By contrast, examination of the goods may be deferred until after their arrival at their ultimate destination in the event they have been redirected in transit or re-dispatched by the buyer.<sup>322</sup> However, the inspection may be deferred under these circumstances only if the redirection or re-dispatch occurred without a "reasonable opportunity" for examination.<sup>323</sup> In addition, the buyer must demonstrate that the seller knew or should have known of the possibility of such redirection or re-dispatch at the time of the conclusion of the contract.<sup>324</sup>

The failure to comply with the provisions of Article 38 deprives the buyer of the right to rely upon the defense of nonconformity of the goods in a future dispute with the seller. The buyer also loses this defense in the event its notice does not specify "the nature of the lack of conformity within a reasonable time."<sup>325</sup> The time for providing this notice begins to run from

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<sup>320</sup> CISG, *supra* note 4, at art. 38(1).

<sup>321</sup> *Id.* at art. 38(2).

<sup>322</sup> *Id.* at art. 38(3).

<sup>323</sup> *Id.*

<sup>324</sup> *Id.*

<sup>325</sup> *Id.* at art. 39(1).

the time of the actual discovery of the nonconformity or from when the buyer should have discovered it.<sup>326</sup> In any event, the buyer loses the right to rely upon nonconformity of the tendered goods if it does not give notice to the seller “at the latest within a period of two years from the date on which the goods were actually handed over to the buyer.”<sup>327</sup> This two-year window for notice is inapplicable to the extent that it is inconsistent with any guarantees set forth in the sales contract.<sup>328</sup> Furthermore, the buyer retains the right to reduce the price payable to the seller or claim damages, except for loss of profits, if it has a “reasonable excuse” for its failure to provide the required notice.<sup>329</sup>

The buyer’s ability to reject nonconforming goods is accompanied by a corresponding duty to preserve such goods for the benefit of the seller. Article 86 provides that the buyer must take steps to preserve the goods as are “reasonable in the circumstances.”<sup>330</sup> The buyer is entitled to reimbursement from the seller of reasonable expenses incurred in preservation of the goods and is entitled to retain the goods until its receipt of such payment.<sup>331</sup> In the event the goods have been placed at its disposal by the seller and are subsequently rejected, the buyer must take possession on the seller’s behalf.<sup>332</sup> The buyer’s obligation in this regard is contingent upon its ability to take possession of the goods without payment of the price and without “unreasonable inconvenience or . . . expense.”<sup>333</sup> Buyer’s duties under Article 86 are inapplicable in the event the seller or a person authorized to take control of the goods on its behalf is present at the destination at the time of the arrival of the goods.<sup>334</sup>

### *1. Inspection Duties and Rights: Article 38*

National courts interpreting the CISG’s provisions relating to inspection, notice and preservation of goods have concentrated on three issues raised by Article 38. These issues are the amount of time the buyer has to conduct an inspection of the goods, what constitutes an adequate inspection, and the enforceability of contractual provisions modifying the buyer’s inspection rights.

The initial issue addressed by national courts with respect to Article 38 is the time within which the buyer must inspect goods purchased from their

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<sup>326</sup> *Id.*

<sup>327</sup> *Id.* at art. 39(2).

<sup>328</sup> *Id.*

<sup>329</sup> *Id.* at art. 44.

<sup>330</sup> *Id.* at art. 86(1).

<sup>331</sup> *Id.*

<sup>332</sup> *Id.* at art. 86(2).

<sup>333</sup> *Id.*

<sup>334</sup> *Id.*

vendors. Article 38(1) provides that this inspection must occur within “as short a period as practicable in the circumstances.”<sup>335</sup> This language does not establish a definite time within which such inspection must occur in order to permit the buyer to reject the goods on the basis of nonconformity. Rather, it appears that the time within which such inspection must occur is flexible depending upon the individual circumstances in each case. Indeed, commentators have noted that “[t]his language seems to acknowledge that the shortest applicable period to inspect complex machinery received by a buyer in an isolated town of a developing country may be different from the shortest applicable period to inspect other types of goods by a sophisticated buyer in a big industrial city.”<sup>336</sup>

There is some acknowledgement of the flexibility of this standard in the opinions of national courts. A U.S. court noted that it was required to take into account the uniqueness of the goods involved, the method of delivery (including installments) and the familiarity of the buyer’s employees with the goods.<sup>337</sup> Courts adopting this approach have noted that buyers may produce proof demonstrating why under the specific circumstances inspection could not occur in a diligent fashion.<sup>338</sup> Although not expressly stated in the CISG, buyers seeking such additional time bear the burden of proof with respect to the reasons justifying such additional time.<sup>339</sup>

However, this interpretive “flexibility” has not been universally accepted. Rather, the majority of cases have rejected this approach in favor of less flexibility in the inspection requirement.<sup>340</sup> These courts have adopted two different approaches to determine whether the buyer’s inspection was within as short a time period as practicable. The first approach requires the buyer to prove a special burden existed prior to the request for additional time for inspection. These courts have refused to grant time extensions for inspection of goods, based upon the absence of a burden upon the buyer. Courts adopting this approach have focused upon the ease with which the inspection could have occurred at the time of

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<sup>335</sup> *Id.* at art. 38(1).

<sup>336</sup> Garro, *Reconciliation*, *supra* note 114.

<sup>337</sup> See *Shuttle Packaging Sys. v. Jacob Tsonakis, INA, S.A.*, 1:01-CIV-691, 2001 U.S. Dist. LEXIS 21630, at \*22 (W.D. Mich. Dec. 17, 2001).

<sup>338</sup> See, e.g., OLG Koblenz 14 S 358/94, Jul. 7, 1995 (F.R.G.), available at <http://www.cisg.law.pace.edu/cisg/wais/db/cases2/950707g1.html>.

<sup>339</sup> See *Handelsgericht [Commercial Court] [HG] Zürich*, SZ 930634/O, Nov. 30, 1998 (Switz.), available at <http://www.cisg.law.pace.edu/cisg/wais/db/cases2/981130s1.html>.

<sup>340</sup> See *OLG Düsseldorf Recht der Internationalen Wirtschaft [RIW] 1050-51*, Feb 10, 1994 (F.R.G.), available at <http://www.cisg.law.pace.edu/cisg/wais/db/cases2/940210g1.html>; *Rheinland Versicherungen v. Atlarex S.r.l.*, Trib. Di Vigevano, 12 Jul. 2000 n.405, available at <http://www.cisg.law.pace.edu/cisg/wais/db/cases2/000712i3.html>.

delivery<sup>341</sup> or the obviousness of the alleged nonconformity, such as readily apparent defects and disparities in color and weight.<sup>342</sup> The uniqueness of the goods, their complicated nature, their delivery in installments and the need for training of employees may also place unique burdens on the buyer justifying additional time within which to perform inspections.<sup>343</sup> Moreover, the ultimate disposition of the goods after delivery also may be relevant to this inquiry. The two states that have placed primary importance on this factor have not set specific times for the occurrence of inspections, although they require that these inspections occur prior to the processing, transformation or incorporation of goods into the manufacturing process.<sup>344</sup>

By contrast, other courts have established specific deadlines for the completion of the buyer's inspection, specifically supporting a deadline for inspection with respect to perishable goods. In this regard, national courts have required the inspection occur immediately upon delivery of the goods to the buyer.<sup>345</sup> This is an understandable result given the consequences of delays in inspections with respect to such goods. However, several national courts have extended this inspection upon delivery requirement to nonperishable goods as well.<sup>346</sup> Courts in two states have adopted a more lenient approach by granting buyers one week from the time of delivery to complete their inspection.<sup>347</sup>

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<sup>341</sup> See, e.g., *Handelsagentur v. DAT-SCHAUB A/S*, Mar. and Commercial Ct. of Copenhagen, n. H-0126-98, Jan. 31, 2002 (Den.), available at <http://www.cisg.dk/shd310102.htm>; RIW 1050-51, Feb 10, 1994, *supra* note 341.

<sup>342</sup> See SZ 930634/O, Nov. 30, 1998, *supra* note 339.

<sup>343</sup> See, e.g., *Shuttle Packaging Sys.*, 2001 U.S. Dist. LEXIS 21630, at \*22.

<sup>344</sup> See Kortrijk [District Court] [Kh] A.R 651/97, Jun. 27, 1997 (Belg.), available at <http://www.cisg.law.pace.edu/cisg/wais/db/cases2/971215n1.html>; *Nurka Furs v. Nertsenfokkerij De Ruiter, Hof Hertogenbosch* [District Court of Appeal] [HOF], NIPR 201, Dec. 15, 1997 (Neth.), available at <http://www.cisg.law.pace.edu/cisg/wais/db/cases2/971215n1.html>; *CME Coop. Mar. Etaploise v. Bos Fishproducts, Rb. Zwolle*, HA ZA 95-640, Mar. 5, 1997, (Neth.), available at <http://www.cisg.law.pace.edu/cisg/wais/db/cases2/970305n1.html>.

<sup>345</sup> See, e.g., *OLG Saarbrücken 1 U 703/97-143*, June 3, 1998 (F.R.G.), available at <http://www.cisg.law.pace.edu/cisg/wais/db/cases2/980603g1.html> (flowers); *OLG Düsseldorf 17 U 82/92*, Jan. 8, 1993 (F.R.G.), available at <http://www.cisg.law.pace.edu/cisg/wais/db/cases2/930108g1.html> (cucumbers); *CME Coop. Mar. Etaploise/Bos Fishproducts, Rb. Zwolle*, Mar. 5, 1997, NIPR 230 (Neth.), available at <http://www.cisg.law.pace.edu/cisg/wais/db/cases2/970305n1.html>, (fish); *Fallini Stefano & Co./Foodik, Rb. Roermond*, Dec. 19, 1991, NIPR 394 (Neth.), available at <http://www.cisg.law.pace.edu/cisg/wais/db/cases2/911219n1.html> (cheese).

<sup>346</sup> See, e.g., *OLG Karlsruhe 1 U 280/96*, June 25, 1997 (F.R.G.), available at <http://www.cisg.law.pace.edu/cisg/wais/db/cases2/970625g1.html>; *OLG München 7 U 3758/94*, Feb. 8, 1995 (F.R.G.), available at <http://www.cisg.law.pace.edu/cisg/wais/db/cases2/950208g4.html>; *LG Aachen 41 O 198/89*, Apr. 3, 1990 (F.R.G.), available at <http://www.cisg.law.pace.edu/cisg/wais/db/cases2/900403g1.html>.

<sup>347</sup> See, e.g., *OLG Koblenz 14 S 358/94*, Jul. 7, 1995, *supra* note 338; *Handelsgericht Zürich*, HG 930634/O, Nov. 30, 1998, *supra* note 339.

National courts have also addressed the time within which the buyer's inspection must occur in the event of redirection or reshipment of the goods to the ultimate consumer. Article 38(3) appears to grant buyers some leeway in the event inspection is rendered impractical by surrounding circumstances, such as the necessity of significant unpacking prior to inspection. However, Article 38 does not define the circumstances under which this deferral is available or the time within which the inspection must be completed upon the arrival of the goods at their final destination.

There is less case law with respect to the timeliness of inspection in the event of transshipment than inspection pursuant to Article 38(1). Nevertheless, existing jurisprudence has exhibited a common theme of strict construction. Strict construction of Article 38(3) is evident in three separate holdings. First, inspection may be deferred pursuant to Article 38(3) only when the buyer is a mere intermediary or when the goods are delivered directly to end-users.<sup>348</sup> By contrast, inspection may not be deferred when the buyer takes possession of the goods without advance knowledge as to what extent, when and to whom the goods will ultimately be resold.<sup>349</sup> Second, if the buyer serves as a mere intermediary or direct delivery occurs, inspection may be deferred only if the buyer can demonstrate the absence of a "real opportunity" to examine all of the goods.<sup>350</sup> By contrast, if only a portion of the goods is retransmitted to the ultimate end user, the buyer is still under an obligation to inspect those goods remaining in its possession.<sup>351</sup> The failure to conduct a timely inspection prevents the buyer from rejecting the goods for nonconformity pursuant to Article 38. The buyer may also lose its ability to defer inspection pursuant to Article 38(3) if the goods were reprocessed or repackaged prior to their shipment to the end user.<sup>352</sup> Finally, any delays by the end user in inspecting the goods or transmitting notice of nonconformity are attributable to the buyer and may prevent the utilization of Article 38 as a basis for rejection.<sup>353</sup>

A separate issue addressed by national courts is what constitutes a reasonable inspection. The buyer is not required to make an examination that would reveal every possible defect. Rather, the buyer's inspection must be reasonable under the circumstances and is dependent upon the provisions of the contract in question, usage of the trade, the type of goods, and the technical facilities and expertise of the parties.

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<sup>348</sup> See OLG Saarbrücken 1 U 69/92, Jan. 13, 1993, *supra* note 299.

<sup>349</sup> *Id.*

<sup>350</sup> *Id.*

<sup>351</sup> *Id.*

<sup>352</sup> See OLG Karlsruhe, 1 U 280/96 June 25, 1997, available at <http://cisgw3.law.pace.edu/cisg/wais/db/cases2/970625g1.html>.

<sup>353</sup> OLG München 7 U 3758/94 Feb. 8, 1995, *supra* note 346.



Four general rules emerge from an examination of the opinions with respect to the thoroughness of the inspection required by Article 38. The buyer has an affirmative obligation to examine the packaging to discover any nonconformity readily apparent from such inspection, including labeling, weight and date of production.<sup>354</sup> Failure to discover any such nonconformity will prevent the buyer from rejecting the goods pursuant to Article 38. Next, buyers are required to carefully examine the goods themselves and discover readily apparent nonconformities. The opinions have not defined what constitutes an apparent nonconformity. However, national courts have held discrepancies in color, weight and consistency to be apparent nonconformities.<sup>355</sup> Additionally, buyers are excused from a complete examination of the goods in the event the quantity or nature of the product renders comprehensive inspection unreasonable. However, buyers are not completely excused from conducting inspections under such circumstances. Rather, buyers are required to sample or spot check the product upon delivery and discover and report any apparent nonconformities.<sup>356</sup> Buyers may not rely upon sampling or spot checking in the event previous shipments from the seller, if any, were nonconforming.<sup>357</sup> Buyers are not required to discover nonconformities that have been actively concealed by their sellers.<sup>358</sup> In any event, the burden of proving reasonable inspection rests with the buyer.<sup>359</sup>

The final issue addressed by national courts is the enforceability of contractual provisions abrogating the inspection duties of Article 38. Commentators have noted that the provisions of Article 38 are optional, and the parties are free to contract upon different terms, including provisions for the inspection of goods and notice. Several national courts have addressed this issue in their opinions. The intent of the parties to derogate from the provisions of Article 38 must be clearly stated in the parties' agreement. In this regard, the party seeking enforcement of such a provision must demonstrate that both parties were aware of the potential applicability of the CISG and expressly intended to exclude it from their agreement.<sup>360</sup>

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<sup>354</sup> *Id.*

<sup>355</sup> See also, HG Zürich, HG 930634/O, Nov. 30, 1998, *supra* note 339.

<sup>356</sup> See OLG Koblenz 14 S 358/94, Jul. 7, 1995, *supra* note 338 (chemicals).

<sup>357</sup> See LG Stuttgart 3 KfH O 97/89, Aug. 31, 1989 (F.R.G.), available at <http://www.cisg.law.pace.edu/cisg/wais/db/cases2/890831g1.html> (nonconformity in initial shipment of shoes required buyer to conduct complete examination of second shipment of shoes from the same seller).

<sup>358</sup> See LG Trier 7 HO 78/95, Oct. 12, 1995 (F.R.G.), available at <http://www.cisg.law.pace.edu/cisg/wais/db/cases2/951012g1.html> (intentional adulteration by Italian seller of wine sold to German buyer and subsequent concealment prevented seller from alleging that buyer failed to conduct adequate inspection of the product upon delivery).

<sup>359</sup> See, e.g., OG, 11 95 123/357, Jan. 8, 1997, *supra* note 93.

<sup>360</sup> See, e.g., *id.*

Language purporting to derogate from Article 38 must clearly provide for exclusion of its provisions and cannot be implied from related terms.<sup>361</sup>

Upon a finding of an express intent to derogate from Article 38, the parties may elect to set specific time periods for the performance of inspections or to rely upon time periods established by usage and custom of the trade. If the parties elect to set specific dates in their contract, notices must be sent within these time periods in order to be valid.<sup>362</sup> Periods of time upheld in the opinions of national courts range from eight to fourteen days of delivery.<sup>363</sup> The time periods for inspection and the provision of notice may also be based upon usage and custom of the trade.<sup>364</sup> However, parties relying upon such provisions bear the burden of proof with respect to the custom or usage, its applicability to the trade at issue, and the intent of the parties to incorporate it in their agreement.<sup>365</sup> In addition, parties cannot rely upon usage and custom if the agreement establishes specific periods for the performance of inspections and provision of notice of nonconformity.<sup>366</sup>

## 2. *Notice of Nonconformity: Article 39*

The majority of the opinions of national courts on inspection and notice have focused on interpreting Article 39. These opinions have focused on determining a reasonable time for notice of lack of conformity, the buyer's obligations with respect to the discovery of defects, and the specificity of the required notice.

There are numerous opinions of national courts addressing the time in which the buyer must give notice of lack of conformity to the seller. Unfortunately, these opinions are completely lacking in uniformity. The opinions have required notice within a wide range of time from immediate to an extended period of time after delivery. The one common element of these opinions is the placement of the burden on the buyer to demonstrate the reasonableness of the time in which it gave notice of nonconformity to

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<sup>361</sup> See, e.g., INT'L CHAMBER OF COMMERCE, PUB. NO. 7565/1994, 6 ICC INT'L CT. OF ARB. BULL. 64-66 (Nov. 1995) (refusing to imply a derogation from Article 38 on the basis of a related provision fixing a thirty day time limit to file a request for arbitration upon the failure of negotiation).

<sup>362</sup> See, e.g., LG Hannover 22 O 107/93, Dec. 1, 1993 (F.R.G.), available at <http://www.cisg.law.pace.edu/cisg/wais/db/cases2/931201g1.html>.

<sup>363</sup> See, e.g., OLG Saarbrücken 1 U 69/92, Jan. 13, 1993, *supra* note 299 (eight day period for the provision of notice of nonconformity in the purchase of doors); LG Hannover 22 O 107/93, Dec. 1, 1993, *supra* note 365 (ten day period for the provision of notice of nonconformity in the purchase of shoes).

<sup>364</sup> See, e.g., OLG Saarbrücken 1 U 69/92, Jan. 13, 1993, *supra* note 299; CME Coop. Mar. Etaploise v. Bos Fishproducts, Rb. Zwolle, Mar. 5, 1997, *supra* note 345.

<sup>365</sup> See, e.g., OLG Saarbrücken 1 U 69/92, Jan. 13, 1993, *supra* note 299.

<sup>366</sup> *Id.*

the seller.<sup>367</sup>

An initial group of opinions held that notice of nonconformity needed to be sent within an immediate or very short period of time. For example, a national court in Denmark required a Russian purchaser of a load of fish give “prompt” notice of the nonconformity of the species ultimately delivered by the seller.<sup>368</sup> In a similar vein, a Belgian court held that the Dutch buyer of neon signage was required to give notice of nonconformity to the Belgian seller within a “short time.”<sup>369</sup> By contrast, a Dutch court required notice of nonconformity of cheese products within a short period of time after delivery.<sup>370</sup> Similarly, a German court held that a German buyer of textiles that failed to provide notice of nonconformity to the French seller within a few days of delivery was not in compliance with the requirement of reasonable notice set forth in Article 39.<sup>371</sup>

Some courts have linked the time within which inspection must occur pursuant to Article 38 to the time within which notice of nonconformity must be given pursuant to Article 39. For example, a German court required immediate inspection and notice of nonconformity by a German purchaser of flowers from an Italian seller.<sup>372</sup> Similarly, another court required that a German buyer of shoes provide the Italian seller notice of nonconformities one day after delivery.<sup>373</sup>

There are another group of opinions that have granted buyers extended periods of time to give notice of nonconformities. For example, despite the ease of discovery of nonconformities in a shipment of lambskin jackets from a Swiss seller to a buyer in Liechtenstein, a Swiss court held that the buyer had seven to fourteen days within which to notify the seller.<sup>374</sup> In a similar fashion, a German court required an Austrian buyer to inform a German seller of nonconformities in plastic granulate within eight days of delivery.<sup>375</sup> This period of time was extended to ten days by a different German court.<sup>376</sup> Two courts have extended the notice period to two weeks

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<sup>367</sup> See, e.g., OLG Koblenz 3 O 212/97, Jul. 30, 1998 (F.R.G.), available at <http://www.cisg.law.pace.edu/cisg/wais/db/cases2/980730g1.html>.

<sup>368</sup> Handelsagentur v. DAT-SCHAUB A/S, Handelsretten [Maritime Comm. Ct.] Copenhagen, n. H-0126-98, Jan. 31, 2002.

<sup>369</sup> Epsilon BVBA v. Interneon Valkenswaard BV, Rechtbank van Koophandel, Hasselt, n. AR 1972/96, Jan. 21, 1997 (Belg.), available at <http://www.law.kuleuven.ac.be/int/tradelaw/WK/1997-01-21.htm>.

<sup>370</sup> See Rb. Roermond, Dec. 19, 1991, *supra* note 345.

<sup>371</sup> See OLG Düsseldorf RIW, 1050-51, Feb 10, 1994, *supra* note 340.

<sup>372</sup> OLG Saarbrücken 1 U 703/97-143, June 3, 1998, *supra* note 345.

<sup>373</sup> See LG Aachen 41 O 198/89, Apr. 3, 1990, *supra* note 346.

<sup>374</sup> See HG Zürich, SZ HG 930634/O, Nov. 30, 1998, *supra* note 339.

<sup>375</sup> OLG München, 7 U 3758/94, Feb. 8, 1995 *supra* note 346.

<sup>376</sup> See OLG Karlsruhe, 1 U 280/96, Jun. 25, 1997, *supra* note 346 .

for similar goods.<sup>377</sup>

The national courts of four states have extended the period of notification beyond two weeks. These cases have set a specific time for notification of nonconformities beyond two weeks or have set an indefinite period of time for such notification depending on the circumstances. For example, courts in Germany and Switzerland have granted buyers one month from the date of delivery to notify sellers of nonconformities. This one-month period has been deemed applicable to a wide range of perishable and nonperishable goods.<sup>378</sup> By contrast, national courts in Italy and the Netherlands have refused to set specific dates for the buyer's notification. Specifically, an Italian court held that a German buyer of vulcanized rubber should have provided notice to the Italian seller of nonconformities immediately upon processing the product.<sup>379</sup> However, the court did not set a time within which such processing was to occur other than to note that four months after delivery was untimely.<sup>380</sup> A similar result was reached by a court in the Netherlands in its determination that a Greek buyer of furs from a Dutch seller should have provided notice of nonconformities prior to processing of the product.<sup>381</sup> The Dutch court did not set a specific time for such processing to occur other than to conclude that notice provided three weeks after delivery was untimely.<sup>382</sup>

There are far fewer cases addressing the time within which notice must be given in the event of redirection of the goods in transit by the buyer to a third party. Opinions have established two preconditions for granting delays in providing notice of nonconformity. Initially, delays in providing notice will only be permitted when the buyer serves as a simple intermediary or when the goods are directly delivered to the end user.<sup>383</sup> Delays in providing notice will not be excused when, at the time of the delivery at the buyer's facilities, the buyer does not know to what extent and when the goods will be resold to its customers.<sup>384</sup> In addition, delays will not be countenanced in the event that the buyer has a "real opportunity"

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<sup>377</sup> See *Giustina Int'l Sp.A. v. Perfect Circle Europe SARL*, CA Versailles, Cass. Com., no. 56, Jan. 29, 1998 (Fr.), available at <http://witz.jura.unisb.de/CISG/decisions/290198v.htm>; see also OLG Koblenz 14 S 358/94, Jul. 7, 1995, *supra* note 339 (chemical compounds).

<sup>378</sup> See, e.g., *AG Augsburg n. 11 C 4004/95*, Jan. 29, 1996 (F.R.G.), available at <http://www.jura.uni-freiburg.de/ipr1/cisg/urteile/text/172.htm> (shoes).

<sup>379</sup> OG, 11 95 123/357, Jan. 8, 1997, *supra* note 93.

<sup>380</sup> *Id.*

<sup>381</sup> See *Nurka Furs/Nertsenfokkerij De Ruiter*, HOF Hertogenbosch C9700046/HE, Dec. 15, 1997 (Neth.), available at <http://cisgw3.law.pace.edu/cisg/wais/db/cases/971215nl.html>.

<sup>382</sup> *Id.*

<sup>383</sup> See OLG Saarbrücken n. 1 U 69/92, Jan. 13, 1993, *supra* note 299.

<sup>384</sup> *Id.*

to examine the goods despite their transshipment to a third party end user.<sup>385</sup>

In the event of transshipment, national courts have not permitted prolonged delays in giving of notice. In a case involving the sale of adhesive foil covers by a German seller to an Austrian buyer, the court held that notice of defects provided twenty-four days after delivery of the goods to the ultimate end user was untimely.<sup>386</sup> The court held that notice within ten or eleven days after delivery was reasonable under the circumstances.<sup>387</sup> A key fact was that the defect was apparent and could easily have been discovered by the buyer and its end user upon delivery.<sup>388</sup>

A number of decisions have upheld the enforceability of contractual provisions altering the notice requirements of Article 39.<sup>389</sup> However, in order for such an alteration to be effective, particularized consent<sup>390</sup> must be given by the disadvantaged party. The party must have been aware that the CISG is applicable to the specific contract in question and demonstrate an affirmative intent to exclude its application.<sup>391</sup> Furthermore, the period of time selected by the parties for the provision of notice must be reasonable.<sup>392</sup> The opinions of national courts to date have found contractually designated periods of time ranging from eight to fourteen days to be reasonable and thus enforceable.<sup>393</sup> Courts in Germany and the Netherlands have also accepted notification periods consistent with accepted usages within the trade.<sup>394</sup>

The requirement of timely notice also raises the issue of the buyer's obligation with respect to the discovery of defects. The court opinions focus on the ease of discovery of the alleged nonconformity. In addition,

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<sup>385</sup> OG, 11 95 123/357, Jan. 8, 1997, *supra* note 93.

<sup>386</sup> See OLG Karlsruhe 1 U 280/96, June 25, 1997, *supra* note 346.

<sup>387</sup> *Id.*

<sup>388</sup> *Id.* Similarly, in a case involving the purchase of plastic granulate by an Austrian buyer from a German seller, the court held that the Danish end user's notice of defects one month after delivery was untimely. OLG München 7 U 3758/94, Feb. 8, 1995, *supra* note 347. This conclusion was further bolstered by the Austrian buyer's additional two month delay in communicating this notice of nonconformity to the German seller. *Id.*

<sup>389</sup> See, e.g., LG Hannover 22 O 107/93, Dec. 1, 1993, *supra* note 362.

<sup>390</sup> See *infra* Part VII.A.2.

<sup>391</sup> See, e.g., OG, 11 95 123/357, Jan. 8, 1997, *supra* note 93.

<sup>392</sup> See, e.g., OLG München 7 U 4427/97, Mar. 11, 1998, *supra* note 301.

<sup>393</sup> *Id.* (fourteen days after delivery for the provision of notice of nonconformity in the sale of cashmere textiles); see also OLG Saarbrücken 1 U 69/92, Jan. 13, 1993, *supra* note 299 (eight days after delivery for the provision of notice of nonconformity in the sale of doors); LG Hannover, 22 O 107/93, Dec. 1, 1993, *supra* note 362 (ten days from the date of delivery for the provision of notice of nonconformity in the sale of shoes).

<sup>394</sup> See, e.g., OLG Saarbrücken 1 U 69/92, Jan. 13, 1993, *supra* note 299, (trade usages in the door manufacturing industry); HA ZA 95-640, Mar. 5, 1997, *supra* note 344 (trade usages in the fish industry). However, usages are superseded by the specific notification requirements contained in the contract.

court opinions concluding that the buyer's notice was untimely have concentrated on whether the defect was apparent from examination of the goods at the time of their delivery, from the time of subsequent processing, or at the time they were incorporated as a component in an end product. In *Handelsagentur v. DAT-SCHAUB A/S*,<sup>395</sup> a Danish court refused to excuse an untimely notice with respect to nonconformities that were easily detectable upon the completion of a reasonable inspection at the time of delivery. German and Dutch courts have declined to give effect to notices when the defects were readily apparent upon subsequent processing that was to occur as soon as practicable after delivery.<sup>396</sup> The buyer's notice obligations are also triggered by defects that become apparent when the goods are incorporated into an end product.<sup>397</sup>

By contrast, untimely notice of defects will be excused in the event the nonconformity was one of which the seller knew and actively concealed it from the buyer. Thus, a German court excused an untimely notice from a German buyer with respect to wine that was intentionally adulterated with water by an Italian seller.<sup>398</sup> Similarly, a Dutch court excused untimely notice from a Dutch buyer with respect to infested cheese delivered by an Italian seller.<sup>399</sup> National courts have also excused untimely notice in the event the defect could only have been discovered through the performance of inspections that are not customary in the trade.<sup>400</sup> At least one court has also excused untimely notice when the nonconformity is such that its existence could only have been detected by a highly trained expert, such as

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<sup>395</sup> See Maritime Comm. Ct. of Copenhagen, H-0126-98, Jan. 31, 2002, *supra* note 342 (nonconformity of species of fish sold by Danish seller to Russian buyer easily detectable from examination of the label and packaging); see also OLG München 7 U 4427/97, Mar. 11, 1998, *supra* note 301 (spot checks of cashmere textiles by the German buyer at the time of their delivery by the Italian seller would have disclosed defects).

<sup>396</sup> See OLG Koblenz 2 U 580/96, Sept. 11, 1998 (F.R.G.) (nonconformity of chemicals purchased by Moroccan buyer from German seller were readily apparent when chemicals were utilized to manufacture plastic tubes one month after delivery) *available at* <http://cisgw3.law.pace.edu/cisg/wais/db/cases2/980911g1.html>; see also OLG Karlsruhe 1 U 280/96, June 25, 1997, *supra* note 346 (nonconformity of adhesive foil covers purchased by Austrian buyer from German seller was readily discoverable at the time of their subsequent processing); HA ZA 95-640, Mar. 5, 1997, *supra* note 344 (nonconformity of fish purchased by Dutch buyer from French seller was readily apparent upon processing, which should have occurred as soon as practicable after delivery given the perishable nature of the product).

<sup>397</sup> See, e.g., OLG Köln 18 U 121/97, Aug. 21, 1997 (F.R.G.) (defect in chemicals utilized to produce glass were readily discoverable upon their incorporation into the manufacturing process), *available at* <http://cisgw3.law.pace.edu/cisg/wais/db/cases2/970821g1.html>.

