

**University of Belgrade  
Faculty of Law**

**UNIFORM SALES LAW  
CONFERENCE**

**The CISG at Its 30<sup>th</sup> Anniversary  
A Conference in Memory of Albert H. Kritzer**

**Belgrade, 2010**

# UNIVERSITY OF BELGRADE FACULTY OF LAW

Organizing and Scientific Board of

UNIFORM SALES LAW CONFERENCE  
The CISG at Its 30th Anniversary  
A Conference in Memory of Albert H. Kritzer

Prof. Dr. Mirko Vasiljević, President of the Board  
Milena Djordjević, LL.M., Executive Secretary

Members:

Prof. Dr. Gašo Knežević  
Prof. Dr. Vladimir Pavić  
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## CONTENTS

TEXT OF THE CISG IN ENGLISH AND SERBIAN .....	7
STATUS OF THE CISG .....	59
Luca CASTELLANI UNCITRAL contribution to the harmonization of international sale of goods law .....	65
Eric BERGSTEN Work of the CISG Advisory Council .....	77
Vikki ROGERS The Establishment of a Global Jurisconsultorium for the CISG .....	83
Loukas MISTELIS Scope of Application and Issues Excluded from the CISG .....	85
Jelena PEROVIĆ Critical Issues Regarding the Sphere of Application of the CISG .....	87
Petra BUTLER Articles 7 And 8 CISG – Vehicles to Lure the Common Law World to the CISG? .....	93
Jack GRAVES Article 6 and Issues of Formation – The Problem of Circularity.....	95
Larry A. DIMATTEO Critical Issues in the Formation of Contracts under the CISG .....	107
Sieg EISELEN Incorporation of Standard Terms in International Sales Contracts .....	135

Martin DAVIES	
Documents that Satisfy the Requirements of Art 58 CISG .....	143
Hiroo SONO	
Non-Conformity and Buyer's Duty of Examination and Notification .....	175
Michael BRIDGE	
Seller's Right to Cure Non-Conforming Performance .....	179
Stefan KRÖLL	
The Burden of Proof for the Conformity or Non-Conformity of the Goods .....	199
Ingeborg SCHWENZER	
The Right to Avoid the Contract .....	219
John GOTANDA	
Damages under the CISG: A Comparison of Monetary Remedies in International Investment and Transnational Commercial Disputes .....	231
Pascal HACHEM	
Fixed Sums in CISG Contracts.....	249
Harry FLECHTNER	
Exemption for Non-Performance Under CISG Articles 79 and 80.....	253
Peter HUBER	
Typically German – Three Contentious German Contributions to the Interpretation of the CISG .....	279
Jan RAMBERG	
Incoterms and CISG .....	287

Alejandro GARRO	
Interplay Between CISG and UNIDROIT Principles .....	299
Leonardo GRAFFI	
Trade Usages and Business Practice .....	319
Nils SCHMIDT-AHRENDTS	
CISG and Arbitration .....	337
Vladimir PAVIĆ, Milena DJORDJEVIĆ	
Application of the CISG Before the Foreign Trade Court of Arbitration at the Serbian Chamber of Commerce - Looking Back at the Latest 100 Cases .....	349



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

**ZAKON  
O RATIFIKACIJI  
KONVENCIJE  
UJEDINJENIH NACIJA O  
UGOVORIMA O  
MEĐUNARODNOJ  
PRODAJI ROBE**

*("Sl. list SFRJ - Međunarodni  
ugovori", br. 10-1/84)*

**ČLAN 1**

Ratifikuje se Konvencija Ujedinjenih nacija o ugovorima o međunarodnoj prodaji robe, potpisana 11. aprila 1980. godine u Beču, u originalu na arapskom, engleskom, francuskom, kineskom, ruskom i španskom jeziku.

**ČLAN 2**

Tekst Konvencije u originalu na engleskom jeziku i u prevodu na srpskohrvatskom jeziku glasi:

**KONVENCIJA  
UJEDINJENIH NACIJA O  
UGOVORIMA O MEĐUNARODNOJ  
PRODAJI ROBE**

Države članice ove konvencije,

Imajući u vidu opšte ciljeve navedene u rezolucijama o uspostavljanju novog međunarodnog ekonomskog poretka koje je Generalna

THE STATES PARTIES TO THIS  
CONVENTION,

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

<p>International Economic Order,</p> <p>CONSIDERING that the development of international trade on the basis of equality and mutual benefit is an important element in promoting friendly relations among States,</p> <p>BEING OF THE OPINION that the adoption of uniform rules which govern contracts for the international sale of goods and take into account the different social, economic and legal systems would contribute to the removal of legal barriers in international trade and promote the development of international trade,</p> <p>HAVE AGREED as follows:</p> <p style="text-align: center;"><b>PART I</b></p> <p style="text-align: center;"><b>SPHERE OF APPLICATION AND GENERAL PROVISIONS</b></p> <p style="text-align: center;"><b>Chapter I</b></p> <p style="text-align: center;"><b>SPHERE OF APPLICATION</b></p> <p style="text-align: center;"><b>Article 1</b></p> <p>(1) This Convention applies to contracts of sale of goods between parties whose places of business are in different States:</p> <p>(a) when the States are Contracting States; or</p> <p>(b) when the rules of private international law lead to the application of the law of a Contracting State.</p>	<p>skupština usvojila na svom šestom specijalnom zasjedanju,</p> <p>Smatrajući da je razvoj međunarodne trgovine na osnovama jednakosti i uzajamne koristi značajan element unapređenja prijateljskih odnosa između država,</p> <p>Ocenjujući da bi usvajanje jednoobraznih pravila koja bi se primenjivala na ugovore o međunarodnoj prodaji robe, a kojima bi se uzeli u obzir različiti društveni, privredni i pravni sistemi, doprinelo otklanjanju pravnih prepreka u međunarodnoj trgovini i unapređenju razvoja međunarodne trgovine,</p> <p>Složile su se o niže navedenom:</p> <p style="text-align: center;"><b>Deo I</b></p> <p style="text-align: center;"><b>OBLAST PRIMENE I OPŠTE ODREDBE</b></p> <p style="text-align: center;"><b>Glava I</b></p> <p style="text-align: center;"><b>OBLAST PRIMENE</b></p> <p style="text-align: center;"><b>Član 1</b></p> <p>(1) Ova konvencija primenjuje se na ugovore o prodaji robe zaključene između strana koje imaju svoja sedišta na teritorijama različitih država:</p> <p>(a) kad su te države države ugovornice; ili</p> <p>(b) kad pravila međunarodnog privatnog prava upućuju na</p>
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(2) The fact that the parties have their places of business in different States is to be disregarded whenever this fact does not appear either from the contract or from any dealings between, or from information disclosed by, the parties at any time before or at the conclusion of the contract.

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

### **Article 2**

This Convention does not apply to sales:

(a) of goods bought for personal, family or household use, unless the seller, at any time before or at the conclusion of the contract, neither knew nor ought to have known that the goods were bought for any such use;

(b) by auction;

(c) on execution or otherwise by authority of law;

(d) of stocks, shares, investment securities, negotiable instruments or money;

(e) of ships, vessels, hovercraft or aircraft;

(f) of electricity.

### **Article 3**

primenu prava jedne države ugovornice.

(2) Činjenica da strane imaju svoja sedišta u raznim državama neće se uzeti u obzir kad god to ne proističe iz ugovora ili ranijeg poslovanja između strana ili iz obaveštenja koje su one dale u bilo koje vreme pre ili za vreme zaključenja ugovora.

(3) Ni državljanstvo strana kao ni građanski ili trgovački karakter strana ili ugovora ne uzimaju se u obzir prilikom primene ove konvencije.

### **Član 2**

Ova konvencija se ne primenjuje na prodaje:

(a) robe kupljene za ličnu ili porodičnu upotrebu ili za potrebe domaćinstva, izuzev ako prodavac u bilo koje vreme pre ili u trenutku zaključenja ugovora nije znao niti je morao znati da se roba kupuje za takvu upotrebu;

(b) na javnoj dražbi;

(c) u slučaju zaplene ili nekog drugog postupka od strane sudskih vlasti;

(d) hartija od vrednosti i novaca;

(e) brodova, glisera na vazdušni jastuk i vazduhoplova;

(f) električne energije.

(1) Contracts for the supply of goods to be manufactured or produced are to be considered sales unless the party who orders the goods undertakes to supply a substantial part of the materials necessary for such manufacture or production.

(2) This Convention does not apply to contracts in which the preponderant part of the obligations of the party who furnishes the goods consists in the supply of labour or other services.

#### **Article 4**

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

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

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

#### **Article 5**

This Convention does not apply to the liability of the seller for death or personal injury caused by the goods to any person.

#### **Article 6**

The parties may exclude the application of this Convention or, subject to article 12, derogate

#### **Član 3**

(1) Ugovorima o prodaji smatraju se i ugovori o isporuci robe koja treba da se izradi ili proizvede, izuzev ako je strana koja je robu naručila preuzela obavezu da isporuči bitan deo materijala potrebnih za tu izradu ili proizvodnju.

(2) Ova konvencija se ne primenjuje na ugovore u kojima se pretežni deo obaveza strane koja isporučuje robu sastoji u izvršenju nekog rada ili pružanju nekih usluga.

#### **Član 4**

Ovom konvencijom se reguliše samo zaključenje ugovora o prodaji i prava i obaveze prodavca i kupca koje proističu iz takvog ugovora. Posebno, izuzev ako nije izričito drukčije predviđeno ovom konvencijom, ona se ne odnosi na:

(a) punovažnost ugovora, bilo koji od njegovih odredaba ili običaja;

(b) dejstvo koje bi ugovor mogao imati na svojinu prodate robe.

#### **Član 5**

Ova konvencija se ne primenjuje na odgovornost prodavca za smrt ili telesne povrede koje bi roba prouzrokovala bilo kom licu.

#### **Član 6**

Strane mogu isključiti primenu ove konvencije ili, pod rezervom

from or vary the effect of any of its provisions.

## **Chapter II**

### **GENERAL PROVISIONS**

#### **Article 7**

(1) In the interpretation of this Convention, regard is to be had to its international character and to the need to promote uniformity in its application and the observance of good faith in international trade.

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

#### **Article 8**

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

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

odredbi člana 12, odstupiti od bilo koje od njenih odredbi ili izmeniti njihovo dejstvo.

## **Glava II**

### **OPŠTE ODREDBE**

#### **Član 7**

(1) Prilikom tumačenja ove konvencije vodiće se računa o njenom međunarodnom karakteru i potrebi da se unapredi jednoobraznost njene primene i poštovanje savesnosti u međunarodnoj trgovini.

(2) Pitanja koja se tiču materija uređenih ovom konvencijom a koja nisu izričito rešena u njoj, rešavaće se prema opštim načelima na kojima ova konvencija počiva ili, u odsustvu tih načela, prema pravu merodavnom na osnovu pravila međunarodnog privatnog prava.

#### **Član 8**

(1) U smislu ove konvencije, izjave i druga ponašanja jedne strane tumačiće se u skladu sa njenom namerom kada je druga strana znala tu nameru ili joj ta namera nije mogla biti nepoznata.

(2) Ako prethodni stav ne može da se primeni, izjave i druga ponašanja jedne strane tumačiće se onako kako bi ih razumno lice istih svojstava kao druga strana shvatila u istim okolnostima.

(3) Prilikom utvrđivanja namere

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

#### **Article 9**

(1) The parties are bound by any usage to which they have agreed and by any practices which they have established between themselves.

(2) The parties are considered, unless otherwise agreed, to have impliedly made applicable to their contract or its formation a 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.

#### **Article 10**

For the purposes of this Convention:

(a) if a party has more than one place of business, the place of business is that which has the closest relationship to the contract and its performance, having regard to the circumstances known to or contemplated by the parties at any time before or at the conclusion of the contract;

jedne strane ili shvatanja koje bi imale razumno lice, vodiće se računa o svim relevantnim okolnostima slučaja uključujući njihove pregovore, praksu koju su strane međusobno uspostavile, običaje i svako docnije ponašanje strana.

#### **Član 9**

(1) Strane su vezane običajima sa kojima su se složile, kao i praksom uspostavljenom među njima.

(2) Ako nije drukčije dogovoreno, smatra se da su strane prećutno podvrgle svoj ugovor ili njegovo zaključenje običaju koji im je bio poznat ili morao biti poznat i koji je široko poznat u međunarodnoj trgovini i redovno ga poštuju ugovorne strane u ugovorima iste vrste u odnosnoj struci.

#### **Član 10**

U smislu ove konvencije:

(a) ako jedna strana ima više sedišta, uzima se u obzir sedište koje ima najtešnju vezu sa ugovorom i njegovim izvršenjem, imajući u vidu okolnosti koje su bile poznate stranama ili koje su strane imale u vidu u bilo koje vreme pre ili u trenutku zaključenja ugovora;

(b) ako jedna strana nema sedište, uzeće se u obzir njeno

(b) if a party does not have a place of business, reference is to be made to his habitual residence.

#### **Article 11**

A contract of sale need not be concluded in or evidenced by writing and is not subject to any other requirement as to form. It may be proved by any means, including witnesses.

#### **Article 12**

Any provision of article 11, article 29 or Part II of this Convention that allows a contract of sale or its modification or termination by agreement or any offer, acceptance or other indication of intention to be made in any form other than in writing does not apply where any party has his place of business in a Contracting State which has made a declaration under article 96 of this Convention. The parties may not derogate from or vary the effect of this article.

#### **Article 13**

For the purposes of this Convention "writing" includes telegram and telex.

### **PART II**

## **FORMATION OF THE CONTRACT**

#### **Article 14**

(1) A proposal for concluding a contract addressed to one or more specific persons constitutes

redovno boravište.

#### **Član 11**

Ugovor o prodaji ne mora da se zaključi niti potvrdi u pismenoj formi niti je podvrgnut bilo kojim drugim zahtevima u pogledu forme. On se može dokazivati na bilo koji način, uključujući svedoke.

#### **Član 12**

Bilo koja odredba člana 11, člana 29. ili Dela II ove konvencije kojom se dozvoljava da se ugovor o prodaji zaključi, izmeni ili sporazumno raskine ili ponuda, prihvatanje ili druga indikacija o nameri učine na neki drugi način a ne u pismenoj formi, neće se primeniti u slučaju kad bilo koja strana ima svoje sedište u državi ugovornici koja je dala izjavu na osnovu člana 96. ove konvencije. Strane ne mogu da odstupe od ovog člana ili izmene njegovo dejstvo.

#### **Član 13**

U smislu ove konvencije, izraz "pismeno" obuhvata telegram i teleks.

### **Deo II**

## **ZAKLJUČENJE UGOVORA**

#### **Član 14**

(1) Predlog za zaključenje ugovora upućen jednom ili više određenih lica predstavlja ponudu ako je

an offer if it is sufficiently definite and indicates the intention of the offeror to be bound in case of acceptance. A proposal is sufficiently definite if it indicates the goods and expressly or implicitly fixes or makes provision for determining the quantity and the price.

(2) A proposal other than one addressed to one or more specific persons is to be considered merely as an invitation to make offers, unless the contrary is clearly indicated by the person making the proposal.

#### **Article 15**

(1) An offer becomes effective when it reaches the offeree.

(2) An offer, even if it is irrevocable, may be withdrawn if the withdrawal reaches the offeree before or at the same time as the offer.

#### **Article 16**

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

(2) However, an offer cannot be revoked:

(a) if it indicates, whether by stating a fixed time for acceptance or otherwise, that it is irrevocable; or

(b) if it was reasonable for the offeree to rely on the offer as

dovoljno određen i ako ukazuje na nameru ponudioca da se obaveže u slučaju prihvatanja. Predlog je dovoljno određen ako označava robu i izričito ili prećutno utvrđuje količinu i cenu ili sadrži elemente za njihovo utvrđivanje.

(2) Predlog upućen neodređenom broju lica smatraće se samo kao poziv da se učine ponude, izuzev ako lice koje čini takav predlog jasno ne ukaže na suprotno.

#### **Član 15**

(1) Ponuda proizvodi dejstvo od trenutka kad stigne ponuđenome.

(2) Ponuda, čak i kad je neopoziva, može da se povuče ako je povlačenje stiglo ponuđenome pre ili u isto vreme kad i ponuda.

#### **Član 16**

(1) Sve dok se ugovor ne zaključi, ponuda može da se opozove, ako opoziv stigne ponuđenome pre nego što je on otposlao svoj prihvatač.

(2) Ponuda, međutim, ne može da se opozove:

(a) ako je u njoj naznačeno, bilo time što je određen rok za prihvatanje ili na drugi način, da je neopoziva;

(b) ako je ponuđeni razumno verovao da je ponuda neopoziva i ponašao se saglasno tome.

being irrevocable and the offeree has acted in reliance on the offer.

#### **Article 17**

An offer, even if it is irrevocable, is terminated when a rejection reaches the offeror.

#### **Article 18**

(1) A statement made by or other conduct of the offeree indicating assent to an offer is an acceptance. Silence or inactivity does not in itself amount to acceptance.

(2) An acceptance of an offer becomes effective at the moment the indication of assent reaches the offeror. An acceptance is not effective if the indication of assent does not reach the offeror within the time he has fixed or, if no time is fixed, within a reasonable time, due account being taken of the circumstances of the transaction, including the rapidity of the means of communication employed by the offeror. An oral offer must be accepted immediately unless the circumstances indicate otherwise.

(3) However, if, by virtue of the offer or as a result of practices which the parties have established between themselves or of usage, the offeree may indicate assent by performing an act, such as one relating to the dispatch of the goods or payment of the price, without notice to the offeror, the acceptance is effective at the moment the act is performed, provided that the act is performed

#### **Član 17**

Ponuda, čak i kad je neopoziva, prestaje da važi kad izjava o njenom odbijanju stigne ponudiocu.

#### **Član 18**

(1) Izjava ili drugo ponašanje ponuđenog koje ukazuje na saglasnost s ponudom smatra se prihvatanjem. Čutanje ili nečinjenje, samo po sebi, ne znači prihvatanje.

(2) Prihvatanje ponude proizvodi dejstvo od trenutka kad izjava o saglasnosti stigne ponudiocu. Prihvatanje će biti bez dejstva ako izjava o saglasnosti ne stigne ponudiocu u roku koji je on odredio ili ako nije odredio rok u razumnom roku, vodeći računa o okolnostima posla i brzini sredstava komunikacije koje je koristio ponudilac. Usmena ponuda mora biti prihvaćena odmah, izuzev ako okolnosti ne ukazuju na suprotno.

(3) Međutim, ako na osnovu ponude, prakse koju su strane između sebe uspostavile ili običaja, prihvatanje ponuđenog može biti izraženo izvršavanjem neke radnje, kao što je ona koja se odnosi na odašiljanje robe ili plaćanje cene, bez obaveštenja ponudioca, prihvatanje proizvodi dejstvo u trenutku kad je radnja izvršena pod uslovom da je ona izvršena u rokovima predviđenim u prethodnom stavu.

within the period of time laid down in the preceding paragraph.

#### **Article 19**

(1) 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.

(2) However, a reply to an offer which purports to be an acceptance but contains additional or different terms which do not materially alter the terms of the offer constitutes an acceptance, unless the offeror, without undue delay, objects orally to the discrepancy or dispatches a notice to that effect. If he does not so object, the terms of the contract are the terms of the offer with the modifications contained in the acceptance.

(3) Additional or different terms relating, among other things, to the 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 are considered to alter the terms of the offer materially.

#### **Article 20**

(1) A period of time for acceptance fixed by the offeror in a telegram or a letter begins to run from the moment the telegram is handed in for dispatch or from the date shown on the letter or, if no such date is shown,

#### **Član 19**

(1) Odgovor na ponudu koji ukazuje na prihvatanje, a koji sadrži dodatke, ograničenja ili druge izmene jeste odbijanje ponude i predstavlja obratnu ponudu.

(2) Međutim, odgovor na ponudu koji ukazuje na prihvatanje ali koji sadrži dopunske ili različite uslove koji suštinski ne menjaju uslove ponude predstavlja prihvatanje, izuzev ako ponudilac bez neopravdanog odlaganja stavi usmeno prigovor na razlike ili pošalje obaveštenje u tom smislu. Ako on tako ne postupi, ugovor je zaključen prema sadržini ponude sa izmenama koje se nalaze u prihvatanju.

(3) Dopunski ili različiti uslovi koji se odnose, pored ostalog, na cenu, plaćanje, kvalitet i količinu robe, mesto i vreme isporuke, obim odgovornosti jedne ugovorne strane u odnosu na drugu ili na rešavanje sporova, smatraće se da suštinski menjaju uslove ponude.

#### **Član 20**

(1) Rok za prihvatanje, koji je odredio ponudilac u telegramu ili pismu počinje teći od trenutka kad je telegram predat za odašiljanje ili od datuma koji nosi pismo ili, u nedostatku datuma na pismu, od datuma koji se nalazi na kovertu. Rok za prihvatanje koji je odredio ponudilac telefonom, teleksom ili drugim neposrednim sredstvima saopštavanja počinje



from the date shown on the envelope. A period of time for acceptance fixed by the offeror by telephone, telex or other means of instantaneous communication, begins to run from the moment that the offer reaches the offeree.

(2) Official holidays or non-business days occurring during the period for acceptance are included in calculating the period. However, if a notice of acceptance cannot be delivered at the address of the offeror on the last day of the period because that day falls on an official holiday or a non-business day at the place of business of the offeror, the period is extended until the first business day which follows.

#### **Article 21**

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

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

da teče od trenutka kad ponuda stigne ponuđenome.

(2) Zvanični praznici i neradni dani koji padaju u vreme određeno za prihvatanje uračunavaju se u to vreme. Međutim, ako obaveštenje o prihvatanju ne može da se uruči na adresu ponudioca poslednjeg dana roka usled zvaničnog praznika ili neradnog dana u mestu ponudioca, rok se produžuje do prvog narednog radnog dana.

#### **Član 21**

(1) Prihvatanje izvršeno sa zadocnjenjem ipak proizvodi dejstvo prihvatanja ako ponudilac, bez odlaganja, o tome usmeno obavesti ponuđenog ili mu pošalje pismeno obaveštenje u tom smislu.

(2) Ako se iz pisma ili drugog pismenog dokumenta koji sadrži zadocnelo prihvatanje vidi da je bilo poslato u takvim okolnostima da bi stiglo ponudiocu na vreme da je njegov prenos bio redovan, zadocnelo prihvatanje će proizvesti dejstvo prihvatanja, izuzev ako ponudilac, bez odlaganja, usmeno obavesti ponuđenog da smatra da se ponuda ugasila ili mu u tom smislu pošalje obaveštenje.

#### **Član 22**

Prihvatanje se može povući ako povlačenje stigne ponudiocu pre ili u trenutku kad bi prihvatanje

<p style="text-align: center;"><b>Article 22</b></p> <p>An acceptance may be withdrawn if the withdrawal reaches the offeror before or at the same time as the acceptance would have become effective.</p> <p style="text-align: center;"><b>Article 23</b></p> <p>A contract is concluded at the moment when an acceptance of an offer becomes effective in accordance with the provisions of this Convention.</p> <p style="text-align: center;"><b>Article 24</b></p> <p>For the purposes of this Part of the Convention, an offer, declaration of acceptance or any other indication of intention "reaches" the addressee when it is made orally to him or delivered by any other means to him personally, to his place of business or mailing address or, if he does not have a place of business or mailing address, to his habitual residence.</p> <p style="text-align: center;"><b>PART III</b></p> <p style="text-align: center;"><b>SALE OF GOODS</b></p> <p style="text-align: center;"><b>Chapter I</b></p> <p style="text-align: center;"><b>GENERAL PROVISIONS</b></p> <p style="text-align: center;"><b>Article 25</b></p> <p>A breach of contract committed by one of the parties is fundamental if it results in such detriment to the other party as substantially to deprive him of what he is entitled to expect under the contract, unless the</p>	<p>proizvelo dejstvo.</p> <p style="text-align: center;"><b>Član 23</b></p> <p>Ugovor o prodaji zaključen je u trenutku prihvatanja ponude u skladu sa odredbama ove konvencije.</p> <p style="text-align: center;"><b>Član 24</b></p> <p>U smislu ovog dela konvencije, ponuda, izjava o prihvatanju ili bilo koje drugo izražavanje namere "stiglo" je primaocu ako mu je saopštena usmeno ili je na drugi način uručena njemu lično ili predata njegovom sedištu ili na njegovu poštansku adresu ili, ako nema sedišta, odnosno poštanske adrese, u njegovom redovnom boravištu.</p> <p style="text-align: center;"><b>Deo III</b></p> <p style="text-align: center;"><b>PRODAJA ROBE</b></p> <p style="text-align: center;"><b>Glava I</b></p> <p style="text-align: center;"><b>OPŠTE ODREDBE</b></p> <p style="text-align: center;"><b>Član 25</b></p> <p>Povreda ugovora koju učini jedna strana smatraće se bitnom ako se njome prouzrokuje takva šteta drugoj strani da je suštinski lišava onog što je opravdano očekivala od ugovora, izuzev ako takvu posledicu nije predvidela strana koja čini povredu niti bi je predvidelo razumno lice istih svojstava u istim okolnostima.</p>
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party in breach did not foresee and a reasonable person of the same kind in the same circumstances would not have foreseen such a result.

#### **Article 26**

A declaration of avoidance of the contract is effective only if made by notice to the other party.

#### **Article 27**

Unless otherwise expressly provided in this Part of the Convention, if any notice, request or other communication is given or made by a party in accordance with this Part and 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.

#### **Article 28**

If, in accordance with the provisions of this Convention, one party is entitled to require performance of any obligation by the other party, a court is not bound to enter a judgement for specific performance unless the court would do so under its own law in respect of similar contracts of sale not governed by this Convention.

#### **Article 29**

(1) A contract may be modified or terminated by the mere agreement of the parties.

#### **Član 26**

Izjava o raskidu ugovora ima dejstvo jedino ako je o njoj obavještena druga strana.

#### **Član 27**

Izuzev ako je izričito drukčije predviđeno u ovom delu Konvencije, kad je jedna strana neko obavještenje, zahtev ili drugo saopštenje dala ili učinila u skladu sa ovim delom i na način koji se smatra odgovarajućim u datim okolnostima, zadocnjenje ili greška u prenosu saopštenja ili činjenica da saopštenje nije stiglo ne lišava tu stranu prava da se na to saopštenje poziva.

#### **Član 28**

Ako, u skladu sa odredbama ove konvencije, jedna strana ima pravo da zahteva izvršenje neke obaveze od druge strane, sud nije dužan da donese presudu o izvršenju u naturi osim ako bi to učinio prema pravilima sopstvenog prava za slične ugovore o prodaji na koji se ova konvencija ne odnosi.

#### **Član 29**

(1) Ugovor može da se izmeni ili raskine prostim sporazumom strana.

(2) Pismeni ugovor koji sadrži odredbu kojom se predviđa da svaka izmena ili raskid moraju da budu učinjeni u pismenoj formi ne

(2) A contract in writing which contains a provision requiring any modification or termination by agreement to be in writing may not be otherwise modified or terminated by agreement. However, 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.

## **Chapter II**

### **OBLIGATIONS OF THE SELLER**

#### **Article 30**

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

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

##### **Article 31**

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

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

(b) if, in cases not within the preceding subparagraph, the contract relates to specific goods, or unidentified goods to be drawn from a specific stock or to be manufactured or produced, and at the time of the conclusion of

može biti drukčije izmenjen ili sporazumno raskinut. Ipak, ugovorna strana može usled svog ponašanja izgubiti pravo da se poziva na takvu odredbu ako se druga strana oslonila na takvo ponašanje.

## **Glava II**

### **PRODAVČEVE OBAVEZE**

#### **Član 30**

Prodavac je dužan da na način predviđen ugovorom i ovom konvencijom isporuči robu, preda dokumente koji se na robu odnose i prenese svojinu na robu.

#### **Odsek I**

### **ISPORUKA ROBE I PREDAJA DOKUMENATA**

#### **Član 31**

Ako prodavac nije dužan isporučiti robu u nekom drugom određenom mestu, njegova obaveza isporuke sastoji se:

(a) ako prema ugovoru o prodaji roba treba da se preveze - u predaji robe prvom prevoziocu radi dostavljanja kupcu;

(b) ako su u slučajevima na koje se prethodna tačka ne odnosi, predmet ugovora individualno određene stvari, ili stvari određene po rodu koje treba izdvojiti iz određene mase ili ih treba proizvesti ili izraditi, a u vreme zaključenja ugovora strane su znale da je roba u određenom mestu ili je treba izraditi ili proizvesti u određenom mestu - u stavljanju robe na raspolaganje u tom

the contract the parties knew that the goods were at, or were to be manufactured or produced at, a particular place - in placing the goods at the buyer's disposal at that place;

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

### **Article 32**

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

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

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

### **Article 33**

The seller must deliver the goods:

mestu;

(c) u svim drugim slučajevima - u stavljanju robe na raspolaganje kupcu u mestu u kome je prodavac u trenutku zaključenja ugovora imao svoje sedište.

### **Član 32**

(1) Ako prodavac, u skladu sa ugovorom ili ovom konvencijom, preda robu prevoziocu, a roba nije jasno identifikovana kao roba namenjena za izvršenje ugovora obeležavanjem na njoj, u dokumentima za prevoz ili na drugi način, prodavac je dužan kupcu poslati obaveštenje o otpremi kojim se bliže određuje roba.

(2) Ako je prodavac dužan da se postara za prevoz robe, on mora zaključiti sve ugovore koji su potrebni za prevoz robe do određenog mesta prevoznim sredstvima koja su u datim okolnostima odgovarajuća i pod uslovima koji su uobičajeni za tu vrstu prevoza.

(3) Ako prodavac nije dužan da robu u prevozu osigura, on je obavezan da kupcu, na njegov zahtev, dostavi sve raspoložive podatke koji su mu potrebni da bi mogao robu osigurati.

### **Član 33**

Prodavac je dužan da robu isporuči:

(a) ako je datum određen ili se može odrediti na osnovu ugovora,

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

(b) if a period of time is fixed by or determinable from the contract, at any time within that period unless circumstances indicate that the buyer is to choose a date; or

(c) in any other case, within a reasonable time after the conclusion of the contract.

#### **Article 34**

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

### **Section II. Conformity of the goods and third party claims**

#### **Article 35**

(1) The seller must deliver goods which are of the quantity, quality and description required by the contract and which are contained or packaged in the manner required by the contract.

(2) Except where the parties have

tog datuma;

(b) ako je vremenski period određen ili se može odrediti na osnovu ugovora, u bilo koje vreme u okviru tog perioda, izuzev ako okolnosti ne ukazuju na to da je kupac bio ovlašćen da odredi datum; ili

(c) u svakom drugom slučaju, u razumnom roku posle zaključenja ugovora.

#### **Član 34**

Ako je prodavac dužan da preda dokumente koji se odnose na robu, on ih mora predati u vreme, na mestu i u obliku koji su predviđeni ugovorom. Ako preda dokumente pre tog roka, prodavac može, sve do tog roka, da popravi svaki nedostatak saobraznosti u dokumentima, pod uslovom da ovo njegovo pravo ne prouzrokuje kupcu ni nerazumne nepogodnosti ni nerazumne troškove. Kupac, međutim, zadržava pravo da zahteva naknadu štete predviđenu ovom konvencijom.

#### **Odsek II**

### **SAOBRAZNOST ROBE I PRAVA ILI POTRAŽIVANJA TREĆIH LICA**

#### **Član 35**

(1) Prodavac je dužan isporučiti robu u količini, kvalitetu i vrsti kako je to predviđeno ugovorom i pakovanu ili zaštićenu na način predviđen u ugovoru.

(2) Izuzev ako su se strane drukčije sporazumele, smatra se da roba

<p>agreed otherwise, the goods do not conform with the contract unless they:</p> <p>(a) are fit for the purposes for which goods of the same description would ordinarily be used;</p> <p>(b) are fit for any particular purpose expressly or impliedly made known to the seller at the time of the conclusion of the contract, except where the circumstances show that the buyer did not rely, or that it was unreasonable for him to rely, on the seller's skill and judgement;</p> <p>(c) possess the qualities of goods which the seller has held out to the buyer as a sample or model;</p> <p>(d) are contained or packaged in the manner usual for such goods or, where there is no such manner, in a manner adequate to preserve and protect the goods.</p> <p>(3) The seller is not liable under subparagraphs (a) to (d) of the preceding paragraph for any lack of conformity of the goods if at the time of the conclusion of the contract the buyer knew or could not have been unaware of such lack of conformity.</p> <p style="text-align: center;"><b>Article 36</b></p> <p>(1) The seller is liable in accordance with the contract and this Convention for any lack of conformity which exists at the time when the risk passes to the buyer, even though the lack of conformity becomes apparent</p>	<p>nije saobrazna ugovoru ukoliko:</p> <p>(a) nije podobna za svrhe za koje se roba iste vrste uobičajeno koristi;</p> <p>(b) nije podobna za naročitu svrhu koja je prodavcu izričito ili prećutno stavljena do znanja u vreme zaključenja ugovora, izuzev kad okolnosti ukazuju da se kupac nije oslonio niti je bilo razumno da se osloni na stručnost i prosuđivanje prodavaca;</p> <p>(c) ne poseduje kvalitete robe koje je prodavac kupcu predložio u vidu uzorka ili modela;</p> <p>(d) pakovana ili zaštićena na način uobičajen za takvu robu ili, ako takav način ne postoji, na način koji je odgovarajući da sačuva i zaštititi robu.</p> <p>(3) Prodavac neće odgovarati na osnovu tačke (a) do (d) prethodnog stava za bilo kakvu nesaobraznost robe ako je u vreme zaključenja ugovora kupac znao za tu nesaobraznost ili mu ona nije mogla biti nepoznata.</p> <p style="text-align: center;"><b>Član 36</b></p> <p>(1) Prodavac odgovara, u skladu sa ugovorom i ovom konvencijom, za svaki nedostatak saobraznosti koji je postojao u trenutku prelaska rizika na kupca, čak i ako je nedostatak saobraznosti postao očit kasnije.</p> <p>(2) Prodavac je takođe odgovoran za svaki nedostatak saobraznosti koji se pojavio posle trenutka utvrđenog u prethodnom</p>
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only after that time.

(2) The seller is also liable for any lack of conformity which occurs after the time indicated in the preceding paragraph and which 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.

### **Article 37**

If the seller has delivered goods before the date for delivery, he may, up to that date, deliver any missing part or make up any deficiency in the quantity of the goods delivered, or deliver goods in replacement of any non-conforming goods delivered or remedy any lack of conformity in the goods delivered, provided that the exercise of this right does not cause the buyer unreasonable inconvenience or unreasonable expense. However, the buyer retains any right to claim damages as provided for in this Convention.

### **Article 38**

(1) The buyer must examine the goods, or cause them to be examined, within as short a period as is practicable in the circumstances.

(2) If the contract involves carriage of the goods, examination may be deferred until after the goods have arrived at

stavu a koji se može pripisati povredi bilo koje njegove obaveze, uključujući povredu garantije o tome da će za neko vreme ostati podobna za njenu redovnu kao i naročitu svrhu ili da će zadržati određena svojstva ili karakteristike.

### **Član 37**

Ako preda robu pre isteka roka za isporuku prodavac može, do datuma određenog za isporuku, isporučiti deo ili količinu koji nedostaju ili zameniti nesaobraznu robu novom saobraznom robom ili otkloniti nedostatak saobraznosti isporučene robe, pod uslovom da to njegovo pravo ne prouzrokuje kupcu ni nerazumne nepogodnosti ni nerazumne troškove. Kupac, međutim, zadržava pravo da zahteva naknadu štete predviđenu ovom konvencijom.

### **Član 38**

(1) Kupac je dužan pregledati robu ili je dati na pregled u što je moguće kraćem roku, zavisno od okolnosti.

(2) Ako se ugovorom predviđa prevoz robe, pregled se može odložiti do stizanja robe u mesto opredeljenja.

(3) Ako je kupac u toku prevoza robe promenio pravac ili je dalje otpremio, a da pri tom nije postojala razumna mogućnost da je pregleda, i ako je prodavcu u



their destination.

(3) If the goods are redirected in transit or redispached by the buyer without a reasonable opportunity for examination by him and at the time of the conclusion of the contract the seller knew or ought to have known of the possibility of such redirection or redispach, examination may be deferred until after the goods have arrived at the new destination.

#### **Article 39**

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

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

#### **Article 40**

The seller is not entitled to rely on the provisions of articles 38 and 39 if the lack of conformity relates to facts of which he knew or could not have been unaware and which he did not disclose to the

trenutku zaključenja ugovora bila poznata ili mu je morala biti poznata mogućnost ove izmene pravca ili dalje otpreme, pregled robe može da se odloži do prispeća robe u novo mesto opredeljenja.

#### **Član 39**

(1) Kupac gubi pravo da se poziva na nedostatak saobraznosti robe ako o tome nije prodavcu poslao obaveštenje u kome je naveo prirodu nedostatka, u razumnom roku od trenutka kad ga je otkrio ili morao otkriti.

(2) Kupac u svakom slučaju gubi pravo da se pozove na nedostatak saobraznosti robe, ako o njemu nije obavestio prodavca najkasnije u roku od dve godine računajući od dana stvarne predaje robe kupcu, izuzev kad je taj rok nesaglasan sa rokom o ugovornoj garantiji.

#### **Član 40**

Prodavac nema pravo da se koristi odredbama čl. 38. i 49. kad se nedostatak saobraznosti odnosi na činjenice koje su mu bile poznate ili mu nisu mogle biti nepoznate, a on ih nije otkrio kupcu.

#### **Član 41**

buyer.

#### **Article 41**

The seller must 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 right or claim. However, if such right or claim is based on industrial property or other intellectual property, the seller's obligation is governed by article 42.

#### **Article 42**

(1) The seller must deliver goods which are free from any right or claim of a third party based on industrial property or other intellectual property, of which at the time of the conclusion of the contract the seller knew or could not have been unaware, provided that the right or claim is based on industrial property or other intellectual property:

(a) under the law of the State where the goods will be resold or otherwise used, if it was contemplated by the parties at the time of the conclusion of the contract that the goods would be resold or otherwise used in that State; or

(b) in any other case, under the law of the State where the buyer has his place of business.

(2) The obligation of the seller under the preceding paragraph does not extend to cases where:

(a) at the time of the conclusion of

Prodavac je dužan da isporuči robu slobodnu od prava ili potraživanja trećeg lica, izuzev ako se kupac složi da primi robu pod tim uslovima. Međutim, ako se takvo pravo ili potraživanje zasniva na industrijskoj ili drugoj intelektualnoj svojini, ova obaveza prodavca reguliše se članom 42.

#### **Član 42**

(1) Prodavac je dužan da isporuči robu slobodnu od svakog prava ili potraživanja trećeg lica koji se zasnivaju na industrijskoj ili drugoj intelektualnoj svojini, a bili su mu u trenutku zaključenja ugovora poznati ili mu nisu mogli biti nepoznati, pod uslovom da se pravo ili potraživanje zasniva na industrijskoj ili drugoj intelektualnoj svojini:

(a) po pravu države u kojoj će roba da se dalje prodaje ili na drugi način koristi, ako su strane u vreme zaključenja ugovora imale u vidu da će roba da se dalje prodaje ili na drugi način koristi u toj državi; ili

(b) u svakom drugom slučaju, po pravu države u kojoj kupac ima svoje sedište.

(2) obaveza prodavca na osnovu prethodnog stava ne odnosi se na slučajeve u kojima:

(a) u trenutku zaključenja ugovora kupac je znao ili mu nije moglo biti nepoznato postojanje takvog prava ili potraživanja; ili

(b) takvo pravo ili potraživanje su posledica prodavčevog

the contract the buyer knew or could not have been unaware of the right or claim; or

(b) the right or claim results from the seller's compliance with technical drawings, designs, formulae or other such specifications furnished by the buyer.

#### **Article 43**

(1) The buyer loses the right to rely on the provisions of article 41 or article 42 if he does not give notice to the seller specifying the nature of the right or claim of the third party within a reasonable time after he has become aware or ought to have become aware of the right or claim.

(2) The seller is not entitled to rely on the provisions of the preceding paragraph if he knew of the right or claim of the third party and the nature of it.

#### **Article 44**

Notwithstanding the provisions of paragraph (1) of article 39 and paragraph (1) of article 43, the buyer may reduce the price in accordance with article 50 or claim damages, except for loss of profit, if he has a reasonable excuse for his failure to give the required notice.

### **Section III. Remedies for breach of contract by the seller**

#### **Article 45**

(1) If the seller fails to perform any

postupanja po tehničkim planovima, crtežima, formulama ili drugim sličnim specifikacijama koje mu je dostavio kupac.

#### **Član 43**

(1) Kupac gubi pravo da se koristi odredbama člana 41. ili člana 42. ukoliko o pravu ili potraživanju trećeg lica ne dostavi prodavcu obavještenje u kome je naveo njihovu prirodu u razumnom roku pošto je saznao ili morao da sazna za postojanje takvog prava ili potraživanja.

(2) Prodavac nema pravo da se koristi odredbama prethodnog stava ako je znao za pravo ili potraživanje trećeg lica i njihovu prirodu.

#### **Član 44**

Bez obzira na odredbe stava 1. člana 39. i stava 1. člana 43. kupac može sniziti cenu u skladu sa članom 50. ili zahtevati naknadu štete, izuzev za izgublenu dobit, ako ima razumno opravdanje što nije poslao traženo obavještenje.

### **Odsek III**

## **SREDSTVA KOJIMA RASPOLAŽE KUPAC U SLUČAJU POVREDE UGOVORA OD STRANE PRODAVCA**

#### **Član 45**

(1) Ako prodavac ne izvrši bilo koju svoju obavezu koju ima na osnovu ugovora ili ove konvencije, kupac može:

(a) koristiti se pravima

<p>of his obligations under the contract or this Convention, the buyer may:</p> <p>(a) exercise the rights provided in articles 46 to 52;</p> <p>(b) claim damages as provided in articles 74 to 77.</p> <p>(2) The buyer is not deprived of any right he may have to claim damages by exercising his right to other remedies.</p> <p>(3) No period of grace may be granted to the seller by a court or arbitral tribunal when the buyer resorts to a remedy for breach of contract.</p>	<p>predviđenim u čl. 46. do 52;</p> <p>(b) zahtevati naknadu štete predviđenu u čl. 74. do 77.</p> <p>(2) Kupcu nije uskraćeno pravo da zahteva naknadu štete iako se poslužio drugim sredstvom.</p> <p>(3) Ako se kupac koristi sredstvom koje je predviđeno za povredu ugovora, sud ili arbitraža ne mogu odobriti prodavcu produženje roka.</p>
<p style="text-align: center;"><b>Article 46</b></p> <p>(1) The buyer may require performance by the seller of his obligations unless the buyer has resorted to a remedy which is inconsistent with this requirement.</p> <p>(2) If the goods do not conform with the contract, the buyer may require delivery of substitute goods only if the lack of conformity constitutes a fundamental breach of contract and a request for substitute goods is made either in conjunction with notice given under article 39 or within a reasonable time thereafter.</p> <p>(3) If the goods do not conform with the contract, the buyer may require the seller to remedy the lack of conformity by repair, unless this is unreasonable having regard to all the circumstances. A request for repair must be made either in</p>	<p style="text-align: center;"><b>Član 46</b></p> <p>(1) Kupac može zahtevati od prodavca izvršenje njegovih obaveza ako se ne koristi nekim sredstvom koje bi bilo suprotno takvom zahtevu.</p> <p>(2) Ako roba nije saobrazna ugovoru, kupac ima pravo da zahteva isporuku druge robe kao zamenu samo ako nedostatak saobraznosti predstavlja bitnu povredu ugovora a zahtev za zamenu je učinjen bilo istovremeno sa obaveštenjem datim na osnovu člana 39. ili u razumnom roku posle tog obaveštenja.</p> <p>(3) Ako roba nije saobrazna ugovoru, kupac može zahtevati od prodavca da otkloni nedostatak popravkom, izuzev ako bi to bilo nerazumno uzimajući u obzir sve okolnosti. Zahtev za popravkom mora da se učini bilo istovremeno sa obaveštenjem datim na osnovu člana 39. ili u razumnom roku posle tog obaveštenja.</p>

conjunction with notice given under article 39 or within a reasonable time thereafter.

#### **Article 47**

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

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

#### **Article 48**

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

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

#### **Član 47**

(1) Kupac može odrediti prodavcu dodatni rok razumne dužine za izvršenje njegovih obaveza.

(2) Izuzev ako kupac primi obaveštenje od prodavca da on neće izvršiti svoje obaveze do isteka tog roka, kupac ne može u tom roku da se koristi bilo kojim sredstvom predviđenim za povredu ugovora. Kupac, međutim, ne gubi zbog toga pravo da usled docnje prodavca zahteva naknadu štete.

#### **Član 48**

(1) Ako to nije u suprotnosti sa članom 49, prodavac može, čak i posle isteka roka za isporuku, na svoj trošak otkloniti svako neizvršenje svojih obaveza ako je u stanju da to učini bez nerazumnog odlaganja i bez nanošenja kupcu nerazumnih nepogodnosti ili neizvesnosti da će mu prodavac naknaditi troškove koje je s tim u vezi imao. U svakom, pak, slučaju kupac zadržava pravo da zahteva naknadu štete u saglasnosti sa ovom konvencijom.

(2) Ako prodavac zahteva od kupca da se izjasni da li prihvata izvršenje ugovora, a kupac mu ne odgovori u razumnom roku, prodavac može da izvrši ugovor u roku koji je naveden u njegovom zahtevu. Kupac nema pravo, do isteka tog roka, da se koristi bilo kojim sredstvom koje ne bi bilo u skladu sa izvršenjem od strane prodavca.

(3) Smatra se da obaveštenje

<p>of time, resort to any remedy which is inconsistent with performance by the seller.</p> <p>(3) A notice by the seller that he will perform within a specified period of time is assumed to include a request, under the preceding paragraph, that the buyer make known his decision.</p> <p>(4) A request or notice by the seller under paragraph (2) or (3) of this article is not effective unless received by the buyer.</p> <p style="text-align: center;"><b>Article 49</b></p> <p>(1) The buyer may declare the contract avoided:</p> <p>(a) if the failure by the seller to perform any of his obligations under the contract or this Convention amounts to a fundamental breach of contract; or</p> <p>(b) in case of non-delivery, if the seller does not deliver the goods within the additional period of time fixed by the buyer in accordance with paragraph (1) of article 47 or declares that he will not deliver within the period so fixed.</p> <p>(2) However, in cases where the seller has delivered the goods, the buyer loses the right to declare the contract avoided unless he does so:</p> <p>(a) in respect of late delivery, within a reasonable time after he has become aware that delivery</p>	<p>prodavca o tome da će izvršiti ugovor u određenom roku sadrži i zahtev iz prethodnog stava da mu kupac saopšti svoju odluku.</p> <p>(4) Zahtev ili obaveštenje prodavca na osnovu stava 2. ili 3. ovog člana proizvodi dejstvo samo ako ga je kupac primio.</p> <p style="text-align: center;"><b>Član 49</b></p> <p>(1) Kupac može izjaviti da raskida ugovor:</p> <p>(a) ako neizvršenje bilo koje obaveze koju prodavac ima na osnovu ugovora ili ove konvencije predstavlja bitnu povredu ugovora; ili</p> <p>(b) u slučaju neisporuke, ako prodavac nije isporučio robu u dodatnom roku koji mu je kupac odredio na osnovu stava 1. člana 47. ili je izjavio da je neće isporučiti u tako određenom roku.</p> <p>(2) Međutim, u slučajevima kad je prodavac isporučio robu, kupac gubi pravo da raskine ugovor ako to nije učinio:</p> <p>(a) u odnosu na zadocnelu isporuku, u razumnom roku računajući od trenutka kad je saznao da je isporuka izvršena;</p> <p>(b) u odnosu na bilo koju drugu povredu, osim zadocnele isporuke, u razumnom roku:</p> <p style="padding-left: 40px;">(i) pošto je saznao ili morao saznati za povredu;</p>
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<p>has been made;</p> <p>(b) in respect of any breach other than late delivery, within a reasonable time:</p> <p>(i) after he knew or ought to have known of the breach;</p> <p>(ii) after the expiration of any additional period of time fixed by the buyer in accordance with paragraph (1) of article 47, or after the seller has declared that he will not perform his obligations within such an additional period; or</p> <p>(iii) after the expiration of any additional period of time indicated by the seller in accordance with paragraph (2) of article 48, or after the buyer has declared that he will not accept performance.</p> <p style="text-align: center;"><b>Article 50</b></p> <p>If the goods do not conform with the contract and whether or not the price has already been paid, the buyer may reduce the price in the same proportion as the value that the goods actually delivered had at the time of the delivery bears to the value that conforming goods would have had at that time. However, if the seller remedies any failure to perform his obligations in accordance with article 37 or article 48 or if the buyer refuses to accept performance by the seller in accordance with those articles, the buyer may not reduce the price.</p>	<p>(ii) po isteku svakog dodatnog roka koji je kupac odredio u skladu sa stavom (1) člana 47, ili pošto je prodavac izjavio da neće izvršiti svoje obaveze u ovom dodatnom roku; ili</p> <p>(iii) po isteku svakog dodatnog roka koji je odredio prodavac u skladu sa stavom (2) člana 48. ili pošto je kupac izjavio da neće prihvatiti izvršenje.</p> <p style="text-align: center;"><b>Član 50</b></p> <p>Ako roba nije saobrazna ugovoru kupac može, bez obzira na to da li je cena već plaćena ili nije, sniziti cenu srazmerno razlici između vrednosti stvarno isporučene robe u vreme isporuke prema vrednosti koju bi u to vreme imala roba saobrazna ugovoru. Međutim, ako prodavac otkloni bilo koje neizvršenje svojih obaveza u skladu sa članom 37. ili članom 48. ili ako kupac odbije da primi isporuku od prodavca u skladu s tim članovima, kupac ne može da snizi cenu.</p> <p style="text-align: center;"><b>Član 51</b></p> <p>(1) Ako prodavac isporuči samo jedan deo robe ili kad je samo jedan deo robe saobrazan ugovoru, čl. 46. do 50. primeniće se u pogledu dela koji nedostaje ili koji nije saobrazan ugovoru.</p> <p>(2) Kupac može izjaviti da raskida</p>
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### **Article 51**

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

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

### **Article 52**

(1) If the seller delivers the goods before the date fixed, the buyer may take delivery or refuse to take delivery.

(2) If the seller delivers a quantity of goods greater than that provided for in the contract, the buyer may take delivery or refuse to take delivery of the excess quantity. If the buyer takes delivery of all or part of the excess quantity, he must pay for it at the contract rate.

## **Chapter III**

### **OBLIGATIONS OF THE BUYER**

#### **Article 53**

The buyer must pay the price for the goods and take delivery of them as required by the contract and this Convention.

ceo ugovor samo ako delimično neizvršenje ili nedostatak saobraznosti predstavlja bitnu povredu ugovora.

#### **Član 52**

(1) Ako prodavac isporuči robu pre datuma određenog za isporuku, kupac može primiti ili odbiti isporuku.

(2) Ako prodavac isporuči količinu robe veću od one koja je predviđena ugovorom, kupac može primiti ili odbiti isporuku količine koja premaša ugovorenu količinu. Ako kupac primi ceo višak ili jedan njegov deo iznad ugovorene količine, dužan ga je platiti po ugovorenoj ceni.

## **Glava III**

### **KUPČEVE OBAVEZE**

#### **Član 53**

Kupac se obavezuje da isplati cenu i da preuzme isporuku robe onako kako je predviđeno ugovorom i ovom konvencijom.

#### **Odsek I ISPLATA CENE**

#### **Član 54**

Kupčeva obaveza da isplati cenu podrazumeva preduzimanje mera i ispunjavanje formalnosti predviđenih ugovorom ili odgovarajućim zakonima i propisima da bi se omogućilo izvršenje plaćanja.



<p><b>Section I. Payment of the price</b></p> <p><b>Article 54</b></p> <p>The buyer's obligation to pay the price includes taking such steps and complying with such formalities as may be required under the contract or any laws and regulations to enable payment to be made.</p> <p><b>Article 55</b></p> <p>Where a contract has been validly concluded but does not expressly or implicitly fix or make provision for determining the price, the parties are considered, in the absence of any indication to the contrary, to have impliedly made reference to the price generally charged at the time of the conclusion of the contract for such goods sold under comparable circumstances in the trade concerned.</p> <p><b>Article 56</b></p> <p>If the price is fixed according to the weight of the goods, in case of doubt it is to be determined by the net weight.</p> <p><b>Article 57</b></p> <p>(1) If the buyer is not bound to pay the price at any other particular place, he must pay it to the seller:</p> <p>(a) at the seller's place of business; or</p> <p>(b) if the payment is to be made against the handing over of the</p>	<p><b>Član 55</b></p> <p>Kad je ugovor valjano zaključen a da cena za prodatu robu nije u ugovoru ni izričito ni prećutno određena niti u njemu ima odredbi na osnovu kojih bi se mogla utvrditi, smatraće se, ako nije suprotno navedeno, da su strane prećutno pristale na cenu koja se u trenutku zaključenja ugovora redovno naplaćivala u odnosnoj struci za takvu robu prodatu pod sličnim okolnostima.</p> <p><b>Član 56</b></p> <p>Ako je cena utvrđena prema težini robe, za određivanje cene se u slučaju sumnje uzima neto-težina.</p> <p><b>Član 57</b></p> <p>(1) Ako kupac nije preuzeo obavezu da plati cenu u bilo kom drugom određenom mestu, dužan je da je plati prodavcu:</p> <p>(a) u sedištu prodavca; ili</p> <p>(b) ako se isplata ima izvršiti uz predaju robe ili dokumenata, u mestu te predaje.</p> <p>(2) Prodavac snosi svako povećanje troškova vezano uz plaćanje do koga je došlo zbog promene njegovog sedišta posle zaključenja ugovora.</p> <p><b>Član 58</b></p> <p>(1) Ako kupac nije preuzeo obavezu da plati cenu u bilo koje drugo određeno vreme, on je dužan da je plati kad prodavac, u</p>
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goods or of documents, at the place where the handing over takes place.

(2) The seller must bear any increases in the expenses incidental to payment which is caused by a change in his place of business subsequent to the conclusion of the contract.

### **Article 58**

(1) If the buyer is not bound to pay the price at any other specific time, he must pay it when the seller places either the goods or documents controlling their disposition at the buyer's disposal in accordance with the contract and this Convention. The seller may make such payment a condition for handing over the goods or documents.

(2) If the contract involves carriage of the goods, the seller may dispatch the goods on terms whereby the goods, or documents controlling their disposition, will not be handed over to the buyer except against payment of the price.

(3) The buyer is not bound to pay the price until he has had an opportunity to examine the goods, unless the procedures for delivery or payment agreed upon by the parties are inconsistent with his having such an opportunity.

### **Article 59**

The buyer must pay the price on the date fixed by or determinable from the contract and this

skladu sa ugovorom i ovom konvencijom, stavi kupcu na raspolaganje bilo robu bilo dokumente na osnovu kojih se robom može raspolagati. Prodavac može usloviti predaju robe ili dokumenata takvim plaćanjem cene.

(2) Ako je ugovorom predviđen prevoz robe, prodavac može otpremiti robu pod uslovom da roba ili dokumenti na osnovu kojih se robom može raspolagati neće biti predati kupcu dok ne isplati cenu.

(3) Kupac nije dužan isplatiti cenu pre nego što je imao mogućnosti da robu pregleda, izuzev ako načini isporuke ili plaćanja sa kojima su se strane saglasile isključuju takvu mogućnost.

### **Član 59**

Kupac je dužan da isplati cenu onog dana koji je određen ugovorom ili koji se može utvrditi na osnovu ugovora ili ove konvencije, bez potrebe da prodavac postavi neki zahtev ili učini neke druge formalnosti.

## **Odsek II PREUZIMANJE ISPORUKE**

### **Član 60**

Kupčeva obaveza preuzimanja isporuke sastoji se u:

(a) obavljanju svih radnji koje se razumno od njega očekuju da bi omogućio prodavcu da izvrši isporuku; i

Convention without the need for any request or compliance with any formality on the part of the seller.

## **Section II. Taking delivery**

### **Article 60**

The buyer's obligation to take delivery consists:

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

(b) in taking over the goods.

## **Section III. Remedies for breach of contract by the buyer**

### **Article 61**

(1) If the buyer fails to perform any of his obligations under the contract or this Convention, the seller may:

(a) exercise the rights provided in articles 62 to 65;

(b) claim damages as provided in articles 74 to 77.

(2) The seller is not deprived of any right he may have to claim damages by exercising his right to other remedies.

(3) No period of grace may be granted to the buyer by a court or arbitral tribunal when the seller resorts to a remedy for breach of contract.

### **Article 62**

(b) preuzimanju robe.

## **Odsek III SREDSTVA KOJIMA RASPOLAŽE PRODAVAC U SLUČAJU POVREDE UGOVORA OD STRANE KUPCA**

### **Član 61**

(1) Ako kupac ne izvrši bilo koju od svojih obaveza koju ima na osnovu ugovora ili ove konvencije, prodavac može:

(a) koristiti prava predviđena u čl. 62. do 65;

(b) zahtevati naknadu štete predviđenu u čl. 74. do 77.

(2) Prodavac ne gubi pravo da zahteva naknadu štete time što koristi svoja prava u pogledu drugih sredstava.

(3) Kad se prodavac koristi sredstvom koje je predviđeno za povredu ugovora, sud ili arbitražna ne može odobriti kupcu produženje roka.

### **Član 62**

Prodavac može zahtevati od kupca da plati cenu, preuzme isporuku ili da izvrši druge svoje obaveze, ako se prodavac ne opredeli za sredstvo koje je suprotno takvim zahtevima.

### **Član 63**

(1) Prodavac može odrediti kupcu dodatni rok razumne dužine za izvršenje njegovih obaveza.

(2) Ako prodavac ne primi obaveštenje od kupca da neće

The seller may require the buyer to pay the price, take delivery or perform his other obligations, unless the seller has resorted to a remedy which is inconsistent with this requirement.

### **Article 63**

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

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

### **Article 64**

(1) The seller may declare the contract avoided:

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

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

izvršiti svoje obaveze u roku koji je tako određen, prodavac ne može do isteka tog roka da se koristi bilo kojim sredstvom predviđenim za slučaj povrede ugovora. Prodavac, međutim, ne gubi zbog toga pravo da usled docnije kupca zahteva naknadu štete.

### **Član 64**

(1) Prodavac može izjaviti da raskida ugovor:

(a) ako neizvršenje bilo koje obaveze koju kupac ima na osnovu ugovora ili ove konvencije predstavlja bitnu povredu ugovora; ili

(b) ako kupac nije ni u dodatnom roku koji je odredio prodavac u skladu sa stavom 1. člana 63. izvršio svoju obavezu da plati cenu ili preuzme isporuku robe, ili je izjavio da to neće učiniti u tako određenom roku.

(2) Međutim, u slučaju kad je kupac platio cenu, prodavac gubi pravo da raskine ugovor ukoliko to nije učinio:

(a) u pogledu zadocnelog izvršenja od strane kupca pre nego što je saznao za izvršenje; ili

(b) u pogledu bilo koje druge povrede, osim zadocnelog izvršenja, u razumnom roku:

(i) pošto je prodavac saznao ili morao saznati za povredu; ili

(ii) po isteku dodatnog roka koji je odredio

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

(a) in respect of late performance by the buyer, before the seller has become aware that performance has been rendered; or

(b) in respect of any breach other than late performance by the buyer, within a reasonable time:

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

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

#### **Article 65**

(1) If under the contract the buyer is to specify the form, measurement or other features of the goods and he fails to make such specification either on the date agreed upon or within a reasonable time after receipt of a request from the seller, the seller may, without prejudice to any other rights he may have, make the specification himself in accordance with the requirements of the buyer that may be known to him.

(2) If the seller makes the specification himself, he must inform the buyer of the details thereof and must fix a reasonable

prodavac u skladu sa stavom (1) člana 63. ili pošto je kupac izjavio da neće izvršiti svoje obaveze u ovom dodatnom roku.

#### **Član 65**

(1) Ako je prema ugovoru kupac dužan da odredi oblik, mere ili druga obeležja robe, a kupac ne učini ovu specifikaciju do ugovorenog datuma ili do isteka razumnog roka pošto je od prodavca primio zahtev da to učini, prodavac može, ne dirajući time u svoja druga prava koje može imati, učiniti sam tu specifikaciju u skladu sa kupčevim potrebama koje su mu mogle biti poznate.

(2) Ako prodavac sam učini specifikaciju, on je dužan obavestiti kupca o njenim pojedinostima i odrediti mu jedan razuman rok u kome kupac može učiniti neku drugu specifikaciju. Ako kupac, pošto je primio takvo obaveštenje prodavca to ne učini u tako određenom roku, specifikacija koju je učinio prodavac je obavezna.

#### **Glava IV**

#### **PRELAZ RIZIKA**

#### **Član 66**

time within which the buyer may make a different specification. If, after receipt of such a communication, the buyer fails to do so within the time so fixed, the specification made by the seller is binding.

#### **Chapter IV**

### **PASSING OF RISK**

#### **Article 66**

Loss of or damage to the goods after the risk has passed to the buyer does not discharge him from his obligation to pay the price, unless the loss or damage is due to an act or omission of the seller.

#### **Article 67**

(1) If the contract of sale involves carriage of the goods and the seller is not bound to hand them over 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 in accordance with the contract of sale. If the seller is bound to hand the goods over 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. The fact that the seller is authorized to retain documents controlling the disposition of the goods does not affect the passage of the risk.

(2) Nevertheless, the risk does not pass to the buyer until the goods are clearly identified to the contract, whether by markings on

Pošto je rizik prešao na kupca, ovaj je dužan platiti cenu bez obzira na gubitak ili oštećenje robe, izuzev kad su gubitak ili oštećenje posledica radnje ili propusta od strane prodavca.

#### **Član 67**

(1) Ako je prema ugovoru o prodaji potrebno izvršiti prevoz robe, a prodavac nije obavezan da je preda u određenom mestu, rizik prelazi na kupca kad je roba predata prvom prevoziocu da je prenese kupcu u skladu sa ugovorom o prodaji. Ako je prodavac obavezan da robu preda prevoziocu u određenom mestu, rizik prelazi na kupca tek kad je roba predata prevoziocu u tom mestu. Činjenica da je prodavac ovlašćen da zadrži dokumente na osnovu kojih se može raspolagati robom ne utiče na prelaz rizika.

(2) Međutim, rizik ne prelazi na kupca sve dok roba nije jasno identifikovana kao roba namenjena za izvršenje ugovora obeležavanjem na njoj, dokumentima o prevozu, obaveštenjem koje je poslato kupcu ili na drugi način.

#### **Član 68**

Rizik za robu koja je prodana u toku prevoza prelazi na kupca u trenutku zaključenja ugovora. Međutim, ako okolnosti na to ukazuju, rizik prelazi na kupca u trenutku kad je roba predata prevoziocu koji je izdao

the goods, by shipping documents, by notice given to the buyer or otherwise.

#### **Article 68**

The risk in respect of goods sold in transit passes to the buyer from the time of the conclusion of the contract. However, if the circumstances so indicate, the risk is assumed by the buyer from the time the goods were handed over to the carrier who issued the documents embodying the contract of carriage. Nevertheless, if at the time of the conclusion of the contract of sale the seller knew or ought to have known that the goods had been lost or damaged and did not disclose this to the buyer, the loss or damage is at the risk of the seller.

#### **Article 69**

(1) In cases not within articles 67 and 68, the risk passes to the buyer when he takes over the goods or, if he does not do so in due time, from the time when the goods are placed at his disposal and he commits a breach of contract by failing to take delivery.

(2) However, if the buyer is bound to take over the goods at a place other than a place of business of the seller, the risk passes when delivery is due and the buyer is aware of the fact that the goods are placed at his disposal at that place.

(3) If the contract relates to goods not then identified, the goods are considered not to be placed at

dokumente kojim se potvrđuje ugovor o prevozu. Ako je, pak, u trenutku zaključenja ugovora o prodaji prodavac znao ili morao znati da je roba izgubljena ili oštećena i tu činjenicu nije saopštio kupcu, rizik za takav gubitak ili oštećenje snosi prodavac.

#### **Član 69**

(1) U slučajevima koji nisu predviđeni u čl. 67. i 68. rizik prelazi na kupca od časa kad on preuzme robu ili, ako to ne učini blagovremeno, u času kad mu je roba stavljena na raspolaganje a on čini povredu ugovora time što je ne preuzme.

(2) Međutim, ako je kupac obavezan da robu preuzme u mestu koje nije sedište prodavca, rizik prelazi kad je isporuka trebalo da se izvrši, a kupcu je bilo poznato da mu je roba stavljena na raspolaganje u tom mestu.

(3) Ako se ugovor odnosi na robu koja još nije identifikovana, smatra se da je roba stavljena kupcu na raspolaganje tek kad je jasno identifikovana kao roba namenjena za izvršenje ugovora.

#### **Član 70**

Ako je prodavac počinio bitnu povredu ugovora, odredbe čl. 67, 68. i 69. ne sprečavaju kupca da se koristi sredstvima koja mu stoje na raspolaganju u slučaju takve povrede.

the disposal of the buyer until they are clearly identified to the contract.

### **Article 70**

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

### **Chapter V**

#### **PROVISIONS COMMON TO THE OBLIGATIONS OF THE SELLER AND OF THE BUYER**

#### **Section I. Anticipatory breach and instalment contracts**

### **Article 71**

(1) A party may suspend the performance of his obligations if, after the conclusion of the contract, it becomes apparent that the other party will not perform a substantial part of his obligations as a result of:

(a) a serious deficiency in his ability to perform or in his creditworthiness; or

(b) his conduct in preparing to perform or in performing the contract.

(2) If the seller has already dispatched the goods before the grounds described in the preceding paragraph become evident, he may prevent the

### **Glava V**

#### **ZAJEDNIČKE ODREDBE ZA PRODAVČEVE I KUPČEVE OBAVEZE**

### **Odsek I**

#### **POVREDE UGOVORA PRE DOSPEĆA I UGOVORI SA UZASTOPNIM ISPORUKAMA**

### **Član 71**

(1) Jedna ugovorna strana može odložiti izvršenje svojih obaveza ako, posle zaključenja ugovora, postane jasno da druga strana neće izvršiti bitan deo svojih obaveza usled:

(a) ozbiljnog nedostatka sposobnosti za izvršenje ili kreditne sposobnosti; ili

(b) njenog ponašanja u pogledu priprema za izvršenje ili izvršenja ugovora.

(2) Ako je prodavac već otpremio robu pre nego što su se pojavili razlozi predviđeni u prethodnom stavu, on može sprečiti prodaju robe kupcu čak i kad ovaj već ima u rukama neki dokument kojim se roba može dobiti. Ovaj stav se odnosi samo na uzajamna prava kupca i prodavca u pogledu robe.

(3) Strana koja odlaže izvršenje, bilo pre ili posle otpreme robe, dužna je o tome odmah poslati obaveštenje drugoj strani i nastaviti sa izvršavanjem ako joj druga strana pruži dovoljno



handing over of the goods to the buyer even though the buyer holds a document which entitles him to obtain them. The present paragraph relates only to the rights in the goods as between the buyer and the seller.

(3) A party suspending performance, whether before or after dispatch of the goods, must immediately give notice of the suspension to the other party and must continue with performance if the other party provides adequate assurance of his performance.

### **Article 72**

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

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

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

### **Article 73**

(1) In the case of a contract for delivery of goods by instalments, if the failure of one party to perform any of his obligations in respect of

obezbeđenje da će uredno izvršiti svoje obaveze.

### **Član 72**

(1) Ako je pre roka za izvršenje ugovora jasno da će jedna strana učiniti bitnu povredu ugovora, druga strana može izjaviti da raskida ugovor.

(2) Ako raspoloživo vreme dopušta, strana koja ima nameru da raskine ugovor mora poslati razumno obaveštenje drugoj strani kako bi joj omogućila da pruži dovoljno obezbeđenje da će uredno izvršiti svoje obaveze.

(3) Odredbe prethodnog stava neće se primeniti ako je druga strana izjavila da neće izvršiti svoje obaveze.

### **Član 73**

(1) Ako, u slučaju ugovora sa uzastopnim isporukama, neizvršenje bilo koje obaveze jedne strane koja se odnosi na jednu isporuku, predstavlja bitnu povredu ugovora u vezi sa tom isporukom, druga strana može izjaviti da ugovor raskida u odnosu na tu isporuku.

(2) Ako zbog neizvršenja bilo koje obaveze jedne strane u odnosu na bilo koju uzastopnu isporuku, druga strana osnovano može zaključiti da će doći do bitne povrede ugovora u odnosu na buduće isporuke, ta strana može izjaviti da ugovor raskida za ubuduće, pod uslovom da to učini

any instalment constitutes a fundamental breach of contract with respect to that instalment, the other party may declare the contract avoided with respect to that instalment.

(2) If one party's failure to perform any of his obligations in respect of any instalment gives the other party good grounds to conclude that a fundamental breach of contract will occur with respect to future instalments, he may declare the contract avoided for the future, provided that he does so within a reasonable time.

(3) A buyer who declares the contract avoided in respect of any delivery may, at the same time, declare it avoided in respect of deliveries already made or of future deliveries if, by reason of their interdependence, those deliveries could not be used for the purpose contemplated by the parties at the time of the conclusion of the contract.

## **Section II. Damages**

### **Article 74**

Damages for breach of contract by one party consist of a sum equal to the loss, including loss of profit, suffered by the other party as a consequence of the breach. Such damages may not exceed the loss which the party in breach foresaw or ought to have foreseen at the time of the conclusion of the contract, in the light of the facts and matters of which he then knew or ought to have known, as a possible

u razumnom roku.

(3) Kupac koji raskida ugovor zbog bilo koje isporuke može istovremeno izjaviti da raskida ugovor za već primljene isporuke ili za buduće isporuke, ukoliko se zbog njihove međuzavisnosti ove isporuke ne bi mogle koristiti za svrhu koju su strane imale u vidu prilikom zaključenja ugovora.

## **Odsek II NAKNADA ŠTETE**

### **Član 74**

Naknada štete za povredu ugovora koju je počinila jedna strana ravna je pretrpljenom gubitku i izmakloj dobiti koji su usled povrede nastali za drugu stranu. Ova naknada ne može biti veća od gubitka koji je strana koja je povredila ugovor predvidela ili je morala predvideti u trenutku zaključenja ugovora kao moguću posledicu povrede ugovora, s obzirom na činjenice koje su joj tada bile poznate ili morale biti poznate.

### **Član 75**

Ako je ugovor raskinut i ako je na razuman način i u razumnom roku posle raskida kupac izvršio kupovinu radi pokrića ili prodavac prodaju radi pokrića, strana koja zahteva naknadu štete može dobiti razliku između ugovorene cene i cene kupovine radi pokrića, odnosno prodaje radi pokrića kao i svaku drugu

consequence of the breach of contract.

#### **Article 75**

If the contract is avoided and if, in a reasonable manner and within a reasonable time after avoidance, 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 as well as any further damages recoverable under article 74.

#### **Article 76**

(1) If the contract is avoided and there is a current price for the goods, the party claiming damages may, if he has not made a purchase or resale under article 75, recover the difference between the price fixed by the contract and the current price at the time of avoidance as well as any further damages recoverable under article 74. If, however, the party claiming damages has avoided the contract after taking over the goods, the current price at the time of such taking over shall be applied instead of the current price at the time of avoidance.

(2) For the purposes of the preceding paragraph, the current price is the price prevailing at the place where delivery of the goods should have been made or, if there is no current price at that place, the price at such other place as serves as a reasonable

naknadu štete koja se može dobiti na osnovu člana 74.

#### **Član 76**

(1) Ako je ugovor raskinut, a postoji tekuća cena za robu, strana koja zahteva naknadu štete može, ako nije izvršila kupovinu ili prodaju radi pokrića na osnovu člana 75, dobiti razliku između cene predviđene ugovorom i tekuće cene u trenutku raskida, kao i svaku drugu naknadu štete koja joj pripada na osnovu člana 74. Međutim, ako je strana koja zahteva naknadu štete raskinula ugovor posle preuzimanja robe, primeniće se tekuća cena u trenutku preuzimanja robe a ne tekuća cena u trenutku raskida.

(2) U smislu prethodnog stava uzima se u obzir tekuća cena u mestu gde je isporuka trebalo da bude izvršena ili, ako u tom mestu nema tekuće cene, cena u drugom mestu koje može razumno poslužiti u tu svrhu vodeći računa o razlici u troškovima prevoza robe.

#### **Član 77**

Strana koja se poziva na povredu ugovora dužna je preduzeti sve mere koje su prema okolnostima razumne da bi se smanjio gubitak, uključujući i izmaklu dobit, prouzrokovan takvom povredom. Ako tako ne postupi, druga strana može zahtevati smanjenje naknade u visini iznosa gubitka koji

substitute, making due allowance for differences in the cost of transporting the goods.

#### **Article 77**

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

#### **Section III. Interest**

##### **Article 78**

If a party fails to pay the price or any other sum that is in arrears, the other party is entitled to interest on it, without prejudice to any claim for damages recoverable under article 74.

#### **Section IV. Exemptions**

##### **Article 79**

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

(2) If the party's failure is due to the failure by a third person whom he

je mogao da se izbegne.

#### **Odsek III KAMATA**

##### **Član 78**

Ako jedna strana ne plati cenu ili neki drugi iznos sa kojim je u zaostatku, druga strana ima pravo na kamatu na takav iznos, a da time ne gubi pravo da traži naknadu štete koja joj pripada na osnovu člana 74.

#### **Odsek IV OSLOBOĐENJE OD ODGOVORNOSTI**

##### **Član 79**

(1) Ako jedna strana ne izvrši neku od svojih obaveza, ona neće biti odgovorna za neizvršenje ako dokaže da je do neizvršenja došlo zbog smetnje koja je bila van njene kontrole i da od nje nije bilo razumno očekivati da u vreme zaključenja ugovora smetnju uzme u obzir, da izbegne ili savlada takvu smetnju i njene posledice.

(2) Ako je neizvršenje jedne strane posledica neizvršenja nekog trećeg lica koje je ta strana angažovala da izvrši ugovor u celini ili delimično, ta strana se oslobađa odgovornosti samo:

(a) ako je ona oslobođena odgovornosti na osnovu prethodnog stava; i

(b) ako bi lice koje je ona angažovala bilo tako oslobođeno kad bi se odredbe tog stava primenile na njega.

has engaged to perform the whole or a part of the contract, that party is exempt from liability only if:

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

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

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

(4) The party who fails to perform must give notice to the other party of the impediment and its effect on his ability to perform. If the notice is not received by the other party within a reasonable time after the party who fails to perform knew or ought to have known of the impediment, he is liable for damages resulting from such non-receipt.

(5) Nothing in this article prevents either party from exercising any right other than to claim damages under this Convention.

#### **Article 80**

A party may not rely on a failure of the other party to perform, to the extent that such failure was caused by the first party's act or omission.

### **Section V. Effects of avoidance**

#### **Article 81**

(3) Oslobođenje predviđeno ovim članom dejstvuje za vreme dok smetnja traje.

(4) Strana koja nije izvršila svoje obaveze dužna je da obavesti drugu stranu o smetnji i uticaju smetnje na njenu mogućnost da izvrši obavezu. Ako obaveštenje ne stigne drugoj strani u razumnom roku pošto je strana koja nije izvršila saznala ili morala saznati za smetnju, ta strana odgovara za štetu do koje je došlo zbog neprijema obaveštenja.

(5) Ništa u ovom članu neće sprečiti bilo koju stranu da se koristi bilo kojim drugim pravom, izuzev da zahteva naknadu štete prema ovoj konvenciji.

#### **Član 80**

Jedna strana ne može se pozivati na neizvršenje druge strane ako je to neizvršenje prouzrokovano njenom radnjom ili propustom.

### **Odsek V DEJSTVO RASKIDA**

#### **Član 81**

(1) Raskidom ugovora obe strane se oslobađaju svojih ugovornih obaveza, izuzev eventualne obaveze da se naknadi šteta. Raskid ne utiče na odredbe ugovora o rešavanju sporova ili na bilo koju odredbu ugovora koja uređuje prava i obaveze strana posle raskida ugovora.

(2) Strana koja je izvršila ugovor u celini ili delimično može zahtevati od druge strane vraćanje onog

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

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

#### **Article 82**

(1) The buyer loses the right to declare the contract avoided or to require the seller to deliver substitute goods if it is impossible for him to make restitution of the goods substantially in the condition in which he received them.

(2) The preceding paragraph does not apply:

(a) if the impossibility of making restitution of the goods or of making restitution of the goods substantially in the condition in which the buyer received them is not due to his act or omission;

(b) if the goods or part of the goods have perished or deteriorated as a result of the examination provided for in article

što je na osnovu ugovora isporučila ili platila. Ako su obe strane dužne da izvrše vraćanje, uzajamna vraćanja vrše se istovremeno.

#### **Član 82**

(1) Kupac gubi pravo da izjavi da raskida ugovor ili da zahteva od prodavca da izvrši zamenu robe ako mu je nemoguće da vrati robu u suštinski istom stanju u kome je primio.

(2) Prethodni stav se neće primeniti:

(a) ako nemogućnost vraćanja robe ili njenog vraćanja u suštinski istom stanju u kome je primljena nije posledica radnje ili propusta od strane kupca;

(b) ako je roba u celini ili delimično propala ili se pogoršala usled pregleda propisanog u članu 38; ili

(c) ako je roba, u celini ili delimično, prodana u redovnom toku poslovanja ili je kupac potrošio ili preradio u toku njene normalne upotrebe pre nego što je otkrio ili morao otkriti nedostatak saobraznosti.

#### **Član 83**

Kupac koji je izgubio pravo da izjavi da raskida ugovor ili da zahteva od prodavca zamenu robe na osnovu člana 82, zadržava sva ostala pravna

38; or

(c) if the goods or part of the goods have been sold in the normal course of business or have been consumed or transformed by the buyer in the course of normal use before he discovered or ought to have discovered the lack of conformity.

### **Article 83**

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 under the contract and this Convention.

### **Article 84**

(1) If the seller is bound to refund the price, he must also pay interest on it, from the date on which the price was paid.

(2) The buyer must account to the seller for all benefits which he has derived from the goods or part of them:

(a) if he must make restitution of the goods or part of them; or

(b) if it is impossible for him to make restitution of all or part of the goods or to make restitution of all or part of the goods substantially in the condition in which he received them, but he has nevertheless declared the contract avoided or required the seller to deliver substitute goods.

### **Section VI. Preservation of the**

sredstva na osnovu ugovora i ove konvencije.

### **Član 84**

(1) Ako je prodavac dužan vratiti cenu, on takođe mora platiti kamatu na nju počev od dana kada mu je cena isplaćena.

(2) Kupac je dužan naknaditi prodavcu sve koristi koje je od robe ili jednog njenog dela imao:

(a) ako je dužan vratiti robu ili jedan njen deo; ili

(b) ako mu je nemoguće da vrati robu ili jedan njen deo ili da robu ili jedan njen deo vrati u suštinski istom stanju u kome je primio, ali je i pored toga izjavio da ugovor raskida ili je zahtevao od prodavca zamenu robe.

### **Odsek VI ČUVANJE ROBE**

### **Član 85**

Ako je kupac u docnji sa preuzimanjem isporuke ili kad, u slučaju da se plaćanje cene i isporuka moraju izvršiti istovremeno, nije isplatio cenu, a prodavac robu drži ili je na drugi način kontroliše, prodavac je dužan preduzeti mere koje su prema okolnostima razumne za očuvanje robe. On ima pravo da robu zadrži dok mu kupac ne naknadi njegove razumne

<p><b>goods</b></p> <p style="text-align: center;"><b>Article 85</b></p> <p>If the buyer is in delay in taking delivery of the goods or, where payment of the price and delivery of the goods are to be made concurrently, if he fails to pay the price, and the seller is either in possession of the goods or otherwise able to control their disposition, the seller must take such steps as are reasonable in the circumstances to preserve them. He is entitled to retain them until he has been reimbursed his reasonable expenses by the buyer.</p> <p style="text-align: center;"><b>Article 86</b></p> <p>(1) If the buyer has received the goods and intends to exercise any right under the contract or this Convention to reject them, he must take such steps to preserve them as are reasonable in the circumstances. He is entitled to retain them until he has been reimbursed his reasonable expenses by the seller.</p> <p>(2) If goods dispatched to the buyer have been placed at his disposal at their destination and he exercises the right to reject them, he must take possession of them on behalf of the seller, provided that this can be done without payment of the price and without unreasonable inconvenience or unreasonable expense. This provision does not apply if the seller or a person authorized to take charge of the goods on his behalf is present at</p>	<p>troškove.</p> <p style="text-align: center;"><b>Član 86</b></p> <p>(1) Ako je kupac robu primio i nameravao da se posluži svojim pravom na osnovu ugovora ili ove konvencije da robu odbije, on je dužan da preduzme sve mere za očuvanje robe koje su prema okolnostima razumne. On, takođe, ima pravo da zadrži robu sve dok mu kupac ne naknadi njegove razumne troškove.</p> <p>(2) Ako je roba otpremljena kupcu stavljena ovome na raspolaganje u mestu opredeljenja i on se koristi svojim pravom da je odbije, dužan je da je preuzme u državinu za račun prodavca pod uslovom da se to može učiniti bez isplate cene i bez nerazumnih nepogodnosti ili nerazumnih troškova. Ova odredba se ne primenjuje ako se prodavac ili lice koje je ovlašćeno da preuzme brigu o robi za njegov račun nalazi u mestu opredeljenja. Prava i obaveze kupca koji preuzme robu u državinu saglasno ovom stavu, regulišu se odredbama prethodnog stava.</p> <p style="text-align: center;"><b>Član 87</b></p> <p>Strana koja je dužna preduzeti mere za očuvanje robe može je predati na čuvanje u skladište nekog trećeg lica o trošku druge strane, pod uslovom da troškovi tog čuvanja ne budu nerazumni.</p> <p style="text-align: center;"><b>Član 88</b></p>
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the destination. If the buyer takes possession of the goods under this paragraph, his rights and obligations are governed by the preceding paragraph.

#### **Article 87**

A party who is 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.

#### **Article 88**

(1) 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 has been an unreasonable delay by the other party in taking possession of the goods or in taking them back or in paying the price or the cost of preservation, provided that reasonable notice of the intention to sell has been given to the other party.

(2) If the goods are subject to rapid deterioration or their preservation would involve unreasonable expense, a party who is bound to preserve the goods in accordance with article 85 or 86 must take reasonable measures to sell them. To the extent possible he must give notice to the other party of his intention to sell.

(3) A party selling the goods has the right to retain out of the proceeds of sale an amount

(1) Strana koja je dužna da robu očuva u skladu s članom 85. ili 86. može je prodati na bilo koji pogodan način ako druga strana nerazumno odugovlači da preuzme robu u državinu ili da je uzme natrag ili da plati troškove očuvanja, pod uslovom da dostavi razumno obaveštenje drugoj strani o nameri da će robu prodati.

(2) Ako je roba podložna brzom kvarenju ili bi njeno čuvanje iziskivalo nerazumne troškove, strana koja je dužna da čuva robu shodno članu 85. ili 86. mora preduzeti razumne mere da je proda. Ako je to moguće, dužna je drugu stranu obavestiti o svojoj nameri da robu proda.

(3) Strana koja proda robu ima pravo zadržati od svote dobijene prodajom iznos razumnih troškova čuvanja i prodaje robe. Ona je dužna višak prodati drugoj strani.

### **Deo IV**

#### **ZAVRŠNE ODREDBE**

##### **Član 89**

Generalni sekretar Ujedinjenih nacija se određuje za depozitora ove konvencije.

##### **Član 90**

Ova konvencija nema prednost pred bilo kojim međunarodnim sporazumom koji je ranije

equal to the reasonable expenses of preserving the goods and of selling them. He must account to the other party for the balance.

#### **PART IV**

#### **FINAL PROVISIONS**

##### **Article 89**

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

##### **Article 90**

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

##### **Article 91**

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

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

(3) This Convention is open for accession by all States which are

zaključen ili koji bi se eventualno zaključio a sadrži odredbe koje se odnose na pitanja koja se regulišu ovom konvencijom, pod uslovom da strane imaju svoja sedišta u državama koje su strane ugovornice takvog sporazuma.

##### **Član 91**

(1) Ova konvencija biće otvorena za potpisivanje na završnoj sednici konferencije Ujedinjenih nacija o ugovorima o međunarodnoj prodaji robe i ostaće otvorena za potpisivanje svim državama u sedištu Ujedinjenih nacija u Njujorku do 30. septembra 1981. godine.

(2) Ova konvencija podleže ratifikaciji, prihvatanju ili odobrenju od strane država potpisnica.

(3) Ova konvencija je otvorena za pristupanje svim državama koje nisu države potpisnice od dana njenog otvaranja za potpisivanje.

(4) Instrumenti ratifikacije, prihvatanja, odobravanja ili pristupanja deponovaće se kod generalnog sekretara Ujedinjenih nacija.

##### **Član 92**

(1) Država ugovornica može u trenutku potpisivanja, ratifikacije, prihvatanja, odobravanja ili pristupanja izjaviti da se ne smatra obaveznom u pogledu Dela II ove konvencije ili da se ne smatra obaveznom u pogledu Dela III

not signatory States as from the date it is open for signature.

(4) Instruments of ratification, acceptance, approval and accession are to be deposited with the Secretary-General of the United Nations.

### **Article 92**

(1) A Contracting State may declare at the time of signature, ratification, acceptance, approval or accession that it will not be bound by Part II of this Convention or that it will not be bound by Part III of this Convention.

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

### **Article 93**

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

Konvencije.

(2) Država ugovornica koja učini izjavu u skladu s prethodnim stavom u odnosu na Deo II ili Deo III ove konvencije neće se smatrati državom ugovornicom u smislu stava 1. člana 1. ove konvencije u odnosu na materije koje se regulišu u delu na koji se takva izjava odnosi.

### **Član 93**

(1) Ako država ugovornica ima jednu ili više teritorijalnih jedinica u kojima se, shodno njenom ustavu, primenjuju različiti pravni sistemi u pogledu pitanja koja se regulišu ovom konvencijom, ona može u vreme potpisivanja, ratifikacije, prihvatanja, odobravanja ili pristupanja izjaviti da će se ova konvencija primeniti na sve teritorijalne jedinice ili samo na jednu ili više njih, s tim što takvu svoju izjavu može izmeniti naknadnom izjavom u bilo koje vreme.

(2) O ovim izjavama mora se obavestiti depozitar i u njima se moraju izričito navesti teritorijalne jedinice na koje se proteže ova konvencija.

(3) Ako se, na osnovu izjave date shodno ovom članu ova konvencija proteže na jednu ili više ali ne na sve teritorijalne jedinice države ugovornice, i ako se sedište jedne strane ugovornice nalazi u toj državi, smatraće se u smislu ove konvencije, da to sedište nije u državi ugovornici ukoliko se ne nalazi na teritorijalnoj jedinici na koju se ova konvencija

declaration by submitting another declaration at any time.

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

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

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

#### **Article 94**

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

(2) A Contracting State which has the same or closely related legal rules on matters governed by this Convention as one or more non-

proteže.

(4) Ako država ugovornica ne učini izjavu shodno stavu 1. ovog člana, Konvencija se primenjuje na celokupnoj teritoriji te države.

#### **Član 94**

(1) Dve ili više država ugovornica koje imaju ista ili slična pravna pravila za pitanja na koja se ova konvencija odnosi mogu u bilo koje vreme izjaviti da se Konvencija neće primeniti na ugovore o prodaji ili na njihovo zaključenje kada strane imaju svoja sedišta u tim državama. Ove izjave mogu da se učine zajednički ili na osnovu recipročnih jednostranih izjava.

(2) Država ugovornica koja ima ista ili slična pravna pravila o pitanjima na koja se ova konvencija odnosi kao jedna ili više država koje nisu strane ugovornice može u bilo koje vreme izjaviti da se Konvencija neće primenjivati na ugovore o prodaji ili njihovo zaključenje kad strane imaju svoja sedišta u tim državama.

(3) Ako jedna država u pogledu u kome je data izjava u smislu prethodnog stava naknadno postane država ugovornica, učinjena izjava će, od datuma kad Konvencija stupi na snagu u odnosu na novu državu ugovornicu, imati dejstvo izjave učinjene na osnovu stava 1, pod uslovom da se nova država ugovornica pridruži takvoj izjavi ili učini recipročnu jednostranu

Contracting States may at any time declare that the Convention is not to apply to contracts of sale or to their formation where the parties have their places of business in those States.

(3) If a State which is the object of a declaration under the preceding paragraph subsequently becomes a Contracting State, the declaration made will, as from the date on which the Convention enters into force in respect of the new Contracting State, have the effect of a declaration made under paragraph (1), provided that the new Contracting State joins in such declaration or makes a reciprocal unilateral declaration.

#### **Article 95**

Any State may declare at the time of the deposit of its instrument of ratification, acceptance, approval or accession that it will not be bound by subparagraph (1)(b) of article 1 of this Convention.

#### **Article 96**

A Contracting State whose legislation requires contracts of sale to be concluded in or evidenced by writing may at any time make a declaration in accordance with article 12 that any provision of article 11, article 29, or Part II of this Convention, that allows a contract of sale or its modification or termination by agreement or any offer, acceptance, or other indication of intention to be made in any

izjavu.

#### **Član 95**

Prilikom deponovanja svojih instrumenata ratifikacije, prihvatanja, odobravanja ili pristupanja svaka država može izjaviti da se ne smatra obaveznom odredbama tačke (b) stava 1. člana 1. ove konvencije.

#### **Član 96**

Država ugovornica čije zakonodavstvo zahteva da se ugovori o prodaji zaključuju ili potvrđuju u pismenoj formi može u bilo koje vreme dati izjavu u skladu sa članom 12. da se odredbe člana 11, člana 29. ili Dela I ove konvencije kojim se dozvoljava da se ugovor o prodaji zaključi, izmeni ili sporazumno raskine ili ponuda, prihvatanje ili bilo koja druga izjava volje učini na neki drugi način a ne u pismenoj formi, neće primeniti kad bilo koja strana ima svoje sedište u toj državi.

#### **Član 97**

(1) Izjave učinjene na osnovu ove konvencije u vreme potpisivanja moraju se potvrditi posle ratifikacije, prihvatanja ili odobravanja.

(2) Izjave i potvrde izjava moraju biti u pismenoj formi i zvanično dostavljene depozitaru.

(3) Izjave stupaju na snagu istovremeno kad i konvencija u odnosu na državu u pitanju. Međutim, izjave koje depozitar

form other than in writing, does not apply where any party has his place of business in that State.

### **Article 97**

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

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

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

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

zvanično primi posle takvog stupanja na snagu proizvode dejstvo prvog dana idućeg meseca po isteku šestomesečnog roka, računajući od dana kada je depozitar primio takvu izjavu. Recipročne jednostrane izjave date na osnovu člana 94. proizvode dejstvo prvog dana idućeg meseca po isteku šestomesečnog roka, računajući od dana kada je depozitar primio poslednju izjavu.

(4) Svaka država koja učini izjavu na osnovu ove konvencije može je povući u bilo koje vreme zvaničnim pismenim obaveštenjem upućenim depozitaru. Ovo povlačenje proizvodi dejstvo prvog dana idućeg meseca po isteku šestomesečnog roka od dana kad je depozitar primio takvo obaveštenje.

(5) Povlačenje izjave koja je data na osnovu člana 94. lišava dejstva, od dana stupanja na snagu takvog povlačenja svaku recipročnu izjavu koju učini neka druga država na osnovu tog člana.

### **Član 98**

Nisu dopuštene bilo kakve rezerve osim onih koje su izričito dozvoljene ovom konvencijom.

### **Član 99**

(1) Ova konvencija stupa na snagu, izuzev u slučajevima predviđenim u odredbama stava

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

### **Article 98**

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

### **Article 99**

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

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

(3) A State which ratifies, accepts, approves or accedes to this

6. ovog člana, prvog dana idućeg meseca po isteku dvanaestomesečnog roka od dana deponovanja desetog instrumenta ratifikacije, prihvatanja, odobravanja ili pristupanja, uključujući instrument koji sadrži izjavu datu na osnovu člana 92.

