The CISG

The CISG

A new textbook for students and practitioners

Peter Huber
Alastair Mullis

sellier.
european law
publishers

Peter Huber, Dr. iur., LL.M. (London),
Professor of Private Law, Private International Law and Comparative Law
at the Johannes Gutenberg-University Mainz (Germany);
present website: www.jura.uni-mainz.de/huber.

Alastair Mullis, LL.M. (Cantab),
Professor of Law at the University of East Anglia Norwich (England).

ISBN 978-3-86653-020-1

Die Deutsche Nationalbibliothek verzeichnet diese Publikation in der Deutschen Nationalbibliografie; detaillierte bibliografische Daten sind im Internet über http://dnb.d-nb.de abrufbar.

Gestaltung: Sandra Sellier, München. Herstellung: Karina Hack, München.
Druck und Bindung: Friedrich Pustet KG, Regensburg. Gedruckt auf säurefreiem, alterungsbeständigem Papier. Printed in Germany.

Preface

The purpose of this book is a didactic one: The book is meant to help students and practitioners to get a quick and easy-to-understand access to the 1980 UN Convention on the International Sale of Goods (CISG). In order to explain how the Convention works and to analyse the problems that may arise we have of course made reference to case law and academic writing. We do however not intend to give a comprehensive picture of case law and academic writing as this would have interfered with our prime objective to introduce the readers to the Convention.

Peter Huber has written § 1 to § 3 and § 9 to § 20 of the book, Alastair Mullis has written § 4 to § 8. We have of course discussed each other's contributions, but each of us is the sole author of his chapters.

We are immensely grateful to a lot of people for helping us to finish this project. We owe our particular thanks to: Markus Altenkirch, Jennifer Antomo, Ivo Bach, Niels Dabelow, Sarah Ott, Simone Rechel, Christoph Stieber, Johanna Wald.

Mainz and Norwich, June 2007

Peter Huber
Alastair Mullis

Preface by Professor Eric E. Bergsten

The United Nations Convention on Contracts for the International Sale of Goods, familiarly know as the CISG, has been an outstanding success. As of the time of writing, twenty seven years after the diplomatic conference, there are 70 States party. By way of comparison, 66 States had ratified the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards by 1985, i.e. twenty seven years after its diplomatic conference. One wonders whether 142 States will also have ratified the CISG after fifty years.

The parties to CISG come from every corner of the world. I personally found it striking that the first State to ratify the CISG was Lesotho and the most recent was Paraguay. No less striking is that on 11 December 1986 China, Italy and the United States submitted their instruments of ratification in a joint ceremony, thereby becoming the ninth, tenth and eleventh States to ratify. The CISG entered into force on the first day of the month one year later, 1 January 1988.

The CISG has also been an outstanding success in the legal publishing world. The Pace CISG website, http://cisgw3.law.pace.edu/, lists 8,000 articles and books in 28 languages. The website also contains 1,900 references to decisions of courts and arbitral tribunals. Anyone researching a CISG problem in depth cannot complain about a shortage of material.

Nevertheless, there is a feeling in some quarters that the CISG was a utopian dream that has not lived up to its promise to provide a uniform law for international sales of goods. One problem that is inherent in the international unification of private law is that there is no supreme court to give a uniform interpretation of the text. Such a court would be desirable given the wide diversity in legal conceptions in the States party. The problem was foreseen at the time of drafting the CISG. Art. 7(1) provides that "In the interpretation of this Convention, regard is to be had to its international and to the need to promote uniformity in its application …" UNCITRAL has endeavored to reduce the problem through its system of CLOUT abstracts of CISG cases. Furthermore, the extensive literature cited above permit lawyers, judges and arbitrators to be aware of the issues and how they have already been handled.

Another problem has been the desire of some lawyers to use the domestic law they have always known to govern their international sales rather than the

CISG. That is a perfectly understandable desire, but it is not feasible in an international transaction for the relevant law to be the domestic law of both parties. One argument sometimes raised, especially in the United States, is that the text is unfamiliar and there is not yet sufficient case law to clarify its meaning. Given the exceedingly large number of cases cited above, that can only mean that there have not been sufficient cases from that lawyer's jurisdiction.

Finally, the CISG is not taught in depth in the law faculties. That is a problem that will be difficult to overcome, given the pressure on the curriculum in all countries. One effort to overcome it is the Willem C. Vis International Commercial Arbitration Moot. More than 7,000 law students have taken part over the years. Almost all of them experienced the CISG for the first time in the Moot.

That brings us to the particular value of the book that Prof. Dr. Peter Huber and Prof. Alastair Mullis have written. In spite of all of the literature on the CISG cited above, there is a lack of a clear and simple exposition of the text for students and practitioners alike. That is the role of the current book, which it fills admirably. All of the issues that have been raised in the cases and the literature are considered, but without excessive detail. There are sufficient citations to sources for further research. This is a book that will do much to make the CISG an easily understandable text for all users, student and practitioner alike.

Table of Content

Preface *V*

Preface by Professor Eric E. Bergsten *VII*

Part 1:
Introduction and general issues

§ 1. Introduction

I. History and background of the CISG *2*
1. Ernst Rabel, UNIDROIT and the Hague Uniform Law of International Sales (ULIS) *2*
2. UNCITRAL and the 1980 Convention *3*

II. Structure of the CISG *4*

§ 2. General issues concerning the application of the convention

I. Interpretation of the Convention
1. Guidelines in Art. 7(1) CISG *7*
2. Standards of interpretation *9*

II. Working with the Convention *10*

III. Interpretation of declarations of the parties
1. General rule *12*
2. Specific issues *15*

IV. Usages and trade practices
1. Practices and usages by consent *16*
2. Relevant international trade usages *17*
3. Specific issues *18*

V. "Legal scope"
1. Basic principle *20*

2. Specific issues
a) Validity 21
b) Property 25
c) Personal injury 25
d) Tort 26
e) Precontractual liability 28
f) Limitation 29
g) Set off 30
h) Standard terms 30

VI. Gap filling
1. Basic principle 33
2. Use of the UNIDROIT Principles of International Commercial Contracts? 35
3. In particular: burden of proof 36

VII. Some general rules
1. Form requirements 37
a) Principle of informality 37
b) Exceptions 38
2. Communication risks 39
3. Further provisions 40

Part 2:
Scope of application of the Convention

§ 3. Rules on the scope of application

I. Outline 41

II. Contract of sale of goods
1. Goods 41
a) Mixed contracts 42
b) Companies 42
c) Software 43
2. Contract of sale
a) Basic principle 43
b) Goods to be manufactured (Art. 3(1) CISG) 44
c) Contracts with a service element 45
d) Contracts with a finance element 48
e) Distribution agreements 48
f) Private use and further exceptions in Art. 2 CISG 48

III. International character 49

IV. Connection to a Contracting State 50
1. Places of business in different Contracting States (Art. 1(1) lit. (a) CISG) 51
2. Private international law leading to the law of a Contracting State (Art. 1(1) lit. (b) CISG)
a) Mechanism of Art. 1(1) lit. (b) CISG 52
b) Importance of the forum 53
c) Effect of reservations under Art. 95 CISG 54
3. Summary 57

V. Temporal scope of application 59

VI. Party Autonomy
1. Opting out of the CISG
a) Validity of the derogation agreement 60
b) Content of the derogation agreement 62
c) Interpretation of the derogation agreement 62
d) Examples 63
2. "Opting in" to the CISG 65
3. Derogation from specific provisions of the CISG 66

VII. Application of the CISG by arbitral tribunals 66

Part 3:
Formation of the contract

§ 4. Rules on formation of contract

I. Introduction
1. Traditional model of offer and acceptance 69
2. Reservations against the application of Part II 69

II. The offer 70
1. Intention to be bound 71
2. Offer sufficiently definite
a) Necessary content 72
b) Implicit determination 73
c) Determinability 73
d) Power of determination 74
e) Determination of the price under Art. 55 CISG? 75

3. "Effective" offer 78
4. Offer not terminated
a) Withdrawal (Art. 15(2) CISG) 80
b) Revocation 80
c) Rejection of offer 84
d) Lapse of time 84

III. Acceptance
1. General overview 84
2. Indication of assent
a) General rule 85
b) Acceptance by silence? 85
c) Cross offers 86
d) Commercial letters of confirmation 87
3. Unqualified acceptance
a) The general rule 88
b) Modified acceptance as new offer (Art. 19 CISG) 88
c) The "battle of the forms" 91
4. Effective acceptance
a) General rule 95
b) Exception: acceptance without communication reaching the offeror (Art. 18(3) CISG) 95
c) Time for acceptance 96
aa) Time fixed 96
bb) Reasonable time 97
cc) Late acceptance 97
5. Withdrawal of the acceptance 100

IV. Conclusion of contract otherwise than by offer and acceptance 100

V. Modification of the contract 102

Part 4:
Obligations of the seller

§ 5. Delivery of goods and documents

I. Introduction 106

II. The obligation to deliver the goods
1. General overview 107
2. The meaning of "delivery" 107

3. The consequences of "delivery"
a) Delivery and payment *108*
b) Delivery and "taking delivery" *108*
c) Delivery and risk *108*
d) Liability for expenses *109*
4. Place of delivery *109*
a) Seller bound to deliver at particular place *110*
b) Contract of sale involving carriage of the goods (Art. 31 lit. (a) CISG) *110*
c) Delivery by placing the goods at the buyer's disposal (Art. 31 lit. (b), (c) CISG) *115*
d) Sale of goods in transit *118*
5. Associated duties
a) Duty to give notice to the buyer of the consignment *119*
b) Conclusion of contract of carriage *120*
c) Insurance of the goods: *121*
6. Time of delivery
a) Date for delivery fixed by or determinable from the contract (Art. 33 lit. (a) CISG) *122*
b) Period of time fixed or determinable from the contract (Art. 33 lit. (b) CISG) *123*
c) No time fixed for delivery (Art. 33 lit. (c)CISG) *125*

III. The seller's obligation to hand over documents
1. General rules *126*
2. Details
a) Time *128*
b) Place *128*
c) Cure *129*

IV. Transfer of property *129*

§ 6. Conformity of the goods

I. General outline *130*

II. Contractual conformity requirements (Art. 35(1) CISG) *130*
1. Contractual quantity *131*
2. Contractual quality *132*
3. Contractual description *132*
4. Packaging as required by the contract *134*

III. Conformity with the standards set out in Art. 35(2) CISG 134
1. Fitness for ordinary purpose (Art. 35(2) lit. (a) CISG)
a) Relationship to Art. 35(2) lit. (b) CISG 135
b) Average quality or reasonable quality? 135
c) Relevant standards: seller's state or buyer's state? 136
2. Fitness for particular purpose made known to the seller 138
3. Correspondence with sample or model 139
4. Packaging 141

IV. Exclusion of liability (Art. 35(3) CISG) 142

V. Relevant time
1. The general rule (Art. 36(1) CISG) 144
2. Lack of conformity after the risk has passed (Art. 36(2) CISG) 145

VI. Seller's right to cure before delivery date (Art. 37 CISG) 146

§ 7. Examination and notice requirements concerning the conformity of the goods

I. Introduction 147

II. Examination of the goods (Art. 38 CISG)
1. Introduction: interrelation between examination and notice requirement 149
2. Method of examination 150
3. Time period for examination
a) Starting point 152
b) Duration 154

III. Notice of lack of conformity (Art. 39 CISG)
1. Introduction 156
2. Requirements concerning the notice 156
3. Time limit for notice under Art. 39(1) CISG
a) Starting point for the time limit 159
b) Duration of the "reasonable time" 159
4. Time limit for notice under Art. 39(2) CISG 162
5. Dispatch of the notice 163
6. Consequences of failure to give notice 163
7. Exceptions to the requirement to give notice
a) Art. 40 CISG 164
b) Art. 44 CISG 165
c) Waiver 167

§ 8. Third party rights

I. Introduction *169*

II. Third party rights other than industrial and intellectual property rights (Art. 41 CISG)
1. Rights *170*
2. Claims *171*
3. Specific issues *173*

III. Industrial or intellectual property rights (Art. 42 CISG) *173*
1. Industrial or intellectual property *174*
2. Territorial limitations *175*
3. Seller's actual or "imputed" knowledge *176*
4. Exclusion of liability *176*

IV. Notice requirements (Art. 43, 44 CISG) *177*

Part 5:
Remedies of the buyer

§ 9. Outline of the buyer's remedies

I. General outline of the buyer's remedies under Art. 45 et seq. CISG
1. Performance *179*
2. Avoidance of the contract *180*
3. Reduction of the purchase price *180*
4. Damages *180*
5. Right to suspend performance *181*

II. The fundamental objective: saving the contract and avoiding restitution
1. An international trend *181*
2. Policy considerations *182*
3. Instruments used in order to save the contract *183*
4. The position of the CISG *184*

§ 10. Performance

I. General requirements for performance claims
1. Breach of contract *185*

2. Domestic law defence (Art. 28 CISG)
a) Claims for performance 186
b) Court 187
c) Reference to domestic law 187
d) Mandatory character 190
3. Inconsistent remedy
a) Avoidance 191
b) Damages 192
c) Price reduction 192
4. Exemption under Art. 79 CISG and cases of impossibility
a) Application of Art. 79 CISG to performance claims? 192
b) Hardship and impossibility of performance 193
5. Art. 80 CISG 196
6. Declaration 196

II. Substitute delivery in the case of non-conforming goods (Art. 46(2) CISG) 196
1. Non-conformity
a) Basic principle 197
b) "Aliud" 197
c) Defects in title 198
d) Partial delivery 198
2. Fundamental breach 199
3. Time limit 200
4. Return of non-conforming goods 201
5. Specific issues
a) Substitute delivery and sale of specific goods 202
b) Costs and place of performance 202
c) Choice between substitute delivery and repair 203
d) Substitute delivery before transport? 204

III. The right to require repair, Art. 46(3) CISG
1. Preconditions
a) General requirements and non-conformity 205
b) Reasonableness 205
c) Time limit 206
2. Repair 206

IV. The general claim for performance 207

V. Burden of proof 207

§ 11. Avoidance of the contract

I. Introduction *209*

II. Outline: Preconditions for avoidance
1. Breach of contract by the seller *210*
2. Ground of avoidance *210*
3. Declaration of avoidance *210*
4. Time limit *211*
5. Possibility to make restitution of the goods *211*
6. No defence under Art. 80 CISG *213*

III. Avoidance for fundamental breach
1. General concept of fundamental breach *213*
   a) Substantial deprivation *214*
   b) Foreseeability *215*
2. Criteria for assessing the fundamental character of the breach *216*
   a) Contractual agreement *217*
   b) Seriousness of the breach *217*
   c) Seller's right to cure? *217*
   d) Reasonable use test? *218*
3. Seller's right to cure
   a) Right to cure under Art. 48(1) CISG *218*
   b) Right to cure under Art. 48(2) CISG *220*
   c) Interaction between right to cure and avoidance *221*
4. Specific case scenarios
   a) Delay in delivery *225*
   b) Definite non-delivery *227*
   c) Delivery of non-conforming goods *227*
   d) Third party rights *232*
   e) Documents *232*
   f) Breach of ancillary obligations *233*
5. Fundamental breach and avoidance of uncertainty in commercial law *233*

IV. Avoidance using the "Nachfrist"-procedure
1. Function of Art. 49(1) lit. (b) CISG *234*
2. Non-delivery
   a) General definition of non-delivery *235*
   b) Delivery where goods have not been moved yet? *236*
   c) Documents *236*
3. Details concerning the "Nachfrist"-procedure
   a) "Nachfrist" under Art. 47 CISG *237*
   b) Absence of delivery or refusal to deliver *238*

V. Time limits
1. Structure of Art. 49(2) CISG 239
2. Time limit in cases of late delivery (Art. 49(2) lit. (a) CISG) 240
3. Time limit for other types of breach (Art. 49(2) lit. (b) CISG) 241

VI. Burden of proof 242

VII. Effects of avoidance
1. Release from the respective obligations 243
2. Duty to make restitution
a) Place of performance 244
b) Cost of restitution 245
3. Duty to account for benefits 245
4. Seller's duty to pay interest 246

§ 12. Reduction of the price

I. Introduction 247

II. Non-conformity 247

III. Priority of the seller's right to cure 249

IV. Declaration 250

V. Irrelevant issues 250

VI. Burden of proof 251

VII. Effects of price reduction
1. General effects 251
2. Calculation 251
a) Method 251
b) Relevant time and place 252
3. Price reduction to zero? 254

VIII. Price Reduction and Damages 254

§ 13. Damages

I. Outline 256

II. Requirements for the buyer's claim for damages 257

III. Breach of contract 257

IV. Exemption under Art. 79 CISG
1. Outline 257
2. Basic rule (Art. 79(1) CISG)
   a) Impediment beyond seller's control 259
   b) Unforeseeability 262
   c) Unavoidability 262
3. Liability for third parties 263
4. Consequences
   a) Exemption from liability for damages 264
   b) Contractual penalty clauses 265
   c) Duty to inform 265

V. Exemption under Art. 80 CISG
1. Outline 265
2. Joint responsibility 267

VI. The general rule: damages under Art. 74 CISG
1. General rules
   a) Compensation for loss 268
   b) Types of compensable loss 268
   c) Compensation in money 269
   d) Causation 270
   e) Calculation of loss 270
2. Foreseeability (contemplation rule)
   a) Purpose 271
   b) Possible consequence of the breach 272
   c) Standard 272
   d) Normative criteria 274
3. Case scenarios
   a) Defect-related losses 274
   b) Loss of resale profit 276
   c) Loss of production 277
   d) Damage to buyer's property 277
   e) Loss resulting from buyer's liability 277
   f) Wasted expenses 278

g) Legal costs 278
h) Loss of customers and loss of good will 279
4. Specific issues
a) Third parties 280
b) Currency 280
c) Place of performance for payment of damages 281
d) Burden of proof 281
5. Damages and avoidance 282

VII. Specific methods of calculation (substitute transaction)
1. Outline 283
2. Concrete calculation of damages (Art. 75 CISG)
a) Requirements 283
b) Consequences 287
3. Abstract calculation of damages (Art. 76 CISG) 287
a) Requirements 288
b) Consequences 288

VIII. Mitigation of loss
1. Purpose and scope of application 289
2. Reasonable measures 290
3. Consequences 291

§ 14. Specific issues

I. Partial breach of contract
1. Scope of application 293
2. "Narrowing the focus" to the breached part 294
3. Avoidance of the entire contract 295
4. Art. 51 CISG and instalment contracts 295

II. Early delivery 296

III. Delivery of excess quantity
1. Scope of application 297
2. Refusal to take delivery 298
3. Taking delivery 301

Part 6:
Obligations of the buyer, passing of risk and remedies of the seller

§ 15. Obligations of the buyer and passing of risk

I. Outline *303*

II. Payment *303*
1. Determination of the price
a) Failure to determine the price *304*
b) Validity requirement *305*
2. Time of payment *307*
3. Place of payment
a) Contractual agreement and trade usages *309*
b) Concurrent obligations (Art. 57(1) lit. (b) CISG) *310*
c) Default rule (Art. 57(1) lit. (a) CISG) *311*
d) Specific examples *311*
e) Importance of the place of payment *313*
f) Application of Art. 57 CISG to other monetary obligations *313*
4. Risk *314*
a) Time of passing of risk *315*
b) Consequences *316*
c) Exceptions *317*

III. Taking delivery *318*

§ 16. Remedies of the seller

I. Outline of the system of remedies *321*

II. Performance
1. Buyer's breach *322*
2. Limitations of the claim
a) Art. 62 CISG *322*
b) Art. 28 CISG *323*
c) Further limitations *324*
3. Burden of proof *324*

III. Avoidance
1. Outline *325*
2. Avoidance for fundamental breach
a) Payment *326*
b) Taking delivery *328*

c) Other obligations 328
3. Avoidance under the "Nachfrist"-procedure
a) Scope of application 329
b) Fixing the "Nachfrist" 330
c) Fruitless expiry of the "Nachfrist" 331
4. Declaration of avoidance 332
5. Time limits 332
6. Burden of proof 334

IV. Damages
1. Outline 334
2. Specific issues
a) Late payment 334
b) Lost volume 335
c) Other issues 336

Part 7:
Specific issues

§ 17. Anticipatory breach

I. Outline 339

II. Right to suspend performance (Art. 71(1), (3) CISG) 339
1. Threat of a breach 340
2. Origin of the breach (lit. (a) and (b)) 341
3. Right to suspend 342
4. Notice 343
5. Damages 343

III. Right of stoppage (Art. 71(2), (3) CISG) 344

IV. Right to avoid the contract (Art. 72 CISG)
1. Fundamental breach 345
2. Standard of probability 345
3. Examples 346
4. Notice 347
5. Avoidance 348

§ 18. Instalment contracts

I. Outline 349

II. Partial avoidance (Art. 73(1) CISG) 349

III. Avoidance for future instalments (Art. 73(2) CISG)
1. Breach with respect to one instalment 351
2. Likelihood of a future fundamental breach 351
3. Declaration of avoidance within reasonable time 352
4. Examples 352

IV. Buyer's right to avoid the entire contract in case of interdependence 353

V. Art. 73 CISG and other provisions
1. Rules on anticipatory breach 354
2. Art. 73 and 49 CISG 355

§ 19. Interest

I. Preconditions 356

II. Rate of interest 358

III. Practical details 360

§ 20. Preservation of goods

I. Duty to preserve the goods 362
1. Duty of the seller 362
2. Duty of the buyer 363

II. Preservation measures 364

Bibliography 365

United Nations Convention on Contracts for the International Sale of Goods (1980) 369

Table of Abbreviations 395

Index 397

Part 1:
Introduction and general issues[1]

§ 1. Introduction

Today, international sales contracts are frequently governed by the 1980 UN Convention on Contracts for the International Sale of Goods (CISG). The CISG is in force in more than 60 States from all parts of the world, among them both industrial nations and developing states. It has been widely applied in international commercial transactions in the past twenty years with more than 1500 decisions by state courts and arbitral tribunals having been reported so far.[2] It therefore seems fair to say that the CISG has in fact been one of the success stories in the field of the international unification of private law.[3]

The CISG applies to contracts of sale of moveable goods between parties which have their place of business in different states when these States are Contracting States (Art. 1(1) lit. (a) CISG) or when the rules of private international law lead to the application of the law of a contracting state (Art. 1(1) lit. (b) CISG).[4] Certain types of contracts are excluded from its scope of application by virtue of Art. 2 CISG. By way of example, most consumer sales will not fall under the CISG (cf. Art. 2 lit. (a) CISG).

With regard to the substantive issues, the CISG basically governs three areas: the conclusion of the contract, the obligations of the seller including the respective remedies of the buyer and the obligations of the buyer including the respective remedies of the seller. The CISG therefore provides both a

---

1 For a shortened version of this Part see *P. Huber*, Internationales Handelsrecht (IHR) 2006, 228.

2 See for instance the following databases: www.cisg.law.pace.edu/; www.unilex.info; www.cisg-online.ch; www.uncitral.org/uncitral/en/case_law.html.

3 See for example *Zimmermann*, Rabels Zeitschrift für ausländisches und internationales Privatrecht (RabelsZ) 71 (2007), 1. But see also *Reimann*, Rabels Zeitschrift für ausländisches und internationales Privatrecht (RabelsZ) 71 (2007), 115.

4 Several states have however declared a reservation against the application of the rule in Art. 1(1) lit. (b) CISG under Art. 95 CISG.

substantive "law of sales" and a regulation of certain issues of the general law of contract, albeit limited to those international sales transactions which fall under its scope of application.

I. History and background of the CISG

The CISG is the result of a rather long process which started in the 1920s and was initially guided by the International Institute for the Unification of Private Law (UNIDROIT) and the Hague Conference for Private International Law, then by the United Nations Commission on International Trade Law (UNCITRAL).[5]

1. Ernst Rabel, UNIDROIT and the Hague Uniform Law of International Sales (ULIS)

The story of the international unification of the law of sales contracts is inextricably linked to the Austrian scholar and academic Ernst Rabel (1874-1955). Rabel not only prepared the basis for any comparative study of the modern law of sales in his epochal treatise *"Das Recht des Warenkaufs"*[6], but he also initiated the process of world-wide harmonisation of the law of (international) sales. In 1928, Ernst Rabel suggested to the newly established (1926) UNIDROIT Institute that it adopt the unification of the law of international sales of goods as one of its first projects. One year later, Rabel submitted a preliminary report to UNIDROIT and in 1930 UNIDROIT set up a committee charged with the elaboration of a uniform law for international sales. Between 1930 and 1934 the committee, of which Ernst Rabel had since become a member, met eleven times and in 1934 it submitted a preliminary draft,[7] which was, of course, considerably influenced by the comparative studies on the law of sales which Rabel and his colleagues at the Berlin Institute for international and foreign private law had undertaken. After comments from member states of the League of Nations, the Governing Council of UNIDROIT adopted in 1939 a revised version of the draft.

---

5 For a short account see *Bonell*, in: Bianca/Bonell, Commentary, 'Introduction' para. 3 et seq. See also *P. Huber*, in: Reimann/Zimmermann (eds.), The Oxford Handbook of Comparative Law, 2006, p. 938 et seq.

6 *Rabel*, Das Recht des Warenkaufs, Vol. 1 (1936), Vol. 2 (1957).

7 Rabel could, however, not attend the final session in 1934, because Germany had in the meantime left the League of Nations, cf. *Rabel*, Der Entwurf eines Einheitlichen Kaufgesetzes, Rabels Zeitschrift für ausländisches und internationales Privatrecht (RabelsZ) 9 (1935), 3 et seq.

The Second World War interrupted the work on the harmonisation of international sales law, but in 1951 the government of the Netherlands convened a Conference in The Hague which appointed a special Sales Commission. Ernst Rabel – now living in the U.S. – was a member of this Commission and again had a considerable impact on its work until his death in 1955. The Sales Commission produced two drafts which were generally well received by the interested authorities and in 1964 a Diplomatic Conference was convened in The Hague which adopted two Conventions: the Convention on a Uniform Law of International Sales (ULIS) and the Convention on a Uniform Law on the Formation of Contracts for the International Sale of Goods (ULFC). Both Conventions entered into force in 1972. They proved however unsuccessful as only a very limited number of (mostly European) states ratified them and they were not widely applied in international trade.[8]

2. UNCITRAL and the 1980 Convention

While the process of ratification of ULIS and ULFC was still pending, a new player entered the field of the international harmonisation of commercial law: the United Nations Commission on International Trade Law (UNCITRAL) which was established in 1966. After consulting the Member States of the UN on their assessment of both Hague Conventions, UNCITRAL decided in 1968 to set up a Working Group in order to modify the Conventions or to produce a new text which would have a better chance of being accepted world-wide. The Working Group in 1978 submitted a Draft Convention (the "New York Draft") which covered both the specific rules on sales and the rules on the formation of a sales contract and in the same year the UN decided to convene a Diplomatic Conference on this matter.

The Diplomatic Conference took place in Vienna in spring 1980. After intense deliberations and several modifications of the New York Draft the Conference finally adopted the 1980 UN Convention on Contracts for the International Sale of Goods (CISG, often called Vienna Convention). The CISG entered into force in January 1988 for eleven states; since then the number of contracting states has been steadily growing.[9]

---

8 *Schlechtriem*, in: Schlechtriem/Schwenzer, Commentary, 'Introduction' para. 1; *Bonell*, in: Bianca/Bonell, Commentary, 'Introduction' para. 1.2.

9 For the history of the CISG see: *Schlechtriem*, in: Schlechtriem/Schwenzer, Commentary, 'Introduction' para. 1 et seq. (with further references).

II. Structure of the CISG

The Convention is divided into four parts:

(1) The first part (Art. 1-13 CISG) contains rules on its sphere of application (Chapter I, Art. 1-6 CISG) and a number of general provisions (Chapter II, Art. 7-13 CISG).

(2) The second part (Art. 14-24 CISG) deals with the formation of the contract.

(3) The third part (Art. 25-88 CISG) is by far the most comprehensive part of the Convention. It is entitled "Sale of Goods" and provides the actual "sales law" of the Convention. It is subdivided into five chapters:

Chapter I (Art. 25-29 CISG) contains some general provisions which may be relevant throughout the entire sales law,[10] in particular the definition of the notion of "fundamental breach" which will be relevant in particular as a precondition to the availability of certain remedies including the right to avoid the contract (cf. Art. 49, 64, 72 et seq. CISG).

Chapter II (Art. 30-52 CISG) deals with the obligations of the seller. After the general rule in Art. 30 CISG setting out the obligations of the seller in broad terms, Section I (Art. 31-34 CISG) deals with the delivery of the goods and the handing over of documents. Section II (Art. 35-44 CISG) deals with the conformity of the goods and with third party claims, and finally, Section III (Art. 45-52 CISG) contains the core element of every sales law, the buyer's remedies for breach of contract by the seller.

Chapter III (Art. 53-65 CISG) has a similar structure: Art. 53 CISG states the buyer's obligations in a general way. Section I (Art. 54-59 CISG) deals with the obligation to pay the price. Section II (Art. 60 CISG) deals shortly with the obligation to take delivery. Section III (Art. 61-64 CISG) governs the seller's remedies for breach of contract by the buyer.

10 In the course of this book these provisions will not be dealt with as one separate chapter, but will be mentioned where they become relevant.

Chapter IV (Art. 66-70 CISG) deals with the passing of risk. This section is closely linked to the buyer's obligation to pay the price and will therefore be dealt with in the chapter on the payment obligation.

Chapter V (Art. 71-88 CISG) contains provisions common to the obligations of the seller and of the buyer. Section I (Art. 71-73 CISG) deals with anticipatory breach and instalment contracts. Section II (Art. 74-77 CISG) contains the extremely important rules on damages; this section is closely linked to Section IV (Art. 79-80 CISG) which governs the exemptions from the strict liability for damages that the Convention imposes on the parties. Section III (Art. 78 CISG) contains a short (and fragmentary) rule on interest. Section V (Art. 81-84 CISG) governs the effects of an avoidance of the contract and Section VI (Art. 85-88 CISG) deals with the preservation of the goods.

(4) The fourth part of the Convention (Art. 89-101 CISG) contains the public international law elements of the Convention which deal in particular with the details of ratification etc., with possible reservations against certain parts or provisions of the Convention and with the entry into force of the Convention. These provisions will not be dealt with in detail in this book. Suffice it to give a short outline of some of these provisions:

Art. 92 CISG provides that a Contracting State may declare (up to a certain moment in time) that it will not be bound by Part II (i.e. the formation rules in Art. 14-24 CISG) or by Part III (i.e. the sales rules in Art. 25-88 CISG) of the Convention. Such a reservation has been made by several Scandinavian states with regard to Part. II; see in more detail below p. 69 et seq.[11]

Art. 94 CISG gives those Contracting States which have reached a certain degree of (regional) unification of their sales laws or contract laws the possibility to declare that the Convention is not to apply to contracts of sale or their formation where the parties have their places of business in those states. Several Scandinavian states have made such a declaration.[12]

Art. 95 CISG permits the Contracting States to declare (up to a certain moment in time) that it will not be bound by Art. 1(1)(b) CISG; for more details on this provision see below p. 52 et seq. Art. 96 CISG allows certain reservations concerning the provision on form requirements (Art. 12 CISG); for more detail see below p. 38 et seq. Art. 97 CISG provides rules on the

11 For a list of Reservation States see www.uncitral.org.

12 For a list of Reservation States see www.uncitral.org.

technical details of making a reservation and on the withdrawal of a reservation. Art. 98 CISG states that no reservations are permitted except those expressly authorised in the Convention.

Art. 90 CISG provides that the CISG 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 which are parties to such agreement. Art. 99 CISG contains provisions on the entry into force of the Convention and on the relation with the Hague Uniform Sales laws (see above p. 3). Art. 100 CISG is concerned with the temporal scope of application; see below p. 59. Art. 101 CISG contains rules on how to denounce the Convention. The Final Clause states the official languages of the Convention (Arabic, Chinese, English, French, Russian, Spanish).

§ 2. General issues concerning the application of the convention

I. Interpretation of the Convention

As the CISG is an international legal instrument, the issue of interpretation requires special attention. The Convention itself sets out some guidelines in Art. 7(1) CISG (see below 1.) which have to be taken into account when trying to identify the standards of interpretation that are admissible (see below 2.).

1. Guidelines in Art. 7(1) CISG

Art. 7(1) CISG provides a rule on the interpretation of the Convention which states that 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. This rule gives three guidelines for interpreting the Convention:

The first guideline is its *international character*. In the first place, therefore, the Convention has to be interpreted autonomously. This means that words or phrases in the CISG should not simply be regarded as having the same meaning as identical words or phrases that may exist in the domestic legal system. They should instead be given a "CISG-meaning", based on the structure and the underlying policies of the Convention as well as on its drafting and negotiating history. Of course, this autonomous interpretation may lead to the result that the CISG-term actually has the same meaning as a corresponding domestic term. One should, however, not jump to that conclusion too easily, but only after a careful analysis.[13]

The second guideline is the need to promote *uniformity* in the application of the Convention. The ideal would of course be a situation in which every court or tribunal that has to apply the CISG would interpret its provisions in exactly the same way and with the same results. In practice, however, this

[13] See in more detail *Schlechtriem*, in: Schlechtriem/Schwenzer, Commentary, Art. 7 para. 10 et seq.

aim is hard, if not impossible, to realize, in particular because there is no supranational court having the power to decide with binding effect on the correct interpretation of the Convention. The courts should, however, try to take into account foreign case law (and academic writing) as persuasive authority when interpreting the CISG.[14] In fact, the relevant material is being made available by several databases and publications which are easily accessible (cf. in more detail below p. 10 et seq.) so that there is at least a reasonable basis for complying with the uniformity guideline. Indeed, some courts have been particularly willing to do so.[15]

The third guideline is the observance of *good faith* in international trade. The meaning of this principle is not entirely clear.[16] The first problem that arises is how to find the relevant standards of "good faith". Given the principle of autonomous interpretation, it seems clear that one should not simply transfer domestic good faith concepts (of which state anyway?) into the Convention. In theory, it may be possible, however, to discern from usages and trade practices (which the Convention recognises in principle, cf. Art. 9 CISG), from other international instruments and from case law and academic writing certain standards concerning fair and reasonable behaviour in international trade relations. The practical application of that idea will, however, prove difficult.

The second problem that arises with regard to the "good faith" reference is to determine its exact purpose. It is submitted that the reference to good faith should not be used as a "super-tool" to override the rules and policies of the Convention whenever one regards the solution to a particular case or problem as inadequate. Art. 7(1) CISG actually grants the good faith principle a rather limited role as one of several guidelines that can be used when interpreting the Convention. The good faith principle is therefore not established as a sort of "super-rule" towering over the ordinary provisions of the CISG, but rather it has has a more limited function in the process of finding out what the CISG states. In the author's opinion, it is conceivable that the good faith guideline may influence the concrete result of the interpretation of a provision where the other methods of interpretation offer differing options. All in all, however, it is submitted that the real practical impact of the good faith principle will be rather limited.

---

14 *Schlechtriem*, in: Schlechtriem/Schwenzer, Commentary, Art. 7 para. 12.

15 Thus for instance some of the Italian decisions contain an impressive amount of comparative and international sources, e.g. (Italian) Tribunale di Vigevano 12 July 2000, CISG-Online No. 493.

16 See *Schlechtriem*, in: Schlechtriem/Schwenzer, Commentary, Art. 7 para. 17 et seq.

2. Standards of interpretation

Taking the guidelines of Art. 7(1) CISG into account, it is clear that the forum state should not simply refer to its domestic standards when interpreting the Convention. On the other hand, recent studies[17] have shown that despite certain differences in terminology many legal systems use similar standards or tools when interpreting statutory texts.

In the author's opinion the following matters may be relevant when interpreting the Convention, always on the understanding that they are applied with due respect for the guidelines of Art. 7(1) CISG, and in particular for the principle of autonomous interpretation and for the international character of the Convention: the wording of the provision (in particular in the official languages[18] of the Convention, i.e. Arabic, Chinese, English, French, Russian and Spanish, with possibly a slight preference for English as being the dominating language at the Vienna Conference[19]); the drafting and negotiating history, in particular the "Travaux Préparatoires"[20]; the purpose of the provision and the underlying policy; the position of the provision within the framework of the Convention (systematic approach).

The use of comparative legal analysis when interpreting the Convention raises intricate questions. As a starting point it is submitted that one should be rather careful in this respect.[21] The CISG is not necessarily the common denominator of an exercise in comparative law, but the result of a political negotiation process that aimed at establishing a workable and well-suited instrument for international sales. Having said that, it is of course not impossible that comparative legal analysis may play a role in interpreting the Convention, for instance where a particular rule has been transferred into the Convention from one or several legal systems.

---

17 See in particular *Vogenauer*, Die Auslegung von Gesetzen in England und auf dem Kontinent (2 volumes), 2001; on the interpretation of uniform law see also *Gruber*, Methoden des internationalen Einheitsrechts, 2004.

18 Cf. the final clause of the Convention.

19 *Schlechtriem*, in: Schlechtriem/Schwenzer, Commentary, Art. 7 para. 21 et seq.

20 See for instance the publications in the Official Records, in the UNCITRAL Yearbooks and on www.uncitral.org; www.cisg.law.pace.edu.

21 For a rather cautious approach see also *Schlechtriem*, in: Schlechtriem/Schwenzer, Commentary, Art. 7 para. 26.

II. Working with the Convention

In the light of the principles of autonomous and internationally-orientated interpretation it may seem at first sight rather complicated to work with the Convention. However, the task is made considerably easier by an extremely well developed system of databases and academic literature structuring the masses of material.

Numerous databases offer valuable services to lawyers having to apply the CISG. It is obviously a matter of personal preferences which of the databases one wants to use (primarily). In the author's experience, the following databases have been extremely helpful:

Pace Database (www.cisg.law.pace.edu): offering structured information on case law, literature, "Travaux Préparatoires" (e.g. the so-called "Secretariat Commentary"), the status (Contracting States) etc. Many of the foreign decisions are translated into English and the site contains a large number of articles in full text.

CISG-Online (www.cisg-online.ch), offering different search forms on case law and a similar (but somewhat more limited) content than the Pace Database. The advantage of this database is that every decision is numbered individually so that they can be easily identified. This is the reason why this book quotes the decisions simply by reference to their CISG-Online Number (where available). CISG-Online also offers information on printed versions of the decisions and cross-references to English translations on Pace-Database.

UNITRAL Database (www.uncitral.org), featuring CLOUT (www.uncitral.org/uncitral/en/case_law.html), the official case law database of UNCITRAL which provides abstracts of decisions rather than the full decision. The site also provides an up-to-date list of Contracting States and other relevant issues (www.uncitral.org/uncitral/en/uncitral_texts/sale_goods/1980CISG_status.html).

Autonomous network of CISG Databases (www.cisg.law.pace.edu/network.html): A network of national or regional databases on the CISG.

A very useful instrument for finding relevant case law on the CISG is the UNCITRAL Digest which presents an overview of relevant case law on every

article of the CISG.[22] The Digest has been prepared by eminent scholars in this area. The Digest tries to limit itself to simply referring to the content of decisions without trying to evaluate or criticise them. A draft of it (the so-called Draft Digest) has been published, however, together with the proceedings of a Conference at the University of Pittsburgh where scholars (including the persons charged with drafting the Digest) commented on the Draft Digest and on the case law referred to there.[23]

A good reference for important case law on the CISG is the new casebook "International Sales Law", edited by Ingeborg Schwenzer and Christiana Fountoulakis (2007).

Recently a private initiative of eminent scholars in the field has founded the "CISG-Advisory Council". Its aim is to promote the uniform application of the CISG by issuing opinions relating to the interpretation and application of the Convention on request (for instance of international organizations, professional associations and adjudication bodies) or on its own initiative. As of May 2007 the CISG-AC has issued six opinions.[24] The opinions of the CISG-AC are regularly published in journals (for instance Internationales Handelsrecht (IHR)[25], a journal which specialises on the CISG and related areas) and on the relevant websites (e.g. Pace, CISG-Online).

Another rewarding source for interpreting the CISG are commentaries. The leading commentaries published in English are:

- Peter Schlechtriem / Ingeborg Schwenzer (Editors); Commentary on the UN Convention on the International Sale of Goods (CISG); 2nd ed. (2005).
- John Honnold, Uniform Law of International Sales, 3rd ed. (1999).
- Cesare Massimo Bianca / Michael Joachim Bonell (Editors); Commentary on the International Sales Law; The 1980 Vienna Sales Convention; (1987).

---

22 The Digest is available under: www.uncitral.org/uncitral/en/case_law/digests/cisg.html.

23 See Ferrari/Flechtner/Brand, The Draft UNCITRAL Digest and Beyond, 2004.

24 For more detail see the introductory article by the Secretary of the CISG-AC, *Loukas Mistelis*: www.cisg.law.pace.edu/cisg/CISG-AC.html#1.

25 Published by Sellier. European Law Publishers.

III. Interpretation of declarations of the parties

1. General rule

Art. 8 CISG provides rules on how to interpret statements, declarations or conduct of the parties. The wording of this provision only refers to the interpretation of the parties' individual statements. It is submitted, however, that they should also apply to the interpretation of "the contract" as such, i.e. to determine its content.[26]

The first step in the interpretation process is a subjective approach which is contained in *Art. 8(1) CISG*: Statements or 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. The second part of the provision is very important: It means that the subjective intent of the declaring party will only be relevant in two situations: First, where the other party knew it. This would amount to a "subjective meeting of the minds" and it is submitted that in such a case there will be no objective modification. Thus, if both parties mean the same thing although – objectively – they used the wrong expression for it, their common intention will prevail irrespective of what an objective outsider might have understood ("falsa demonstratio non nocet").[27] The second situation where the subjective intent of the declaring party will be relevant is where the other party "could not have been unaware" of it. By using that term, the Convention uses an objective filter in order to protect the other party.[28] It is submitted that the term "could not have been unaware" is equivalent to gross negligence.[29]

If Art. 8(1) CISG is not applicable (e.g. because the real intent of the declaring party cannot be discerned), *Art. 8(2) CISG* provides for an objective test. Under Art. 8(2) CISG, the standard of interpretation is the understand-

---

26 *Ferrari*, in: Ferrari/Flechtner/Brand, The Draft UNCITRAL Digest and Beyond, p. 175 et seq.; *Schmidt-Kessel*, in: Schlechtriem/Schwenzer, Commentary, Art. 8 para. 3. For an example in the practice of the courts see (Swiss) Bundesgericht 22 December 2000, CISG-Online No. 628.

27 *Ferrari*, in: Ferrari/Flechtner/Brand, The Draft UNCITRAL Digest and Beyond, p. 177; *Schmidt-Kessel*, in: Schlechtriem/Schwenzer, Commentary, Art. 8 para. 22.

28 *Ferrari*, in: Ferrari/Flechtner/Brand, The Draft UNCITRAL Digest and Beyond, p. 177.

29 *Magnus*, in: Staudinger Kommentar zum Bürgerlichen Gesetzbuch, Art. 8 para. 12; *Ferrari*, Internationales Handelsrecht (IHR) 2003, 10, 12 (pointing out correctly that the relevant time for assessing whether there was gross negligence should be the moment when the declaration becomes effective).

ing that a reasonable person of the same kind as the other party would have had in the same circumstances.[30] As it will often be difficult to prove the actual intent of the declaring party (let alone a common intent of both parties), Art. 8(2) CISG will be considerably more important in practice than Art. 8(1) CISG.[31] The standard set in Art. 8(2) CISG is that of a reasonable person in the other party's shoes.[32] As a consequence, it may be irrelevant how the adressee in question actually understood the declaration (or the conduct).[33]

Irrespective of whether the subjective rule or the objective rule applies, *Art. 8(3) CISG* identifies certain elements that should be given due consideration in determining the intention of the parties. Thus, the negotiations, practices which the parties have established between themselves, usages and any subsequent conduct of the parties may all be relevant. Two points deserve specific attention in this respect:

First, the fact that the negotiations may be taken into account shows that the CISG neither recognises nor allows the so-called *parol evidence rule* which is part of the law of several Common Law countries and which prevents the judge from taking into account extrinsic evidence (like oral statements or previous correspondence) if the contract was concluded in writing.[34] The opinion held by most academics [35] and several courts that have considered the issue[36] is

---

30 For examples of the application of Art. 8(2) CISG in practice see *Ferrari*, in: Ferrari/Flechtner/Brand, The Draft UNCITRAL Digest and Beyond, p. 181 et seq. and *UNCITRAL Digest* on Art. 8.

31 See *Ferrari*, in: Ferrari/Flechtner/Brand, The Draft UNCITRAL Digest and Beyond, p. 178 et seq. with numerous references to case law; *Ferrari*, Internationales Handelsrecht (IHR) 2003, 10, 12; *Schmidt-Kessel*, in: Schlechtriem/Schwenzer, Commentary, Art. 8 para. 19; *Honnold*, para. 107.

32 *Schmidt-Kessel*, in: Schlechtriem/Schwenzer, Commentary, Art. 8 para. 19.

33 *Ferrari*, in: Ferrari/Flechtner/Brand, The Draft UNCITRAL Digest and Beyond, p. 179 et seq.

34 The same result should be reached for the related Plain Meaning Rule, cf. in more detail CISG-AC Opinion No. 3 (*Hyland*) para. 1.3, 3, Internationales Handelsrecht (IHR) 2005, 81.

35 See CISG-AC Opinion No. 3 (*Hyland*), Internationales Handelsrecht (IHR) 2005, 81, para. 1.2, 2 with further references; *Schmidt-Kessel*, in: Schlechtriem/Schwenzer, Commentary, Art. 8 para. 32; *Ferrari*, in: Ferrari/Flechtner/Brand, The Draft UNCITRAL Digest and Beyond, p. 186.

36 See for instance U.S. Court of Appeals (11th Circuit) 29 June 1998, (MCC-Marble Ceramic Center, Inc. v Ceramica Nuova D'Agostino, S.p.A.) CISG-Online No. 342; U.S. District Court, Southern District of New York 6 April 1998, CISG-

that recourse to the parol evidence rule is not permissible where the contract is governed by the CISG. A further argument in favour of this view can be derived from Art. 11 CISG which states that a contract of sale may be proved by any means, including witnesses. It is submitted, however, that the parties may agree on the exclusion of extrinsic evidence (thereby reaching similar results as the parol evidence rule), for instance by so-called Merger Clauses or Entire Agreement Clauses. Such agreements would in principle be covered by Art. 6 CISG, second alternative, which allows the parties to derogate from or modify the effect of the provisions of the Convention.[37]

Secondly, the reference to the *subsequent conduct* of the parties may need some explanation. It is submitted that this rule does not mean that the parties can unilaterally change the content of their agreement by subsequent behaviour. It simply means that their subsequent conduct may be taken into account in order to find out what their intentions were at the time when they made the declaration or concluded the contract.[38]

If, for example, A delivers goods to B on the basis of an oral agreement and if B accepts the goods, uses parts of them, complains about the quality of other parts and finally even asks for an invoice (without specifying whether the invoice should be for the entire shipment or only for the used parts), this behaviour will make it difficult for B to argue that he did not want to conclude a binding sales contract.[39] If the transport clause that the parties have used in their contract is not clear as to which of them should bear the transport risk[40], the fact that the seller took out a transport insurance policy in his own name may indicate that he believed himself to bear the transport risk.[41]

Online No. 440 (Calzaturificio Claudia S.n.c. v Olivieri Footwear Ltd.); U.S. District Court, Western District of Michigan 17 December 2001, CISG-Online No. 773 (Shuttle Packaging Systems v Tsonakis). But see also U.S. District Court, 5th circuit 993 F.2d 1178 (Bejing Metals & Minerals Import/Export Corp. v U.S. Business Center, Inc.).

37 For more detail see CISG-AC Opinion No. 3 (*Hyland*), Internationales Handelsrecht (IHR) 2005, 81.

38 *Ferrari*, in: Ferrari/Flechtner/Brand, The Draft UNCITRAL Digest and Beyond, p. 187; *Schmidt-Kessel*, in: Schlechtriem/Schwenzer, Commentary, Art. 8 para. 50.

39 For a similar scenario see (Swiss) Bezirksgericht St. Gallen 3 July 1997, CISG-Online No. 336.

40 As often is the case in Germany with the clause "frei …".

41 For a similar scenario see (German) Oberlandesgericht Karlsruhe 20 November 1992, CISG-Online No. 54. For another example see: (Austrian) Oberster Gerichtshof 10 November 1994, CISG-Online No. 117. For further references see *Schmidt-Kessel*, in: Schlechtriem/Schwenzer, Commentary, Art. 8 para. 51.

2. Specific issues

A controversy exists as to whether the Convention embodies a "contra proferentem" rule. This rule, which is part of many domestic legal systems, states that doubts as to the meaning of a statement are to be resolved against the drafter. The rule has its major field of application where standard terms are used, but it is not limited to those cases.

Undoubtedly, the Convention does not explicitly state such a rule. It is submitted, however, that the application of Art. 8 CISG may lead to similar results as would be obtained by application of the "contra proferentem" rule.[42] In fact, unless the recipient knows the actual intent of the declaring party (Art. 8(1) CISG, first alternative), the interpretation will always have to be made according to an objective standard from the perspective of the recipient.[43] If the statement is not clear, this will usually not lead to the understanding that is more favourable to the declaring party.