<sup>398</sup> See LG Trier 7 HO 78/95, Oct. 12, 1995, *supra* note 358.

<sup>399</sup> See Rb. Roermond, Dec. 19, 1991, *supra* note 345.

<sup>400</sup> See, e.g., LG Trier 7 HO 78/95, Oct. 12, 1995, *supra* note 358 (holding that inspections to determine if wine had been adulterated with water were not customarily undertaken in the wine industry).

a health professional.<sup>401</sup> In any event, the burden of presenting evidence with respect to the seller's misconduct or knowledge or the latency of the nonconformity rests with the buyer.<sup>402</sup>

The courts have dealt with Article 39's requirement of specificity of notice. The specificity of notice is important in informing the seller of what actions are necessary to remedy the nonconformity and provides the seller with a basis for conducting his own examination of the goods.<sup>403</sup> As a result, a notice merely stating that the goods are nonconforming is insufficient to excuse the buyer's contractual performance.<sup>404</sup> If the nonconformity is capable of precise description, such description must be provided to the seller on a timely basis.<sup>405</sup> Furthermore, the notice must identify defects and demand remediation rather than constitute a request for assistance in addressing specific problems.<sup>406</sup>

There are numerous cases in which buyers have lost their rights to reject goods because their notices lacked specificity. A German court refused to give effect to a notice that informed the seller of flowers that its goods were of "bad quality" and "poor appearance."<sup>407</sup> Similarly, German and Italian courts have deemed notices stating that the goods are "defective" or "present problems" as lacking sufficient specificity to be effective pursuant to Article 39.<sup>408</sup> A Swiss court refused to give effect to a

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<sup>401</sup> See OLG Thüringener 8 U 1667/97, May 26, 1998 (F.R.G.) (excusing untimely notice by a German buyer of live fish from a Czech seller on the basis that only a health professional could have determined that the fish suffered from a viral infection at the time of their delivery), available at <http://cisgw3.law.pace.edu/cisg/wais/db/cases2/980526g1.html>.

<sup>402</sup> *Id.* See also, Trib. di Vigevano, July 12, 2000, n. 405, *supra* note 340; HG Zürich, HG 930634, Nov. 11, 1998 (Switz.), available at <http://cisgw3.law.pace.edu/cisg/wais/db/cases2/981130s1.html#cabc>.

<sup>403</sup> See LG Erfurt 3 HKO 43/98, Jul. 29, 1998 (F.R.G.), available at <http://www.cisg.law.pace.edu/cisg/wais/db/cases2/980729g1.html>

<sup>404</sup> See LG Hannover 22 O 107/93, Dec. 1, 1993, *supra* note 362.

<sup>405</sup> *Id.* (shoes); See also, LG Regensberg 6 O 107/98, Sept 24, 1998 (F.R.G.) (textiles), available at <http://cisgw3.law.pace.edu/cisg/wais/db/cases2/980924g1.html#ctoc>; LG Erfurt 3 HKO 43/98, Jul. 29, 1998, *supra* note 403 (soles); Bronneberg/Ceramica Belvedere, HR, Feb. 20, 1998, NJ 480 (Neth.) (floor tiles), available at <http://cisgw3.law.pace.edu/cisg/wais/db/cases2/980220n1.html>; HG Zürich, HG 930634, Nov. 11, 1998, *supra* note 340 (lambskin jackets).

<sup>406</sup> See LG München 8 HKO 24667/93, Feb. 8, 1995 (F.R.G.) (sale of computer programs), available at <http://www.cisg.law.pace.edu/cisg/wais/db/cases2/950208g4.html>.

<sup>407</sup> OLG Saarbrücken 1 U 703/97-143, Jun. 3, 1998, *supra* note 345.

<sup>408</sup> LG Erfurt, 3 HKO 43/98, Jul. 29, 1998, *supra* note 403 (soles). See also Trib. di Vigevano, July 12, 2000, n. 405, *supra* note 340 (buyer did not retain samples of vulcanized rubber for trial and thus were unable to prove that seller sold defective rubber for shoes). Another German court reached the same conclusion with respect to a notice given by a German purchaser of leather goods from an Italian seller that the merchandise was "badly stamped" and incapable of sale to customers. OLG München 7 U 2070, Jul. 9, 1997 (F.R.G.), available at <http://cisgw3.law.pace.edu/cisg/wais/db/cases2/970709g1.html#ctoc>.

notice an Italian seller that its furniture had “wrong parts” and was “full of breakages.”<sup>409</sup>

German courts have devised rules with respect to specificity of the required notice in the event the subject matter of the contract consists of an integrated system or multiple components or deliveries. With respect to an integrated system containing defects, the notice of nonconformity must specifically identify the defective components.<sup>410</sup> Reference to the system in its entirety is insufficient to satisfy the requirements of Article 39.<sup>411</sup> Rather, the notice must precisely identify the defective components by serial number and date of delivery.<sup>412</sup> Similar rules are applicable to sales consisting of multiple items or deliveries. In such circumstances, the notice must identify those items or deliveries that are defective.<sup>413</sup> A notice deeming the entire performance to be defective not specifically identifying the items or specific deliveries do not meet the strict requirements of Article 39.<sup>414</sup>

### 3. Reasonable Excuse: Article 44

National courts interpreting Article 44 have focused on one primary issue, specifically, the determination of reasonable excuses for failure to give notice of nonconformity of goods as required by Article 39. This provision has been subject to criticism by academics for its lack of clarity and resultant liberality in excusing tardy or absent notices pursuant to Article 39.<sup>415</sup> Article 44 has also been criticized for its lack of clarity as to what constitutes a “reasonable excuse.”<sup>416</sup> As a result, at least one commentator has recommended that sellers protect themselves from the uncertainty arising from Article 44 by varying the CISG’s notice provisions by agreement, including the elimination of excuses for failure to provide

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<sup>409</sup> Kantonsgericht [District Court] [KG] Nidwalden, 15/96 Z, Dec. 3, 1997 (Switz.), available at <http://cisgw3.law.pace.edu/cisg/wais/db/cases2/971203s1.html>.

<sup>410</sup> See BGH VIII ZR 306/95, Dec. 4, 1996 (F.R.G.), available at <http://cisgw3.law.pace.edu/cisg/wais/db/cases2/961204g1.html> (sale of a printing system).

<sup>411</sup> *Id.*

<sup>412</sup> See LG Marburg 2 O 246/95, Dec. 12, 1995 (F.R.G.), available at <http://cisgw3.law.pace.edu/cisg/wais/db/cases2/951212g1.html> (sale of agricultural machinery).

<sup>413</sup> LG München 10 HKO 23750/94, Mar. 20, 1995 (F.R.G.) available at <http://cisgw3.law.pace.edu/cisg/wais/db/cases2/950320g1.html> (sale of frozen bacon).

<sup>414</sup> LG Marburg 2 O 246/95, Dec. 12, 1995 *supra* note 412 (sale of agricultural machinery). Furthermore, as previously noted with respect to integrated systems, the serial numbers and dates of delivery of such components must be included in the notice in order to spare the seller the inconvenience of researching the sales documentation with respect to all of the components or deliveries.

<sup>415</sup> See SCHLECHTRIEM, *supra* note 107, at 70.

<sup>416</sup> See Garro, *Reconciliation*, *supra* note 114.



notice.<sup>417</sup>

The sparse case law interpreting the reasonable excuse provision of Article 44 is inconsistent with these criticisms. Rather, the national courts that have addressed this issue have proven most reluctant to excuse noncompliance with Article 39. These opinions have cited numerous reasons for refusing to conclude that a buyer's failure or delay in providing notice was excusable. A Dutch court noted that a Greek buyer could not use Article 44 as an excuse for a three-week delay in providing notice to a Dutch furrier since the defects were easily detectable through a sampling of the goods.<sup>418</sup> Reasonable excuse also does not exist if the buyer delays in communicating consumer complaints.<sup>419</sup> A German court rationalized that a restrictive use of excuse is necessary due to the fast paced nature of business. There is often need for prompt action that is dependent upon timely notice.<sup>420</sup> However, this same court found that the granting of an excuse for untimely notice is less justified when the purchaser is an experienced and sophisticated participant in the international marketplace.<sup>421</sup> The court noted that it would be easier to accept excuses from single traders and artisans.<sup>422</sup> At this time, the nature of the differences necessary to justify different treatment and the specific excuses that would be acceptable to a national court remain indeterminate.

## B. Payment of the Price and the Taking of Delivery

The buyer is obligated to pay the contract price for the goods and take delivery in the event they are conforming or have otherwise been accepted without objection. These obligations are set forth in Articles 54 through 60 of the CISG. Initially, the buyer's obligation to pay the contract price includes compliance with all formalities as may be required by the contract or pursuant to applicable laws and regulations to enable payment to be made.<sup>423</sup> Where the sales contract has been concluded, but the parties have failed to expressly or implicitly fix or make provision for price, the parties are considered "to have impliedly made reference to the price generally

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<sup>417</sup> See E. Allan Farnsworth, *The Vienna Convention: An International Law for the Sale of Goods*, in PRIVATE INVESTORS ABROAD—PROBLEMS AND SOLUTIONS IN INTERNATIONAL BUSINESS 121, 127, 134 (Martha L. Landwehr ed. 1983).

<sup>418</sup> See Nurka Furs/Nertsenfokkerij De Ruiter, *supra* note 381.

<sup>419</sup> See BG Unterrheintal, EV. 1998.2 (IKZ. 1998.7), Sept. 16, 1998 (Switz.), available at <http://cisgw3.law.pace.edu/cisg/wais/db/cases2/980916s1.html> (nine month delay in communicating customer complaints about furniture sold by a German seller to a Swiss buyer).

<sup>420</sup> See OLG München 7 U 3758/94, Feb. 8, 1995, *supra* note 346 (sale and purchase of plastic granulate).

<sup>421</sup> *Id.*

<sup>422</sup> *Id.*

<sup>423</sup> CISG, *supra* note 4, at art. 54.

charged at the time of the conclusion of the contract for such goods sold under comparable circumstances in the trade concerned."<sup>424</sup> In addition, if the price is fixed according to the weight of the goods, such reference will be interpreted as net weight in the absence of language to the contrary.<sup>425</sup>

Article 57 governs the place of the buyer's obligation to remit payment. In the event the contract does not specify the place of payment, the buyer must make payment at the seller's place of business.<sup>426</sup> However, if the payment is to be made against the handing over of goods or documents, the buyer is to make payment at the place of the handing over.<sup>427</sup> The seller is responsible for increased expenses incurred by the buyer in satisfying its payment obligation caused by the seller's change in its place of business subsequent to the conclusion of the sales contract.<sup>428</sup>

Article 58 governs the circumstance where the sales contract fails to establish a specific time for payment. In the event of the absence of a specific time, the buyer must remit payment when the seller places the goods or documents controlling their disposition at the buyer's disposal.<sup>429</sup> The seller is permitted to condition the handing over of the goods or controlling documents upon such payment.<sup>430</sup> By contrast, if the contract provides for carriage of the goods, the seller may dispatch the goods on terms whereby the goods or controlling documents thereto, are not to be handed over to the buyer without payment of the price.<sup>431</sup> In any event, the buyer is under no obligation to pay the contract price until it has the opportunity to examine the goods.<sup>432</sup> However, the buyer must remit the contract price in the event the procedures for delivery or payment agreed upon by the parties are inconsistent with the opportunity for inspection.<sup>433</sup>

Regardless of any uncertainty with respect to the price or place and time of payment, the buyer must pay the contract price without the necessity of a request by the seller or its compliance with any formality.<sup>434</sup> The buyer must also take delivery of the goods, which consists of the performance of all acts reasonably necessary to enable the seller to make delivery and the buyer to take possession of the goods.<sup>435</sup>

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<sup>424</sup> *Id.* at art. 55.

<sup>425</sup> *Id.* at art. 56.

<sup>426</sup> *Id.* at art. 57(1)(a).

<sup>427</sup> *Id.* at art. 57(1)(b).

<sup>428</sup> *Id.* at art. 57(2).

<sup>429</sup> *Id.* at art. 58(1).

<sup>430</sup> *Id.*

<sup>431</sup> *Id.* at art. 58(2).

<sup>432</sup> *Id.* at art. 58(3).

<sup>433</sup> *Id.*

<sup>434</sup> *Id.* at art. 59.

<sup>435</sup> *Id.* at arts. 60(a)-(b).

### *1. Formalities of Payment: Article 54*

National courts have focused on one issue arising from Article 54. This issue is the enumeration of formalities with which the buyer must comply in order to enable payment of the price. The formalities identified by the national courts consist of two requirements. The courts of Austria and Switzerland, and the Court of Arbitration of the International Chamber of Commerce, have required buyers to open letters of credit where required by the terms of the sales contract.<sup>436</sup> Compliance with Article 54 also requires the buyer, where necessary, to comply with currency exchange regulations, including authorization to transfer currency.<sup>437</sup> However, despite these opinions, there is no requirement that the buyer needs to succeed in its efforts to comply with contractual formalities. Failure to satisfy required formalities does not constitute a breach. The buyer must make a good faith effort to satisfy the requirements of the contract and cannot use its own lack of action as an excuse for failure.<sup>438</sup> The seller cannot hinder the buyer's attempts to comply with these formalities.<sup>439</sup>

### *2. Place of Payment: Article 57*

National courts interpreting Article 57 have focused their attention on two issues. These issues are whether Article 57 is a grant of personal jurisdiction to national courts and the enforceability of forum selection agreements to avoid the exercise of such jurisdiction. The issue of whether Article 57 grants jurisdiction to national courts with respect to disputes concerning payment of the purchase price independent of national laws remains unresolved. There is no shortage of judicial opinions confirming jurisdiction where the seller's place of business is located within the court's national boundaries.<sup>440</sup> However, none of these opinions expressly

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<sup>436</sup> See OGH, 10 Ob 518/95, Feb. 6, 1996, *supra* note 134; BG der Saane, T 171/95, Feb. 20, 1997 (Switz.), available at <http://cisgw3.law.pace.edu/cisg/wais/db/cases2/970220s1.html>.

<sup>437</sup> See ICC Arbitration Case No. 7197/1992, *supra* note 436. Furthermore, Article 54 does not require the seller to demand compliance with contractual formalities from the buyer. See Arbitration Court of the Chamber of Commerce & Indus. of Budapest, Vb 94124, Nov. 17, 1995 (Hung.), available at <http://www.cisg.law.pace.edu/cisg/wais/db/cases2/951117h1.html>. See also, Trib. of Int'l Commercial Arbitration at the Chamber of Commerce & Indus., 123/192, Oct. 17, 1995, available at <http://www.cisg.law.pace.edu/cisg/wais/db/cases2/951017r1.html>.

<sup>438</sup> See, e.g., Trib. of Int'l Commercial Arbitration at the Chamber of Commerce & Indus., *supra* note 437 (Russian buyer could not excuse failure to obtain letter of credit because of an absence of funds).

<sup>439</sup> See OGH, 10 Ob 518/95, Feb 6, 1996, *supra* note 134 (failure of German seller to name the port of origin of the goods causing the Austrian buyer to be unable to obtain a letter of credit).

<sup>440</sup> See, e.g., SA Mo. v. SA Ma., Trib. de Commerce, Charleroi, A 2000/01451, Oct. 20,

conclude that Article 57 constitutes a grant of jurisdiction separate and apart from national laws. As such, the better interpretation is that Article 57 confirms the conclusion reached in domestic rules of procedure, jurisdiction and venue, specifically, that the place of business or habitual residence of the seller will serve as the forum for all disputes with respect to payment of the purchase price absent a contrary agreement of the parties. The issue may ultimately prove irrelevant to the extent that the result reached through the application of Article 57 is the same as if it constituted a separate grant of jurisdiction by requiring disputes arising from the payment of the purchase price to be determined in the national courts of the seller's place of business.

Regardless of the ultimate resolution of the above issue, parties to sales transactions subject to the CISG are well-advised to utilize choice of forum provisions. Unlike many other provisions within the CISG, there is broad consensus among national courts with respect to the enforceability of forum selection agreements and their impact on the operation of Article 57. These opinions have uniformly held that courts must give effect to the provisions of Article 57 with respect to the location of dispute resolution in the absence of a contrary selection by the parties in the sales contract.<sup>441</sup>

In order to supplant the operation of Article 57, the forum selection agreement must comply with stringent requirements established by national courts. The forum selection provision should be express.<sup>442</sup> Past practices between the parties in prior transactions are not sufficient to overcome this requirement.<sup>443</sup> In addition, the mention of bank accounts and other commercial relationships in states other than where the delivery of the goods occurs is insufficient to constitute a forum selection agreement in the

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2000 (Belg.), available at <http://www.law.kuleuven.ac.be/int/tradelaw/WK/2000-10-20.htm>; Silver Int'l, *supra* note 344.

<sup>441</sup> See, e.g., SA Mo. v. SA Ma. A 2000/01451, Oct. 20, 2000, *supra* note 440; BJR Trading v. Ekasa, Østre Landsret København (ØLK), B-1145-00, Dec. 4, 2000 (Den.), available at <http://www.law.kuleuven.ac.be/ipr/eng/cases/2000-10-20.htm>; Sodime-La Rosa SARL v. Softlife Design Ltd., CA Paris, 1e ch., Oct. 15, 1997 (Fr.), available at <http://witz.jura.uni-sb.de/CISG/decisions/151097v.htm>; Dänisches Bettenlager & Co. v. Forenede Factors, Østre Landsret [Eastern Appellate Court] København [ØLK], B-3112-95, Jan. 22, 1996 (Den.), available at <http://www.cisg.law.pace.edu/cisg/wais/db/cases2/960122d1.html>.

<sup>442</sup> See Silver Int'l v. Pochon Tissage, S.A., Rechtbank van Koophandel, Kortrijk, A.R. 651/97, Jun. 27, 1997, *supra* note 344; See also, OLG München 7 U 2246/97, July 9, 1997 (F.R.G.), available at <http://www.cisg.law.pace.edu/cisg/wais/db/cases2/970709g2.html>.

<sup>443</sup> See Corte di Cassazione, Sez. Un [Supreme Court], Aug. 7, 1998, n.7759 (It.), available at <http://www.cisg.law.pace.edu/cisg/wais/db/cases2/980807i3.html>. See also, HG Zürich, 980280.1, Apr. 8, 1999 (Switz.), available at <http://www.cisg.law.pace.edu/cisg/wais/db/cases2/990408s1.html>; Zivilgericht Kanton Basel-Stadt, P4 1996/00448, Dec. 3, 1997 (Switz.), available at <http://www.cisg.law.pace.edu/cisg/wais/db/cases2/971203s2.html>.

absence of an express intent by the parties.<sup>444</sup> Finally, usage of the trade in question also fails to constitute a forum selection agreement in most circumstances.<sup>445</sup> Such usages would only serve to select the forum if it was widely known in the trade that certain actions undertaken by the parties to the transaction had the indelible effect of selecting an exclusive forum for the resolution of disputes between the parties other than as established by Article 57.<sup>446</sup>

### 3. *Time of Payment: Article 58*

Courts interpreting Article 58 have focused the identity of the documents controlling the disposition of the goods. Academics commenting on Article 58 have noted the uncertainty associated with specific identification of these documents. One commentator has concluded that this reference is extremely broad and is not necessarily limited to negotiable documents of title.<sup>447</sup> Rather, other documents, such as insurance policies and certificates of origin, may also relate to the goods and affect the buyer's ability to accept their delivery.<sup>448</sup> Under such circumstances, the delivery of such documents must be part of the seller's performance in order to trigger the buyer's payment obligation.<sup>449</sup> By contrast, the buyer would be required to pay the purchase price upon the seller's failure to deliver other documents of less importance to the consummation of the transaction.<sup>450</sup> Under such circumstances, the buyer may still avail itself of legal or equitable remedies, such as specific performance, in the appropriate national court.<sup>451</sup>

It is clear from the opinions to date that, in the absence of specific provisions within the contract establishing the time for the buyer's payment of the price, payment is due upon delivery.<sup>452</sup> In addition, as a general rule, documents controlling the disposition of the goods are to be procured by the party responsible for their exportation.<sup>453</sup> It is important to note that this

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<sup>444</sup> HG Zürich, 980280.1, Apr. 8, 1999, *supra* note 443. See also Zivilgericht Kanton Basel-Stadt, P4 1996/00448, Dec. 3, 1997, *supra* note 443.

<sup>445</sup> See Zivilgericht Kanton Basel-Stadt, P4 1996/00448, Dec. 3, 1997, *supra* note 443.

<sup>446</sup> See *id.*

<sup>447</sup> See SCHLECHTRIEM, UNIFORM SALES LAW, *supra* note 107, at 81 n.327.

<sup>448</sup> *Id.*

<sup>449</sup> *Id.*

<sup>450</sup> *Id.*

<sup>451</sup> *Id.*

<sup>452</sup> See, e.g., KG St. Gallen, Gerichtskommission Oberrheintal, OKZ 93-1, Jun. 30, 1995 (Switz.), available at <http://www.cisg.law.pace.edu/cisg/wais/db/cases2/950630s1.html> (holding that the buyer was obligated to pay for gates upon their delivery and installation upon the buyer's premises).

<sup>453</sup> See, e.g., KG St. Gallen, 3 ZK 96-145, Aug. 12, 1997 (Switz.), available at <http://www.cisg.law.pace.edu/cisg/wais/db/cases2/970812s1.html> (rejecting the claim of a Swiss

does not necessarily refer to the seller in every case.<sup>454</sup> Rather, in the one case addressing this issue, the court held that the seller was responsible for procuring customs documents only if so provided by the sales contract.<sup>455</sup> The absence of a developed body of case law surrounding this issue perhaps suggests that the uncertainty is more of an academic interest rather than one presenting practical difficulties for businesses operating in the global marketplace.

### C. The Consequences of Breach of Contract

The CISG provides for numerous procedures and remedies in the event of late performance by the seller or default by the buyer. These procedures and remedies are set forth in Articles 47, 48 and 61 through 65. The initial procedure established by these articles relates to late performance by the seller. In such circumstances, the buyer may set an additional period of time of "reasonable length" for the seller's performance.<sup>456</sup> The buyer may not resort to any remedy for breach of contract during this period of time unless the buyer receives notice from the seller that it will not perform the contract regardless of any such extension.<sup>457</sup> However, the buyer may claim damages resulting from the seller's delay in performance.<sup>458</sup> In addition, the seller may, after the date of delivery, remedy, at its own expense, its failure to perform.<sup>459</sup> Despite this provision, the seller must be able to remedy its failure without "unreasonable delay and without causing the buyer unreasonable inconvenience or uncertainty of reimbursement of expenses advanced by it."<sup>460</sup> The seller may request the buyer to make known whether it will accept such performance, and the buyer is required to respond to this request within a reasonable time.<sup>461</sup> Such request is in fact assumed to be contained in any notice by the seller that it will perform within a specified time.<sup>462</sup> If the buyer does not respond, the seller may perform the contract within the time set forth in the request.<sup>463</sup> However, the request is not effective unless actually received by the buyer.<sup>464</sup>

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buyer that it was not obligated to pay the purchase price for clothing delivered by a German seller due to the seller's failure to obtain necessary documents to allow the goods to clear Swiss customs).

<sup>454</sup> *Id.*

<sup>455</sup> *Id.*

<sup>456</sup> CISG, *supra* note 4, at art. 47(1).

<sup>457</sup> *Id.* at art. 47(2).

<sup>458</sup> *Id.*

<sup>459</sup> *Id.* at art. 48(1).

<sup>460</sup> *Id.*

<sup>461</sup> *Id.* at art. 48(2).

<sup>462</sup> *Id.* at art. 48(3).

<sup>463</sup> *Id.* at art. 48(2).

<sup>464</sup> *Id.* at art. 48(4).

Articles 61 through 65 provide remedies for breach of contract by the buyer. As a general proposition, in the event of default by the buyer, the seller may exercise its rights pursuant to Articles 62 through 65 and Articles 74 through 77.<sup>465</sup> The exercise of these remedies does not deprive the seller of any rights to claim damages pursuant to other provisions of the CISG.<sup>466</sup> Furthermore, the buyer is not entitled to receive additional time to perform by a court or arbitral tribunal in the event the seller seeks relief for breach of contract.<sup>467</sup> However, the seller may not seek a remedy inconsistent with any attempt to require the buyer to pay the price, take delivery of the goods or perform other contractual duties.<sup>468</sup>

The seller has numerous options in the event of the failure of the buyer to perform its contractual obligations. Article 63 provides that the seller may fix an “additional period of time of reasonable length” for the buyer’s performance.<sup>469</sup> The seller may not resort to any remedy for breach of contract during any extension granted pursuant to Article 63.<sup>470</sup> The seller is however entitled to claim damages incurred as a result of the buyer’s delay in performance.<sup>471</sup>

The seller also retains the option of declaring the contract avoided. This declaration is limited to two specific circumstances. Initially, the seller may declare the contract avoided in the event that the buyer’s failure to perform its obligations amounts to a fundamental breach of contract.<sup>472</sup> Second, the seller may declare the contract avoided if the buyer fails to perform the contract within the additional period of time granted by the seller pursuant to Article 63 or states its intention not perform within this period of time.<sup>473</sup> This right to declare the contract avoided is further limited in those circumstances where the buyer has paid the price. In such circumstances, the seller may not declare the contract avoided unless it does so “in respect of late performance by the buyer, before the seller . . . become[s] aware that performance has been rendered.”<sup>474</sup> The seller may also declare the contract avoided in the event of breaches other than late performance “within a reasonable time after the seller knew or ought to

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<sup>465</sup> *Id.* at arts. 61(1)(a-b).

<sup>466</sup> *Id.* at art. 61(2).

<sup>467</sup> *Id.* at art. 61(3).

<sup>468</sup> *Id.* at art. 62. Furthermore, the seller may require the buyer to perform its contractual obligations, including payment of the price and taking of delivery, unless the seller has resorted to remedies inconsistent with this requirement.

<sup>469</sup> *Id.* at art. 63(1).

<sup>470</sup> *Id.* at art. 63(2).

<sup>471</sup> *Id.*

<sup>472</sup> *Id.* at art. 64(1)(a).

<sup>473</sup> *Id.* at art. 64(1)(b).

<sup>474</sup> *Id.* at art. 64(2)(a).

have known of the breach.”<sup>475</sup> The right to avoid the contract also exists when the buyer fails to perform its obligations within any additional period of time fixed by the seller or advises the seller that it will not perform its obligations within such additional time.<sup>476</sup>

Finally, Article 65 governs in the event that the buyer’s breach consists of its failure to advise the seller of the form, measurement or other features of the goods that are the subject matter of the contract. In the event the buyer fails to provide the seller with such specifications within the time provided by the contract or within a reasonable time after receipt of a request from the seller, the seller may make the specification itself in accordance with the buyer’s requirements known to the seller.<sup>477</sup> The seller is required to inform the buyer of the details of the selected specifications and set a reasonable time within which the buyer must provide different specifications.<sup>478</sup> The seller is entitled to utilize its selected specifications if the buyer fails to communicate different specifications within the set by the seller.<sup>479</sup>

### 1. *Nachfrist* Notice: Article 47

Article 47 gives the buyer the right to grant additional time to the seller for performance. The failure of the seller to perform within this additional period of time permits the buyer to avoid the contract. This request for additional time, known as *nachfrist* notice in German law, is commonly found in the civil law legal systems.<sup>480</sup> The underlying premise behind the concept is that delayed performance does not necessarily translate into a material breach. National courts called upon to interpret the CISG’s provisions with respect to breach of contract have concentrated on two issues raised by Article 47. The first issue is what constitutes a reasonable period of time granted by the buyer in order for the seller to complete performance? The time extension must be reasonable in length in order to prevent buyers from avoiding contracts on the basis of inconsequential delays in performance.

The three national courts that have addressed this issue have taken somewhat different approaches. One German court focused upon the need for specificity in setting the time extension.<sup>481</sup> A buyer granted an eleven

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<sup>475</sup> *Id.* at art. 64(2)(b)(i).

<sup>476</sup> *Id.* at art. 64(2)(b)(ii).

<sup>477</sup> *Id.* at art. 65(1).

<sup>478</sup> *Id.* at art. 65(2).

<sup>479</sup> *Id.*

<sup>480</sup> See generally, LARRY A. DIMATTEO, THE LAW OF INTERNATIONAL BUSINESS TRANSACTIONS 229-31 (2003).

<sup>481</sup> See OLG Celle 20 U 76/94, May 24, 1995 (F.R.G.), available at <http://www.cisg.law.pace.edu/cisg/wais/db/cases2/950524g1.html>.



day extension to a seller to deliver all components of the printing machinery that was the subject matter of the contract. In upholding the buyer's right to declare the contract to be in breach, the court held that the specific period of additional time established by the buyer for performance was not unreasonable. Thus, the buyer was entitled to avoid performance of the contract. Other courts have permitted buyers to avoid sales contracts on the basis of notices that were not specific with respect to the additional period of time granted to the sellers for performance. A French court for example, permitted a buyer to avoid performance of a sales contract for high technology machinery on the basis that the seller advised the buyer of its intent to repair the machinery subsequent to its delivery.<sup>482</sup> The failure of the seller to effect adequate repairs pursuant to its promise justified the buyer's attempt to avoid the contract even in the absence of a specific time granted by the buyer for such repairs.<sup>483</sup> Under this version of Article 47, the time extension need not be precise but rather only capable of judicial interpretation as reasonable.<sup>484</sup>

The second issue addressed by the courts is the effect of the buyer's failure to grant the seller additional time for performance under Articles 47. Decisions on this issue have varied depending on whether the buyer ultimately seeks equitable or legal relief. The buyer may be barred from declaring contract avoidance by its refusal to grant the seller additional time<sup>485</sup> However, the buyer has been allowed to declare the contract to be avoided in two circumstances. First, the buyer is free to declare the contract avoided if the seller notifies the buyer that it does not intend to perform the contract regardless of whether the buyer grants an additional period of time for performance.<sup>486</sup> Second, the buyer may declare the contract to be avoided in the absence of a grant of additional time if the seller promises to

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<sup>482</sup> See *Giustina Int'l Sp.A. v. Perfect Circle Europe SARL*, CA Versailles, 1e ch. Jan. 29, 1998, *supra* note 377.

<sup>483</sup> *Id.* See also, LG Ellwangen 1 KfH O 32/95, Aug. 21, 1995 (F.R.G.), available at <http://www.cisg.law.pace.edu/cisg/wais/db/cases2/950821g2.html> (German court determined that the period of time established by a German buyer for delivery of conforming goods by a Spanish seller of paprika was reasonable on the basis that the buyer only declared the contract to be avoided two weeks after the expiration of the original additional period of time to perform).