(2) Kad država ratifikuje, prihvati, odobri ili pristupi ovoj konvenciji posle deponovanja desetog instrumenta ratifikacije, prihvatanja, odobravanja ili pristupanja, ova konvencija, sa izuzetkom dela koji je isključen, stupa na snagu u odnosu na tu državu, izuzev u slučajevima predviđenim u stavu 6. ovog člana, prvog dana idućeg meseca po isteku dvanaestomesečnog roka od dana deponovanja njenih instrumenata ratifikacije, prihvatanja, odobravanja ili pristupanja.

(3) Država koja ratifikuje, prihvati, odobri ili pristupi ovoj konvenciji, a članica je Konvencije koja se odnosi na Jednoobrazni zakon o zaključenju ugovora o međunarodnoj prodaji telesnih pokretnih stvari donete u Hagu 1. jula 1964. (Haška konvencija o zaključenju ugovora od 1964) ili Konvencije koja se odnosi na Jednoobrazni zakon o prodaji telesnih pokretnih stvari donete u Hagu 1. jula 1964. (Haška konvencija o prodaji od 1964.) ili obe ove konvencije, istovremeno će otkazati, zavisno od slučaja, jednu ili obe konvencije - Hašku konvenciju o prodaji od 1964. i Hašku konvenciju o zaključenju

<p>Convention and is a party to either or both the Convention relating to a Uniform Law on the Formation of Contracts for the International Sale of Goods done at The Hague on 1 July 1964 (1964 Hague Formation Convention) and the Convention relating to a Uniform Law on the International Sale of Goods done at The Hague on 1 July 1964 (1964 Hague Sales Convention) shall at the same time denounce, as the case may be, either or both the 1964 Hague Sales Convention and the 1964 Hague Formation Convention by notifying the Government of the Netherlands to that effect.</p> <p>(4) A State party to the 1964 Hague Sales Convention which ratifies, accepts, approves or accedes to the present Convention and declares or has declared under article 52 that it will not be bound by Part II of this Convention shall at the time of ratification, acceptance, approval or accession denounce the 1964 Hague Sales Convention by notifying the Government of the Netherlands to that effect.</p> <p>(5) A State party to the 1964 Hague Formation Convention which ratifies, accepts, approves or accedes to the present Convention and declares or has declared under article 92 that it will not be bound by Part III of this Convention shall at the time of ratification, acceptance, approval or accession denounce the 1964 Hague Formation Convention by notifying the Government of the Netherlands to</p>	<p>ugovora od 1964 - obaveštenjem koje će u tom smislu uputiti holandskoj vladi.</p> <p>(4) Država članica Haške konvencije o prodaji od 1964. koja ratifikuje, prihvati, odobri ili pristupi sadašnjoj Konvenciji i izjavi ili je već izjavila na osnovu člana 92. da se neće obavezati Delom II ove konvencije će, u času ratifikacije, prihvatanja, odobravanja ili pristupanja otkazati Hašku konvenciju o prodaji od 1964. obaveštenjem koje će u tom smislu poslati holandskoj vladi.</p> <p>(5) Država članica Haške konvencije o zaključenju ugovora od 1964. koja ratifikuje, prihvati, odobri ili pristupi sadašnjoj konvenciji i izjavi ili je već izjavila, na osnovu člana 92, da se neće obavezati Delom III ove konvencije će, u času ratifikacije, prihvatanja, odobravanja ili pristupanja, otkazati Hašku konvenciju o zaključenju ugovora od 1964. obaveštenjem koje će u tom smislu poslati holandskoj vladi.</p> <p>(6) U smislu ovog člana, ratifikacije, prihvatanja, odobravanja i pristupanja ovoj konvenciji od strane Država članica Haške konvencije o zaključenju ugovora od 1964. ili Haške konvencije o prodaji od 1964. stupaju na snagu tek pošto otkazi koji se zahtevaju od strane takvih država u odnosu na pomenute dve konvencije stupe na snagu. Depozitar ove konvencije konsultovaće se sa holandskom vladom, kao depozitarom Konvencije od 1964, kako bi se obezbedila potrebna</p>
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that effect.

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

#### **Article 100**

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

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

#### **Article 101**

(1) A Contracting State may

koordinacija u tom smislu.

#### **Član 100**

(1) Ova konvencija se primenjuje na zaključenje ugovora samo kad je predlog za zaključenje ugovora učinjen na dan ili posle dana stupanja na snagu ove konvencije u odnosu na države ugovornice o kojima je reč u tački (1) stava 1. člana 1. ili državu ugovornicu o kojoj je reč u tački (b) stava 1. člana 1.

(2) Ova konvencija primenjuje se samo na ugovore zaključene na dan ili posle dana stupanja na snagu Konvencije u odnosu na države ugovornice o kojima je reč u tački (a) stava 1. člana 1. ili države ugovornice o kojoj je reč u tački (b) stava 1. člana 1.

#### **Član 101**

(1) Država ugovornica može otkazati ovu konvenciju, ili Deo II ili Deo III ove konvencije, zvaničnim pismenim obaveštenjem upućenim depozitaru.

(2) Otkaz proizvodi dejstvo prvog dana idućeg meseca po isteku dvanaestomesečnog roka od dana kada je depozitar primio obaveštenje. Kad je u obaveštenju naveden duži rok u kome otkaz proizvodi dejstvo, otkaz proizvodi dejstvo po isteku takvog dužeg roka posle prijema obaveštenja od strane depozitara.

Sačinjeno u Beču, jedanaestog aprila hiljadu devet stotina osamdesete, u jednom originalnom primerku čiji su

denounce this Convention, or Part II or Part III of the Convention, by a formal notification in writing addressed to the depositary.

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

DONE at Vienna, this day of eleventh day of April, one thousand nine hundred and eighty, in a single original, of which the Arabic, Chinese, English, French, Russian and Spanish texts are equally authentic.

IN WITNESS WHEREOF the undersigned plenipotentiaries, being duly authorized by their respective Governments, have signed this Convention.

arapski, engleski, francuski, kineski, ruski i španski tekstovi podjednako verodostojni.

U potvrdu čega su dole potpisani, propisno opunomoćeni od strane svojih vlada, potpisali ovu konvenciju.

### ČLAN 3

Ovaj zakon stupa na snagu osmog dana od dana objavljivanja u "Službenom listu SFRJ - Međunarodni ugovori".

## Status

### 1980 - United Nations Convention on Contracts for the International Sale of Goods

as available at the [www.uncitral.org](http://www.uncitral.org) web-site.

Readers are also advised to consult the United Nations Treaty Collection for authoritative status information on UNCITRAL Conventions deposited with the Secretary-General of the United Nations.

The UNCITRAL Secretariat also prepares yearly a document containing the Status of Conventions and Enactments of UNCITRAL Model Laws, which is available on the web page of the corresponding UNCITRAL Commission Session.

State	Signature	Ratification, Accession, Approval, Acceptance or Succession	Entry into force
Albania		13 May 2009 (b)	1 June 2010
Argentina (a)		19 July 1983 (b)	1 January 1988
Armenia (a)		2 December 2008 (b)	1 January 2010
Australia		17 March 1988 (b)	1 April 1989
Austria	11 April 1980	29 December 1987	1 January 1989
Belarus (a)		9 October 1989 (b)	1 November 1990
Belgium		31 October 1996 (b)	1 November 1997
Bosnia and Herzegovina		12 January 1994 (c)	6 March 1992
Bulgaria		9 July 1990 (b)	1 August 1991
Burundi		4 September 1998 (b)	1 October 1999
Canada (d)		23 April 1991 (b)	1 May 1992
Chile (a)	11 April 1980	7 February 1990	1 March 1991
China (e)	30 September 1981	11 December 1986 (f)	1 January 1988
Colombia		10 July 2001 (b)	1 August 2002
Croatia (g)		8 June 1998 (c)	8 October 1991
Cuba		2 November 1994 (b)	1 December 1995
Cyprus		7 March 2005 (b)	1 April 2006
Czech Republic (h), (i)		30 September 1993 (c)	1 January 1993
Denmark (j)	26 May 1981	14 February 1989	1 March 1990
Dominican Republic		7 June 2010 (b)	1 July 2011
Ecuador		27 January 1992 (b)	1 February 1993
Egypt		6 December 1982 (b)	1 January 1988
El Salvador		27 November 2006 (b)	1 December 2007
Estonia (k)		20 September 1993 (b)	1 October 1994
Finland (j)	26 May 1981	15 December 1987	1 January 1989
France	27 August 1981	6 August 1982 (f)	1 January 1988
Gabon		15 December 2004 (b)	1 January 2006
Georgia		16 August 1994 (b)	1 September 1995

Germany (l), (m)	26 May 1981	21 December 1989	1 January 1991
Ghana	11 April 1980		
Greece		12 January 1998 (b)	1 February 1999
Guinea		23 January 1991 (b)	1 February 1992
Honduras		10 October 2002 (b)	1 November 2003
Hungary (a), (n)	11 April 1980	16 June 1983	1 January 1988
Iceland (j)		10 May 2001 (b)	1 June 2002
Iraq		5 March 1990 (b)	1 April 1991
Israel		22 January 2002 (b)	1 February 2003
Italy	30 September 1981	11 December 1986	1 January 1988
Japan		1 July 2008 (b)	1 August 2009
Kyrgyzstan		11 May 1999 (b)	1 June 2000
Latvia (a)		31 July 1997 (b)	1 August 1998
Lebanon (b)		21 November 2008 (b)	1 December 2009
Lesotho	18 June 1981	18 June 1981	1 January 1988
Liberia		16 September 2005 (b)	1 October 2006
Lithuania (a)		18 January 1995 (b)	1 February 1996
Luxembourg		30 January 1997 (b)	1 February 1998
Mauritania		20 August 1999 (b)	1 September 2000
Mexico		29 December 1987 (b)	1 January 1989
Moldova		13 October 1994 (b)	1 November 1995
Mongolia		31 December 1997 (b)	1 January 1999
Montenegro		23 October 2006 (c)	3 June 2006
Netherlands	29 May 1981	13 December 1990 (o)	1 January 1992
New Zealand		22 September 1994 (b)	1 October 1995
Norway (j)	26 May 1981	20 July 1988	1 August 1989
Paraguay (a)		13 January 2006 (b)	1 February 2007
Peru		25 March 1999 (b)	1 April 2000
Poland	28 September 1981	19 May 1995	1 June 1996
Republic of Korea		17 February 2004 (b)	1 March 2005
Romania		22 May 1991 (b)	1 June 1992
Russian Federation (a), (p)		16 August 1990 (b)	1 September 1991
Saint Vincent and the Grenadines (i)		12 September 2000 (b)	1 October 2001
Serbia (q)		12 March 2001 (c)	27 April 1992
Singapore (i)	11 April 1980	16 February 1995	1 March 1996
Slovakia (h), (i)		28 May 1993 (c)	1 January 1993
Slovenia		7 January 1994 (c)	25 June 1991
Spain		24 July 1990 (b)	1 August 1991
Sweden (j)	26 May 1981	15 December 1987	1 January 1989
Switzerland		21 February 1990 (b)	1 March 1991
Syrian Arab Republic		19 October 1982 (b)	1 January 1988
The former Yugoslav Republic of Macedonia		22 November 2006 (c)	17 November 1991
Turkey		7 July 2010 (b)	1 August 2011
Uganda		12 February 1992 (b)	1 March 1993
Ukraine (a)		3 January 1990 (b)	1 February 1991
United States of	31 August 1981	11 December 1986	1 January 1988

America (i)		
Uruguay		25 January 1999 (b) 1 February 2000
Uzbekistan		27 November 1996 (b) 1 December 1997
Venezuela (Bolivarian Republic of)	28 September 1981	
Zambia		6 June 1986 (b) 1 January 1988

**Parties: 76**

(a) Declarations and reservations. This State declared, in accordance with articles 12 and 96 of the Convention, that any provision of article 11, article 29 or Part II of the Convention that allowed a contract of sale or its modification or termination by agreement or any offer, acceptance or other indication of intention to be made in any form other than in writing, would not apply where any party had his place of business in its territory.

(b) Accession.

(c) Succession.

(d) Declarations and reservations. Upon accession, Canada declared that, in accordance with article 93 of the Convention, the Convention would extend to Alberta, British Columbia, Manitoba, New Brunswick, Newfoundland and Labrador, Nova Scotia, Ontario, Prince Edward Island and the Northwest Territories. (Upon accession, Canada declared that, in accordance with article 95 of the Convention, with respect to British Columbia, it will not be bound by article 1, paragraph (b), of the Convention. In a notification received on 31 July 1992, Canada withdrew that declaration.) In a declaration received on 9 April 1992, Canada extended the application of the Convention to Quebec and Saskatchewan. In a notification received on 29 June 1992, Canada extended the application of the Convention to the Yukon Territory. In a notification received on 18 June 2003, Canada extended the application of the Convention to the Territory of Nunavut.

(e) Declarations and reservations. Upon approving the Convention, the People's Republic of China declared that it did not consider itself bound by sub-paragraph (b) of paragraph (1) of article 1 and article 11, nor the provisions in the Convention relating to the content of article 11.

(f) Approval.

(g) Upon succeeding to the Convention, Croatia has decided, on the basis of the Constitutional Decision on Sovereignty and Independence of the Republic of Croatia of 25 June 1991 and the Decision of the Croatian Parliament of 8 October 1991, and by virtue of succession of the Socialist Federal Republic of Yugoslavia in respect of the territory of Croatia, to be considered a party to the Convention with effect from 8 October 1991, the date on which Croatia severed all constitutional and legal connections with the Socialist Federal Republic of Yugoslavia and took over its international obligations.

(h) The former Czechoslovakia signed the Convention on 1 September 1981 and deposited an instrument of ratification on 5 March 1990, with the Convention entering into force for the former Czechoslovakia on 1 April 1991. On 28 May and 30 September 1993, respectively, Slovakia and the Czech Republic, deposited instruments of succession, with effect from 1 January 1993, the date of succession of both States.

(i) Declarations and reservations. This State declared that it would not be bound by paragraph 1 (b) of article 1.

(j) Declarations and reservations. Upon ratifying the Convention, Denmark, Finland, Norway and Sweden declared, in accordance with article 92, paragraph 1, that they would not be bound by Part II of the Convention ("Formation of the Contract"). Upon ratifying the Convention, Denmark, Finland, Norway and Sweden declared, pursuant to article 94, paragraph 1 and 94, paragraph 2, that the Convention would not apply to contracts of sale where the parties have their places of business in Denmark, Finland, Iceland, Sweden or Norway. In a notification effected on 12 March 2003, Iceland declared, pursuant to article 94, paragraph 1, that the Convention would not apply to contracts of sale or to their formation where the parties had their places of business in Denmark, Finland, Iceland, Norway or Sweden.

(k) Declarations and reservations. On 9 March 2004, Estonia withdrew the reservation made upon ratification mentioned in footnote (a).

(l) The Convention was signed by the former German Democratic Republic on 13 August 1981 and ratified on 23 February 1989 and entered into force on 1 March 1990.

(m) Declarations and reservations. Upon ratifying the Convention, Germany declared that it would not apply article 1, paragraph 1 (b) in respect of any State that had made a declaration that that State would not apply article 1, paragraph 1 (b).

(n) Declarations and reservations. Upon ratifying the Convention, Hungary declared that it considered the General Conditions of Delivery of Goods between Organizations of the Member Countries of the Council for Mutual Economic Assistance to be subject to the provisions of article 90 of the Convention.

(o) Acceptance.

(p) The Russian Federation continues, as from 24 December 1991, the membership of the former Union of Soviet Socialist Republics (USSR) in the United Nations and maintains, as from that date, full responsibility for all the rights and obligations of the USSR under the Charter of the United Nations and multilateral treaties deposited with the Secretary-General.

(q) The former Yugoslavia signed and ratified the Convention on 11 April 1980 and 27 March 1985, respectively. On 12 March 2001, the former Federal Republic of Yugoslavia declared the following:

"The Government of the Federal Republic of Yugoslavia, having considered [the Convention], succeeds to the same and undertakes faithfully to perform and carry out the stipulations therein contained as from April 27, 1992, the date upon which the Federal Republic of Yugoslavia assumed responsibility for its international relations."





**Luca Castellani** (1968) is a legal officer in the secretariat of the United Nations Commission on International Trade Law (UNCITRAL), where he discharges the functions of secretary of Working Group IV (Electronic Commerce) and is tasked, inter alia, with the promotion of the adoption and uniform interpretation of UNCITRAL texts relating to sale of goods and electronic commerce.

After graduating in law (JD) in the University of Torino, he received a doctoral degree in comparative law (SJD) from the University of Trieste and a master in international law (LLM) from the New York University. Admitted to the bar in Italy, he held lecturing positions in Italy and Eritrea.

He joined the Office of Legal Affairs of the secretariat of the United Nations in New York in 2001, the UNCITRAL secretariat in Vienna, Austria, in 2004, and served as legal advisor to the United Nations Mission in Ethiopia and Eritrea (UNMEE) in Addis Ababa, Ethiopia, in 2008.

He published in the fields of international trade law and comparative law, dealing, in particular, with African law issues.



# **UNCITRAL contribution to the harmonization of international sale of goods law: short reflections on its past, present and future**

**Luca G. Castellani\***

The United Nations Commission on International Trade Law (UNCITRAL) is well-known as the core body in the United Nations system for the modernization and harmonization of international trade law. For more than forty years UNCITRAL has been active as a law-making body, preparing texts covering many of the areas relevant to international trade. While the first efforts of UNCITRAL went towards the preparation of treaties, following the example of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards that foreshadowed the establishment of the Commission, eventually attention was paid also to texts of a less binding nature, which are often seen as “soft law” sources. Model laws were thus prepared with a view to complementing conventions and to facilitating their uniform application and interpretation; later, legislative guides and similar texts were also drafted, in an effort to further complement existing instruments and support their adoption.

However, this was not the case in the area of sale of goods. In this field, UNCITRAL could start work in its early days by capitalizing on the extensive preparatory studies carried out in the previous decades as well as on the conventions finalized just before the establishment of the

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\* Luca Castellani is a legal officer with the UNCITRAL Secretariat, Vienna, Austria. The views expressed herein are those of the author and do not necessarily reflect the views of the United Nations.

Commission.<sup>1</sup> In this context, it is not surprising that the first outcome of the work of UNCITRAL was the Convention on the Limitation Period in the International Sale of Goods (the Limitation Convention),<sup>2</sup> which intended to consolidate a limited, but complex area of the law of sale of goods. The Limitation Convention was a forerunner, and indeed functionally a part, of the United Nations Convention on Contracts for the International Sale of Goods (CISG).<sup>3</sup> After the conclusion of the CISG, work on sale of goods continued for a few more years, leading to the preparation of the Uniform Rules on Contract Clauses for an Agreed Sum Due upon Failure of Performance (the Uniform Rules).<sup>4</sup> The Uniform Rules seek to unify the treatment, particularly as to validity and application, of clauses that provide for the payment by a party of a specified sum of money as damages or as a penalty in the event of the failure of the party to perform its contractual obligations in an international commercial transaction.

Though their use in practice does not seem to be widespread, the Uniform Rules constitute an important intellectual achievement as they suggest a viable compromise between the notions of liquidated damages clauses, which are acceptable in many jurisdictions, and of penalty clauses, which may, on the contrary, find more difficulties in being recognized by courts.<sup>5</sup> Moreover, by limiting the power of judicial intervention to cases when the sum agreed “is substantially disproportionate in relation to the loss that has been suffered”,<sup>6</sup> they anticipated and may further support a global trend towards the

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<sup>1</sup> Namely, the Convention relating to a Uniform Law on the Formation of Contracts for the International Sale of Goods, 1964 (ULF), United Nations, *Treaty Series*, vol. 834, p. 169, and the Convention relating to a Uniform Law on the International Sale of Goods, 1964 (ULIS), United Nations, *Treaty Series*, vol. 834, p. 107.

<sup>2</sup> Concluded in 1974 and amended in 1980: United Nations, *Treaty Series*, vol. 1511, p. 3.

<sup>3</sup> Concluded in 1980. United Nations, *Treaty Series*, vol. 1489, p. 3.

<sup>4</sup> UNCITRAL, *Yearbook*, vol. XIV: 1983, part three, II, A (p. 272).

<sup>5</sup> However, the Uniform Rules may find application only in presence of liability for failure to perform: Uniform Rules, article 5.

<sup>6</sup> Uniform Rules, article 8.

mitigation of such clauses when excessive, in particular, in civil law countries. Given the regular calls for undertaking new codification projects in the field of sale of goods and, more specifically, of uniform provisions relating to damages, the Uniform Rules should be taken into due consideration when designing such projects.

From an administrative perspective, the fact that the UNCITRAL Secretariat receives and allocates resources mainly on the basis of the legislative work carried out in UNCITRAL Working Groups, coupled with the lack of an active working group dealing with sale of goods, did not facilitate continuity in the promotion of the adoption and of the uniform interpretation of texts on sale of goods in the long term. Nevertheless, important results were achieved, namely with the establishment of the CLOUT (Case Law on UNCITRAL Texts) case reporting system. CLOUT proved in turn to have strong points (multilingualism) and weaknesses (uneven coverage of jurisdictions and timing in the preparation of abstracts). CLOUT represents nevertheless the main source of information on CISG case law in certain languages, and a useful complement in the others, especially when it disseminates information on cases from jurisdictions that usually are not covered by other reporting tools. The Digest of Case Law on the CISG has proven to be particularly successful, and additional work in identifying those trends that pose challenges to the uniform interpretation of the CISG is scheduled, subject to availability of resources. That work should enable the Commission's consideration of additional appropriate measures to further align the application of the CISG in the various jurisdictions while at the same time preserving the desirable level of flexibility already contained in the text of that treaty.<sup>7</sup>

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<sup>7</sup> For a recent discussion of the open-textured nature of the provisions of the CISG, see Blair, H. Allen, *Hard Cases Under the Convention on the International Sale of Goods: A Proposed Taxonomy of Interpretive Challenges*, forthcoming in *Duke Journal of*

Recently, the renewed focus on technical assistance and cooperation activities in the UNCITRAL Secretariat opened the way to a more comprehensive approach to its work in the area of sale of goods. The promotion of the adoption of the CISG based on certain parameters such as regional trading patterns started bearing fruits in terms of additional States Parties to the treaty. The preparation of new tools, such as the mentioned Digest of Case Law on the CISG, and a more systematic engagement in events and other initiatives contributed to starting a reconsideration of the common attitude of practitioners towards the CISG that sees, on the one hand, in theory a desire to benefit from a uniform law of sales and, on the other hand, in practice frequent opting out from the CISG due to reasons not always evident.

This more proactive approach to technical assistance activities relating to texts on sale of goods finds strong justification in the need to help addressing some of the enduring effects of globalization: the steep increase in cross-border trade, including in regional economic integration organizations; the fragmentation of certain sovereign States into smaller entities; and the widespread use of electronic communications.

Uniform law provides specific answers to such issues. It increases legal predictability for international transactions, especially with respect to legal systems of countries that are new players in global markets, and therefore reduces transaction costs. It recreates legal uniformity in regions that, despite separation and sometimes conflict, often keep strong economic, linguistic and cultural ties, and therefore helps counter the negative economic effects of State fragmentation and, through renewed economic ties, prevents further tensions. It provides a complete enabling framework for the use of electronic communications, whose legal issues

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*Comparative & International Law*, 2010. Available at SSRN:  
<http://ssrn.com/abstract=1695634>

are best dealt with on the basis of uniform texts given the inherent identity of the underlying operations in each country as well as the ability of those means to interact at great distance, which is now further improved by the mobility of electronic devices. Thus, a comprehensive and coherent legislation based on international standards may assist in fostering economic development through the use of information and communication technologies and, in particular, in bridging the digital divide that still penalizes developing countries.

In short, globalization may well aim at reducing State regulation, but it does not exclude, and probably requires a sophisticated enabling legislative environment. Most jurisdictions are unable to develop such an environment on their own. As a result, the need for international cooperation, especially in critical areas such as international trade, is thus more acute. As sale of goods represents the backbone of cross-border commerce, it should receive attention and resources accordingly.

Today's event marks the conclusion of a pioneer exercise in the promotion of the adoption and uniform interpretation of the CISG that has achieved significant results. Thanks also to this project, the CISG has become the common law for sale of goods in the Balkans, and indeed the whole of Central and Eastern Europe.<sup>8</sup> Significant capacity-building has fostered interest for the CISG in the region: case reporting, scholarly studies, and analysis of judicial application have increased, and the overall knowledge of the Convention and of its implementation in the

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<sup>8</sup> European States that have not yet adopted the CISG include, among EU member States: Ireland, Malta, Portugal and the United Kingdom; among non-EU member States: Andorra, Liechtenstein, Monaco and San Marino. The position of such States vis-à-vis adoption of the CISG is not even. For instance, in 1992 the Irish Law Reform Commission recommended the adoption of the CISG in its Report on the United Nations (Vienna) Convention on Contracts for the International Sale of Goods (LRC 42 – 1992). San Marino, still a party to the ULF and the ULIS, may consider denouncing those treaties and adopting the CISG soon.

region has benefited accordingly. In short, we see several signs of significant success.

The next challenge is clear: how to capitalize on such success. A first obvious step would be to continue the current efforts, and actually intensify them where capacity is still scarce. A promising move would be to export the initiative to other regions, starting possibly with Central and Eastern European countries, and, in particular, economies in transition, where the interest for the uniform sale of goods has always been strong and a revival would be welcome. Possible activities include strengthening capacity, especially with respect to academic dialogue and access to specialized academic and research resources by young scholars, and adopting a more comprehensive and structured approach in case collecting and reporting, with a view to providing a complete overview of regional CISG interpretative trends. Specific legislative work could bear significant fruits as well: for instance, a review of certain CISG declarations that seem out of line with current business needs, such as those on written form and those excluding the application of article 1(1)(b) CISG, would seem timely and desirable. This could lead to submitting to the consideration of the relevant governments the possibility of withdrawing those declarations.

In a broader perspective, the region might benefit from the wider adoption of the Limitation Convention, which, in some cases, has been signed but not yet ratified. That treaty seems interesting not only for its intrinsic technical qualities and for the fact that it sheds light on a particularly intricate area of the law of sale of goods. At times of repeated calls for further codification of uniform texts, it seems particularly advisable to seek careful coordination between regional and global levels, and to capitalize on existing texts by using them as building blocks towards the establishment of a broader legislative framework. Hence, the adoption of



the Limitation Convention should be seen as a step towards further legal and economic integration at all levels, and as such should be promoted and implemented.

Similarly, a number of countries, especially in the Balkans, could start considering adopting legislation on electronic communications based on UNCITRAL texts, including the United Nations Convention on the Use of Electronic Communications in International Contracts (the Electronic Communications Convention).<sup>9</sup> Indeed, two of the main functions of the Electronic Communications Convention are to provide core legislation to countries lacking any, and to promote a common core of rules on electronic communications, thus facilitating the removal of legal obstacles to international trade, including those arising from existing treaties such as the CISG.

To date, the Electronic Communications Convention has received limited attention in Europe due to certain concerns of the European Commission with respect to its interaction with European Union legislation. Such concerns are, of course, legitimate and remind us of the need to design regional uniform legal systems that do not interfere but rather support global standards. However, those concerns are not insurmountable, as article 17 of the Electronic Communications Convention already contains a disconnection clause whose aim is to allow for the operation of legal regional systems to the fullest extent.

As the Electronic Communications Convention nears its entry into force, and large trading countries are making progress on its adoption, a revision of the position of the European Commission vis-à-vis this treaty is desirable. Meanwhile, those countries seeking modern legislation for

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<sup>9</sup> Concluded in 2005. United Nations Publication Sales No. E.07.V.2 (treaty not yet in force). Other relevant UNCITRAL texts include the UNCITRAL Model Law on Electronic Commerce, 1996, with additional article 5 bis as adopted in 1998 (United Nations Publication Sales No. E.99.V.4), and the UNCITRAL Model Law on Electronic Signatures, 2001 (United Nations Publication Sales No. E.02.V.8).

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electronic communications could start considering the adoption of the Electronic Communications Convention as well as of the UNCITRAL Model Law on Electronic Commerce and of the UNCITRAL Model Law on Electronic Signatures, thus creating the enabling legislative environment necessary to support their economic development through the broader use of electronic means.

To sum up, several issues seem immediately relevant: legislative work, at UNCITRAL or in other venues, should take into consideration the achievements already made and, in particular, carefully consider the provisions of the CISG so as to avoid any contradiction between instruments, especially between global and regional levels; promotion of the adoption of the CISG and of its uniform interpretation should continue, and immediate opportunities lie ahead in Central and Eastern Europe, where the CISG is already the common law for sale of goods, with respect to capacity building and to streamlining the CISG regime through reconsideration of certain declarations; in this framework, other treaties aimed at further facilitating international trade and specifically designed to complement the CISG should also receive due attention, with a view to improving the overall effectiveness of the uniform law for sale of goods. This conference contributes meaningfully to this ambitious plan. We welcome its organization and look forward to our fruitful discussions.

Thank you.



**Prof. Dr. Eric Bergsten** helped create the UN Sales Convention. He headed the team responsible for the Secretariat Commentary on it that was prepared pursuant to Resolution 33/93 of the United Nations General Assembly, and was thereafter Secretary of the United Nations Commission on International Trade Law from 1985 to 1991. A Professor of Law Emeritus at Pace University School of Law, he is editor of the four volume looseleaf text *International Commercial Arbitration* and author of many publications from the area of uniform law. He is a member and chairperson of CISG Advisory Council and a director of Willem C Vis International Commercial Arbitration Moot.



## **MORE ABOUT THE CISG ADVISORY COUNCIL**

The following description of the CISG Advisory Council and its work by its first secretary, Prof Loukas Mistelis was published in 2003. It provides a good background to the history and founding principles of the Council. Since it was written the Council has published 8 more opinions and have participated in numerous international conferences around the world, spreading the harmonising message of the CISG.

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### **CISG-AC Publishes First Opinion**

By Dr. Loukas Mistelis, LLB, MLE, Dr. iuris, MCI Arb, Advocate, is the Clive M Schmitthoff Senior Lecturer in Commercial Law at the Centre for Commercial Studies, Queen Mary, University of London. He acted as Secretary of the CISG-AC from 2001 to 2007.

In a world of countless legal abbreviations, one more is being added in our jargon. CISG-AC stands for Advisory Council of the United Nations Conventions on Contracts for the International Sale of Goods (CISG). This is an unusual Convention and this is an unusual Council.

Knowingly the CISG is one of the most successful international instruments which produce uniform substantive rules for international trade. It is often pointed out that, world-wide two thirds of international sale transactions are conducted between parties based in a CISG country. In addition more than 1,000 judicial and arbitral decisions have been identified and are now featured in the relevant databases, such as [www.cisg.law.pace.edu](http://www.cisg.law.pace.edu). In this sense, CISG is a successful and mature text of protean nature, which has been supported and enhanced by legal practice over the last 15 years. Most recently, UNCITRAL, the CISG formulating agency, has completed a digest which provides a comprehensive presentation of case law on the CISG and aims at assisting courts in the application of the Convention.

The CISG-AC has been established in 2001 as a private initiative to respond to the emerging need to address some controversial, unresolved issues relating to the CISG which would merit interpretative guidance. Professor Albert Kritzer, Executive Secretary of the Institute of International Commercial Law, Pace University School of Law, has been the spiritus rector of the idea of an interpretative council, an idea which has been mooted reluctantly in meetings of international organisations before. In a meeting in Paris in June 2001 some of the most eminent scholars in CISG gathered to explore the possibility of creating a CISG interpretative council.

The idea received warm support and the founding members of the CISG-AC are Professor Dr. Eric E. Bergsten, Emeritus of Pace University, formerly Secretary General of UNCITRAL, Professor Dr. Michael Joachim Bonell, University of Rome La Sapienza, formerly Secretary General of UNIDROIT, Professor E. Allan Farnsworth, Columbia University, New York, Professor Dr. Alejandro Garro, Columbia University, Professor Sir Roy Goode, University of Oxford, Professor Dr. Sergei N. Lebedev, Moscow Institute of International Relations, Professor Dr. Jan Ramberg, Emeritus, Stockholm University, Professor Dr. Dr. h.c. Peter Schlechtriem, Emeritus, University of Freiburg, Professor Hiroo Sono, Hokkaido University and Professor Dr. Claude Witz, Universität des Saarlandes and Université Robert Schuman, Strasbourg. The meeting was also attended by Albert Kritzer, Pace, and Dr. Loukas Mistelis, Clive M. Schmitthoff Senior Lecturer in International Commercial Law, Centre for Commercial Law Studies, Queen Mary, University of London who represented the two sponsoring institutions. Professor Schlechtriem was elected as the first Chair, and Dr. Mistelis as the Secretary of CISG-AC. Two more members were invited to join the Council in June 2003, Professor Dr. M<sup>a</sup> del Pilar Perales Viscasillas, Universidad Carlos III, Madrid, and Professor Dr. Ingeborg Schwenzer, University of Basel.

The CISG-AC is a private initiative which aims at promoting a uniform interpretation of the CISG. It is a private initiative in the sense that its members do not represent countries or legal cultures, but they are scholars who look beyond the cooking pot for ideas and for a more profound understanding of issues relating to CISG. Accordingly the group is afforded the luxury of being critical of judicial or arbitral decision and of addressing issues not dealt with previously by adjudicating bodies. The Council is guided by the mandate of Article 7 of the Convention as far its interpretation and application are concerned: the paramount regard to international character of the Convention and the need to promote uniformity.

In practical terms, the primary purpose of the CISG-AC is to issue opinions relating to the interpretation and application of the Convention on request or on its own initiative. Requests may be submitted to the CISG-AC, in particular, by international organizations, professional associations and adjudication bodies. This first opinion is a response to an informal request by the International Chamber of Commerce for the Council to reflect on issue of electronic communications and the ability of the CISG to respond to such challenges. The CISG-AC invited Professor Dr. Christina Ramberg, University of Göteborg, to submit a report to the Council's consideration. The opinion has been discussed in three sessions. The CISG-AC is of the opinion that the Convention can accommodate electronic communications as well as it does traditional communications and the published opinion suggests interpretation of all CISG provisions which pertain to communications.



Three more opinions will be completed in the next few months. One opinion is a response to a request by the Association of the Bar of the City of New York Committee on Foreign and Comparative Law to address the question of the parole evidence rule. The other two opinions address the issue of reasonable notice for lack of conformity, a highly controversial issue in judicial practice, and the question of exemption from liability for economic hardship.

The inaugural conference of the CISG-AC will be held in New York at the New York State Judicial Training Institute, Pace University School of Law, on 26 September 2003. Other conferences and workshops will follow in the near future.

The CISG-AC wishes to publicise all its opinions widely through printed and electronic media and wishes to receive any comments the readership may have. The preferred citation style is: CISG-AC, Opinion no 1: Electronic Communications under CISG, 15 August 2003; Rapporteur: Professor Christina Ramberg, followed by a reference to the place of publication.





**Vikki Rogers**, in November 2008, was named the Director of the Institute of International Commercial Law. Prior to that she served as an associate at Mazur, Carp & Rubin, PC, and also Shearman & Sterling (New York and Germany), focusing her practice on construction law arbitration and litigation, both domestic and international. She was also an international case manager at the International Centre for Dispute Resolution at the American Arbitration Association in New York, and has worked as a research fellow at the University of Heidelberg and University of Cologne. She has taught International Commercial Transactions at Pace Law School; International Arbitration at Villanova Law School and Fordham Law School; and Introduction to US Law at the University of Heidelberg.

She has published in the areas of international sales law and international arbitration. Her current work focuses on international sales law, international consumer law, online dispute resolution (for domestic and cross-border disputes), and electronic and mobile commerce. She is the Vice-President Elect of the Internet Bar Organization, Director of the Global Consumer Law Forum and a member of the Global ODR Working Group. Ms. Rogers is a member of the Arbitration Committee of the NYC Bar Association and an Editor of the UNCITRAL CISG Digest [2011 edition]. She earned a BA from Syracuse University, a J.D. from Pace Law School (1999), and a Master of Studies in Environmental Law from Vermont Law School.





**Loukas Mistelis** is the Clive M Schmitthoff Professor of Transnational Commercial Law and Arbitration at the Centre for Commercial Law Studies where he is Director of Studies of the School of International Arbitration. He is also Adjunct Professor of Law at Pace University, School of Law. He teaches at the University of London LLM programme and is the co-ordinator of the courses in International and Comparative Commercial Arbitration, International Trade and Investment Dispute Settlement, and International Trade Law. He also teaches International Commercial Litigation. Loukas Mistelis also directs our Diploma in International Arbitration by Distance Learning and the Diploma in International Arbitration, which is offered by CCLS in association with the Chartered Institute of Arbitrators.

Loukas is the former Secretary of the CISG-AC (Advisory Council of the Convention on Contract for the International Sale of Goods ) and co-ordinator of the Queen Mary Case Translation Programme, part of the CISG Database (IALL Website Award 2002). He studied law at Athens (LLB) Strasbourg (Certificate in International & Comparative Human Rights); Hanover (Magister Legum Europae and Dr. iuris) and Keio (Certificate in Japanese International Trade Law). He is a Member of the Athens Bar (since 1993). Besides English he is fluent in German and Greek, has good knowledge of French, and basic knowledge of Polish, Spanish and Russian. He maintains a selective arbitration and consulting practice in respect of international commercial and investment disputes, secured transactions and complex contractual matters, including e-commerce and technology matters. He has also participated in a number of experts groups, including for the UK Department of Trade and Industry, the International Chamber of Commerce, UNCITRAL and UNCTAD.

Loukas Mistelis' research focuses on international arbitration (in particular, the internationalisation of commercial arbitration, investment arbitration and harmonisation of arbitration procedure), international commercial transactions (in particular, long-term

The idea received warm support and the founding members of the CISG-AC are Professor Dr. Eric E. Bergsten, Emeritus of Pace University, formerly Secretary General of UNCITRAL, Professor Dr. Michael Joachim Bonell, University of Rome La Sapienza, formerly Secretary General of UNIDROIT, Professor E. Allan Farnsworth, Columbia University, New York, Professor Dr. Alejandro Garro, Columbia University, Professor Sir Roy Goode, University of Oxford, Professor Dr. Sergei N. Lebedev, Moscow Institute of International Relations, Professor Dr. Jan Ramberg, Emeritus, Stockholm University, Professor Dr. Dr. h.c. Peter Schlechtriem, Emeritus, University of Freiburg, Professor Hiroo Sono, Hokkaido University and Professor Dr. Claude Witz, Universität des Saarlandes and Université Robert Schuman, Strasbourg. The meeting was also attended by Albert Kritzer, Pace, and Dr. Loukas Mistelis, Clive M. Schmitthoff Senior Lecturer in International Commercial Law, Centre for Commercial Law Studies, Queen Mary, University of London who represented the two sponsoring institutions. Professor Schlechtriem was elected as the first Chair, and Dr. Mistelis as the Secretary of CISG-AC. Two more members were invited to join the Council in June 2003, Professor Dr. M<sup>a</sup> del Pilar Perales Viscasillas, Universidad Carlos III, Madrid, and Professor Dr. Ingeborg Schwenzer, University of Basel.

The CISG-AC is a private initiative which aims at promoting a uniform interpretation of the CISG. It is a private initiative in the sense that its members do not represent countries or legal cultures, but they are scholars who look beyond the cooking pot for ideas and for a more profound understanding of issues relating to CISG. Accordingly the group is afforded the luxury of being critical of judicial or arbitral decision and of addressing issues not dealt with previously by adjudicating bodies. The Council is guided by the mandate of Article 7 of the Convention as far its interpretation and application are concerned: the paramount regard to international character of the Convention and the need to promote uniformity.

In practical terms, the primary purpose of the CISG-AC is to issue opinions relating to the interpretation and application of the Convention on request or on its own initiative. Requests may be submitted to the CISG-AC, in particular, by international organizations, professional associations and adjudication bodies. This first opinion is a response to an informal request by the International Chamber of Commerce for the Council to reflect on issue of electronic communications and the ability of the CISG to respond to such challenges. The CISG-AC invited Professor Dr. Christina Ramberg, University of Göteborg, to submit a report to the Council's consideration. The opinion has been discussed in three sessions. The CISG-AC is of the opinion that the Convention can accommodate electronic communications as well as it does traditional communications and the published opinion suggests interpretation of all CISG provisions which pertain to communications.



**Dr. Jelena Perović** is a professor of International Commercial Law at the University of Belgrade, Faculty of Economics. Lectures in International Commercial Law (bachelor classes), International Commercial Contracts (master classes), EU Law (master classes).

She is the president of the Commission for the International Sale of Goods of International Association of Lawyers (UIA), Paris, member of International Academy of Comparative Law, Paris, expert of the ITC Committee on International Commercial Model Contracts of UN/WTO/ITC, Geneva, author of the ITC Model-contract for the International Commercial Sale of Goods, national expert for distribution and commercial agency contracts at International Distribution and Commercial Agency Institute (IDI), Torino, member of the working group "Task Force on Updating the Model International Sale Contract" of the ICC Commission on Commercial Law and Practice, Paris, permanent Scientific Correspondent for the *Revue de Droit international et de Droit comparé*, Bruylant, Brussels, editor of the section "International Commercial Contracts, Arbitration" of the legal journal *Pravni zivot*, Kopaonik School of Natural Law, Belgrade and deputy editor of the *Review for European Law*, Belgrade. She was a Chief Legal Advisor for the economic legislation reform in the Ministry of International Economic Relations of Republic of Serbia (2001-2003) and a chair of the working groups for drafting the Law on Financial Leasing and Law on Registered Charges on Movable Assets in Serbia. She is an arbitrator in international commercial disputes (ICC and *ad hoc* international commercial arbitration) and arbitrator of the Permanent Court of Arbitration attached to the Chamber of Commerce of Serbia.

Prof. Perović is the author of numerous articles, contributions and books in the fields of contract law, international commercial law and arbitration, in particular:

- *International Commercial Law*, Belgrade, 2010 (four editions);
- *Fundamental Breach of Contract - International Sale of Goods*, Belgrade, 2004;
- *Commentary on the Law on Financial Leasing*, Belgrade, 2003;
- *Arbitration agreement – International Commercial Arbitration*, Belgrade, 2002;
- *La convention d'arbitrage en droit commercial international*, Belgrade, 2000.







# Critical Issues Regarding the Sphere of Application of the CISG

Prof. Dr. Jelena Perović  
University of Belgrade

Uniform Sales Law Conference  
The CISG at its 30th Anniversary  
12-13 November 2010  
University of Belgrade Faculty of Law

1



## *Introduction*

**The sphere of application of the CISG is defined by Articles 1-6.**

**Articles 1, 2 and 3** - which contracts fall within the scope of the CISG

**Articles 4 and 5** - the extent to which sales transactions are governed by the CISG

**Article 6** - the CISG applies subject to contrary agreement by the parties (opting-out approach)



## *Contract of sale*

The CISG does not expressly define contract of sale. Can be viewed as a general framework for the numerous types and specific varieties of sales contracts in international commerce.

### **Critical issues**

- 1) Applicability of the CISG to:
  - Contracts for goods to be manufactured
  - Contracts for supply or services
  - Barter
  - Leasing contracts
  - Distributionship
  
- 2) Interpretation of the term "goods"

3



## *Internationality of the contract*

The CISG applies to contracts of sale between the parties whose places of business are in different states.

### **Critical issues:**

- Problem of interpretation of "place of business" of the parties
- Several places of business of one or both parties
- Disclosed agency
- Undisclosed agency



## *Direct and indirect application of the CISG*

**Direct application** - Contracting States

**Indirect application** - Conflict of law rules lead to the law of a Contracting State.

**Selected problems concerning indirect application:**

- the choice of law clause is not clear or is ineffective
- dépeçage

5



## *The extent to which the sales contracts are governed by the CISG*

### **Selected critical issues**

Clauses excluding or limiting liability for "consequential damages" – problems of validity, interpretation, effects

Loss of a chance of winning – recoverable loss under the CISG?

Loss of goodwill – recoverable loss under the CISG?

Recovery of attorneys' fees – matter outside of the CISG?



## *“OPTING–OUT” APPROACH*

Main problems related to:

Positive choice of law

Negative choice of law

Derogating from the entire CISG

Derogating from individual provisions of the CISG

7



## *In a nutshell... Some recommendations*

Remember the CISG' rules regulating its sphere of application

Take account of the CISG' international character. The rules of the CISG are not identical with the rules of any domestic legal system. The CISG has to be interpreted uniformly and autonomously.

Avoid the terms which may have different legal and/or terminological meanings in comparative law. Adapt the contractual clauses to the solutions and principles of the CISG.



**Petra Butler** holds a PhD from the University of Goettingen and an LLM from Victoria University of Wellington where she is now a senior lecturer and the Associate Director of the New Zealand Centre of Public Law. Petra's research and teaching focuses on two distinct areas: human rights and private international law with an emphasis on international commercial contracts. In regard to the latter she has coached and arbitrated in the Vis Moot for the last eight years, has published several articles, has recently contributed to the soon to be published commentary on the CISG edited by Mistelis/Kroell, and has co-written a book on the CISG with the late Professor Peter Schlechtriem. She has been called upon by the New Zealand legal profession and Government departments as an expert on questions of private international law.





**Prof. Jack Graves** is an Associate Professor of Law at Touro College Law Center where he teaches Contracts, Business Organizations, and International Sales Law and Arbitration. Professor Graves brings a unique blend of academic, business and legal experience. Before attending law school, he spent 15 years in business management. He earned his law degree from the University of Colorado in 1994, where he served as an editor of the Law Review and as a Teaching Fellow in Contracts. Following law school, he clerked for the Honorable David M. Ebel on the United States Court of Appeals for the 10th Circuit. After his clerkship, Professor Graves spent 6 years with a Colorado firm, specializing in commercial and corporate litigation. Before joining the faculty at Stetson, Professor Graves taught at the University of Colorado School of Law, first as an Adjunct Professor, and then as a full-time Visitor. Before joining the Touro College Law Center faculty in fall 2006 he was an assistant professor of law at Stetson University College of Law in Tampa, Florida. He was also a Visiting Professor of Law at Syracuse University College of Law and Franklin Pierce Law Center in Concord, NH. Professor Graves was selected by the University of Colorado law school student body as "Outstanding Visiting Professor" for the 2001-02 academic year.

Professor Graves also spends significant time working with students and collaborating with other law faculty members from the U.S. and abroad in relation to the Willem C. Vis International Commercial Arbitration Moot, an international moot involving law student teams from over 200 law schools and over 50 countries. He has coached teams from Stetson (1st place in team orals – 2005), Franklin Pierce (honorable mention in team orals – 2006), and Touro (2nd place in team orals – 2008; round of 16 in team orals – 2009). Professor Graves also founded, in collaboration with a group of colleagues from the University of Pittsburgh and the University of Zagreb, the Institute of International Commercial Law & Dispute Resolution. In the summer of 2010, the Institute held its first summer program in Zagreb and Zadar, Croatia, hosting 31 law students from 9 different countries.





# The Problem of Circularity

## Article 6 and Issues of Formation

### Opting Out of CISG Part II

- CISG Article 6 provides a broad right to “opt out” or derogate
- But opting out of or derogating from Part II presents two unique conceptual challenges:
  - Should one apply the purported “substitute” rules in deciding whether the parties concluded their main agreement containing those rules?
  - What if the tribunal decides the parties failed to conclude the main agreement?

# Choice of Law Governing Formation

- Same issues arise, generally, with choice of law governing formation—largely matter of PIL
- But today I want to focus on CISG art 6 “opt out” – see Honnold/Flechtner 4<sup>th</sup> (132.2)
  - Governed by the CISG
  - Little commentary or case law on the issue
  - Many choice of law provisions don’t include formation
  - But potentially important in view of various issues raised by provisions of Part II

## The Basic Problem of Circularity

- “Opting Out” of Part II by a state is easy under Article 92
- As is opting out of Part II by a party in a “framework agreement”
- But opting out of Part II in the same agreement subject to a dispute over formation presents a classic problem of circularity

# Arbitration Analogy

- An arbitration agreement within a main contract raises two similar issues, which are addressed by the two related, and largely statutory, doctrines of:
  - Competence-Competence
  - Separability

## Article 6

- Article 6 governs any attempt to opt out of the application of the CISG
  - And Article 6 clearly applies to CISG Part II, as well as Part III
- However, Article 6 does not expressly settle how these challenges of circularity should be resolved
  - And the drafting history of the Convention does not provide a clear answer

## Interpreting Article 6

- Article 7(2) mandates that we attempt to resolve these issues by reference to the general principles upon which the CISG is based
- Two general principles may be useful here:
  - The primacy of the will of the parties
  - The autonomous existence and separability of any “dispute resolution” provision

## Primacy of the Will of the Parties

- The very nature of the CISG is one of default rules subject to the autonomous will of the parties
- The general principle of the primacy of party autonomy is nowhere more clearly expressed than in Article 6, itself
- This principle suggests that the parties’ intent to decide formation issues under rules other than those in Part II should be given effect

# Dispute Resolution & Separability

- Article 81 states that any provision for “resolution of disputes” survives avoidance
- Secretariat Commentary and AC Opinion No. 9 clarify that provisions for “resolution of disputes” include “choice of law” provisions
- Thus, the principles reflected in Article 81 suggest that a choice to “opt out” of the CISG is, to at least some extent, separable from the agreement within which it is contained

## Applying these principles

- We should give effect to party intent to “opt out” of the CISG and decide formation under rules other than those contained in Part II
- To the extent we find such intent, a failure to conclude the main contract should not affect any “opt out” provision, unless such failure is specifically caused by the “opt out” provision

# Ascertaining Party Intent

- How does one ascertain party intent with respect to an individual provision within a disputed contract—even if separable?
  - Presumptive intent absent objection?
  - Intent of the offeror or offeree?
    - Do we know which party is the offeror or offeree?
  - Intent of the party asserting formation?
  - Intent of the party challenging formation?
  - Presumption in favor of or against formation?

# A Few Potential Scenarios

- Attempted formation of a contract based on a traditional offer and acceptance paradigm
  - 2 variations
- Attempted formation of a contract through a process of negotiation
  - 2 variations
- Attempted acceptance of an offer in which the “opt out” provision is included only in one of the two parties’ communications

## A Hypothetical “Opt Out” Choice

- UCC Art 2 (supplemented by common law)
  - Assigns risk of failed transmission to offeror if acceptance dispatched in manner invited by offer
  - Allows revocation of offers, broadly, unless strict requirements of UCC 2-205 are met
  - Allows formation with “open price term” and fills with reasonable price under UCC 2-305
  - Requires signed writing under UCC 2-201
  - Allows formation based on acceptance containing material variances from offer under UCC 2-207(1)

## Acceptance Lost in Transmission

- US buyer mails offer to German seller, which includes choice of Article 2 (and associated state common law)
- Seller mails acceptance, which is lost in mail (assuming tribunal believes testimony that it was actually mailed but never arrived)
  - Can seller enforce?

## Revocation Contrary to a Promise

- US seller makes oral telephone offer to German buyer, promises to keep open for 10 days, and says offer governed by Article 2
- Seller telephones buyer on day 3 and revokes—buyer then purports to accept
  - Can buyer enforce?

## The Open Price Term

- US buyer sends proposed contract to German seller, including provision choosing Article 2
- Seller marks up language and returns, but does not change choice of law provision
- After a few exchanges, parties agree on all terms except price and orally agree to basic “deal,” agreeing to work out final price later
  - Can buyer walk away at this point?
  - Can seller? What if seller added term?



## Requiring a Writing

- US seller and German buyer negotiate terms of possible contract at trade show—during negotiations, US seller says Article 2 must govern any transaction, and German buyer says nothing in response to this
- When they walk away, the buyer thinks they have a contract, while the seller does not
  - Assuming a tribunal believes the parties formed a contract—whether governed by CISG or Art 2— what about seller’s attempt to “opt out” of Part I?

## “Opting Out” in a Battle of Forms

- German buyer sends offer
- US seller sends acceptance, but includes provision choosing UCC Article 2
- One party wants out of the deal before any further communication or performance, and so notifies other party
  - Can buyer enforce if seller wants out?
  - Can seller enforce if buyer wants out?
    - What if buyer sends “confirmation” after acceptance, but expressly states that the CISG governs?





**Prof. Larry A. DiMatteo** is a Huber Hurst Professor of Contract Law & Legal Studies at the University of Florida where he teaches Contracts, Commercial Law, Sales, International Business Transactions, International Sales Law, International Trade Law and Contract Theory Seminar . He received his J.D. from the Cornell Law school, LL.M. from Harvard Law School and Ph.D from Monash University (Australia). He is the former Chair of the Department of Management at the University of Florida and Editor-in-Chief of the *American Business Law Journal*. He is the author or co-author of some 50 publications including 7 book and 25 law review articles. His book include, *International Law of Sales* (with Dhooge, Greene, Maurer & Pagnattaro) (Cambrudge University Press), *Visions of Contract Theory: Rationality, Bargaining and Interpretation* (with Prentice, Morand & Barnhizer) (Carolina Academic Press), *The Law of International Contracting* (Kluwer Law), *International Business Law: A transactional Approach* (with Dhooge) (West), and *Contract Theory: The Evolution of Contractual Intent* (Michigan State University Press). His articles have appeared in the *Harvard International Law Journal*, *Yale Journal of International Law*, *Northwestern Journal of International Law & Business*, *Vanderbilt Journal of Transnational Law*, *American Business Law Journal*, *Hofstra Law Review*, *University of Pittsburgh Law Review*, *Penn State Law Review*, *Florida State Law Review*, *South Carolina Law Review*, *Michigan State Law Review*, *Rutgers Computer & Technology Law Journal*, *Cornell International law Journal*, *Texas Intellectual property Law Journal*, and *Journal of Legal Studies Education*. His awards include the Ray August Master Teacher Award (2005), Ralph J. Bunche Award (2003), and Ralph C. Hoerber Award (2001).





## ***Critical Issues in the Formation of Contracts Under the CISG***

**Prof. Dr. Larry A. DiMatteo**  
Huber Hurst Professor of Contract Law  
University of Florida

University of Belgrade School of Law  
12 November 2010



## **Interconnectedness of CISG**

### **3 Theories of Interconnectedness**

- **Law as Integrity: Dworkinian Fit**
  - Finding a Correct Answer within the Structure of the Entire CISG
- **CISG as Hermeneutic Circle**
  - Article 15 within 14-24; Part II within CISG
- **Application though Meta-Principals**
  - Art. 6 (Derogation), Art. 7 (Good Faith), Art. 8 (Interpretation), Art. 9 (Usage)

## Interconnectedness

Articles 14, 16, 18, among others.

- Article 6 (derogation)
- Article 7 (meta-principles)
- Article 8 (interpretation)
- Article 9 (usage)
- Article 19 (battle of forms)
- Article 29 (modification)
- Article 55 (open price)

## Contract Formation

Articles 14, 16, and 18

- Article 14
  - “Sufficiently Definite” “Indicates Intention”
  - “Indicates Goods” “Fixes Price & Quantity”
- Article 16(2)(b)
  - Irrevocability = Reasonable to Rely + Actual Reliance

# Acceptance

## Article 18

- Statement or Conduct
- Silence or Inactivity “not in itself”
- Reaches by “fixed time” or “reasonable time”
- Usage or Practices
  - “performing an act” “without notice”

# Incorporation of General Conditions

General Conditions = Standard Terms (Boilerplate)

- Articles 14, 18 & 19
- Scenarios
  - 1 party attempts to insert (formation)
  - 1 party attempts to insert subsequent to formation (series of installments or contracts)
  - Both parties attempt to insert (battle of the forms)

# General Conditions: One Party Scenario

## Two Approaches

- #1: Automatic Incorporation
  - Offer: Offeree must Object
  - Acceptance: Subsequent Performance is the Real Acceptance
- #2: Something More is Needed
  - One party's intent & other party's awareness

# General Conditions: Defining Awareness

## Apparent v. Constructive

- Awareness
  - Actual or Opportunity to become Aware?
  - Knowledge
  - Understanding
    - Language cases (language of K v. international languages)
- Incorporation by Reference (formation)
  - Not Receiving Party's Duty to Enquire about Content
    - *Golden Valley*: e-mail attachment



# Subsequent Incorporation

## What is Objective Intent?

- Subsequent Unilateral Insertion of Conditions?
  - Not Effective
  - *Metal Ceiling Case* (Ger. 2009): Series of contracts or course of dealings: Party could not have been unaware.
- Objective Intent: U.S. does not require awareness for incorporation
  - Exception: Unconscionability
  - Exception: Subsequent Unilateral Incorporation

## Avoiding Article 19

### Agreement under Article 18

- *Noma v. Misa Sud* (Belgium 2004)
  - General Conditions (Limitation Period) (Art. 19)
  - Court: Need full agreement (18) (not part of K)
- Neglects Art. 19(2) Duty to Object
  - Decision is over-inclusive since does not make distinction b/w material & non-material terms.

# Article 18 versus 19

## 18(1) No Duty to Object v. Article 19(2) Duty to Object

- Art. 18 is general rule vs. Art. 19 is a specialized rule
- Art. 18 is general rule & Art. 19 is exception
- Art. 18, offeree perspective; Art. 19 offeror perspective (intent)

# Article 14 & Article 55

## Implicitly Fix or Open Price Term?

### **Problem: Art. 14 fails to reference Art. 55**

- Option 1: “Must” fix controls
  - No contract; no Art. 55
- Option 2: No Price, No Problem; 55 as gap-filler
  - Acceptance of “non-offer” + performance = Art. 55

# To Confirm or Not to Confirm?

That is the question!

## **Problem: No Confirmation Rule in CISG**

- Oral Agreement + Written Confirmation
  - Duty to Object?
- Exceptions?
  - Trade Usage or Course of Dealings
  - Duty of Good Faith
  - Performance/Conduct as Acceptance
- Best Practice: Strong Probative Evidence!

# Reliance Theory

## Article 16(2)(b)

### Issues

- What if the fixing of time was intended to limit the time of acceptance and not as a firm offer?
- Does any reasonable reliance create a firm offer?
  - Secretariat Commentary: “Extensive investigation”
  - Article 18(2) oral offer self-terminates v. Reasonable Reliance (firm offer)
    - Derogation (intent controls)

# Activity or Conduct as Acceptance

## Explicitly & Implicitly (intent)

- With or Without “Notice”
  - No Notice if Expressly/Implicitly Authorized
  - In all Other Cases, Notice Required
- Definitional Issues
  - Art. 18 (1): “other conduct”
  - Art. 18 (3): “performing an act”
  - Art. 18 (3): “at moment act is performed”

## What is an “Act”?

### Article 18

- Is any conduct or act indicating assent sufficient?
  - Golden Valley (U.S. 2010): Third-Party K is an “act”
- Is an act the performance required under the agreement?
  - *Shoes Case (Ger. 1995)*: Partial Delivery is not an “Act”

# Beginning Performance vs. Revocation?

## What is an act?

- Act = Completion of Act: Injustice?
- Act = Something less than Full Performance
  - “relating to” (Art. 18(3))
- Reasonable Reliance = Firm Offer
- Acceptance by “Conduct” (Art. 18(1))
  - Knowledge of Conduct must Reach Offeror

**THANK YOU!**  
**Al Kritzer**





Larry A. DiMatteo, BA, BA, JD, LL.M., PH.D.

**Huber Hurst Professor of Contract Law & Legal Studies  
University of Florida**

## **CRITICAL ISSUES IN THE FORMATION OF CONTRACTS UNDER THE CISG**

*The depth of jurisprudence and scholarly commentary on the United Nations Convention on Contracts for the International Sale of Goods (CISG) has grown exponentially over the last few decades. One example has been the increase in CISG cases in the United States from only 16 cases from 1988 to 1999 to 92 additional cases from 2000 to the middle of 2010. This Article will draw from CISG jurisprudence, but will also provide some insights from a purely American common law perspective.<sup>1</sup>*

*In the area of contract formation relating to CISG Articles 14, 16, and 18, there is a growing jurisprudence on contract formation. According to the Institute of International Commercial Law's CISG Database, the international jurisprudence includes 162 cases relating to Article 14; 13 cases related to Article 16; and 184 cases relating to Article 18. The battle of the forms scenario under Article 19 will not be discussed. However, the interconnection between Articles 18 and 19 will be discussed.*

*This article will examine the jurisprudence relating to Articles 14, 16, and 18. This examination will cover the topics of offer and acceptance, receipt rule, firm offers, and conduct as acceptance. From this review of the case law, and related scholarly commentary, the article analyzes the critical issues related to the application of these CISG Articles. The key insight offered is the interconnectedness of these CISG articles, along with articles 6, 8, 9, 29, and 55.*

*Key Words: International sales law—contracts—contract formation—firm offer rule—written confirmations*

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<sup>1</sup> Note, that the American common law perspective used here includes use of Article 2 of the American Uniform Commercial Code. Article 2 of the Code relates to the sale of goods. It should also be noted that the Uniform Commercial Code is not comprehensive so, the general common law of contracts still is used to fill in the gaps in the Code.

## 1. INTRODUCTION

Part II of the CISG consists of Articles 14-24. These articles provide the offer-acceptance rules for the formation of contracts under the CISG. The thoughts that comprise this article stem from years of reading CISG cases, but more currently on a renewed focus on Articles 14-16 and 18-19 performed in conjunction with the Advanced CISG Digest project spearheaded by Albert Kritzer and Sieg Eiselen.

## 2. INTERCONNECTEDNESS

In understanding the CISG and its surrounding jurisprudence, it is important to not just focus on a given CISG Article in isolation to the CISG as a whole. For example, it is easier to view the battle of forms scenario under Article 19 as a singular group of cases. But, Article 19 can only be truly understood as a part of a template that includes Articles 8, 9, 14, 15, 16, 18, and 29, among others. The use of provisions in a code by analogy to understand other code provisions has a strong history in Civilian law.<sup>2</sup> In contrast, because of the common law's focus on case law that practice is not as evident, but has been used in relation to code-like enactments, such as the United States Uniform Commercial Code (UCC).<sup>3</sup> Part 2.1 provides some theoretical arguments of reading an independent CISG Article by analogy to other CISG Articles. Part 2.2 focuses on the practical application of the CISG given the interconnectedness of CISG Articles.

### 2.1 THEORIES OF INTERCONNECTEDNESS

In Dworkinian terms, the integrity of law to provide, if not a right answer, then at least a correct answer, is based upon the entire structure of the law.<sup>4</sup> In our case, CISG rule application needs to be done within the entire structure of

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<sup>2</sup> R. Youngs, *English, French and German Comparative Law*, Cavendish Publishing Limited, London 1998, 47-48; J. Gordley & A.T. von Mehren, *An Introduction to the Comparative Study of Private Law*, Cambridge University Press, New York 2006, 50-54, 61-63.

<sup>3</sup> The American Uniform Commercial Code began as a model law that has been enacted with variations in all fifty states. The one exception is the State of Louisiana has not enacted Article II (Sales). It has elected to retain the French Napoleonic Code. See W. Schnader, "A Short History of the Preparation and Enactment of the Uniform Commercial Code", *University of Miami Law Review* 22/1967, 1.

<sup>4</sup> R. Dworkin, "Hard Cases", *Harvard Law Review* 88/1975, 1057; R. Dworkin, "Law as Interpretation", *Texas Law Review* 60/1981, 527.



the CISG. A rule application that appears reasonable within the confines of a single CISG Article may actually be an improper application due to its inability to be harmonized with the CISG as a whole. A certain rule application can only be justified if it provides a proper fit relating to the specific CISG Article or Articles, as well as the CISG as a whole.<sup>5</sup> In applying the CISG contract formation Articles, due regard must be given to the interpretive template provided by Articles 8 and 9.

A similar proposition is found in the hermeneutic circle that asserts that the parts of something, in this case a body of sales law rules, cannot be understood without a knowledge of the whole; in turn, the whole cannot be understood without knowledge of the parts. The CISG can be seen as a series of hermeneutic circles including ones that interrelates Articles within a specific subject area (Articles 14-24, Formation of the Contract), one that interrelates a given Article or bunch of Articles with Articles from another areas (Article 19 with Article 29; Article 44 with Articles 39, 43, and 50), and finally one that interrelates one Article or group of Articles with the CISG as a whole (Articles 14-24, Formation with Articles 7-13, General Provisions).

Seemingly disconnected Articles can be mined under CISG interpretive methodology for rationales in the application of other Articles. Alternatively stated, it is important to note that some of the reasons used in the application of one Article may be useful in the interpretation of another Article. A simple example is the jurisprudence involving the requirement of an indication of intent in an offer would also be pertinent to determining intent to be bound in an acceptance.

A third means of viewing interconnectedness relating to the CISG is the recognition and application of meta-principles. The meta-principles of the CISG are generally recognized as the principle of good faith, its international character, and the need to promote uniformity in its application.<sup>6</sup> In the area of contract formation, the meta-principles most relevant are provided by Articles 8 and 9.

## 2.2 INTERCONNECTEDNESS WITHIN THE CISG

The interconnectedness of CISG Articles in the area of contract formation is obvious in that many cases the issues of the enforceability of a contract or contractual terms implicate more than one of the offer-acceptance Articles. For example, the incorporation of general conditions or standard terms into a contract is an issue found in Articles 14, 15, 18, and 19, as well as Articles 8 (interpretation, intent) and 9 (interpretation, usage). This interrelationship was noted in a Belgium case.<sup>7</sup> The case involved the enforceability of a term that

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<sup>5</sup> *Ibid.* See also, L. DiMatteo, "A Theory of Interpretation in the Realm of Realism", *DePaul Business & Commercial Law Journal* 5/2006, 17.

<sup>6</sup> See CISG Article 7(1). See also, L. DiMatteo, et al, *International Sales Law: A Critical Analysis of CISG Jurisprudence*, Cambridge University Press, New York 2005, 22-29.

<sup>7</sup> Belgium 17 May 2004 Appellate Court Ghent (Noma B.V.B.A. v. Misa Sud Refrigerazione S.p.A.), <http://cisgw3.law.pace.edu/cases/040517b1.html>.

provided a limitation period for bringing claims. If decided strictly under Article 19 the term would likely have been considered a material alteration of the offer since it related to the “extent of one party’s liability to the other.” However, the court avoided the issue by holding that a contract had been formed without the incorporation of the limitation term. It held that “with regard to the conditions of sale on the backside of the invoice, [under Articles 18 and 19] it is determined that full agreement about these conditions is always required *before* the contract comes into existence and mere silence does not count as an acceptance.” Note that the court holds that all the conditions of sale—whether material or non-material — required “full agreement” in order to enter into the contract and that a party is not required to object to their inclusion. A few comments are in order here. The court neglects the fact that there is a duty to object in Article 19(2) regarding any non-material terms found in the purported acceptance. Thus, the requirement of full agreement is overbroad when it encompasses non-material terms in a battle of the forms situation. The over-inclusive nature of the decision is rendered moot since a limitation period term is a material term and therefore, there is no duty to object. Even when more than one Article is not implicated in a dispute, it is important to note that some of the reasons used in the application of one Article may be useful in the interpretation of another Article. These reasons are also vital in filling in gaps in areas within the scope of CISG’s coverage.<sup>8</sup>

Unfortunately, the clarity provided by the specialized offer-acceptance rules of Part II is often lost when they interact with each other or Articles outside of Part II. A few examples will illustrate this point more clearly. The first example implicates the appearance of conflict within Part II. Article 18(1) states that “silence or inactivity does not in itself amount to acceptance.” Compare that sentence with this sentence from Article 19(2); “additional terms which do not materially alter the terms of the offer constitutes an acceptance, unless the offeror, without undue delay, objects orally to the discrepancy or dispatches notice to that effect.” How does a judge or arbitrator reconcile Article 18’s no requirement to object or respond in order to prevent the creation of an effective acceptance with Article 19(2)’s requirement that a party must object to additional non-material terms in a purported acceptance. The lack of clarity is relatively easy to rectify with a thoughtful scholarly analysis, but such clarity may be more difficult for an arbitrator or judge to obtain. The result is sometimes a conflation of the purposes or meanings of different Articles.

The easiest way to argue that there is no true conflict between Article 18 and 19 is to make the distinction that Article 18(1) is a general rule for acceptance, while Article 19(2) is a specialized rule pertaining to the battle of forms scenario. This is surely true, but the better way of viewing these Articles is to view Article 19(2) as an exception to Article 18(1). This view helps remove the bias in seeing these Articles as independent of one another.

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<sup>8</sup> L. DiMatteo (2005), 165-166

The best epistemological means of understanding the rule-exception distinction—in this case, on the issue of silence or inactivity as a method of acceptance—is to acknowledge that they reference different fact scenarios. Article 18 refers to the more generic scenario where a party receives an offer. The focus is upon the offeree to determine if she intended to be bound to a contract. For there to be an acceptance that party must proactively make a statement or show conduct that evidences intent to be bound by the offer. A contract cannot be forced upon another party based upon that party's silence or inactivity.<sup>9</sup> In contrast, Article 19(2) focuses primarily on the perspective of the original offeror. Without Article 19(2), any additional terms in a purported acceptance would convert that instrument into a counter-offer. Under Article 18(1), silence or inactivity of the original offer could not result in a binding contract. Article 19(2) carves out an exception where the additional terms are deemed to be non-material. In that event, silence or inactivity results in the formation of a binding contract.

The meaningful differences between Article 18 and 19 are narrowed by the broad definition of materiality implied by Article 19(3). In essence, Article 18 and 19 act as one since the instances of additional, conflicting non-material terms are negligible. The overwhelming amount of the case law finds most terms, such as forum selection clauses,<sup>10</sup> arbitration clauses,<sup>11</sup> trade terms,<sup>12</sup> warranty and certification<sup>13</sup> to name a few, as material in nature. This can be attributed in some degree to the behavioral phenomenon of hindsight bias.<sup>14</sup> A term that may have been considered non-material at the time of contract formation is likely to be viewed as material to all parties concerned if it is dispute-determining at the time of dispute.

In the end, the great equalizer in the finding or not finding an enforceable contract is the major premise that even though silence and inactivity (except under the narrow exception provided under Article 19) may not be a ground for silence, activity or conduct is a ground for acceptance. A shortcoming in Article 19 is its failure to recognize this principle, as it is recognized in Article 18.

### 3. DEFINITNESS: ROLE OF EXPLICITLY AND IMPLICITLY

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<sup>9</sup> The exception being that silence or inactivity was made a form of effective acceptance by the parties through an express agreement, course of dealings, or the implication of trade usage. See Article 18(3).

<sup>10</sup> See United States 31 March 2010 Federal District Court [Alabama] (Belcher-Robinson, L.L.C. v. Linamar Corporation, et al.), <http://cisgw3.law.pace.edu/cases/100331u1.html>.

<sup>11</sup> See Germany 26 June 2006 Appellate Court Frankfurt (*Printed goods case*), <http://cisgw3.law.pace.edu/cases/060626g1.html>.

<sup>12</sup> See China 18 April 2003 CIETAC Arbitration proceeding (*Desulfurization reagent case*), <http://cisgw3.law.pace.edu/cases/030418c1.html>.

<sup>13</sup> See United States 25 July 2008 Federal District Court [Pennsylvania] (*Norfolk Southern Railway Company v. Power Source Supply, Inc.*), <http://cisgw3.law.pace.edu/cases/080725u1.html>.

<sup>14</sup> C. Sunstein, *Behavioral Law and Economics*, Cambridge University Press, New York 2000.

One theme that is consistent throughout the CISG is the role of implicit intent. The judge or arbitrator is free to imply intent or terms into a contract. This authority to imply is given expressly through such Articles as Article 8 (3) and Article 9 (usage and party practices), and Article 14(1) ("implicitly fixes" price or quantity). The power to imply is also given implicitly through the use of the term "reasonable" throughout the CISG. Nonetheless, the strongest probative evidence is evidence of the express intent of the parties. This leads to a bit of circular reasoning in that the more detail placed in the proposal the easier it is to imply an intent to be bound; the lesser the detail the less likelihood of finding the required intent. That said, Article 14 makes it clear that if there is clear intent (express words of intent or implied intent through course of dealings) to be bound, then the proposal need not contain much detail.

The definiteness requirement found in Article 14(1)—when there is a clear intent to be bound—is satisfied if the proposal (1) indicates (specifies) the goods, (2) a provision expressly or implicitly provides for determining the price, and (3) a provision expressly or implicitly provides for determining the quantity. These are issues of interpretation which will be discussed later and include: What is meant by "indicates the goods"? What is meant by "implicitly" fixing or making provision for determining the price and quantity?

### 3.1 Price Term: Articles 14 and 55

There is a debate on the relationship between Article 14 which requires at least an implicit fixing of the price term and Article 55 which acts as a gap-filler to imply a price into an open price term. Some scholars focus solely on Article 14 to determine if a contract has been formed. Under this analysis, unless the contract expressly or implicitly fixes a price, or expressly intends the price term to be open, there is no contract and therefore, no recourse to Article 55. Other scholars assert that if the offer does not fix the price, then Article 55 should be applied to fill in the gap.<sup>15</sup> This later approach expands the reach of Article 55 from filling in the gap of an express open price term to instances where no price term is provided. This expansion rests upon the dubious presumption that the parties implicitly agreed that Article 55 would apply to fix the price.

It has been noted that Article 14's notion of "implicitly" fixing the price term can be read broadly to include external factors not stated in the offer. This could include setting a price based open "objective parameters agreed to by the parties previously or tacitly."<sup>16</sup>

Article 14 (1) does not state that a price need actually be fixed. The issue then becomes how the price is to be fixed post hoc. In contrast, Article 55 provides a

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<sup>15</sup> Article 55 provides that the price is the price generally paid under comparable circumstances in the trade concerned at the conclusion of the contract.

<sup>16</sup> J.O. Albán, "Criteria for an offer," in J. Felemegas, *An International Approach to the Interpretation of the United Nations Convention on Contracts for the International Sale of Goods (1980) as Uniform Sales Law*, Cambridge University Press, New York 2007, 79.

default rule that allows a court or arbitral panel to imply a price without the guidance of the contract. It states that when a contract does not expressly or implicitly make provision for determining the price then a price may be implied by looking “to the price generally charged at the time of the conclusion of the contract for such goods sold under comparable circumstances in the trade concerned.”

This dilemma is produced because Article 14 does not reference Article 55 as a means of fixing a price. On the surface, Article 14 states that an offer *must* fix the price expressly or implicitly while Article 55 only applies to a concluded contract. The interpretive choices are that Article 55 controls Article 14 on the issue of price or that the Articles deal with completely different subjects. The former view would use Article 55 to fix the price as long as there was a general intent to enter a contract. It would salvage the contract even though the acceptance was, in reality, a faulty offer or non-offer. The majority view is that if the offer implicitly fixes or provides a mechanism to fix the price, then Article 55 is not available if the price becomes indeterminable.

If the parties do not implicitly or expressly fix a price or expressly agree to an open price, then the Article 14 analysis, as noted above, would recognize the proposal as a non-offer and therefore, no contract is formed. One argument around such a conclusion is that if the other party accepts the “non-offer” the parties are implicitly derogating from the rules of Article 14.<sup>17</sup> In this case, the derogation would be the elimination of Article 14’s requirement that a price must be expressly or implicitly fixed in the offer. If the parties perform as if there was a contract despite the fact that none was consummated due to a lack of a price term, it would seem reasonable for a court to imply one using Article 55.

#### **4. TO CONFIRM OR NOT TO CONFIRM: THAT IS THE QUESTION?**

A common practice in commercial sale of goods is for the parties to come to an oral agreement which is then confirmed in writing by one of the parties. Unfortunately, the CISG does not provide a written confirmation rule to deal directly with the effect of such instruments. The result, as stated by one commentator, has been that “courts applying the Convention have unfortunately not been consistent in their treatment of such ‘letters.’”<sup>18</sup>

The written confirmation is used in two scenarios. First, the written confirmation can be used as an instrument of offer or acceptance. If used as an offer, then there is no duty of the offeree to respond. If used as an acceptance, its effectiveness is determined under Article 18 or by Article 19. The second scenario is when two parties orally agree to a contract and one party follows it up with a written confirmation. An issue becomes does the

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<sup>17</sup> P. Huber & A. Mullis, 77.

<sup>18</sup> P. Huber & A. Mullis, 87.

receiving party have any duty to respond or object to terms in the confirmation that were not a part of the original agreement? The answer appears to be that there is no duty to respond or object. The contract is the one that the parties previously entered. However, the written confirmation provides powerful evidence in which there is conflicting testimony as to the contents of the oral agreement.<sup>19</sup> The burden of proof rests on the non-confirming party to show that a material term in the written confirmation is additional and not a part of the oral agreement

The terms of a written confirmation may be incorporated into the contract by way of course of dealings or usage. A Swiss court held that there was a trade usage in which a failure to respond to a written confirmation constitutes an acceptance of the terms in the confirmation.<sup>20</sup> A more conservative view holds that a trade usage pertaining to the effect of a written confirmation has to be international in scope.<sup>21</sup> Another court incorporated the terms of the written confirmation into the contract based upon the duty of good faith.<sup>22</sup> In that case a check was attached to the confirmation. The court reasoned that by accepting the check it was accepting the terms of the confirmation. In addition, in the non-battle of the forms scenario, CISG Article 18 states that silence is generally not to be construed as an acceptance. However, some courts have construed subsequent performance or conduct following receipt of a confirmation as an acceptance of the terms in the confirmation.

## 5. RELIANCE AND FIRM OFFERS

Article 16 was the result of compromise between the different approaches to irrevocable offers found in the civil and common laws. In most civil law systems, it is implied that the offer will remain open for a reasonable period of time. In common law parlance, almost all offers under the civil law are considered as firm offers. In contrast, the irrevocability of offers is very limited in the common law. The common law holds fast to the rule that the offeror is the master of the offer and has the ability to revoke any offer at any time even if the offer expressly states that it is irrevocable.<sup>23</sup>

### 5.1 OFFERS AND RELIANCE

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<sup>19</sup> P. Huber & A. Mullis, 88.

<sup>20</sup> Switzerland 21 December 1992 Civil Court Basel (*Textiles case*), <http://cisgw3.law.pace.edu/cases/921221s1.html>.

<sup>21</sup> Germany 5 July 1995 Appellate Court Frankfurt (*Chocolate products case*), translation available at <http://cisgw3.law.pace.edu/cases/950705g1.html>.

<sup>22</sup> Switzerland 5 November 1998 District Court Sissach (*Summer cloth collection case*), <http://cisgw3.law.pace.edu/cases/981105s1.html>.

<sup>23</sup> See U.S. Uniform Commercial Code §2-205 (needs to be in writing, signed, and not extend beyond 90 days).

Despite, these profound differences between the civil and common law systems, the compromise structured in Article 16 has resulted in a surprising paucity of cases. This may be due to the fact that the broad firm offer rule found in Article 16(2)(b) is partially reconcilable with the common law's doctrine of promissory estoppel. Under promissory estoppel, courts may recognize that the offeree had a good reason to assume that an offer would remain open for a certain period of time. The classic example is in the invitation to make bids for a component of a larger contract. The company making the offer or bid understands that the bid will be used as part of a larger bid on a prime contract. If the offeror elects to rescind its bid after the primary bid has been submitted an injustice is recognized and the revoking offeror will be required to pay damages.

Before analyzing reliance theory as the underlying norm of Article 16(2)(b) and the common law's promissory estoppel doctrine, the issue of whether the fixing of time necessarily results in a firm offer? The answer is that the fixing of time may have been intended not as a firm offer, but as fixing the time upon which the offeree has to accept before the offer self-terminates. In the common law, the fixing of time, unless under the very narrow confines of the American UCC firm offer rule, does not result in irrevocability, but for self-termination of the offer. Such an intent would eliminate Article 16(2)(a)'s reach under an express or implicit derogation under Article 16.

The reliance concept as applied in Article 16(2)(b) holds that as a general rule—in this case, the offeror's absolute right to revoke an outstanding offer—is suspended in order to prevent an injustice upon the offeree. It would be an injustice if the offeror knew or should have known of the offeree's reliance upon an offer remaining open and revokes nonetheless. Reasonable reliance can be created by a communication by the offeree that it is relying on the offer to remain open, prior or course of dealings, or if there is a well-known and existing usage in the industry that such offers remain open unless expressly stated otherwise.

An Austrian court took up the issue of reliance in the broader context of the CISG and used Article 16(2)(b) as an example. In that case, a buyer asserted that the seller had waived its right to assert that the notice of non-conformity was not timely. The arbitral tribunal found that the "seller had repeatedly made statements to the buyer from which the latter could reasonably infer that the seller would not set up the defense of late notice and that, in reliance upon this, buyer refrained from taking legal action not only against its own customer, but also against seller."<sup>24</sup> Citing Articles 7(1) and 7(2) and, by analogy, the reliance concept expressed in Articles 16(2)(b) and 29(2), the tribunal invoked the principle of estoppel as a bar to seller's use of the defense of late notice. The tribunal based the use of estoppel on the general principle of good faith.

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<sup>24</sup> Austria 15 June 1994 Vienna Arbitration proceeding SCH-4318 (*Rolled metal sheets case*), <http://cisgw3.law.pace.edu/cases/940615a4.html>.

The determination of reasonable reliance in the case of an offer should be decided under the interpretive methodology of Article 8. First, the intent of the parties, if discernable, controls whether an offer is irrevocable or not. Second, if intent is not provable, then the reasonable person standard shall apply. The reasonable person is placed in the shoes of the offeree to determine if it was reasonable for the offeree to assume that the offer would remain open. The Secretariat Commentary on Article 14 provides an example where the offeree's reliance would be deemed reasonable. It states that "where the offeree would have to engage in extensive investigation to determine whether he should accept the offer . . . the offer . . . should be irrevocable for the period of time necessary for the offeree to make his determination."<sup>25</sup>

## 6. CONDUCT AS ACCEPTANCE

Article 18(3) provides that in certain situations an acceptance can be effective through the conduct of the offeree. The situations in which conduct and not oral or written communication can be a means of acceptance include: (1) the offer expressly states or authorizes an acceptance by conduct, (2) the parties through previous dealings have established a practice of acceptance by conduct; and (3) a trade usage recognizes such a means of acceptance. However, a German court held that a partial delivery may indicate consent, but is not an effective acceptance under Article 18(3).<sup>26</sup> The court held that the delivery of less than the full quantity ordered amounted to a counter-offer that the buyer was free to accept or reject.

The most recent reported case applying Article 18 focuses on the use of conduct as a method of acceptance.<sup>27</sup> In the case, the offeree-buyer incorporated the offeror-seller's sales quote into a sales quote given to another party. The court held that the subsequent contract with the third-party was conduct of acceptance binding the original seller to a contract to supply the goods to the original offeree. In another case, the sending of an advanced payment was held to be an acceptance.<sup>28</sup>

It is important to note that the lack of a notice requirement in Article 18(3) doesn't apply to all acceptances by conduct. Article 18(3) only applies when the offer expressly authorizes acceptance by conduct ("send me the goods" or "send me the payment") or there is an existing course of dealing or usage.

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<sup>25</sup> Secretariat Commentary, Article 14, paragraph 8,  
<http://cisgw3.law.pace.edu/cisg/text/secomm/secomm-14.html>.

<sup>26</sup> Germany 23 May 1995 Appellate Court Frankfurt (Shoes case),  
<http://cisgw3.law.pace.edu/cases/950523g1.html>.

<sup>27</sup> United States 21 January 2010 Federal District Court [California] (Golden Valley Grape Juice and Wine, LLC v. Centrisys Corporation et al.), <http://cisgw3.law.pace.edu/cases/100121u1.html>.

<sup>28</sup> See Switzerland 29 April 2004 Commercial Court St. Gallen (Lenses case),  
<http://cisgw3.law.pace.edu/cases/040429s1.html>.



Otherwise, the offeree must notify or the offeror must have knowledge of the offeree's acceptance by conduct.<sup>29</sup> Acceptance by conduct without notification and acceptance by conduct with notification affects the type of conduct or performance needed to bind the contract. When conduct by performing an act is authorized by the offer, course of dealings or usage, then Article 18(3) can be read to mean that acceptance is only triggered by completion of the act. In contrast, where notification is required the notice of the beginning of the performance of an act may be sufficient.

The conduct without notice rule seemingly provides the opportunity for abuse by the offeror. This scenario would exist where the offeree begins performing the act and before completion receives a revocation from the offeror. This possible scenario can be prevented under the CISG in two ways. First, Article 18(3) does not require complete performance to bind the contract. The language of "performing an act" does not necessarily mean completion of all the offeree's duties under the contract. This is supported by the language that "performing an act" could be one "*relating to* the dispatch of goods or payment of the price." The "*relating to*" language indicates that the beginning of performance satisfies the performing of an act requirement. The second method to prevent the injustice noted above is that the offeror has lost its ability to revoke under Article 16(2) since this would be a case of reasonable reliance.<sup>30</sup>

## 6.1 ARTICLES 16(2) AND 18(2)

A question to be answered is the conflict between the self-termination rule in Article 18(2) and the irrevocable offer rules of Article 16(2). As noted earlier, Article 16(2)(b) poses the question of whether an oral offer that the offeree reasonably relies upon to remain open and one in which the offeree acted in reliance is transformed into an irrevocable offer? The most plausible answer taken solely from the reading of the text of the CISG is that since there is a specific rule of self-termination of oral offers in Article 18(2), the offeree is precluded from relying on the offer remaining open.

Nonetheless, the expression that the offer would remain open after the termination of the oral communication would seem to trigger the firm offer rule found in Article 16(2). It could also be evidence of intent of the offeror to derogate from Article 18(2). Article 8 provides a meta-principle that underlies the interpretation of many of the Articles of the CISG. The parties intent, in this case the intent of the offeror—by expressly stating the offer will remain open or under the circumstances provided grounds for the offeree to reasonably rely on the offer remaining open—whether through Article 18(2) or Article 16(2).

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<sup>29</sup> J.O. Albán in J. Felemegas, 103.

<sup>30</sup> See P. Schlechtriem & P. Butler, 76-77.

## 7. GENERAL CONDITIONS AND STANDARD TERMS

The incorporation of standard terms into a contract involves a number of scenarios including when the terms are found in only one form, such as an offer or the acceptance, are being inserted by one of the parties subsequent to the formation of the contract; or where each party uses forms with differing or conflicting standard terms. The first two scenarios will be discussed here; the battle of the forms scenario is discussed in Professor Eiselen's article.

In response to the issue of whether the standard terms of one of the party's become part of the contract, two approaches can be offered. First, the terms enter the contract automatically unless the other party promptly objects to their inclusion. The second, and seemingly predominant approach, is that something more than failure to object is necessary for the inclusion of the standard terms. The receiving party—whether the offeror or the offeree—needs to be aware of the standard terms before they can be incorporated into the contract. The awareness may be actual or constructive. A German court states that "within the scope of the Convention, the effective inclusion of standard terms and conditions requires not only that the offeror's intention that he wants to include his standard terms and conditions into the contract be apparent to the recipient," but also that the "recipient of a contract offer, which is supposed to be based on standard terms and conditions, must have the possibility to become aware of them in a reasonable manner."<sup>31</sup>

The German court also dealt with the issue of the incorporation of standard terms by reference. It asserts that the principle of good faith found in Article 7(1) requires that the offering party not only reference the terms but also must provide or make available the terms to the other party. It notes that in the international arena some countries do not provide specific rules to regulate standard terms (such as in the United States) while there are significant differences among those countries that have adopted standard terms regulations (such as Germany and France). The court concludes it is not the receiving party's duty to "enquire about the content of the standard terms and conditions." The risk of non-incorporation of the standard terms is placed on the sending party.

Some courts have emphasized the importance of a lengthy history of course of dealings. In one case, the parties agreed by telephone to enter a long-term supply contract that provided for numerous shipments and payments. The seller would send an installment, along with an invoice, and the buyer took delivery and made payment. On the face of each invoice was a provision that stated in French that: "Any dispute arising under the present contract is under

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<sup>31</sup>Germany 24 July 2009 Appellate Court Celle (*Broadcasters case*)  
<http://cisgw3.law.pace.edu/cases/090724g1.html>.

the sole jurisdiction of the Court of Commerce of the City of Perpignan."<sup>32</sup> The court concluded that the forum selection clause was not part of any agreement between the parties. It provided the rationale that the contract was the one orally agreed to and the unilateral and subsequent insertion of terms were not incorporated into the contract.

A 2010 United States case addressed this issue as it relates to the formation of contracts through the exchange of e-mail communications.<sup>33</sup> The seller's general conditions which included a forum selection clause were provided as an e-mail attachment to its sales quote. The buyer argued that the clause was not a part of the contract because the buyer had never agreed to them. The facts of the case show that the general conditions were available as an e-mail attachment. The buyer argued that he was unaware of their existence and even if they were aware they did not open the attachment and accept them as part of the contract. The court held that under article 14 the sales quote was an offer. But, did the quote incorporate the general conditions? The terms were available to the receiving party through the e-mail attachment. The court noted that the general conditions were not attached to just any correspondence but were provided contemporaneously with the sales quote. It is important to distinguish this case from those where a party tries to insert new terms or modify the contract subsequent to formation. This case deals directly with the formation of a contract and the determination of the terms of that contract.

In another scenario, is the case where following an initial agreement one of the party's attempts to incorporate its standard terms through subsequent documents? Most courts have held that general terms and conditions that are first provided in an invoice or a purchase order, subsequent to the formation of the contract, are not incorporated into the contract without express acceptance. Under Article 8, in order for standard terms to be incorporated into a contract, they must be included in the proposal in a way that the other party under the given circumstances knew or could not have been reasonably unaware of the offeror's intent to incorporate the terms.<sup>34</sup>

The main issue in the most recent case involving Article 18 is whether the seller's general conditions in the offer which included a forum selection clause became part of the contract.<sup>35</sup> Buyer argues that the mere receipt of the general conditions is not enough to recognize an acceptance of the conditions. He further argued that he did not affirmatively agree to the general conditions.

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<sup>32</sup> United States 5 May 2003 Federal Appellate Court [9th Circuit] (*Chateau des Charmes Wines Ltd. v. Sabaté USA, Sabaté S.A.*), <http://cisgw3.law.pace.edu/cases/030505u1.html>.

<sup>33</sup> United States 21 January 2010 Federal District Court [California] (*Golden Valley Grape Juice and Wine, LLC v. Centrisys Corporation et al.*), <http://cisgw3.law.pace.edu/cases/100121u1.html>.

<sup>34</sup> Austria 17 December 2003 Supreme Court (*Tantalum powder case*), <http://cisgw3.law.pace.edu/cases/031217a3.html>.

<sup>35</sup> United States 21 January 2010 Federal District Court [California] (*Golden Valley Grape Juice and Wine, LLC v. Centrisys Corporation et al.*), <http://cisgw3.law.pace.edu/cases/100121u1.html>.

The court held that the general condition terms of the offer were accepted when the buyer sold the product to a third-party. The court reasoned that since the general condition terms were part of the original offer they were not unilaterally incorporated into the contract.

In order to ensure the application of the general conditions a Dutch court asserted that the seller should have offered the buyer a reasonable opportunity before or at the time of concluding the contract in order to become aware of their content.<sup>36</sup> The court concluded that the buyer did not have a reasonable opportunity to become aware of the general conditions and could not reasonably have understood that these general conditions were part of the offer by the seller. In referencing the CISG, the court stated that the general conditions at hand can only become part of the contract if the application thereof was stipulated by the seller and accepted by the buyer pursuant to Article 14 et seq. of the CISG.

A recent German case<sup>37</sup> stated that the decisive factor is whether a reasonable person would have understood the confirmations (acceptances) as indicating an intention to incorporate the general conditions. The court's application of the reasonable person standard required that a certain threshold of communication was necessary before the general conditions could be deemed to be incorporated into the contract—at the minimum “the recipient . . . must be provided with the general conditions. CISG jurisprudence holds that there is no duty on the part of the receiving party to inquire about the content of the general conditions. That said, in the present case, the court indicated that there was an implicit duty if the incorporation of general conditions are set in a course of dealings between the parties. As to the intent requirement, the court noted that the buyer “knew from the negotiations that seller applied its general terms and conditions and intended to include them in the contract.”

## 8. SUBJECTIVE-OBJECTIVE TEMPLATE

The offer and acceptance rules of CISG Part II are applied through the interpretive template of mutual intent as provided in Article 8. Article 8(1) provides a first order rule that the subjective intent of the offeror to be bound or not bound controls. However, this is conditioned by the requirement that the other party “knew or could not have been unaware what that intent was.” Failure of the offeror to prove her subjective intent and the knowledge or imputed knowledge of the receiving party results in the use of the second order rule—the reasonable person perspective.

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<sup>36</sup> Netherlands 21 January 2009 District Court Utrecht (*Sesame seed case*), <http://cisgw3.law.pace.edu/cases/090121n1.html>.