International contracts often give rise to the language issue, that is to say, how far can statements or declarations be effective if they are not drafted in the recipient's language? The predominant opinion correctly tries to answer that issue by using the rules on interpretation in Art. 8 CISG. It is submitted that the basic rule should read as follows: the statement must be in the language of the contract[44] or – under the requirements of Art. 9 CISG – in a langugage that is accepted by a usage or practice in the relevant trade. This approach would be consistent with the objective criteria that both Art. 8(1) CISG ("could not have been unaware") and Art. 8(2) CISG ("reasonable person") set. There may, of course, be exceptions to this principle. This may, for example, be the case where the recipient has shown by his conduct that he "accepts" communication in another language (for instance by replying to it several times without objecting to the use of that other language).[45] In the

---

42 For similar approaches see *Honnold*, para. 107.1 et seq.; *Schmidt-Kessel*, in: Schlechtriem/Schwenzer, Commentary, Art. 8 para. 47 et seq.; (German) Oberlandesgericht Celle 24 May 1995, CISG-Online No. 152. But see also for a more sceptical approach *Ferrari*, Internationales Handelsrecht (IHR) 2003, 10, 15; *Witz*, in: Witz/Salger/Lorenz, Kommentar, Art. 8 para. 15 (to standard terms and conditions).

43 Cf. "could not have been unaware", "reasonable person".

44 This could be the language which has been designated by the parties as the language of the contract or of the negotiations. It could also be the language that the parties have used so far during their negotiations.

45 For similar approaches in case law see: (Austrian) Oberster Gerichtshof 17 December 2003, CISG-Online No. 828 and (Austrian) Oberster Gerichtshof 31 August

light of the first alternative of Art. 8(1) CISG, another exception might be appropriate if the recipient actually understood the statement that was made in another language. In such a case, it seems to be at least arguable that the recipient then "knows" the actual intent of the declaring party so that there is no room for application of the objective criteria ("could not have been unaware", "reasonable person").

IV. Usages and trade practices

It is self-evident that trade usages and trade practices may play an important role in international sales contracts. Art. 9 CISG recognises this fact. In its two paragraphs the provision distinguishes between two different methods of making usages or practices binding on the parties.

1. Practices and usages by consent

Art. 9(1) CISG states that the parties are bound by any usage to which they have agreed and by any practices which they have established between themselves. Put simply, the provision makes clear that the parties are bound by usages and practices to which they have agreed, whether expressly, implicitly or by conduct.[46] The provision therefore specifically formulates what would result from the application of Art. 6 and 8 CISG anyway.[47] As the "incorporation" of the usages under Art. 9(1) CISG is in the last resort based on the consensus of the parties and – unlike under Art. 9(2) CISG – not on their "international recognition", it does not matter whether the usages are local,

---

2005, CISG-Online No. 1093; (German) Landgericht Kassel 15 February 1996, CISG-Online No. 190; (Belgian) Rechtbank van Koophandel Hasselt 2 June 1999, CISG-Online No. 762 (cf. www.cisg.law.pace.edu); see also (German) Oberlandesgericht Hamm 8 February 1995, CISG-Online No. 141 and (German) Landgericht Heilbronn 15 September 1997, CISG-Online No. 562 (although both decisions are in the author's opinion not quite clear as to whether they are – with regard to the language issue – actually based on the Convention or on principles of domestic law). For similar approaches in legal writing see: *Ferrari*, in: Ferrari/Flechtner/Brand, The Draft UNCITRAL Digest and Beyond, p. 188 et seq.; *Ferrari*, Internationales Handelsrecht (IHR) 2003, 10, 13 et seq.; *Schmidt-Kessel*, in: Schlechtriem/Schwenzer, Commentary, Art. 8 para. 41 et seq.

46 See *Ferrari*, in: Ferrari/Flechtner/Brand, The Draft UNCITRAL Digest and Beyond, p. 192.

47 *Schmidt-Kessel*, in: Schlechtriem/Schwenzer, Commentary, Art. 9 para. 1.

regional, national or international.[48] It is submitted that the formation of the consensus required by Art. 9(1) CISG should be assessed according to the rules of Art. 8, 14 et seq. CISG or according to the general principles deriving from these provisions.[49]

2. Relevant international trade usages

Art. 9(2) CISG goes somewhat further. It essentially states that, unless otherwise agreed, relevant international trade usages (which are defined more closely as being widely known to and regularly observed by parties to contracts of the type involved in the particular trade concerned) will be binding on the parties[50] if they knew or ought to have known of these usages. The provision may give rise to difficult problems in application. It could of course be argued that, if the usage is widely known in the relevant trade, most parties doing business in that area ought to have known of that usage. It is, however, conceivable that in exceptional situations this may not be the case so that the requirement of "knew or ought to have known" is not redundant.[51] A further question arises with regard to regionally limited usages. The predominant opinion seems to be that as a rule parties will only be treated as bound by such regional usages where either their place of business is located in that geographical area or, even when not located there, they are continuously doing business in that region.[52] It is submitted that this rule will in most cases be correct, but that there is no need to "invent" a specific rule to deal with such usages. Whether a particular usage, whether regionally limited or international in scope, is part of the contract is answered by determining whether it is recognised in the "particular trade" and whether the parties "knew or ought to have known" of it.

---

48 *Ferrari*, in: Ferrari/Flechtner/Brand, The Draft UNCITRAL Digest and Beyond, p. 194; *Schmidt-Kessel*, in: Schlechtriem/Schwenzer, Commentary, Art. 9 para. 6; see also (Austrian) Oberster Gerichtshof 15 October 1998, CISG-Online No. 380.

49 *Schmidt-Kessel*, in: Schlechtriem/Schwenzer, Commentary, Art. 9 para. 7.

50 The provision uses a fiction: The parties are considered to have these usages impliedly made applicable to their contract or its formation.

51 *Ferrari*, in: Ferrari/Flechtner/Brand, The Draft UNCITRAL Digest and Beyond, p. 201.

52 See (Austrian) Oberster Gerichtshof 21 March 2000, CISG-Online No. 641; *Ferrari*, in: Ferrari/Flechtner/Brand, The Draft UNCITRAL Digest and Beyond, p. 201 with further references.

3. Specific issues

Whether a usage exists in the relevant trade and whether it is widely accepted will usually be a question of fact, not of law.[53] The burden of proof for the existence of the usage should be placed on the party that seeks to rely on it.[54]

The *validity* of any usages that may be relevant is not governed by the CISG. This is clearly stated by Art. 4 lit. (a) CISG. Validity will therefore be a matter for the applicable domestic law (as determined by the private international law of the forum).[55] It is submitted, however, that validity problems will rarely arise with regard to trade usages though an example where such an issue might arise is where the usage infringes mandatory rules of the applicable domestic law.[56] It should further be noted that – as mentioned above – the formation of the consensus that is required under Art. 9(1) CISG is not covered by the validity exception.

If there is a binding usage or practice in the sense of Art. 9 CISG, it will usually take *precedence* over the provisions of the Convention.[57] It is further submitted that a usage or practice binding under Art. 9(1) CISG will usually take precedence over a usage binding under Art. 9(2) CISG as that provision explicitly states that it is subject to the parties' agreeing "otherwise".[58] For

---

53 See (Austrian) Oberster Gerichtshof 21 March 2000, CISG-Online No. 641; (German) Oberlandesgericht Dresden 9 July 1998, CISG-Online No. 559.

54 (German) Oberlandesgericht Dresden 9 July 1998, CISG-Online No. 559; *Schmidt-Kessel*, in: Schlechtriem/Schwenzer, Commentary, Art. 9 para. 20; *Ferrari*, in: Ferrari/Flechtner/Brand, The Draft UNCITRAL Digest and Beyond, p. 204 et seq.

55 For more detail see *Ferrari*, in: Ferrari/Flechtner/Brand, The Draft UNCITRAL Digest and Beyond, p. 194 et seq., pointing out that this may also be the law applicable to a trade center which has such usages (e.g. a seaport or an exchange).

56 *Schlechtriem*, in: Schlechtriem/Schwenzer, Commentary, Art. 4 para. 16.

57 (Austrian) Oberster Gerichtshof 21 March 2000, CISG-Online No. 641; *Ferrari*, in: Ferrari/Flechtner/Brand, The Draft UNCITRAL Digest and Beyond, p. 197, 199.

58 *Ferrari*, in: Ferrari/Flechtner/Brand, The Draft UNCITRAL Digest and Beyond, p. 199, where he furthermore discusses the interesting case that two usages which are binding under Art. 9(2) CISG lead to conflicting results and submits that the usage which is more closely connected to the contractual relationship should take precedence; but see for a different opinion in that respect (the usages cancelling each other out) *Bonell*, in: Bianca/Bonell, Commentary, Art. 9 para. 2.2.

the same reason one should normally assume that usages or practices should give way to conflicting terms in the contract.[59]

Several legal systems recognise a rule or a trade usage that silence as a response to "commercial letters of confirmation" (purporting to confirm the content of oral agreements) amounts to an acceptance of the content of those letters. The CISG does not contain such a rule. It is further submitted that one cannot find a general principle (Art. 7(2) CISG) to that effect because the basic rule under the CISG is that silence in itself does not amount to an acceptance (Art. 18(1) CISG). In the author's opinion therefore, any usage that may exist in certain countries, regions or branches can only become relevant under the CISG by virtue of Art. 9 CISG.[60] In the case of Art. 9(2) CISG, this will usually require that the relevant usage is known both where the seller and where the buyer have their place of business (or continuously do business),[61] as mentioned above.

Another issue arises where the parties use a trade term which is defined in the *Incoterms* but no express reference is made to Incoterms (e.g.: "CIF Rotterdam" instead of "CIF Rotterdam (Incoterms 2000)"). It has been held in case law that as a rule such a clause should be construed as referring to the Incoterms.[62] This view has been criticised for not taking into account that national legal systems may ascribe different meanings to those terms than the Incoterms do.[63] It is submitted that the solution to this problem should be found by adhering to the rules of Art. 9 CISG. The applicability of the Incoterms in such cases would therefore depend either on the kind of "consensus" meant in Art. 9(1) CISG or on the requirements of Art. 9(2) CISG.

---

59 (German) Oberlandesgericht Saarbrücken 13 January 1993, CISG-Online No. 83; *Ferrari*, in: Ferrari/Flechtner/Brand, The Draft UNCITRAL Digest and Beyond, p. 199.

60 (German) Oberlandesgericht Frankfurt 5 July 1995, CISG-Online No. 258; see also (Swiss) Zivilgericht Basel-Stadt 21 December 1992, CISG-Online No. 55 which regarded the requirements of Art. 9 CISG as fulfilled in the case at hand.

61 See (German) Oberlandesgericht Frankfurt 5 July 1995, CISG-Online No. 258.

62 U.S. District Court, Southern District of New York 26 March 2002, CISG-Online No. 615 (St. Paul Guardian Insurance Company and Travelers Insurance Company, as subrogees of Shared Imaging, Inc. v Neuromed Medical Systems & Support, GmbH, et al.); (Italian) Corte di Appello di Genova 24 March 1995, CISG-Online No. 315; Arbitral Award, Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, CISG-Online No. 1249.

63 *Ferrari*, in: Ferrari/Flechtner/Brand, The Draft UNCITRAL Digest and Beyond, p. 203.

The same principles should apply when considering whether the UNIDROIT Principles of International Commercial Contracts can be regarded as usages in the sense of Art. 9 CISG. The answer will therefore have to be found on a case-by-case basis.[64]

V. "Legal scope"

Most of the questions that can arise with regard to a sales contract will be addressed and answered by the CISG. There are, however, certain issues which the CISG does not govern although they can be relevant with regard to the conclusion and performance of sales contracts. It is therefore necessary to draw the line between the issues that are governed and those issues that are not, or, in other words, to define the "legal scope" of the CISG.

1. Basic principle

The starting point for defining the legal scope of application is Art. 4 CISG: "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 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."

The first sentence of that provision gives a positive definition of the legal scope of application of the CISG: It governs the formation and the rights and obligations of the parties. As a general rule, one can assume that the terms "formation" and "rights and obligations of the parties" have to be understood as covering everything that the Convention actually deals with, in particular in Art. 14-24 CISG and in Art. 25-88 CISG, but also in Art. 11-13 CISG (concerning form which can also be regarded as a matter of "formation" in its widest sense).

From that positive definition of the legal scope of the CISG one can subtract what is actually not governed by the Convention, i.e. those issues which neither belong to formation nor to the rights and obligations of the parties. By way of example, the second sentence of Art. 4 CISG names two areas which

64 *Ferrari*, in: Ferrari/Flechtner/Brand, The Draft UNCITRAL Digest and Beyond, p. 204.

are not governed by the Convention: validity (lit. (a)) and the transfer of property (lit. (b)). A further exception is contained in Art. 5 CISG (personal injury and death). These issues are not exhaustive. Other matters may be outside the scope of the CISG without being named in Art. 4 CISG, for instance the limitation (prescription) of claims.

2. Specific issues

a) Validity

aa) General rule

At first sight, the treatment of validity issues in the Convention seems to be rather straightforward. The second sentence of Art. 4 CISG actually names the "validity of the contract or of any of its provisions or of any usage" as one of the examples not governed by the Convention. On closer analysis, however, certain problems may arise.[65]

The first issue to be addressed is how to interpret the terms used in Art. 4 CISG. It is submitted that in line with the rule of Art. 7(1) CISG, these terms should be given an autonomous, "Convention-style" interpretation.[66] In other words, "validity" and "formation" do not mean what (the applicable) domestic law says, but have to be interpreted against the background of the CISG.

Secondly, one has to bring the validity exception in line with the positive statement that "formation" issues (which may on a broad interpretation also be regarded as affecting the validity) are governed by the CISG. The predominant opinion correctly assumes that "formation" in the sense of the CISG is the so-called "external consensus", i.e. the mechanics of how the

---

65 See on the issue for example: *Ferrari*, Rabels Zeitschrift für ausländisches und internationales Privatrecht (RabelsZ) 71 (2007), 52; *Leyens*, Review of the Convention on Contracts for the International Sale of Goods (CISG) 2003-2004, 3; *Hartnell*, 18 (1993) Yale Journal of International Law 1; *P. Huber*, UN-Kaufrecht und Irrtumsanfechtung, Zeitschrift für Europäisches Privatrecht (ZEuP) 1994, 585.

66 *Schlechtriem*, in: Schlechtriem/Schwenzer, Commentary, Art. 4 para. 7; *Ferrari*, in: Schlechtriem/Schwenzer (4th German ed.), Art. 4 para. 6. But see also the differing opinions of *Lessiak*, Juristische Blätter (JBl) 1989, 487; *Hartnell*, 18 (1993) Yale Journal of International Law (YJIL) 1; U.S. District Court, Southern District New York 10 May 2002, CISG-Online No. 653 ("Geneva Pharmaceuticals Technology Group v Barr Laboratories").

contract is concluded (e.g. offer and acceptance).[67] This is what Art. 14-24 CISG actually deal with. Other matters that may affect the validity of the contract are regarded as matters of "validity" which fall under the exception of Art. 4 lit. (a) CISG and are therefore not governed by the CISG. This is for instance true for the so-called "internal consensus", i.e. incapacity, fraud and – within certain limits[68] – also mistake and misrepresentation. Further examples would be validity issues arising from legislation such as legal prohibitions, ordre public, export bans etc.[69]

bb) Error concerning the quality or the characteristics of the goods

Difficult issues may arise if the buyer's error relates to the quality or the characteristics of the goods. Domestic legal systems will often allow the buyer to rescind the contract if he had been induced to conclude the contract by an error concerning essential characteristics of the goods. At first sight this type of remedy seems to fall under the validity exception as it is concerned with the "internal consensus" and not with the "external mechanism". Several authors indeed take this position and argue that domestic remedies for an error concerning the characteristics or the quality of the goods should remain applicable by virtue of Art. 4 lit. (a) CISG.[70]

It is submitted, however, that the buyer should not be permitted to have recourse to any domestic remedies for errors concerning characteristics or qualities of the goods for two reasons: The first reason is a policy argument. In many cases where the goods were defective at the time of contracting, there will also have been an error of the buyer in that respect (otherwise he would probably not have bought the goods, at any rate not for the normal market price). If one allowed the buyer to have recourse to the right to rescind under the applicable domestic law, the restrictions that the CISG imposes on the right to avoid the contract for defects of the goods (e.g. the notice requirements under Art. 39 CISG, the exception in Art. 35(3) CISG, the fundamental breach requirement in Art. 49(1) lit. (a) CISG) could easily be undermined. This would not only lead to unfair results but it would also impair the objective of a uniform interpretion of the Convention (cf. Art. 7(1) CISG). The second reason is a doctrinal one. If one accepts the submission

---

67 (Austrian) Oberster Gerichtshof 22 October 2001, CISG-Online No. 613 and (Austrian) Oberster Gerichtshof 6 February 1996, CISG-Online No. 224; *Ferrari*, in: Schlechtriem/Schwenzer (4th German ed.), Art. 4 para. 15.

68 But see below bb.

69 *Ferrari*, in: Schlechtriem/Schwenzer (4th German ed.), Art. 4 para. 18 et seq.

70 *Lessiak*, Österreichische Juristische Blätter (JBI) 1989, 487 et seq.; *Neumayer*, Recht der internationalen Wirtschaft (RIW) 1994, 99, 101 et seq.; see also *Hartnell*, 18 Yale Journal of International Law (YJIL) 1993, 77.

that the term "validity" is not to be construed according to the standards of the applicable domestic law but as an autonomous concept, one will have to conclude that "validity" matters in the sense of Art. 4 lit. (a) CISG are only those validity issues that are not positively governed by the Convention (cf. Art. 4 first sentence CISG), i.e. that neither concern the formation of the contract nor the rights and obligations of the parties. The question, however, of whether the buyer can rely on the defects in the goods in order to get out of the contract is one of the core issues of the system of remedies of the buyer (Art. 45 et seq. CISG, in particular Art. 49 CISG). One should therefore follow the view[71] that the buyer cannot rely on domestic remedies for errors in the quality or characteristics of the goods in order to avoid the contract. To put it in other words, this issue is not a "validity" issue in the sense of Art. 4 lit. (a) CISG.[72]

cc) Fraud

A different situation arises, however, where the buyer has been induced to conclude the contract by fraud. In these cases the predominant opinion regards the domestic fraud remedies as applicable, even if the fraud is related to the characteristics of the goods.[73] It is submitted that this is correct for the policy reason that the fraudulent seller does not deserve the protection that the CISG rules may grant him.

---

71 *P. Huber*, Zeitschrift für Europäisches Privatrecht (ZEuP) 1994, 585, 597 et seq.; *Ferrari*, Rabels Zeitschrift für ausländisches und internationales Privatrecht (RabelsZ) 71 (2007), 52, 68 et seq.; *P. Huber*, in: Münchener Kommentar zum Bürgerlichen Gesetzbuch, Art. 49 para. 22; *Schlechtriem*¸ in: Schlechtriem/Schwenzer, Commentary, Art. 4 para. 13; *Ferrari*, in: Schlechtriem/Schwenzer (4th German ed.), Art. 4 para. 22 et seq.; *Honnold*, para. 240; *Magnus*, in: Staudinger Kommentar zum Bürgerlichen Gesetzbuch, Art. 49 para. 43; (German) Landgericht Aachen 14 May 1993, CISG-Online No. 86. The Austrian Supreme Court may also have thought in this direction, see (Austrian) Oberster Gerichtshof 13 April 2000, Praxis des Internationalen Privat- und Verfahrensrechts (IPRax) 2001, 149, 151 et seq. = CISG-Online No. 576. See further *Leyens*, Review of the Convention on Contracts for the International Sale of Goods (CISG) 2003-2004, 3.

72 For a different line of argument leading to the same result see *Ferrari*, in: Schlechtriem/Schwenzer (4th German ed.), Art. 4 para. 26 et seq.

73 *Ferrari*, in: Schlechtriem/Schwenzer (4th German ed.), Art. 4 para. 25; *Magnus*, in: Staudinger Kommentar zum Bürgerlichen Gesetzbuch, Art. 4 para. 52; *P. Huber*, in: Münchener Kommentar zum Bürgerlichen Gesetzbuch, Art. 45 para. 23.

dd) Errors concerning the other party's ablility to perform

Domestic remedies in cases where one party erroneously trusted in the other party's ability to perform the contract should be treated in the same way as errors concerning the characteristics of the goods: As this issue is addressed by the Convention in Art. 71 CISG, one should not regard it as a "validity" issue in the sense of Art. 4 lit. (a) CISG, but as governed by the Convention under the first sentence of Art. 4 CISG ("rights and obligations"). Domestic remedies for such cases should therefore not be regarded as applicable.[74]

ee) Initial impossibility

It is submitted that any domestic provisions which regard a contract as invalid in cases of initial impossibility (e.g. S sells B a used machine which has already been destroyed at the time of the conclusion of the contract) should not be applied under the validity exception in Art. 4 lit. (a) CISG. Cases of impossibility fall under the Convention rules on non-performance so that the matter should be regarded as governed by the Convention ("rights and obligations of the parties") so that there is no room for the application of domestic law in that respect.[75] Under contracts governed by the CISG initial impossibility therefore is not a ground for invalidity, but only one of the instances that may give rise to remedies under the Convention.

ff) Consideration

Common Law systems have, to a greater or lesser extent, a requirement that the formation and/or variation of a contract must be supported by consideration if it is to be legally effective. To put it differently, the mere agreement of the parties to conclude or vary a contract is not valid unless some "consideration", that is to say something of legal value, has been offered or given in return. It is submitted that the domestic consideration requirement cannot be applied to contracts underlying the CISG. In fact, both the formation rules (Art. 14 et seq. CISG) and the rules on form (Art. 11 et seq., 29 CISG) demonstrate that consideration is not required for either formation or variation under the CISG. It would therefore not be correct to treat the consideration requirement as a "validity" issue and submit it to the domestic law according to Art. 4 lit. (a) CISG.[76] This is, however, what one U.S. court[77] has done,

---

74 See *Schlechtriem*, in: Schlechtriem/Schwenzer, Commentary, Art. 4 para. 13.

75 See *Schlechtriem*, Internationales UN-Kaufrecht, para. 36; *Ferrari*, in: Schlechtriem/Schwenzer (4th German ed.), Art. 4 para. 24.

76 See in more detail *Viscasillas*, in: Ferrari/Flechtner/Brand, The Draft UNCITRAL Digest and Beyond, p. 259 et seq., with further references; see also *Schlechtriem*, in: Schlechtriem/Schwenzer, Commentary, Art. 16 para. 2.

77 U.S. District Court, Southern District of New York 10 May 2002, CISG-Online No. 653 (Geneva Pharmaceuticals Technology Group v Barr Laboratories").

though another U.S. court has held that under the Convention, a contract for the sale of goods may be modified without consideration for the modification.[78]

b) Property

According to Art. 4 lit. (b) CISG the effect which the contract may have on the property in the goods sold is in principle not governed by the CISG. This means in particular that the question of how property in the goods is transferred to the buyer (e.g. by a separate agreement as in German law or simply with the conclusion of the sales contract as for instance in French law) will not be governed by the Convention but by the applicable (domestic) law, i.e. in most countries by the lex situs.[79] What is more, the proprietary aspects of security interests in the goods sold (e.g. retention of title) will in principle be governed by the applicable (domestic) law.[80]

c) Personal injury

Art. 5 CISG states that the Convention does not apply to the liability of the seller for death or personal injury caused by the goods to any person. The purpose of this provision is to avoid conflicts between the CISG and domestic legal systems of product liability.[81] Its application is, however, not limited to cases where the law of such a state is applicable. The provision generally excludes claims for personal injury or death from the Convention if they were caused by the goods. The latter requirement probably means that cases where the buyer's injury does not result from (a defect of) the goods but from the seller's behaviour while delivering the goods will not fall under the Art. 5 CISG exception and will therefore be governed by the CISG.[82]

If the buyer himself is not injured, but is instead liable to his sub-purchasers for personal injury (or death) caused by the goods, the question will arise whether the buyer's recourse for damages against the seller will be covered by the exception in Art. 5 CISG. It is submitted that the CISG should not

---

78 U.S. District Court, Western District of Michigan 17 December 2001, CISG-Online No. 773 (Shuttle Packaging Systems v Tsonakis).

79 *Schlechtriem*, in: Schlechtriem/Schwenzer, Commentary, Art. 4 para. 18.

80 (German) Oberlandesgericht Koblenz 16 January 1992, CISG-Online No. 47; Federal Court of Australia, South Australian District, Adelaide 28 April 1995, CISG-Online No. 218; U.S. District Court, Northern District of Illinois 28 March 2002, CISG-Online No. 696 (Usinor Industeel v Leeco Steel Products).

81 See *Schlechtriem*, in: Schlechtriem/Schwenzer, Commentary, Art. 5 para. 1.

82 *Schlechtriem*, in: Schlechtriem/Schwenzer, Commentary, Art. 5 para. 5.

be applied in those cases.[83] In fact, the exception in Art. 5 CISG explicitly covers "any" person's injury and it is therefore not limited to injuries caused to the buyer.[84]

If Art. 5 CISG applies it will be for the private international law of the forum to designate the applicable law (and to decide whether it wants to do so by using the contractual conflicts rule or by using the conflicts rule for torts).

d) Tort

Tort claims of the buyer against the seller can raise difficulties in two respects: First, there is the general issue of the interaction between contract and tort (aa). Secondly, a specific issue arises with regard to the EC Product Liability Directive (bb).

aa) Contract and tort

Every legal system has to address the difficult question in how far a buyer who is damaged by the goods should be able to resort to tort remedies besides his contractual remedies. Several answers are possible. First, the contractual claims may be treated as exclusive and as barring tort remedies altogether (in order to safeguard the contractual requirements against more lenient tort rules). Secondly, tort claims may be allowed but subjected to the stricter contractual requirements (e.g. concerning the obligation to give timely notice of the defects) or, finally, tort claims may be allowed "as they are", i.e. without any interference by contract law. The solution to this issue will usually depend on how the contract rules and the tort rules within that legal system interact with each other, in particular on whether tort law is "needed" to fill inadequate gaps that contractual liability might leave.

If the sales contract is governed by the CISG, the matter is even more complicated because the international contractual regime of the CISG would in most cases face a domestic tort system (i.e. the tort law that the private international law rules of the forum regard as applicable). Any concurrence between the sales law of the CISG and a (usually domestic) tort system will therefore run a high risk of friction and discrepancies.

---

83 *Schlechtriem*, in: Schlechtriem/Schwenzer, Commentary, Art. 5 para. 7; *Ferrari*, in: Schlechtriem/Schwenzer (4th German edition), Art. 5 para. 8. But see the decision of (German) OLG Düsseldorf 2 July 1993, CISG-Online No. 74 where the court may have been inclined to apply the CISG to such claims (albeit without having to decide the issue and without actually discussing it so that the precedential value of the decision seems to be rather doubtful).

84 *Ferrari*, in: Schlechtriem/Schwenzer (4th German edition), Art. 5 para. 8.

In so far as claims for personal injury or death in the sense of Art. 5 CISG are concerned, the matter is rather straightforward in that, as the CISG does not govern such claims at all, it should not have a say about the admissibility of domestic tort rules.

Claims for damage to the buyer's property are more difficult to assess. The starting point is that as a rule these claims can be based on the damages rules of the Convention (on the understanding, of course, that the requirements of Art. 45, 74 et seq. CISG are met). The crucial question then is in how far the buyer may also rely on the applicable (domestic) tort law for those claims. This may for instance be advantageous for him if he has not complied with the notice requirement of Art. 39 CISG.

The predominant opinion seems to be that tort claims under domestic law are fully admissible and not subject to any (analogous application of the) restrictions of the CISG because tort claims are based on policy considerations which are different from the ones which underlie contract law.[85] However, some authors have argued that such a position might lead to a circumvention of the specific policy considerations of the CISG, in particular with regard to the notice requirement (Art. 39, 43 CISG), and that it might impair the uniform application of the Convention (Art. 7(1) CISG) as it would be for the applicable (domestic) law to decide whether it wants to admit tort claims next to contractual claims.[86]

Both approaches have their merits. In earlier publications the present author has inclined towards the second approach (i.e. towards excluding the application of domestic tort remedies).[87] On a new evaluation of the different arguments and taking into account the different policy considerations, however,

---

85 *Schlechtriem*, in: Schlechtriem/Schwenzer, Commentary, Art. 5 para. 10; *Ferrari*, in: Ferrari/Flechtner/Brand, The Draft UNCITRAL Digest and Beyond, p. 96, 103 et seq.; *Ferrari*, Rabels Zeitschrift für ausländisches und internationales Privatrecht (RabelsZ) 71 (2007), 52, 74 et seq.; *Magnus*, in: Staudinger Kommentar zum Bürgerlichen Gesetzbuch, Art. 5 para. 13. This was also the position of the German courts concerning the predecessor of the CISG, the ULIS: (German) Bundesgerichtshof 28 November 1994, Praxis des Internationalen Privat- und Verfahrensrechts (IPRax) 1996, 124; (German) Oberlandesgericht München 9 August 1995, Praxis des Internationalen Privat- und Verfahrensrechts (IPRax) 1997, 38.

86 *Herber*, in: Festschrift für P. Schlechtriem, p. 207 et seq.; *Honnold*, para. 73.

87 See *P. Huber*, in: Münchener Kommentar zum Bürgerlichen Gesetzbuch, Art. 45 para. 27.

the present author has doubts whether the risk of a circumvention of the CISG really is so severe as to justify the exclusion of domestic tort remedies.

bb) EC Product Liability Directive

The EC Product Liability Directive 85/374/EEC[88] has given rise to some controversy with regard to its interaction with the CISG. The practical relevance of the dispute will probably be rather limited as most cases that fall under the Directive will not fall under the CISG by virtue of Art. 2 lit. (a) CISG.[89]

The debate centers on the question whether EC Directives prevail over the CISG as "international agreements" in the sense of Art. 90 CISG. In the author's opinion this is not the case because EC Directives need to be transformed into national law by the Member States and usually leave the Member States considerable room for regulating the details so that they cannot be assimilated to the type of international conventions that Art. 90 CISG has in mind.[90] It is submitted therefore that the national rules that transpose the EC Product Liability Directive should not be given preferential treatment under Art. 90 CISG. Their application will therefore depend on the position one takes with regard to the general interaction between the CISG and domestic tort law (cf. aa) above).

e) Precontractual liability

Many legal systems impose certain duties on parties who enter into negotiations, even before the actual contract is concluded, for instance duties to inform, duties to protect the other side's health, duties to cooperate etc. These types of duties are often labelled "culpa in contrahendo". They may be sanctioned on the level of tort law or by an analogy to the contractual system of remedies. If the negotiations lead to a contract of sale that is governed by the CISG, the question will arise whether such precontractual liability under domestic law can be invoked by the injured party or whether this is excluded by the Convention.

It is submitted that as the CISG does not provide a regime for the breach of precontractual duties, domestic rules of "culpa in contrahendo" should in principle be applicable irrespective of the fact that the contract is governed

---

88 Official Journal 1985 L 210 p. 29.

89 *Schlechtriem*, in: Schlechtriem/Schwenzer, Commentary, Art. 5 para. 11, note 25.

90 *P. Huber*, in: Münchener Kommentar zum Bürgerlichen Gesetzbuch, Art. 90 para. 2. For a more detailed analysis – also with regard to other EC Directives where the overlap may be more significant – *Schlechtriem*, in: Schlechtriem/Schwenzer, Commentary, Art. 90 para. 12 et seq. But see also the differing opinion of, for instance, *Siehr*, in: Honsell, Kommentar, Art. 90 para. 7.

by the CISG. It is arguable, however, that there may be exceptions to that principle: In particular, if the seller has (innocently) induced the buyer to conclude the contract by not (correctly) informing him about certain defects of the goods and if the applicable domestic law sanctions this behaviour as breach of a precontractual duty, there are good arguments for letting the CISG prevail over the domestic law.[91] In fact, this scenario squarely falls into the Convention's system of remedies for non-conformity. It would be an unfortunate result if the specific policy considerations of the CISG (e.g. the notice requirement or the fundamental breach doctrine) could be undermined by a more lenient domestic regime of "culpa in contrahendo". The situation in fact very much resembles the one where the buyer relies on a mistake in order to rescind the contract and where – according to the view taken here – a recourse to the domestic law of mistake should also be barred.[92]

f) Limitation

The CISG does not govern the issue of limitation (prescription). There is a United Nations Convention on the Limitation Period in the International Sale of Goods of 1974 (as amended by the Protocol of 1980)[93] which has only been ratified by a limited number of the Contracting States to the CISG.[94] The requirements for the application of the UN Limitation Convention are similar, but not identical to the CISG.[95]

If the UN Limitation Convention is binding on the court deciding the dispute and if the requirements for the application of the UN Limitation Convention are met, this Convention will apply. If this is not the case, it will be for the private international law of the forum to designate the applicable law.[96]

---

91 *P. Huber*, in: Münchener Kommentar zum Bürgerlichen Gesetzbuch, Art. 45 para. 24 et seq.; *Schlechtriem*, in: Schlechtriem/Schwenzer, Commentary, Art. 4 para. 23.

92 The situation is different, of course, where the seller acts fraudulently. In these cases, he does not deserve the protection afforded by an exclusive application of the CISG.

93 For a commentary see *Müller-Chen*, in: Schlechtriem/Schwenzer, Commentary, Annex II.

94 For the status see www.uncitral.org.

95 See in more detail Art. 1 et seq. UN Limitation Convention, in particular Art. 3(1) UN Limitation Convention which is similar to Art. 1(1) CISG.

96 See *Schlechtriem*, in: Schlechtriem/Schwenzer, Commentary, Art. 4 para. 21 with further references; (Austrian) Oberster Gerichtshof 25 June 1998, CISG-Online No. 352; (German) Oberlandesgericht Zweibrücken 26 July 2002, CISG-Online No. 1011 (= No. 688).

g) Set off

It is submitted that set-off is not covered by the CISG and that it is neither possible to deduce from Art. 84(2) CISG a general principle, in the sense of Art. 7(2) CISG (see below p. 33 et seq.)[97] which could give enough guidance to regulate the intricate questions every law on set-off has to answer.[98] It will therefore be for the private international law of the forum to designate the applicable rules to set-off.

h) Standard terms

The CISG does not provide specific rules for the incorporation of standard terms. However with regard to most of the issues that may arise out of the use of standard terms there is a prevailing opinion which leads to reasonable results. Under that opinion the question whether standard terms have been effectively incorporated into the contract is governed by the Convention (the specific rules being derived from the provision on the interpretation of the contract – Art. 8 CISG), whereas the material validity of the standard terms (e.g. a control of their content according to standards of fairness) will be governed by the applicable domestic law.

aa) Incorporation of standard terms

There is a judgment by the German Supreme Court (Bundesgerichtshof) which summarizes the position on the incorporation of standard terms in a contract that underlies the CISG very well.[99] It states (references omitted).[100]

> "1. According to the general view, the inclusion of general terms and conditions into a contract that is governed by the CISG is subject to the provisions regarding the conclusion of a contract (Arts. 14, 18 CISG); recourse to the national law that is applicable based on a conflict of laws analysis is generally not available. The CISG does not, however, contain special rules regarding the inclusion of standard terms and conditions into a contract. This was not deemed necessary because the Convention already contains rules regarding the interpretation of contracts.
>
> 2. Thus, through an interpretation according to Art. 8 CISG, it must be determined whether the general terms and conditions are part of the

[97] But see also the differing view of *Magnus*, in: Staudinger Kommentar zum Bürgerlichen Gesetzbuch, Art. 4 para. 47.

[98] *Schlechtriem*, in: Schlechtriem/Schwenzer, Commentary, Art. 4 para. 22a.

[99] (German) Bundesgerichtshof 31 October 2001, Internationales Handelsrecht (IHR) 2002, 14 = CISG-Online No. 617.

[100] Translation taken from http://cisgw3.law.pace.edu/cases/011031g1.html.

> offer, which can already follow from the negotiations between the parties, the existing practices between the parties, or international customs (Art. 8(3) CISG). As for the rest, it must be analyzed how a "reasonable person of the same kind as the other party" would have understood the offer (Art. 8(2) CISG).
>
> It is unanimously required that the recipient of a contract offer that is supposed to be based on general terms and conditions have the possibility to become aware of them in a reasonable manner."

The court then goes on to specify the requirements for an effective incorporation in more detail. It is with regard to certain elements of this part of the judgment that some debate has arisen. The court stated:

> "An effective inclusion of general terms and conditions thus first requires that the intention of the offeror that he wants to include his terms and conditions into the contract be apparent to the recipient of the offer. In addition, as the Court of Appeals correctly assumed, the Uniform Sales Law requires the user of general terms and conditions to transmit the text or make it available in another way."

Thus, in essence there would be two requirements for the incorporation of standard terms under the CISG: First, the "offeror's"[101] intention to incorporate his standard terms must be apparent to the recipient; this requirement will usually require a clear and understandable reference to the standard terms. Secondly, the offeror must transmit the text of the standard terms to the recipient or make it available in another way.

It is the second requirement ("making available") that has triggered some debate. First it should be noted that this requirement may be more strict than the solutions to be found in domestic law[102] in that it places on the offeror the burden to make the standard terms available to the recipient rather than to require the recipient of a contract which refers to the offeror's standard terms to enquire about the contents of these terms. The Bundesgerichtshof justifies this rule by bringing forward two arguments: First, it is easier for the offeror to provide a copy of his standard terms than for the recipient to make enquiries as to their content. Secondly, while in domestic transactions the

---

101 The term "offeror" being understood as the party that wants to introduce its standard terms.

102 Thus, for example, domestic German law would – in this respect (not in others) – take a less strict approach in many cases.

parties will often be familiar with the "typical" sets of standard terms, this will not usually be the case in the international context. Based on these two requirements the court concluded that the principle of good faith (Art. 7(1) CISG) and the general obligations of cooperation and information lead to the rule described above.

The "making available"-requirement set by the Bundesgerichtshof[103] has been criticised as being too strict; rather – so it is argued – a mere reference to the standard terms may suffice.[104] Indeed other courts seem to take a more lenient approach than the Bundesgerichtshof.[105]

It is submitted that even if one follows the stricter approach of the Bundesgerichtshof one should interpret the "making available"-requirement rather generously. Thus, it should normally be sufficient if the standard terms have been given to the other party at the beginning of a longer-lasting business relationship so that it is not necessary to send them every time a contract is concluded during that relationship (provided of course that reference is made to them).

Irrespective of whether one follows the Bundesgerichtshof or not, one may face the language issue: In what language are the referring clause (and/or the standard terms themselves) to be drafted in order to be effectively incorporated? It is submitted that in accordance with the standards in Art. 8 CISG the crucial question should be whether the recipient understood or was at least (under the circumstances of the case) required to understand the language used.[106] Thus the use of the language in which the negotiations were

---

[103] Which has been followed, for example, by (German) Oberlandesgericht Düsseldorf 21 April 2004, Internationales Handelsrecht (IHR) 2005, 24 = CISG-Online No. 915, stating further that where the copy of the standard terms sent by the offeror were partly illegible, this need not necessarily mean that they were not made available because it would be on the recipient to ask for clarification in that situation.

[104] See *Schmidt-Kessel*, in: Schlechtriem/Schwenzer, Commentary, Art. 8 para. 53.

[105] See for instance (Austrian) Oberster Gerichtshof 17 December 2003, Internationales Handelsrecht (IHR) 2004, 148, 153 = CISG-Online No. 828 where the court seems to accept that standard terms may be validly incorporated even if they are not made part of the offer, provided that there is a clause referring to these terms which is so clear that a reasonable party in the shoes of the recipient would have understood it. For further references see *Schmidt-Kessel*, in: Schlechtriem/Schwenzer, Commentary, Art. 8 para. 53; *Schlechtriem*, in: Schlechtriem/Schwenzer, Commentary, Art. 14 para. 16.

[106] See *Schmidt-Kessel*, in: Schlechtriem/Schwenzer, Commentary, Art. 8 para. 54.

made should normally pose no problems. So, too, will the use of the recipient's language in most cases be acceptable.[107] Whether one should "require" the recipient to know certain "world languages", such as English, is however doubtful in the author's opinion.[108]

bb) Material validity of standard terms

When the standard terms have been effecitively incorporated into the contract the issue may arise whether they should be subjected to some form of control of their contents according to standards of fairness. Several domestic laws[109] provide for such a control even with respect to commercial contracts. It is submitted that this is an issue of material validity which is not governed by the Convention, but by the applicable domestic law, as provided for in Art. 4 lit. (a) CISG.[110]

cc) The "battle of the forms"

Specific problems concerning the use of standard terms arise when both parties to the contract try to impose their own set of standard terms. This so-called "battle of the forms" scenario will be dealt with below p. 91 et seq.

VI. Gap filling

1. Basic principle

As we have seen in the preceding paragraph, the "legal scope of application" of the CISG is in principle defined by Art. 4 CISG: the CISG governs the formation of the contract and the rights and obligations of the parties. Accordingly, Art. 14 et seq. CISG provide specific rules on formation, and Art. 25 et seq. CISG provide specific rules on the rights and obligations of the parties.

---

[107] See for these two cases (German) Oberlandesgericht Düsseldorf 21 April 2004, Internationales Handelsrecht (IHR) 2005, 24 = CISG-Online No. 915.

[108] But see for a more demanding position in that respect (Austrian) Oberster Gerichtshof 17 December 2003, Internationales Handelsrecht (IHR) 2004, 148, 154 = CISG-Online No. 828.

[109] Such as German law.

[110] *Magnus*, in: Staudinger Kommentar zum Bürgerlichen Gesetzbuch, Art. 4 para. 24.

As, however, no legislator is blessed with perfect foresight and as the provisions of the CISG sometimes had to take the form of a compromise between differing positions of the negotiating states, there will inevitably be certain questions which are not specifically dealt with in the CISG although they fall into its legal scope of application (i.e. concern the formation of the contract or the rights and obligations of the parties). A good example for such an "internal gap" of the Convention is the place of performance for money claims. In so far as the buyer's obligation to pay the contract price is concerned, Art. 57 CISG provides a detailed rule on the place of performance. In so far as other money claims (for instance the seller's obligation to pay back the price after an avoidance of the contract, Art. 81(2) CISG) are concerned, however, there is no specific rule on the place of performance.

Of course the drafters of the Convention could simply have shrugged their shoulders and left the "gap-filling" to the applicable (domestic) law. They did, however, not do so, but decided on a more Convention-based approach which is now contained in Art. 7(2) CISG. This provides that questions concerning matters governed by the CISG which are not expressly settled in the CISG are to be settled in conformity with the general principles on which the CISG is based or, in the absence of such principles, in conformity with the law applicable by virtue of the rules of private international law (of the forum). This means that when one is faced with a situation such as the one above[111] one should first check whether there is a general principle underlying the CISG that provides the answer to the problem before resorting to the applicable (domestic) law.

In practice, gap-filling with the help of general principles of the CISG is quite frequent. Many examples will be encountered in the course of this book. Several general principles have been identified in an abstract manner by courts and academic writing, among them the principle of party autonomy (derived from Art. 6 CISG), the principle of freedom of form (derived from Art. 11 CISG), the principle of "favour contractus" (meaning that avoidance of the contract should only be granted as a last resort, derived from Art. 49, 64 CISG), and the principle of full compensation (subject of course

[111] I.e. that one finds oneself within the legal scope of the CISG without there being a specific CISG rule on the problem at hand.

to the foreseeability rule of Art. 74 CISG).[112] What is more, the predominant opinion finds a general principle concerning the burden of proof in the Convention (cf. below 3).

Such abstract enumerations may help to develop a "feeling" for the underlying policies of the CISG, but they should not be regarded as ready-made instruments for handling the specific issues of the case at hand. In fact, the question of gap-filling by using general principles should be addressed separately for each specific "gap".[113] It is further submitted that when "finding" the general principle one should try to draw parallels to existing provisions. In the example mentioned above regarding the place of performance for money claims, one could for example regard Art. 57 CISG as an expression of the general principle that monetary obligations are to be performed at the place of business of the monetary creditor unless the parties have agreed otherwise.

2. Use of the UNIDROIT Principles of International Commercial Contracts?

It is a very controversial issue whether the UNIDROIT Principles of International Commercial Contracts[114] may be used as "gap-filling material" for the CISG under Art. 7(2) CISG.[115] The UNIDROIT Principles themselves explicitly "offer" that possibility as their preamble states that they may be used (inter alia) to supplement international uniform law instruments. In fact, this has been done in arbitral practice.[116] It is submitted, however, that although it may be as such desirable and reasonable, the use of the UNIDROIT Principles for gap-filling under Art. 7(2) CISG is hard to justify. Art. 7(2) CISG makes clear that any gap has to be filled by recourse to general principles which are to be found *within the CISG*. The use of provisions

---

112 For more detail see *Ferrari*, in: Ferrari/Flechtner/Brand, The Draft UNCITRAL Digest and Beyond, p. 60 et seq.; *Schlechtriem*, in: Schlechtriem/Schwenzer, Commentary, Art. 7 para. 30.

113 *Schlechtriem*, in: Schlechtriem/Schwenzer, Commentary, Art. 7 para. 30.

114 For further information on the UNIDROIT Principles see www.unilex.info. A similar issue arises with regard to the Principles of European Contract Law.

115 For a more detailed discussion of that issue see *Ferrari*, in: Schlechtriem/Schwenzer (4th German Edition), Art. 7 para. 59 et seq.; *Ferrari*, in: Ferrari/Flechtner/Brand, The Draft UNCITRAL Digest and Beyond, p. 169 et seq.; *Schlechtriem*, in: Schlechtriem/Schwenzer, Commentary, Art. 7 para. 30.

116 See Arbitral Award, ICC 8128/1998, CISG-Online No. 526.

from an external instrument which came into existence considerably later than the CISG is not consistent with that rule.[117]

This does not mean, however, that the UNIDROIT Principles have no role to play in the gap filling process. Thus, it is suggested that they can be used to corroborate a principle that one has already deduced from the Convention.[118] So too, it may be possible to argue that both the CISG and the UNIDROIT Principles draw their fundamental policy decisions from the same common ground so that it might happen that the Principles actually state a general principle that underlies the CISG as well although it has not been clearly formulated there. Even this line or argument will, however, require that one finds some indication of the principle in question within the CISG itself.

In addition to the above, provisions of the UNIDROIT Principles may find application to CISG-governed contracts on other grounds.[119] They may be applicable for instance as part of usages or practices under Art. 9 CISG, by virtue of a choice of "law" by the parties (the details of course being subject to the private international law of the forum) or as an expression of the good faith principle which is contained in Art. 7(1) CISG.[120]

3. In particular: burden of proof

It is submitted (albeit disputed) that the issue of burden of proof falls within the legal scope of the Convention, but is (with a few exceptions) not expressly settled there. It is therefore an internal gap that should be closed by reference to the general principles of the CISG.[121] It is further submitted that one

---

117 *Ferrari*, in: Ferrari/Flechtner/Brand, The Draft UNCITRAL Digest and Beyond, p. 169 et seq.

118 *Ferrari*, in: Ferrari/Flechtner/Brand, The Draft UNCITRAL Digest and Beyond, p. 170. Examples in case law are: (French) Cour d'Appel Grenoble 23 October 1996, CISG-Online No. 305; Arbitral Award, Internationales Schiedsgericht der Bundeskammer der gewerblichen Wirtschaft in Österreich, CISG-Online No. 691.

119 Examples where the Principles have been referred to in practice (albeit without precisely stating on which basis) are: Arbitral Award, ICC 9117/1998, CISG-Online No. 777; Arbitral Award, ICC 8117/1997, CISG-Online No. 750.

120 *Schlechtriem*, in: Schlechtriem/Schwenzer, Commentary, Art. 7 para. 36.

121 But see for a different view (burden of proof governed by the applicable domestic law) (Swiss) Bezirksgericht der Saane 20 February 1997, CISG-Online No. 426; Arbitral Award, ICC 6653/1993, CISG-Online No. 71; *Khoo*, in: Bianca/Bonell, Commentary, Art. 2 para. 3.2.

can deduce such general principles on the burden of proof from several provisions, in particular from Art. 79, 25 and 2 lit. (a) CISG. The basic rule on the burden of proof is that the party who wants to use a provision of the CISG in order to gain advantage from it has to prove that the factual preconditions of that provision are met.[122] The burden of proof may shift if the Convention so stipulates or in other exceptional cases (for instance where it would be excessively burdensome for that party to adduce the necessary evidence whereas it would be easy for the other side to do so).

VII. Some general rules

Before venturing into the details of the Convention it may be useful to address some general rules that the CISG provides as a basis for the application of the more specific provisions on formation and on sales. These general rules appear at different places in the Convention depending on how far they are meant to reach. A first group of provisions is contained in Chapter II of Part I and these provisions – as a rule – are meant to apply to the entire Convention. A second group of provisions can be found as Chapter I of Part III and is meant to apply to the sales regime of the Convention.