<sup>484</sup> Furthermore, even if the initial period of time granted by the buyer is not reasonable, it may be rendered reasonable by delays in the buyer's declaration of avoidance. However, buyers would be wise to note that general demands to the seller to perform "promptly" or "as soon as possible" may be insufficient to meet the requirements of Article 47.

<sup>485</sup> See, e.g., LG Düsseldorf 2 O 506/94, Oct. 11, 1995 (F.R.G.), available at <http://www.cisg.law.pace.edu/cisg/wais/db/cases2/951011g1.html>

<sup>486</sup> See *OLG Hamburg 1 U 143/95*, Jul. 4, 1997 (F.R.G.), available at <http://www.cisg.law.pace.edu/cisg/wais/db/cases2/970704g1.html>. However, the seller's statement that it could not presently perform the contract does not constitute a definitive refusal to perform.

perform the contract but only upon terms inconsistent with the existing agreement between the parties or upon a renegotiation of the contract.<sup>487</sup>

The buyer's failure or refusal to grant the seller additional time does not prevent him from obtaining legal as opposed to equitable remedies.<sup>488</sup> Buyers are free to seek any number of damage awards against breaching sellers. For example, an injured buyer may seek compensatory damages resulting from the seller's breach of its obligations.<sup>489</sup> Buyers are also free to recover additional costs associated with obtaining substitute performance, such as the difference between the contract price and the price ultimately paid by the seller to obtain substitute goods.<sup>490</sup> In the absence of a substitute purchase, the buyer's recovery is calculated as the difference between the contract price and the current price of the goods at the time of the seller's breach by the buyer.<sup>491</sup> Finally, the buyer may seek consequential damages consisting of lost profits assuming that proper proof thereof is presented to the court.<sup>492</sup>

## 2. Late Performance: Article 48

Courts applying Article 48 have focused on two issues. The initial issue addressed by national courts is what constitutes an unreasonable delay in performance as to constitute a fundamental breach of contract. Article 48 recognizes the buyer's right to use or resell tendered goods or to seek substitute performance. However, the buyer's rights are to be balanced against the seller's right to remedy its defective performance. In striking this balance, courts must first consider the nature of the nonconformity of the tendered goods and the readiness of the seller to remedy the nonconformity.<sup>493</sup> This determination is also dependent upon the consent of the buyer to the late performance. However, the buyer may not

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<sup>487</sup> See Schiedsgericht der Handelskammer [Arbital Tribunal] Hamburg, Partial Award of March 21, 1996, CLOUT Case No. 166, available at <http://www.cisg.law.pace.edu/cisg/wais/db/cases2/960321g1.html>. The buyer is not required to grant the seller additional time to perform as a precondition to declaring the contract to be avoided if the seller states that it will only perform upon the buyer's satisfaction of additional terms not within the parties' original agreement or upon a renegotiation of the contract between the parties.

<sup>488</sup> See, e.g., AG München 271 C 18968/94, June 23, 1995 (F.R.G.), available at <http://www.cisg.law.pace.edu/cisg/wais/db/cases2/950623g1.html>

<sup>489</sup> *Id.* (permitting a German buyer to seek compensation for the cost of treatment and remediation of defective chemicals delivered by an Italian seller).

<sup>490</sup> See, e.g., OLG Hamburg 1 U 143/95, Jul. 4, 1997, *supra* note 486.

<sup>491</sup> *Id.*

<sup>492</sup> See, e.g., SA P. v. AWS, Trib. de Commerce Namur [District Court], RG. 985/01, Jan. 15, 2002 (Belg.), available at <http://www.cisg.law.pace.edu/cisg/wais/db/cases2/020115b1.html>.

<sup>493</sup> See OLG Koblenz, 2 U 1230/91, Sept. 17, 1993 (F.R.G.), available at <http://www.cisg.law.pace.edu/cisg/wais/db/cases2/930917g1.html>. See also, Int'l Chamber of Commerce, n. 7531/1994, ICC INT'L CT. OF ARB. BULL. 67-68 (Nov. 1995).

unjustifiably reject attempts by the seller to remedy the nonconformity through the delivery of substitute goods in a prompt fashion.<sup>494</sup> This conclusion has caused one arbitral panel to conclude that the seller has a right to remedy nonconformities in its performance which is impervious to interference by the buyer.<sup>495</sup> The buyer may decline to accept the seller's tender of conforming goods only if it would have incurred *substantial and serious injury* by waiting. In defining substantial and serious injury, one national court has focused upon the production stoppage caused by the delivery of non-conforming goods.<sup>496</sup>

The second issue addressed by courts interpreting Article 48 is identification of damages that are properly recoverable by buyers. As set forth in judicial interpretations of Article 47, buyers are entitled to a wide variety of damages in the event the seller fails to tender conforming goods or where late tender causes unreasonable inconvenience. Buyers are generally entitled to compensatory damages, such as cost to the buyer of purchasing substitute performance from third parties. By contrast, the buyer who retains the goods is entitled to a price reduction equal to the reduced value of the goods.<sup>497</sup> Buyers may recover other damages incurred by its retention of nonconforming goods, such as treatment costs and other costs associated with remedying the nonconformities.<sup>498</sup>

### 3. *Avoidance of Contract: Article 64*

Courts interpreting Article 64 have focused on what constitutes a fundamental breach by the buyer that would permit the seller to declare the contract void. The opinions have failed to reach a definition of fundamental breach. However, it is apparent from the opinions that in order to constitute a fundamental breach, the buyer's failure to act must not be easily repairable.<sup>499</sup> Based upon this general conclusion, the opinions of the

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<sup>494</sup> See OLG Koblenz, 2 U 1230/91, Sept. 17, 1993 (F.R.G.) *supra* note 493.

<sup>495</sup> See Int'l Chamber of Commerce, n. 7754, ICC INT'L CT. OF ARB. BULL. 46-49 (2000).

<sup>496</sup> AG München 271 C 18968/94, Jun. 23, 1995 (F.R.G.), *supra* note 488. In addition, a substantial and serious injury may occur in the event the nonconforming goods are sold by the buyer to third parties which in turn results in stoppage of their production and resultant claims of damages against the buyer. *Id.*

<sup>497</sup> See OLG Koblenz, *supra* note 493.

<sup>498</sup> AG München 271 C 18968/94, June 23, 1995, *supra* note 488. Other damages recoverable by the buyer include loss of value of the goods because of delivery delays and additional transportation costs incurred by the buyer as a result of such delays. See Joachim v. La Sarl Holding Manin Riviere, CA Grenoble, Cass. Com., RG 93/4879, Apr. 26, 1995 (Fr.), available at <http://witz.jura.uni-sb.de/CISG/decisions/260495v.htm>.

<sup>499</sup> See, e.g., HG Zürich, HG 920670, Apr. 26, 1995 (Switz.), available at <http://cisgw3.law.pace.edu/cisg/wais/db/cases2/950426s1.html> (concluding that a flaw in a salt water container resulting in leakage was easily repairable and thus did not constitute a fundamental breach of contract between the Swiss seller and the German buyer).

national courts may be organized into three separate categories.

The first category of cases concerns delays in the buyer's performance. In this regard, a fundamental breach occurs if it is readily apparent to the seller that the buyer has no intention of fulfilling its contractual duties.<sup>500</sup> Under such circumstances, the seller is relieved of its obligation to tender a performance rendered useless as a result of the buyer's anticipatory breach.<sup>501</sup> In a similar fashion, the failure of the buyer to perform the contract during any additional period of time granted by the seller may also be deemed a fundamental breach.<sup>502</sup> The same conclusion holds true when the seller does not formally grant an additional period of time to perform but nevertheless delays in filing litigation or seeking other remedies against the buyer.

It is important to note that not all delays in performance constitute a fundamental breach. Minor delays in performance do not constitute fundamental breaches of contract.<sup>503</sup> One court concluded that, in order for the seller to declare the buyer's delayed performance to be a fundamental breach, the contract must provide that the time of performance is of the essence.<sup>504</sup> Time may be of the essence either through the express declaration of the parties or through surrounding circumstances, such as the foreseeability of damage to the subject matter of the contract in the event of a delay.<sup>505</sup>

The second category of cases concerning fundamental breach relates to problems associated with the remittance of the buyer's payment pursuant to the contract. Courts interpreting the CISG have concluded that buyers have an unconditional obligation to remit payment for tendered goods without

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<sup>500</sup> See, e.g., OLG Braunschweig 2 U 27/1999, Oct. 28, 1999 (F.R.G.), available at <http://www.cisg.law.pace.edu/cisg/wais/db/cases2/991028g1.html> (relieving the German seller of its obligation to deliver frozen meat on the basis of the Belgian buyer's failure to remit advance payments as provided in the contract).

<sup>501</sup> *Id.*

<sup>502</sup> See *Bielloni Castello SpA v. EGO S.A.*, *Rivista trimestrale di diritto e procedura civile*, Dec. 11, 1998 (It.), available at <http://www.cisg.law.pace.edu/cases/981211i3.html>.

<sup>503</sup> It bears to note that the outer bounds of what constitutes a "minor delay" have not been enunciated by the national courts in their opinions to date. See, e.g., LG Oldenburg 12 O 2541/95, Mar. 27, 1996 (F.R.G.), available at <http://www.cisg.law.pace.edu/cisg/wais/db/cases2/960327g1.html> (concluding that a delay of one day in tendering performance does not constitute a fundamental breach of contract in the absence of contractual provisions to the contrary).

<sup>504</sup> See CA Grenoble, RG 98/0270, Feb. 4, 1999 (Fr.), available at <http://www.cisg.law.pace.edu/cisg/wais/db/cases2/990204f1.html> (contract for the sale of orange juice between a Spanish seller and a French buyer).

<sup>505</sup> *Id.* An additional relevant consideration in this regard is whether the seller sought to avoid or mitigate injury resulting from the delay through a grant of additional time to the buyer for its performance.

formal demand from their sellers.<sup>506</sup> As a result, the failure of the buyer to remit payment to the seller for conforming goods tendered pursuant to a sales contract within the CISG constitutes a fundamental breach permitting the seller to avoid performance. This failure to remit payment may take many forms. However, the most common form is the buyer's failure to open or establish a letter of credit as required by the sales contract.<sup>507</sup> Less certain with respect to the determination of a fundamental breach are circumstances surrounding the buyer's operations that indicate the unlikelihood of payment.

The third category of decisions relating to the identification of fundamental breach concerns issues arising from delivery. An initial group of cases found a fundamental breach arising from the buyer's unjustifiable refusal to accept delivery of goods from the seller. The buyer's non-acceptance may simply consist of a refusal to accept a delivery of conforming goods tendered pursuant to the contract.<sup>508</sup> However, the refusal to take delivery need not consist of a rejection of the entire delivery tendered. At least one court has concluded that the buyer's failure to take delivery of 50% or more of the goods tendered constitutes a fundamental breach upon which the seller may avoid further performance.<sup>509</sup> Finally, the seller may avoid further contractual performances in the event that the buyer fails to disclose the ultimate destination of the goods.<sup>510</sup> A fraudulent

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<sup>506</sup> See, e.g., Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry [ICA Arbitral Tribunal], 387/1995, Apr. 4, 1998 (Russ.), available at <http://www.cisg.law.pace.edu/cisg/wais/db/cases2/980404r1.html>.

<sup>507</sup> See, e.g., Helen Kaminski PTY Ltd. v. Mktg. Australian Prods., Inc., 97 Civ. 8072A, 1997 U.S. Dist. LEXIS 10630 (S.D.N.Y. July 21, 1997); see also Supreme Court of Queensland [Q.S. Ct.], Down Investments v. Perwaja Steel, Nov. 17, 2000 (Aust.); Kh Hasselt, AR 1849/94, May 2, 1995, (Belg.), available at <http://www.cisg.law.pace.edu/cisg/wais/db/cases2/950502b1.html>; One arbitral panel has refused to conclude that the buyer's failure to open or establish a letter of credit automatically constitutes a fundamental breach of contract. See Int'l Chamber of Commerce 7585/1992, ICC INT'L CT. OF ARB. BULL. 60-64 (Nov. 1995). Nevertheless, this holding may be disregarded to the extent that the court found an independent basis for determining the existence of a fundamental breach of contract, specifically, the buyer's initial failure to perform its contractual obligations within the period of time between the buyer's failure and the time the seller declared the existence of a fundamental breach.

<sup>508</sup> See, e.g., People's Supreme Court in Ho Chi Minh City, 28/KTPT, 1995 (Vietnam), available at <http://www.cisg.law.pace.edu/cisg/wais/db/cases2/950000v1.html> (buyer's refusal to accept delivery of monosodium glutamate).

<sup>509</sup> See OLG Hamm 8 U 250/91, Jan. 25, 1993 (F.R.G.), available at <http://www.cisg.law.pace.edu/cisg/wais/db/cases2/930125g1.html> (refusal to accept delivery of 120 tons of bacon tendered by an Italian seller pursuant to a contract for the sale of 200 tons of bacon to a German buyer).

<sup>510</sup> See Bri Prod. Bonaventure v. Société Pan African Exp., CA Grenoble, Feb. 22, 1995 (Fr.), available at <http://www.cisg.law.pace.edu/cisg/wais/db/cases2/950222f1.html> (refusal by U.S. purchaser to disclose to ultimate destination of clothing purchased from French seller).

disclosure in this regard also constitutes a fundamental breach.<sup>511</sup>

## V. OBLIGATIONS OF SELLERS

This part focuses on the duties of sellers in the CISG-governed transaction. The seller has the basic duty, of course, to attend to timely delivery of conforming goods and documents, free of the unexpected claims of third parties. This part analyzes the issues associated with the delivery of goods and the handing over of documents; the conformity of the goods and third party claims; and remedies for breach of contract by the seller. It reviews how courts and arbitral panels have interpreted the CISG obligations of the seller.<sup>512</sup>

### A. The Duty of Delivery

The CISG requires the seller to “deliver the goods, hand over any documents relating to them and transfer the property in the goods, as required by the contract.”<sup>513</sup> The CISG specifies the seller’s obligations with respect to the place for delivery, arranging for the carriage of goods and their insurance, the time of delivery, and the time and place at which documents are to be handed over. These obligations are set forth in Articles 30-34.

As noted in Part II, an underlying principle of the CISG is the continuance of the contractual relationship. Some commentators have noted that Article 30 contains “the beginnings of an obligation to cooperate.”<sup>514</sup> The Article 30 obligation is general and references the actual agreement of the parties and the particulars of national law. It “states the obvious,”<sup>515</sup> that the seller must deliver the goods, a principle of sales law that is near universal, for “there is no sale without delivery and transfer of property.”<sup>516</sup> Article 4 excludes from the scope of the CISG “the effect which the contract may have on the property in the goods sold.”<sup>517</sup> Thus, the duty to transfer the property in the goods under Article 30 is subject to

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<sup>511</sup> See *id.* (fraudulent statement by U.S. buyer to French seller that purchased clothing was resold to distributor in South America when in fact clothing was sold to a distributor in Spain).

<sup>512</sup> There is significant literature on sellers’ obligations. See, e.g., Fritz Enderlein, *Rights and Obligations of the Seller under the UN Convention on Contracts for the International Sale of Goods in*, INTERNATIONAL SALE OF GOODS: DUBROVNIK LECTURES 133 (Petar Sarcevic & Paul Volken eds., 1996) (hereinafter, DUBROVNIK LECTURES).

<sup>513</sup> CISG, *supra* note 4, at art. 30.

<sup>514</sup> ENDERLEIN & MASKOW, *supra* note 20, at 127.

<sup>515</sup> The purpose of Article 30 is to set the stage for the more particularized rules on delivery and the required character of the goods set forth in the succeeding chapters.

<sup>516</sup> DUBROVNIK LECTURES, *supra* note 512, at 144.

<sup>517</sup> CISG, *supra* note 4, at art. 4(b)

the requirements of national law with respect to property rights in goods.<sup>518</sup>

Article 31 addresses the circumstance in which the contract does not specify the place of delivery.<sup>519</sup> In most transactions, these terms are specified by the use of customary delivery terms as provided by INCOTERMS.<sup>520</sup> In the absence of such a specification, Article 31 serves as a “gap-filling” provision. If the contract requires delivery to a carrier, then the seller’s obligation of delivery is satisfied by its handing the goods over to the first carrier.<sup>521</sup> If delivery of the goods does not involve carriage, but the contract relates to specific goods, goods yet to be identified, or goods to be manufactured at a specific place of which the parties were aware at the time of the contract such as a warehouse or a manufacturing facility, then delivery is accomplished by “placing the goods at the buyer’s disposal at that place.”<sup>522</sup> In other cases the seller’s obligation with respect to the place of delivery is met by “placing the goods at the buyer’s disposal at the place where the seller had his place of business at the time of the conclusion of the contract.”<sup>523</sup>

The seller’s obligations with respect to the carriage of the goods depend upon its obligations for carriage provided in the contract. Normally, these obligations are implicated by the use of INCOTERMS or customary delivery clauses. Article 32 of the CISG requires that if the seller hands goods over to a carrier, then he must give notice of consignment specifying the goods to the buyer, unless the goods are clearly identified to the contract by markings on the goods or shipping documents. There is no obligation to mark the goods apart from those mandated in the contract.<sup>524</sup> If the seller is obligated by the shipping terms to arrange for carriage of the goods, he must “make such contracts as are necessary for carriage to the place fixed by means of transportation appropriate to the circumstances and according

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<sup>518</sup> While the custom in Anglo-American and Roman legal systems is that title in identified goods passes on the conclusion of the contract and in generic goods at the time of identification to the contract, other legal systems vary in this respect. See ENDERLEIN & MASLOW, *supra* note 20, at 128. The *lex sitae* is a commonly applied conflict of law rule, and transfer of property under the law of the seller’s country is effective even if not all conditions are satisfied for transfer of property under the law of the buyer’s country. *Id.*

<sup>519</sup> CISG, *supra* note 4, at art. 67 (providing the default rule for the transfer of risk of loss).

<sup>520</sup> INCOTERMS is a manual of 13 trade terms published by the International Chamber of Commerce. The most recent revision of Incoterms was issued in 2000. See *generally*, Jan Ramberg, ICC GUIDE TO INCOTERMS 2000 (1999).

<sup>521</sup> CISG, *supra* note 4, at art. 3(a).

<sup>522</sup> *Id.* at art. 31(b).

<sup>523</sup> *Id.* at art. 31(c); see also ENDERLEIN & MASKOW, *supra* note 20, at 134 (describing the circumstances which have to be taken into account, including the category and quantity of the goods, their packaging, the distance which will have to be covered by transport, the available means of transport, and existing transport routes”).

<sup>524</sup> DUBROVNIK LECTURES, *supra* note 512, at 149.

to the usual terms for such transportation.”<sup>525</sup> Finally, if delivery terms do not require the seller to obtain insurance of the goods during carriage, then he must nonetheless provide buyer with “all available information necessary to enable him to effect such insurance.”<sup>526</sup>

The time for delivery of the goods is an integral part of the delivery obligation. Article 33 requires the seller to deliver the goods on the date “fixed by or determinable from the contract.”<sup>527</sup> Or, if a period of time is specified within which the goods are to be delivered, the seller can deliver the goods at any time within that period, “unless circumstances indicate that the buyer is to choose a date.”<sup>528</sup> A final “gap filling” provision permits the seller to meet his obligation with respect to the time of delivery by delivery within a reasonable time after the conclusion of the contract.<sup>529</sup>

The contract may—by its specific terms or by its reference to customary terms such as INCOTERMS—require the seller to hand over documents, such as bills of lading, warehouse receipts, insurance certificates, invoices, or certificates of origin, necessary for the buyer to take possession of the goods. In that event, the seller is required by the CISG to hand over the documents relating to the goods “at the time and place and in the form required by the contract”<sup>530</sup> If the seller hands over the documents prior to that time, “he may, up to that time, cure any lack of conformity in the documents, if [doing so] does not cause the buyer unreasonable inconvenience or unreasonable expense.”<sup>531</sup>

Finally, the seller has a further obligation to the buyer to preserve goods under circumstances in which the buyer has delayed in taking delivery of the goods, or where delivery of the goods and payment for them are concurrent obligations and the buyer fails to pay the price. Seller is obligated to take reasonable steps to preserve the goods and can withhold delivery until the payment of any reasonable expenses incurred in preserving them.<sup>532</sup>

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<sup>525</sup> CISG, *supra* note 4, at art. 32(2).

<sup>526</sup> *Id.* at art. 32(3).

<sup>527</sup> *Id.* at art. 33(a).

<sup>528</sup> *Id.* at art. 33(b).

<sup>529</sup> *Id.* at art. 33(c). In normal commerce, however, the seller gives the buyer notice of the consignment. See, e.g., Audiencia Provincial de Barcelona, 755/95-C section 16, Jun. 20, 1997 (Sp.), available at <http://cisgw3.law.pace.edu/cases/970620s4.html>.

<sup>530</sup> CISG, *supra* note 4, at art. 34.

<sup>531</sup> *Id.*

<sup>532</sup> CISG, *supra* note 4, at art. 85. See *infra* Part VI.C.5. Few cases have been decided under this article. See ICA Arbitral Tribunal 387/1995, Feb. 10, 2000, *supra* note 506.



### 1. Place of Delivery: Article 31

The place where the seller is obligated to deliver the goods matters in a variety of contexts. The language of Article 31 makes clear that a contract that requires delivery to a third-party carrier is effective when the goods are handed over to the first carrier, and not when they cross the border into international commerce, nor when they arrive or are handed over to the buyer.<sup>533</sup> This applies, however, only where the parties have not agreed otherwise. Typically, they do agree otherwise.<sup>534</sup>

Most national courts interpret the place of delivery under Article 31 as the place of performance of delivery for purposes of determining jurisdiction where the CISG governs the place of delivery.<sup>535</sup> In a 1998 case, the French Court of Appeals in Paris<sup>536</sup> addressed a situation in which the buyer, a French company, ordered winter clothing from a German seller. The goods were subject to a contract specifying the INCOTERM “ex works,” which the French court determined to be the defendant’s principal place of business in Germany. It declined jurisdiction in favor of the courts of Germany.<sup>537</sup> Where the parties have not specified a place for delivery, French courts have, consistent with Article 31(a), identified the place of delivery to be the place where the goods were handed over to the first carrier for transmission to the buyer.<sup>538</sup> In these cases, the French courts

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<sup>533</sup> See generally DUBROVNIK LECTURES, *supra* note 512, at 1132-33.

<sup>534</sup> Where, for example, the parties agreed to delivery *frei Haus*, delivery occurs where the goods are handed over to the buyer at the buyer’s place of business. LG Aachen 43 O 136/92, May 14, 1993 (F.R.G.), available at <http://www.unilex.info/case.cfm?pid=1&do=case&id=23&step=Abstract>.

<sup>535</sup> Societe Anton Huber GmbH & Co. KG v. SA Polyspace, E 99-14.844, Cour de cassation, Jun. 21, 2001 (Fr.), available at <http://cisgw3.law.pace.edu/cases/010626f1.html> (The European Community Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters [Brussels Convention 1968] identified the place of delivery as the place of performance for purposes of determining jurisdiction.); see Michael Joachim Bonell & Fabio Liguori, *The U.N. Convention on the International Sale of Goods: A Critical Analysis of Current International Case Law—1997* (Part 1), 2 UNIFORM L. REV., 385, 385-95 (1997) (discussing jurisdiction cases based on identifying the place of performance of delivery under art. 31).

<sup>536</sup> Ste Franco-africaine de distribution textile v. Ste More and More Textilfabrik GmbH, 97/25212 CA Paris, Mar. 18, 1998 (Fr.), available at <http://cisgw3.law.pace.edu/cases/980318f1.html>.

<sup>537</sup> Societe Laborall v. S.A. Matis, 97/24418 CA Paris, Mar. 4, 1998 (Fr.), available at <http://www.cisg.law.pace.edu/cisg/wais/db/cases2/980304f1.html>. In the same month, this court ruled similarly on a contract where goods sold by an Italian manufacturer to a French buyer subject to a contract specifying delivery “ex works.” See Societe TCE Diffusion S.a.r.l. v. Societe Elettrotecnica Ricci, 514 CA d’Orleans, Mar. 29, 2001 (Fr.), available at <http://cisgw3.law.pace.edu/cases/010329f1.html> (declining jurisdiction in favor of Milan, Italy, the place of delivery under CISG art. 3).

<sup>538</sup> Societe Mode jeune diffusion v. Societe Maglificio il Falco di Tiziana Goti e Fabio Goti et al, 95-20.809 Court of cassation, Dec. 2, 1997 (Fr.), available at <http://>

have observed that the place of performance of the obligation to deliver goods and the place of performance of the obligation to deliver conforming goods must be the same.<sup>539</sup>

In a pair of 1998 cases, the Austrian Supreme Court ruled that the identification of the place of delivery under Article 31 was not conclusive under the Lugano Convention on Jurisdiction and the Enforcement of Judgment in Civil and Commercial Matters.<sup>540</sup> In the first case, the parties identified delivery terms as “free construction site Vienna” and in the second as “free domicile Klagenfurt.” The German sellers in both cases claimed that the place of performance of the delivery obligation were the respective towns in Austria, and that they could, therefore, bring suit in Austria. The court rejected this claim, and refused jurisdiction, arguing that “according to Article 31 CISG, terms like the ones used in the contract in question were insufficient to constitute a place of performance and entail jurisdiction of the courts in the Austrian cites mentioned therein.”<sup>541</sup> In the absence of clear delivery terms, Article 31(a) would identify the place of delivery in Germany, where the goods were handed over to the first carrier. These cases are inconsistent with the French decisions on analogous facts. However, they may be distinguishable because of the lack of clarity in identifying the seller’s obligation of delivery in the contracts under review by the Austrian courts.

In a 1996 German Supreme Court case,<sup>542</sup> the German seller delivered almond paste to a French buyer. The buyer brought an action for damages in a French court, while the seller brought an action in a German court seeking a declaration of non-obligation to pay damages. The German appellate court examined the various pieces of communication between the parties, in particular communiqués in which the price was quoted “duty unpaid, untaxed, delivery being free to the door of the place of the buyer’s business.” The appellate court held that the parties did not intend this language to alter the place of performance but rather to relate to transportation costs and the allocation of risk. Thus, the court upheld

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cisgw3.law.pace.edu/cases/971202f1.html; CA Paris, 95-018179, Dec. 13, 1995, *supra* note 260.

<sup>539</sup> Where the obligation in question is the obligation to pay, CISG, *supra* note 4, at art. 57, may be used to identify the place of the obligation to pay, and jurisdiction over disputes based on the obligation to pay may be resolved with reference to Article 57. *See, e.g.*, CA 93/2821 Mar. 29, 1995, *supra* note 160.

<sup>540</sup> OGH 206208/98x, Sept. 10, 1998 (Aus.), *available at* <http://cisgw3.law.pace.edu/cases/980910a4.html>.

<sup>541</sup> Willibald Posch & Thomas Petz, *Austrian Cases on the UN Convention for the International Sale of Goods*, 6 VINOBOVA J. INT’L COM. L. & ARB. 1, 14-15 (2002)(on file with author).

<sup>542</sup> BGH VIII ZR 145/95, Dec. 11, 1996 (F.R.G.), *available at* <http://cisgw3.law.pace.edu/cases/961211g1.html>.

jurisdiction of the German courts. The court interpreted the term “delivery being free to the door of the place of the buyer’s business” under Article 31 as being the handing over to the first carrier or at seller’s place of business.<sup>543</sup>

Determination of the place of delivery under Article 31 is relevant to the buyer’s obligation to pay and to the passing of the risk of loss under CISG Articles 67-69. In a German case,<sup>544</sup> the sellers were located in Austria and customarily placed manufactured furniture in a warehouse in Hungary and then sent invoices to the buyer. According to a series of contracts governing various partial deliveries of furniture, the buyer was to take possession of the goods at the manufacturing works and load the furniture into railway wagons or trucks. The buyer would pay the sellers based on the delivery invoices after taking delivery of the furniture. However, no delivery was taken; the manufacturer went bankrupt, the warehouse closed, and the furniture disappeared. Seller sued for the purchase price, which was denied on the ground that delivery had not occurred under Article 31(b). The delivery was due at buyer’s demand, which had not been made, and the sellers had failed to place the furniture at the buyer’s disposal. Thus, the buyer’s obligation to pay did not arise and the risk of loss of the goods did not pass to the buyer.<sup>545</sup>

## 2. *Time of Delivery: Article 33*

Article 33 fixes the obligation of the seller to deliver the goods according to the contract terms or, if the time of delivery cannot be ascertained from the contract, then within a reasonable time after the conclusion of the contract. National courts and arbitral panels have applied this Article in cases involving questions of whether a time for delivery was fixed in the contract,<sup>546</sup> where a time was fixed but not met and the issue was whether this constituted a fundamental breach,<sup>547</sup> where no time for

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<sup>543</sup> Another example of confusion in this area is reflected in a German appellate court opinion in which the parties stipulated “ex works on lorry.” See OLG Köln 27 U 58/96, Jan. 14, 1994 (F.R.G.), available at <http://cisgw3.law.pace.edu/cases/970108g1.html> (finding that, notwithstanding the language “ex works on lorry,” the parties had agreed that the buyer’s place of business in Germany would be the place of performance). In this case, however, it appears that the seller actually delivered the goods to the buyer’s principal place of business using its own people rather than a third-party carrier. *Id.*

<sup>544</sup> OLG Hamm 19 U 127/97, Jun. 23, 1998 (F.R.G.), available at <http://www.cisg.law.pace.edu/cisg/wais/db/cases2/980623g1.html>.

<sup>545</sup> *Id.*

<sup>546</sup> AG Nordhorn 3 C 75/94, Jun. 14, 1994 *supra* note 261 (deciding whether handwritten addition “before the holidays, no later” constituted, under trade usage, an agreement that shoes would be delivered before Aug. 1).

<sup>547</sup> T, SA v. E, 729/96-B Audiencia Provincial de Barcelona, sección 16ª, Nov. 3, 1997 (Spain), available at <http://cisgw3.law.pace.edu/cases/971103s4.html>.

delivery was fixed and the reasonability of the time taken was in question,<sup>548</sup> and in cases in which the buyer may have provided an additional period of time for delivery under Article 47.<sup>549</sup> The scope of these cases indicate that the “reasonability” standard in Article 33 provides courts with the flexibility to vary the time frame for delivering goods depending on the nature of the goods and distance covered.