<sup>37</sup> Germany 14 January 2009 Appellate Court München (*Metal ceiling materials case*), <http://cisgw3.law.pace.edu/cases/090114g1.html>.

In the area of the incorporation of general conditions or standard terms into a contract, as noted earlier, most courts require some objective evidence of awareness, knowledge, and/or understanding of those conditions by the receiving party before finding consent. Failing such evidence, courts have often held that the general conditions are not incorporated into the contract. U.S. courts take a much narrower view of objective evidence.<sup>38</sup> This should be understood under the backdrop that standard terms are generally enforced in the United States without needing to prove awareness, knowledge or understanding. The exception is if a term is subsequently found to be unconscionable (grossly unfair). Such unconscionability findings are a rarity in commercial contract adjudication. American courts do not determine if a party had actual awareness, knowledge, or understanding of the standard terms. However, they do recognize the general rule that a party cannot unilaterally change the terms of an existing contract.<sup>39</sup>

In applying Article 8, there is a strong argument that the inclusion of general conditions in commercial invoices over a series of transactions can lead to their incorporation. In making the argument that the receiving party gave an implied consent to their incorporation, the subjective and objective approaches merge. The subjective approach in Article 8(1) states that a party is bound if she "knew or could not have been unaware" of the other party's intent. The reasonable person standard of Article 8(2) could be used to support the argument that a reasonable person would have been aware of the general conditions and would have believed that they were intended by the other party to be part of the contract. The strength of this argument is wholly dependent upon the course of dealings, whether the general conditions were discussed, and trade usage. But, in a given contextual setting the argument could overcome the facts that there was no express consent and that the document was subsequent to the formation of the contract.<sup>40</sup>

## 9. CONCLUDING REMARKS

The importance of recognizing the interconnectedness of CISG Articles is especially acute in Part II, "Formation of the Contract." In many cases, numerous Articles of Part II are brought to bear in resolving a case. This article focused on the interconnectedness of Articles 14, 16, and 18 as they relate to each other and to other CISG Articles, such as Articles 6, 8, 9, 19, and 55. This interconnectedness should be mined by practitioners in the fabrication of arguments and rationales on behalf of clients engaged in a dispute. It is also

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<sup>38</sup> United States 16 June 2008 Federal District Court [Minnesota] (BTC-USA Corporation v. Novacare et al.), <http://cisgw3.law.pace.edu/cases/080616u1.html>.

<sup>39</sup> *Ibid.*

<sup>40</sup> See OLG München 7 U 4427/97, Mar. 11, 1998 (F.R.G.), available at <http://cisgw3.law.pace.edu/cases/930113g1.html>.

important to the transactional attorney in counseling its clients on the enforceability of contracts and contract terms. For example, in the area of incorporating standard terms or general conditions, it is best to expressly incorporate them into the contract. In incorporating standard terms, an attorney should advise her client to make sure the other party is aware of them, place a conspicuous reference to the terms on the face of the instrument, and provide a copy of the terms on the back of the form or attached to the form. Modification of long-term-supply contracts, such as an attempt of one of the parties to incorporate its general conditions, should be done with a greater deal of formality, such as an express agreement between the parties.



**Sieg Eiselen** is a professor of Private Law at the University of South Africa where he teaches Contracts Law, Electronic Commerce law and Unjustified Enrichment and Estoppel. He is currently the Secretary of the CISG Advisory Council and his previous posts include membership in the SA Law Commission Project Team on Unfair Contract Terms, he was a Chairman of the legal committee SAFTO electronic Data Interchange Project, United Nations Working Party 4 UN Economic Commission for Europe EDI Project SA representative on legal working group, member of the Government Inter-Departmental Advisory Committee on the Electronic Storage of Business Documentation , Chairman of the legal committee SABS Electronic Data Interchange Project and Member of the drafting team Electronic Communications and Transactions Act 25 of 2002 – responsible for Chapter III (contractual aspects), Chapter VII (consumer protection) and Chapter VIII (protection of personal information). He has published extensively both in South Africa and world-wide. He is the co-author of International Contract Manual (2008 Thompson/West), co-author of The Law of Contract in South Africa (2009 OUP), co-author of The Law of Commerce in South Africa (2009 OUP), co-author of Information and Communications Technology Law (2008 LexisNexis) and co-author of Unjustified Enrichment Law – A Case Book 3rd ed (2008 LexisNexis).





# **Incorporation of Standard Terms under the CISG Conflicting Terms**

Sieg Eiselen  
University of South Africa

## **Introduction**

- Party autonomy and the use of standard terms
- German Powdered Milk case 9 January 2002
- Incorporation by reference
- Battle of forms problem stated
- General principles of contract – difficulties in solving the problem
- Negotiated part of the deal v non-negotiated part
- Auxiliary legal issues only assuming importance during conflict

## Various solutions

- Strict mirror image approach
- Last shot approach
- Reliance (consensus) or commercially realistic approach
- Knock-out approach

## CISG approach

- Art 19 mirror image rule?
- Legislative history – Art 19
- Traditionalists v Reformists
- Belgian delegation proposal - Art 19(4)
- Battle of forms falls within the scope of the CISG
- Problem to be solved with reference to the CISG itself

# **Incorporation of Standard Terms under the CISG Conflicting Terms**

Sieg Eiselen  
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## **Proposed solutions: Domestic law**

- Issue falls outside the scope of the CISG
- Evades the apparent strict mirror image rule contained in Art 19
- Drafters considered Art 19 dealt with the issues sufficiently
- Majority view of commentators and courts

## Proposed solutions: Last shot rule

- Traditional Common Law approach
- Party succeeding in including it last wins the battle
- The rules of offer and acceptance (Art 14 and 180 determines
- Opportunistic and arbitrary, but legally certain
- Usually favours the seller
- Ping pong effect
- Unrealistic solution
- Exclusivity clause

## Proposed solutions: Modified consensus

- Method adopted by the German BGH in the *Powdered Milk* case
- Art 6 used as a key provision
- The attempted incorporation by the parties is ignored
  - Tacit exclusion of principles contained in Art 19
  - No reasonable reliance by either party on the inclusion of its standard terms
- Standard terms are ignored in total and displaced by the CISG
- Conflicting standard terms are knocked out and only consistent standard terms applied
- Realistic approach where parties through their conduct have shown that they regard the contract valid and binding despite dissensus on the incorporation of standard terms
- Somewhat artificial solution based on the strict application of the provisions of the CISG

# UNIDROIT Principles

- UNIDROIT Principles for International Commercial Contracts
- General approach to consensus – offer and acceptance (mirror image rule)
- Art 2.20(1) excludes surprising terms
- Specific provision dealing with the Battle of Forms

*terms, a contract is concluded on the basis of the agreed terms and of ARTICLE 2.22 (Battle of forms)*

*Where both parties use standard terms and reach agreement except on those any standard terms which are common in substance unless one party clearly indicates in advance, or later and without undue delay informs the other party, that it does not intend to be bound by such a contract.*

- Clear choice for the knock-out rule
- Aimed at keeping transaction alive
- 

## Conclusion

- Preference for the commercially reasonable approach adopted by the Bundesgerichtshof
- Consistent with the approach found in the Uniform Commercial Code (US) and the approach adopted by German courts in domestic disputes.
- Leads to a solution which is aimed at keeping the transaction in tact
- Leads to a uniform interpretation and application of the CISG by finding a solution relying on the provisions of the CISG rather than reverting to domestic law
- Despite some artificiality in the reasoning, best possible solution to the problem





**Martin Davies** is Admiralty Law Institute Professor of Maritime Law at Tulane University Law School in New Orleans, and Director of the Tulane Maritime Law Center. He holds the degrees of M.A. and B.C.L. from Oxford University, England, and an LL.M. from Harvard Law School. Before joining Tulane, he was Harrison Moore Professor of Law at The University of Melbourne in Australia and before that he taught at Monash University, The University of Western Australia and Nottingham University. He has also been a visiting professor at universities in Italy and Singapore.

He is author (or co-author) of books on maritime law, international trade law, conflict of laws, and the law of torts and many journal articles. He also has extensive practical experience as a consultant in maritime matters and general international litigation and arbitration. He has advised on cargo claims, arrest and admiralty matters, drafting bills of lading, sea waybills and charterparties, collisions and limitation of liability, oil pollution, salvage, marine insurance, maritime arbitrations and international sale of goods.





# Documents that Satisfy the Requirements of CISG Art. 58

Professor Martin Davies  
Admiralty Law Institute Professor of Maritime Law,  
Tulane University Law School  
Director, Tulane Maritime Law Center  
Uniform Sales Law Conference: The CISG at Its 30<sup>th</sup>  
Anniversary  
University of Belgrade Faculty of Law  
12 November 2010

## Article 58

- (1) If the buyer is not bound to pay the price at any other specific time, he must pay it when the seller places either the goods or documents controlling their disposition at the buyer's disposal in accordance with the contract and this Convention. The seller may make such payment a condition for handing over the goods or documents.
- (2) If the contract involves carriage of the goods, the seller may dispatch the goods on terms whereby the goods, or documents controlling their disposition, will not be handed over to the buyer except against payment of the price.
- (3) The buyer is not bound to pay the price until he has had an opportunity to examine the goods, unless the procedures for delivery or payment agreed upon by the parties are inconsistent with his having such an opportunity.

## The key question

- What are “documents controlling their disposition”?
- No definition given
- CISG Arts 30 and 34 use the phrase “documents relating to them”
- Generally accepted that “documents controlling their disposition” is narrower than “documents relating to them”
  - E.g., surveyor’s certificate on pre-shipment condition of goods “relates to” them but does not (usually) “control their disposition”

3



## Travaux préparatoires

- Not much help in the debates about what became Art. 58 itself
- Legislative history of Art. 68 more helpful
- Article 68 now uses the phrase “the documents embodying the contract of carriage”
- Original text was “documents controlling their disposition”
- John Honnold proposed the change, saying that “documents controlling their disposition” was likely to be understood as being limited to negotiable bills of lading
- Chairman, Roland Loewe, agreed
- So, in Vienna at least, “documents controlling their disposition” seems to have been understood to mean negotiable bills of lading

4



## Other languages

- As usual, equivocal
- Chinese (控制货物处置权的单据) and Russian (либо товарораспорядительные документы) are equivalent to the English phrase
- Arabic (او المستندات التي تمثلها), French (des documents représentatifs des marchandises) and Spanish (los correspondientes documentos representativos) closer to documents *representing* the goods
  - Manuel Alba Fernández says that the Spanish phrase is understood in the narrower sense to mean documents entitling the holder to possession

5



## Changing times, changing documents

- Negotiable bills of lading much less common than they were in 1980
  - Non-negotiable sea waybills are much more common in the liner trade
- International road, rail and air carriage has always used non-negotiable carriage documents
- UCP 600 (2007 revision) has provisions relating to several different types of non-negotiable transport documents
- Incoterms 2010 has been reorganized to remove the traditional emphasis on ship-specific trade terms (FOB, CIF, etc)

6



## Two possible responses

- Argue for a broader interpretation of CISG Art. 58: documents *representing* the goods
  - Non-negotiable transport documents *represent* the goods
- Continue to confine Art. 58 to negotiable transport documents
  - If non-negotiable transport documents are used, buyer's obligation to pay is then triggered only when the *goods* are placed at its disposition, there being no "documents controlling their disposition"
- I prefer the former: any document that acknowledges receipt of the goods and an undertaking to carry them to their destination should be included

7



## An aside about letters of credit

- Applicant/buyer may ask for many documents that do not control the disposition of the goods in the narrow sense
  - Commercial invoices
  - Survey certificates
  - Certificates of origin
  - Packing lists
- By agreeing to payment by LC, beneficiary/seller agrees to provide these in return for payment
- Therefore CISG Art. 58(1) does not apply
  - "If the buyer is not bound to pay the price at any other specific time..."

8



# The narrow reading

- Included
  - Negotiable bills of lading issued by an ocean carrier directly to the shipper
  - Straight bills of lading issued by an ocean carrier directly to the shipper
  - Ship's delivery orders (undifferentiated bulk)
  - Road and rail bills of lading (USA)
  - Warehouse receipts (Orderlagerschein)
- Excluded
  - Negotiable bills of lading issued by intermediaries (NVOCCs, MTOs)
  - Sea waybills
  - Air waybills
  - Road consignment notes
  - Rail consignment notes
  - Dock receipts
  - Mate's receipts
  - Commercial documents: survey reports, certificates of origin, insurance certificates

9



# Argument for the broader view

- (Changing times, changing documents)
- Goods carried under a non-negotiable transport document destroyed after risk has passed to buyer but before they reach the buyer's actual possession
  - Eg, New Orleans seller sells CIP Belgrade, carrier issues non-negotiable sea waybill, goods are destroyed in the container terminal in New Orleans or while at sea
- Buyer should be obliged to pay for the documents; seller is entitled to payment because risk had passed
- Narrow view of Art. 58(1) would impose no obligation on the buyer to pay
  - Goods will never be at buyer's disposal
  - No "documents controlling their disposition" in the narrow sense

10



# Insurance certificates

- A special case
- Clearly not “documents controlling...disposition” of the goods in the narrow sense
- Peter Schlechtriem’s example: destruction after risk has passed
  - Buyer may be unable to claim against the insurance without the certificate
  - Buyer should not be obliged to pay until it gets the insurance certificate
- Probably not a document *representing* the goods either
  - Represents the insurer’s promise to provide an indemnity
- Should be included

# Documents that Satisfy the Requirements of CISG Art. 58

**Martin Davies\***

## **I. Introduction**

What are “documents controlling [the] disposition” of the goods for purposes of Art. 58 of the U.N. Convention on Contracts for the International Sale of Goods (the CISG)? Under Art. 58(1), the buyer’s obligation to pay arises when the seller places the goods or “documents controlling their disposition” at the buyer’s disposal (unless the parties agree that payment should be made at some other specific time). Article 58(2) provides that if the contract involves carriage of the goods, the seller may send the goods to the buyer on terms whereby the goods or “documents controlling their disposition” will not be handed over to the buyer except against payment of the price. What documents trigger the buyer’s obligation under Art. 58(1) and what documents may the seller withhold under Art. 58(2)?

The phrase “documents controlling their disposition” is narrower than the phrase used in CISG Arts 30 and 34, “documents relating to them” (meaning the goods). Articles 30 and 34 are concerned with the seller’s primary obligation to “hand over” the documents “relating to” the goods. Clearly, only some of the documents “relating to” the goods are “documents controlling their disposition”, so there is broad (but not universal) agreement that the phrase in Art. 58 is narrower in meaning than that in Arts 30 and 34. For example, a document such as a surveyor’s report on the pre-shipment condition of the goods *relates* to the goods (and so must be “handed over” under Arts 30 and 34) but it does not control their disposition in the narrow sense. Conversely, the phrase “documents controlling their disposition” is more generic than the phrase “shipping documents”, which appears in Arts 32 and 67(2), and it focuses on different qualities of the document than the phrase “documents embodying the contract of carriage”, which appears in Art. 68.

Henry Gabriel has suggested that the phrase “documents controlling their disposition” refers only to documents giving the buyer the right to take possession of the goods, such as bills of lading or warehouse receipts.<sup>1</sup> Dietrich Maskow has argued for a broader view, namely that the phrase should be interpreted to refer to “any documents that are required in practice by the buyer”, which may extend to include invoices or certificates

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\* Admiralty Law Institute Professor of Maritime Law, Tulane University Law School, New Orleans, U.S.A.; Director, Tulane Maritime Law Center. I thank Jessica Marrero and Jennifer Rohrback for their invaluable research assistance, and also my doctoral students Han Deng and Yehya Badr for their assistance in translating the Chinese and Arabic texts of the CISG, respectively.

<sup>1</sup> Henry Gabriel, *The Buyer’s Performance Under the CISG: Articles 53-60 Trends in the Decisions*, 25 J.L. & Com. 273, 280-81 (2005).

of origin if the buyer is required by the Customs authorities of its country to present those documents before taking delivery.<sup>2</sup> Peter Schlechtriem argued for a still broader interpretation, namely that “controlling” documents should be interpreted in the sense of Arts 30 and 34, so that even an insurance certificate, for example, should be included, even though it is not required for the disposition of the goods, because the seller has not “placed the goods at the buyer’s disposal” until the insurance certificate has been tendered.<sup>3</sup> Manuel Alba Fernández has recently argued for a functional interpretation that would allow Art. 58 to adapt to new practices and legal changes, so that any transport document issued under a contract of carriage that enables the buyer to take delivery from the carrier should qualify.<sup>4</sup>

There is plenty of scope for scholarly disagreements of this kind because the CISG contains no definition of “documents controlling their disposition” and little assistance in the interpretation of the phrase can be found in the *travaux préparatoires* to Art. 58 itself. The phrase appeared in the Working Group draft as part of what was then Art. 39 and was adopted without comment by Committee of the Whole I in 1977.<sup>5</sup> It was incorporated in the Draft Convention of 1978 (then as Art. 54)<sup>6</sup> and was adopted, again without comment, as part of Art. 58 at the Diplomatic Conference in Vienna in 1980.<sup>7</sup> The only change made at the Diplomatic Conference was to introduce at the beginning of the article the words, “If the buyer is not bound to pay the price at any other specific time”, a proposal made in the First Committee by Argentina, Spain and Portugal.<sup>8</sup> At no time was there any discussion of what kind of documents would trigger the buyer’s obligation to pay. The UNCITRAL Secretariat Commentary on Art. 54 in the 1978 Draft simply repeats the phrase “documents controlling their disposition” without elaboration.<sup>9</sup>

The best interpretive assistance to be found in the *travaux préparatoires* lies not in the legislative history of Art. 58 itself, but in the legislative history of Art. 68. In the 1978 Draft, then-Art. 80 (which became Art. 68) used the same phrase, “documents controlling their possession”, which

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<sup>2</sup> Dietrich Maskow, *Article 58* in COMMENTARY ON THE INTERNATIONAL SALES LAW, THE 1980 VIENNA SALES CONVENTION p. 427 para. 3.1 (eds C.M. Bianca & M.J. Bonell, 1987).

<sup>3</sup> Peter Schlechtriem, UNIFORM SALES LAW – THE U.N. CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS p. 82, n. 327 (1986). In the same spirit, the most recent edition of Schlechtriem’s commentary states that maturity of the buyer’s obligation to pay is dependent on the seller’s presentation of “all documents as required by the contract”, including “insurance documents, certificates of origin or quality and/or customs documents”. Florian Mohs, *Article 58*, in SCHLECHTRIEM & SCHWENZER, COMMENTARY ON THE UN CONVENTION ON THE INTERNATIONAL SALE OF GOODS (CISG) p. 849 para. 16 (Ingeborg Schwenzer ed., 3d ed. 2010).

<sup>4</sup> Manuel Alba Fernández, *Documentary Duties of the Seller in Contracts for the International Sale of Goods: A Case for an Autonomous Interpretation of Article 58 of the Vienna Sales Convention*, in SCRITTI IN ONORE DE FRANCESCO BERLINGIERI, 1-2010 Il Diritto Marittimo 3 at 16-24 (2010).

<sup>5</sup> UNCITRAL *Yearbook VIII: 1977* (1978); A/CN.9/SERA/1977; E.78.V.7, p. 49, para. 348.

<sup>6</sup> UNCITRAL, *Report on Eleventh Session* (1978), A/33/17, p. 19.

<sup>7</sup> A/CONF.97/L.13, para. 35.

<sup>8</sup> A/CONF.97/C.1/L.189.

<sup>9</sup> Secretariat of the United Nations Commission on International Trade Law (UNCITRAL), *Secretariat Commentary*, A/CONF. 97/5, Commentary to Art. 54 of the 1978 Draft Convention, available at <http://www.cisg.law.pace.edu/cisg/text/secomm/secomm-58.html> (last visited July 22nd, 2010).



now appears only in Arts 58 and 67(1). At the Diplomatic Conference in Vienna, the First Committee approved an amendment to then-Art. 80 proposed by the United States, to substitute the words "documents embodying the contract of carriage" for "documents controlling their disposition".<sup>10</sup> Proposing the amendment, John Honnold said that the expression "documents controlling their disposition" was likely to be understood as being limited to negotiable bills of lading, whereas the rule about passing of risk in what became Art. 68 should apply whether the document was negotiable or not.<sup>11</sup> The Chairman, Roland Loewe, agreed, saying that the phrase "documents controlling the disposition of the goods" did indeed mean negotiable documents.<sup>12</sup>

The Chinese and Russian texts of Art. 58, "控制货物处置权的单据" and "либо товарораспорядительные документы" are equivalent in meaning to the English text "documents controlling their disposition". In the Arabic, French and Spanish texts, Art. 58 speaks literally of documents *representing* the goods, although it seems that in Spanish, at least, the phrase is understood in the narrower sense to mean documents entitling the holder to possession.<sup>13</sup> In Spanish, the relevant phrase is: "los correspondientes documentos representativos". In French, it is: "des documents représentatifs des marchandises". In Arabic, it is: "ادلة ثمت ي تلى تادانتس ملى وا".

Although the delegates at Vienna did not debate the meaning of the phrase "documents controlling their disposition" when considering Art. 58, it seems likely from their discussion about Art. 68 that they had in mind the traditional, negotiable bill of lading issued by an ocean carrier, which is the paradigm document controlling the right to possession of the goods it represents. Although negotiable bills of lading of this kind are still common when goods are carried by sea in bulk, they are much less common than they used to be in liner trades of goods carried by sea in containers, as Sections 2.1, 2.2 and 2.3 of this paper will demonstrate. Sections 2.5 and 2.6 will show that the documents used for international carriage of goods by road, rail and air are not (except in North America) and have never been "documents controlling [the] disposition" of the goods under the narrow interpretation of the phrase that makes it equivalent to documents giving the holder the right to possession. Thus, to summarize Section 2 in advance, bills of lading issued directly by ocean carriers control the disposition of the goods in the narrow sense, as do ship's delivery orders. Negotiable bills for sea carriage issued by intermediaries, sea waybills, air waybills, and road and rail consignment notes do not control the disposition of the goods in the narrow sense. In short, only two of the many different types of international transport document now in use clearly fall within the narrow interpretation of Art. 58.

Two responses are possible. The first is to argue for a broader interpretation of Art. 58, one closer in meaning to documents *representing*

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<sup>10</sup> A/CONF.97/C.1/L.231.

<sup>11</sup> Report of the First Committee, A/CONF.97/11, 32<sup>nd</sup> meeting, para. 13 (1980).

<sup>12</sup> *Id.*, para. 17.

<sup>13</sup> Alba Fernández, *supra* note 4, at 15.

the goods, as being much better suited to the kinds of document used for international transportation of goods in the 21st century.<sup>14</sup> This would at least match the literal text of the Arabic, French and Spanish versions, if not the way in which that text is apparently understood.<sup>15</sup> All of the transport documents considered in Section 2 represent the goods, each of them being at least a receipt acknowledging the carrier's possession of the goods and its undertaking to carry them to their destination. Under this broad interpretation of Art. 58(1), presentation of any kind of transport document would trigger the buyer's payment obligation.

An alternative approach would be to confine Art. 58 narrowly to traditional negotiable bills of lading, so that no other kind of transport document could trigger the buyer's obligation to pay the price under Art. 58(1). If any of the other kinds of transport document were to be used, the buyer's obligation to pay would be triggered only by the seller placing the goods at the buyer's disposition, there being no "documents controlling [the] disposition" of the goods. These two alternative interpretations will be considered in Section 4; the former is preferred. Section 3 considers other kinds of documents, such as warehouse receipts, ship's delivery orders and the other documents that a buyer typically asks to see as applicant under a letter of credit.

## 2. Transport Documents

### 2.1 Negotiable bills of lading and their decline

The classic example of a "document controlling [the] disposition" of the goods is the negotiable bill of lading issued by an ocean carrier. A bill of lading is made negotiable<sup>16</sup> by insertion of the words "To Order" in the box where the consignee is to be identified.<sup>17</sup> This operates as a promise by the carrier to deliver the goods at the named port of discharge to the order of the shipper (the person putting the goods on the ship, usually the seller or its representative) or other identified person.<sup>18</sup> The order is given to the carrier by indorsing the bill of lading and sending it to the person who is to take delivery, usually in return for the purchase price.<sup>19</sup> The new holder then

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<sup>14</sup> Alba Fernández, *supra* note 4, at 16-24.

<sup>15</sup> *Supra* note 13.

<sup>16</sup> Strictly speaking, a bill of lading "To Order" is not negotiable, but transferable: see *Kum v. Wab Tat Bank* [1971] 1 Lloyd's Rep. 439 at 446 (P.C.); *J.I. MacWilliam Co. Inc. v. Mediterranean Shipping Co. S.A. (The Rafaela S)* [2005] 2 A.C. 423 at 444 per Lord Bingham. It cannot give the transferee better title than the transferor has. It may, however, transfer the transferor's contractual rights to the transferee by indorsement, including the right to possession of the goods.

<sup>17</sup> *Henderson v. Comptoir d'Escompte de Paris* (1873) L.R. 5 P.C. 253 (PC) ("[T]o make bills of lading negotiable, some such words as 'or order or assigns' ought to be in them").

<sup>18</sup> *Parsons Corp. v. C.V. Scheepvaartonderneming "Happy Ranger" (The Happy Ranger)* [2002] 2 Lloyd's Rep. 357 at 363 para. [27] per Tuckey L.J.

<sup>19</sup> The bill of lading may be indorsed to the particular person – e.g. "Deliver to B or B's order" – which is called special indorsement, or indorsement in full, or it may be indorsed in blank, by the shipper simply writing its name on the back, which then means that whoever holds the bill is entitled to possession of the goods. See SCRUTTON ON CHARTERPARTIES AND BILLS OF LADING, p. 169 (Stewart Boyd, et al., eds, 21<sup>st</sup>

presents the original bill of lading to the carrier at the port of discharge. The carrier is entitled and obliged to deliver to the holder of the original bill of lading, without inquiring about whether it is the true owner of the goods.<sup>20</sup> The document thus controls the right to possession of the goods – it is the “key to the warehouse”.<sup>21</sup> Whoever has the indorsed original bill of lading is entitled to possession of the goods,<sup>22</sup> so there can be no doubt that such a document would satisfy the description in Art. 58 of “documents controlling...disposition” of the goods, even under the narrow interpretation.

“Straight” bills of lading name the consignee. They are not negotiable but they must be transferred to the named consignee and presented to the carrier in order for the consignee to be entitled to take possession of the goods.<sup>23</sup> Because the carrier is entitled to demand surrender of the original straight bill of lading before handing over the goods, this kind of document must also be regarded as a “document controlling...disposition” of the goods in the narrow sense of CISG Art. 58, as the buyer cannot take possession of the goods without the original document.

As noted above, the classic negotiable bill of lading is used far less often in modern international transportation than it was thirty years ago when the CISG was made. Increasingly, it has been replaced by non-negotiable sea waybills,<sup>24</sup> which are dealt with in Section 2.2. Sea waybills are particularly common for containerized cargoes on relatively short sea voyages, when the ship may arrive at the port of destination before there has been time for a traditional negotiable bill of lading to be negotiated to the intended receiver.<sup>25</sup> When negotiable bills of lading are used in relation to goods carried in containers, they are often issued by operators that are known as NVOCCs (Non-Vessel-Operating Common Carrier) in North

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ed. 2008). See also *Bandung Shipping Pte Ltd v. Keppel Tattee Bank Ltd* [2003] 1 S.L.R. 295 at [18]-[20]; [2003] 1 Lloyd's Rep. 619 at 622 per Chao Hick Tin, J.A. Indorsement in blank is more common in practice.

<sup>20</sup> *Barber v. Meyerstein* (1870) L.R. 4 H.L. 317.

<sup>21</sup> *Sanders Bros v. Maclean & Co.* (1883) 11 Q.B.D. 327 at 341 per Bowen L.J.

<sup>22</sup> The U.N. Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea 2009 (the Rotterdam Rules), Art. 47(1)(a)(i) adds the requirement that the holder of a “negotiable transport document” must properly identify itself as well as surrendering the original document *if* it is the shipper, consignee or person to whom the document has been indorsed. The requirement that the holder identify itself does not apply when the document has been indorsed in blank, which is what is usually done in practice: Rotterdam Rules, Arts 1(10)(a)(ii), 47(1)(a)(i). The Rotterdam Rules, Art. 47(1)(b) provides that the carrier shall refuse delivery if the original document is not surrendered or the holder does not properly identify itself (if required to do so).

<sup>23</sup> *APL Co. Pte Ltd v. Voss Peer* [2002] 4 S.L.R. 481; [2002] 2 Lloyd's Rep. 707 (Sin.C.A.); *J.I. MacWilliam Co. Inc. v. Mediterranean Shipping Co. S.A. (The Rafaela S)* [2005] 2 A.C. 423 (H.L.); *Porky Products, Inc. v. Nippon Express USA (Illinois), Inc.*, 1 F.Supp.2d. 227 (S.D.N.Y. 1997). See also Hugo Tiberg, *Legal Qualities of Transport Documents*, 23 Mar. Law 1, 32 (1998); Hugo Tiberg, *Transfer of Documents* [2002] L.M.C.L.Q. 539, 541, pointing out that German and Scandinavian law call such bills “recta bills”, which are “presentation documents”, in the sense that they must be presented to the carrier to take delivery. The Rotterdam Rules, Art. 51.2(b) provides that where a non-negotiable transport document contains a surrender clause, as straight bills of lading do, the consignee must present the original document(s) to the carrier in order to exercise its right to control the goods.

<sup>24</sup> In 1989, it was estimated that 70% of all liner goods on North Atlantic routes were carried under sea waybills: see Sir Anthony Lloyd, *The Bill of Lading: Do We Really Need It?* [1989] L.M.C.L.Q. 47, 49.

<sup>25</sup> PAUL TODD, *BILLS OF LADING AND BANKERS' DOCUMENTARY CREDITS* pp. 31-2 (4th ed. 2007).

America and as freight forwarders or multimodal transport operators (MTOs) elsewhere. Bills of lading of that kind are considered in Section 2.3.

## 2.2 Sea waybills

Sea waybills are non-negotiable transport documents for carriage of goods by sea. Their non-negotiable nature is unmistakable: they usually have the word “Non-Negotiable” printed across them in large, diagonally-sloping letters. In the box where the consignee’s name is to be written, the caption is usually “Consignee (not to order)”, making it clear that this document should not be made out “To order”, as a negotiable bill of lading would be.<sup>26</sup> The intended consignee is named on the waybill. The carrier undertakes to deliver to the named consignee. Importantly, there is no “surrender clause” on a sea waybill as there typically is on bills of lading, requiring one of the original bills of lading to be surrendered to the carrier in return for the cargo or a delivery order.<sup>27</sup> That is because the named consignee does not have to present the original sea waybill to the carrier in order to take delivery<sup>28</sup> (unlike the named consignee on a straight bill of lading, which must surrender the original bill of lading<sup>29</sup>). The named consignee simply identifies itself to the carrier as the person to whom delivery must be made. That procedure is reflected in the new U.N. Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea 2009 (the Rotterdam Rules), Art. 45, which deals with: “Delivery when no negotiable transport document or negotiable electronic transport record is issued”. Article 45(a) simply provides that the carrier shall deliver the goods to the consignee, which must properly identify itself as the consignee if the carrier requests it to do so.

Because there is no longer any need to present an original document to take delivery, sea waybills are very often made in electronic form and are simply e-mailed from consignor to consignee.

Given these qualities, there can be little doubt that a sea waybill is not a “document controlling...disposition” of the goods under the narrow interpretation of CISG, Art. 58. The document merely reflects the delivery instruction given by the shipper to the carrier. Unlike a bill of lading, the document itself has no impact on the disposition of the goods, which will be delivered by the carrier to the consignee no matter what happens to the waybill document. The consignee would be entitled to possession of the goods on arrival even if it never received a copy of the sea waybill, because the carrier’s obligation is simply to deliver to the named consignee upon proper identification.<sup>30</sup>

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<sup>26</sup> See, e.g., the Linewaybill and Combiconwaybill forms, two standard form sea waybills created by the Baltic and International Maritime Council (BIMCO), available online in several places, including <https://noppa.lut.fi/noppa/opintojakso/ac40a0050/.../merirahtikirja.pdf> (Linewaybill) and [http://www.infomarine.gr/bulletins/chartering\\_forms/combiconwaybill.pdf](http://www.infomarine.gr/bulletins/chartering_forms/combiconwaybill.pdf) (Combiconwaybill).

<sup>27</sup> See, e.g., the Conlinebill form, a BIMCO standard form bill of lading available in many places online, including <http://www.formag-agencies.com/docs/charters/conlinebill.pdf>.

<sup>28</sup> Hugo Tibergh, *Transfer of Documents* [2002] L.M.C.L.Q. 539, 542.

<sup>29</sup> See *supra* note 23.

<sup>30</sup> This will also be the position under the Rotterdam Rules, Art. 45(a).

Some sea waybills reserve to the shipper the right to change the consignee after the goods have been shipped. Others provide that the shipper is entitled to transfer the “right of control” to the consignee, provided that option is noted on the sea waybill and exercised before the carrier receives the cargo.<sup>31</sup> These variants allow one or other party, either the shipper or the consignee, to change the delivery instructions by substituting a new person to whom the carrier must make delivery.<sup>32</sup> Not even these types of sea waybill are “documents controlling...possession” of the goods under the narrow interpretation of CISG, Art. 58. Even when the option to change the identity of the consignee is exercised, the document itself plays no part in the disposition of the goods. It merely reflects the fact that the shipper has reserved to itself a right, or has transferred a right to the consignee. The substituted consignee is entitled to take delivery if it can identify itself as the substituted consignee, not by virtue of the sea waybill document itself.

A sea waybill does, however, undoubtedly *represent* the goods under the broader interpretation of CISG, Art. 58. It operates as a receipt for the goods, showing their quantity, weight and apparent condition when handed to the carrier, and it is evidence of the carrier's obligation to carry them to their destination.<sup>33</sup> To that extent, the waybill serves as a kind of sign or symbol for the goods while they are in the carrier's possession.

### **2.3 Bills of lading issued by multimodal transport operators, freight forwarders and NVOCCs**

In many cases, the seller or buyer of goods has little experience in dealing with international carriers. A seller of goods on CIP terms has contracted to arrange for carriage and insurance of the goods to the named port of destination<sup>34</sup> but it may not know how to go about contracting with a shipping line or buying cargo insurance. Often, traders in goods engage operators who specialize in international transportation, effectively delegating the task to them. Such operators are called many different things in different countries, often indicating slight differences in their function: freight forwarders, NVOCCs, logistics operators, multimodal transport operators (MTOs), etc.<sup>35</sup> An NVOCC undertakes to arrange transportation from point A to point B. Very often, it undertakes none of the carriage itself, but rather sub-contracts with road, rail, ocean and sometimes air carriers.<sup>36</sup>

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<sup>31</sup> See, e.g., the Linewaybill and Combiconwaybill forms, *supra* note 26.

<sup>32</sup> The Rotterdam Rules deal with this situation, too, in Art. 51.1, which defines the “controlling party” for a non-negotiable transport document without a surrender clause as the shipper, “unless the shipper, when the contract of carriage is concluded, designates the consignee, the documentary shipper or another person as the controlling party”.

<sup>33</sup> CAROL PROCTOR, *THE LEGAL ROLE OF THE BILL OF LADING, SEA WAYBILL AND MULTIMODAL TRANSPORT DOCUMENT*, Ch. 4, pp. 83 ff (Interlegal, 1997).

<sup>34</sup> International Chamber of Commerce, INCOTERMS 2000, CIP, para. A3. INCOTERMS 2010 come into operation on 1 January 2011.

<sup>35</sup> Hereafter, I shall use the North American name Non-Vessel-Operating Common Carrier (NVOCC), because it conveniently emphasizes the fact that such operators do not carry the goods themselves.

<sup>36</sup> The Rotterdam Rules are drafted to make provision for this kind of arrangement as well as the traditional form of carriage by sea, where the ocean carrier contracts directly with the shipper. Rotterdam Rules, Art.

The seller or buyer of the goods makes a contract with the NVOCC; the NVOCC makes sub-contracts with the actual carriers of the goods. When the seller hands the goods over to the NVOCC's first sub-contracting carrier, the NVOCC usually issues its own document to the seller, acknowledging receipt of the goods and undertaking to carry them to the named destination. Just like an ocean carrier, the NVOCC may issue a bill of lading<sup>37</sup> (sometimes called a "house" bill of lading), which is negotiable if made out "To Order" or non-negotiable if made "straight" for delivery to a named consignee, or the NVOCC may issue a waybill,<sup>38</sup> which merely acknowledges receipt and evidences the contract of carriage. The goods are actually carried by the NVOCC's sub-contractors pursuant to the terms of the contracts between the NVOCC and the actual carriers. The NVOCC may have bought a large block of space on an ocean vessel on a liner route under a slot charter party or some other kind of contract between the NVOCC and the ocean carrier.<sup>39</sup> Alternatively, the NVOCC buys space on a carrying ship on an ad hoc basis, depending on how much trade it arranges between the two ports in question. The ocean carrier usually issues its own transport document naming the NVOCC as shipper.<sup>40</sup> That document is usually a straight bill of lading (often called the main bill to distinguish it from the NVOCC's "house" bill) or a sea waybill, naming the NVOCC as shipper and the NVOCC's foreign agent or subsidiary as receiver. The main bill or waybill is non-negotiable, as there is no need for it to be made negotiable because the ocean carrier simply delivers the goods to the NVOCC or its agent at the port of discharge.

Under such an arrangement, which is very common in relation to goods carried in containers, the document that passes from the seller's hands to the buyer's hands under the sale contract is the NVOCC's bill of lading. The seller and buyer usually never see the ocean carrier's transport document, which regulates the sub-contracting relationship between the

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1(6)(a) defines "performing party" as a person other than the carrier that performs any part of the carrier's obligations. "Carrier" is defined as a person who enters into a contract of carriage with a shipper: Rotterdam Rules, Art. 1(6). Thus, the Rules provide for the situation where the contracting "carrier" does not perform itself, but sub-contracts with "performing parties".

<sup>37</sup> See, e.g., the Negotiable FIATA Multimodal Transport Bill of Lading (FIATA-FBL), designed for use by multimodal transport operators and issued subject to the UNCTAD/ICC Rules for Multimodal Transport Documents, available at many locations online, including <http://www.pier2pier.com/links/files/Certi/FBL.pdf>.

<sup>38</sup> See, e.g., the FIATA Multimodal Transport Waybill (FIATA-FWB), designed for use by multimodal transport operators, available in <http://www.oasis-open.org/committees/download.php/14902/annex2r.pdf>.

<sup>39</sup> See, e.g., *Metvale Ltd v. Monsanto International SARL (The MSC Napoli)* [2009] 2 Lloyd's Rep. 246 (slot charterers seek limitation); Mary Reilly, *Identity of the Carrier: Issues under Slot Charters*, 25 Tul. Mar. L.J. 505 (2001). If the contract between NVOCC and ocean carrier is a slot charter, the Rotterdam Rules would not apply as between ocean carrier and NVOCC: see Art. 6.1. Other types of carriage sub-contract might be governed by the Rotterdam Rules, although if the contract between NVOCC and ocean carrier amounts to a "volume contract" as defined in Art. 1(2), then special rules would apply as between the NVOCC and the ocean carrier, by operation of Art. 80.

<sup>40</sup> See, e.g., *Norfolk Southern Railway Co. v. Kirby*, 543 U.S. 14, 2004 AMC 2705 (2004), where an NVOCC (called a freight forwarder because it was Australian) issued a bill of lading to a seller of goods for carriage from Sydney, Australia to Huntsville, Alabama. The NVOCC/forwarder contracted with an ocean carrier, Hamburg Süd, for ocean transportation from Sydney, Australia to Savannah, Georgia, and for rail carriage from Savannah to Huntsville. Hamburg Süd issued an ocean bill of lading naming the NVOCC as shipper.

NVOCC and the ocean carrier. Importantly for our present purposes, the NVOCC bill of lading cannot be regarded as a “document controlling...disposition” of the goods in the strict sense, even if it is made negotiable by inclusion of the words “To Order”. True, a negotiable bill of lading issued by an NVOCC regulates the relationship between NVOCC, shipper and holder in the same way that a classic negotiable bill of lading does. The NVOCC will (or should) only hand over the goods (or arrange for them to be handed over) at the named place of destination in return for the original bill of lading, presented by the holder. Importantly, though, the NVOCC does not have (and may never have had) possession of the goods itself. It has the right to receive possession of the goods from the ocean carrier (or sub-contracting inland carrier) but that right is regulated by the terms of the contract between the NVOCC and the actual carrier. If, for example, the NVOCC owes freight to the ocean carrier, the ocean carrier may be entitled to exercise a lien over the goods for non-payment of freight, and may refuse to deliver them. In those circumstances, the NVOCC cannot give possession of the goods to the buyer of the goods at the place of destination in return for the original NVOCC bill of lading.

In other words, the NVOCC bill of lading does not *in itself* control the disposition of the goods, in the narrow sense of giving the holder the right to possession of the goods. It only does so in combination with the transport document issued by the ocean carrier (or other sub-contracting carrier). The latter document (the main bill) is not among those transferred from seller to buyer, as the seller may never see it. The NVOCC bill can have no effect in controlling the disposition of the goods in the narrow sense unless and until the ocean carrier (or other sub-contracting carrier) has made delivery under its contract of carriage with the NVOCC. Thus, a strict interpretation of Art. 58 should exclude NVOCC bills of lading from the category of “documents controlling [the] disposition” of the goods, because the NVOCC does not have and cannot give possession of the goods itself. The document may or may not control disposition of the goods, depending on the NVOCC's relationship with the sub-contracting carriers.

There can be no doubt, however, that an NVOCC bill *represents* the goods under the broader interpretation of CISG, Art. 58. It operates as a receipt for the goods, showing their quantity, weight and apparent condition when handed to the carrier (usually the first sub-contracting actual carrier), and it is evidence of the NVOCC's obligation to arrange carriage of them to their destination.

## 2.4 Ship's delivery orders

When goods are carried in bulk, a document known as a ship's delivery order is often generated by the carrier. The shipper of goods carried in an undifferentiated bulk<sup>41</sup> may sell parts of the cargo to different buyers. The bill

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<sup>41</sup> For example, if 40,000 metric tonnes of wheat are shipped on a ship with five holds (or 40,000 metric tonnes of oil on a ship with five cargo tanks), and the shipper later sells 25,000 metric tonnes to one buyer and 15,000 metric tonnes to another, it is impossible to tell where the first buyer's portion ends and the

of lading issued by the carrier to the shipper when the goods are shipped on board represents the whole quantity of the goods. In order for the seller to pass to several different buyers the right to take delivery of portions of the cargo that are presently undifferentiated, the seller must present to those buyers documents giving them the right to take possession of their respective portions. In short, the seller must be able to split the whole cargo into parts. That is achieved by the seller-shipper surrendering the bill of lading to the carrier in return for several ship's delivery orders corresponding to the amounts to be delivered to each of the buyers. The seller-shipper tenders a delivery order to each buyer, who takes delivery from the carrier of the quantity of cargo corresponding to its delivery order.<sup>42</sup>

Standard form contracts for the sale of bulk cargoes often expressly exclude the CISG,<sup>43</sup> so the question whether a ship's delivery order is a "document controlling...disposition" for purposes of CISG, Art. 58 will seldom arise in practice. If the question does arise, it seems clear that a ship's delivery order should qualify as a "document controlling...disposition" of the goods, even under the narrow interpretation of Art. 58, if tender of such a document is permitted under the sale contract. For all practical purposes, it functions in the same way as a bill of lading, except for an undifferentiated portion of the cargo on the ship.<sup>44</sup> Each buyer needs the ship's delivery order to take possession of its portion of the goods on the ship. The seller should be able to retain withhold the document under CISG, Art. 58(2) until the buyer pays, and the buyer should be obliged to pay under CISG, Art. 58(1) once it receives the document.

## 2.5 Road and rail consignment notes

### 2.5.1 Under the international conventions governing road and rail carriage

If the goods are to be carried from one country to another by road or rail, the transport document is usually a non-negotiable one. When the country of departure and the country of arrival are both party to the Convention

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second buyer's portion begins, except that it will be somewhere in the middle of one of the holds (or tanks). It is possible for dry bulk cargoes to be differentiated in advance by the use of separators, and for bulk liquid cargoes to be differentiated in vessels such as parcel tankers, which carry many different cargoes in small tanks.

<sup>42</sup> See, e.g., *Peter Cremer, Westfaelische Central Genossenschaft G.m.b.H. v. General Carriers, S.A. (The Dona Mari)* [1973] 2 Lloyd's Rep. 366 (cargo of bulk tapioca shipped under single bill of lading split into two by issue of ship's delivery orders for smaller quantities; ship's delivery order presented in return for payment by buyers, who presented their delivery orders to the carrier to take delivery).

<sup>43</sup> See, e.g., GAFTA Contract No. 100, cl. 28(b)(CIF terms bulk grain); GAFTA Contract No. 119, cl. 27(b)(FOB terms bag or bulk grain); FOSFA Contract No. 24, cl. 27(b) (CIF terms soybeans); FOSFA Contract No. 53, cl. 28(b) (FOB terms bulk vegetable and mineral oil), reproduced in MICHAEL BRIDGE, *THE INTERNATIONAL SALE OF GOODS*, Appendices 1-4 (2d ed. 2007). Each clause excludes the operation of the CISG. See also the NAEGA II Contract, cl. 27(b), produced by the North American Export Grain Association, Inc, which also excludes the CISG. It is available at <http://www.naega.org/images/naegacontract.pdf> (last visited July 21st 2010).

<sup>44</sup> It is not possible for the original bill of lading to be surrendered in return for several new bills of lading corresponding to the buyers' respective portions, as a bill of lading must be issued on shipment or soon thereafter. Splitting a cargo issued under a single bill of lading can only be done by issuing ship's delivery orders: see *S.I.A.T. Di Del Ferro v. Tradax Overseas, S.A.* [1978] 2 Lloyd's Rep. 470 at 493 per Donaldson J.



Concerning International Carriage by Rail 1980 (COTIF), rail carriage is governed by the Uniform Rules Concerning the Contract of International Carriage of Goods by Rail (CIM), which is Appendix B to COTIF. When either the country of departure or the country of arrival is party to the Convention on the Contract for the International Carriage of Goods by Road (CMR), road carriage is governed by CMR. Although COTIF and CMR were originally confined to Europe, they both now reach far beyond, to Scandinavia, the Middle East, North Africa and (in the case of CMR) Central Asia. Forty-five countries are party to COTIF,<sup>45</sup> of which 35 are also party to the CISG;<sup>46</sup> 55 countries are party to CMR,<sup>47</sup> of which 42 are also party to the CISG.<sup>48</sup>

For rail carriage under CIM and road carriage under CMR, the transport document issued by the carrier is called a consignment note. In both cases, the consignment note is non-negotiable; the consignee is named on the consignment note.<sup>49</sup> Consignment notes do not control possession of the goods but merely provide evidence of the contract and the condition of the goods received for carriage.<sup>50</sup> Under CIM, the consignment note is carried with the goods to the destination and delivered to the consignee there, and a duplicate copy is given to the consignor.<sup>51</sup> Under CMR, three original consignment notes are made: one is handed to the sender, one accompanies the goods and is handed to the consignee on arrival, and the third is retained by the carrier.<sup>52</sup> Under both conventions, the consignee is

<sup>45</sup> The parties are: Albania, Algeria, Austria, Belgium, Bosnia and Herzegovina, Bulgaria, Croatia, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Iran, Iraq, Ireland, Italy, Latvia, Lebanon, Liechtenstein, Lithuania, Luxembourg, The Former Yugoslav Republic of Macedonia, Monaco, Montenegro, Morocco, Netherlands, Norway, Poland, Portugal, Romania, Russia, Serbia, Slovak Republic, Slovenia, Spain, Sweden, Switzerland, Syria, Tunisia, Turkey, Ukraine and United Kingdom. Intergovernmental Organisation for International Carriage by Rail, *Intergovernmental Organisation for International Carriage by Rail (OTIF)*, para. 11 (July 2010), available at: [http://www.otif.org/fileadmin/user\\_upload/otif\\_verlinkte\\_files/01\\_vorstellung/01\\_allg\\_info/OTIF\\_Inf\\_o\\_07\\_2010\\_e.pdf](http://www.otif.org/fileadmin/user_upload/otif_verlinkte_files/01_vorstellung/01_allg_info/OTIF_Inf_o_07_2010_e.pdf) (last visited July 6th, 2010). The membership of Iraq and Lebanon is suspended because international rail traffic with those states is interrupted. *Id.* para. 12.

<sup>46</sup> Of the countries party to COTIF (see *supra* note 45), only Algeria, Iran, Ireland, Liechtenstein, Monaco, Morocco, Portugal, Tunisia, Turkey and the U.K. are not party to the CISG.

<sup>47</sup> The parties to CMR are: Albania, Armenia, Austria, Azerbaijan, Belarus, Belgium, Bosnia and Herzegovina, Bulgaria, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Georgia, Germany, Greece, Hungary, Iran, Ireland, Italy, Jordan, Kazakhstan, Kyrgyzstan, Latvia, Lebanon, Lithuania, Luxembourg, The Former Yugoslav Republic of Macedonia, Malta, Moldova, Mongolia, Montenegro, Morocco, Netherlands, Norway, Poland, Portugal, Romania, Russia, Serbia, Slovakia, Slovenia, Spain, Sweden, Switzerland, Syria, Tajikistan, Tunisia, Turkey, Turkmenistan, Ukraine, United Kingdom and Uzbekistan. United Nations Economic Commission for Europe (UNECE), *Legal instruments in the field of transport: Convention on the Contract for the International Carriage of Goods by Road (CMR)*, at [http://www.unece.org/trans/conventn/legalinst\\_25\\_OLIRT\\_CMR.html](http://www.unece.org/trans/conventn/legalinst_25_OLIRT_CMR.html) (last visited July 7th, 2010).

<sup>48</sup> Of the countries party to COTIF (see *supra* note 47), only Azerbaijan, Iran, Ireland, Jordan, Kazakhstan, Malta, Morocco, Portugal, Tajikistan, Tunisia, Turkey, Turkmenistan and the U.K. are not party to the CISG.

<sup>49</sup> CIM, Art. 7 § 1(g); CMR, Art. 6.1(e). CIM, Art. 6 § 5 specifically provides that the consignment note shall not have effect as a bill of lading.

<sup>50</sup> Hugh Beale & Lowri Griffiths, *Electronic Commerce: Formal Requirements in Commercial Transactions* [2002] L.M.C.L.Q. 467, 479; A.D. MESSENT & DAVID GLASS, HILL & MESSENT'S CMR: CONTRACTS FOR THE INTERNATIONAL CARRIAGE OF GOODS BY ROAD, Ch. 4 (3d ed. 2000).

<sup>51</sup> CIM, Art. 6 § 4 (duplicate copy to consignor), Art. 17 § 1 (original consignment note to be delivered to consignee).

<sup>52</sup> CMR, Art. 5.1.

entitled to demand delivery of both the goods and the consignment note after arrival of the goods at the place designated for delivery.<sup>53</sup> Because the consignee takes delivery of the goods and the original consignment note from the road or rail carrier at the same time, it is obvious that the original consignment note itself cannot constitute a “document controlling...disposition” of the goods under a narrow interpretation of CISG, Art. 58.

It has been suggested, albeit tentatively, that the provisions in CIM and CMR about the right of disposal have the effect that the duplicate consignment note (in the case of CIM) or the sender’s copy<sup>54</sup> of the consignment note (in the case of CMR) is a document controlling the disposition of the goods for the purposes of CISG Art. 58(1).<sup>55</sup> Both CIM and CMR give the consignor the right to modify the contract of carriage by giving subsequent orders to the carrier including, in particular, the right to deliver the goods to a consignee different from the one entered on the consignment note.<sup>56</sup> The consignee has that right under CIM unless the consignor indicates to the contrary on the consignment note; under CMR, the consignee has a right of disposal only if the sender makes an entry to that effect on the consignment note.<sup>57</sup> Thus, under CIM, the consignee has the right of disposal and the consignor does not unless the consignment note reserves the right to the consignor.<sup>58</sup> Conversely, under CMR, the sender has the right of disposal and the consignee does not unless the consignment note confers the right on the consignee.<sup>59</sup>

In order to exercise the right of disposal, the consignor or consignee must produce to the carrier the duplicate consignment note (in the case of CIM) or the first copy of the consignment note (in the case of CMR).<sup>60</sup> Thus, the consignor is no longer entitled to redirect the goods if it has sent the duplicate or first copy to the consignee.<sup>61</sup> Conversely, the consignee cannot exercise the right of disposal until it has received the duplicate or first copy from the consignor.<sup>62</sup> This is the basis for the argument that the duplicate or first copy may be a “document controlling...disposition” of the goods for purposes of CISG, Art. 58.<sup>63</sup>

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<sup>53</sup> CIM, Art. 17 § 1; CMR, Art. 13.1.

<sup>54</sup> CMR refers to this copy as the “first copy”, which is the expression that will be used hereafter.

<sup>55</sup> Leif Sevón, *Obligations of the Buyer under the Vienna Convention on the International Sale of Goods*, 106 *Juridisk Tidskrift* 327, 335 (1990). See also Maskow, *supra* note 2; Alba Fernández, *supra* note 4 at 22.

<sup>56</sup> CIM, Art. 18 § 1(c); CMR, Art. 12.1.

<sup>57</sup> CIM, Art. 18 § 3; CMR, Art. 12.3.

<sup>58</sup> CIM, Art. 18 § 2(d) provides that the consignor’s right is extinguished when the consignee becomes entitled to give orders under Art. 18 § 3. The consignee is entitled to give orders as soon as the consignment note is drawn up unless the consignor indicates to the contrary (see CIM, Art. 18 § 3), so the consignor’s right is extinguished immediately unless it is expressly reserved in the consignment note.

<sup>59</sup> CMR, Art. 12.3.

<sup>60</sup> CIM, Art. 19 § 1; CMR, Art. 12.5(a).

<sup>61</sup> CIM, Art. 17 § 7 and CMR, Art. 12.7 provide that the carrier is liable in damages to the consignee if it follows the consignor’s orders without requiring production of the duplicate (in the case of CIM) or first copy (in the case of CMR).

<sup>62</sup> CIM, Art. 19 § 1; CMR, Art. 12.5(a).

<sup>63</sup> *Supra* note 55.

That view overstates the significance of the duplicate or first copy. The document itself does not control the disposition of the goods in the narrow sense. If, under CMR, the sender does not reserve the right of disposal to the consignee on the face of the consignment note, transfer of the first copy of the consignment note does not pass the right of disposal to the consignee.<sup>64</sup> The UNECE Ad Hoc Working Party that drafted CMR considered and rejected such a rule, on the basis that it would have been contrary to the principle that the consignment note is not a negotiable instrument but principally a document of proof.<sup>65</sup> If the sender exercises the right of disposal by presenting the first copy to the carrier, it can divert delivery of the goods from the named consignee but in those circumstances, *ex hypothesi*, it is not presenting a document “controlling...disposition” to the *buyer*, it is exercising a right conferred on it by CMR, using the document as a means of proving to the *carrier* that it has that right.

If the consignee has the right of disposal,<sup>66</sup> it cannot exercise that right unless it presents the duplicate consignment note (in the case of CIM) or the first copy of the consignment note (in the case of CMR).<sup>67</sup> Nevertheless, the document itself does not control the disposition of the goods in the narrow sense. The consignor cannot exercise the right of disposal even if it still holds the duplicate or first copy.<sup>68</sup> Transfer of the document from consignor to consignee does not transfer the right of disposal, which has always been with the consignee; it merely gives the consignee the ability to exercise that right. If the duplicate or first copy is not transferred, the consignee is entitled to demand delivery of the goods without presentation of the document.<sup>69</sup>

In summary, possession of the duplicate consignment note (in the case of CIM) or the first copy of the consignment note (in the case of CMR) does not change who has the right of disposal. If the consignor has the right of disposal, transfer of the document does not give the consignee the right; if the consignee has the right of disposal, the consignor cannot exercise the right even if it has the document. Thus, under the narrow interpretation of CISG, Art. 58, which equates “documents controlling...disposition” with documents giving the holder the right to possession, neither the duplicate consignment note (in the case of CIM) nor the first copy of the consignment note (in the case of CMR) would qualify.

Both types of consignment note *represent* the goods under the broader interpretation of CISG, Art. 58 because they operate as a receipt for the goods, showing their quantity, weight and apparent condition when

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<sup>64</sup> Roland Loewe, *Commentary on the Convention of 19<sup>th</sup> May 1956 on the Contract for the International Carriage of Goods by Road*, 11 Eur. Transp. L. 311, 352, para. 119 (1976).

<sup>65</sup> *Id.*

<sup>66</sup> As it will automatically under CIM unless the consignment note provides otherwise, but not under CMR unless the consignment note so provides: see *supra* note 57.

<sup>67</sup> *Supra* note 62.

<sup>68</sup> CIM, Art. 19 § 2 expressly provides that the consignor’s right is extinguished if the consignee has the right of disposal, “notwithstanding that he [the consignor] is still in possession of the duplicate of the consignment note”.

<sup>69</sup> CIM, Art. 17 § 1; CMR, Art. 13.1.

handed to the carrier, and as evidence of the carrier's obligation to carry them to their destination.

### 2.5.2 In North America

In North America, transport documents for carriage by road and rail are called bills of lading. In the United States, for example, a road or rail carrier receiving goods for transportation from the United States to another country must issue a receipt or bill of lading.<sup>70</sup> All bills of lading, including road and rail bills, may be either negotiable or non-negotiable.<sup>71</sup> Because road and rail bills of lading issued in the United States are subject to the same provisions as those governing bills of lading for carriage of goods by sea,<sup>72</sup> they would be "documents controlling [the] disposition" of the goods even under the narrow interpretation of CISG, Art. 58, unlike their counterparts under CIM and CMR.

## 2.6 Air waybills

Goods carried by air from one country to another as cargo are carried under non-negotiable documents called air waybills. Like sea waybills and road and rail consignment notes, air waybills simply name the consignee to which delivery must be made.

When the country of departure and the country of arrival are both party to the Convention for the Unification of Certain Rules for International Carriage by Air 1999 (the Montreal Convention), the Convention governs the carriage.<sup>73</sup> Ninety-seven countries are party to the Montreal Convention,<sup>74</sup> of which 57 are also party to the CISG.<sup>75</sup>

The Montreal Convention requires an air carrier of cargo to issue an air waybill in three original parts, one for the carrier, one for the consignee and one for the consignor.<sup>76</sup> The carrier is obliged to deliver the cargo to the consignee on arrival at the place of destination, unless the consignor has exercised a right of disposal similar to that considered above in relation to

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<sup>70</sup> 49 U.S.C. § 11706(a)(rail); 49 U.S.C. § 14706(a)(road). Under both of these provisions, the carrier is only obliged to issue a bill of lading if it is subject to the jurisdiction of the Surface Transportation Board (STB), which is the case for road and rail carriage between the United States and a place in a foreign country: see 49 U.S.C. § 10501(a)(2)(F)(rail); 49 U.S.C. § 13501(1)(E)(road).

<sup>71</sup> 49 U.S.C. § 80103. 49 C.F.R. § 1035.1 stipulates the standard forms of order bills of lading and straight bills of lading that must be issued by rail carriers. 49 U.S.C. § 373.101 lists the information that must be contained in bills of lading issued by motor carriers.

<sup>72</sup> The Pomerene Act, 49 U.S.C. § 80101-16, applies to all bills of lading issued by a "common carrier", which includes road and rail carriers as well as sea carriers.

<sup>73</sup> Montreal Convention, Art. 1.2. The Convention also governs carriage from one place to another within a single State Party if there is an agreed stopping place within the territory of another State Party: Montreal Convention, Art. 1.2.

<sup>74</sup> The list of countries party to the Montreal Convention can be read at: <http://www.icao.int/icao/en/leb/mlt99.pdf> (last visited July 8th, 2010).

<sup>75</sup> The following 17 countries are party to the CISG but not the Montreal Convention: Belarus, Burundi, Gabon, Georgia, Guinea, Honduras, Iraq, Israel, Kyrgyzstan, Lesotho, Liberia, Mauritania, Moldova, Russia, Uganda, Uzbekistan and Zambia. All other countries party to the CISG are also party to the Montreal Convention.

<sup>76</sup> Montreal Convention, Art. 7.

CIM and CMR.<sup>77</sup> The consignor may stop the cargo in transit or may require the carrier to deliver it to a consignee other than the one originally designated, but it can only do so upon presentation of the consignor's copy of the air waybill.<sup>78</sup> Unlike CIM and CMR, the Montreal Convention does not confer a similar right of disposal on the consignee. Thus, there is never any need for the consignor to send its copy or the air waybill to the consignee. Accordingly, no copy of the air waybill can be regarded as a "document controlling...disposition" under the narrow interpretation of CISG, Art. 58. The copies of the air waybill play no part in establishing the consignee's right to delivery of the goods from the carrier.

## **2.7 Summary in relation to transport documents**

Negotiable bills of lading and straight bills of lading for sea carriage are "documents controlling...disposition" of the goods under the narrow reading of CISG, Art. 58 if they are issued by the sea carrier directly to the shipper. So are ship's delivery orders reflecting an undertaking by the carrier to deliver parts of an undifferentiated bulk to different receivers. Sea waybills, road and rail consignment notes and air waybills are not "documents controlling...disposition" of the goods under the narrow interpretation of CISG, Art. 58. Negotiable bills of lading for sea carriage issued by NVOCCs probably are not. In North America, road and rail bills of lading do fall within CISG, Art. 58, even under the narrow interpretation.

All of these documents *represent* the goods under the broader interpretation of CISG, Art. 58. All acknowledge receipt of the goods and the carrier's obligation to carry them to their destination and to deliver them there.

## **3. Other Documents**

### **3.1 Warehouse receipts (or warrants)**

The document known in the U.S.A. and in many other countries as a warehouse receipt (but in the U.K. as a warehouse warrant<sup>79</sup>) functions in much the same way as a bill of lading, but for the fact that the goods are not in transit in the possession of a carrier but rather are static in the possession of a warehouse keeper. When goods are deposited with it, the warehouse keeper issues a warehouse receipt, which may be negotiable or non-negotiable. A non-negotiable warehouse receipt is made out to a particular person, promising return of the goods to that person. A warehouse receipt is negotiable if it provides that the goods in the warehouse are to be delivered

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<sup>77</sup> Montreal Convention, Art. 13.1.

<sup>78</sup> Montreal Convention, Arts 12.1, 12.3.

<sup>79</sup> In the U.K., a warehouse receipt is a non-negotiable document simply acknowledging receipt of goods. Hereafter, the expression "warehouse receipt" is used in the American sense, which is in common usage in other countries, too. In the U.K. such a document would be called a warehouse warrant.

to bearer or to the order of a named person.<sup>80</sup> The holder of a negotiable warehouse receipt may sell or pledge the goods in the warehouse by dealing with the document.

Because it functions much like a bill of lading, a warehouse receipt is clearly a document "controlling...disposition" of the goods in the warehouse under the narrow interpretation of CISG, Art. 58. The fact that the goods remain in the warehouse until delivered to the holder of the document is immaterial, as they may still be the subject of a sale contract governed by the CISG if the seller and the buyer are in different Contracting States.<sup>81</sup> The German Bundesgerichtshof has described a warehouse receipt (in German, *Lagerschein*) as a "true transfer document" ("echten Traditionspapiere"), listing it as an example of the kind of document to which CISG, Art. 58(1) clearly applies.<sup>82</sup> Similarly, the Kantonsgericht St. Gallen in Switzerland described a negotiable warehouse receipt ("*Orderlagerschein*") as the kind of document to which CISG Art. 58 clearly applies.<sup>83</sup>

### 3.2 Dock receipts (or warrants), quai receipts, mate's receipts, etc.

Sometimes, a sea-carrier or dock or terminal operator issues a document known variously as a dock receipt, dock warrant or quai receipt, which acknowledges receipt of the goods at the port for later shipment on a ship.<sup>84</sup> Later, often not until the goods are shipped on board the ship, the carrier issues a bill of lading in return for the dock receipt, based on the information contained in the dock receipt. This practice is much less common than it used to be because of the increased use of multimodal bills of lading, under which the multimodal carrier acknowledges receipt of the goods long before they even arrive at the port for shipment onto a vessel, and also the use of "received for shipment" bills of lading issued by the carrier acknowledging receipt of the goods at the dock or container terminal, which are later simply indorsed with the words "shipped on board". Dock receipts may, however, still be issued for goods not carried in containers (break-bulk cargo), or goods to be consolidated with other cargoes into containers at the port (LCL or Less than Container Load cargo).

Similarly, for bulk cargoes, a document known as a mate's receipt is sometimes issued when the cargo is first delivered to the ship, acknowledging receipt of the goods and stating their apparent condition. The bill of lading is later issued in conformity with, and in return for, the mate's receipt.

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<sup>80</sup> See, e.g., the Uniform Commercial Code, U.C.C. § 7-104(a).

<sup>81</sup> CISG, Art. 1(1)(a).

<sup>82</sup> BGH VIII ZR 51/95 (3 April 1996), para. II.3, CLOUT Case 171. English translation by Peter Feuerstein available at <http://cisgw3.law.pace.edu/cases/960403g1.html#cx> (last visited July 8th, 2010); original German text available at <http://www.cisg-online.ch/cisg/urteile/135.htm> (last visited July 8th, 2010).

<sup>83</sup> Kantonsgericht St. Gallen, 3 ZK 96-145 (12 August 1997), CLOUT Case 216; CISG-online No. 330. Original German text available at <http://www.globalsaleslaw.org/content/api/cisg/urteile/330.pdf> (last visited July 13th, 2010).

<sup>84</sup> The dock receipt may in some cases be issued by the dock or terminal operator, rather than by the carrier: see, e.g., *Ferrex Int'l, Inc. v. M/V Rico Chone*, 718 F.Supp. 451, 1989 AMC 1109 (D.Md. 1988). Whoever issues the dock receipt, it typically incorporates the terms of the carrier's bill of lading: see, e.g., *Mediterranean Marine Lines, Inc. v. John T. Clark & Son of Maryland, Inc.*, 485 F.Supp. 1330 (D.Md. 1980).

It has been suggested that documents such as dock receipts should be regarded as falling within CISG, Art. 58 if transferred to the buyer,<sup>85</sup> but that seems undesirable. The carrier's obligation is to issue a bill of lading to the shipper named on the dock receipt or mate's receipt, regardless of who is actually in possession of the receipt.<sup>86</sup> If the buyer's obligation to pay were to be triggered by CISG, Art. 58(1) on presentation by the seller of the dock receipt or mate's receipt, the buyer might be left in the position of having to pay for the goods when the carrier could still, quite properly, issue a bill of lading to the seller, who could then sell the right to possession to someone else by indorsing the bill of lading to them.<sup>87</sup> Because the dock receipt or mate's receipt is not enough in itself to give the holder the right to possession of the goods, it should not qualify as a document "controlling...disposition" of the goods under the narrow interpretation of CISG, Art. 58.

It might be argued that a dock receipt or mate's receipt must be regarded as a document *representing* the goods and so must be included under CISG, Art. 58 under the broader interpretation, however undesirable the practical implications. The document does, after all, act as the carrier's (or dock or terminal operator's) initial acknowledgment of receipt of the goods, stating their quantity, weight and apparent condition. There are certainly circumstances in which it might seem appropriate at first sight to treat a dock receipt or mate's receipt as a document qualifying under CISG, Art. 58. For example, if goods are sold on FCA terms and a dock receipt is issued by the terminal operator when the goods are delivered to the port, but the goods are destroyed while waiting to be loaded, the buyer should still be obliged to pay for them because risk passes under FCA terms when the goods are handed to the terminal operator.<sup>88</sup> It might seem that the buyer should therefore be required to pay for the goods upon presentation by the seller of the dock receipt. However, transfer of the dock receipt would not give the buyer the right to sue the carrier or terminal operator, whichever issued the dock receipt, because it is not the contract of carriage nor even evidence of the contract of carriage, but merely a receipt.<sup>89</sup> Thus, the buyer should not be required to pay in return for the dock receipt, because purchase of the document would give it no rights against the carrier. In such a case, the seller should present the dock receipt to the carrier and demand a "received for shipment" bill of lading, which the carrier would be obliged to issue, notwithstanding the destruction of the goods before actual shipment. The seller should then transfer the "received for shipment" bill of lading to the buyer, demanding payment. Transfer of the "received for shipment" bill of lading would transfer to the buyer rights of suit against the carrier because it is evidence of the contract of carriage.

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<sup>85</sup> Maskow, *supra* note 2 at p. 427 para. 3.1.

<sup>86</sup> This principle is firmly entrenched as a matter of English law: see *Hathesing v. Laing* (1874) L.R. 17 Eq. 92; *Nippon Yusen Kaisha v. Ramjiban Serongee* [1938] A.C. 429 (P.C., appeal from India).

<sup>87</sup> See, e.g., *Nippon Yusen Kaisha v. Ramjiban Serongee* [1938] A.C. 429 (P.C., appeal from India).

<sup>88</sup> International Chamber of Commerce, INCOTERMS 2000, FCA, paras A4, A5. INCOTERMS 2010 come into operation on 1 January 2011.

<sup>89</sup> *A.R. Brown, McFarlane & Co. v. C. Shaw Lovell & Sons* (1921) 7 Ll. L. Rep. 36 (mate's receipt); MICHAEL BRIDGE, *THE INTERNATIONAL SALE OF GOODS*, p. 424 (2d ed. 2007).

This example serves to illustrate that a dock receipt or mate's receipt does not truly represent the goods but only the shipper's right to receive a bill of lading representing the goods. It ought not to qualify, even under the broader interpretation of CISG, Art. 58. The example also serves to illustrate a nuance that must be added to the broader interpretation. A document given by a carrier only represents the goods if it acknowledges receipt of the goods *and an undertaking to carry them to their destination*.<sup>90</sup> In the broader context of goods being carried from one country to another, which is explicitly referred to in CISG, Art. 58(2), it is appropriate to say that a document does not represent the goods unless it also represents the carrier's obligation to get them to their destination. A dock receipt or mate's receipt does not satisfy that requirement.

### 3.3 Survey reports, certificates of origin, etc.

Many other documents about the quality or condition of the goods may be generated before the goods leave the seller's country. When the buyer is paying by letter of credit, it will often require, via stipulation in the letter of credit issued by its bank, that the seller (the beneficiary under the letter of credit) should present such documents as a pre-shipment survey report, a packing list (in the case of goods in containers), a certificate of origin showing in which country the goods were produced, sanitary or phytosanitary certificates (in the case of food or plant products), commercial invoices, etc.

If the buyer has agreed to pay the purchase price by providing a letter of credit, the seller must present all of the documents stipulated in the letter of credit, whether or not they control the disposition of the goods, and those documents must be accepted by the nominated or confirming bank as conforming to the credit before the seller gets paid.<sup>91</sup> As applicant under the letter of credit, the buyer often makes payment conditional upon presentation of many kinds of document that do not control the disposition of the goods, such as commercial invoices, survey certificates, certificates of origin, packing lists, and so on. By agreeing to payment under a letter of credit, the seller accepts that it must present all of these documents before it is entitled to be paid. Thus, CISG, Art. 58(1) only has practical significance when payment is to be made other than by letter of credit.

If the buyer has not undertaken to pay by letter of credit, the question may arise whether documents of this kind fall within CISG, Art. 58, so that the buyer's obligation to pay does not arise until it receives them. As noted above, Peter Schlechtriem argued that any documents relating to the goods, including certificates of origin, should be "part of the seller's performance" under CISG, Arts 30 and 34 and so must be presented before the buyer's obligation to pay is triggered under CISG, Art. 58(1).<sup>92</sup> The German Bundesgerichtshof disagreed, stating that certificates of origin or quality

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<sup>90</sup> Alba Fernández, *supra* note 4, at 21.

<sup>91</sup> *Uniform Customs and Practice for Documentary Credits*, 2007 revision (UCP 600), Articles 7, 8, 15.

<sup>92</sup> Schlechtriem, *supra* note 3.



("Ursprungszeugnisse oder Qualitätszertifikate") are neither necessary nor sufficient to require payment of the purchase price by the buyer.<sup>93</sup> The Bundesgerichtshof is surely right on this point. In ordinary circumstances, certificates of origin and survey reports about the quality or condition of the goods clearly do not control the disposition of the goods in the narrow sense, nor are they even documents *representing* the goods in the broader interpretation of CISG, Art. 58. They are plainly documents *relating* to the goods, and so must be presented by the seller under CISG, Arts 30 and 34, but a buyer who has received a bill of lading or other document entitling it to possession of the goods should not be able to withhold payment simply because it has not received something like a certificate of origin or survey report.<sup>94</sup>

Dietrich Maskow has argued that documents such as certificates of origin should fall within CISG, Art. 58 if the buyer is required by the Customs authorities of its country to present those documents before taking delivery.<sup>95</sup> The same might be said in relation to sanitary or phytosanitary certificates if required by the quarantine authorities in the importing country. In these circumstances, the buyer cannot take physical possession of the goods unless and until it has the relevant document. In such a case, the certificate of origin (or other document) controls disposition of the goods even in the narrow sense. However, the Kantonsgericht St. Gallen in Switzerland has stated that CISG, Art. 58 applies to documents such as bills of lading or warehouse receipts and not to Customs documents ("ein Konossement oder ein Orderlagerschein, nicht um die Zollpapiere").<sup>96</sup> "Customs documents" ("Zollpapiere") could refer to any documents required by the Customs authorities in the buyer's country, such as a commercial invoice, a certificate of origin, a phytosanitary certificate, an export declaration or export permit from the authorities in the seller's country, import permits from the authorities in the buyer's country and so on.

### 3.4 Insurance certificates

Insurance certificates deserve special consideration. They are plainly not "documents controlling...disposition" of the goods under the narrow interpretation of CISG, Art. 58 because they have no effect whatever on what happens to the goods. They reflect only an obligation on the insurer to indemnify the assured in the event of loss or damage to the goods. Obviously, though, an insurance certificate is a very important document. Peter Schlechtriem highlighted the significance of such documents by

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<sup>93</sup> BGH VIII ZR 51/95 (3 April 1996), para. II.3; CLOUT Case 171. English translation by Peter Feuerstein available at <http://cisgw3.law.pace.edu/cases/960403g1.html#cx> (last visited July 8th, 2010); original German text available at <http://www.cisg-online.ch/cisg/urteile/135.htm> (last visited July 8th, 2010).

<sup>94</sup> Unless, of course, it has stipulated for presentation of these documents as a condition for payment under a letter of credit, in which case CISG, Art. 58(1) would not apply, in any event.

<sup>95</sup> Maskow, *supra* note 2 at pp. 427-8.

<sup>96</sup> Kantonsgericht St. Gallen, 3 ZK 96-145 (12 August 1997), CLOUT Case 216; CISG-online No. 330. Original German text available at <http://www.globalsaleslaw.org/content/api/cisg/urteile/330.pdf> (last visited July 13th, 2010).

positing a situation in which the purchased goods are destroyed after the risk has passed to the buyer.<sup>97</sup> In such a case, the buyer might be unable to claim on the insurance taken out for its benefit unless it had an insurance certificate containing details of the insurance cover. Schlechtriem's argument on this point is compelling. A buyer on CIF or CIP terms should not be compelled to pay the purchase price for goods unless and until it receives the ability to claim on the insurance relating to those goods. Although the seller's obligation to provide the buyer with details of insurance cover is imposed by the contract, the buyer's obligation to pay is not tied to it.<sup>98</sup>

It is desirable that the CISG should tie the two obligations together. That is impossible, however, under a narrow interpretation of CISG, Art. 58 because an insurance certificate simply does not control disposition of the goods in the narrow sense, by any stretch of the imagination. Schlechtriem's argument that "the seller has not placed the goods at the buyer's disposal"<sup>99</sup> until it has presented the insurance documents is unconvincing, because it is more relevant to the seller's obligation under Art. 30 to hand over the goods and documents than it is to the buyer's obligation under Art. 58(1). In the example posited by Schlechtriem himself, it would be impossible for the seller to place the goods at the buyer's disposal if they had already been destroyed. A better solution would be to say that the insurance certificate is a document *representing* the goods under the broader interpretation of Art. 58, and so must be presented by the seller to trigger the buyer's obligation under Art. 58(1). Admittedly, even that would be an exception, given that the interpretation otherwise favored here is that the document must acknowledge receipt of the goods and an undertaking to carry them to their destination.<sup>100</sup> In truth, all that an insurance certificate represents is the insurer's promise to provide an indemnity if anything befalls the goods. Without an expansive reading of Art. 58 to apply to insurance certificates, however, the situation described by Schlechtriem cannot be avoided.

#### 4. Interpretation of Article 58

On one view, the phrase "documents controlling their disposition" was not well chosen because it focused inappropriately on the kinds of negotiable document used in maritime transportation. Even in 1977, when the phrase was first drafted, international carriage of goods by road, rail and air was done using documents that do not control the disposition of the goods in the

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<sup>97</sup> Schlechtriem, *supra* note 3. One must also posit that the goods were sold on terms such as CIF and CIP, where the seller undertakes to buy insurance for the buyer. Schlechtriem's example would not work for goods bought on any of the F terms or CFR or CPT, because in each of those cases the buyer buys its own insurance. International Chamber of Commerce, INCOTERMS 2000, FCA, FAS, FOB, CFR, CPT, para. B3 states that the buyer has "No obligation" in relation to insurance, but in each case a footnote directs the reader to para. 10 of the Introduction, which explains that although the buyer has no obligation *to the seller* to buy insurance, that does not mean it is not in its own interest to buy insurance.

<sup>98</sup> International Chamber of Commerce, INCOTERMS 2000, CIF, para. A3, CIP, para. A3, both state that: "The seller must...provide the buyer with the insurance policy or other evidence of insurance cover". *Id.* para. B1 states only: "The buyer must pay the price as provided by the contract of sale".

<sup>99</sup> Schlechtriem, *supra* note 3.

<sup>100</sup> See *supra* note 90.

strict sense. Since then, that has become true for many types of sea carriage, too. As noted in the Introduction, one possible response is to read CISG, Art. 58 expansively, so as to make it apply to all kinds of documents used for international transportation, as well as such documents as warehouse receipts and ship's delivery orders. In the literal sense, the French, Spanish and Arabic texts of the CISG all speak of documents *representing* the goods, which all of the transport documents considered in Section 2 do in one way or another. According to this view, CISG, Art. 58(1) would trigger the buyer's obligation to pay on presentation of any of the types of transport document considered in Section 2. That view is consistent with the provisions of the Uniform Customs and Practice for Documentary Credits, 2007 revision (UCP 600), which contains provisions relating to non-negotiable sea waybills (Art. 21), air transport documents (Art. 23) and road, rail or inland waterway transport documents (Art. 24). If the buyer is to pay by letter of credit, it can ask for presentation of any of these types of document as applicant under the letter of credit. Under the broad reading of CISG, Art. 58(1), the seller could make payment conditional upon the handing over of any of these documents and, under Art. 58(2) could dispatch the goods on terms that the documents will not be handed over until the price is paid.

Another possible view is that the phrase "documents controlling their disposition" was deliberately chosen to apply only to negotiable bills of lading and other documents, like warehouse receipts and ship's delivery orders, that actually confer a right to possession of the goods. Non-negotiable air waybills and road and rail consignment notes were in daily use in 1977 when the provision was first drafted and in 1980 when the Convention was made. If the drafters had wanted to use a phrase broad enough to cover non-negotiable transport documents, they would have done so. According to this view, the references to documents in Art. 58 simply do not apply when non-negotiable transport documents are used. Because the buyer can take delivery of the goods whether or not it has possession of the non-negotiable transport document, its obligation to pay should not be contingent upon receiving the document. As a result, CISG, Art. 58(1) triggers the buyer's obligation to pay only when the goods themselves are placed at the buyer's disposition, because there are no "documents controlling [the] disposition" of the goods when non-negotiable transport documents are used. Similarly, under Art. 58(2), the seller could dispatch the goods on terms whereby the goods themselves will not be handed over until the price is paid, but could not withhold the non-negotiable transport documents relating to them – although it would have no real interest in withholding those documents, in any event, as they do not control the buyer's right to take possession of the goods. That view would be consistent with the fact that non-negotiable transport documents do not give the holder the right to possession of the goods, so the buyer routinely receives its own copy of them. The seller would be entitled to withhold delivery of the goods simply by exercising the right of disposal conferred by CIM, CMR, the Montreal Convention and (when and if

they come into force) the Rotterdam Rules,<sup>101</sup> and not by retaining possession of the document.

There are sound practical reasons for preferring the first of the two views described above. If the goods are lost or destroyed after the risk has passed but before they have been physically delivered to the buyer, the buyer should be obliged to pay the seller, even though it will never receive the goods. That result can only be achieved by imposing an obligation on the buyer to pay in return for the documents representing the goods. For example, if the goods are sold on CIP terms, risk passes to the buyer when the seller hands the goods to the carrier who is contracted to bring them to the agreed place of destination.<sup>102</sup> If the carriage contract between seller and carrier generates a non-negotiable transport document such as a sea or air waybill or a road or rail consignment note, there is no document controlling disposition of the goods under the narrower of the two interpretations of Art. 58 described above. If the goods were to be destroyed while in the carrier's custody, the buyer's obligation to pay for them would never be triggered under the narrow view of Art. 58(1) because the goods themselves could never be placed at the buyer's disposition and there would be no "documents controlling their disposition". Thus, if the seller were to present the non-negotiable transport document and insurance certificate to the buyer, as contemplated by CIP terms, the buyer would have no obligation to pay under Art. 58(1), despite the fact that the goods were destroyed after risk had passed to the buyer. The buyer's obligation to pay would then depend solely on the contract, which might be silent on this point.<sup>103</sup>

In contrast, the broader reading of Art. 58 would impose an obligation on the buyer to pay in return for the non-negotiable transport document, as it ought, given that risk had passed when the goods were destroyed. The buyer could then claim against the carrier or claim on the cargo insurance policy, if the seller were also to present the insurance certificate, as it ought to under CIP terms and CISG, Art. 30. That returns us to Schlechtriem's concern, considered in Section 3.4, that the buyer might be obliged to pay under Art. 58(1) even if the seller failed, in breach of its obligation under Art. 30, to hand over the insurance certificate. As noted above, although it is something of a stretch to say that an insurance certificate is a document *representing* the goods, the broader interpretation of Art. 58 may be sufficient to address that concern.

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<sup>101</sup> The Rotterdam Rules, Arts 50.1(c), 51.1(a) provide that the shipper under a non-negotiable transport document without a surrender clause (i.e., a sea waybill) is the "controlling party" and may give orders to the carrier replace the consignee by any other person, including the shipper itself, unless the consignee is designated as the controlling party. The seller would exercise its right under CISG, Art. 58(2) by not designating the consignee as controlling party.

<sup>102</sup> International Chamber of Commerce, INCOTERMS 2000, CIP, paras A4, A5. INCOTERMS 2010 come into operation on 1 January 2011.

<sup>103</sup> INCOTERMS 2000, CIP, para. B1 simply provides that: "The buyer must pay the price as provided in the contract of sale".

## 5. Conclusion

The phrase "documents controlling their disposition" in CISG, Art. 58 should be interpreted as referring to any documents representing the goods. That interpretation is consistent with the literal text of the Arabic, French and Spanish versions of the CISG, which are equally authoritative with the English, Chinese and Russian. Any document given by a carrier that acknowledges receipt of the goods and an undertaking to carry them to their destination would qualify. That would include negotiable ocean bills of lading, whether issued by the ocean carrier itself or an NVOCC, straight bills of lading, sea waybills, air waybills, road and rail consignment notes (and, in North America, road and rail bills of lading). It would also include other documents that give the holder the right to possession of the goods, such as warehouse receipts and ship's delivery orders. It would not include dock receipts or mate's receipts, commercial invoices, survey reports, packing lists and certificates of origin or quality, *unless* the Customs or quarantine authorities in the buyer's country demand presentation of such a document before the goods are released to the buyer, which may be the case with certificates of origin and sanitary or phytosanitary certificates. There are sound practical reasons for concluding that insurance certificates should be included as well, although in truth they neither control the disposition of the goods in the narrow sense nor do they represent the goods in the broad sense.





**Hiroo Sono**, LL.M 1990, University of Michigan Law School, is Professor of Law at Hokkaido University, Japan. Prior to joining the faculty in 2008 where he teaches civil law and international commercial law, he was Counsellor, Civil Affairs Bureau, Ministry of Justice (2006-08) and taught at Hokkaido University (2004-06), Kyushu University (1998-2004), and Kanazawa University (1994-98). His main field of interest is in the regulatory function of contract law in light of private ordering; as well as in the international developments in contract law including the CISG and the UNIDROIT Principles. He is a member of the CISG Advisory Council (CISG-AC); and a member of the Japanese Delegation to UNCITRAL Working Group VI (Security Interests).





*Uniform Sales Law Conference  
CISG at Its 30<sup>th</sup> Anniversary  
A Conference in Memory of Albert H. Kritzer  
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## **Non-Conformity and the Buyer's Duty of Examination and Notification**

Hiroo Sono  
Hokkaido University

### *Abstract*

When the seller delivers goods which do not conform to the contract, various remedies are available to the buyer under the CISG: right to performance, damages, avoidance, price reduction etc. However, buyers must be aware that the availability of these remedies is subject to fulfillment of one significant condition. Namely, the buyer must examine the goods (Art. 38 CISG) and must give notice to the seller specifying the nature of the lack of conformity (Art. 39 CISG). Otherwise, the buyer will suffer forfeiture of its rights to any remedy for non-conformity of the goods.

Such drastic consequence of the buyer's duty of examination and notification under the CISG has caused it to be a frequently disputed topic. This presentation will first provide a brief overview of the functioning of this duty. Issues that will be covered include when examination and notice should take place, and the required specificity of the notice. Then it will take up the criticism raised by some who argues that this duty is incompatible with practice in international trade, and that it produces unfairness for the buyer. Despite such criticism, this presentation will conclude by suggesting that interpretation and application of this duty in a manner conforming to practice is possible, desirable, and fair.





**Professor Michael Bridge** is currently Cassel Professor of Commercial Law at the London School of Economics. He was formerly Professor of Commercial Law and Dean of the Faculty of Laws of University College London and before that held chairs in McGill University (Montreal) and the University of Nottingham. He is also a barrister of the Middle Temple and a door tenant at 20 Essex Street Chambers. In Europe, Professor Bridge was a member of the Second and Third Lando Commissions on European Contract Law and a member of the Property Group for the Trento Project seeking the common core of European private law. He was also an advisor to the European Civil Code Study Group (secured transactions and transfer of property), which is developing proposals for the codification of European private law. His interests lie across a broad range of commercial law, principally in international and domestic sales, contract, personal property, insolvency, secured transactions and private international law. He is also interested in European private comparative law. He has written treatises for Oxford University Press on *The Sale of Goods*, *The International Sale of Goods*, *International Sale of Goods in the Conflict of Laws* ((with co-authors)) and *The Law of Personal Property Security* (with co-authors)). For the same publisher, he has co-edited a collection on *Cross-Border Security and Insolvency*, written a short text on *Personal Property* and contributed the chapter on Insolvency for its encyclopaedia on *English Private Law*. He is also the general editor of *Benjamin's Sale of Goods* (8<sup>th</sup> ed 2010). In addition, he has published about 100 articles and book chapters, mainly in the field of contract and commercial law including secured transactions.



## **Curing a Seller's Defective Tender or Delivery of Goods in Commercial Sales**

**By Michael Bridge**

A contract of sale of goods requires the seller to deliver to the buyer goods of a particular specification or quality or fitness.<sup>1</sup> This obligation may derive from express terms of the contract or it may arise by operation of law. In breach of contract, the seller tenders or delivers non-conforming goods. Does the seller have the right to cure that defective delivery by whatever means are appropriate? And does this question depend upon whether the seller is seeking to eradicate the non-conformity or merely to lessen its severity? Alternatively, does the buyer have the right to demand that the defective delivery be cured? In dealing with these questions, an examination will be made of the US Uniform Commercial Code (Article 2) and the UN Convention on the International Sale of Goods (CISG). It will be preponderantly devoted to the first of these two questions because the latter, concerning the buyer's right to cure, brings into play the doctrine of specific performance. Given the negative attitude of common law systems to specific performance in sale of goods cases,<sup>2</sup> there is therefore little to say about the right of a buyer under Article 2 to demand a cure. Moreover, where the goods delivered are non-conforming, we shall see that under the CISG the buyer's right to require performance by a defaulting seller is circumscribed. There are matters of precedence to consider, also, as between the seller's right to cure and the buyer's right to require performance.

### *Seller's right to cure*

Taking first the notion of a seller's right to cure, this is recognised in Articles 37 and 48 of the CISG. Although these provisions immediately derive from

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<sup>1</sup> The issue of curing defective documents is not dealt with in this paper.

<sup>2</sup> The buyer's cure is a more lively issue in consumer sales legislation: see, eg, UK Sale of Goods Act 1979, ss.48A *et seq* (transposing Directive 1999/44/EC on certain aspects of sale of consumer goods and associated guarantees); Saskatchewan Consumer Protection Act, S.S. 1996, c.C-30.1, s.57(1).

Articles 37 and 44 ULIS,<sup>3</sup> their inspiration comes from Article 2 of the American Uniform Commercial Code. There is no equivalent right in English<sup>4</sup> or French<sup>5</sup> law. An assessment of how the right to cure works in Article 2 supplies an appropriate base from which to examine the CISG provisions. It has aptly been said of the right to cure in the CISG that it is "one of the most difficult points to handle in the Convention".<sup>6</sup> It may also be said that the nature of cure is barely elucidated at all by the travaux préparatoires.

### **(a) Article 2 of the Uniform Commercial Code**

The Uniform Commercial Code establishes a seller's right to cure, not a buyer's right to demand cure. A buyer might in very rare cases seek specific performance of the contract of sale,<sup>7</sup> but this hardly adds up to a cure entitlement. The operative provision dealing with the seller's right to cure consists of two paragraphs. According to Article 2-508(1): "Where any tender or delivery by the seller is rejected because non-conforming and the time for performance has not yet expired, the seller may seasonably notify the buyer of his intention to cure and may then within the contract time make a conforming delivery." The points to note about this paragraph are as follows. First, the right to cure may arise whether or not the buyer has initially refused to take delivery. Secondly, since the buyer has either refused delivery or, having taken delivery has later rejected the goods,<sup>8</sup> difficult issues of protocol concerning access to the

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<sup>3</sup> Professor Tunc's Commentary on the Hague Conventions of 1964, included at the end of Volume 1 of the Conference Proceedings, gives no explanation of the origins or scope of these provisions. Cure first appears in the 1956 draft.

<sup>4</sup> See Law Commission, *Sale and Supply of Goods* (Law Com. No. 160, 1987), paras 4.13 *et seq.*

<sup>5</sup> See J Huet, *Traité de Droit Civil: Principaux Contrats Spéciaux* (LGDJ, 2<sup>nd</sup> ed 2001), para. 11754 (referring to the right as a "droit de 'porter remède'"). See also CM Bianca and MJ Bonell, *Commentary on the International Sales Law* (1987), pp.347-48 (Will) (noting the recognition of cure only in Sweden, Switzerland, Czechoslovakia and the United States).

<sup>6</sup> CM Bianca and MJ Bonell, *Commentary on the International Sales Law* (1987), p.349 (Will).

<sup>7</sup> Under Article 2-716.

<sup>8</sup> Article 2 draws a distinction between rejection (Article 2-601) and revocation of acceptance of the goods (Article 2-608), depending upon the time when the buyer seeks to throw the goods back on the seller. A significant issue, not dealt with in this paper, is whether Article 2-508 applies to revocation of acceptance as well as to rejection. There is no rational justification for confining it to rejection; the failure of Article 2-508 to mention revocation of acceptance appears to be an oversight. The draft amendment of Article 2-508, however, does mention revocation of acceptance but excludes it in the case of consumer contracts.

buyer's premises are avoided. Thirdly, the right to cure is evidently limited to cases where the buyer could "cancel" (ie, terminate) the contract as a result of the seller's breach of contract.<sup>9</sup> Fourthly, the type of cure is not stipulated. Since the seller will have retaken possession in order to effect a cure, the reference to making a conforming delivery cannot be confined to the provision of replacement goods. Fifthly, the right to cure in this paragraph is confined to cases of early delivery, but not necessarily to all cases of early delivery. The seller will also have to give notice to the buyer of an intention to cure, effect a cure and redeliver to the buyer, all "within the contract period",<sup>10</sup> which may not be possible in some cases of early delivery. A sceptic might ask how often cure takes place under Article 2-508(1). There is nothing in the Official Comments that points to any practical need for paragraph (1).<sup>11</sup> It may be making the dogmatic point, though not in so many words, that the restriction in paragraph (2) on the right to cure – the seller's reasonable belief that the buyer would accept the tender – has no part to play in a case where the seller cannot yet be said to be in breach of contract.<sup>12</sup> If this is the case, then all breaches of contract concerning non-conforming goods are ultimately collapsible into a single breach, the failure to deliver conforming goods by the due delivery date. On its face, Article 2-508(1) would seem to allow a seller consciously to chance, by taking early action, a delivery that he knows to be non-conforming. There seems no good reason to allow this. If a general norm of good faith is invoked to cut down any such action by the seller,<sup>13</sup> then it also cuts away the distinction between paragraphs (1) and (2). In sum, Article 2-508(1) appears to be redundant.