1. Form requirements

a) Principle of informality

The CISG takes a very liberal position with regard to form requirements. Art. 11 CISG states that a contract need not be concluded in or evidenced by writing and that it is not subject to any other requirement as to form. Moreover, the contract may be proved by any means, including witnesses. Art. 29(1) CISG further states that the contract may, as a rule[123], be modified or terminated by the mere agreement of the parties. Strictly speaking, Art. 11 CISG is by its wording limited to the actual conclusion of the contract whereas Art. 29 CISG is by its position in Part III limited to the sales provisions. In the author's opinion, however, taking both provisions together leads to a general principle (Art. 7(2) CISG) that all declarations to be made under the CISG are not, as a rule, submitted to any form requirement. This

[122] See *Ferrari*, in: Ferrari/Flechtner/Brand, The Draft UNCITRAL Digest and Beyond, p. 164; *Schlechtriem*, in: Schlechtriem/Schwenzer, Commentary, Art. 4 para. 22; (German) Bundesgerichtshof 9 January 2002, CISG-Online No. 651; (Italian) Tribunale di Vigevano 12 July 2000, CISG-Online No. 493; (Swiss) Bundesgericht 15 September 2000, CISG-Online No. 770.

[123] But see the exception mentioned in Art. 29(2) CISG.

would also exclude domestic form requirements (such as Statute of Frauds requirements[124]) and functionally equivalent domestic rules (such as the consideration requirement[125]).

b) Exceptions

There are exceptions to the general informality principle. The first exception is mentioned in Art. 12 CISG and relates to those states that have made a reservation (Art. 96 CISG)[126] against the informality principle. If a party has its place of business in such a reservation state any provision that allows a declaration to be made in any form other than in writing will not apply. According to the second sentence of Art. 12 CISG, the party may not derogate from that provision and this is also recognised explicitly in Art. 6 CISG. It is not entirely clear what the precise consequences of Art. 12 CISG are. Two different possibilities are conceivable if one of the parties has its place of business in a reservation state.[127] On the one hand, it could be argued that the form requirements of the reservation state should apply.[128] On the other hand, the position could be taken that the wording of the provision simply excludes the relevant form provisions of the CISG so that the form issue should be left to the private international law of the forum.[129] It is submitted that the second view should be followed because it is in line with the wording of the provision. It follows from this that if the private international law of the forum designates the law of the reservation state as applicable, its form requirements should be applied. If, however, the private international law of the forum leads to the law of a non-reservation state, it is disputed whether the form rules of the CISG[130] or the form rules of that state's domestic law[131] should be applied.

---

124 See U.S. Supreme Court of Oregon 11 April 1996, CISG-Online No. 202; *Schlechtriem*, Internationales UN-Kaufrecht, para. 64.

125 As to the consideration requirement see p. 24 et seq.

126 As for the actual status concerning reservations under Art. 96 CISG see www.uncitral.org.

127 For more detail and references see *Ferrari*, in: Ferrari/Flechtner/Brand, The Draft UNCITRAL Digest and Beyond, p. 213 et seq.

128 This seems to be what the (Belgian) Rechtbank von Koophandel Hasselt 2 May 1995, CISG-Online No. 371 has done.

129 *Schlechtriem*, in: Schlechtriem/Schwenzer, Commentary, Art. 12 para. 2 et seq.; *Ferrari*, in: Ferrari/Flechtner/Brand, The Draft UNCITRAL Digest and Beyond, p. 213 et seq. with further references; (Dutch) Hoge Raad 7 November 1997, CISG-Online No. 551.

130 *Schlechtriem*, in: Schlechtriem/Schwenzer, Commentary, Art. 12 para. 3; *Ferrari*, in: Ferrari/Flechtner/Brand, The Draft UNCITRAL Digest and Beyond, p. 213 et seq.; (Dutch) Hoge Raad 7 November 1997, CISG-Online No. 551.

131 *Magnus*, in: Staudinger Kommentar zum Bügerlichen Gesetzbuch, Art. 12 para. 9.

The second exception to the informality principle is that the parties are free to agree on a form requirement for all or certain of their contractual declarations.[132] This simply results from Art. 6 CISG and has been further expressed (and submitted to a counter-exception) in Art. 29(2) CISG.

If the Convention (e.g. Art. 29(2) CISG or a usage in the sense of Art. 9 CISG) or the contract does in an exceptional case require a statement to be made in writing, Art. 13 CISG provides that "writing" also includes telegram and telex.[133] Given the time at which the Convention was agreed upon it is not surprising that this provision does not deal with more modern forms of communication such as fax, email etc.[134] It is submitted that one should develop a rather liberal approach as a general principle (Art. 7(2) CISG), based on Art. 13 CISG. As a guideline one should look to whether the communication can be made manifest by print-out so that it can, at least in principle, be used to read, to understand and to provide evidence of the content.[135] This would normally lead to the result that fax and email may be sufficient to meet the writing requirement.[136]

2. Communication risks

Art. 27 CISG contains a general rule on the risk of disturbances in the communication of declarations, notices etc. The provision is influenced by the so-called dispatch theory in that the recipient bears the risk of loss, delay or alteration that may occur during the transmission process, provided that the

---

[132] For more detail see *Schlechtriem*, in: Schlechtriem/Schwenzer, Commentary, Art. 11 para. 16 et seq.; *Ferrari*, in: Ferrari/Flechtner/Brand, The Draft UNCITRAL Digest and Beyond, p. 214.

[133] It is disputed whether Art. 13 CISG should also apply if the writing requirement originates in domestic law as a result of the application of Art. 12, 96 CISG (reservation against Art. 11 CISG, see above); see in more detail *Schlechtriem*, in: Schlechtriem/Schwenzer, Commentary, Art. 13 para. 4. In the author's view it should be possible to argue in favour of the application of Art. 13 CISG by saying that the reservation mechanism provided for in Art. 12, 96 CISG is limited to allow domestic law to require written form, but that it does not go as far as to forbid the Convention to define or illustrate what constitutes written form.

[134] See as to this problem *Schlechtriem*, in: Schlechtriem/Schwenzer, Commentary, Art. 13 para. 2a; CISG-AC Opinion No. 1 (*Ramberg*), Internationales Handelsrecht (IHR) 2003, 244.

[135] *Schlechtriem*, in: Schlechtriem/Schwenzer, Commentary, Art. 13 para. 2a.

[136] *Ferrari*, in. Ferrari/Flechtner/Brand, The Draft UNCITRAL Digest and Beyond, p. 209 et seq.

communication is made by the declaring party by means appropriate in the circumstances.[137] It should be noted that the provision only applies to declarations made under Part III (i.e. the sales part) of the Convention, but not to declarations made in the course of the formation of the contract (which are submitted to different provisions in Art. 14 et seq. CISG). The rule in Art. 27 CISG does not apply where Part III of the Convention provides otherwise (as for instance in Art. 47(2), Art. 48(4), Art. 63(2), Art. 79(4) CISG). Neither will it apply if the parties have agreed otherwise (cf. Art. 6 CISG) or if there is a differing usage or practice in the sense of Art. 9 CISG.[138]

3. Further provisions

Further general provisions are contained in Art. 10 CISG (place of business), Art. 25 CISG (fundamental breach), Art. 26 CISG (declaration of avoidance), Art. 28 CISG (limits to claims for specific performance). Some of these provisions are extremely important and will be discussed in the context where they become relevant (in particular in the chapters on remedies).

---

137 *Schlechtriem*, in: Schlechtriem/Schwenzer, Commentary, Art. 27 para. 1. See also idem. at para. 7 for more detail on what is to be regarded as "appropriate in the circumstances" submitting for instance that the means chosen by the sender must be "appropriate" both in the country of the sender and in the country of the recipient.

138 See *Schlechtriem*, in: Schlechtriem/Schwenzer, Commentary, Art. 27 para. 4.

Part 2:
Scope of application of the Convention

§ 3. Rules on the scope of application

I. Outline

Every international convention has to define its scope of application. The Convention does so in Art. 1 et seq. CISG and in Art. 100 CISG. Stated generally, the following requirements will have to be met for the CISG to be applicable:

- There must be a contract of sale of goods (Art. 1-3 CISG, cf. II)
- The parties must have their places of business in different states – the "international" character of the contract (Art. 1 CISG, cf. III)
- The case must have a specified connection to a Contracting State (Art. 1 CISG, cf. IV)
- The temporal scope of application must be met (Art. 100 CISG, cf. V)
- The application of the CISG must not be excluded by party autonomy (Art. 6 CISG, cf. VI)
- The application of the CISG by arbitral tribunals raises specific questions which will be dealt with in a separate part (cf. VII).

II. Contract of sale of goods

1. Goods

According to Art. 1 CISG the CISG applies to "contracts of sale of goods". Goods in the sense of the CISG are moveable, tangible objects.[139] It is submitted that this concept should be interpreted widely.[140] Nevertheless, the

[139] *Schlechtriem*, in: Schlechtriem/Schwenzer, Commentary, Art. 1 para. 20 et seq.
[140] *Schlechtriem*, in: Schlechtriem/Schwenzer, Commentary, Art. 1 para. 21.

CISG will not cover, for instance, the "sale" of know-how which is not in any form incorporated in a physical or electronic medium.[141]

a) Mixed contracts

Problems can arise if there is one single contract which obliges the "seller" both to deliver goods and to provide other objects (e.g. rights, immovables, know-how). This particular issue is not addressed specifically in the CISG although of course the CISG does govern the general question of the object of the sale ("goods"). The solution for such cases of so-called "internal gaps" of the CISG can be found in Art. 7(2) CISG: "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." In other words, before finding the solution in the applicable domestic law one has to examine whether one can extract from the CISG a general principle which provides a solution to the issue in question. It is submitted that this can be done in the present case. Art. 3(2) CISG stipulates that in a single mixed contract for both goods and services, the CISG will not apply if the services part is the preponderant part (there not being a "sale"). In the author's opinion, a general principle can be derived from this provision to the effect that if one contract contains two (or more) different elements the CISG will not apply if the elements which were outside the scope of the CISG form the preponderant part of the contract.

b) Companies

The sale of an entire business or a company will not usually come within the scope of the CISG. This is obvious where the seller's rights (shares) in the business are sold because rights are not "goods" in the sense of the CISG and because Art. 2 lit. (d) CISG specifically excludes shares from the application of the CISG. It will, however, usually be the same where the business is not sold by way of its shares, but by way of its assets ("asset deal"). It is true that in such a case the CISG might apply if the assets consist of "goods", but in most cases the predominant part of the assets consists of intangible rights or of immovable property. According to the general principle (Art. 7(2) CISG) developed above, this means that the entire contract falls outside the scope of the CISG.

---

[141] *Schlechtriem*, in: Schlechtriem/Schwenzer, Commentary, Art. 1 para. 21a. And even if it is incorporated in such a medium, Art. 3(2) CISG will often apply excluding the application of the CISG, cf. below.

c) Software

How far the "sale" of software falls under the scope of the CISG is not entirely clear. The first issue which arises here is whether the application of the CISG depends on whether the software is "materialized" in some form (CDs, external drives etc.). It is of course true that software embodied on a CD accords more to the classic notion of goods as corporeal objects than does software which has simply been transmitted electronically. Against that, the legal issues and difficulties will be similar so that there are good arguments for applying the CISG to such contracts, too; if necessary, the rules of the CISG can be adjusted (by use of the "general principles" mentioned in Art. 7(2) CISG) in order to fit to possible particuliarities of electronically transmitted software.[142]

The second matter for discussion is whether the CISG can only apply to standard software or also to individually tailored software.[143] It is submitted that this is not a question of whether software can be regarded as a "good", but rather a matter for Art. 3(1) CISG which deals with those cases where the "seller" has to manufacture the object of the sale. It is therefore preferable to regard software in any form as "goods" in the sense of Art. 1 CISG.

It should be noted, however, that the CISG can only apply if the intention of the parties is to transfer ownership in the software to the "buyer", and not merely to grant a licence on terms to use the software for a certain period of time. In the latter case this would not be a "sale" in the sense of the CISG (cf. below).

2. Contract of sale

a) Basic principle

The CISG does not expressly define what constitutes a contract of sale. However, it can be concluded from the rules on the obligations of the parties (Art. 31 et seq., 53 et seq. CISG) that the "standard" sales contract is one where the seller is obliged to deliver the goods (and possibly the documents) and where the buyer is obliged to pay the price.[144] In most cases it will be easy to recognize a sales contract. There are, however, certain types of contract

142 *Schlechtriem*, in: Schlechtriem/Schwenzer, Commentary, Art. 1 para. 21.

143 See *Schlechtriem*, in: Schlechtriem/Schwenzer, Commentary, Art. 1 para. 21, with further references to legal writing and case law.

144 See *Schlechtriem*, in: Schlechtriem/Schwenzer, Commentary, Art. 1 para. 14.

where the classification may create difficulties (cf. b-e). What is more, Art. 2 CISG excludes certain types of contracts from the scope of the CISG (cf. f).

b) Goods to be manufactured (Art. 3(1) CISG)

According to Art. 3(1) CISG, 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. This provision makes clear that not only does the CISG govern the sale (or rather distribution) of so-called end-products but it can also be applied to contracts where the "seller" has to manufacture (or produce) the goods or to have them manufactured (or produced). Only in cases where the material needed for that process is in a substantial part to be furnished by the "buyer", will the contract not be regarded as a contract of sale in the sense of the CISG. The burden of proof will be on the party claiming that the CISG does not apply.[145]

The interpretation of Art. 3(1) CISG has given rise to considerable controversy. In the following section the main outlines of these controversies are discussed though no attempt is made at completeness.[146]

First, one has to define what is meant by "materials necessary for such manufacture or production". Raw materials needed for production will usually be covered, while mere "accessory" elements (e.g. material provided for the packaging of the goods) will not.[147] It is far from settled, however, whether the provision of know-how (plans, designs etc.) by the "buyer" counts as "material necessary" for the production in the sense of Art. 3(1) CISG.[148]

Secondly, there is uncertainty concerning the concept of the "substantial part". Several criteria have – alternatively or cumulatively – been suggested, in legal writing and in case law, as relevant: the economic value of the "buyer's" contribution, its volume and the importance of its contribution for the

---

145 *Schlechtriem*, in: Schlechtriem/Schwenzer, Commentary, Art. 3 para. 10.

146 See for more detail *Schlechtriem*, in: Schlechtriem/Schwenzer, Commentary, Art. 3 para. 3a et seq.; CISG-AC Opinion No. 4 (*Pirales Viscasillas*), Internationales Handelsrecht (IHR) 2005, 124.

147 CISG-AC Opinion No. 4 (*Pirales Viscasillas*), Internationales Handelsrecht (IHR) 2005, 124, para. 2.11.

148 For references see CISG-AC Opinion No. 4 (*Pirales Viscasillas*), Internationales Handelsrecht (IHR) 2005, 124, para. 2.12 et seq.; *Schlechtriem*, in: Schlechtriem/Schwenzer, Commentary, Art. 3 para. 3b. See also (Swiss) Handelsgericht Zürich 10 February 1999, CISG-Online No. 488; (French) Cour d'appel Chambéry 25 May 1993, CISG-Online No. 223.

end-product. It is submitted that the application of Art. 3(1) CISG will always depend on a case-by-case analysis and that one should therefore be able to look at each of these criteria in order to reach an overall assessment on whether the "buyer's" contribution was essential or not. It is further submitted that one should not try to draw a hard and fast line when a particular percentage is reached (for instance the 50 percent threshold which is sometimes mentioned[149]) but instead a court should weigh all relevant factors in each individual case. In fact, it will often be too difficult, if not impossible, to measure the "buyer's" contribution in exact figures (in particular if one has not reached agreement on which elements to bring into the equation, as mentioned above). The uncertainty resulting from that approach is the price one has to pay for the vague criterion ("substantial") used in Art. 3(1) CISG.

Contracts where the "seller" simply performs services or work on the "buyer's" goods, for example, repairing his machine, converting his crude oil into petroleum etc., will not fall under the CISG.[150] The result will not change if the services undertaken by the "seller" imply that he inserts some material of his own into the "buyer's" product (e.g. exchange of spare parts in the course of the repair of the "buyer's" machine). On the other hand, the CISG will apply if both the "buyer" and the "seller" have to contribute material to the production process, as long as the "buyer's" contribution does not amount to a "substantial" part.

c) Contracts with a service element

Sales contracts are frequently not confined to the delivery of the goods, but also contain certain service elements, for instance to instal the sold machine, to instruct the buyer's personnel in its use, to provide adequate documentation etc. Every legal system then has to decide how far those types of contracts should be treated as sales contracts or as service contracts. Art. 3(2) CISG states that the CISG does not apply to contracts in which the preponderant part of the obligations of the "seller" consists in the supply of labour or other services. It is submitted that the burden of proof is on the party which argues that the CISG is not applicable because the service part is the preponderant part of the contract.[151]

---

149 For references see CISG-AC Opinion No. 4 (*Pirales Viscasillas*), Internationales Handelsrecht (IHR) 2005, 124, para. 2.8 et seq.

150 *Schlechtriem*, in: Schlechtriem/Schwenzer, Commentary, Art. 3 para. 3.

151 *Schlechtriem*, in: Schlechtriem/Schwenzer, Commentary, Art. 3 para. 3.

It is important to note that this provision will only apply if there is *one* single contract which contains both the obligation to furnish the goods and the service (labour) obligation. If on the other hand, there are two separate contracts, one concerning the goods, the other concerning the services, Art. 3(2) CISG will not apply; in these cases the sales contract will be governed by the CISG, the service contract by the applicable (domestic) law as determined by the conflict of law rules of the forum. Whether delivery and services are contained in one contract or in two, is primarily a matter of the interpretation of the contract(s). Irrespective of whether this task has to be done under the standards of the applicable domestic law[152] or according to the rules of the CISG[153] the practical result will usually depend on an analysis of the parties' intentions. It is submitted that the following factors can (inter alia) be used in order to draw the distinction: Did the parties agree on one global price? Were all the agreements contained in one document? If not, was there a close timely connection between the "delivery"-document and the "services"-document?[154]

If there is one single contract consisting of both a "delivery"-element and a "services"-element, Art. 3(2) CISG will exclude it from the application of the CISG if the services-element forms the "preponderant" part of the obligations of the "seller". What precisely this test means, is (again) a matter of dispute.[155] In the author's opinion, the main criterion should be a comparison between the economic value of the goods and the economic value of the services rendered.[156] If the services part amounts to 50 percent or less of the entire economic value of the contract (i.e. goods plus services), then the CISG will apply on the ground that the service element does not constistute the preponderant part of the seller's obligations. Once, however, the services part constitutes more than 50 percent it will usually be treated as preponder-

152 *Secretariat Commentary*, Art. 3 para. 3.

153 *Schlechtriem*, in: Schlechtriem/Schwenzer, Commentary, Art. 3 para. 5.

154 See *Schlechtriem*, in: Schlechtriem/Schwenzer, Commentary, Art. 3 para. 6a.

155 See in detail CISG-AC Opinion No. 4 (*Pirales Viscasillas*), Internationales Handelsrecht (IHR) 2005, 124, para. 3; *Schlechtriem*, in: Schlechtriem/Schwenzer, Commentary, Art. 3 para. 7a et seq.

156 As of the conclusion of the contract, CISG-AC Opinion No. 4 (*Pirales Viscasillas*), Internationales Handelsrecht (IHR) 2005, 124, para. 3.3 et seq.; *Schlechtriem*, in: Schlechtriem/Schwenzer, Commentary, Art. 3 para. 7a; *Magnus*, in: Staudinger Kommentar zum Bürgerlichen Gesetzbuch, Art. 3 para. 25; Arbitral Award, Tribunal of Commercial Arbitration at the Russian Federation Chamber of Commerce, 30 May 2000, CISG-Online No. 1077.

ant. It should be noted, however, that it is often argued that "preponderance" will only start at a mark which is "significantly" over 50 percent.[157]

In any event, the economic value test will have to be decided on a case-by-case basis and should always be combined with, and in the last resort subjected to, an analysis of the parties' intentions which may lead to results which differ from the result of a pure mathematical approach.[158] Indications for the parties' assessment of the importance of the respective parts can, for instance, be drawn from the degree of detail which they have dedicated to these parts in the contract[159] or from the way in which the "price" for the services part was calculated.[160]

In the case of so-called "turnkey-contracts" the application of Art. 3(2) CISG will usually lead to the result that the CISG does not apply, as the services part will usually be clearly preponderant.[161] The same is true where a market research institute undertakes a market analysis for its client: in such a case, the service part is clearly preponderant relative to the obligation to hand over the study in a printed version.[162]

A difficult problem will arise where there is a contract which falls under both Art. 3(1) and Art. 3(2) CISG, i.e. a contract for goods to be manufactured with certain service obligations of the seller (e.g. installation of the manufactured machines on the buyer's premises). It is submitted that in these cases Art. 3(1) and (2) CISG should be applied independently from one another:

---

157 See for an overview *Schlechtriem*, in: Schlechtriem/Schwenzer, Commentary, Art. 3 para. 7b.

158 See for instance (German) Oberlandesgericht München 3 December 1999, CISG-Online No. 585; (German) Landgericht München 16 November 2000, CISG-Online No. 667; (German) Landgericht Mainz 26 November 1998, CISG-Online No. 563; (Italian) Corte Suprema di Cassatione 9 June 1995, CISG-Online No. 314; Arbitral Award, ICC 7153/1992, CISG-Online No. 35.

159 See (German) Landgericht Mainz 26 November 1998, CISG-Online No. 563.

160 See (German) Landgericht München 16 November 2000, CISG-Online No. 667 where the court regarded it as an indication for the preponderance of the sales part that the service parts (here: installation of the sold pizzeria fittings in the buyer's restaurant) were not charged separately but was contained in the overall price charged for the goods.

161 See for instance (Swiss) Handelsgericht Zürich 9 July 2002, CISG-Online No. 726 where the "seller" had to plan, deliver, assemble, supervise the assembly and put into operation a plant for the breaking down and separation of food-cardboard packaging; *Schlechtriem*, in: Schlechtriem/Schwenzer, Commentary, Art. 3 para. 8.

162 (German) Oberlandesgericht Köln 26 August 1994, CISG-Online No. 132.

First, one should examine whether the contract falls outside the scope of the CISG under Art. 3(1) CISG which is not the case if the parts provided by the buyer are not substantial. If the contract is not excluded from the CISG by virtue of Art. 3(1) CISG, one will have to apply Art. 3(2) CISG according to the criteria developed above. When doing so, one will face the question of whether the efforts made by the seller in the production process are to be regarded as "services or labour" in the sense of Art. 3(2) CISG; if so, that could easily tip the balance against the application of the CISG because the "service part" would gain economic value. In the author's opinion, however, the term "labour and services" in Art. 3(2) does not refer to the actual production or manufacture of the goods because the fact that the "seller" manufactures the goods is already taken account of in Art. 3(1) CISG so that there is no room left for an application of Art. 3(2) CISG.[163]

d) Contracts with a finance element

Contracts which provide for the delivery of goods (or documents) are often combined with agreements on the financing of the transaction. Whether such contracts are to be regarded as contracts of "sale" should be decided according to the general principle (Art. 7(2) CISG) developed above for "mixed" contracts. Thus, whether such a contract falls under the CISG will depend on whether the financing agreements form the preponderant part of the entire transaction. Simple financial credit arrangements such as the permission to pay in instalments or retention of title clauses will usually not have that effect. Typical leasing contracts will on the other hand usually be preponderantly finance contracts and will therefore not be governed by the CISG.[164]

e) Distribution agreements

Distribution agreements need to be analysed on a case-by-case basis. As a general rule, however, one can say that a framework contract concluded between a supplier and distributor will usually not be a sales contract whereas the respective delivery contracts will often fall under the CISG.[165]

f) Private use and further exceptions in Art. 2 CISG

According to Art. 2 lit. (a) CISG the CISG does not apply to sales of goods bought for personal, family or household use (the burden of proof on this

---

[163] The issue is, however, disputed. See for further detail CISG-AC Opinion No. 4 (*Pirales Viscasillas*), Internationales Handelsrecht (IHR) 2005, 124, para. 4; *Schlechtriem*, in: Schlechtriem/Schwenzer, Commentary, Art. 3 para. 3.

[164] See *Schlechtriem*, in: Schlechtriem/Schwenzer, Commentary, Art. 1 para. 16.

[165] See *Schlechtriem*, in: Schlechtriem/Schwenzer, Commentary, Art. 1 para. 16a.

issue lying with the buyer)[166], 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. As a general rule, therefore, the CISG only applies where the buyer has bought the goods for business or professional use. This will in most cases exclude typical consumer sales from the CISG. The practical consequence of this is, therefore, that the CISG will chiefly apply to sales in a commercial setting, although, of course, the commercial character of the transaction (or of the parties) is not directly required by the CISG, as evidenced by Art. 1(3) CISG. By way of exception (to be proven by the seller[167]), however, the CISG can apply to purchases for private use if the seller neither knew nor ought to have known that the goods were bought for such use. "Ought to have known" according to the predominant opinion means that the seller must have been grossly negligent.[168]

Art. 2 lit. (b) to (f) CISG contains further cases in which the CISG does not apply, for instance for auctions, sales by authority of law, shares, negotiable instruments[169], money, ships, aircraft or electricity etc.

III. International character

According to Art. 1 CISG the parties to the contract of sale must have their places of business in different states. The CISG therefore does not use the place of the conclusion of the contract or the place of performance in order to define the required international character of the contract, but simply

166 According to the predominant opinion, *Schlechtriem*, in: Schlechtriem/Schwenzer, Commentary, Art. 2 para. 15; *Khoo*, in: Bianca/Bonell, Commentary, Art. 2 para. 2.2; *Westermann*, in: Münchener Kommentar zum Bürgerlichen Gesetzbuch, Art. 2 para. 4 et seq.; *Siehr*, in: Honsell, Kommentar, Art. 2 para. 11; *Magnus*, in: Staudinger Kommentar zum Bürgerlichen Gesetzbuch, Art. 2 para. 12.

167 According to the predominant opinion, *Schlechtriem*, in: Schlechtriem/Schwenzer, Commentary, Art. 2 para. 15; *Westermann*, in: Münchener Kommentar zum Bürgerlichen Gesetzbuch, Art. 2 para. 6; *Honnold*, para. 50; *Siehr*, in: Honsell, Kommentar, Art. 2 para. 13.

168 *Schlechtriem*, in: Schlechtriem/Schwenzer, Commentary, Art. 2 para. 12; *Khoo*, in: Bianca/Bonell, Commentary, Art. 2 para. 2.2; *Westermann*, in: Münchener Kommentar zum Bürgerlichen Gesetzbuch, Art. 2 para. 6; *Siehr*, in: Honsell, Kommentar, Art. 2 para. 13; *Magnus*, in: Staudinger Kommentar zum Bürgerlichen Gesetzbuch, Art. 2 para. 28.

169 Documents of title which represent the goods (e.g. bills of lading) do not fall under the term "negotiable instruments" in the sense of the CISG. Documentary sales therefore can be governed by the CISG, as is also evidenced by Art. 33 CISG.

looks at where the parties come from. If for instance two parties with their places of business in France conclude a contract for the sale and shipment of goods from China to Spain, the CISG will not be applicable. If, on the other hand, a party with its place of business in China contracts with a party with its place of business in Spain for the sale and shipment of goods from Paris to Bordeaux, the internationality requirement of the CISG is met. As for the burden of proof it is submitted that it has to be borne by the party which claims that the CISG is applicable.[170]

In accordance with a decision of a German court it is submitted that a place of business exists if a party "uses it openly to participate in trade" and if it is not merely temporary and displays a certain degree of independence (in the sense of having a certain independent ability to act).[171]

This need not necessarily be the main center of business. In fact, Art. 10 lit. (a) CISG recognises that a party can have several places of business and chooses the one which has the closest connection with the contract as the relevant one. If a party does not have a place of business, reference is to be made to its habitual residence (Art. 10 lit. (b) CISG).

The relatively wide definition of the international character of the contract in Art. 1(1) CISG is to some extent restricted by Art. 1(2) CISG: The fact that the parties have their places of business in different states is to be disregarded if it was not apparent at or before the conclusion of the contract. The burden of proof should be on the party which relies on this exception.[172]

IV. Connection to a Contracting State

Art 1 CISG requires that the contract must have some connection to at least one of the Contracting States of the CISG. For the Convention to apply by virtue of Art. 1(1) lit. (a) CISG the two states where the parties have their places of business must both be Contracting States to the CISG. However, the CISG may also apply by virtue of Art. 1(1) lit. (b) CISG if the rules of private international law lead to the application of the law of a Contracting State. These two mechanisms will be dealt with in turn.

---

170 *Schlechtriem*, in: Schlechtriem/Schwenzer, Commentary, Art. 1 para. 25.

171 See (German) Oberlandesgericht Stuttgart 28 February 2000, Internationales Handelsrecht (IHR) 2001, 65 = CISG-Online No. 583 translation taken from www.cisg.law.pace.edu; *Magnus*, in Staudinger Kommentar zum Bürgerlichen Gesetzbuch, Art. 1 para. 63.

172 *Schlechtriem*, in: Schlechtriem/Schwenzer, Commentary, Art. 1 para. 48.

1. Places of business in different Contracting States (Art. 1(1) lit. (a) CISG)

Art. 1(1) lit. (a) CISG is a rather straightforward rule. If the two states where the parties have their places of business are Contracting States, the CISG will be applicable without there being any recourse to the rules of private international law of the forum. This is why Art. 1(1) lit. (a) CISG is often called an "autonomous" mechanism.

Art. 1(1) lit. (a) CISG will only apply if the court is in a Contracting State. This is not expressly stated in Art. 1 CISG, but it results from the simple consideration that a court in a Non-Contracting State will simply not have to look at Art. 1 CISG because the provision is not binding law for this court.[173]

Contracting States are those states where the CISG has effectively entered into force. At present, more than 60 states have set the CISG into force, among them many of the world's most important trading nations, for instance most of the EC states, China, the US etc. A list of the Contracting States can be found at the homepage of UNCITRAL (http://www.uncitral.org/uncitral/en/uncitral_texts/sale_goods/1980CISG_status.html).

It should be noted that the Convention allows a state to make a number of reservations when signing or otherwise acceding to the Convention.[174] Where a state makes a reservation under Art. 92 CISG that it will not be bound by Part II or Part III the effect is that it will not be regarded as Contracting State in respect of matters which are governed by that respective part. Several Scandinavian States (Denmark, Finland, Norway, Sweden) have made this declaration with regard to Part II of the CISG, i.e. the rules on the formation of the contract.[175] Whether the CISG applies to govern a dispute between a person which has its place of business in a *non-reservatory* "Contracting State" contracts and a person from a *reservatory* "Contracting State" is not an easy question. By way of example, if a person which has its place of business in Germany (a non-reservatory "Contracting State") contracts with someone whose place of business is in Sweden and a dispute later arises as to whether a contract has been formed, a simple recourse to Art. 1(1) lit. (a) would not be appropriate because Sweden has entered a reservation to Part II of the CISG and is as a result not a Contracting State for that Part. However, the CISG

173 See *Ferrari*, in: Schlechtriem/Schwenzer (4th German ed.), Art. 1 para. 63.

174 See Art. 92 et seq. CISG.

175 See www.uncitral.org for more details on the status of reservations.

might still be applicable by virtue of Art. 1(1) lit. (b) CISG if the private international law of the forum leads to the law of a Contracting State which has not made a reservation under Art. 92 CISG.[176] If that is not the case, the formation rules of the CISG will not be applicable at all and the formation of the contract will be governed by the (domestic) law designated by the private international law of the forum.[177]

Similar restrictions may result from reservations made under Art. 93 and 94 CISG.

2. Private international law leading to the law of a Contracting State (Art. 1(1) lit. (b) CISG)

Whereas lit. (a) of Art. 1(1) CISG provides for a straightforward autonomous mechanism without any recourse to the rules of private international law, the alternative rule in lit. (b) of Art. 1 CISG is more complicated as it leads to the application of the CISG via the private international law rules of the forum: The CISG applies when these rules lead to the application of the law of a Contracting State.

a) Mechanism of Art. 1(1) lit. (b) CISG

The first step the court seized with the matter has to undertake under Art. 1(1) lit. (b) CISG is an application of "its" rules of private international law (for a German court: the "German" rules on private international law, for a French court the "French" ones etc.). These rules may be found in an international set of rules if in force and applicable (e.g. the 1955 Hague Convention on the Law Applicable to Contracts for the International Sale of Goods, the 1980 Rome Convention on the Law Applicable to Contractual Obligations or a future EC Regulation on that matter) or in the domestic body of rules on private international law of that state, depending on the legal framework in the forum state. It is submitted that the CISG itself does not give any guidance in how to find and apply the court's private international law rules.[178]

---

176 This is even the case if the case is decided by a court in a state which has made the reservation under Art. 92 CISG; see (Danish) Ostre Landsret 23 April 1998, CISG-Online No. 486; *Schlechtriem*, in: Schlechtriem/Schwenzer, Commentary, Art. 92 para. 3.

177 *Schlechtriem*, in: Schlechtriem/Schwenzer, Commentary, Art. 92 para. 3.

178 But see for a slightly differing view *Schlechtriem*, in: Schlechtriem/Schwenzer, Commentary, Art. 1 para. 39.

The application of the private international law rules of the forum will lead to the designation of the sales law of one particular state. The next step then will be to examine whether this state is a Contracting State of the CISG. If so, the CISG will be applicable to the contract, and not the domestic sales law of the designated state.[179]

b) Importance of the forum

Art. 1(1) lit. (b) CISG obviously applies when the forum is a court in a Contracting State (which has not declared a reservation under Art. 95 CISG, cf. below c).

The provision will, however, also have (indirect) effect if the court of a Non-Contracting State (e.g. Japan) is deciding the case. Of course, this court will not apply Art. 1(1) lit. (b) CISG directly, as this provision is not binding law in that state. The court will rather proceed as usual in international sales cases, i.e. apply its own (e.g. Japanese) rules of private international law which will designate the applicable (domestic) sales law. At this point, however, Art. 1(1) lit. (b) CISG can come into operation. If the applicable sales law is the law of a Contracting State (e.g. Germany), the contract will not be subject to the domestic sales law of that State, but to the CISG. What Art. 1(1) lit. (b) CISG does in these cases is to say that if the sales law of a Contracting State is to be applied to an international contract, the relevant body of sales law of that state will be the CISG. To put it differently, Art. 1(1) lit. (b) CISG in those cases operates as an internal conflicts rule for the Contracting State in question: if an international sales contract "comes in" (sent by the private international law of the foreign forum), Art. 1(1) lit. (b) CISG routes it away from the domestic rules and towards the rules of the CISG. Art. 1(1) lit. (b) CISG therefore creates a "second layer" of sales law for international sales, namely the CISG. As a consequence, the court in the foreign Non-Contracting State (e. g. Japan) will end up applying the CISG as part of the law of the Contracting State (e. g. Germany), i.e. as "foreign law".[180] This result may at first sight appear to be astonishing as the forum state is not a party to the CISG. On closer analysis, however, this result is logically correct and adequate: in fact, the forum state via its private international law "sends the contract away" to another state and therefore accepts the application of the rules that this other state provides for (international) sales. If that state

[179] The same result should be reached if the parties have chosen the CISG as the applicable law and if the private international law of the forum regards that choice as effective.

[180] Here lies the crucial difference to the case where the case is pending before the court of a Contracting State: In those cases, the court has to apply Art. 1(1) lit. (b) CISG directly, as part of its *own* binding law.

happens to be a Contracting State, it results from Art. 1(1) lit. (b) CISG that this set of rules is not its domestic law, but the CISG. For the forum state to accept this result is nothing but the logical consequence of subjecting the contract to a foreign legal system.

c) Effect of reservations under Art. 95 CISG

From the very beginning of the drafting process the mechanism provided for in Art. 1(1) lit. (b) CISG was subject to criticism for attempting unreasonably to widen the scope of application of the Convention. As a result, Art. 95 CISG was inserted which gives any state the right to declare[181] that it will not be bound by Art. 1(1) lit. (b) CISG (the so-called Art. 95 – reservation). Such reservations have for instance been declared by China, the Czech Republic, Singapore, Slovakia, the USA and Canada (for British Columbia).[182] Such a reservation may have different consequences depending on whether the forum is in a Reservation State, in a Contracting State which has not declared the reservation or in a Non-Contracting State. The critical case is the one where (at least) one of the parties does not have a place of business in a Contracting State but where all other requirements for the application of the CISG would be met (e.g. Art. 1, 2, 3 CISG etc.).

aa) Forum in a Contracting State which has not declared an Art. 95 reservation

The courts in a Contracting State which has not declared the Art. 95 reservation will apply Art. 1(1) lit. (b) CISG. If they are led by their private international law rules to the application of the law of a state which has declared the reservation (e.g. China) a difficult question exists as to whether they should apply the CISG by virtue of Art. 1(1) lit. (b) CISG notwithstanding the fact that the state of the applicable law has declared that it is not to be bound by this provision. In principle two different positions may be taken here:

On the one hand, it could be argued that Art. 95 CISG simply states that the Reservation State is not bound by Art. 1(1) lit. (b) CISG but that this in no way affects the application of this provision by courts in Non-Reservation States. If this is correct then even courts in Non-Reservation States would be obliged to apply Art. 1(1) lit. (b) CISG and thus to apply the CISG as part of the foreign law.[183]

---

181 As for the time of the declaration read Art. 95 CISG.

182 For an up-to-date status see http://www.uncitral.org.

183 *Siehr*, in: Honsell, Kommentar, Art. 1 para. 17.

On the other hand, the position could be taken that by designating the law of a Reservation State as applicable, the forum state has to apply this state's law in the way the courts in that state would do.[184] This would lead to the application of this state's domestic law, but not to the application of the CISG.[185] This is actually the position of the German Government which has declared upon ratification of the CISG that it holds the view that Reservation States are not considered Contracting States within the meaning of Art. 1(1) lit. (b) CISG so that there will be no obligation to apply the CISG in cases such as the one dealt with here.[186]

Both approaches have their merits. The starting point should be to check whether the forum state has declared a position on this issue, as for instance Germany has done. If this is not the case a formal application of traditional conflicts doctrine seems to lead to the first approach which would actually apply the CISG. A further argument that could be advanced in favour of that solution is that the Art. 95 reservation – unlike the reservation in Art. 92 CISG – does not say that the Reservation State is not to be regarded as a Contracting State.

bb) Forum in a Non-Contracting State

If the forum is in a Non-Contracting State, the court will not apply Art. 1(1) lit. (b) CISG. It will instead apply its own rules of private international law. If these lead to the application of the law of a Reservation State, should the court apply the CISG or that state's domestic sales law?

The situation is different here from the one mentioned just now (aa). The formal, argument advanced for the application of the CISG there (i.e. the court being obliged by Art. 1(1) lit. (b) CISG and by traditional conflicts doctrine to apply the CISG) is not valid here because the court in a Non-Contracting state cannot, of course, be actually "bound" by Art. 1(1) lit. (b) CISG in any form. The matter therefore entirely shifts to the sphere of the applicable law (i.e. to the law of the Reservation State). It is submitted that there is a lot to be said here for not applying the CISG out of respect for that state's decision to make the reservation. In fact, by doing so, that state has declared that it does not accept the mechanism of Art. 1(1) lit. (b) CISG. It is reasonable to assume that as a consequence this state does not want to

184 *Schlechtriem*, in: Schlechtriem/Schwenzer, Commentary, Art. 1 para. 43.

185 The courts in the Reservation State would only look at Art. 1(1) lit. (a) CISG which is not fulfilled in the present case as (at least) one of the parties has its place of business in a Non-Contracting State.

186 A correspondent provision has been inserted in the German Statute on the transformation of the CISG into German law.

have the insertion of a "second layer" of sales law for international cases (i.e. the CISG) either. In the author's opinion the result should therefore be that the court should apply the *domestic* law of the state designated by its private international law.

cc) Forum in a Reservation State

Just like the courts in a Non-Contracting State, the court in a Reservation State will not apply Art. 1(1) lit. (b) CISG, but apply its own rules of private international law. If these lead to the application of a Reservation State the same problem as was discussed just above (2) will arise. It is submitted that the solution should be the same, too: the court should apply the domestic sales law of the Reservation State. In addition to the argument which arises from respect for the other Reservation State's refusal to accept Art. 1(1) lit. (b) CISG, in the instant case, the forum state itself has made the reservation under Art. 95 CISG. In the author's opinion there are good grounds to conclude that by doing so the forum state has also expressed that it does not want to accept the insertion of the "second layer" of sales law that might follow from Art. 1(1) lit. (b) CISG within the framework of the applicable foreign law. This would in fact operate in a similar way as the decision of a state to exclude "renvoi" in private international law, i.e. to designate not the foreign state's private international law rules, but its substantive law. It is therefore not an excessive or inadequate interpretation of the reservation if one concludes from it that the forum (reservation) state simply wants to designate the foreign domestic sales law without any detour via the foreign state's private international law or via the foreign state's "second layer" for international sales.

If one follows that approach, the logical consequence would be that the courts in a reservation state would also have to apply the domestic law (and not the CISG as part of the foreign law) if its private international law rules designate the law of a Contracting State.[187]

[187] For a different opinion (application of the CISG as part of the foreign law) see however *Schlechtriem*, in: Schlechtriem/Schwenzer, Commentary, Art. 1 para. 41.

3. Summary

Any court seised with a case where the CISG might be applicable should therefore proceed as follows in order to determine whether the contract has a sufficient "connection" to the CISG in the sense of Art. 1(1) lit. (a) or (b) CISG.

If the court is in a Contracting State, the first step should be the application of Art. 1(1) lit. (a) CISG which will lead to the application of the CISG if both parties have their places of business in a Contracting State. If that is not the case, one has to distinguish further according to whether the forum state has made a reservation under Art. 95 CISG: (i) If the forum state has not done so, the court will have to resort to Art. 1(1) lit. (b) CISG. (ii) If the forum state has made a reservation under Art. 95 CISG, the court will not apply Art. 1(1) lit. (b) CISG, but will simply look to its private international law in order to find the applicable sales law.

If the court is in a Non-Contracting State, Art. 1(1) lit. (a) CISG will not be applicable. The court will not directly apply Art. 1(1) lit. (b) CISG either, but resort to its rules of private international law to find the applicable sales law.

If one follows the submissions made above (which is, of course, not self-evident as the matter is highly controversial), this would result in the following detailed picture in cases where Art. 1(1) lit. (a) CISG does not apply:[188]

[188] The following text is based on the assumption that all the other preconditions for an application of the CISG are given (e.g. contract of sale, international character etc.).

Applicable Law[189] / Forum	Contracting State	Reservation State	Non-Contracting State
Contracting State	Art. 1(1) lit. (b) CISG: CISG	Disputed, views: (i) court bound by Art. 1(1) lit. (b) CISG, therefore obliged to apply CISG as part of foreign law[190] (ii) obligation to respect the State's reservation decision thereby leading to application of state's domestic – non-CISG – law[191]; further argument: Reservation State does not want the "second layer"-effect of Art. 1(1) lit. (b) CISG. (iii) Reservation State not regarded as a "Contracting State" for purposes of Art. 1(1) lit. (b) CISG.[192]	Domestic law
Non-Contracting State	Art. 1(1) lit. (b) CISG not applicable. However, CISG should be applied as part of the (applicable) foreign law[193] ("second layer"[194]).	Art. 1(1) lit. (b) CISG not applicable: View (i) from above therefore not relevant here. Therefore, court should apply the domestic – non CISG – law out of respect for Reservation State's decision that it does not want to have the "second layer"-effect.	Art. 1(1) lit. (b) CISG not applicable: Domestic law.
Reservation State	Art. 1(1) lit. (b) CISG not applicable: consequences doubtful, possible approaches: (i) Same situation as if court in Non-Contracting State had to decide: application of CISG as part of the applicable foreign law.[195] (ii) Arguable: Higher respect for the reservation: Reservation State did not even want to accept the "second layer"-effect of Art. 1(1) lit. (b) CISG within the foreign law; similar to excluding the renvoi in private international law.	Art. 1(1) lit. (b) CISG not applicable out of respect for both: • Foreign (applicable law) State's decision not to want the "second layer"-effect in its own law. • Forum (Reservation) State's decision not to accept the "second layer"-effect even in a foreign law when being the competent forum.	Art. 1(1) lit. (b) CISG not applicable: Domestic law.

V. Temporal scope of application

The temporal scope of application of the Convention is governed by Art. 100 CISG. This provision distinguishes between the rules on the formation of the contract (Part II, Art. 14-24 CISG) and the other rules of the Convention: According to Art. 100(1) CISG, the 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 Art. 1(1)(a) CISG or the Contracting State referred to in Art. 1(1)(b) CISG. According to Art. 100(2) CISG, the 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 Art. 1(1)(a) CISG or the Contracting State referred to in Art. 1(1)(b) CISG.

The temporal scope of application is therefore linked to the entry in force of the Convention in that Contracting State(s) which provide(s) the necessary "connection" of the particular case to the Convention under Art. 1(1) CISG (cf. IV above). In the case of Art. 1(1)(a) CISG this refers to (both) the states where the parties have their place of business. In the case of Art. 1(1)(b) CISG this refers to the Contracting State the law of which has been declared applicable by the rules of private international law.

In most cases the crucial element which has to exist after the relevant date(s) of entry into force of the Convention will be the conclusion of the contract (Art. 100(2) CISG). By way of an exception, however, Art. 100(1) CISG chooses a different rule with regard to the formation of the contract itself: in that respect it is the proposal for concluding the contract that will be decisive.

---

189 As designated by the private international law of the forum.

190 *Siehr*, in: Honsell, Kommentar, Art. 1 para. 17.

191 *Schlechtriem*, in: Schlechtriem/Schwenzer, Commentary, Art. 1 para. 43.

192 German Government's position.

193 This has been the situation in the case of (German) Oberlandesgericht Düsseldorf 2 July 1993, CISG-Online No. 74 which had to decide at a time when the CISG had not entered in force in Germany (i.e. as the court of a "Non-Contracting State") and applied the CISG as part of the applicable Italian law.

194 I.e. Art. 1(1) lit. (b) CISG having the effect that "within" the Contracting State's legal system (where Art. 1(1) lit. (b) CISG is operative) the body of rules for international sales in the sense of Art. 1 CISG is the CISG.

195 *Schlechtriem*, in: Schlechtriem/Schwenzer, Commentary, Art. 1 para. 4.

VI. Party Autonomy

The application of the CISG is subject to the principle of party autonomy. According to Art. 6 CISG, the parties may exclude the application of the CISG or, subject to Art. 12 CISG, derogate from or vary the effect of any of its provisions. This provision in fact contains two different mechanisms: first, the complete "opting out" of the application of the Convention (see below 1.), and secondly the derogation from specific provisions of the Convention (see below 3.). Another issue that should be dealt with in that respect is whether the parties can "opt in" to the Convention, i.e. apply it although its scope of application is not given (see below 2.).

1. Opting out of the CISG

The first alternative mentioned in Art. 6 CISG operates on the private international law level in that the parties may exclude the application of the CISG entirely. Thus, even if all the requirements for the application of the CISG as mentioned above are met, the CISG will not be applicable if the parties have made the choice to exclude its application. Art. 6 CISG in other words accepts such a "negative choice of law" by the parties. If the parties have excluded the application of the CISG it will be for the private international law of the forum to designate the applicable (domestic) law.

a) Validity of the derogation agreement

In order to exclude the application of the CISG, the derogation agreement of the parties must of course be valid. It is, however, a controversial question according to which rules the validity should be assessed. On the one hand, one could argue that this is entirely a matter for the private international law of the forum.[196] On the other hand, there is the view that at least the formation of this agreement should be governed by the formation rules of the CISG (Art. 14-24 CISG).[197]

---

[196] *Schlechtriem*, in: Schlechtriem/Schwenzer, Commentary, Art. 6 para. 7. This is what the (German) Oberlandesgericht Düsseldorf 2 July 1993, CISG-Online No. 74 has done (at a time when Germany was not yet a Contracting State in a case where only one of the parties came from a Contracting State (Italy), but where the CISG was in principle, i.e. with regard to the sales issues, held to be applicable to the contract as part of the applicable Italian law). See also (Swiss) Kantonsgericht Zug 11 December 2003, CISG-Online No. 958 where the court did not apply Art. 14 et seq. CISG to a jurisdiction agreement.

[197] See for instance *Ferrari*, in: Schlechtriem/Schwenzer (4th German ed.), Art. 6 para. 12 et seq.; *Magnus*, in: Staudinger Kommentar zum Bürgerlichen Gesetzbuch,

The first issue to be addressed in that respect is whether the formation rules of the CISG actually extend to choice of law clauses or whether they are limited to the sales contract. In the latter case, they could not be applied to the derogation agreement because it is widely accepted that a choice of law is a legally separate agreement from the main (sales) contract. It is submitted that there are good grounds to assume that the formation provisions of the CISG (Art. 14 et seq. CISG) are only aimed at the formation of the sales contract, and do not extend to other agreements that may be concluded on the occasion of a sales contract (such as a choice of law or a forum selection). In fact, the requirements set up in Art. 14(1) CISG ("goods", "quantity", "price") clearly refer to a classic sales contract. It is true that Art. 19(3) CISG mentions clauses concerning dispute resolution mechanisms, but this reference does not necessarily presuppose that the formation of such clauses – which are generally regarded to be separate contracts from the contract of sale – is governed by Art. 14 et seq. CISG; it simply says that they are so important that the insertion or modification of such a (separate) clause or contract during the negotiation process may also affect the conclusion of the sales contract. As a result, the formation rules of the CISG should be regarded as not covering the formation of choice of law clauses (or forum selection clauses).