### B. Express and Implied Warranties

This section addresses the issues of the seller’s obligation for non-conforming goods or for goods with respect to which third parties assert claims. These obligations are found in Articles 35-44 of the CISG. Article 35 states the basic obligation of the seller to deliver goods of the quantity, quality, and description<sup>550</sup> required by the contract.<sup>551</sup> Unless the parties have otherwise agreed, this obligation is not met unless the goods conform to any express warranties, or if there are no such warranties, then certain implied warranties. The basic implied warranty requires that goods be “fit for the purposes for which goods of the same description would ordinarily be used.”<sup>552</sup> They must be fit for the special purposes of the buyer, where that purpose is expressly or impliedly made known to the seller at the time of the contract. The seller also warrants, unless otherwise agreed, that the goods will be “contained or packaged in the usual manner for such goods or, where there is no such manner, in a manner adequate to preserve and protect the goods.”<sup>553</sup> The implied warranties do not attach where circumstances indicate that the buyer did not rely on the seller’s skill or judgment or where the circumstances indicate that it would be unreasonable

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<sup>548</sup> See, e.g., Tribunal Cantonal Valais [Canton Appellate Court], C1 97 167, Oct. 28, 1997 (Switz.), available at <http://cisgw3.law.pace.edu/cases/971028s1.html>; OLG Naumberg 9 U 146/98, Apr. 27, 1999 (F.R.G.), available at <http://cisgw3.law.pace.edu/cases/990427g1.html>; ICC, 8611/HV/JK, Jan. 23, 1997, available at <http://cisgw3.law.pace.edu/cases/978611i1.html>.

<sup>549</sup> See, e.g., S.A.P. v. AWS, Tribunal de commerce Nemur [District Court], R.G. 985/01, Jan. 15, 2002, *supra* note 492; T, SA v. E, 729/96-B Audiencia Provincial de Barcelona, section 16<sup>a</sup>, Nov. 3, 1997, *supra* note 547. A controversy, of sorts, exists between commentators over whether only express assurances about the goods become contract obligation, or whether both descriptions of the goods and promised characteristics become contract obligations. See ENDERLEIN & MASKOW, *supra* note 20, at 141.

<sup>550</sup> In addition, if the seller has held out a sample or a model to show the qualities of the goods, the seller warrants that the goods possess the qualities exemplified in the model or sample. CISG, *supra* note 4, at art. 35.

<sup>551</sup> CISG, *supra* note 4, at art. 5(1). Professor Kazimierska traces this basic obligation to the *pacta sunt servanda* of Roman law, the obligation to perform a contract “in a way that complies to its terms, even if the performance becomes unfavorable for one of the parties or excessively difficult.” Kazimierska, *Remedy of Avoidance*, *supra* note 50, at 80.

<sup>552</sup> CISG, *supra* note 4, at art. 35(2)(a).

<sup>553</sup> *Id.* at art. 35(2)(c).

for the buyer to do so.<sup>554</sup> In addition, these warranties do not apply to non-conformities the buyer knew about, or should have known, at the time of the conclusion of the contract.<sup>555</sup>

While Article 35 establishes the obligations of the seller with respect to conformity of the goods, Article 36 governs the seller's liability for lack of conformity of the goods. It identifies the point of reference for the non-conformity at the time the risk passes to the buyer.<sup>556</sup> The CISG permits the seller to cure any lack of conformity if he has delivered the goods before the "date for delivery," which would be the date fixed in the contract for delivery or a date within the period for delivery identified in the contract. The cure may include delivering missing parts or making up deficiencies in quantity of the goods or replacing non-conforming goods with conforming goods. The cure must not cause unreasonable inconvenience or unreasonable expense to the buyer.<sup>557</sup>

The seller's obligation to deliver conforming goods relates to the reciprocal obligations of the buyer to examine the goods (Article 38) and to give notice to the seller of non-conformities (Article 39).<sup>558</sup> Failure to do either within a practicable or reasonable time causes the buyer to lose the right to rely on a lack of conformity of the goods, unless the seller knew, or should have been aware of the non-conformity and failed to disclose the non-conformity to the buyer.<sup>559</sup>

Third-party claims pose special issues of lack of conformity. The seller is obligated under Article 41 to "deliver goods which are free from any right or claim of a third party unless the buyer agreed to take the goods subject to that claim or right."<sup>560</sup> However, Article 41 does not apply to rights or claims based on "industrial property or other intellectual property" rights.<sup>561</sup> In that case, Article 42 governs the obligations of the seller.

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<sup>554</sup> *Id.* at art. 35(2)(b).

<sup>555</sup> *Id.* at art. 35(3).

<sup>556</sup> The seller, however, remains liable for lack of conformity that occurs after the passage of the risk of loss if the lack of conformity is due to "a breach of any of his obligations, including a breach of any guarantee that for a period of time the goods will remain fit for their ordinary purpose or for some particular purpose, or will retain specified qualities or characteristics." CISG, *supra* note 4, at art. 36(2).

<sup>557</sup> *Id.* at art. 37.

<sup>558</sup> See *supra* Parts IV.A.1. & IV.A.2.

<sup>559</sup> CISG, *supra* note 4, at art. 40. See Arbitration Institute of the Stockholm Chamber of Commerce Award, Jun. 5, 1998, available at <http://cisgw3.law.pace.edu/cisg/biblio/limbach.html>; Francis Limbach and Brandon Ahearn, *Conformity of Goods, Derogation from Article 40 by the Parties and Conditions of Art 40 CISG* (Case Commentary), available at <http://cisgw3.law.pace.edu/cisg/biblio/limbach.html>.

<sup>560</sup> CISG, *supra* note 4, at art. 41. The rights or claims referenced in Article 41 include "rights of title, rights to possession, and possessory/non-possessory pledges." ENDERLEIN & MASKOW, *supra* note 20, at 141.

<sup>561</sup> CISG, *supra* note 4, at art. 41.

Article 42 requires generally that the seller deliver goods “which are free from any right or claim of a third party based on industrial property or intellectual property, of which at the time of the conclusion of the contract the seller knew or could not have been unaware.” This obligation only pertains to third-party claims<sup>562</sup> based on the law of the State in which the buyer has his place of business or the law of the State where the goods will be resold or used, provided that the parties contemplated their resale or use in that State at the time the contract was concluded.<sup>563</sup> This obligation of the seller does not extend to cases where the buyer knew “or could not have been unaware” of the right or claim, and the seller has complied with technical drawings, designs, formulae or other such specifications that are the basis for the third party claim or right.<sup>564</sup> Unless he has a reasonable excuse for failing to do so,<sup>565</sup> or unless the seller knew of the right or claim of the third party and the nature of it, the buyer loses the right to rely on Article 41 or Article 42 if he fails to give notice to the seller of the right or claim and the nature of it, within a reasonable time after he has become, or ought to have become, aware of it.<sup>566</sup>

### 1. Warranties: Article 35

Article 35 is implicated in many commercial sales disputes, undoubtedly because it goes to the very heart of the seller’s contract obligation. Many conflicts involve reconciling Article 35 with related Articles identifying the rights of buyers when sellers breach their obligations under Article 35.<sup>567</sup> A variety of issues, both factual and

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<sup>562</sup> While industrial property refers, most likely, to patents, the broader term “intellectual property” suggests a broader set of rights including not only patents but also, registered designs, copyrights, company names, tradenames, trademarks, and other similar intangibles. See ENDERLEIN & MASKOW, *supra* note 20, at 141.

<sup>563</sup> CISG, *supra* note 4, at art. 42(1).

<sup>564</sup> *Id.* at art. 42(2).

<sup>565</sup> *Id.* at art. 44.

<sup>566</sup> *Id.* at art. 43.

<sup>567</sup> OLG München 7 U 4419/93, Mar. 2, 1994 (F.R.G.), available at <http://www.cisg.law.pace.edu/cisg/wais/db/cases2/940302g1.html> (reconciling art. 35 with art. 45); Rheinland Versicherungen v. S. r.l.Atlarex and Allianz Subalpina S.p.A., n. 405 Tribunale [District Court] di Bigevano, (It.), July 12, 2000, available at <http://cisgw3.law.pace.edu/cases/000712i3.html> (reconciling art. 35 with art. 44); 2 U 27/01OLG Zweibrücken [Provincial Court of Appeal], Jul. 26, 2002 (F.R.G.), available at <http://cisgw3.law.pace.edu/cases/020726g1.html> (reconciling art. 35 with art. 45); BGH VIII ZR 121/98 Mar. 24, 1999, *supra* note 95 (reconciling art. 35 with art. 45); VIII BGH ZR 304/00 Jan. 9, 2002, *supra* note 289 (reconciling art. 35 with art. 45); S.A. Vetimo v. SARL Aubert, R.G. 242/99 CA, Mar. 8, 2000 (Belg.), available at <http://cisgw3.law.pace.edu/cases/010308b1.html> (reconciling art 35 with art. 49); Tampere Court of First Instance, Jan. 17, 1997 (Fin.), available at <http://cisgw3.law.pace.edu/cases/970117f5.html> (reconciling art. 35 with art. 50); OLG Graz, 6 R 194/95 Nov. 9, 1995 (Aus.), available at

interpretive, arise under Article 35(1) that govern the seller's obligation to provide goods of the "same quality, quantity and description required by the contract."<sup>568</sup> The factual cases, often in courts of first instance, involve evidentiary inquiry to identify whether there was a non-conformity and, if so, its nature,<sup>569</sup> whether the buyer inspected the goods in a timely manner and gave the seller adequate notice of the non-conformity,<sup>570</sup> and whether the goods were adequately packaged.<sup>571</sup> Other cases involve interpretation of the contract description. Since national law may vary on this, court applications have provided insight into questions of homeward trends<sup>572</sup> and uniformity of interpretation.<sup>573</sup>

In a 1999 case,<sup>574</sup> the Austrian Supreme Court heard a dispute involving wall panels that were to be sold "ex factory" from a business in Germany to a buyer in Vienna. The panels that were shipped were non-conforming panels, in that they were not "formatted" (cut and drilled) as agreed in the contract. The parties agreed, by telephone, that the panels would be shipped back by the buyer. On inspection by the seller, the panels were found to be badly damaged and useless for resale. The seller invoiced the buyer for the value of the panels, claiming that they were not shipped correctly and that buyer had assumed the transportation risk.

The appellate court held that the shipping of non-conforming panels constituted a delivery of non-conforming goods and a breach of contract

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<http://cisgw3.law.pace.edu/cases/951109a3.html> (reconciling art. 35 with art. 50).

<sup>568</sup> CISG, *supra* note 4, at art. 31(1).

<sup>569</sup> See, e.g., Tampere Court of First Instance, Fin. Jan. 17, 1997, *supra* note 567; La San Giuseppe v. Forti Moulding Ltd., 98-CV-1493CM, 1999 Ont. Sup. C.J. LEXIS 853 (Aug. 31, 1999), available at <http://casgw3.law.pace.edu/cases/990831c4.html>; S.A. Vetimo v. SARL Aubert, R.G. 242/99 CA, Mar. 8, 2000, *supra* note 567; BGH VIII ZR 121/98 Mar. 24, 1999, *supra* note 95 (reconciling art. 35 with art. 45); Landergericht [LG][Trial Court] Berlin 52 S 247/94 Sept. 15, 1994 (F.R.G.), available at <http://cisgw3.law.pace.edu/cases/940915g1.html> (last updated Jun. 2003); Societe Sorhofroid SARL, CA Grenoble, 94/0258, May 15, 1996 (Fr.), available at <http://cisgw3.law.pace.edu/cases/970515f1.html> (last updated May 2002).

<sup>570</sup> See, e.g., Audiencia Provincial de Barcelona, R.J.C., IV, Jun. 20, 1997 *supra* note 529, OLG Hamm 8 U 46/97, Mar. 31, 1994 (F.R.G.), available at <http://cisgw3.law.pace.edu/cases/980331g1.html> (last updated Aug. 2003); Trib. di Vigevano, July 12, 2000, n. 405, *supra* note 340.

<sup>571</sup> See, e.g., CA Paris, Dec. 13, 1995, J.C.P. 1997, I, 53-55, available at <http://www.unilex.info/dynasite.cfm?dssid=2376&dsmid=13354&x=1> (last visited Jan. 2004).

<sup>572</sup> See *infra* Part VII.B.

<sup>573</sup> See *supra* Part I.B.

<sup>574</sup> OGH, SZ 1 Ob 74/99k, Jun. 29, 1999 (Aus.), available at <http://cisgw3.law.pace.edu/cases/990629a3.html>; see Posch & Petz, *supra* note 541, at 15. See also ROLF HERBER & BEATE CZERWENKA, INTERNATIONALES KAUFRECHT: KOMMENTAR ZU DEM ÜBEREINKOMMEN DER VEREINTEN NATIONEN VOM 11. APRIL 1980, at art. 29 UN-K (Munich 1991); PETER SCHLECHTRIEM ET AL., KOMMENTAR ZUM EINHEITLICHEN UN-KAUFRECHT (2nd ed. 1995).

under Article 35 rather than a non-delivery of goods. The significance of the distinction lay in the seller's retention of the risk of loss under CISG Article 82(2)(a) and (b). Under the Austrian Commercial Code ("HGB") a distinction would have been made between delivery of non-conforming goods (Falschlieferung) and non-delivery of conforming goods (Nichtlieferung). The distinction would turn on the extent of the deviation from the contract and on whether the incorrect delivery was subject to approval. In refraining from applying the domestic law, the court drew the distinction based on the authoritative CISG commentary<sup>575</sup> used to interpret and apply the CISG Articles. Reliance on such commentary indicates a commitment to interpret the CISG in a manner that tends to promote uniformity of interpretation.<sup>576</sup>

Resistance to homeward trend interpretations was demonstrated again in a 2001 Belgian case.<sup>577</sup> In that case, the buyer sought avoidance of the obligation to pay the contract price. The buyer framed its case on "non-conforming delivery" and "latent defects," drawing on the Belgian Civil Code for authority. Relying on existing case law<sup>578</sup> and authoritative commentary,<sup>579</sup> the Belgian court further held the CISG alone to be applicable law and insisted that "[t]he CISG knows only one uniform concept of conformity."<sup>580</sup> Within the CISG "no distinction is made between a guarantee against latent defects and the seller's obligation to deliver. The seller must deliver conforming goods and that is all."<sup>581</sup>

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<sup>575</sup> *Id.*

<sup>576</sup> See also BGH VIII ZR 51/95, Apr. 3, 1996 (F.R.G.), available at <http://cisgw.law.pace.edu/cases/960403gl.html> (last updated Sep. 2003). The German Supreme Court held that the CISG does not differentiate between delivery of different goods and delivery of goods that do not conform to the contract. The court noted that the CISG diverged from German civil law on this point, citing scholarly commentary as authority.

<sup>577</sup> Rechtbank van Koophandel Veurne A/00/00665, Apr. 25, 2001, *supra* note 270.

<sup>578</sup> *Id.*

<sup>579</sup> The Belgian court cited the following sources as authoritative: S. DeGroot, "Nonconformiteit volgens het Weens Koopverdrag", 3 T.P.R. (1999); H. Van Houtte *et al.*, *Het Weenskoopverdrag*, 129, at n. 4.36. *Id.*

<sup>580</sup> Rechtbank van Koophandel Veurne A/00/00665, Apr. 25, 2001, *supra* note 270.

<sup>581</sup> *Id.*; But see Cass. ass. Plen., Dec. 17, 1996, D. 1997, 337 (Fr.), available at <http://www2.gov.si/uncitral/clout.nsf/70dd6f602c1773bec12566ca005c864d/7be5a231df8> (distinguishing between the application of "latent defect" in the French Civil Code and Article 31(2)(a) in such a way as to apply the homeward trend law in the face of conflicting CISG jurisprudence). Similarly, in 2000, the Swiss Federal Supreme Court rejected "homeward trend" attempts by the parties to impose concepts of local law in a dispute over whether a rotary printing machine met contract specifications. Under Swiss law, issues associated with the impressions of the buyer with respect to the quality of the goods would have been significant, or even dispositive. The Supreme Court overturned the Court of First Instance, applied CISG Article 35(1), and relied upon authoritative commentary for its application. Roland Schmidt GmbH c. Textil-Werke Blumenegg [Supreme Court], 4C.296/2000/rnd Dec. 22, 2000 (Switz.), available at <http://cisgw3.law.pace.edu/cases/>



An example of a court's application of CISG interpretive methodology is the 2000 Italian decision in *Rheinland Versicherungen v. S. r.l. Atlarex and Allianz Subalpina S.a.A.*<sup>582</sup> The case turned on whether adequate and timely notice of the non-conformity was given by the buyer to the seller. In making the determination, the court referenced CISG case law from several nations, including Italy,<sup>583</sup> Germany,<sup>584</sup> Austria, The Netherlands,<sup>585</sup> United States,<sup>586</sup> France,<sup>587</sup> and Switzerland.<sup>588</sup> The court recognized the non-binding nature of these cases, pointing out that the purpose of the case analysis was not to observe binding authority but "to assure and promote uniform enforcement of the United Nations Convention."<sup>589</sup> This opinion serves as an example of using CISG interpretive methodology to advance the goal of uniformity and discourage resort to homeward trend analysis.<sup>590</sup>

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001222s1.html.

<sup>582</sup> See Trib. di Vigevano, July 12, 2000, n. 405, *supra* note 340. See also Franco Ferrari, *Tribunale di Vigevano: Specific Aspects of the CISG Uniformly Dealt With*, 20 J.L. & COM. 225-39 (2001) [hereinafter Ferrari, *Tribunale de Vigevano*]; Franco Ferrari, *Truly Uniform Application of CISG: Tribunale de Vigevano*, UNIFORM L. REV. 203 (2001-01); Pilar P. Viscillas, *Battle of the Forms and Burden of Proof: An Analysis of the BGH 9 January 2002*, 6 2002 VINDOBONA J. INT'L L. 217 (2002) at n.23.

<sup>583</sup> See, e.g., Pret. di Torino [District Court of First Instance], 30 Jan. 1997, Giur. I. 1998, II, 982-985 (It.), available at <http://cisgw3.law.pace.edu/cisg/wais/db/cases2/970130i3.html>. See also Trib. Civile di Cuneo [District Court], Sez. 145/96, Jan. 31, 1996 (It.), available at <http://cisgw3.law.pace.edu/cases/960131i3.html>;

<sup>584</sup> See OLG Düsseldorf Recht der Internationalen Wirtschaft [RIW] 1050-51, Feb 10, 1994, *supra* note 340; OLG München, 7 U 3758/94, Feb. 8, 1995, *supra* note 346; AG Augsburg n. 11 C 4004/95, Jan. 29, 1996, *supra* note 378 (shoes); see AG Kehl 3 C 925/93, Oct. 6, 1995, *supra* note 285.

<sup>585</sup> See, e.g., W.M.J.M. Bronneberg/Ceramica Belvedere SpA, HR 20 Feb. 1998, NJ 568, available at <http://www.unilex.info/case.cfm?pid=1&do=case&id=328&step=FullText>; Rb. Roermond, Dec. 19, 1991, *supra* note 345; Rb. Zwolle, Mar. 5, 1997, *supra* note 345.

<sup>586</sup> See, e.g., Orbisphere Corp. v. United States, 726 F. Supp. 1344 (Ct. Int'l Trade 1989), available at <http://cisgw3.law.pace.edu/cases/891024u1.html> (last updated May 2002).

<sup>587</sup> See, e.g., Cass. ass. Plen., Dec. 17, 1996, D. 1997, *supra* note 581; CA Colmar [Regional Court of Appeal], 94-00488, Sept. 26, 1995 (Fr.), available at <http://cisgw3.law.pace.edu/cisg/wais/db/cases2/950926f1.html>.

<sup>588</sup> See, e.g., HG Zürich, 930634/0, Nov. 30, 1998, *supra* note 339; HG Zürich, 920670, Apr. 26, 1995, *supra* note 499.

<sup>589</sup> Trib. di Vigevano, July 12, 2000, n. 405, *supra* note 340.

<sup>590</sup> A U.S. example of the proper application of CISG interpretive methodology is *Medical Marketing International, Inc., v. Internazionale Medico Scientifica, S.R.L.*, 99-0380, 1999 U.S. Dist. LEXIS 7380, at \*6 (E.D. La. May 17, 1999), available at <http://cisgw3.law.pace.edu/cases/990517u1.html>. The District Court cited a German Supreme Court case for the proposition that Article 35 of the CISG does not require the seller to supply goods that conform to laws and regulations in effect in the buyer's country. See *Einscheidungung des BGH VIII ZR 159/94*, Mar. 8, 1995 (F.R.G.), available at <http://cisgw3.law.pace.edu/cases/950308g3.html> (last updated Dec. 2003). The German case involved the sale of New Zealand mussels by a Swiss company to a German importer. The cadmium content of the mussels exceeded the allowable limits under German law but was

Article 35(2)(b) addresses the sale of goods in which the seller is aware of the particular purpose for which the buyer will use the goods and the buyer is relying upon the seller to use skill and judgment to provide the goods. In effect, it creates an implied warranty for a particular purpose. The implied warranty for a particular purpose<sup>591</sup> has been the subject of

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acceptable under Swiss law. The decision process under Article 35 required the court to first determine whether a violation of government regulations constitutes a defect under Article 35(2)(a), which requires that the goods be “fit for the purposes for which goods of the same description would ordinarily be used or whether the regulations are simply a feature of the local environment affecting use of the goods. Since health, safety, and environmental regulations vary dramatically from country to country, the real question—assuming that regulations affect fitness of purpose—is whether it is the regulations of the seller’s country or the buyer’s country that affect fitness.” CISG, *supra* note 4, at art. 35(2)(a). The German Supreme Court held for the seller’s country, unless the buyer stipulated its own country requirements should have been met. The German court depended heavily upon authoritative commentary to reason to this conclusion, stating: “According to the absolutely prevailing opinion in the legal literature, which this Court follows, the compliance with specialized public law provisions of the buyer’s country or the country of use cannot be expected.” BGHZ, VIII ZR 159/94, *supra* note 590; *see generally*, Peter Schlechtriem, Case Commentary, *Conformity of the Goods and Standards Established by Public Law: Treatment of Foreign Court Decision as Precedent*, available at <http://cisgw3.law.pace.edu/cases/990517u1.html> (last updated Dec. 2003); Andrew J. Kennedy, *Recent Developments: Nonconforming Goods Under the CISG—What’s a Buyer to Do?*, 16 DICK. J. INT’L L. 319 (1998). An abundant literature has chronicled and commented upon this decision. *See, e.g.*, HONNOLD, UNIFORM LAW FOR INTERNATIONAL SALES, *supra* note 53; KAROLLUS, CORNELL REVIEW OF THE CISG (1995) 51 [Arts. 67-68] (comment on conformity-of-the-goods ruling); SCHWENZER *in* SCHLECHTRIEM, COMMENTARY ON THE UN CONVENTION ON THE INTERNATIONAL SALE OF GOODS 280 (1998) [Art. 35] at n.57; BERNSTEIN & LOOKOFSKY, UNDERSTANDING THE CISG IN EUROPE, 2d ed. (2003), § 2-8 at n. 113 & § 4-7 at n.94. The *Medical Marketing* decision is an example of the convergence in CISG interpretation based first on learned commentary and then the integration of the thinking of the best foreign decisions on the given issue. Courts in both Argentina and Austria came to similar results drawing upon reasoning from other national courts’ experience to produce more uniform interpretation of the CISG. *See* Second Instance Court of Appeal, Apr. 24, 2000, (Arg.), available at <http://cisgw3.law.pace.edu/cisg/wais/db/cases2/000424a1.html>; OG 2 Ob 100/00w, Apr. 13, 2000 (Aus.) available at <http://cisgw3.law.pace.edu/cisg/wais/db/cases2/000413a3.html>. The Austrian court noted,

[a] seller cannot be expected to know all special rules of the buyer’s country or the country of usage. . . . It is rather for the buyer to observe her country’s public law provisions and specify these requirements—either according to Art. 35(1) or (2)(b) CISG—in the sales contract. . . . [t]he requirements of the buyer’s country should only be taken into account if they also apply in the seller’s country, in they are agreed on, or if they are submitted to the seller at the time of the formation of the contract, according to Art. 35(2)(b).

This use of uniformity principle is not without critics. *See, e.g.*, Fletcher, *Several Texts*, *supra* note 6, arguing that the German court applied an unduly rigid standard of uniformity.

<sup>591</sup> *See* UCC § 2-315, *supra* note 117.

several court cases.<sup>592</sup> Some of these cases involved simply an analysis of whether the facts constituted a failure to conform to the contract.<sup>593</sup> Others, discussed below, involved legal analysis that provides greater insight into the courts and arbitral panels interpretation of this warranty.

As is the case under Article 35(2)(a) (implied warranty of merchantability), a seller is not responsible to conform its products to the nuances of the national law of the buyer's country. However, the seller may be responsible for such conformity under Article 35(2)(b) (implied warranty for a particular purpose). In a German case,<sup>594</sup> the issue of whether a Spanish paprika seller had to certify that its product complied with the German Food Safety Laws demonstrates this nuance. The court found that the seller had prior knowledge of the laws and, therefore, could not argue that it was ignorant of the requirement that the goods comply with the German laws. The court held that since the paprika contained more ethylene oxide than permitted under German law, the goods failed to conform to the contract and specifically failed to meet the buyer's purpose known to the seller.<sup>595</sup>

The crucial factors for applying the implied warranty for a particular purpose are the buyer communicating the intended use of the product and the seller's knowledge of the nuances of the foreign law or standards. A Netherlands Arbitration Institute case involving a dispute concerning the conformity of a petroleum product illustrates the intended use criterion.<sup>596</sup> The buyer argued that the product contained excessive amounts of mercury, which the seller knew—because it was in the refining business—would

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<sup>592</sup> See, e.g., BGH VIII ZR 121/98, Mar. 24, 1999, *supra* note 95; Netherlands Arbitration Institute, No. 2319, Oct. 15, 2002 (Neth.), available at <http://cisgw3.law.pace.edu/cases/021015n1.html>; Schmitz-Werke GmbH & Co. v. Rockland Industries, 37 Fed. Appx. 687 (4th Cir. 2002), available at <http://cisgw3.law.pace.edu/cases/020621u1.html>; Mayer Alejandro v. Onda Hofferle, Camara Nacional de Apelaciones en lo Comercial, Second Instance Court of Appeal, Apr. 24, 2000, available at <http://cisgw3.law.pace.edu/cases/000424a1.html>; LG Ellwangen I KfH O 32/95, Aug. 21, 1995, *supra* note 483; Manipulados del Papel y Carton SA v. Sugem Europa SL RA 340/1997 Audiencia Provincial de Carclona, seccion 16a, Appellate Court Barcelona, RA 340/1997, Feb. 4, 1997 (Spain), available at <http://cisgw3.law.pace.edu/cases/970204s4.html>; CA Grenoble, 93/4879, Apr. 26, 1995, *supra* note 498.

<sup>593</sup> See, e.g., CA Grenoble, 93/4879, Apr. 26, 1995, *supra* note 498; See OLG Düsseldorf Recht der Internationalen Wirtschaft [RIW] 1050-51, Feb 10, 1994, *supra* note 340; Manipulados del Papel y Carton SA v. Sugem Europa SL RA 340/1997, *supra* note 592; Mayer Alejandro v. Onda Hofferle, Camara Nacional de Apelaciones en lo Comercial, Second Instance Court of Appeal, Apr. 24, 2000, available at <http://cisgw3.law.pace.edu/cases/000424a1.html>; Netherlands Arbitration Institute, No. 2319, Oct. 15, 2002, *supra* note 592; BGH VIII ZR 121/98 Mar. 24, 1999, *supra* note 95 (reconciling art. 35 with art. 45)

<sup>594</sup> LG Ellwangen I KfH O 32/95, Aug. 21, 1995, *supra* note 483.

<sup>595</sup> *Id.*

<sup>596</sup> Netherlands Arbitration Institute, No. 2319, Oct. 15, 2002, *supra* note 592.

make the product unusable to the buyer. The arbitral tribunal concluded as a factual matter that the buyer did not expressly or impliedly indicate to the seller the use it intended to make of the product, and that the product had other uses in the refining industry. Thus, the panel rejected the Article 35(2)(b) claim.<sup>597</sup>

The panel, however, did find for the buyer on its Article 35(2)(a) claim. In doing so it reviewed different interpretation of merchantability. It first drew on the concept of “merchantability” or “merchantable quality,” a standard of conformity found in English common law. The second interpretation is the *average quality rule* found in the German, Austrian, French, and Swiss civil codes. The tribunal also found this interpretation to be unsatisfactory. Instead, the panel drew on the history of the drafting of the CISG and its interpretive methodology. First, the panel looked to general principles, namely, that “[i]n the interpretation of this Convention, regard is to be had to its international character and to the need to promote uniformity in its application and the observance of good faith in international trade.”<sup>598</sup> Second, it attempted to find an appropriate interpretation through the use of implied principles taken from the different Articles of the CISG.<sup>599</sup>

It interpreted this mandate to suggest that neither the merchantability test nor the average quality test should apply, based as they are in domestic notions of quality. Rather, it resorted to the history of the CISG and the legislative history preceding its adoption. In reviewing these documents, the tribunal became convinced that the drafters declined to articulate a standard, leaving an “open-textured” provision. In the final analysis, emphasizing the absence of alternative buyers willing to pay the contract price for product with that level of mercury, the tribunal concluded that the goods were not merchantable judged by any of the available interpretations.<sup>600</sup>

In sharp contrast, the U.S. court in *Circuit Schmitz-Werke GmbH & Co. v. Rockland Industries, Inc.*<sup>601</sup> disregarded CISG interpretive methodology and resorted to a *homeward trend* analysis. The court cited only U.S. cases and ignored other national court or arbitral decisions and scholarly commentaries on the CISG. The court expressly ignored those sources by concluding that if the CISG is “not settled under its own terms,”

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<sup>597</sup> *Id.*

<sup>598</sup> CISG, *supra* note 4, at art. 7(1).

<sup>599</sup> See Netherlands Arbitration Institute, No. 2319, Oct. 15, 2002, *supra* note 592.

<sup>600</sup> *Id.*

<sup>601</sup> See *Schmitz-Werke GmbH & Co. v. Rockland Industries, Inc.*, 37 Fed. Appx. 687 (4th Cir. 2002). While ultimately the circuit court upheld the lower court ruling, which was apparently reached using the CISG, the praxis of the circuit court in applying the CISG is noteworthy.

then a court could resort to private international law. It then proceeded to analyze the problem under Article 2 of the Uniform Commercial Code.<sup>602</sup>

Often times a contract is based upon a sample or model. Article 35(2)(c) requires the seller to provide goods of equivalent quality to a sample or model upon which the contract was formed. A Finnish court dealt with the issue of a contract based upon a sample and a seller's representation that the product had a "shelf life" of 30 months.<sup>603</sup> The sample of the product tested before delivery contained the specified vitamin content, but the product—both on delivery and increasingly over its life on the shelf—deteriorated in Vitamin A content. The seller argued, pursuant to Article 35(3),<sup>604</sup> that buyer was aware of the Vitamin A deterioration over time and thus could not have expected the content to remain in constant conformance with the sample for thirty months.