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<sup>9</sup> See Articles 2-601, 2-608(3) and 2-711; *Boies v Norton*, 526 S.W.2d 651 (Tex. App. 1975). Consequently, in such cases, the buyer's right to recover is not extinguished if he refuses cure, though the principle of mitigation of damages may come into play: *Bonebrake v Cox*, 499 F.2d 951, 957 (8<sup>th</sup> Cir 1974).

<sup>10</sup> If the seller has the choice of delivery date within a stated period, say July, but chooses to deliver at the beginning of the month, then the rest of the month remains for a cure under paragraph (1). But if the buyer has the choice of date within that period and stipulates the date, paragraph (1) ought not to apply since the delivery period has now expired.

<sup>11</sup> Article 2-508(1) has been traced to pre-Article 2 developments. See Note 69 Mich L R 130 (1970), citing S Williston, *Sales* (rev. ed. 1948), Vol 2, para. 459.

<sup>12</sup> For a similar view of Article 37 of the CISG, that there is an *anticipatory* breach in the case of early delivery, see P Schlechtriem and I Schwenger, *Commentary on the UN Convention on the International Sale of Goods (CISG)* (OUP, 3<sup>rd</sup> ed 2010), p.602 (Schwenzer).

<sup>13</sup> Article 1-201(b) (20) and 1-304 (honesty in fact and the observance of reasonable standards of commercial fair dealing).

Taking Article 2-508(1), therefore, as a rare case,<sup>14</sup> paragraph (2), which dispenses with the requirement of early delivery and redelivery within the contract period, becomes the more significant provision in practice. Building upon the other features of cure in paragraph (1), it allows for a cure within “a further reasonable time” in those cases where the seller “had reasonable grounds to believe...with or without money allowance” that his tender<sup>15</sup> of the goods to the buyer would be acceptable. According to the Official Comments, the purpose of paragraph (2) is to protect the seller from the “injustice” that would be caused by a “surprise rejection” by the buyer. Article 2-508 tempers strict cancellation rights available where the goods are non-conforming even in minor respects.<sup>16</sup> This is something that should be borne firmly in mind when making comparisons with the CISG.

Various features of Article 2-508(2) call for examination. The first is how good must the cure be. According to one case, the seller's right to cure is to substitute a conforming delivery for a non-conforming delivery.<sup>17</sup> This would mean that a better but still non-conforming delivery may not be substituted for the original delivery. It accords with the perfect tender rule in Article 2-601 but leading commentators take a more relaxed approach, arguing that the seller should be able to tender a price allowance to make up for defects in quality or quantitative shortcomings.<sup>18</sup> This argument may have something to commend it in a code that asks to be “construed liberally and applied to promote its underlying purposes and policies”,<sup>19</sup> and it may be a realistic, indeed almost fatalistic, way of accommodating the (often wayward) decisions of a wide variety of courts in a large federal state, but it does nothing for commercial certainty. First of all, Article 2-508(2) grants a seller the right to cure if he reasonably expected the buyer to take the goods with a money allowance.<sup>20</sup> To say that the money allowance may constitute the cure or a part of it is to conflate the circumstances giving rise to the right to cure with the cure itself. Moreover, Article 2-601 allows the buyer to reject the goods if they are non-conforming “in any respect”. Why should such a strict tender rule be expressed if in fact it does not apply in practice?

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<sup>14</sup> See Note 69 Mich L R 130, 134 (1970).

<sup>15</sup> The physical offering of the goods to the buyer at the point of delivery.

<sup>16</sup> Article 2-601.

<sup>17</sup> *Bowen v Foust*, 925 S.W.2d 211 (Mo. App. 1996).

<sup>18</sup> JJ White and RS Summers, *Uniform Commercial Code* (5<sup>th</sup> ed, 2000), p.338. Cf. the draft revision of Article 2-508, which refers to the seller effecting cure by making a tender of conforming goods” (emphasis added).

<sup>19</sup> Article 1-102(1).

<sup>20</sup> Article 2-508(2).



What stops the buyer from turning down repeated imperfect cures until the seller runs out of time?

Closely allied to the perfection of the cure is the form in which that cure is to be made. Apart from substitute goods, there is no reason to suppose that cure might not take the form of goods that have been adjusted or repaired to factory gate standard.<sup>21</sup> In this connection, the issue of "shaken faith" came to the fore in *Zabriskie Chevrolet Inc v Smith*,<sup>22</sup> where the faulty transmission of a new car made it practically inoperable and the dealer sought to substitute for it another transmission of unknown lineage from a car in its existing stock rather than from the factory. The cure was held to be ineffective because the buyer's faith in the car had been shaken and he would only be able to operate it in a state of nervous apprehension. The court's ruling on this point leaves unanswered questions. One possible inference is that replacement rather than repair is the only feasible cure where the defect is severe. If something as basic as the transmission is defective, who knows what other defects might come to light? It may therefore be that even a new transmission from the factory would have been insufficient. One criticism made of the case is that it might be interpreted as basing cure on the subjective concerns of the buyer, instead of on a reasonable buyer.<sup>23</sup> The judgment of the court supplies no grounds for this concern. Even if the particular buyer was more affected than most by the defect, there seems no good reason why the buyer should pay a continuing price in the shape of anxiety for the seller's breach.<sup>24</sup>

Going beyond replacement or repair, the tender of a cash allowance to make up for shortcomings cannot be justified as an alternative rendering of conforming delivery: the buyer's contractual entitlement concerns goods and not goods and cash.<sup>25</sup> A related question is whether a cure is properly made if it is not accompanied by payment to make up for costs

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<sup>21</sup> *Wilson v Scampoli*, 228 A.2d 848, 849-50 (D.C. App. 1967) ("minor repairs or reasonable adjustments" but not "patchwork goods or substantially repaired articles"). The possibility of repair is implicitly recognised in *Zabriskie Chevrolet Inc v Smith*. 240 A.2d 195, 205 (Sup. Ct. N.J. 1968).

<sup>22</sup> 240 A.2d 195 (Sup. Ct. N.J. 1968).

<sup>23</sup> JJ White and RS Summers, *Uniform Commercial Code* (5<sup>th</sup> ed, 2000), p.339.

<sup>24</sup> See also the discussion below of a reasonable time.

<sup>25</sup> Official Comment (4) to Article 2-508 states that "[e]xisting trade usages permitting variations without rejection but with price allowance...are not covered by this section". See also *Continental Forest Products Inc v White Lumber Sales Inc*, 474 P.2d 1, 3 (Sup. Ct. Or. 1970).

or inconvenience incurred by the buyer in permitting the seller to effect a cure or arising out of the non-conforming delivery.<sup>26</sup> There seems no good reason why an action for damages for earlier losses should in this way be secured against a seller's right to cure, and the same might be said for inconvenience and losses incurred by the buyer awaiting cure. But actual costs incurred present a more difficult case. A buyer who insists upon being put in funds to pay for the cost of packing and carriage, for example, might *de facto* compel the seller to make this offer, since this insistence by the buyer does not obstruct the seller's right to cure. Article 2-508, it is submitted, does not grant the seller the right to impose further costs on the buyer.

A vital issue concerning cure, which marks out paragraph (2) from paragraph (1), is the requirement in the former that the seller have "reasonable grounds to believe that [the tender] would be acceptable with or without a money allowance". The governing idea is to protect the seller from a surprise rejection of the goods by the buyer.<sup>27</sup> The existence of reasonable grounds thus goes to the initial tender and not to any proposed cure. The tender of upgraded goods, at least without any demand for a higher price, should fall within this formula.<sup>28</sup> So too should the onward transmission of goods by the seller without intermediate inspection, and thus without notice of defect, from a reputable supplier.<sup>29</sup> The reference in paragraph (2) to a money allowance has particular meaning for a seller who is aware of the defect but believes, because of its minor character or because of past dealings or trade practice, that the buyer would accept the goods at a discount. The notion of good faith is immanent in the reference to the seller's reasonable grounds.<sup>30</sup> Consequently, the substitution of the seller's good faith for the seller's

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<sup>26</sup> The court required both in *Moulden & Sons Inc v Osaka Landscape & Nursery Inc*, 584 P.2d 968 (Wash. App. 1978) (cost of regrading cinders already spread in a school playing field) on the ground that the buyer was entitled to be put in the same position as if no breach had occurred (p.970). But this is not what Article 2-508 says.

<sup>27</sup> Official Comment (2).

<sup>28</sup> *Bartus v Riccardi*, 284 N.Y.S.2d 222 (1967).

<sup>29</sup> *T.W. Oil Inc v Consolidated Edison Co*, 443 N.E.2d 932 (N.Y. App. 1982). The case concerned oil with a higher sulphur content than that provided for by the contract. The seller was unaware of the higher content but it seems that knowledge of this would not have prejudiced its right to cure, since the seller knew that the buyer burned fuel with that higher content.

<sup>30</sup> See *T.W. Oil Inc v Consolidated Edison Co*, 443 N.E.2d 932, 937 (N.Y. App. 1982).

reasonable grounds, in the draft revision of Article 2-508,<sup>31</sup> marks no break from the previous position.

There is also the time element to consider in Article 2-508(2). First, the seller must "seasonably" notify the buyer of his intention to cure. Secondly, he must substitute a conforming tender within a reasonable time. The seller's seasonable notification is timed according to the buyer's seasonable notice of rejection to the seller.<sup>32</sup> That notice must also state the particular defects ascertainable by reasonable inspection, or else the buyer may not rely upon those defects to establish breach or justify a lawful rejection if, *inter alia*, the seller could have cured the defects had they been stated seasonably.<sup>33</sup>

As for the reasonable time in which the seller's cure must be effected, the first question concerns those contracts where the time of performance is of the essence of the contract. So far as the cure takes effect beyond the due delivery date, it cannot be compatible with the importance attached by the contracting parties to time<sup>34</sup> since a breach where time is of the essence is a material breach, giving rise to the right to cancel,<sup>35</sup> and it is axiomatic that a time breach cannot be cured. As for the length of time allowed in other cases, it is obviously at large and dependent upon the particular circumstances of a given case.<sup>36</sup> The most important consideration ought to be whether, given the buyer's circumstances, the buyer might after a period turn to an alternative supplier for the goods. Although it is arguable that any particular circumstances concerning an urgent need for the goods ought to be disclosed to or contemplable by the seller at the contract date, it is submitted that the buyer's

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<sup>31</sup> "[A] seller that has performed in good faith, upon seasonable notice to the buyer and at the seller's expense, may cure the breach of contract, if the cure is appropriate and timely in the circumstances, by making a tender of conforming goods" (not adopted).

<sup>32</sup> Article 2-602(1).

<sup>33</sup> Article 2-605(1)(a). The reference to establishing breach is odd since, mitigation apart, a seller is not allowed to cure in order to reduce or eliminate a damages claim.

<sup>34</sup> But it seems to be implied, albeit vaguely, that cure might still take place in *June G. Ashton Interiors v Stark Carpet Corp*, 491 N.E. 2d 120 (Ill. App. 1986).

<sup>35</sup> See the discussion of material breach in *Ramirez v Autosport*, 440 A.2d 1345 (N.J. Sup. Ct. 1982).

<sup>36</sup> *Ramirez v Autosport*, 440 A.2d 1345, 1349 (N.J. Sup. Ct. 1982): "The determination of what constitutes a further reasonable time depends on the surrounding circumstances, which include the change of position by and the amount of inconvenience to the buyer. [Article 2-508] Official Comment 3. Those circumstances also include the length of time needed by the seller to correct the nonconformity and his ability to salvage the goods by resale to others."

circumstances as they exist at the date of rejection should be determinative.<sup>37</sup> The issue should not be confused by any diverting controversy about the role of subjective or objective considerations. It is the buyer's circumstances as they exist at the time that matter. The buyer at this point is not seeking a remedy against the seller. The buyer has the remedy of rejection and cancellation and the question is whether, by means of a cure, the seller should be able to take this remedy away from the buyer. A seller who has breached the contract should take his chances. Cure exists in the shadow of the perfect tender rule.

Finally, a striking feature of Article 2 is the cumulation of commercial and consumer contracts, as though both types could indifferently be dealt with under a statute that is supposedly based on mercantile mores. A preoccupation with *rigor commercialis* is hardly to be expected in consumer cases, where some of the laxity concerning the application of cure is commonly found in the case law. Apart from this, perhaps the greatest mystery of the cure provision in Article 2-508 is why it is there in the first place. It is a commonplace observation that cure is justified because this is the way business parties behave in practice.<sup>38</sup> But just because many buyers (how many?) are prepared to waive their rights is no ground for depriving them all of their rights. If buyers are prepared to exercise discretion in favour of the seller, it is better to leave this as a matter of business practice and commercial judgment, and not to hedge it with legal sanctions. Cure in Article 2-508 ultimately finds its justification in the derivation of an ought-proposition from an is-statement. The judgment that Article 2-508 "substantially complicates the job of a lawyer who represents the buyer who wishes to reject" and "raises almost as many [more?] problems as it answers"<sup>39</sup> says more or less all that needs to be said about this provision.

## **(b) Article 37 and 48 of the CISG**

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<sup>37</sup> Official Comment (3) refers to the "attendant circumstances" in defining the reasonable time.

<sup>38</sup> See, eg, JJ White and RS Summers, *Uniform Commercial Code* (5<sup>th</sup> ed, 2000), p.332: "[Article] 2-508 simply recognizes a general pattern of business behaviour and adds a legal sanction to those economic and nonlegal sanctions which the parties had and have."

<sup>39</sup> JJ White and RS Summers, *Uniform Commercial Code* (5<sup>th</sup> ed, 2000), p.339.

Article 37, as noted above, allows the seller to cure a defective delivery prior to the due date of performance.<sup>40</sup> It also provides that notwithstanding such cure "the buyer retains any right to claim damages as provided for in this Convention". There is no equivalent in Article 2-508 and the immediate question is whether this refers to damage caused by the breach or as a result of the cure effected by the seller. The former, so far as it can be distinguished from the latter, would be subject to the foreseeability rule in Article 74 whereas the latter, as long as it is a claim for damages created by Article 37 itself, might not be. If the conclusion were reached that a seller tendering defective performance does not commit a breach at all while time remains to correct that defective tender, then Article 37 would have to refer to cost and inconvenience arising out of the seller's cure itself. The problem with this conclusion, which otherwise appears sound, is that Article 37 states that a buyer "retains"<sup>41</sup> a right to claim damages, as though it existed prior to any cure effected by the seller. Furthermore, the history of the Convention makes it plain that the damages refer to losses caused by the early delivery and not the cure.<sup>42</sup> The necessary conclusion is that any losses caused by the cure itself would have to be claimed as damages under Article 74. They would therefore have to be traced causally back to the breach of contract and would have to pass the test of foreseeability in Article 74.

The division between Articles 37 and 48 appears to have its origins in the division between paragraphs (1) and (2) of Article 2-508. In one sense, the division goes further in that Article 37 is located in the Chapter dealing with the obligations of the seller, in the section concerned with the delivery of goods and handing over of documents, whereas Article 48, though in the same Chapter, is in a section dealing with remedies for breach of contract by the seller. Since cure is the exercise of a right by the seller, this is a strange piece of legislative dislocation, but it ought not lead to any practical consequences. In another and more important sense, the differentiation between paragraphs (1) and (2) of Article 2-508, based on

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<sup>40</sup> "If the seller has delivered goods before the date for delivery, he may, up to that date, deliver any missing part or make up any deficiency in the quantity of the goods delivered, or deliver goods in replacement of any non-conforming goods delivered or remedy any lack of conformity in the goods delivered, provided that the exercise of this right does not cause the buyer unreasonable inconvenience or unreasonable expense. However, the buyer retains any right to claim damages as provided for in this Convention."

<sup>41</sup> In a similar vein, the French version says "conserve".

<sup>42</sup> Report of the Secretary-General of 7 December 1972, para. 78 (A/CN.9/WG.2/WP.16) (Yearbook Vol IV, p.46). In addition, an earlier version of Article 37 carried an explicit cross-reference to Article 82 (the previous numbering of Article 74).

whether or not the seller believed that the buyer would accept delivery, is altogether absent from Article 48, thereby subverting the need for any distinction at all between the two provisions.

The conclusions reached above as to the unnecessary nature of the distinction between paragraphs (1) and (2) of Article 2-508, and the lack of any practical need for paragraph (1), are therefore mirrored in the evident redundancy of Article 37. Article 37, like UCC Article 2-508(1), does not sanction premature performance,<sup>43</sup> but rather applies where the seller has a range of dates within which he may lawfully perform. An examination of the case law, as well as the literature, shows a complete lack of impact on the law of international sale.<sup>44</sup> Nothing of any real substance emerges from the Secretariat Commentary except that one of the examples given inspires one commentator to remark that Article 37 allows a seller to convert an entire contract into an instalment contract.<sup>45</sup> It is proposed to say no more about Article 37 except to note that it goes into a level of detail about the form of cure that is not seen in Article 48. Article 37 speaks of the seller delivering missing parts, making up a deficiency in quantity, delivering replacement goods and remedying any lack of conformity in the goods. This and other points of differentiation from the text of Article 48 will be discussed below. There is no mention in Article 37 of a money allowance.

Article 48 carries in practice the main burden of dealing with cure but, even here, it is remarkable how uninformative the cases are. They are few in number, even when counting those that merely note in passing cure as part of the legal landscape, and say scarcely any more than the Article 37 cases. The main provision is in paragraph (1):

“Subject to article 49, the seller may, even after the date for delivery, remedy at his own expense any failure to perform his obligations, if he can do so without unreasonable delay and without causing the buyer unreasonable inconvenience or uncertainty of reimbursement by the seller of expenses advanced

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<sup>43</sup> According to Article 52(1): “If the seller delivers goods to the buyer before the date fixed, the buyer may take delivery or refuse to take delivery.”

<sup>44</sup> Some cases repeat the rule expressed in Article 50 that a buyer may not reduce the price when refusing to accept remedied performance by the seller under Article 37.

<sup>45</sup> P Sarcevic and P Volcken, *International Sale of Goods: Dubrovnik Lectures* (1986), p.164 (Enderlein). The absence of any rule, similar to the one in many legal systems, that the buyer is not bound to accept part delivery is noted in P Schlechtriem and I Schwenzer, *Commentary on the UN Convention on the International Sale of Goods (CISG)* (OUP, 3<sup>rd</sup> ed 2010), p.604 (Schwenzer).

by the buyer. However, the buyer retains any right to claim damages as provided for in this Convention."

First of all, the reference to damages is a *fortiori* to the seller's liability for loss caused by the breach since, unlike the case of Article 37, there is no doubt about the existence of a breach.

The next issue concerns the type of cure that is permissible. It is a bewildering feature of the CISG that the degree of detail referred to in Article 37 is absent in Article 48. There is no reason, however, why a seller might not appropriately cure under Article 48 by the same range of methods expressly mentioned in Article 37. The lack of identical expression can perhaps be put down to simple unintentional differentiation between two texts that were not considered side by side in the drafting process. Accordingly, the seller ought to be able to cure by supplementing a short delivery, substituting conforming for non-conforming goods or repairing or altering the goods, as appropriate. The debate should centre, not so much on the form of the cure, but upon two other matters: first, the question whether the cure causes unreasonable inconvenience to the buyer; and secondly, whether the buyer can insist upon his right to require performance. This right might take the form of repair under Article 46(3), or replacement goods under Article 46(2). May the seller insist on replacement goods instead of repair (Article 46(3)) or, in the event of a fundamental breach, insist upon repair when the buyer is demanding replacement goods (Article 46(2))?<sup>46</sup> Before this question is considered, it should first be remarked that it is very doubtful that a seller could "remedy" a failure to perform by tendering a money allowance instead of new or repaired goods. This would be tantamount to the payment of damages up front, and would thus be compensation rather than performance. In a Convention that puts a far higher value upon requiring performance than does the common law – which is entirely consistent with the civil law commitment to *pacta sunt servanda* – it is scarcely arguable that the seller's non-conforming performance is remedied by the offer of a cash allowance or some other financial inducement.

Whatever legitimate method of cure the seller proposes, the buyer is not required to accept it if it would cause "unreasonable delay...[,] unreasonable inconvenience or uncertainty of reimbursement by the seller of expenses advanced by the buyer". There is no mention here of

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<sup>46</sup> This second question is dealt with in combination with the discussion below of Article 48(2)-(4).

adequate assurance of performance<sup>47</sup> or – an extension of the idea – adequate assurance of *reimbursement*, but no doubt something of this nature might be appropriate in particular circumstances, for example, where the buyer is being requested to incur significant insurance and carriage expenses in returning the non-conforming goods to the seller. A more fundamental question is why the buyer should in any event be required to make these payments, for the history of commerce is littered with the bodies of merchants, good for the money, who unexpectedly become insolvent. Nevertheless, Article 48 appears to assume<sup>48</sup> that a proper form of cure may require the buyer's cooperation by assuming such expenses prior to reimbursement. Although Article 48 refers to the uncertainty of reimbursement by the seller, it does not as such render relevant the amount of expenses<sup>49</sup> that a buyer might incur in cooperating with a seller who is attempting a cure. It may be, nevertheless, that beyond a certain point of expenditure, the buyer is being put to a degree of inconvenience that goes beyond the seller's right to cure.

Unreasonable inconvenience, which in effect includes unreasonable delay, is more than a matter of expenditure on the part of the buyer. This restriction is a matter of degree that can only be elucidated by a so-far insufficient body of case law. Appropriate considerations should include whether continuing delay on the part of the seller creates mounting losses for the buyer and whether the buyer has to divert time and energy to assisting the seller when there is other business for the buyer to conduct. Realistically, the existence of other opportunities for the buyer is relevant, particularly where the buyer reasonably entertains doubts about the seller's capability or commitment to cure. In all, the legislative formula chosen is a bait for dispute, but in all likelihood the same could have been said about any formula. The problem resides in the nature of cure – the attempt to impose legislatively a solution that contracting parties are better able to work towards following their own practical and commercial

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<sup>47</sup> For which see Articles 71-72. P Schlechtriem and I Schwenzer, *Commentary on the UN Convention on the International Sale of Goods (CISG)* (OUP, 3<sup>rd</sup> ed 2010), p.736 note 15 (Müller-Chen) (asserting – on what legislative ground? – that the seller has to find security for costs).

<sup>48</sup> P Schlechtriem and I Schwenzer, *Commentary on the UN Convention on the International Sale of Goods (CISG)* (OUP, 3<sup>rd</sup> ed 2010), p.736 (Müller-Chen); Turku Court of Appeal (Finland) 12 November 1997. Where time is of the essence, it should be the case that any extension of cure beyond the delivery date should amount to unreasonable delay. See Handelsgericht Zug (Switzerland) 10 February 1999.

<sup>49</sup> And since the reference is to expenses, the recoverability of damages for breach of contract does not directly come into play.



instincts. It is questionable how often commercial parties in this position will even consider the legal position on cure as they work to resolve the problem facing them.

As for the consistency between the buyer's right to require performance and the seller's right to cure, mentioned above, it has been argued that the latter should prevail.<sup>50</sup> This is far from being obviously the right conclusion. Requiring performance is a primary right of a buyer entitled to receive performance; curing defective performance is in the nature of a concession to the seller, a *locus poenitentiae*, who is being offered a chance to redeem himself.<sup>51</sup> The performance required by the buyer may also redeem the seller, in the sense that it might preserve a contract that would otherwise be avoided by the buyer for fundamental breach or might reduce the amount of damages to which the seller would otherwise be liable if the required performance were not given. These considerations would seem to apply to both conflicts between cure and requiring performance referred to above. The performance required by the buyer amounts to a type of cure by the seller, except that it is not the cure that the seller would prefer to have given. Subject to one matter, there seems no reason to prefer the seller to the buyer and every reason to propose instead that the buyer's right to require performance trumps the seller's right to cure.<sup>52</sup> That matter concerns the case of the buyer's preferred performance being disproportionately more expensive than the seller's preferred cure. One response to this is to say that a tribunal, interpreting Articles 46 and 48 in accordance with good faith,<sup>53</sup> should not read those provisions in favour of the buyer when it is wholly unreasonable to resist the form of cure offered by the seller. Those provisions are ambiguous enough to give the tribunal room to operate the standard of good faith in favour of the seller. Although the rule of mitigation would not apply here, since it is not a question of reducing the buyer's damages, the principle that Article 77 embodies might encourage a tribunal to interpret the Convention against the buyer's claim.

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<sup>50</sup> CM Bianca and MJ Bonell, *Commentary on the International Sales Law* (1987), p.356 (Will); P Schlechtriem and I Schwenzler, *Commentary on the UN Convention on the International Sale of Goods (CISG)* (OUP, 3<sup>rd</sup> ed 2010), p.741 (Müller-Chen).

<sup>51</sup> See the Comments of the Committee of the Whole on the 1977 draft at para.276 ("any possibility to cure was a privilege") (A/32/17; J Honnold *Documentary History of the Uniform Law for International Sales* (1989), p.318).

<sup>52</sup> The decision of the Landsgericht Regensburg (Germany) 24 September 1998 is not a decisive authority in favour of this. The buyer was not entitled to avoid the contract because, when demanding "non-defective" cloth, without stipulating what would be non-defective, he thwarted the seller's right to cure.

<sup>53</sup> Article 7(1).

The above discussion assumes that, when Article 48 applies, but subject to Article 46, it is the seller who chooses the cure. This introduces a feature of Article 48 that is not present in UCC 2-508. Article 48(2) states that a seller seeking to cure may request the buyer to say whether he will accept performance.<sup>54</sup> The paragraph then goes on to make two further provisions. First, if the buyer does not respond within a reasonable time, the seller may perform within the time indicated within his request. To be effective, this request must actually be received by the buyer.<sup>55</sup> Although paragraph (2) does not say so explicitly, it would seem to follow that the non-responsive buyer would be prevented from claiming that the seller is not proposing a cure within a reasonable time.<sup>56</sup> It should also follow that the buyer may not object to the proposed cure on the grounds mentioned in paragraph (1), namely, inconvenience and uncertainty of reimbursement of expenses. The second further provision in paragraph (2) is that the buyer is frozen out of resorting to any remedy that is inconsistent with the seller's proposed performance. This would mean that, during the reasonable time allowed for the buyer's response, the buyer would not be able to require a performance under Article 46 that is inconsistent with the seller's proposed cure. Does this mean, contrary to what is proposed above, that the seller's cure proposal overrides the buyer's right to require performance if the two are different? The answer, it is submitted, is no. The buyer needs merely to respond by rejecting the seller's proposed cure and insisting on the performance permitted by Article 46 instead.

The final point in paragraph (2) is that it is expressed in permissive tones. It is not clear that the seller must follow this procedure in order to be able to effect a cure. It is obviously to the seller's advantage to serve a notice, in that it gives the seller breathing space and the opportunity to discover whether attempts to effect a cure will be wasted. This, however, does not make the procedure mandatory. A buyer may provide a notice of defect to the seller, to which the seller responds immediately by sending substitute goods and giving instructions about the non-conforming goods. As long as this is a reasonable form of cure, and does not interfere with a buyer's preference under Article 46 for repaired goods, it should be effective.

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<sup>54</sup> This request may be implicit, as where a seller asks the buyer to return the goods: Amtsgericht München 23 June 1992.

<sup>55</sup> Article 48(4).

<sup>56</sup> This could be seen as a form of estoppel, implicitly evident in other parts of the Convention and thus constituting one of the principles on which the Convention is based (Article 7(2)).

Article 48 thus raises a number of difficult issues that render it uncertain in its application. As difficult as they may be, a further and quite taxing difficulty is presented by paragraph (3), which states that the seller's notice in paragraph (2) "is assumed to include a request...that the buyer make known his decision". What decision is this? Subject to the buyer's rights under Article 46, the seller controls the form and incidents of cure since these depend upon the seller's capabilities. The buyer is already given protection against cures that give rise to unreasonable delay, unreasonable inconvenience and uncertainty of reimbursement. The decision might be a decision to require inconsistent performance under Article 46. Or it may go to the minor details of implementation, such as the precise date for a seller to send engineers to the buyer's factory. It should not be understood as sanctioning a buyer's veto over the cure proposed by the seller.

One of the most difficult issues of interpretation to resolve is the relationship of the seller's right to cure and the buyer's right to terminate for fundamental breach in Article 49.<sup>57</sup> Article 48(1) provides for the seller's right to cure "[s]ubject to Article 49". The straightforward way to read this is to allow the buyer to avoid the contract for fundamental breach without the seller being able to cure the breach. The Unidroit Principles of International Commercial Contracts, seeking the opposite solution, provide that the right to terminate (avoid) the contract is subject to the performing party's right to cure.<sup>58</sup> Given the difficulty of establishing a fundamental breach,<sup>59</sup> this is unlikely to be a problem of frequent occurrence. What appears to be the prevailing view, however, makes light of the linguistic difficulty posed by the reference to Article 49. According to that view, the existence of a fundamental breach depends upon various factors, including the seller's willingness and capability to effect a cure. There is support for this in the proceedings<sup>60</sup> as well as in the

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<sup>57</sup> This issue dominated proceedings leading to the Convention, almost to the exclusion of other issues.

<sup>58</sup> Article 7.1.4(2).

<sup>59</sup> See M Bridge, "Avoidance for Fundamental Breach under the CISG" (2010) xx International and Comparative Law Quarterly xxx.

<sup>60</sup> "In some cases the failure of the goods to operate or to operate in accordance with the contract specifications would constitute a fundamental breach only if that failure was not remedied within an appropriate period of time. Until the passage of that period of time, the buyer could not preclude the seller from remedying the non-conformity by declaring the contract avoided": UN Secretariat Commentary on Article 44 of the 1978 Draft, para. 5.

literature<sup>61</sup> and the case law.<sup>62</sup> In the event of that cure not eventuating, the interesting question is whether the original breach becomes retrospectively a fundamental breach or whether in consequence of that failure to cure that breach matures into a fundamental breach.<sup>63</sup> The intellectual interest of the question probably falls short of its practical importance.

Another difficult question that flows on from this concerns the *quality* of the cure. Does the cure have to be good enough that the seller thus complies with his delivery duty under Article 30 or is the seller entitled, for example, to render a cure that reduces the impact of a fundamental breach so that it is no longer a fundamental breach. The nature of the strict tender rule in the United States is that the seller has to supply a perfect cure or something approximating to it. Perhaps the single most important impulse behind cure in Article 2-508 is to prevent surprise rejections of the goods. The nature of and difficulty of complying with the fundamental breach test in Article 25 of the Convention is that cure serves a very different purpose under Article 48. Although Article 48 refers to the seller's right to "remedy" his failure to perform, it appears to be orthodoxy that the seller need not attain the standard of a perfect cure and that a cure may be effective even if only converts a fundamental breach into a lesser breach.<sup>64</sup> This question is an important one: it bears upon, not just the standard of later performance that the seller renders, but also upon the standard of later performance that the seller is offering the buyer when proposing a cure. It therefore lends further support to the view that the seller's right to cure is subordinate to the buyer's right to require performance in those cases where they conflict. Why should the buyer have to accept a sub-standard cure which falls short of the standard of performance that the buyer might otherwise require under Article 48? A final point flowing from a cure that amounts to less than complete performance is that it is still performance being rendered by the seller and

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<sup>61</sup> P Schlechtriem and I Schwenger, *Commentary on the UN Convention on the International Sale of Goods (CISG)* (OUP, 3<sup>rd</sup> ed 2010), p.736 (Müller-Chen). *Contra* CM Bianca and MJ Bonell, *Commentary on the International Sales Law* (1987), p.357 (Will).

<sup>62</sup> Oberlandesgericht Koblenz (Germany) 31 January 1997; Oberlandesgericht Köln (Germany) 14 October 2002; Handelsgericht Zurich (Switzerland) 26 April 1995; Handelsgericht Aargau (Switzerland) 5 November 200.

<sup>63</sup> See A Mullis, "Avoidance for Breach under the Vienna Convention: A Critical Analysis of Some of the Early Cases" in M Andenas and N Jareborg, *Anglo-Swedish Studies in Law* (Lustus Forlag, 1998), 343.

<sup>64</sup> According to the UN Secretariat Commentary on draft Article 48 (formerly Article 44) at para. 4: "Once the seller has remedied his failure to perform or has remedied it to the extent that it no longer constitutes a fundamental breach, the buyer may no longer declare the contract avoided."

therefore subject to the rules governing examination and notice of defect.<sup>65</sup>

### **(c) Conclusion**

The doctrine of cure stems from the legal thinking of Karl Llewellyn, the architect of the Uniform Commercial Code. It finds its roots in a strain of nineteenth century Germanic legal thought that saw law as residing not in systematic legal doctrine but in the spirit of the people, more particularly, in the case of commercial law, in the spirit of the mercantile class.<sup>66</sup> Law was immanent in mercantile custom, which was best discovered with the aid of a merchant jury. As originally conceived, Article 2 would have worked with the institution of a merchant jury lending substance to otherwise vague expressions, found throughout Article 2, such as "reasonable", "seasonable" and "usages". Without that jury, American judges have had to struggle with these "vague directives".<sup>67</sup> The landscape inhabited by Article 2-508 is formless and gives no clear guide to buyers and sellers. The case law that has grown up does not have the merit of making things any clearer.

That is the law inspiring cure in the CISG, which raises a number of additional unanswered questions. The position under the CISG is even worse because the problems already present in Article 2-508 have been compounded by its transplantation into an altogether different legal landscape, where there is no rule of strict tender and where the doctrine of fundamental breach keeps avoidance of the contract for non-conformity within narrow limits. The CISG has generated a very large body of case law, but very little of that is devoted to cure and such as there is tells us almost nothing. The CISG is devoted to commercial, not consumer, sales, but the rules on cure strike a position that is the antithesis of commercial certainty. Cure under the CISG is an unnecessary institution. It adds almost nothing to the rule of mitigation of damages in Article 77, which would in very many cases practically require the buyer to accept a defaulting seller's proposal. It also creates unnecessary conflict with the buyer's right to require performance. Cure is unlikely to flourish as the CISG

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<sup>65</sup> Landgericht Oldenburg (Germany) 9 November 1994.

<sup>66</sup> See the excellent article by J Whitman, "Commercial Law and the American Volk: A Note on Llewellyn's German Sources for the Uniform Commercial Code" (1987) 97 Yale Law Journal 156.

<sup>67</sup> Whitman, *ibid*, 156.

gathers greater experience and may come in time to seem a curious piece of redundant legal embellishment, a creature of its times.

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Cassel Professor of Commercial Law

London School of Economics



**Dr. Stefan Kröll** is a lawyer in Cologne and one of the German national correspondents to UNCITRAL for arbitration and international commercial law. Admitted to the bar in 1997, he specializes in international commercial law, conflict of laws, banking law and dispute resolution and sits regularly as arbitrator in national and international cases (ICC, DIS, WKO, ad-hoc). He is member of the board of editors of the *International Arbitration Law Review* and the *IHR (Internationales Handelsrecht – International Commercial Law)*. Dr. Kröll is visiting Lecturer at the Bucerius Law School (Hamburg) and a visiting Reader at the School of Arbitration at the Centre for Commercial Law Studies (Queen Mary, University of London). He teaches regularly on international contract law, conflict of laws and dispute resolution for these two institutions as well as for the University of California (Davis), the German Foundation for International Legal Cooperation (IRZ) and other institutions.

Dr. Kröll has published widely in the field of international and national arbitration, dispute resolution and contract law. Inter alia he is the author or editor of several books on arbitration, including *Comparative International Commercial Arbitration*, (co-authored with Lew/Mistelis), *Arbitrating Foreign Investment Disputes* (assistant editor with Horn) and *Arbitration in Germany – The Model Law in Practice*, (co-editor with Böckstiegel/Nacimiento) and *Arbitration and Conflict of Laws* (co-editor with Ferrari). His complete bibliography can be found at <[www.rechtsanwalt-kroell.de](http://www.rechtsanwalt-kroell.de)>.





# The burden of proof for the non-conformity of goods

Dr. Stefan Kröll

- I. Introduction
- II. Importance of the burden of proof: examples from case law
  - a. Bundesgericht (Swiss Supreme Court) 7 July 2004 – cable drums, CISG-Online 848 (Pace)
  - b. Bundesgerichtshof (German Supreme Court) 9 January 2002 -powdered milk, CISG-Online 651 (Pace)
- III. Substance vs. Procedure
- IV. Overview on the different approaches in practice
- V. The burden of proof concerning the standard of conformity
- VI. The burden of proof concerning compliance with the standard
  - a. Proving actual non-conformity
  - b. Non-conformity at the time the risk passed
- VII. Conclusion

## Case text (English translation)

### Queen Mary Case Translation Programme

#### Swiss Federal Supreme Court (*Bundesgericht*)

7 July 2004 [4C.144/2004]

Translation [\*] by Veit Konrad [\*\*]

Translation edited by Elisabeth Corcoran [\*\*\*]

#### A. [FACTS OF THE CASE]

Company A... S.r.l., seated in Milan, Italy (hereafter referred to as [Seller]), has had long established business relations with public limited company B... (*Aktiengesellschaft; AG*) (hereafter referred to as [Buyer]), which has its place of business in Ostermündingen, Switzerland. According to a bill of 26 April 2001, [Seller] owed the delivery of cables and conductors (30 packages; total weight 6,115 kilograms) for the total amount of SFR (*Swiss francs*) 35,641.21. On 2 May 2001, [Seller] handed goods packed on pallets and drums to its carrier firm C. On 3 May 2001, C. delivered the cable drums and pallets express by van to [Buyer]'s place of business in Ostermündingen. Without examining the delivery upon arrival, [Buyer]'s store manager receipted the whole consignment as conforming to the bill of 26 April 2001.

About three days later, [Buyer] examined the delivery and discovered, according to [Buyer]'s statement, that a part of the ordered goods was missing. [Buyer] then notified [Seller] of this defect by telephone. After the search for the missing goods on [Buyer]'s premises remained unsuccessful, [Buyer] on 15 May 2001 sent [Seller] a fax specifying the goods (17 drums and one pallet) that were missing.

By fax of 22 May 2001, [Buyer] again asked [Seller] to initiate a search for the missing goods at the factory where the goods had been produced. In its response writing of 12 June 2001, [Seller] took the position that according to the chronological order of the delivery process the whole consignment had been delivered to [Buyer] as ordered.

[Buyer] made a first partial payment of SFR 14,700.00 in response to [Seller]'s bill of 26 April 2001, but held back the remainder, due to the alleged incomplete delivery. By the middle of June 2001, [Buyer] had

paid the remaining SFR 20,940.50. At the end of September 2001, however, [Buyer] declared a set-off for this amount against two subsequent bills from [Seller]. On 24 September 2001, [Buyer] made another payment. In total, an amount of SFR 22,222.06 corresponding to the missing goods remains as yet to be paid.

## **B. [LOWER COURT RULINGS]**

### **Judgment of the Court of First Instance**

On 29 April 2002, [Seller] filed a claim with the District Court (*Gerichtskreis*) of Bern VIII, Bern-Laupen, against [Buyer] for payment of SFR 20,222.06 plus interest due for being in default. By judgment of 8 May 2003, the District Court of Bern VIII, Bern-Laupen, ruled that [Buyer] had to pay to [Seller] SFR 20,222.06 plus interest of 10 percent since 29 August 2003. The Court of First Instance held that:

- The sales contract between the parties was governed by the United Nations Convention of Contracts for the International Sale of Goods (hereafter referred to as CISG).
- Under Art. 38 CISG, Buyer was obliged to examine the number and quality of delivered goods immediately upon delivery.
- As Buyer failed to do so, Buyer cannot rely on its rights under Art. 45 CISG.

### **Ruling in Second Instance**

[Buyer] brought an appeal (*Berufung*) against this judgment before the Appellate Court of the Canton of Bern (*Appellationshof des Kantons Bern*). The Appellate Court quashed the ruling of the Court of First Instance and dismissed [Seller]'s claim (decision of 10 /11 February 2004). Contrary to the Court of First Instance, the Appellate Court found that by examining the goods within three days after delivery on 3 May 2001, [Buyer] had satisfied its duty under Art. 38 CISG, and that [Buyer] had given notice about the presumably missing cables to [Seller] within reasonable time as required under Art. 39 CISG. According to the Appellate Court, it fell within the responsibility of [Seller] to prove that the delivery had been complete. As [Seller] had failed to substantiate this, the Appellate Court, ruling in favor of [Buyer], held that [Buyer] was entitled to deduct the purchase price of the presumably missing goods.

## **C. [SUPREME COURT APPEAL]**

Against this decision, [Seller] now appeals to the Swiss Federal Supreme Court (*Eidgenössische Berufung*). [Seller] seeks to have the decision of the Appellate Court of the Canton of Bern set aside and the judgment of the Court of First Instance to be re-upheld.

[Buyer] seeks the dismissal of [Seller]'s appeal.

## REASONING OF THE SUPREME COURT

**1. 1.1.** [Seller]'s appeal is admissible. It concerns a value in dispute of more than SFR 8,000.00, and a decision which cannot be appealed against with any of the ordinary remedies available within the Canton (see Art. 46 and Art. 48 of the Swiss Law of Obligations (*Obligationenrecht; OR*)). [Seller]'s appeal satisfies all necessary formal requirements.

**1.2.** The subject of the appeal is an alleged violation of Swiss federal law, including an international convention that the Appellate Court ruled has been validly incorporated into Swiss law (Art. 43(1) of Swiss Law of Obligations (*Obligationenrecht; OR*)). Since the two contracting parties have their place of business in different Contracting States, the contract is governed by the CISG (Art. 1(1)). Therefore, the application of the CISG may be examined in an appellate procedure.

**2. 2.1.** The Appellate Court correctly found that the presumably incomplete delivery would constitute a breach of contract under Art. 35 CISG (See Hans-Christian Salger, in: Witz/Salger/Lorenz, *International Einheitliches Kaufrecht: Praktiker-Kommentar und Vertragsgestaltung zum CISG*, Art. 35 CISG note 6; Ingeborg Schwenzer, in: Schlechtriem (ed.), *Kommentar zum Einheitlichen UN-Kaufrecht - CISG - 3d ed.*, Art. 35 CISG note 8). Taking account of various legal opinions, the Appellate Court concluded that the [Buyer] had complied with its duty under Art. 38(1) CISG to examine the delivered goods within an adequate period of time and further that [Buyer] had satisfied its duty to give timely notice of missing goods under Art. 39 CISG (for the content of the given notice see: BGE 130 III 258 E.4.3. p. 262). The Appellate Court decided on the timely examination of the delivery and notice of the missing goods by referring to its own judicial discretion. [Seller] does not argue that the Appellate Court has unduly exceeded its scope of discretion. In any event, there is no indication that this had been the case.

**3. 3.1.** The Appellate Court held that, as a general rule, a seller, who claims for payment of the purchase price, has to prove that the goods he delivered conformed to the contract. The burden of proof, however, will be passed to the buyer when he accepts delivery without giving timely notice of defects as demanded by Art. 38 and Art. 39 CISG. Acceptance in this sense does not only mean taking delivered goods, but is indicated by the expiration of the period of time that is considered appropriate for giving notice of defects according to Art. 38 and Art 39 CISG. If, on the other hand, the buyer notifies the seller of a defect within reasonable time, then the burden of proof concerning the conformity of the goods at the time before the risk had passed remains with the seller.

For the case at issue, the Appellate Court assumed that [Buyer], in compliance with the relevant CISG provisions, had indeed notified [Seller] that parts of the ordered goods were missing. Thus, it was up to [Seller] to substantiate that its delivery had been complete.

**3.2.** In its appeal, [Seller] argues that the Appellate Court mistakenly placed the burden of proof for completeness of the delivery upon [Seller]. [Seller] alleged that, as [Buyer] had accepted the delivery without giving notice as required by the CISG, [Buyer] bears the risk to sustain that parts of the ordered goods had been missing.

**3.3.** The allocation of the burden of proof between the parties is regulated by the CISG. In case an explicit rule is not available, a court has to resort to the general principles underlying the Convention. As one of these principles, it must be taken into account how close each party is to the relevant facts at issue, i.e., a party's ability to gather and submit evidence for that point. Hence, if a buyer takes on a delivery without giving notice for any claimed deficiencies, thus establishing his exclusive possession of the goods, then he, the buyer, has to prove any claimed lack of conformity of the delivered goods (see BGE 130 III 258 E. 5.3. p. 264 *et seq.*).

**3.4.** [Buyer] unconditionally accepted the goods that were delivered by [Seller]'s carrier without notifying [Seller] of any of the subsequently claimed defects. Therefore, as far as its argument relies on this presumption, [Buyer] has to sustain that the delivery did not conform to the contract, i.e., that part of the ordered cables had been missing, in order to deduce the right to abate the purchase price There is no indication whatsoever to deviate from this principle in this particular case at issue. Even if one follows the Appellate Court's conclusion that, due to the vast volume of goods, which all had to be unloaded quickly from [Seller]'s carrier's van, [Buyer] was not obliged to check on the completeness of the delivery immediately upon arrival, it must be concluded that in the time thereafter, when an examination

of the goods was possible and reasonable, the goods were already in [Buyer]'s exclusive possession. Only [Buyer] could have taken measures to check on the number and kind of the delivered goods at that time. [Seller], on the other hand, was not in a position to conduct such an examination and, thus, to gather and preserve evidence on this point.

**4. 4.1.** Based on these considerations, this Court concludes that the burden of proof concerning the conformity of the delivered goods passed to [Buyer] at the time when [Buyer] took on the delivery without giving any notice. Therefore, it is up to [Buyer] to prove that the delivered goods did not conform to the contract -- not for the [Seller] to prove the opposite.

[Seller]'s argument that the Appellate Court had mistakenly set the standard for the adequacy of proof too high by not acknowledging the submitted letter of consignment as sufficient evidence to sustain the completeness of the delivery does not need to be decided by the Court (see BGE 120 II 5 E. 20 p. 7).

**4.2.** In its appeal, [Seller] argues that its original claim is justified, as [Buyer] has failed to prove that the delivery did not comply with their contract. This, however, does not take into account that the Appellate Court did not consider this question in its decision, as it assumed the burden of proof to lie with [Seller]. Equally, the Court of First Instance, on whose assumptions the Appellate Court relied, failed to reason upon this point: It found [Buyer]'s claim unjustified due to [Buyer]'s failure to give notice within reasonable time. Hence, the factual question whether [Buyer] was able to prove the delivery had been incomplete, has yet to be considered by a court. Therefore, the ruling of the Appellate Court of the Canton of Bern has to be set aside and the case referred back to the Appellate Court, which will have to consider new evidence on this relevant question (Art. 64(1) of the Swiss Law of Obligations (*Obligationenrecht*; OR)).

**4.3.** If the Appellate Court finds that [Buyer] cannot substantiate its claim that part of the ordered cables was missing, then [Seller]'s original claim is justified, as [Buyer] owes payment of the full purchase price due as agreed in the contract. If, on the other hand, the Appellate Court finds, in favor of [Buyer], that the incompleteness of [Seller]'s delivery can be sustained, then indeed [Buyer] would have been entitled to a proportionate reduction of the price. In that case, however, the Appellate Court must not simply dismiss [Seller]'s claim, but will need to take into account that [Buyer] had already paid the full price for the delivery and only thereafter declared its claim for reimbursement set off with other more recent positions of [Seller]. Therefore, [Seller]'s claim may be dismissed only as far as [Buyer] is entitled to claim back the paid money for undue enrichment. Such

claims do not fall within the scope of the CISG (see Huber, in: Schlechtriem (ed.) *Kommentar zum Einheitlichen UN-Kaufrecht*, 3d ed., Art. 52 CISG, note 11). The applicable provisions of international private law define which national law shall govern [Buyer]'s counterclaim for undue enrichment (Art. 128(1) of the Act concerning Private International Law (*Internationales Privatrechtsgesetz; IPRG*)). The Appellate Court will need to decide whether [Buyer] is indeed entitled to restitution under the applicable national law, i.e., if [Buyer] can provide sufficient evidence to sustain its counterclaim for undue enrichment. Only then may the Appellate Court consider [Buyer]'s declared set-off, which, again, is not regulated by the CISG but by the applicable national law (see Ferrari, *ibidem*, Art. 4 CISG, note 39; Manuel Lorenz, in: Witz/Salger/Lorenz, *International Einheitliches Kaufrecht: Praktiker-Kommentar und Vertragsgestaltung zum CISG*, Art. 4 CISG note 29 with further references).

5. The Court finds [Seller]'s appeal justified as far as it concerns the quashing of the decision of the Appellate Court in the Second Instance. But, for the aforesaid reasons, the Court cannot grant [Seller]'s original claim, because crucial evidence still needs to be taken. Due to the partial success of [Seller]'s appeal, the Court deems it justified that each side shall bear half of the court costs and its own attorneys' fees and expenses (Art. 156(3) and Art. 159(3) of the Swiss Law of Obligations (*Obligationenrecht; OR*)).

## JUDGMENT

1. [Seller]'s appeal is justified in part; the decision of the second Chamber of the Appellate Court of the Canton of Bern of 10 / 11 February 2004 is set aside. The case is referred back for retrial.
2. Each party bears half of the court costs of SFR 2,000.00.
3. Each party bears its own attorneys' fees and expenses.

[...]

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## FOOTNOTES

\* All translations should be verified by cross-checking against the original text. For purposes of this translation, the Italian Plaintiff-Appellant is referred to as [Seller]; the Defendant-Appellee seated in Switzerland is referred to as [Buyer].

\*\* Veit Konrad has studied law at Humboldt University, Berlin, since 1999. During 2001-2002 he spent a year at Queen Mary College, University of London, as an Erasmus student.

\*\*\* Elisabeth Corcoran has also been a student at Humboldt University, Berlin, since 1999. She has been a guest student at Oxford Brookes University, England, and Università degli Studi, Florence.

[Go to Case Table of Contents](#)

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**Pace Law School Institute of International Commercial Law** - Last updated December 10, 2009



**Bundesgerichtshof (Civil Panel VIII) January 9, 2002  
[VIII ZR 304/00], Neue Juristische Wochenschrift 2002,  
1651**

**Translation [\*] by Alston & Bird LLP  
Editors: William M. Barron, Esq. & Birgit Kurtz, Esq.**

**Facts**

The plaintiff [buyer 1] and the assignor [buyer 2], both located in the Netherlands and trading in dairy products, purchased a total of 2,557.5 tons of powdered milk in the first half of 1998, based on a number of contracts, from defendant [seller 1], which is headquartered in Germany, and its major shareholder [seller 1A]. Of this powdered milk, [buyer 1] and [buyer 2] sold 7.5 tons to the Dutch company I. and 2,550 tons to the Algerian company G.I., owned by P.L. S.p.A. (hereinafter G. S.p.A.), formerly known as O.R. S.p.A. The contents of the telephonic orders were recorded by [buyer 1] and [buyer 2] and/or by [seller 1] and [seller 1A] in written confirmations. The letters of confirmation of delivery of [seller 1] and [seller 1A] (whose production facility in L. [seller 1] acquired in the beginning of 1998 with all existing contractual relationships) each contained in the footer the following text:

"We sell exclusively pursuant to our general terms and conditions. Contrary statutory conditions or contrary general terms and conditions of the buyer are expressly not acknowledged and are therefore not part of the contract."

The terms and conditions at issue contain the following warranty clause:

*"VI. Warranty and Notification of Defects*

The buyer must inspect the goods immediately upon delivery and note any complaints on the delivery note ... Defects that are not noticeable at the time of delivery can only be claimed before the printed expiration date ... The buyer must make available the goods at issue or enough samples of the goods at issue; if he does not do so, the buyer cannot make any warranty claims."

Condition No. 8 in the so-called M.P.C. conditions referred to by [buyer 1] provides:

*"Section 10. Sampling and Complaints*

Notwithstanding any duty of the seller to pay back the purchase price, or a part thereof, the liability of the seller for damages suffered (and/or to be suffered) is at all times limited to the invoiced amount for the delivered goods."

The powdered milk, which was packaged and delivered by [seller 1], was inspected through spot-checks by [buyer 1] and/or [buyer 2] with the assistance of "I.S. Nederland B.V." (hereinafter "I.S.") without any special results, then it was newly palletized in the harbor of Antwerp and thereafter shipped to Algeria and, to the extent it was sold to I., to Aruba/Netherlands Antilles.

After local subsidiaries of G S.p.A. processed the powdered milk delivered to Algeria, some of the produced milk had a rancid taste. Thereupon, G. S.p.A. complained to [buyer 1] and [buyer 2] about a total of 207.6 tons of powdered milk as well as part of the powdered milk that had already been processed into 10,000 liters of milk. On June 24 and August 19, 1998, representatives of G. S.p.A., of [buyer 1], of [buyer 2] and of [seller 1] had several meetings in A. to clarify the question of the compensation for G. S.p.A. The result of these negotiations, during which [buyer 1] and [buyer 2] each promised certain compensation to G. S.p.A., was recorded in four "minutes of amicable settlement"; these documents were also signed by the representative of [seller 1].

By letter dated August 24, 1998, the legal department of [seller 1A], which was entrusted by [seller 1] with the resolution of the matter, informed [buyer 1] and [buyer 2] of the following, among other things:

"We acknowledge that a partial quantity of 177 tons of the total quantity of 3,495 tons of powdered milk, delivered pursuant to the letters of confirmation of delivery dated ... did not meet the contractual requirements.

"We do not deny that you have warranty claims because of the quality deviation, but the following two aspects must be considered:

1. [...]
2. All letters of confirmation of delivery mentioned above refer to our general terms and conditions, which must therefore govern our legal relationship. Thus, S. AG does not have to deal with any warranty or damages claims raised by company G.

"... We expressly emphasize here that we are willing to rescind the contractual relationship with you and/or company A. because of the 177 tons of inadequate powdered milk. Further claims that company

G. may raise against you or company A. are not substantively justified and will not be accepted by us."

By letter dated September 1, 1998, [buyer 2] claimed damages from [seller 1] in the amount of \$198,150.36; it assigned this claim to [buyer 1] on November 30, 1998.

Company I. also complained to [buyer 1] regarding the delivery of 7.5 tons of powdered milk because of, among other things, a sour taste of the powdered milk, and claimed damages in the amount of *Hfl* [Dutch florin] 29,256, which [buyer 1] paid.

[Buyer 1] alleged that the rancid taste, noticed by the ultimate buyers, was caused by an infestation of the powdered milk by lipase that already existed at the time of the transfer of the risk as a result of the faulty processing of the milk. [*Translator's note: lipase is an enzyme.*] This defect was only noticeable after the delivery and was immediately complained of by it. [Seller 1] acknowledged its warranty in the agreements recorded in Algeria as well as in its letter dated August 24, 1998. Under the rules of the CISG, [seller 1] is liable for the damages incurred by [buyer 1] and [buyer 2] that resulted from the payment of damages to the ultimate purchasers and the travel costs for the meeting in A., totaling *DM* [Deutsche Mark] 780,506.46; this was not excluded by [seller 1]'s general terms and conditions of delivery.

[Seller 1] alleged that the lipase infestation of the powdered milk delivered to Algeria first occurred after the transfer of the risk, or at least it was not caused by it. The powder delivered to company I. could not be consumed because of an insect infestation. In any case, the application of the CISG is excluded by its general terms and conditions. Thus, the German BGB [\*] governs, with the consequence that [buyer 1] has no claim for damages because the delivered powdered milk did not lack an assured quality.

The Regional Court [*Landgericht*] dismissed the complaint for payment of the above-referenced amount. On appeal by [buyer 1], the Higher Regional Court [*Oberlandesgericht*] granted the claim in the amount of *DM* 633,742.45 - after obtaining an oral expert opinion regarding the cause of the defect - and dismissed the appeal as to the rest, especially insofar as the complaint concerns the last partial delivery to G. S.p.A. on July 6, 1998 (650 tons) and the delivery to company I. On appeal to the Supreme Court, [seller 1] continues to request the dismissal of the case in its entirety.

### **Grounds for the decision**

I. The Court of Appeals stated in essence:

The warranty claims asserted by [buyer 1], based on its own rights and on rights assigned to it, are justified according to the rules of the CISG. The CISG was neither totally nor partially replaced by the General Terms and Conditions and Delivery Conditions of [seller 1] nor by the M.P.C. conditions used by [buyer 1]. The latter did not become part of the agreements with [buyer 2] and was also altogether superseded by the rejection clause in the General Terms and Conditions of [seller 1]. The fact that the mutual general terms and conditions partially contradicted each other 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.

[Seller 1] must pay damages under Arts. 74, 75 CISG because 177.6 tons of the delivered powdered milk must be considered defective, the defects were claimed in time and the liability of [seller 1] was not excluded under Art. 79 CISG. According to the expert report of Prof. Dr. F., the powdered milk was infested by lipase. Because [seller 1] acknowledged the defect in 177.6 tons of powdered milk by letter dated August 24, 1998, which caused a reversal of the burden of proof according to the applicable (non-CISG) German law, it was its duty to show and prove that the powdered milk met the requirements of the contract at the time of the transfer of the risk. [Seller 1] did not submit such evidence. According to the expert report of Prof. Dr. F., it cannot be ruled out that the powdered milk was infested by inactive lipase at the time of the transfer of the risk. This assumption was not changed by the considerations of the private expert Prof. Dr. B. (who was retained by [seller 1]), which are based on the fact that no lipase activity was diagnosed in the analysis of the powdered milk by I.S.; that is so because the expert does not deal with the question whether the contamination by inactive lipase could have been determined. Therefore, the commissioning of another report, as requested by [seller 1], is not necessary, the more so since the expert Prof. Dr. F. has testified that, in 1998, there was no scientifically accepted method to quantitatively determine inactive lipase in powdered milk.

The assertion of [seller 1] about the comprehensive sensory, physical and microbiological examination of the powdered milk, carried out in its facilities, can be assumed to be correct, because also through this examination, knowledge could also not be gained about the existence of inactive lipase. Even if - as asserted by [seller 1] - the powdered milk was stored in Algeria at high temperatures and very high humidity, according to the statements of the expert Prof. Dr. F., it must remain undecided whether the cause of the spoiled flavor commenced first after the transfer of the risk or whether the powdered milk was infested by lipase from the outset. At least to that extent, a new trial is not necessary because the improper storage is only one possible explanation for the spoiled flavor, which does not, however, exclude

the oxidation processes caused by lipase. Finally, a contamination by inactive lipase that already existed at the time of delivery cannot be excluded by the fact that the lipase-induced taste allegedly appeared already at the time the powdered milk was mixed because that could be easily explained with inactive lipase existing in the powdered milk.

[Seller 1] did not sufficiently set forth the requirements of an exemption from the duty of compensation under Art. 79(1) CISG. It may remain open whether this rule can generally be applied to goods that do not meet contractual requirements; in any case, [seller 1] did not show that the causes for the inactive lipase were outside its sphere of influence. It is true that, because of the expert report of Prof. Dr. F., it can be ruled out (in favor of [seller 1]) that the powdered milk was infested by lipase-forming microorganisms or by inactive lipoprotein-lipase (at the time of the transfer of the risk). But there is still the possibility of the contamination by inactive lipase, which must have developed either in the milk that was delivered by the milk producers, or in the production process at [seller 1]'s facilities; [seller 1] is liable for either. In addition, [seller 1] also did not show that it was unable to avoid the lipase infestation. It is true that, according to the expert report, it must be assumed that, even with the highest diligence, the existence of heat resistant lipase in the powdered milk cannot be ruled out with certainty. That does not, however, say anything about the question whether the undisputedly existing lipase was caused by a development that was fateful for [seller 1] or by the failure to comply with optimal standards.

The amount of damages granted must not be diminished because of a violation of a duty of [buyer 1] and [buyer 2]. [Seller 1] has agreed to the stipulated resolution of the damages question between [buyer 1], [buyer 2] and G. S.p.A., and it therefore cannot now argue that the defective powdered milk cannot be returned to it.

**II.** These elaborations do not withstand legal scrutiny on all points. Because of the current status of the facts and the dispute, it cannot be ruled out that the defects in the powdered milk are based on causes for which [seller 1] is not liable under Arts. 36, 45, 74 CISG.

**1.** The Court of Appeals, however, correctly assumed that the compensation rules of the CISG for the claims of [buyer 1] are not excluded by its General Terms and Conditions ("M.P.C. conditions"), which provide considerable limitations of liability for the seller, *inter alia*, by restricting any compensation to the amount invoiced for the delivered goods.

**a)** The Court of Appeals correctly assumed that the partial contradiction of the referenced general terms and conditions of [buyer 1] and [seller 1] did not lead to the failure of the contract within the

meaning of Art. 19(1) and (3) CISG because of the lack of a consensus (dissent). His judicial appraisal, that the parties have indicated by the execution of the contract that they did not consider the lack of an agreement between the mutual conditions of contract as essential within the meaning of Art. 19 CISG, cannot be legally challenged and is expressly accepted by the appeal.

**b)** The Court of Appeals further correctly stated that the warranty clauses in the M.P.C. conditions used by [buyer 1], which are beneficial to [seller 1], were replaced by the rejection clause of [seller 1]. The objections raised by the appeal in this regard are not persuasive.

The question to what extent colliding general terms and conditions become an integral part of a contract where the CISG applies, is answered in different ways in the legal literature. According to the (probably) prevailing opinion, partially diverging general terms and conditions become an integral part of a contract (only) insofar as they do not contradict each other; the statutory provisions apply to the rest (so-called "rest validity theory"; e.g., Achilles, *Komm. zum UN-Kaufrechtsübereinkommen* [Commentary to the CISG], Art. 19 ¶ 5; Schlechtriem/Slechtriem, *CISG* (3d ed.), Art. 19 ¶ 20, esp. p. 226; Staudinger/Magnus, *CISG* (1999), Art. 19 ¶ 23). Whether there is such a contradiction that impedes the integration, cannot be determined only by an interpretation of the wording of individual clauses, but only upon the full appraisal of all relevant provisions. The appeal misunderstands this when it wants to compare only the limited rejection clause of [seller 1] to [buyer 1]'s warranty clauses, which are favorable to [seller 1]. As the Court of Appeals has correctly determined, the Dutch M.P.C. conditions contain substantial deviations from the CISG's warranty rules - which would essentially remain applicable based on the General Terms and Conditions of [seller 1] - and it cannot be assumed that [buyer 1] wanted to have the M.P.C. conditions, which are internally balanced, apply to it insofar as they are noticeably more detrimental than the statutory provisions without having the benefit of the clauses that are favorable to it. Vice versa, there is nothing to show that [seller 1] wanted those clauses of the M.P.C. conditions that are unfavorable to it apply to the contracts.

The result is no different if one follows the contrary opinion ("Last shot" doctrine; re. the current status of opinions and the concerns against the application of this theory where the CISG applies, compare Schlechtriem/Slechtriem, *supra*, ¶ 20 and fn. 62). Certainly under the point of view of good faith and fair dealing (Art. 7(1) CISG), [seller 1] should not have assumed that the question whether certain provisions of the opposing terms and conditions contradicted its own (even insofar as it served its Terms and Conditions last) could be answered in

isolation for individual clauses with the consequence that the individual provisions that were beneficial to it would apply.

**2.** We also reject as unsubstantiated the argument in the appeal to this Court that the Court of Appeals incorrectly placed the burden of proof on [seller 1] for the allegation that the partial amount of 177.6 tons of the delivered powdered milk met the requirements of the contract at the time of delivery.

**a)** According to the case law of the Panel [of the Federal Supreme Court] referenced by the Court of Appeals, where the CISG applies and where the goods were accepted by the buyer without any complaints, it is the buyer who must show and prove that the goods did not meet the contractual requirements, and it is not the seller who must show and prove that the goods met the contractual requirements (BGHZ [\*] 129, 75, 81). It is true that, in the instant case, no claim was made at the time of delivery. But the Court of Appeals correctly assumed that the letter from [seller 1A] dated August 24, 1998 led to a reversal of the burden of proof. The appeal objects to this holding mostly with the argument that the CISG also regulates the question of the burden of proof, so that any recourse to the national laws is blocked; [the appeal argues that] the CISG does not, however, contain a reversal of the burden of proof based on actual admissions of liability. [The appeal argues, that] thus, the rule/exception principle, which applies to all burdens of proof where the CISG applies, remains. [The appeal argues that,] as a consequence, [buyer 1] must prove that the goods were already defective at the time of delivery; [the appeal argues that] the uncertainty acknowledged by the Court of Appeals therefore had be detrimental to [buyer 1]. This argument cannot be followed.

**b)** The starting point of the appeal to this Court is correct, that the CISG regulates the burden of proof explicitly (e.g., in Art. 79(1)) or tacitly (Art. 2(a)), so that consequently, recourse to the national law is blocked to that extent, and that the CISG follows the rule/exception principle (compare in detail Baumgärtel/Laumen/Hepting, *Handbuch der Beweislast* [Manual of the Burden of Proof], Vol. 2 (2d ed.), Introduction before Art. 1 CISG, ¶ 4 et seq. and 16 et seq.; Achilles, *supra*, Art. 4 ¶ 15; Schlechtriem/Ferrari, *supra*, Art. 4 ¶ 48 et seq.; Staudinger/Magnus, *supra*, Art. 4 ¶ 63 et seq.; also Panel [of the Supreme Court] decision BGHZ [\*] 129, 75, 81). The appeal to this Court overlooks, however, that the burden of proof rules of the CISG cannot go farther than the scope of its substantive applicability. That scope results from Art. 4(1) CISG; according to that provision, the CISG regulates exclusively the execution of the sales contract and the duties and responsibilities of the buyer and the seller resulting from that contract. The question whether and possibly which evidentiary consequences an actual

admission of liability has, is not part of that scope. That question - just like the meaning of a defective *mens rea*, an assignment, a set-off, or similar issues - does not implicate a specific sales-law-related problem, but rather a legal aspect of a general type; there is no intimate relationship to the actual or legal aspects of the international trade in goods, which make up the regulatory subject of the CISG.

**c)** Under these circumstances, we do not fault the Court of Appeals' view that the letter from [seller 1A] dated August 24, 1998 contained a statement that was, as an actual admission, generally able to result in the reversal of the burden of proof, and that it further came to the conclusion, based on its judicial evaluation of the letter, that in the letter, [seller 1A] acknowledged the existence of a defect for which it was liable - with an effect for and against [seller 1]. In view of the clear wording of the latter, which mentions a partial amount "that does not meet the contractual requirements" and "defective" powdered milk and "the rescission of the contractual relationship," the appeal to this Court with the argument that the letter was only meant to clarify that [buyer 2] did not have any legal right to damages, is baseless. The special circumstances of the case - dispatch of two employees of [seller 1] to the Algerian purchaser of [buyer 1]'s goods, where at least one of them was able to gain its own knowledge regarding the quality of the powdered milk and the milk produced from the powdered milk, [seller 1]'s own expertise - justify the evaluation that the content of the letter resulted in a reversal of the burden of proof and did not serve only as circumstantial evidence.

**d)** The argument in the appeal to this Court that the prerequisites for a reversal of the burden of proof are not present because [buyer 1] and [buyer 2] did not, in reliance on the letter, give up on otherwise possible exploratory possibilities and they therefore did not suffer any evidentiary problems, is also baseless; according to the appeal to this Court, that is so because the proof that the powdered milk was infested by inactive lipase could not have been ascertained before or after the letter dated August 24, 1998. The appeal to this Court explains that, except for cases of factual statements of actual observations of the party, the reversal of the burden of proof is only possible in cases where such reliance must be protected (compare BGH [\*], Decision of January 10, 1984, VI ZR 64/82, NJW [\*] 1984, 799). This argument cannot be successful for factual reasons. In the part of the Court of Appeals' opinion referenced by the appeal to this Court, the Court of Appeals explained that, according to the expert report of Prof. Dr. F., the result of the analysis of I.S. - which was based on a spot check analysis of the powdered milk upon arrival in Antwerp - did not permit a definitive statement about the "sole decisive question" whether the powder was infested by inactive lipase at the time of the transfer of the risk. It thus does not seem far-fetched that, upon targeted investigations after



August 24, 1998 - for example, if [seller 1A] had denied all liability - the existence of inactive lipase at the time of the transfer of the risk could have been proven or that at least other causes, especially the subsequent contamination of the powdered milk or the spoiling through inadequate storage, could have been excluded. Thus, the evidentiary situation has deteriorated to the detriment of [buyer 1] and [buyer 2] by the fact that they relied on the written statement of [seller 1] dated August 24, 1998 and therefore refrained from conducting further investigations.

Based on all this, the Court of Appeals correctly assumed that, based on the reversal of the burden of proof resulting from the letter dated August 24, 1998, [seller 1] should have shown and proven that the powdered milk at issue met the requirements of the contract at the time of the transfer of the risk.

*[3. In this section of the decision, the Supreme Court, based on its prior case law, discusses the Court of Appeals' incorrect evaluation of the evidence as a procedural error. The expert opinion presented by [seller 1] regarding the defect in the powdered milk at the time of the transfer of the risk contradicted the oral expert opinion (which had been commissioned by the Court) in a decisive point. According to the Supreme Court, the Court of Appeals, without its own know-how in this question, should have at least obtained a supplementary statement of the expert on the issue of the contradictory expert opinion presented by [seller 1].]*

**III.** For the further proceedings, the Panel [of the Supreme Court] notes the following:

If, after a new trial, it should appear that an infestation of the powdered milk by microbiological inactive lipase cannot be excluded at the time of the transfer of the risk, the outcome will depend on whether [seller 1] is not liable for this infestation under Art. 79 CISG. The appeal to this Court is of the opinion that Art. 79 CISG also applies to the delivery of goods that do not meet the requirements of the contract (left open in the Panel [of the Supreme Court] decision BGHZ [\*] 141, 129, 132); it argues that the failure to fulfill the contractual duties to perform of [seller 1] was based here on a ground for which it was not responsible under Art. 79 CISG because (according to its evidence) the powdered milk had been manufactured according to the current knowledge of science and technology and that any existing lipase stock could have only been such stock that could have never been excluded based on standard procedure. In this context, we note, as a precaution, that [seller 1] can only be freed from its obligation to pay damages for its failure to comply with the contract if it can prove that any lipase infestation of the delivered milk would not have been

detectable, even upon the careful use of the necessary methods of analysis before any further processing, and that a possible infestation in the manufacture of the powdered milk was based on grounds that were outside of its sphere of influence. As long as the cause of the lipase infestation before the transfer of the risk cannot be determined, the factual testimony of [seller 1], as taken into account by the appeal to this Court, lacks the necessary cumulative exonerative proof.

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### **Footnote**

\* Amounts in German currency [*Deutsche Mark*] are indicated as [DM]; amounts in Dutch currency [*Dutch florin*] are indicated as [Hfl].

Translator's note on other abbreviations: BGB = *Bürgerliches Gesetzbuch* [German Civil Code]; BGH = *Bundesgerichtshof* [German Federal Supreme Court]; BGHZ = *Die amtliche Sammlung der Entscheidungen des Bundesgerichtshofes in Zivilsachen* [Official Reporter of Decisions of the German Federal Supreme Court in Civil Matters]; NJW = *Neue Juristische Wochenschrift* [German weekly law journal].



**Ingeborg Schwenzer** is a full Professor of Private Law at the Faculty of Law at the University of Basel, Switzerland since 1989. Her work in comparative law covers a broad range of research areas including general law of obligations (contracts, tort law and unjust enrichment, sales law both domestic and international), commercial arbitration as well as family law. Aside from teaching and publishing extensively in these subjects Professor Schwenzer assumes numerous other functions and memberships. These *inter alia* include her membership in the International Academy of Comparative Law (since 2000), of the Expert Group of the Commission on European Family Law (since 2001), of the CISG Advisory Council (since 2003), of the Berlin Brandenburg Academy of Sciences and Humanities (since 2008) and of the International Academy of Commercial and Consumer Law (since 2010). Since 2004 she also serves as Deputy Chairperson of the Board of the Association of German Jurists.

Ingeborg Schwenzer has published extensively in all of her areas of research. In particular, she is the editor and main contributor of the Commentary on the Convention on the International Sale of Goods (CISG) (3rd edition, Oxford, Oxford University Press: 2010), a standard work of extensive annotations on the provisions of the CISG, incorporating the available jurisprudence in contracting states and international scholarship, and of its German language counterpart, Kommentar zum Einheitlichen UN-Kaufrecht (5th edition, Munich: Beck, 2008). She is furthermore the author of ten books and various other monographs, including a standard textbook on the general part of the Swiss Code of Obligations, now in its fifth edition (2009), a textbook on comparative law, a case book on International Sales, and a comparative study on German and American law of the sale of goods. In 2007 Ingeborg Schwenzer has started the Global Sales Law Project at the University of Basle with researchers from all over the world.

Ingeborg Schwenzer is also active in all areas of legal practice. In particular, she regularly acts as arbitrator and counsel in international disputes. Since 1991 she is a member of the Examination Board for the

cantonal Bar Exam of Basel-Land, Switzerland. Furthermore, she has served as expert for legislative bodies, courts and international arbitral tribunals. In 1994 she has counselled the Government of the Russian Federation in the course of the drafting of the new Russian Civil Code. Several times she has been called as expert to the Legal Committee of the German Federal Parliament. She has acted as expert witness for the German Federal Government before the German Constitutional Court and as party appointed expert for German and Swiss law before US American, German, Swiss, French, Dutch, Swedish and Norwegian courts and numerous international arbitration tribunals.

# The Right to Avoid the Contract

Prof. Dr. Ingeborg Schwenzer  
University of Basel/Switzerland

## The Right to Avoid the Contract

- I. Introduction
- II. Fundamental Breach of Contract
- III. Specific Cases
  - 1. Seller's Breach of Duties
  - 2. Buyer's Breach of Duties
- IV. Notice
- V. Time Limits
- VI. Restitution of Goods
- VII. Conclusion

# I. Introduction

- Different approaches by different legal systems
- CISG: avoidance as *ultima ratio* remedy
- Situations when avoidance is possible
- Fundamental breach v. *Nachfrist*-principle

## II. Fundamental Breach

- Definition of Art. 25 CISG
- All kind of breaches treated alike
- Fault irrelevant
- Substantial deprivation: importance defined by the contract itself
- Foreseeability
- Time to establish importance of duty

## III. Specific Cases

1. Seller's Breach of Duties
  - Definite non-delivery
  - Delay in performance
  - Delivery of defective goods/partial delivery
  - Relevance of terms of the contract
  - Purpose for which goods are bought
  - Relevance of possible cure

## III. Specific Cases

2. Buyer's Breach of Duties
  - Failure to pay purchase price
  - Failure to take delivery
  - *Nachfrist*-principle

- IV. Notice
  - No *ipso iure* avoidance
- V. Time Limits to Declare Avoidance
  - No statute of limitations under the CISG
  - Reasonable time in special cases
- VI. Restitution of the Goods
  - Where restitution is not possible
- VII. Conclusion

Thank you very much  
for your attention!



# The Right to Avoid the Contract

**Prof. Dr. Ingeborg Schwenzer, LL.M., Basel/Switzerland**

## I. Introduction

At first sight, there is hardly any agreement between different legal systems as to when a party may avoid the contract because its performance has been disrupted. Not only do they adopt divergent views on the means by which it is to be avoided – by court decision, by one party's simple declaration or *ipso iure* – but in particular, different approaches can be found as regards the preconditions for avoidance, particularly what significance is to be attached to the fault of the party in breach. However, a thorough comparative analysis reveals that under most legal systems it is decisive whether the breach reaches a certain level of seriousness.

This is also the starting point of the CISG. Avoidance is regarded as a remedy of last resort, an *ultima ratio* remedy. Only if the aggrieved party cannot be adequately compensated especially by damages may it declare the contract avoided. The reason for this restrictive approach is that avoidance is the harshest of all remedies and that in an international context it may entail the necessity of transporting back the goods from their place of destination to their place of origin or another place with considerable costs involved.

The CISG provides for avoidance in four different situations; in case of the seller's breach of contract (Art. 49 CISG), in case of the buyer's breach of contract (Art. 64 CISG), in case of an anticipatory breach (Art. 72 CISG) and finally in case of the breach of an instalment sale (Art. 73 CISG). In general, in all of these cases avoidance is only possible if the breach amounts to a *fundamental breach of contract*.

However, in cases of non-delivery by the seller (Art. 49(1)(b) CISG), non-payment or failure to take delivery by the buyer (Art. 64(1)(b) CISG) – but only in these cases – the aggrieved party may fix an additional time for performance and after the lapse of this time declare the contract avoided.

Let me first, however, discuss the concept of fundamental breach.

## II. Fundamental breach of contract

According to Art. 25 CISG a breach 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".

The first prerequisite is the breach of a contractual obligation. Unlike especially Germanic legal systems the CISG does not distinguish between different kinds of contractual obligations. All kinds of contractual obligations – especially main and ancillary obligations, synallagmatic and non-synallagmatic obligations, obligations to perform or to refrain from doing something etc. – are treated alike. The obligation may be expressly provided for in the CISG, such as delivery of conforming goods and documents at the right time, at the right place etc., but it may also be a *sui generis* obligation agreed upon by the parties, such as information, training of employees, refraining from reimport, non-competition etc.

Whether the breaching party was at fault is not decisive in establishing a fundamental breach, although some authors argue that an intentional breach should always be regarded as being fundamental.

Second, the aggrieved party must be substantially deprived of what it was entitled to expect. Insofar the importance of the interest which the contract creates for the promisee is crucial. It is the contract itself that not only creates obligations but also defines their respective importance for the parties. Thus, if delivery by a fixed date is required the interest in taking delivery on that very date is so fundamental that the buyer may avoid the contract regardless of the actual loss suffered due to the delay in delivery. Likewise in the commodity trade where string transactions prevail and/or markets are highly volatile timely delivery of clean documents is always of the essence.

Third, Art. 25 CISG provides for an element of foreseeability. A breach cannot be deemed fundamental if the breaching party "did not foresee and a reasonable person of the same kind and in the same circumstances would not have foreseen such a result". Some authors opine that lack of foreseeability and knowledge is a kind of subjective ground for excusing the party in breach. However, knowledge and foreseeability are instead relevant only when interpreting the contract and ascertaining the importance of an obligation. The parties themselves can clarify the special weight given to an obligation; in English legal terminology this would be a "condition". The importance may also be manifested by relying on trade practice and usage (Art. 8(3), 9 CISG). A reasonable person would have foreseen this. Once the importance of an obligation to the promisee under the contract has been established the promisor will not be heard when alleging that it did not or should not have foreseen the fundamentality of the breach of this obligation.

As it all amounts to simple questions of contract interpretation it is clear that the decisive point in time to establish the importance of the

obligation is the time of the conclusion of the contract. Later developments cannot upgrade a former minor obligation to an important one even if the obligor is aware of this fact.

### III. Specific cases

In order to exemplify the abstract notion of fundamental breach I will now briefly explore the different cases and discuss when the promisee may avoid the contract.

#### 1. Seller's breach of duties

I will first discuss the seller's breach of duties which in practice account for the lion's share of litigated cases. The most important ones being; non-delivery, delay, and delivery of non-conforming goods including partial delivery. Where the seller must deliver documents, the same principles apply.

Definite non-delivery almost always amounts to a fundamental breach. The seller's refusal to perform constitutes a fundamental breach. Exceptions to this rule apply where the seller may avail itself of a right to withhold performance or where due to fundamentally changed circumstances the seller is no longer obliged to fulfil the contract according to the initial terms but instead suggests to the buyer adjusted terms that a reasonable buyer should accept under the circumstances.

In cases of delay where performance is still possible and the seller is still willing to perform the importance of the agreed delivery date is decisive. Whether time is of the essence primarily depends on the terms of the contract as well as on the respective trade sector. If the buyer insists on a certain delivery date because of its own obligation towards its sub-buyers, if the sale concerns seasonal goods or commodities time is usually of the essence making any delay a fundamental breach and thus allowing the buyer to immediately avoid the contract. If time cannot be deemed of the essence the buyer has to fix an additional time for performance before it may avoid the contract (Art. 47(1), 49(1)(b) CISG).

Unlike in many other legal systems - especially those belonging to the Civil law - delivery of defective goods and partial delivery are treated alike under the heading of non-conformity (Art. 35(1) CISG). Thus the same principles apply concerning the possibility of avoidance.

Again, primary consideration must be given to the terms of the contract. It is up to the parties to stipulate what they consider to be of the essence of the contract. Thus a breach can be held to be

fundamental if the parties agreed on certain central features of the goods, such as for example soy protein products that have not been genetically modified or goods where no children were involved in manufacturing them or that have been traded fairly.

If the contract itself does not make clear what amounts to a fundamental breach one of the central questions is for what purpose the goods are bought. The decisive factor is whether the goods are improper for the use intended by the buyer. If the buyer wants to use the goods itself it is not relevant whether they could be resold even at a discount price. However, where the buyer is in the resale business, the issue of a potential resalability becomes relevant. The question then is whether resale can reasonably be expected from the individual buyer in its normal course of business.

A fundamental breach will usually not exist if the non-conformity can be remedied either by the seller, the buyer or a third person – e.g. by repairing or delivering substitute or missing goods – without causing unreasonable delay or inconvenience to the buyer. Here again, due regard is to be given to the purposes for which the buyer needs the goods. If timely delivery of conforming goods is of the essence of the contract repair or replacement usually will lead to unreasonable delay. In finding such unreasonableness the same criteria have to be applied as in case of late delivery. Furthermore, the buyer should not be expected to accept cure by the seller if the basis of trust has been destroyed, e.g. due to the seller's deceitful behaviour. If the seller refuses to remedy the defect, simply fails to react, or if the defect cannot be remedied by a reasonable number of attempts within a reasonable time, then a fundamental breach will also be deemed to have occurred.

## 2. Buyer's breach of duties

Let me now turn to the buyer's breach of duties, the main obligations being the payment of the purchase price and taking delivery of the goods.

In general, failure to pay the purchase price on the date due will not amount to a fundamental breach of contract, as the seller's interest to receive payment is not substantially impaired by the delay. However, where timely payment is of the essence, e.g. in case of highly fluctuating exchange markets, a fundamental breach is conceivable. The same holds true if payment by letter of credit against presentation of documents is agreed upon. The letter of credit must be opened for the seller no later than the first day of the period for shipment. Finally, the definite refusal by the buyer to pay the purchase price amounts to a fundamental breach of contract. The same holds true in case of insolvency of the buyer.

Failure to take delivery of the goods by the buyer, again, in general will not constitute a fundamental breach. However, where the seller has a special interest in the buyer taking delivery at the exact contractually agreed upon date, e.g. due to sparse warehouse or transportation capacities, a fundamental breach can be assumed. A fundamental breach also exists if the buyer definitely refuses to take delivery.

If according to the foregoing no fundamental breach can be ascertained or if the seller is in doubt about the weight of the breach it may fix an additional time for the buyer to pay the price or take delivery and after the lapse of this *Nachfrist* it may avoid the contract (Art. 64(1)(b) CISG).

#### IV. Notice

The CISG requires that the party having the right to avoid the contract gives notice to the other party (Art. 26 CISG). Unlike in many other legal systems there exists no *ipso iure* avoidance under the CISG. The notice must be communicated to the other party by appropriate means, whereby dispatch of the notice suffices (Art. 27). Today usually notice will be given by email.

#### V. Time limits

In general, under the CISG no special time limits exist to declare the contract avoided. Thus the general statute of limitations applies. Depending upon the applicable law this period of time may vary between one year (Switzerland, Art. 210 Code of Obligations) and six years (UK, Sec. 2 Limitation Act 1980). In exceptional cases this time period may be reduced and the party precluded from relying on the otherwise possible remedy of avoidance especially if it has led the other party to believe that it will not exercise this right.

However, the CISG itself provides for a time limit to exercise the right of avoidance in two situations.

If the seller has delivered the goods the buyer has to declare the avoidance of the contract within a reasonable time after the delivery of the goods or after it has become aware of the breach or an additional period to remedy the breach has elapsed (Art. 49(2) CISG). A comparable rule in case of buyer's breach of contract exists. If the buyer has paid the price – albeit delayed – the seller must react before it has become aware of the payment or – in respect of any breach other than late performance – within a reasonable time after it has become aware of the breach or after an additional period has expired (Art. 64(2) CISG).

## VI. Restitution of the goods

In accordance with Roman law and thus Civil law tradition the buyer is precluded from exercising its right of avoidance if it cannot make restitution of the goods substantially in the condition in which it received them (Art. 82(1) CISG). However, there are numerous exceptions to this rule (Art. 82(2) CISG) so that in practice this rarely becomes an obstacle to the buyer avoiding the contract. In fact, this rule is hardly appropriate for modern international commerce. Thus neither the UNIDROIT Principles for International Commercial Contracts (2004), nor the Principles of European Contract Law (2000), nor the Draft Common Frame of Reference (2008) have followed this example. If the buyer cannot return the goods it may still avoid the contract with due compensation for their value.

## VII. Conclusion

Although the concept of fundamental breach as a prerequisite for avoidance has been criticised by some authors for its vagueness in practice it has proven to yield just and reasonable results. On the one hand it is flexible enough to be applied to the vast variety of possible breaches of contract; on the other hand the necessary legal certainty has been achieved by case law and scholarly writing. The superiority of this concept is not the least proven by the fact that all later international attempts to further harmonization and unification of the law of obligations – such as PICC, PECL and DCFR – as well as many domestic laws that have been revised lately have taken over this basic concept of the CISG coupled with the possibility of fixing a *Nachfrist*. Similarly, the CISG's concept of avoidance by notice has gained ground on an international as well domestic level.

To sum up; the CISG concept of the right of avoidance has proven most adequate in practise. It certainly contributes to the fact that nowadays the CISG can be called a true story of worldwide success.



**John Gotanda** is the Dean and Professor of Law at Villanova University School of Law. His scholarly interests focus on damages in international law and international commercial arbitration. He is the author of *Supplemental Damages in Private International Law*, which was published by Kluwer Law International, as well as numerous articles that have been published in the *American Journal of International Law*, the *Columbia Journal of Transnational Law*, the *Georgetown Journal of International Law*, the *Harvard International Law Journal*, the *Michigan Journal of International Law*, the *Oxford University Comparative Law Forum*, and the *Vanderbilt Journal of Transnational Law*. His scholarly writings have been cited by courts, tribunals and commentators, including most recently by U.S. Supreme Court, U.S. Courts of Appeals for the Second, Seventh, Ninth and Eleventh Circuits, U.S. District Courts in Illinois, Louisiana and the District of Columbia, the Supreme Courts of Iowa and Texas, the California Courts of Appeal, and arbitral panels deciding transnational contract disputes and investment tribunals deciding cases under the rules of the International Centre for Settlement of Investment Disputes (ICSID).

Dean Gotanda has spoken widely on the subject of damages in international law. He has lectured on damages at the prestigious Hague Academy of International Law, which was published in 326 *Recueil des Cours* 73-407 (2007). He also taught at the University of Mainz and the Geneva Master in International Dispute Settlement (University of Geneva and Graduate Institute of International and Development Studies), and given numerous presentations on damages, including at Gray's Inn in London (at the invitation of the British Institute of International and Comparative Law), the International Chamber of Commerce in Paris, Tokyo University, 4th Annual Arab Conference for Commercial and





*Damages under the CISG:  
A Comparison of Monetary Remedies  
in International Investment and  
Transnational Commercial Disputes*

University of Belgrade  
12-13 November 2010



John Y. Gotanda  
Professor of Law and Associate Dean for Academic Affairs  
and Faculty Research, Villanova University School of Law

## Global Recession and Arbitration

- Winner: International Commercial Arbitration
  - Arbitral institutions reporting increases in new claims:
    - CIETAC
    - ICC
    - LCIA
    - SCC
    - AAA (Intl)
- Loser: Investment Arbitration
  - ICSID reports a 43% decrease

## *A Comparison of Monetary Remedies in International Investment and Transnational Commercial Disputes*

- The Study:
  - Who is winning?
  - What are successful parties winning in terms of damages?
  - Are the costs of the proceedings, arbitration costs and the parties' legal costs, including attorneys' fees, being awarded and, if so, how are they apportioned?
  - How long do these disputes take to resolve?
- Conclusions
  - CIETAC-CISG claimants are more successful than ITA claimants
  - CIETAC-CISG claimants win a larger percentage of their claims than ITA claimants
  - CIETAC-CISG tribunals are more likely to shift arbitration costs
  - Parties' costs are awarded infrequently in both CIETAC-CISG and ITA disputes
  - ITA disputes take significantly longer to resolve than CIETAC-CISG disputes



## *Damages under the CISG: A Comparison of Monetary Remedies in International Investment and Transnational Commercial Disputes*

### Overview

- CISG Disputes
- Investment Disputes

# List of States that Have Adopted the CISG

\* Entry into force: June 1, 2010.  
Signatories without ratification, accession, approval, acceptance, or succession: Bolivarian Republic of Venezuela; Ghana.