If one accepts this view, the entire validity of the derogation agreement will have to be examined under the rules that the private international law of the forum regards as applicable to such agreements (this may for instance be the substantive rules of the "lex fori" or the ones of the applicable law to the contract). This would also include the issue of whether a derogation agreement contained in standard terms is valid or not. The well-known problem of the "battle of forms" would therefore – in so far as the derogation clause is concerned – be decided under the rules that the private international law of the forum designates.

If, however, one assumes that the formation rules of the CISG can cover choice of law clauses, then it is submitted that the solution will depend on whether the forum is in a Contracting State. Assuming a case where both parties are situated in Contracting States and where all the requirements for the application of the CISG are met, if one disregarded the derogation agreement, the picture would be as follows:

Art. 6 para. 11 et seq. This view seems to have been taken – without expressly discussing the matter – by the (German) Oberlandesgericht Köln 24 May 2006, CISG-Online No. 1232.

(i) If the forum is in a Contracting State, it seems to be correct that the court should apply the CISG in order to decide on the validity of the derogation agreement. In fact, in such a case the court is in principle bound by the CISG and has to start its enquiry in the CISG that would in principle be applicable. The crucial question will be to decide whether the parties have validly excluded the application of the CISG. The CISG, however, provides rules for deciding on the validity of such a derogation agreement (if one accepts that opinion) and as a result those rules should be applied.

(ii) If, on the other hand, the forum is in a Non-Contracting State, it will be for the private international law of the forum to decide on the rules governing the validity of the derogation agreement.

b) Content of the derogation agreement

The parties' agreement to exclude the application of the CISG may be explicit or implicit. It is true that the Convention – unlike its predecessor, the ULIS – does not expressly say that an implicit derogation is possible. However, the predominant opinion is that deletion during the drafting process of a reference to an implied derogation was made solely to prevent the courts from too readily assuming an implicit derogation in order to be able to apply (their own) domestic law.[198]

The agreement to exclude the CISG need not designate the law that should apply instead. It can therefore be limited to the simple negative statement that the CISG shall not apply.[199] In such a case, the private international law of the forum will have to determine the applicable law. For the purposes of contract drafting, however, it is recommended to positively determine the applicable law in the contract in order to avoid the uncertainties that may result from the application of the private international law rules of the forum.

c) Interpretation of the derogation agreement

Whether or not the parties actually have reached an agreement to exclude the CISG will often be a matter of interpretation. Here a similar controversy to the one that exists with regard to the validity question has arisen, that is

---

198 See (Austrian) Oberster Gerichtshof 22 October 2001, CISG-Online No. 614; (French) Cour de Cassation 26 June 2001, CISG-Online No. 598; (German) Oberlandesgericht Düsseldorf 2 July 1993, CISG-Online No. 74; *Ferrari*, in: Ferrari/Flechtner/Brand, The Draft UNCITRAL Digest and Beyond, p. 119 et seq.; *UNCITRAL Digest,* Art. 6 para. 6; *Schlechtriem*, in: Schlechtriem/Schwenzer, Commentary, Art. 6 para. 8; *Secretariat Commentary,* Art. 5 para. 2.

199 See *Ferrari*, in: Ferrari/Flechtner/Brand, The Draft UNCITRAL Digest and Beyond, p. 132 et seq.; *UNCITRAL Digest,* Art. 6 para. 5.

to say, does the interpretation have to be made according to the standards of the CISG (i.e. Art. 8 CISG)[200] or according to the interpretation rules of the private international law of the forum[201]? Notwithstanding that the disputes are similar, in the author's opinion the situation here is different from the one concerning the validity issue. In fact, there should be little doubt that the CISG provision on the interpretation of the parties' declarations (Art. 8 CISG) can cover any declaration made by the parties. It is therefore submitted that one should distinguish according to where the forum is. Thus, courts in a Contracting State should apply Art. 8 CISG and use autonomous standards when interpreting the derogation agreement, whereas courts in Non-Contracting States should apply the rules designated for such purposes by their private international law.

d) Examples

Irrespective of the applicable standard of interpretation, it will of course always depend on a case-by-case analysis whether the parties implicitly meant to exclude the CISG.[202]

As a general rule, however, the parties will probably be treated as having intended to exclude the application of the CISG if they chose the law of a Non-Contracting State (e.g. "This contract is governed by English law", England not being a Contracting State).[203]

If, on the other hand, the parties have chosen the law of a Contracting State (e.g. "This contract is governed by Italian law"), the situation is more complicated. In fact such a choice might have two different meanings. On the one hand, it could mean that the parties wanted the "domestic" (i.e. non-CISG) law of that state (i.e. "Italian domestic sales law") to apply. On the other hand it could also mean that the parties agreed on those rules that the chosen state provides for international sales contracts (i.e. in the case of Italy the CISG, provided of course that the other requirements of Art. 1 et seq. CISG are given). The predominant opinion seems to follow the sec-

200 See for instance (Austrian) Oberster Gerichtshof 22 October 2001, CISG-Online No. 614; *Magnus*, in: Staudinger Kommentar zum Bürgerlichen Gesetzbuch, Art. 6 para. 20; *Bonell*, in: Bianca/Bonell, Commentary, Art. 6 para. 2.3.1.

201 See *Schlechtriem*, in: Schlechtriem/Schwenzer, Commentary, Art. 6 para. 8.

202 *Ferrari*, in: Schlechtriem/Schwenzer (4th German ed.), Art. 6 para. 19.

203 See for instance (German) Oberlandesgericht Düsseldorf 2 July 1993, CISG-Online No. 74; *Ferrari*, in: Ferrari/Flechtner/Brand, The Draft UNCITRAL Digest and Beyond, p. 123; *Ferrari*, in: Schlechtriem/Schwenzer (4th German ed.), Art. 6 para. 20; *Magnus*, in: Staudinger Kommentar zum Bürgerlichen Gesetzbuch, Art. 6 para. 23.

ond approach.[204] It is submitted that this is correct. In fact, the CISG is part of the law of the Contracting States – it is their "second layer" for international sales – so that the "prima facie" effect of the choice of the law of a Contracting State should be the application of the CISG.[205] It will, of course, be different if the choice of law clause contains some indication that the parties actually wanted the domestic law of the chosen state to apply; such an indicaton can, for instance, be expressed directly ("German domestic law", "German law excluding the CISG") or result from formula like "French Civil Code" or "California Commercial Code" or "Uniform Commercial Code".[206]

It has been held by the Austrian Supreme Court that choosing an Incoterm does not in itself amount to an implicit exclusion of the CISG.[207] This is correct because the Incoterms do not offer a complete sales regime but simply standardise certain party agreements on details concerning the place of performance, transport costs and risk etc. By agreeing on one of the Incoterms the parties therefore modify particular provisions of the CISG (which is admissible under the second alternative of Art. 6 CISG), but they do not usually express their wish to exclude the application of the CISG altogether.

A different issue will arise in cases where the CISG is in principle applicable but the parties, however, plead their case solely on the basis of a domestic legal system which they regard as applicable. In such a case, the court will have to decide whether such a behaviour of the parties amounts to an implicit derogation of the CISG under the first alternative of Art. 6 CISG. It is submitted that the answer will depend on how the private international law rules of the forum (which in that respect will usually be those of the "lex fori") deal with the application of "foreign" (i.e. non-domestic) law.[208] If these rules require the parties to actually invoke the application of "foreign"

---

[204] See for instance (German) Bundesgerichtshof 25 November 1998, CISG-Online No. 353; (Austrian) Oberster Gerichtshof 12 February 1998, CISG-Online No. 349; (Austrian) Oberster Gerichtshof 22 October 2001, CISG-Online No. 614; U.S. District Court, Northern District of California 27 July 2001, CISG-Online No. 616; *Ferrari*, in: Schlechtriem/Schwenzer (4th German ed.), Art. 6 para. 22. For a differing view see (Swiss) Bezirksgericht Weinfelden 23 November 1998, CISG-Online No. 428.

[205] The domestic law of the chosen state will be relevant for those issues which are not governed by the CISG, e.g. Art. 4 and 5 CISG (cf. above p. 20 et seq.).

[206] See the examples mentioned in U.S. District Court, Northern District California 27 July 2001, CISG-Online No. 616.

[207] (Austrian) Oberster Gerichtshof 22 October 2001, CISG-Online No. 614.

[208] *Schlechtriem*, in: Schlechtriem/Schwenzer, Commentary, Art. 6 para. 9.

law then the court will apply domestic law in the case mentioned above.[209] If, on the other hand, the law of the forum applies the principle of "iura novit curia" to the application of "foreign" law, the court should only regard such behaviour by the parties as a derogation of the CISG if there is evidence that the parties knowingly restricted their pleadings to domestic law *in order to* avoid the CISG, i.e. that they knew that without their behaviour another set of rules than the domestic law pleaded might apply.[210]

2. "Opting in" to the CISG

If the requirements for the application of the CISG are not met, the question may arise as to whether the parties (for instance from two Non-Contracting States such as England and Japan) may none the less choose the CISG to be the applicable law ("opting in"). It is submitted that two different situations have to be distinguished in this respect:

The first situation is the one where the parties have chosen the law of a Contracting State (e.g. Germany). The exact treatment of the case may depend on where the forum is situated. The details are dealt with in the table above (p. 58), but the general rule is that in most cases the CISG will apply as part of the chosen law of the Contracting State.

The second situation is the one where the parties have chosen the CISG as the applicable law. This raises a well-known and controversial problem in the area of private international law, namely whether the parties can chose an international legal instrument "as such", i.e. not as part of the law of a state which has enacted this instrument.[211] In other words: Can the parties choose "the CISG" as the applicable law or should they choose, for instance, "German law including the CISG"? The matter cannot be dealt with in detail here. It is submitted, however, that in the last resort the answer will be for the private international law of the forum state to decide whether it per-

[209] This seems to be what the U.S. Court of Appeals of Oregon 12 April 1995, CISG-Online No. 147 has done.

[210] See for instance (German) Oberlandesgericht Celle 24 May 1995, CISG-Online No. 152. But see also (French) Cour de Cassation 26 June 2001, CISG-Online No. 598 assuming an implicit derogation of the CISG from the fact that the parties did not invoke the CISG in the proceedings before the French judge without going into a deeper analysis of the parties' intentions.

[211] It should be reminded that the CISG in this case cannot be regarded as part of a state law because its requirements of application are not given.

mits the choice of non-state law.[212] Even if it does not do so, the parties are of course free to "choose" the CISG. Such a choice will have the simple effect of "incorporating" the provisions of the CISG into their contract. The rules of the CISG will, in other words, be applicable not as the applicable law, but as simple contract clauses. At first sight, therefore, one might be inclined to ask why the matter of whether the forum state permits the choice of non-state law is actually important if the parties can incorporate the CISG anyway. The answer to this question is that a "real" choice of the CISG as the applicable law will be stronger than the mere incorporation into the contract because a contractual incorporation will not shield the CISG from the mandatory rules of the applicable state law (as designated by the private international law of the forum state) whereas a "real" choice of the CISG as the applicable law can have that effect.

3. Derogation from specific provisions of the CISG

Art. 6 CISG also entitles the parties to derogate from or vary the effect of any of the provisions of the CISG. Unlike the "complete" opting out dealt with above (p. 60 et seq.), this type of derogation has a more limited scope. The parties accept that the CISG in principle applies, but want to exclude or to modify one or more of its provisions. As the CISG is applicable in these cases it is submitted that the formation and the interpretation of such a specific derogation agreement should be governed by the relevant rules of the CISG, i.e. Art. 14 et seq. and 8 CISG.[213]

VII. Application of the CISG by arbitral tribunals

The CISG has often been applied in arbitral practice, as a look at the case law databases reveals. It is, however, not entirely clear how an arbitral tribunal should proceed when deciding on the applicability of the CISG.

On the one hand, it might be conceivable to try to assimilate an arbitral tribunal to a state court for purposes of making the distinctions developed above. The next step would then be to develop the criteria for "classifying"

---

[212] *Schlechtriem*, in: Schlechtriem/Schwenzer, Commentary, Art. 6 para. 11.

[213] *Schlechtriem*, in: Schlechtriem/Schwenzer, Commentary, Art. 6 para. 12 et seq. As for the validity of such an agreement, the validity exception in Art. 4 lit. (a) CISG will usually apply so that the applicable (domestic) law will often govern that aspect.

the arbitral tribunal as a "court of" a Contracting State, a Non-Contracting State or an Art. 95-Reservation State. One possible way of doing so would be by looking at the seat of the arbitration.

However, such an approach would be likely to face well-founded criticism. Even if one has "localised" the arbitral tribunal (for instance by using the seat criterion), the arbitral tribunal is not subject to the domestic legal system of that state in the same way as a domestic court. Unlike a state court, for instance, an arbitral tribunal is not necessarily forced to find the applicable law by applying the private international law rules of the state in which it has its seat. In fact, the different arbitration rules provide different solutions to the question of how an arbitral tribunal should determine the applicable law.[214]

In the author's opinion one should not make any attempts to "assimilate" the arbitral tribunal to a state court. The arbitral tribunal should simply embark on its private international law analysis in the ordinary way, i.e. by following the relevant provision in the applicable arbitration rules (for instance Art. 13 of the ICC Rules), the parties' intentions or the relevant rules of the "lex arbitri". If the relevant private international law rule leads to the law of a Contracting State of the CISG (be it as a result of a choice of law clause or as a result of an objective analysis such as the closest connection test), the arbitral tribunal should regard the CISG as part of that state's legal system and check whether the requirements for the application of the CISG are met (in particular, of course, Art. 1 CISG). If that is the case, it should apply the CISG. If not, it should apply the domestic sales law of that state. Should the relevant private international law rule lead to the applicability of "general principles of law" instead of a the law of a state, the CISG may of course be taken into consideration as evidence of internationally accepted general principles of international sales law if the arbitral tribunal regards this as appropriate.[215] This approach seems to have been taken by several arbitral tribunals.[216]

---

214 This issue cannot be dealt with here. See for instance *Lew/Mistelis/Kröll*, Comparative International Commercial Arbitration, p. 411 et seq.

215 See for instance Arbitral Award, ICC 7331/1994, CISG-Online No. 106 where the tribunal believed that for the dispute at hand, such general principles and accepted usages (on which the Tribunal had decided to base its decision) were most aptly contained in the CISG. The tribunal continued that applying the CISG was "all the more appropriate" since both parties came from Contracting States to the CISG.

216 See for instance Arbitral Award, ICC 6653/1993, CISG-Online No. 71; Arbitral Award, Internationales Schiedsgericht der Bundeskammer der gewerblichen Wirtschaft in Österreich, CISG-Online No. 691; Arbitral Award, Schiedsgericht der Handelskammer Hamburg, CISG-Online No. 187; Arbitral Award, Hungarian

It should be noted however that there also are arbitral awards which have not (at least not explicitly) taken that view. Instead, the Tribunals appear to have relied on Art. 1(1) lit. (a) CISG (both parties from a Contracting State) without going into a private international law analysis first.[217] In the author's opinion, such a shortcut avoiding the relevant private international law rule and analysis should not be taken. It is submitted, however, that if both parties have their places of business in (different) Contracting States, the practical results between both approaches will often be the same as the applicable law will frequently be the law of one of the parties so that the CISG would then have to be applied even under the approach favoured here.

Chamber of Commerce and Industry Court of Arbitration, CISG-Online No. 163; Arbitral Award, CIETAC CISG/1999/20, CISG-Online No. 1244; but see also for example Arbitral Award, CIETAC CISG/1999/25, CISG-Online No. 1356. For more detail see *Ferrari*, in: Ferrari/Flechtner/Brand, The Draft UNCITRAL Digest and Beyond, p. 55 et seq.

217 See for instance: Arbitral Award, ICC 7531/1994, CISG-Online No. 565; Arbitral Award, ICC 7153/1992, CISG-Online No. 35; possibly also Arbitral Award, Hungarian Chamber of Commerce and Industry Court of Arbitration, CISG-Online No. 500.

Part 3:
Formation of the contract

§ 4. Rules on formation of contract

I. Introduction

1. Traditional model of offer and acceptance

The Convention, in line with most legal systems,[218] adopts the traditional model of offer and acceptance in order to determine whether a contract has been concluded.[219] That is to say, there must be a definite offer made by one party that is clearly and unequivocally accepted by the other. The rules governing formation are set out in Part II of the Convention. Under these rules, a contract is said to be concluded when an acceptance of an offer becomes effective. The first four articles of Part II (Art. 14-17 CISG) deal with the offer, while the following five articles (Art. 18-22 CISG) deal with the acceptance. The final two articles (Art. 23-24 CISG) address the time when a contract is concluded and when a communication "reaches" the addressee, respectively.

2. Reservations against the application of Part II

Art. 92 CISG allows a contracting state to declare at the time of signature, ratification, acceptance, approval or accession that it will not be bound by Part II[220] of the Convention.[221] If a state does so, it is not considered a Contracting State within Art. 1(1) CISG in respect of matters governed by Part. II, i.e. in respect of Art. 14-24 CISG. It follows from this that if party A has its place of business in a Contracting State (C) and party B in a Reservation State (R),

---

218 See *Schlesinger,* Formation of Contract, Vol. 2, p. 1584 et seq.

219 As for other techniques of concluding the contract see below V.

220 Or Part III which contains the rules on the sale of goods (Art. 25-88 CISG).

221 As of May 2007 Denmark, Finland, Iceland, Norway and Sweden have made such a reservation with regard to Part. II. For an explanation of why these countries have taken this position see *Kai Krüger,* Norsk kjøpsrett (Norwegian Sales Law), Bergen (Alma Mater), 4th ed. 1999 (available at http://www.cisg.law.pace.edu/cisg/biblio/kruger.html). For the exact status of reservations see www.uncitral.org.

Art. 1(1) lit. (a) CISG of the Convention cannot apply because R will not be regarded as a Contracting State by virtue of Art. 92(2) CISG.[222] The provision of Art. 1(1) lit. (b) CISG will however remain applicable.[223] Thus if the private international law of the forum state leads to the application of the law of a Contracting State which has not made a reservation under Art. 92 CISG, Part II of the Convention (Art. 14-24 CISG) will be applicable as part of the law of that Contracting State.[224]

Under Art. 94 CISG, Contracting States which have the same or closely-related legal rules on the formation of a sales contract may declare that the Convention is not to apply to the formation of sales contracts where the parties have their places of business in these States. Thus far, only the Scandinavian states have made a reservation under this provision.[225]

II. The offer

Art. 14(1) CISG provides that: "A proposal for concluding a contract addressed to one or more specific persons constitutes an offer if it is sufficiently definite and indicates the intention of the offeror to be bound in the case of acceptance." For there to be an offer, therefore, three elements must come together: the offeror must intend to be bound in the event that his proposal is accepted, the proposal must be sufficiently definite and, the offer must become effective. So too, to be capable of acceptance the offer must not have been "terminated". These elements will be dealt with in turn.

---

222 See for instance (German) Oberlandesgericht Rostock 27 July 1995, Transportrecht – Internationales Handelsrecht (TranspR-IHR) 1999, 23 = CISG-Online No. 209.

223 Provided that no Reservation under Art. 95 CISG is declared; for more detail see p. 54 et seq..

224 *Schlechtriem*, in: Schlechtriem/Schwenzer, Commentary, Art. 92 para. 3; *P. Huber*, in: Münchener Kommentar zum Bürgerlichen Gesetzbuch, Art. 92 CISG para. 2.

225 Denmark, Finland, Norway and Sweden declared, pursuant to Art. 94(1) and (2) CISG, 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 Art. 94(1) CISG, 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. See www.uncitral.org.

1. Intention to be bound

An essential element of a valid offer is that the offeror indicate his willingness to be bound in the case of acceptance. In many cases, the language used by the offeror will make it clear that he intends to be bound in the case of acceptance. Thus, the use, in a commercial context, of phrases such as "we order for immediate delivery"[226] and "we offer for sale" should normally be regarded as indicating an intention to be bound in the event of acceptance by the offeree. Where, on the other hand, the offer is made "without obligation" there will normally be no intention to be bound.[227] Where the words used are less obvious in meaning, the intention of the offeror will often become clearer when, as is required by Art. 8 CISG, the proposal is interpreted in its full context. Thus, in one case the buyer's request, made after the goods had been delivered, to issue an invoice was treated as sufficient evidence of the buyer's intention to be bound at the time he made his proposal.[228]

As is the case in most national legal systems, the Convention draws a distinction between an offer and a communication intended only to invite the recipient to make an offer to the communicator ("invitatio ad offerendum"). This distinction is easy to describe in theory but sometimes rather difficult to draw in practice. Ultimately, the answer depends on the elusive criterion of the proposer's intention which must be assessed by reference to the rules on interpretation of statements made by the parties contained in Art. 8 CISG. Where the proposer is found to have intended to bind himself in case of acceptance then it is an offer, if not, then the proposal is merely an invitation to make offers.

Art. 14(2) CISG seeks to deal with the classification problem where the proposal is made other than to "one or more specific persons", i.e. to the public. It states that such a proposal is to be considered merely as an invitation to make offers, unless the contrary is indicated by the person making the proposal. It does not follow from Art. 14(2) CISG however that a proposal made to one or more *specific* persons will always be treated as an offer. A proposer may have no intention to be bound, notwithstanding that his proposal is

---

226 (Swiss) Handelsgericht St. Gallen 5 December 1995, Internationales Handelsrecht (IHR) 2001, 44 = CISG-Online No. 245; see also (Swiss) Handelsgericht Aargau 26 September 1997, Transportrecht – Internationales Handeslrecht (TranspR-IHR) 1999, 11 = CISG-Online No. 329.

227 See for more detail *Schlechtriem*, in: Schlechtriem/Schwenzer, Commentary, Art. 14 para. 14.

228 (Swiss) Bezirksgericht St. Gallen 3 July 1997, Transportrecht – Internationales Handeslrecht (TranspR-IHR) 1999, 10 = CISG-Online No. 336.

communicated to a specific person, where, for example, his proposal is stated to require further clarification or it is made in circumstances where it is clear that essential details remain to be determined. Ultimately, as explained above, it will be a matter of interpretation under Art. 8 CISG.

2. Offer sufficiently definite

a) Necessary content

In order to constitute an offer under Art. 14(1) CISG, the proposal made by the offeror must be sufficiently definite. By this is meant that the essential terms of any future agreement ("essentialia negotii") must be contained in the offeror's proposal such that if the proposal is accepted a contract capable of enforcement comes into existence.[229]

What then is required to make the proposal sufficiently definite? The second sentence of Art. 14(1) CISG provides that 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." The degree of specification required will depend upon the type of goods that are the subject matter of the proposal. Thus, a proposal that indicates only the general description of goods in the case of goods that are available in several sizes or qualities may be held not to indicate the goods with sufficient particularity even though there is no general requirement that the quality of the goods be indicated.[230]

While the second sentence might be read to imply that a proposal will be sufficiently definite if the goods are indicated and the price and quantity determined or determinable, it seems clear that there may be cases where meeting these requirements may not be sufficient to render the proposal sufficiently definite. Thus, an express agreement between the parties,[231] reference to trade usage or a previous course of dealings may indicate that the offer must specifically refer to certain additional matters (such as time and place of shipment) which must then be agreed. A proposal that fails to refer to those matters cannot constitute an offer.

---

229 U.S. Federal District Court, Northern District of Illinois, Magellan International Corp. v Salzgitter Handel GmbH, 7 December 1999, CISG-Online No. 439; *Schlechtriem*, in: Schlechtriem/Schwenzer, Commentary, Art. 14 para. 2; *Gruber*, in: Münchener Kommentar zum Bürgerlichen Gesetzbuch, Art. 14 para. 13.

230 See for example (German) Oberlandesgericht Frankfurt 31 March 1995, CISG-Online No. 137.

231 Such as a framework contract.

b) Implicit determination

The second sentence of Art. 14(1) CISG allows the offeror to implicitly fix the "essentialia".[232] When deciding whether such an implicit determination has been made, regard is to be had 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 (Art. 8, 9 CISG).[233] In one Hungarian case which involved parties who had traded together over a lengthy period, it was held that the terms as to quality, quantity and price were impliedly fixed by the practices established between the parties.[234] So too, in another case, it was held that a proposal to purchase three 'truck loads' of eggs was sufficiently definite. While the precise quantity was not expressly stated, a person in the position of the seller could only reasonably have understood that the proposal referred to full trucks. In that sense therefore the precise quantity was implicitly stated – the number of eggs needed to fill three trucks so that each one was full.[235]

c) Determinability

Under the second sentence of Art. 14(1) CISG, a proposal can be sufficiently definite notwithstanding that the price, goods and quantity are neither expressly nor implicitly fixed if provision is made for their determination, i.e. if

---

[232] Although the wording of the provision only refers to quantity and price it is submitted that the same is true with regard to the determination of the goods.

[233] *Gruber,* in: Münchener Kommentar zum Bürgerlichen Gesetzbuch, Art. 14 para. 18; *Schlechtriem,* in: Schlechtriem/Schwenzer, Commentary, Art. 19 para. 3. See also (Austrian) Oberster Gerichtshof 10 November 1994, CISG-Online No. 117 (the Supreme court in reaching its conclusion that a proposal to buy "a larger amount of chinchilla pelts of medium or superior quality" was sufficiently definite took into consideration the behaviour of the Austrian buyer who accepted the delivered goods and sold them further without questioning their price, quality or quantity).

[234] (Hungarian) Metropolitan Court, Adamfi Video v Alkotók Studiósa Kisszövetkezet, 24 March 1992, CISG-Online No. 61. See also (German) Oberlandesgericht Hamburg 4 July 1997, CISG-Online No. 1299; (Austrian) Oberster Gerichtshof 6 February 1996, CISG-Online No. 224 (the fact that the parties only agreed on a approximate quantity of gas to be delivered did not prevent the conclusion of a contract as such an indication consituted a usage regularly used in the natural gas trade). See also, (French) Cour de Cassation, Ste Fauba France FDIS GC Electronique v Ste Fujitsu Mikroelectronik GmbH, 4 January 1995, CISG-Online No. 138.

[235] (German) Landgericht Oldenburg 28 February 1996, CISG-Online No. 189.

they are determinable.[236] By way of example, if a buyer places an order for 100 widgets described and priced per unit in a catalogue, the price for the order is sufficiently determinable.[237] Further, it has been held that a proposal that the prices are to be adjusted to reflect market prices was sufficiently definite,[238] as was a contract price that could only be finally determined by reference to the price obtained by the buyer on reselling the goods.[239]

d) Power of determination

Where minimum elements of the proposal are made determinable by reference to a market price or some other mechanical measure, there has been little disagreement among scholars or courts that such proposals are at least, in principle, sufficiently definite. Cases likely to give rise to more difficulty are those where one or more of the minimum elements are left open to be determined by one or both of the parties or are to be referred to a third person for determination. In the author's view such terms may satisfy the definiteness requirement. The requirement that the essential elements must be definite is satisfied where they are fixed, determined or determinable. A proposal that includes the term that one or more of the essential elements is to be determined by one of the parties or by a third party is determinable in that sense.[240]

However, a number of points should be noted. First, such case law as there is does not unequivocally support this position.[241] Secondly, there is a seri-

---

[236] *Schlechtriem,* in: Schlechtriem/Schwenzer, Commentary, Art. 14 para. 5; *Gruber,* in: Münchener Kommentar zum Bürgerlichen Gesetzbuch, Art. 14 para. 19.

[237] For a further example see (Austrian) Oberster Gerichtshof 10. November 1994, CISG-Online No. 117.

[238] (French) Cour de Cassation, Ste Fauba France FDIS GC Electronique v Ste Fujitsu Mikroelectronik GmbH, 4 January 1995, CISG-Online No. 138.

[239] ICC Arbitration Case No. 8324 of 1995 (available at http://cisgw3.law.pace.edu/cases/958324i1.html).

[240] *Schlechtriem,* in: Schlechtriem/Schwenzer, Commentary, Art. 14 para. 6 et seq.; *Gruber,* in: Münchener Kommentar zum Bürgerlichen Gesetzbuch, Art. 14 para. 20; see also U.S. Federal District Court, New York, Geneva Pharmaceuticals Tech. Corp. v Barr Labs. Inc, 10 May 2002, CISG-Online No. 653. But see for the opposite view *Schnyder/Straub,* in: Honsell, Kommentar, Art. 14 para. 32.

[241] See for instance opposed to the view suggested here (Russian) Arbitral Award 309/1993, Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce 3 March 1995, CISG-Online No. 204; for a note on that case see *Rozenberg,* A Case from the Practice of the International Court of Commercial Arbitration at the Russian Federation Chamber of Commerce & Industry (available at http://www.cisg.law.pace.edu/cases/950303r2.html).

ous question whether a proposal containing a term leaving an essential term to be determined later *by agreement* evidences a sufficient intention to be bound. In many cases, the natural inference to be drawn from a proposal that the price or quantity was "to be agreed" at a later date may be that the offeror did not intend to be bound until the price or quantity was settled by future agreement. Thus, unless such an intention to be bound can be inferred by recourse to Art. 8 or 9 CISG, a term providing that one of the minimum elements is "to be agreed between the parties" is unlikely to constitute an offer because it insufficiently evidences an intention to be bound. The third problem concerns enforceability. Assume, for example, that the proposal contains a provision that the quantity is to be agreed by the parties at some future date, and this is subsequently accepted by the offeree, what is the position if the parties cannot later agree on the quantity? Is the offeror or offeree to be treated as being in breach of contract or, on the assumption that good faith efforts to reach agreement have been made, is neither party? If the parties make best endeavours to fix a price but fail, what should a court do?

The final problem worth highlighting is that in some jurisdictions a clause that gives one party the power to determine certain matters may be invalid.[242] Under the prevailing opinion those domestic invalidity rules would be applicable by virtue of Art. 4 lit. (a) CISG.[243]

e) Determination of the price under Art. 55 CISG?

As we have seen, in most cases the price will have been determined in the contract, be it expressly or implicitly. Where, however, the contract (has been validly concluded but) does not expressly or implicitly fix the price or provide for a mechanism to determine the price, Art. 55 CISG gives a default rule for determining the price. Thus, the parties are considered 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. In short, the price shall be the usual price for such goods. The CISG thus follows the Common Law example albeit that the measure chosen is different.[244] Despite the fact that Art 55 CISG has triggered a considerable amount of controversy, its practical importance is likely to be limited.

---

242 See for example with regard to the position of French law *Witz,* The First Decision of France's Court of Cassation Applying the UN Convention on Contracts for the International Sale of Goods, (1997) 16 Journal of Law and Commerce, 334

243 *Schlechtriem,* in: Schlechtriem/Schwenzer, Commentary, Art. 14 para. 7; *Magnus,* in: Staudinger Kommentar zum Bürgerlichen Gesetzbuch, Art. 14 para. 24.

244 Cf. Section 8(2) English Sale of Goods Act; § 2-305(2) UCC.

The reason for the controversy is that Art 55 CISG only applies if the contract has been validly concluded without determining the price. Art. 14 CISG however provides that the contract is only validly concluded if the parties have determined the price. At first sight, therefore, the provisions seem to be inconsistent with each other. This apparent inconsistency had been discussed during the negotiations on the Convention[245], but had not been entirely resolved. A considerable number of solutions have been suggested in legal writing.[246] In short, two basic approaches can be identified.

First, there are those who argue that Art. 55 CISG should take precedence over Art. 14 CISG.[247] If the parties intended to conclude a binding contract without determining the price, then Art. 55 should be applied irrespective of Art. 14 CISG. According to the second, and prevailing opinion, Art. 14 CISG should be given precedence.[248] Under this approach Art. 55 CISG can only be applied if the case is such that the parties have concluded a valid contract despite failing to determine the price. It is submitted that this is the correct view because Art. 55 CISG expressly requires that the contract has been validly concluded. The main task therefore is to identify those cases in which the contract is valid without the determination of the price. It is submitted that there will primarily be two groups of cases which lead to this result.

The first group consists of those cases in which the parties knew and agreed that they wanted to conclude the contract without (expressly or implicitly) determining the price. It is submitted that in doing so the parties have implicitly derogated from Art. 14(1) second sentence CISG (which is permissible, Art. 6 CISG) so that the contract was validly concluded and Art. 55 CISG can be applied to determine the price.[249]

---

245 Cf. *Hager*, in: Schlechtriem/Schwenzer, Commentary, Art. 55 para. 2 et seq.; *Schwenzer/Mohs*, IHR 2006, 239, 240.

246 For a detailed discussion see *Schlechtriem*, in: Schlechtriem/Schwenzer, Commentary, Art. 14 para. 8 et seq.

247 *Eörsi*, in: Bianca/Bonell, Commentary, Art. 55 para. 2.2.2, 2.3.

248 Cf. *Hager*, in: Schlechtriem/Schwenzer, Commentary, Art. 55 para. 5 et seq.; *P. Huber*, in: Münchener Kommentar zum Bürgerlichen Gesetzbuch, Art. 55 para. 7 et seq.; *Schnyder/Straub*, in: Honsell, Kommentar, Art. 55 para. 8.

249 *Schlechtriem*, in: Schlechtriem/Schwenzer, Commentary, Art. 14 para. 11; *Hager*, in: Schlechtriem/Schwenzer, Commentary, Art. 55 para. 7; *P. Huber*, in: Münchener Kommentar zum Bürgerlichen Gesetzbuch, Art. 55 para. 9; *Bernstein/Lookofsky*, Understanding the CISG in Europe, p. 51; *Schnyder/Straub*, in: Honsell, Kommentar, Art. 55 para. 10. In fact the view which wants to give precedence to Art. 55 CISG over Art. 14 CISG (Fn. 247 above) would probably reach the same result.

The second group consists of those cases in which the sales contract is governed by the CISG with the exception of Art. 14-24 CISG.[250] This situation can for instance arise as a result of a reservation made by a Contracting State under Art. 92 CISG as the Scandinavian countries have done.[251] It will also arise if the parties have excluded the application of Art. 14-24 CISG (as they are entitled to under Art. 6 CISG) or if the application of Art. 14-24 CISG is excluded by usages or practices (Art. 9 CISG). In these cases the conclusion of the contract is not governed by the CISG but by the applicable contract law, usually a national law. If this legal system allows a contract to be validly concluded even if there is no determination of the price, Art. 55 CISG will apply to fill the gap.[252]

It is sometimes argued that there is a third group of cases in which Art. 55 CISG will apply, namely those cases in which the contract was not concluded by a clear-cut exchange of offer (with which Art. 14 CISG is solely concerned) and acceptance, but by a series of communications, by their conduct (delivery, acceptance) or by simply executing a contract of sale.[253] Indeed it seems to be arguable in theory that Art. 14 CISG which only deals with the offer does not really fit and should therefore not apply to such cases, so that Art. 55 CISG could be applied. In the author's opinion, however, it is doubtful whether there really is a need to create this third group of cases. In fact one could also assume in the cases mentioned above that the parties intended to conclude the contract without having determined the price thus derogating from Art. 14 CISG. These cases would therefore fall under the first group anyway.

Summing the issue up, it is suggested that it is rather unlikely that a court properly directing itself will conclude that a contract is invalid for failure to fix the price (Art.14 (1) CISG).[254] This is true in particular for those cases in which the parties have already performed the contract (and "discover" later that the validity may be questionable, possibly after some dispute has arisen with regard to the quality of the goods). In most cases there will be an implic-

---

250 *Hager*, in: Schlechtriem/Schwenzer, Commentary, Art. 55 para. 6. See also *Nicholas*, The Vienna Sales Convention on International Sales Law (1989) 105 Law Quarterly Review 201, 213.

251 See p. 51 et seq., 69 et seq.

252 *Schlechtriem*, in: Schlechtriem/Schwenzer, Commentary, Art. 14 para. 12.

253 *Honnold*, para. 137.5 et seq.

254 But see for examples to the opposite the decision of the (Hungarian) Supreme Court 25 September 1992, CISG-Online No. 63; (Russian)Arbitral Award, Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce 3 March 1995, CISG-Online No. 204.

it agreement on the price.[255] If there is not, there will often be a (implicit) derogation of Art. 14(1) second sentence CISG so that Art. 55 CISG will apply.

3. "Effective" offer

For an offer to be capable of being accepted, Art. 15(1) CISG requires that it must have become "effective", and for this to happen the provision requires that the offer must have "reached" the offeree.

By Art. 24 CISG, an offer[256] "reaches" the addressee, when it is made orally to him or delivered by other means to him personally or 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). The provision draws a distinction between oral declarations and those made by other means. Oral declarations would undoubtedly include a spoken communication made by one party to another while in that other's presence. Also included are spoken declarations made by telephone.[257] Where a declaration is made in any other way, it should generally be treated as having been made "by other means". Thus, a declaration made by letter or fax would be treated as having been made "by other means", as would a declaration communicated by e-mail or teletext.[258] Given the wording of the provision, "real time" electronic communication should also be treated as having been made "by other means" even though such method of communications is in some respects akin to a spoken conversation.[259]

An oral communication reaches the offeree only when it is "made orally to him." It is a matter for debate whether this requires that the offeree actually

---

[255] See *Gruber*, in: Münchener Kommentar zum Bürgerlichen Gesetzbuch, Art. 14 para. 23; *P. Huber*, in: Münchener Kommentar zum Bürgerlichen Gesetzbuch, Art. 55 para. 10; *Schlechtriem*, in: Schlechtriem/Schwenzer, Commentary, Art. 14 para. 11.

[256] Or declaration of acceptance, or other indication of intention. Art. 24 CISG therefore also applies to the acceptance, see below p. 95..

[257] A declaration that is recorded (e.g., by a telephone recording machine) is, it is suggested, not an oral declaration; see *Schlechtriem*, in: Schlechtriem/Schwenzer, Commentary, Art. 24 para. 4.

[258] See in that direction *Schlechtriem*, in: Schlechtriem/Schwenzer, Commentary, Art. 24 para. 4.

[259] But see for a different view CISG-AC Opinion No 1 (*Ramberg*), Internationales Handelsrecht (IHR) 2003, 244, Comment to Art. 24 and Art. 18 CISG.

hears and understands the communication or whether it is sufficient if the communication is made in such a way that a reasonable person in the same position as the other person understands what is being communicated.[260] It is submitted that the latter view is correct.

A communication made by other means reaches the addressee when it is delivered to him personally[261] or "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." It is submitted that as a general rule it is sufficient if the communication enters the addressee's "sphere of control" and that it is not necessary that the addressee actually became aware of it.[262] Thus it would be enough that a declaration of acceptance is posted in the offeror's mailbox, recorded in an electronic mail box or received on the offeror's fax machine. An e-mail would reach the addressee when it enters his server, provided that the addressee has consented to receiving communications by e-mail and that he is able to retrieve it.[263] For reasons of legal certainty it is further submitted that as a general rule it does not matter whether the communication "reaches" the addressee outside his business hours.[264] Different solutions may however be appopriate in specific situations, in particular as a result of usages or trade practices, of the parties' agreements or of the principle of good faith (Art. 7(1) CISG).[265]

With regard to the language in which the communication is made it is submitted that one should rely on the general principle embodied in Art. 8 CISG. It will then essentially depend on whether a reasonable party in the shoes of the addressee would have understood the (language of the) communication. This will usually be the case where the communication is made in the language in which earlier negotiations took place or in the language of

---

260 See for more detail *Schlechtriem*, in: Schlechtriem/Schwenzer, Commentary, Art. 24 para. 6 et seq. (with a further distinction between oral declaration "inter praesentes" and "inter absentes").

261 It is submitted that this includes delivery to an agent who has the requisite authority (which would in turn depend on the applicable (domestic) law; see *Schlechtriem*, in: Schlechtriem/Schwenzer, Commentary, Art. 24 para. 12; *Farnsworth*, in: Bianca/Bonell, Commentary, Art. 24 para. 2.4; *Honnold*, para. 179.

262 See *Schlechtriem*, in: Schlechtriem/Schwenzer, Commentary, Art. 24 para. 12.

263 See *Schlechtriem*, in: Schlechtriem/Schwenzer, Commentary, Art. 24 para. 12; CISG-AC Opinion No 1 (*Ramberg*), Internationales Handelsrecht (IHR) 2003, 244, para 15.1 et seq.

264 See *Schlechtriem*, in: Schlechtriem/Schwenzer, Commentary, Art. 24 para. 14.

265 See *Schlechtriem*, in: Schlechtriem/Schwenzer, Commentary, Art. 24 para. 14.

the recipient.[266] Again, it will depend on the circumstances of the individual case whether other languages may be used.

4. Offer not terminated

In order to be able to be accepted by the offeree the offer must not have been terminated. A distinction is drawn under the Convention between a termination of the offer by the offeror made before or at the same time as the offer reaches the offeree, which is known as *withdrawal*, and termination after it reaches the offeree, which is known as *revocation*. The Convention places few restrictions on the right to "withdraw" the offer (Art. 15(2) CISG). However, the right to "revoke" the offer is limited in several important ways (Art. 16 CISG). Termination of the offer may also be brought about by rejection of the offer by the offeree (Art. 17 CISG) and a failure to accept within a period of time set for acceptance (Art. 18(2),(3), Art. 21 CISG).

a) Withdrawal (Art. 15(2) CISG)

Where a communication terminating an offer reaches the offeree before or at the same time as the offer, this is effective to withdraw the offer even where the offer is stated to be irrevocable (Art. 15(2) CISG). Until the offer is effective, it cannot be accepted and there is, as a result, no reason to prevent or limit the circumstances in which the offeror can withdraw his offer. It also seems commercially sensible in the circumstances to give precedence to the withdrawal as the offeree will not normally have acted in reliance on an offer that has not reached him.

As a general rule, there is no requirement that the notice (or other communication) of withdrawal take any particular form. However, where one of the parties to the contract has his place of business in a state that has made a reservation under Art. 96 CISG, and the law of that state applies to the contract, any form requirements of that state will apply to the withdrawal.[267] The wording of Art. 15(2) CISG makes clear that the notice of withdrawal must reach the offeree in order to be effective.

b) Revocation

One of the more difficult issues met during the drafting of the Convention was the question of whether an "effective" offer (i.e. one that has reached the offeree) was to be presumed irrevocable or revocable and if the latter,

---

266 See *Schlechtriem*, in: Schlechtriem/Schwenzer, Commentary, Art. 24 para. 16.

267 *Schlechtriem*, in: Schlechtriem/Schwenzer, Commentary, Art. 14 para. 4.

whether restrictions should be imposed upon the offeror's right to revoke his offer.[268] The problem was particularly acute because there was a sharp divide on the issue between, the common law and the civil law worlds (compare, by way of example, the English[269] and the German[270] position) albeit that there were also differences within both the common law and civil law worlds as to how to deal with the problem.[271] The provision finally agreed upon was an attempt to accommodate the different traditions and to a large extent it succeeds in doing so. However, where any attempt is made to accommodate two traditions that adopt diametrically opposed positions on key questions, it is almost inevitable that clarity will suffer and ambiguities remain.[272] That is certainly the case here though the paucity of case law on the subject may suggest that the issues raised are of more academic than practical interest.

aa) Principle of revocability

Art. 16(1) CISG sets out the basic principle that under the Convention offers are revocable: "Until a contract is concluded an offer may be revoked if the revocation reaches the offeree before he has dispatched an acceptance." As for the notice of revocation the same considerations apply as for the withdrawal (see above (b)).[273]

---

[268] Much has been written about Art. 16 CISG. See for instance: *Malik*, Offer: Revocable or Irrevocable. Will Art. 16 of the Convention on Contracts for the International Sale Ensure Uniformity? (1985) 25 Indian Journal of International Law 26-49; *Eörsi*, Problems of Unifying Law on the Formation of Contracts for the International Sale of Goods (1979) 27 American Journal of Comparative Law 311-323; *Murray*, An Essay on the Formation of Contracts and Related Matters under the United Nations Convention on Contracts for the International Sale of Goods (1988) 8 Journal of Law and Commerce 11-51; *Mather*, Firm Offers under the UCC and the CISG (2000) 105 Dickinson Law Review 31-56.

[269] For an English common lawyer, an offer is in principle always revocable, even if stated to be irrevocable, unless the offeree provides consideration for the offeror's undertaking to keep the offer open.

[270] Under which an offer was treated as irrevocable unless stated by the offeror to be revocable.

[271] For further discussion of the details of the various approaches, see: *Malik*, Offer: Revocable or Irrevocable. Will Art. 16 of the Convention on Contracts for the International Sale Ensure Uniformity? (1985) 25 Indian Journal of International Law 26-49; *Eörsi*, Problems of Unifying Law on the Formation of Contracts for the International Sale of Goods (1979) 27 American Journal of Comparative Law 311-323.

[272] See *Schlechtriem*, in: Schlechtriem/Schwenzer, Commentary, Art. 16 para. 1.

[273] See *Schlechtreim*, in: Schlechtriem/Schwenzer, Commentary, Art. 16 para. 3.

bb) Restrictions on revocability

There are however certain restrictions on the right to revoke the offer. First, Art. 16(1) CISG makes clear that the right to revoke will be lost once the acceptance has been dispatched (and not when the contract is concluded which will normally only occur when the acceptance has reached the offeror). The effect of dispatch of an acceptance is therefore to convert a revocable offer into an irrevocable one. Secondly, Art. 16(2)(a) CISG provides that an offer cannot be revoked if it indicates (whether by stating a fixed time for acceptance or otherwise) that it is irrevocable. Whether a particular statement or conduct indicates an intention on the part of the offeror that the offer is irrevocable has to be determined in accordance with Art. 8 CISG. While every case has to be considered on its facts, use of words such as "irrevocable", "binding" and "firm" would be strongly suggestive of an intention to make the offer irrevocable.[274] There is no need under the Convention, as there would be in English law, for the offeree to show that he provided something (i.e. consideration) in exchange for the offeror's promise not to revoke the offer. Any argument that this is a question of validity, and that by virtue of Art. 4 CISG the question of the binding nature of an irrevocable offer is to be decided by reference to the applicable domestic law should be rejected. The question of the binding nature of an offer stated to be irrevocable is dealt with expressly by the Convention so that the validity exception in Art. 4 lit. (a) CISG does not apply (see above p. 21 et seq.). Nor is there any need for the offer to be made in any particular form;[275] it is sufficient that the offeror intends his offer to be binding.

There was considerable debate about the question whether the mere fixing of a time for acceptance as such should qualify as a promise not to revoke the offer during this period.[276] The solution ultimately adopted in Art. 16(2)(a) CISG ("if it indicates, whether by stating a fixed time for acceptance or otherwise,") is not entirely free of ambiguity. As Nicholas has put it, 'The common lawyer can lay the stress on the need for an indication of irrevocability, the civil lawyer can treat the fixing of a time as providing such an indication.'[277] It is suggested that the better view, and the one most consistent with the history of the provision, is that the fixing of time for acceptance is not

---

274 *Schlechtriem*, in: Schlechtriem/Schwenzer, Commentary, Art. 16 para. 8; *Bernstein/Lookofsky*, Understanding the CISG in Europe, p. 54 et seq.

275 As is the case under Art. 2-205 of the UCC which requires that an offer be in writing in order to satisfy the "firm offer" provision.

276 See for the history of this provision *Eörsi*, in: Bianca/Bonell, Commentary, Art. 16 para. 1.

277 *Nicholas*, The Vienna Convention on International Sales Law (1989) 105 The Law Quarterly Review 201, 215.

conclusive but merely one factor indicating an intention to be bound. What Art. 16(2)(a) CISG makes clear is that an offer cannot be revoked where it indicates that it is irrevocable. Whether it does so is a question of interpreting the meaning of the language chosen by the offeror. In that process it may play a role from which legal background the parties come.[278] Where, for example, both parties are from common law jurisdictions, a "reasonable person of the same kind" as the offeree[279] is likely to understand the fixing of a period for acceptance as merely an indication that the offer lapses after the period specified, unless there are other indications to show that he ought reasonably to have understood that the offer was intended to be irrevocable. On the other hand, where the offeree is from a civil law jurisdiction, an offeror from a common law jurisdiction would be unwise to blithely assume that he can treat the fixing of a date for acceptance as merely an indication that the offer lapses after the fixed date. The simple solution of course is for business people to spell out what effect they intend the fixing of a time for acceptance to have.