In deciding in favor of the buyer, the court relied not on Swiss law or trade usage but pointed instead to the fact that the seller "must have been aware of the international content of the shelf-life concept."<sup>605</sup> With respect to the seller's argument under Article 35(3), the court found it irrelevant that the buyer knew Vitamin A deteriorated. "[I]t appears that the buyer counted on the seller's expertise in terms of how the seller reaches the required Vitamin A content and how the required preservation is carried out."<sup>606</sup> The court resisted a *homeward trend* solution by rejecting application of domestic law. However, it also failed to consider the experience of other national courts in interpreting the CISG.<sup>607</sup>

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<sup>602</sup> Another example of homeward trend analysis is the Italian decision of the Corte d'Appello di Milano *Italdecor S.A.S. v. Yiu's Industries (H.K.) Ltd*, Corte app di Milano, Mar. 20, 1998 (It.), available at <http://cisgw3.law.pace.edu/cisg/wais/db/cases/2/980320i3.html>.

<sup>603</sup> See Helsinki Court of Appeals, *EP S.A. v. FP Oy*, s96/1215, Jun. 30, 1998 (Fin.), available at <http://cisgw3.law.pace.edu/cases/980630f5.html>.

<sup>604</sup> CISG, *supra* note 4, at art. 35(3).

<sup>605</sup> See Helsinki Court of Appeals, *EP S.A. v. FP Oy*, s96/1215, Jun. 30, 1998, *supra* note 603; see also KUOPPALA, EXAMINATION OF THE GOODS UNDER THE CISG AND THE FINNISH SALE OF GOODS ACT, § 3.4.1 (2000), available at <http://www.cisg.law.pace.edu/cisg/biblio/kuoppala.html>.

<sup>606</sup> See Helsinki Court of Appeals, *EP S.A. v. FP Oy*, s96/1215, Jun. 30, 1998, *supra* note 603.

<sup>607</sup> The other cases involving Article 35(3), which negates implied warranties if at time of the conclusion of the contract the buyer knew of the non-conformity, tend to involve the factual question of what the buyer knew, and when. See generally *Tribunal Cantonal Valais*, CI 97 167 28, Oct. 28, 1997 (Switz.), available at <http://www.cisg.law.pace.edu/cases/971028s1.html>; see also *Sø og Handelsretten* [Maritime Commercial Court] 31 H-0126-98, Jan. 31, 2002, *supra* note 341; *OLG Köln* 22 U 4/96, available at <http://cisgw3.law.pace.edu/cases/960521g1.html>. A 1996 German case provided an opportunity for an appellate court to place a gloss on 35(3), denying the defendant the ability to invoke the provision where he himself had engaged in fraud. The case involved the international sale of a late model apparently low mileage car in which the date of original sale had been

### 2. Risk of Loss and Warranties: Article 36

Article 36 fixes the point at which the seller's obligations pertaining to the conformity of goods expires; when the risk of loss passes to the buyer or at the expiration of any express or implied guaranty. The buyer is allocated the burden of proving that the goods were defective prior to the expiration of the seller's obligation point. This was the issue in a German case involving the sale of meat products.<sup>608</sup> Upon receipt, the buyer objected to the quality of the meat and sued for a refund. The court reasoned that since the parties had not agreed otherwise, the risk of loss had passed to the buyer when the seller handed over the goods to the first carrier. Therefore, under CISG Articles 36 and 66, the buyer had the burden of proving that the goods did not conform to the contract at the time the risk of loss passed. This burden, demonstrated here, is often difficult to sustain.<sup>609</sup>

### 3. Effect of Seller's Knowledge: Article 40

Articles 38<sup>610</sup> and 39<sup>611</sup> require the buyer to examine the goods and give timely notice to the seller of non-conformities. Article 40, in effect, excuses the buyer from the consequences of failing to make timely examination of the goods and give notice of the non-conformities. If the seller "knew or could not have been unaware" of the non-conformities and then failed to disclose them to the buyer, the seller cannot rely on the buyer's failure of examination and notice. This provision has occasioned discussion in case law<sup>612</sup> and commentary.<sup>613</sup> Some cases turn on whether

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adjusted. The buyer resold the car to someone who detected the deception and exacted damages, which the buyer sought to recover from the seller. The German court denied the seller access to the defense that the buyer could have detected the car's lack of conformity to the contract because the seller himself knew of the age of the car and thus behaved fraudulently. "The [seller] thus had to reckon that the delivery of non-conforming goods would make the [buyer] liable towards his customer." *Id.*

<sup>608</sup> See LG Flensburg 20 291/98, Mar. 24, 1999 (F.R.G.), available at <http://cisgw3.law.pace.edu/cases/990324g2.html>.

<sup>609</sup> On the issue of the burden of proof, see generally, Lugano, Cantone del Ticino, La seconda Camera civile del Tribunale d'appello [Appellate Court], 12.97.00193, Jan. 15, 1988 (Switz.), available at <http://cisgw3.law.pace.edu/cases/980115s1.html>; CA Grenoble, 94/0258, May 15, 1996, *supra* note 569. Often decisions under Article 36 turn on factual analysis when the risk of loss passed. See Cairo Chamber of Commerce and Industry, Egypt Arbitration Award, 19/1990, Apr. 13, 1991 (Egypt), available at <http://cisgw3.law.pace.edu/cases/910413e1.html>; FB Budapest, 12.G.75.715/1996/20, Jul. 1, 1997 (Hung.), available at <http://cisgw3.law.pace.edu/cisg/wais/db/cases2/970701h1.html>; BP Int'l, Ltd. v. Empresa Estatal Petroleos de Ecuador, 332 F.3d 333 (5th Cir. 2003).

<sup>610</sup> CISG, *supra* note 4, at art. 38.

<sup>611</sup> *Id.* at art. 39.

<sup>612</sup> See *La San Giuseppe v. Forti Moulding, Ltd.*, [1999] O.J. No. 3352, available at <http://is.dal.ca/~cisg/cases/forti.htm>; *BP Oil Int'l v. Empresa Estatal Petroleos de Ecuador*, 332 F.3d 333 (5th Cir. 2003), *S.r.l. R.C. v. BVBA R.T., Hof van Beroep Antwerp*,

the buyer can provide proof of the seller's knowledge of the non-conformity<sup>614</sup> or on whether the seller disclosed the non-conformity to the buyer.<sup>615</sup> To the latter point, a recent Belgian case characterized Article 40 as the application of "the good faith principle,"<sup>616</sup> noting that if the seller knows of the non-conformity and fails to reveal it, he cannot fall back upon the buyer's failure to tell him what he already knew.<sup>617</sup>

### C. Remedies

The remedies for breach of contract by the seller are addressed in CISG Articles 45 through 52. Article 45 outlines the basic remedies of the buyer for the seller's breach.<sup>618</sup> Article 45's remedial framework does not distinguish between material and non-material breaches.<sup>619</sup> Therefore, Article 45 must be read in conjunction with the notion of a fundamental breach described in Article 25.<sup>620</sup> Enforcing its rights to substituted goods,

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1997/AR/1554, Jun. 27, 2001, *supra* note 91; ICC International Court of Arbitration No. 5713 of 1989, *available at* <http://www.cisg.law.pace.edu/cisg/wais/db/cases2/895713i1.html>; OLG Zweibrücken 2 U 27/01, Jul. 26, 2002, *supra* note 567; T.SA v. R. Etablissement, HG Zürich, HG 930634/O, Nov. 30, 1998, *supra* note 339; ICC International Court of Arbitration No. 9083 of 1999, *available at* <http://cisgw3.law.pace.edu/cases/999083i1.html>;

<sup>613</sup> See Franco Ferrari, *Specific Topics of the CISG in the Light of Judicial Application and Scholarly Writing*, 15 J.L. & COM. 1 (1995), *available at* <http://cisg.law.pace.edu/casg/wais/db/editorial/ferrari950308g3.html>.

<sup>614</sup> See, e.g., OLG Zweibrücken 2 U 27/01, Jul. 26, 2002, *supra* note 567; ICC International Court of Arbitration No. 5713 of 1989; T.SA v. R. Etablissement, HG Zürich, HG 930634/O, Nov. 30, 1998, *supra* note 339.

<sup>615</sup> See, e.g., ICC International Court of Arbitration 1999, Case No. 9083; La San Giuseppe v. Forti Moulding, Ltd., [1999] O.J. No. 3352, *supra* note 612.

<sup>616</sup> See S.r.l. R.C. v. BV BA R.T., Hof van Beroep Antwerp, 1997/AR/1554, Jun. 27, 2001, *supra* note 91; *see also*, Arbitration Institute of the Stockholm Chamber of Commerce Arbitration Award of Jun. 5, 1998 *available at* <http://cisg.law.pace.edu/980605s5.html>; Francis Limbach & Brandon Ahearn, *Conformity of goods, derogation from Article 40 by the parties and conditions of Art 40 CISG*, *available at* <http://www.cisg.law.pace.edu/cisg/biblio/limbach.html>.

<sup>617</sup> *Id.*

<sup>618</sup> See, e.g., OLG Dusseldorf 17 U 82/92, Jan. 8, 1998, *supra* note 345; AG Frankfurt 32 C 1074/90-41, Jan. 13, 1991 (F.R.G.), *available at* <http://www.cisg.law.pace.edu/cisg/wais/db/cases2/910131g1.html>; HG Zürich, HG 95 0347 Feb. 5, 1997 (Switz.), *available at* <http://www.cisg.law.pace.edu/cisg/wais/db/cases2/970205s1.html>; Schiedsgericht der Handelskammer Hamburg [Arbitration Tribunal], Mar. 21, 1996 (F.R.G.), *available at* <http://www.cisg.law.pace.edu/cisg/wais/db/cases2/960321g1.html>; OLG Zweibrücken 2 U 27/01, Jul. 26, 2002, *supra* note 567; SA P. v. AWS, R.G. no. 982/01, Jan. 15, 2002 (Belg.), *available at* <http://cisgw3.law.pace.edu/cases/020115b1.html>; OGH 10 OB 518/95, Feb. 6, 1996, *supra* note 134.

<sup>619</sup> See ENDERLEIN & MASKOW, *supra* note 20, at 177.

<sup>620</sup> See generally, Robert Koch, *The Concept of Fundamental Breach of Contract under the United Nations Convention for the International Sale of Goods*, in, REVIEW OF THE CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS, 1999, at 177-354,

extension of time, and avoidance found in Articles 46-52 does not prevent the buyer from subsequently seeking damages under Articles 74-76.<sup>621</sup> To this end, the following sections will review the range of buyer remedies outlined in Article 45.<sup>622</sup>

### 1. *Right to Substituted or Repaired Goods*

Article 46 gives the buyer the right to demand performance of the unperformed elements of a contract, a concept that draws from the civil law system but is considered an extraordinary remedy in the common law system.<sup>623</sup> Under Article 46, the buyer may demand delivery of substitute goods if the lack of conformity of the goods constitutes a fundamental breach if he gives notice under Article 39 or within a reasonable time thereafter.<sup>624</sup> However, this right may be limited in some countries by Article 28, which relieves a court of the obligation to order specific performance if such a remedy would not be granted under domestic law.<sup>625</sup> Finally, unless it is unreasonable under the circumstances, the buyer may require the seller to remedy the lack of conformity by repair. The request for repair must be made either in conjunction with notice given under Article 39 or within a reasonable time thereafter.<sup>626</sup> The buyer is not obliged to require the seller to remedy a breach;<sup>627</sup> he may instead move to his own

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available at <http://cisg.law.pace.edu/cisg/biblio/koch.html>.

<sup>621</sup> CISG, *supra* note 4, at art.45.

<sup>622</sup> *Id.* at art. 45(1); *see also* OLG Köln 27 U 58/96, Jun. 14, 1994, *supra* note 543. This German case provided an opportunity for interpretation of Article 45 (1). A Dutch seller delivered tannery machines to a German buyer, but he retrieved them to make adjustments. The seller agreed to return the machines at a certain time. When he failed to do so, the buyer was forced to contract with a third-party for the tanning of hides. The seller's suit for the price of the machines was met with a counterclaim against the seller for the expense of covering with the third party contract. The Seller argued that the failure to perform a secondary obligation collateral to the contract did not give rise to a claim for damages under the CISG Article 45 (1).

<sup>623</sup> *See* ENDERLEIN & MASKOW, *supra* note 20, at 177. Enderlein and Maskow describe the right to require performance of the contract in Article 46 as "an expression of the *maxim pacta sunt servanda*." They note that specific performance is a secondary remedy under the common law principles and in the UCC, but in theory it is more available under civil codes. *See also*, Siegfried Eiselen, *A Comparison of the Remedies for Breach of Contract under the CISG and South African Law*, in AUFBRUCH NACH EUROPEA (Basedow et al. eds., 2001) available at <http://www.cisg.law.pace.edu/cisg/biblio/eiselen2.html> (comparing specific performance in Article 46(1) with principles drawn from common law countries).

<sup>624</sup> CISG, *supra* note 4, at art. 46(2).

<sup>625</sup> *Id.* at art. 28 ("unless the court would do so under its own law in respect of similar contracts of sale not governed by this Convention").

<sup>626</sup> *Id.* at art. 46(3).

<sup>627</sup> *See* Arbitration Court of the Chamber of Commerce and Industry of Budapest, VB/94131, Dec. 5, 1995 (Hung.) available at <http://cisgw3.law.pace.edu/cases/951205h1.html>.



remedies such as declaring avoidance and seeking damages.

If the seller delivers only part of the goods, or if only part of the goods delivered is in conformity with the contract, the buyer's remedies apply with respect to the missing or non-conforming part.<sup>628</sup> Partial non-performance can be the basis for avoidance of the contract only if it amounts to a fundamental breach.<sup>629</sup> Conversely, if the seller delivers the goods early, or if the seller delivers a quantity of goods greater than that provided in the contract, the buyer may refuse early delivery<sup>630</sup> and refuse delivery of excess goods.<sup>631</sup> If the buyer does take delivery of the excess goods, he is obligated to pay for them at the contract rate.<sup>632</sup>

## 2. *Right to Affix Additional Time*

Under Article 47, the buyer may fix a reasonable period of additional time for performance by the seller.<sup>633</sup> During that time, the buyer may not resort to other remedies unless the seller has notified the buyer that he will not perform within the period fixed by the buyer.<sup>634</sup> The buyer may unilaterally fix a time extension to overcome the presumption that a delayed performance does not generally constitute a fundamental breach and to limit the time for the seller to cure its breach. Article 48 allows the seller to cure any non-conformity "even after the date for delivery, remedy at his own expense any failure to perform his obligations, if he can do so without unreasonable delay and without causing the buyer unreasonable inconvenience."<sup>635</sup> However, the seller must notify the buyer of its intent to deliver late. The buyer is then obligated to notify the seller if he intends to accept the late delivery. In the event that the buyer does not respond, then the seller is automatically granted the time extension.<sup>636</sup> From the buyer's perspective, the time extension provision in Article 47 can be used to limit the seller's right to cure and to ensure that seller's failure to deliver at the expiration of the extended time period is a fundamental breach under the CISG. The elevation of untimely performance to the status of fundamental breach allows the buyer to avoid the contract. The relationship between contract extension or *nachfrist* and contract avoidance will be further explored in the next section.

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<sup>628</sup> CISG, *supra* note 4, at art. 51(1). Few cases have been decided under Article 51. See LG Baden-Baden 4 O 113/90, Aug. 14, 1991, *supra* note 311.

<sup>629</sup> CISG, *supra* note 4, art 51(2).

<sup>630</sup> *Id.* at art. 52(1).

<sup>631</sup> *Id.* at art. 52(2).

<sup>632</sup> *Id.*

<sup>633</sup> *Id.* at art. 47(1).

<sup>634</sup> *Id.* at art. 47(2).

<sup>635</sup> *Id.* at art. 48(1).

<sup>636</sup> *Id.* at art. 48(2).

### 3. Right to Avoid Contract

As discussed in the preceding section, the buyer's right to avoid the contract under Article 49<sup>637</sup> arises as a result of a fundamental breach of contract<sup>638</sup> or non-delivery by the seller within the additional period of time fixed by the buyer under Article 47.<sup>639</sup> If, however, the seller delivers the goods, the buyer's options change. If the goods are delivered late, the buyer must declare the contract avoided within a reasonable period of time after he becomes aware of the late delivery.<sup>640</sup> In the case of a lack of conformity, other than late delivery, the buyer must avoid the contract within a reasonable time after he knew or should have known of the breach;<sup>641</sup> after the seller has failed to cure the breach within the period set by the buyer under Article 47;<sup>642</sup> after the seller has declared that he will not perform within such a period;<sup>643</sup> after the expiration of any additional time period indicated by the seller under Article 48; or after the buyer has indicated that he will not accept performance under Article 48.<sup>644</sup> The limitation of the avoidance remedy to the above events is consistent with the CISG's underlying policy of contract continuance. The importance of completing transactions is based upon the recognition of the high costs of contract avoidance associated with international sales.<sup>645</sup>

Courts and tribunals have evolved a substantial body of law associated with Article 49.<sup>646</sup> Conflicts appear to arise often as problems of whether a

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<sup>637</sup> See generally, Catherine Piche, *The Convention on Contracts for the International Sale of Goods and the Uniform Commercial Code Remedies in Light of Remedial Principles Recognized under U.S. Law: Are the Remedies of Granting Additional Time to the Defaulting Parties and of Reduction of Price fair and Efficient Ones?*, 28 N. INT'L L. & COM. REG. 519 (2003).

<sup>638</sup> See generally, Koch, *supra* note 620, at 300 (discussing the relationship of seller's fundamental breach and the right of avoidance).

<sup>639</sup> CISG, *supra* note 4, at arts. 49(1)(a)-(b); see also Piche, *supra* note 637, at 526 (avoidance "relieves both parties of executory performance obligations").

<sup>640</sup> CISG, *supra* note 4, at art. 49(2)(a); see ENDERLEIN & MASKOW, *supra* note 20, at 191 ("The declaration is unilateral, does not permit conditions, and cannot be revoked.").

<sup>641</sup> CISG, *supra* note 4, at art. 49(2)(b)(i).

<sup>642</sup> *Id.* at art. 49(2)(b)(ii).

<sup>643</sup> *Id.*

<sup>644</sup> *Id.* at art. 49(2)(b)(iii).

<sup>645</sup> Piche, *supra* note 637, at 531.

<sup>646</sup> Unfortunately, the jurisprudence has been divergent and has shown homeward trend tendencies. *FCF S.A. v. Adriafile Commerciale S.r.l.*, Schweizerisches Bundesgericht [Supreme Court][BGer] 4C.105/2000, Sept. 15, 2000 (Switz.), available at <http://cisgw3.law.pace.edu/cases/000915s2.html>. In this case, a Swiss court used language that to the common law lawyer appears to reflect a homeward trend in its mode of interpretation. The court was faced with contract for cotton to be delivered between certain dates, with payment to be made by letter of credit due 60 days after the date of customs clearance. The buyer and seller contracted for a series of cotton deliveries that, to condense the facts, did not materialize according to the times specified in the contract. The buyer sued for the costs of

fundamental breach has occurred such as to give rise to the buyer's right of avoidance under Article 49(1)(a). Normally, the outcome in those cases turns on interpretation of CISG Article 25.<sup>647</sup> Article 25's definition of fundamental breach will be discussed in Part VI.<sup>648</sup>

Some cases have addressed the buyer's obligation to give notice of avoidance.<sup>649</sup> There is a good deal of variability on the kinds of actions that constitute sufficient notice. One German court held that under Article 27, the buyer need only prove that notice of avoidance was sent, not that was received.<sup>650</sup> In contrast, another German court declared that the buyer "must expressly declare the agreement avoided vis-à-vis the opposite party so that there are not any remaining doubts . . . . [S]uch a declaration of avoidance must be explicitly recognizable and realizable to the other party."<sup>651</sup> A Russian arbitration panel disregarded the need for such a

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cover, and the seller complained that the buyer had unilaterally cancelled the contracts with no justification. One of the issues for the court was the significance of avoidance under Article 49 (1). Citing commentary on the CISG, the court characterized avoidance under the CISG in this manner: "It is not an avoidance in the juridical way of the words with effects *ex tunc*, but a *resiliation* which releases both parties from their contractual obligations yet to be executed and which executes itself *ex nunc*." *Id.* The court in explaining its decision in a manner sensible to Swiss lawyers is doing so at the expense of hindering the development of uniform concepts.

<sup>647</sup> The typical cases involve two types of fact patterns: (1) Non-delivery of the goods, *see, e.g.*, HO Helsinki S 96/605, Mar. 27, 1997 (Fin.), *available at* <http://cisgw3.law.pace.edu/cases/970327f5.html>; HO Turku S 95/1023, Feb. 18, 1997 (Fin.), *available at* <http://cisgw3.law.pace.edu/cases/970218f5.html>; FCF S.A. v. Adriafile Commerciale S.r.l., BGer 4C.105/2000, *supra* note 646; ICA Arbitral Tribunal, 7531 of 1994, May 11, 1997 (Russ.), *available at* <http://cisgw3.law.pace.edu/cases/947531i1.html>; BGH VIII ZR 306/95, Dec. 4, 1996, *supra* note 410. (2) Delivery of goods whose non-conformity is alleged to be fundamental, *see, e.g.*, OLG Frankfurt 5 U 15/93, Jan. 18, 1994 (F.R.G.), *available at* <http://cisgw3.law.pace.edu/cases/940118g1.html>; LG Munchen 10 O 5423/01, Feb. 20, 2002 (F.R.G.), *available at* <http://cisgw3.law.pace.edu/cases/020220g1.html>; ICC Arbitration Case No. 7531 of 1994.

<sup>648</sup> *See infra*, Part VI.B.1.

<sup>649</sup> *See, e.g.*, OLG Frankfurt 5 U 164/90, Sept. 17, 1991 (F.R.G.), *available at* <http://cisgw3.law.pace.edu/cases/910917g1.html>; ICA Arbitral Tribunal 2/1995, May 11, 1997, (Russ.), abstract *available at* <http://cisgw3.law.pace.edu/cases/947531i1.html>.

<sup>650</sup> OLG 9 U 146/98 Naumberg, Apr. 27, 1999, *supra* note 548.

<sup>651</sup> BG T 171/95, Feb. 20, 1997, *supra* note 436. Yet another German court held that a cancellation of the "order of March 1990" was insufficient notice of avoidance. LG Frankfurt 3/11 O 3/91, Sept. 16, 1991 (F.R.G.), *available at* <http://cisgw3.law.pace.edu/cisgwais/db/cases2/910916g1.html>. A subsequent court found the contents of a buyer's telegram to seller to be a sufficiently specific declaration of avoidance. "An explicit reference to the avoidance of the contract, pursuant to the CISG, was not required for the validity of the legal effects of the avoidance of the contract . . . . It was sufficient that the [buyer] made clear that she wouldn't pay the [seller's] bill because of her breach of contract." OLG Frankfurt 5 U 164/90, Sept. 17, 1991 (F.R.G.), *available at* <http://cisgw3.law.pace.edu/cases/910917g1.html>.

formal declaration.<sup>652</sup> It did not identify any specific action that the buyer needed to take, but indicated that a study of the evidence demonstrated that “the [buyer] has demonstrated by [buyer’s] statement of action, if not earlier, that [buyer] had considered the contract as avoided.”<sup>653</sup> Thus, the formality and the content needed to satisfy the notice requirement under Article 49 has not been clearly resolved.

The importance of the prompt notice was emphasized by another German court.<sup>654</sup> It denied the buyer the right to avoidance because the declaration of avoidance occurred five months after the breach. While Article 49(1)(b) does not explicitly require notice of avoidance within a reasonable time, the court construed the language of the Section (Remedies for Breach of Contract by Seller), as a whole, to require reasonably prompt notice.<sup>655</sup>

The question of timeliness of the notice of avoidance has arisen in cases involving Article 49(2) as well. In *T, SA v. E Audiencia Provincial de Barcelona*,<sup>656</sup> a Spanish court found 48 hours to be a reasonable time after a fundamental breach for giving notice of avoidance. In a novel situation, the buyer was held to have forfeited the right to avoid the contract because the buyer failed to abide by contractual terms obligating it to notify the seller of his intent to avoid within a specified time frame.<sup>657</sup> In holding a one-day notice of avoidance to be timely and reasonable, a German court likened the “reasonable time period” language of Article 49(2)(b) to the concept of

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<sup>652</sup> ICA Arbitral Tribunal 2/1995, May 11, 1997. It cited an earlier arbitral decision which held that an arguably late declaration of avoidance by a buyer was excused by bad faith behavior of the seller. ICC Arbitration Case No. 7645 of March 1995, available at <http://cisgw3.law.pace.edu/cases/957645i1.html>.

<sup>653</sup> *Id.*

<sup>654</sup> BGH VIII ZR 18/94, Feb. 15, 1995 (F.R.G.), CLOUT Case No. 124, available at <http://www.uncitral.org/english/clout/abstract/abstr9.htm>.

<sup>655</sup> Article 49(1)(b) permits the buyer to avoid the contract if the seller does not deliver the goods within the time frame permitted under the time extension provision of Article 47. The right to avoidance can be lost for failure to provide additional time under Article 47. See, e.g., OLG Köln U 202/93, Feb. 22, 1994, *supra* note 237. The question arises, in interpreting this article, of the timeliness of the buyer’s declaration of avoidance following the expiration of the additional time period given pursuant to Article 47. Often this is a judgment based on the nature of the goods and the circumstances of the parties. In a German case involving the sale of printing machines by a German seller to an Egyptian buyer, an additional period of two weeks was provided to the seller. When the machines still had not been delivered seven weeks after the additional time was announced, the buyer declared avoidance of the contract, and the court found this to be within a reasonable time period. OLG Celle 10 U 76/94, *supra* note 481. Another German district court reached the same result on similar facts that year, noting contrary scholarly authority. LG Ellwangen I KfH O 32/95, Aug. 21, 1995, *supra* note 483.

<sup>656</sup> *T, SA v. E Audiencia Provincial de Barcelona*, seccion 16a, Nov. 3, 1997 (Spain), available at <http://cisgw3.law.pace.edu/cases/971103s4.html>.

<sup>657</sup> AG Nordhorn 3 C 75/94, Jun. 14, 1994, *supra* note 261.

promptness, or *unverzüglich*, in the German civil code.<sup>658</sup> But in a 2002 case involving the international sale of a stolen car, another German court held three months to be a reasonable time period after learning of the failure of title in which to give notice of avoidance to the seller.<sup>659</sup> In a Finnish case, the court held that three years was not a reasonable time period in which to give notice of avoidance.<sup>660</sup> Thus, while timeliness is a continuing issue under Article 49, the fact specific nature of most cases of timeliness makes uniformity of interpretation and application difficult to assess.

#### 4. *Right to a Price Reduction*

Under Article 50, the buyer can reduce the price of goods<sup>661</sup> that do not conform to the contract, even if the price has already been paid.<sup>662</sup> To reduce the price, the buyer must simply disclose the reduction, which does not preclude a claim for damages sustained due to the non-conformity. The reduction must be proportionate to the value at the time of delivery that the non-conforming goods bore to the value of the conforming goods. The CISG does not indicate the place where the value of the goods will be assessed, but better thinking suggests it would be the place “where the seller has to perform.”<sup>663</sup>

The major issue under CISG Article 50 is the proper measure of price reduction.<sup>664</sup> Article 50 refers to “value” rather than to contract price. At least one arbitral tribunal, citing scholarly authority, has identified the

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<sup>658</sup> AG Frankfurt 5 U 164/90, Sept. 17, 1991, *supra* note 651.

<sup>659</sup> LG Freiburg 8 O 75/02 22, Aug. 22, 2002 (F.R.G.), *available at* <http://cisgw3.law.pace.edu/cases/020822g1.html>.

<sup>660</sup> “In this kind of commercial transaction, a reasonable time for notice is most often very short, at most a few months. To extend this period would require pressing circumstances indeed.” HO Turku, Apr. 12, 2002 (Fin.), *available at* <http://cisgw3.law.pace.edu/cases/020412f5.html>.

<sup>661</sup> See Piche, *supra* note 637, at 548, 558-65 (tracing the principle of price reduction to the *actio quanti minoris* of Roman law through the Justinian Compilations, and explaining the justifications for the price reduction remedy).

<sup>662</sup> There is some controversy among commentators with respect to whether a non-conformity of quantity, as opposed to quality, justifies a price reduction. Piche, *supra* note 637, at 551.

<sup>663</sup> ENDERLEIN & MASKOW, *supra* note 20, at 196; Piche, *supra* note 637, at 555. The buyer may not reduce the price if the seller has remedied his failure to perform in accordance with Article 37 or Article 48 or if the buyer refuses to accept performance by the seller in accordance with those Articles. CISG, *supra* note 4, at art. 50.

<sup>664</sup> Budapest Arbitration proceeding VB/94131, Dec. 5, 1995, *supra* note 627; LG Aachen 41 O 198/89, Apr. 3, 1990, *supra* note 346; Karajaoikeus Tampere [District Court] [KO] Jan. 17, 1997 (Fin.), *available at* <http://cisgw3.law.pace.edu/cases/970117f5.html>; Overlandesgericht [OLG] Graz [Provincial Court of Appeal], 6 R 194/95, Nov. 9, 1995, *supra* note 567; Canton of Ticino: Pretore della giurisdizione di Locarno Campagna, CLOUT Case No. 56, Apr. 27, 1992, (Switz.), *available at* <http://www.uncitral.org/english/clout/abstract/abstr4.htm>.

buyer's place of business or the place where the goods will be directed as the market in which value is to be ascertained.<sup>665</sup> Beyond that, ascertaining a ratio of the value of the non-conforming goods relative to the value of conforming goods is an evidentiary matter.<sup>666</sup>

## VI. COMMON OBLIGATIONS OF BUYERS AND SELLERS

This part focuses on the common obligations of buyers and sellers under the CISG. These common obligations and concepts pertain to the passing of risk, fundamental breach, anticipatory breach, and the consequences of breach. Consequences of breach focus on the calculation of damages, the limiting doctrines of foreseeability and mitigation, the use of impediment as an excuse, the effects of avoidance of contract, and the requirements for the preservation of goods.

### A. Passing of Risk

The CISG sets forth the basic principle for the passing of risk in Article 67.<sup>667</sup> A pivotal issue for determining risk is whether the contract requires the seller to hand over the goods. If the seller is not bound to hand over the goods at a particular place, the risk passes to the buyer when the goods are handed over to the first carrier for transmission to the buyer.<sup>668</sup> If, however, the seller is bound to hand over the goods to a carrier at a particular place, the risk does not pass to the buyer until the goods are handed over to the carrier at that place.<sup>669</sup> In any event, risk of loss does not pass to the buyer until the goods are clearly identified in the contract.<sup>670</sup> Identification can be demonstrated by markings on the goods, shipping documents, notice to the buyer, or other appropriate means.<sup>671</sup>

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<sup>665</sup> Budapest Arbitration proceeding VB/94131 Arbitration Court of the Chamber of Commerce and Industry of Budapest, Dec. 5, 1995, *supra* note 627.