# ICSID Convention

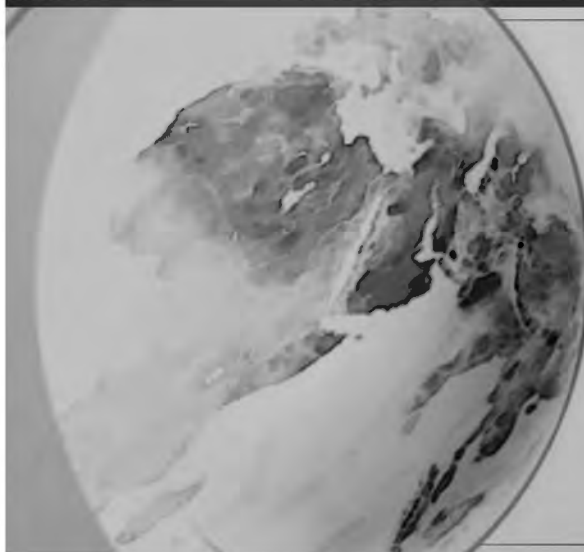
- |                           |                     |                                    |                       |  |
|---------------------------|---------------------|------------------------------------|-----------------------|--|
| Afghanistan               | Congo, Rep. of      | Israel                             | Netherlands           | St. Lucia  |
| Albania                   | Costa Rica          | Italy                              | New Zealand           | St. Vincent and the Grenadines                       |
| Algeria                   | Côte d'Ivoire       | Jamaica                            | Nicaragua             | Sudan  |
| Argentina                 | Croatia             | Japan                              | Niger                 | Swaziland  |
| Armenia                   | Cyprus              | Jordan                             | Nigeria               | Sweden   |
| Australia                 | Czech Republic      | Kazakhstan                         | Norway                | Switzerland  |
| Austria                   | Denmark             | Kenya                              | Oman                  | Syria  |
| Azerbaijan                | Dominican Republic  | Korea, Rep. of                     | Pakistan              | Tanzania   |
| Bahamas, The              | Egypt, Arab Rep. of | Kosovo, Rep. of                    | Panama                | Thailand   |
| Bahrain                   | El Salvador         | Kuwait                             | Papua New Guinea      | Timor-Leste  |
| Bangladesh                | Estonia             | Kyrgyz Republic                    | Paraguay              | Togo   |
| Barbados                  | Ethiopia            | Latvia                             | Peru                  | Tonga  |
| Belarus                   | Fiji                | Lebanon                            | Philippines           | Trinidad and Tobago                                  |
| Belgium                   | Finland             | Lesotho                            | Portugal              | Tunisia  |
| Belize                    | France              | Liberia                            | Romania               | Turkey   |
| Benin                     | Gabon               | Lithuania                          | Russian Federation    | Turkmenistan   |
| Bosnia and Herzegovina    | Gambia, The         | Luxembourg                         | Rwanda                | Uganda   |
| Botswana                  | Georgia             | Macedonia, former Yugoslav Rep. of | Sao Tome and Principe | Ukraine  |
| Brunei Darussalam         | Germany             | Madagascar                         | Saudi Arabia          | United Arab Emirates                                 |
| Bulgaria                  | Ghana               | Malawi                             | Serbia                | United Kingdom of Great Britain and Northern Ireland |
| Burkina Faso              | Greece              | Malaysia                           | Seychelles            | United States of America                             |
| Burundi                   | Grenada             | Mali                               | Sierra Leone          | Uruguay  |
| Cambodia                  | Guatemala           | Malta                              | Singapore             | Uzbekistan   |
| Cameron                   | Guinea              | Mauritania                         | Slovak Republic       | Venezuela  |
| Canada                    | Guinea-Bissau       | Mauritius                          | Slovenia              | Yemen, Republic of                                   |
| Central African Republic  | Guyana              | Micronesia, Federated States of    | Solomon Islands       | Zambia   |
| Chad                      | Haiti               | Moldova                            | Somalia               | Zimbabwe   |
| Chile                     | Honduras            | Mongolia                           | Spain                 |  |
| China                     | Hungary             | Morocco                            | Sri Lanka             |  |
| Colombia                  | Iceland             | Mozambique                         | St. Kitts and Nevis   |  |
| Comoros                   | Indonesia           | Namibia                            |                       |  |
| Congo, Democratic Rep. of | Ireland             | Nepal                              |                       |  |
- Current as of January 7, 2010.  
Countries in bold have deposited instruments of ratification.*

# The Data

- CIETAC-CISG data acquired from:
  - The Institute of International Commercial Law’s study and translation of 265 CIETAC awards involving the CISG from 1988-2006
- ITA data acquired from:
  - Professor Susan Franck’s study of 52 publicly available investment awards decided before June 2006
  - Global Financial Analytics’ study of publicly available ICSID awards in 2007 and 2008
  - Publicly available ICSID awards decided between 1996 and 2009



## *Damages under the CISG: A Comparison of Monetary Remedies in International Investment and Transnational Commercial Disputes*



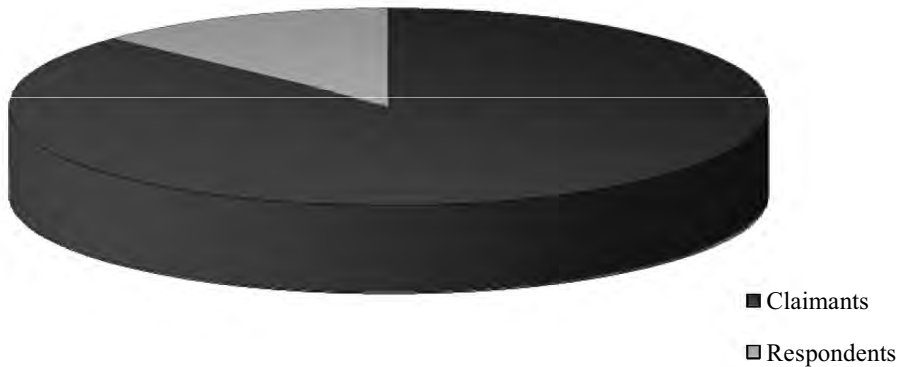
### Results

- Who is Winning?
- What are Parties Winning?
- Costs and Fees: Amounts & Allocation
- Length of Disputes

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*Results*

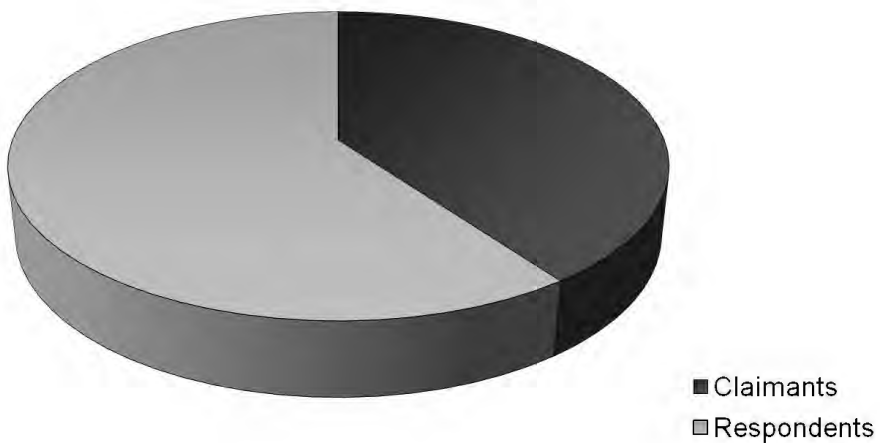
Who's Winning?: CIETAC-CISG Cases



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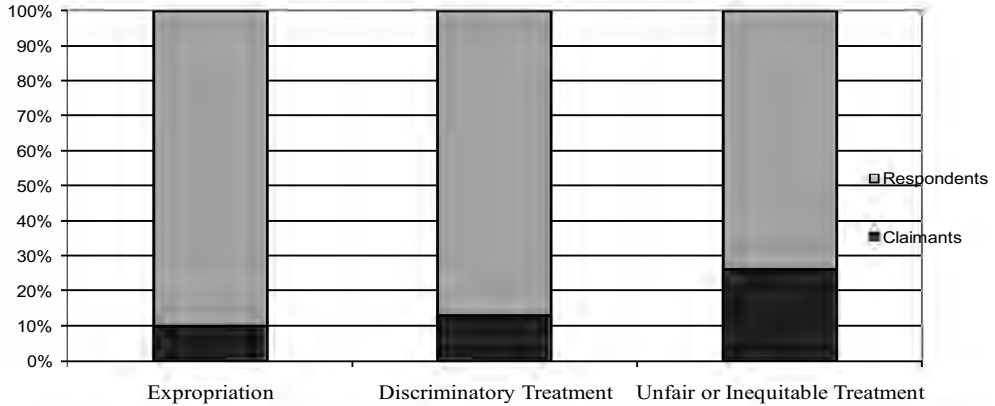
*Results*

Who's Winning?: Investment Arbitrations Franck Study



## Results

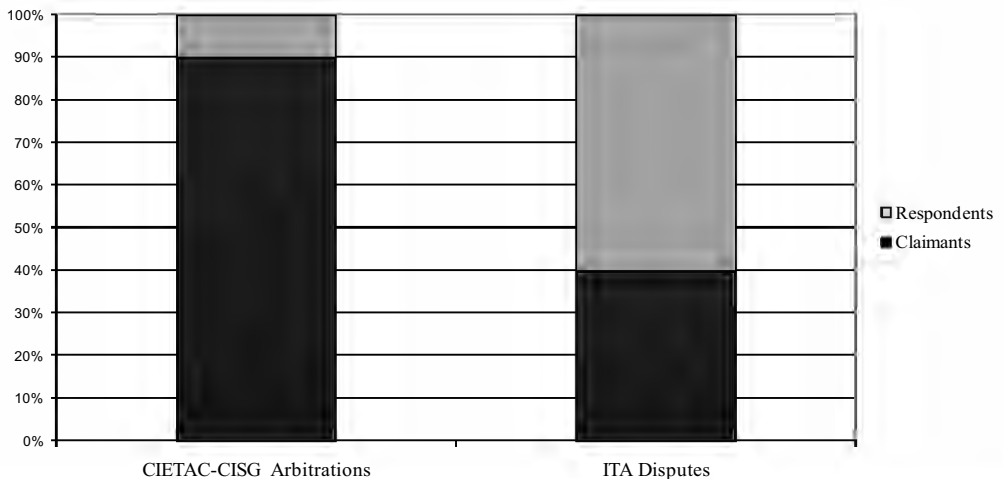
### Who's Winning?: Investment Arbitrations – GFA Study



Global Financial Analytics, Investment Arbitration Update (2007), [http://www.gfa-llc.com/images/Investment\\_Arbitration\\_Update\\_12-31-07.pdf](http://www.gfa-llc.com/images/Investment_Arbitration_Update_12-31-07.pdf)

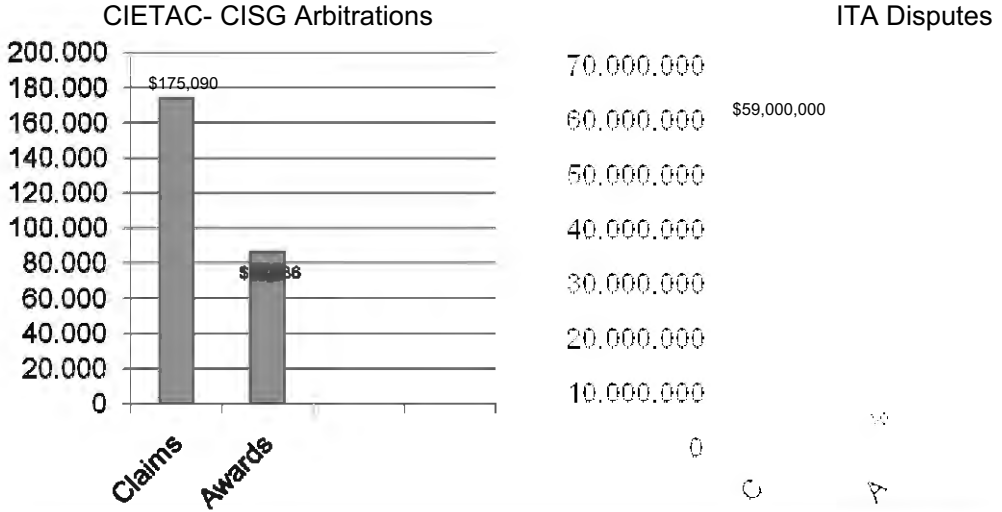
## Results

### Who's Winning?: A Comparison



## Results

### What Parties are Winning: A Comparison of Median Claims and Awards



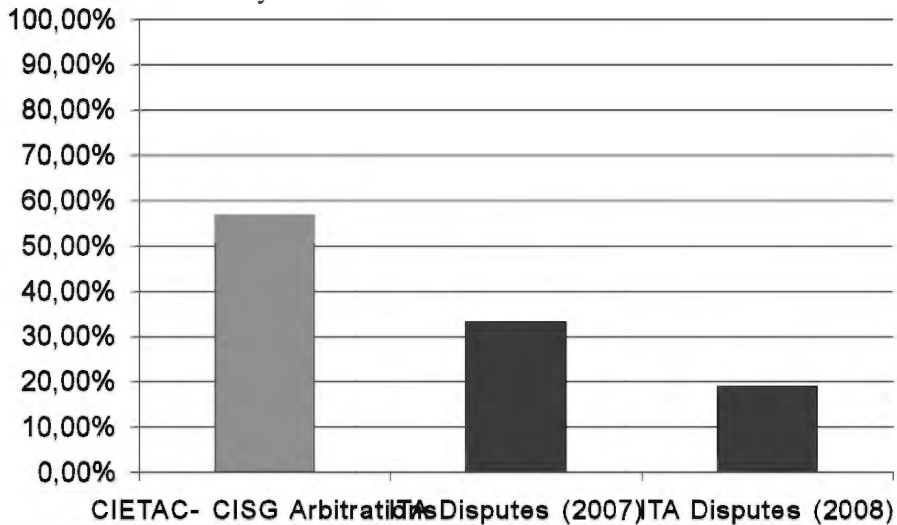
## Results

### What Parties are Winning: A Comparison of Mean Claims and Awards



## Results

### Average Recovery of Amounts Claimed by Successful Claimants



## Arbitration Costs

- CIETAC Costs:
  - “The arbitral tribunal has the power to decide in the award, according to the specific circumstances of the case, that the losing party shall compensate the winning party for the expenses reasonably incurred by it in pursuing its case.”
- ICSID Costs:
  - The Tribunal shall “assess the expenses incurred by the parties in connection with the proceedings, and shall decide how and by whom those expenses, the fees and expenses of the members of the Tribunal and the charges for the use of the facilities of the Centre shall be paid.”





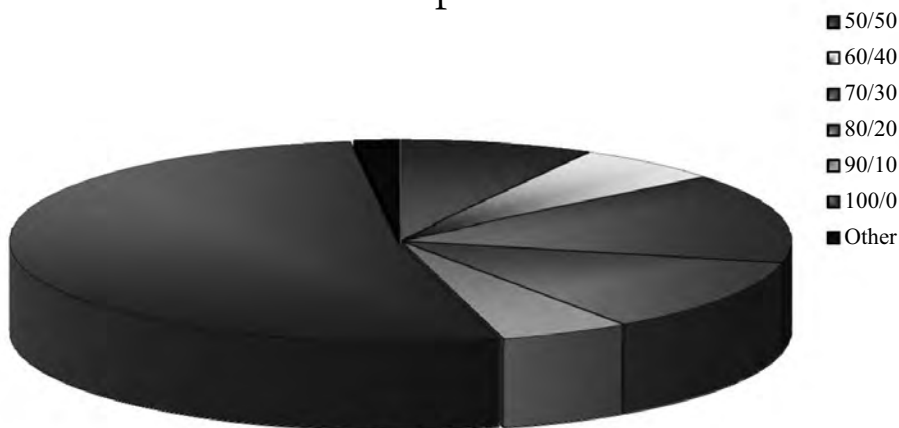
# Calculating the Costs of CIETAC Arbitrations

- Median Claim: US \$175,090
- Cost to resolve median claim under CIETAC based on fee schedule (not including parties' costs): US \$7,301



## Results

Distribution of Arbitration Costs in CIETAC-CISG Disputes



# ICSID Arbitration Costs

- Costs are based on the actual price of arbitration which includes:
  - Arbitrators' fees (usually calculated at an hourly rate)
  - The expenses of the Tribunal
  - Fees of any experts or administrators
- Average cost: US \$581,332



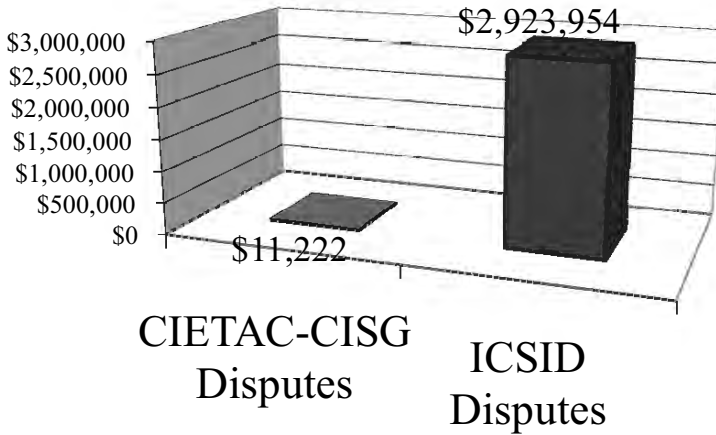
## *Results*

### Distribution of Arbitration Costs in ICSID Disputes



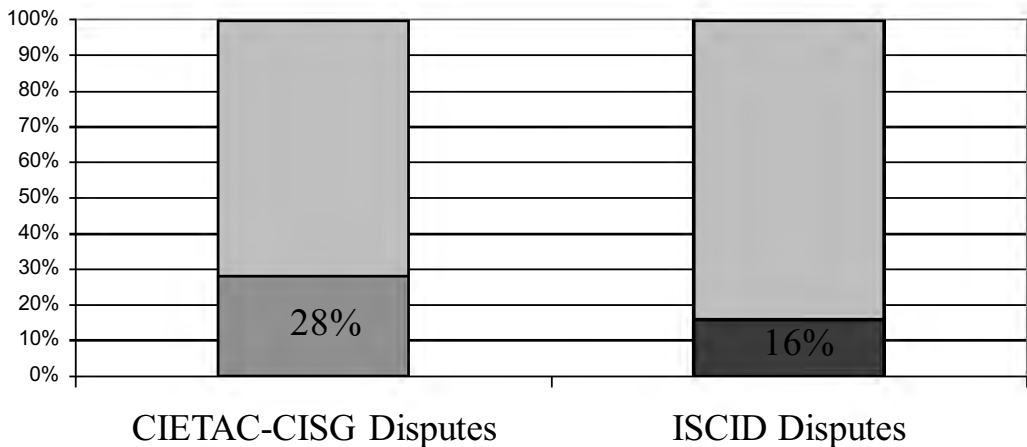
## Results

### Average Award of Party Costs



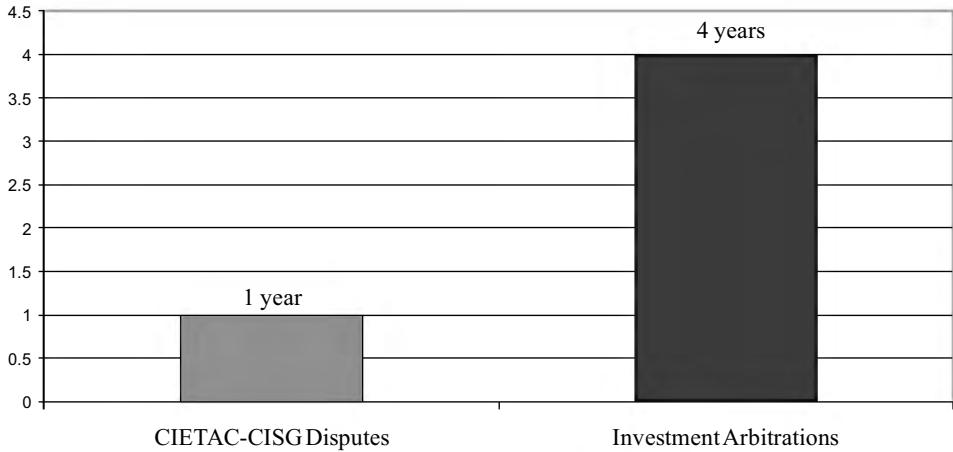
## Results

### Percent of Cases Awarding Attorneys' Fees

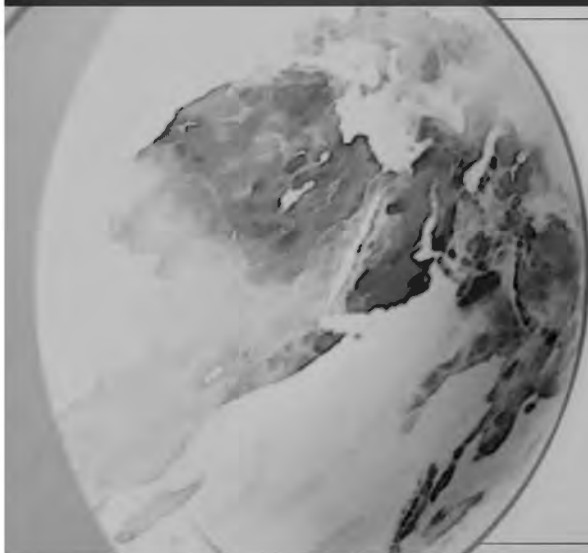


## Results

### How Long Do the Disputes Take to Resolve?: A Comparison



### *Damages under the CISG: A Comparison of Monetary Remedies in International Investment and Transnational Commercial Disputes*



## Conclusions

# Conclusions: Winners and Losers

CIETAC-CISG claimants won more often than ICSID claimants

- Investment disputes
  - The involvement of government parties complicates disputes
  - Uncertain legal rules with regard to claims of expropriation, breach of treaty, discrimination, unfair or inequitable treatment and defenses of necessity and abuse of rights
- CISG disputes
  - Typically involve only private parties
  - Legal rules set forth in code based on familiar principles
  - More case precedent and scholarly commentary



# Conclusions: Recoveries

CIETAC-CISG claimants won a larger percentage of their claims than ICSID claimants

- ITA claims – calculation may be difficult
  - Claims of expropriation may involve calculating the value of a lost business and valuation methods, such as the discounted cash flow method, are complicated and difficult to apply
- CISG claims – calculation can be straight forward
  - CISG Articles 74, 75, and 76 provide familiar methods for calculating damages



## Conclusions: Arbitration and Parties' Costs

- Why CIETAC-CISG tribunals do not regularly award parties' costs?
  - Parties may not be seeking parties' costs
  - CIETAC-CISG arbitrators demand a specific degree of certainty be shown before parties' costs are awarded
- Why ITA tribunals do not regularly award parties' costs?
  - Claims for costs and fees run into the millions of dollars and thus tribunals may be cautious or reluctant to award them
  - Policy concerns
  - Wide discretion



## Conclusions: Time for Resolving Disputes

- Why do ITA disputes take so long to resolve?
  - Determining the issue of jurisdiction takes on average 2.7 years in ICSID disputes (on average 2/3 of the length of the average case)
  - ITA disputes are more complex



# Summary

- The CISG appears to provide a more predictable legal regime for determining liability and damages
  - Thus, the CISG cases take less time and are less expensive to resolve
- As more ITA cases are decided it is likely that more uniform practices will emerge resulting in a more predictable and efficient system

## *Damages under the CISG: A Comparison of Monetary Remedies in International Investment and Transnational Commercial Disputes*

### John Y. Gotanda

Associate Dean for Academic Affairs  
and Faculty Research

Professor of Law

Director, J.D./M.B.A. Program

Villanova University School of Law

299 North Spring Mill Rd.

Villanova, PA, 19085, USA

Telephone: +1.610.519.7006

Email: [gotanda@law.villanova.edu](mailto:gotanda@law.villanova.edu)







**Dr. Pascal Hachem** is a Senior Researcher and lecturer at the Faculty of Law, University of Basel, Switzerland. He is a graduate from the Faculty of Law, University of Freiburg i. Br., Germany where he worked for Prof. Dr. Dres. h. C. Peter Schlechtriem, M.C.L. Since September 2006 he works at the chair of Prof. Dr. Ingeborg Schwenzer, LL.M. where he completed his doctorate in 2009 with a comparative study on penalty and liquidated damages clauses. He currently serves as Reporter for the CISG Advisory Council on the issue of how these clauses are dealt with under the CISG.

Pascal Hachem publishes in the fields of the law of obligations, international trade and comparative law. Since fall 2007 he is Senior Researcher in the Global Sales Law Project and co-author of the "Handbook on Sales Law". Since March 2010 he is also post-doctoral researcher (Habilitation) at the Faculty of Law, Basel and works on a comparative study on the recovery of expenses made on things which are subject to restitution.

As lecturer Pascal Hachem teaches "Comparative Private Law" at Master level at the University of Basel. Besides that he holds tutorials in law of obligations for first year students. Furthermore, he was coach of the Basel Team during the 15th and 17th Annual Willem C Vis International Commercial Arbitration Moot in Vienna.



## **Agreed Sums in CISG Contracts**

**Pascal Hachem**

Agreed sums payable upon breach of an obligation are a frequent feature in sales contracts. Traditional legal terminology addresses these as “penalty” and “liquidated damages” clauses. The situations in which parties include agreed sums into their contracts are manifold. Typical examples include a particular interest in the timely delivery of goods and payment of the purchase price but also adherence to a confidentiality or non-competition agreement. Furthermore, there may be uncertainties as to whether certain detriments are recognised as ‘losses’ and whether compensation is available. This may e.g. be the situation where chances are lost, reputation is damaged, or where legal costs have been incurred. Finally, the complexity of the contract may bring about serious problems in proving losses. In these latter cases, agreed sums reduce legal costs, the time for producing evidence, and the risk of losing litigation or arbitral proceedings due to the required level of proof not being met. The CISG does not contain any provision addressing agreed sums in sales contracts. Efforts made before the Vienna Conference to have a specific provision dealing with this issue to be included were unsuccessful. This matter was considered to raise too many technical problems and, in light of its practical importance, to require an individual uniform instrument. While it is undisputed that the formation of such clauses is subject to the provisions of the CISG, so far there is no comprehensive approach to dealing with agreed sums in CISG contracts. The author addresses the interplay of the Convention and domestic provisions dealing with agreed sums in two main areas: The protection of the obligor and the relationship of the agreed sum to other remedies. He concludes that as

a general rule domestic protection measures other than writing requirements remain applicable but that they must be interpreted in light of the CISG. It is further submitted that the Convention itself determines the relationship of the agreed sum to other remedies.



**Harry M. Flechtner** joined the faculty of the University of Pittsburgh School of Law in 1984. He teaches Contracts and Commercial Transaction in Goods (domestic and international sales and leases) as well as a seminar on International Sales Law, and he has coached the University of Pittsburgh team in the Willem Vis International Arbitration Moot 12 times. He is a four-time winner of the Law School's Excellence-in-Teaching Award and a recipient of the Chancellor's Teaching Award. He has published extensively on international and domestic commercial law, with particular emphasis on international sales law; he edited and updated the 4<sup>th</sup> edition (2009) of John Honnold's Uniform Law for International Sales under the 1980 United Nations Convention. He speaks frequently on commercial law topics, and has been cited by the Solicitor General of the United States as "one of the leading academic authorities on the [United Nations Sales] Convention." Professor Flechtner serves as a National Correspondent for the United States at the United Nations Commission on International Trade Law. He is a graduate of Harvard College, and received his J.D. from Harvard Law School and an M.A. in literature from Harvard University.



# CISG Articles 79 and 80: Exemption and the Decision of Belgian Cassation Court of 19 June 2009 (“Hardship” Doctrine in CISG Transactions)

Harry M. Flechtner  
University of Pittsburgh (U.S.A.)

## General Comments on and Comparison between Arts. 79 & 80

- Article 79 – the more significant, detailed and complex of the Convention’s Exemption provisions.
  - 6 elements to qualify for exemption in Art. 79(1)
    - Compare 2 elements of Art. 80
  - Art. 79 relief limited to damages
    - Art. 80 relief is complete – “may not rely”
  - Art. 79 deals with details (non-perf. by 3<sup>rd</sup> parties, notice of exemption, etc. – 5 subsections)
    - Article 80 very general -- no details

# Art. 80 as an Express “General Principle” for Purposes of Art. 7(2)

- The challenges of dealing with such a general provision
- Misuse of Art. 80
  - Used to justify responsive non-performance without avoidance of contract
  - Alternative view: it is not enough that the other side’s prior breach *motivated* a refusal to perform; rather, the other party’s acts or omissions must have prevented performance – must have made it “impossible or nearly impossible” for the other party to perform.“

## “Hardship” Doctrine in CISG Transactions

- Features of hardship doctrine (based on Arts. 6.2.2 & 6.2.3 of UNIDROIT Principles)
    - Definition of “hardship” in Art. 6.2.2
      - Event after conclusion of Contract fundamentally alters the contractual equilibrium through increased costs to perform or diminished value of return performance
      - Event could not reasonably have been taken into account at time contract concluded
      - Event was beyond disadvantaged party’s control
      - Risk of even not assumed by disadvantaged party
- Compare elements of CISG Art. 79(1)



# “Hardship” Doctrine in CISG Transactions

[Features of “hardship” doctrine cont’d]

- Less-than-impossibility standard (“fundamentally alters the equilibrium of the contract”)
  - Compare CISG Art. 79(1)
- Relief: obligation to renegotiate; if renegotiation fails, contract may be terminated or “adapted” (i.e., modified terms imposed by court to restore equilibrium)
  - Compare CISG Art. 79(5)
- Reaction from a common law perspective

## Decision of Belgian Cassation Court of 19 June 2009

- Facts: 70% increase in price of steel seller used to produce the goods (steel tubing)
- When negotiations to increase the price that the buyer would pay failed, seller refused to deliver except at an increased price it unilaterally set
- Buyer sought an order from Belgian Court requiring seller to deliver at original contract prices

# Decision of Belgian Cassation Court of 19 June 2009

- Opinion of Court of First Instance
  - No relief under CISG Art. 79: seller should have taken into account the possibility of increased price for steel but it failed to include a price adjustment clause in its contracts with buyer
  - Domestic hardship doctrines deemed inconsistent with the Convention; indeed, Belgian domestic law rejected the theory of *imprévision*
  - Court nevertheless gave seller half the price increase it sought, apparently on general principles of equity

# Decision of Belgian Cassation Court of 19 June 2009

- Opinion of Intermediate Appeals Court
  - The lack of a hardship provision in the CISG constituted an “internal gap” invoking Art. 7(2)
  - Court filled the “gap” by referring to the law applicable under PIL rules
  - Applying the *imprévision* principles of French law, the court “adapted” the contracts by increasing the contract price by € 450,000 (apparently the price increase sought by the seller – at any rate, more than given by the court of first instance)

# Decision of Belgian Cassation Court of 19 June 2009

- Opinion of Cassation Court
  - Although CISG Article 79 addressed “hardship” situations, a “gap” still existed (apparently court saw Convention’s failure to provide for “adaptation” of contract terms as a gap)
  - Court filled this gap by applying the UNIDROIT Principles’ hardship rules, reasoning that those rules expressed “**general principles which govern the law of international trade**” and that such principles were applicable in CISG transactions pursuant to Art. 7(2)

# Decision of Belgian Cassation Court of 19 June 2009

- Opinion of Cassation Court, cont’d
  - In other words, the Court ruled that the hardship rules of the UNIDROIT Principles were incorporated by the CISG itself; thus all courts should apply them in all CISG transactions, irrespective of applicable non-CISG law
  - On this basis, the court affirmed the Intermediate Appeals Court decision to impose a € 450,000 price increase

# Comments on the Decision of the Belgian Cassation Court

- The Court's reasoning that the UNIDROIT Principles could be used to fill internal gaps in the CISG via Article 7(2)
- The Court's reasoning that there existed a gap in the Convention concerning "hardship"
- The likely effect of the Court's decision on uniform interpretation of the CISG

**THE EXEMPTION PROVISIONS OF THE SALES  
CONVENTION, INCLUDING COMMENTS ON  
“HARDSHIP” DOCTRINE AND THE 19 JUNE 2009 DECISION  
OF THE BELGIAN CASSATION COURT**

**Harry M. Flechtner\***

I am extremely honored by and grateful for the opportunity to participate in this conference on the United Nations Convention on Contracts for the International Sale of Goods (“CISG”). The honor, and my gratitude, is greatly increased by two facts: the conference is organized by the University of Belgrade Law Faculty, whose members have made so many significant contributions to understanding the Convention; and the conference is being held in conjunction with a meeting of the CISG Advisory Council, one of the most ambitious and creative projects to encourage an intelligent and uniform approach to the CISG.

I was invited to comment on the exemption provisions – Articles 79 and 80 – of the CISG. These articles contain rules under which parties to international sales contracts may be shielded from at least some of the usual legal consequences that flow from a failure to perform a contractual duty. The question of when a party should be so shielded is certainly one of the most challenging in the field of uniform commercial law.

Article 79, the broader and more significant of the two exemption provisions, is related to traditional doctrines – *force majeure*, impossibility/impracticability – with long and interesting histories in both domestic and international legal traditions.<sup>1</sup> The provision is one of the most complex and difficult in the CISG. Article 79(1), the core of the provision, establishes six elements (depending on how one counts) that must be satisfied before a party that has failed to perform may claim exemption under the article: 1) an “impediment” to performance must have arisen; 2) the party’s failure to perform must have been “due to” the impediment (causation); 3) the impediment must have been “beyond the control” of the party claiming exemption; 4) the impediment must be one

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\* Professor of Law, University of Pittsburgh School of Law.

<sup>1</sup> See Ingeborg Schwenzer, *Article 79 ¶ 4*, in COMMENTARY ON THE UN CONVENTION ON THE INTERNATIONAL SALE OF GOODS (CISG) (Ingeborg Schwenzer, ed.) (3<sup>rd</sup> ed. 2010, Oxford University Press); JOHN O. HONNOLD, UNIFORM LAW FOR INTERNATIONAL SALES UNDER THE 1980 UNITED NATIONS CONVENTION § 425 (edited and updated by Harry M. Flechtner) (4<sup>th</sup> ed., Kluwer Law International, 2009).

that the party claiming exemption “could not reasonably be expected to have taken . . . into account at the time of the conclusion of the contract”; 5) the impediment must be such that the party claiming exemption “could not reasonably be expected . . . to have avoided . . . it or its consequences” ; and 6) the impediment must be such that the party claiming exemption “could not reasonably be expected to have . . . overcome it or its consequences.”

Although Article 79 is one of the most challenging and important CISG provisions, it is not necessarily the best example of the Convention’s methods. Alluding to the necessarily vague standards employed in the provision, Professor Honnold asserted that “Article 79 may be the least successful part of the half-century of work towards international uniformity.”<sup>2</sup> Perhaps in response to these challenges, Article 79 has produced a rich and varied body of case law. Some of those decisions reflect great credit on the tribunals that have applied the provision; others raise disturbing questions about the tribunal’s methods.<sup>3</sup> At any rate, Article 79 poses many fascinating and significant questions that demand thoughtful analysis. I will attempt to comment on one of those questions in greater depth later in this paper.

Article 80 is, in a sense, the poor relative of Article 79. It appears to be a straightforward statement of a simple and obvious general principle: “A party may not rely on a failure of the other party to perform, to the extent that such failure was caused by the first party’s act or omission.” A Belgian court has characterized Article 80 as embodying a principle “close to *estoppel*.”<sup>4</sup> Professor Honnold has opined that the provision “has the seductive charm of a self-evident statement,”<sup>5</sup> and he notes that at the 1980 Vienna Diplomatic Conference at which the text of the CISG was approved, “both supporters and opponents of this provision claimed that it embodied self-evident truth.”<sup>6</sup>

Comparing the approaches of the Convention’s two exemption provisions is revealing. Whereas proving exemption under Article 79 requires satisfying a long list of requirements that can be difficult to

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<sup>2</sup> HONNOLD, UNIFORM LAW, *supra* note 1, §432.1 at 627.

<sup>3</sup> See Joseph Lookofsky & Harry M. Flechtner, *Nominating Manfred Forberich: The Worst CISG Decision in 25 Years?*, 9 THE VINDOBONA JOURNAL OF INTERNATIONAL COMMERCIAL LAW AND ARBITRATION 199 (2005), available at SSRN: <http://ssrn.com/abstract=1311459> (discussing *Raw Materials Inc. v. Manfred Forberich GmbH*, 2004 WL 1535839 (U.S. District Court for the Northern District of Illinois, 7 July 2004), available online at <http://cisgw3.law.pace.edu/cases/040706u1.html>).

<sup>4</sup> *Rechtbank van Koophandel Tongeren*, Belgium, 25 January 2005, English translation available at <http://cisgw3.law.pace.edu/cases/050125b1.html>.

<sup>5</sup> HONNOLD, UNIFORM LAW, *supra* note 1, §436.

<sup>6</sup> *Id.* § 436.4 at 646.

understand, challenging to distinguish, and daunting to apply, Article 80 only requires proof that 1) there was an “act or omission” by the other side, and 2) it caused the failure to perform by the party claiming exemption. Article 80 contains nothing beyond these two requirements that expressly limits, conditions or adjusts its application.

Article 79 includes special rules addressing a variety of specific sub-issues and procedural details, including exemption claims based on a third party’s failure to perform (Article 79(2)), treatment of temporary impediments (Article 79(3), and a party’s obligation to notify the other side of a claim to exemption (Article 79(4)). Article 80 includes no such detail. The fact that Article 79 has five subsections, whereas Article 80 is uncluttered by subdivisions, says much about the different approaches of the two provisions.

The consequences of exemption under Article 80 also appear to be simple and more straightforward, as well as more far-reaching, than under Article 79. Article 79(5) specifies that the article exempts a party only from liability for *damages* for non-performance, leaving other remedies for breach (such as avoidance of contract or price reduction under Article 50) unaffected.<sup>7</sup> Exemption under Article 80, in contrast, apparently shields a party from all remedies for its failure to perform<sup>8</sup>: when the provision’s requirements are satisfied, the other side “may not rely” on the failure to perform. Stripping a party of the right to “rely” on a breach is the same approach used in Article 39, which denies all remedies for non-conforming goods if the notice requirements of that provision are not satisfied.

The simplicity of Article 80 (particularly in comparison to Article 79) no doubt reflects its origins and history.<sup>9</sup> Although similar to an idea that appeared in Article 74(3) of the Uniform Law on the International Sale of Goods (1964) (“ULIS”), an antecedent of the CISG, Article 80 was a late addition to the Convention. It was added at the 1980 Vienna Diplomatic Conference at which the text of the Convention was finalized, based on a proposal by the (former) German Democratic Republic. Professor

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<sup>7</sup> See Ingeborg Schwenzer, *Article 79 ¶¶ 49 & 55*, in COMMENTARY ON THE UN CONVENTION, *supra* note 1; HONNOLD, UNIFORM LAW, *supra* note 1, §§435.4 & 435.6. The extent to which a breaching party who is exempt under Article 79 remains subject to an order for specific performance is subject to some debate. See HONNOLD, UNIFORM LAW, *supra* note 1, §435.5 (in particular, n. 63). Compare Ingeborg Schwenzer, *Article 79 ¶¶ 52-54*, in COMMENTARY ON THE UN CONVENTION, *supra* note 1.

<sup>8</sup> See Ingeborg Schwenzer, *Article 80 ¶¶ 8 & 9*, in COMMENTARY ON THE UN CONVENTION, *supra* note 1; HONNOLD, UNIFORM LAW, *supra* note 1, §436.1 at 644.

<sup>9</sup> The following account of the drafting history of Article 80 is derived from Ingeborg Schwenzer, *Article 80 ¶1*, in COMMENTARY ON THE UN CONVENTION, *supra* note 1, and HONNOLD, UNIFORM LAW, *supra* note 1, §436.1.

Honnold has observed: "Some delegates [to the 1980 Vienna Diplomatic Conference] stated that the proposal expressed the important general principle that one should not gain by a wrongful act; others noted that such a statement was unnecessary and, in any event, followed from the good faith requirement of Article 7(1) .... Most delegates seemed to feel that there might be some value and, at any rate, no danger in stating the obvious; the provision was approved."<sup>10</sup>

The simple structure and straightforward language of Article 80, however, belies the power of the provision: as was noted above, the consequences of exemption under Article 80 are considerably more far-reaching than under Article 79. The lack of express limitations or exceptions on the principle expressed in Article 80, furthermore, creates the possibility of far-ranging applications that are, in my view, improper, and may even undermine important aspects of the Convention's system for regulating international sales.

Perhaps unsurprisingly, given the history mentioned above, the drafting of Article 80 seems out of character for the CISG – not in keeping with the general approach of the Convention, which is characterized (usually) by more carefully-crafted and detailed provisions. In fact, Article 80 appears less like a legal provision, and more like a statement of one of the general principles of the CISG, designed to be used (according to Article 7(2)) to deal with "gaps" in the Convention – i.e., situations that the drafters did not specifically anticipate, and for which they therefore did not provide a particular rule.<sup>11</sup>

Because it is an express provision (whereas other "general principles" are implied from the Convention's express terms) and because it contains almost nothing in the way of express limitations on or distinctions in its use, it strikes me that Article 80 may be difficult for judges and arbitrators to apply with the kind of precision that justice, the complex demands of international commerce, and the purposes of the Convention demand. An example of this dangerous malleability is the fact that some authorities have invoked Article 80 to justify an aggrieved party's refusal to perform its duties under a contract, even though it has not avoided the contract, on the footing that the non-performance was "caused by" the other side's prior breach<sup>12</sup> Other authorities (with whom I agree) reject this approach; they argue that the causal link required by Article 80 between a party's failure to perform and the other party's acts

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<sup>10</sup> HONNOLD, *UNIFORM LAW*, *supra* note 1, §436.1.

<sup>11</sup> See HONNOLD, *UNIFORM LAW*, *supra* note 1, §436.4.

<sup>12</sup> See, e.g., decisions discussed in Thomas Neumann, *Shared Responsibility under Article 80 CISG*, 2009 Issue 2 *NORDIC L. J.* 1 AT 16, available online at <http://www.cisg.law.pace.edu/cisg/biblio/neumann1.html>.



or omissions is the same kind of "objective" causation required by Article 79.<sup>13</sup> In other words, according to the latter authorities it is not enough that the other side's prior breach *motivated* a refusal to perform; rather, the other party's acts or omissions must have prevented performance – must have, in the words of one arbitration decision, made it "impossible or nearly impossible"<sup>14</sup> for the other party to perform.

Among the many interesting and complex issues that have arisen under Article 79 – far more than I could hope to cover in this paper – is one that I will in fact attempt to discuss, and that was addressed in a recent decision by the Belgian Court of Cassation.<sup>15</sup> The issue is this: in transactions governed by the CISG, what is the status of "hardship" doctrine – "*imprévision*," *eccessica onerosita sopravvenuta*, *Wegfall der Geschäftsgrundlage* and the like – that permit a contract to be terminated, or its terms "adjusted," in the event of a "hardship" event that upsets the equilibrium of contractual burdens and benefits between the parties? Do domestic hardship doctrines continue to apply in CISG transactions, or are they displaced by the Convention? Alternatively, might the CISG itself provide for termination or adaptation of a contract in case of hardship?

These questions concerning the status of hardship doctrine in CISG transactions are made more interesting by the drafting history of the Convention, which includes episodes in which "hardship" provisions were proposed to be added to the express provisions of the CISG, and such proposals were rejected.<sup>16</sup> Those rejected proposals included one that

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<sup>13</sup> See, e.g., Supreme Court, Poland, 11 May 2007, English translation available at <http://cisgw3.law.pace.edu/cases/070511p1.html>; CIETAC Arbitration Decision, China, 18 December 2003, English translation available at <http://cisgw3.law.pace.edu/cases/031218c1.html>; ICC Arbitration Case No. 11849, 2003, English text available at <http://cisgw3.law.pace.edu/cases/031849i1.html>. A leading commentary put it this way: "If, for example, the buyer, without cause, refuses payment of the due price or refuses payment for previous obligations, the seller is not entitled to refuse delivery of the goods under Article 80. The breach of contract on the part of the promisee is the occasion but not the cause of the non-performance." Hans Stoll and George Gruber, *Article 80 ¶ 6*, in COMMENTARY ON THE UN CONVENTION ON THE INTERNATIONAL SALE OF GOODS (CISG) (Peter Schlechtriem & Ingeborg Schwenzer, eds.) (2<sup>nd</sup> (English) ed. 2005).

<sup>14</sup> ICC Arbitration Case No. 11849, 2003, English text available at <http://cisgw3.law.pace.edu/cases/031849i1.html>.

<sup>15</sup> Cour de Cassation/Hof van Cassatie, Belgium, 19 June 2009, Editorial Comments by Professor Siegfried Eiselen and English translation available at <http://cisgw3.law.pace.edu/cases/090619b1.html>.

<sup>16</sup> For accounts of this history, see Niklas Lindström, *Changed Circumstances and Hardship in the International Sale of Goods*, 2006 Issue 1 NORDIC L. J. 2, available online at <http://www.cisg.law.pace.edu/cisg/biblio/lindstrom.html>; Joern Rimke, *Force majeure and hardship: Application in international trade practice with specific regard to the*

would specifically have empowered tribunals to adjust contract terms in the event of hardship in order to reestablish contractual equilibrium. The status of "hardship" doctrine under the Convention has previously been addressed in case law<sup>17</sup> and by scholars.<sup>18</sup> The recent decision by the Belgian Court of Cassation dealing with this area, however, suggests further exploration is required.

As my reference point for hardship doctrine I will use the hardship provisions in the UNIDROIT Principles of International Commercial Contracts. Under Article 6.2.2 of the Principles, "hardship" exists:

where the occurrence of events fundamentally alters the equilibrium of the contract either because the cost of a party's performance has increased or because the value of the performance a party receives has diminished, and

- (a) the events occur or become known to the disadvantaged party after the conclusion of the contract;
- (b) the events could not reasonably have been taken into account by the disadvantaged party at the time of the conclusion of the contract;
- (c) the events are beyond the control of the disadvantaged party;
- (d) the risk of the events was not assumed by the disadvantaged party.

The consequences of "hardship" are specified in Article 6.2.3 of the Principles, which provides:

- (1) In case of hardship the disadvantaged party is entitled to request renegotiations. The request shall be made without undue delay and shall indicate the grounds on which it is based.
- (2) The request for renegotiation does not in itself entitle the disadvantaged party to withhold performance.

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*CISG and the UNIDROIT Principles of International Commercial Contracts*, in PACE REVIEW OF THE CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS 197, 218-19 (1999-2000).

<sup>17</sup> E.g., Tribunale Civile di Monza, Italy, 14 January 1993, CLOUT case No. 54, English translation available at 15 J.L. & COM. 153 (1995) and online at <http://cisgw3.law.pace.edu/cases/930114i3.html>; decisions discussed in Lindström, *Changed Circumstances*, *supra* note 16.

<sup>18</sup> E.g., Ingeborg Schwenzer, *Article 79 ¶¶ 4, 42*, in COMMENTARY ON THE UN CONVENTION, *supra* note 1; HONNOLD, *UNIFORM LAW*, *supra* note 1, §435.2; Stoll & Gruber, *Article 79 ¶¶ 30-32*, in COMMENTARY ON THE CISG (2<sup>nd</sup> ed), *supra* note 13; Lindström, *Changed Circumstances*, *supra* note 16; Scott D. Slater, *Overcome by Hardship: The Inapplicability of the UNIDROIT Principles' Hardship Provisions to CISG*, 12 FLA. J. INT. L. 231 (1998).

- (3) Upon failure to reach agreement within a reasonable time either party may resort to the court.
- (4) If the court finds hardship it may, if reasonable,
  - (a) terminate the contract at a date and on terms to be fixed; or
  - (b) adapt the contract with a view to restoring its equilibrium.

These provisions are completely separate from the “force majeure” provision (Article 7.1.7) of the Principles, which reproduces the exemption rule of CISG Article 79(1). This distinction between “force majeure” and “hardship” reproduces a common dichotomy: in the Civil Law tradition, force majeure doctrine generally provides for release from liability for non-performance if post-contract-formation events rendered that performance impossible; hardship doctrine provides relief, even where a party's performance remains possible, if post-contract developments fundamentally change the expected equilibrium between that performance and what the party was to receive in exchange.<sup>19</sup> The relief provided by hardship doctrine, furthermore, differs from that for force majeure: under Article 6.2.3 of the UNIDROIT Principles, for example, the occurrence of “hardship” requires the parties to attempt to renegotiate the terms of their agreement in a fashion that restores the original contractual equilibrium; should such renegotiation fail, a court is empowered to terminate the agreement or, more interestingly (from the common law perspective), “adapt” the contract – i.e., impose changed contractual terms not agreed to by the parties – to restore that equilibrium.

In short, the hardship regime of the UNIDROIT Principles (reflecting, I believe, most Civil Law hardship doctrines in this regard) has two significant features that distinguish it from traditional force majeure doctrine. First, the standard for triggering relief is different – and more relaxed – under hardship doctrine: hardship includes events that do not render a party's performance impossible, but merely (much) more difficult and/or expensive (or that render the return performance that a party is to receive much less valuable to it) so that the contractual equilibrium is

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<sup>19</sup> It is not clear if the dichotomy between the “impossibility” standard traditionally required under “force majeure” and the “something-less-than-impossibility standard” for “hardship” is maintained in the UNIDROIT Principles. Comment 6 to the UNIDROIT Principles' definition of hardship, Article 6.2.2., states that “there may be factual situations which can at the same time be considered as cases of hardship and of force majeure,” and, as the Comment explains, “hardship” doctrine looks “to allow the contract to be kept alive although on revised terms” – an approach that cannot be pursued if performance is impossible. On the other hand, both situations in which the comments to UNIDROIT Article 7.1.7 suggest that the Principles' force majeure provision could be invoked successfully – Illustrations 1(2) and 2 – appear to involve impossibility.

upset. Second, hardship doctrine provides for the possibility of relief not available under force majeure doctrine – an obligation on the part of the parties to attempt to renegotiate the contract and, most strikingly, the possibility that a court will impose changed contractual terms not agreed to by the parties in order to restore the contractual equilibrium.

From the perspective of one trained in U.S. commercial law, the standard defining “hardship” in Article 6.2.2 of the UNIDROIT Principles is not particularly surprising or disturbing. At least in a rough way, it resembles the concept of “impracticability” under U.S. domestic law, found in § 2-615 of the Uniform Commercial Code (“U.C.C.”). The U.S. impracticability provision provides a party relief from liability for non-performance where that performance was rendered “impracticable” – more difficult in the extreme, including extremely more expensive, but not necessarily impossible – by a post-contract-formation “contingency,” provided the contingency was not reasonably foreseeable at the time the contract was formed and its risk was not otherwise assumed by the adversely-affected party. Certainly the examples of “hardship” in contracts for the sale of goods offered in the Comments to Article 6.2.2 of the UNIDROIT Principles – e.g., “a dramatic rise in the price of the raw materials necessary for the production of the goods or ... the introduction of new safety regulations requiring far more expensive production procedures” – present the kind of situations that might invoke “impracticability” under U.C.C. § 2-615.<sup>20</sup> Although it is not clear whether the U.S. domestic law standard for relief (whether post-contract-formation events have rendered performance “impracticable”) is identical to the standard for relief under the UNIDROIT hardship doctrine (whether events after the conclusion of the contract have “fundamentally” altered the “equilibrium” of the contract), the necessary vagueness of those standards renders this debate largely an academic exercise.

Furthermore, CISG Article 79 itself is usually read to be satisfied by “impediments” that render performance extremely more difficult even if performance has not been made literally impossible.<sup>21</sup> If this is accepted,

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<sup>20</sup> Under the UNIDROIT Principles, “hardship” encompasses situations in which events occurring after the conclusion of the contract produce, not an extreme increase in the cost of a party’s performance, but an extreme decrease in the value of the performance a party is entitled to receive. Under U.C.C. § 2-615, U.S. impracticability doctrine technically applies only to a seller’s increased difficulty in performing, but exemption for an extreme diminishment in the value of the performance that a party (particularly a buyer) is to receive under a contract is possible either by analogical application of 2-615, or by invoking the U.S. common law doctrine of “frustration of purpose” (see Restatement of Contracts 2d § 265) to supplement the U.C.C. (see U.C.C. § 2-103(b)).

<sup>21</sup> See, e.g., Ingeborg Schwenzer, *Article 79 ¶ 30*, in COMMENTARY ON THE UN CONVENTION, *supra* note 1; HONNOLD, UNIFORM LAW, *supra* note 1, §432.2; Lindström, *Changed Circumstances*, *supra* note 16.

defining the precise difference between the level of difficulty of performance that will trigger relief under CISG Article 79 and the standard for relief under domestic hardship provisions is, again, largely an academic exercise.

Whereas the “less-than-impossibility” standard for relief under hardship doctrine is not unfamiliar to a U.S. lawyer, the relief available for hardship under the UNIDROIT Principles is unfamiliar – indeed, almost shocking – to one trained in U.S. law. The long-held attitude of U.S. courts is expressed in the traditional maxim that the job of courts is to enforce the contract the parties made, and that they should not “make a contract” for the parties. Some of the more extreme expressions of this attitude have been abandoned – in particular the idea that “an agreement to agree is unenforceable,” which sometimes led U.S. courts to refuse enforcement of agreements with missing terms even though the parties clearly intended the agreement to be legally enforceable.<sup>22</sup> It remains almost inconceivable, however, that a U.S. court would overrule terms expressly agreed to by parties to a contract in favor of terms imposed by the court – the remedy expressly authorized by Article 6.2.3(4)(b) of the UNIDROIT Principles. The rejection of the remedial approach of Civil Law hardship doctrine in the domestic legal tradition of the U.S. (and in other Common Law systems) provides context for viewing the recent decision on hardship and the CISG by the Belgian Cassation Court, to which I now turn.

In the Belgian case, the buyer and seller had entered into contracts, governed by the Convention, for the sale of steel tubing to be used by the buyer to make scaffolding. After a severe (approximately 70%) increase in the cost of the steel used for producing such tubing, the seller stopped making deliveries and demanded an adjustment to the price in the existing contracts. When negotiations between the parties for an adjustment failed, the seller refused delivery unless the buyer agreed to pay an increased price set by the seller, and the buyer sought a court order requiring the seller to resume deliveries at the original price specified in the parties’ contracts.

The court of first instance, the Rechtbank van Koophandel Tongeren,<sup>23</sup> held that, although situations of economic hardship could

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<sup>22</sup> See, e.g., Official Comment 1 to § 2-305 (dealing with sales agreements lacking a price term) in the (U.S.) Uniform Commercial Code: “This section applies when the price term is left open on the making of an agreement which is nevertheless intended by the parties to be a binding agreement. This Article rejects in these instances the formula that ‘an agreement to agree is unenforceable’ . . . .”

<sup>23</sup> Rechtbank van Koophandel Tongeren, Belgium, 25 January 2005, English translation and editorial comments by Professor Siegfried Eisele available at <http://cisgw3.law.pace.edu/cases/050125b1.html>.

constitute an impediment triggering exemption under CISG Article 79, the possibility of the increased market prices that occurred in the case was something the seller should reasonably have taken into account at the time of the conclusion of the contracts; because the seller did not insist on a price adjustment clause in the contracts to address this possibility, the Article 79 exemption was not available. The court also refused to apply the theory of *imprévision* as grounds to adjust or adapt the terms of the contract to restore its balance in light of the hardship caused by the seller's increased costs: the court cited authority suggesting that hardship theory was inconsistent with the provisions of the Convention, and noted that the Belgian courts have rejected the theory as a matter of Belgian domestic law. Invoking a general principle of equity, however, the court ruled that the buyer would have to pay half of the price increase demanded by the seller.

On appeal, the intermediate appeals court<sup>24</sup> ruled that the lower court had improperly rejected the possibility of adapting the contract to changed conditions pursuant to the theory of *imprévision*; that there was a gap in the Convention concerning the issue of adapting the terms of the contract under this theory; that to fill that gap, pursuant to Article 7(2), reference should be made to the law applicable under rules of private international law; that PIL rules led to the application of French law; and that French law, although it formally rejected the theory of *imprévision*, provided for adaptation of contractual terms in situations of hardship pursuant to the doctrine of good faith. The court applied the approach to hardship in French domestic law and held that the buyer was required to pay an additional € 450,000 beyond the original price in the parties' contracts.

I do not agree with this analysis. I believe that the legal effect of post-contract developments that render a party's performance more difficult, including more expensive, is fully addressed in the Convention's exemption provisions.<sup>25</sup> The Convention's provisions, in my view, preempt national domestic law on the question.<sup>26</sup> The fact that the CISG articles

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<sup>24</sup> Hof van Beroep Antwerp, Belgium, 29 June 2006 and 15 February 2007. Information concerning the interim appeals court opinion in this case is taken from the English translation of the decision by the Belgian Hof van Cassatie and the comments thereon by Professor Siegfried Eiselen: Hof van Cassatie, Belgium, 19 June 2009, English translation and Editorial Comments by Professor Siegfried Eiselen available at <http://cisgw3.law.pace.edu/cases/090619b1.html>.

<sup>25</sup> Accord, Stoll & Gruber, *Article 79* ¶ 31, in COMMENTARY ON THE CISG (2<sup>nd</sup> ed), *supra* note 13 (referring to "the history of Article 79 and its intent to exhaustively determine the limits of the promisor's performance guarantee").

<sup>26</sup> HONNOLD, UNIFORM LAW, *supra* note 1, § 432.2. Accord, Rimke, *supra* note 16, at 219. Contra, e.g., Joseph Lookofsky, *Walking the Article 7(2) Tightrope between CISG and*

governing exemption do not authorize a tribunal to impose modified contract terms not agreed to by the parties does not create a “gap” in the Convention<sup>27</sup>; it merely reflects the Convention’s rejection of the adaptation remedy, as reflected in the *travaux préparatoires*. By failing to recognize that there is no “gap” in the Convention’s coverage that could be filled by applicable national domestic law, the intermediate appeals court undermines the utility and purposes of the Convention, which focuses on reducing the significance of choice-of-law issues in international sales transactions. The Convention cannot be extended beyond its intended scope with undermining its legitimacy, but where it does cover an issue, failing to properly recognize its full preemptive scope brings back into play domestic doctrines in a fashion that improperly re-elevates the importance of the choice-of-law issue.

At least the approach of the Belgian intermediate appellate court did not mandate that Civil Law approaches to “hardship” rejected in the Convention be applied in all CISG transactions: under this decision, tribunal-imposed adaptation of contract terms in the event of hardship would be required in CISG transactions only where PIL rules led to the application of “supplementary” domestic law that provided for that approach. Under the approach that emerged when the buyer appealed the intermediate appeals court decision to the Belgian Court of Cassation, however, such adaptation would be required in every transaction governed by the Convention, and by every tribunal hearing disputes in such transactions.

The Cassation Court affirmed the result in the intermediate appeals court, although on a significantly different basis than that adopted by the lower court.<sup>28</sup> The Cassation Court opined that a situation involving economic hardship could constitute an impediment under Article 79 of the CISG that would trigger exemption that provision.<sup>29</sup> The Cassation Court nevertheless agreed with the intermediate appeals court that the Convention’s failure to provide, in the event of hardship, for an obligation to renegotiate or for the possibility for a court to adapt the terms of the contract constituted a “gap” in the Convention that should be addressed by means of the methodology described in Article 7(2) of the Convention.

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*Domestic Law*, 25 J.L. & COM. 87, 99 ff. (2005), available online at <http://www.cisg.law.pace.edu/cisg/biblio/lookofsky16.html>.

<sup>27</sup> Accord, *id.*; Lindström, *Changed Circumstances and Hardship*, *supra* note 16.

<sup>28</sup> Hof van Cassatie, Belgium, 19 June 2009, English translation and Editorial Comments by Professor Siegfried Eiselen available at <http://cisgw3.law.pace.edu/cases/090619b1.html>.

<sup>29</sup> “Changed circumstances that were not reasonably foreseeable at the time of the conclusion of the contract and that are unequivocally of a nature to increase the burden of performance of the contract in a disproportionate manner, can, under circumstances, form an impediment in the sense of this provision of the Convention.” *Id.*

Article 7(2), of course, provides that a question that is governed by the Convention but that is not expressly addressed therein should be resolved, first, by reference to the Convention's general principles; if the Convention contains no general principles adequate to resolve the issue, reference should be made to the law applicable under the principles of Private International Law ("PIL"), as the intermediate Belgian appeals court had done. The Cassation Court, however, determined that, pursuant to Article 7(2), the Convention itself, rather than applicable national law, required a court to adapt the terms of the parties' contracts in light of the seller's hardship; on this basis, the Cassation Court affirmed the intermediate appeals court's order increasing the price buyer was obliged to pay by € 450,000.

The English translation of the reasoning that led the Belgian Cassation Court to find, within the CISG itself, a doctrine authorizing a tribunal to devise and impose "adapted" contract terms is worth quoting. After citing Article 7(2), the court stated: "Thus, to fill the gaps in a uniform manner, adhesion should be sought with the general principles which govern the law of international trade. Under these principles, as incorporated *inter alia* in the Unidroit Principles of International Commercial Contracts, the party who invokes changed circumstances that fundamentally disturb the contractual balance, as mentioned in paragraph 1, is also entitled to claim the renegotiation of the contract."

Assuming this English translation captures the court's statement with reasonable accuracy – and I certainly admit my inability to judge that – it offers a very interesting window into the court's reasoning. The mandate in Article 7(2) to resolve gaps by reference to the general principles upon which the Convention is based is transformed by the court into an obligation to refer to "the general principles which govern the law of international trade." The general principles of the Convention and the general principles governing the law of international trade certainly seem to me to be two quite different things. The difference is not hard to discern: the general principles on which the Convention is based are derived from the text of the CISG itself; the general principles governing the law of international trade could be found in many sources *outside* the Convention, including domestic laws to the extent they have been applied to international sales or any other international transaction.<sup>30</sup> Indeed, the court's linguistic sleight of hand immediately paves the way for the court to look outside the Convention for general principles to fill the

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<sup>30</sup> See Harry M. Flechtner, *The CISG's Impact on International Unification Efforts: The UNIDROIT Principles of International Commercial Contracts and the Principles of European Contract Law*, in *THE 1980 UNIFORM SALES LAW: OLD ISSUES REVISITED IN THE LIGHT OF RECENT EXPERIENCES* (VERONA CONFERENCE 2003) 169 at 190 (Franco Ferrari, ed., 2003).



posited “hardship gap” – to the UNIDROIT Principles of International Commercial Contracts, which by their express terms, attempt to be a compendium or restatement of internationally-recognized contract principles (not just sales law principles) derived from domestic and international legal sources from around the globe, including – but most certainly not limited to – the CISG.<sup>31</sup>

I admire the substance of the UNIDROIT Principles, as I have publically declared in the past.<sup>32</sup> But, as I have also publically declared, I do not agree that they can legitimately used to supplement the CISG.<sup>33</sup> The Sales Convention – which is actual law, and on the basis of whose actual text the Contracting States bound themselves to it – specifies in Article 7(2) how it is to be supplemented when gaps in its coverage appear. The rule in Article 7(2) requires those applying the Convention to look within its provisions to determine *its* general principles, not to look outside the Convention to determine general international law principles, especially ones that, like the UNIDROIT Principles, are expressly based on sources beyond the CISG.

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<sup>31</sup> See *Introduction to the 1994 Edition* in UNIDROIT Principles of International Commercial Contracts (2004 edition). See also Flechtner, *CISG’s Impact on International Unification Efforts*, *supra* note 30, at 170-74.

<sup>32</sup> See, e.g., the description of Article 7.2.2 of the Principles (“Performance of non-monetary obligation”) as “a carefully-crafted and thoughtful provision that could well form the basis of a compromise between the common law and civil law positions” in Flechtner, *CISG’s Impact on International Unification Efforts*, *supra* note 30, at 196.

<sup>33</sup> Flechtner, *CISG’s Impact on International Unification Efforts*, *supra* note 30, at 189-93. For similar opinions see Slater, *Overcome by Hardship*, *supra* note 18, 253-60; U. Drobnig, *The Use of the UNIDROIT Principles by National and Supranational Courts* (paper presented at the colloquium on “les contrats commerciaux internationaux et les nouveaux Principes UNIDROIT: Une nouvelle lex mercatoria” in Paris, 20-21 October 1994), quoted in Michael Joachim Bonell, *The UNIDROIT Principles of International Commercial Contracts and the Vienna Sales Convention – Alternatives or Complementary Instruments?* 1996-1 UNIFORM L. REV. 26 at 36 n. 35. Compare J.S. Ziegel, *The UNIDROIT Contract Principles, CISG and National Law*, in *LOS PRINCIPIOS DE UNIDROIT: ¿UN DERECHO COMÚN DE LOS CONTRATOS PARA LAS AMÉRICAS? / THE UNIDROIT PRINCIPLES: A COMMON LAW OF CONTRACTS FOR THE AMERICAS?* (Actas/Acts - Congreso Interamericano/Inter-American Congress - *Hacia un nuevo regimen para la contratación mercantil internacional: los Principios de UNIDROIT sobre los contratos comerciales internacionales / A new approach to international commercial relations: the UNIDROIT Principles of International Commercial Contracts*, Valencia, Venezuela (6-9 November 1996)), (1998) 221, available at <http://www.cisg.law.pace.edu/cisg/biblio/ziegel2.html>. For contrary views see, e.g., Michael Joachim Bonell, *The UNIDROIT Principles of International Commercial Contracts and the Vienna Sales Convention – Alternatives or Complementary Instruments?* 1996-1 UNIFORM L. REV. 26, 34-37; Alejandro M. Garro, *The Gap-Filling Role of the UNIDROIT Principles in International Sales Law: Some Comments on the Interplay between the Principles and the CISG*, 69 TULANE L. REV. 1152 (1995).

Furthermore, in my view, the claim that the UNIDROIT Principles can be used to supplement the CISG because the Principles declare the general principles on which the CISG is based,<sup>34</sup> at best, adds several additional and unnecessary steps to the Article 7(2) analysis: to use a UNIDROIT Principle to supplement the CISG in a legitimate fashion, one would have to determine if the Principle in question actually derives from the provisions of the CISG, as opposed to the many other sources on which the UNIDROIT Principles are based, and then determine whether the UNIDROIT Principles (which are not law, and whose drafters are not lawmakers nor authorized by CISG Contracting States as a source of supplementary principles) got the CISG general principles right. Why not just follow the methodology mandated by CISG Article 7(2) when filling gaps – determine directly what the general principles of the Convention are. Of course the UNIDROIT Principles can be consulted as a (non-authoritative) source of opinions about those general principles. Beyond their intrinsic persuasiveness, however, they do not possess any special authority to declare the general principles of the Convention for purposes of CISG Article 7(2).

In addition, the Principles often seem to me to favor the Civilian as opposed to the Common Law positions on controversial questions. Witness, for example, the very hardship provisions at issue in the Belgian case<sup>35</sup>, the Principles' position on specific performance,<sup>36</sup> the approach to good faith,<sup>37</sup> and the treatment of pre-contractual liability.<sup>38</sup> As a result, incorporation of provisions of the UNIDROIT Principles into the CISG via gap-filling – particularly where those same approaches were proposed and rejected during the drafting of the CISG – can appear to be a back-handed way of imposing the approaches of the Civil Law on non-Civil Law states that never agreed to those approaches.

Frankly, however, the use of the UNIDROIT Principles by the Belgian Cassation Court is not the aspect of the opinion that, in my view, poses the greatest threat to the proper application of the CISG. More disturbing to me, by far, is the court's approach to determining whether there is a gap in the Convention's rules – although the court is hardly forthcoming or articulate on its approach to this issue. In order to invoke the UNIDROIT Principles "hardship" rules (as an expression, in the court's view, of the general principles that can be used to supplement the CISG), the court

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<sup>34</sup> See the Preamble and Official Comment 5 thereto in UNIDROIT Principles (2004 edition), *supra* note 31.

<sup>35</sup> On the Civil Law basis for the hardship provisions of the UNIDROIT Principles, see Slater, *Overcome by Hardship*, *supra* note 18, at 241.

<sup>36</sup> See UNIDROIT Principles Art. 7.2.2 and Official Comment 2 thereto.

<sup>37</sup> See UNIDROIT Principles Art. 1.7 and Official Comment 4 thereto.

<sup>38</sup> See UNIDROIT Principles Art. 2.1.15.

must of course have agreed with the intermediate appeals court that a gap existed in the Convention with respect to a matter “governed by this Convention.” The Cassation Court, however, expressly found that “hardship” could constitute an “impediment” that would result in exemption under Article 79. In other words, the court found that situations falling short of impossibility – situations in which a party’s performance would be possible, but entail “hardship” – were governed by Article 79. Because Article 79 provides only for the remedy of exemption from damages, however, – and not for adaptation of the terms of the contract by a court or arbitration tribunal – the Cassation Court found a “gap” that it could fill by reference to the UNIDROIT Principles, which does provide for such adaptation. In other words, the “gap” that the court must have found is the failure to the Convention to provide expressly for the particular remedy of tribunal-imposed adaptation (modification without the agreement of the parties) in the event of hardship .

Dear readers, please understand how this holding strikes one not from the Civil Law tradition. Although the Belgian Cassation Court found that CISG Article 79 provides a remedy for “hardship,” it also posited a gap in the Convention because the treaty does not provide for a specific additional remedy from the Civil Law tradition – a remedy that is vehemently rejected in the Common Law tradition. The court then filled this supposed gap by a version of the Civil Law remedy found in a compendium of Principles that does not even purport to be based solely on the Convention, although Article 7(2) mandates that gaps be filled by reference to general principles on which the Convention is based. This court performs this rather perverse tour de force despite the fact that a provision to incorporate this very remedy was proposed and rejected during the drafting of the CISG – although the court gives no hint that it was aware of this history.

The Belgian court, of course, is by no means the first to hallucinate a gap in the Convention when it could not find a familiar domestic rule. I am reminded of a decision by a U.S. court ludicrously asserting that the Convention does not address disclaimers of the implied quality obligations imposed by CISG Article 35(2),<sup>39</sup> even though Article 35(2) itself expressly (and redundantly, given Article 6) states that its obligations apply “[e]xcept where the parties have agreed otherwise.” You see, U.S. domestic sales law has quite elaborate rules governing attempts to disclaim quality obligations (“warranties”) – an entire lengthy section of the Uniform Commercial Code, § 2-316, with four subsections, is devoted

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<sup>39</sup> *Supermicro Computer Inc. v. Digitechnic, S.A.*, 145 F. Supp. 2d 1147 (U.S. District Court of the Northern District of California, U.S.A., 30 January 2001, CLOUT case No. 617, full text available at <http://cisgw3.law.pace.edu/cases/010130u1.html>).

solely to warranty disclaimers. The U.S. court apparently just could not fathom that the CISG addressed the question in a simple seven-word phrase. Therefore, the court concluded, there must be a gap in the CISG concerning disclaimers of the Article 35(2) obligations – a view even more clearly the product of the distorting influence of the homeward trend than that of the Belgian Court of Cassation.

The Belgian Cassation Court invokes the value of uniformity articulated in CISG Article 7(1) to justify its approach. Its holding, however, is likely to have just the opposite effect: it is likely to seriously increase non-uniformity in the application of the Convention. I find it almost unimaginable that a U.S. court would follow the Belgian decision, given that it lacks any real support in the text or *travaux* of the Convention, that it contradicts deeply-held views on the proper role of courts, and that it is based on the UNIDROIT Principles, which have failed to gain any significant traction in the U.S. The fact that following the Belgian Court's lead would require U.S. courts to devise tribunal-imposed contract adaptations for which they have no experience and no developed decisional traditions further supports my prediction.

Indeed, I would encourage U.S. courts – and all other tribunals – to ignore this particular foreign precedent, just as I would urge tribunals not to follow the seriously misguided decisions of some U.S. courts that have applied the CISG.<sup>40</sup> The Belgian Cassation Court decision fails what I believe the most important criterion for determining how much deference should be paid to a particular decision on the CISG: the Belgian opinion does not itself comply with the mandate in Article 7(1) to interpret the Convention with regard for its *international* character.<sup>41</sup> In fact, the decision shows a clear parochial bias by assuming that the Convention's failure to include the Civil Law doctrines with which it is familiar must constitute a "gap" that should be filled with those familiar doctrines derived from sources outside the CISG. This is, in my view, the homeward trend at its corrosive worst. And in this instance the UNIDROIT Principles acted as an enabler by providing cover for the court to fill its imaginary gap with the Civil Law oriented doctrines for which it apparently yearned.

Please understand – my objection is not that adaptation for hardship is not part of U.S. domestic law; my objection is that it is not part of the Convention, and is "found" by the Cassation Court within the Convention by a process that violates the express terms of Article 7(2) and

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<sup>40</sup> See Lookofsky & Flechtner, *Nominating Manfred Forberich*, *supra* note 3.

<sup>41</sup> See Harry M. Flechtner, *Recovering Attorneys' Fees as Damages Under the U.N. Sales Convention (CISG): The Role of Case Law in the New International Commercial Practice, with Comments on Zapata Hermanos v. Hearthside Baking*, 22 NORTHWESTERN J. INT'L L. & BUS. 121, 145-46 (2002).

runs counter to the implications of the Convention's drafting history. The fact that the remedy of court-devised modification of contract terms has been vigorously rejected in U.S. domestic law merely points up how seriously corrosive the Belgian Court's holding is to both uniform interpretation and the political legitimacy of the CISG – a political legitimacy based on the consent of States, including those in which court-imposed contract modifications have traditionally been viewed as fundamentally objectionable.

I have not hesitated to condemn the very serious violations of the methodologies mandated by CISG Article 7 (as well as the damage to the goals of the CISG caused thereby) when those violations were committed by U.S. courts.<sup>42</sup> In its opinion on the hardship question, the Belgium Cassation Court commits a violation of CISG Article 7 that is every bit as serious as the ludicrous proposition in U.S. decisions that U.S. domestic sales law should guide the interpretation of the CISG.<sup>43</sup> If tribunals find a “gap” in the Convention every time familiar domestic law approaches do not appear in the Convention (even where those courts admit the Convention actually addresses the situation), there is little hope that the Convention can achieve its goal of creating a uniform international sales law. If Civil Law and Common Law courts engage in a competition to see which can incorporate more familiar traditional domestic approaches into decisions construing the CISG – which courts can more flagrantly engage in the homeward trend in interpreting the Convention – , then we should begin the process of analyzing why the Convention failed. At least then we can more quickly begin the process of starting over again – one hopes, with greater wisdom.

A number of years ago I speculated on the possibility that interpretation of the Convention would break down along regional lines – that non-uniform regional interpretations would develop.<sup>44</sup> I fear that this prediction may be coming true – except that the break-down is not along literal geographical lines (reflecting, e.g., trade patterns and the magnitude of trading volumes) as I speculated, but rather along the fault lines of mental geography. I underestimated the importance of legal ideology – the thought patterns ingrained by one's legal education. One

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<sup>42</sup> See Joseph Lookofsky & Harry M. Flechtner, *Nominating Manfred Forberich: The Worst CISG Decision in 25 Years?* 9 THE VINDOBONA J. INT'L COMM. L. & ARB. 199 (2005), available online at <http://ssrn.com/abstract=1311459>.

<sup>43</sup> See Harry M. Flechtner, *The CISG in U.S. Courts: The Evolution (and Devolution) of the Methodology of Interpretation*, in *QUO VADIS CISG: CELEBRATING THE 25TH ANNIVERSARY OF THE UNITED NATIONS CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS* (Franco Ferrari, ed., Sellier European Law Publishers, 2005).

<sup>44</sup> Harry M. Flechtner, *Another CISG Case in the U.S. Courts: Pitfalls for the Practitioner and the Potential for Regionalized Interpretations*, 15 J.L. & COM. 127 (1995).

split in interpretational patterns seems to be following, for example, the divide between the Civil Law and Common Law traditions. Decisions like that of the Belgian Cassation court, unfortunately, encourage the process of creating CISG subcultures. As Prof. Michael Bridge has eloquently stated: "The challenge facing the CISG is no less than the manufacture of a legal culture to envelope it before the centrifugal forces of nationalist tendency take over."<sup>45</sup>

Unfortunately, the centrifugal forces of nationalist (or, I would say, legal ideologist) tendencies may be winning, as evidenced by the decision of the Belgian Cassation Court. I freely admit that many decisions by U.S. courts are, in this regard, at least as bad. Unfortunately, bad decisions from tribunals in one tradition are not counter-balanced by bad decisions from tribunals in a different tradition: the "evil" is cumulative.

I have not, however, given up hope. A new generation of lawyers and judges, less imprisoned by those legal traditions and more aware of the alternative approaches of other traditions, is being educated in law schools around the world. They may yet save us from the disintegration of a globally coherent and consistent interpretation of the Convention, provided we can hold on to basic shared understandings and agreements until this new generation takes over. And if the next generation cannot so save us, at least we will have a rich body of material to mine for lessons to help in the next attempt to create genuinely uniform international commercial law. Even in that event the CISG should not be considered a failure – just an interim experiment to build on. But the entrenchment of different approaches to interpreting the CISG by tribunals from different legal traditions would mean that the Convention's ultimate goals, the ambitious vision that inspired it, would not have been achieved. That would be a loss to the prosperity of the world. It would also be a serious setback to the process of developing a global legal culture – a process on which, I genuinely believe, the very survival of our species may depend. So let us at least make the attempt to listen to and understand each other.

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<sup>45</sup> Michael R. Bridge, *The Bifocal World of International Sales: Vienna and Non-Vienna*, in *MAKING COMMERCIAL LAW: ESSAYS IN HONOUR OF Roy GOODE* 288 (Ross Cranston ed., 1997).



**Peter Huber** is professor of Law at Johannes-Gutenberg-University Mainz (Germany) where he holds the chair for private law, conflict of laws and comparative law since 2000. His main interests lie in the fields of international and transnational contract law, of comparative contract law and in the area of international litigation and arbitration. He has published several books and articles on these issues, teaches them regularly and acts as one of the co-editors of the journal "IHR-Internationales Handelsrecht" (International Commercial Law). He also is a member of the Editorial Board of the Vindobona Law Journal of International Commercial Law and Arbitration. Since the year 2001 he is the Coach of the Mainz University team for the W.C. Vis International Commercial Arbitration Moot Competition. Since the year 2000 he acts as secretary for the section of private law in the German Society of Comparative Law.





# Typically German – three contentious German contributions to the CISG

Prof. Dr. Peter Huber



## Three contributions

- The „Nachfrist“
- The „reasonable use“ test
- The love of intricate doctrinal exercise



- CISG: avoidance of the contract as ultima ratio
- Example: buyer's right to avoid for seller's breach, Art. 49(1) CISG
  - basic principle: fundamental breach (Art. 49(1)(a), Art. 25 CISG)
  - *only* in cases of non-delivery: alternatively „Nachfrist“-procedure, i.e. if seller does not deliver (...) within additional period of time fixed by the buyer (Art. 49(1)(b), Art. 47 CISG)

## The Nachfrist

- German origins: Art. 49(1)(b) CISG: in cases of non-delivery, buyer can avoid if seller does not deliver (...) within a „Nachfrist“ fixed by the buyer
  - see also Art. 64(1)(b)
- German suggestions: „Nachfrist“ also for other types of breach ?

**Bundesgerichtshof 3.4.1996, www.cisg-online.ch Nr. 135 (cobalt sulphate case)**  
[shortened and simplified]

- sold: cobalt sulphate of British origin; delivered: South African origin
- buyer wants to avoid for fundamental breach (Art. 49(1)(a) CISG), arguing (inter alia) that he primarily exports to countries which have an import ban for South African goods
- Bundesgerichtshof rejects that argument:
  - buyer had neither been able to name potential buyers in those countries or to adduce evidence of earlier sales in these countries,
  - nor had he even alleged that *it would have been impossible or unreasonable to make another use of the goods in Germany or to export it into another country (!)*
- What does this mean ?
  - even if the non-conformity is serious and not curable,
  - there will be no fundamental breach if the buyer can reasonably be expected to use the non-conforming goods in another way (and claim damages for any remaining loss)

Folie Nr. 5

... followed by the Swiss Bundesgericht,...

**Swiss Bundesgericht 28.10.1998, www.cisg-online.ch Nr. 413**  
[shortened and simplified]

- Sold: frozen meat
- Delivered: meat with (inter alia) a considerably higher percentage of fat; value of the meat reduced by ~25 percent
- Held by Swiss Bundesgericht: no fundamental breach:
  - “If the breach of contract is based on a deviation from the contractual characteristics of the goods or any other deficiency of the goods, it must be determined whether a further processing or disposal of the goods in the usual course of business - even with a markdown or something alike - is possible without an unreasonable effort and is reasonable(...)”
  - “The buyer shall primarily make use of the other remedies, namely price reduction and compensation, with the reversed transaction constituting the last recourse in reacting to the other party’s breach of contract which is that essential that it deprives that party of its interest in the fulfilment of the contract (...)”
- “In the first written notice of deficiencies of 16 October as well as in the second one of 22 October 1992, [Buyer] offered to take the meat at a lower price...  
...that [Buyer] did see the possibility and, according to its own estimation, did actually have the ability to dispose of the meat despite its reduced value at a lower price in the frame of its own business activity in Egypt.”

Folie Nr. 6

US Court of Appeals (2nd circuit) 6.12.1995, [www.cisg-online.ch](http://www.cisg-online.ch) Nr. 140 (Delchi v. Rotorex)

[shortened and simplified]

- sale of air conditioner compressors; the compressors delivered were less efficient, had lower cooling capacity and consumed more energy than required
- held that there was a fundamental breach by the seller because „the cooling power and energy consumption of an air conditioner compressor are important determinants of the product’s value“
- not examined whether there was another reasonable use
- however: earlier than the cobalt sulphate decision – So ???

## The reasonable use test: Is it reasonable ? – The Pros and Cons

### PRO:

- the policy parallel: avoiding avoidance, avoiding restitution, saving the contract
- the literal argument: substantially deprived?

### CONTRA: the English objections:

- Is the CISG only suited for “disputes concerning consignments of shoes sent from Italy to England or Germany” or for “sales of tractors by salesmen from developed countries to Nusquamian peasants” ?
- And not for documentary commodity sales where “certainty is at a premium and strict rights of termination are the order of the day”?

## When is another use „reasonable“ ?

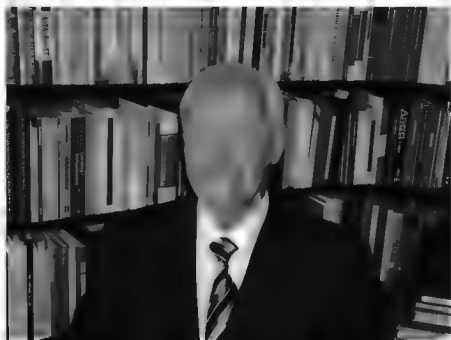
### Emphasis on (i.a.):

- the commercial background of the transaction: time of the essence ? – even impliedly (string contract, documentary sale...)
- the buyer's brand image and trade reputation

## The love of intricate doctrinal exercise: a case study

Seller delivers non-conforming goods. Non-conformity does *not* amount to a fundamental breach (eg reasonable use). Buyer buys the required goods from a third party and claims the costs of this cover purchase as damages from the seller. Correct ?

- Art. 75 CISG ?
- Art. 74 CISG ?
  - Would that circumvent the fundamental breach doctrine ?
- The (former) German background: „Don't call it avoidance, call it damages!“
- The German reaction: damages in lieu of performance // avoidance
- The consequences for the CISG ?



**Jan Ramberg** is Professor emeritus in private law and former Dean of the Law Faculty of the University of Stockholm, First Rector and Honorary Professor of Riga Graduate School of Law, former Member of the Board of the Arbitration Institute of the Stockholm Chamber of Commerce, ICSID Conciliator appointed by the Swedish Government, former Vice President of the Commission of Commercial Law and Practice of the International Chamber of Commerce, former Chairman of CISG Advisory Council, Honorary Member and former President of the Swedish Maritime Law Association, former President of the Scandinavian Maritime Law Institute, Honorary Vice President of Comité Maritime International and Honorary Member of FIATA.





# GROUP I: ANY MODE OR MODES OF TRANSPORT

EXW FCA CPT CIP DAP DAT DDP: *may* be chosen  
for maritime transport and *should* be chosen for  
wholly or partly non-maritime transport

# GROUP II: SEA AND INLAND WATERWAY TRANSPORT

FAS FOB CFR CIF: *should only* be chosen for maritime  
transport

# CHOICE WITHIN GROUP I

- EXW seller wants to restrict its obligation merely to place the goods at the buyer's disposal at the seller's premises or another named place
- FCA seller willing to make the goods available for the buyer at the carrier's named reception point and to clear the goods for export
- CPT seller, in addition to obligations under FCA, is also willing to provide and pay for a contract of carriage to a named destination
- CIP seller, in addition to obligations under CPT, is also willing to provide and pay for insurance
- DAP seller willing to deliver at a named place and to assume all costs and risks until the goods arrive there

# CHOICE WITHIN GROUP I continued

- DAT seller, in addition to obligations under DAP, is also willing to unload the goods from the means of transport upon arrival at the named place or point
- DDP seller, in addition to obligations under DAP, is also willing to clear the goods for import and pay the duty

## CHOICE WITHIN GROUP II

- FAS seller willing to deliver, or procure the goods delivered, alongside the ship
- FOB seller willing to deliver, or procure the goods delivered, on board the ship
- CFR seller, in addition to obligations under FOB, is also willing to provide and pay for a contract of carriage to the named destination
- CIF seller, in addition to obligations under CFR, is also willing to provide and pay for insurance

# CHANGES OF SUBSTANCE

Additions and restructuring

- Restructuring to invite appropriate choice of term
- Terms for any mode of transport
- Maritime only terms
- Compare the ICC Sale Form (ICC publ. No 556)

- Additions and changes to promote better understanding and easy reading:
- Security measures
- Transport handling charges (THC)
- String sales ( no physical delivery but procurement of goods, e.g. mid-ocean; compare risk transfer according to Art. 68 CISG )
- Electronic transmission applies generally
- All insurance obligations in A3/B3

- **Terms for any mode of transport:**
- EXW - No change. Seller's minimum obligation
- FCA - No change. To be chosen when buyer wishes to avoid loading at seller's premises or export clearance
- CPT - No change. Unless otherwise agreed, risk passes upon handing over to first carrier (= Art. 31 (a) CISG )
- CIP - No change. Principle of minimum insurance cover retained.
- DDP – No change. Seller's maximum obligation.

- **NEW TERMS:**

- DAP ("Delivered at Place")
- An important trigger of the 2010 revision in order to induce choice of Incoterms in the U.S
- Replaces DAF, DDU and DES
- DAT ("Delivered At Terminal")
- Seller unloads goods from means of transport arriving at the terminal
- Replaces DEQ- the quay qualifies as "terminal"

- **MARITIME-ONLY TERMS:**

- FAS – No change
- FOB – Change: No risk transfer on passing of ship's rail but when goods placed on board. Addition: "procure goods delivered"
- CFR - Addition: "procure goods delivered"
- CIF - Addition: "procure goods delivered"
- DES – Replaced by DAP
- DEQ –Replaced by DAT

TO WHAT EXTENT DO INCOTERMS 2000 VARY  
ARTICLES 67(2), 68 AND 69?

*Jan Ramberg\**

I. INTRODUCTION

Contracting parties cannot rely solely on the stipulations of the Convention on Contracts for the International Sale of Goods (CISG) to determine the modalities of delivery. They have to agree on where, when and how the goods should be delivered. For such purposes, they have, since time past, used standardized trade terms, which, in contemporary world trade, are reflected by INCOTERMS 2000.<sup>1</sup> In the United States, the American Foreign Trade Definitions of 1941 have been used and incorporated in the Uniform Commercial Code (UCC), however, they have been removed from the updated version. This removal will undoubtedly contribute to an increased worldwide use of INCOTERMS 2000. Disputes relating to modalities of delivery and passing of risk normally will not concern the interpretation of the CISG but rather the interpretation of trade terms as related to the CISG.

The CISG, in Article 31, distinguishes between handing over the goods to the carrier and delivery at a particular place. If the contract of sale involves carriage of goods, they are, according to Article 31(a), to be handed over to the first carrier for transmission to the buyer. This corresponds to the principle of CPT and CIP INCOTERMS 2000. Articles 31(b) and (c) deal with cases unrelated to carriage where the goods have to be made available directly to the buyer at “a particular place”<sup>2</sup> or the seller’s “place of business.”<sup>3</sup> These cases correspond to EXW INCOTERMS 2000.

INCOTERMS 2000 adds specificity in a number of carrier-related trade terms. Traditionally, these concerned cases where the goods were to be handed over for carriage of goods by sea (FAS, FOB, CFR (or C&F) and CIF). In the revisions of the original INCOTERMS 1936, trade terms relating to carriage by rail (FOR, FOT) and air (FOB Airport) were added, but these

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\* Professor Emeritus.

1. INCOTERMS 2000: ICC OFFICIAL RULES FOR THE INTERPRETATION OF TRADE TERMS (1999).

2. CISG art. 31(b).

3. CISG art. 31(c).

terms have now been replaced by the general FCA-term (“Free Carrier”), which could be used for all modes of transport.

While, traditionally, maritime transport required the seller (shipper) to deliver the goods *to the ship*, the use of so-called cellular vessels receiving goods stowed in containers implies delivery of the goods *to the carrier* rather than to the ship. In practice, the goods are either received at so-called container freight stations (CFS) or container yards (CY) for subsequent loading of the containers onboard the ship. Hence, the traditional terms FOB, CFR and CIF, where the goods are to be placed onboard and the risk passes when the goods pass the ship’s rail, became inappropriate in such traffic. FCA is now available for use instead of FOB, while CPT and CIP could be used in place of CFR and CIF. As has been said, CPT and CIP conform with the principle of handing over the goods to the first carrier adopted in CISG Article 31(a).

INCOTERMS 2000 contain variations compared with Articles 67(2), 68 and 69, and it is the purpose of this paper to deal with these article-by-article.

## II. ARTICLE 67(2)

Article 67(2) stipulates that “the risk does not pass to the buyer until the goods are clearly identified to the contract, whether by markings on the goods, by shipping documents, by notice given to the buyer or otherwise.”<sup>4</sup> The language used in INCOTERMS 2000 is slightly different, as the proviso of B5 requires “that the goods have been duly appropriated to the contract, that is to say, clearly set aside or otherwise identified as the contract goods.”<sup>5</sup> Both versions create difficulties of interpretation when the sale concerns goods to be shipped in bulk together with other goods of the same kind. In such cases, it may be difficult to hold that the goods have been *identified* as the contract goods before they have been separated from the bulk at the destination. However, the words “*appropriated* to the contract” might invite the conclusion that a pro rata part of the bulk might be appropriated to the contract by a bill of lading, as long as the *bulk* is identified. If so, the risk may pass to the buyer before breaking bulk at destination so that each buyer would have to bear the risk in proportion from the moment that the goods have been handed over to the carrier. Another solution would create strange results in the case of a sale of goods in transit, where breaking bulk as a requirement for

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4. CISG art. 67(2).

5. INCOTERMS 2000, *supra* note 1, § B5.



the passing of the risk would keep the original seller at risk until the goods have arrived at the destination. There is, to my knowledge, no case providing guidance on the issue, but it follows from comments made on the article that the CISG should be interpreted as suggested here and there would not seem to be any difference between CISG Article 67(2) and INCOTERMS 2000 clause B5.

### III. ARTICLE 68

With respect to sale in transit, Article 68 connects the passing of the risk to the time of the conclusion of the contract. However, owing to the use of CFR and CIF, this rule is superseded in practice so that, as expressly stipulated in INCOTERMS 2000, the risk passes when the goods pass the ship's rail at the port of shipment. In this respect, these trade terms reflect the exception to the main rule in Article 68, second sentence: "However, if the circumstances so indicate, the risk is assumed by the buyer from the time the goods were handed over to the carrier who issued the document embodying the contract of carriage."<sup>6</sup> It may seem strange that the risk could pass retroactively before the conclusion of the contract, but this logical dilemma may be solved if the sale is regarded as a sale of documents, putting subsequent buyers of the goods in the same position as the first buyer receiving the document controlling the disposition of the goods.

### IV. ARTICLE 69

The most obvious differences between the CISG and INCOTERMS 2000 relate to Article 69. INCOTERMS 2000, in EXW and the D-terms (DAF, DES, DEQ, DDU and DDP), expresses the principle that the risk passes as soon as the goods have been made available to the buyer at the respective delivery points, without any further requirements, such as the buyer "commits a breach of contract by failing to take delivery" as stipulated in the main rule of Article 69(1).<sup>7</sup> Thus, under INCOTERMS 2000, the exception to the rule of Article 69(1) in Article 69(2) that, in case of taking over the goods at a place other than the place of business of the seller, the buyer's awareness of the fact that the goods are placed at his disposal is enough for the passing of

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6. CISG art. 68.

7. CISG art. 69(1).

the risk becomes redundant.<sup>8</sup> It may, perhaps, seem rough on the buyer that, under INCOTERMS 2000, the risk may pass to the buyer even before he has been aware of the fact that the goods are at his disposal. However, it should at least be clear to the buyer that the risk *may* pass to him at the agreed date or at the beginning of an agreed period for delivery, so that he could insure himself accordingly. According to INCOTERMS 2000, the seller has the duty to notify the buyer that the goods are available for him or that they have been duly delivered (clause A7).<sup>9</sup> Thus, the seller's failure to notify the buyer would constitute a breach of contract, entitling the buyer to the remedies for breach under CISG.

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8. CISG art. 69(2).

9. INCOTERMS 2000, *supra* note 1, § A7.



**Alejandro M. Garro** teaches at Columbia University School of Law, where he is also a Senior Research Scholar at the Parker School of Foreign and Comparative Law. A member of the Columbia Law School Faculty since 1981, Professor Garro has been teaching in the fields of Comparative Law, International Business Transactions and Latin American Legal Systems. His principal areas of teaching and research at present are international commercial contracts and transnational arbitration and litigation. He regularly gives courses and seminars in Latin America (including the National Universities of Buenos Aires and La Plata (Argentina), Universidad Iberoamericana and Escuela Libre de Derecho (Mexico), Universidad de Montevideo (Uruguay), Universidad Francisco Marroqui (Guatemala), and Universidad de Rio Grande do Sul (Brazil). He has also taught at the University of Fribourg (Switzerland), Strasbourg (France), Doshisha University (Kyoto and Tokyo campuses, in Japan), Amsterdam and Leiden (The Netherlands), Universidad Carlos III in Madrid and Universidad de Salamanca (Spain). He is a regular Visiting Professor at the Université de Strasbourg, where every year he teaches a seminar on selected issues of American law and another on secured transactions in international trade.

Alejandro Garro is the author or editor of books on international commercial arbitration, international sales, and secured transactions, as well as scores of scholarly articles and contributions to edited volumes. He is a graduate from the National University of La Plata School of Law (Argentina), subsequently graduating with an LL.M. from Louisiana State University, and a doctoral degree in law (J.S.D.) from Columbia University. He is admitted to practice in Buenos Aires, Madrid, and New York.

Professor Garro is an expert to the delegation of the Argentine Government of Argentina before the United Nations Commission on International Trade Law (UNCITRAL) and before the OAS Conference on Private International Law (CIDIP). He also represents the American Association of Private International Law (ASADIP) before the Hague Conference on Private International Law and the New York City Bar Association before the International Institute for the Unification of Private Law (UNIDROIT).