Thirdly Art. 16(2)(b) CISG prevents an offeror revoking his offer where it was reasonable for the offeree to rely on the offer as being irrevocable and the offeree has acted in reliance on the offer. Both conditions must be satisfied for the provision to apply. Whether it is reasonable for the offeree to rely on the offer as being irrevocable is a question of fact to be decided in the light of all the circumstances of the case. An example where such reliance would be reasonable is offered in the Secretariat Commentary, namely, "where the offeree would have to engage in extensive investigation to determine whether he should accept the offer. Even if the offer does not indicate that it is irrevocable, it should be irrevocable for the period of time necessary for the offeree to make his determination."[280] The offeree must also show that he has acted[281] in reliance on the offer being irrevocable. Such an act or conduct may consist of entering into other contracts, preparation for production, incurring expenses, buying or hiring materials for production or perhaps even taking on new employees provided that the act or conduct was a result of reasonable reliance on the offeror's offer.[282]

---

278 See *Schlechtriem*, in: Schlechtriem/Schwenzer, Commentary, Art. 16 para. 10.

279 Art. 8(2) CISG.

280 *Secretariat Commentary*, Art. 14 para. 8.

281 "Act" may also include a failure to act. For example, a failure to solicit further offers. See *Schlechtriem*, in: Schlechtriem/Schwenzer, Commentary, Art. 16 para. 11.

282 See *Schlechtriem*, in: Schlechtriem/Schwenzer, Commentary, Art. 16 para. 11.

c) Rejection of offer

Art. 17 CISG provides that an offer is terminated when a rejection reaches the offeror. A rejection has that effect even if the offer is stated to be irrevocable. A rejection can be declared expressly or impliedly. Under Art. 19 CISG a purported acceptance on new terms, not contained in the offer, may be treated as an implied rejection of original offer accompanied by a counter-offer. In order to be effective, the rejection must reach[283] the offeror. Until the rejection reaches the offeror it is of no effect and it can, therefore, be withdrawn.[284] An offeree who rejects an offer cannot later accept the original offer; the effect of a rejection is to terminate the offer.[285]

d) Lapse of time

In addition to being withdrawn or revoked, an offer may lapse and thereafter cease to be available for acceptance. These situations will be dealt with below p. 96 et seq.

III. Acceptance

1. General overview

By Art. 23 CISG the contract is concluded at the moment when an acceptance of an offer becomes effective in accordance with the provisions of the Convention. The rules concerning the acceptance are contained in Art. 18 to 22 CISG. Art. 18 CISG states what amounts to an acceptance and when an acceptance becomes effective. Art. 19 CISG deals with the problem of acceptances that contain modifications to the original offer. Art. 20 CISG provides rules on the calculation of relevant time periods. Art. 21 CISG deals with the issue of late acceptances. Art. 22 CISG specifies when an acceptance may be withdrawn.

As a general rule, three elements must be satisfied before a reply to an offer can constitute an acceptance. First, there must be an indication of assent to the offer. Secondly, the assent must be unqualified. Thirdly, the assent must be effective. Additionally, the assent should not have been withdrawn. These requirements will be dealt with in turn.

---

283 Art. 24 CISG.

284 Although Art. 22 CISG does not directly govern this situation, it is submitted that one may derive from Art. 15(2), 22 CISG a general principle (Art. 7(2) CISG) to that effect.

285 See *Schlechtriem*, in: Schlechtriem/Schwenzer, Commentary, Art. 17 para. 3.

2. Indication of assent

a) General rule

Art. 18(1) CISG states in its first sentence that a statement made by or other conduct of the offeree indicating assent to an offer is an acceptance. In most cases the indication of assent will of course be made clearly in writing or orally. Art. 18(1) CISG also makes clear that acceptance may be made by conduct. Examples of conduct satisfying this provision would include the supply, delivery or dispatch of goods[286] in response to an offer to buy. So too, payment of the price[287] and taking delivery of the offered goods may constitute assent to an offer and this may be so even if fewer goods are delivered than had originally been contracted for.[288] Other acts of a more preparatory nature may also amount to acceptance. Thus, the purchasing of the necessary raw materials, the commencement of production,[289] the packaging of goods for dispatch,[290] the conclusion of a contract to carry the goods to the buyer and the dispatch of an invoice or its signature by the buyer[291] may all in appropriate circumstances constitute acceptance.[292]

b) Acceptance by silence?

The second sentence of Art. 18(1) CISG states that "silence or inactivity does not in itself amount to acceptance." Put simply, this means that silence in response to an offer will not, without some additional evidence of the offeree's intention, amount to an acceptance.[293] The rule can be seen as one

---

286 "Dispatch of the goods" and "payment of the price" are expressly identified in Art. 18(3) CISG as a method by which the offeree may indicate assent. The provision states further that under certain circumstances such acceptance may be "effective" without notice to the offeror, see below p. 95 et seq.

287 See preceding footnote.

288 (German) Oberlandesgericht Frankfurt 23 May 1995, CISG-Online No. 185.

289 *Farnsworth*, in: Bianca/Bonell, Commentary, Art. 18 para. 2.2.

290 *Heuze*, La Vente Internationale de Marchandises – Droit Uniforme, at note 184.

291 See (Argentinian) Cámara Nacional de Apelaciones en lo Comercial, Inta SA v MCS Officina Meccanica SpA, 14 October 1993, CISG-Online No. 87 (where it was held that the buyer's signing of an invoice in order to submit it to his bank amounted to an implicit acceptance of the seller's jurisdiction clause contained in the invoice).

292 See for more detail *Schlechtriem*, in: Schlechtriem/Schwenzer, Commentary, Art. 18 para. 7.

293 See for example (Swiss) Handelsgericht Zürich 10 July 1996, CISG-Online No. 227 (Failure by buyer to respond to notification of increase in sales price was held not to constitute acceptance. There was no evidence, whether from statements or other conduct of the parties, from previous course of dealings or from

intended to protect an offeree from having to take action in response to an offer which he would otherwise prefer to ignore.[294] While it is clear that the offeror cannot impose silence as a condition of acceptance, it seems clear from the language of Art. 18(1) CISG ("in itself") and from the decisions interpreting the provision, that cases will arise in which silence on receipt of an offer may be treated as acceptance.[295] By way of example, if the parties have expressly agreed that a failure by the offeree to object to the terms of an offer within two weeks of receipt should be treated as an acceptance then the court should give effect to that agreement and treat the offeree's silence as capable of amounting to an acceptance.[296] A similar conclusion should be reached if such an agreement can be implied from the statements and/or conduct of the parties, from their previous course of dealings,[297] or even from a relevant trade usage.[298]

c) Cross offers

Art. 18 CISG provides that an acceptance is a statement or other conduct of the offeree "indicating assent to an offer". The Convention, thus, appears to require that there must be an offer followed by an indication of assent to the terms of the offer if a valid contract is to be concluded. Where there are two "offers" crossing each other, even if made in identical terms, that would

---

trade usage, from which it could be inferred that the failure by the buyer to respond amounted to an assent to the proposed contractual modification); See also (Danish) Østre Landsret 23 April 1998, CISG-Online No. 486.

294 See *Schlechtriem*, in: Schlechtriem/Schwenzer, Commentary, Art. 18 para. 9.

295 See in more detail *Schlechtriem*, in: Schlechtriem/Schwenzer, Commentary, Art. 18 para. 9.

296 See, for example U.S. Federal District Court, New York, Filanto v Chilewich 14 April 1992, CISG-Online No. 45.

297 See, for example (French) Cour d'Appel Grenoble 21 October 1999, CISG-Online No. 574. (in holding that silence constituted assent, the court referred, inter alia, to the practice of previous years, the seller having always fulfilled the French company's orders without expressing its acceptance); See also U.S. Federal District Court, New York, Filanto v Chilewich, 14 April 1992, CISG-Online No. 45 (Court held that the buyer's offer had been accepted by the seller's failure to respond promptly. The court noted that under Art. 18(1) CISG silence is not usually to be treated as acceptance, but nevertheless held that a course of dealing had been established between the parties creating a duty on the part of the seller to object promptly in the event that it did not wish to accept the buyer's offer. On the facts the seller's delay was held to amount to acceptance).

298 See, for example (Dutch) Gerechtshof Hertogenbosch, E.H.T.M. Peters v Kulmbacher Spinnerei & Co Produktions KG, 24 April 1996, CISG-Online No. 321.

not appear to satisfy the requirement in Art. 18 CISG because neither one indicates assent to the other. It should be noted however that it is possible for the parties, by virtue of Art. 6 CISG, to agree to derogate from the formation rules contained in Art. 14-24 CISG and to allow for the creation of a contract otherwise in accordance with the sequence of offer followed by acceptance to that offer.[299]

d) Commercial letters of confirmation

A specific issue that needs to be mentioned here arises because of the effect given in some jurisdictions to so-called "commercial letters of confirmation". Such "documents" are widely known and in common use in central Europe. Generally speaking, they amount to a written repetition of the contract terms, or a summary thereof, sent by one party to another about a contract that has either already been verbally concluded or which has not yet been concluded.[300] Although the matter was discussed extensively during the drafting of the Convention, neither the Convention, nor its "Travaux Preparatoires", indicate expressly what effect should be given to a failure to respond to a confirmation letter under the Convention. Moreover, courts applying the Convention have unfortunately not been consistent in their treatment of such "letters".[301]

Where a commercial letter of confirmation is intended merely to evidence a contract that has already been concluded, few problems arise as the letter will be treated merely as evidence of both formation and content of the contract. Where, however, a letter of confirmation is properly construed by a court as an offer or a proposed modification of an existing contract,[302] then it is argued that the following statements can be made about the effect of silence after receipt of the letter. First, there is nothing to stop the parties expressly or implicitly agreeing that failure to respond to a letter of confirmation sent by one of them will be treated as assent to the terms contained therein.[303] Should they do so, silence after receipt of the letter will bind the offeree. Secondly, if the parties have established a course of dealings between them-

299 *Schlechtriem*, in: Schlechtriem/Schwenzer, Commentary, Art. 18 para. 9.

300 *Esser*, Commercial Letters of Confirmation in International Trade: Austrian, French, German and Swiss Law and Uniform Law Under the 1980 Sales Convention (1988) Georgia Journal of International and Comparative Law 427.

301 For a brief and helpful summary of the different approaches taken see *UNCITRAL Digest*, Part II.

302 If, for example, it introduces new terms not present in the original offer that are materially different. See, for example, (German) Oberlandesgericht Saarbrücken 13 January 1993, CISG-Online No. 83.

303 See further (Swiss) Zivilgericht Basel 21 December 1992, CISG-Online No. 55.

selves whereby a failure to object in a timely manner to the terms of a letter of confirmation is treated as assent to the terms in the letter, then, by virtue of Art. 9(1) CISG, the parties are to be treated as bound. So too, where it is established that there is an "international" usage, which satisfies the requirements of Art. 9(2) CISG, to similar effect, the parties will be treated, in the absence of evidence to the contrary, as bound by the usage.[304] Finally, even if a letter of confirmation is not given full effect it may have evidentiary value when determining the parties' intent.[305]

3. Unqualified acceptance

a) The general rule

For a reply to an offer to constitute an acceptance, it must represent a final and unqualified expression of assent to the terms proposed by the offeror. Whether a reply evinces such an intention on behalf of the offeree is a matter of interpretation under Art. 8 CISG.[306]

b) Modified acceptance as new offer (Art. 19 CISG)

Where the offeree in his reply does not unqualifiedly accept the terms offered but instead seeks to introduce new terms or in some other way qualifies or modifies the original offer, he will not generally be treated as having accepted the offer. Instead the reply will be treated as a rejection of the original offer and as amounting to a counter-offer on the terms set out in the reply. This rule is contained in Art. 19(1) CISG. By way of example, in one German case, the court treated the seller's delivery of 2,700 pairs of shoes as a rejection of the buyer's offer to buy 3,240 pairs. However, the delivery of 2,700 constituted a counter-offer which was accepted by the buyer when he took

---

304 Schwenzer/Mohs, IHR 2006, 239, 245. It should be noted that the majority of courts have treated trade usages that would give effect to the letter of confirmation as insufficiently "international" to satisfy the requirements of Art. 9(2) CISG. See, e.g., (German) Oberlandesgericht Dresden 9 July 1998, CISG-Online No. 559; (German) Oberlandesgericht Frankfurt 5 July 1995, CISG-Online No. 258. But see for a different approach (Swiss) Zivilgericht Basel 21 December 1992, CISG-Online No. 55.

305 See *UNCITRAL Digest*, Part II para. 13; (German) Oberlandesgericht Frankfurt 5 July 1995, CISG-Online No. 258.

306 'Failure to achieve exact *verbal* correspondence between offer and acceptance will not necessarily mean that there is no concluded contract. See *Schlechtriem*, in: Schlechtriem/Schwenzer, Commentary, Art. 19 para. 5 et seq.

delivery.[307] A contract was therefore concluded for 2,700. Had the buyer in fact refused the seller's offer, it would not have been open to the seller subsequently to accept the 'original' offer by delivering 3,240 pairs since a reply that is characterised as a counter-offer rather than an acceptance has the effect of rejecting the original offer thus making it incapable of subsequent acceptance.[308]

While the general rule under the Convention is that the acceptance must "mirror" the offer, an exception is contained in Art. 19(2) CISG. The exception in paragraph (2) only applies if the additional or different terms contained in the purported acceptance do not materially alter the terms of the offer. It is not possible to lay down a clear rule for distinguishing between material and non-material alterations; what is material will depend upon the circumstances of each individual case. However, Art. 19(3) CISG provides a presumptive, though non-exclusive, list of terms that are considered to materially alter the terms of the offer. Included within the list are additional or different terms relating 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." Thus, terms proposing an increase in the price of the goods,[309] a different time of payment,[310] and a change in the quality of the goods[311] have all been held to be material. So too, has a term relating to the time[312] and place[313] of delivery, and a term proposing a different place of

307 (German) Oberlandesgericht Frankfurt 23 May 1995, CISG-Online No. 185. See also (French) Cour d'Appel, Paris, ISEA Industrie v Lu, 13 December 1995, CISG-Online No. 312; (German) Oberlandesgericht Frankfurt 4 March 1994, CISG-Online No. 110.

308 See Art. 19(1) CISG and Art. 17 CISG.

309 See e.g., (Austrian) Oberster Gerichtshof 9 March 2000, Internationales Handelsrecht (IHR) 2001, 39 = CISG-Online No. 573; (Swiss) Handelsgericht Zurich 10 July 1996, Transportrecht – Internationales Handeslrecht (TranspR-IHR) 1999, 54 = CISG-Online No. 227.

310 (Austrian) Oberster Gerichtshof 6 February 1996, CISG-Online No. 224 (time of payment).

311 See, e.g., (German) Oberlandesgericht Frankfurt 31 March 1995, CISG-Online No. 137 (difference in quality of test tubes); (German) Oberlandesgericht Hamm 22 September 1992, Transportrecht – Internationales Handeslrecht (TranspR-IHR) 1999, 24 = CISG-Online No. 57 (acceptance offering to sell "unwrapped" bacon rather than bacon).

312 (German) Oberlandesgericht München 8 February 1995, CISG-Online No. 143.

313 U.S. Federal District Court, New York, Calzaturificio Claudia v Olivieri Footwear, 6 April 1998, CISG-Online No. 440.

jurisdiction.[314] It may be possible to show that a change in a term presumed to be material according to Art. 19(3) CISG is not material on the facts of the individual case.[315] By way of example, it has been held that a modification of offer concerning the quantity of the goods which was exclusively favourable to the offeror was a non-material alteration.[316] It is suggested however that because of the width of the wording of Art. 19(3) CISG most alterations will be material and the exception in paragraph (2) will only rarely apply.[317] Alterations or additions that have been held to be non-material include a request to treat a letter confidentially until the parties make a joint public announcement[318] and, rather more controversially, a term indicating that notice of defects must be given within a specified time[319] and a term stating that the price would be modified by increases as well as decreases in the market price and deferring delivery of one item.[320] Both these latter decisions are with respect somewhat surprising and hard to reconcile with the language of Art. 19(2) and (3) CISG. The "modification of notice" term surely comes within the umbrella of events that impact the "extent of one party's liability to the other". And a term providing that the price may be increased or

---

314 (French) Cour de Cassation, Les Verreries de Saint Gobain v Martinswerk, 16 July 1998, Transportrecht – Internationales Handeslrecht (TranspR-IHR) 1999, 43 = CISG-Online No. 344.

315 *Schwenzer/Mohs*, Old Habits die hard: Traditional Contract Formation in a Modern World, Internationales Handelsrecht (IHR) 2006, 239, 243.

316 (Austrian) Oberster Gerichtshof 20 March 1997, Transportrecht–Internationales Handeslrecht (TranspR-IHR) 1999, 52 = CISG-Online No. 269.

317 *Farnsworth*, in: Bianca/Bonell, Commentary, Art. 19 para. 2.7.

318 (Hungarian) Fováosi Bíróság Budapest, Malev Hungarian Airlines v United Technologies Inc. Pratt and Whitney Commercial Engine Business, 10 January 1992, CISG-Online No. 43. Reversed on a different point by the Supreme Court, (Hungarian) Legfelsóbb Bíróság 25 September 1992, CISG-Online No. 63.

319 (German) Landgericht Baden-Baden 14 August 1991, CISG-Online No. 24. The decision has been criticised by a number of scholars. See, e.g., *Karollus*, Judicial Interpretation and Application of the CISG in Germany 1988-1994, Cornell Review of the CISG, 51-94; *DiMatteo*, The CISG and the Presumption of Enforceability: Unintended Contractual Liability in International Business Dealings, 22 Yale Journal of International Law (1997) 111, 154 (available at http://cisgw3.law.pace.edu/cisg/biblio/karollus.html).

320 (French) Cour d'appel Paris, Fauba v Fujitsu, 22 April 1992, CISG-Online No. 222, affirmed without reference to the Convention by the (French) Cour de Cassation 4 January 1995, CISG-Online No. 138. The decision is criticised by *Witz*, Case Commentary, The First Decision of France's Court of Cassation Applying the U.N. Convention on Contracts for the International Sale of Goods, (1995), available at http://cisgw3.law.pace.edu/cases/950104f1.html.

decreased would surely fall within the "price, payment" part of Art. 19(3) CISG. In neither case, is the reasoning of the court particularly convincing and it is suggested that the decisions should not be followed.[321]

Where a particular modification is, unusually, treated as non-material then, unless the offeror, "without undue delay, objects orally to the discrepancy or dispatches a notice to that effect", the reply to the offer constitutes an acceptance. If he does not object, the terms of the contract are the terms of the offer with the modifications contained in the acceptance. Such objection can be made by means of a notice to that effect or orally. The notice need not take any particular form, but whether made in writing or orally it must be communicated without delay.[322] As the wording of Art. 19(2) CISG makes clear ("dispatches") the risk of loss, or late arrival, of a notice of objection sent without undue delay falls, it is submittted, on the offeree who, after all, is responsible for creating the departure from the terms of the offer. [323]

Where a timely objection is made, the effect is that no contract has been concluded.[324]

c) The "battle of the forms"

aa) Setting of the problem

Standard form documents variously named "contracts", "purchase orders", "acceptances" and "confirmations" are in widespread commercial use and play an important role in standardising and speeding up the contracting process. The use of such documents, however, carries with it attendant problems, one of which has become known as the "battle of forms".[325] A "battle of forms"

---

321 See for more examples *Schlechtriem*, in: Schlechtriem/Schwenzer, Commentary, Art. 19 para. 13.

322 Although Art. 19(2) CISG could be read as meaning that only if the objection is made orally must it be made without undue delay, the history of the provision makes clear that the words 'without undue delay' apply to both oral objections and to those made by other means. See *Schlechtriem*, in: Schlechtriem/Schwenzer, Commentary, Art. 19 para. 17.

323 See *Schlechtriem*, in: Schlechtriem/Schwenzer, Commentary, Art. 19 para. 16.

324 *Schlechtriem*, in: Schlechtriem/Schwenzer, Commentary, Art. 19 para. 18.

325 There is a voluminous literature on battle of forms under the CISG. See e.g., *Viscasillas*, Battle of the Forms Under the 1980 United Nations Convention on Contracts for the International Sale of Goods: A Comparison with Section 2-207 UCC and the UNIDROIT Principles, 10 Pace International Law Review (1998), 97 (available at http://www.cisg.law.pace.edu/cisg/biblio/pperales.html); *Schlechtriem*, Battle of the Forms in International Contract Law: Evaluation of approaches in German law, UNIDROIT Principles, European Principles, CISG;

arises where both parties to the negotiations seek to introduce and rely on their own set of standard forms. Typically, for example, the buyer sends his printed purchase order form in response to a seller's catalogue or price list. The seller responds by sending his printed acceptance. The back of each form commonly contains a list of printed terms designed to protect each party's interest and not infrequently these sets of terms conflict. In the vast majority of cases where forms conflict the contract will be performed without incident and no issue will be raised.[326] However, a fall in the market price of the contract goods (prompting the buyer to look for a way out of the agreement) or some defect in the performance tendered may lead to arguments about two questions; first, whether a contract has in fact been concluded and, secondly, if so whether it is on the seller's or buyer's terms. The Convention does not contain any special rules on the battle of forms[327] and the question therefore

---

UCC approaches under consideration, in: Karl-Heinz Thume ed., Festschrift für Rolf Herber zum 70. Geburtstag, Neuwied: Luchterhand (1999), 36 (available at http://www.cisg.law.pace.edu/cisg/biblio/schlechtriem5.html); *Murray,* The Definitive Battle of Forms: Chaos Revisited, 20 Journal of Law and Commerce (2000), 1 (available at http://www.cisg.law.pace.edu/cisg/biblio/murray2.html); *Viscasillas,* Battle of Forms and the Burden of Proof: An analysis of BGH 9 January 2002, 6 Vindobono Journal of International Commercial Law and Arbitration (2002), 217 (available at http://www.cisg.law.pace.edu/cisg/biblio/perales2.html); *Schultz,* Rolling Contract Formation on Contracts for the International Sale of Goods, 35 Cornell International Law Journal (2001), 263 (available at http://www.cisg.law.pace.edu/cisg/biblio/schultz.html); *Van Alstine,* Consensus, Dissensus and Contractual Obligation Through the Prism of Uniform International Sales Law, 37 Virginia Journal of International Law (1996), 1 (available at http://www.cisg.law.pace.edu/cisg/biblio/alstine3.html); *Vergne,* The "Battle of the Forms" Under the 1980 United Nations Convention on Contracts for the International Sale of Goods, 33 American Journal of Comparative Law (1985), 233 (available at http://www.cisg.law.pace.edu/cisg/biblio/vergne.html); *Di Matteo/Dhooge/Green/Maurer/Pagnattaro,* The Interpretive Turn in International Sales Law: An Analysis of Fifteen Years of CISG Jurisprudence, 34 Northwestern Journal of International Law and Business (2004), 299, 348 et seq.

326 See on this issue, and generally, *Viscasillas,* Battle of the Forms Under the 1980 United Nations Convention on Contracts for the International Sale of Goods: A Comparison with Section 2-207 UCC and the UNIDROIT Principles, 10 Pace International Law Review (1998), 97, at Fn. 23; *Farnsworth,* in: Bianca/Bonell, Commentary, Art. 19 para. 2.3.

327 The issue was discussed at Vienna but proposals to deal with it were rejected. See, *Vergne,* The "Battle of the Forms" Under the 1980 United Nations Convention on Contracts for the International Sale of Goods, 33 American Journal of Comparative Law (1985), 233 (available at http://www.cisg.law.pace.edu/cisg/biblio/

arises how a court should deal with a dispute raising such an issue. Perhaps unsurprisingly, given the difficulty that many jurisdictions have encountered with this issue, no single solution has emerged and a number of different approaches can be identified in the case law and academic commentary. A broad and simplified overview of some of these solutions will be given under (bb)-(cc).

Before doing so it is appropriate to point out that the problem of the battle of the forms will only arise where both sets of standard terms fulfil the high standards that the CISG sets for the "technical" incorporation of standard terms. These standards have been described above p. 30 et seq.

bb) Solution 1: "last shot rule"

A view that has been adopted by a number of courts is the "last shot rule". This view involves a straightforward application of Art. 19(1) CISG. In essence it treats each subsequent form as a counter-offer rejecting the previous offer. The resulting contract, if there is one, will therefore be on the terms of the final form used without being objected to by the other party and thus being "accepted" by that party; typically such "acceptance" is evidenced by some form of performance by that party.[328] The following example illustrates this approach: B sends S a purchase order (including his standard terms of purchase which include a jurisdiction clause in favour of the German courts) for 100 widgits and S replies accepting the offer on the basis of his own standard terms of sale which include an arbitration clause. S subsequently ships the goods and B accepts them. Subsequently, B alleges that the widgits are defective but he refuses to submit the dispute to arbitration. Application of the "last shot" approach to these facts would mean that B is bound by the contract on S's terms and he must, therefore, arbitrate the dispute. B's purchase order was the original offer. S's acceptance was a rejection of that offer, because it contained a material alteration (cf. Art. 19 CISG), and a counter-offer including the arbitration clause. When B accepted the widgits, he accepted by his conduct the counter-offer and he is therefore bound by its terms including the arbitration clause.

---

vergne.html); *Schlechtriem*, in: Schlechtriem/Schwenzer, Commentary, Art. 19 para. 4, 19.

328 See *Farnsworth*, in: Bianca/Bonell, Commentary, Art. 19 para. 2.5.; *Enderlein/Maskow*, Commentary, Art. 19 para. 10; *Schnyder/Straub*, in: Honsell, Kommentar, Art. 19 para. 37 et seq.; *Viscasillas*, Battle of the Forms Under the 1980 United Nations Convention on Contracts for the International Sale of Goods: A Comparison with Section 2-207 UCC and the UNIDROIT Principles, 10 Pace International Law Review (1998), 97, 117 et seq, 144 et seq.; (German) Oberlandesgericht Hamm 22 September 1992, CISG-Online No. 57.

This approach, while perhaps according most clearly with the language of the Convention, is by no means satisfactory and it must be doubted whether it will in many cases accord with the parties' true intentions or with commercial reality. Consider what the position would be in our previous example, if instead of accepting the goods B had rejected them. The "last shot" principle would presumably lead to the conclusion that no contract had been made because B never accepted S's counter offer. It is difficult to see that such a solution accords with commercial reality.

cc) Solution 2: "knock out rule" (Restgültigkeitstheorie)

The difficulties to which in practice the "last shot" theory may give rise have led writers and courts to look for an alternative approach to the battle of forms problem which is both consistent with the Convention and which avoids recourse to the applicable domestic law. As a result the following analysis has been suggested which – in the author's opinion – is the best way to solve the problem.[329]

Where it can be established that the parties have agreed the essential terms of the contract and actually "want" the contract despite the conflict between their respective standard terms (because, for example, it has been performed) then it is suggested that it can be presumed that the parties have agreed to waive the application of their standard terms in so far as they are in conflict with each other. What is more, one can assume that by virtue of their party autonomy, Art. 6 CISG, they have departed from the Convention's rules on formation and in particular from Art. 19 CISG which would require one of the parties' terms to apply. The contract then takes effect as one including those parts of the respective standard terms that are not in conflict with each other. In so far as their respective standard terms are in conflict with each other, they will not apply. Remaining gaps are filled by the rules of the Convention.

---

[329] See, for example, *Schlechtriem*, in: Schlechtriem/Schwenzer, Commentary, Art. 19 para. 20; *Honnold*, para. 170.4; *Gruber*, in: Münchener Kommentar zum Bürgerlichen Gesetzbuch, Art. 19 para. 20. The knock out rule has been said by the (German) Bundesgerichtshof 9 January 2002, IHR 2002, 16 = CISG-Online No. 651 to be the prevailing opinion; the court did however not have to choose between the two solutions as it found that both would lead to the same result in the case at hand; see also (German) Landgericht Kehl 6 October 1995, CISG-Online No. 162.

4. Effective acceptance

a) General rule

As a general rule an acceptance is not effective until it is communicated to the offeror which, under the Convention, occurs when it reaches the offeror (Art. 18(2) CISG). Until that moment no contract is concluded. The term "reaches" is dealt with in Art. 24 CISG (see in more detail p. 78 et seq.).

The Convention does not prescribe any particular method by which an acceptance must be communicated. There is, for example, no requirement that an offer must be accepted by the same means used for the communication of the offer, nor need the acceptance have been communicated by the means usual or appropriate in the circumstances. However, the offeror can provide in the offer that it can only be accepted in a certain way. Where that is done, the offeror is not, in general, bound unless acceptance is made in that way. However, while an acceptance by a different means to that prescribed will not be effective, it may nevertheless still lead to the conclusion of a concluded contract if the purported acceptance can be regarded as a counter-offer and if that counter-offer is then accepted by the counter-offeree.

b) Exception: acceptance without communication reaching the offeror (Art. 18(3) CISG)

The general rule, that an indication of assent must reach the offeror in order to be effective, is subject to the exception contained in Art. 18(3) CISG which provides that: "… 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 time limits in Art. 18(2) CISG are complied with. The same effect can of course be achieved where the parties agree, in accordance with the provisions of Art. 6 CISG, to derogate from the provisions of Art. 18(2) CISG.

The exception will, for example, apply if the offeror makes clear in his offer that assent can be indicated by performing an act without any notice to him. Commentators have suggested that wording such as "Ship immediately", "Procure for me without delay"[330] or "Rush shipment"[331] may be sufficient.

---

[330] The *Secretariat Commentary* provides that an offer might indicate that the offeree could accept by performing an act by the use of such a phrase as "Ship immediately" or "Procure for me without delay". Commentary to Art. 16(3), para. 11.

[331] See *Farnsworth,* in: Bianca/Bonell, Commentary, Art. 18 para. 3.4.

However, while such language certainly invites swift acceptance by performing an act, it must be questioned whether such wording, without more, invites the offeree to accept without giving notice. Unless, therefore, the offer also indicates that communication of completion of the act of acceptance is unnecessary, an offeree would be well advised to give notice if he intends to accept.

Performance of the act is effective to constitute the contract when the conditions set out in Art. 18(3) CISG are met.[332] It follows from this, that once the act is performed it cannot be withdrawn since the act has perfected the contract. Further, there is no necessity for the offeror to be made aware, by notice or otherwise, that the act has been performed.[333] Under Art. 18(3) CISG a contract is formed by conduct amounting to acceptance even where that has not been communicated to the offeror.

c) Time for acceptance

aa) Time fixed

Where an offer provides that it must be accepted within a fixed time, an acceptance received after that time is not effective (Art. 18(2) second sentence CISG). Exceptionally, however, a late acceptance may still be effective if either of the provisions contained in Art. 21 CISG are satisfied (see below bb). The time may be fixed as a particular date or in some other manner[334] (e.g., "reply within the next 10 days"; "reply by January 1"; "reply before the next meeting of the Board"). It may also be fixed by reference to less definite terms such as "reply immediately" or "reply within the usual period for consideration," the precise meaning then being a matter of interpretation.[335]

Art. 20 CISG sets out the basis on which a time period set for acceptance is to be calculated. The provision applies only to the situation where the offeror has fixed the time for acceptance by reference to a period of time as opposed to by reference to a particular date. Further, the rule set out in Art. 20(1) CISG is one of interpretation only and it must yield to evidence of a contrary intention. Where, therefore, it is possible to determine the date from which time begins to run by construing the offer itself, no recourse need be made

---

[332] *Farnsworth*, in: Bianca/Bonell, Commentary, Art. 18 para. 2.8, 2.9; *Schlechtriem*, in: Schlechtriem/Schwenzer, Commentary, Art. 18 para. 22.

[333] See *Schlechtriem*, in: Schlechtriem/Schwenzer, Commentary, Art. 18 para. 23 (also to the question of whether there is an ancillary duty to give notice). But see for a different view *Honnold*, para. 164(1).

[334] *Schlechtriem*, in: Schlechtriem/Schwenzer, Commentary, Art. 18 para. 14.

[335] See *Schlechtriem*, in: Schlechtriem/Schwenzer, Commentary, Art. 18 para. 14 (with examples at Fn. 53-56).

to Art. 20(1) CISG. Thus, a provision in an offer letter to the effect that the offer must be accepted within 10 days of its receipt would fix the commencement of the period of time to the receipt of the letter.

bb) Reasonable time

Where the offer makes no provision as to the time within which it must be accepted, Art. 18(2) CISG distinguishes between an oral offer and an offer by other means. According to the final sentence of Art. 18(2) CISG, to be effective an oral offer must be accepted immediately if no time for acceptance is fixed unless the circumstances indicate otherwise. Thus, where an oral offer is made face to face or even over the telephone, the offer generally will not survive the conversation so that an acceptance made after the conversation has finished will not be effective.[336]

Where an offer is made "by other means" without a fixed date or period for acceptance, the acceptance will only be effective where it reaches the offeror "within a reasonable time" (Art. 18(2) second sentence CISG). What is a reasonable time depends, according to this provision, on "the circumstances of the transaction, including the rapidity of the means of communication employed by the offeror." Other circumstances may, however, be relevant, such as the volatility of the market price of the goods, the stability or perishability of the goods, the means used by the offeror for communicating his offer and the means available to the offeree to make his reply. Thus, an offer to sell perishable goods for which the price is liable to sudden fluctuations would lapse after a short period of time. The same would, in general, be true of an offer made by fax or other instantaneous means of communication. By way of contrast, where a company offers to sell an expensive and complicated piece of machinery which will need installation and maintenance by third parties, account will have to be taken, in considering what amounts to a reasonable time, of the offeree's need to negotiate with those third parties and perhaps with their bankers before being able to accept the offer.

cc) Late acceptance

As a general rule, an acceptance that reaches the offeror after any period of time set for acceptance is not effective; no contract is, therefore, concluded and the offer lapses. However, that is not to say that the whole contracting process thereby comes to an end. In English law, for example, a late acceptance is likely to be treated as a counter-offer. Thus, an offeror who wanted to conclude a contract would have to do so by letting the offeree know that he was accepting the counter-offer.

---

336 *Farnsworth,* in: Bianca/Bonell, Commentary, Art. 18 para. 2.6.

Art. 21 CISG takes a different approach. It draws a distinction between two reasons for lateness; namely, obvious delay in transmission (Art. 21(2) CISG) and late acceptance for reasons other than obvious transmission delay, e.g., late dispatch of acceptance (Art. 21(1) CISG). In both cases, the Convention allows a contract to be formed by the late acceptance, albeit under different conditions. In the case of an obvious transmission delay, a late acceptace will be treated as effective and a contract concluded unless the offeror objects in a timely manner. Where, however, the acceptance is late for a reason other than an obvious transmission delay, a contract will only be concluded if the offeror gives notice to that effect.

(i) Obvious delay in transmission (Art. 21(2) CISG)

Art. 21(2) CISG applies where a letter or other writing[337] containing an acceptance is late because of obvious delay in transmission. In essence, it provides that where an acceptance is sent in such circumstances that it is apparent that had the transmission been normal the acceptance would have been timely, the acceptance shall be treated as effective unless "without delay, the offeror orally informs the offeree that he considers his offer as having lapsed or dispatches a notice to that effect." The effect of the provision is to protect the offeree's reliance interest (e.g., in a contract having been concluded), and to shift onto the offeror the burden of preventing the completion of a contract.[338] Thus, if an offeror wishes to prevent a contract coming into existence he must take positive steps to do so (i.e. orally inform the offeree that he considers his offer as having lapsed or dispatching a notice to that effect, cf. Art. 18(2) second sentence CISG). If he fails to do so the contract is treated as having been concluded at the moment when the late acceptance reached the offeror.[339]

The provision only applies 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 reason for the delay must have been one in "transmission" of the acceptance. It is submitted that, for the purposes of Art. 21(2) CISG, the word "transmission" refers only to transmission by a third party carrier and that, therefore, delays caused by either the offeror or the offeree should not be

337 It is submitted that the provision should be applied to electronic communications, too, provided that such form of communication has been accepted by the parties; see *Schlechtriem*, in: Schlechtriem/Schwenzer, Commentary, Art. 21 para. 16; CISG-AC Opinion No 1 (Ramberg), Internationales Handelsrecht (IHR) 2003, 244, para. 21.3.

338 *Schlechtriem*, in: Schlechtriem/Schwenzer, Commentary, Art. 21 para. 16.

339 *Schlechtriem*, in: Schlechtriem/Schwenzer, Commentary, Art. 21 para. 2.

treated as "transmission" delays.[340] Delays in transmission may occur for example because of matters relating to the particular communication (e.g., a letter that is lost in the post), or because of general disturbances (e.g., a postal strike).[341]

Art. 21(2) CISG requires that the letter or other writing must show that if its transmission had been normal it would have reached the offeror in time. In other words it must be apparent from the letter or other writing that it has been delayed. Despite the wording of the provision it is submitted that evidence from another source is sufficient (e.g., by a telephone call from the offeree stating that the letter was dispatched).[342]

(ii) Other reason for late acceptance (Art. 21(1) CISG)

Where an acceptance is late for reasons other than an obvious delay in transmission (e.g., late dispatch of the acceptance), the acceptance is nevertheless effective provided that the offeror "without delay (…) orally so informs the offeree or dispatches a notice to that effect" (Art. 21(1) CISG).

It is submitted that the giving of an oral or written notice has the effect of retrospectively validating the late acceptance. [343] Thus, the contract is treated as having been formed at the time the late acceptance reached the offeror.[344] Such a view is consistent with the language of Art. 21(1) CISG which begins, "A late acceptance is nevertheless effective as an acceptance …" thereby implying that it is the late acceptance that is treated as concluding the contract and not the later notice.[345]

---

340 *Gruber*, in: Münchener Kommentar zum Bürgerlichen Gesetzbuch, Art. 22 para. 17.

341 *Schlechtriem*, in: Schlechtriem/Schwenzer, Commentary, Art. 21 para. 17.

342 *Schlechtriem*, in: Schlechtriem/Schwenzer, Commentary, Art. 21 para. 18.

343 See *Schlechtriem*, in: Schlechtriem/Schwenzer, Commentary, Art. 21 para. 10; *Secretariat Commentary*, Art. 19 para. 3.

344 This interpretation is supported by the *Secretariat Commentary* which provides that "it is the late acceptance which becomes the effective acceptance as of the moment of *its* receipt, even though it requires the subsequent notice to validate it" emphasis added).

345 *Secretariat Commentary*, Art. 19(1) para. 3.

5. Withdrawal of the acceptance

Under Art. 22 CISG, an acceptance may be withdrawn if the withdrawal reaches the offeror before or at the same time as the acceptance would have become effective.

IV. Conclusion of contract otherwise than by offer and acceptance

Although the Convention adopts the traditional offer and acceptance model of agreement, agreement in practice may be reached in circumstances which cannot easily be analysed into the form of offer and acceptance.[346] It is not unusual, for example, for parties to an international sales transaction to engage in point by point negotiation of individual clauses or lengthy exchange of communications[347] prior to final agreement. As the negotiations progress, each side may make concessions or new demands and in the end it may be very difficult to determine whether an agreement was ever concluded or if so, on what terms. Other methods of reaching agreement that do not fit easily within the traditional offer and acceptance model include the dispatch of identical cross offers and a failure to reply (i.e., silence) to a letter of confirmation.

At the Vienna Conference, a number of proposals were made seeking to bring such agreements within the scope of the Convention. However, these proposals were withdrawn largely, though not completely, because of the "extreme difficulties of formulating an acceptable text."[348]

The fact that the delegates at Vienna were unable to agree upon an acceptable text to govern such agreements should not lead to the conclusion that all such agreements fall outside the ambit of the Convention. Recourse to the applicable domestic law should if at all be made rarely for the following reasons. First, it is undoubtedly true that identifying an offer and acceptance from a lengthy series of negotiations may be an artificial process. However, this is a

---

346 Though it is probably true to say that courts are likely to apply the analysis even in relation to unpromising material: see, for example, U.S. Federal District Court, New York, Filanto v Chilewich, 14 April 1992, CISG-Online No. 45.

347 *Schlechtriem*, in: Schlechtriem/Schwenzer, Commentary, Intro to Arts 19-24 para. 2.

348 A/33/17, IX Yearbook (1978), para 104; *Honnold*, Doc.Hist., 373. See also *Schlechtriem*, in: Schlechtriem/Schwenzer, Commentary, Intro to Arts 14-24 para. 5.

process with which courts in most jurisdictions are familiar. Such evidence as exists from decided cases[349] suggests that courts applying the Convention have no more difficulty in finding an offer and acceptance, particularly where the agreed subject matter has been performed,[350] when they are minded to do so than courts applying their own domestic, non-Convention, law. There will, of course, be differences of opinion as to whether it is possible to identify from all the relevant circumstances whether either party intended to make an offer that was capable of acceptance. Such is inevitable in respect of what is in essence an interpretative exercise. However, there will be very few cases in which it is simply impossible for a court to apply the offer and acceptance model.[351]

Secondly, the parties can agree to depart from the traditional model of contract formation (Art. 6 CISG).[352] Such agreement may be express or implied by reference to usages to which they have agreed and by any practices which they have established between themselves.[353] If, for example, a practice exists between the parties that a failure to reply to a commercial letter of confirmation amounts to an acceptance on the terms contained in the letter, a court should treat a contract as having been concluded even if the Convention provisions on formation have not been satisfied.

If it is impossible in a given case to discern offer and acceptance it has been submitted in academic writing that recourse to the applicable domestic law is unnecessary. Instead, the court should apply the principle of consensus, which is a general principle on which the Convention is based (Art. 7(2) CISG), and should consider whether agreement has been established. If consensus is established and the minimum content required for a contract exists then a court should treat a contract as having been concluded.[354] While there

---

349 See e.g., U.S. Federal District Court, New York, Filanto v Chilewich, 14 April 1992, CISG-Online No. 45; (German) Oberlandesgericht Frankfurt 23 May 1995, CISG-Online No. 185.

350 Note that under Art. 18(3) CISG a contract may be concluded by "performing an act, such as one relating to the dispatch of goods or payment of the price."

351 See *Schlechtriem*, in: Schlechtriem/Schwenzer, Commentary, Intro to Arts 14-24 para. 5.

352 *Schlechtriem*, in: Schlechtriem/Schwenzer, Commentary, Intro to Arts 14-24 para. 5.

353 See Art. 8 CISG.

354 See (German) Oberlandesgericht München 8 March 1995, CISG-Online No. 145 where the court purported to apply principles underlying the Convention rather than national contract law and found that the conduct of a Finnish seller and a German buyer evidenced an enforceable contract.

is much to be said for this from a policy point of view, it is difficult to find much support for it in either the Convention or its "Trauvaux Preparatoires". The better view may, therefore, be that if a court concludes that it is wholly impossible to apply the offer and acceptance model and that the parties have not agreed, expressly or impliedly, to depart from this model, recourse to the applicable domestic law will be necessary in order to determine whether a contract has been concluded.

V. Modification of the contract

Art. 29(1) CISG states that a contract may be modified or terminated by the mere agreement of the parties.[355] This provision shows that a modification (or termination) of a sales contract that is governed by the CISG is not subject to any domestic requirements of "consideration".[356] Such rules should not be regarded as "validity" rules in the sense of Art. 4 lit. (a) CISG (which would lead to the application of domestic law). See for a discussion on this provision above p. 21 et seq. It is submitted that by virtue (and subject to the limitations) of Art. 11 CISG, the modification or termination need not take any particular form.[357]

Art. 29(2) first sentence CISG provides an exception to Art. 29(1) CISG: "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". The parties may thus agree that any modification of their written contract must be in the written form. By way of example, so-called "no oral modification"-clauses would fall under this provision.

There is however a counter-exception to Art. 29(2) first sentence CISG. The second sentence of this provision states that a party may be precluded by his conduct from asserting such a clause to the extent that the other party has relied on that conduct. This counter-exeption aims at preventing abuse.[358] The provision may apply, for example, where party A orally suggests a modification to the contract (which includes a "no oral modification"-clause),

---

355 Although the provision is to be found in Part III of the Convention (entitled "Sale of Goods") it is closely related to the formation provisions in Part II; see (German) Oberlandesgericht Köln, 22 February 1994, CISG-Online No. 127.

356 See *Schlechtriem*, in: Schlechtriem/Schwenzer, Commentary, Art. 29 para. 3.

357 *Schlechtriem*, in: Schlechtriem/Schwenzer, Commentary, Art. 29 para.. 2

358 *Schlechtriem*, in: Schlechtriem/Schwenzer, Commentary, Art. 29 para. 10.

which party B accepts by performing according to the suggested modification. In such a case party A will normally be precluded from relying on the "no oral modification"-clause in order to insist on the originally agreed performance rather than the modified performance.[359]

[359] See for further examples *Schlechtriem*, in: Schlechtriem/Schwenzer, Commentary, Art. 29 para. 10.

Part 4:
Obligations of the seller

Chapter II of Part III of the Convention begins by setting out the main obligations of the seller. These may be grouped into three parts: First, the seller must deliver the goods and hand over the documents; this is governed by Art. 30-34 CISG (see § 5). Secondly, the goods must be in conformity with the contractual requirements, as provided for in Art. 35-40 CISG (see § 6 and § 7). Thirdly, the goods must be free from third party claims, Art. 41-44 CISG (see § 8). Both the second and the third part also contain rules on duties of (examination and) notice. The remedies of the buyer are governed by Art. 45 et seq. CISG and will be discussed later (§§ 9 et seq.).

§ 5. Delivery of goods and documents

I. Introduction

Art. 30 CISG provides that: "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 the Convention."

In addition to setting out the basic elements of due performance under the Convention, Art. 30 CISG also makes explicit the importance of the terms of the contract in determining the content of those obligations. "The scope and substance of those obligations are determined chiefly by the terms of the contract":[360] only where the contract is silent will recourse to the provisions of the Convention be necessary. Since Art. 6 CISG permits the parties to exclude the application of the Convention or to derogate from or vary the effect of any of its provisions, it follows that in cases of conflict between the contract and provisions of the Convention, the seller must fulfil his obligations as required by the contract.[361]

The "seller's primary obligation is to deliver the goods".[362] The delivery obligations with respect to the goods are found in Art. 31 et seq. CISG. According to Art. 31 CISG, delivery consists of dispatch of the goods to the buyer or in the seller placing the goods at the buyer's disposal. The primary rule in Art. 31 CISG is supplemented by Art. 32 and 33 CISG which lay down rules relating to notice of dispatch, conclusion of the contract of carriage, insurance (Art. 32 CISG) and the time of delivery (Art. 33 CISG). Art. 34 CISG governs the handing over of documents.

In practice, the parties will more often than not specifically agree that the above matters are to be governed by standard delivery terms, such as CIF, FOB or ex ship. Such terms are "shorthand descriptions of particular delivery

---

360 *U. Huber/Widmer*, in: Schlechtriem/Schwenzer, Commentary, Art. 30 para. 1.

361 *Secretariat Commentary*, Art. 28. See also (German) Oberlandesgericht München 3 December 1999, CISG-Online No. 585.

362 *Secretariat Commentary*, Art. 29 para. 1.

obligations."[363] Where the parties contract on such terms, the seller's delivery obligations will as a general rule be determined by the terms of the contract and not by the provisions of the Convention.[364]

II. The obligation to deliver the goods

1. General overview

Three provisions of the Convention deal with the seller's obligation to deliver the goods. The substance of the delivery obligation and the closely related issue of the place of delivery are dealt with in Art. 31 CISG. Art. 32 CISG provides a number of supplementary rules relating to the giving of notice, the conclusion of a contract of carriage and transportation arrangements. Finally, Art. 33 CISG sets out rules relating to the time of delivery.

2. The meaning of "delivery"

The Convention does not expressly define the concept of "delivery". However, a number of points can be made about what the concept involves. First, "delivery" refers only to the steps that the seller must take in order to ensure that the buyer obtains possession of the goods. Thus, as a general rule, the delivery obligation can be performed unilaterally by the seller without the need for the buyer's cooperation.[365] Secondly, the delivery obligation may be performed notwithstanding that actual possession has not been given or any transportation been made to the buyer. By way of example, under Art. 31 CISG, the seller may perform his delivery obligation either by handing the goods over to the first carrier or by placing them at the disposal of the buyer.

Unlike under ULIS, where delivery depended upon the handing over of "*conforming* goods", there is no requirement in the CISG that performance of the delivery obligation depends upon delivery of "conforming" goods.[366] Delivery of non-conforming goods will, therefore, generally constitute a delivery under the CISG; the seller will, however, be liable for the breach of his obligations under Art. 35 CISG.

---

363 *Bridge*, The Sale of Goods, p. 230.

364 See e.g., Cour d'Appel Paris 4 March 1998, CISG-Online No. 535; (German) Oberlandesgericht Oldenburg 22 September 1998, CISG-Online No. 1306.