<sup>666</sup> See, e.g., LG Aachen 41 0 198/89, Apr. 3, 1989, *supra* note 346. See also Tampere Court of First Instance, Jan. 17, 1997, *supra* note 567 (the court held, however, that the right of price reduction for non-conforming goods is "independent of whether the buyer has sold the goods further and at what price or whether the buyer has been subject to complaints or demands for compensation"); Canton of Ticino: Pretore della giurisdizione di Locarno Campagna, Apr. 27, 1992, *supra* note 664 (rejecting a seller's plea that the price reduction should equal the cost of repairing the non-conforming goods, in favor of the Article 50 measure of reduction based on proportionality of value).

<sup>667</sup> CISG, *supra* note 4, at art. 67.

<sup>668</sup> *Id.* at art. 67(1). See generally, Secretariat Commentary to Art. 67, available at <http://www.cisg.law.pace.edu/cisg/text/secomm/secomm-67.html> (if the contract specifies the passage of the risk of loss by the use of trade terms or otherwise, Article 67 does not apply).

<sup>669</sup> *Id.*

<sup>670</sup> *Id.* at art. 67(2).

<sup>671</sup> *Id.*

Courts interpreting Article 67 have focused on two issues. The first issue pertains to the consequences of damage or deterioration to goods after they are handed over to the carrier. A number of courts have considered the liability of buyers and sellers in this context. A second issue regards the effect of additional contract terms on the application of Article 67. When risk of loss passes to the buyer pursuant to Article 67, the seller is not responsible for any deterioration or damage to the goods. In *B.P. Oil International, Ltd. v. Empresa Estatal Petroleos De Ecuador*,<sup>672</sup> the buyer refused to accept delivery claiming that the goods did not conform to the contract specifications.<sup>673</sup> The contract provided that the goods were to be delivered “CFR” and undergo a pre-shipment inspection for conformity.<sup>674</sup> The U.S. Fifth Circuit Court of Appeals found that the goods should have been tested for conformity *before* risk of loss passed to the buyer at the port of shipment.<sup>675</sup> The court also stated that the general principle in the event of subsequent damage or loss was that the buyer must first seek a remedy against the carrier or insurer.<sup>676</sup>

Issues of the application of Article 67 often hinge on a court’s interpretation of contract terms that impact the passage of risk of loss. In one case, a French seller sold goods to a German buyer pursuant to a contract with a clause that it would deliver the goods to a carrier in accordance with its general business conditions of “free delivery, duty-paid,

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<sup>672</sup> 332 F.3d 333 (5th Cir. 2003).

<sup>673</sup> *Id.* at 335.

<sup>674</sup> *Id.* at 338.

<sup>675</sup> *Id.*

<sup>676</sup> *Id.* at 338, (*citing* In re Daewoo Int’l (Am.) Corp., No. 01-Civ-8205, 2001 U.S. Dist. LEXIS 19796, at \*8 (S.D.N.Y. Dec. 3, 2001)). Because there was a question of fact, however, as to whether the seller fulfilled its contractual obligations regarding the specifications of the goods before they passed the ship’s rail, the court ordered the district court to permit the parties to conduct discovery on this limited issue. *Id.* at 339. German courts have likewise held that under Article 67 the seller is not responsible for the depreciation of goods. OLG Schleswig 11 U 40/01, Aug. 22, 2002 (F.R.G.), *available at* <http://cisgw3.law.pace.edu/cases/020822g2.html>. Another German court held that a seller is not responsible for subsequent damage to goods once they are handed over to the carrier. AG Duisburg 49 C 502/00, April 13, 2000, (F.R.G.), *available at* <http://cisgw3.law.pace.edu/cases/000413g1.html>. In that case, the court held that Article 67 applied because the buyer was not able to prove that there was an agreement between the parties for risk of loss to pass to the buyer at a different location. A third German court stated that a seller is only liable for a defect if it gave a mandate to the carrier regarding the means of shipment. OLG Schleswig-Holstein 11 U 40/01, Aug. 22, 2002, *supra* note 676. An Argentina court reached the same conclusion and held that after the risk of loss passed to the buyer, it was obligated to pay the purchase price unless the loss or damage to the goods was due to an act or omission of the seller. CN Buenos Aires 47.448 (Bedial, S.A. v. Paul Muggenburg and Co. GmbH), Oct. 31, 1995 (Arg.), CLOUT Case No. 191, *available at* <http://www.uncitral.org/english/clout/abstract/index.htm>.

untaxed.”<sup>677</sup> The dispute arose after the buyer denied that delivery had taken place, even after the seller produced an unsigned receipt with the buyer’s stamp.<sup>678</sup> The court held that the clause “free delivery . . .” should be interpreted under German law. As such, the seller bore the risk for transportation of the goods.<sup>679</sup> Moreover, the parties’ past course of dealings included the seller using its own means of transportation to deliver to the buyer. The court found this to be additional evidence of the parties’ intention to pass the risk to the buyer’s place of business in Germany. Because the seller was unable to prove that the goods were delivered to the buyer, no passing of risk to the buyer took place, and the seller was not entitled to claim the purchase price.<sup>680</sup> It should be noted that when the risk of loss passes to the buyer pursuant to Article 67, the risk passes irrespective of whether the contract contains a C & F clause<sup>681</sup> or whether the buyer has arranged to insure the goods while they are being transported.<sup>682</sup>

### B. Fundamental and Anticipatory Breach

Essential to a determination of the liability of buyers and sellers is whether there has been a fundamental breach or anticipatory breach of contract. Under Article 25, a fundamental breach of contract occurs when an act by one of the parties results in the other party being substantially deprived of what it expected under the contract.<sup>683</sup> However, the detriment caused by the breach must have been foreseeable. If the breaching party did not foresee, and a reasonable person in the same circumstances would not have foreseen such a result, there is no fundamental breach.<sup>684</sup> A fundamental breach gives the non-breaching party the right to avoid the contract or to require the delivery of substitute goods.<sup>685</sup> If the breach is

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<sup>677</sup> OLG Karlsruhe 15 U 29/92, Nov. 20, 1992 (F.R.G.), CLOUT Case No. 317, available at <http://www.uncitral.org/english/clout/abstract/abst-30.pdf>.

<sup>678</sup> *Id.*

<sup>679</sup> *Id.*

<sup>680</sup> *Id.*

<sup>681</sup> CN Buenos Aires 47.448 (Bedial, S.A. v. Paul Muggenburg and Co. GmbH), Oct. 31, 1995, *supra* note 676.

<sup>682</sup> Audiencia Provincial de Córdoba [Division 3], Oct. 31, 1997 (Spain), CLOUT Case No. 247, available at <http://www.uncitral.org/english/clout/abstract/abst-24.pdf>.

<sup>683</sup> CISG, *supra* note 4, at art. 25. See, e.g., Med. Mktg. Int’l, Inc. v. Internazionale Medico Scientifica, S.R.L., No. 99-0380-5(1), 1999 WL 311945.

<sup>684</sup> *Id.* at art. 25. See generally, Koch, *supra* note 620 (discussing the concept of fundamental breach under the CISG); Clemens Pauly, *The Concept of Fundamental Breach as an International Principle to Create Uniformity of Commercial Law*, 19 J.L. & COM. 221, 229-32 (2000) (discussion includes German concepts related to fundamental breach, including the fact that German sales law does not distinguish between general and fundamental breach).

<sup>685</sup> See CISG, *supra* note 4, at arts. 46, 49, 51, 64, 70, and 72 (referring specifically to the



considered non-material, the aggrieved party is entitled to damages, but not the remedy of avoidance.<sup>686</sup>

The CISG provisions set a high threshold before a party anticipates a breach and can suspend performance.<sup>687</sup> Anticipatory breach under Articles 71, 72, and 73 can occur in various contexts in the performance of a contract.<sup>688</sup> These Articles aim to provide a remedy while keeping the contract intact. A party may suspend the performance of his obligations if it becomes apparent that the other party will not substantially perform because of a serious deficiency in its ability to perform, such as poor creditworthiness, or in its failure to prepare to perform.<sup>689</sup> If these preconditions exist, a party can suspend performance. Alternatively, if a seller has dispatched the goods, he may prevent the goods from being handed over to the buyer.<sup>690</sup> Article 72 allows the suspending party to terminate the contract by electing the remedy of avoidance.<sup>691</sup>

The narrowness of the preconditions for suspension of performance is designed to prevent abuse of anticipatory breach. Another limitation on suspension of performance is that the party suspending performance must immediately give notice of suspension to the other party.<sup>692</sup> “Reasonable notice” to the other party enables the opportunity to provide adequate assurance of his performance.<sup>693</sup> If a party declares that he will not perform his obligations, notice need not be given.<sup>694</sup> Finally, a party’s right to suspend performance is limited by the reciprocal right of the other party to provide adequate assurance that it will perform. If the party provides such assurance, then the party is prohibited from continuing the suspension.<sup>695</sup>

The final context in which the CISG addresses common obligations of

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concept of a “fundamental breach” to determine liability).

<sup>686</sup> See *id.* at arts. 49(1)(a), 51(2), 64(1)(a), 72(1), and 73.

<sup>687</sup> Jelena Vilus, *Provisions Common to the Obligations of the Seller and the Buyer, in INTERNATIONAL SALE OF GOODS; DUBROVNIK LECTURES*, *supra* note 512.

<sup>688</sup> See generally, Seig Eiselen, *Remarks on the Manner in Which the UNIDROIT Principles of International Commercial Contracts may be Used to Interpret or Supplement Articles 71 and 72 of the CISG* (Sept. 2002) available at <http://cisgw3.law.pace.edu/cisg/principles/uni71,72.html> (using the UNIDROIT principles as an aid to the interpretation of Articles 71-71 of the CISG); Seig Eiselen, *Remarks on the Manner In Which The Principles of European Contact Law May Be Used to Interpret or Supplement Articles 71 and 72 of the CISG* (Sept. 2002) available at <http://cisgw3.law.pace.edu/cisg/text/peclcomp71,72.html> (using the European Union legal principles as an aid to the interpretation of Articles 71-71 of the CISG).

<sup>689</sup> CISG, *supra* note 4, at arts. 71(1)(a) and (b).

<sup>690</sup> *Id.* at art. 71(2).

<sup>691</sup> *Id.* at art. 72.

<sup>692</sup> *Id.* at art. 71(3).

<sup>693</sup> *Id.* at art. 72(2).

<sup>694</sup> *Id.* at art. 71(3).

<sup>695</sup> *Id.*

buyers and sellers for anticipatory breach is Article 73. Article 73 provides the threshold for fundamental breach in the context of installment contracts.<sup>696</sup> If one party's failure to perform any of his obligations constitutes a fundamental breach of contract with respect to that installment, the other party may declare the contract avoided only with respect to that installment.<sup>697</sup> However, if the failure to perform with respect to one installment gives the non-breaching party reasonable grounds to believe that the breaching party will not deliver a future installment, the anticipation of future breaches equates to a fundamental breach allowing the non-breaching party to declare the contract avoided.<sup>698</sup> The issues of fundamental breach as they pertain to installment contracts will be explored more fully below in Part VI.B.2.

### 1. *Fundamental Breach: Article 25*

The concept of fundamental breach under Article 25 is very restrictive. A breach must concern the essential content of the contract in order for it to be considered fundamental.<sup>699</sup> Courts and arbitral decisions have focused on three types of breaches as potentially fundamental—late delivery, deficiencies in the goods, and failure to uphold specific contractual terms.

First, late delivery does not generally constitute a fundamental breach.<sup>700</sup> Similarly, there cannot be a fundamental breach for failure to deliver where the parties have not agreed on a precise date of delivery.<sup>701</sup> A buyer's refusal to take delivery of goods may also not be considered a fundamental breach under certain circumstances. In one case involving staggered deliveries from May to December, the parties agreed that in return for a price reduction, the September delivery would take place in late August.<sup>702</sup> At the time of delivery, the buyer refused the goods and demanded the delivery be postponed until September. A French court

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<sup>696</sup> *Id.* at art. 73.

<sup>697</sup> *Id.* at art. 73(1).

<sup>698</sup> *Id.* at art. 73(2). As is the case in other instances of avoidance, however, notice must be provided to the other party within a reasonable time. *Id.* Note that a buyer who declares the contract avoided in respect to any delivery may, at the same time, declare it avoided in respect to deliveries already made or of future deliveries if, by reason of interdependence, those deliveries could not be used for the purpose contemplated by the parties at the time of the conclusion of the contract. *Id.* at art. 73(3).

<sup>699</sup> See, e.g., *FCF S.A. v. Adriafile Commerciale S.r.l.*, BGE 4C.105/2000, *supra* note 646 (breach must concern the essential content of the contract, the goods, or the payment of the price concerned, and it must lead to serious consequences to the economic goal pursued by the parties).

<sup>700</sup> OLG München 10 O 5423/01, July 1, 2002, *supra* note 647.

<sup>701</sup> OLG München 7 U 1720/94, Feb. 8, 1995 (F.R.G.), available at <http://cisgw3.law.pace.edu/cases/950208g1.html>.

<sup>702</sup> *SARL Ego Fruits v. La Verja*, RG 98/02700, Feb. 4, 1999, *supra* note 504.

determined that the buyer did not commit a fundamental breach, because the buyer was entitled to regard the bringing forward of the delivery date to late August as merely a reciprocal concession for a financial advantage.<sup>703</sup> As such, it could not be expected to have understood that a few days' delay in taking delivery would constitute a fundamental breach on its part. Accordingly, the seller should have granted the buyer additional time in which to take delivery.

However, a delay in delivery can rise to a level of a fundamental breach when a timely delivery is in the special interest of the buyer.<sup>704</sup> The importance of the delivery date must be foreseeable at the time of the conclusion of the contract.<sup>705</sup> Depending on the circumstances of the transaction, such as the need to honor obligations to downstream purchasers, the delivery time may be considered a material term.

Second, a common type of breach is the delivery of deficient or defective goods or documents. In a German case of non-conformity of documents, a buyer made alternative arguments of non-conforming delivery amounting to fundamental breach and non-conforming delivery amounting to a non-delivery.<sup>706</sup> This case, popularly known as the "blue cobalt" case, involved a contract that required the goods to be of British origin and accompanied by a certificate of origin. The seller delivered the goods to a warehouse in Antwerp, as required by the contract, and sent certificates of origin to the buyer. The certificates of origin indicated that the goods were of South African origin. The buyer declared the contract avoided on the grounds that the non-conforming certificate constituted a fundamental breach and that because of the defective document there was no true delivery. The court rejected the buyer's Article 49(1)(b) (non-delivery) claim that the non-conforming delivery was a non-delivery. The court reasoned that under the CISG, non-conforming delivery still constitutes delivery, making Article 49(1)(b) not available to the buyer. The court also rejected the buyer's avoidance claim under Article 49(1)(a) (fundamental breach) holding that it failed to prove a fundamental breach. It asserted that the buyer failed to present evidence that South African cobalt could not be sold or that the seller could not obtain conforming documents of origin. The later assertion seems fanciful since the cobalt was clearly not of British origin. This case demonstrates that the concept of fundamental breach is narrowly construed under the CISG.<sup>707</sup>

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<sup>703</sup> *Id.*

<sup>704</sup> OLG Hamburg 1 U 167/95, Feb. 28, 1997 (F.R.G.), CLOUT Case No. 277, available at <http://www.uncitral.org/english/clout/abstract/index.htm>.

<sup>705</sup> For example, the use of the Incoterm "CIF" by definition determines the contract to be a transaction for delivery by a fixed date. *Id.*

<sup>706</sup> BGHZ VIII ZR 51/95, Apr. 3, 1996, *supra* note 576.

<sup>707</sup> *Id.*

Third, defects are considered fundamental only when the buyer is substantially deprived of what he was entitled to under the contract.<sup>708</sup> For example, tiles sold as “impermeable” which turned out to be easily stained by household items, such as juice, constituted a fundamental breach of the contract.<sup>709</sup> A shipment of jeans that contained the wrong quantity and were incorrectly labeled with the wrong sizes fundamentally breached the contract.<sup>710</sup> In *Delchi Carrier SpA v. Rotorex Corp.*, the Court of Appeals for the Second Circuit held that a fundamental breach of contract occurred when air compressors did not conform to the sample model and the accompanying specifications regarding cooling capacity and energy consumption.<sup>711</sup> However, the burden remains on the buyer to prove that due to the non-conformity, the goods provided were substantially below what was stipulated in the contract.<sup>712</sup>

Fundamental breach under Article 25 is not confined to untimely delivery or delivery of non-conforming goods. Under certain circumstances, any provision in a contract can be considered material and the breach would be considered fundamental. For example, a French seller of jeans negotiated a contract with an American buyer that specified that the ultimate destination of the goods was to be either South America or Africa.<sup>713</sup> During the performance of the contract, the buyer repeatedly ignored the seller’s demand for proof of destination. Subsequently, the seller learned that a shipment of the jeans was delivered in Spain. A French court found that the buyer disregarded the seller’s destination requirement and that this “attitude” constituted a fundamental breach of the contract.<sup>714</sup>

Failure to abide by exclusivity provisions can also give rise to a fundamental breach under Article 25. In one case, an Italian manufacturer agreed to produce shoes according to a German buyer’s specifications. At a trade fair, the seller displayed some of the shoes produced under the

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<sup>708</sup> International Chamber of Commerce Arbitral Award 1994, ICC International Court of Arbitration Bulletin Vol. 6, No. 2, 67, CLOUT Case No. 304, available at <http://www.uncitral.org/english/clout/abstract/index.htm>.

<sup>709</sup> LG Saarbrücken 8 O 49/02, July 2, 2002 (F.R.G.), available at <http://cisgw3.law.pace.edu/cases/020702g1.html>.

<sup>710</sup> OLG Hamburg 1 U 31/99 (Nov. 26, 1999 Germany) available at <http://cisgw3.law.pace.edu/cases/991126g1.html>.

<sup>711</sup> 71 F.3d 1024, 1027-29 (2d Cir. 1995).

<sup>712</sup> See, e.g., BGHZ VIII ZR 51/95, *supra* note 576 (buyer was unable to demonstrate that the quality of the goods it received was inferior to what was agreed upon).

<sup>713</sup> S.A.R.L. Bri Prod. “Bonaventure” v. Société Pan Africa Export, Feb. 22, 1995 (Fr.), CLOUT Case No. 154, available at <http://www.uncitral.org/english/clout/abstract/index.htm>. In another case, it was determined that a buyer’s failure to pay large sums due as “performance payments” was a fundamental breach of contract. *Shuttle Packaging Sys., L.L.C. v. Jacob Tsoukakis, Ina S.A.*, 01-CV-691, 2001 WL 34046276 (W.D. Mich. Dec. 17, 2001).

<sup>714</sup> S.A.R.L. Bri Prod. “Bonaventure,” *supra* note 713.

specifications, bearing a trademark of which the buyer was the licensee.<sup>715</sup> After the seller refused to remove the shoes, the buyer avoided the contract. The court held that the seller's breach of the ancillary duty of preserving exclusivity constituted a fundamental breach of the contract.<sup>716</sup>

2. *Anticipatory Breach, Adequate Assurance, and Installment Contracts: Articles 71-73 and the Importance of Notice*

The concept of fundamental breach is also a determining factor in the context of anticipatory breach. The CISG affords both buyers and sellers the right to suspend or avoid a contract due to a fundamental breach under Articles 71-73.<sup>717</sup> If a fundamental breach occurs or is likely to occur, the non-breaching party may seek to suspend performance under Article 71 or to avoid the contract under Article 72. Although there is no bright-line standard for determining the degree of certainty needed to anticipate fundamental breach, there should be a very high degree of probability that the breach will occur.<sup>718</sup>

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<sup>715</sup> OLG Frankfurt 5 U 164/90, Sept. 17, 1991, *supra* note 651.

<sup>716</sup> *Id.* Compare FCF S.A. v. Adriafile Commerciale S.r.l., BGE, Sept. 15, 2000 (Switz.), available at <http://cisgw3.law.pace.edu/cases/000915s2.html>. That case involved a buyer who purchased shoes through a commercial agent. After the buyer learned that identical shoes made by an Italian manufacturer were being offered for sale by a competing retailer at a considerably lower price, the buyer attempted to avoid the contract. Holding that the buyer was not entitled to avoid the contract, the court stated that there was no fundamental breach because the manufacturer had no knowledge about the branches of its business partners. Ultimately, the two cases can be reconciled under the principle that an ancillary obligation can only be a basis for a fundamental breach when it goes to the principle performance under the contract. See, e.g., LG Frankfurt 3/11 O 3/91, Sept. 16, 1991, *supra* note 651.

<sup>717</sup> CISG *supra* note 4, at arts. 71-73. See *Shuttle Packaging Sys., LLC*, 2001 WL 34046276.

<sup>718</sup> LG Berlin 99 O 123/92, Sept. 30, 1992 (F.R.G.), available at <http://cisgw3.law.pace.edu/cases/920930g1.html>. The chance of a breach should be "clear" or obvious to anyone. In German, the standard is defined by the words "it is clear" or *offensichtlich*. *Id.* For example, in a German case, a seller delivered the goods to a third-party's warehouse; after the third-party declared bankruptcy and the goods disappeared, the seller attempted to collect the alleged outstanding purchase price from the buyer. The court held that the buyer was not obligated to pay the purchase price, because the seller did not prove that the goods were lost after the risk passed to the buyer. OLG Hamm 19 U 127/97, Jun. 23, 1998, *supra* note 544. Parties are generally allowed to avoid a contract under similar circumstances under Article 72. For example, a buyer was entitled to terminate a contract concerning non-delivered goods where the seller only made a partial delivery after the price of the goods rose significantly. Arbitration Court attached to the Hungarian Chamber of Commerce and Industry, Vb/97142, May 15, 1999 (Hung.), CLOUT Case No. 265, available at <http://www.uncitral.org/english/clout/abstract/index.htm>. In another case, a seller was entitled to avoid a contract after the buyer failed to settle other bills with the seller. The buyer ordered 140 pairs of winter shoes from the seller; after the shoes were manufactured, seller demanded security for the sales price as the buyer still had other unsettled bills with the seller. Because the buyer did not pay and did not furnish security, the

The installment contract requires a more complicated analysis. A breach of an installment must be analyzed to determine if the breach is to be considered fundamental within the installment and the contract as a whole. Article 73(1) implies that as a general rule, a breach of an installment performance gives the other party the right to declare the contract avoided only with respect to the installment.<sup>719</sup> If, however, it is determined to be fundamental to the whole, then the non-breaching party may avoid obligations in connection with future deliveries.<sup>720</sup> A stronger case for fundamental breach is made when there are a series of defective installment performances. This occurred in the Spanish case of *T. SA v. E.*<sup>721</sup> Here, the seller delivered three installments four and eight weeks past the agreed upon dates, causing disruption to the buyer's production process. The court ruled that avoidance was proper and canceled the remaining installments due under the contract.<sup>722</sup>

In addition to fundamental breach, a second issue that often arises in connection with anticipatory breach is the sufficiency of notice. In many instances, notice is improperly made or given too late. It should be noted that consistent with Article 27, if any notice is made by "means appropriate in the circumstances," a delay or error in the transmission of the communication or its failure to arrive does not deprive that party of the right to rely on the communication.<sup>723</sup> Under Article 71, a party suspending performance must "immediately" give notice of the suspension to the other party.<sup>724</sup> Such notice is to be given as soon as the party makes the decision to suspend performance.<sup>725</sup> For example, simply failing to pay the purchase price does not replace the notification that payment of the purchase price is being suspended until the other party properly fulfills the contract or

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court held that the seller had the right to avoid the contract. OLG Düsseldorf 17 U 146/93, Jan. 14, 1994 (F.R.G.), available at <http://cisgw3.law.pace.edu/cases/940114g1.html>.

<sup>719</sup> CISG, *supra* note 4, at art. 73(1). See, e.g., Schiedsgericht der Hamburger freundschaftlichen Arbitrage [Arbitral Award], Dec. 29, 1998 (F.R.G.), CLOUT Case No. 293, available at <http://www.uncitral.org/english/clout/abstract/index.htm>.

<sup>720</sup> S.A.R.L. Bri Production "Bonaventure" v. Société Pan Africa Export, *supra* note 713.

<sup>721</sup> *T, SA v. E*, Audiencia Provincial [Appellate Court] de Barcelona, sección 16ª, Nov. 3, 1997 (Spain), CLOUT Case No. 246, available at <http://www.uncitral.org/english/clout/abstract/index.htm>.

<sup>722</sup> *Id.* In order to protect the right of avoidance, the avoiding party must give "reasonable notice" that a fundamental breach will occur with respect to future installments. CISG, *supra* note 4, at art. 73(2). See generally HG Zürich, HG 930634, Nov. 30, 1998, *supra* note 339.

<sup>723</sup> CISG, *supra* note 4, at art. 27; See LG Stendal 22 S 234/94, Oct. 12, 2000 (F.R.G.), available at <http://cisgw3.law.pace.edu/cases/001012g1.html>.

<sup>724</sup> CISG, *supra* note 4, at art. 71(3).

<sup>725</sup> This was particularly true in a case in which the parties agreed upon a modification of the contract by reducing the purchase price. LG Stendal 22 S 234/94, Oct. 12, 2000, *supra* note 723.

provides adequate assurance.

The importance of notice is a general theme found throughout the CISG.<sup>726</sup> It is particularly evident in Article 71(2). Failure to give proper notice under Article 71(2) results in the revocation of an otherwise reasonable suspension of performance. A German court held that reasonable doubts about the buyer's creditworthiness were not sufficient to overcome the seller's failure to give notice pursuant to Article 71(3).<sup>727</sup> The court reasoned that if the seller wanted to exercise his right of suspension, he was obligated to inform the buyer about any doubts regarding her creditworthiness or ability to perform her duties and liabilities under the sales contract. Inasmuch as the seller did not demonstrate that he gave any such notice and information to the buyer, he was not permitted to suspend performance. Hence, notification is an absolutely necessary prerequisite for exercising the right of suspension for anticipatory breach.<sup>728</sup>

Proper notice must also be given for a party to avail itself of the avoidance provisions in Article 72, except that the standard is slightly different.<sup>729</sup> Under Article 72, the party intending to declare the contract avoided must give "reasonable notice" to the other party to allow that party the opportunity to provide adequate assurance of performance.<sup>730</sup> The substance of the notice is just as important as the timing; notice must be given prior to the date of performance.<sup>731</sup> After the parties have performed the contract, neither party is entitled to declare the contract avoided under Article 72.

### C. Consequences of Breach

Upon breach by either party, a number of consequences result that are common to buyers and sellers. The CISG provides a series of procedures that impact the consequences of breach. First, it provides rules for the calculation of damages. Second, it provides a number of limiting doctrines

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<sup>726</sup> See, e.g., CISG, *supra* note 4, at arts. 18(3), 19(2), 21, 26, 27, 39, 43(1), 46(2), 47(1), 48, 63(2), 65(2), 71(3), 72(2), 73(2), 79(4), and 88(1).

<sup>727</sup> AG Frankfurt 32 C 1074/90-41, Jan. 31, 1991, *supra* note 618.

<sup>728</sup> *Id.* See generally Hof van Beroep Gent, 1997/AR/2235, Apr. 26, 2000 (Belg.), available at <http://http://cisgw3.law.pace.edu/cisg/wais/db/cases2/000426b1.html>; Netherlands Arbitration Institute 2319, Oct. 15, 2002.

<sup>729</sup> CISG, *supra* note 4, at art. 72.

<sup>730</sup> *Id.* at art. 72(2). The plain language of Article 72 reveals that a party needs to "simply allege (1) that the defendant intended to breach the contract before the contract's performance date and (2) that such breach was fundamental." *Magellan Int'l Corp. v. Salzgitter Handel GmbH*, 76 F.Supp.2d 919, 925-26 (N.D. Ill. 1999).

<sup>731</sup> See generally BGH VIII ZR 18/94, Feb. 15, 1995, *supra* note 654. One way that reasonable notice is given is when goods are examined upon receipt and a message is promptly faxed noting the nonconformity. See generally *HO Helsinki*, S 96/1215, Jun. 30, 1998 (Fin.), available at <http://cisgw3.law.pace.edu/cases/980630f5>.

that may be used to reduce the amount of damages awarded. Third, it provides the excuse of impediment that allows the breaching party to avoid damages. Fourth, it provides rules for the consequences of contractual avoidance. Finally, it allocates certain obligations pertaining to the preservation of goods.

### 1. Calculation of Damages

Articles 74, 75, and 76 set out general formulas for the calculation of damages.<sup>732</sup> Pursuant to Article 74, damages consist of a sum equal to the loss, including loss of profit, suffered by the other party as a consequence of the breach.<sup>733</sup> Under Article 75, if the contract is avoided, and the buyer has bought goods in replacement or the seller has resold the goods, the party claiming damages may recover “the difference between the contract price and the price in the substitute transaction.”<sup>734</sup> The substitute transaction must be made in a reasonable manner and within a reasonable time after avoidance.<sup>735</sup> If the substitute transaction occurs in a different place from the original transaction or is on different terms, the amount of damages must be adjusted to recognize any increase in costs, less any expenses saved as a consequence of the breach.<sup>736</sup> Moreover, the time limit within which the resale or cover purchase must be made does not begin until the injured party has in fact declared the contract avoided.<sup>737</sup> Failure to abide by the requirements of Article 75 will result in a party being precluded from recovering damages.<sup>738</sup> Consequently, the buyer who does not declare a

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<sup>732</sup> CISG, *supra* note 4, at arts. 74-76. See generally Harry M. Flechtner, *Remedies Under the New International Sales Convention: The Perspective from Article 2 of the U.C.C.*, 8 J.L. & COM. 53 (1988) (elaborating on the use of Article 2 of the UCC to interpret the remedy provisions of the CISG); Jeffrey S. Sutton, *Measuring Damages Under the United Nations Convention on the International Sale of Goods*, 50 OHIO S. L.J. 737 (1989) (comparing Article 2 of the UCC with the CISG).

<sup>733</sup> CISG, *supra* note 4, at art. 74.

<sup>734</sup> *Id.* at art. 75.

<sup>735</sup> See *id.* The time limit does not begin to run until the injured party has in fact declared the contract avoided.

<sup>736</sup> Secretariat Commentary to art. 75, available at <http://www.cisg.law.pace.edu/cisg/text/secomm/secomm-75.html>.