**International Conference:**  
***Uniform Sales Law - A Conference in memory of Al Kritzer***

University of Belgrade Faculty of Law  
12-13 November 2010

**The CISG in a Globalised World**

**INTERPLAY BETWEEN CISG AND UNIDROIT PRINCIPLES:**

**The “Skeleton Theory” under Article 7 of the Vienna Sales Convention**

Prof. Alejandro M. Garro <sup>1</sup>

Introduction

- What does it mean “to take into account the [CISG’s] *international character*” under Article 7(1)? What about “*the need to promote uniformity in its application*”?
- Impact of the canon of interpretation in Article 7(1) on the meaning of the exclusion interpretation of Article 4(a): What if a provision of the CISG is in conflict with national laws on the validity of contracts?
- Impact of Article 4 on the determination of “*matters governed but not settled*” by the CISG (Article 7(2)).

Can the UNIDROIT Principles Become Relevant  
to the determination of the CISG’s “general principles”?

- Is Article 7(1) relevant to the gap-filling provision of Article 7(2)?
- Possible interpretative approaches to ascertain CISG’s “general principles”.
- Are there “principles” that are common to both the CISG and the UNIDROIT Principles?
- Reliance on the UNIDROIT Principles as “trade usages”: The “White Crystal Sugar Case”
- Reliance on the UNIDROIT Principles to add “flesh” to the CISG’s “bones”.
- Some cases on point: Filling gaps under Article 78 and Article 79 of the CISG

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<sup>1</sup> Alejandro M. Garro, [garro@law.columbia.edu](mailto:garro@law.columbia.edu), Columbia University School of Law, 435 West 116<sup>th</sup> Street, New York, N.Y. 10027.



## Case text (English translation)

### Queen Mary Case Translation Programme

#### **Foreign Trade Court of Arbitration attached to the Serbian Chamber of Commerce in Belgrade, Serbia**

#### **Award of 23 January 2008 [Proceeding No. T - 9/07]**

*Translation [\*] by Jovana Stevovic  
Edited by Dr. Vladimir Pavic, Milena Djordjevic, LL.M. [\*\*]*

#### **Claimant of Italy [Buyer] vs. Respondent of Serbia [Seller]**

After the preliminary decision of the Expanded Arbitral Tribunal of the Foreign Trade Court of Arbitration attached to the Serbian Chamber of Commerce in Belgrade, composed of [...], on the challenge of jurisdiction of the Court of Arbitration, the Arbitral Tribunal, composed of [...], in the presence of D.P taking the minutes of the meeting, deciding in a dispute concerning the claim of the [Buyer] against the [Seller] for payment of the main debt in the amount of **124,843.24 €**, after the proceedings, the hearing and deliberations and voting, pursuant to Article 54 paragraph 1 of the Law on Arbitration (hereinafter referred to as: the LA) (Official Gazette of the Republic of Serbia no. 46 of 2 June 2006) and Article 49 of the Rules of the Foreign Trade Court of Arbitration attached to the Serbian Chamber of Commerce (Official Gazette of the Republic of Serbia no. 52 of 8 June 2007; hereinafter the Rules) on 23 January 2008 has made the following unanimous:

#### **AWARD**

**1.)** The [Seller] is ordered to pay to the [Buyer] the sum of 90,904.91 € for the main debt with 4.62% yearly interest, distributed in the following way: for the sum of 76,657.63 € the interest is due for the period from 18 June 2007 until the final payment; for the sum of 8,260.58 € the interest is due for the period from 19 June 2007 until the final payment and for the sum of 5,986.70 € the interest is due for the period from 5 June 2007 until the final payment, within 15 days of the receipt of this Award, subject to court enforcement in case of non-payment.

**2.)** The [Seller] is ordered to pay to the [Buyer] the amounts of US \$146.00 and 2,623.15 € as compensation of the costs of proceedings and the amount of 73,630.00 RSD, for the cost of representation in this dispute, within 15 days from the day receipt of the Award, subject to court enforcement in case of non-payment.

**3.)** The [Buyer]'s claim against the [Seller] in the amount of 33,939.07 € is rejected as unfounded.

#### **STATEMENT OF REASONS**

##### **1. Jurisdiction of the Court of Arbitration [.....]**

## **2. Appointment of Arbitrators [.....]**

### **3. Arbitration proceedings, statements and evidence presented by the Parties**

1.) On 5 June 2007, [Buyer] submitted a Statement of Claim against [Seller] to the Foreign Trade Court of Arbitration attached to the Serbian Chamber of Commerce in Belgrade. [Buyer] requested the Court of Arbitration to order [Seller] to pay damages in the amount of 114,819.45 €, with interest which the European Central Bank stipulates for debts in Euros, on the following amounts: for the amount of €77,383.33 the interest was to be paid as of 24 May 2005 until the final payment, and for the amount of €37,436.12 the interest was to be paid as of the submission of the claim until the final payment. [Buyer] also requested costs of the procedure to be reimbursed to him.

[Buyer] stated in the claim the following: On 7 October 2002, [Buyer] concluded Sales Contract No. 3585 with [Seller] and an Annex No. 1 to this Contract on 9 December 2002. According to the Contract, [Seller] was required to sell and deliver to [Buyer] 671 tons of white crystal sugar of Serbian origin, 2002 harvest. Apart from the other documents regarding the goods, [Seller] was required to provide a certificate of origin of the goods - EUR 1, as evidence of the agreed origin of the sugar. It noted that in several successive deliveries until the end of March 2003, [Seller] delivered the agreed goods and provided a EUR 1 for each successive delivery, which was issued by the Customs Administration of the Republic of Serbia. However, in the middle of August 2004, the Government of the Republic of Serbia communicated about 5,000 suspicious cases of the export of sugar into the EU which were followed by EUR 1 forms to the Customs Administration. The European Anti-Fraud Office (OLAF) demanded an explanation regarding the validity of the EUR 1 forms issued. After the subsequent inspection, the Customs Administration RS sent report No. 01/13 No. D-908/1 of 19 January 2005 to [Seller] informing him that it withdrew the certificate of origin (EUR 1) for 168 tons of sugar. After the withdrawal of the certificate of origin (EUR 1), there was no basis for a favored treatment of the acquired and imported sugar, therefore, the competent customs organs of Italy instructed [Buyer] (as the buyer and importer of the sugar in question for which EUR 1 was withdrawn) to pay 66,369.60 € in the name of customs with VAT and due interest up to 24 May 2005 in the amount of 9,013.73 €. [Buyer] stated that, due to all these circumstances, he suffered damages in the amount of 1,550 € and 5,886.12 € and that tax costs amounted to 30,000 €.

In addition to the claim, [Buyer] also submitted the following items of evidence:

- The Sales Contract between the Parties, with Annex No. 1
- EUR 1 forms;
- Bills of lading;
- Certificates;



- Statements of the sugar factory on the origin of the sugar;
- Dispositions for dispatch of the goods, information of the Customs Administration RS on the results of the export control;
- [Buyer]'s Information (objection) submitted in regards to the finding of the Customs Administration RS;
- The judgment of the tax commission in the G. Province No. 99/2/06 made in regard to [Buyer]'s appeal;
- Notification of the Customs Agency in G. of 24 May 2005 with an order to pay the customs and VAT;
- Policy of judicial deposit of the [name of a company ] company 9-34122;
- Payment invoices: No. 126/07 of 30 March 2007 for the amount of 2,773.72 €, No. 51/2006 of 8 May 2006 for the amount of 100 €, No. 172 of 20 October 2005 for the amount of 499.20 € and No. 280/05 of 23 September 2005 for the amount of 2,613,20 €.

[Buyer] has not submitted with his claim, nor until the conclusion of the hearing, the evidence of the payment of tax nor of the payment of costs - premium for the issuance of the policy of judicial deposit.

In his submission of 3 July 2007, [Buyer] increased his claim to 124,843.98 €, with interest which the European Central Bank stipulates for: the amount of 81.224,12 € without determination of the time period for which [Buyer] seeks interest, and for the amount of 43,619.86 € with interest from the submission of the claim until the final payment. He requested the reimbursement of the costs of the proceedings as well. With this document he submitted: Receipts of the Department for the payment of tax No. XX T 126111 of 18 June 2007 for the amount of 76,657.63 € and No. XX T 127386 of 19 June 2007 for the amount of 8,260.58 €.

The Statement of Claim and document increasing the amount of claim were duly delivered to [Seller].

**2.)** On 9 July 2007, [Seller] submitted a written answer without submitting any evidence. This answer and [Seller]'s objections in the submissions of 25 July and 10 September 2007 are referred to in the Statement of Reason of this Award in Section 1 - Jurisdiction of the Court of Arbitration. They are all related to the plea contesting jurisdiction.

**3.)** In his submission of 17 July 2007, [Buyer] responded in greater detail to the raised plea contesting jurisdiction. His positions are stated in Section 1. - of this Award.

**4.)** In the submission of 10 September 2007, [Seller] contested the basis and the amount requested in the claim. [Seller] stated that proceedings between the Parties

have already been held on the same basis before this Court of Arbitration, under Case No. T-10/06, and terminated by an award of 27 November 2006 and that the [Seller] paid "... the entire amount of damages which were claimed under this basis." He contested the [Buyer]'s claim in regard to the unpaid customs, due to the fact that previously [Buyer] requested a smaller amount on the same basis. He asserted that [Buyer] had come to an agreement with the customs organs in his country to pay under a favored condition just the amount of 16,592.25 €. This sum was already the subject matter of the abovementioned claim before this Court of Arbitration. The [Seller] disputed the obligation to pay the costs of the guarantee and the fees for legal representation. He particularly stated that he is not obliged to pay 32,489.65 € for tax, since [Buyer] has not paid this sum. In reference to Article 279 paragraph 1 of the Serbian LCT, [Seller] contested [Buyer]'s right to interest. [Seller] emphasized that in the entire business operation regarding sale and delivery of sugar there is no fault on his part, due to the fact that he performed his contractual obligations in good faith and professionally.

In [Seller]'s opinion, the Customs Administration RS, on its initiative, conducted a subsequent inspection and verification of the issued certificates of origin of goods and then withdrew the issued certificate EUR 1. Therefore, there is no responsibility or fault on the part of [Seller], so he should not be ordered to pay the requested amount to [Buyer]. [Seller] requested the Tribunal to dismiss the claim as unfounded. He requested reimbursement of the costs of arbitration, however, he did not specify their amount nor did he provide evidence on that subject. As evidence of his assertions, he suggested the examination of the records of Case T-10/06 before this Court of Arbitration. [Seller] submitted [Buyer]'s letter of 13 January 2006 as evidence.

5.) In his submission of 25 October 2007, [Buyer] contested all of [Seller]'s assertions from the previous submission. He emphasized that "... there [was] a difference in the subject matter between the dispute in the case at hand and the dispute in the proceedings No. T-10/06 ..." In Case T-10/06, [Buyer] requested the amount he had paid for the penalties, while in the present dispute he requested the amount he had paid for the customs, interest and costs. In [Buyer]'s claim, he specified the main debt in the amount of 124,843.98 € with interest stipulated by the European Central Bank for: the amount of 66,369.60 € as of 18 June 2007 until final payment, for the amount of 14,485.52 € as of 19 June 2007 until the final payment, and for the amount of 43,619.86 € as of the submission of claim until the final payment. He also requested the reimbursement of the costs of the proceedings - the sum that they amount to until the end of the proceedings. He also submitted evidence: Notification of the imposed administrative measure towards [Buyer] in the amount of 66,369.00 € which was issued by the director of the Customs Department in G. under No. 48/2005.

6.) In the submission of 7 November 2007, [Seller] reiterated all of the above-mentioned reasons upon which he disputes the basis and the amount requested in the [Buyer]'s claim. [Seller] did not make any new assertions. He did not submit any

new evidence. He requested the Tribunal to refuse the [Buyer]'s Statement of Claim as unfounded.

7.) The hearing was scheduled and held on 23 January 2008, in the presence of the Parties' counsel.

The Arbitral Tribunal, at its own initiative, verified whether this Court of Arbitration had jurisdiction over the present dispute and whether the dispute was arbitrable *rationae personae rationae materiae*. The Tribunal decided that the Parties may freely dispose with the subject of the claim.

**7.a.) Arbitrability *rationae personae*.** In the assessment of the arbitrability in regard to the Parties, the Arbitral Tribunal started off with the fact that the Parties to the present dispute were from different countries. In their countries they represented *national legal entities* - legal entities within the sense of the domiciliary regulations of the country in which they were established and registered. Different countries have granted them the status of a legal entity, whereby they have fulfilled the requirement to be a party in the dispute pursuant to Article I paragraph 1(a) of the European Convention of 1961, and the conditions provided for in Article 12 of the Rules and Article 3 paragraph 1 of the LA.

**7.b.) Arbitrability *rationae materiae*.** When examining the arbitrability *rationae materiae*, the Arbitral Tribunal first turned to the essence of the legal relationship between the Parties, determined by their Contract No. 3585, its execution and the substance of the claim. After analyzing the abovementioned elements, the Arbitral Tribunal has concluded that the backbone of this legal relationship between the Parties is a classical sales contract on the export of goods. Their legal relationship is in no way special or specific in order for it to be excluded from the term: international business relationship - international commercial business, nor does it fall within the scope of exclusive jurisdiction of the state courts, as provided for in the relevant legal acts.

According to the Arbitral Tribunal, it is not disputed that 1.) the substance of the legal relationship is an international commercial business relationship; 2.) there is no exclusive jurisdiction of the state courts for the settlement of this dispute provided by relevant legal acts; and 3.) the Parties can freely dispose of the right which is the subject of this dispute. In this way, a unique ruling was made that all the requirements for the objective arbitrability of the dispute have been met pursuant to the abovementioned provisions of European Convention 1961 as well as the conditions laid down in Article 5 paragraph 1 of the LA and Article 1 paragraph 1 and Article 12 of the Rules.

After the assessment of the arbitrability of the dispute, the deliberation on the merits of the dispute began in the presence of the Parties' counsel. Before the hearing was held, the Extended Arbitral Tribunal made a ruling on the refusal of the plea contesting jurisdiction. This ruling was read to the Parties, and copies of the minutes of the hearing before the Expanded Arbitral Tribunal were delivered.

At the hearing, the counsel remained with their assertions and proposals made in their written submissions. They did not request an additional evidentiary proceeding. They agreed that the Serbian substantive law should be applied. [Buyer] requested to be reimbursed for the amount of the costs he had paid.

Counsel stated that they did not have objections to the composition of the Arbitral Tribunal. The Arbitral Tribunal made a ruling to examine the evidence by reading all the documents submitted by the Parties and to read Case T-10/06. All the submitted evidence has been read. The hearing was then concluded. The minutes of the hearing have been signed without any objections.

On 23 January 2008, the Arbitral Tribunal met *in camera*. At that occasion, the evidence was assessed and the Tribunal made the award.

#### **4. Substantive law**

The arbitration clause was silent with regard to the choice of substantive law. The Parties' counsel agreed at the hearing that the substantive law of the Republic of Serbia should be applied in the present dispute.

Acting in accordance with the agreement between the Parties, and keeping in mind Article VII paragraph 1 of the European Convention of 1961, Article 50 paragraph 4 of the LA and Article 48 paragraph 3 of the Rules, the Arbitral Tribunal was obliged to also take into consideration the trade usages which might be applied to the present dispute and underlying transaction..

As the question of "hierarchy of regulations" was considered not to be essential, and in accordance with the abovementioned obligation to settle the dispute, this Arbitral Tribunal has applied:

1. The terms of Sales Contract No. 3585;
2. The United Nation Convention on Contracts for the International Sale of Goods, Vienna, 11 April 1980 (hereinafter: Vienna Convention 1980). It was ratified by both Italy and Serbia. According to the international standardized practice and domiciliary regulations of the States, the Vienna Convention is to be applied directly (without recurring to the conflict of law rules);
3. The Principles of European Contract Law - PECL, published in 1998 and 2002, also known in practice as: the *Ole Lando Principles* (as it will be further referred to) - as a generally accepted part of the *lex mercatoria*;
4. The UNIDROIT Principles of International Commercial Contracts, 1994, with later amendments, hereinafter: UNIDROIT Principles - as *lex mercatoria*;
5. The UNCITRAL Model Law on International Credit Transfers of 1992. (UNCITRAL, XXV session in 1992 - documents of the UN General Assembly -

Supplement No. 17 (A/47/17) hereinafter: UML on International Credit Transfers - as *lex mercatoria*.

6. The Law on Contracts and Torts, Official Gazette of SFR Yugoslavia, No. 29/1978, with later amendments, which is now applied as the law of the Republic of Serbia.

The Ole Lando Principles are interpreted and applied together with the UNIDROIT Principles (adopted in 1992 by the International Institute for the Unification of Private Law) and the Vienna Convention of 1980. This also applies to the UML on International Credit Transfers.

The Arbitral Tribunal paid due regard to the widely known fact that from the end of the 20th and the beginning of the 21st Century there could be noted a development and harmonization of a new international commercial practice and trade usages which was "codified" in the form of the abovementioned UNIDROIT Principles, UML on International Credit Transfers and Ole Lando Principles. They became available to everyone who performs international business transactions as well as to those who arbitrate disputes in the field of international commerce. Respectable Arbitral Tribunals in the world (especially the ICC Court of Arbitration) have long since made awards pursuant to these Principles and arbitrated disputes between Parties by applying these principles as *lex mercatoria*. Considering that there is no reason for this Court of Arbitration to keep avoiding their application, the Arbitral Tribunal has decided to interpret these principles in regard to the present dispute, to apply them and to arbitrate in accordance with their contents and aims.

The Arbitral Tribunal has commenced with the undisputed and clear obligation laid down in Article VII paragraph 1 of the European Convention of 1961 that trade usages should be applied "*to all cases*". The Tribunal also respected the obligation laid down in Article 50 paragraph 4 of the LA, accordance to which it "*shall always take into account the terms of the contract and usages*", as well as the obligation contained in Article 48 paragraph 3 of the Rules that it "*shall make the award in accordance with the provisions of the contract, and it shall take into account trade usages that may be applicable to the transaction*". Considering that trade usages represent the "hard core" of *lex mercatoria*, that they are modern, widely accepted and that their content is to the greatest extent harmonized in the abovementioned Principles, the Arbitral Tribunal, decided to primarily apply the abovementioned Principles as trade usages, in addition to the Sales Contract. However, the Tribunal did not neglect the mandatory norms of the substantive law chosen by the Parties (Serbian Law on Contracts and Torts).

Considering that, absent the adequate provisions of the substantive law chosen by the Parties, both the Principles and UML on the International Transfer of Funds can provide more up-to-date and modern solutions for the dispute at hand, that they "determine the general principles for international commercial contracts ... they may be used for interpreting and complementing the internationally unified rules ..." as well as for "interpreting and complementing the provisions of national law", the

Arbitral Tribunal strongly supports the application of the abovementioned Principles in this dispute - as *lex mercatoria*.

By applying the Principles in accordance with their meaning, the Arbitral Tribunal has found that they contain solutions for the questions disputed between the Parties.

## **5. Procedural law**

The Parties had the chance to make a free choice of rules to govern the proceedings before this Court of Arbitration. They were entitled to make such a choice pursuant to Article IV paragraph 1 (b) - iii - of the European Convention 1961.

As the Parties have not determined the procedural law in the arbitration clause, the Arbitral Tribunal acted pursuant to Article 45 paragraph 1 of the Rules and applied the Rules to the proceedings before this Court of Arbitration, as stated in the reasoning of this Award.

## **6. The disputed questions**

The Arbitral Tribunal has identified the following questions as disputed between the Parties:

1. Is [Seller] justified in objecting that in Case T- 10/06 settled before this Court of Arbitration [Buyer] was awarded damages which he is now claiming again (*res iudicata* objection)?
2. Is the claim founded and what is the amount of claim?
3. Is the claim for the interest on the main debt founded and at what rate?
4. Does the [Buyer] have the right to be reimbursed for the costs of the proceedings and to what extent?

## **7. Position of the Arbitral Tribunal in regard to the disputed questions**

### **7.1. Res iudicata objection**

Before deciding on the subject matter of this case, the Arbitral Tribunal has read the records of the proceedings before this Court in Case No. T-10/06.

After reading the records of the above mentioned case, the Arbitral Tribunal has concluded that there is no identity of claims between Cases No. T-10/06 and No. T-9/07.

Admittedly, [Buyer] and [Seller] were parties to both proceedings and they appeared in the same roles (as Claimant and Respondent). It is also correct that the legal relationship between the Parties was defined by the same Sales Contract No. 3585 of 7 October 2002. In both disputes [Buyer] claimed damages.

According to the legal reasoning of this Arbitral Tribunal, the mere fact that the proceedings in relation to the same legal grounds were conducted earlier between

the same parties does not suffice to determine the identity of disputes. It is necessary to determine whether in the prior proceedings [Buyer] was awarded the entire amount for damages, in all of its aspects and in the total amount, or just a part of it.

After reviewing the records of the Case No. T-10/06 the Arbitral Tribunal determined that [Buyer] claimed the amount of 16,592.25 €, which was awarded to him under the award carrying the same number, rendered on 27 November 2006. From the report of the claim and the documents submitted with the claim it was determined that in that case [Buyer] based his claim on the documents concerning the payment of the administrative penalties to the authorities of his country. He informed [Seller] of this in a letter dated 13 January 2006, specifically stating that it concerns a penalty and not the payment of customs duties or other damages. From the written reply sent to [Buyer], dated with the same date, [Seller] literally stated that he considered [Buyer]'s decision "to pay one-fourth of the penalty" to be rational. From receipt No. 7/A of 31 January 2006 in the name of [Buyer] and inspection sheet of the Central institute of the National Bank of Italy of the same date (pages 16 and 17 in that case), it was determined that [Buyer] paid an administrative penalty in the amount of 16,592.25 €. From the statement of reason of the award under this number, it can also be seen that the dispute concerned a penalty and not the payment of customs duties and costs in regards to the customs procedure.

The previously requested and awarded amount of 16,592.25 € in the dispute between the same parties before this Court of Arbitration is therefore of no relevance.

In the current dispute, [Buyer] does not claim the amount paid for the penalty, which he paid on 31 January 2006, but rather the amount of 76,657.73 € paid on 18 June 2007 for the customs duties with interest and the amount of 8,260.58 € which he paid on 19 June 2007 for the costs of customs procedure. By conducting proceedings for the damages he had incurred by paying the penalty, [Buyer] did not exhaust his right to claim newly incurred damages or to commence new proceedings on a different basis - on the basis of paid customs, interest and costs which he subsequently had to pay. The Arbitral Tribunal has analyzed and qualified the prior and current claims and found that they are not identical in regard to the legal basis and the documents on which they are based. By conducting proceedings of one dispute for one part of the material damages, the party does not lose the right to claim the remaining amount for damages. Any other interpretation would deny the party the right to claim damages which it later incurred or the entire amount of damages, which does not have justification in the applied substantive law. On the basis of all of the abovementioned reasons, [Seller]'s objection of *res iudicata* has been refused as unfounded.

## **7.2. The basis of the claim**

In regard to the circumstances of the basis of the claim, the Arbitral Tribunal has determined the following:

On 7 October 2002, the Parties concluded Sales Contract No. 3585 according to which [Seller] was required to sell to [Buyer] a certain amount of "white crystal sugar of Yugoslav origin, harvest 2002". According to the same contract [Seller], was required to provide the specifically stipulated documents regarding the goods, among which is also the certificate of origin of goods - EUR 1. That was not disputed between the Parties. [Seller] exported the agreed goods in the period of end of 2002 until March 2003. With each successive delivery it provided a certificate of origin in the form EUR -1, which it obtained from the competent bodies - Federal Customs Administration. From the memo of the Customs Administration of the Republic of Serbia 01/13 No. D-908/1 of 19 January 2005, the Arbitral Tribunal has determined that the Customs Administration has acted in accordance with the order of the Ministry of Finance and conducted a subsequent inspection of the issued certificates of the origin of goods - EUR-1. All this occurred after the request of the European Anti-Fraud Commission (OLAF), which suspected that some certificates (around 5,000) were not valid. The subsequent inspection determined that for 7 certificates it was not possible to confirm the national origin of the exported good which [Buyer] bought.

- From the judgment of the Tax Commission of the Province of G. No. 99/2/06 of 28 September 2006, the Arbitral Tribunal concluded that [Buyer]'s appeal in regard to the act of the Tax Department of 24. May 2005 on the determination of the customs and VAT for the goods for which the form EUR -1 was withdrawn in the amount of 66.396,60 €, was refused.
- From the receipt of payment No. XX T 126111 of 18 June 2007, issued by the competent authority in Italy, it was established that [Buyer], on the date of issuance, paid 76.657,63 €.
- According to receipt no. 127386 of 19 June 2007, it was established that [Buyer] paid interest, fees, and costs in the amount of 8,260.58 €.
- The invoice of the law firm L. No. 126/07 of 30 March 2007 and invoice No. 280/05 of 23 September 2005, the Arbitral Tribunal has established that [Buyer] paid 2,773.72 € and 2,613.20 € for the costs for representation in the proceedings before the commission of the Province of G.
- According to receipt R.C.A representation and insurance consulting - S.r.l., No. 51/2006 of 8 May 2006 it was determined that [Buyer] paid a 100.00 € fee for the verification of documents.
- According to receipt no. 172 of 20 October 2005, the Arbitral Tribunal established that [Buyer] paid 499.20 € for the appeal before the Tax Commission of the Province of G.



According to this evidence, the Arbitral Tribunal established that [Buyer] paid the total amount of 90,904.91 € for the fees of the customs, VAT and other necessary expenses in regards to it.

[Buyer] failed to provide evidence that he had paid the difference up to the total amount of the claim, which amounts to 33,939.07 €.

The amount of 90,904.91 € paid represents damages which [Buyer] incurred due to the withdrawal of EUR - 1 by the customs organs of Serbia by which a certain quantity of the acquired sugar lost its favored treatment, so [Buyer] had to pay for it an import custom with VAT. Due to these reasons, [Buyer] also had other expenses mentioned above.

In examining the legal basis of the obligation to pay damages which [Buyer] incurred:

- The Arbitral Tribunal commenced with Articles 9.501 and Article 9.502 of the Ole Lando Principles according to which the aggrieved party is entitled to damages for loss caused by the other party's non-performance which is not justified. The general measure of damages is such a sum that would put the aggrieved party in the closest possible position to the one in which it would have been if the contract had been duly performed. The Arbitral Tribunal does not have any doubts in regard to whether [Seller] could reasonably foresee the possible consequences of the non-performance of his obligation to deliver sugar "of Yugoslav origin, harvest 2002" at the time of the conclusion of the Contract. As a professional businessman he ought to have reasonably foreseen such consequences. [Seller] ought to have foreseen that the non-performance of his contractual duties could make [Buyer] responsible before the authorities of his country until the payment of the penalty and subsequently assessed customs, and in connection to that the costs incurred in his country.
- The same rights to damages due to non-performance of the contract are granted to the aggrieved party (in this case [Buyer]) pursuant to Article 7.4.1 and Article 7.4.4 of the UNIDROIT Principles. The right to damages is more closely specified in these Articles exclusively or in conjunction with other remedies. [Seller] did not invoke the exclusion of his liability and he did not prove that conditions for the exclusion of liability are fulfilled. The provisions regarding foreseeability of harm (Article 7.4.4) provide that the non-performing party is liable only for harm which it foresaw or could reasonably have foreseen at the time of the conclusion of the contract as being likely to result from his non-performance. [Seller], who professionally does business, certainly falls in to the category of people who could have at the conclusion of the contract foreseen and expected the consequences for the contracting party due to non-delivery of goods whose origin is not in conformity with the contract.
- The provisions of Chapter II of the Vienna Convention of 1980 (Article 35(1), Article 36(1), Article 45(1)(b) and Article 74.) have clearly determined that apart from the goods, the seller (here respondent) must provide the buyer (here

claimant) with the specified documents in regard to the goods. It is undisputed that certificate EUR-1 falls within these documents, which should verify that the exported sugar is of "Yugoslav origin, harvest 2002." It is only on the basis of an accurate document that [Buyer] would not be required to pay the subsequently determined customs, which is the economical effect relevant for him, which cannot be disregarded.

- [Seller] was required to provide [Buyer] with the specified documents regarding the goods which can in a credible manner prove the Yugoslav origin of the goods, harvest 2002. [Seller] was obliged to deliver the goods in conformity with the quality and origin required by the contract. Only such goods could have the favored treatment in regard to the exemption of custom duties. Any other goods of the same quality which is not of "Yugoslav origin, harvest 2002" would not have had a favored treatment. That is why [Buyer] had to pay customs and VAT for the imported goods. According to the Arbitral Tribunal's opinion, the contract provision concerning the goods of Yugoslav origin, harvest 2002 is an essential element of the contract. Respondent as a Seller is liable for the non-conformity of goods which existed at the time of the passing of the risk to Claimant as the Buyer, even though the lack of conformity became apparent only after that time, which was the case in the present dispute. In accordance with Article 45(1)(b) and Article 74 of the Vienna Convention of 1980, [Buyer]'s right to damages is undisputed and the amount of the damages has been proven.

According to the Arbitral Tribunal there are no fundamental differences in the obligation to pay damages which occurred due to non-performance of the contract on the part of the Seller who at the time of the conclusion of the contract as a reasonable person could have foreseen, regardless of the legal basis which the Arbitral Tribunal invokes. All three documents: the Ole Lando Principles, UNIDROIT Principles and the Vienna Convention of 1980 regulate the obligation to pay damages which can be foreseen at the time of the conclusion of the contract in a similar manner.

There are no fundamental differences between the three mentioned documents and the LCT in regard to damage that occurred due to breach of a contract. Article 262 paragraph 1 and 2 and Article 266 of the LCT determine the basic right of the obligee in the obligational relationship to demand the fulfillment of an obligation, and obligor (in this case: Respondent as the Seller) is required to fulfill the obligation in good faith as it is specified. If it fails to do so, the obligee (here: Claimant as the Buyer) has the right to demand damages which it incurred, if the other party had to foresee such harm as a possible consequence of the breach of contract, due to the facts that were known to it or that it should have known. This Arbitral Tribunal, in regard to the evidentiary material in this case, had no dilemma whether [Seller] knew or could have known that in Italy sugar is imported under a favored treatment and that there is a financial consequence for [Buyer] if [Seller] does not deliver goods which are in conformity with the conditions of the contract, especially in regard to the origin and the type of harvest.

Under Article 510 of the LCT, [Seller] is also responsible for the restriction of the public law nature, - for the payment of customs on the goods which had defects in regard to its origin and which it did not delivered in conformity with the contract. [Buyer] also had the right to invoke the [Seller]'s responsibility for the defects in case when it admitted the right of his country to the subsequently determined customs even without the notification of the [Seller] or the dispute.

Assessing the [Seller]'s actions during entire performance of the contract, the Arbitral Tribunal has concluded that the [Seller] has not acted in accordance with the principle of good faith and fair dealing, on which all of the modern legislation is based, This principle is also accepted by the acts that the Arbitral Tribunal invokes as the legal sources of substantive law on the basis of which it decided this dispute.

Pursuant to the evidence put forward and by applying the provisions of the mentioned Principles, Vienna Convention of 1980 and the LCT, the Arbitral Tribunal has unanimously reached the decision - as is stated in the operative part of this Award under 1.

The claim in the amount of 33,939.07 € is rejected as unfounded, which is stated in the operative part of this Award under 3. [Buyer] did not submit any evidence to prove that he actually paid that amount.

### **7.3. Right to interest**

The Arbitral Tribunal recognizes [Buyer]'s right to interest according to:

- Article 9.508 of the Ole Lando Principles;
- Article 7.4.9 of the UNIDROIT Principles;
- Article 78 of the Vienna Convention 1980;
- Article 2 paragraph 1 (m) of the UML on International Credit Transfers; and
- Article 277 paragraph 1 and Article 279 paragraph 2 of the LCT.

All of these provisions are very similar. All of them provide in a very similar manner that the obligor must pay the interest on the debt, payment of which is delayed.

- Article 9.508 of the Ole Lando Principles determines that if payment of a sum of money is delayed, the aggrieved party is entitled to interest on that sum from the time when payment is due to the time of payment at the average commercial bank short-term lending rate to prime borrowers prevailing for the contractual currency of payment at the place where payment is due.
- Article 7.4.9 of the UNIDROIT Principles provides that the rate of interest shall be the average bank short-term lending rate to prime borrowers prevailing for the currency of payment at the place for payment, or where no such rate exists at that place, then the same rate in the State of the currency of payment. In the absence of such a rate at either place the rate of interest shall be the

appropriate rate fixed by the law of the State of the currency of payment.

- The Vienna Convention of 1980 in Article 78 establishes the obligation of a party whose payment is in arrears, to pay interest on that amount, without further specification of the interest rate and of how it is to be determined.
- Article 277 paragraph 1 and Article 279 paragraph 2 of the LCT, as well as the prior regulations and Principles, provide that the obligor who is in delay with payment is obliged to pay the default interest for the main debt from the date that it became due, and for the amount of interest that is not paid it can demand a default interest from the day that the claim for its payment was submitted to the court.

As none of the abovementioned Principles and regulations determine the interest rate, but rather make it definable, and because as of March 2001 there is no law in Serbia to fix such a rate for claims in a foreign currency, in the determination of the interest rate the Arbitral Tribunal has relied on the abovementioned principles as a safe indicator how to determine such a rate.

Article 9.508 of the Ole Lando Principle, as well as Article 7.4.9 of the UNIDROIT Principles clearly address the "short term lending rate" which the Arbitral Tribunal has accepted as the method in which to determine the interest rate. Having in mind Article 2 paragraph 1 (m) of the UML on International Credit Transfers, by which interest is defined as a time value of the funds or money involved, which, unless otherwise agreed, is calculated at the rate and on the basis customarily accepted by the banking community for the funds or money involved, therefore for the Euro. The Arbitral Tribunal is only left to determine the average interest rate.

In order to determine this, the Arbitral Tribunal, on its own initiative, acquired the Statistical Report of the European Central Bank for December 2007 (<http://www.ecb.int>) according to which it determined how the amounts of the interest rate (EURIBOR) have changed from the submission of the claim until the end of November 2007 - when the information was given to the Report. In the specified time period the interest rate of the Central European Bank was variable. The Arbitral Tribunal took as the most realistic interest rate for the time period from the submission of the claim until the end of November 2007, until the information existed, and determined the average interest rate of 4.62% - as stated in operative part of this Award under 1.

[.....]

Belgrade, 23 January 2008. Arbitral Tribunal:

No. T- 9/07

President: signed

Members of the Tribunal: signed

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## FOOTNOTES

\* All translations should be verified by cross-checking against the original text. For the purposes of this presentation Claimant of Italy is referred to as [Buyer] and Respondent of Serbia is referred to as [Seller].

\*\* Jovana Stevovic is a student at the University of Belgrade Faculty of Law. Dr. Vladimir Pavic is an Assistant Professor of Private International Law and Arbitration, and Milena Djordjevic, LL.M. (U. of Pittsburgh) is a Lecturer of International Commercial Law at the University of Belgrade Faculty of Law.

[Go to Case Table of Contents](#)

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 **Pace Law School Institute of International Commercial Law** - Last updated June 3, 2009



**Leonardo Graffi** is a dual qualified attorney admitted to the Rome bar and the New York bar. He currently practices M&A, private equity and corporate law at the law firm of Freshfields Bruckhaus Deringer LLP. He has experience in negotiating and drafting acquisition agreements and has developed a substantial experience in the formation of private equity funds. Before practising law, he acted as an assistant professor of comparative private law at the Faculty of Law of the University of Verona. Mr. Graffi published various articles on international commercial legal matters in European and American law reviews.





# Remarks on Trade Usages and Business Practices in International Sales Law

Leonardo Graffi\*

## I. Introduction

Trade usages and business practices are key elements of international commerce. In their day-to-day activities, traders and business people around the world constantly rely upon trade usages and business practices across a variety of industries. Usages and practices tend to be dignified by the business community with a status equivalent to that of actual law. As a matter of fact, many business persons often tend to regard trade usages and business practices as very powerful tools to ensure the stability of their bargain and, at times, transact business solely based on such usages and practices, without any written contract. Due to the importance of this subject, distinguished international legal commentators have often attempted to define trade usages and business practices and, in doing so, they have indeed succeeded at providing a substantial amount of theoretical ammunition for the benefit of the interpreter.<sup>1</sup> What is more challenging, in my opinion, is to understand the interplay (and the related legal and commercial consequences) arising from the application of trade usages and business practices alongside the black letter rules of international conventions and model law instruments, which often refer to usages and practices without defining them.

More specifically, the United Nations Convention on Contracts for the International Sale of Goods (hereinafter “CISG” or “Convention”)<sup>2</sup> expressly deals with trade usages and business practices under

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\* Attorney-at-law, Freshfields Bruckhaus Deringer LLP (admitted to the bars of Rome, Italy and New York, U.S.A.); J.D., University of Bologna (honours); LL.M. (Harvard Law School). The opinions expressed in this article are the private views of the author, and are not to be construed as the official views of Freshfields Bruckhaus Deringer LLP. The author wishes to thank Professor Franco Ferrari for his guidance.

<sup>1</sup> The legal literature discussing trade usages and business practices is virtually endless. For selected articles concerning the meaning of usages and practices in the context of the CISG, see *Achilles*, Kommentar zum UN-Kaufrechtsübereinkommen (CISG) (2000) Article 9, para. 2; *Bainbridge*, Trade Usages in International Sales of Goods: An Analysis of the 1964 and 1980 Sales Convention, 24 *Va. J. Int'l L.* (1984) 619 et seq.; *Bianca/Bonell/Bonell*, Commentary on the International Sales Law (1987) Article 9, commentary 1.2; *Farnsworth*, Unification and Comparative Law in Theory and Practice: Liber amicorum Jean Georges Sauveplanne (1984) 81 et seq.; *Ferrari*, La rilevanza degli usi nella convenzione di Vienna sulla vendita internazionale di beni mobili, *Contratto e Impresa* (1994) 239 et seq.; *Ferrari*, Relevant trade usage and practices under UN sales law, *The European Legal Forum* (2002) 273; *Ferrari*, Trade Usage and Practices Established between the Parties under the CISG, *Revue de droit des affaires internationales/ International Business Law Journal* (2003) 576; *Gillette*, Harmony and Stasis in Trade Usage for International Sales, 39 *Virginia Journal of International Law* (1999) 707-741; *Goldstajn*, in: *Sarcevic/Volken* (eds.), *Dubrovnik Lectures* (1986) 55 et seq.; *Herber/Czerwenka*, Internationales Kaufrecht, Kommentar zu dem Übereinkommen der Vereinten Nationen vom 11. April 1980 über Verträge über den internationalen Warenkauf (1991) Article 9, para. 1; *Holl/Kießler*, “Selbstgeschaffenes Recht der Wirtschaft” und Einheitsrecht - Die Stellung der Handelsbräuche und Gepflogenheiten im Wiener UN-Kaufrecht, *RIW* (1995) 457 et seq.; *Honhold*, Uniform Law for International Sales Under the 1980 United Nations Convention (2<sup>nd</sup> ed. 1991) 175 et seq.; *Honsell/Melis*, Kommentar zum UN-Kaufrecht (1997) Article 9, para. 1; *Neumayer/Ming*, Convention de Vienne sur les contrats de vente internationale de marchandises. Commentaire (1993) Article 9, commentary 1; *Pamboukis*, The Concept and Function of Usages in the United Nations Convention on the International Sale of Goods, at: Conference Celebrating the 25th Anniversary of United Nations Convention on Contracts for the International Sale of Goods sponsored by UNCITRAL and the Vienna International Arbitration Centre (Vienna: 15-18 March 2005), 25 *Journal of Law and Commerce* (2006) 107-131; *Soergel/Lüderitz/Lorenz*, Bürgerliches Gesetzbuch mit Einführungsgesetz und Nebengesetzen, Volume 13, Übereinkommen der Vereinten Nationen über Verträge über den internationalen Warenkauf (CISG) (2000); *Staudinger/Magnus*, Kommentar zum Bürgerlichen Gesetzbuch mit Einführungsgesetz und Nebengesetzen, Wiener UN-Kaufrecht (CISG), (13<sup>th</sup> ed., 1999), Article 9 CISG, para. 3; *Walker*, Trade Usages and CISG: Defending the Appropriateness of Incorporating Custom into International Commercial Contracts.

<sup>2</sup> This appears to be the most commonly used abbreviation; in this regard, see *Flessner/Kadner*, CISG? Zur Suche nach einer Abkürzung für das Wiener Übereinkommen über Verträge über den internationalen Warenkauf, *ZEUP* (1995) 347

Article 9 CISG. Unfortunately, the case law interpreting this provision has only rarely dealt with the issue in an exhaustive and satisfactory manner. As pointed out by one leading commentator: “Only some aspects – albeit important ones – have actually been addressed in the various judgments [relating to Article 9 CISG]”.<sup>3</sup>

The interpretation of international sale contracts governed by the CISG is therefore subject to the existence, application and interpretation of trade usages and commercial practices, which are powerful tools for the conduct and development of international commerce. The CISG does not, however, explain how to handle such tools and eventually the usages and practices may be found to conflict with the relevant provisions of this uniform treaty. This paper does not purport to address all the possible ramifications arising from the interplay between trade usages and business practices and the CISG, but rather intends to lay out an analysis of certain selected usages and practices which are commonly found to apply in the case law and have a practical impact on international sale transactions governed by the CISG.

## II. Defining the Scope of Article 9 CISG

### 1. Trade Usages

The key provision for the analysis of trade usages and business practices under the CISG is Article 9, which states that:

*“(1) The parties are bound by any usage to which they have agreed and by any practices which they have established between themselves.*

*(2) The parties are considered, unless otherwise agreed, to have impliedly made applicable to their contract or its formation a 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.”*

It is a well known fact that this provision gave rise to much debate among the drafters during the Vienna Conference.<sup>4</sup> Article 9 sets out the framework for the interpretation of usages and practices applicable to the international sale contracts governed by the CISG.<sup>5</sup> In doing so, Article 9 CISG makes a clear distinction between usages and practices. In a nutshell, on the one hand, when referring to usages, the Convention intends to deal with a broad concept that embraces at least those business conducts that are routinely adopted by a certain group or category of business players, taken as a whole. On the other hand, the concept of practices is narrower and by its nature relates to certain behaviours established among the same parties involved in specific series of transactions through repeated courses of dealings.

This being said, one cannot avoid noticing that the CISG does not define a “usage”.<sup>6</sup> This prompts the

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et seq.

<sup>3</sup> See, *Ferrari*, Relevant trade usage and practices under UN sales law (*supra* note 1) 273. See also *Gillette* (*supra* note 1) 715 (“Custom is inherently vague – some call it fuzzy – so that its formal elaboration by courts (as opposed to informal application through extralegal procedures”) is often doomed to misstate the actual practice of transactors).

<sup>4</sup> See Official Records: Documents of the Conference and Summary Records of the Plenary Meetings and of the Meetings of the Main Committees (Vienna, 10 March – 11 April 1980), U.N. Doc. A/Conf.97/19, New York (USA), 1981 (cited: O.R.) at 89, 262 et seq.; *Biancal/Bonell* (*supra* note 1), Article 9, commentary 2.3.

<sup>5</sup> See *Holl/Keßler*, “Selbstgeschaffenes Recht der Wirtschaft” und Einheitsrecht - Die Stellung der Handelsbräuche und Gepflogenheiten im Wiener UN-Kaufrecht, RIW (1995) 457 et seq.

<sup>6</sup> For this kind of remarks, see *Bianca/Bonell/Bonell* (*supra* note 1) Article 9, commentary 3.1; *Diez-Picazo/Calvo Caravaca*, La compraventa internacional de mercaderías. Comentario de la Convención de Viena (1998) Article 9, at 140; *Goddard*, El Contrato de Compraventa Internacional (1994) at 80; *Goldstajn* (*supra* note 1) at 96; *Honsell/Melis* (*supra* note 1) Article 9, para. 1; *Rudolph*, Kaufrecht der Export und Import Verträge, Kommentierung des UN-Übereinkommens über Internationale Warenkaufverträge mit Hinweisen für die Vertragspraxis (1996) Article 9, para. 2; *Schlechtriem/Junge*, Kommentar zum Einheitlichen UN-Kaufrecht (CISG) (3<sup>rd</sup> ed. 2000) Article 9, para. 8.

interpreter to ensure that the concept of usages (similarly to many other concepts dealt with by the CISG) be autonomously interpreted<sup>7</sup>, without recourse to specific concepts of national law or to particular national concepts or perceptions.<sup>8</sup> For instance, the concept of usage commonly used under Italian law requires that the parties believe that the usage is legally binding (the so-called *opinio iuris atque necessitatis*)<sup>9</sup>. This, however, is not necessary for the purposes of a usage under the CISG, since the parties may decide to comply with a usage on a customary basis even though they are aware that such usage is not legally binding upon them.<sup>10</sup>

Under Article 9(1) CISG the parties are bound by any usage to which they have agreed. As pointed out by Professor Ferrari: “it is not necessary that the agreement be made explicitly; the agreement by which the usages become relevant may also be implicit, as long as there is a real consent, which can also take place after conclusion of the contract.”<sup>11</sup>

It should be noted, however, that so long as the parties have agreed to apply the usages to their transaction, in accordance with the party autonomy rule<sup>12</sup> any local, regional or national usages (and not just international usages) may come into play.<sup>13</sup>

Thus, there is no doubt that the usages agreed upon by the parties prevail over the provisions of the Convention, as confirmed by the case law.<sup>14</sup> Ultimately, commercial players often prefer to incorporate by reference in their agreements established trade usages with which they are familiar, rather than negotiating long and detailed contractual provisions that may achieve the same result.

Hence, if it is determined that the usages are applicable and that their choice by the parties is a valid agreement under the applicable national law,<sup>15</sup> the usages will prevail over the provisions of the

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<sup>7</sup> See *Bianca/Bonelli* (*supra* note 1) Article 9, commentary 3.2; *Bonelli* (*supra* note 1) 386; *Diez-Picazo/Calvo Caravaca* (*supra* note 6) Article 9, at 140; *Ferrari*, *Vendita internazionale di beni mobili. Artt. 1-13. Ambito di applicazione. Disposizioni generali* (1994) at 187; *Herber/Czerwenka* (*supra* note 1) Article 9, para. 4; *Honsell/Melis* (*supra* note 1) Article 9, para. 3.

<sup>8</sup> See *Ferrari*, *Besprechung von Magnus, Wiener UN-Kaufrecht* (1995) IPRax 64, 65; *Heuzé*, *La vente internationale de marchandises - droit uniforme* (2<sup>nd</sup> ed. 2000), commentary 95; *Honsell/Melis* (*supra* note 1) Article 7, para. 5; *Schlechtriem*, *Internationales UN-Kaufrecht* (1996) para. 43; *Torzilli*, *The Aftermath of MCC-Marble: Is This the Death Knell for the Parol Evidence Rule?*, 74 St. John's L. Rev. (2000) 843, 859; in the case law, see OLG Karlsruhe (Germany) 25 June 1997 – I U 280/96, Unilex (stating that German legal terms such as mistake [*Fehler*] and “warranted characteristics” [*zugesicherte Eigenschaften*] are not transferable to the CISG); *Gerichtspräsident Laufen*, 7 May 1993, Unilex (stating that the CISG should be interpreted autonomously and not from the respective national law viewpoint held by the individual applying the law).

<sup>9</sup> See *Galgano*, *Diritto civile e commerciale*, Vol. I (4<sup>th</sup> ed. 2004) 69 defining usages as a “fonte non scritta e non statutale di produzione di norme giuridiche: consistono nella pratica uniforme e costante di dati comportamenti seguita con la convinzione che quei comportamenti siano giuridicamente obbligatori (*opinio iuris atque necessitatis*)”. As pointed out by *Gillette* (*supra* note 1) 707 there is “a compelling rationale on which to elevate custom to the status of legal rule. Requiring adherence to custom not only protects the expectations of parties who are aware of the practices of the trade and anticipate compliance by other in same trade; it also minimizes the risk related to judicial construction of contractual obligations or reliance on state-supplied defaults that do not fit the needs of specific industries.”

<sup>10</sup> See *Schlechtriem/Junge* (*supra* note 6) Article 9, para. 3, holding that it is not necessary for the purposes of Article 9 CISG that the relevant commercial circles believe that the usages are binding.

<sup>11</sup> See *Ferrari*, *Relevant trade usage and practices under UN sales law* (*supra* note 1) 273.

<sup>12</sup> See, e.g., CIETAC Arbitration award 9 January 2008, available online at: <<http://cisgw3.law.pace.edu/cases/080109c1.html>> holding that: “The parties agreed in the Contract that Incoterms were applicable as international usages. The Tribunal notes that in accordance with the principle of autonomy, Incoterms applied to the present case.”

<sup>13</sup> See *Achilles* (*supra* note 1) Article 9, para. 4. For this conclusion, see OGH (Austria) 21 March 2000 – 10 Ob 344/99g, Unilex, holding that usages under Article 9 do not need to be internationally applicable.

<sup>14</sup> See, e.g., OBH Saarbrücken (Germany), 21 March 2000, CLOUT Case no. 425; OLG Saarbrücken (Germany), 13 January 1992, Unilex.

<sup>15</sup> It is well known that the CISG does not govern issues of validity in respect of contract formation. Thus, under the CISG the validity of a contract must be assessed based on applicable domestic law, see *Hartnell*, *Rousing the Sleeping Dog: The Validity Exception to the Convention on Contracts for the International Sale of Goods*, 18 Yale J. of Int'l Law (1993) 1, 45.

CISG.<sup>16</sup>

Article 9(2) adds further relevance to the application of usages to contracts governed by the CISG, since it enables such usages to apply even if the parties have not expressly incorporated them in their agreements.<sup>17</sup> This provision includes two prongs: (a) a subjective one and (b) an objective one. The subjective prong essentially states that, unless otherwise agreed, the parties are deemed to have impliedly made applicable to their contract or its formation a usage of which the parties knew or ought to have known.<sup>18</sup> This means that if the subjective test is met, both parties will be bound by the usage. The objective test requires that the usage be “widely known”<sup>19</sup> in international trade, and be regularly observed<sup>20</sup> by parties to contracts of the type involved in the particular trade concerned. Hence, the subjective and objective prongs essentially rely on the ability of the party that is invoking the existence of the binding usage to prove that such usage exists. Clearly, however, if a party invoking the usage cannot successfully prove its existence, it is unlikely that the usage will apply (unless under the applicable national law of the forum a judge will be entitled to apply the usages *ex officio*).

## 2. Practices Established between the Parties

Unlike usages, which typically possess general common features, practices tend to have a narrower scope, since they are the result of specific conducts arising from business relationships and bargains executed by the parties. For the purposes of Article 9(2) of the CISG, practices may relate to a particular commercial behaviour, such as the prompt delivery of replacement machinery parts, which an ICC arbitral tribunal held had become normal practice among the parties.<sup>21</sup> Another example of an established practice based on the parties’ prior dealings is the tolerance of a delayed performance, which according to an arbitral panel of the American Arbitration Association (AAA) was one of the reasons for which the late performance of a party had not amounted to fundamental breach.<sup>22</sup> As pointed out by various legal commentators, the individual business conduct established by the parties,

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<sup>16</sup> See *Goddard* (*supra* note 6), at 81; *Enderlein/Maskow/Strohbach*, Internationales Kaufrecht (1991) Article 9, para. 1.2; *Ferrari* (*supra* note 7), at 192; *Herber/Czerwenka* (*supra* note 1), Article 9, para. 6; *Honsell/Melis* (*supra* note 1), Article 9, para. 6; *Plantard*, Un nouveau droit uniforme de la vente internationale: La Convention des Nations Unies du 11 avril 1980, J.D.I. (1988) 311, 317; *Rudolph* (*supra* note 6), Article 9, para. 1; *Schlechtriem/Junge* (*supra* note 6), Article 9, para. 2; for the same view, expressly stated in case law, see OGH (Austria) 21 March 2000 – 10 Ob 344/99g, Unilex.

<sup>17</sup> This view is confirmed by the case law. See *St. Paul Guardian Insurance Co. et al. v Neuromed Medical Systems & Support et al.*, 2002 U.S. Dist. Court Lexis 5096 (S.D.N.Y. 2002). According to *Torsello*, Commercial Features of Uniform Commercial Law Conventions. A Comparative Study Beyond the 1980 Uniform Sales Law (2004) 335, at 35, the requirement that the parties knew or ought to have known of the usages is bewildering. “Indeed, it seems beyond doubt that whenever interpreting whether a party “ought to have known” about a usage, the interpreter will do nothing but investigate whether the usage is “widely known” and “regularly observed.”

<sup>18</sup> *Ferrari* (*supra* note 7) at 195; *Herber/Czerwenka* (*supra* note 1) Article 9, para. 8; *Gillette* (*supra* note 1) 719; *Maskow*, The Convention on the International Sale of Goods from the Perspective of the Socialist Countries, in: La vendita internazionale. La convenzione di Vienna dell’11 aprile 1980 (1981) at 39, 58; *Neumayer/Ming* (*supra* note 1) Article 9, commentary 3. In the case law, see ICC Arbitral Award No. 8324/1995, Unilex; ZG Kanton Basel-Stadt (Switzerland) 21 December 1992 – P4 1991/238, Unilex.

<sup>19</sup> The period of exercise of usages is irrelevant, insofar that usages are widely known and observed regularly; see *Honnold* (*supra* note 1) para. 120.1; *Staudinger/Magnus* (*supra* note 1) Article 9 CISG, para. 23. See OGH (Austria) 21 March 2000 – 10 Ob 344/99g, Unilex.

<sup>20</sup> See U.S. Dist. Court (W.D.W. 2006), Unilex (holding that the placement of oral orders for goods followed by invoices with sales terms was commonplace practice among the parties and therefore such behaviour was to be incorporated in the contract by way of Article 9(2) of the CISG).

<sup>21</sup> See ICC Arbitral Award No. 8611/ 1997, Unilex.

<sup>22</sup> See AAA, Interim Arbitral Award, 23 October 2007, available online at <<http://cisgw3.law.pace.edu/cases/071023a5.html>> (“The lapse in time between the contractual shipment periods and the Romanian government’s blockage of imports was a matter of weeks or days, depending upon the particular Contract. However, this delay in performance did not amount to a fundamental breach for several reasons. As explained below, first, the parties’ prior course of dealing and industry practice allowed for some flexibility in the delivery date -- a flexibility that was shown in Buyer’s responses here, at least at the onset of the delivery delay”).

rather than a general kind of commercial behaviour applicable in a given business sector, is the essential factor that characterises the practice<sup>23</sup>. This, however, implies that the business relationship has been carried out for a certain defined period of time and that the specific conduct giving rise to the practice has occurred in a number of repeat transactions (even though the CISG does not provide guidance as to how many transactions must have occurred to give rise to the practice).<sup>24</sup> The case law has stressed that a commercial practice cannot be established merely by way of the parties having entered into two contracts<sup>25</sup>. And clearly, no practice could be deemed to arise from one single delivery of goods between the parties.<sup>26</sup> Thus, as pointed out by Professor Ferrari, a judgment of the Austrian Supreme Court was met with some surprise,<sup>27</sup> as it stated that a party's perception from preliminary discussions (albeit not expressly agreed upon) could be deemed to constitute "practices" within the meaning of Article 9, even if this occurred at the outset of the business relationship.

The fact that parties are bound by those practices that have originated between them in the course of extended business relations is consistent with the general principles of good faith underlying the CISG<sup>28</sup>, as well as the prohibition of *venire contra factum proprium*.<sup>29</sup> A factual element of trust, which may not be frustrated, has come into existence between the parties.<sup>30</sup> Accordingly, for instance, a party cannot contend that the contract makes no specific requirements in respect of notification periods (with which the complaining party has not complied), if existing practices indicate the opposite. Regarding the relationship between commercial practices existing between the parties and any conflicting provisions of the CISG, it is commonly acknowledged that the practices will prevail over the Convention.<sup>31</sup> Moreover, it is generally accepted among the legal commentators that if the usages agreed upon by the parties were to contradict the practices established between the parties, the agreed upon usages should prevail.<sup>32</sup> This latter view, however, is not supported by a strong practical argument, since in my view the practices (if arisen through a process that accurately reflects the bargain struck by the parties) tend to be a true expression of the parties' autonomy and real intentions, whereas usages typically arise from general sets of conducts in a specific business sector which the

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<sup>23</sup> See *Achilles* (supra note 1) Article 9, para. 16; *Bianca/Bonell* (supra note 1) Article 9, commentary 2.1.1; *Ferrari* (supra note 7) at 189; *Herber/Czerwenka* (supra note 1) Article 9, para. 3; *Holl/Kesfler* (supra note 1) 457; *Honsell/Melis* (supra note 1) Article 9, para. 4; *Neumayer/Ming* (supra note 1) Article 9, commentary 1; *Rudolph* (supra note 6) Article 9, para. 4; *Staudinger/Magnus* (supra note 1) Article 9 CISG, para. 13.

<sup>24</sup> For this line of reasoning, see *Schlechtriem/Junge* (supra note 6) Article 9, para. 7; also refer to *Schlechtriem* (supra note 16), para. 60, who mentions the requirement of a certain continuity and duration of a practice (*eine gewisse Häufigkeit und Dauer einer Übung*).

<sup>25</sup> See ZG Kanton Basel-Stadt (Switzerland) 3 December 1997 – P4 1996/00448, Unilex; but see also AG Duisburg (Germany) 13 April 2000, IHR (2001) 114, 115, explicitly stating that a certain duration and continuity does not yet exist in the case of two previous deliveries.

<sup>26</sup> See LG Zwickau (Germany) 19 March 1999 – 3 HKO 67/98, CISG Online.

<sup>27</sup> See *Ferrari*, Relevant trade usage and practices under UN sales law (supra note 1) 275, referring to Austrian Supreme Court (Austria) 6 February 1996 – 10 Ob 518/95, Unilex.

<sup>28</sup> See *Honsell/Melis* (supra note 1) Article 9, para. 4; *Schlechtriem/Junge* (supra note 6) Article 9, para. 7.

<sup>29</sup> See *Achilles* (supra note 1) Article 9, para. 16; *Diez-Picazo/Calvo Caravaca* (supra note 6) Article 9, at 137; *Honhold* (supra note 1) para. 116; *Honsell/Melis* (supra note 1) Article 9, para. 4; *Rudolph* (supra note 6) Article 9, para. 4; *Witz/Salger/Lorenz*, *Einheitliches Kaufrecht* (2000) Article 9, para. 16.

<sup>30</sup> *Herber/Czerwenka* (supra note 1) Article 9, para. 3; *Honhold* (supra note 1) para. 116.

<sup>31</sup> *Diez-Picazo/Calvo Caravaca* (supra note 6) at 138; *Rudolph* (supra note 6) Article 9, para. 1; *Staudinger/Magnus* (supra note 1) Article 9 CISG, para. 12; *Witz/Salger/Lorenz* (supra note 29) Article 9, para. 1.

<sup>32</sup> See *Achilles* (supra note 1) Article 9, para. 8; *Diez-Picazo/Calvo Caravaca* (supra note 6) Article 9, at 138; *Ferrari*, What Sources of Law for Contracts for the International Sale of Goods? Why One Has to Look Beyond the CISG, 25 *International Review of Law and Economics* (2005) 333-336, at 335; *Garro/Zuppi*, *Compraventa internacional de mercaderías* (1990) at 62; *Piltz*, *Internationales Kaufrecht* (1993) § 2 para. 177; *Reinhart*, UN-Kaufrecht, Kommentar zum Übereinkommen der Vereinten Nationen vom 11. April 1980 über Verträge über den internationalen Warenkauf (1991) Article 9 para. 2. See also *Staudinger/Magnus* (supra note 1) Article 9 CISG, para. 15 (proposing a case-by-case approach).

parties may know, and yet not be willing to (fully) comply with.<sup>33</sup>

### III. Applying Trade Usages and Established Practices: The Burden of Proof Issue

The issue of whether or not trade usages or established practices may apply to an international sales contract governed by the CISG is ultimately a matter of proof. Indeed, there are instances where the parties have expressly agreed to incorporate the trade usages or the practices in their contract, by expressly referring to them. Here, the applicability will not be a controversial issue. However, in litigation matters it is often the case that one party will have an interest in proving that the trade usage or the practice applies (for instance, when the relevant trade usages or practices are more favourable than the actual provisions of the CISG), whereas the other party will claim that it has never agreed to apply the usage, or it was not aware of it or that no practice had been established through repeated business conduct.<sup>34</sup> This is ultimately a question of fact that must be addressed on a case by case basis and the outcome of which is rather unpredictable. Therefore, it is required that the party willing to rely either on the practice or usage prove the existence thereof<sup>35</sup>, also by means of oral witnesses, if permitted under the applicable local procedural rules.<sup>36</sup> As noted by paragraph 9 of the UNCITRAL Digest: “there is no difference in the allocation of burden of proof under article 9(1) and (2)”.<sup>37</sup> This criterion has been supported by the case law interpreting the CISG,<sup>38</sup> which generally holds that the parties are not bound by any practices or usages that are not proved.<sup>39</sup> In this regard, it is worth noting, however, that various authors have rejected the view that the burden of proof is an issue regulated by the CISG and they have therefore suggested that national laws should apply to this issue.<sup>40</sup> However, the better view seems to be the contrary, since the allocation of the burden of proof is an issue that falls (at least implicitly) within the scope of the CISG and should rest upon the aggrieved party,<sup>41</sup>

<sup>33</sup> For a decision consistent with this reasoning, see *Treibacher Industrie, A.G. v. Allegheny Technologies, Inc.*, U.S. Dist. Court (11th Cir. 2006), Unilex, holding that the meaning of a contract term resulting from practices established between the parties prevail over terms of common usage in the industry. Among the legal commentators, this view is supported by *Enderlein/Maskow/Strohbach* (*supra* note 16), Article 9, commentary 3 (holding the view that practices should take precedence).

<sup>34</sup> As pointed out in the UNCITRAL Digest, Digest of Article 9 case law, 4, available online at <<http://daccess-dds-ny.un.org/doc/UNDOC/GEN/V04/547/68/PDF/V0454768.pdf?OpenElement>>, “As for the burden of proof, several courts stated that it is the party alleging the existence of practices established between themselves or usages agreed upon that bears it.”

<sup>35</sup> *Achilles* (*supra* note 1) Article 9 para. 11; *Herber/Czerwenka* (*supra* note 1) Article 9, para. 19; *Witz/Salger/Lorenz* (*supra* note 29) Article 9, para. 11; *DiMatteo/ Dhooge/ Greene/ Maurer/ Pagnattaro*, 34 *Northwestern Journal of International Law & Business* (Winter 2004) 299-440, 363 (“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>36</sup> See, *Geneva Pharmaceuticals Technology Corp. v. Barr Laboratories, Inc., et al.*, U.S. Dist. Court (S.D.N.Y. 2002) 98 Civ. 861, 99 Civ. 3607, Unilex, accepting oral evidence of an industry custom and holding that based on such industry custom the contract was sufficiently definite.

<sup>37</sup> See UNCITRAL Digest, Digest of Article 9 case law (*supra* note 34) id.

<sup>38</sup> On this issue, see for instance, Trib. Vigevano (Italy) 12 July 2000, *Giur. it.* (2001) 280, 286. For commentary on this landmark decision of the Italian case law on the CISG, see *Ferrari*, *Tribunale di Vigevano: Specific Aspects of the CISG Uniformly Dealt With*, 20 *Journal of Law and Commerce* (Spring 2001) 225-239; *Graffi*, *Overview of recent Italian decisions on the CISG*, *European Legal Forum* (2000/2001) 240-244.

<sup>39</sup> See, e.g., OLG Dresden (Germany) 9 July 1998 – 7 U 720/98, Unilex (party alleging that recipient’s lack of response equals consent in the absence of a response to a letter of confirmation was unable to establish that this was a valid international trade usage); ZG Basel-Stadt (Switzerland) 3 December 1997 – P4 1996/00448, Unilex (party alleging that existence of a binding international trade usage, according to which payment by means of direct transfer into the account of the seller is common in the import trade industry, need not prove this if the parties ought to have been aware of this practice.).

<sup>40</sup> To this effect, see, e.g., *Bianca/Bonelli/Khoo* (*supra* note 1) Article 2, commentary 3.2.

<sup>41</sup> For this type of reasoning, see, e.g., ICC Arbitral Award n. 8213/ 1995, Unilex (“For the claims based on breach of the Purchase Agreements, the Arbitrator has considered the burden of proof to be on Claimants and for the counterclaim, the burden is on Respondent”).

while it is undisputed that the issue of whether or not the evidence is satisfactory should remain within the boundaries of domestic procedural law.<sup>42</sup>

From a practical standpoint, providing evidence that the parties knew or ought to have known about the existence of a usage and that such usage is “widely known” and “regularly observed” in international trade (as required by Article 9(2)) may be somewhat difficult, especially since the tests surrounding the evaluation of actual knowledge or constructive knowledge are subjective tests, which vary from jurisdiction to jurisdiction. Moreover, establishing if a usage is “widely known” may not be straightforward, considering that in highly technical trade sectors few people tend to have an actual insight as to which usages are truly applicable in that trade and will be unlikely to witness to the existence of a “widely known” usage. Finally, national courts (unlike business people) tend to be ill equipped to identify trade usages specific to a particular business sector, as they often lack the necessary knowledge of the business and judges are likely to fail to grasp the underlying commercial drivers of the parties.<sup>43</sup>

#### IV. Selected Trade Usages and Business Practices Interpreted by the CISG Case Law

##### 1. INCOTERMS and the CISG

INCOTERMS are probably the most widely known sources of codified trade usages. They are set out in a catalogue of rules compiled and periodically updated by the ICC.<sup>44</sup> These rules are accepted by governments, legal commentators, business players and practitioners worldwide for the interpretation of certain commonly used terms in international trade. The use of INCOTERMS promotes uniformity in international trade, in that it reduces altogether uncertainties arising from diverging interpretations of such terms in multiple jurisdictions. More specifically, INCOTERMS govern four main categories of issues arising from international sales: delivery of the goods, passage of risk, allocation of costs, and customs formalities.<sup>45</sup> It is well known that these terms may apply to an international sales

<sup>42</sup> For this view, see *Ferrari*, The Sphere of Application of the Vienna Sales Convention (1995), 28; *Ferrari*, Burden of proof under the United Nations Convention on Contracts for the International Sale of Goods (CISG), *Revue de droit des affaires internationales/ International Business Law Journal* (2000) 665-670; *Giovannucci Orlandi*, Procedural issues and uniform law conventions, in: *International Uniform Law Conventions, Lex Mercatoria and UNIDROIT Principles. Symposium held at Verona University (Italy), Faculty of Law, 4-6 November 1999, Uniform Law Review* (2000) 23-41, 26 (“However, the final determination of whether or not the judge finds the evidence sufficiently convincing should continue to be based on the rules of the *lex fori*, which are also defined as strictly procedural rules”).

<sup>43</sup> For similar remarks, see *Gillette* (*supra* note 1) *id.*; *Pamboukis* (*supra* note 1) at 130, holding that the application of trade usages and business practices under Article 9 CISG requires judges and arbitrators of high caliber, familiar with the international commercial environment; *Walker* (*supra* note 1) 267 (“Customs, by definition, derive their existence from particular actors in a particular context. However, determining how much of the context from which the custom arises to impute into its definition proves to be less than clear for many courts.”).

<sup>44</sup> For the official version of INCOTERMS 2000, see ICC Official Rules for the Interpretation of Trade Terms, ICC Publication No. 560 (2000). For reference to scholarly materials on INCOTERMS, see, among others, *Debattista*, Incoterms and documentary practices, *Incoterms 2000: A forum of experts*, ICC Publication No. 617 (2000) 63-89; *Eisemann*, La pratique des incoterms: usages de la vente internationale (3<sup>rd</sup> ed. 1988). On the relationship between INCOTERMS and the CISG, see *Bergami*, *Incoterms 2000 as a Risk Management Tool for Importer*, *The Vindobona Journal of International Commercial Law and Arbitration* (2006) 273-286; *Derains/ Ghestin*, La Convention de Vienne sur la vente internationale et les incoterms, *Actes du Colloque des 1er et 2 décembre 1989, Librairie Générale de Droit et de Jurisprudence* (1990) 171 et seq.; *Gabriel*, The International Chamber of Commerce INCOTERMS 1990: A Guide to the Terms and Their Usage, *The Vindobona Journal of International Commercial Law and Arbitration* (1999) 61-70; *Gabriel*, The International Chamber of Commerce INCOTERMS 2000: A Guide to their Terms and Usage, *The Vindobona Journal of International Commercial Law and Arbitration* (2001) 41-73; *Ramberg*, ICC Guide to INCOTERMS (2002); *Ramberg*, CISG and INCOTERMS 2000 in Connection with International Commercial Transactions, in: *Andersen/ Schroeter* eds., *Sharing International Commercial Law across National Boundaries: Festschrift for Albert H. Kritzer on the Occasion of his Eightieth Birthday* (2008) 394-403; *Ramberg*, To What Extent Do Incoterms 2000 vary Articles 67(2), 68 and 69?, at: *Conference Celebrating the 25th Anniversary of United Nations Convention on Contracts for the International Sale of Goods sponsored by UNCITRAL and the Vienna International Arbitration Centre (Vienna: 15-18 March 2005)*, 25 *Journal of Law and Commerce* (2005/2006) 219-222.

<sup>45</sup> The 2000 version of the INCOTERMS provides for thirteen terms categorized into four groups: E Group: EXW; F

contract under Article 9(1) CISG, if the parties have agreed to incorporate them by reference in their agreement.<sup>46</sup> INCOTERMS may also apply pursuant to Article 9(2), if the subjective and objective tests have been met. In *St. Paul Guardian*, the Federal District Court of the Southern District of New York<sup>47</sup> held that "INCOTERMS are incorporated into the Convention through Article 9(2)." Here, the court stated that, pursuant to Article 9(2), the INCOTERMS' definitions should be applied even though the contract did not contain an explicit reference to INCOTERMS. In a nutshell, the parties had made reference in their contract to a CIF term (without expressly mentioning the INCOTERMS). In the opinion of the court, the parties' choice plainly meant that they had intended to refer to the definition of CIF included in the INCOTERMS.<sup>48</sup> A year later, the same conclusion was reached by the Court of Appeals of the Fifth Circuit<sup>49</sup>, which moved one step further in the analysis. In a controversy arising from a contract between BP Oil International and an Ecuadorian oil company relating to the sale of gasoline, the parties had included in their agreement reference to the fact that gasoline was to be delivered "CFR La Libertad, Ecuador". The Fifth Circuit held that since "CFR" is part of the 1990 INCOTERMS issued by the ICC and the CISG incorporates INCOTERMS through Article 9(2), even if the usage of INCOTERMS is not global, the fact that they are well known in international trade means that they are incorporated through Article 9(2). Similar conclusions have been reached by a Russian arbitral tribunal<sup>50</sup>, as well as by a decision of the Court of Appeals of Genoa.<sup>51</sup> A recent decision of a Swiss court went so far to suggest that: "even when the Incoterms were not incorporated into the contract explicitly or implicitly, they are considered as rules of interpretation".<sup>52</sup> Along the same lines, in *China North Chemical Industries* the District Court of Texas<sup>53</sup> ruled that since the international sales contract included a reference to a "CIF" term for delivery of the cargo to Berwick, Louisiana, the CIF term was to be interpreted in accordance with Incoterms 1990, which were in effect when the parties made the contract. The above referenced decisions consistently take the view that a reference in a contract governed by the CISG to certain standard clauses of international trade (such as CIF, FOB, EXW etc.) are to be deemed to constitute an automatic reference to the definition of such clauses under the INCOTERMS. Personally, I take the view that this implied construction of the meaning of such clauses is too simplistic and, as pointed out by certain leading legal commentators, the consent of the parties to the INCOTERMS is not self evident,<sup>54</sup> "in various countries abbreviations such as Fob, Cif, etc., do not always have the meaning ascribed to them by Incoterms".<sup>55</sup> As a matter of fact, the use by the parties of a CIF clause should not

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Group: FCA, FAS, FOB; C Group: CFR, CIF, CPT, CIP; D Group: DAF, DES, DEQ, DDU, DDP. For a basic description of each term, see <<http://www.iccwbo.org/incotermsrules/>> Note also that the updates to INCOTERMS publications have continued with INCOTERMS 2010, which will come into effect on 1 January 2011.

<sup>46</sup> On this, see *Honsell/Melis* (*supra* note 1) Article 9, para. 7.

<sup>47</sup> See *St. Paul Guardian Insurance Co., et al. v Neuromed Medical Systems & Support, et al.*, U.S. Dist. Court, Lexis 5096 (S.D.N.Y. 2002) (*supra* note 17).

<sup>48</sup> *Id.*

<sup>49</sup> See *BP Oil International and BP Exploration&Oil Inc. v. Empresa Estatal Petroleos de Ecuador (PetroEcuador et al.*, U.S. Fifth Circuit, 11 June 2003, Unilex.

<sup>50</sup> See Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, Award 406/1998, Unilex.

<sup>51</sup> See Corte d'appello Genova (Italy), 24 March 1995, Unilex (the court interpreted a FOB clause by referring to the INCOTERMS even though the parties had not expressly referenced to the INCOTERMS).

<sup>52</sup> See Tribunal Cantonal du Valais (Switzerland), 28 January 2009, available online at: <<http://cisgw3.law.pace.edu/cases/090128s1.html>>.

<sup>53</sup> See *China North Chemical Industries Corporation v. Beston Chemical Corporation*, Dist. Court (Texas 2006), available online at: <<http://cisgw3.law.pace.edu/cases/060207u1.html>>.

<sup>54</sup> This is, correctly so, answered in the negative by *Achilles* (*supra* note 1) Article 9 para. 14; *Witz/Salger/Lorenz* (*supra* note 29) Article 9, para. 14; in the affirmative, *Goddard* (*supra* note 6) at 85; *Bianca/Bonelli/Bonelli* (*supra* note 1) Article 9, commentary 3.5; *Bonelli* (*supra* note 7) at 42; *Enderlein/Maskow/Strohbach* (*supra* note 16) Article 9, commentary 11; *Herber/Czerwenka* (*supra* note 1) Article 9, para. 16.

<sup>55</sup> For this kind of reasoning, see *Ferrari*, Trade Usage and Practices Established between the Parties under the CISG (*supra* note 1) 576. Also holding this point of view, *Gillette* (*supra* note 1) 736 et seq.



in all instances be construed as a reference to the same internationally accepted term under INCOTERMS, since if the parties have not referred to INCOTERMS, they may have established a practice between them of giving a specific local interpretation to CIF clauses, which diverges from the international meaning of CIF under INCOTERMS.

## 2. CIF Terms and Implicit Reference to INCOTERMS: A Practical Example

It is well known that shipments designated "CIF"<sup>56</sup> require the seller to procure and pay for the costs of transport and insurance of the goods to the destination port, but the transfer of the risk of loss to the buyer takes place once the goods pass the ship's rail at the port of shipment. Also, the INCOTERMS (including the CIF term) are not designed to resolve questions of title or other property rights of the seller and buyer, since these issues are to be resolved by the parties' agreement or by other substantive law that governs the agreement.<sup>57</sup> Under INCOTERMS 2000, the seller must provide insurance that shall be in accordance with minimum cover requirements. As pointed out by Professor Gabriel, "the minimum cover requirement reflects the common practice of subsequent sales of the goods in transit where it is impossible to know the actual insurance needs of every subsequent buyer."<sup>58</sup> In a sale of goods contract governed by a CIF INCOTERM clause, the minimum insurance made available by the seller to the buyer must cover the price of the goods sold, plus 10 per cent of such price (i.e., 110 per cent of the price of the goods sold).<sup>59</sup> The ICC Guide to INCOTERMS 2000 clarifies that the additional 10 per cent purports to cover the minimum resale profit anticipated by the buyer.<sup>60</sup> It is rather questionable, however, that if the parties merely referred in their contract to a generic "CIF" term, in the absence of any express reference to INCOTERMS, they actually intended to have an insurance coverage equal to 110 per cent of the price of the goods sold.<sup>61</sup> For instance, there may be instances where the CIF clause commonly adopted by shippers or sales people in a certain port of transit does not require (as the INCOTERMS do) that insurance should be provided by the seller with a marked up coverage exceeding by 10 per cent the price of the goods sold. Local usages, for instance, may provide for a CIF term that only requires insurance coverage up to the value of the goods sold. This practical example shows that the automatic reference to INCOTERMS when a CIF (or FOB or EXW) term is incorporated in a contract may not at all times be consistent with the parties' intention. Hence, the courts should not automatically apply INCOTERMS as a hard and fast rule whenever the parties have referred, say to a "FOB" or "CIF" term. Courts should instead ensure that there is sufficient evidence to support the argument that the parties truly intended to incorporate the INCOTERMS in their contract and, in lack of such evidence, should interpret the parties' true intentions.

## 3. UCP

The Uniform Customs and Practice for Documentary Credits (hereinafter, "UCP") are a set of rules

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<sup>56</sup> The following explanation is provided in the ICC Guide to INCOTERMS 2000, 65: "Cost, Insurance and Freight" means that the seller delivers when the goods pass the ship's rail at the point of shipment. The seller must pay the costs and freight necessary to bring the goods to the named port of destination but the risk of loss or damage to the goods, as well as any additional costs due to events occurring after the time of delivery, are transferred from the seller to the buyer. However, in CIF the seller also has to procure marine insurance against the buyer's risk of loss of or damage to the goods during the carriage.

<sup>57</sup> See *Gabriel*, *The International Chamber of Commerce INCOTERMS 2000: A Guide to their Terms and Usage* (*supra* note 44) footnote 3.

<sup>58</sup> See *Gabriel*, *The International Chamber of Commerce INCOTERMS 2000: A Guide to their Terms and Usage* (*supra* note 44) 56.

<sup>59</sup> For a case specifically citing the usage requiring the insurance under CIF terms to cover 110% of the cost of the goods sold, see *Tribunal of International Commercial Arbitration at the Russian Federation Chamber*, 13 April 2006, available online at <<http://cisgw3.law.pace.edu/cases/060413r1.html>>.

<sup>60</sup> See ICC Guide to INCOTERMS 2000, 66.

<sup>61</sup> The affirmative view was held by the *Tribunal of International Commercial Arbitration at the Russian Federation Chamber* (*supra* note 59) *id.*.

applicable to the issue and execution of letters of credit.<sup>62</sup> The UCP are widely adopted and, as pointed out by Professor Schmitthoff almost thirty years ago, “as banks in more than 170 countries operate letters of credit under this document, the Uniform Customs and Practice for Documentary Credits has become world law”.<sup>63</sup> UCP 600 are the latest revision of the Uniform Customs and Practice that govern the operation of letters of Credit and have come into effect on 1 July 2007.

The UCP gather a set of rules applicable to specific transactions in which documentary credits are employed as methods of payment between merchants. The wide use of documentary credits in international trade provides a strong indication of the fact that the principles underlying the UCP are widely known to, and regularly observed by, traders across the five continents. Like INCOTERMS, UCP are the result of long established usages in various industries and are bred in the commercial, not academic, world. In practice, however, it is difficult to understand if the international business community has embraced UCP in their entirety, or if, instead, merchants have become familiar with certain aspects of UCP and not with the entirety of the various complex granular provisions set forth therein. In my opinion, UCP should only apply to an international sales contract pursuant to Article 9(1) CISG if the parties have expressly referred to them. This view is consistent with and stems directly from the wording of Article 1 UCP, which states that: “*The Uniform Customs and Practice for Documentary Credits, 2007 Revision, ICC Publication no. 600 (“UCP”) are rules that apply to any documentary credit (“credit”) [.....] when the text of the credit expressly indicates that it is subject to these rules. [.....]*”.

With respect to payment obligations, it is well known that under the CISG the buyer is required to pay the purchase price for the goods in accordance with the provisions of Articles 53 and 54. Article 54 CISG, provides that:

“*[t]he buyer's obligation to pay the price includes taking such steps and complying with such formalities as may be required under the contract or any laws and regulations to enable payment to be made.*”

On the other hand, in a documentary sales transaction the seller has the duty to hand over to the buyer any documents relating to the goods as set out in Articles 30 and 34 CISG. Article 34 of the CISG provides (in part) that:

“*[i]f the seller is bound to hand over documents relating to the goods, he must hand them over at the time and place and in the form required by the contract.*”

Although letters of credit are payment instruments which are typically deemed effective and enforceable regardless of any issues or claims arising from the underlying sales contract,<sup>64</sup> in international agreements governed by the CISG an interplay between the provisions of UCP and those of the CISG itself may often occur in practice. By way of example, the tender of strictly complying documents under clause 16 UCP is an essential requirement to make a payment under a letter of credit and, ultimately, to discharge the payment obligations under the sales contract. Accordingly, the bank is obliged to refuse to pay the price if the documents submitted to it by the buyer do not comply with the terms set out in the letter of credit. This, in turn, means that the seller must hand over to the buyer

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<sup>62</sup> For reference materials on letters of credit, *Gutteridge/ Megrah*, Gutteridge and Megrah's Law of Bankers' Commercial Credits (8<sup>th</sup> ed. 2001); *Jack, Malek & Quest*, Documentary Credits. The Law and Practice of Documentary Credits Including Standby Credits and Demand Guarantees (2001); *Kurkela*, Letters of Credit and Bank Guarantees under International Trade Law (2007); *Roeland/ Bertrams*, Bank Guarantees in International Trade (3<sup>rd</sup> ed. 2004); *Schmitthoff*, Schmitthoff's Export Trade: The Law and Practice of International Trade. The Law and Practice of International Trade (11<sup>th</sup> ed. 2007); *Tunc*, Réflexions générales sur la vente internationale et crédits documentaires, 16 European Transport Law, Belgium (1981) 151-156; for a discussion of the implications of the UCP rules, see *Bergami*, What Can UCP 600 Do for You?, The Vindobona Journal of International Commercial Law and Arbitration (2007) 1-10.

<sup>63</sup> See *Schmitthoff*, Commercial Law in a Changing Economic Climate (2<sup>nd</sup> ed. 1981) 28.

<sup>64</sup> See, among others, *Roeland/ Bertrams* (*supra* note 62) 199 (noting that it is fully accepted that the guarantee has a causa of its own, which is independent from the causa of the underlying contract and that such former causa can be recognized in the will of the parties to provide security in a manner which is independent from the underlying relationship.).

a complete and accurate set of documents that will enable the buyer to request payment from the bank. Depending on the circumstances of the case, the failure by the seller to comply with such an obligation (which ultimately has implications both under UCP and the CISG) may constitute a fundamental breach under the CISG.<sup>65</sup> Clearly, in a scenario where the conduct of the seller must be assessed in order to determine if a fundamental breach has in fact occurred, the express reference to the UCP in the contract will make the difference. Under clauses 14(a) and 14(b) UCP a bank must examine a presentation of documents relating to a letter of credit within five banking days and determine if the presentation is compliant with the terms of the letter of credit. Under clause 16 UCP a bank may refuse to honour the payment obligations if it finds that the documents were not compliant. This standard of review has led Professor Schwenger to consider that if the contract provides for payment by means of a letter of credit, this implies that the documents need to be 'clean' in every respect, otherwise the buyer can avoid the contract.<sup>66</sup> In other words, the reference to UCP implies that the seller's failure to provide a complete and accurate set of documents will be subject to a stricter scrutiny than if the CISG alone were deemed to apply. Such kind of remark derives from the fact that the buyer may avoid the contract under article 25 CISG only if a fundamental breach has occurred. Hence, the incorporation by reference of the UCP into the contract means that the seller must comply with a specific set of rules governing documentary credits, which calls for strict compliance with documentary obligations. Article 30 CISG requires the seller to "deliver the goods [and] hand over any documents relating to them". This provision essentially recognises that the contract may impose separate obligations in relation to goods and documents. It is therefore self evident that in international sale contracts involving letter of credit transactions governed by UCP, the delivery of non-conforming documents can give rise to a fundamental breach, if the result of this breach is that the bank irrevocably refuses to pay the price for the goods.<sup>67</sup> This example shows the significance of the interplay between the provisions of UCP and Article 25 CISG and the importance of understanding the practical implications of the interpretation of trade usages under the CISG. As a potential mitigating factor, one must look at clause 16(b) of UCP, under which the issuing bank can decide in its sole judgment to approach the buyer to see if it deems fit to waive the document discrepancies.<sup>68</sup> Ultimately, if the buyer is satisfied with the delivery of the goods and the discrepancies are minor, he will have no interest in denying the waiver thereof, and such behaviour would be consistent with the principle of good faith underlying the CISG. Yet, the interplay between the provisions of UCP on strict document compliance and the breach under the CISG are worth paying a great deal of attention, since the consequences of the failure to meet the standards provided by UCP can be rather harsh.

#### 4. Letters of confirmation: The Issue of Silence

<sup>65</sup> See UNCITRAL Digest, Digest of Article 34 case law, 3 available online at <<http://daccess-dds-ny.un.org/doc/UNDOC/GEN/V04/551/57/PDF/V0455157.pdf?OpenElement>> ("The handing over of non-conforming documents constitutes a breach of contract to which the normal remedies apply. Provided the breach is of sufficient gravity it can amount to a fundamental breach, thus permitting the buyer to declare the contract avoided"). For a commentary on the concept of fundamental breach under article 25 of the CISG, see *Ferrari*, Fundamental Breach of Contract under the UN Sales Convention on Contracts for the International Sale of Goods - 25 years article 25, 5 *Revue de droit des affaires internationales / International Business Law Journal* (2005) 389-400; *Graffi*, Case law on the concept of "fundamental breach" in the Vienna Sales Convention, *Revue de droit des affaires internationales / International Business Law Journal* (2003) 338-349.

<sup>66</sup> See *Schwenger*, The Danger of Domestic Preconceived Views with Respect to the Uniform Interpretation of the CISG: The Question of Avoidance in the Case of Nonconforming Goods and Documents, *Victoria University of Wellington Law Review* 36:4 (2005) 805.

<sup>67</sup> For similar conclusions, see *Bijl*, Fundamental Breach in Documentary Sales Contracts. The Doctrine of Strict Compliance with the Underlying Sales Contract, 1 *European Journal of Commercial Contract Law* (1/2009) 19-28, 28, holding that: "Letter of credit practice strongly suggests that if the parties have agreed to payment by means of a letter of credit, they have simultaneously agreed to apply the strict compliance principle to the delivery of documents in the underlying sales contract."

<sup>68</sup> For a discussion of the issue of discrepancies in letters of credit, see *Bergami*, Discrepant documents and letters of credit: the banks' obligations under UCP500, *The Vindobona Journal of International Commercial Law and Arbitration* (2003) 105-120.

An issue that frequently arises in the practice of international sales is that of whether or not silence in response to a letter of confirmation may be sufficient to reach an agreement. Traders and business people across the world do not often find practical to reply in writing to a letter of confirmation<sup>69</sup> and they may prefer to simply rely on prior usages or past commercial practices. It is therefore necessary to determine if under such circumstances silence may amount to consent. Commercial letters of confirmation have been the object of wide discussions among legal commentators and the case law of various European countries for more than a century.<sup>70</sup> By way of background, a commercial letter of confirmation is typically a document setting out the terms of a contract, which is sent by one party to another party in respect of a contract which has already been concluded orally (e.g., over the telephone) or which has not yet been concluded. As pointed out by Professor Ferrari: “It is safe to assume that the rules pertaining to this issue may be understood as usages within the (autonomous) meaning of the CISG”<sup>71</sup> and should not be construed in accordance with the meaning attributed to them under national laws. It is also worth noting that Article 18(1) CISG expressly provides that “[...] Silence or inactivity does not in itself amount to acceptance.” This provision may, however, be derogated by an applicable usage or practice, so long as the parameters of either Article 9(1) or 9(2) of the CISG are met. Under Article 9(1), silence can be deemed a binding sign of a party’s acceptance if it constitutes a usage to which the parties have agreed or a practice which the parties have established between themselves. In my view, it is rather unlikely that the parties have expressly agreed that silence will constitute a form of agreement, since silence is typically a form of acceptance that will occur in transactions that are not heavily regulated. It is also more frequent in practice that the parties will establish in their business dealings a practice of accepting contracts by way of silent or tacit acceptance.<sup>72</sup> The existence of the practice needs, however, to be proved by the party invoking it and evidence should be provided that a number of contracts have been concluded through silent acceptance.<sup>73</sup> If Article 9(1) does not apply, a party may still be in a position to argue that the silent acceptance constitutes a usage of which the parties knew or ought to have known and which in international trade is widely known to, and regularly observed in the relevant trade sector by, parties to contracts of the type involved in the specific transaction.<sup>74</sup> However, the majority of the legal

<sup>69</sup> For a detailed discussion of the issue of commercial letters of confirmation under the CISG, see *Esser*, Commercial Letters of Confirmation in International Trade: Austrian, French, German and Swiss Law and Uniform Law Under the 1980 Sales Convention, in 18 Georgia Journal of International and Comparative Law (1988) 427 (“Confirmation letters are typically employed where the parties negotiate in different ways, for example, when they exchange letters, negotiate on the telephone, send telexes and fail to reduce their final agreement to writing.”). For an example of a specific practice established among pharmaceutical companies, which did not find practical to reply in writing to a letter of confirmation, see *Geneva Pharmaceuticals Technology Corp. v. Barr Laboratories, Inc., et al.* (*supra* note 36), where plaintiffs alleged that it is a widespread practice throughout the pharmaceutical industry that a supplier providing a reference letter commits itself to providing commercial quantities of the raw material and that throughout the 1990’s it was also practice to rely on informal oral arrangements, rather than written supply contracts (for example, more than 90% of the bulk pharmaceutical ingredients purchased by Barr, and the majority of bulk pharmaceuticals sold by ACIC/Brantford, did not involve written supply agreements).

<sup>70</sup> See *Esser* (*supra* note 69), *id.*.

<sup>71</sup> See *Ferrari*, Trade Usage and Practices Established between the Parties under the CISG (*supra* note 1) 575. To this effect, see also *Esser*, Die letzte Glocke zum Geleit? - Kaufmännische Bestätigungsschreiben im Internationalen Handel: Deutsches, Französisches, Österreichisches und Schweizerisches Recht und Einheitliches Recht unter der Kaufrechtskonvention von 1980, [1988] ZfRvgl 167, 188 et seq.; *Piltz* (*supra* note 31), § 2 para. 178.

<sup>72</sup> See Civil Court of Basel (Switzerland), 21 December 1992, CLOUT case no. 95, where the court found that the exchange of confirmations was consistent with the practice which the parties had established between themselves.

<sup>73</sup> For similar remarks, see *Ferrari*, The Draft UNCITRAL Digest and Beyond: Cases, Analysis and Unresolved Issues in the U.N. Sales Convention (*Ferrari/Flechtner/Brand* eds. 2004) 196. Regarding the need to give sufficient evidence of the existence of the usages, see, e.g., Dist. Court Landshut (Germany), 12 June 2008, available online at <<http://cisgw3.law.pace.edu/cases/080612g2.html>>, holding that in a sale of metallic slabs the seller would have had to substantiate that there is a specific trade usage in respect to the sale of metallic slabs between Germany and Italy, which contained the conferral of jurisdiction to the place where the supplier is domiciled or the acceptance of the principles on silence in respect to a commercial order confirmation, but the seller had failed to do so.