365 See *U. Huber/Widmer*, in: Schlechtriem/Schwenzer, Commentary, Art. 31 para. 4.

366 See, e.g., *Lando*, in: Bianca/Bonell, Commentary, Art. 31 para. 2.7; *Honnold*, para. 210.

3. The consequences of "delivery"

a) Delivery and payment

The parties are free to make whatever arrangements they wish as to the relative times at which payment and delivery are to be made. But, in the absence of any such agreement, Art. 58(1) CISG provides that "[the buyer] must pay [the price] 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 effect of the provision is, therefore, that unless the parties agree otherwise, payment of the price is due as soon as the goods or documents representing the goods are placed at the buyer's disposal. Thus, unless the sale involves carriage of the goods, the general rule is that the buyer must pay in exchange for "delivery" of the goods or documents. Where the sale involves carriage of goods, the seller performs his delivery obligation by handing the goods over to the first carrier for transmission to the buyer (Art. 31 lit. (a) CISG). The price is not, however, payable until the seller has tendered the goods to the buyer at their place of destination. It should be noted, however, that where a sale involves carriage of goods, the seller can 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" (Art. 58(2) CISG).

b) Delivery and "taking delivery"

The seller's obligation of "delivery" and the buyer's obligation of "taking delivery" (Art. 53, 60 CISG) are closely linked to each other. There are two elements of the buyer's obligation to take delivery. First, the buyer must do all the acts which can reasonably be expected of him in order to enable the seller to make delivery (Art. 60 lit. (a) CISG). This obligation emphasises that the buyer has to co-operate with the seller. The buyer must act reasonably to enable the seller to deliver and to that extent the two obligations are linked. Such an obligation will often be imposed by contract, such as the obligation that may be placed on an FOB buyer to arrange for the carriage of the goods and nominate an effective ship to the seller. Until the buyer performs this part of his obligation to take delivery, the seller is unable to deliver. Secondly, the buyer must take over the goods (Art. 60 lit. (b) CISG). This part of the obligation does not arise until the seller has delivered the goods.

c) Delivery and risk

Unlike the position under ULIS, delivery is no longer the decisive factor for the passage of risk. Indeed the idea of linking the passage of risk to the delivery of the goods did not find favour during the preliminary work on the CISG

and was dropped.[367] Nevertheless, the requirements for the passage of risk (Art. 67 et seq. CISG) and the requirements for delivery are very similar so that the risk will often pass at the same time as the seller performs his delivery obligation.[368]

d) Liability for expenses

The Convention does not contain rules relating to the expenses of delivery. Frequently, however, this will be the subject of express provisions in the contract[369] or may be ascertained by reference to previous course of dealings or trade usage (Art. 9 CISG). If no agreement has been reached, then the gap in the Convention should, by virtue of Art. 7(2) CISG, be filled by recourse to general principles on which the Convention is based; there should be no need to have recourse to the applicable domestic law. The underlying general principle is that each party must bear the costs of his own performance.[370] Thus, unless otherwise agreed, the seller must bear all the costs of, and incidental to, the transportation of the goods to the place of delivery.[371] This may for instance include the costs of loading the goods on board[372] and, where the place of delivery is in the buyer's country, their discharge at the port of destination.[373]

4. Place of delivery

Art. 31 CISG provides rules on the place of delivery. Primarily, it is the parties' agreement on the place of delivery that is relevant (see (a) below). In the absence of such an agreement, several situations have to be distinguished. Where the contract of sale involves carriage of the goods, Art. 31 lit. (a) CISG will apply (see (b) below). In other cases, one should first refer to Art. 31 lit. (b) CISG before resorting to the residual rule in Art. 31 lit. (c) CISG (see (c) and (d) below).

---

367 Yearbook 1 (1968-70) at 175, No 141, see also the Report of the General Secretary Yearbook III (1972), Art. 31-41 = *Honnold*, Documentary History of the Uniform Law for International Sales, p. 73 – 83.

368 For a fuller discussion of risk under the Convention, see below p. 314 et seq.

369 The Incoterms contain provisions dealing with the division of costs (clauses A6 and B6).

370 See *U. Huber/Widmer*, in: Schlechtriem/Schwenzer, Commentary, Art. 31 para. 83.

371 See for more detail *U. Huber/Widmer*, in: Schlechtriem/Schwenzer, Commentary, Art. 31 para. 83.

372 As in contracts concluded on CIF and FOB terms.

373 As in contracts concluded on ex quay, d.d.u. and d.d.p. terms.

a) Seller bound to deliver at particular place

The provisions in Art. 31 CISG relating to the place of delivery apply only "if the seller is *not* bound to deliver the goods at any other particular place."[374] Where, therefore, the parties have agreed expressly or impliedly that the goods are to be delivered at a particular place (for instance the buyer's place of business or the seller's place of business), the place of delivery is determined by that agreement[375] and recourse to the provisions in Art. 31 CISG is unnecessary.[376]

Where the parties contract by reference to a particular delivery term (such as one of the Incoterms), the substance of the delivery obligation and the place of delivery must be determined in accordance with the express terms of the contract. Thus, for example, if the parties contract on CIF Incoterms, the seller must "deliver the goods on board the vessel at the port of shipment on the date or within the period stipulated."[377] In relation to some delivery terms, the Incoterms produce the same place of delivery and delivery obligation as Art. 31 CISG.[378] Regardless, however, of whether the contractual delivery term produces the same effect as that produced by Art. 31 CISG, the substance of the delivery obligation and the place of delivery are to be determined in accordance with the provisions of the contract (e.g., the delivery term) and not with the "fall-back" provisions contained in Art. 31 CISG.

b) Contract of sale involving carriage of the goods (Art. 31 lit. (a) CISG)

Where the contract of sale involves the carriage of goods, and the seller is not bound to deliver the goods at any particular place, the seller performs his delivery obligation by handing the goods over to the first carrier for transmission to the buyer (Art. 31 lit. (a) CISG).

aa) Carriage of goods

Interpreted literally, a contract of sale involving carriage of goods could refer to all contracts where the goods will be moved from one place to another.

---

374 Art. 31 first sentence CISG (emphasis added).

375 For the consequences of delivery at the wrong place see *U. Huber/Widmer*, in: Schlechtriem/Schwenzer, Commentary, Art. 31 para. 78.

376 (Italian) Corte Suprema di Cassazione 19 June 2000, CISG-Online No. 1317; (German) Oberlandesgericht München 3 December 1999, CISG-Online No. 585.

377 Clause A4 Incoterms 2000.

378 See e.g., the ex works term: (German) Oberlandesgericht Köln 8 January 1997, CISG-Online No. 217.

Such a definition would include almost all international sales contracts.[379] It is clear, however, from the language of the provision that this is not the meaning intended by the draftsmen of the Convention. A contract of sale involving carriage of the goods within the meaning of the Convention refers only to contracts of sale where the seller is to arrange for the carriage of goods to the buyer[380] by an independent carrier[381].

Thus, where under the contract the goods are to be transported to the buyer by the seller using his own vessels, or by an employee of the seller, this does not involve a carriage of the goods within the meaning of Art. 31 lit. (a) CISG; it is rather a case where the seller is "bound to deliver at another place" (see (a) above).

A difficult question is raised by whether a contract of sale under which the transportation of the goods is to be carried out or arranged by the *buyer* involves carriage of goods within the meaning of the provision. Literally, such a contract does involve carriage of goods and there would be nothing wrong with a rule stating that the delivery obligation is only performed when the seller hands the goods over to the buyer or an independent carrier contracted for by the buyer.[382] However, it must be remembered that the Convention seeks to define delivery in such a way that the seller's delivery obligation can generally be performed without the co-operation of the buyer. To include contracts of sale where the carriage of goods is to be carried out, or arranged, by the buyer Art. 31 lit. (a) CISG has the effect that delivery can only be accomplished with the co-operation of the buyer. This runs counter to the policy adopted by the Convention's provisions on delivery. The better view, therefore, is that sales where the carriage is carried out, or arranged, by the buyer should be treated as sales not involving the carriage of goods and, therefore, they fall within either Art. 31 lit. (b) or (c) CISG.[383]

bb) Handing the goods over for transmission to the buyer

Under Art. 31 lit. (a) CISG, the seller's obligation to deliver consists in handing the goods over to the first carrier for transmission to the buyer. The handing over of the goods to the carrier is complete when the carrier obtains

379 See Nicholas, The Vienna Convention on International Sales Law, Law Quarterly Review (L.Q.R) 1989, 208, 238.

380 Whether by sea, road, rail, air or other means of transportation.

381 *Lando*, in: Bianca/Bonell, Commentary, Art. 31 para. 2.4; *UNCITRAL Digest*, Art. 31 para. 5.

382 See *Feltham*, CIF and FOB Contracts and the Vienna Convention on Contracts for the International. Sale of Goods Journal of Business Law (J.B.L) 1991, 413.

383 *U. Huber/Widmer*, in: Schlechtriem/Schwenzer, Commentary, Art. 31 para. 15.

physical possession of the goods for the purpose of carriage to the buyer.[384] The goods must actually be handed over to the carrier or to his employees.[385] Thus, the seller does not perform his delivery obligation by handing over a document of title to the goods to the carrier enabling him to collect the goods from a third party.[386] Nor is delivery effected when the seller merely makes the goods ready for collection by the carrier, or puts them in one of his own vehicles for transportation to the carrier.

Delivery to the carrier must be made for the purpose of transmission of the goods to the buyer. This requires that the seller must have entered into a carriage contract with the carrier under which the carrier undertakes to transport the goods to the buyer.[387] However, it is not necessary that immediately on receipt of the goods, the carrier commences the carriage.

cc) To the first carrier

The seller performs his delivery obligation when he hands the goods over to a carrier. Where the carriage is to be completed in stages, involving perhaps different modes of transportation, the seller performs his obligation by handing the goods over to the *first* carrier.[388] The first carrier need not, for the purposes of the seller's performance of his delivery obligation, be the carrier responsible for finally delivering the goods to the buyer. Nor is the length of the first transportation stage relevant.[389]

As mentioned above, "carrier", within Art. 31 lit. (a) CISG, must be understood as referring to an *independent* carrier; that is a (legal) person who

---

384 *U. Huber/Widmer*, in: Schlechtriem/Schwenzer, Commentary, Art. 31 para. 29.

385 (Spanish) Audiencia Provincial Cordoba 31 October 1997, CISG-Online No. 502.

386 *Secretariat Commentary*, Art. 29 para. 9; *U. Huber/Widmer*, in: Schlechtriem/Schwenzer, Commentary, Art. 31 para. 29.

387 *U. Huber/Widmer*, in: Schlechtriem/Schwenzer, Commentary, Art. 31 para. 30.

388 See *U. Huber/Widmer*, in: Schlechtriem/Schwenzer, Commentary, Art. 31 para. 20; (Swiss) Handelsgericht Zürich 10 February 1999, CISG-Online No. 488.

389 See *U. Huber/Widmer*, in: Schlechtriem/Schwenzer, Commentary, Art. 31 para. 20; (Swiss) Handelsgericht Zürich 10 February 1999, CISG-Online No. 488. If, for example, goods are to be transported in two stages with carrier A contracted to take delivery of the goods at the seller's place of business and transport them two miles to the port of shipment, X, where they are to be delivered to carrier B who is contracted to take delivery and transport them 3,000 miles to the final port of destination, Y, delivery is effected when the goods are handed over to carrier A.

is not an employee or a mere department of the seller or buyer.[390] This results from the following considerations. Until the goods are *handed over* to a carrier, there can be no delivery. As long as the seller retains control of the goods or as long as they remain in his sphere of control, there can have been no handing over within the meaning of Art. 31 lit. (a) CISG. Thus, where the first stage of the transport is made by the seller's employees, delivery will only be made when they hand the goods over to the first independent carrier. Similarly, where the goods are handed over to the buyer, or to an agent or employee of the buyer, there is no handing over to a carrier for *transmission to the buyer*. In such a case, the delivery is to the buyer (delivery to the buyer's agent or employee being treated as delivery to the buyer) and not to a carrier.

The meaning of "carrier" certainly includes any person who in a contract of carriage undertakes to carry by road, rail, sea, air, inland waterways or by a combination of such modes.[391] It is not necessary that the person who undertakes responsibility for the operation actually carry the goods himself. By way of contrast, the handing over of goods to some other type of bailee, such as a warehouse owner or independent packing house would not constitute delivery within Art. 31 lit. (a) CISG. In such a case, the warehouse owner does not undertake to carry or to procure the performance of a contract of carriage.

Whether delivery may be effected under Art. 31 lit. (a) CISG when the goods are handed over to a freight forwarder has been the subject of controversy. That controversy arises from the fact that, while a freight forwarder may act merely as an agent of the seller, he may also act as principal undertaking at least some, or indeed all, of the responsibility for the movement of the goods. Three different types of freight forwarding contracts need to be considered: First, the seller may simply engage a freight forwarder to act as a forwarding agent.[392] Assuming, in such a case that the freight forwarder himself never takes delivery of the goods but only instructs a carrier to take delivery of the

---

[390] See *U. Huber/Widmer*, in: Schlechtriem/Schwenzer, Commentary, Art. 31 para. 23.

[391] See Incoterms 2000, preamble to FCA contract.

[392] In Jones v European Express ((1921) 90 L.J. 159) Rowlatt J. described forwarding agents as persons: "willing to forward goods for you … to the uttermost ends of the world. They do not undertake to carry you, and they are not undertaking to do it either themselves or by their agent. They are simply undertaking to get somebody to do the work, and as long as they exercise reasonable care in choosing the person to do the work they have performed their contract."

goods and transport them to the buyer, the seller performs his delivery obligation by handing the goods over to that carrier.[393]

Secondly, a freight forwarder may agree to act as both a carrier and forwarding agent such that, at least for the stage of the transport operation during which he acts as carrier, he assumes the liability of one. Handing over to such a freight forwarder[394], whether or not he would be classified as a carrier under the applicable law, constitutes delivery within Art. 31 lit. (a) CISG, provided of course that he is the "first" carrier.[395]

The third type of freight forwarding contracts concerns the situation where a seller transports the goods to a freight forwarder and hands them over to him with instructions to arrange for onward transportation. In such a case, the freight forwarder may not undertake responsibility as principal for any movement of the goods, though he may undertake responsibility with regard to their storage and to procure a contract of carriage on behalf of (as agent for) the seller.[396] Under the definition proposed above, the freight forwarder in that scenario is not a carrier because he has not undertaken to arrange the procurement of the contract of carriage as principal. But, it might be argued to the contrary, that a seller who hands the goods over to such an independent undertaking for transmission to the buyer, has done what is required of him in order for the goods to reach the buyer.[397] However, while such a solution has the merit of avoiding the necessity of drawing subtle distinctions based on the law of carriage of goods, it must be admitted that a definition of carrier that includes a person who undertakes to procure, as agent for the seller, a contract of carriage for transmission of the goods to the buyer would be much wider than definitions of carrier found in other conventions[398] and

---

393 See *U. Huber/Widmer, in*: Schlechtriem/Schwenzer, Commentary, Art. 31 para. 26.

394 Or to an independent carrier acting on his instructions.

395 See *U. Huber/Widmer*, in: Schlechtriem/Schwenzer, Commentary, Art. 31 para. 27.

396 See for more detail *Ramberg*, Unification of the Law of International Freight Forwarding, Uniform Law Review (ULR) 1998, 5.

397 See *U. Huber/Widmer*, in: Schlechtriem/Schwenzer, Commentary, Art. 31 para. 28.

398 The United Nations Convention on the Carriage of Goods by Sea, 1978 (The Hamburg Rules) defines carrier as "any person by whom or in whose name a contract of carriage of goods has been concluded with a shipper." (Art 1.1). This definition is wider than the one found in the Hague Visby Rules which is limited to the charterer or shipowner.

in the Incoterms.[399] In the author's view, therefore, the better view remains that delivery to a freight forwarder only constitutes a delivery to a first carrier if the freight forwarder undertakes responsibility as a carrier for the voyage.

dd) Consequences

Once the seller has handed the goods over to the "first carrier" for transmission to the buyer, the seller has performed his delivery obligation.[400] What is more, pursuant to Art. 67(1) first sentence CISG, any loss of, or damage to, the goods after that moment is at the risk of the buyer.[401] Thus, if as a result of a breach of the carriage contract, the goods are lost or damaged while in transit, the buyer's remedy (if any) is against the carrier and not the seller. The seller, however, remains liable for any defect in the goods which existed at the time of handing over, even if that defect only becomes apparent at a later time.

c) Delivery by placing the goods at the buyer's disposal (Art. 31 lit. (b), (c) CISG)

If the seller is not bound to deliver the goods at any other particular place and the contract of sale does not involve carriage, the place of delivery is determined by reference either to Art. 31 lit. (b) or (c) CISG. Art. 31 lit. (b) CISG will be applicable under certain specified conditions (see (aa) below); if these conditions are not met, the residual rule in Art. 31 lit. (c) CISG will apply (see (bb) below). In both cases, the seller performs his delivery obligation by placing the goods at the buyer's disposal and it is therefore for the buyer to collect the goods.

aa) Place of delivery under Art. 31 lit. (b) CISG

Art. 31 lit. (b) CISG applies to the following categories of goods.[402] First, it applies to specific goods that the parties knew, at the time of the contract,

---

399 Preamble to Incoterms FCA defines carrier as "any person who, in a contract of carriage undertakes to perform or to procure the performance of carriage by rail, road, sea, air, inland waterway or by a combination of such modes." The introduction to Incoterms makes clear, however, that a person undertaking to perform or to procure the performance of the carriage is a carrier only if such enterprise undertakes liability as carrier (i.e., principal) for the carriage.

400 As for the complicated issues that can arise if the goods are dispatched to the wrong place see *U. Huber/Widmer*, in: Schlechtriem/Schwenzer, Commentary, Art. 31 para. 39 et seq., 78.

401 *U. Huber/Widmer*, in: Schlechtriem/Schwenzer, Commentary, Art. 31 para. 32.

402 See *U. Huber/Widmer*, in: Schlechtriem/Schwenzer, Commentary, Art. 31 para. 46.

were at a particular place.[403] Where the contract relates to specific goods that the parties knew were at a particular place, the seller performs his delivery obligation by placing the goods at the buyer's disposal at that place. Secondly, it applies to unidentified goods to be drawn from a specific stock; if the parties knew at the time of the conclusion of the contract where the specific stock was situated, that place is the place of delivery. The third category of goods consists of those to be manufactured or produced; provided that the parties knew, at the time of conclusion of the contract, that the goods were to be manufactured at a particular place, that place is the place of delivery.

In respect of each category of goods, the parties must have known at the time the contract was made that the goods were situated at a particular place. The parties must have actual knowledge: it does not suffice if one or the other party ought to have had such knowledge but did not.[404] If the knowledge requirement is not met, Art. 31 lit. (b) CISG will not be applicable. The place of delivery will then result from Art. 31 lit. (c) CISG.

bb) Place of delivery under Art. 31 lit. (c) CISG

Art. 31 lit. (c) CISG fulfils a fall back or "residuary" role.[405] It applies where the contract does not require the goods to be delivered at any particular place (Art. 31 first sentence CISG), the contract of sale does not involve the carriage of goods (Art. 31 lit. (a) CISG) and the specific provisions of Art. 31 lit. (b) CISG are not satisfied (e.g. lack of knowledge). In such a case, the seller's obligation to deliver consists "in placing the goods at the buyer's disposal at the place where the seller had his place of business[406] at the time of conclusion of the contract."

cc) Placing the goods at the buyer's disposal

Under both Art. 31 lit. (b) and (c) CISG, the seller performs his delivery obligation by "placing the goods at the buyer's disposal" at the indicated place of delivery. In accordance with the Secretariat Commentary, it is submitted that a seller places the goods at the buyer's disposal where he "has done that

---

403 "Specific goods" are nowhere defined in the Convention. However, it appears from the language of Art. 31 lit. (b) CISG that in order to be specific, the goods must be agreed upon and identified at the time the contract was made: Specific goods are distinguished in Art. 31 lit. (b) CISG from "unidentified goods to be drawn from a specific stock" and goods that are "to be manufactured or produced".

404 *Secretariat Commentary*, Art. 29 para. 13; *U. Huber/Widmer*, in: Schlechtriem/Schwenzer, Commentary, Art. 31 para. 48.

405 *Secretariat Commentary*, Art. 29 para. 15.

406 For more detail on the concept of "place of business" see Art. 10 CISG.

which is necessary for the buyer to be able to take possession."[407] The seller's obligation to place the goods at the buyer's disposal does not require that he hand them over to the buyer. It is for the buyer to take possession of the goods and not for the seller to hand over possession.[408] Thus, under Art. 31 lit. (b) and (c) CISG, the loading of the goods onto the buyer's trucks is not, in the absence of a provision to the contrary, part of the seller's delivery obligations.

Where goods are stored, to the knowledge of both parties, with a third party, such as an independent warehouse keeper, the seller places the goods at the buyer's disposal when he enables the buyer to collect the goods from the warehouse. It is not part of the seller's delivery obligation to cause the goods to be handed over to the buyer by the warehouse keeper; the seller need only put the buyer in a position that he can take delivery of the goods from the warehouse keeper.[409]

Unless by the contract of sale, as a result of previous course of dealings or trade usage, the seller is obliged to hand over specific documents, the seller performs his delivery obligation by handing over to the buyer any document that enables the buyer to take delivery of the goods from the third party. Thus, the handing over to the buyer of a properly endorsed document of title (such as an order bill of lading or other document of title) will usually enable the buyer to take delivery of the goods from the warehouse keeper. Similarly, delivery to the buyer of some other document, such as a delivery order, or other instruction to the warehouse keeper may also have that effect, provided that it enables the buyer to take delivery of goods.

However, the seller does not perform his delivery obligation, if the warehouse keeper refuses to deliver the goods to the buyer. In such a case, the seller has not placed the goods at the buyer's disposal. If the warehouse keeper is willing to make delivery, but makes payment of storage costs (which under the contract of sale the buyer is not obliged to pay) a condition of taking delivery, it is disputed whether the seller has performed his delivery obligations.[410] It is submitted that this will be the case, but that he will be liable for breach

---

407 *Secretariat Commentary*, Art. 29 para. 16. See also (German) Oberlandesgericht Hamm 23 June 1998, CISG-Online No. 434.

408 (German) Oberlandesgericht Hamm 23 June 1998, CISG-Online No. 434.

409 See *U. Huber/Widmer*, in: Schlechtriem/Schwenzer, Commentary, Art. 31 para. 58.

410 See *U. Huber/Widmer*, in: Schlechtriem/Schwenzer, Commentary, Art. 31 para. 60 with further references.

of Art. 41 CISG because he has not delivered goods "free from any right or claim of a third party."

Art. 32(1) CISG does not by its terms apply to cases falling within Art. 31 lit. (b) and (c) CISG. Nevertheless, there may be circumstances in which a seller has to give a notice to inform the buyer that the goods are at his disposal.[411] Without such a notice, the buyer will have insufficient information to enable him to take delivery of the goods.[412] Provided such a notice has been sent in accordance with the requirements in Art. 27 CISG, the seller has performed his delivery obligation and this is the case even if notice does not arrive. However, under the relevant risk provisions (Art. 69 CISG, in particular Art. 69(2) CISG) the risk of loss of the goods as a rule only passes to the buyer when he is *aware* that the goods are placed at his disposal. Thus, if the notice to the buyer is lost in the post, the risk of loss of the goods remains on the seller.[413]

d) Sale of goods in transit

In international trade, it is not uncommon for goods to be sold while they are in transit. Such contracts fall into one of two categories. First, goods may be sold in transit on particular delivery terms such as CIF or ex ship. In these cases the substance of the delivery obligation and the place of delivery are determined by the terms of the contract so that there is no need for the residual rules in Art. 31 CISG to apply.[414] The second category consists of contracts for the sale of goods already afloat either on a named or an unnamed ship, but without any provision as to the place of delivery.[415]

It is submitted that in relation to sales of goods in transit, the provisions of Art. 31 CISG are not directly applicable as such contracts – in the words of Huber and Widmer – "constitute a special agreement as to the place of deliv-

411 *U. Huber/Widmer*, in: Schlechtriem/Schwenzer, Commentary, Art. 31 para. 51; *Secretariat Commentary*, Art. 29 para. 16; *Lando*, in: Bianca/Bonell, Art. 31 para. 2.7.

412 In the *Secretariat Commentary*, Art. 29 para. 16, it was said that goods would normally only be placed at the buyer's disposal where, inter alia, the seller had given 'such notification to the buyer as would be necessary to enable him to take possession.'

413 See *U. Huber/Widmer*, in: Schlechtriem/Schwenzer, Commentary, Art. 31 para. 51.

414 Above p. 106.

415 A sale of goods afloat on a *named* ship is now a "rare phenomenon"; Eurico SpA v Phillip Brothers (The Epaphus) [1986] 2 Lloyd's Rep 387, at 387, [1987] 2 Lloyd's Rep 215, at 222, *per* Croom Johnson LJ.

ery and the content of the delivery obligation which excludes the application of Art. 31".[416] It is possible, however, to derive from Art. 31 lit. (b) and (c) CISG a general principle (Art. 7 CISG) to the effect that delivery is made when the seller places the goods at the buyer's disposal.[417]

5. Associated duties

a) Duty to give notice to the buyer of the consignment

Art. 32(1) CISG provides that where delivery is made by handing the goods over to the carrier and where the goods are not clearly identified to the contract[418], the seller must give the buyer notice of the consignment specifying the goods. The purpose of the rule is to prevent the seller appropriating goods that he knows to have been lost or damaged to the contract and to enable the buyer to take the necessary steps to be ready to receive the goods.[419]

Art. 32(1) CISG only applies to cases where delivery is made by handing the goods over to a carrier, i.e. cases which fall under Art. 31 lit. (a) CISG or where there is a contractual agreement to that effect. The provision does not include contracts that fall within Art. 31 lit. (b) or (c) CISG (because under neither provision does the seller perform his delivery obligation by delivering the goods to a carrier). Nor, does it apply to those contracts under which the seller is obliged to deliver to the buyer at another place (Art. 31 first sentence CISG).[420]

In order to comply with Art. 32(1) CISG, the seller must give the buyer a notice of the consignment specifying the goods. This does not require that the seller send a separate communication to the buyer specifying the goods; the obligation could, for example, be performed if the seller sent to the buyer a transport document naming the buyer as consignee[421]. However, a simple

---

416 *U. Huber/Widmer*, in: Schlechtriem/Schwenzer, Commentary, Art. 31 para. 79. But see for a different view *Secretariat Commentary*, Art. 29 para. 12.

417 *U. Huber/Widmer*, in: Schlechtriem/Schwenzer, Commentary, Art. 31 para. 79; *Lando*, in: Bianca/Bonell, Commentary, Art. 31 para. 2.6.2.

418 As to the question if the goods are sufficiently identified see *U. Huber/Widmer*, in: Schlechtriem/Schwenzer, Commentary, Art. 32 para. 3 et seq.

419 See *U. Huber/Widmer*, in: Schlechtriem/Schwenzer, Commentary, Art. 32 para. 1.

420 *U. Huber/Widmer*, in: Schlechtriem/Schwenzer, Commentary, Art. 32 para. 1 et seq.

421 *Honnold*, para. 213.

communication to the effect that the buyer's goods are to be found on a particular ship may also be sufficient to satisfy the obligation.[422]

A failure by the seller to give notice to the buyer identifying the goods to the contract will prevent the passing of risk under Art. 67(2) CISG. Further, the seller will also thereby commit a breach of contract which entitles the buyer to the remedies under Art. 45 et seq. CISG (if their requirements are met). The buyer may in particular be entitled to damages to compensate him for any losses he sustains as a result. For example, a failure to give such a notice may mean that the buyer is unable to make the necessary arrangements to take delivery of the goods.[423]

b) Conclusion of contract of carriage

According to Art. 32(2) CISG, when the seller is bound to arrange for carriage of the goods[424], 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.

The means of transportation contracted for should be "appropriate in the circumstances".[425] In particular, the seller must ensure that the type of transportation contracted for is appropriate to carry the contract goods. Thus, for example, if the contract goods are such that they require to be refrigerated during transit, the seller must make a contract for carriage by means of transportation that possesses refrigeration facilities. Similarly, where goods are likely to deteriorate if carried on deck, the seller must make a contract for carriage under deck.

---

422 See in more detail *U. Huber/Widmer*, in: Schlechtriem/Schwenzer, Commentary, Art. 31 para. 5 et seq.

423 *U. Huber/Widmer*, in: Schlechtriem/Schwenzer, Commentary, Art. 31 para. 11; *Honnold*, para. 213. A notice of nomination may be important in, for example, the oil business, to enable the buyer to make the necessary berthing and discharging arrangements, see *Benjamin's* Sale of Goods, para. 19-017.

424 A contract under which the seller is to arrange for the carriage of goods includes not only those under which the seller merely agrees to arrange transportation and hand the goods over to a carrier (e.g., those contracts that fall within Art. 31 lit. (a) CISG), but also those under which the seller is to arrange for the carriage of goods from a particular place; *U. Huber/Widmer*, in: Schlechtriem/Schwenzer, Commentary, Art. 31 para. 15. That the seller contracts, in addition to arranging the carriage contract, to pay the cost of carriage is immaterial. Thus, contracts made on CIF, CPT and CFR terms should fall within the provision.

425 See for instance (Swiss) Bezirksgericht Saane 20 February 1997, CISG-Online No. 426.

The contract concluded must be on the usual terms for such transportation. What are the usual terms has to be assessed by reference to, inter alia, the type of goods carried, the means of transportation employed and any applicable trade usages or practices. Thus, terms usual for the carriage of cereals may be different to those usual in respect of the carriage of oil. It is suggested that the English cases on CIF contracts[426] may provide a useful indication as to what matters may be relevant to the question whether the seller has concluded a contract on the usual terms. Thus, the seller's obligation to contract on the usual terms is likely to require consideration of issues such as the route to be followed[427], the liability[428] of the carrier, the price of the carriage, whether transhipment is permitted and whether deviation is permitted.[429]

c) Insurance of the goods:

According to Art. 32(3) CISG where the seller is not bound to effect insurance in respect of the carriage, the seller is obliged to provide the buyer with such information as he needs to enable him to effect insurance. The sort of information that is likely to be required may include: details of the goods shipped; the date of shipment; the name of the vessel or means of transportation by which they were shipped; and, the name of the carrier. The obligation only arises in respect of contracts of sale under which the seller does not have an obligation to insure. Further, the seller is only obliged to give the necessary information if requested to do so by the buyer. If no such request is made, the seller need not provide any information. Where the buyer has all the necessary information to enable him to effect insurance, it is suggested

426 Under a CIF contract, it is for the seller to arrange transportation for the benefit of the buyer. The English courts have in a series of cases clarified what, in the absence of express provisions in the contract, the seller's obligations are in respect to the type of contract that must be concluded (see *Benjamin's* Sale of Goods, 19-024–19-039). As the essential obligation imposed in English law is to arrange a contract on terms usual in the trade, the decisions of the English courts on that question may be helpful to courts addressing what is essentially the same question under the Convention.

427 In the absence of an express provision the seller must conclude a contract for the carriage by the *usual route*, which need not be the most direct one. See Tsakiroglou & Co. v Noblee Thorl GmbH [1962] A.C. 93.

428 The seller must also arrange a contract of carriage under which one or more carriers undertake responsibility for the whole of the carriage. See Hansson v Hamel & Horley Ltd. [1922] A.C. 36.

429 See *U. Huber/Widmer*, in: Schlechtriem/Schwenzer, Commentary, Art. 32 para. 19.

that the seller would not be in breach of Art. 32(3) CISG if he failed to respond to a request for such information.[430]

Because of the importance of information requested and the consequences that may arise if goods are uninsured, it is important for the seller to respond quickly. Thus, where the buyer makes the necessary request, the seller must, if he has the information, respond without delay.[431]

A failure by the buyer to respond to a request for information or to give sufficient information amounts to a breach of contract for which the seller is liable under Art. 45 et seq. CISG.[432]

6. Time of delivery

According to Art. 33 CISG the seller must deliver the goods:
- if a date is fixed by or determinable from the contract, on that date;
- 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
- in any other case, within a reasonable time after the conclusion of the contract.

a) Date for delivery fixed by or determinable from the contract (Art. 33 lit. (a) CISG)

Art. 33 lit. (a) CISG simply repeats what would result from the principle of party autonomy anyway. The date may be *fixed* by reference to a calendar date (e.g., 1 January 2006). However, that is not necessary. Thus, a date is fixed if it can be determined by reference to the occurrence of an event that is certain to happen (e.g., 10 days after Easter 2006[433]). A date is *determinable* from the contract if the language used by the parties makes it possible to de-

---

[430] See the English case of Wimble, Sons & Co. v Rosenberg & Sons [1913] 3 K.B. 743.

[431] See *U. Huber/Widmer*, in: Schlechtriem/Schwenzer, Commentary, Art. 32 para. 31.

[432] *U. Huber/Widmer*, in: Schlechtriem/Schwenzer, Commentary, Art. 31 para. 30; *Lando*, in: Bianca/Bonell, Commentary, Art. 32 para. 2.4.

[433] cf. *U. Huber/Widmer*, in: Schlechtriem/Schwenzer, Commentary, Art. 33, para. 7, who argue that, "in case of doubt [such a provision should be understood] as meaning not that delivery must be made *precisely* on the tenth day but *at the latest* by the tenth day; it is not a 'date' falling within Art. 33 lit. (a) CISG, but a 'period of time' falling under Art. 33 lit. (b) CISG."

termine a date by recourse to external evidence. Thus, a provision requiring delivery to be made 10 days after completion of a specified stage in the construction of the goods, would make the date determinable. Similarly, a date of delivery fixed by reference to when a named ship reaches a named port would be determinable, notwithstanding the fact that the ship might never reach the port.[434] However, provisions requiring that the seller should deliver, "as soon as possible" or "promptly", would not fall within Art. 33 lit. (a) CISG because it is impossible to determine a date with any certainty from the contract.[435]

If a date has been fixed by the contract or is determinable from it, delivery must be made precisely on that date.[436] The buyer is not obliged to take delivery of goods delivered before the date on which delivery is due (Art. 52 CISG).

b) Period of time fixed or determinable from the contract (Art. 33 lit. (b) CISG)

According to Art. 33 lit. (b) CISG, if the contract provides that the seller must deliver within a period of time fixed by or determinable from the contract, the seller can deliver at any time within that period unless the circumstances indicate that the buyer is to choose a date. In principle therefore, it is for the seller to choose when during the period he wishes to deliver.[437] Thus, if the seller delivered all the goods on the first or last day of a delivery period the buyer could not refuse to take delivery.

Art. 33 lit. (b) CISG, however, also states that the circumstances may indicate that the buyer is to choose a date;[438] where that is the case, the buyer may require the seller to deliver on any date during the specified period. However, such a conclusion should not be lightly drawn. In the author's opinion, in the

---

434 A provision that the date of delivery is to be fixed by a third party would make the date determinable; as would a provision that delivery is to be made when the seller chooses or when the buyer requests delivery.

435 *U. Huber/Widmer*, in: Schlechtriem/Schwenzer, Commentary, Art. 33 para. 7.

436 (Italian) Corte di Apello Milano 20 March 1998, CISG-Online No. 348. See also the *Secretariat Commentary*, Art. 31 para. 3.

437 *U. Huber/Widmer*, in: Schlechtriem/Schwenzer, Commentary, Art. 33 para. 9. See also Arbitral Award, ICC 9117, CISG-Online No. 777. Note, however, (German) Amtsgericht Oldenburg 24 April 1990, CISG-Online No. 20 in which it was held that provision for delivery "July, August, September + -" meant that one third of the shipment was to be delivered during each of the aforementioned months.

438 For an example of a case where this was the position, see (German) Oberlandesgericht Hamm 23 June 1998, CISG-Online No. 434.

absence of an express term giving the buyer the right to choose the date of delivery[439], it will be rare that the circumstances will indicate that the buyer has the right to choose.[440] If the buyer wants to have the option to choose a date for delivery during a specified period, he should stipulate for it and if he fails to do so, a court should not readily treat the general rule as having been displaced. The mere fact that delivery is effected by placing the goods at the buyer's disposal (e.g., under Art. 31 lit. (b) and (c) CISG) so that it is for the buyer to collect the goods, is not, of itself, enough to indicate that the buyer has the right to choose a date. For example, if S agrees to sell a machine, delivery period August/September, the fact that it is for the buyer to collect the machine does not mean that the seller cannot deliver the goods on 30 September and that the buyer can insist that the seller delivers the goods on 1 August. Such an interpretation would wholly defeat the purpose of specifying a delivery period.

Where the contract provides a period during which delivery is to be made but the buyer is to choose the delivery date, the seller will normally need notice of that date in time to prepare the goods for shipment and, if he is obliged by the contract to do so, to make the necessary contract of carriage. In many contracts, there will be an express provision requiring the buyer to give the seller a specified number of days notice.[441] In the absence of an ex-

---

439 Where the parties have contracted by reference to certain trade terms, the right to choose the date of delivery may be placed on the buyer: E.g., clause B7 of FOB Incoterms provides that the buyer must "give the seller sufficient notice of the vessel name, loading port and *required delivery time*". See also contracts concluded on Incoterms FCA and f.a.s. terms (clause B7). It is not invariably the case in these types of contract that the buyer has the choice as to the date of delivery; the contract may expressly or by implication give the seller the right to choose at what point in the shipment period the goods are to be shipped. See, for example, the English case of Harlow and Jones Ltd. v Panex (International) Ltd. [1967] 2 Lloyd's Rep. 509. In that case a contract for the sale of 10,000 tons of iron on FOB terms provided for shipment "during August/September 1966, at the … suppliers' option". So too, the buyer's option as to the date of delivery may be qualified in the sense that it is subject to the approval of some third party.

440 *UNCITRAL Digest*, Art. 33 para. 6, and *U. Huber/Widmer*, in: Schlechtriem/Schwenzer, Commentary, Art. 31 para. 10 also take a restrictive view.

441 "Buyer shall give at least 15 days pre-advice of readiness of steamer."

press provision to that effect,[442] the buyer must give the seller a reasonable period of time.[443]

c) No time fixed for delivery (Art. 33 lit. (c) CISG)

Art. 33 lit. (c) CISG requires the seller, "*in any other case*" to deliver within a reasonable period of time after the conclusion of the contract. Notwithstanding the words "in any other case", there may be circumstances where a provision in the contract as to the time of delivery does not fall within Art. 33 lit. (a) or (b) CISG, yet also does not fall within Art. 33 lit. (c) CISG. For example, provisions requiring the seller to deliver "promptly", "as soon as possible" or "immediately" probably do not fall within either Art. 33 lit. (a) or (b) CISG[444] as they express an intention that delivery should be made sooner than within a reasonable period of time after conclusion of the contract. Such terms should, it is argued, be treated as derogating from the provisions of Art. 33 CISG and should be interpreted in such a way as to give effect to the parties' intentions.

The seller must deliver "within a reasonable time after the conclusion of the contract." What is a reasonable period of time is a question of fact to be determined by taking account of all the relevant circumstances of the case and by weighing the interests of both parties without giving preference to the seller's interests.[445] The following circumstances may be relevant to the issue of what is a reasonable period of time: the nature of the goods sold; whether the goods are to be manufactured or are already in stock; the purpose for

---

442 Note that the contract may require the seller to have the goods ready for collection throughout the shipment period; Compagnie Comerciale Sucres et Denrees v C.Czarnikow Ltd. (The Na*xos)* [1990] 1 W.L.R. 1337, noted by Trietel [1991] L.M.C.L.Q. 147. The case involved an FOB contract for the sale of sugar under which the time of shipment was at the buyer's option. The contract required the buyers to give 14 days notice of the ship's expected readiness to load. It further entitled the buyers on giving such notice to call for delivery of the sugar "between the first and last days inclusive of the contract period" and required the sellers to have the "sugar ready *at any time*" within the contract period. The House of Lords held that the combined effect of these provisions was that the seller was obliged to have the goods ready immediately on the ship presenting it for loading.

443 See *U. Huber/Widmer*, in: Schlechtriem/Schwenzer, Commentary, Art. 33 para. 10.

444 In none of the cases is it possible to ascertain a definite date on which delivery must be made.

445 See *U. Huber/Widmer*, in: Schlechtriem/Schwenzer, Commentary, Art. 33 para. 16.

which the buyer requires the goods; whether the seller has to acquire the goods from his supplier.[446]

Where Art. 33 lit. (c) CISG applies, the seller is not usually bound to deliver on any specific date; he performs the obligation of timely delivery, if he delivers at any time after the conclusion of the contract but before the expiration of a reasonable period of time. In other words, in the usual case Art. 33 lit. (c) CISG allows the seller a period of time within which he may deliver and still comply with the obligation of timely delivery.[447]

III. The seller's obligation to hand over documents

1. General rules

Contracts for the international sale of goods frequently make provision for the tender of documents.[448] The tender of such documents is often a condition of obtaining payment.[449] Thus, for example, where the parties contract on CIF Incoterms, the seller must hand over to the buyer, usually as a condition of obtaining payment, an insurance policy or other evidence of insurance cover,[450] the usual transport document (e.g., a negotiable bill of lading),[451] and an invoice.[452]

Where an obligation to tender documents arises it generally constitutes an independent obligation separate from the seller's obligation to deliver the goods.[453] If the seller is not to be in breach of contract, he must perform both

---

446 For examples of cases where courts have considered what amounts to a reasonable time see (Swiss) Tribunal Cantonal Valais 28 October 1997, CISG-Online No. 328; (Spanish) Audiencia Provincial Barcelona 20 June 1997, CISG-Online No. 338; (German) Oberlandesgericht Naumburg 27 April 1999, CISG-Online No. 512.

447 See *U. Huber/Widmer*, in: Schlechtriem/Schwenzer, Commentary, Art. 33 para. 18.

448 See, for example, CIF and CFR Incoterms 2000.

449 Art. 58(1) CISG allows the seller to make the payment of the price a condition for handing over the "goods or *documents*".

450 Clause A3(b).

451 Clause A8.

452 Clause A1.

453 Art. 30 CISG requires the seller to "deliver the goods [and] hand over any documents relating to them." The Convention thus recognises that the contract may impose separate obligations in relation to the documents and the goods on the

documentary obligations and the "physical" obligations in relation to the goods.

The first sentence of Art. 34 CISG states that which would in any event be the position namely, that if the seller is obliged to hand over documents relating to the goods, he must do so "at the time and place and in the form required by the contract." Unlike the position with respect to the goods, the Convention lays down no "fall back" provisions relating to the time, place and form of delivery. Further, not only does it not define "documents relating to the goods", it does not list which documents the seller must, in the absence of any provision to the contrary, hand over to the buyer. Thus, to determine the seller's documentary obligations, a court must look to the contract,[454] previous course of dealings or trade usages (Art. 9 CISG).

Because Art. 34 CISG merely states, in essence, that the seller must perform such documentary obligations as he undertook, there is no practical need to precisely define the meaning of the phrase "documents relating to the goods" which Art. 34 CISG uses.[455] Distinguishing such documents from documents that the seller must tender but which do not relate to the goods becomes unnecessary because with respect to both types of documents the seller must comply with such obligations as he undertook. No additional obligations are imposed by Art. 34 CISG with respect to documents which relate to the goods that are not imposed with respect to documents that do not relate to the goods.

Examples of documents that the seller may have to tender under the contract are: bills of lading or other documents which by law or trade usage give the possessor of the document a right to have the goods delivered to him; notices or declarations of appropriation or shipment[456]; certificates and policies of insurance; commercial and consular invoices; certificates of origin, quality, quantity, weight and phyto-sanitary health; export and import licenses.

---

seller. The *Secretariat Commentary*, Art. 32 para. 34 makes this clear; "Art. 32 CISG deals with the *second* obligation of the seller described in Art. 28 (30), i.e., to hand over to the buyer any documents relating to the goods." (emphasis added).

454 Interpreted in accordance with Art. 8 CISG. See also Arbitral Award ICC 7645, CISG-Online No. 844.

455 See also *U. Huber/Widmer*, in: *Schlechtriem/Schwenzer*, Commentary, Art. 34 para. 1.

456 These will usually be made the subject of a separate obligation by the contract and will usually be tendered before the "shipping" documents must be tendered.

However, as was stated above, what must be delivered in any particular case depends upon the terms of the contract, previous course of dealings and trade usage.[457]

2. Details

a) Time

The time at which any documents relating to the goods must be handed over is frequently made the subject of an express provision in the contract. What is more, an obligation to deliver by a particular time may be implied from the circumstances, for instance from the payment terms.[458] Similarly, if the seller's obligation to deliver consists in placing the goods at the buyer's disposal on a particular date, the necessary documents should be tendered in sufficient time to enable the buyer to take delivery of the goods on that date.[459]

Where neither the contract nor such circumstances indicate the time by which the documents must be handed over, it is submitted that the seller must take steps to hand them over "as soon as possible"[460] after the goods have been shipped, or (in the case of goods sold afloat) after the seller has "destined the cargo to the particular vendee or consignee."[461]

b) Place

Where there is an express provision as to the place of handing over of the documents, the seller must hand the documents over at that place. If there

---

457 Note that even where parties contract by reference to one of the Incoterms which requires tender of documents, they may agree that additional documents are required. Where this is the case a failure to tender the additional documents amounts to a breach of contract. See Arbitral Award, ICC 7645, CISG-Online No. 844.

458 Where for instance there is a term requiring payment against documents on a particular date that day may be the day on which the documents must be tendered; see for English law Toepfer v Lenersan Poortman N.V. [1980] 1 Lloyd's Rep. 143. See also *U. Huber/Widmer*, in: Schlechtriem/Schwenzer, Commentary, Art. 34 para. 2.

459 *U. Huber/Widmer*, in: Schlechtriem/Schwenzer, Commentary, Art. 34 para. 2.

460 This is the position under both English law (C. Sharpe & Co. Ltd. v Nosawa [1917] 2 K.B. 814) and under the Uniform Commercial Code (UCC s.2-320(2)(e) requires that documents be tendered with "commercial promptness"). Comment 11 says that this phrase "expresses a more urgent need for action than that suggested by the phrase 'reasonable time'."

461 Sanders Bros. v Mclean Co. (1883) 11 Q.B.D. 327.

has been no specific agreement on a place of delivery, it may nevertheless be possible to identify one from the circumstances, for instance by reference to the contractually agreed method of payment.[462] Thus, if payment is to be made by documentary credit through a bank in the seller's country, the place of handing over is likely to be the premises of the bank.

It is submitted that as a residual rule the seller should be obliged to send the documents to the buyer at his own (the seller's) cost and risk, irrespective of where the corresponding obligation in regard of the goods has to be performed. Although, presumptively, it is for the buyer to collect the goods and not for the seller to dispatch them it is likely to be rare that a court would hold that the buyer must collect the documents from the seller's place of business. In the usual case, therefore, the place of delivery of the documents will be the buyer's place of business.

c) Cure

If the seller has handed over documents before the relevant 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 (Art. 34 second sentence CISG). The buyer retains, however, any right to claim damages as provided for in the Convention (Art. 34 third sentence CISG).

IV. Transfer of property

According to Art. 30 CISG the seller has to transfer the property in the goods to the buyer. It should be noted, however, that the question whether that transfer has actually been made, is not governed by the CISG. Art. 4 lit. (b) CISG states that the Convention is not concerned with the effect the contract may have on the property in the goods sold. Thus, issues concerned with the transfer of property in the goods or the possibility of acquiring property notwithstanding that the seller is not the owner of the goods are governed by the law applicable pursuant to the private international law of the forum (in many cases therefore by the "lex situs").[463]

---

462 *U. Huber/Widmer*, in: Schlechtriem/Schwenzer, Commentary, Art. 34 para. 3.

463 See *U. Huber/Widmer*, in: Schlechtriem/Schwenzer, Commentary, Art. 30 para. 7; *Lando*, in: Bianca/Bonell, Commentary, Art. 30 para. 2.2.

§ 6. Conformity of the goods

I. General outline

Art. 35-37 CISG provide that the seller must deliver goods which are in conformity with the contract. The first paragraph of Art. 35 CISG emphasises that it is conformity with the *contractual* provisions as to quantity, quality and description that is required.[464] However, Art. 35(2) CISG sets a series of graduated obligations, that apply unless otherwise agreed, with which the goods must comply if they are to be conforming. Art. 36 CISG sets out the time at which the goods must conform and also provides rules for dealing with the distinction between a lack of conformity of the goods for which the seller is liable and losses or deterioration as risks which fall on the buyer. Art. 37 CISG gives the seller who has delivered goods before the date for delivery the right to cure a non-conformity unless this would cause the buyer unreasonable inconvenience or expense.

If the seller breaches his obligation to deliver conforming goods under Art. 35 et seq. CISG, the buyer will be entitled to resort to the ordinary system of remedies as provided for in Art. 45 et seq. CISG; there is no specific set of remedies which would only apply to cases of non-conformity. There are, however, certain particularities which will only apply if the seller's breach is that he delivered non-conforming goods. Of these the most important points are, first, that a buyer who wishes to bring a claim must comply with the examination and notice requirements as provided for in Art. 38-40 and 44 CISG. Secondly, a buyer may be precluded from relying on any non-conformity by virtue of Art. 35(3) CISG if at the time of the conclusion of the contract he knew or could not have been unaware of the non-conformity. Thirdly, there are certain remedies in Art. 45 et seq. CISG which are only available to the buyer in cases of non-conformity (e.g. Art. 46(2),(3), Art. 50 CISG).