<sup>737</sup> *Id.*

<sup>738</sup> Issues of proof can be raised as to whether a substitute purchase was carried out at the price claimed or whether the purchase is justifiable. LG Braunschweig 21 0 703/01 (028), Jul. 30, 2001 (F.R.G.), available at <http://cisgw3.law.pace.edu/cases/010730g1.html>. A plaintiff, however, is not obliged to resell the goods before the date of avoidance. OLG Düsseldorf 17 U 146/93, Jan. 14, 1994, *supra* note 718 (resale nearly two months after avoidance was still within a reasonable time). Furthermore, a substitute purchase cannot replace a notice of declaration of avoidance of a contract. OLG Bamberg 3 U 83/98, Jan. 13, 1999 (F.R.G.), available at <http://cisgw3.law.pace.edu/cases/990113g1.html>. Likewise, once avoidance of the contract is clear, a buyer does not need to wait before purchasing substitute goods. FCF S.A. v. Adriafile Commerciale S.r.l. BGE, 4C.105/2000, *supra* note



contract avoided is not entitled to recover the expenses incurred in procuring replacement goods.<sup>739</sup>

If the contract has been avoided but no substitute transaction followed, then Article 76 sets forth an alternative means of measuring damages. Article 76 provides that if the contract is avoided and there is a current sale price for the goods, the party claiming damages may, if he has not made a purchase or sale under Article 75, recover “the difference between the price fixed by the contract and the current price at the time of avoidance.”<sup>740</sup> If, however, the party claiming damages avoided the contract after taking the goods, then the current price at the time of the taking over shall be applied.<sup>741</sup> If no current price is presented in connection with a claim for damages under Article 76, a party is precluded from recovering under this Article.<sup>742</sup> A party collecting under Articles 75 and 76 may also recover additional damages under Article 74.<sup>743</sup>

A number of cases have dealt with the ability of the claiming party to recover interest. Generally, interest is awarded for any claim of damages.<sup>744</sup> In fact, one arbitration tribunal awarded a rate above the legal rate.<sup>745</sup> The rationale given was that the entitlement to interest under Article 78 is independent of any claim for damages under Article 74. The tribunal found that the seller operated on the basis of credit for which it had to pay interest at the rate of 12%. It then applied that rate since the seller would have to obtain credit in order to replace the funds missing due to non-payment by the buyer

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646 (except in the case in which the seller could prove that the buyer was able to find goods at a more favorable price).

<sup>739</sup> OLG Bamberg 3 U 83/98, Jan. 13, 1999, *supra* note 738.

<sup>740</sup> CISG, *supra* note 4, at art. 76. The “current price” is that for goods of the contract description in the contract amount; the concept of “current price” does not require the existence of official or unofficial market quotations, but the lack thereof may raise the question whether there is a current price for the goods. Secretariat Commentary to Art. 76, available at <http://www.cisg.law.pace.edu/cisg/text/secomm/secomm-76.html>.

<sup>741</sup> CISG, *supra* note 4, at art. 76. See KG Zug, A3 1997 61, Oct. 21, 1999 (Switz.), available at <http://cisgw3.law.pace.edu/cases/991021s1.html> (court held that damages resulting from non-performance of the contract by the seller had to be assessed on the basis of an abstract calculation under Article 76).

<sup>742</sup> OLG Celle 3 U 246/97, Sept. 2, 1998 (F.R.G.), available at <http://cisgw3.law.pace.edu/cases/980902g1.html> (the court was not able to make a calculation under Article 76 for damages because the buyer failed to present any evidence of the current market price of the goods).

<sup>743</sup> CISG, *supra* note 4, at art. 74.

<sup>744</sup> *Id.* at art. 78.

<sup>745</sup> International Chamber of Commerce Arbitration 7197 (1993), CLOUT Case No. 104, available at <http://www.uncitral.org/english/clout/abstract/abstr8.htm>.

## 2. *Limiting Doctrines: Articles 74 and 77*

The damages available under Articles 74 and 75 are subject to the limiting doctrines of foreseeability, found in Article 74, and the principle of mitigation, found in Article 77. Under Article 74, 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 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.<sup>746</sup> A party may increase the scope of foreseeability by communicating to the other party that a breach would cause him exceptionally heavy losses or losses of an unusual nature.<sup>747</sup>

Issues arising under Article 74 fall into two major categories. First, there are cases addressing whether or not certain damages are foreseeable. The burden of proof is on the non-breaching party to prove that the damages were a foreseeable consequence of breach. Second, there is the issue of whether attorneys’ fees and the costs of debt collection are allowed under Article 74. Article 77 places a duty on the non-breaching party to mitigate damages. A key determination in the application of the doctrine of mitigation is the timing of the mitigation.

### a. Doctrine of Foreseeability

The Supreme Court of Germany applied the foreseeability limitation at the time of contract formation, rather than, as under national law, at the time of the breach.<sup>748</sup> In that case, the buyer was a German cheese importer who entered into a contract to purchase cheese from a Dutch exporter. Because three percent of the cheese delivered was defective, the buyer sought damages, including lost profits as a result of the loss of four wholesale customers, damages paid to one of buyer’s customers who lost his own customers as a result of the defective cheese, and the loss of a group delivery arrangement causing an increase in the buyer’s transportation costs.<sup>749</sup> Two lower courts denied the buyer’s claims, stating that he could only recover lost profits if the seller could have foreseen such damages

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<sup>746</sup> CISG, *supra* note 4, at art. 74. See Arthur G., Murphy, Jr., *Consequential Damages in Contracts for the International Sale of Goods and the Legacy of Hadley*, 23 GEO. WASH. J. INT’L L. & ECON. 415 (1989); see generally CA Grenoble, RG 98/02700, Feb. 4, 1999, *supra* note 504 (judges applied art. 74 to calculate the damages awarded to the buyer after seller refused to deliver and buyer obtained supplies elsewhere).

<sup>747</sup> Secretariat Commentary to Art. 74, available at <http://www.cisg.law.pace.edu/cisg/text/secomm/secomm-74.html>.

<sup>748</sup> BGH VIII ZR 210/78, Oct. 24, 1979 (F.R.G.), available at <http://cisgw3.law.pace.edu/cases/791024g1>; see also Arbitral Tribunal Vienna, SCH-4366, Jun. 15, 1994, *supra* note 78 (issue of foreseeability). For a discussion of this case, see Eric C. Schneider, *Consequential Damages in the International Sale of Goods: Analysis of Two Decisions*, 16 U. PENN. J. OF INT’L B.L. 615 (1995).

<sup>749</sup> *Id.*

because 3% of the cheese was defective. The German Supreme Court reversed and remanded noting that the seller knew at the time of the formation of the contract that the buyer was a middleman or reseller of the goods.

In *Delchi Carrier SpA v. Rotorex Corp.*,<sup>750</sup> the Court of Appeals for the Second Circuit emphasized that the CISG requires damages to be limited by the “familiar principle of foreseeability established in *Hadley v. Baxendale*.”<sup>751</sup> Accordingly, the court found that a CISG plaintiff may collect damages to compensate for the full loss, including lost profits, “subject only to the familiar limitation that the breaching party must have foreseen, or should have foreseen, the loss as a probable consequence.”<sup>752</sup> The court held that damages were foreseeable and could be recovered for lost profits due to lost sales from having to shut down manufacturing operations, along with expenses for storage, shipping and retooling.<sup>753</sup> In so holding, the court stated that to award damages for such costs actually incurred in no way creates a double recovery and instead furthers the purpose of giving the injured party damages “equal to the loss” as provided for by Article 74.<sup>754</sup>

As demonstrated in *Delchi Carrier SpA v. Rotorex Corp.*, the general principle that there should be “full compensation” for damages under the CISG not only allows for recovery of lost profits, but also additional out of pocket expenses.<sup>755</sup> Damages have been awarded for a variety of expenses including costs of obtaining credit,<sup>756</sup> damages caused by liability to a customer when goods are sold to a dealer who intends to resell them,<sup>757</sup> and damages for the costs relating to a dishonored check.<sup>758</sup> Damages were not awarded where they were not reasonably foreseeable and damages have been denied where the party seeking damages fails to do the following:

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<sup>750</sup> 71 F.3d 1024 (2d Cir. 1995).

<sup>751</sup> *Id.* at 1029 (citing *Hadley v. Baxendale*, 156 Eng. Rep. 145 (1854)).

<sup>752</sup> *Id.* at 1030.

<sup>753</sup> *Id.* at 1029-30. See also HG Zürich, HG 95 0347, Feb. 5, 1997, *supra* note 618 (buyer proved that it had the opportunity to resell the first shipment from the seller at a higher price) compare OLG Celle 3 U 246/97, Sept. 2, 1998, *supra* note 742 (court held that the buyer was not entitled to a claim for loss of profit, in view of the fact that it had omitted to assess its damages on the basis of a specific calculation as required by art. 74).

<sup>754</sup> *Delchi Carrier SpA*, 71 F.3d at 1030. In so doing, the Second Circuit disagreed with lower court holdings that denied recovery of such damages as “double recovery.” *Id.*

<sup>755</sup> See generally OLG Hamburg 1 U 31/99, Nov. 26, 1999, *supra* note 710 (damages cover the whole loss resulting from non-performance).

<sup>756</sup> ICC International Court of Arbitration 7531.

<sup>757</sup> See generally OLG Köln 22 U 4/96, May 21, 1996, *supra* note 607; BGer I. Zivilabteilung 4C.179/1998/odi, Oct. 28, 1998 (Switz.), available at <http://cisgw3.law.pace.edu/cases/981028s1>.

<sup>758</sup> OLG Stuttgart, 5 U 195/94, Aug. 21, 1995 (F.R.G.), available at <http://cisgw3.law.pace.edu/cases/950821g1>.

prove that additional costs of obtaining goods were foreseeable at the time the contract was concluded;<sup>759</sup> where the buyer was forewarned by complaints concerning an initial delivery, but still failed to carefully examine a second shipment for defects in a timely manner;<sup>760</sup> where the buyer lost profits associated with general distribution agreement with other parties;<sup>761</sup> where the buyer failed to state a claim for damages within a reasonable time;<sup>762</sup> where a party sought compensation for impairment to its "trading image";<sup>763</sup> where the buyer claiming damages failed to specify the nature of the lack of conformity of the goods;<sup>764</sup> and where the buyer did not produce any evidence that the seller knew about the terms and conditions of a contract between the buyer and a third party.<sup>765</sup>

### b. Attorney Fees and Debt Collection

A second major issue under Article 74 is whether attorneys' fees are recoverable.<sup>766</sup> Authority is split on this point. German courts have required parties to pay attorneys' fees under Article 74.<sup>767</sup> Recently, a German district court held that the buyer was responsible to pay the seller's attorneys' fee incurred as a result of the buyer's failure to pay in a timely manner, plus interest accrued since the commencement of the legal action.<sup>768</sup> In the United States, however, the Court of Appeals for the Seventh Circuit held in *Zapata Hermanos Sucesores v. Hearthside Baking Co.* that the loss recoverable in Article 74 does not include attorneys' fees.<sup>769</sup> In reaching this conclusion, Judge Posner noted that there was

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<sup>759</sup> OLG Bamberg 3 U 83/98, Jan. 13, 1999, *supra* note 738.

<sup>760</sup> LG Stuttgart 3 KfH O 97/89, Aug. 31, 1989, *supra* note 359.

<sup>761</sup> Schiedsgericht der Handelskammer Hamburg, Mar. 21, 1996, *supra* note 618.

<sup>762</sup> HG Zürich, HG 92 0670, Apr. 26, 1995 (Switz.), *available at* <http://cisgw3.law.pace.edu/cases/950426s1.html>.

<sup>763</sup> Société Calzados Magnanni v. SARL Shoes General International, Oct. 21, 1999 (Fr.), CLOUT Case No. 313, *available at* <http://www.uncitral.org/english/clout/abstract/abst-29.pdf>

<sup>764</sup> LG Köln 89 O 20/99, Nov. 30, 1999 (F.R.G.), *available at* <http://cisgw3.law.pace.edu/cases/991130g1.html>.

<sup>765</sup> ICA Arbitral Tribunal 406/1998, Jun. 6, 2000 (Russ.), *available at* <http://cisgw3.law.pace.edu/cases/000606r1.html>.

<sup>766</sup> See Peter Schlechtriem, *Attorneys' Fees as Part of Recoverable Damages*, 14 PACE INT'L L. REV. 205 (2002) (note that this discussion precedes the most recent cases discussed below).

<sup>767</sup> In one case, the court held that the plaintiff could claim attorneys' fees for a reminder that was sent prior to the lawsuit. OLG Düsseldorf 6 U 152/95, Jul. 11, 1996 (F.R.G.), *available at* <http://cisgw3.law.pace.edu/cases/960711g1.html>.

<sup>768</sup> LG Berlin 103 O 213/02, Mar. 23, 2003 (F.R.G.), *available at* <http://cisgw3.law.pace.edu/cases/030321g1.html>.

<sup>769</sup> *Zapata Hermanos Sucesores v. Hearthside Baking Co.*, 313 F.3d 385, 389 (7th Cir. 2002).

nothing in the background of the CISG about whether “loss” was intended to include attorneys’ fees.<sup>770</sup> In *Ajax Tool Works, Inc. v. Can-Eng Manufacturing Ltd.*,<sup>771</sup> the Federal District Court for the Northern District of Illinois held that since the granting of “attorneys’ fees [is] a procedural matter governed by the law of the forum,” they are not recoverable in the United States under Article 74.<sup>772</sup>

In the related area of debt collection, a German court held that debt collection costs are not recoverable under Article 74.<sup>773</sup> The court, however, did not totally exclude the possibility of recovering the costs associated with debt collection. It rejected the claim because it found that the plaintiff failed to follow the most economical means to collect the debt.<sup>774</sup> In another case, a Swiss court held that the buyer had to indemnify the seller for debt collection costs.<sup>775</sup> The seller was awarded default interest and reimbursement of debt collection costs.

### c. Doctrine of Mitigation

In accordance with Article 77, a party who is subject to a breach of contract must take “such measures as are reasonable in the circumstances to mitigate the loss, including loss of profit, resulting from the breach.”<sup>776</sup> If a party fails to take measures to mitigate damages, the party in breach may claim a reduction in damages in the amount by which the loss should have been mitigated.<sup>777</sup> The duty to mitigate damages also applies to an anticipatory breach of contract.<sup>778</sup>

The timing of the non-breaching party’s mitigation efforts is crucial to the ultimate calculation of damages owed. A party is not required to mitigate before the date of avoidance. However, mitigation must take place

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<sup>770</sup> *Id.* at 388.

<sup>771</sup> Prod. Liab. Rep. (CCH) ¶16,516, 01C 5938 2003 WL 223187, at \*7 (N.D. Ill. Jan. 30, 2003).

<sup>772</sup> *Id.*

<sup>773</sup> AG Berlin-Tiergarten 2 C 22/97, Mar. 13, 1997 (F.R.G.), available at <http://cisgw3.law.pace.edu/cases/970313g1>.

<sup>774</sup> *Id.*

<sup>775</sup> KG Zug, A3 1998 153, Feb. 25, 1999, *supra* note 742.

<sup>776</sup> CISG, *supra* note 4, at art. 77. See Arbitral Tribunal Vienna, SCH-4366, Jun. 15, 1994, *supra* note 78; NAI, 2319, Oct. 15, 2002 (Neth.), available at <http://cisgw3.law.pace.edu/cases/021015n1.html>; OLG München 7 U 1720/94, *supra* note 701. Note that there is no need to mitigate as long as a contract between the parties still exists. See, e.g., OLG Braunschweig 2 U 27/99, Oct. 28, 1999 (F.R.G.), available at <http://cisgw3.law.pace.edu/cases/991028g1.html>. ICC Court of Arbitration 7331 of 1994, available at <http://cisgw3.law.pace.edu/cases/947331i1.html> (party must mitigate even if timely notice is given to the other party).

<sup>777</sup> *Id.* See generally, BGH VIII ZR 121/98, Mar. 24, 1999, *supra* note 95.

<sup>778</sup> Secretariat Commentary to Art. 77, available at <http://www.cisg.law.pace.edu/cisg/text/secomm/secomm-77.html>.

within a reasonable time. The reasonable time standard provides the flexibility needed to consider a wide range of divergent fact patterns. For example, a two-month timeframe for mitigation would be deemed, under most circumstances, to be unreasonable. In a case involving the sale of winter shoes, one court held that resale nearly two months after avoidance was within a reasonable time frame, especially in light of the fact that most retailers had already filled their winter orders by the date of the avoidance.<sup>779</sup>

In mitigating its loss, a party obligated to resell goods should make reasonable efforts to undertake a profitable resale.<sup>780</sup> Examples of failure to mitigate include only making efforts to effect replacement purchases in the buyer's region, without taking into account other suppliers in the country or abroad,<sup>781</sup> and failure to make a covering purchase after the seller terminated a contract with respect to non-delivered goods.<sup>782</sup>

### 3. *Impediment (Excuse) to Performance: Article 79*

A buyer may still be barred from recovering foreseeable damages if the defendant seller can prove that non-performance was due to an *impediment*. Under Article 79, a party will not be held liable for failure to perform his contractual obligations if he proves that "the failure was due to an impediment beyond his control" and that he could not reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract or to have avoided or overcome it or its consequences.<sup>783</sup> A party may also be excused from performance, under limited circumstances, if the failure to perform is due to the failure of a third person.<sup>784</sup> As is the case with avoidance, a party who fails to perform because of an impediment must provide notice to the other party within a "reasonable time" after the party who fails to perform knew or ought to have known of the impediment.<sup>785</sup> If the other party does not receive such notice, then the party who fails to perform will be liable for damages that could have been avoided if proper notice had been given.<sup>786</sup>

To be excused, the circumstances constituting the impediment must be

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<sup>779</sup> OLG Düsseldorf 17 U 146/93, Jan. 14, 1994, *supra* note 718.

<sup>780</sup> OLG Rostock 1 U 247/94, Jul. 27, 1995, *supra* note 569.

<sup>781</sup> OLG Celle 3 U 246/97, Sept. 2, 1991, *supra* note 742.

<sup>782</sup> Court of Arbitration of the Hungarian Chamber of Commerce VB/97142, May 25, 1999, *supra* note 718.

<sup>783</sup> CISG, *supra* note 4, at art. 79(1).

<sup>784</sup> *Id.* at art. 79(2). To be excused from performance due to the failure by a third party, both the party to the contract and the third party must be able to meet the requirements of Article 79(1).

<sup>785</sup> *Id.* at art. 79(4).

<sup>786</sup> *Id.*

beyond the party's control.<sup>787</sup> The burden of proof is on the non-performing party to prove the circumstances entitling it to an excuse from liability.<sup>788</sup> For example, a seller who fully performed his obligations under the contract, then placed the goods in the hands of a carrier, was not held liable for the carrier's failure to deliver on time.<sup>789</sup>

As a general rule, however, national courts are not inclined to excuse a party for an impediment to performance.<sup>790</sup> A party cannot rely on the exemption merely on the ground that performance has become unforeseeably more difficult or unprofitable.<sup>791</sup> For example, in International Chamber of Commerce *Case 6281 of 1989*,<sup>792</sup> an arbitration panel held that a seller could not be relieved of the obligation to deliver the goods at the contract price due to a change in the market price. It reasoned that the increase in the market price was neither sudden nor unforeseeable.<sup>793</sup> In another case involving the sale of defective powdered milk, the German Supreme Court held that the seller could only be freed from its obligation to pay damages by proving that the infestation of the delivered milk could not have been detected and that the probable source of infestation was outside of its sphere of influence.<sup>794</sup>

Other circumstances where parties were not granted an excuse under Article 79 include the buyer's inability to obtain foreign currency,<sup>795</sup> "hardship" caused by an almost 30% increase in the cost of goods,<sup>796</sup>

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<sup>787</sup> *Id.* at art. 77; Constitutional Court of the Russian Federation No. 7-P, Apr. 27, 2001 (Russ.), available at <http://cisgw3.law.pace.edu/cases/010427r1.html>.

<sup>788</sup> Trib. di Vigevano, July 12, 2000, n. 405, *supra* note 39.

<sup>789</sup> HG Zürich, HG 97 0238.1, Feb. 10, 1999 (Switz.), available at <http://cisgw3.law.pace.edu/cases/990210s1.html>.

<sup>790</sup> *See, e.g.*, BGH VIII ZR 121/98, Mar. 24, 1999, *supra* note 95. The German Supreme Court considered a seller's liability for the delivery of non-conforming goods when the seller was only acting as an intermediary. In that case, the non-conformity was caused during the time the goods were in the control of either his supplier or his supplier's supplier.

<sup>791</sup> *See generally* Dionysios Flambouras, *Remarks on the Manner in Which the PECL may be Used to Interpret or Supplement Article 79 CISG* (May 2002), available at <http://cisgw3.law.pace.edu/cisg/text/anno-art-79.html> (the drafting history of the CISG reveals that Article 79 is a stricter version of its predecessor which was criticized for excusing non-performance too readily, such as where performance merely became more difficult). *See generally* FCF S.A. v. Adriaifil Commerciale S.r.l., BGE, *supra* note 646 (determinative facts do not reveal the existence of circumstances that may constitute an unforeseeable or unavoidable impediment or an obstacle that the party could not have reasonably overcome).

<sup>792</sup> ICC International Court of Arbitration no. 6281, Aug. 26, 1989, available at <http://cisgw3.law.pace.edu/cases/896281i1.html>.

<sup>793</sup> *Id.*

<sup>794</sup> BHG VIII ZR 304/00, Jan. 9, 2002, *supra* note 289.

<sup>795</sup> ICA Arbitral Tribunal 123/1992, Oct. 17, 1995 (Russ.), CLOUT Case No. 142, available at <http://cisgw3.law.pace.edu/cases/951017r1.html>.

<sup>796</sup> Nuova Fucinati S.p.A. v. Fondmetal International A.B., Tribunale Civile [District Court] di Monza, 4267/88, Jan. 14, 1993 (It.), available at <http://cisgw3.law.pace.edu/cases/>

inability to deliver the goods because of an emergency production stoppage,<sup>797</sup> and financial difficulties of the seller's main supplier.<sup>798</sup> In cases of shortage, a seller can only claim impediment if goods of an equal or similar quality are no longer available on the market. In the case of price fluctuations, the seller is allocated the risk of increasing market prices at the time of the substitute transaction. As is evidenced by these representative cases, a high standard is set for a party to successfully claim excuse due to impediment.

#### 4. *Effects of Avoidance: Articles 81-84*

The effects of avoidance are set forth in Articles 81, 83, and 84.<sup>799</sup> Avoidance of the contract releases both parties from their obligations subject to any damages attributed to them.<sup>800</sup> Additionally, a party who has wholly or partially performed the contract may claim restitution from the other party consisting of whatever has been paid or supplied under the contract.<sup>801</sup> Articles 83 and 84 also contain provisions setting forth specific

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<sup>797</sup> ICA Arbitral Tribunal 155/1994, Mar. 16, 1995, (Russ.), CLOUT Case No. 140, available at <http://www.uncitral.org/english/clout/abstract/abstr10.htm>.

<sup>798</sup> Schiedsgericht der Handelskammer, Hamburg 1996, 3229, Mar. 21, 1996, *supra* note 618. See also, OLG Hamburg 1 U 167/95, Feb. 28, 1997, *supra* note 704 (seller's excuse was denied when it did not receive goods from its supplier). The seller would only be able to claim impediment if goods of an equal or similar quality are no longer available on the market; furthermore, it is also incumbent on a seller to bear the risk of increasing market prices at the time of the substitute transaction. *Id.* The court also held that although the market price had risen to triple the agreed-upon price, this did not amount to a "sacrificial sale price," as the transaction (sale of iron-molybdenum from China) was said to be highly speculative. *Id.*

<sup>799</sup> CISG, *supra* note 4, at arts. 81, 83-84. For a general discussion of notice and avoidance, see Ericson P. Kimbel, *Nachfrist Notice and Avoidance Under the CISG*, 18 J.L. & COM. 301 (1999). See also Secretariat Commentary to art. 81, available at <http://www.cisg.law.pace.edu/cisg/text/secomm/secomm-81.html>.

<sup>800</sup> CISG, *supra* note 4, at art. 81(1).

<sup>801</sup> *Id.* at art. 81(2). Note that if both parties are required to make restitution, they must do concurrently. *Id.* A classic illustration of this situation took place when a German buyer entered into a contract with a French seller for the delivery of sunflower oil. The buyer paid a timely installment for the first delivery, yet the seller did not ship the goods. Accordingly, the seller had to refund the price paid. OLG München 7 U 1720/94, *supra* note 701. This was also the case in a dispute involving multiple shipments of machines. OLG Celle 20 U 76/94, *supra* note 481. Because the first shipment contained only half of the machines specified by the contract, and the buyer had already paid a considerable part of the contract price before the shipment, the court found that the parties mutually terminated the contract. Accordingly, it found that the buyer's repayment claim was justified under Article 81(2). *Id.* See also ICC Court of Arbitration no. 978, Mar. 1999, available at <http://www.unilex.info/case.cfm?pid=1&do=case&id=471&step=FullText> (tribunal found that the buyer was allowed to avoid the contract since non-delivery was a fundamental breach of contract and awarded restitution under Article 82, along with interest under Article 84).



rights and liabilities of buyers and sellers. For example, if it is impossible to return the goods in the same condition in which the buyer received them, a buyer is not entitled to avoid the contract.<sup>802</sup> A buyer who has lost the right to declare the contract avoided or to require the seller to deliver substitute goods in accordance with Article 82 retains all other remedies set forth in the contract and under the provisions of the CISG.<sup>803</sup>

As discussed in the coverage of notice of non-conformity,<sup>804</sup> a party must declare a contract avoided in a timely fashion. This duty of timely avoidance can be implied from Article 49's language that the non-breaching party must declare avoidance "within a reasonable time."<sup>805</sup> A German court looked to the general principles of the CISG in fashioning the principle of timely avoidance. It held that a plaintiff's attempt to declare a contract avoided after 2½ years was a violation of the principle of good faith contained in Article 7(1) CISG.<sup>806</sup>

Under Article 83, the loss of the right to declare the contract avoided or to require the seller to deliver substitute goods does not deprive the buyer of the right to claim damages, to require that any defects be cured, or to declare a reduction in price.<sup>807</sup> In addition, Article 84 states that if the seller is required to refund the price "he must also pay interest from the date on which the price was paid."<sup>808</sup> Despite this reference to the payment of interest, the CISG does not specify how the applicable interest rate is to be determined.<sup>809</sup> A Swiss court offered a reasonable answer by holding the rate of interest the seller had to pay was determined on the basis of the prevailing rate of interest at the seller's place of business.<sup>810</sup>

### 5. *Preservation of Goods: Articles 87 and 88*

This section addresses the requirement for the preservation of goods dictated under Articles 87 and 88. The general rule is that a party who is

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<sup>802</sup> CISG, *supra* note 4, at art. 82(2). *See generally*, OLG Koblenz 2 U 1899/89, Sept. 27, 1991 (F.R.G.), available at <http://cisgw3.law.pace.edu/cases/910927g1.html>.

<sup>803</sup> CISG, *supra* note 4, at art. 83.

<sup>804</sup> *Supra* Part V.B.1.

<sup>805</sup> CISG, *supra* note 4, at art. 49(2).

<sup>806</sup> OLG München 7 U 1720/94, *supra* note 701.

<sup>807</sup> CISG, *supra* note 4, at arts. 45(a)(b), 46, 50 and 83.

<sup>808</sup> *Id.* at art. 84(1). *See generally* OLG Celle 20 U 76/94, *supra* note 481. However, contrary to this provision with regard to the time of accrual of interest, an Italian court held that interest was payable from the date of avoidance of the contract. *Foliopack Ag v. Daniplast S.p.A.*, Pretura circondariale [Court of First Instance] [PR] di Parma, sez. di Fidenza Nov. 24, 1989, 77/89 (It.), available at <http://cisgw3.law.pace.edu/cases/891124i3.html>.

<sup>809</sup> ICC International Court of Arbitration no. 7197, *supra* note 745.

<sup>810</sup> HG Zürich, HG 950347, Feb. 5, 1997 (Switz.), CLOUT Case No. 214, available at <http://www.uncitral.org/english/clout/abstract/abstr18.htm>.

bound to take steps to preserve the goods may deposit them in a warehouse of a third person at the expense of the other party provided that the expense incurred is not unreasonable.<sup>811</sup> Articles 87 and 88 provide for the preservation of goods when there is some instance of delay.<sup>812</sup> Failure to appropriately store or to sell goods can affect the amount of damages a party will be awarded.<sup>813</sup> For example, a buyer was held not liable for the full amount of goods after the seller, who was storing the goods, gave some of the goods to charity and the remainder were spoiled.<sup>814</sup> In general, the requirement in Article 87 that a party who is under an obligation to preserve the goods by depositing them in the warehouse of a third party is intended to be interpreted broadly to mean any appropriate place for the storage of the type of goods in question.<sup>815</sup>

A party who is bound to preserve the goods in accordance with Article 85 or 86 *may* sell them by “any appropriate means” if there is an unreasonable delay in the other party re-taking possession of the goods, or in paying the price, as long as reasonable notice of the intention to sell is given to the other party.<sup>816</sup> If, however, the goods are subject to rapid deterioration or their preservation would involve unreasonable expense, a party who is bound to preserve them *must* take reasonable measures to sell them.<sup>817</sup> The party selling the goods has the right to retain from the proceeds of sale an amount equal to the reasonable expenses incurred to preserve and sell the goods.<sup>818</sup>

Under Article 88, the sale of goods may be by “any appropriate means” if there has been an unreasonable delay by the other party in taking possession.<sup>819</sup> Unfortunately, the CISG does not specify what constitutes “appropriate means.” Appropriate means can vary depending on the

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<sup>811</sup> CISG, *supra* note 4, at art. 87.

<sup>812</sup> *Id.* at arts. 87 and 88. See generally ICC Arbitration 7531, *supra* note 647 (the tribunal, without elaboration, allowed such damage costs, expenses, and losses related to the buyer’s reasonable expenses for the preservation of goods).

<sup>813</sup> See, e.g., Schiedsgericht Hamburger Freundschaftliche Arbitage [Arbitral Tribunal], Dec. 29, 1998 (F.R.G.), CLOUT Case No. 293, available at <http://cisgw3.law.pace.edu/cases/981229g1.html> (seller failed to meet the prerequisites for damages by not fulfilling its obligations under Article 87 to store the goods and/or engaging in a self-help sale).

<sup>814</sup> ICA Arbitral Tribunal, Feb. 10, 2000 (Russ.), available at <http://cisgw3.law.pace.edu/cases/000210r1.html>.

<sup>815</sup> Secretariat Commentary to Art. 87, available at <http://www.cisg.law.pace.edu/cisg/text/secomm/secomm-87.html>.

<sup>816</sup> CISG, *supra* note 4, at art. 88(1).

<sup>817</sup> *Id.* at art. 88(2). To the extent possible, he is also required to give notice to the other party of his intention to sell.