<sup>74</sup> See *Achilles* (*supra* note 1) Article 9, para. 4; *Holl/Kessler* (*supra* note 1) 459; *Neumayer/Ming* (*supra* note 1) Article 9, commentary 4; *Schlechtriem* (*supra* note 6) para. 62; *Staudinger/Magnus* (*supra* note 1) Article 9 CISG, para. 27.

commentators and the case law held that for the usage to be effective, the mere fact that the laws of the country in which the recipient has its place of business admit the silent acceptance of a contract may not be sufficient grounds to bind both parties under Article 9(2).<sup>75</sup> In a Swiss case precedent<sup>76</sup> where the parties had not entered into a written contract, but the seller had simply delivered a commercial letter to the buyer confirming that a certain quantity of textiles was going to be manufactured and supplied, a Swiss court found that the letters of confirmation sent by the seller and the subsequent failure by the buyer to react reflected a usage as to the formation of contracts in the sense of Article 9(2) CISG. According to the court, the parties had impliedly made that usage applicable to their contract, since they knew or ought to have known the binding nature of such confirmations, which are recognized under both laws of the countries in which the parties had their place of business (i.e., Austrian law and Swiss law).<sup>77</sup> Proving the existence of a trade usage or commercial practice capable of derogating from the rule set out in Article 18(1) CISG may, however, be a difficult task. In a 2007 decision,<sup>78</sup> a Dutch appellate court was called to interpret a dispute arising from a sale by a Belgian company of a certain machinery to a Dutch company. The invoice sent by the seller indicated that "the goods remain our property until complete payment has been received". The seller also used a set of general conditions, which further confirmed that "delivered goods remain the property of the seller until full payment has been received, meaning in particular that the buyer cannot resell the goods or give them as collateral". However, the purchasing agreement did not state anywhere that the purchase was subject to a reservation of property. The Dutch buyer did not agree to or object against the provision on the invoice reserving property to the Belgian company. However, the Dutch buyer failed to pay the entire purchase price and meanwhile sold the machinery to a third party, leasing it back from that same third party. The Belgian seller claimed that the Dutch buyer had violated the property reservation clause set out in the invoice and the general conditions. However, the Dutch appellate court noted (in my view correctly) that, since there was no evidence that the reservation of property was an established practice or usage by which the Dutch company would be bound and since the Dutch company could only have become aware of the reservation of property after receiving the invoice (regardless of whether the reference to the reservation of property was made on the front or the back thereof), the buyer could not be deemed to have consented to the reservation of property clause. A different position was taken in a case decided by the Court of Appeals of Paris,<sup>79</sup> in which the French judges ruled out the possibility that the buyer's silence to the confirmation order delivered by the seller and concerning the sale of 100,000 meters of fabric could be deemed to constitute an acceptance. Here, the Court of Appeals held that even though the seller and the buyer had previously developed a practice of transacting business based on confirmation orders silently accepted by the buyer, the new sale dealt with a very different type of fabric (namely, a new lycra-type of fabric) and therefore the seller could not rely on the prior practice. As a result, the

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<sup>75</sup> See Appellate Court of Frankfurt (Germany), 5 July 1995, available online at: <<http://cisgw3.law.pace.edu/cases/950705g1.html>>. Among the legal commentators, see *Ferrari*, Trade Usage and Practices Established between the Parties under the CISG (*supra* note 1) 575; *Herber/Czerwenka* (*supra* note 1) Article 9 para. 12; for a different opinion, see *Ebenroth*, Internationale Vertragsgestaltung im Spannungsverhältnis zwischen AGBG, IPR-Gesetz und UN-Kaufrecht, *ÖstJBl.* (1986) 681, 688; for a diverging view, see, however, *Huber*, Der UNCITRAL Entwurf eines Übereinkommens über internationale Warenkaufverträge, 43 *RebelsZ* (1979) 413, 449, holding that if under the silent party's domestic law silence is recognized as a form of acceptance, then this law should control.

<sup>76</sup> See Civil Court of Basel (*supra* note 72).

<sup>77</sup> *Id.* Note that according to Professor Ferrari, the decision of the Civil Court of Basel has failed to take notice of the fact that in one of the two states involved (namely Austria), the effect of such a letter of confirmation, i.e. the conclusion of a contract, has been ruled out [on Austrian law, see for instance, OGH (Austria) 26 June 1974, *ÖstJBl.* (1975) 89] (see *Ferrari*, Trade Usage and Practices Established between the Parties under the CISG (*supra* note 1) 575).

<sup>78</sup> See Appellate Court of Hertogenbosch (The Netherlands), 29 May 2007, CLOUT case No. 827. See also, Dist. Court Gera (Germany), 29 June 2006, available online at <<http://cisgw3.law.pace.edu/cases/060629g1.html>>, holding that a contract cannot be assumed on the basis of silence to a letter of acknowledgement - as the court cannot establish such a practice at the seat of the buyer and as the seller failed to prove that there had been such a practice between the parties.

<sup>79</sup> See Court of Appeal of Paris (France), 10 September 2003, CLOUT case No. 490.

"confirmation of order" was regarded as an offer of sale of goods, which the buyer had not accepted. The position of the French court in the case at hand appears to be rather draconian, since the nature or kind of good sold should not be a key element in determining if a practice has been established among the parties. In other words, if the parties have repeatedly transacted business based on a silent acceptance of confirmation orders, so long as the trade practice and sector remains the same, the type of good sold should not be a decisive factor in determining whether or not the practice falls under Article 9 CISG. Furthermore, in the specific case the difference between the goods sold related only to a different type of fabric, not even to a different type of good overall.

## V. Conclusions

Since the existence of a usage or practice largely depends upon the specific facts of the case, the issue of whether or not trade usages or practices established among the parties may apply to an international sales contract governed by the CISG pursuant to Article 9 becomes a matter of proof by the party invoking their application.<sup>80</sup> There are many instances in which the successful application of the usages or practices can provide benefits to a party. For example, a payment delay or a certain quantity of defective goods sold may be tolerated by a party under certain trade usages or business practices, whereas such delays or defects could be deemed to amount to a breach of contract under the applicable provisions of the CISG. It may be possible (at least in theory) that a judge applies trade usages or business practices *ex officio*, but this is rather unlikely to occur in practice, especially in the absence of specific evidence provided by a party of the transaction. As pointed out by leading commentators,<sup>81</sup> in arbitration proceedings there are higher chances that a specialized arbitrator may be aware of specific trade usages of a given business sector and decide to apply them on its own motion. To sum up, trade usages and business practices can be successfully invoked by a party, so long as adequate and persuasive evidence is made available to the judge or arbitrator regarding the existence and applicability of the usage or business practice. Yet, it is difficult to predict how a court or arbitration panel will react, since the sufficiency and persuasiveness of evidence is a procedural issue that falls outside the scope of the CISG.<sup>82</sup> In my opinion, although business practices and usages are expressly made applicable to international sale contracts governed by the CISG pursuant to Article 9, in light of their peculiar features which vary from case to case, such usages and practices can undermine the uniform goals that the CISG purports to achieve.<sup>83</sup> This may perhaps explain why most of the uniform law conventions that have come into force after the CISG do not include provisions expressly dealing with usages.<sup>84</sup> Thus, in order to avoid unwanted conflicting interpretations between

<sup>80</sup> See *Pamboukis* (*supra* note 1) at 124, stating that: "As with the usages agreed upon by the parties or the practices established between them, the party that alleges the existence of any binding usage has to prove it."

<sup>81</sup> See *Bianca/ Bonell/ Bonell* (*supra* note 1) at 112, holding that the application of usages by an arbitrator, by virtue of his office, through various rules of arbitration, is allowed and at times may even be required; *Bout*, Trade Usages: Article 9 of the Convention on Contracts for the International Sale of Goods (1988) § II(G), available online at <<http://www.cisg.law.pace.edu/cisg/biblio/bout.html>>; *Pamboukis* (*supra* note 1) at 124.

<sup>82</sup> For a discussion on procedural issues and the CISG, see *Flechtner*, The U.N. Sales Convention (CISG) and MCC-Marble Ceramic Center Inc. v. Ceramica Nuova D'Agostino, S.p.A.: The Eleventh Circuit Weighs in on Interpretation, Subjective Intent, Procedural Limits to the Convention's Scope, and the Parol Evidence Rule, 18 *Journal of Law and Commerce* (1999) 259-287; *Giovannucci Orlandi*, Procedural issues and uniform law conventions (*supra* note 42) *id.*; *La China*, La convenzione di Vienna sulla vendita internazionale di diritto uniforme. Profili processuali: la giurisdizione, 44 *Rivista trimestrale di diritto e procedure civile* (1990) 769-783.

<sup>83</sup> For a contrary view, see, however, *DiMatteo/ Dhooge/ Greene/ Maurer/ Pagnattaro*, (*supra* note 35) 306 ("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, including the recognition of evolving trade usage, in the re-formulation 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.")

<sup>84</sup> For these remarks, see *Torsello* (*supra* note 17) at 147 ("Notwithstanding the ever-increasing relevance of usages in the

usages and provisions of the CISG, it is therefore advisable for courts and arbitrators to take a rather cautious approach to usages and practices and to determine the exact force of such rules vis-à-vis the uniform sales law provisions, especially when the application thereof may significantly depart from uniform and predictable rules set out in the CISG.<sup>85</sup>

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regulation of international trade, reflected in the number of arbitral decisions based upon it, as well as in the creation of international uniform instruments other than Conventions, such as the Incoterms and the Unidroit Principles, international uniform commercial law Conventions seem to be reluctant to enhance the role of usage. This conclusion clearly emerges should one consider that most subsequent Conventions do not even mention usages among the possible sources of law governing the transaction, while the Agency Convention does nothing but reproduce, with the minimal necessary adaptation, the wording of the CISG”).

<sup>85</sup> As pointed out by *Ferrari* (*supra* note 32) at 335 (“What has been said in respect of Article 9 CISG clearly shows that the rules governing an international contract for the sale of goods are not necessarily only those laid down by the CISG, even where the CISG itself applies. But it also shows that it is important to determine on what grounds one rule applies, as that rule's position in the hierarchy of sources of law for international sales contracts depends on those grounds.”).





### **Dr. Nils Schmidt-Ahrendts**

- is a member of arbitration department of CMS Hasche Sigle Munich headed by Dr. Klaus Sachs (Vice President of the ICC and the LCIA);
- is acting as counsel and secretary to the arbitral tribunal in national and international arbitration proceedings (International Trade, M&A and Construction);
- areas of specialisation are arbitration, cross-border litigation, international private law and contract law;
- studied law in Freiburg/Germany and Grenoble/France;
- completed his doctoral thesis on "The relationship of specific performance, damages and contract avoidance under the CISG";
- spent three month as a trainee with the ICC Court of Arbitration in Paris;
- participated in the Willem C. Vis Moot as a student, coach and arbitrator; and
- is a lecturer of Arbitration and CISG at the University of Freiburg.





## CISG and Arbitration – "Less alien than one may expect"

Dr. Nils Schmidt-Ahrendts, CMS Hasche Sigle  
The CISG at its 30<sup>th</sup> anniversary - In Memory of Albert H. Kritzer

## CISG and Arbitration - Outline

- I. Obvious Differences
- II. Statistics
- III. Applying the CISG to 'Arbitration Issues'
- IV. Common Features
- V. Joint Opportunities

## I. Obvious Differences – The CISG

- is a statute
- is a single international convention
- only applies to contracts of sale
- governs the parties' substantive rights and obligations
- applies in the same manner regardless of the judges' or the arbitrators' nationality

## I. Obvious Differences – Arbitration

- is a concept of dispute settlement
- is based on various conventions, statutes, rules and principles
- applies to various types of disputes including, *inter alia*, M&A, joint venture, construction and investment disputes
- governs the parties' procedural rights and obligations
- may be applied differently depending on, *inter alia*, the place of arbitration

## II. Statistics – How frequently is the CISG applied by Arbitral Tribunals?

### – Unilex

- Published CISG cases as of 25 October 2010 : 866
- CISG cases decided by Arbitral Tribunals: 88

### – CISG-Online

- Published CISG cases as of 25 October 2010: 2,060
- CISG cases decided by Arbitral Tribunals: 527

## II. Statistics - How frequently is the CISG applied in Arbitration?

- Out of the 3000 ICC cases listed under case numbers 14000 to 17000 (2 September 2005 to 31 March 2010), 155 "involved" the CISG. In the majority of cases, the CISG was applied and only in a small number of cases, the CISG was excluded.

### III. Applying the CISG to 'Arbitration Issues' – Law Applicable

- How may an arbitrator come to the conclusion that the CISG applies?
- What is the relationship between Article 1 CISG and the choice of law rules contained in institutional (e.g. Article 17 ICC Rules) and ad-hoc rules (e.g. Article 35 UNCITRAL Arbitration Rules) or national laws (e.g. Section 1051 German Code of Civil Procedure)?

### III. Applying the CISG to 'Arbitration Issues' – Law Applicable

- 1<sup>st</sup> Contention:  
Tribunals are not bound to apply Article 1 CISG directly (as it is the case for courts of ratifying states), but rather to primarily apply the choice of law rules contained in the applicable
  - national laws
  - institutional rules; or
  - ad-hoc rules

### III. Applying the CISG to 'Arbitration Issues' – Law Applicable

– 2<sup>nd</sup> contention:

Applying these choice of law provisions, the CISG may apply for various alternative reasons:

- 1) The Parties have chosen the CISG or the Law of a Contracting State
- 2) The CISG or the Law of a Contracting State is the "most appropriate" or "most closely connected" law
- 3) The "most appropriate conflict of law rule" foresees the applicability of the CISG or of the Law of a Contracting State
- 4) The CISG forms part of Trade Usages

### III. Applying the CISG to 'Arbitration Issues' – Arbitration Agreement

– Is the CISG potentially applicable to an arbitration agreement?

– Which aspects of the validity of an arbitration agreement (formation, formal validity, arbitrability) are potentially governed by the CISG?

### III. Applying the CISG to 'Arbitration Issues' – Arbitration Agreement

- 1<sup>st</sup> contention: Arbitration agreements are – potentially – governed by the law applicable to the substance of the dispute, including the CISG
- 2<sup>nd</sup> contention: The CISG only applies to the formation (offer and acceptance) of the arbitration agreement, not to its formal validity

### III. Applying the CISG to 'Arbitration Issues' – Breach of Procedural Obligations

- May a party claim damages under the CISG, if the other party has breached its duty to keep the proceedings and their content confidential?
- Would the result be different, if the party had breached an obligation to keep the existence of the contract of sales confidential?



### III. Applying the CISG to 'Arbitration Issues' – Breach of Procedural Obligations

*Zapata Hermanos vs. Hearthside Baking* (U.S. Court of Appeals 7<sup>th</sup> Circuit, 19 November 2003) – May a party recover its legal fees pursuant to Article 74 CISG?

- U.S. court: "The CISG is about contracts, not about procedure".
- Prof. Schlechtriem: "*If national courts simply classify the recoverability of litigation costs and lawyers fees as a procedural matter [...] there will be soon more enclaves of domestic law, which [...] will cause an erosion of the uniformity achieved*".

### III. Applying the CISG to "Procedural Issues"? – Damages for breach of "Procedural Obligations" or "Legal costs"

- 1<sup>st</sup> contention: Art. 74 CISG may apply to a breach of an arbitration agreement if the arbitration agreement is governed by the CISG
- 2<sup>nd</sup> contention: Article 74 CISG covers direct and indirect damages arising out of a breach of contract, including a breach of the obligation to keep the existence of the contract confidential

## IV. Common Features

- both are products of UNCITRAL aiming at the promotion and facilitation of international trade
- their purpose is to minimize the risk of disputes (CISG) and to swiftly settle disputes (Arbitration)
- both are based on the concepts of "good faith" and "party autonomy"
- both share the same standards of interpretation (theoretical primacy of parties' actual intent and *de facto* prevalence of objective interpretation)

## IV. Common Features

- both aim at the unification of Law
  - by virtue of a uniform law, ratified by states and incorporated in their national law (CISG)
  - by virtue of a international treaties, model laws, non-binding soft laws by the IBA and standards of best practice (Arbitration)

## V. Joint Opportunities – How the CISG may benefit from Arbitration

- international legal interpretation:
  - absence of a "CISG Court of Justice"
  - tendency of state courts to rely on national preconceptions
  - national diversity of arbitral tribunals
  
- factual diversity:
  - limited resources and practical experience of state court judges
  - financial resources and business sector knowledge of arbitrators

## V. Joint Opportunities – How Arbitration may benefit from the CISG

- availability of the CISG in several languages
- good accessibility of literature and case law on the CISG
- neutrality of the CISG
- reduced risk of complex disputes over conflict of law issues
- predictability of the CISG compared to undeveloped national laws
- enlargement of the pool of available arbitrators
- 'small' CISG cases as a chance for the young arbitration generation (unlike M&A, construction and investment disputes)

## Outlook

- Has the time come for a "Convention on International Arbitration"?
- Is there a need for a "CISG Supreme Court" and/or an "Arbitration Supreme Court"?

## Last page

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**Vladimir Pavić** graduated from University of Belgrade Faculty of Law in 1994, finished his master studies at the Central European University (Budapest) in 1996, and completed his doctorate studies there in 1999. He was at the T.M.C. Asser Instituut in Den Haag in 1996 on the Asser College Europe research stipend and at Lincoln College, Oxford University in 1996/7 on the FCO/Chevening Scholarship as a visiting student.

Vladimir Pavić is currently an Associate Professor in International Private Law and Arbitration at the University of Belgrade Faculty of Law, Visiting Professor at the postgraduate courses of the Central European University and University of Graz and an arbitrator with the Foreign Trade Arbitration Court attached to the Serbian Chamber of Commerce, Permanent Court of Arbitration at the Croatian chamber of commerce and Foreign Trade Arbitration Court attached to the Chamber of Commerce of Montenegro. As a visiting professor at the University of Pittsburgh he taught a course on International Commercial Arbitration in fall 2010.



**Milena Đorđević** graduated from University of Belgrade Faculty of Law in 2000, finished her master studies at the University of Pittsburgh School of Law in 2002 and is currently finishing her doctorate thesis from the area of International Sales Law. In 2005 and 2008 she was awarded Max Planck Institute for International Private and Comparative Law stipend where she has spent couple of months for research.

Milena Đorđević is currently a lecturer at the Faculty of Law University of Belgrade, where she teaches International Commercial Law, EU Trade Policy and Legal English. She also does consulting work for domestic companies, institutions and international organizations including the USAID, GTZ and IFC and is listed as arbitrator on the List of arbitrators of the Foreign Trade Arbitration Court attached to the Serbian Chamber of Commerce and Foreign Trade Arbitration Court attached to the Chamber of Commerce of Montenegro. As a visiting professor at the University of Pittsburgh she taught a course on International Commercial Arbitration in fall 2010.

# ARTICLES

## APPLICATION OF THE CISG BEFORE THE FOREIGN TRADE COURT OF ARBITRATION AT THE SERBIAN CHAMBER OF COMMERCE—LOOKING BACK AT THE LATEST 100 CASES

*Vladimir Pavić & Milena Djordjević[\*][\*\*]*

### TABLE OF CONTENTS

I.	Introduction.....	3
II.	Sphere of Application of the CISG.....	5
	1. International Character of the Contract.....	6
	2. Relevant Nexus with the CISG Contracting State.....	7
	2.1.) Choice of the law of a Contracting State.....	8
	2.2.) Application of the CISG when there was no choice of law of a Contracting State.....	13

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\* Dr. Vladimir Pavić is Associate Professor of Private International Law and Arbitration at the University of Belgrade Faculty of Law [LL.B. University of Belgrade 1994; LL.M. Central European University in 1996; S.J.D. Central European University 1999]. He has served as an arbitrator at the FTCA court since 2005. Milena Djordjević, LL.M. is a Lecturer in International Commercial Law at the University of Belgrade Faculty of Law [LL.B. University of Belgrade Faculty of Law, 2000; LL.M. University of Pittsburgh School of Law, 2002] and a national delegate on the GTZ Open Regional Fund's project on promotion of the CISG and arbitration in Southeast Europe. The authors have jointly coached the University of Belgrade team at the Willem C. Vis International Commercial Arbitration Moot for the past seven years. The authors may be contacted at: bgmoot@ius.bg.ac.rs.

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2.3.)	Direct application of the CISG. . . . .	15
2.4.)	Effects of dissolution of SFRY to application of the CISG. . . . .	16
2.5.)	Failure to apply the CISG where it was applicable. . . . .	21
3.	Meaning of “Contract for Sale”. . . . .	22
III.	Interpretation of the CISG. . . . .	24
1.	Internationality. . . . .	24
2.	Uniform Application. . . . .	25
3.	Good Faith. . . . .	27
4.	Gap-Filling. . . . .	28
IV.	Interpretation of the Parties’ Statements and Conduct. . . . .	30
V.	Modification of Contract and Form Requirements. . . . .	32
VI.	Fundamental Breach. . . . .	33
VII.	Non-Conformity of the Goods. . . . .	35
1.	The Concept of Non-Conformity. . . . .	35
2.	Notice of Non-Conformity. . . . .	36
2.1.)	Form of notice. . . . .	37
2.2.)	Content of notice. . . . .	39
2.3.)	Reasonable time. . . . .	40
VIII.	No-Fault Liability. . . . .	41
IX.	Avoidance. . . . .	42
1.	Basis of Avoidance. . . . .	42
2.	Declaration of Avoidance. . . . .	44
3.	Effects of Avoidance. . . . .	45
X.	Damages. . . . .	46
1.	Categories of Loss. . . . .	46
2.	Proof of Damages. . . . .	47
3.	Foreseeability. . . . .	48
4.	Liquidated Damages. . . . .	50
XI.	Interest. . . . .	51
1.	Statutory Interest Rate Approach. . . . .	53
2.	Interest Rate “In Accordance with Practice of Courts and Arbitration Tribunals”. . . . .	54
3.	Interest Rate in Accordance with International Payment Usages. . . . .	55
4.	Interest Rate Calculation Under the CISG General Principles. . . . .	58
XII.	Exemption from Liability to Pay Damages. . . . .	61
XIII.	Concluding Remarks. . . . .	62



## I. INTRODUCTION

Although former Yugoslavia had been active in the drafting process of the 1980 UN Convention on Contracts for the International Sale of Goods (CISG) and was one of the first countries to ratify the CISG,<sup>1</sup> the subsequent application of the CISG before national courts and arbitral tribunals based in Serbia has not been monitored on a regular basis. This survey attempts to bridge a serious gap which has occurred in reporting cases on the CISG originating from Serbia.

Although one would occasionally learn of a correct or incorrect application of the CISG, only after the advent of organized electronic databases of court case-law could one actually attempt to assess how often Serbian courts dealt with the CISG. Because of the difficulties in accessing Serbian court decisions that apply the CISG,<sup>2</sup> our analysis focuses on the caseload handled by the Foreign Trade Court of Arbitration at the Serbian Chamber of Commerce (FTCA).<sup>3</sup> Given that the FTCA has an average load

1. The Socialist Federative Republic of Yugoslavia (SFRY) signed the CISG on April 11, 1980 and ratified it on December 27, 1984. The Law on Ratification of the Convention was published in the Official Gazette of the SFRY, MU 10/84. On March 12, 2001, the Federal Republic of Yugoslavia (FRY) notified the UNCITRAL Secretariat that the Convention had been in force with respect to FRY as of April 27, 1992, i.e., as of the date of state succession. When constitutional changes were made in the FRY in 2003, the CISG remained in force in the State Union of Serbia and Montenegro (former FRY) in accordance with Article 63 of the Constitutional Charter of the State Union. OFFICIAL GAZETTE SM, Nos. 1/03 and 26/05. Upon Montenegro's declaration of independence of June 3, 2006, all international treaties to which the State Union was a party to, including the CISG, remained in force only in respect to the Republic of Serbia, as provided by Article 60(4) of the Constitutional Charter of the State Union and confirmed by the decision of June 5, 2006 of the Serbian Parliament. Montenegro's contracting status to the CISG was later confirmed by filing a notification of succession. See STATUS 1980—UNITED NATIONS CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS, [http://www.uncitral.org/uncitral/en/uncitral\\_texts/sale\\_goods/1980CISG\\_status.html](http://www.uncitral.org/uncitral/en/uncitral_texts/sale_goods/1980CISG_status.html) (last visited Oct. 2, 2009) [hereinafter STATUS 1980].

2. There are only seven court decisions reported on Paragraf Lex and Ing-Pro, two major Serbian electronic databases of domestic case-law. The authors of this paper are fairly sure that there are dozens of other CISG cases existing in Serbian courts, but one would need to know about them first in order to find them by the case number in the court archives.

3. The FTCA is a permanent arbitration body founded in 1947 that provides for conciliation and arbitration services in settling disputes of international business character when the parties have agreed upon its jurisdiction in accordance with its rules. It is the only institutional arbitration in Serbia that resolves cross-border disputes and has so far handled over 8,000 cases. Proceedings before the FTCA are governed by the Rules of the FTCA and by the provisions of the arbitration agreement. The parties may also stipulate that the procedure before the FTCA will be conducted in accordance with the Rules of Arbitration of the United Nations Commission on International Trade Law. The Rules of the Foreign Trade Court of Arbitration at the Serbian Chamber of Commerce, arts. 45(1) and 46(1), available at <http://eng.komora.net/ForeignTradeCourtOfArbitration/tabid/1029/Default.aspx>; see generally Mirko Vasiljević, *Priroda i*

of 25-30 cases per year of which all are international and many deal with sale of goods, and that over 80% of Serbian trade is directed to other CISG contracting states,<sup>4</sup> we assumed that there were plenty of unreported cases waiting in the FTCA archives. It turned out that, luckily, our assumptions were correct. As a starting point, we selected the year 2000, which was the year that international economic sanctions against Serbia were fully lifted, allowing for unhindered trade and resumption of normal and transparent methods of dispute settlement among trading partners (although this was not reflected immediately on the caseload of the FTCA—disputes usually need some time to ripen).

We identified 100 cases within the nine year period starting in 2000 in which the application of the CISG was at stake—sometimes applied, sometimes overlooked. This finding was particularly important given the scarcity of reported CISG case law coming from Serbia and former Yugoslavia.<sup>5</sup> These cases dealt with a wide variety of sales contracts—from sales of raspberries, wheat, and fresh mushrooms to sales of paper rolls, steel

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*karakteristike Spoljnotrgovinske arbitraže pri Privrednoj komori Jugoslavije u Beogradu [Nature and Characteristics of the Foreign Trade Arbitration Court at the Yugoslav Chamber of Commerce in Belgrade]*, 1 ARBITRAŽA 3–13 (2000); Dobrosav Mitrović, *Spoljnotrgovinska arbitraža pri Privrednoj komori Srbije [Foreign Trade Arbitration Court at the Serbian Chamber of Commerce]*, ARBITRAŽA 122–29 (2003); GASO KNEŽEVIĆ & VLADIMIR PAVIĆ, ARBITRAŽA I ADR [ARBITRATION AND ADR] 17–180 (2009); M. Wietzorek, *Arbitration in Serbia*, 2009 AUSTRIAN ARB. Y.B. 357, 357–82; Serbian Chamber of Commerce, Foreign Trade Court of Arbitration, <http://eng.komora.net/ForeignTradeCourtOfArbitration/tabid/1029/Default.aspx> (last visited Oct. 11, 2009).

4. *Compare* World Trade Organization [WTO], *Serbia Trade Profile*, <http://stat.wto.org/CountryProfile/WSDBCountryPFView.aspx?Language=E&Country=RS> (Oct. 2009), *with* STATUS 1980, *supra* note 1. It must also be noted that upon Albania's accession to the CISG on May 13, 2009, all member states of the Central European Free Trade Agreement (CEFTA), to which Serbia is a party, are now parties to the CISG as well. Consequently, it may be reasonably expected that the volume of trade between Serbian enterprises and enterprises from other CISG Contracting States will further increase in the future. These expectations are also supported by the recent amendments of the Free Trade Agreement between Serbia and Russia of April 3, 2009 that expanded the list of the goods covered by the CEFTA and anticipated entry into force of the Stabilization and Association Agreement (SAA) between Serbia and EU guaranteeing easier and predominantly customs-free access of Serbian products to European markets and vice versa. *See* Importing from Serbia, [http://www.siepa.sr.gov.yu/site/en/home/1/importing\\_from\\_serbia/trade\\_regulations/](http://www.siepa.sr.gov.yu/site/en/home/1/importing_from_serbia/trade_regulations/) (last visited Jan. 5, 2010).

5. This fact is likely to change in the future given that the University of Belgrade Faculty of Law has recently joined the Queen Mary translation program founded by the Institute for International Commercial Law at the Pace University School of Law and the Centre for Commercial Law Studies at Queen Mary, University of London. Albert H. Kritzer & Loukas A. Mistelis, *Taming the Dragons of Uniform Law: Sharing the Reasoning of Courts and Arbitral Tribunals—English Case Texts and Translated Case Texts*, 5 VINDOBONA J. INT'L COM. L. ARB. 282, 286 (2001). Dozens of translations of the FTCA awards exist at the Pace web site. *See* Electronic Library on International Commercial Law and the CISG, <http://www.cisg.law.pace.edu/cisg/text/caselit.html#serbia> (last visited Oct. 11, 2009).

pipes, and timber; from sales of DVD-DVX players to sales of milk packaging machines and locomotives. The value at stake in these disputes also varied considerably; some of the transactions were minuscule, while others were worth millions of U.S. dollars or euros. However, as one would expect, the value involved in a dispute does not necessarily reflect its legal complexity and some of the cases turned out to be extremely interesting for the purposes of our research. Still, the vast majority of the cases follow a similar scenario: the seller sues the buyer for non-payment of the contract price. Nevertheless, such a simple scenario has raised some interesting questions with regards to the CISG's scope of application and, even more so, the applicable interest rate that should be applied to outstanding payments. Finally, having approximately 100 cases to analyze enabled us to observe a wide range of interesting topics that are helpful for developing a proper understanding of the application of the CISG. We have, therefore, addressed the issues dealt with in the awards topically rather than analyzing every case separately. This, in our opinion, allows for a more streamlined presentation and, hopefully, somewhat more interesting reading material. Also, given that Serbian scholarly work on CISG has rarely been translated into English, we have included, where appropriate, basic references to the relevant articles and monographs on the CISG published in Serbia.

## II. SPHERE OF APPLICATION OF THE CISG

The initial step towards a correct application, or a correct non-application, of the CISG is assessing whether the contract falls within its scope. In order to be governed by the CISG, Article 1 of the CISG requires a contractual relationship that is international in its character and deals with the "sale of goods" and a proper connection between the parties to the contract and the laws of the CISG Contracting States.<sup>6</sup>

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6. For more on the CISG sphere of application in Serbian legal doctrine, see ALEKSANDAR ĆIRIĆ & RADOMIR DJUROVIĆ, *MEDJUNARODNO TRGOVINSKO PRAVO, POSEBNI DEO* [INTERNATIONAL COMMERCIAL LAW, SPECIAL PART] 50–52 (2005); MLADEN DRAŠKIĆ & MAJA STANIVUKOVIĆ, *UGOVORNO PRAVO MEDJUNARODNE TRGOVINE* [THE CONTRACT LAW OF INTERNATIONAL TRADE] 133–48 (2005); GASO KNEŽEVIĆ, *MERODAVNO PRAVO ZA TRGOVAČKI UGOVOR O MEDJUNARODNOJ PRODAJI ROBE* [APPLICABLE LAW TO THE CONTRACT FOR INTERNATIONAL SALE OF GOODS] (1989); JELENA PEROVIĆ, *BITNA POVREDA UGOVORA—MEDJUNARODNA PRODAJA ROBE* [FUNDAMENTAL BREACH OF CONTRACT—INTERNATIONAL SALE OF GOODS] 32–84 (2004); VLADIMIR STOJILJKOVIĆ, *MEDJUNARODNO PRIVREDNO PRAVO* [INTERNATIONAL COMMERCIAL LAW] 141–43 (2003); TIBOR VARADY ET AL., *MEDJUNARODNO PRIVATNO PRAVO* [PRIVATE INTERNATIONAL LAW] 422–27 (2007); JELENA VILUS, *KOMENTAR KONVENCIJE UN O MEDJUNARODNOJ PRODAJI ROBE 1980* [COMMENTARY ON THE 1980 UN CONVENTION FOR CONTRACTS ON

### *1. International Character of the Contract*

The first prerequisite for the application of the CISG is that the underlying contract is international in nature. This requirement is derived from the wording of Article 1, which states that “the [CISG] applies to the contracts . . . between the parties whose places of business are in different states . . . .” If a party has several places of business, the relevant place of business for determination of the international nature of the contract will be the one which has “the closest relationship to the contract and its performance, having regard to the circumstances known to or contemplated by the parties at any time before or at the conclusion of the contract,” as set out in Article 10 CISG.

The Serbian translation of the CISG contained in the Law on Ratification of the Convention<sup>7</sup> refers to the “seat” of a party in both Articles 1 and 10 and not to its “place of business,” which is used in the English text of the CISG. Although these two terms often coincide, this may not always be the case. Hence, the Serbian translation suffers from inherent logical inconsistencies, since a company cannot have more than one seat. To the best of our knowledge, this mistake in translation has not adversely affected the application of Article 10 of the CISG in Serbia to this date.

The issue of multiple places of business arose only once in the cases we examined. In that case, a Swiss seller and a Serbian buyer entered a contract of sale. When the Serbian buyer defaulted on his payments, representatives of seller’s daughter company,<sup>8</sup> based in Serbia, interfered by attempting to assure that the delay in payment would be as short as possible. It was, therefore, questionable whether, in light of the daughter company’s involvement and the contract’s language, Serbian, the entire transaction had only superficial contacts with Switzerland and the seller’s Serbian establishment was, in effect, the place of business most closely connected with the contract and its performance within the meaning of CISG Article 10. The sole arbitrator found

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INTERNATIONAL SALE OF GOODS] 3–17 (1981); Maja Stanivuković, *Polje primene Konvencije UN o ugovorima o međunarodnoj prodaji robe u dosadašnjoj sudskoj i arbitražnoj praksi* [*Sphere of Application of the CISG in the Current Court and Arbitral Practice*], PRAVO I PRIVREDA No. 5-8/00, 931–44 (2000); Radovan D. Vukadinović, *Teritorijalni domašaj primene Konvencije UN o ugovorima o međunarodnoj prodaji* [*Territorial Extent of Application of the CISG*], PRAVO I PRIVREDA No. 5-8/07, 427–40 (2007).

7. See STATUS 1980, *supra* note 1.

8. The award makes reference to a “daughter company” of the Swiss seller. It cannot be deduced from the award itself whether the daughter company was a wholly owned subsidiary of the Swiss company, its branch office, or representation office.

that the transaction was genuinely international and that the Swiss headquarters had played a decisive role in the conclusion and performance of the contract because it negotiated and signed the contract, it transported and installed the equipment, and the payment was effectuated to its account. Therefore, it was held that the CISG should be applied even without resorting to the principle *in dubio pro conventione*.<sup>9</sup> It is worth noting that, when pointing out the erroneous translation of the CISG into the Serbian language, the court made specific reference to the original English text of Article 10 rather than the Serbian translation contained in the Law on Ratification.

## 2. Relevant Nexus with the CISG Contracting State

Article 1(1) of the CISG defines which contractual relationship triggers application of the CISG.<sup>10</sup> Specifically, the CISG should be applied when either both of the contracting parties have their place of business in different contracting states, or the operation of private international law rules leads to the application of the law of a Contracting State.<sup>11</sup> Given that cases before the FTCA usually involve a Serbian company as one of the parties and Serbian trade is usually directed towards other contracting states, there are numerous cases where conditions for CISG application are met.

Some features of the decision-making process under the FTCA rules are common to other arbitration rules as well, e.g., parties are free to choose the applicable law, or rules of law, and, absent express mandate of the parties, arbitrators are not allowed to decide a case *ex aequo et bono*.<sup>12</sup> However,

9. Foreign Trade Court of Arbitration at the Serbian Chamber of Commerce, Award No. T-04/05, July 5, 2008.

10. This provision has given rise to a great deal of controversy with respect to the assessment of its character, prevailing methodology, and interaction with the reservation contained in Article 95. See JOHN HONNOLD, *UNIFORM LAW FOR INTERNATIONAL SALES UNDER THE 1980 UNITED NATIONS CONVENTION passim* (3d ed. 1999); Christophe Bernasconi, *The Personal and Territorial Scope of the Vienna Convention on Contracts for the International Sale of Goods (Article 1)*, 46 NETH. INT'L L. REV. 137, 141 (1999) (Neth.); Loukas Mistelis, *CISG and Arbitration*, in *CISG METHODOLOGY 375 passim* (Andre Janssen & Olaf Meyer eds., 2009); Alexis Mourre, *Application of the Vienna International Sales Convention in Arbitration*, 17 ICC INT'L CT. ARB. BULLETIN 43–44 (2006); Georgios Petrochilos, *Arbitration Conflict of Laws Rules and the 1980 International Sales Convention*, 52 REVUE HELLÉNIQUE DE DROIT INTERNATIONAL 191–218 (1999) (Fr.), available at [http://www.cisg.law.pace.edu/cisg/biblio/petrochilos.html#N\\_15\\_](http://www.cisg.law.pace.edu/cisg/biblio/petrochilos.html#N_15_); Jacob Ziegel, *The Scope of the Convention: Reaching Out to Article One and Beyond*, 25 J.L. & COM. 59, 59 (2005).

11. CISG art. 1(1)(a), (b). In the context of this study, the reservation of Article 95 has not appeared to be relevant since neither former Yugoslavia nor Serbia have made this reservation and there were no situations which called for taking the said reservation into account.

12. The Rules of the Foreign Trade Court of Arbitration [hereinafter The Rules of the FTCA], arts.

where parties have not exercised their autonomy in choosing the applicable law, or rules of law, arbitrators must arrive at the substantive solution by application of the most appropriate *conflict-of-laws rule*<sup>13</sup> and not the most appropriate *rules of law*, as some institutional arbitration rules prescribe.<sup>14</sup> In all cases, arbitrators are bound to make the award in accordance with contractual provisions and take into account relevant trade usages.<sup>15</sup>

In the majority of the FTCA cases, parties have not exercised their freedom and have omitted to insert a choice of law clause in their contract. On several occasions, parties reached agreement on the applicable law during the arbitral hearing. There has been no explicit choice of the CISG as the applicable law in the analyzed cases and only one case exists where the CISG was expressly excluded. Consequently, the application of the CISG before the FTCA has arisen either as a result of: (1) parties' choice of the law of a contracting state as applicable; (2) application of the CISG as a final result of the conflict-of-laws approach; or (3) by direct application. These three groups of cases will be elaborated in more detail later. Also, we will give special attention to the issue of dissolution of SFRY and its effect on application of the CISG in the FTCA practice. Finally, cases where the CISG was not applied although all prerequisites for its application were met will be discussed under the last heading of this section.

### 2.1.) *Choice of the law of a Contracting State*

One of the main principles of the CISG is party autonomy. Article 6 of the CISG embodies this by allowing parties to contract out of the CISG or vary the effect of any of its provisions. However, the majority of courts and tribunals have taken a firm position that choosing the law of a contracting state does not amount to the exclusion of the application of the CISG.<sup>16</sup>

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48(1) and (4) (2007), available at <http://eng.komora.net/LinkClick.aspx?fileticket=FBMu4VYIJUE%3D&tabid=1029&mid=2441>.

13. The Rules of the FTCA, art. 48(2) (2007), available at <http://eng.komora.net/LinkClick.aspx?fileticket=FBMu4VYIJUE%3D&tabid=1029&mid=244>. The end result of this process need not be just the choice of applicable law, but applicable *rules of law* as well. The 1997 version of the FTCA Rules allowed arbitrators to choose only the applicable law (and not the applicable rules of law) in the absence of parties' choice.

14. See International Chamber of Commerce [ICC] Rules of Arbitration, art. 17(1) (1998), available at <http://www.sice.oas.org/DISPUTE/comarb/icc/rules.asp>.

15. The Rules of the FTCA, art. 48(3) (2007), available at <http://eng.komora.net/LinkClick.aspx?fileticket=FBMu4VYIJUE%3D&tabid=1029&mid=2441>.

16. See *B.V./Quetard*, Arrondissementsrechtbank [Rb.] [District Court], Gravenhage, June 7, 1995, available at <http://www.unilex.info/case.cfm?pid=1&do=case&id=154&step=Abstract>; CLOUT Case No.

Exclusion of the CISG has to be either explicit, (e.g., in the form of a contract term stating that “the CISG shall not be applied”) or at least implicit—either by choosing the law of a non-contracting state<sup>17</sup> or pinpointing applicable provisions within the chosen legal system (e.g., “Swiss Code of Obligations shall apply”).<sup>18</sup>

Opinions are not so uniform when it comes to identifying the exact basis for applying the CISG when the law of a Contracting State is chosen. One position stresses that party autonomy itself is a rule of private international law within the meaning of Article 1(1)(b).<sup>19</sup> Another explanation indicates that, when the law of a contracting state is chosen, the CISG is applied as the

270 [Bundesgerichtshof (Supreme Court), Germany, Nov. 25, 1998], available at <http://cisgw3.law.pace.edu/cases/981125g1.html>; CLOUT Case No. 206 [Cour de Cassation (Supreme Court), France, Dec. 17, 1996], available at <http://cisgw3.law.pace.edu/cisg/text/draft/961217case.html>; CLOUT Case No. 166 [Schiedsgericht der Handelskammer Hamburg (Arbitral Tribunal), Germany, Mar. 21, 1996], available at <http://cisgw3.law.pace.edu/cases/960321g1.html>; CLOUT Case No. 93 [Internationales Schiedsgericht der Bundeskammer der gewerblichen Wirtschaft (Arbitral Tribunal), Vienna, June 15, 1994], available at <http://cisgw3.law.pace.edu/cases/940615a3.html>; CLOUT Case No. 236 [Bundesgerichtshof (Supreme Court), Germany, July 23, 1977], available at <http://cisgw3.law.pace.edu/cases/970723g1.html>; ICC Arbitration Case No. 9187 (1999), available at <http://www.unilex.info/case.cfm?pid=1&do=case&id=466&step=Abstract>; ICC Arbitration Case No. 7844 (1995), available at <http://www.unilex.info/case.cfm?pid=1&do=case&id=123&step=Abstract>; ICC Arbitration Case No. 8324 (1995), available at <http://www.unilex.info/case.cfm?pid=1&do=case&id=240&step=Abstract>; ICC Arbitration Case No. 7660 (1994), available at <http://cisgw3.law.pace.edu/cases/947660i1.html>; ICC Arbitration Case No. 6653 (1993), available at <http://cisgw3.law.pace.edu/cases/936653i1.html>.

17. CLOUT Case No. 483 [Audiencia Provincial de Alicante (Appellate Court), Spain, Nov. 16, 2000] and CLOUT Case No. 49 [Oberlandesgericht Düsseldorf (District Court), Germany, July 2, 1993], available at <http://daccessdds.un.org/doc/UNDOC/GEN/V94/239/16/IMG/V9423916.pdf?OpenElement>.

18. CLOUT Case No. 429 [Oberlandesgericht Frankfurt am Main (District Court), Germany, Aug. 20, 2000], available at [http://www.uncitral.org/uncitral/en/case\\_law/abstracts.html](http://www.uncitral.org/uncitral/en/case_law/abstracts.html); ICC Arbitration Case No. 10849 (2000).

19. See Internationales Schiedsgericht der Bundeskammer der gewerblichen Wirtschaft, Arbitral Award No. SCH-4318, June 15, 1994 (Austria), available at <http://cisgw3.law.pace.edu/cases/940615a4.html>; Internationales Schiedsgericht der Bundeskammer der gewerblichen Wirtschaft, Arbitral Award No. SCH-4366, June 15, 1994, available at <http://cisgw3.law.pace.edu/cases/940615a3.html> (Austria); Vestnik Vysshego Arbitrazhnogo Suda RF [The Highest Arbitration Court of the RF], Information Letter 29, Feb. 16, 1998 (Russ.), available at <http://www.unilex.info/case.cfm?pid=1&do=case&id=365&step=Abstract>; Arbitration Court of the Chamber of Commerce & Industry of Budapest, Vb 94124, Nov. 17, 1995 (Hung.), available at <http://www.unilex.info/case.cfm?pid=1&do=case&id=217&step=Abstract>; ICC Arbitration Case No. 7645 (1995), available at <http://cisgw3.law.pace.edu/cases/957645i1.html>; ICC Arbitration Case No. 7660 (1994), available at <http://cisgw3.law.pace.edu/cases/947660i1.html>. For a critique of this position, see Mourre, *supra* note 10, at 44. This could also open the question of whether the choice of the law of a country which has made reservation under Article 95 would lead to application of its domestic rules or the Convention, even where both parties are from Contracting States. According to at least one court decision, such choice of the law would still lead to application of the CISG. See *Valero Mktg. & Supply Co. v. Greeni Oy*, 373 F. Supp. 2d 475, 482 (D.N.J. 2005).

primary source of those substantive rules, because ratified international treaties usually occupy a tier above domestic legislation in the hierarchy of legal sources.<sup>20</sup>

Taking into account that Serbia is a Contracting State and that most of the foreign partners of Serbian companies, and foreign FTCA parties, come from other contracting states, choice of law clauses, when inserted, usually point to a law of a contracting state, be it Serbia or another country. In the majority of the cases, arbitrators have correctly identified the consequences of such choice.

In one FTCA decision, the sole arbitrator determined that the fact that a Serbian and a Ukrainian company had chosen the Swedish law as applicable triggered application of the CISG on the basis that Sweden is a Contracting State and that the CISG is incorporated in its legal order.<sup>21</sup> Similarly, choice of Austrian law in a contract concluded between a Serbian company and a German company has justly been interpreted to primarily point to the CISG, with provisions of the Austrian Civil Code as a fall-back source.<sup>22</sup> The tribunal pointed out that:

Article 6 of the CISG allows parties to exclude application of the [CISG]. However, a contract provision which points to Austrian law as applicable does not appear to manifest the parties' intention to exclude application of the [CISG], particularly due to the fact that Austria has ratified the [CISG] and that, consequently, its provisions have become part of Austrian law.<sup>23</sup>

Similarly, another FTCA tribunal understood choice of “substantive law of Serbia and Montenegro” to mean choice of Serbian law, including the CISG.<sup>24</sup> Moreover, even when the sales contract was concluded between a seller from

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20. See ICC Arbitration Case No. 7645 (1995), available at <http://cisgw3.law.pace.edu/cases/957645i1.html>; ICC Arbitration Case No. 7754 (1995), available at <http://www.unilex.info/case.cfm?pid=1&do=case&id=519&step=Abstract>; Peter Schlechtriem, *Article 1*, in COMMENTARY ON THE UN CONVENTION ON THE INTERNATIONAL SALE OF GOODS (CISG) 34 (Peter Schlechtriem & Ingeborg Schwenzer eds., 2d ed. 2005) [hereinafter CISG COMMENTARY]; Mourre, *supra* note 10, at 44; Peter Winship, *The Scope of the Vienna Convention in International Sales Contracts*, in INTERNATIONAL SALES: THE UNITED NATIONS CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS 1–53 (N. Galston & H. Smit eds., 1984). A further account of the conceptual difficulties experienced in the practical application of Article 1 is offered by Bruno Zeller in *The CISG—Getting off the Fence*, LAW INST. J., Sept. 2000, 73, 73–74 (Austr.), available at <http://www.cisg.law.pace.edu/cisg/biblio/zeller4.html>.

21. FTCA, Award No. T-02/00, Dec. 9, 2002.

22. FTCA, Award No. T-13/05, Jan. 5, 2007.

23. *Id.*

24. FTCA, Award No. T-13/08, Mar. 16, 2009; FTCA, Award No. T-05/08, Jan. 5, 2009; FTCA, Award No. T-06/06, July 31, 2007.



a Contracting State (Serbia) and a buyer from a Non-Contracting State (Albania), contractual choice of law pointing to the law of the Contracting State (Serbia) was considered to trigger application of the CISG pursuant to Article 1(1)(b), since “the primary rule respected in the private international law, points to a law of the Contracting State—Serbia.”<sup>25</sup>

Although the selection of applicable law is more likely to happen at the time of the conclusion of the contract, it can also take place at a later stage, even at the hearing. For example, FTCA award number T-17/06 of September 10, 2007 dealt with a contract between companies from the FYR Macedonia and Serbia that did not contain a choice of law clause. However, the parties’ representatives agreed at the hearing that Yugoslav law should be applied. The sole arbitrator noted that the parties had expressed their choice. Still, given that FR Yugoslavia had ceased to exist (and so did its successor, Serbia and Montenegro) the arbitrator had to further interpret such a choice in order to give it any effect. He found that the applicable law should be that of Serbia, and within it, primarily CISG provisions,<sup>26</sup> while Serbian Law on Contracts and Torts (LCT) should be used to fill any gaps in the CISG.<sup>27</sup>

The FTCA case law also contains decisions where the CISG was not applied although a disputed contract contained the choice of law clause calling for application of the law of a CISG Contracting State. For example, in a dispute between a Polish company and a Serbian company arising out of a contract calling for application of Swiss law, the tribunal erroneously concluded that the parties chose to apply Swiss domestic provisions, specifically the Federal Code of Obligations, although Switzerland is a party to the CISG.<sup>28</sup> A similar slip occurred in case number T-2/03 of October 21, 2003 between a Serbian company and a Macedonian<sup>29</sup> company where the contract provided for Yugoslav law as applicable. Instead of applying the CISG, arbitrators applied the Yugoslav (Serbian) LCT.<sup>30</sup> Also, in award

25. FTCA, Award No. T-08/08, Jan. 28, 2009.

26. Constitution art. 194 (Serb.); Constitutional Charter of the State Union Serbia and Montenegro art. 16; Constitution of the Federal Republic of Yugoslavia (1992) art. 16.

27. The same position was taken in other awards. See FTCA, Award No. T-09/07, Jan. 23, 2008; FTCA, Award No. T-16/04, July 18, 2005; FTCA, Award No. T-18/04, May 24, 2005; FTCA, Award No. T-19/03, June 15, 2004; FTCA, Award No. T-13/02, May 9, 2003.

28. FTCA, Award No. T-01/07, Oct. 18, 2007.

29. For the sake of brevity and without prejudice to the ongoing dispute surrounding the name of the country, we use in this article the adjective “Macedonian” to designate parties and laws originating from the FYR Macedonia.

30. A similar outcome, where a contractual choice of Serbian (Yugoslav) law led to application of the Serbian LCT, was reached in FTCA, Award No. T-10/07, Dec. 3, 2008; FTCA, Award No. T-27/02, June 6, 2003; FTCA, Award No. T-20/00, Apr. 3, 2002; FTCA, Award No. T-8/99, Dec. 25, 2000; FTCA,

number T-6/99 of October 15, 2001, the parties' agreement to apply Yugoslav law mistakenly resulted in application of the LCT, not the CISG. Similar errors are fairly common in reported international cases,<sup>31</sup> and have been repeatedly criticized in legal doctrine.<sup>32</sup>

There has been only one case where the application of the CISG was expressly excluded in the contract.<sup>33</sup> However, there has also been one case where the application of the CISG should have been avoided as contrary to parties' agreement, but the application of the CISG nevertheless occurred. Namely, the contract for sale of fresh plums between a Serbian seller and a Bosnian buyer contained the following provision: "the provisions of the Law on Contracts and Torts shall apply to all the issues not covered by this Contract."<sup>34</sup> The sole arbitrator erred by interpreting this provision as an imprecise agreement on the applicable law since "it was not clear which Law the parties have in mind" (although the same 1978 Yugoslav LCT was in force in both countries where parties had their places of business, albeit now in the guise of their own domestic laws). Hence, the arbitrator engaged in the conflict-of-laws analysis in order to determine the applicable law. The end result was the application of the Serbian law and primarily the application of the CISG, as part of the Serbian law. Although the outcome of the dispute would have been the same under the CISG and the LCT, since the claimant requested payment of the remainder of the price, which he is entitled to under both legal documents, the arbitrator's disregard for the express choice of the parties is striking. Fortunately, this was an isolated incident in the FTCA practice.

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Award No. T-10/99, Oct. 16, 2000; FTCA, Award No. T-11/99, July 11, 2000.

31. See ICC Arbitration Case No. 7754 (1995), available at <http://www.unilex.info/case.cfm?pid=1&do=case&id=519&step=FullText>. See also CLOUT Case No. 326 [Kantonsgericht des Kantons Zug (District Court), Switzerland, Mar. 16, 1995], available at <http://cisgw3.law.pace.edu/cases/950316s1.html>; CLOUT Case No. 92 [Ad hoc Arbitral Tribunal, Florence, Apr. 19, 1994], available at <http://cisgw3.law.pace.edu/cases/940419i3> (where the choice of Italian law was understood as implied exclusion of the CISG); CLOUT Case No. 54 [Tribunale Civile di Monza (District Court), Italy, Jan. 14, 1993], available at <http://cisgw3.law.pace.edu/cases/930114i3.html>.

32. Franco Ferrari, *CISG Rules on Exclusion and Derogation: Article 6*, in *THE DRAFT UNCITRAL DIGEST AND BEYOND: CASES, ANALYSIS AND UNRESOLVED ISSUES IN THE U.N. SALES CONVENTION* 114, 124–28 (Franco Ferrari, Harry Flechtner & Ronald Brand eds., 2004) [hereinafter *UNCITRAL DIGEST*]; Mourre *supra* note 10, at 44–45.

33. FTCA, Award No. T-19/08, Apr. 28, 2009 (involving the sale of mazut between Bosnian and Serbian parties).

34. FTCA, Award No. T-02/08, Sept. 30, 2008.

2.2.) *Application of the CISG when there was no choice of law of a Contracting State*

Where parties refrain from exercising their freedom of choice, there are two additional scenarios for applying the CISG. The first approach is to have a conflict-of-laws rule point to the law of a Contracting State. This conflict-of-laws rule is usually the rule of “the closest connection,”<sup>35</sup> although it is conceivable to use somewhat less flexible connecting factors, such as the seat of the party who provides a characteristic performance, which in the contract of sale means that *lex loci venditoris* is applied. Occasionally, even Article 1(1)(a) of the CISG is interpreted as a unilateral conflict-of-laws rule pointing to the rules common to both contracting parties, which are the rules of the CISG when both parties have their relevant places of business in different Contracting States.<sup>36</sup> The second possible approach is to construct the rules on choosing applicable substantive provisions so as not to insist on using a traditional conflict-of-laws technique, but the application of the “most appropriate rules of law.” This enables arbitrators to directly invoke provisions of the CISG without any need to justify their choice via further conflict-of-laws analyses.

It is, therefore, worth repeating that the Rules of the FTCA provide for the conflict-of-laws method when deciding on the applicable law or applicable rules.<sup>37</sup> FTCA practice reveals that arbitrators have taken different paths in meeting this requirement. In most of the cases where tribunals have correctly applied the CISG in absence of parties’ choice, it is impossible to detect whether this has been done on the basis of subsections (a) or (b) of Article 1(1). This ambivalence has already been noticed in the practice of other arbitral institutions.<sup>38</sup> It is hard not to sympathize with this simplification, as it avoids a controversy which, at least in the practice of the arbitral tribunals, rarely has practical implications.

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35. See ICC Arbitration Case No. 8247 (1996), available at <http://www.unilex.info/dynasite.cfm?dssid=2376&dsmid=13355&x=1>.

36. Kevin Bell, *The Sphere of Application of the Vienna Convention on Contracts for the International Sale of Goods*, 8 PACE INT’L L. REV. 237, 246–47 (1996); Mourre, *supra* note 10, at 44; Carolina Saf, *A Study of the Interplay between the Conventions Governing International Contracts of Sale*, PACE 2.1 (Sept. 1999), <http://www.cisg.law.pace.edu/cisg/text/saf7.html>.

37. The Rules of the FTCA, *supra* note 13, at 48(2).

38. Compare CLOUT Case No. 164 [Arbitration Court of the Hungarian Chamber of Commerce & Indus., May 12, 1995], with CLOUT Case No. 174 [Arbitration Court of the Hungarian Chamber of Commerce & Indus., Aug. 5, 1997].

In a dispute between Serbian and Romanian companies, the tribunal determined that Serbian law had the closest connection to the disputed contract.<sup>39</sup> This was based on the fact that the preponderance of factors pointed to Serbia as the proper choice: the language of the contract was Serbian; the seller's seat was in Serbia; and the stipulated place of performance was in Serbia. In addition, a "split" dispute resolution clause provided, in addition to jurisdiction of the FTCA, for alternative jurisdiction of Serbian courts.<sup>40</sup> Although the claimant had based its request on provisions of the Serbian LCT, the tribunal correctly determined that the CISG applied instead. After designating Serbian law as applicable, the tribunal noted that both Serbia and Romania are Contracting States to the CISG and went on to apply the CISG in accordance with Article 194 of the Serbian Constitution, which provides that ratified international treaties have primacy over domestic legislation. Therefore, the end result was a correct application of the CISG, while the actual basis for application remained undisclosed.<sup>41</sup>

Award No. T-4/01 of May 10, 2002 dealt with a dispute between Yugoslav and Bulgarian companies. Application of conflict-of-laws rules led the tribunal to Bulgarian law as the proper law of contract. The tribunal then went on to apply the CISG as a part of Bulgarian law. Just like in the above mentioned case, the tribunal then muddled its justification, stating that the CISG was ratified by both Yugoslavia and Bulgaria and had, consequently, become part of their internal legal orders. Once again, arbitrators avoided getting entangled in the intricacies of Article 1(1). Similar approaches have been used in a significant number of cases where the CISG was applied.<sup>42</sup>

In one case involving Yugoslav and Greek companies, the parties made a clearly imperfect choice, providing for application of *either* Serbian *or* Greek law.<sup>43</sup> This alternative clause was naturally impossible to effectuate once the dispute arose. Arbitrators therefore disregarded it and, through conflict-of-laws technique, decided to apply Yugoslav substantive rules. As

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39. FTCA, Award No. T-08/06, Oct. 1, 2007.

40. *Id.* (noting that the respondent did not contest jurisdiction of the arbitral tribunal so the effectiveness of such split clause was not an issue in the proceedings).

41. Similar reasoning was reached in another case involving a Serbian seller and a Romanian buyer. *See* FTCA, Award No. T-07/07, Aug. 19, 2008.

42. *See, e.g.*, FTCA, Award No. T-15/06, Jan. 28, 2008; FTCA, Award No. T-14/03, Oct. 18, 2007; FTCA, Award No. T-22/05, Oct. 30, 2006; FTCA, Award No. T-17/02, Oct. 2, 2006; FTCA, Award No. T-03/06, Sept. 14, 2006; FTCA, Award No. T-09/01, Feb. 23, 2004; FTCA, Award No. T-03/01, Sept. 24, 2001; FTCA, Award No. T-15/01, Mar. 15, 2001.

43. FTCA, Award No. T-19/99, Nov. 22, 2000.

their primary Yugoslav source of rules of law, they have chosen the CISG in accordance with Article 16 of the FRY Constitution.<sup>44</sup>

In another case one of the parties had its place of business in the Contracting State, FR Yugoslavia, while its counterpart was established in Cyprus, a non-contracting state at the time. The tribunal correctly applied the CISG, but again avoided pinpointing the basis for its application, although it was clear that it could have been only Article 1(1)(b). Instead, it invoked the internal hierarchy of applicable rules and primacy of international sources over domestic legislation.<sup>45</sup>

### 2.3.) *Direct application of the CISG*

In some of the cases before the FTCA where both parties came from CISG contracting states provisions of the CISG have been applied through direct reference to Article 1(1)(a) of the CISG.<sup>46</sup> Had it been employed by the courts, this approach would require no further analysis. However, direct application of the CISG on the basis of Article 1(1)(a) is quite different in the arbitral setting because the arbitral tribunal is not a state organ and as such, is not bound by the treaties ratified by the state where it is situated.<sup>47</sup> Hence, it is important to note that although the application of the CISG in these cases was correct, the tribunals avoided spelling out whether they used Article 1(1)(a) as a unilateral conflict-of-laws rule, which seems plausible given that

44. This provision had a similar effect to the current Article 194 of Serbian Constitution regarding primacy of international conventions.

45. FTCA, Award No. T-16/99, Feb. 12, 2001. At present, though, Cyprus is a Contracting State of the CISG.

46. This was the technique used in FTCA, Award No. T-18/07, Oct. 15, 2008; FTCA, Award No. T-13/05, Jan. 5, 2007; FTCA, Award No. T-22/03, Jan. 19, 2004; FTCA, Award No. T-22/03, Jan. 19, 2004 (where the arbitrators immediately invoked Article 1 of the CISG, without prior conflict-of-laws analysis). FTCA, Award No. T-22/05, Oct. 30, 2006, stated that the CISG should “primarily be applied” and the conflict-of-laws technique has been used only to determine rules which supplement the CISG. In FTCA, Award No. T-15/06, Jan. 28, 2008, the tribunal noted that the parties have not chosen the proper law and decided that the CISG should be applied “since the conditions for its application are fulfilled.” In some of the awards, the CISG has been applied as “the most appropriate” instrument and the conflict-of-laws technique was consulted only to fill the gaps in the CISG. *See* FTCA, Award No. T-12/04, Jan. 24, 2006; FTCA, Award No. T-03/05, Dec. 15, 2005; FTCA, Award No. T-10/04, Nov. 6, 2005; FTCA, Award No. T-09/01, Feb. 23, 2004; FTCA, Award No. T-18/01 Nov. 27, 2002; FTCA Award No. T-17/01, Apr. 12, 2002; FTCA, Award No. T-15/01, Mar. 15, 2001.

47. Pierre Mayer, *L'application par l'arbitre des conventions internationales de droit privé*, in *L'INTERNATIONALISATION DU DROIT: MÉLANGES EN L'HONNEUR DE YVON LOUSSOUARN* 275, 287 (Dalloz ed., 1994); Petrochilos, *supra* note 10.

FTCA Rules require conflict-of-laws methodology in determining applicable substantive provisions, or for its persuasive force.<sup>48</sup>

#### 2.4.) *Effects of dissolution of SFRY to application of the CISG*

The CISG entered into force on the territory of former Yugoslavia (SFRY) on January 1, 1988. However, the dissolution of the former Yugoslavia in the 1990's raised the question of application of the CISG in the case of state succession by what are now six independent countries—the former federal units, republics, of the SFRY.<sup>49</sup> Namely, were the newly independent ex-Yugoslav republics to be regarded as the CISG contracting states automatically upon dissolution of SFRY or not?

The answer to this question is simple if we accept the position of Article 34 of the 1978 Vienna Convention on Succession of States in respect of Treaties. This article provides, in case of dissolution of a state, for automatic continuation of application of the multilateral treaties signed by the predecessor state in the territory of the successor state.<sup>50</sup> This view can also be supported by the fact that many of the former Yugoslav republics have, together with their declarations of independence, made firm commitments that the treaties entered into by the SFRY will remain in force in their territories.<sup>51</sup>

48. See Mayer, *supra* note 46, at 282; Petrochilos, *supra* note 10.

49. Slovenia, Croatia, Bosnia and Herzegovina, Serbia, Montenegro and Macedonia.

50. This Convention applies, pursuant to its Article 7, only to the successions, which have occurred after the Convention entered into force, as of November 6, 1996, unless the concerned states agree otherwise. See Vienna Convention on Succession of States in Respect of Treaties art. 7, Aug. 23, 1978, 1946 U.N.T.S. 3. Given that the dissolution of SFRY was held completed in 1992, it can be argued that the 1978 Vienna Convention is inapplicable to this issue. Furthermore, it has often been said in the legal doctrine that the formulation of Article 34 of the 1978 Vienna Convention cannot be taken as reflective of international customary law. Even the automatic state succession to humanitarian treaties is highly controversial and is not supported by much state practice. Moreover, the International Court of Justice never expressed an opinion to the question whether or not the automatic succession reflects international customary law. Consequently, the area of state succession is still deemed as “an area of great uncertainty and controversy,” even amongst the international public law scholars. See generally IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 650, 663–64 (5th ed. 1998); ANTONIO CASSESE, INTERNATIONAL LAW 53 (2001); V. RAKIĆ-VODINELIĆ ET AL., PRESTANAK SFRJ—PRAVNE POSLEDICE [DISSOLUTION OF THE SFRY—LEGAL CONSEQUENCES] 17 (1995); MALCOLM SHAW, INTERNATIONAL LAW 976–77 (6th ed. 2008); Int'l Law Ass'n, 2002 *ILA Rapport final sur la succession en matière de traits*, 14, available at <http://www.ila-hq.org>; Akbar Rasulov, *Revisiting State Succession to Humanitarian Treaties: Is There a Case for Automaticity?*, 14 EUR. J. INT'L L. 141 (2003); Maren Tamke, *Succession of States to Multilateral Treaties* (2001), available at <http://www.hausarbeiten.de/faecher/vorschau/104018.html>.

51. See Int'l Law Ass'n, *supra* note 50, at 14; D. Dimitrijević, *Sukcesija država u odnosu na međunarodne ugovore SFRJ [Succession of States with Respect to Treaties Signed by SFRY]*, STRANI PRAVNI ŽIVOT Nos. 1-2/2005, 33–35, at 9.

With respect to the CISG, these promises were further formalized by filing notifications of successions with retroactive application covering the period from the date of state succession to the date of filing of notification.<sup>52</sup> However, these actions were not made with the same expeditiousness by all of the former Yugoslav republics, thus creating legal uncertainty for private parties as to the status of the CISG in the legal systems concerned.<sup>53</sup> While Montenegro waited only four and a half months from the date of its independence to file a notification of succession to the CISG, it took Bosnia little less than two years, Croatia six and a half years, and over 15 years in the case of Macedonia.<sup>54</sup> Consequently, it is necessary to reopen a controversial and unsettled issue of international public law regarding effects of the notifications of successions to treaties, whether they are of declaratory or constitutive character.<sup>55</sup> These effects, especially in Macedonian case, might have important consequences on application of the CISG in the region.

Should Macedonian parties to contracts concluded in the period between the date of state succession, November 17, 1991, and the date of receipt of notification of succession to the CISG, November 22, 2006, be considered as coming from a CISG contracting state for the purposes of Article 1(1)(a) CISG? If Article 1(1)(b) of the CISG points to Macedonian law, should the CISG be applied when the contract was concluded in the abovementioned period? These questions are not purely academic, since some of them have already been addressed in the FTCA practice. However, the approach of the FTCA tribunals with respect to this issue has not been unanimous.

We have identified 14 FTCA awards in the matter of international sales where one of the parties appearing before arbitration was Macedonian.<sup>56</sup> In

52. See STATUS 1980, *supra* note 1.

53. Bernasconi advises business persons wanting to conclude an international sale contract with a partner who has his place of business in one of the newly independent Republics of both the former USSR and the former Yugoslavia, in order to avoid uncertainty as to CISG's application, to implement into the contract a clear and unequivocal choice of law rule, either in favor of the CISG or in favor of one particular national legal order. See Bernasconi, *supra* note 10, at 154.

54. See STATUS 1980, *supra* note 1.

55. On one hand, the practice of making notifications by the successor states and the acceptance by the depositories could be interpreted as a statement against automatic succession, since had it been otherwise, the status of a Contracting State to the multilateral treaty would be established *ipso facto* from the date when such state declares independence. On the other, the practice of filing notifications of successions should be interpreted as concerned state's assistance to the depository for clarifying the situation and enabling the depository to modify the list of the Contracting States, thus preventing the risk of annulling their acts in the future. See Tamke, *supra* note 50.

56. Only FTCA, Award No. T-16/07, June 18, 2008, deals with the dispute arising out of a contract concluded after Macedonia's filing of notification of succession to the CISG.

some of these cases, the contract contained a choice-of-law clause calling for application of Serbian (Yugoslav) law and the tribunals have reached different results, deciding on some occasions to apply the CISG, resorting to the application of the LCT on others.<sup>57</sup> Where there was no choice of law, tribunals did not address the issue of Macedonia's contracting status to the CISG and instead chose Serbian rules as the most appropriate, pursuant to Article 46(2) of the FTCA Rules.<sup>58</sup> There is one case where the tribunal, without addressing the issue of applicable law, went straightforward to applying the Serbian LCT.<sup>59</sup> Finally, in one third of these cases the arbitrators addressed the issue of whether Macedonia was to be considered a CISG Contracting State prior to filing a notification of succession. We will focus our attention on this last group of cases.

In the two cases decided prior to Macedonia's notification of succession, the sole arbitrator started with examining Article 46(2) of the FTCA Rules and found that the Serbian law, as the law of the seller, should be deemed the most appropriate law to apply to the case at hand. This led to application of the CISG as part of Serbian law. However, in elaborating the reasons for CISG's application, the arbitrator stated the following:

Since the seller is a Serbian company, the applicable law should be the law of Serbia, i.e. the Law on Contracts and Torts. However, since both states on whose territory the parties have places of business were constituents of former SFRY, and since the SFRY has signed the UNCITRAL Convention on Contracts for International Sale of Goods and the contract at hand is the contract for international sale of goods, the arbitrator considers the Vienna (UNCITRAL) Convention as also applicable for reasons of automatic succession to multilateral treaties.<sup>60</sup>

Although the final application of the CISG was in our view correct, it is notable that the arbitrator implicitly invoked Article 1(1)(a) as the basis for application of the CISG and not Article 1(1)(b). Any justification of such an approach would prove to be controversial since the position of international law on state succession to treaties is not that clear<sup>61</sup> and Macedonia was not

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57. The tribunal applied Serbian LCT instead of CISG in FTCA, Award No. T-08/99, Dec. 25, 2000; FTCA, Award No. T-10/99, Oct. 16, 2000; and FTCA, Award No. T-11/99, July 11, 2000.

58. The CISG was applied in FTCA, Award No. T-37/03, May 17, 2004, and FTCA, Award No. T-25/06, Nov. 13, 2007. The CISG was not applied in the FTCA, Award No. T-05/01, Nov. 29, 2001. It is not clear what law the arbitrator applied in FTCA, Award No. T-28/03, Apr. 26, 2004, when granting seller's request for payment of the price.

59. FTCA, Award No. T-11/05-12, Dec. 16, 2005.

60. FTCA, Award No. T-14/04, Feb. 21, 2005; FTCA, Award No. T-15/04, Feb. 21, 2005. The same arbitrator decided both awards.

61. See *supra* text accompanying note 49.



listed on the UNCITRAL web site as the CISG contracting state at the time when the award was made.

There are three FTCA cases decided after Macedonia filed a notification of succession and was listed on the UNCITRAL web site as a CISG Contracting State. In award number T-23/06 of September 15, 2008, in a dispute between a Serbian seller and a Macedonian buyer, the CISG was applied as part of the Serbian law on the basis of the conflict-of-laws method. The sole arbitrator explicitly noted in the *obiter dictum* that the analysis of CISG application on the basis of Article 1(1)(a) was purposefully omitted although Macedonia was a party to the CISG at the time of the making of the award, since this was not the case at the time of the contract conclusion. The opposite conclusion was reached in the awards T-8/07 of May 9, 2008 and T-1/08 of November 17, 2008, where the CISG was applied on the basis of Article 1(1)(a) despite the fact that the underlying contract was concluded prior to Macedonia's filing of notification of succession to the CISG.

It appears that the conditions for application of the CISG on the basis of Article 1(1)(a) were met in all of these cases regardless of the nature and legal effects of Macedonian notification of succession. On one hand, if such notification is of a declaratory character,<sup>62</sup> there are no reasons for denying application of the CISG in these cases since the CISG was in fact in force at the time of the contract conclusion. On the other hand, if it is of a constitutive character,<sup>63</sup> the text of the notification specifying the date of CISG's entry into force in Macedonia as the date of state succession, November 17, 1991,<sup>64</sup> justifies the application of the CISG to contracts concluded after the date of succession, where the disputes arising out of these contracts were decided after the date of notification. Consequently, the phrasing of Macedonian notification of succession suggests that once Macedonia filed notification of succession all the obstacles were removed in finding the CISG applicable. This would be either by virtue of Article 1(1)(a), whenever the Macedonian party concluded the contract with another party based in a contracting state,

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62. See Ulrich G. Schroeter, *Backbone or Backyard of the Convention? The CISG's Final Provisions*, in SHARING INTERNATIONAL COMMERCIAL LAW ACROSS NATIONAL BOUNDARIES, Festschrift for Albert H. Kritzer on the occasion of his eightieth birthday 425, 459–60 (Camilla B. Andersen & Ulrich G. Schroeter eds., 2008) (arguing that under the “continuity principle” the CISG continues in force in successor States and notifications that are declaratory in nature only confirm preexisting law).

63. This view can, *inter alia*, be supported by the fact that the FYR Macedonia contracting status to the CISG was confirmed on the UNCITRAL web site only upon filing of such notification.

64. The Secretary-General, Depositary Notification (Nov. 27, 2006), <http://treaties.un.org/doc/treaties/1998/12/19981208%2003-03%20AM/Related%20Documents/CN.1103.2006-Eng.pdf>.

or pursuant to Article 1(1)(b), whenever the rules of private international law point to Macedonian law as applicable, irrespective of the date on which the contract was concluded. However, we note that such outcome does not fit neatly with the idea expressed in Article 100 of the CISG in all cases, especially if the notification is regarded to be of the constitutive character.

The tension between Article 100 of the CISG and the potentially constitutive nature of notification would be particularly strong in the cases where Macedonian law was explicitly chosen as the proper law of the contract and the contract was concluded after the Macedonian declaration of independence but prior to Macedonian notification of succession to the CISG. It could be argued that, by opting for Macedonian law in such a case, the parties did not intend to be bound by the CISG since it did not form part of the Macedonian law at the time of contract conclusion. The CISG has a built-in mechanism to protect parties' legitimate expectations. One is contained in Article 100(2), which insulates the parties from subsequent CISG incorporation into national law(s). Without such provision, parties who contract after the CISG enters into force in the relevant jurisdiction(s) would be given greater freedom. They could always exclude application of the CISG via Article 6, while the parties who contracted before CISG entry into force would be deprived of such opportunity. Consequently, there is ambiguity surrounding successions and the status of membership of Macedonia to the CISG (after all, Macedonia was not listed among contracting states of the CISG at the UNCITRAL web site for 15 years<sup>65</sup>). In particular, notifications of succession which, in effect, confirm that a state was bound by the CISG for the past decade and a half seem to run contrary to the spirit of Article 100 and the need for legal certainty. In that context, Article 100 would be powerless to protect the legitimate expectations of the parties. Therefore, in the light of these circumstances, it may be justified to interpret the parties' choice of Macedonian law in the contracts concluded between November 17, 1991 and November 22, 2006 as the choice of Macedonian internal law (LCT) and not the CISG.

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65. The controversies regarding legal character of notification of succession are also relevant with respect to the 1974 Convention on the Limitation Period in the International Sale of Goods. Former Yugoslavia acceded to this convention on Nov. 27, 1978. Yet, only those former Yugoslav republics who have filed notifications of succession are listed on the UNCITRAL web site as Contracting States. Neither Croatia nor FYR Macedonia, which are undisputedly successor states to the SFRY, are, at this moment, listed as Contracting States. *See* STATUS 1974—CONVENTION ON THE LIMITATION PERIOD IN THE INTERNATIONAL SALE OF GOODS, [http://www.uncitral.org/uncitral/en/uncitral\\_texts/sale\\_goods/1974\\_Convention\\_status.html](http://www.uncitral.org/uncitral/en/uncitral_texts/sale_goods/1974_Convention_status.html) (last visited Nov. 13, 2009).

Since 14 percent of the cases we analyzed involved a Macedonian party, this issue is not purely academic even for the FCTA practice, as one can reasonably expect more disputes between Serbian and Macedonian parties to be filed.<sup>66</sup> Given that the court decisions are subject to appeal, *inter alia*, on the questions of law, one is less likely to expect court decisions where considerations of legitimate expectations would trump strictly technical application of the Macedonian law. However, given that arbitral tribunals receive no scrutiny on the merits, protection of parties' legitimate expectations might take priority before the FTCA tribunals in the years to come.

### 2.5.) *Failure to apply the CISG where it was applicable*

Overview of the FTCA case-law has shown that there were generally two groups of cases where the CISG should have been applied, but the arbitrators failed to do so. The first type of situation is where the facts of the case clearly pointed to the application of the CISG, such as where there is a contract for international sale of goods, both parties come from contracting states, and the issue at hand was covered by the CISG, but arbitrators applied domestic provisions of applicable laws instead.<sup>67</sup> The second group of cases deals with situations where it is not clear whether arbitrators resorted to the CISG or to some other rules. In one case, the sole arbitrator simply determined Serbian law to be applicable and later failed to disclose which particular provisions of Serbian law he applied to resolve the dispute, Serbian LCT or the CISG.<sup>68</sup> In another case, the sole arbitrator in a dispute between a Bosnian and a Serbian company noted that both countries have identical *laws* regulating contracts. It was not possible to discern whether he had in mind identical provisions of respective domestic laws, both of them emanating from the 1978 Yugoslav

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66. See *supra* Part II.2.4 (the significance of this issue is limited to disputes arising out of the contracts concluded prior to Nov. 22, 2006).

67. FTCA, Award No. T-10/07, Dec. 3, 2008; FTCA, Award No. T-10/06, Nov. 27, 2006; FTCA, Award No. T-07/05, May 5, 2006; FTCA, Award No. T-11/05-12, Dec. 16, 2005; FTCA, Award No. T-03/04, Nov. 4, 2005; FTCA, Award No. T-38/03, Sept. 23, 2004; FTCA, Award No. T-21/03, May 18, 2004; FTCA, Award No. T-13/01, Sept. 12, 2002; FTCA, Award No. T-04/99, July 8, 2002; FTCA, Award No. T-07-01, Feb. 21, 2002; FTCA, Award No. T-01/00, Dec. 7, 2000; FTCA, Award No. T-17/98, Dec. 7, 2000.

68. See FTCA, Award No. T-03/03, Jan. 30, 2004; FTCA, Award No. T-05/02, Apr. 24, 2003. The latter award invokes Serbian LCT only with respect to the right to claim interest. However, we do not consider this as a sufficiently clear indication on whether the sole arbitrator applied CISG or domestic Serbian provisions to the other aspects of the contractual relationship. This hesitation stems from the fact that there were quite a few decisions where, although the CISG has been held applicable, domestic provisions were applied with respect to awarding interest. See *supra* Part XI.

LCT, or the identical provisions on international sales, since both countries are parties to the CISG.<sup>69</sup>

### 3. Meaning of “Contract for Sale”

Arbitration practice regularly encounters contracts which elude clear-cut classification. The CISG is, in accordance with Article 1(1), applicable to the contracts for *sale*. The definition of a contract for sale is not contained in the CISG but it can be derived from the list of essential obligations of the parties to the contract stipulated in Articles 30 and 53 of the CISG. Article 3 further clarifies that the CISG covers “contracts for the supply of goods to be manufactured or produced, unless the party who orders the goods undertakes to supply a substantial part of the materials necessary for such manufacture or production.” Also, if the contract is of a hybrid sales-labor/services nature, the CISG is applicable if the labor/services component is not the preponderant part of the obligations of the party who furnishes the goods.

There were several FTCA decisions in which the mixed nature of the underlying contract had to be examined in order to determine applicability of the CISG. For example, CISG application was correctly rejected in a case between Serbian and Italian companies in the award number T-22/06 of October 22, 2007. Although the underlying contract was labeled a “Contract of Sale,” the tribunal examined the exact nature of the contract in accordance with principle of *falsa nominatio non nocet* and found that the buyer had to supply the seller with almost all materials needed for production.<sup>70</sup>

The majority of FTCA cases that posed the question of characterization dealt with distribution contracts.<sup>71</sup> For example, in a dispute over a contract concluded between Macedonian and Serbian companies, the sole arbitrator determined that the CISG was not applicable, although the parties had labeled the contract as a contract of sale.<sup>72</sup> Examination of the parties’ rights and obligations revealed that they had actually concluded a distribution contract.<sup>73</sup>

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69. FTCA, Award No. T-17/05, Nov. 1, 2006. There are at least two more cases where one cannot discern which law has actually been applied. See FTCA, Award No. T-08/01, Mar. 17, 2003; FTCA, Award No. T-23/01, Sept. 19, 2002.

70. See also FTCA, Award No. T-19/03, June 25, 2004.

71. For the purposes of this paper we refer to the term “distribution contracts” as used in the ICC, The ICC Model Distributorship Contract, Sole Importer-Distributor, ICC Publication No. 646 (2d ed. 2002).

72. FTCA, Award No. T-25/06, Nov. 13, 2007.

73. The contract provided, *inter alia*, that the Respondent undertook to resell the goods only within certain areas of FYR Macedonia and the Claimant could rescind the contract if the reselling was directed to other areas as well. Also, distributor (respondent) was to monitor sales on relevant markets and inform

The reasoning contained observation that the CISG is not applicable to contracts of distribution, except in the cases where the subject matter of the dispute are individual shipments within the larger framework of the distribution contract. This reasoning was supported by reference to foreign court and arbitral decisions<sup>74</sup> and later confirmed in award number T-8/08 of January 28, 2009. This case arose from a dispute under a “Sales and Distribution Contract” concluded between a Serbian supplier and Albanian distributor. The facts of the case led to application of the CISG, since the merits of the case revolved around an unpaid shipment of drugs that was made pursuant to the sales and distribution contract. Relying on both FTCA practice and foreign case law, the sole arbitrator held that the “CISG is applicable . . . to individual sales transactions concluded within the framework of the distribution contract and not to the distribution contract as a whole.”

Finally, one FTCA decision addressed the issue of whether a contract of leasing might fall within the scope of the CISG.<sup>75</sup> Leasing contracts, as a rule, are not covered by the CISG.<sup>76</sup> However, there might be instances where the analyses of the contract provisions warrant application of the CISG.<sup>77</sup> In this particular FTCA case, the sole arbitrator had found that the preconditions for CISG application were met. The dispute between a Swiss company and a Serbian company arose out of a “Leasing Contract,” whereby the Swiss company was to transport and install a machine, while the Serbian company was to pay half of the contract price in advance, and the remaining half during the five-year contract period. Once the last installment was paid, the machine would become the property of the buyer. Although the claimant argued that this was a lease, the sole arbitrator found that the contract was actually an installment sale coupled with a *pactum reservati dominii* clause and based his conclusion primarily on the fact that half of the price was paid in advance and that the property would be transferred at the very moment the last installment

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the seller-supplier (claimant) about the figures. *Id.*

74. CLOUT Case No. 231 [Bundesgerichtshof (Federal Supreme Court), July 23, 1997], available at <http://cisgw3.law.pace.edu/cases/970723g1.html>; CLOUT Case No. 169 [Oberlandesgericht Dusseldorf (Provincial Court of Appeal), July 11, 1996], available at <http://cisgw3.law.pace.edu/cases/960711g1.html>; CLOUT Case No. 126 [Fovarosi Birosag Budapest (Metropolitan Court), Mar. 19, 1996], available at <http://cisgw3.law.pace.edu/cases/960319h1.html>.

75. FTCA, Award No. T-04/05 (July 15, 2008).

76. Peter Schlechtriem, *Uniform Sales Law—The Experience with Uniform Sales Laws in the Federal Republic of Germany*, JURIDISK TIDSKRIFT 9 (1991), available at <http://www.cisg.law.pace.edu/cisg/biblio/slech2.html>.

77. See Schlechtriem, *Article 1*, in CISG COMMENTARY, *supra* note 20, at 27; PETER HUBER & ALASTAIR MULLIS, *THE CISG: A NEW TEXTBOOK FOR STUDENTS AND PRACTITIONERS* 48 (2007) [hereinafter CISG TEXTBOOK].

would be paid, i.e. that financing does not constitute a preponderant part of seller's obligations. Invoking the need to promote uniformity in application, decision referred to a similar treatment of a contract labeled as leasing in one Australian case.<sup>78</sup>

### III. INTERPRETATION OF THE CISG

Determining that the application of the CISG is warranted on the basis of the facts of the case does not in itself guarantee correct application of the CISG. Rather, the correct application of the CISG will often depend on the proper understanding of the operation of the provisions on interpretation of the CISG, found in Article 7.

#### 1. *Internationality*

Article 7 of the CISG requires reading the CISG through an international lens even when expressions employed by the CISG are textually the same as expressions which have a specific meaning within a particular legal system. The need to interpret the CISG in an autonomous manner has been repeatedly confirmed by doctrine<sup>79</sup> and case law.<sup>80</sup> Hence, invoking provisions of domestic law when dealing with issues governed by the CISG is completely erroneous. Unfortunately, Serbian arbitrators have on many occasions been

78. *Roder Zelt- und Hallenkonstruktionen GmbH v. Rosedown Partk Pty Ltd.* (1995), 57 F.C.R. 216 (Austl.).

79. See Michael G. Bridge, *The Bifocal World of International Sales: Vienna and Non-Vienna*, in *MAKING COMMERCIAL LAW: ESSAYS IN HONOUR OF ROY GOODE* 277, 288 (Ross Cranston ed., 1997); Franco Ferrari, *Have the Dragons of Uniform Sales Law Been Tamed? Ruminations on the CISG's Autonomous Interpretation by Courts*, in *SHARING INTERNATIONAL COMMERCIAL LAW ACROSS NATIONAL BOUNDARIES*, Festschrift for Albert H. Kritzer on the occasion of his eightieth birthday 134, 139–46 (Camilla B. Andersen & Ulrich G. Schroeter eds., 2008); John Honnold, *The Sales Convention in Action—Uniform International Words: Uniform Application?*, 8 J.L. & COM. INT'L 207, 208 (1988); Djakhongir Saidov, *Cases on CISG Decided in the Russian Federation*, 7 VINDOBONA J. INT'L COM. L. & ARB. 1, 14 (2003), available at <http://www.cisg.law.pace.edu/cisg/biblio/saidov1.html>.

80. See *Am. Mint L.L.C. v. Gosoftware, Inc.*, No. 05-CV-650, 2006 WL 42090 (M.D. Pa. 2006); *St. Paul Guardian Ins. Co. v. Neuromed Med. Sys. & Support, GmbH*, No. 00-CV-9344, 2002 WL 465312 (S.D.N.Y. 2002); CLOUT Case No. 230 [Oberlandesgericht Karlsruhe (Court of Appeal), Germany, June 25, 1997], available at <http://cisgw3.law.pace.edu/cisg/text/draft/970625case.html>; CLOUT Case No. 171 [Bundesgerichtshof (Supreme Court), Germany, Apr. 3, 1996], available at <http://cisgw3.law.pace.edu/cases/960403g1.html>; CLOUT Case No. 84 [Oberlandesgericht Frankfurt am Main (Court of Appeals), Germany, Apr. 10, 1994], available at <http://cisgw3.law.pace.edu/cases/940420g1.html>; CLOUT Case No. 201 [Richteramt Laufen (District Court), Switzerland, May 7, 1993], available at <http://cisgw3.law.pace.edu/cases/930507s1.html>.

inclined to cite in support of their decisions not only the provisions of the CISG, but also the provisions of the relevant national law, predominantly Serbian LCT.<sup>81</sup> Although this kind of practice is reported in other CISG jurisdictions,<sup>82</sup> the CISG requires its abolishment.

## 2. Uniform Application

Even the most proper determination of the need to apply the CISG would be fruitless if the resulting application would deviate from the universal character of the CISG. A parochial approach to decision making would in fact fragment the message of the CISG and erode its widespread adoption.<sup>83</sup> Article 7(1) of the CISG therefore represents a tool designed to ensure uniform application of the CISG and foster legal certainty for parties involved in sales transactions. Practice of foreign courts and arbitral tribunals is, therefore, a very important yardstick against which one may gauge the correctness of his or her own approach and the extent to which available options deviate from the current point of consensus.<sup>84</sup>

81. See, e.g., FTCA, Award No. T-08/06, Oct. 1, 2008 (basing the award of interest on art. 78 CISG and art. 278 LCT); FTCA, Award No. T-19/07, June 30, 2008; FTCA, Award No. T-24/06, Dec. 1, 2007; FTCA, Award No. T-22/05, Oct. 30, 2006 (basing the award of damages on art. 74 CISG and 275(2) LCT); FTCA, Award No. T-18/04, May 24, 2005; FTCA, Award No. T-19/99, Nov. 22, 2000.

82. See *Schmitz-Werke GmbH & Co. v. Rockland Indus., Inc.*, 37 Fed. Appx. 687 (4th Cir. 2003); *Delchi Carrier, SpA v. Rotorex Corp.*, 71 F.3d 1024 (2d Cir. 1995); Saidov, *supra* note 79, at 14.

83. See CAMILLA B. ANDERSEN, UNIFORM APPLICATION OF THE INTERNATIONAL SALES LAW. UNDERSTANDING UNIFORMITY, THE GLOBAL JURISCONSULTORIUM AND EXAMINATION AND NOTIFICATION PROVISIONS OF THE CISG 47 (2007); Michael G. Bridge, *A Commentary on Articles 1–13 and 78, in UNCITRAL DIGEST*, *supra* note 32, at 235, 250; P. Cvetković, *Tumačenje ugovora o međunarodnoj prodaji robe: uloga načela savesnosti i poštenja i problem “međunarodne” interpretacije [Interpretation of International Sales Contracts: The Role of the Good Faith Principle and the Problem of “International” Interpretation]*, PRAVO I PRIVREDA Nos. 5-8/01, 966, 970–73 (2001); Ferrari, *supra* note 79, at 149–50; Peter Schlechtriem, *Article 7, in CISG COMMENTARY*, *supra* note 20, at 96–102; Harry 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); Honnold, *supra* note 79, at 208; V. Susanne Cook, Note, *The Need For Uniform Interpretation of the 1980 United Nations Convention on Contracts for the International Sale of Goods*, 50 U. PITT. L. REV. 197 (1988).

84. For the most elaborate analyses of the foreign case law, see Trib. Vigevano [Ordinary Court of First Instance], July 12, 2000 n.405, Giur. It. 2001, II, 280 *et seq.* (Italy), available at <http://cisgw3.law.pace.edu/cases/000712i3.html> (citing forty foreign decisions regarding Article 7(1) of the CISG). See also *Am. Mint L.L.C. v. Gosoftware, Inc.*, No. 05-CV-650, 2006 WL 42090 (M.D. Pa. 2006); *St. Paul Guardian Ins. Co. v. Neuromed Med. Sys. & Support, GmbH*, No. 00-CV-9344, 2002 WL 465312 (S.D.N.Y. 2002); Trib. Padova [Ordinary Court of First Instance], Feb. 25, 2004 n.40552, Giur. It. 2004, II, 1405–08 (Italy), available at <http://cisgw3.law.pace.edu/cases/040225i3.html> (citing forty foreign decisions regarding Article 7(1) of the CISG); Trib. Rimini [Ordinary Court of First Instance], Nov. 11,

The practice of the FTCA contains several decisions in which reference has been made to foreign court and arbitral practice. In award number T-25/06 of November 13, 2007, the sole arbitrator used decisions of Hungarian and German courts to support the position that the CISG is not applicable to the distribution contracts, but only to individual sales transactions concluded within the framework of the distribution contract.<sup>85</sup> This position was reaffirmed by award of January 28, 2009, invoking decisions from same jurisdictions on the same issue.

The latter award is an ample example of FTCA's adherence to the mandate of Article 7(1) by quoting a total of eight foreign decisions and arbitral awards. Besides the issue of CISG applicability to distribution contracts, the tribunal consulted foreign case law regarding the applicability of the CISG in a dispute involving a contract that contains a choice of law clause. Namely, although the contract at hand called for application of "the applicable regulations and laws of the Republic of Serbia," the sole arbitrator found that the CISG should be applied to the contract since it is an integral part of Serbian law.<sup>86</sup> This finding was said to be "in accordance with the foreign judicial and arbitral practice, which should be taken into consideration for the purpose of achieving uniform application of the CISG, pursuant to Article 7(1) of the CISG."<sup>87</sup> Specifically, the sole arbitrator noted that

[It] has generally been held that the choice of law of the Contracting State, absent explicit exclusion of the CISG or exercise of Article 95 reservation, means that the CISG will be applicable [OLG Köln February 22, 1994; ICC case 7754 (1995); Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, award of February 9, 2001].<sup>88</sup>

The sole arbitrator further consulted the foreign judicial and arbitral practice when deciding on the appropriate interest rate and noted that:

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2002 n.3095, *Giur. It.* 2003, I, 896 (Italy), available at <http://cisgw3.law.pace.edu/cases/021126i3.html> (citing thirty five foreign decisions regarding article 7(1) of the CISG).

85. Fovárosi Bíróság Budapest [Hungary] [Metropolitan Court of Budapest], No. 12 G 75.558/1994/36, Mar. 19, 1996, available at <http://cisgw3.law.pace.edu/cases/960319h1.html> (Hungarian case referred to by arbitrator); Bundesgerichtshof [BGH] [Federal Supreme Court], No. VIII ZR 134/96, July 23, 1997 (F.R.G.), available at <http://cisgw3.law.pace.edu/cases/970723g2.html> (German case referred to by arbitrator; German case citations do not generally identify parties to proceedings); Oberlandesgericht Düsseldorf [OLG] [Provincial Court of Appeal], No. 6 U 152/95, Nov. 11, 1996 (F.R.G.), available at <http://cisgw3.law.pace.edu/cases/960711g1.html> (German case referred to by arbitrator).