II. Contractual conformity requirements (Art. 35(1) CISG)

The seller's essential obligation under Art. 35(1) CISG is to deliver goods that conform to the *contract* with respect to quantity, quality, description and

464 *Secretariat Commentary*, Art. 33 para. 35.

packaging. In ascertaining, for the purposes of Art. 35(1) CISG, what the contract – expressly or impliedly[465] – requires so far as the particular quantity, quality, description, or packaging is concerned, one must refer to the general rules for determining the content of the parties' agreement (Art. 8 and 9 CISG).[466] What is more, trade usages will have to be taken into account.[467]

1. Contractual quantity

The seller must deliver to the buyer the exact quantity of goods stipulated in the contract of sale. A failure to deliver the exact quantity, whether more or less than the stipulated amount, constitutes a breach of contract under Art. 35(1) CISG.[468]

Parties to international sales frequently state the quantity of goods to be delivered as an approximate amount, leaving a margin as to the exact quantity to be delivered by using words such as "more or less", "not less than" or "about". By such a stipulation, the seller gains some latitude as to the amount he can deliver and still fulfil his obligation under Art. 35 CISG.[469] For example, if the parties agreed that the seller should deliver 1000 tonnes of wheat

---

[465] Note that in (German) Bundesgerichtshof 8 March 1995, CISG-Online No. 144, the German Supreme Court found on the facts that the seller had not impliedly agreed to comply with recommended (but not legally mandatory) domestic standards for cadmium in shellfish existing in the buyer's country. The court reasoned that the mere fact the seller was to deliver the shellfish to a storage facility located in the buyer's country did not constitute an implied agreement under Art. 35(1) CISG to meet the standards for resaleability in the buyer's country or to comply with public law provisions of the buyer's country governing resaleability.

[466] See (Swiss) Bundesgericht 22 December 2000, CISG-Online No. 628.

[467] See (Austrian) Oberster Gerichtshof 27 February 2003, Internationales Handelsrecht (IHR) 2004, 25 = CISG-Online No. 794 where it was held that where there is a trade usage concerning certain qualities of the goods, this is the minimum requirement under Art. 35 CISG; see also infra (III).

[468] See e.g. (German) Oberlandesgericht Koblenz 31 January 1997, CISG-Online No. 256.

[469] It should be noted that in certain trades, variations in quantity would be considered normal within certain limits. Provided the seller does not deliver more or less than those tolerances, he will not be in breach of contract. In English law, the courts have refused to allow buyers to take advantage of a merely "de minimis" variation which is "not capable of influencing the mind of the buyer". Whether the position would be the same under the Convention is open to doubt. Unless there is a contractual term, previous course of dealing or trade usage allowing

"10 percent more or less", the buyer would be obliged to take delivery of any delivery between 900 and 1100 tonnes. However, in the event that the seller delivers 800 tonnes or 1200 tonnes, the buyer is entitled to resort to the remedies available to him in the case of, respectively, insufficient or excessive[470] delivery.

2. Contractual quality

So far as the seller's obligation with regard to the quality of goods is concerned, he is required to ensure that any contractual provisions relating to the quality of the goods are complied with. It is submitted that the term "quality" should be given a wide interpretation which is not restricted to the physical characteristics of the goods.[471] Thus, the fact that the delivered goods did not come from the agreed country of origin may amount to a defect in the quality of the goods.[472] That the goods delivered are of a similar but different quality or even that they are of a higher quality does not mean that there is not a breach of contract;[473] it will be a different matter, of course, whether this breach is fundamental in the sense of Art. 25 CISG thus enabling the buyer to avoid the contract under Art. 49(1) lit. (a) CISG or to claim substitute delivery under Art. 46(2) CISG.

3. Contractual description

Under Art. 35(1) CISG, any deviation from the contractual description of the goods amounts to a breach of contract There has been some debate on how to treat the delivery of a so-called "aliud", i.e. of goods which are totally different from the contractual description. The classic examples are taken from sales of specific goods. Examples of this would include cases where the buyer purchases a specific item, for example, a specified painting by Picasso, a specified used machine or the whole load of one particular ship, and the seller does not deliver the chosen object but another one, i.e. another paint-

variation, it is suggested that any variation including those which are merely "de minimis" amounts to a breach of contract.

470 See in particular Art. 52(2) CISG.

471 *Schwenzer*, in: Schlechtriem/Schwenzer, Commentary, Art. 35 para. 9.

472 See (German) Bundesgerichtshof 3 April 1996, CISG-Online No. 135.

473 See for instance (German) Bundesgerichtshof 8 March 1995, CISG-Online No. 144; (German) Landgericht Paderborn 25 June 1996, CISG-Online No. 226. But see also (Swiss) Handelsgericht Zürich 30 November 1998, CISG-Online No. 415.

ing by Picasso, another machine or the load of another vessel.[474] Where the contract is one for the sale of unascertained or generic goods a similar situation arises when the seller delivers a wholly different category of good, for example, if the seller contracts to sell peas and delivers beans.

At first sight, it may be conceivable to argue that these cases should not be treated as the delivery of non-conforming goods but as the delivery of something completely different ("aliud") and should, as a consequence, be regarded as a breach of the obligation to deliver under Art. 30 CISG[475], the result being inter alia, that the notice requirement in Art. 38 et seq. CISG would not apply. The prevailing opinion, however, regards these situations as cases of "non-conformity".[476] It is submitted that this is correct because the wording Art. 35 CISG ("description") also covers the delivery of an "aliud". Such a view has the advantage that it makes drawing the, somewhat arbitrary, distinction between merely defective goods and delivery of wholly different goods unnecessary.[477] Further, there is little injustice in imposing on the buyer the obligation to give notice of delivery of obviously different goods and to give notice of avoidance. What is more, where a seller delivers totally different goods, that delivery will almost invariably amount to a fundamental breach of contract. Thus, the remedies available for the buyer if delivery of totally different goods is treated as a "delivery" are almost the same as those available where the seller fails or refuses to deliver.

---

474 In principle one can also think of "aliud"-cases in sales of generic goods: The seller delivers stones instead of salt etc. However the exact line may be difficult to draw: What, for example, would be the position if the seller delivered grade C oil instead of the contractually required grade B?

475 See in that direction *Bianca*, in: Bianca/Bonell, Commentary, Art. 35 para. 2.4. It should be noted that in the author's opinion the decision of (German) Oberlandesgericht Düsseldorf 10 February 1994, CISG-Online No. 115, which is sometimes mentioned as supporting that view is not clear on that point.

476 (German) Bundesgerichtshof 3 April 1996, CISG-Online No. 135; *Schwenzer*, in: Schlechtriem/Schwenzer, Commentary, Art. 35 para. 10; *Müller-Chen*, in: Schlechtriem/Schwenzer, Commentary, Art. 46 para. 20; *Will*, in: Bianca/Bonell, Commentary, Art. 46 para. 2.1.1.1; *P. Huber*, in: Münchener Kommentar zum Bürgerlichen Gesetzbuch, Art. 46 para. 7.

477 By way of example, would the delivery of carrot or beetroot seed in performance of a contract for the sale of cabbage seed merely amount to a delivery of non-conforming goods or a complete non-delivery? (see *Atiyah*, The Sale of Goods, p. 55).

4. Packaging as required by the contract

The goods will not conform, and there will therefore be a breach under Art. 35(1) CISG, if the goods are not packaged as required by the contract. Packaging does not conform merely because it suffices to keep the goods safe: if the contract specifies a particular type of packaging, and that type is not used, there is a breach of contract.

III. Conformity with the standards set out in Art. 35(2) CISG

Art. 35(2) CISG provides that:

> "Except where the parties have agreed otherwise, the goods do not conform with the contract unless they:
> (a) are fit for the purposes for which goods of the same description would ordinarily be used;
> (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;
> (c) possess the qualities of goods which the seller has held out to the buyer as a sample or model;
> (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."

Art. 35(2) CISG thus sets out a series of obligations, similar to those found in the law of several jurisdictions[478] that apply to all sales governed by the CISG unless they are – expressly or impliedly – excluded by the contract. The provision will primarily be relevant in so far as there is no contractual conformity requirement under Art. 35(1) CISG. It is submitted that in the case of a conflict between an express contractual requirement under Art. 35(1) CISG on the one hand and one of the requirements of Art. 35(2) CISG on the other hand the former will prevail as the wording of Art. 35(2) CISG makes clear ("Except where the parties have agreed otherwise (…)").

[478] See, for example, of the Sale of Goods Act 1979 (England and Wales), sections 13, 14 and 15; Uniform Commercial Code, Section 2 – 314 (United States); Bürgerliches Gesetzbuch/BGB (Germany), § 434.

1. Fitness for ordinary purpose (Art. 35(2) lit. (a) CISG)

Under Art. 35(2) lit. (a) CISG, goods delivered under the contract are not conforming unless they are fit for the purposes for which goods of the same description would ordinarily be used. Whether or not the goods are fit for the purpose or purposes for which goods of such description are ordinarily used must be answered by reference to what a reasonable person in the same trade as the seller and buyer would think.[479]

a) Relationship to Art. 35(2) lit. (b) CISG

It is submitted that Art. 35(2) lit. (b) CISG should take priority over lit. (a) in the sense that if any specific purpose was made known to the seller under lit. (b), goods that do not meet this standard will not be in conformity of the contract even if they are fit for ordinary purposes under lit. (a). It may therefore be sensible for the court to address lit. (b) before dealing with lit. (a).

b) Average quality or reasonable quality?

There has been some disagreement[480] among scholars as to whether the fitness for the usual purposes requirement means that the goods must be of average quality.[481] The better view, it is suggested, is that goods need not necessarily be of average quality to be fit for their usual purpose(s). What "quality" is required to meet the "fitness for usual purpose(s)" standard cannot be answered in the abstract and depends in every case on a commercial judgment as to what quality a reasonable person in the position of the buyer would be entitled to expect.[482] Where goods are sold by a relatively broad description that would encompass within it several different grades or "qualities", it is submitted that, unless the buyer and seller specifically agree that the average quality is required, the seller will perform his obligation if he delivers goods of the lowest grade that are still fit for the purposes for which goods of that description are normally used.

---

479 *Schwenzer*, in: Schlechtriem/Schwenzer, Commentary, Art. 35 para. 14.

480 See *Schwenzer*, in: Schlechtriem/Schwenzer, Commentary, Art. 35 para. 15. For a detailed discussion see Arbitral Award, Netherlands Arbitration Institute, Internationales Handelsrecht (IHR) 2003, 283 = CISG-Online No. 780, para. 62 et seq.

481 For an average quality requirement (German) Landgericht Berlin 15 September 1994, CISG-Online No. 399; *Magnus*, in: Staudinger Kommentar zum Bürgerlichen Gesetzbuch, Art. 35 para. 19; *Brunner*, Art 35 para. 8; *Herber/Czerwenka*, Art. 35 para. 4. The question whether fitness for usual purposes requirement means that the goods must be of "average" quality was left open by the (German) Bundesgerichtshof, 8 March 1995, CISG-Online No. 144.

482 Arbitral Award, Netherlands Arbitration Institute, Internationales Handelsrecht (IHR) 2003, 283 = CISG-Online No. 780, para. 108.

The Austrian Supreme Court has held that where there is a trade usage concerning certain qualities of the goods, this is the minimum requirement under Art. 35 CISG.[483] It is submitted that this is correct, but that this will usually become relevant already under Art. 35(1) CISG as part of the contractual requirements (Art. 9 CISG) so that the issue will usually not be dealt with under the heading of Art. 35(2) lit. (a) CISG.[484]

c) Relevant standards: seller's state or buyer's state?

In several cases, the courts have made clear that goods may be fit for the purpose of resale even if they do not comply with public law standards in the buyer's country.[485] Thus, in one of the leading cases on the subject[486], the German Bundesgerichtshof held that a delivery of mussels that contained cadmium levels higher than that recommended by the buyer's country's health regulations did not breach either Art. 35(2) lit. (a) or Art. 35(1) CISG. In so concluding the court stated that:

> "a foreign seller can simply not be required to know the not easily determinable public law provisions and/or administrative practices of the country to which he exports, and … the purchaser, therefore, cannot rationally rely upon such knowledge of the seller, but rather, the buyer can be expected to have such expert knowledge of the conditions in his own country or in the place of destination, as determined by him, and, therefore, he can be expected to inform the seller accordingly."[487]

The court did note however that the standards in the importing jurisdiction would have applied if the same standards existed in the seller's jurisdic-

---

483 (Austrian) Oberster Gerichtshof 27 February 2003, Internationales Handelsrecht (IHR) 2004, 25 = CISG-Online No. 794.

484 See *P. Huber*, Praxis des Internationalen Privat- und Verfahrensrechts (IPRax) 2004, 359.

485 (German) Bundesgerichtshof 8 March 1995, CISG-Online No. 144; (Austrian) Oberster Gerichtshof 13 April 2000, CISG-Online No. 576; (Austrian) Oberster Gerichtshof 27 February 2003, CISG-Online No. 794; (Austrian) Oberster Gerichtshof 25 January 2006, Internationales Handelsrecht (IHR) 2006, 110 = CISG-Online No. 1223. See for a detailed discussion *Schwenzer*, in: Schlechtriem/Schwenzer, Commentary, Art. 35 para. 17.

486 (German) Bundesgerichtshof 8 March 1995, CISG-Online No. 144.

487 Translation taken from Pace Database: http://cisgw3.law.pace.edu/cases/950308g3.html.

tion,[488] or if the buyer had pointed out the standards to the seller and relied on the seller's expertise.[489] The court raised but did not determine the question whether the seller would be responsible for complying with public law provisions of the importing country if the seller knew or should have known of those provisions because of "special circumstances"[490] – e.g., if the seller maintained a branch in the importing country, had a long-standing business connection with the buyer, often exported into the buyer's country, or promoted its products in the importing country.[491]

It is submitted that the position of the Bundesgerichtshof is correct. The issue will, however, have to be decided on a case-by-case basis, taking into account the specific circumstances at hand. Priority should be given to the parties' intentions, either under Art. 35(1) CISG (contractual agreement) or under Art. 35(2) lit. (b) CISG (specific purpose made known to the seller).[492] If neither of these provisions is applicable, one should have reference to the surrounding circumstances.[493] The upshot of these considerations is that, unless there are specific indications to the contrary, the goods will often be compliant with Art. 35(2) lit. (a) CISG if they are fit for the ordinary use in the buyer's country *or* for the ordinary use in the seller's country. In practice it will therefore often be advisable for the buyer to make the relevant standards in his country (or in the country of use) known to the seller under lit. (b) rather than to rely on the ordinary purpose standard in lit. (a).

---

488 In a later case the (German) Bundesgerichtshof 2 March 2005, CISG-Online No. 999 found that products that violated standards existing in both, the seller's and the buyer's country were not in conformity with Art 35(2) lit. (a) CISG.

489 In the latter case, this would of course amount to a breach of Art. 35(2) lit. (b).

490 In a later case, an American court upheld an arbitral award finding a seller in violation of Art. 35(2) lit. (a) because it delivered medical devices that failed to meet safety regulations of the buyer's jurisdiction. The court concluded that the arbitration panel acted properly in finding that the seller should have been aware of and was bound by the buyer's country's regulations because of "special circumstances" within the meaning of the opinion of the court that rendered the aforementioned decision: U.S. District Court Louisiana 17 May 1999, CISG-Online No. 387. (Medical Marketing International v Internazionale Medico Scientifica). See also (French) Cour d'appel Grenoble 13 September 1995, CISG-Online No. 157.

491 (German) Bundesgerichtshof 8 March 1995, CISG-Online No. 144.

492 See in more detail *Schwenzer*, in: Schlechtriem/Schwenzer, Commentary, Art. 35 para. 16 et seq.

493 Where, for example, it is well known in international trade that standards in the buyer's state are very much higher than anywhere else in the world, it may be that a court should conclude that goods will not be fit for usual purpose unless they would be fit in the buyer's country.

2. Fitness for particular purpose made known to the seller

Art. 35(2) lit. (b) CISG imposes an additional requirement, applicable in narrower circumstances than Art. 35(2) lit. (a) CISG, that the goods must be fit for any particular purpose that the buyer made known to the seller at the time of the conclusion of the contract. Although there is considerable overlap between this provision and lit. (a), Art. 35(2) lit. (b) CISG provides the buyer with additional protection over and above that provided by lit. (a) where the buyer makes known to the seller the purpose for which he intends to use the goods and relies upon the seller to select goods for him that are appropriate for that purpose.[494] By way of example, if the buyer breeds especially rare and delicate birds and he informs the seller, an expert in animal feed, that he needs feed for these birds, the seller will be in breach of Art. 35(2) lit. (b) CISG if the feed harms these birds even if such feed would not have been harmful to most birds. The point is that the buyer, by making known his specific purpose (feeding rare and delicate birds), has made it clear to the seller that he is relying on him to select appropriate feed. In the circumstances he is entitled to rely on the seller's skill and judgment and the seller will be liable for the feed which harms the birds.

Two particular elements of this provision deserve further discussion. First, the provision only applies where the buyer makes known to the seller a particular purpose for which he intends to use the goods. "Particular" in this context means only "specified" and the specification can be either broad or narrow. However, the more specifically the purpose is stated the more the seller will have to do to ensure that the goods are fit for that particular purpose. It is submitted that the concept of "making known" does not require that there was an actual agreement on that particular purpose.[495] The particular purpose must of course be made known sufficiently clearly so that the seller has an opportunity to decide whether or not he wishes to take on the responsibility of selecting goods that are appropriate for the purpose for which the buyer intends to use them. As the wording of the provision indicates, this can be done either expressly or impliedly.[496] Where it is alleged that a particular purpose has been impliedly made known, it is enough that a reasonable person

494 For the relationship between the two provisions see above (1.a).

495 See *Schwenzer*, in: Schlechtriem/Schwenzer, Commentary, Art. 35 para. 20 with further references, also to the Drafting History which points in that direction.

496 A proposal by the Federal Republic of Germany to the effect that a particular purpose should only be recognised if it had been made the subject matter of the contract did not receive any support – Official Records, p. 316, No. 57 et seq.

in the position of the seller would have recognised the purpose for which the buyer intended to use the goods.[497]

The second key element to Art. 35(2) lit. (b) CISG is that of "reliance". Even where the buyer has made known a particular purpose to the seller, there will be no breach of lit. (b) if the buyer did not rely on the seller's skill and judgment to select goods fit for that purpose or it was unreasonable for him to do so. It is for the buyer to prove that he made known a particular purpose to the seller but once he has done so the seller will be liable unless he shows that the buyer did not rely or it was unreasonable for him to rely on the seller's skill and judgment.[498] Where the seller is an expert in relation to the goods which are the subject of the contract, it will be a rare case when the seller will be able to prove that the buyer either did not rely or it was unreasonable for him to rely.[499]

3. Correspondence with sample or model

Where the subject matter of the contract was agreed by reference to a sample or model, there will be a breach of Art. 35(2) lit. (c) CISG where the goods delivered do not possess the qualities that were present in that sample or model.[500] The purpose of the sample or model in such a case is to identify and describe the subject matter of the contract. Thus instead of using words to describe the goods and their qualities, such a task is performed by the sample or model.

Where the goods delivered do not possess qualities inherent in the sample that would have been apparent on a reasonable examination of a sample, there will be a breach of lit. (c).[501] More difficult, however, is the case where the goods delivered do possess qualities that would have been apparent on

---

497 *Schwenzer*, in: Schlechtriem/Schwenzer, Commentary, Art. 35 para. 21. Note however that under the *Secretariat Commentary* (Art. 33 para. 8) it would appear that it is the seller's actual awareness which is relevant.

498 See *Schwenzer*, in: Schlechtriem/Schwenzer, Commentary, Art. 35 para. 50; *Honnold*, para. 226.

499 *Schwenzer*, in: Schlechtriem/Schwenzer, Commentary, Art. 35 para. 23. This issue will however have to be decided on a case by case basis.

500 See for example (German) Oberlandesgericht Frankfurt 18 January 1994, CISG-Online No. 123; U.S. Court of Appeals 2nd Circuit 6 December 1995, CISG-Online No. 140 (Delchi Carrier v Rotorex).

501 See, e. g., U.S. Court of Appeals 2nd Circuit 6 December 1995, CISG-Online No. 140 (Delchi Carrier v Rotorex).

a reasonable examination of the sample but not those that could only be identified with a much more detailed examination. Though the position is not without doubt, it is suggested that in the latter case there is a breach of lit. (c) notwithstanding that the buyer may not have been aware of these hidden qualities at the time he entered into the contract. There is nothing in the CISG to suggest that the protection was intended to be limited to qualities that would only have been apparent on a reasonable examination of the sample and even where qualities were not readily apparent in the sample, the seller should be required to guarantee that the goods delivered possess in all respects the qualities of the sample whether apparent or hidden.[502]

Art. 35(2) lit. (c) CISG requires that the sample or model has been presented by the seller. Where the sample or model has been provided by the buyer rather than the seller, it has been suggested that the provision could be applied by analogy. An alternative approach, which would in most cases reach the same conclusion, would be to regard the case as one of an implicit agreement under Art. 35(1) CISG.[503]

A difficult question arises if the goods correspond with the qualities of the sample (lit. (c)) but are not fit for their ordinary use under lit. (a). The majority view is probably that lit. (c) should normally take priority over lit. (a) as lit. (c) can be regarded as some sort of parties' agreement which is generally regarded as more important than the purely objective standard in lit. (a).[504] It is suggested however that there is little justification for such an approach. Instead, in any case where the goods correspond with the sample, but are not fit for one or more usual purposes (Art. 35(2) lit. (a) CISG) it should be treated as a matter of interpretation of the contract whether the reference to the sample was meant to supersede the fitness for usual purpose requirement.[505] One of the relevant criteria for deciding the issue is whether the quality in question was easily apparent from the sample (which is an argu-

---

502 That the qualities not present in the goods delivered were hidden or not apparent from the sample might be a relevant factor to take into account in deciding whether the breach was a fundamental one.

503 See *Schwenzer*, in: Schlechtriem/Schwenzer, Commentary, Art. 35 para. 27; (Austrian) Oberlandesgericht Graz 9 November 1995, CISG-Online No. 308.

504 See in that direction *Schwenzer*, in: Schlechtriem/Schwenzer, Commentary, Art. 35 para. 25; *Magnus*, in: Staudinger Kommentar zum Bürgerlichen Gesetzbuch, Art. 35 para. 37; *Bianca*, in: Bianca/Bonell, Commentary, Art. 35 para. 2.6.1.

505 *Schwenzer*, in: Schlechtriem/Schwenzer, Commentary, Art. 35 para. 25; *Gruber*, in: Münchener Kommentar zum Bürgerlichen Gesetzbuch, Art. 35 para. 28.

ment for superseding the contractual agreement) or not.[506] Only if it is clear that the parties understood that compliance with the model or sample inevitably meant that goods would not be fit for their usual purpose would the seller not be liable in the event that the goods were not so fit.

4. Packaging

Art. 35(2) lit. (d) CISG reinforces the obligation placed on the seller in Art. 35(1) to contain or package the goods as required by the contract. Lit. (d) applies where the contract is silent as to the manner of packaging required and provides that the goods must be packaged or contained in the usual manner or if there is no such manner, in such manner as is adequate to preserve and protect the goods. Where goods shipped from the seller to the buyer arrive in damaged condition notwithstanding that they were shipped in apparent good order and condition, the seller may be liable for such damage even where the contract places the risk of loss or damage on the buyer during transportation. While the relevant time for assessing conformity is the time when risk passes (Art. 36(1)), and thus "prima facie" any damage arising after that point of time is for the buyer, if the damage that occurred during transport was due to inadequate packaging by the seller, this will be treated as a non-conformity which was already present when risk passed so that the requirements of Art. 36(1) CISG are met.[507] The seller will as a result be liable under Art. 35(2) lit. (d) CISG.

In determining what constitutes "usual" packaging, regard should be had to the understanding of a reasonable trader in the same trade or business as well as to any relevant trade usages.[508] When considering whether the packaging is "adequate" regard should be had to the type of goods, the means and length of any transportation, the climatic conditions likely to be encountered both during and after the transit[509] and the contractually required "shelf-life" of

[506] See *Gruber*, in: Münchener Kommentar zum Bürgerlichen Gesetzbuch, Art. 35 para. 28.

[507] See *Schwenzer*, in: Schlechtriem/Schwenzer, Commentary, Art. 35 para. 4 (with references to a differing opinion which would like to deal with these cases under Art. 36(2) CISG); *Gruber*, in: Münchener Kommentar zum Bürgerlichen Gesetzbuch, Art. 36 para. 7.

[508] See *Schwenzer*, in: Schlechtriem/Schwenzer, Commentary, Art. 35 para. 29; *Honnold*, para. 259. Regard should be had to any trade usages or practices that the parties have established between themselves – see Art. 9(2) CISG.

[509] *Schwenzer*, in: Schlechtriem/Schwenzer, Commentary, Art. 35 para. 31. See also (French) Cour de Cassation 24 September 2003 CISG-Online No. 791.

the goods. In one Mexican case before Compromex[510], it was held that a seller of canned fruit had violated Art. 35 CISG where the containers were not adequate to prevent the contents from deteriorating after shipment. The tribunal stated that, in the absence of specifications as to the quality of the goods, the seller is required under Art. 35 and 36 CISG to ship the goods with adequate canning and packaging in order to store and protect them during carriage. Without addressing the question of means and standard of proof, Compromex found that the damage suffered by the canned fruit was due to the fact that the boxes, packaging, and shipping of the cans were unsuitable to withstand maritime transportation.

IV. Exclusion of liability (Art. 35(3) CISG)

Under Art. 35(3) CISG, the seller is not liable under paragraphs (a) – (d) of Art. 35 (2) CISG "for any lack of conformity if at the time of conclusion of the contract the buyer knew or could not have been unaware of such lack of conformity." "Could not have been unaware" denotes more than mere negligence or even "gross" negligence[511] and requires something much closer to "blind eye" recklessness. [512]

The wording of the provision makes clear that it only applies to non-conformities arising under Art. 35(2) CISG, but not to those arising under Art. 35(1) CISG. There is some debate however whether Art. 35(3) CISG should be applied by analogy to non-conformities under Art. 35(1) CISG. It is submitted that this should not be done.[513] If the buyer has positive knowledge of the non-conformity when he concludes the contract, it will rather be a matter of interpretation of the contract whether the relevant qualities have been agreed upon under Art. 35(1) CISG or not.[514]

---

510 Arbitral Award, Compromex (Comisión pare la Protección del Comercio Exterior de Mexico), CISG-Online No. 350.

511 *Gruber*, in: Münchener Kommentar zum Bürgerlichen Gesetzbuch, Art. 35 para. 36; *Magnus*, in: Staudinger Kommentar zum Bürgerlichen Gesetzbuch, Art. 35 para. 47; *Schlechtriem*, Internationales UN-Kaufrecht, para. 143.

512 See *Honnold* para. 229; *Schwenzer*, in: Schlechtriem/Schwenzer, Commentary, Art. 35 para. 34.

513 *Schwenzer*, in: Schlechtriem/Schwenzer, Commentary, Art. 35 para. 38 (referring to the Drafting History); *Gruber*, in: Münchener Kommentar zum Bürgerlichen Gesetzbuch, Art. 35 para. 35. But see for the contrary view *Herber/Czerwenka*, Kommentar, Art. 35 para. 11.

514 *Schwenzer*, in: Schlechtriem/Schwenzer, Commentary, Art. 35 para. 38.

In terms of the way in which the buyer is likely to acquire knowledge of any lack of conformity, the buyer will either discover this from any examination of the goods he carries out before the contract is concluded or alternatively as a result of something that the seller says to him. So far as the first of these is concerned, the Convention does not impose any obligation on the buyer to examine the goods before entering into a contract.[515] However, if he does so, he will lose his right to rely on a lack of conformity in respect of any defect which he discovered or which he could not have been unaware of as a result of the inspection.[516] Thus, in one case,[517] a Swiss court held that a buyer who had tested a bulldozer before purchasing it and who had discovered a number of defects could not later complain when the bulldozer did not work. In this case, the court stated that a buyer who elects to purchase goods despite an obvious lack of conformity must accept the goods 'as is'.

Where it is alleged that the buyer is aware of defects in the goods as a result of something brought to his attention by the seller, it is suggested that the seller will bear a heavy burden of proof in proving that the buyer either knew or could not have been unaware of the defect.[518] In order to do so, it is suggested that the seller will have to show that he made known the precise nature of the defect to the seller: merely indicating that the goods have defects without specifying their detailed nature is, it is suggested, insufficient. It should be noted that in at least one case it has been held that where the seller fraudulently misrepresents the quality of the goods to be better than they are or deliberately conceals a defect, the seller may have to bear responsibility for the lack of conformity even if the buyer could not have been unaware of the non-conformity. As the court made clear: "Even a grossly negligent unknowing buyer appears to be more protection-worthy than a seller acting fraudulently. Consequently, when there is fraudulent conduct of the seller,

---

515 *Schwenzer*, in: Schlechtriem/Schwenzer, Commentary, Art. 35 para. 35.

516 Art. 35(3) CISG does not excuse the seller in respect of defects which a hypothetical reasonable examination would have revealed if that is not the examination that the buyer made. The buyer is only unable to rely on the lack of conformity if the examination that he carried out either revealed the defect to him or, alternatively, he could not have been unaware of the defect as a result of the examination he carried out.

517 (Swiss) Tribunal Cantonal du Valais 28 October 1997, CISG-Online No. 167.

518 The burden of proving this actual or imputed knowledge is on the seller: *Schwenzer*, in: Schlechtriem/Schwenzer, Commentary, Art. 35 para. 52; *Audit*, Vente Internationale, para. 101.

the inapplicability of Art. 35(3) CISG follows from Art. 40 in connection with Art. 7(1) CISG."[519]

V. Relevant time

1. The general rule (Art. 36(1) CISG)

Under Art. 36(1) CISG, the goods must conform, for the purposes of Art. 35 CISG, at the time when risk passes from the seller to the buyer. The time at which risk passes is either dealt with expressly by the contract, by trade usage or alternatively by Art. 66 – 70 CISG.[520] If the goods are not in conformity at that time the buyer is entitled to exercise the remedies available to him under Art. 45 CISG. However, if the goods were conforming at the time when the risk passed to him, the buyer is obliged to pay for the goods even if they subsequently deteriorate. For example, where a contract for the sale of dried mushrooms included a "C & F" clause, and the mushrooms deteriorated during shipment, one court found that the lack of conformity occurred after risk of loss had passed and the seller was therefore not responsible for it under Art. 36(1) CISG.[521]

Although it is the case that the time at which the goods must conform is the time when risk passes to the buyer, it does not follow from this that goods which only disclose their lack of conformity after this time will be treated as conforming. Indeed, Art. 36(1) CISG makes clear that the seller will be liable for a lack of conformity that existed at the time the risk passed to the buyer even where that only becomes apparent later.[522]

---

519 (German) Oberlandesgericht Köln 21 May 1996, CISG-Online No. 254 (translation taken from Pace Database: www.cisg.law.pace.edu).

520 *Schwenzer*, in: Schlechtriem/Schwenzer, Commentary, Art. 36 para. 3.

521 (Argentinean) Cámara Nacional de los Apelaciones en lo Comercial 31 October 1995, CISG-Online No. 299.

522 See (Swiss) Tribunale d'appello Ticino 15 January 1998, CISG-Online No. 417. See also (French) Cour d'appel Grenoble 15 May 1996, CISG-Online No. 219. For an interesting but, it is argued, wrong decision, see (Dutch) Gerechtshof Arnhem 9 February 1999, CISG-Online No. 1338, in which the court held, inter alia, that the buyer of a painting said to be by a specific artist could not recover against the seller when it was discovered that the painting could not in fact be attributed to that artist. The court stated that the seller was not liable because, under Art. 36(1) CISG, the seller was only responsible for non-conformities existing at the time risk of loss passed to the buyer, and there was no indication at that time that the artist indicated was not the painter. With due respect to the court,

2. Lack of conformity after the risk has passed (Art. 36(2) CISG)

Under Art. 36(2) CISG the seller is liable for a lack of conformity which occurs after the time indicated in paragraph (1) where that lack of conformity is due to a breach of the seller's obligations including a breach of guarantee that the goods will remain conforming.

The provision is intended to deal with cases where the seller's breach which occurs prior to the passing of risk does not cause a lack of conformity to the goods at that time but instead causes a lack of conformity to arise only after the risk has passed. By way of example, if the seller is required by the terms of the sales contract to conclude a contract of carriage and he does so with an obviously incompetent carrier, damage caused to the goods by the carrier after risk has passed would appear to be the responsibility of the seller. Such a situation would not fall within Art. 36(1) CISG because no lack of conformity of the goods existed at the time risk passed to the buyer.[523] However, the seller would, as a result of Art 36(2) be liable. As mentioned above (III.4), the situation will be different where the damage to the goods that arose after risk had passed was due to the seller's breach of the packaging requirement under Art. 35(2) lit. (d) CISG: In that case it is submitted that there was already a non-conformity at the time of the passing of risk so that Art. 36(1) CISG applies.

Art. 36(2) CISG should also be applied if the seller breaches the contract after risk has passed thereby damaging the goods. By way of example if risk is stated in the contract to pass to the buyer on shipment but the seller has undertaken to unload the goods from the ship at the port of destination[524] or to recollect the containers then he would be liable under Art. 36(2) CISG for any breach in performing that obligation which causes damages to the goods.[525] Finally, under Art. 36(2) CISG the seller is also liable for a lack of conformity appearing after the passing of risk where the lack of conformity is due to the breach of a 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. Whether this adds anything to

---

that there was no indication at the time of the sale that the artist indicated was not the painter is surely irrelevant. The question for the court was surely whether the painting was in fact by the artist. If it was not then the seller was in breach at the time when risk passed even if neither party was aware of the fact that the painting was not by whom they thought it was.

523 *Schwenzer*, in: Schlechtriem/Schwenzer, Commentary, Art. 36 para. 5.

524 An admittedly unlikely scenario!

525 See *Schwenzer*, in: Schlechtriem/Schwenzer, Commentary, Art. 36 para. 5.

Art. 36(1) CISG must be doubtful. By virtue of Art. 35(2) lit. (a), (b) CISG the seller is liable to ensure the fitness of the goods for a reasonable period of time.[526] Where it becomes apparent after the time when risk has passed that the goods do not satisfy the condition of durability, there will be a breach for which the seller is liable under Art. 35 and 36(1) CISG. In most cases therefore Art. 36(2) CISG will add little to Art. 36(1) CISG save perhaps in the, highly unusual, situation where the seller undertakes to indemnify the buyer against inappropriate use of the goods by the buyer or another third party.[527]

VI. Seller's right to cure before delivery date (Art. 37 CISG)

Pursuant to Art. 37 CISG, if the seller has delivered the goods before the dates for delivery, he may cure any non-conformity, provided that this does not cause the buyer unreasonable inconvenience[528] or unreasonable expense[529]. The buyer retains however any right to claim damages under the Convention; thus, the buyer can claim compensation for those losses which would not be removed by the cure, such as damage already done to other property of the buyer or the expenses which the buyer has had as a result of the cure.[530]

The provision only applies before the date for delivery. After that moment, any right to cure will have to comply with the requirements of Art. 45 et seq. CISG, in particular Art. 48 CISG.

---

526 *Schwenzer*, in: Schlechtriem/Schwenzer, Commentary, Art. 36 para. 7.

527 *Schwenzer*, in: Schlechtriem/Schwenzer, Commentary, Art. 36 para. 7.

528 Example: substantial interference with the buyer's business operations; *Gruber*, in: Münchener Kommentar zum Bürgerlichen Gesetzbuch, Art. 37 para. 14.

529 Example: buyer would have to make substantial advances on the costs for cure without the seller's offering adequate security for subsequent reimbursement; *Gruber*, in: Münchener Kommentar zum Bürgerlichen Gesetzbuch, Art. 37 para. 15.

530 *Schwenzer*, in: Schlechtriem/Schwenzer, Commentary, Art. 37 para. 16.

§ 7. Examination and notice requirements concerning the conformity of the goods

I. Introduction

The provisions of the Convention dealing with the requirements to examine the goods (Art. 38 CISG) and to give notice of any lack of conformity (Art. 39 CISG) caused considerable difficulty during drafting and at the debates in the Vienna Conference.[531] They have subsequently been among the most litigated provisions in the Convention.

Notwithstanding this, the provisions are relatively clear in intent. The buyer is required to examine the goods within as short a period as is practicable[532] and, in the event that the goods are non-conforming or are subject to a third party right or claim, must give notice within a reasonable period of time of discovering such lack of conformity or right or claim.[533] A failure to give such notice means that the buyer cannot rely on the lack of conformity[534] and that he therefore loses any claim he would have had, save that, under Art. 40 CISG a seller cannot rely on the provisions of Art. 39(1) CISG if he knew or could not have been unaware of the lack of conformity and did not inform the buyer of this. So too, under Art. 44 CISG, a buyer can, if he had a reasonable excuse for his failure to give notice, claim reduction of the price and damages, except for loss of profit.

---

[531] See *Garro*, Reconciliation of Legal Traditions in the U.N. Convention on Contracts for the International Sale of Goods, (23) International Lawyer (1989), 443 (available online at http://www.cisg.law.pace.edu/cisg/text/garro11,12.html); *Schlechtriem*, Uniform Sales Law in the Decisions of the Bundesgerichtshof, in: 50 Years of the Bundesgerichtshof (available online at http://www.cisg.law.pace.edu/cisg/biblio/schlechtriem3.html); *Andersen*, Reasonable Time in Art. 39(1) CISG of the CISG – Is Art. 39(1) CISG Truly a Uniform Provision? (available online at http://www.cisg.law.pace.edu/cisg/biblio/andersen.html); *Witz*, ICC International Court of Arbitration Bulletin, Vol. 11/No. 2 (2000), 15; *Reitz*, 36 American Journal of Comparative Law (1988) 437 and (1989) 249.

[532] Art. 38 CISG.

[533] Art. 39 and 43 CISG.

[534] Art. 39 and 43 CISG.

What then was the cause of the differences of opinion at Vienna? Two main issues divided the delegates. First, significant differences exist in the domestic sales law of the participants as to both the strictness of any requirement to give notice of lack of conformity and also the effect of a failure to give notice.[535] Some states have imposed strict requirements as to both the contents and timing of the notice with any failure to comply leading to the loss of a right to complain. At the other end of the scale there are jurisdictions in which few formal requirements exist as to the giving of notice and a failure to give such notice leads only to a loss of a right to reject and not to claim damages. These differences not only affected the terms of the debates about the provisions but have also subsequently influenced the way in which courts have interpreted the provisions.[536] The second concern was raised by representatives of the developing states who felt that traders from their states might lack the technical expertise of traders from the developed world and as a result be unable to identify defects in a timely fashion.[537] These conflicts came to a head in the discussions about Art. 39 CISG with various amendments being proposed to reduce the adverse consequences for the buyer who failed to give adequate notice of non-conformity of the goods in time, including a suggestion to delete Art. 39(1) CISG entirely. Agreement was eventually reached when a new provision, Art. 44 CISG, was adopted which preserves the buyer certain remedies (price reduction and – with certain restrictions – damages) even if he failed to give notice under Art. 39(1) CISG. This, at least on its face, mitigates the harshness of the notice provisions in Art. 39 CISG and on this basis the Convention was approved. However, judging by the number of reported cases that raise issues under these provisions it is clear that they continue to cause difficulty in practice.

Art. 38 CISG and 39 CISG apply to all cases of lack of conformity under Art. 35 and also to non-conformities under contractual provisions that derogate from Art. 35.[538] Although the Convention does not by express wording impose an obligation on the buyer to examine any documents tendered by

[535] See the overview in CISG-AC Opinion No. 2 (Bergsten), Internationales Handelsrecht (IHR) 2004, 163 et seq., Comment 2. See also *Schwenzer*, in: Schlechtriem/Schwenzer, Commentary, Art 38 para. 4, Art. 39 para. 6.

[536] See CISG-AC Opinion No. 2 (*Bergsten*) Internationales Handelsrecht (IHR) 2004, 163, para. 2.

[537] See the detailed discussion in CISG-AC Opinion No. 2 (*Bergsten*) Internationales Handelsrecht (IHR) 2004, 163, para. 3.

[538] Arbitral Award, Stockholm Chamber of Commerce, CISG-Online No. 379.

the seller, it is submitted that the provisions contained in Art. 38 and Art. 39 CISG should be applied to such a situation by analogy.[539]

II. Examination of the goods (Art. 38 CISG)

1. Introduction: interrelation between examination and notice requirement

Although Art. 38(1) CISG places an obligation on the buyer to examine the goods, a failure by the buyer to examine the goods does not constitute a breach of contract or Convention giving rise to liability in damages.[540] Instead, the "obligation" to examine is relevant to the time at which the notice period in Art. 39(1) CISG begins to run: the buyer "ought to have discovered" a lack of conformity of the goods for the purposes of Art. 39 CISG when an examination under Art. 38 CISG would have revealed the non-conformity.[541] A failure to examine the goods may therefore have the serious consequence that the buyer does not discover the lack of conformity when he ought to have done so, and as a result he fails to give notice of lack of conformity thereby potentially losing all his rights relating to the lack of conformity.[542]

It follows from the above that in analysing the main purpose of Art. 38 CISG, the provision must be read together with Art. 39 CISG. Taken together, these provisions seek to enable the parties rapidly to clarify whether a delivery is in conformity with the contractual obligations. If the goods are claimed by the buyer not to be in conformity, then the notice gives the seller an opportunity either to put the defect right[543] or to prepare for any dispute

---

539 *Schwenzer*, in: Schlechtriem/Schwenzer, Commentary, Art. 38 para. 7; *Honnold*, para. 256; *Magnus*, in: Staudinger Kommentar zum Bürgerlichen Gesetzbuch, Art. 34 para. 18. But see for a differing view *Gruber*, in: Münchener Kommentar zum Bürgerlichen Gesetzbuch, Art. 38 para. 14.

540 "Although a buyer must examine the goods, or cause them to be examined, within as short a period as is practicable in the circumstances, there is no independent sanction for failure to do so". CISG-AC Opinion No 2 (Bergsten) Internationales Handelsrecht (IHR) 2004, 163, para 1.

541 See *Schwenzer*, in: Schlechtriem/Schwenzer, Commentary, Art. 38 para. 3; *Secretariat Commentary,* Art. 36 para. 1 et seq.; *UNCITRAL Digest*, Art. 38 para 2.

542 See, e.g., (German) Landgericht Stuttgart 31 August 1989, CISG-Online No. 11; (Swiss) Pretore della giurisdizione Locarno Campagna 27 April 1992, CISG-Online No. 68.

543 E.g. by exercising his right to cure under Art. 48 CISG.

or negotiation with the buyer by for example collecting evidence or preparing a claim against his own supplier.[544]

2. Method of examination

By stating that the buyer "must examine the goods or *cause them to be examined*", the drafters of the Convention intended to make clear that the buyer need not himself examine the goods but he may instead procure someone else to do the examination. Thus, although the buyer may himself examine the goods, he may also engage an independent third party[545] or leave it to his customer (to whom he has resold the goods) to carry out the examination.[546] However, it seems clear that the buyer bears ultimate responsibility under Art. 38 for examinations by whomsoever they are carried out.[547] Thus if an independent third party appointed by the buyer is negligent in his examination of the goods and as a result fails to find a defect that should have been obvious to him then, as between seller and buyer, the buyer bears the responsibility for the defective examination albeit that the buyer may have a claim against the inspector.

It is quite frequent to find provisions in contracts setting out the method by which the goods shall be examined. Thus, commodity contracts typically contain detailed provisions relating to the method of examination that must be used by an independent surveyor of the goods.[548] So too, it would not be uncommon to find detailed rules relating to testing in a contract for the sale

---

544 See (Austrian) Oberster Gerichtshof 27 August 1999, CISG-Online No. 485; *Schwenzer*, in Schlechtriem/Schwenzer, Commentary, Art. 38 para. 4; *Gruber*, in: Münchener Kommentar zum Bürgerlichen Gesetzbuch, Art. 38 para. 2; *Sono*, in: Bianca/Bonell, Commentary, Art. 39 para. 2.4.

545 See, e.g., (German) Bundesgerichtshof 3 November 1999, CISG-Online No. 47 (expert appointed by buyer to examine the goods).

546 See, e.g., (German) Oberlandesgericht Köln 22 February 1994, CISG-Online No. 127 (examination by buyer's customer, to whom the goods had been transshipped, was timely and proper); (German) Oberlandesgericht München 8 February 1995, CISG-Online No. 142 (buyer's customer should have examined goods and discovered defect sooner than it did); *Bianca*, in: Bianca/Bonell, Commentary, Art. 38 para. 2.2.

547 (German) Oberlandesgericht München 8 February 1995, CISG-Online No. 142; *Schwenzer*, in: Schlechtriem/Schwenzer, Commentary, Art. 38 para. 10; *UNCITRAL Digest*, Art. 38 para. 9. But see for the possibility of an excuse under Art. 44 CISG below (III.6.b).

548 See, for example, Grain and Feed Trade Association Rules, form No. 124.

of complex machinery. Where the contract contains provisions relating to examination, the method set out should be followed.

In the absence of any express provision in the contract, it may be possible to identify the appropriate method of examination by reference to trade usage or previous course of dealings.[549] Where, however, the contract is silent and there is no trade usage or previous course of dealings to fall back on, it is suggested that the examination undertaken need only be a reasonable one in all the circumstances, that is to say the examination must be one that is both "thorough and professional" but need not be either "costly or expensive".[550] What amounts to a "reasonable" examination will depend upon the circumstances of each case though it is likely that matters such as the type and nature of the goods, the quantity of the goods,[551] the relevant place of examination,[552] and any packaging in which the goods are contained[553] will be relevant to determine the type of examination that is reasonable. Where large quantities of goods are delivered in accordance with the contract, it is not always necessary that the buyer examine all the goods and a representative sampling may suffice.[554] If the goods are meant to be used in the buyer's production process, such representative sampling should include test runs.[555] However, there may be circumstances in which, notwithstanding that a very large quantity of goods has been delivered, a reasonable examination will require examination of all the delivered goods. Thus, in two cases where the

---

549 See (Austrian) Oberster Gerichtshof 27 August 1999, CISG-Online No. 485; *Schwenzer*, in: Schlechtriem/Schwenzer, Commentary, Art. 38 para. 11; *UNCITRAL Digest*, Art. 38 para. 10; *Gruber*, in: Münchener Kommentar zum Bürgerlichen Gesetzbuch, Art. 38 para. 21.

550 (Austrian) Oberster Gerichtshof 27 August 1999, CISG-Online No. 485; (German) Landgericht Paderborn, 25 June 1996, CISG-Online No. 262.

551 It has been said in at least one case that where the size of the contract is a very large one, "experts" may be required meaning that at the very least the inspection must be carried out by someone skilled in the trade in question: (Austrian) Oberster Gerichtshof 27 August 1999, CISG-Online No. 485.

552 Where there are no specialized inspection facilities at the contractual place of examination, this may be taken into account in determining whether any examination carried out was reasonable.

553 *Bianca*, in: Bianca/Bonell, Commentary, Art. 38 para. 2.3.

554 See, e.g., (German) Oberlandesgericht Koblenz 11 September 1998, CISG-Online No. 505 (buyer should have conducted a test by processing a sample of delivered plastic using its machinery). See also (German) Oberlandesgericht Saarbrücken 13 January 1993, CISG-Online No. 83. See also, (Swiss) Obergericht Luzern 8 January 1997, CISG-Online No. 228.

555 *Schwenzer*, in: Schlechtriem/Schwenzer, Commentary, Art. 38 para. 14.

buyer had discovered a defect in an earlier shipment it was held that examination by sample was not sufficient and a reasonable examination required an examination of all the goods.[556]

3. Time period for examination

So far as the time period allowed for examination is concerned, Art. 38(1) CISG provides that the buyer must examine the goods "within as short a period as is practicable in the circumstances." It is clear from the use of these words that the drafters of the Convention intended that the buyer should act quickly. Indeed courts have stressed that the purpose of such a short period for examination is to permit prompt clarification of whether the buyer accepts the goods as conforming[557] and also to ensure that the examination is complete before the condition of the goods so changes that the opportunity to determine if the seller is responsible for a lack of conformity is lost.[558] However, even if it is accepted that the time period allowed for examination is short, two important questions arise: first, from when does the time period for examination of the goods begin to run; secondly, how long is "as short a period as is practicable in the circumstances"?

a) Starting point

So far as the first of these questions is concerned, the general rule is that the time period for examination runs from the time of delivery.[559] By way

---

556 (Dutch) Arrondissementsrechtbank Zwolle 5 March 1997, CISG-Online No. 545 (examination of delivery of fish by sample would not be sufficient where the buyer had ready opportunity to examine entire shipment when it was processed and buyer had discovered lack of conformity in another shipment by the seller); (German) Landgericht Stuttgart 31 August 1989, CISG-Online No. 11 (spot checking of delivery of shoes held not to have been sufficient where defects had been discovered in an earlier delivery).

557 (German) Oberlandesgericht Karlsruhe 25 June 1997, CISG-Online No. 263.

558 (German) Oberlandesgericht Köln 21 August 1997, CISG-Online No. 290 (immediate examination of chemicals required where the chemicals were going to be mixed with other substances soon after delivery); (Dutch) Arrondissementsrechtbank Zwolle 5 March 1997, CISG-Online No. 545 (examination was due quickly where shipment of fish was to be processed by the buyer, making it impossible to ascertain whether the fish were defective when sold).