<sup>818</sup> *Id.* at art. 88(3).

<sup>819</sup> *Id.* at art. 88(1). See [Canton Appellate Court] [TR-C], 01 93 1308, May 17, 1994 (Switz.), available at <http://cisgw3.law.pace.edu/cases/940517s1.html> (seller sought to sell a base of a product immediately in accordance with Article 88(1)).

conditions in the country. As a result, reference should be made to the means required for sales in similar circumstances under the law of the country where the sale occurs.<sup>820</sup> The resale of goods is especially important when the goods are subject to rapid deterioration.<sup>821</sup> Moreover, the concept of loss is not limited to the physical deterioration of the goods.<sup>822</sup> It also includes situations in which the goods threaten to decline rapidly in value due to market changes.<sup>823</sup>

## VII. SUMMARY AND OBSERVATIONS

We believe that CISG jurisprudence has done more good than harm in removing legal obstacles to international trade. It has helped to overcome what Franco Ferrari has called the problem of “nationality of law.”<sup>824</sup> Although it has not yet attained critical mass, CISG jurisprudence has grown significantly. As it has grown, greater uniformity of application has been evidenced. One commentator predicts that “[a]s more case law and commentary on the Convention develops, courts will apply the Convention with more regularity.... This will bring more predictability in international sales law.”<sup>825</sup>

This Part will make observations taken from the analysis presented in the earlier Parts of this article. These observations show that existing jurisprudence has *already* witnessed the coalescence or regularity of opinion pertaining to the development of specific default rules to fill in gaps in the CISG. These gaps are a result of both the vagueness in wording of many express CISG provisions and lack of express provisions in areas arguably within the scope of the CISG. Coverage of the “developing jurisprudence,” in Section A below, more specifically discusses the importance of notice, trade usage, and particularized consent in CISG jurisprudence. Finally, it examines how courts have had to develop rules due to the CISG’s failure to expressly allocate the burden of proof. This Part concludes with a note of caution represented by the persistence of

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<sup>820</sup> Secretariat Commentary to Art. 88, Right to Reimbursement, para. 93 [sic], *available at* <http://www.cisg.law.pace.edu/cisg/text/secomm/secomm-88.html> (party selling the goods has the right to retain an amount equal to the reasonable expenses of preserving the goods and of selling them, but he must account to the other party for the remainder of the balance). *See, e.g.*, OLG Hamburg I U 31/99, Nov. 26, 1999, *supra* note 710.

<sup>821</sup> *See, e.g.*, China International Economic and Trade Arbitration Commission [CIETAC] Shenzhen Commission, Jun. 6, 1991 (China), *available at* <http://cisgw3.law.pace.edu/cases/910606c1.html> (deterioration of chemicals).

<sup>822</sup> Secretariat Commentary to Art. 88, Right to Reimbursement, ¶ 2.

<sup>823</sup> *Id.*

<sup>824</sup> Ferrari, *Uniform Interpretation*, *supra* note 15, at 184 (“[S]ince the end of the last century and with increasing intensity since the beginning of this century, efforts have been made to . . . overcome the nationality of law.”).

<sup>825</sup> Hackney, *supra* note 26, at 486.

*homeward trend* analysis found in *too many* CISG decisions.

#### A. Developing an International Jurisprudence

In cases where the CISG fails to provide a specific default rule, courts have been tempted to apply the default rule provided under their domestic laws. The better reasoned cases have taken the “international character” mandate of Article 7 seriously. They have explored foreign cases dealing with gaps in the CISG. In addition, in cases where CISG general principles or analogical reasoning have failed to provide a solution the better reasoned cases have avoided the hasty application of the local default rule in favor of an analysis of the default rules of various countries.<sup>826</sup> This approach is aligned with the mandate of “international character.” An example of this is the Italian case of *Sport d’Hiver Genevieve Cutlet v. Ets. Louys et Fils*, in which the court reviewed both German and Swiss law to determine the reasonableness of a notice of non-conformity.<sup>827</sup> The court pointed out that the notice provision of CISG Article 39 is “intentionally elastic . . . in terms of reasonableness, so that the degree of flexibility will be evaluated in accordance with the practicalities of each case.”<sup>828</sup> It found that a notice sent 23 days after delivery for defects that were apparent was unreasonable under Swiss and German law and therefore under the CISG.<sup>829</sup>

A Swiss court in trying to determine a “reasonable time”<sup>830</sup> for sending a notice of non-conformity, recognized the divergent views of prompt notice in different legal systems. It noted that

the calculation of the time limit to give a notice of defect varies. Whereas jurisdictions of the Germanic legal family demand an immediate notice . . . in Anglo-American and Dutch law the notification . . . of defect given several months after discovery of the defect is deemed to be within an appropriate time limit.<sup>831</sup>

The court then fabricated a one-month limit to giving notice as a compromise between the divergent views. It then reasoned that it was necessary to narrow this gap when interpreting Article 39 of the CISG.<sup>832</sup> “To avoid too wide a gap in interpretation, a convergence of those points of view seems inevitable. Therefore, an approximate medium time frame of at

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<sup>826</sup> Trib. Civile di Cuneo, 45/96, Jan. 31, 1996 (It.), translation available at <http://cisgw3.law.pace.edu/cases/960131i3.html>.

<sup>827</sup> *Id.*

<sup>828</sup> *Id.*

<sup>829</sup> *Id.*

<sup>830</sup> CISG, *supra* note 4, at art. 39(1).

<sup>831</sup> OG, 11 95 123/357, Jan. 8, 1997, *supra* note 93.

<sup>832</sup> *Id.*

least one month seems appropriate.”<sup>833</sup> The court, in essence, fabricated a specific default rule of one month under Article 39’s general default rule of giving prompt notice. However, this is not an inflexible, bright line rule. The court also lists a number of factors that impact the reasonableness of the one-month rule, including that the one-month rule is to be adjusted upward or downward depending upon the mix of the enunciated factors.<sup>834</sup>

### 1. Filling in the Gaps and the Fabrication of Specific Default Rules

The open-ended nature of CISG default rules has expectedly produced divergent interpretations. The interpretations that are a product of reasoned analysis within the framework of the CISG’s interpretive methodology will hopefully be given persuasive effect. The issue of gaps presents special problems for the interpreter. A true gap is an issue not contemplated by the drafters. This was the case in *Usinor Industeel v. Leeco Steel Products, Inc.*<sup>835</sup> in which a U.S. District Court was confronted with a case of first impression. The case involved a French seller and an American buyer. The American buyer secured a loan and provided the American bank with a security interest in the goods. The issue was whether a claim of a third party could preclude CISG jurisdiction.<sup>836</sup> The CISG provides for jurisdiction when two parties to a contract are from different signatory countries.<sup>837</sup> It does not deal directly with the issue of whether that jurisdiction is affected when a third party with a security interest in the goods enters the litigation. The American court cited an Australian case on the validity of retention of title clauses. In doing so it correctly recognized that “commentators on the CISG have noted that courts should consider the decisions issued by foreign courts on the CISG.”<sup>838</sup> The case hinged upon the court’s interpretation of Article 4(b) of the CISG which states that the CISG does not cover “the effect which the contract may have on property in the goods sold.”<sup>839</sup> The Buyer argued that Article 4(b) implies that security interests of third parties are covered under domestic law. The Seller argued that the Article 4(b) exclusion pertains only to property interests occurring prior to the sale. The court cited scholarly commentary in rejecting the Seller’s argument.<sup>840</sup> Thus, the Seller could not obtain avoidance of the

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<sup>833</sup> *Id.*

<sup>834</sup> *Id.*

<sup>835</sup> *Usinor Industeel v. Leeco Steel Prods., Inc.*, 209 F. Supp. 2d 880 (N.D. Ill. 2002).

<sup>836</sup> *Id.*

<sup>837</sup> The United States opted out of Article 1(1)(b) jurisdiction that allows for the application of the CISG where one of the parties is from a CISG country.

<sup>838</sup> *Usinor Industeel*, 209 F. Supp. 2d at 886.

<sup>839</sup> *Id.* at 885.

<sup>840</sup> *Id.* at 885. The Court cites Richard Speidel, *The Revision of Article 2, Sales in Light of the United Nations Convention on Contracts for the International Sale of Goods*, 16 *Nw.*

contract and retake possession of the goods because the bank had a perfected security interest under domestic law.

As discussed in the previous section, courts have, when necessary, grafted specific default rules on to the CISG in order to make its express default rules functional. These specific default rules allow for the uniform handling of categories of similar cases. For example, Article 38 makes it the buyer's duty to inspect delivered goods. It fails to express a standard for an adequate inspection. In response, courts have provided parameters for a legally adequate inspection through the development of specific default rules.<sup>841</sup>

## 2. *Particularized Express Consent*

Some courts have refused to enforce derogation from CISG rules without proof of particularized express consent. Article 6 states that "parties may exclude the application of the Convention or derogate from or vary the effect of any of its provisions."<sup>842</sup> However, excluding or varying the application of a CISG provision may require more than inserting an express term in the written contract. The importance of particularized consent was discussed in Part III.A's (writing requirements) and Part III.B.3's coverage of the acceptance rules of Article 18. Parties are free to derogate from Article 11 and require that any contracts or modifications are enforceable only when concluded in writing. However, an Austrian court rejected such a derogation from Article 11's *no writing requirement* when it failed to enforce a writing requirement clause inserted into a standard form contract.<sup>843</sup> It held that such a writing requirement is only enforceable if the non-derogating party gives informed assent.<sup>844</sup>

The need for express consent in standard form contracting is an example of a domestic gloss interpretation of the CISG. As discussed in Part III.B.3, the CISG does not specifically address the enforceability of standard terms or what is necessary to validly incorporate them into a contract. The courts that have required the non-inserting party to be aware of the terms and their meanings are those of civil law countries. The civil law legal systems have emphasized that a party must be reasonably aware of the terms the other seeks to incorporate.<sup>845</sup> In contrast, American law

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J. INT'L L. & BUS. 165, 173 (1995); Caroline D. Klepper, *The Convention for the International Sale of Goods: A Practical Guide for the State of Maryland and Its Trade Community*, 15 MD. J. INT'L L. & TRADE 235, 239 (1991); HONNOLD, UNIFORM LAW FOR INTERNATIONAL SALES, *supra* note 53, § 444.

<sup>841</sup> *Supra* Part V.A.1.

<sup>842</sup> CISG, *supra* note 4, at art. 6.

<sup>843</sup> See OGH, 10 Ob 518/95, Feb. 6, 1996, *supra* note 134.

<sup>844</sup> *Id.*

<sup>845</sup> *Supra* Part III.B.3.

does not distinguish between dickered and standard or boilerplate terms. Also, American law more narrowly polices abuse through the application of the doctrine of unconscionability, primarily in consumer and not commercial contracts.

### 3. *Importance of Trade Usage in CISG Rule Application*

Articles 8 and 9 recognize the importance of trade usage in the interpretation of CISG contracts. Article 8(3) notes that in determining the parties' intent, due consideration is to be given to "usage." Article 9 (2) states that the parties are bound by "a usage . . . which in international trade is widely known to, and regularly observed by, parties to contracts of the type involved in the particular trade concerned."<sup>846</sup> The role of trade usage is a general principle that affects the application of many of the CISG's provisions. For example, national courts have excused untimely notice when a defect could only have been discovered through an inspection that is not customary in the trade concerned. As previously discussed in Part III.B.3, the courts are split in their views as to the applicability of trade usage under the CISG. The conservative view holds that a trade usage must have a distinct international character to be considered while the liberal view allows for the admission of local trade usage.

An innovative trade usage to fill in a gap in the CISG is in the area of Article 84's obligation to pay interest. It states that the seller must pay interest on price refunds.<sup>847</sup> However, it fails to mention any buyer's obligation to pay interest for non-payment or how the interest is to be calculated. It can be argued that its statement on interest brings the issue within the scope of the CISG. An Argentine court resorted to the concept of trade usage to fill in the gaps. "[N]otwithstanding the fact that CISG contains no express provision recognizing the payment of interest [by the buyer], [i]t was considered that payment of interest was a widely known usage in international trade."<sup>848</sup>

In a more sweeping acceptance of international trade usage, the court in *St. Paul Insurance Co. v. Neuromed Medical Systems* implied INCOTERMS into the CISG through Article 9(2).<sup>849</sup> It correctly avoided the temptation of finding that trade terms were not within the scope of the CISG and then applied the trade terms found in the UCC.<sup>850</sup> Instead, the court found that many trade terms issues were within the scope of the

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<sup>846</sup> CISG, *supra* note 4, at art. 9(2).

<sup>847</sup> *Id.* at art. 84.

<sup>848</sup> CLOUT Case No. 21, May 20, 1991, available at <http://www.uncitral.org/english/clouut/abstract/abstr2.htm>. The court cited Article 9(2) for its application of trade usage.

<sup>849</sup> See *St. Paul Ins. Co. v. Neuromed Med. Sys.*, No. 00 Civ. 9344(SHS), 2002 U.S. Dist. LEXIS 5096 (S.D.N.Y. Mar. 26, 2002).

<sup>850</sup> See UCC §§ 2-319, 2-320, 2-321, 2-322, 3-223, 2-509, and 2-510.

CISG. It based that decision on the transfer of risk provision found in Article 67(1). It then held that “INCOTERMS are incorporated into the CISG through Article 9(2).”<sup>851</sup> Although this was an easy decision given the universal recognition of INCOTERMS, it is still significant because it was handed down by an American court. Furthermore, the court references German law and case precedent as well as scholarly writings on the CISG.<sup>852</sup> More importantly, it recognized the importance of uniformity in interpreting the CISG by using the appropriate interpretive methodology. It states that “interpretations [should be] grounded in its underlying principles rather than in specific national conventions.”<sup>853</sup> This is a clear rejection of the *homeward trend* bias.

The potential use and misuse of trade usage was also demonstrated in a Swiss court decision.<sup>854</sup> The court used Articles 9(1) (inter-party usage) and 9(2) (international trade usage) to recognize the binding nature of a written confirmation. It creatively argued that the parties “knew or ought to have known the binding nature of such confirmations under both Austrian and Swiss law.”<sup>855</sup> The court asserted that due to that knowledge, and that there was no other practice prevailing in the particular trade, the binding nature of a confirmation was a usage under both Articles 9(1) and 9(2).<sup>856</sup> Although, the court was correct in recognizing the binding nature of confirmations as a general trade usage, it is a dangerous precedent to use domestic law as a vehicle in establishing an international trade usage.

The above case and a decision of an Austrian court illustrate how the problem of homeward trend can present itself in various ways.<sup>857</sup> These cases demonstrate that homeward trend bias can influence the recognition of trade usage. An Austrian court held that Article 9(2) “could not be interpreted as barring the application of national or local usage in interpreting a contract.”<sup>858</sup> This is a contradiction of Article 9(2)’s requirement that any such usage be widely known in international trade. The court’s decision is reconcilable with the express mandate in Article 9(2) given the court’s emphasis on the fact that the seller had done business in the country of the local usage for many years and, thus, could not have been unaware of the usage. Instead of declaring national and local usages to be generally applicable, the court should have crafted an exception based

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<sup>851</sup> St. Paul Ins. Co., 2002 U.S. Dist. LEXIS 5096, at \*9.

<sup>852</sup> *Id.* at \*7-8.

<sup>853</sup> *Id.* at \*8.

<sup>854</sup> LZG Basel-Stadt, P4 1991.238, Dec. 21, 1992 (Switz.), CLOUT Case No. 95, available at <http://www.uncitral.org/english/clout/abstract/abstr7.htm>.

<sup>855</sup> *Id.*

<sup>856</sup> *Id.*

<sup>857</sup> *Id.* OLG Graz, 6 R 194/95, Nov. 9, 1995, *supra* note 567.

<sup>858</sup> *Id.*



upon the facts of the case. In short, a more specific default rule would have made local usage available to the court if the adverse party knew of its existence and knew there was no conflicting international usage.

#### *4. Importance of Notice*

One element that runs throughout the CISG is the importance of notice. Notice is expressly mandated in the following CISG provisions: notice of objection to additional terms (Article 19), notice of acceptance of a belated acceptance (Article 21), notice of avoidance (Article 26, 49), sufficiency of notice (Article 27), notice of consignment (Article 32), notice of non-conformity and sufficiency of notice of non-conformity (Article 39), notice of third party claims (Article 43), notice of demand for substituted goods (Article 46), notice of time extension (Articles 47, 48, 63), notice of specifications (Article 65), notice of delivery (Article 67), and notice of intention to sell (Article 88). Failure to communicate to the other party on numerous issues (including avoidance, suspension, fundamental breach, and non-conformity) meets with dire consequence. As discussed in Part VI.B.2, insufficiency of notice, either “improperly made or given too late,”<sup>859</sup> results in the loss of a right to declare an anticipatory breach or right to avoidance under Articles 71-73. Article 79 removes the liability exemption for a party declaring avoidance if it fails to notify the other party within a reasonable time after it knew or ought to have known of the impediment.<sup>860</sup>

Given the pervasiveness of notice requirements, an implied general principle of communication to the other party may be recognized. Awareness of the importance of communication or notice, whether extrapolated from first order principles of good faith or commercial reasonableness, is vital to the international trade of goods. It is likely that courts will imply notice requirements in situations not expressly mandated by the CISG. An example of an implied notice requirement was discussed in Part V.C.3. A German court denied the buyer the right to avoidance because the declaration of avoidance occurred five months after the breach.<sup>861</sup> While Article 49(1)(b) does not explicitly require notice of avoidance within a reasonable time, the court construed the general theme of the CISG’s “Section on Remedies for Breach of Contract by Seller” to require reasonably prompt notice.<sup>862</sup>

#### *5. Burden of Proof*

Generally, the CISG does not expressly provide rules on which party

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<sup>859</sup> *Supra* Part VI.B.2.

<sup>860</sup> *Supra* Part VI.C.3.

<sup>861</sup> BGH VIII ZR 18/94, Feb. 15, 1995, *supra* note 654.

<sup>862</sup> *Id.*

has the burden of proof for different issues of fact.<sup>863</sup> A court's allocation of the burden of proof becomes as important as the substantive rule itself. That allocation often shifts within the dictates of a single Article. For example, Article 2 excludes from the reach of the CISG sales of goods bought for "personal use."<sup>864</sup> The party seeking to enforce the exclusion has the burden of proving that the goods were purchased for personal use. It also provides that the exclusion does not affix to the transaction if the seller "neither knew nor ought to have known that the goods were bought for any such use."<sup>865</sup> In submitting such a claim, the other party would have to satisfy the burden of proof.

If a rule or issue is within the scope of the CISG, then the allocation of the burden of proof should be determined through the interpretive methodology of the CISG. An Italian court in *Rheinland Versicherungen v. Atlarex* concluded that an underlying principle of the CISG is that the party that benefits from a finding has the burden of proving it.<sup>866</sup> The case is an example of a court totally committed to the quest for uniformity through the application of the CISG's interpretive methodology. First, it determined that the issue of the burden of proof is within the scope of the CISG. Second, it performed a comprehensive review of foreign case law to see if decisions on the issue of burden of proof provide persuasive rationales. The court refers to approximately forty foreign cases and arbitral decisions.<sup>867</sup>

Third, the Court concluded that since there was no express provision allocating the burden of proof in Articles 38 and 39 regarding inspection and notice of non-conformity the allocation was to be determined through the application of CISG general principles. The Court found an implicit general principle in Article 79(1)'s placement of the burden of proof on the party claiming an impediment. It then reasoned that Article 79(1)'s allocation brought the issue of the burden of proof within the scope of the

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<sup>863</sup> One exception is Article 79(1) on proving the excuse of "impediment." It states that "[a] party is not liable for a failure to perform any of his obligations if he *proves* that the failure was due to an impediment beyond his control." CISG, *supra* note 4, at art. 79(1) (emphasis added).

<sup>864</sup> *Id.* at art. 2(a).

<sup>865</sup> *Id.*

<sup>866</sup> Trib. di Vigevano, July 12, 2000, n. 405, *supra* note 340. See Alessandro Rizzieri, *Decision of the Tribunal of Vigevano, Italy, July 12, 2000*, 20 J.L. & COM. 209 (2001). A commentary on that case states that "a close examination of both the legislative history of the various provisions, as well as their wording . . . elaborate[s] the general principle that each party has to prove the existence of the factual prerequisites contained in the provision from which it wants to derive beneficial consequence." Ferrari, *Tribunale Di Vegevano*, *supra* note 582, at 238. See also *supra* Part V.A.1 ("courts have required the imposition of a burden on the buyer prior to granting additional time for inspection").

<sup>867</sup> Trib. di Vigevano, July 12, 2000, n. 405, *supra* note 340; Ferrari, *Tribunale Di Vegevano*, *supra* note 582, at 231.

CISG.<sup>868</sup> Based upon the Article 79(1) allocation it further reasoned that the implied general principle is that the burden of proof is on the party who would benefit from the evidentiary finding. It stated that the “Convention’s general principle on the burden of proof seems to be *ei incumbit probatio qui dicit, non qui negat*: The burden of proof rests upon the one who affirms, not the one who denies.”<sup>869</sup> This is how a Swiss court rationalized the placement of the burden of proof for a party seeking an excuse for a delayed inspection of goods. It held that buyers seeking such additional time should bear the burden of proof with respect to the reasons justifying such additional time.<sup>870</sup>

### B. Persistence of Homeward Trend

Despite the existence of enlightened decision-making by courts and arbitral panels using CISG interpretive methodology, the persistence of *homeward trend* remains a problem. We have seen that some areas, such as the battle of forms, are particularly subject to *homeward trend* interpretations.<sup>871</sup> This is likely due to the vagueness and open-endedness of CISG language. An example is the U.S. Court of Appeals for the Fifth Circuit’s decision that the parol evidence rule applied to cases of written contracts within the scope of CISG jurisprudence because of its nature as a rule of procedure and not of substantive law.<sup>872</sup> This is an example of judicial parochialism. The court failed to use CISG interpretive methodology. A reasoned analysis would have involved the court’s

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<sup>868</sup> “Thus, the issue of the burden of proof cannot be deemed beyond the ambit of the Convention . . .” Trib. di Vigevano, July 12, 2000, n. 405, *supra* note 340, ¶ 23. See Rizzieri, *supra* note 866, at 220.

<sup>869</sup> Trib. di Vigevano, July 12, 2000, n. 405, *supra* note 340, ¶ 4. See Rizzieri, *supra* note 866, at 221. See also HG Zürich, HG930138. U/HG93, Sept. 9, 1993 (Switz.), CLOUT Case No. 97, available at <http://www.uncitral.org/english/clout/abstract/abstr7.htm> (burden of proof on buyer to provide defect and that it sent proper notice).

<sup>870</sup> T., S.A. v. R. Etablissement, HG Zürich, HG 930 634/O, Nov. 30, 1998 (Switz.), available at <http://cisgw3.law.pace.edu/cases/981130s1>.

<sup>871</sup> See, e.g., *supra* Part III.C.1 (Battle of the Forms).

<sup>872</sup> *Beijing Metals & Minerals v. Am. Bus. Ctr., Inc.*, 993 F.2d 1178 (5th Cir. 1993). Another example of the use of the procedural-substantive distinction to avoid application of the CISG is Judge Posner’s opinion in *Zapata Hermanos v. Hearthside Baking Co., Inc.*, 313 F.3d 385 (7th Cir. 2002). Posner reasoned that attorney fees could not be given under Article 79 because they are a matter of procedure. In reaching his decision, Posner poses a question that is left unanswered: “And how likely is it that the United States would have signed the Convention had it thought in doing so it was abandoning the hallowed American rule?” 313 F.3d at 389. The question begs a more substantive response than the implied response offered by Posner. It should be remembered that the United States failed to opt out of Article 11 and in the process jettisoning the more longstanding statute of frauds and parol evidence rule, and in the process creating a stark contradiction between the CISG and the UCC. *But cf.*, OLG Düsseldorf 6 U 152/95, Jul. 11, 1996, *supra* note 767 (under Articles 61(1)(b) and 74, party could collect attorney fees).

recognition of a general principle that, under the CISG, legal formalities are not to be used to preclude admission of relevant evidence. First, Article 11 states that a contract “need not be evidenced by a writing” and that “it may be proved by any means, including witnesses.”<sup>873</sup> Article 8(3) states that “due consideration is to be given to all relevant circumstances of the case including negotiations.”<sup>874</sup> Nonetheless, the court applied the Texas parol evidence rule to a case involving the CISG. It did so without a review of foreign case law and scholarly commentary.<sup>875</sup>

In comparison, the U.S. Court of Appeals for the Eleventh Circuit in *MCC-Marble Center* rejected the homeward trend temptation and correctly held that the admissibility of parol evidence was a rule of substantive law and within the scope of the CISG.<sup>876</sup> In addition, the court appropriately cited scholarly writings and foreign case law to buttress its holding. In doing so, it recognized an implied general principle that:

the CISG was to provide parties to international contracts for the sale of goods with some degree of certainty as to the principles of law that would govern potential disputes. Courts applying the CISG cannot, therefore, upset the parties’ reliance on the Convention by substituting familiar principles of domestic law.<sup>877</sup>

It also refers to the express general principles of freedom of contract by holding that the parties could adopt the parol evidence rule by inserting a merger clause into their contracts.<sup>878</sup>

More recently the U.S. Court of Appeals for the Fourth Circuit in *Schmitz-Werke GmbH v. Rockland Industries, Inc.* badly misapplied CISG’s interpretive methodology.<sup>879</sup> It placed domestic jurisprudence on a non-hierarchical level with the express language of the CISG and its general principles. It nonchalantly states that “[c]ase law interpreting provisions of Article 2 of the Uniform Commercial Code that are similar to provisions in the CISG can also be helpful in interpreting the Convention.”<sup>880</sup> The court correctly notes that recourse to domestic law is a matter of last resort. It then, however, argues that the CISG is silent as to the type of evidence

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<sup>873</sup> CISG, *supra* note 4, at art. 11.

<sup>874</sup> *Id.* at art. 8(3).

<sup>875</sup> *Beijing Metals & Minerals*, 993 F.2d at 1178.

<sup>876</sup> *MCC-Marble Ceramic Ctr. v. Ceramica Nuova D’Agostino, S.p.A.*, 144 F.3d 1384 (11th Cir. 1998). See generally Paolo Torzilli, *The Aftermath of MCC-Marble: Is This the Death Knell for the Parol Evidence Rule?* 74 ST. JOHN’S L. R. 843 (2000).

<sup>877</sup> *MCC-Marble*, 144 F.3d at 1391.

<sup>878</sup> *Id.*

<sup>879</sup> *Schmitz-Werke GmbH v. Rockland Indus., Inc.*, No. 00-1125, 2002 U.S. App. LEXIS 12336 (4th Cir. Jun. 21, 2002).

<sup>880</sup> *Id.* at \*8-9.

needed to prove a breach of an express warranty. The important question is not whether the CISG is silent as to the nature of the buyer's burden of proof but whether the issue is within the scope of the CISG. Given Article 35's warranty coverage, the issue of how a party proves non-conformity is within the scope of the CISG. Instead of devolving to UCC law, the court should have based its answer upon general principles and by reviewing foreign case law interpreting Article 35.

There are signs that U.S. courts are becoming more sophisticated in their applications of the CISG.<sup>881</sup> The references in *MCC-Marble Center* to international authorities and cases are aligned with Article 7's mandate that decisions should be based on due considerations of international character and the need for uniformity. This mindset was again on display in the U.S. Eastern District Court of Louisiana case of *Med. Mktg.Int'l. v. Internazionale Medico Scientifica S.R.L.*<sup>882</sup> The issue in that case was the role of public regulations on the seller's warranty obligations under Article 35(2).<sup>883</sup> The drafters of the CISG did not consider the role of governmental standards and regulations on the merchantability of goods.<sup>884</sup>

In reviewing a foreign arbitration award, the American court recited the German case reviewed in the arbitral decision and treated it as a persuasive precedent.<sup>885</sup> The German Supreme Court held that the general rule was that a seller was not obligated to supply goods that conform to the laws of the buyer's country. The American court agreed with the arbitral decision that the case at bar came within an exception, namely, that the seller was obligated to provide goods that conform to foreign regulations "if due to 'special circumstances,' such as the existence of a seller's branch office in the buyer's state, the seller knew or should have known about the regulations at issue."<sup>886</sup> This case, along with the German and Austrian cases discussed in Part V, interpreting the warranty provisions of Article 35 provide an example of the proper application of CISG interpretive methodology to resist homeward trend decisions.<sup>887</sup>

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<sup>881</sup> See, e.g., *St. Paul Ins. Co.*, 2002 U.S. Dist. LEXIS 5096; see also, *supra* notes 827-30 and accompanying text.

<sup>882</sup> *Med. Mktg. Int'l. v. Medco Scientifica S.R.L.*, Civ. No. 99-0380 § "K"(1), 1999 U.S. LEXIS 7380 (E.D. La. May 17, 1999), CLOUT Case No. 418, available at <http://www.uncitral.org/english/clout/abstract/Abst-36.pdf>.

<sup>883</sup> *Id.*

<sup>884</sup> "This problem was evidently overlooked at the creation of the CISG." Case Commentary, Peter Schlechtriem, *Conformity of the Goods and Standards Established by Public Law Treatment of Foreign Court Decision as Precedent* (Andre Corterier trans., 1999), available at <http://cisgw3.law.pace.edu/cases/990517ul.html>.

<sup>885</sup> *Med. Mktg. Int'l.*, 1999 U.S. Dist. LEXIS 7380, at \*5-6.

<sup>886</sup> *Id.* at \*6.

<sup>887</sup> *Supra* notes 571-94 and accompanying text.

## VIII. CONCLUSION

A review of CISG jurisprudence is an enlightening experience in the creation and interpretation of a living commercial code. The extremes that are found in the national interpretation of any international convention are evidenced in CISG jurisprudence. At one extreme, some courts have largely ignored the CISG's mandate that interpretations are to be formulated with an eye toward the international character of the transaction and the need for uniformity of application. At the other extreme are courts, and more often arbitral panels, that have taken the above mandates seriously and have resisted the temptation of homeward trend interpretations. In the middle, are the majority of cases that have attempted to provide autonomous interpretations with various degrees of success.

Despite the problem of diverging interpretations, there are signs that courts are taking their role in applying CISG interpretive methodology more seriously. The result has produced a coalescing of different interpretations through the formulation of more specific default rules and the recognition of factors to be used in applying CISG articles. In the end, poorly reasoned interpretations will hopefully be largely ignored. This coalescence of jurisprudence is evidence that the CISG is evolving as a living, functional code. It is this process of evolution that allows us to conclude that the CISG has obtained a significant degree of success in reducing legal impediments to international sales transactions. For even in case of divergence, a certain level of uniformity is achieved in comparison to the realm of private international law. It is the hope that this process will create a more uniform jurisprudence in the years to come.