86. FTCA, Award No. T-8/08, Jan. 28, 2009.

87. *Id.*

88. *Id.*



[S]ince the matter of interest rates is governed, but not settled by the CISG, there is no need to examine [Seller]’s request in the light of any national law, but rather examine whether it is within the checks provided in Article 7 of the CISG. Therefore, the proposed rate has to be determined in accordance with the principles underlying the CISG [CLOUT cases No. 93, SCH-4366 of June 15, 1994 and No. 94 SCH-4318 of June 15, 1994].<sup>89</sup>

In award number T-4/05 of July 15, 2008, the arbitrator referred to an Australian court decision when deciding on the effect of a *pactum reservati dominii* clause found in the disputed leasing contract to legal qualification of the said contract. In reaching the conclusion that the sale elements of the contract prevail, thus allowing for application of the CISG, the sole arbitrator noted that

All of this indicates that the elements of a contract of sale are dominant over elements akin to the characteristics of a contract of lease in this “Leasing Contract.” This position is in accordance with foreign judicial practice, which should be taken into consideration for the purpose of achieving uniform application of the Convention, pursuant to Article 7(1) of the Convention. For example, the Australian Federal Court for South Western Australia . . . .<sup>90</sup>

Another case, contained the correct assessment of *widely accepted comparative practice* related to the form of the notice of avoidance, i.e. that the notice of avoidance can be derived from filing of the claim in which avoidance is sought.<sup>91</sup> However, in this case, unlike the previously quoted cases, an explicit reference to particular foreign decisions was omitted. Instead, the tribunal only noted that comparative practice is to be consulted in accordance with Article 7(1) of the CISG.<sup>92</sup>

### 3. Good Faith

Article 7(1) imposes an additional obligation on the tribunals and courts when interpreting the CISG—due regard is to be made to the need to promote observance of good faith in international trade. The correct application of this mandate of the CISG has been highly disputed in the legal doctrine, i.e. whether it solely relates to the interpretation of the CISG or it imposes an additional obligation on the parties to act in accordance with this principle in

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89. *Id.*

90. FTCA, Award No. T-4/05, July 15, 2008.

91. FTCA, Award No. T-08/06, Oct. 1, 2007.

92. *Id.*

the performance of the sales contract.<sup>93</sup> The FTCA has, in at least one of its decisions, adhered to the latter view. In award number T-9/07 of January 23, 2008, the tribunal examined the conduct of the respondent during the entire course of the transaction and noted that respondent, as a seller

[H]as not acted in accordance with the good faith principle, which represents a cornerstone of entire corpus of modern legislature, especially the legislative instruments which the tribunal has identified as applicable rules in this case (CISG, Law on Contracts and Torts, UNIDROIT Principles on International Commercial Contracts and European Principles of Contract Law).<sup>94</sup>

#### 4. Gap-Filling

Article 7(2) of the CISG sets out a basic methodology for filling the gaps in the CISG. The first step is to determine whether the underlying issue falls within the *lacuna praeter legem*, issues to which the CISG applies but which it does not expressly resolve, or *lacuna intra legem*, issues not governed by the CISG.<sup>95</sup> If the gap is *intra legem*, the recourse is to be made to the law to which the private international law points.<sup>96</sup> However, if the gap is *praeter legem*, the CISG requires judges and arbitrators first to examine whether there

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93. See ČIRIĆ & DJUROVIĆ, *supra* note 6, at 53; Disa Sim, *The Scope and Application of Good Faith in the Vienna Convention on Contracts for the International Sale of Goods*, in REVIEW OF THE CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS 19 (Michael Maggi ed., 2004); Troy Keily, *Good Faith and the Vienna Convention on Contracts for the International Sale of Goods (CISG)*, 3 VINDOBONA J. INT'L COM. L. ARB. 15, 15–40 (1999); M. Milutinović, *Načelo savesnosti i poštenja—univerzalni princip medjunarodne trgovine [The Good Faith Principle—A Universal Principle of International Trade]*, PRAVNI ŽIVOT No. 10/2004, at 419–41; Paul J. Powers, *Defining the Undefinable: Good Faith and the United Nations Convention on Contracts for the International Sale of Goods*, 18 J.L. & COM. 332 *passim* (1999); Benedict C. Sheehy, *Good Faith in the CISG: Interpretation Problems in Article 7* (Bepress Legal Series, Working Paper, 339, 2004).

94. See Bundesgerichtshof [BGH] [Federal Court of Justice], Oct. 31, 2001 (F.R.G.), available at <http://cisgw3.law.pace.edu/cases/011031g1.html> (holding that parties to the sales contract are to act in accordance with the good faith principle, i.e. that they have to cooperate with regard to the performance of the contract and exchange relevant information).

95. See Camilla Andersen, *General Principles of the CISG—Generally Impenetrable?*, in SHARING INTERNATIONAL COMMERCIAL LAW ACROSS NATIONAL BOUNDARIES, Festschrift for Albert H. Kritzer on the Occasion of His Eightieth Birthday 13 (Camilla B. Andersen & Ulrich G. Schroeter eds., 2008); Franco Ferrari, *Interpretation of the Convention and Gap-Filling: Article 7*, in UNCITRAL DIGEST, *supra* note 32, at 138, 157–71; Anthony J. McMahon, Note, *Differentiating Between Internal and External Gaps in the U.N. Convention on Contracts for the International Sale of Goods: A Proposed Method for Determining “Governed by” in the Context of Article 7(2)*, 44 COLUM. J. TRANSNAT'L L. 992 *passim* (2006).

96. CISG arts. 4–5 list some examples of matters not governed by the CISG.

are general principles underlying the CISG that could resolve the issue.<sup>97</sup> The resort to domestic law via means of private international law is to be regarded as *ultima ratio*.

The FTCA tribunals have rarely attempted to seek for a solution of an issue governed but not settled in the CISG within the framework of CISG general principles. As a matter of fact, it can be stated that they have exercised hastiness in invoking the domestic law provisions whenever an issue seemed not to be expressly regulated by the CISG. This has been particularly pronounced not only with respect to the issue of interest rates under the CISG,<sup>98</sup> but also with respect to the form of the notice of non-conformity under Article 39(1).<sup>99</sup>

We have noted only four FTCA awards where express reference has been made to the methodology suggested by Article 7(2) of the CISG, three of which dealt with the issue of determination of interest rates. Award number T-2/00 of December 9, 2002 correctly starts by listing several general principles on which the CISG is based—*bona fides*, party autonomy, the foreseeability rule, principle of cooperation, etc. However, the arbitrator then concluded that these principles cannot serve as the basis for calculating interest and invoked relevant provisions of Serbian law, which is the law applicable by virtue of the rules of private international law. Award number T-23/06 of September 15, 2008, on the other hand, makes clear reference that the issue of interest rates for late payment should be determined on the basis of the CISG general principles. The wording of that award suggests that the arbitrator had the principle of full compensation in mind when determining applicable interest rates. In a more recent award the sole arbitrator noted that “the matter of interest rate is governed but not settled under the CISG” and explicitly resolved the matter by invoking the principle of full compensation, as well as the principle of prohibiting overcompensation of the creditor, which resulted in application of “interest rate which is regularly used for savings, such as short-term deposits in the first class banks at the place of payment (Serbia) for the currency of payment, as this represents rate on a relatively riskless investment.”<sup>100</sup>

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97. CISG art. 7(2). See also Ulrich Magnus, *Die allgemeinen Grundsätze im UN-Kaufrecht*, 59 RABELS ZEITSCHRIFT 492–93 (1995) (containing the most extensive list of CISG general principles), translated at <http://www.cisg.law.pace.edu/cisg/text/magnus.html>.

98. See *infra* Part XI.

99. See *infra* Part VII.2.1.

100. FTCA, Award No. T-08/08, Jan. 28, 2009, available at <http://cisgw3.law.pace.edu/cases/090128sb.html>.

Article 7(2) methodology was correctly avoided in award number T-23/06 of September 15, 2008 where it was stated that the issue of assignment of obligation to pay the price was not governed by the CISG and that it cannot be resolved by means of applying the general principles on which the CISG is based. Instead, the arbitrator applied the substantive law of the seller for resolution of this issue, as required by the rules of private international law.<sup>101</sup> The arbitrator in this case also noted that the CISG does not provide for a rule on the nature of liability for non-payment of price where there are several persons on the buyer's side, i.e. whether such liability is joint or severable or joint and severable. Hence, recourse to the domestic law was justified.

#### IV. INTERPRETATION OF THE PARTIES' STATEMENTS AND CONDUCT

Given that the provisions of the CISG are only default rules and that party autonomy reigns supreme, finding out just what parties have *actually* agreed upon is of crucial importance. According to Article 8, there are two ways to carry out this examination: (1) by establishing the true intent of one party where the other party knew, or could not have been unaware, of such intention; and (2) absent indications of intent, by interpreting statements and conduct in the way a reasonable person of the same kind would interpret them under the same circumstances.<sup>102</sup> This standard of interpretation is of particular importance for those who have to apply the CISG in practice.

In award number T-8/06 of October 1, 2007, the tribunal referred to Article 8 when interpreting correspondence of the parties subsequent to contract conclusion and found that seller had no intention to perform any of the contracted deliveries, and that it was obvious that all subsequent attempts of the buyer to ensure even a belated performance have been in vain. A similar approach was taken in the award number T-15/06 of January 28, 2008. In that

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101. This decision is in accord with foreign case law. See generally *Bezirksgericht Arbon* (District Court), Switzerland, Dec. 9, 1994 (CISG-online Case 376), available at <http://cisgw3.law.pace.edu/cases/941209s1.html>; *CLOUT Case No. 132* [Oberlandesgericht Hamm (Appellate Court), Germany, Feb. 8, 1995], available at <http://cisgw3.law.pace.edu/cases/950208g3.html>; *CLOUT Case No. 269* [Bundesgerichtshof (Federal Supreme Court), Germany, Feb. 12, 1998], available at <http://cisgw3.law.pace.edu/cases/980212g1.html>; *Arrondissementsrechtbank Arnhem* (District Court), Netherlands, Apr. 8, 1999 (CISG-online Case 1339), available at <http://cisgw3.law.pace.edu/cases/990408n1.html>; *Oberlandesgericht Hamburg* (Appellate Court), Germany, Jan. 25, 2008 (CISG-online Case 1681), available at <http://cisgw3.law.pace.edu/cases/080125g1.html>.

102. See Jelena Perović, *Tumačenje ugovora prema Konvenciji UN o međunarodnoj prodaji robe* [Interpretation of Contracts Under the CISG], PRAVO I PRIVREDA, 864, 864–74 (2001); see also Vladimir Stojiljković, *Tumačenje ugovora u međunarodnoj trgovini* [Interpretation of Contracts in the International Trade], PRAVO I PRIVREDA 967, 967–73 (2000).

case, the buyer objected that the delivery was not in conformity with the provisions of the contract and that he was not able to take over the goods. This objection was rejected although the goods were delivered to the Subotica (Serbia) warehouse of company X, when the contract actually called for *ex works* Szeged (Hungary) delivery. The tribunal noted that the buyer was aware that the goods were delivered to the warehouse of company X and that no objection was raised concerning such delivery. The buyer could have had actually taken the goods over, as all the accompanying documents had been duly made to his name. Moreover, the buyer already undertook certain steps in order to secure resale (re-export) of delivered goods. Therefore, on the basis of the above mentioned elements, the tribunal concluded that the only reasonable interpretation of the buyer's statements and conduct is that buyer consented to Subotica delivery and undertook what amounted to implied acceptance of the goods in Subotica.

Another example of operation of Article 8 in the FTCA practice can be found in the award number T-18/01 of November 27, 2002. The buyer had resold the non-conforming, delivered goods to a third party although the seller objected to such an action and expressed, upon buyer's notice of non-conformity, his willingness to take the goods back and reimburse buyer's storage cost. Applying Article 8(2), the sole arbitrator concluded that the buyer's action amounted to implied acceptance of the goods. Arbitrator noted that buyer's indication that "a deal has been reached to sell goods at the best price" was in direct contravention with the seller's express instructions to either return the goods or pay them in full against the invoice. As for the buyer's contention that the parties had not been in contractual relationship at all, the arbitrator noted that such an assertion contravenes the entire behavior of the buyer, which included taking the goods over, allegedly objecting to their quality, reselling the goods, and partially paying against the seller's invoice. The arbitrator concluded that the entirety of such behavior could not be ascribed to a person who has not entered a contractual relationship with the seller.<sup>103</sup>

Finally, interpretation of the party's statements and conduct in the light of Article 8 played an essential role in award number T-4/05 of 15 July 2008 regarding the decision on the appropriate date of contract avoidance. Despite the fact that claimant-seller requested termination of the contract in its claim submitted in March 2005, subsequent negotiations on contract performance were deemed as evidence of seller's (claimant's) willingness to keep contract

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103. FTCA, Award No. T-18/01, Nov. 27, 2002.

in force.<sup>104</sup> This situation changed abruptly once the seller activated court interim measure aimed at repossession of the delivered equipment, which resulted in buyer's dispossession on April 2007. The sole arbitrator concluded that activation of the interim measure amounted to effective notice of avoidance pursuant to Article 26 of the CISG and that, consequently, the contract was effectively avoided at the date of the activation.<sup>105</sup>

#### V. MODIFICATION OF CONTRACT AND FORM REQUIREMENTS

Article 29 of the CISG provides that modification of the contract is not subject to any form requirements.<sup>106</sup> However, the second paragraph of the same article provides that a contract containing a no oral modification clause may not be modified orally, although a party may be precluded by his conduct from relying on such clause. Unfortunately, this basic principle of contract modification under the CISG has been neglected in one FTCA award where the initial contract was concluded in writing.

Namely, in award number T-2/00 of December 9, 2002, the disputed contract was concluded in a written form and each page of the contract was signed and stamped by the parties. During the arbitral proceedings, one party alleged that parties subsequently amended the contract orally, and submitted as evidence a telefax message in which the other party confirmed that oral modification took place. A witness invited by the other party challenged the authenticity of the telefax message and stated that it would be rather unusual to amend important provisions of an international commercial contract by telefax. Although Article 29 provides as a general rule that oral modifications are permitted, the sole arbitrator held that:

When the parties . . . have followed rather strict requirements of form when concluding the contract, signing and stamping each page of the document, it is clear that the function of such form was to turn contract into a complete piece of evidence. They wanted that only the pages certified in such manner produce legal effect, i.e. that the will of the parties so evidenced cannot be challenged later.<sup>107</sup>

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104. FTCA, Award No. T-4/05, July 15, 2008.

105. *Id.*

106. This is in line with the no-form requirement of Article 11 of the CISG. *See* CISG art. 11 (stating “[a] contract of sale need not be concluded in or evidenced by writing and is not subject to any other requirement as to form. It may be proved by any means, including witnesses”).

107. FTCA, Award No. T-2/00, Dec. 9, 2002.

This conclusion mirrors the prevailing view in interpretation of the Serbian Law on Contracts and Torts by Serbian courts and is clearly erroneous in the case at hand since it lacks support in both text of the CISG and relevant trade usages.

## VI. FUNDAMENTAL BREACH

Fundamental breach represents a pivotal concept in the CISG remedial structure as it represents both a basis for avoidance of contract<sup>108</sup> and a precondition for the exercise of the buyer's right to require delivery of substitute goods.<sup>109</sup> Despite the utmost importance of this legal institute, the current CISG case law and scholarly commentaries have not yet succeeded in providing sufficiently clear and foreseeable interpretation criteria.<sup>110</sup>

The majority of national laws, including the Serbian LCT, are not familiar with the concept of fundamental breach.<sup>111</sup> Consequently, the unfamiliarity of Serbian lawyers with its basic requirements is not surprising. Hence, FTCA awards in which the existence of fundamental breach was clearly established and analyzed are extremely rare. As a matter of fact, there are only five cases that we noted that deal expressly with this issue.

In award number T-17/02 of October 2, 2006, the sole arbitrator found that the breach was clearly fundamental. In this case, claimant sold artificial fishing baits to respondent pursuant to their agreement on business cooperation: during the year 2000 only 45,816 baits were taken over and paid out of the contracted quantity of 300,000. This amounted to roughly 15% of

108. See CISG arts. 49(1)(a), 51(2), 64(1)(a), 72(1), 73.

109. CISG art. 46(2).

110. See Robert Koch, *The Concept of Fundamental Breach of Contract Under the United Nations Convention on Contracts for the International Sale of Goods*, REVIEW OF THE CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS (CISG) 177, 177–354 (Pace Int'l L. Rev. ed., 1999), available at <http://www.cisg.law.pace.edu/cisg/biblio/koch.html>; Peter Schlechtriem, *Article 25*, in CISG COMMENTARY, *supra* note 20, at 281–98; PEROVIĆ, *supra* note 6; STOJILJKOVIĆ, *supra* note 6, at 156–57; ĆIRIĆ & DJUROVIĆ, *supra* note 6, at 82–83; M. Milutinović, *Bitna povreda ugovora prema odredbama Bečke konvencije u teoriji i praksi* [*Fundamental Breach of Contract Under the CISG—in Theory and Practice*], PRAVO I PRIVREDA Nos. 5-8/03, 367, 367–80 (2003); A. Ćirić & P. Cvetković, *Bitna povreda ugovora u opštim izvorima međunarodnog privrednog ugovornog prava* [*Fundamental Breach of Contract in General Sources of the Law of International Commercial Transactions*] AKTUELNA PITANJA GRADJANSKE KODIFIKACIJE, ZBORNIK RADOVA, PRAVNI FAKULTET U NIŠU 233–52 (2008).

111. Although Serbian Draft Law on Contracts and Torts, prepared by Prof. M. Konstantinović, did incorporate this institute in Art. 95, it was not kept in the final redaction of this law enacted in 1978 and is still in force with minor changes in majority of former Yugoslav republics. The wording of Art. 95(1) of the Draft LCT corresponds entirely to the wording of Art. 10 of the 1964 Uniform Law of International Sales. There is no similar provision in the pertinent Serbian Law on Contracts and Torts.

the contracted figure. In the next year, orders were even slower, falling to less than 2% of the agreed volume. Hence, the arbitrator concluded that the breach was fundamental and that the claimant was entitled to avoid the contract. Although the contract at hand could have called for application of Serbian LCT instead of the CISG as the disputed issue regarded the avoidance of the distributorship contract as a whole, and not any of the installments made under such contract, the case is illustrative with respect to the proportionality and the seriousness of the breach which makes it fundamental in the eyes of the FTCA arbitrators.

In another case, however, the tribunal did not find the breach to be fundamental although the goods were delivered to another place, not to the place designated in the contract, since the buyer was aware of this and was fully capable to take possession of the goods.<sup>112</sup> Hence, the detriment suffered by the buyer was not deemed substantial.

Award number T-4/01 of May 10, 2002 dealt with a dispute arising out of a contract for sale of zinc coated tin. In accordance with the contract, the buyer made the advance payment, but the seller failed to deliver the goods in the quantity equal to the advance payment, thus keeping a part of the advance payment without legal basis. Once it was clear that the seller would not perform the contract in its entirety, the buyer requested the restitution of the advance payment in the amount corresponding to the undelivered quantity of the goods, with domiciliary interest. The sole arbitrator granted the request on the basis that a delivery of goods in a quantity less than contracted for and paid for in advance amounted to fundamental breach of contract. The arbitrator relied on Article 49 of the CISG when granting buyer's request without reference to Article 51, although it was clear from the facts of the case and the holding of the award that the buyer's right to avoid the contract was triggered only with respect to the undelivered part of the goods. In award number T-8/06 of October 1, 2007, the final refusal to deliver the goods was also deemed to constitute a fundamental breach.

In award T-13/05 of January 5, 2007, the sole arbitrator found that the seller's breach of the contract was not fundamental since the impurities in the goods, raspberries, were present in only 18% of the delivered raspberries. Consequently, claimant's request for substitute delivery was rejected. In addition, written evidence and oral testimony was not conclusive on whether the claimant had really made a request for substitute delivery.<sup>113</sup>

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112. FTCA, Award No. T-15/06, Jan. 28, 2008.

113. In this case, Ms. X noted, on behalf of the buyer, that the quality of the delivered raspberries was



## VII. NON-CONFORMITY OF THE GOODS

*1. The Concept of Non-Conformity*

Seller's obligation to deliver conforming goods and conditions for buyer's exercise of the rights in the case of non-conformity are embodied in Articles 35-44 of the CISG. These concepts are similar, although not identical to the provisions of Serbian LCT.<sup>114</sup> The proper understanding of these provisions of the CISG is crucial given that more than 50 percent of all cases that have been litigated and decided under the CISG have dealt with the issue of non-conforming goods.<sup>115</sup>

With respect to the definition of non-conformity there have been no controversies in the FTCA's jurisprudence. Discrepancies in terms of both quality and quantity of the delivered goods have regularly been found to satisfy the non-conformity test. For example, delivery of goods of non-Yugoslav origin, where such origin was agreed upon, constituted non-conforming delivery.<sup>116</sup> Also, the delivery of leather of II, III and IV quality was regarded as non-conforming where the contract required delivery of I, II and III class of leather.<sup>117</sup> The same principle was applied with respect to delivery of non-conforming documents. For example, in award number T-9/07 of January 23, 2009, the tribunal correctly noted that the seller, under the CISG, apart from the goods "must provide the buyer [here claimant] with the specified documents in regard to the goods." Hence the delivery of non-conforming document constituted seller's breach of contract.

In award number T-10/04 of November 6, 2005, a German buyer invoked against a Serbian seller the non-conformity of goods with respect to the labels on the packaging of the bottles of mineral water. Namely, under the regulations of the country of import, Germany, all labels on the bottles of

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not adequate. However, she has not requested seller to do anything particular with respect to that delivery. Instead, she requested future deliveries to be of better quality. In addition, Y, who has performed quality control, noted that the goods are not of the contracted quality (class A). Nevertheless, the goods were accepted and cleared for unloading. FTCA, Award T-13/05, Jan. 5, 2007.

114. J. Perović, *Nesaobraznost robe kao osnov neizvršenja ugovora o prodaji* [*Non-Conformity of the Goods as Basis of Non-Performance of the Sales Contract*], PRAVO I PRIVREDA Nos. 5-8/03, 332-43.

115. Ingeborg Schwenzer, *Buyer's Remedies in the Case of Non-Conforming Goods: Some Problems in a Core Area of the CISG*, 101 AM. SOC'Y INT'L L. PROC. 416, 416 (2007).

116. FTCA, Award No. T-9/07, Jan. 23, 2008, available at <http://cisgw3.law.pace.edu/cases/080123sb.html>.

117. *Id.*

mineral water had to contain printed information about the company of the importer and distributor, accompanied with other prescribed data. Instead of providing data about the buyer's company, the labels on the delivered bottles contained information about another German company to whom the seller has also exported goods. As a consequence, the buyer was prevented from placing the goods in circulation. The arbitrator correctly noted that such delivery was non-conforming, given that seller was aware of German labeling requirements as it already traded with companies from Germany and complied to said requirements with respect to his other business partners.<sup>118</sup> However, the buyer was prevented from exercising any of his rights under the Convention since the notice of non-conformity was not duly made, it was addressed to the representative of the Serbian Chamber of Commerce instead of being addressed to the seller!

## *2. Notice of Non-Conformity*

Exercise of buyer's rights in the case of non-conforming goods proved to be one of the more interesting issues in the reviewed FTCA case law. Under the CISG, the buyer may invoke non-conformity of the goods against the seller only if he examined the goods as soon as practicable and notified the seller on non-conformity within a reasonable time, specifying the nature of the lack of conformity.<sup>119</sup> Given that only the correct exercise of these formalities gives

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118. This finding is in line with the established principles on when the conformity to public law requirements of the buyer's country is required. See CLOUT Case No. 123 [Bundesgerichtshof, Germany, May 8, 1995]; CLOUT Case No. 774 [Bundesgerichtshof, Germany, Mar. 2, 2005]; CLOUT Case No. 426 [Oberster Gerichtshof, Austria, Apr. 13, 2000].

119. This is prescribed by Arts. 38 and 39 CISG, but could be overridden to some extent if the requirements of Arts. 40 or 44 are met. In any event, the examination of the goods is not, per se, relevant for the buyer's exercise of remedies for non-conformity. However, it is an important step to be taken by the buyer within the prescribed time period since it may impact the calculation of the "reasonable time" for giving notice of non-conformity under article 39. Similar, although not identical, obligations are prescribed in the Serbian LCT Arts. 481, 484. However, these two texts differ in respect to the required time-frame within which the notice of non-conformity has to be given, and form and contents of such notice. Under the LCT the buyer is obliged to inspect the goods as soon as possible and to notify the seller of the defects without delay (in a non-commercial setting within 8 days). In any event, the buyer loses the right to rely on the lack of conformity if he does not give notice within 6 months after delivery of the goods, unless a longer time period has been agreed upon by the parties. Regarding the form of such notice, although the provisions of Serbian LCT Art. 484(1) do not contain an explicit reference as to the form of notice of non-conformity, and the law itself is generally based on the principle of consensualism, interpretation of this provision in the commercial setting has been such as to require written (reliable) form of notice. This view has been affected by the 1954 General Usages for Turnover of Goods which in Art. 152 explicitly require notice of non-conformity to be sent in a "reliable way" and any notice given over the telephone, telegram or teleprinter to be immediately confirmed by means of registered mail. This is further supported by the fact

rise to buyer's unrestricted use of remedies in the case of non-conforming delivery, the correct interpretation of Article 39(1) of the CISG is essential for buyer's protection in such case.

### 2.1.) *Form of notice*

The CISG does not explicitly prescribe formal requirements for the notice of non-conformity. Pursuant to Article 7(2) and the general principle of consensualism on which the CISG is based,<sup>120</sup> one can easily discern that no particular form is required for such notice and that oral notice would be sufficient to meet the conditions laid out in Article 39.<sup>121</sup> Proving that the oral notification has actually been made is, of course, another matter.

In the Serbian context, however, there is a rather unusual potential obstacle to a correct application of Article 39(1), namely the Yugoslav (Serbo-Croatian) official translation of the CISG is not precise enough. This was reflected in FTCA award number T-09/01 of February 23, 2004. Faced with the question of validity of notice of non-conformity, the tribunal held that the:

[CISG] does not prescribe form requirements explicitly. However, given that [the notice] has to be sent and [given] its contents, written form is the only logical solution. It is a standard practice in foreign trade transactions that objections are sent in writing and that any oral objection has to be immediately evidenced in writing. Since this matter is not settled by the CISG, Serbian Law on Contracts and Torts should fill the gaps, given that the provisions of the Private International Law Act direct to its application. LCT states that notice of non-conformity containing description of the defect has to be sent by registered mail, telegram or by any other reliable means.<sup>122</sup>

A similar result was reached in award number T-18/01 of November 27, 2002, where the sole arbitrator concluded that written form of notice was necessary.<sup>123</sup> He noted that the testimony of witnesses who have allegedly

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that Serbian LCT Art. 484(2) regulates the consequences of late arrival or lost notification of defects sent in a reliable way, thus implying, according to the majority opinion, that oral notices of defects are not sufficient under Serbian law. As to the contents of such notice, the LCT requires specificity of such notice in the same manner as does the CISG. However, the LCT further requires in Article 484(1), as did the 1964 ULIS Art. 39(2), that the buyer has to invite the seller to inspect the goods.

120. See CISG art. 11.

121. Ingeborg Schwenzer, *Article 39*, in CISG COMMENTARY, *supra* note 20, at 465. See also CISG-AC Opinion No. 2, *Examination of the Goods and Notice of Non-Conformity: Articles 38 and 39*, June 7, 2004, available at <http://www.cisgac.com/default.php?ipkCat=128&ifkCat=144&sid=144>.

122. Despite the fact that panel's analysis of the form requirements under CISG art. 39 was erroneous, this did not impact the tribunal's finding since the written form of the notice was required by the contract and buyer complied with such requirement. FTCA, Award No. T-09/01, Feb. 23, 2004.

123. See also FTCA, Award No. T-10/04, Nov. 6, 2005.

heard phone conversation in a foreign language, cannot represent a credible proof that the notice of non-conformity was given and that the buyer simply had to confirm such oral notice in writing within a reasonable time. Finally, in award number T-15/04 of February 21, 2005 the sole arbitrator, besides holding that the notice was not given within appropriate period also questioned the validity of oral notices by stating “even if the phone conversation could have been regarded as a notice of defects, *such notice was not given within reasonable time.*”<sup>124</sup>

To a Serbian lawyer, examination of the abovementioned awards reveals that the initial misinterpretation of the CISG stemmed from the faulty translation it received when it was incorporated in Yugoslav legislation. The requirement of Article 39 that a buyer has to ‘*give notice*’ had been translated in a manner which suggested that notice had to be ‘*sent*’ (“*pošalje obavještenje*” in Serbian). To a Serbian reader, this might suggest that notification has to be conducted in a manner and through a medium which allows for “sending” in the classical written form. This initial hint was further reinforced once the arbitrators abandoned looking for solutions in the CISG general principles and resorted to interpretations in light of domestic legislation and court practice.<sup>125</sup> International commercial usages might have been used as a tool to circumvent consensuality, but that could have been done only through Article 9 of the CISG, and by proving the widespread use of the written form of notices in international trade practice, outside of Serbia, or at least by proving the existence of such practice between the parties. However, no similar attempts have been made. To the contrary, it seems that in the first case a shortcut was taken and Serbian legal practice was simply substituted for usage. Luckily, such distortion did not affect the outcome of the second case—the award makes it clear that the testimony on which the buyer relied to prove that seller was given notice would not have convinced the arbitrator even if he held that notification required no special form.

In conclusion, the analyzed awards evidence a firm position in the FTCA practice that Article 39(1) of the CISG requires written form of notice. Since the main cause of such position is the erroneous translation of Article 39(1) of the CISG to Serbian, the most effective way to overcome its continuous application in the FTCA practice would be to amend the language of the Law on Ratification of the CISG. However, given that such procedure would be rather complicated, it seems that the only plausible way to change the

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124. FTCA, Award No. T-15/04, Feb. 21, 2005 (emphasis added).

125. See *supra* note 109.

interpretation of Article 39(1) in Serbian practice is in raising the awareness of the Serbian legal community and FTCA arbitrators, in particular, of such errors in translation and recommending interpretation of the CISG in light of the formulations used in one of its authentic texts (Arabic, Chinese, English, French, Russian and Spanish)<sup>126</sup> in accordance with the 1969 Vienna Convention on the Law of Treaties, to which Serbia is a party, and the prevailing interpretation in foreign case-law and scholarly work, evidenced, *inter alia*, in the CISG-AC Opinion No. 2.<sup>127</sup>

### 2.2.) Content of notice

According to Article 39(1), notice must “*specify the nature of the lack of conformity.*” According to the relevant case law and CISG-AC Opinion No. 2, the level of specificity should not be exaggerated. Namely, it is not always necessary to describe the nature and cause of the problem: pointing out the “symptoms” may be sufficient.<sup>128</sup> Otherwise, a buyer would carry a heavy burden of dissecting specific problems of non-conformity in matters where he lacks technical knowledge. However, laconic notices such as “*bad quality,*”<sup>129</sup> “[*the goods*] *caused some problems,*”<sup>130</sup> or “[*the goods*] *were not labeled according to the schedule of items*”<sup>131</sup> are deemed insufficient. This is because

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126. Such an approach has already been utilized in the decision of CLOUT Case No. 885 [Schweizerisches Bundesgericht (BGer) (Federal Court), Switz., Nov. 13, 2003] (“The UN Sales Law was drafted in Arabic, English, French, Spanish, Russian and Chinese. It was also translated into German, among other languages. In the case of ambiguity in the wording, reference is to be made to the original versions, whereby the English version, and, secondarily, the French version are given a higher significance as English and French were the official languages of the Conference and the negotiations were predominantly conducted in English.”), translated at <http://cisgw3.law.pace.edu/cases/031113s1.html>. The mistake in German translation of the Convention that this Court addressed regards the specificity of the notice of non-conformity required under Article 39(1) of the CISG. *Id.* (holding that a higher degree of specificity is required for German text in comparison to English and French texts), translated at <http://cisgw3.law.pace.edu/cases/031113s1.html>. The use of English text of the Convention instead of its faulty translation to the language of the CISG member state was evidenced in the FTCA practice itself in FTCA, Award No. T-4/05, July 15, 2008 (regarding Article 1 in context of Article 10, i.e. translation of the English phrase “place of business” to Serbian phrase meaning “seat”).

127. See CISG-AC Opinion No. 2, *supra* note 121.

128. *Id.* at 121, at cmt. 4. See also CLOUT Case No. 319 [Bundesgerichtshof (Federal Supreme Court), Germany, Nov. 3, 1999], available at <http://cisgw3.law.pace.edu/cases/991103g1.html>.

129. See Rechtbank van Koophandel, Kortrijk [District Court] Belgium, Dec. 16, 1996, available at <http://www.unilex.info/case.cfm?pid=1&do=case&id=340&step=FullText>.

130. Trib. Vigevano [Ordinary Court of First Instance], July 12, 2000 n.405, Giur. It. 2001, II, 280 *et seq.* (Italy), available at <http://cisgw3.law.pace.edu/cases/000712i3.html>.

131. Landesgericht Köln [Trial Court] Germany, Nov. 30, 1999, available at <http://www.unilex.info/case.cfm?pid=1&do=case&id=799&step=FullText>.

the purpose of the notice is to allow seller to cure the defect, or collect and secure evidence regarding the conformity of goods and perform other activities which might help him later in protecting his rights against his suppliers.<sup>132</sup>

Having all this in mind, it can be concluded that award number T-18/01 of November 27, 2002 arrived at the correct conclusion that notice has to be devoid of any doubts and contain description of the lack of conformity. The sole arbitrator found, stating that poultry's rate of reproduction decreased, while at the same time their mortality rate increased, that the communication was precise enough to represent a proper notice of non-conformity under the contract for sale of poultry. On the same line, another tribunal was correct in finding that a buyer's notice that significant portions of delivered leather pieces were discarded during production of the leather items was inadequate.<sup>133</sup> It would have been proper to explain that the goods delivered were of classes II, III and IV, instead of the contracted classes I, II and III, as buyer had done later in the proceedings.

### 2.3.) *Reasonable time*

Article 39(1) provides that notice has to be made within a "*reasonable time*" after a defect is discovered or ought to be discovered. This standard was fiercely debated during the CISG drafting process<sup>134</sup> and still represents one of the most controversial issues in court and arbitral practice.<sup>135</sup> According to CISG-AC Opinion No. 2,<sup>136</sup> the length of this period has to be determined on a case by case basis, taking into account all the circumstances, and should not be linked to any fixed periods prescribed by national laws.<sup>137</sup> Unless the parties have agreed on such period in advance, this usually boils down to examination of the circumstances of the case, with special emphasis to the nature of the goods, the nature of the defect, the situation of the parties, relevant trade usages, and practices established between the parties.<sup>138</sup>

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132. Harry Flechtner, *Buyer's Obligation to Give Notice of Non-Conformity*, in UNCITRAL DIGEST, *supra* note 32, at 384-88; Ingeborg Schwenzer, *Article 39*, in CISG COMMENTARY, *supra* 20, at 462.

133. FTCA, Award No. T-16/99, Feb. 12, 2001.

134. *See* Vienna Diplomatic Conference, Summary Records, 1st comm., 16th mtg., A/Conf.97/19 (Mar. 20, 1980).

135. CISG-AC Opinion No. 2, *supra* note 121 (discussing the disparate periods which have been regarded as noncompliant with the reasonableness requirement among the awards listed in the annex).

136. CISG-AC Opinion No. 2, *supra* note 121, at cmt. 3.

137. *See* Schwenzer, *supra* note 132, at 467.

138. German courts, for example, appear to regard a one month period as reasonable. *See* CLOUT

FTCA award number T-18/01 of November 27, 2002 dealt with the notice of non-conformity which was given 16 days after the goods were taken over. There the arbitrator found that such a period was not timely and not in accordance with Article 39 of the CISG. He noted that such period might have been reasonable under different circumstances, but the perishable nature of the goods, fresh mushrooms, meant that notice had to be made at an earlier point in time. In another case, the sole arbitrator found that a notice given three months after the goods, poultry, were received was not timely.<sup>139</sup> In a more recent case, failure to send notification within one month after delivery of the goods, again poultry, precluded the buyer from asserting his rights based on non-conformity.<sup>140</sup> Finally, in award number T-09/01 of February 23, 2004 the wording of Article 39 was erroneously paraphrased to require notice of non-conformity to be sent “without delay.” This mistake, however, did not cause the buyer’s loss of rights for non-conformity since he sent notice of non-conformity in a timely manner.

#### VIII. NO-FAULT LIABILITY

It has often been said that, unlike many national laws, the CISG’s remedial system is based on the concept of no-fault liability.<sup>141</sup> This contention has been confirmed by FTCA practices as well. For example in award number T-14/07 of May 23, 2008, the arbitrator rejected the buyer’s reasons for non-payment of the price. The arbitrator stated:

The debtor is liable for his monetary obligations in those cases when he is left without financial means without his fault, for example, if his debtors have failed to pay him the amounts owed, as in the case at hand. Hence, the buyer is obliged to pay the price even where it is not his fault that he is unable to do so. This is because such non-payment represents a breach of contract.<sup>142</sup>

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Case No. 123 [Bundesgerichtshof (Federal Court of Justice), Germany, Mar. 8, 1995]; CLOUT Case No. 319 [Bundesgerichtshof (Federal Court of Justice), Germany, Nov. 3, 1999]; CLOUT Case No. 289 [Obrelandesgericht Stuttgart (District Court), Germany, Aug. 21, 1995].

139. FTCA, Award No. T-15/04, Feb. 21, 2005.

140. FTCA, Award No. T-21/06, Aug. 29, 2008.

141. See Stoll & Gruber, *Article 74*, in CISG COMMENTARY, *supra* note 20, at 750; CISG TEXTBOOK, *supra* note 77, at 256; HONNOLD, *supra* note 10, at 297; Joseph M. Lookofsky, *Fault and No-Fault in Danish, American and International Sales Law: The Reception of the United Nations Sales Convention*, 27 SCANDINAVIAN STUD. L. 109, 130 (1983).

142. FTCA, Award No. T-14/07, May 23, 2008.

## IX. AVOIDANCE

According to Articles 45 and 61 of the CISG, in case of breach of contract, the aggrieved party may, *inter alia*, avoid the contract. Contrary to the view sometimes expressed in Serbian court practice that there is little difference when it comes to the contents of the CISG and the LCT, the conditions for avoidance of contract, as well as the manner of exercising the right to avoid the contract differ significantly between these two legal instruments. Hence, we shall pay a special emphasis to these differences.

*1. Basis of Avoidance*

Aside from avoidance based on mutual consent of the parties, there are two major bases for contract avoidance under the CISG: (1) the existence of fundamental breach; and (2) non-delivery or non-performance of buyer's obligation to pay the price or take delivery of the goods within the additional period of time fixed by the other party in accordance with Articles 47(1) and 63(1) (*Nachfrist* notice).

As has been previously mentioned, the concept of fundamental breach is novel for Serbian lawyers. Hence, there are not many awards that elaborate on this issue. The ones that do have already been covered in section VII of this paper.

On the other hand, fixing an additional period of time for contract performance and avoiding the contract upon expiry of such a period is a well established institute in Serbian contract law.<sup>143</sup> However, its importance and effect differ from the provisions of the CISG.<sup>144</sup> First, giving notice of additional time for performance to the defaulting party is a condition *sine qua non* for the exercise of the right to avoid under Serbian law, except for fixed-time contract and for situations where it is clear from the circumstances of the case that the debtor will not perform even within the additional period of time.<sup>145</sup> Second, upon expiry of this period the contract is avoided *ipso facto*, unless the aggrieved party notifies without delay the debtor that he is still interested in contract performance.<sup>146</sup> Finally, unlike the CISG, Serbian law

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143. See art. 126(2) LCT.

144. Milena Djordjević, *Naknadni rok za izvršenje ugovora prema odredbama Bečke konvencije* [Fixing an Additional Period of Time for Contract Performance Under the CISG], 11 PRAVNI ŽIVOT 259, 259–77 (2003).

145. See art. 126(1) LCT and art. 127 LCT.

146. See art. 126(3) and art. 125(1–2) LCT.



recognizes the possibility of the contract avoidance on the basis of changed circumstances.<sup>147</sup>

The avoidance of contract on the basis of *Nachfrist* notice was addressed in only one of the analyzed FTCA decisions. In award number T-4/05 of July 15, 2008, the parties' settlement of October 7, 2005 on the buyer's payment of the price by January 31, 2006 was considered to be an effective notice of performance of the buyer within the additional period of time of four months fixed therein.<sup>148</sup> Arguably the settlement did not in fact constitute a *Nachfrist* notice within the meaning of Article 63(1), since the *Nachfrist* notice does not represent a unilateral action, but rather an agreed extension of the date for performance. Instead, seller's statement of September 15, 2006 that he would postpone enforcement of a provisional measure entitling him to repossession of the goods from the buyer for two weeks was probably the real *Nachfrist* notice in the mentioned case, since this statement contained all the necessary contents required from the *Nachfrist* notice: specificity of the time-period; and serious intentions as to the avoidance and reasonableness of the length of the set period.<sup>149</sup> However, the final outcome of this case seems just since the arbitrator found the contract was avoided on April 16, 2007, more than 14 months after the expiry of the first *Nachfrist* notice and more than six months from expiry of the second notice containing cut-off date for performance.

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147. See art. 133 LCT; FTCA, Award No. T-10/07, Dec. 3, 2008 (dealing with a party's request for avoidance of contract on the basis of changed circumstances since the party's bank account was blocked and he could not get a loan from the bank). Unfortunately, the award in this case is of little value for this study since the tribunal erred by applying the Serbian LCT instead of the CISG, although its application was warranted since the parties agreed on Serbian law to be applicable to their contract, which should include the CISG, as already elaborated in section II.2.1. of this paper.

148. FTCA, Award No. T-04/05, July 15, 2008 ("The evidence suggests that the parties have negotiated on the performance of the Contract even after the Statement of Claim was submitted. The consequence of these negotiations is a "Statement" signed by Mr. X, the owner of the [Buyer] . . . on October 7, 2005, in which he promised to pay all due sums under the Contract by January 31, 2006. This additional period of nearly four months represents a reasonable and clear time period within the meaning of Article 63(1) of the Convention, by which the [Buyer] was given an additional period of time for performance of its obligations.").

149. *Id.* ("At the meeting of September 15, 2006, Ms. Y, the [consultant at the Serbian subsidiary of Seller], informed the [Buyer] that the [Seller] would help the [Buyer] by postponing the execution of the provisional measure if the [Buyer] pays its obligations in an additional period of two weeks—by September 30, 2006. The [Buyer] was thereby clearly informed that the [Seller] would commence enforcement of the provisional measure after the expiration of this period, which would make the Contract effectively avoided.").

## 2. Declaration of Avoidance

Unlike the Serbian LCT which recognizes *ipso facto* avoidance in certain cases,<sup>150</sup> the CISG always requires avoidance to be effectuated by means of a declaration of avoidance, i.e. notice to the other party.<sup>151</sup> Given that determination of the exact time of contract avoidance may have significant consequences to the rights and obligations of the parties, e.g. calculation of damages on the bases of cover transaction under Article 75 is contingent on such transaction taking place after avoidance of contract or determination of the market price at the time of contract avoidance for the purposes of calculation of damages under Article 76, this question is of utmost importance.

The CISG requires no form as to the declaration of avoidance. An explicit declaration is, of course, sufficient, but so can an implied notification, i.e. notification by conduct.<sup>152</sup> The essential requirement is that the notice to the party in breach unambiguously manifest that the other party does not wish to be further bound by the contract.<sup>153</sup>

Issues of avoidance of a contract and the form of declaration of avoidance were raised in award number T-8/06 of October 1, 2007, dealing with a contract concluded between Serbian and Romanian companies. Claimant-buyer wrote to the Ministry of Internal Affairs of Romania and Ministry of Public Information of Romania asking them to urge respondent-seller to return the sums he received as the advance payment. No explicit statement was at that time directed to the buyer himself, hence, such conduct was not deemed sufficient to constitute valid declaration of avoidance. However, taking into account comparative judicial and arbitral practice on Article 26 of the CISG, without express reference to it, but with reference to a mandate from Article 7(1), the tribunal concluded that only filing a claim before arbitration was sufficient to constitute a proper declaration of avoidance since the statement of claim contained a declaration that claimant considered the contract to be terminated. The tribunal found such language sufficiently clear and unambiguous to meet the requirements of Article 26 of the CISG.

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150. See Serbian LCT art. 125(1) (involving cases of fixed-time contracts); Serbian LCT art. 126(3) (involving cases of non-performance within an additional period of time for performance).

151. See CISG art. 26; J. Perović, *Izjava o raskidu ugovora kao uslov za raskid ugovora zbog neispunjenja obaveze* [Declaration of Avoidance as a Condition for Avoidance of Contract for Non-Performance], PRAVNI ŽIVOT No. 11/05, 473–97 (2005) (Serbia).

152. Rainer Hornung, *Article 26*, in CISG COMMENTARY, *supra* note 20, at 302–03.

153. CLOUT Case No. 6 [Landgericht Frankfurt a.M. (District Court), Germany, Sept. 16, 1991].

Award T-4/05 of July 15, 2008 pushed the moment of avoidance even further—after the claim was submitted. In that case, claimant-seller delivered a machine and respondent-buyer did not pay the price in full. Claimant submitted its claim to arbitration, requesting “to terminate the contract.” However, even after the claim was lodged, the parties were negotiating about possible ways in which the respondent might fulfill its obligations. The first result of those negotiations was a declaration signed by the Respondent, which stated that he would settle his debt by January 31, 2006, within less than four months. However, respondent did not act on his promise. Although, according to the tribunal, the claimant had every right to declare the contract avoided upon expiry of this period, it did not do so until April 2007. During this time fruitless negotiations occurred, empty promises were exchanged, and claimant managed to obtain a court interim measure on March 15, 2005 aimed at repossession of the delivered equipment which, pursuant to a *pactum reservati dominii* clause, was still the property of claimant. Claimant waited until April 2007 to activate such measure, and the arbitrator treated activation of the measure and subsequent dispossession of the buyer as effective notice of avoidance pursuant to Article 26 of the CISG.

### 3. *Effects of Avoidance*

According to Article 81, avoidance of contract releases both parties from their obligations, subject to damages which might be due. Normally this presupposes a symmetrical restitution, whereby both parties are supposed to return concurrently what they have received pursuant to contract performance. In several FTCA awards, this provision was applied in a straightforward and expected manner.<sup>154</sup> However, award number T-4/05 raised another interesting issue. In this case, once the contract was declared avoided, only one of the parties, claimant-seller, requested return of what he gave under the contract, a machine. The other party, although it participated in the proceedings, did not at any time request restitution, and the arbitrator took a restrained attitude with respect to such position. Consequently, while ordering restitution pursuant to Article 81(1), the arbitrator noted that his jurisdiction was limited only to requests that parties have actually made, and that stepping over the line would constitute a violation of the *non ultra petita* principle and render the award

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154. See FTCA, Award No. T-08/06, Oct. 1, 2007, available at <http://cisgw3.law.pace.edu/cases/071001sb.html>; FTCA, Award No. T-02/00, Dec. 9, 2002.

partially unenforceable. This resulted in a one-sided restitution only, whereby partial payment for the returned goods was kept by the claimant.

## X. DAMAGES

The right to damages for breach of contract is an essential right of both the seller and buyer under the CISG Articles 45 and 61. It is available as an independent remedy and concurrently with other remedies, such as avoidance. The basic preconditions for its exercise are contained in Article 74 of the CISG, whereas the special methods for calculation of damages in case of contract avoidance can be derived from Articles 75-76. Article 77 contains an important limitation to recovery of damages by allowing reduction in damages by the amount the loss sustained should have been mitigated by the aggrieved party.

Unsurprisingly, the request for damages has often been raised in the FTCA practice. This survey will not represent an extensive analysis of all the damages awards in FTCA practice. Rather, it will provide an overview of some of the issues tackled by the FTCA and point to the major differences in assessment of damages under the CISG and Serbian LCT.

### *1. Categories of Loss*

Article 74 states that the damages for breach of contract shall consist of “a sum equal to the loss, including loss of profit, suffered by the other party as a consequence of the breach.” So the CISG endows recovery of both “actual damage” (lat. *damnum emergens*) and “lost profit” (lat. *lucrum cessans*), as also provided by the Serbian LCT.<sup>155</sup> While the types of losses recoverable, other than those falling within the two above mentioned categories, are not specified, it is clear that the basic prerequisite for recovery of damages is that the loss is a consequence of the breach. In the FTCA practice, the following types of losses have been deemed recoverable: travel expenses by buyer’s employees in connection with the conclusion and performance of the sales contract;<sup>156</sup> interest for acquiring a bank loan for the advance payment of the price;<sup>157</sup> customs, VAT, and other expenses incurred

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155. See art. 266(1) LCT.

156. FTCA, Award No. T-08/06, Oct. 1, 2007, available at <http://cisgw3.law.pace.edu/cases/071001sb.html>.

157. *Id.*

as a result of seller's breach of contract;<sup>158</sup> administrative penalties;<sup>159</sup> costs of opening the letter of credit;<sup>160</sup> etc.

The controversial issue of awarding attorneys' fees and costs of procedure as damages<sup>161</sup> has not been addressed, since the request for such an award was always made separately from the request for damages.<sup>162</sup> However, the costs of legal representation and the costs of proceedings incurred before a different institution, e.g. tax organs, as a consequence of the seller's breach of contract, have been awarded by the FTCA tribunals as damages.<sup>163</sup>

## 2. Proof of Damages

It goes without saying that damages have to be proven in order to be recovered.<sup>164</sup> This rule is also sustained by the CISG, with the exception of Article 76, which allows for recovery of "abstract damages" provided that the conditions contained therein are fulfilled.

The issue of proof of damages was addressed in several FTCA decisions and recovery of damages was denied in all the cases where claimants were not in a position to prove the loss. For example, in award number T-4/05, claimant-seller requested avoidance of the contract, repossession of the goods, and compensation for respondent-buyer's use of the goods for several years,

158. FTCA, Award No. T-09/07, Jan. 23, 2008, available at <http://cisgw3.law.pace.edu/cases/080123sb.html>.

159. FTCA, Award No. T-10/06, Nov. 27, 2006.

160. FTCA, Award No. T-22/05, Oct. 30, 2006.

161. See John Felemegas, *An Interpretation of Article 74 CISG by the U.S. Circuit Court of Appeals*, 15 PACE INT'L L. REV. 91, 91-147 (2003) (supporting the award of attorney's fees as damages). But see Joseph Lookofsky, *Commentary: Zapata Hermanos v. Hearthside Baking*, 6 VINDOBONA J. INT'L COMM. L. & ARB. 27, 27-29 (2002); Harry M. Flechtner, *Recovering Attorneys' Fees as Damages under the U.N. Sales Convention (CISG): The Role of Case Law in the New International Commercial Practice*, with *Comments on Zappa Hermanos v. Hearthside Banking*, 22 NW. J. INT'L L. & BUS. 121, 12-159 (2002).

162. This is in line with the Serbian practice of requesting attorneys' fees and costs of the procedure under the Serbian Law on Civil Procedure which is based on the "loser pays" principle. Prior to enactment of the LA, FTCA awards predominantly followed such practice. Upon enactment of the LA, which leaves to the discretion of the tribunals to determine the allocation of the costs of procedure (including attorneys' fees), the FTCA awards made their decisions on costs dependent on the result on merits which means that the "loser-pays" principle is still followed. See FTCA, Award No. T-08/06, Oct. 1, 2007; FTCA, Award No. T-09/07, Jan. 23, 2008; FTCA, Award No. T-04/05, July 15, 2008; FTCA, Award No. T-23/06, Sept. 15, 2008; FTCA, Award No. T-18/07, Oct. 15, 2008; FTCA, Award No. T-01/08, Nov. 17, 2008; FTCA, Award No. T-05/08, Jan. 5, 2009.

163. FTCA, Award No. T-09/07, Jan. 23, 2008, available at <http://cisgw3.law.pace.edu/cases/080123sb.html>.

164. See CISG-AC Opinion No. 6, *Calculation of Damages under CISG Article 74*, Rapporteur: Professor John Y. Gotanda, Villanova University School of Law, Villanova, Pennsylvania, USA cmt. 2.2.

claiming lost profits and amortization. Claimant's request for damages was rejected on the grounds that claimant did not prove such damages. In other cases, the recovery was awarded up to the amount proven by the aggrieved party or the expert witness' calculation. For example, in award number T-8/06 of October 1, 2007 buyer's request for recovery of an interest paid on a loan from a bank for securing the necessary funds for advance payment under the sales contract was only partially granted. Having examined the evidence presented by the buyer, the tribunal determined that

[T]he interest on the borrowed amount was not running after the date of repayment of the loan (February 1, 2004) until March 31, 2006 (being the calculation date used by the expert in her opinion). Therefore, the Tribunal refused [Buyer]'s claim for compensation of direct damage on this ground, because only the interest actually paid to the bank could be recognized as direct damage.<sup>165</sup>

### 3. *Foreseeability*

Similar to many national legislations,<sup>166</sup> the CISG requires damages arising out of a contractual relationship to be foreseeable in order to be recoverable.<sup>167</sup>

In award number T-8/06 of October 1, 2007, buyer's claim for actual damages had two components: the costs of daily allowances and transportation costs that the buyer incurred in relation to the business visits to the seller; and the interest buyer had to pay in order to service the bank loan he took to pay the advance on the contract price to the seller. The tribunal found that both types of damages were foreseeable to the seller, including the interest rate of the bank loan.

As to the first portion of the damages award, the tribunal noted that they were foreseeable since it is:

[C]ommon in business practice that [Buyer] would attempt to negotiate with [Seller] the subsequent performance of the contract in case of non-performance of the delivery under it. This conclusion is especially justified having in mind that the correspondence between

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165. FTCA, Award No. T-8/06, Oct. 1, 2007.

166. See Franco Ferrari, *Comparative Ruminations on the Foreseeability of Damages in Contract Law*, 53 LA. L. REV. 1257, 1257-69 (1993); Stoll & Gruber, *supra* note 141, at 763-69; Djakhongir Saidov, *Methods of Limiting Damages under the Vienna Sales Convention on the International Sale of Goods* (2001), <http://www.cisg.law.pace.edu/cisg/biblio/saidov.html>.

167. This requirement exists under Serbian law as well. Serbian LCT art. 266(1). However, Serbian law differs from the CISG in that respect that the foreseeability of the loss is not a limitation to the amount of recoverable damages in case of fraudulent, willful or grossly negligent breach of contract. Serbian LCT art. 266(2).

the parties indicates that [Seller] had suggested to [Buyer] that he would subsequently perform the first delivery.<sup>168</sup>

With respect to the second portion of the damages award, the tribunal found that:

[Seller] at the time of conclusion of the contract could have presumed that [Buyer] would obtain a loan from a bank for securing the necessary funds for the advance payment under the sales contract, since it is a well known and established business practice that companies secure necessary funds by borrowing money from banks . . . . Hence, [Seller] ought to have foreseen that [Buyer] would suffer damage in the amount equal to the interest on the amount borrowed from the bank, from the moment in which the advance payment has been made until the repayment of the loan. Consequently, [Seller] is obliged to compensate [Buyer] for the damage suffered.<sup>169</sup>

In addition, the buyer was awarded lost profits since the tribunal concluded that seller could have foreseen that the goods ordered, planks, were purchased so that the buyer could manufacture goods for sale to third parties. The arbitral tribunal found that:

[Seller] could have foreseen that [Buyer] was purchasing the poplars for the purpose of their processing and reselling, and that [Buyer] had contracted for the resale of the quantity for which the advance payment was made. Therefore, the condition of foreseeability for awarding damages pursuant to Article 74 of the [CISG] is met.<sup>170</sup>

However, the amount of damages awarded on this basis was limited only to the amount of lost profit corresponding to the quantity of a resale agreement concluded by the buyer with the third party.<sup>171</sup> Although the tribunal was correct in not awarding the claimant further damages for loss of profit, it erred

168. FTCA, Award No. T-8/06, Oct. 1, 2007.

169. *Id.*

170. *Id.*

171. See FTCA, Award No. T-8/06 at 8.2, Oct. 1, 2007 (“The Arbitral Tribunal determined that the loss of profit calculated by the [Buyer] as presumed profit which [Buyer] would have acquired after selling [planks produced] from all six installments does not meet the condition of foreseeability for compensation of damage, set out in Article 74 of the Vienna Convention. Namely, the Tribunal found that the [Seller] at the time of conclusion of the sales contract could not have foreseen, nor were there any circumstances which would cause the [Seller] to foresee, that the [Buyer], as a reseller, had concluded a contract of sale of the timber for the total quantity of 10,000 m<sup>3</sup> of poplar. This conclusion is supported by the provisions of the Sales Contract, which provides for several deliveries, with each delivery being triggered by the [Buyer] by making the advance payment for the respective delivery. This indicates that at the time of the conclusion of the sales contract the whole quantity of poplar could not have been envisaged for processing and reselling to specific subsequent buyers. The [Buyer] only proved that it had contracted to sell 40 m<sup>3</sup> of timber (a minimal quantity even in respect of the first delivery of 1.538 m<sup>3</sup> of poplar), thereby not meeting the condition for awarding loss of profit.”).

in relying on non-foreseeability of claimant's claim. In doing so the tribunal contradicted its previous finding that buyer's purpose of further processing and resale of poplars was foreseeable to the seller. However, the true and valid reason for denying buyer's claim for future loss of profits in this case was his omission to prove that any future profit would be lost. The only proof submitted by the buyer was a contract for the planks, and the quantity ordered was minuscule, not only with respect to the total amount of timber to be delivered, but also with respect to the actual amount of timber delivered before avoidance of the contract.

In a case involving a contract for sale of sugar,<sup>172</sup> the tribunal correctly concluded that respondent, as a professional trader, could have foreseen that shipment of sugar, which did not conform to the specifications of the contract, Yugoslav origin, 2002 harvest, could result in damages for the claimant in the amount of customs and other expenses to be paid, given that the origin of the goods was crucial in getting a zero-duty customs treatment.<sup>173</sup> The tribunal expressly stated that, in regard to the evidentiary material in this case:

[It] had no dilemma whether [Seller] knew or could have known that in Italy sugar is imported under a favored treatment and that there is a financial consequence for [Buyer] if [Seller] does not deliver goods which are in conformity with the conditions of the contract, especially in regard to the origin and the type of harvest.<sup>174</sup>

#### 4. Liquidated Damages

The analysis of the FTCA practice confirms the view that recovery under liquidated damages clauses is permissible under the CISG and subject only to limitations of the public policy requirements of the applicable national law.<sup>175</sup> In the words of award number T-4/05 of July 15, 2008:

[The CISG] does not contain any provisions which could be applied to this legal question, but the principle of party autonomy (Article 6 of the Convention) enables the parties to stipulate freely the amount of compensation to be paid by the debtor to the creditor in case of non-performance or untimely performance of the contractual obligation, as is the case here. The validity of this clause is not contested by the Law of Contracts and Torts of the Republic of Serbia, which is based on the same principle

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172. FTCA, Award No. T-09/07, Jan. 23, 2008, available at <http://cisgw3.law.pace.edu/cases/080123sb.html>.

173. *Id.* (affirming that, had the goods been conforming, the buyer would have been exempt from paying custom duty in accordance with the then applicable EU preferential treatment for sugar of Yugoslav origin).

174. *Id.*

175. Stoll & Gruber, *supra* note 141, at 769–70.



(Article 10 of the Law on Contracts and Torts), and these provisions could not be held contrary to the imperative norms, public policy or customs.<sup>176</sup>

## XI. INTEREST

Most of the claims revolve around money, and the cost for use of money—interest—invariably comes into picture. Hence, it is not surprising that almost every case we researched for this article dealt with the issue of determining the appropriate interest rate. There are three articles in the CISG that deal directly or indirectly with the issue of awarding interest: Articles 74, 78 and 84(1).<sup>177</sup> Given that the examined FTCA awards have shown only one example where the interest was awarded as damages, under Article 74,<sup>178</sup> and no example where Article 84(1) was explicitly invoked,<sup>179</sup> our analysis will focus entirely on application of Article 78 of the CISG in the FTCA practice.

Although Article 78 of the CISG provides that creditors are entitled to interest on the sum in arrears, it does not instruct how to compute the appropriate interest rate. This goal appeared to be too difficult to be achieved during the drafting process. The issue remained controversial and complex, often debated in the context of the CISG.<sup>180</sup> Judicial and arbitral practice

176. FTCA, Award No. T-4/05, July 15, 2008.

177. See CISG art. 78 (setting the basis for a party's entitlement to interest if the other party fails to pay the price or any other sum that is in arrears). Article 78 also makes it clear that the interest can be sought under the general damages rule in Article 74 of the CISG (provided that the preconditions for its application are met); see also CISG art. 84(1) (specifying the date of accrual of restitutionary interest if the seller is bound to refund the price).

178. The buyer was awarded interest on the amount borrowed from the bank in order to make an advance payment as damages. FTCA, Award No. T-08/06, Oct. 1, 2007 ("By inspecting the loan agreement that [Buyer] had concluded with the [Bank], the Arbitral Tribunal found that the [Buyer] was to pay interest under that contract at the rate of 12% annually on the amount granted for making the advance payment, and made the decision on compensation of the direct damage by applying the interest rate actually paid. Therefore, the Arbitral Tribunal granted the [Buyer]'s claim for compensation of direct damage in the amount of the interest paid on the amount the [Buyer] had borrowed from the bank to make the advance payment to the [Seller], as of the date of making the advance payment (July 3, 2002) until the date of repayment of the loan (Feb. 1, 2004) at the rate of 12% annually, which was stipulated in the loan contract (EUR 2,948.62)."), available at <http://cisgw3.law.pace.edu/cases/071001sb.html>.

179. Although FTCA Award No. T-08/06, Oct. 1, 2007, available at <http://cisgw3.law.pace.edu/cases/071001sb.html>, dealt with the issue of a price refund upon avoidance of a contract, no reference was made to Article 84(1) CISG and the same interest rate was applied both to the amount sought as repayment of the price and to the amount claimed as damages.

180. The views are not only divided as to whether the issue of interest rate is *lacuna intra legem* or *lacuna praeter legem*, but also as to how, if it is *lacuna praeter legem*, to resolve it. See Francesco G. Mazzotta, *CISG Article 78: Endless Disagreement Among Commentators, Much Less Among the Courts* (2004), <http://www.cisg.law.pace.edu/cisg/biblio/mazzotta78.html>; Alan F. Zoccolillo, *Determination of Interest Rate Under the 1980 United Nations Convention on Contracts for the International Sale of Goods:*

worldwide is also anything but uniform, on either of the possible approaches.<sup>181</sup> The practice of the FTCA is not different in that respect. We have identified five main approaches that were used to determine relevant interest rate: (1) using national legislation on statutory interest rate; (2) using the domicile interest rate<sup>182</sup> of a particular currency with reference to court and arbitral practice; (3) using the domicile interest rate of a particular currency with reference to international payment usages; (4) examining the general principles on which the CISG is based; and (5) applying the interest rate set by the contract. Given the importance of the party autonomy rule under the CISG, the last approach is, of course, always the preferable method of interest calculation. Unfortunately, this approach has been used in only one contract dispute before the FTCA.<sup>183</sup> The first two approaches operate on the assumption that the issue of interest rate is not governed by the CISG, i.e. that it is *lacuna intra legem*. The third approach observes the international usages

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*General Principles vs. National Law*, 1 VINDOBONA J. INT'L COM. ARB. 3, 3–43 (1997); André Corterier, *A New Approach to Solving the Problem of the Interest Rate Under Article 78 CISG*, 5 INT'L TRADE & BUS. L. ANN. 33, 33–42 (2000); Volker Behr, *The Sales Convention in Europe: From Problems in Drafting to Problems in Practice*, 17 J.L. & COM. 263, 263–99 (1998); Franco Ferrari, *Uniform Application and Interest Rates Under the 1980 Vienna Sales Convention*, in CORNELL REVIEW OF THE CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS 3–19 (1995); John Y. Gotanda, *A Study of Interest 172–73* (Villanova Univ. Sch. of Law Working Paper Series, No. 83, 2007), available at <http://law.bepress.com/villanovalwps/papers/art83>; VILUS, *supra* note 6, at 172–73; M. Milutinović, *Kamatna stopa zbog docnje u izvršenju novčane obaveze—da li je uniformno rešenje moguće? [Interest Rates for Late-Payment—Is a Uniform Solution Achievable?]*, 11 PRAVNI ŽIVOT 557–76 (2005); M. Stanivuković, *Stopa zatezne kamate na ugovorna potraživanja u stranoj valuti kada je merodavno srpsko pravo [Default Interest Rate Applicable to Foreign Currency Contractual Claims Governed by Serbian Law]*, ZBORNIK RADOVA SA MEDJUNARODNE KONFERENCIJE “REGIONALNA SARADNJA U OBLASTI GRADJANSKOG SUDSKOG POSTUPKA SA MEDJUNARODNIM ELEMENTOM” 207–25 (2009).

181. Those favoring uniform determination of interest rate pursuant to the general principles on which the CISG is based have different starting positions. Some use the principle of full compensation, while others resort to the principle of full restitution. Two of the solutions preferred within the uniform method are application of the prevailing interest rate of the place of payment and application of international interest rate, such as LIBOR. Those who prefer application of national law to the issue of interest rate have different ideas on how to pick the proper law. Some propose application of the *lex causae*, others the law of debtor's seat, the law of the seller's country, the law of the country of the currency, or the law of the place of performance, etc.

182. The phrase “domicile interest rate” is often used in Serbian judgments and awards, although it is not defined in any statute. The courts and tribunals have so far used this term to designate the interest rate applicable in the country of origin of the currency in which the money is due, which sometimes results in the application of statutory interest rates or the application of other otherwise applicable interest rates such as the Federal Funds rate for debts in U.S. dollars. For example, according to the High Commercial Court opinion of September 27, 2004, for claims in Euros, this rate is equal to the “euro interest rate set by the Central European Bank.”

183. The parties chose Macedonian law to govern the issue of applicable interest rate. FTCA, Award No. T-16/07, June 18, 2008.

as a primary source of law for the issue of interest rates, while the fourth approach regards the matter of interest rate as *lacuna praeter legem* and determines the interest rate via examination of CISG general principles. Regardless of the approach taken by the arbitrators in the analyzed cases, the tribunals have on all occasions observed the *non ultra petita* principle and have never awarded interest at a rate higher, or for the period longer, than the parties requested.<sup>184</sup>

### 1. Statutory Interest Rate Approach

Article 2 of the 1993 Yugoslav Law on Statutory Interest Rate<sup>185</sup> provided for a six percent interest rate on monetary claims in foreign currency. The absence of an explicit rule on interest rate in the CISG led many of the FTCA tribunals to direct application of the Yugoslav statutory rate whenever conflict-of-laws rules chose Yugoslav (Serbian) law as applicable. With similar justification, award number T-13/05 of January 5, 2007 applied the interest rate provided by § 1333 of the ABGB since the parties had chosen Austrian law to govern the contract.

The 2001 Amendments to the Law on Statutory Interest Rate<sup>186</sup> were designed to suppress effects of inflation and have derogated the provision on statutory interest rate for foreign currency debts. Consequently in applying the FTCA, the arbitrators took the position that computing interest rate for foreign currency debts on the basis of rates for domestic currency, which are higher than foreign rates, could ill serve the purpose of suppressing inflation and would produce “unacceptable, inappropriate and onerous results for the [debtors].”<sup>187</sup> Departures from this position were rare.<sup>188</sup>

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184. FTCA, Award No. T-09/01, Feb. 23, 2004 (awarding interest for late payment of price from the date of filing of the claim instead of the date when payment was due, since these were the exact terms of the claimant’s request).

185. OFFICIAL GAZETTE FRY, No. 32/93.

186. OFFICIAL GAZETTE FRY, No. 09/01.

187. FTCA, Award No. T-03/01, Sept. 24, 2001, *available at* <http://cisgw3.law.pace.edu/cases/010924sb.html>; FTCA, Award No. T-09/02, Mar. 24, 2003; FTCA, Award No. T-18/04, May 24, 2005; FTCA, Award No. T-16/04, July 18, 2005; FTCA, Award No. T-19/07, June 30, 2008.

188. *See* FTCA, Award No. T-13/05, Jan. 5, 2007 (applying Serbian legislation to statutory interest rate with the following justification: “. . . having in mind that the legislator wanted to adequately protect creditors who owed sums in [Serbian dinars] and has therefore provided for a monthly rate of compensation in order to prevent decrease of the value of the sums owed due to the fall in the exchange rate.” This resulted in applying 0.5% monthly interest rate to Euro-denominated debt. The arbitrator noted that this approach was in accordance with Art. 3 of the Law on Statutory Interest Rate. One can suppose that this kind of reasoning was due to the fact that domestic currency, the dinar, was enjoying a stable exchange rate,

## 2. Interest Rate “In Accordance with Practice of Courts and Arbitration Tribunals”

Despite the 2001 Amendments of the Law on Statutory Interest Rate, arbitrators continued applying a six percent interest rate to foreign currency debts as an emanation of established arbitration practice.<sup>189</sup> This was done to avoid an inadequate method of interest rate calculation which was designed with dinar debts in mind. In other decisions, tribunals invoked the *cursus curiae est lex curiae* rule and the established practice of the FTCA in order to apply the domicile interest rate of a particular foreign currency.<sup>190</sup> Therefore, if the debt was euro-denominated, arbitrators awarded Central European Bank deposit rates, marginal lending rates, or Euribor rates,<sup>191</sup> while debts denominated in US dollars were usually accompanied by application of the Federal Funds Rate.<sup>192</sup>

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and that application of a different, lower, rate to foreign currency debts would prompt claimants to denominate their claims in domestic currency, dinars, in order to avail themselves of a relatively high interest rate prescribed for dinar-denominated debts.)

189. FTCA, Award No. T-03/01, Sept. 24, 2001, available at <http://cisgw3.law.pace.edu/cases/010924sb.html>. In the present case, the 1994 Law on Statutory Interest Rate was in force at the time of the conclusion of the contract, and it provided for a 6% rate for foreign currency. OFFICIAL GAZETTE FRY, No. 24/94. However, at the time when the arbitration proceedings took place, the 2001 Law on the Statutory Interest Rate had already come into force, and it contained no such provision. The reasoning of the award invoked the FTCA practice and the fact that the parties had the 1994 law in mind when concluding the contract.

190. In FTCA, Award No. T-13/06, May 28, 2007, arbitrators noted that the CISG does not prescribe interest rate on late payments and also remarked that Serbian law does not provide for interest rate on foreign currency payments. They went on to apply domicile interest rate, stating that such approach is well-established in domestic court and arbitral practice. *Id.* See also FTCA, Award No. T-14/03, Oct. 18, 2007; FTCA, Award No. T-14/07, May 23, 2008; FTCA, Award No. T-18/07, Oct. 15, 2008; FTCA, Award No. T-1/08, Nov. 17, 2008; FTCA, Award No. T-05/08, Jan. 5, 2009; FTCA, Award No. T-16/03, Jan. 27, 2009; FTCA, Award No. T-13/08, Mar. 16, 2009.

191. See FTCA, Award No. T-37/03, May 27, 2004; FTCA, Award No. T-03/05, Dec. 15, 2005; FTCA, Award No. T-22/05, Oct. 30, 2006; FTCA, Award No. T-13/06, May 28, 2007; FTCA, Award No. T-06/06, July 31, 2007; FTCA, Award No. T-17/06, Sept. 10, 2007; FTCA, Award No. T-08/06, Oct. 1, 2007; FTCA, Award No. T-14/03, Oct. 18, 2007; FTCA, Award No. T-24/06, Dec. 1, 2007; FTCA, Award No. T-15/06, Jan. 28, 2008; FTCA, Award No. T-01/08, Nov. 17, 2008.

192. See FTCA, Award No. T-05/05, Apr. 4, 2007; FTCA, Award No. T-19/06, June 8, 2007; FTCA, Award No. T-14/03, Oct. 18, 2007.

### 3. Interest Rate in Accordance with International Payment Usages

The role of usages within the framework of the CISG is rather specific.<sup>193</sup> Article 9(2) permits that they may bind the parties, irrespective of whether parties were aware of their existence, as long as they are “widely known to, and regularly observed by, the parties to contracts of the type involved in the particular trade concerned.”<sup>194</sup> The role of usages is further reinforced by rules of arbitral institutions, including the Rules of the FTCA, where arbitrators are regularly instructed to take into account trade usages when deciding a case.<sup>195</sup> Arbitration practice of the FTCA has predominantly, although not exclusively, dealt with usages in the context of determining appropriate interest rates.

In some of the awards tribunals arrived at an appropriate interest rate by invoking international usages contained in the 1992 UNCITRAL Model Law on International Credit Transfers, which were deemed applicable on the basis of Article 9(2) of the CISG.<sup>196</sup> For example, in award number T-17/06 of September 10, 2007 it was stated that:

These international commercial usages, codified in the Model Law, represent a common practice which has been harmonized and widely applied in international trade, and is repeatedly used and found applicable in cases where parties have not agreed otherwise. Parties, who are both traders, knew or ought to have known of such usages. Payment of interest in the case of default represents a regular and very widely observed practice in the business environment.

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193. See Aleksandar Goldstajn, *Usages of Trade and Other Autonomous Rules of International Trade According to the UN Sales Convention*, in *INTERNATIONAL SALE OF GOODS, DUBROVNIK LECTURES* 55, 95–110 (Paul Volken & Petar Šarčević eds., 1986); HONNOLD, *supra* note 10, at 124; Michael Bridge, *A Commentary on Articles 1–13 and 78*, in *UNCITRAL DIGEST*, *supra* note 32, at 235, 255; Martin Schmidt-Kessel, *Article 9*, in *CISG COMMENTARY*, *supra* note 20, at 141–53; Jelena Perović, *Uloga običaja u međunarodnoj prodaji robe [Role of Usages in International Sale of Goods]*, 5-8/02 PRAVO I PRIVREDA 247, 247–54 (2002); STOJILJKOVIĆ, *supra* note 6, at 16–18, 145–47; ĆIRIĆ & DJUROVIĆ, *supra* note 6, at 54–55.

194. On the other hand, the role of usages under the Serbian LCT is limited to situations where either of the parties agree on their application or the law specifically calls for their application. The latter is the case in approximately forty out of over a thousand articles of the law.

195. See The Rules of the FTCA, *supra* note 12, at art. 48(3) (2001); ICC Arbitration Rules art. 17(2) (2008); China International Economic and Trade Arbitration Commission [CIETAC] Rules art. 53 (2005); German Institution of Arbitration [DIS] Rules § 23.4 (1998); Judicial Arbitration and Mediation Services [JAMS] Rules art. 18.3 (2005). However, there is no comparable provision in the Vienna rules, Zagreb rules, or Rules of the LCIA.

196. See FTCA, Award No. T-16/04, July 18, 2005; FTCA, Award No. T-09/02, Mar. 24, 2003; FTCA, Award No. T-08/05, Mar. 28, 2006; FTCA, Award No. T-03/06, Sept. 14, 2006; FTCA, Award No. T-09/07, Jan. 23, 2008.

Article 2(1)(m) of the Model Law on International Credit Transfers defines interest as “the time value of the money involved, which, unless otherwise agreed, is calculated at the rate and on the basis customarily accepted by the banking community for the funds or money involved.” Consequently, the average Eurozone interbanking rate was applied to euro-denominated debt based on the excerpts from the May 2007 ECB Statistical Bulletin. Similarly, in award number T-5/05 of April 4, 2007, it was stated that, in the absence of CISG provisions specifying the interest rate, arbitrators have to take into account widely accepted banking and commercial usages where parties have implicitly subjected their contract to such usages and where such usages are regularly observed in the same course of trade. The tribunal held that the parties “knew or ought to have known, as professional traders and business partners, of a widely accepted principle of commercial practice that a defaulting debtor has to pay interest,” and went on to apply the Federal Funds Rate on a dollar-denominated debt. Assuming that usage on the applicable interest rate truly exists, such approach should be preferred in the future, as it would bring predictable results and legal certainty to the contracting parties.

Among the FTCA decisions dealing with usages, we have found award number T-9/07 of January 23, 2008 to be particularly interesting, although the application of usages in this case was not based on Article 9 of the CISG, but rather on the applicable arbitration rules. Specifically, acting pursuant to Article 48(3) of the FTCA Rules, which suggests application of trade usages, the tribunal took into account the Principles of European Contract Law (PECL) and UNIDROIT Principles of International Commercial Contracts (PICC). Justifying its position, the tribunal stated that it:

[P]aid due regard to the widely known fact that from the end of the 20th and the beginning of the 21st century there could be noted a development and harmonization of a new international commercial practice and trade usages which was “codified” in the form of the abovementioned UNIDROIT Principles, UML on International Credit Transfers and Ole Lando Principles. They became available to everyone who performs international business transactions as well as to those who arbitrate disputes in the field of international commerce. Respectable arbitral tribunals in the world (especially the ICC Court of Arbitration) have long since made awards pursuant to these Principles and arbitrated disputes between parties by applying these principles as *lex mercatoria*. Considering that there is no reason for this Court of Arbitration to keep avoiding their application . . . .<sup>197</sup>

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197. FTCA, Award No. T-9/07, Jan. 23, 2008.

The tribunal concluded that the said principles may offer a more modern set of solutions for issues in the case at hand and that they “set general rules for international commercial contracts” and “may be used for interpretation and gap-filling of uniform international rules . . . and provisions of national law.”<sup>198</sup>

Although the harmonizing goal is noble, it seems to us that invoking PECL and PICC in the case at hand as *lex mercatoria* was not only erroneous but also unnecessary, given that the disputed issue, assessment of damages, was explicitly settled by the CISG. The only aspect where, theoretically, these legal documents might have been of some assistance was the determination of interest rate.<sup>199</sup> However, such approach would require importing invoked principles into the system of the CISG either through Article 7(2), general principles on which the CISG is based,<sup>200</sup> or, more controversially, via Article

198. *Id.*

199. Both PICC art. 7.4.9 and PECL art. 9:508 provide that the rate of interest should amount to the average bank short-term lending rate to prime borrowers prevailing for the currency of payment at the place for payment. Application of PICC to the issue of interest rate has already been reported in a number of cases. See *Holzimplex Inc. v. Republican Agric. Unitary Enter.*, No. 8-5/2003 (Supreme Econ. Ct. of Belr. May 20, 2003), available at <http://www.unilex.info/case.cfm?pid=2&do=case&id=635&step=Abstract>; ICC Arbitration Case No. 8769 (1996) (Switz.), available at <http://www.unilex.info/case.cfm?pid=2&id=656&do=case>; ICC Arbitration Case No. 8128 (1995) (Switz.), available at <http://www.unilex.info/case.cfm?pid=2&id=637&do=case>; Arbitral Award No. SCH-4318 (Internationales Schiedsgericht der Bundeskammer der gewerblichen Wirtschaft Wien 1994) (Austria), available at <http://www.unilex.info/case.cfm?pid=2&do=case&id=635&step=FullText>; Arbitral Award No. SCH-4366 (Internationales Schiedsgericht der Bundeskammer der gewerblichen Wirtschaft Wien 1994) (Austria), available at <http://www.unilex.info/case.cfm?pid=2&id=636&do=case>.

200. Both the timing of these documents and the drafting process make it difficult to sustain that PICC and PECL are the principles on which the Convention is based. Namely, both PICC and PECL were drafted more than a decade after adoption of the CISG. Furthermore, they were drafted under a more or less private initiative whereas the CISG is the result of UNCITRAL’s efforts finalized at the Diplomatic Conference in Vienna in 1980. Also, the preambles of these two documents provide for their scope of application in a different setting in comparison to the CISG’s provisions on its scope of application, which are directly applicable when conditions of Art. 1 are fulfilled. On the other hand, the scope of CISG’s application is limited to certain issues arising out of contracts of sale, whereas PICC and PECL regulate some of the issues regarding the sales contract not governed by the CISG, e.g. validity of a contract, and other types of contracts. Finally, while PECL, as its name suggests, reflects the development of *European* principles of contract law, the CISG is designed as a *global* instrument, which is confirmed both by the diverse structure of the drafting committee and by the pertinent list of the CISG Contracting States. As to the PICC, time will show whether recent UNCITRAL endorsement of the PICC at its 40th Plenary session in the U.N. Commission on International Trade Law (UNCITRAL), *Report of the UNCITRAL on the Work of its Fortieth Session, 52–54, A/62/17* (Part I) (July 23, 2007), will influence the wider application of PICC in the future. In any event, there is already a great number of authors who are advocating for the use of PICC as means to fill the gaps in the CISG, at least when both documents are based on the general principles of comparative law and international trade. See Michael Joachim Bonell, *The UNIDROIT Principles of International Commercial Contracts and CISG—Alternative or Complementary*

9(2).<sup>201</sup> The tribunal failed to apply either of these two approaches. Instead, the tribunal relied on the abovementioned sets of principles as usages, on the basis of the Serbian Arbitration Law, FTCA Rules of Arbitration, and the 1961 European Convention on International Commercial Arbitration. Furthermore, the tribunal erred in application of these Principles by stating that neither of these documents “determines the interest rate, but rather makes it definable” and using them only as “a safe indicator how to determine such a rate.”<sup>202</sup> The tribunal clearly failed to adhere to the basic “indicators” provided in these Principles by applying the average EURIBOR rate, a bank to bank interest rate,<sup>203</sup> for the relevant time period as the appropriate rate for the “money [currency] involved,” instead of the “short term lending rate to prime borrowers prevailing for the currency of payment at the place of payment” (e.g. a bank to borrower interest rate) as required by the Principles.

#### 4. Interest Rate Calculation Under the CISG General Principles

In only two out of a hundred FTCA cases the issue of interest rate was resolved by application of the CISG general principles. In award number

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*Instruments?*, 26 UNIFORM L. REV. 26, 36–37 (1996); Magnus, *supra* note 97, at 492; Alejandro M. Garro, *The Gap-Filling Role of the UNIDROIT Principles in the International Sales Law: Some Comments on the Interplay Between the Principles and the CISG*, 69 TUL. L. REV. 1149, 1152 (1995); Pilar Perales Viscasillas, *The Role of the UNIDROIT Principles and the PECL in the Interpretation and Gap-Filling of CISG*, in CISG METHODOLOGY, *supra* note 10, at 288–89; Klaus Peter Berger, *International Arbitral Practice and the UNIDROIT Principles of International Commercial Contracts*, 46 AM. J. COMP. L. 129, 133–35 (1998); Jurgen Basedow, *Uniform Law Conventions and the UNIDROIT Principles of International Commercial Contracts*, 5 UNIF. L. REV. 129, 136–37 (2000); Ferrari, *supra* note 95; John Y. Gotanda, *Using the UNIDROIT Principles to Fill Gaps in the CISG* (Villanova Univ. Sch. of Law Working Paper Series, No. 88, 2007), available at <http://law.bepress.com/villanovawlp/papers/art88/>; Harry Flechtner, *The CISG's Impact on International Unification Efforts: The UNIDROIT Principles of International Commercial Contracts and the Principles of European Contract Law*, in THE 1980 UNIFORM SALES LAW: OLD ISSUES REVISITED IN THE LIGHT OF RECENT EXPERIENCES 169, 190–97 (Franco Ferrari ed., 2003); Bridge, *supra* note 83, at 249–52.

201. See Viscasillas, *supra* note 200, at 309–14; Michael Bridge, *A Commentary on Articles 1–13 and 78*, in UNICTRAL DIGEST, *supra* note 32, at 235, 255; Emmanuel Gaillard, *La Distinction des Principes Généraux du Droit et des Usages du Commerce International*, in ETUDES OFFERTES À PIERRE BELLER 203 (1991); U.N. Conference on Trade & Dev., *Dispute Settlement: International Commercial Arbitration: Law Governing the Merits of the Dispute*, 25–26, UNCTAD/EDM/Misc.232/Add.40 (2005) (prepared by Jean-Michel Jacquet), available at [http://www.unctad.org/en/docs/edmmisc232add40\\_en.pdf](http://www.unctad.org/en/docs/edmmisc232add40_en.pdf); FTCA, Award No. 229/1996, June 5, 1997; ICC Arbitration Case No. 9333, 10 Int'l Comm. Arb. No. 2 at 102 (1999).

202. FTCA, Award No. T-9/07, Jan. 23, 2008.

203. Euro Interbank Offered Rate (EURIBOR) is the rate at which euro interbank term deposits within the euro zone are offered by one prime bank to another prime bank.



T-23/06 of September 15, 2008, the sole arbitrator expressly stated that the interest rate for late payment should be determined on the basis of the CISG general principles. Although the relevant principle itself was not clearly identified, it seems from the wording of the award that the arbitrator had the principle of full compensation in mind. Namely, upon examining the relevant provisions of the CISG and Serbian contract law, the law applicable by means of private international law, the arbitrator concluded that

[I]nterest for failure to pay money, i.e. statutory interest rate, is set as pre-determined amount of damages whose occurrence does not need to be specifically proven. Both CISG and LCT give the right to the creditor to seek further damages if this amount is not sufficient. Hence, the amount of interest rate should correspond to the amount of pre-determined actual damages which the creditor has suffered for debtor's failure to perform its obligation. When creditor does not receive performance of obligation when due it can be presumed that the damages he suffers as a consequence of such failure can be compensated by acquiring bank loan in the same amount as the amount due, at the average interest rate for short-term loans for the currency of payment.<sup>204</sup>

While we agree with the arbitrator's attempt in this case to resolve the issue of interest rate by application of the CISG general principles and agree with the definition of the purpose of interest, compensation for loss of use of money, we disagree with calculation of interest in the described manner. Firstly, had the purpose of interest been full compensation of the creditor, there would have been no reference to the general damages provision in Article 78 of the CISG. Hence, the interest is not there to necessarily fully compensate the creditor, although awarding interest may lead to such an outcome. Second, the application of the average bank lending rate could lead to overcompensation of the creditor. Therefore, the application of somewhat lower savings rate seems more appropriate to serve the needs that the right to interest intends to cover. Had the creditor actually had to borrow the money at the higher rate due to debtor's breach of contract, both Articles 74 and 78 would allow him to recover such amounts as damages provided that all preconditions for application of Article 74 are met, primarily that the creditor can prove with reasonable certainty the extent of his loss.

The proposed approach has been accepted in one FTCA award.<sup>205</sup> In this case Serbian claimant requested a "domicile" Euro rate. The arbitrator first noted that claimant is entitled to interest in accordance with Article 78 of the

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204. FTCA, Award No. T-23/06, Sept. 15, 2008.

205. FTCA, Award No. T-08/08, Jan. 28, 2009, available at <http://cisgw3.law.pace.edu/cases/090128sb.html>.

CISG and that “there is no need to examine [Seller]’s request in the light of any national law, but rather examine whether it is within the checks provided in Article 7 of the CISG,” since “the matter of interest rate is governed but not settled under the CISG.”<sup>206</sup> Consequently, claimant’s request was examined in the light of any checks that might be imposed by Article 7 of the CISG and the principles underlying the Convention, with special reference to international case law supporting such an approach. Two relevant principles were identified: (1) the principle of full compensation and (2) the principle prohibiting overcompensation of the creditor. The request for “domicile” interest rate was found to be in line with the above mentioned principles. The arbitrator further stated that:

[I]n order to determine the exact “domicile” (Serbian) rate for euro, one should not resort to Serbian law, since it regulates and is appropriate for local currency (RSD) rates only and would result in overcompensation if applied to sums denominated in Euro. Rather, it is more appropriate to apply interest rate which is regularly used for savings, such as short-term deposits in the first class banks at the place of payment (Serbia) for the currency of payment, as this represents rate on a relatively riskless investment. After examining interest rate figures and indicators on short-term Euro deposits in Serbia, the Sole arbitrator finds that the appropriate rate would be 6 percent annually.<sup>207</sup>

This approach is, to the best of our knowledge, novel in the international case law but, in our view, provides for uniform solution to the issue of interest rates under the CISG. What is more, this approach has already gained support by some leading scholars.<sup>208</sup>

It is worth mentioning a third case where the sole arbitrator did not resolve the issue of interest rate pursuant to CISG general principles, although he did classify the interest rate issue as being governed but not settled by the CISG.<sup>209</sup> Even though he listed the general principles of the CISG, *bona fides*, party autonomy, the foreseeability rule, the principle of cooperation, etc., the arbitrator did not find them sufficient to resolve the issue. Consequently, he consulted the rules of law applicable by virtue of the rules of private international law. However, in doing so, the arbitrator found that “. . . in accordance with *the principle of full compensation* the creditor is entitled to expect that the interest rate will be set at the rate that he would expect under

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206. *Id.*

207. *Id.*

208. See, e.g., John Y. Gotanda, *When Recessions Create Windfalls: The Problems of Using Domestic Law to Fix Interest Rates Under Article 78 CISG*, 13 VINDOBONA J. INT’L COM. L. & ARB. 229 (2009).

209. FTCA, Award No. T-02/00, Dec. 9, 2002.

the regulations of his country.”<sup>210</sup> It is somewhat surprising that the arbitrator did not opt for application of this principle within the framework of the CISG, given that it is undisputedly one of the general principles on which the CISG is based.

## XII. EXEMPTION FROM LIABILITY TO PAY DAMAGES

Article 79 of the CISG provides debtor with right to claim exemption from payment of damages if he can prove that his failure to perform is 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>211</sup>

Given the imposition of economic sanctions on trade with Yugoslavia (Serbia) in the 1990s it was not surprising to find debtors invoking this article in defense to claimant’s claim for damages for non-performance. However, in three out of four cases where a *vis major* defense was invoked, the tribunals erred in determining the appropriate substantive law and applied the provisions of the LCT instead of the CISG.<sup>212</sup> There is only one award where this question has been analyzed from the CISG perspective. However, even this case does not contribute significantly to the understanding of the operation of this article under the CISG. Namely, in award number T-8/06 of October 1, 2007, seller’s assertions justifying its non-performance of the loading of the first consignment and its transportation by occurrence of “the situation that represents *vis maior*” and “the oscillation in the level of the water mark” did not suffice to release the seller from the liability for non-performance. This conclusion was supported by the fact that the situation described by the seller in his letter as an obstacle to the performance of the contractual obligation did not *prima facie* meet the conditions regarding the notice set out in Article 79 of the CISG and the sales contract itself.

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210. *Id.* (emphasis added).

211. See Milutinović Milena, *Oslobodjenje od odgovornosti u medjunarodnoj prodaji robe* [Exemption from Liability in International Sales of Goods], 42 PRAVO I PRIVREDA 442 (2005) (Serb.); V. STOJILJKOVIĆ, *MEĐUNARODNO PRIVREDNO PRAVO* [INTERNATIONAL COMMERCIAL LAW, SPECIAL PART] 179–80 (2001) (Serb.); R. ĐUROVIĆ, A. ČIRIĆ, *MEĐUNARODNO TRGOVINSKO PRAVO—OPŠTI DEO* [INTERNATIONAL COMMERCIAL LAW, SPECIAL PART], Niš: Centar za publikacije Pravnog fakulteta, 50-2 (2005) (Serb.).

212. See FTCA, Award No. T-07/01, Feb. 21, 2002; FTCA, Award No. T-66/99, Oct. 15, 2001; FTCA, Award No. T-01/00, Dec. 7, 2000.

### XIII. CONCLUDING REMARKS

The survey of application of the CISG before the FTCA confirms both the importance of interpretation of the CISG in the light of its international character and the need to promote uniformity in its application. A great number of the cases we examined dealt with the issues which are neither particularly controversial, nor unique. However, on a few occasions the FTCA practice revealed factual patterns and controversies for which we could not find comparable foreign decisions and awards.

The first hurdle in applying the CISG in the FTCA practice is determining whether it is applicable. The percentage of correct decisions on this point steadily grew over the years. It is still notable, although hardly surprising, that erring tribunals almost always err in favor of the domestic law. Decisions where tribunals mistakenly applied the CISG where it should not have been applied are extremely rare.

A unique problem with respect to the application of the CISG in the region was caused by the need to examine the controversial effects of the dissolution of the SFRY to the succession of former Yugoslav republics to multilateral treaties, such as the CISG. In this respect, a particular tension was noted between the need to protect parties' legitimate expectations, on the one hand, and a country's belated filing of notification of succession to the CISG with retroactive application on the other. The Macedonian example has been given special attention as its notification of succession to the CISG was filed more than a decade after the dissolution of the SFRY.

Once the decision on the application of the CISG was made, there were several more obstacles to the correct application of its substantive provisions. Imprecise translations of the CISG dating back to ratification by former Yugoslavia created some glitches for those who did not consult any of the original versions. Another type of problem, which appears to be universal, was reflected in tribunals' tendency to treat the CISG 'in the spirit' of national law provisions.

Despite these occasional departures from the proper application and interpretation of the CISG, in most of the cases the CISG was correctly applied. Even situations where this has not been the case have usually been of minor importance and did not affect the final outcome. Finally, the increasing trend of invoking foreign case law in the FTCA awards gives reason to expect that the quality in the decision making process before the FTCA will further increase and that consulting FTCA case law will represent a fruitful source for any scholar and practitioner interested in the CISG jurisprudence.