559 (German) Oberlandesgericht Düsseldorf 8 January 1993, CISG-Online No. 76; (German) Oberlandesgericht Düsseldorf 10 February 1994, CISG-Online No. 116 (asserting that the period for examining the goods under Art. 38 CISG and giving notice under Art. 39 CISG begins upon delivery to the buyer); (Italian) Tribunale

of exception however, this may be delayed in the circumstances set out in Art. 38(2) and (3) CISG.

Under Art. 38(2) CISG, if the contract involves carriage of the goods, examination may be deferred until after the goods have arrived at their destination. This rule represents a sensible recognition of the fact that many international sales contracts require the seller to deliver the goods to a carrier in the seller's country for onward transmission to the buyer. In such a case, it may be impossible or at the least inconvenient for the buyer to examine the goods at the time when the seller hands the goods over to the carrier and in these circumstances Art. 38(2) CISG allows for the examination to be postponed until the goods have arrived at their destination.[560] Thus, in a CIF or FOB contract, examination will often be postponed until the goods actually arrive at their place of destination and consequently the time period for examination will not begin to run until then. It should be noted, however, that Art. 38(2) CISG is subject to the contrary agreement of the parties. Thus where a contract between a seller and a buyer provided that the goods were to be delivered "free on refrigerated truck Turkish loading berth (Torbali)" and from there to be shipped on to the buyer's country by carrier, the court found that the parties' agreement had excluded Art. 38(2) and the buyer was required to conduct the Art. 38 examination in Turkey rather than at the place of arrival, because the contract contemplated that a representative of the buyer would inspect the goods at the Turkish loading dock and the buyer was responsible for making arrangements for transporting the goods to his country.[561]

The time period for the examination of the goods may also run from a time different than the time of delivery where the goods are redirected in transit or redispatched by the buyer without an opportunity for examination by him (Art. 38(3) CISG).[562] As with the case of a contract involving carriage of goods, this provision is subject to contrary intention. The provision will also

---

Vigevano 12 July 2000, CISG-Online No. 493 (buyer's time for examining goods begins to run upon delivery or shortly thereafter, except where the defect can only be discovered when the goods are processed); (Swiss) Pretore della giurisdizione Locarno Campagna 27 April 1992, CISG-Online No. 68 (buyer must examine goods upon delivery).

560 This may be either the port of destination or another place of final arrival.

561 (German) Oberlandesgericht Düsseldorf 8 January 1993, CISG-Online No. 76.

562 For an example of a case in which Art. 38(3) CISG was held to postpone the beginning of the examination period see (German) Oberlandesgericht Köln 22 February 1994, CISG-Online No. 127; (German) Oberlandesgericht Stuttgart, 12 March 2001, CISG-Online 841.

not apply unless the seller, at the time of the conclusion of the contract, knew or ought to have known of the possibility of such redirection or redispatch. Where the buyer's business is as an intermediary or middleman, the seller will be presumed to know of the possibility of redirection or redispatch,[563] but every buyer intending to resell or redirect the goods would, as a general rule, be well advised to inform the seller of this fact.

b) Duration

So far as the meaning of, "as short a period as is practicable in the circumstances" is concerned, a number of points are clear. First, the standard is a flexible one and the period for examination will vary with the facts of each case.[564] This is clear from the language of the provision which states that the examination must be made within as short a period as is practicable "in the circumstances". So far as the relevant factors are concerned, the Austrian Supreme Court stated in one case that the following may be relevant: "the size of the buyer's company, the type of the goods to be examined, their complexity or perishability or their character as seasonal goods, the type of the amount in question, the efforts necessary for an examination (…)".[565] Thus, where the goods are perishable or seasonal it is likely that the buyer will be required to act especially quickly.[566] If the buyer intends to resell the goods

563 *Schwenzer*, in: Schlechtriem/Schwenzer, Commentary, Art. 38 para. 24; *Bianca*, in: Bianca/Bonell, Commentary, Art 38 para. 2.9.2; *Enderlein/Maskow*, Art 38 para. 8.

564 (Austrian) Oberster Gerichtshof 27 August 1999, CISG-Online No. 485; (Swiss) Obergericht Luzern 8 January 1997, CISG-Online No. 228; (Italian) Tribunale civile di Cuneo 31 January 1996, CISG-Online No. 268; *Schwenzer*, in: Schlechtriem/Schwenzer, Commentary, Art. 38 para. 15; *UNCITRAL Digest*, Art. 38 para. 13; *Gruber*, in: Münchener Kommentar zum Bürgerlichen Gesetzbuch, Art. 38 para. 57. It should be noted that some courts have set a presumptive period. Thus, German courts have stated that a week will usually be enough (see, e.g., (German) Oberlandesgericht Koblenz 11 September 1998, CISG-Online No. 505). While such an approach is understandable, particularly from courts in states which have a very strict time limit within which to give notice, it is suggested that such an approach is not justified by the language of the Convention, which requires an individual decision to be taken in every case, and should be rejected. See further CISG-AC Opinion No. 2 (Bergsten) Internationales Handelsrecht (IHR) 2004, 163, para. 5.

565 (Austrian) Oberster Gerichtshof 27 August 1999, CISG-Online No. 485 (translation taken from Pace Database: www.cisg.law.pace.edu).

566 (German) Oberlandesgericht Saarbrücken 3 June 1998, CISG-Online No. 354 (the court stated that, where international trade in flowers is involved, the buyer can be expected to act immediately on the day of the delivery); see also

or combine them with other goods the examination should be complete before the resale and/or combination.[567] Where the goods are particularly complex[568] or for some reason it is difficult to carry out an examination at the time or place of delivery,[569] it is suggested that a longer period will be allowed to the buyer. Also relevant may be the fact that there were defects in previous deliveries, in which case a more thorough and speedy examination may be necessary,[570] and the obviousness of the lack of conformity.[571]

In addition to factors relating to the goods, courts have also had regard to the buyer's personal and business situation.[572] It is submitted that this is correct at least so far as the seller was aware or should have been aware of this.[573] Thus, knowledge on the part of the seller that the buyer intended to resell the goods immediately would clearly be relevant to the period of examination, as would knowledge of the expertise of the buyer or his access to experts as well as any specific knowledge about the suitability of the place of examination.

(Dutch) Arrondissementsrechtbank Zwolle 5 March 1997, CISG-Online No. 545; *Schwenzer*, in: Schlechtriem/Schwenzer, Commentary, Art. 39 para. 16.

567 (German) Oberlandesgericht Köln 21 August 1997, CISG-Online No. 290 (immediate examination of chemicals required where the chemicals were going to be mixed with other substances soon after delivery); see also (Dutch) Arrondissementsrechtbank Zwolle 5 March 1997, CISG-Online No. 545.

568 (German) Landgericht Düsseldorf 23 June 1994, CISG-Online No. 179.

569 (French) Cour de Cassation 26 May 1999, CISG-Online No. 487 (time for examination took into account the difficulty of handling the metal sheets involved in the sale); (Belgian) Rechtbank van Koophandel Kortrijk 6 October 1997, CISG-Online No. 532 (buyer of crude yarn did not have to examine goods until they were processed; it would be unreasonable to expect buyer to unroll the yard in order to examine it before processing).

570 (Dutch) Arrondissementsrechtbank Zwolle 5 March 1997, CISG-Online No. 545 (buyer should have examined fish before processing and selling them to his customers given that buyer had already discovered lack of conformity in a previous shipment by the seller).

571 The more obvious the lack of conformity the less time may be allowed for the examination. See, for example, (Italian) Tribunale civile di Cuneo 31 January 1996, CISG-Online No. 268 ("Where defects are easily recognizable, the time for notice will be reduced").

572 (Austrian) Oberster Gerichtshof 27 August 1999, CISG-Online No. 485.

573 See *Schwenzer*, in: Schlechtriem/Schwenzer, Commentary, Art. 38 para. 18; *Gruber*, in: Münchener Kommentar zum Bürgerlichen Gesetzbuch, Art. 38 para. 64.

III. Notice of lack of conformity (Art. 39 CISG)

1. Introduction

Art. 39 CISG names two situations in which the buyer loses his right to rely on a lack of conformity of the goods (i.e. his right to make use of the remedies provided for in Art. 45 et seq. CISG in that respect, see below 5): first, where the buyer does not give notice to the seller of the conformity within a reasonable time after he has or ought to have discovered it, Art. 39(1) CISG (see below 3); secondly, where he does not give notice at the latest within a period of two years from the date when the goods were actually handed over to the buyer (unless this would be inconsistent with a contractual period of guarantee, Art. 39(2) CISG (see below 4). There are however certain exceptions to these rules (see below 6).

Both notice requirements exist independently from one another so that the buyer will lose his right to rely on the non-conformity once one of them has not been complied with. To put it differently, the maximum period that the buyer may have for giving notice of any non-conformity is the two year-period in Art. 39(2) CISG but he may, and frequently will, have lost his rights well before then as a result of the application of Art. 39(1) CISG.

2. Requirements concerning the notice

Art. 39 CISG does not specify that a particular form of notice is required though it is of course open to the parties to reach agreement on this.[574] Notice in writing has been held to suffice and the content of a series of letters has been combined in order to satisfy the Art. 39 CISG requirement.[575] It is suggested that there is no good reason why an otherwise compliant notice of

[574] See, e.g., U.S. Court of Appeals [11th Circuit] 29 June 1998, MCC-Marble Ceramic Center v Ceramica Nuova D'Agostino, CISG-Online No. 342 (contractual clause required complaints of defects in the goods to be in writing and made by certified letter); *Gruber*, in: Münchener Kommentar zum Bürgerlichen Gesetzbuch, Art. 39 para. 21; *Schwenzer*, in: Schlechtriem/Schwenzer, Commentary, Art. 39 para. 11 et seq. Where a writing requirement has been agreed, Art. 13 CISG will apply.

[575] (French) Cour d'appel Versailles 29 January 1998, CISG-Online No. 337. See also *Flechtner*, in: Ferrari/Flechtner/Brand, The Draft UNCITRAL Digest and Beyond, p. 380. It is submitted that as a rule the use of fax and email suffices, too. For communications in electronic form see *Schwenzer*, in: Schlechtriem/Schwenzer, Commentary, Art. 39 para. 11; CISG-AC Opinion No. 1 (*Ramberg*), Internationales Handelsrecht (IHR) 2003, 244, para. 39.1.

lack of conformity should not be given orally and indeed in at least one case an oral notice has been held to be sufficient.[576]

So far as the contents of the notice are concerned, the courts have required that the nature of the lack of conformity must be specified clearly. Although courts have identified a number of reasons for this requirement, it is suggested that the central purposes are to enable prompt clarification of whether there has been a breach[577] and, if so, to give the seller the information needed to determine how to proceed in general with respect to the buyer's claim,[578] and more specifically to facilitate the seller's cure of defects.[579] Reflecting these purposes, the courts have held that a substantial degree of specificity is required for the notice to be compliant. Thus, it has been held insufficient to state only that the goods "do not comply with the contract",[580] "are not working properly",[581] suffer from "poor workmanship and improper fitting"[582] or that they are of "bad quality".[583] In none of these cases was the buyer's no-

576 (German) Landgericht Frankfurt 9 December 1992, CISG-Online No. 184 (oral notice given over the phone was held to satisfy the notice requirement). In Tribunale Vigevano, Italy 12 July 2000, CISG-Online No. 493, the court stated that, "It is worth mentioning at this point that notice of lack of conformity is not required to be in a particular form and thus can be given verbally or by telephone". It should be noted however that in several cases while courts recognised that in principle there is no objection to the giving of an oral notice, on the facts it was found that the buyer had failed to prove with sufficient certainty that a compliant notice had been given. See, e.g., (German) Landgericht Frankfurt 13 July 1994, CISG-Online No. 118; (German) Landgericht Stuttgart 31 August 1989, CISG-Online No. 11.

577 (Austrian) Oberster Gerichtshof 27 August 1999, CISG-Online No. 485; (German) Oberlandesgericht Düsseldorf 8 January 1993, CISG-Online No. 76. See also *Schwenzer*, in: Schlechtriem/Schwenzer, Commentary, Art. 39 para. 6; *Sono*, in: Bianca/Bonell, Commentary, Art. 39 para. 2.3.

578 (German) Bundesgerichtshof 4 December 1996, CISG-Online No. 260; (German) Landgericht Saarbrücken 26 March 1996, CISG-Online No. 391; (Italian) Tribunale di Vigevano 12 July 2000, CISG-Online No. 493.

579 (Italian) Tribunale di Vigevano 12 July 2000, CISG-Online No. 493; (German) Landgericht Erfurt 29 July 1998, CISG-Online No. 561.

580 (Swiss) Handelsgericht Zürich 21 September 1998, CISG-Online No. 416.

581 (Swiss) Handelsgericht Zürich 17 February 2000, CISG-Online No. 637.

582 (German) Landgericht München 3 July 1989, CISG-Online No. 4.

583 (Belgian) Rechtbank van Koophandel Kortrijk 16 December 1996, CISG-Online No. 530.

tice specific enough to allow the seller to comprehend the buyer's claim and to take appropriate steps in response.[584]

While it is true that the buyer must provide a sufficiently detailed notice of lack of conformity, care should be taken not to impose too heavy a burden on the buyer so far as the content of the notice is concerned.[585] Where the defects are obvious they should be stated and a failure to state them will mean that the notice is non-conforming[586] but where the goods delivered do not work and the reason for this is not obvious, it is sufficient that the buyer give an indication of the symptoms without having to provide details as to the cause.[587] In this regard, some of the early case law, particularly decisions from German courts,[588] on the degree of precision required by Art. 39 CISG, should be regarded as suspect.[589] More recent decisions have applied a less strict approach[590] and it is suggested that this more liberal approach should now prevail.[591]

---

584 (German) Bundesgerichtshof 4 December 1996, CISG-Online No. 260; (German) Bundesgerichtshof 3 November 1999, CISG-Online No. 475. See also *Schwenzer*, in: Schlechtriem/Schwenzer, Commentary, Art. 39 para. 7.

585 *Schwenzer*, in: Schlechtriem/Schwenzer, Commentary, Art. 39 para. 6 („… the requirements for specifying a lack of conformity should not be exaggerated."); *Flechtner*, in: Ferrari/Flechtner/Brand, The Draft UNCITRAL Digest and Beyond, p. 386.

586 Thus, in the case of a short or late delivery a failure to state, respectively, that the delivery was insufficient or was late would mean that the notice was non-compliant. See, e.g., (German) Landgericht Köln 30 November 1999, CISG-Online No. 1313.

587 (German) Bundesgerichtshof 3 November 1999, CISG-Online No. 475; (Italian) Tribunale di Busto Arsizio 13 December 2001, CISG-Online No. 1323.

588 These decisions were probably influenced by the requirement in domestic German law to give precise details.

589 *Schwenzer*, in: Schlechtriem/Schwenzer, Commentary, Art. 39 para. 6. See, e.g., (German) Landgericht Stuttgart 31 August 1989, CISG-Online No. 11; (German) Oberlandesgericht Frankfurt 18 January 1994, CISG-Online No. 123; (German) Landgericht Marburg 12 December 1995, CISG-Online No. 148.

590 (German) Bundesgerichthof 3 November 1999, CISG-Online No. 475; (Italian) Tribunale di Busto Arsizio 13 December 2001, CISG-Online No. 1323; (Swiss) Bundesgericht 28 May 2002, CISG-Online No. 676.

591 See *Schwenzer*, in: Schlechtriem/Schwenzer, Commentary, Art. 39 para. 6.

3. Time limit for notice under Art. 39(1) CISG

The period for giving notice under Art. 39(1) CISG commences from the moment that the buyer has discovered or ought to have discovered the lack of conformity. Thus, the time period runs from the earlier of these two points in time.

a) Starting point for the time limit

Knowledge of the existence of a lack of conformity may exist even if the buyer has not examined the goods (for example, the buyer may have been told of discrepancies by his customer) and in such case time will begin to run from the moment he acquires knowledge even though he has not examined the goods.[592]

The question of when the buyer ought to have discovered the lack of conformity is, as was discussed earlier, closely linked with the time under Art. 38 CISG within which the buyer should have examined the goods. In the case of non-conformity that ought reasonably to have been discovered by examination, the time period for giving notice commences from that time. Where an examination has actually been carried out, time will begin to run from this moment provided that the examination was carried out as soon as practicable after delivery. Where an examination was performed later than that or not at all, the time of giving notice will follow on from the time period within which the examination should have been carried out.Where the defect is a latent or hidden one which could not have been discovered by an examination as described in Art. 38 CISG, the time for giving notice of lack of conformity is the earlier of the time when the buyer should have discovered the existence of that latent defect (by for example operating the goods)[593] or the time he did discover such lack of conformity.

b) Duration of the "reasonable time"

In determining what is a "reasonable time" within which notice must be given all the circumstances of the particular case must be taken into account.[594]

---

[592] (Spanish) Audienca Provincia Barcelona 20 June 1997, CISG-Online No. 338; See also *Schwenzer*, in: Schlechtriem/Schwenzer, Commentary, Art. 39 para. 19.

[593] See, for example, (Italian) Tribunale di Vigevano 12 July 2000, CISG-Online No. 493.

[594] See, for example, (German) Oberlandesgericht Düsseldorf 10 February 1994, CISG-Online No. 116; (Italian) Tribunale civile di Cuneo 31 January 1996, CISG-Online No. 268; CISG-AC Opinion 2 (Bergsten), Internationales Handelsrecht (IHR) 2004, 163, para. 3; *Schwenzer*, in: Schlechtriem/Schwenzer, Commentary, Art. 39 para. 15.

The notice period under Art. 39(1) CISG is of course separate from and additional to that contained in Art. 38 CISG.[595] However, as a practical matter, the buyer will not lose his right to rely on any lack of conformity (under Art. 39(1)) until both periods have expired. As a consequence the buyer will often be able to make up for delays in his examination process by giving speedy notice.[596]

While it is the case that the two periods are separate and consecutive, it is also true that the courts have not always clearly distinguished between these two periods so that the relevant decisions should be analysed with great care in order to discern whether the period regarded as "reasonable" actually referred to the notice period as such or to the combined examination and notice periods.

Courts and scholars have identified a number of different factors that will be treated as relevant to this question: One of these factors is whether the goods are perishable[597] or seasonal.[598] It has also been held that the buyer's plans to process the goods[599] or otherwise handle them in a fashion that might make it difficult to determine if the seller was responsible for a lack of conformity[600] are relevant factors in determining what constitutes a reasonable time, as is knowledge by the buyer that the seller is operating under a deadline.[601] It has also been suggested that regard should be had to which remedy the buyer wishes to exercise (an avoidance necessitating a faster notice than

595 *Schwenzer*, in: Schlechtriem/Schwenzer, Commentary, Art. 39 para. 15; CISG-AC Opinion No. 2 (*Bergsten*), Internationales Handelsrecht (IHR) 2004, 163, para. 3.

596 *Schwenzer*, in. Schlechtriem/Schwenzer, Commentary, Art. 39 para. 20; *Magnus*, in: Staudinger Kommentar zum Bürgerlichen Gesetzbuch, Art. 39 para. 30.

597 See, e.g., (Belgian) Arrondissementsrechtbank Roermond 19 December 1991, CISG-Online No. 29; (Dutch) Arrondissementsrechtbank Zwolle 5 March 1997, CISG-Online No. 545.

598 (German) Amtsgericht Augsburg 29 January 1996, CISG-Online No. 172 ("According to Art. 39 CISG, a buyer loses the right to rely on a lack of conformity, if the buyer does not give notice of the lack of conformity within a reasonable time. For seasonal goods, a rapid reproof is very important." Translation taken from: www.cisg.law.pace.edu)

599 (Dutch) Gerechtshof Hertogenbosch 15 December 1997, CISG-Online No. 552; (Dutch) Arrondissementsrechtbank Zwolle 5 March 1997,CISG-Online No. 545.

600 (German) Oberlandesgericht Köln 21 August 1997, CISG-Online No. 290.

601 (German) Landgericht Köln 11 November 1993, CISG-Online No. 200 (Court stated that time frame to send notice of lack of conformity was shorter than usual because the buyer knew that the seller had a deadline to comply with which would necessitate a speedier examination and notification).

simple claims for damages based on the assumption that the buyer keeps the goods).[602] As however the matter will always have to be decided on the facts of each individual case, this list of factors is not exhaustive.

Given the wide range of factors that may be taken into account by a court in determining what constitutes a reasonable time, it is perhaps not surprising that in applying the standard courts have identified different periods as appropriate to the particular facts.[603] This is surely to be expected and is not a particular cause for concern provided that in determining what constitutes a reasonable time courts and tribunals pay attention to decisions of other courts interpreting the Convention and not to principles applied in their domestic sales law.

Some courts and scholars have indicated presumptive periods that may serve as a starting point for standard type cases but may of course be adjusted to reflect the facts of the particular case.[604] Thus there have been suggestions of a standard period of one month which may serve as a rough guideline for the notice period.[605] Again this is not objectionable[606] provided that the presumptive periods are not applied automatically and careful consideration is given to the facts of each case to determine what is a reasonable time.

---

602 *Schwenzer*, in: Schlechtriem/Schwenzer, Commentary, Art. 39 para. 16; *Sono*, in: Bianca/Bonell, Commentary, Art. 39 para. 2.4; *Honnold*, para. 257.

603 On the facts of particular cases, notices given at the following times have been found to be within the reasonable time mandated by Art. 39(1) CISG: one day after the goods were handed over to the buyer; (German) Bundesgerichtshof 4 December 1996, CISG-Online No. 260; eight days after an expert's report identified defects in the goods, Arbitral Award, ICC 5713, CISG-Online No. 3; and, one month after delivery, (French) Cour d'appel Grenoble 13 September 1995, CISG-Online No. 157. Notices given: nine months after delivery ((Belgian) Tribunal commercial Bruxelles 5 October 1994, CISG-Online No. 447); almost two weeks after delivery ((German) Oberlandesgericht Köln 21 August 1997, CISG-Online No. 290); and, any time beyond the day of delivery ((German) Oberlandesgericht Saarbrücken 3 June 1998, CISG-Online No. 354), were however all held, on the facts, to be too late.

604 (German) Bundesgerichthof 3 November 1996, CISG-Online No. 475 ("regular one month period").

605 See (German) Bundesgerichtshof 3 November 1999, CISG-Online No. 475; *Schwenzer*, in. Schlechtriem/Schwenzer, Commentary, Art. 39 para. 17 (referring however also to the still differing approaches of the national courts); *Gruber*, in: Münchener Kommentar zum Bürgerlichen Gesetzbuch, Art. 39 para. 34.

606 But see for a more critical view CISG-AC Opinion 2 (Bergsten), Internationales Handelsrecht (IHR) 2003, 163.

4. Time limit for notice under Art. 39(2) CISG

Art. 39(1) CISG, as we have seen, requires that notice of lack of conformity must be given within a reasonable time after the lack of conformity was discovered or it ought to have been discovered. By Art. 39(2) CISG, this is subject to an overriding time limit of two years within which notice of lack of conformity must, at the latest, be given. The two year period commences when the goods are actually (i.e. physically[607]) handed over to the buyer. Failure to give notice of lack of conformity within this two year "cut-off" period means that the buyer loses his right to rely on the lack of conformity even if he was still not aware of the lack of conformity or it was impossible for him to discover it.[608] This provision, which was highly contentious at the Vienna Conference, was introduced for the purpose of protecting sellers against claims which arise long after the goods have been delivered while at the same time seeking to protect buyers in cases where the defects are latent.[609]

As the wording of the provision indicates, the two year limit does not apply where it is inconsistent with a contractual period of guarantee. Whether this is the case will always depend on an interpretation of the contractual guarantee provision in question.[610] As a general rule there will be a strong argument that a contractual guarantee which is longer than the two year period in Art. 39(2) CISG will be inconsistent so that the time limit in Art. 39(2) CISG should be regarded as ending only when the stipulated guarantee period expires. What is more, the parties are obviously entitled to exclude or modify the rule in Art. 39(2) CISG, for instance by agreeing on shorter "cut-off" periods.[611]

It should be noted that the two year "cut-off" period in Art. 39(2) CISG is not a "limitation" period. In fact, limitation issues are not governed by the CISG, but by the applicable domestic law [612] which may of course incorporate the UN Convention on the Limitation Period in the International Sale

---

607 This requirement aims at avoiding transit time eating into the two year period. It is irrelevant whether risk or property passed at an earlier date. See *Schwenzer*, in: Schlechtriem/Schwenzer, Commentary, Art. 39 para. 24; *Honnold*, para. 258.

608 See *Schwenzer*, in: Schlechtriem/Schwenzer, Commentary, Art. 39 para. 22.

609 *Schwenzer*, in: Schlechtriem/Schwenzer, Commentary, Art. 39 para. 22.

610 *Secretariat Commentary*, Art. 37 para. 7; *Schwenzer*, in: Schlechtriem/Schwenzer, Commentary, Art. 39 para. 26.

611 See *Schwenzer*, in: Schlechtriem/Schwenzer, Commentary, Art. 39 para. 34 et seq.; Arbitral Award, ICC 7660, CISG-Online No. 129.

612 See above p. 29 et seq..

of Goods 1974 (as adapted by the Protocol of 11 April 1980). The general rule therefore is that the time limits provided for in Art. 39 CISG and in the applicable limitation provisions will run independently from one another.[613] Problems may arise where the applicable (domestic) limitation period is shorter than (or ends before) the "cut-off" period in Art. 39(2) CISG. It has been suggested that in this case the domestic limitation period should be extended so as to coincide with the two year period in Art. 39(2) CISG.[614] However, the better view is that the (shorter) domestic limitation period will prevail and the right to claim may therefore be lost before the expiry of the two year period.[615]

5. Dispatch of the notice

Art. 27 CISG applies to the notice under Art. 39 CISG.[616] As a result, if the notice is made (i.e. dispatched[617]) by means appropriate in the circumstances, the risk of delay, failure to arrive or errors in transmission has to be borne by the seller.[618]

6. Consequences of failure to give notice

If the buyer fails to give notice under Art. 39(1) or (2) CISG he loses his right to rely on the lack of conformity. Subject to the exceptions dealt with below (7), the buyer loses all the remedies he would have been entitled to

613 See for more detail *Schwenzer*, in: Schlechtriem/Schwenzer, Commentary, Art. 39 para. 28.

614 See in that direction (Swiss) Cour de Justice de Genève 10 October 1997, CISG-Online No. 295. For a more detailed analysis see *Schwenzer*, in: Schlechtriem/Schwenzer, Commentary, Art. 39 para. 29.

615 (Swiss) Handelsgericht des Kantons Bern 30 October 2001, CISG-Online No. 725.

616 *Schwenzer*, in: Schlechtriem/Schwenzer, Commentary, Art. 39 para. 11 et seq.; *Gruber*, in: Münchener Kommentar zum Bürgerlichen Gesetzbuch, Art. 39 para. 17 et seq.

617 *Schlechtriem*, in: Schlechtriem/Schwenzer, Commentary, Art. 27 para. 9; *Gruber*, in: Münchener Kommentar zum Bürgerlichen Gesetzbuch, Art. 39 para. 18.

618 See *Schwenzer*, in: Schlechtriem/Schwenzer, Commentary, Art. 39 para. 1 for more detail.

under Art. 45.[619] Thus he will for example be obliged to pay for the goods received at the contract price even if they are seriously defective.

7. Exceptions to the requirement to give notice

a) Art. 40 CISG

Under Art. 40 CISG the seller is not entitled to rely on the provisions of Art. 38, 39 CISG if the non-conformity relates to facts of which he knew or could not have been unaware and which he did not disclose to the buyer.[620] Art. 40 CISG constitutes "a safety valve" for preserving the buyer's remedies for non-conformity in cases where the seller has himself forfeited the right of protection.[621] Because of its dramatic effect, it has been suggested that Art. 40 CISG should be restricted to "special circumstances" so that the protections offered by time limits for claims do not become "illusory".[622]

For Art. 40 CISG to apply, the buyer must prove that the seller either knew or could not have been unaware of the lack of conformity. In the absence of an admission by the seller, proving actual knowledge of lack of conformity will be extremely difficult, and in most cases, the buyer will seek to show that the seller could not have been unaware of the lack of conformity.[623] While it is generally accepted that fraud and similar cases of bad faith will make Art. 40 CISG applicable,[624] more debate exists as to whether what can be described as gross negligence or even ordinary negligence suffices or whether slightly more than gross negligence is required. As a Stockholm Chamber of Commerce Arbitral Award has explained, "[S]ome authors are of the opinion that also what can be described as gross negligence[625] or even ordinary negligence[626] suffices, while others indicate that slightly more than gross negli-

619 *Schwenzer*, in: Schlechtriem/Schwenzer, Commentary, Art. 39 para. 30; *Sono*, in: Bianca/Bonell, Commentary, Art. 39 para. 2.2.

620 See, e.g., Arbitral Award, ICC 5713, CISG-Online No. 3; Arbitral Award, Stockholm Chamber of Commerce, CISG-Online No. 379; (German) Landgericht Trier 12 October 1995, CISG-Online No. 160.

621 Arbitral Award, Stockholm Chamber of Commerce, CISG-Online No. 379.

622 Arbitral Award, Stockholm Chamber of Commerce, CISG-Online No. 379.

623 But see (German) Landgericht Landshut 5 April 1995, CISG-Online No. 193.

624 Arbitral Award, Stockholm Chamber of Commerce, CISG-Online No. 379.

625 See *Schlechtriem*, Internationales UN-Kaufrecht, 3rd edition, para. 156; *Magnus*, in: Staudinger Kommentar zum Bürgerlichen Gesetzbuch, Art. 40 para. 5; (German) Oberlandesgericht München 11 March 1998, CISG-Online No. 310.

626 See *Enderlein/Maskow*, Commentary, Art. 40 para. 3.

gence (approaching deliberate negligence) is required."[627] A majority of the tribunal in that case concluded, correctly it is suggested, that the level of seller awareness of non-conformities that is required to trigger Art. 40 CISG is "a conscious disregard of facts that meet the eyes and are of evident relevance to the non-conformity".[628] Mere negligence does not therefore suffice. Whether this formula requires slightly more than gross negligence, is probably a rather academic question.

The application of Art. 40 CISG is also conditional upon the seller not having disclosed the lack of conformity to the buyer. It is submitted that this requirement will have little practical importance. There is of course no general obligation on the seller to examine the goods and to disclose the results to the buyer of any such examination.[629] If the seller informed the buyer before the conclusion of the contract, the buyer will already be precluded from relying on the non-conformity by Art. 35(3) CISG. What appears to be envisaged by Art. 40 CISG is that a seller who was aware of defects in the goods may still rely on Art. 38 and 39 CISG where he can show that he had properly informed the buyer of the lack of conformity (after the conclusion of the contract).[630]

b) Art. 44 CISG

Art. 44 CISG provides that if the buyer has a reasonable excuse for his failure to give the required notice then he "may reduce the price in accordance with Art. 50 or claim damages, except for loss of profit." As has been discussed above, Art. 44 CISG was introduced late in the diplomatic proceedings and was intended to soften the perceived harshness of the notice regime contained in Art. 39 CISG.[631] The effect of Art. 44 CISG when the buyer proves[632] that he has a reasonable excuse for his failure to give notice under Art. 39(1) CISG is therefore to allow the buyer at least a limited set of remedies.

---

627 Arbitral Award, Stockholm Chamber of Commerce, CISG-Online No. 379, reproduced at www.cisg.law.pace.edu. See also *Schwenzer*, in: Schlechtriem/Schwenzer, Commentary, Art. 40 para. 4 et seq. (with further references).

628 A dissenting arbitrator agreed with the standard, although he believed that it required a higher degree of "subjective blameworthiness" on the seller's part than had been proven in the case.

629 *Schwenzer*, in: Schlechtriem/Schwenzer, Commentary, Art. 40 para. 7.

630 See in that direction (German) Oberlandesgericht Rostock 25 September 2002, CISG-Online No. 672. But see also *Schwenzer*, in: Schlechtriem/Schwenzer, Commentary, Art. 40 para. 7.

631 See *Sono*, in: Bianca/Bonell, Commentary, Art. 44 para. 2.2.

632 Arbitral Award, ICC 9187, CISG-Online No. 705; *U. Huber/Schwenzer*, in: Schlechtriem/Schwenzer, Commentary, Art. 44 para. 19.

As the wording of the provision makes clear Art. 44 CISG does not grant a buyer relief from the two year cut-off of notice of lack of conformity imposed by Art. 39(2) CISG. Thus, a buyer that has failed to meet the notice deadline imposed by Art. 39(2) CISG cannot apply Art. 44 CISG to escape the consequences, even if the buyer has a "reasonable excuse" for the failure.[633]

It should also be noted that at least one court has found that, because Art. 44 CISG does not refer to the buyer's obligation to examine goods under Art. 38 CISG, a buyer cannot invoke Art. 44 CISG if the reason he failed to comply with the notice requirements of Art. 39(1) CISG is because he did not examine the goods in a timely fashion, even if the buyer has a reasonable excuse for the tardy examination.[634]

The key to understanding Art. 44 CISG lies in the meaning of the phrase "reasonable excuse". Given the above-mentioned purpose of the provision, it is clear that an "individualised" approach be taken to the meaning of "reasonable excuse".[635] In assessing whether the excuse offered is reasonable, therefore, regard must be had to particular circumstances or problems faced by the buyer.[636] Thus, courts have had regard to such matters as the type of business engaged in by the buyer,[637] the size of the buyer's business,[638] the nature of the

633 *U. Huber/Schwenzer*, in: Schlechtriem/Schwenzer, Commentary, Art. 44 para. 1.

634 (German) Oberlandesgericht Karlsruhe 25 June 1997, CISG-Online No. 263. But see for a differing view *U. Huber/Schwenzer*, in: Schlechtriem/Schwenzer, Commentary, Art. 44 para. 5a.

635 See *Honnold*, para. 261; *U. Huber/Schwenzer*, in: Schlechtriem/Schwenzer, Commentary, Art. 44 para. 3, 5; *UNCITRAL Digest*, Art. 44 para. 3. See also (German) Oberlandesgericht Koblenz 11 September 1998, CISG-Online No. 505; (German) Oberlandesgericht München 8 February 1995, CISG-Online No. 142.

636 See *U. Huber/Schwenzer*, in: Schlechtriem/Schwenzer, Commentary, Art. 44 para. 7 et seq.

637 In one decision it was said an individual engaged in business (an independent trader, artisan or professional) is more likely to have a reasonable excuse for failing to give required notice than is a business entity engaged in a fast-paced business requiring quick decisions and prompt actions: (German) Oberlandesgericht München 8 February 1995, CISG-Online No. 142 (on the facts it was held that Art. 44 CISG did not excuse the buyer).

638 The court in (Swiss) Obergericht Luzern 8 January 1997, CISG-Online No. 228 implied that the small size of the buyer's operation, which did not permit him to spare an employee full time to examine the goods, might form the basis for a reasonable excuse for delayed notice but on the facts held that it did not excuse the buyer.

goods,[639] the seriousness of the breach and the difficulty of discovering it, and the buyer's business experience. Further criteria are, for example, the extent of the violation of the seller's duty, the importance of the loss of seller's legal remedies and the buyer's interest in prompt and exact information.[640] If both parties have agreed on an inspection of the goods by a neutral inspection body and if the buyer has relied on the results of that inspection this will be a strong argument that he was reasonably excused under Art. 44 CISG.[641] In general, it should be noted however that attempted reliance on Art. 44 CISG has only rarely been successful and that the number of cases in which a reasonable excuse was held to exist is small.[642]

If the buyer is excused under Art. 44 CISG, he "may reduce the price in accordance with Art. 50 or claim damages, except for loss of profit." So far as any claim to damages is concerned, the buyer can recover damages for any loss sustained save for loss of profit. By way of example, a buyer who purchases a profit earning chattel expected to produce 10,000 widgits each hour and which only produces 5,000 widgits each hour can recover as damages the difference in value between these two machines. He cannot however recover any ongoing loss of profits suffered as a result of having to accept a machine capable producing only 5,000 widgits each hour.[643]

c) Waiver

In addition to the "exceptions" provided under Art. 40 and 44 CISG, the seller may waive his right to object to the fact that notice of lack of confor-

---

639 The more perishable the goods the less likely it is that an excuse for not giving notice will be found to be reasonable – see *U. Huber/Schwenzer*, in: Schlechtriem/Schwenzer, Commentary, Art. 44 para. 8.

640 See Arbitral Award, ICC 9187, CISG-Online No. 705.

641 See Arbitral Award, ICC 9187, CISG-Online No. 705.

642 See as examples of cases where it was held that buyer had a reasonable excuse: Arbitral Award, ICC 9187, CISG-Online No. 705; Arbitral Award, Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, Internationales Handelsrecht (IHR) 2006, 114 = CISG-Online No. 1042.

643 For a very interesting problem concerning the question in how far the seller may – in cases where the buyer is excused under Art. 44 CISG – rely on Art. 77 CISG in order to reduce the amount of damages see *U. Huber/Schwenzer*, in: Schlechtriem/Schwenzer, Commentary, Art. 44 para. 11 et seq.

mity was not given either at all, in a proper form, or in a timely manner.[644] Waiver can be express or implied but it must be clear that the seller intends to waive his rights to object to the non-conforming notice. The mere fact that a seller enters into settlement negotiations does not necessarily imply that he is waiving his right to object to any defect in the notice.[645]

---

644 See, e.g., (German) Bundesgerichtshof 25 June 1997, CISG-Online No. 277; *Schwenzer*, in: Schlechtriem/Schwenzer, Commentary, Art. 39 para. 33; *Gruber*, in: Münchener Kommentar zum Bürgerlichen Gesetzbuch, Art. 39 para. 44 et seq.

645 (German) Bundesgerichtshof 25 November 1998, CISG-Online No. 353; (German) Oberlandesgericht Oldenburg 5 December 2000, CISG-Online No. 618; *Schwenzer*, in: Schlechtriem/Schwenzer, Commentary, Art. 39 para. 33.

§ 8. Third party rights

I. Introduction

The CISG contains no rules relating to the transfer of property[646] or to the circumstances in which third parties may acquire security rights over goods belonging to another. These matters are governed by the applicable domestic law. What the Convention does do, however, is to make clear that the seller is under an obligation to transfer ownership and a right to enjoy quiet possession.

The Convention's provisions with respect to third party claims are set out in Art. 41 to 44 CISG. Art. 41(1) CISG imposes an unqualified obligation requiring the seller to deliver goods free from any right or claim of a third party unless the buyer agrees to take the goods subject to that right or claim. However, the second sentence of Art. 41 CISG makes clear that this unqualified obligation does not apply where the right or claim is based on industrial or other intellectual property. In respect of such rights and claims Art. 42 CISG applies.

The seller's liability under Art. 42 CISG is considerably more restricted than his liability under Art. 41 CISG in that his liability depends upon two preconditions being established. First, the seller must have had actual or imputed knowledge at the time of the conclusion of the contract of the existence of a relevant right or claim. Secondly, there are certain territorial restrictions concerning the industrial or intellectual property rights that may be taken into account. Further, the seller's obligation does not extend to cases where the buyer knew or could not have been unaware of such a claim or to cases where the right or claim results from "the seller's compliance with technical drawings, designs, formulae or other such specifications furnished by the buyer."

Art. 43 CISG imposes a notice requirement on the buyer and prevents a buyer who fails to give notice from relying on the third party right or claim.

---

646 Art. 4 lit. (b) CISG.

However, a buyer who fails to give such a notice may be excused under Art. 44 CISG and thus still be entitled to price reduction or damages (except for loss of profit).

If the seller breaches his obligations under Art. 41 or 42 CISG and if the buyer is not precluded from relying on that breach by Art. 43 CISG, the buyer's remedies will be governed by Art. 45 et seq. CISG.

II. Third party rights other than industrial and intellectual property rights (Art. 41 CISG)

Art. 41 CISG imposes an obligation on the seller to deliver goods free of any third party rights or claims unless the buyer agrees to take the goods subject to that right or claim.

1. Rights

First, there is a breach of Art. 41 CISG if the seller breaches his obligations to transfer property (Art. 31 CISG), e.g. because he is not the owner of the goods and he cannot compel the owner[647] to transfer property in the goods to the buyer.[648] This will be so whether or not the owner actually makes a claim against the buyer. However, in addition to rights and claims based on ownership, Art. 41 CISG is also intended to protect the buyer against other third party rights and claims whether there are rights "in rem" or rights "in personam". The decisive question in any case is whether a third party can prevent, or claims to be able to prevent, the buyer from having quiet enjoyment of the goods and being able to use, resell or otherwise dispose of the goods.[649] By way of example, a creditor of the seller may, under the applicable domestic law, have rights "in rem" as a consequence of holding a security interest in the goods sold. Where this is the case there will be a breach of Art. 41 CISG.

---

647 If the seller can compel the owner to transfer property there will, it is suggested, be no breach of Art. 41.

648 *Schwenzer*, in: Schlechtriem/Schwenzer, Commentary, Art. 41 para. 3; *Gruber*, in: Münchener Kommentar zum Bürgerlichen Gesetzbuch, Art. 41 para. 4.

649 "Decisive is whether or not, on the basis of his right, the third party can influence control over goods or restrict the buyer in some other way in his use, realisation or disposal of them." *Schwenzer*, in: Schlechtriem/Schwenzer, Commentary, Art. 41 para. 4.

Although the third party rights and claims referred to in Art. 41 CISG include rights and claims beyond those which relate to property in the goods themselves, the provision probably does not include claims by public authorities that the goods violate health or safety regulations and that they may not, therefore, be used or distributed. Such claims would fall to be considered instead under Art. 35 CISG on the ground that such prohibition amounts to a defect in the quality, or fitness for purpose, of the goods rather than one of title.[650] Nor should the provision extend to government interference by export or import prohibition. Thus, where an export prohibition prevents shipment, the seller will be liable to pay damages for non-delivery unless he can claim to be excused under Art. 79 CISG.

2. Claims

Art. 41 CISG also covers "claims" that third parties may have against the buyer. This part of the provision aims at relieving the buyer from having to defend such claims.[651] Thus, if a person claiming to be the owner makes a claim against the buyer, there will be a breach of Art. 41 CISG.[652] Further, a contractual obligation binding on the seller as to use that any goods can be put, while not giving the third party a right in regard to the goods, may lead

650 *Gruber*, in: Münchener Kommentar zum Bürgerlichen Gesetzbuch, Art. 41 para. 12 et seq.; *Schwenzer*, in: Schlechtriem/Schwenzer, Commentary, Art. 41 para. 5 et seq. (with certain modifications). See also (German) Bundesgerichtshof 8 March 1995, CISG-Online No. 144, where public restrictions concerning the usability of food for consumption were dealt with under Art. 35 CISG.

651 *Gruber*, in: Münchener Kommentar zum Bürgerlichen Gesetzbuch, Art. 41 para. 6; see also *Schwenzer*, in: Schlechtriem/Schwenzer, Commentary, Art. 41 para. 9; *Secretariat Commentary*, Art. 39 para. 3.

652 "The seller has breached his obligation not only if the third party's claim is valid, i.e., if the third party has *right* in or to the goods; the seller has also breached his obligation if a third party makes a *claim* in respect to the goods. The reason for this rule is that once a third party has made a claim in respect of the goods, until the claim is resolved the buyer will face the possibility of litigation with and potential liability to the third party. This is true even though the seller can assert that the third-party claim is not valid or a good faith purchaser can assert that, under the appropriate law applicable to his purchase, he buys free of valid third-party claims, i.e., that "possession vaut titre". In either case the third party may commence litigation that will be time-consuming and expensive for the buyer and which may have the consequence of delaying the buyer's use or resale of the goods. It is the seller's responsibility to remove this burden from the buyer." *Secretariat Commentary* to the then Art. 39 (now Art. 41), para. 3.

to liability under Art. 41 CISG if the third party brings a claim against the buyer under that earlier contract.[653]

How likely the claim is to succeed is not, it is argued, a matter that should be taken into account in considering whether there has been a breach of Art. 41. Indeed, it matters not that the claim is wholly unfounded; the fact is that a buyer should not have to deal with any claim against the goods and Art. 41 recognises this.[654] Some authors have put forward the view that Art. 41 CISG should not apply where the third party claim is clearly frivolous.[655] However, such a position is, in the author's opinion, untenable as it requires the drawing of what inevitably will be a fine distinction between claims that are and those that are not frivolous. It is the author's position that once a claim is asserted against the goods there is a breach of Art. 41 CISG and the buyer is entitled to resort to his remedies under Art. 45 CISG. Of course if the claim is a frivolous one that the seller can easily defeat, it would be very unlikely that a court would conclude that the breach was fundamental.[656] However it is for the seller to defeat the claim and not for the buyer to do so. Moreover, if a buyer incurs expenses or other costs as a result of any such claim these would be recoverable from the seller.[657]

---

653 *Schwenzer*, in: Schlechtriem/Schwenzer, Commentary, Art. 41 para. 4. See, for example, (Austrian) Oberster Gerichtshof 6 February 1996, CISG-Online No. 224, in which it was stated that a seller would violate Art. 41 if it delivered goods subject to a restriction, imposed by the seller's own supplier, on the countries in which the buyer could resell the goods, unless the buyer had previously consented to the restriction.

654 Note that the *Secretariat Commentary* (Art. 39 para. 4) states, "This article does not mean that the seller is liable for breach of his contract with the buyer every time a third person makes a frivolous claim in respect of his goods. However, it is the seller who must carry the burden of demonstrating to the satisfaction of the buyer that the claim is frivolous. If the buyer is not satisfied that the third-party claim is frivolous, the seller must take appropriate action to free the goods from the claim or the buyer can exercise his rights as set out in Art. 45."

655 *Herber/Czerwenka*, Commentary, Art. 41 para. 6; *Neumayer/Ming*, Commentary, Art. 41 para. 3.

656 *Honnold*, para. 266; *Schwenzer*, in: Schlechtriem/Schwenzer, Commentary, Art. 41 para. 10.

657 *Schwenzer*, in: Schlechtriem/Schwenzer, Commentary, Art. 41 para. 10.

3. Specific issues

Unlike Art. 36 CISG (cases of non-conformity), Art. 41 CISG does not provide an explicit rule as to the time at which the goods must be free from third party rights or claims. The provision does however expressly oblige the seller to *deliver* goods free of third party rights or claims. It is submitted, therefore, that the relevant test is whether the circumstances which gave rise to the third party right or claim occurred before or after delivery.[658] Only if the circumstances giving rise to the claim arose *before* delivery will a claim lie for breach of Art. 41.

As the wording of the provision indicates, the obligation to deliver goods which are free from third party rights or claims is subject to two limitations. First, no liability under Art. 41 CISG can exist where the buyer agrees to take the goods subject to a known third party right or claim. For liability to be excluded, not only must the buyer be aware of the third party right, but he must also consent to take the goods subject to that right or claim. Such an agreement will often be expressed, but it may also be implied from the facts of the case.[659] Secondly, third party rights based on industrial or other intellectual property are expressly excluded from the ambit of Art. 41 CISG being governed instead by Art. 42 CISG.

III. Industrial or intellectual property rights (Art. 42 CISG)

Art. 42 CISG states the seller's duty to deliver goods free of intellectual property rights or claims of a third party. Under this provision a seller is liable if he delivers goods in respect of which a third party has a right or asserts a claim[660] based on intellectual property. Liability under Art. 42 CISG is however subject to the following limitations. First, the seller is only liable if he knew of, or could not have been unaware of, the intellectual property right at the time of the conclusion of the contract (Art. 42(1) CISG). Secondly, the seller is only liable if the third party's right or claim is based on the law of the state designated by Art. 41(1) lit. (a) or (b) CISG, whichever alternative is applicable. Thirdly, the seller is not liable if at the time of the conclusion of the contract the buyer knew or could not have been unaware of the third

---

658 See *Schwenzer*, in: Schlechtriem/Schwenzer, Commentary, Art. 41 para. 15; *Gruber*, in: Münchener Kommentar zum Bürgerlichen Gesetzbuch, Art 41 para. 16.

659 *Secretariat Commentary* to what was then Art. 39 (now Art. 41), para. 2.

660 It is submitted that with regard to third party claims the same considerations as under Art. 41 CISG should apply, see above (II.2).

party right or claim or if the right or claim results from the seller's compliance with technical requirements that the buyer himself supplied to the seller (Art. 42(2) CISG).

1. Industrial or intellectual property

For a definition of the notion of "industrial or intellectual property" it is submitted that one should refer to the definition in the 1967 Convention establishing the World Intellectual Property Organization (WIPO).[661] This definition is a broad one encompassing as it does essentially "all (…) rights resulting from intellectual activity in the industrial, scientific, literary, or artistic fields."[662] It follows that, e.g., any rights relating to patents, copyrights, industrial design, trade marks, commercial names and trade secrets would fall within the definition. The prevailing opinion applies Art. 42 CISG by analogy to third party rights to personality or the right to a name.[663]

---

661 *Schwenzer*, in: Schlechtriem/Schwenzer, Commentary, Art. 42 para. 4; *Shinn*, Liabilities under Art. 42 of the United Nations Convention on International Sales, 2 Minnesota Journal of Global Trade (1993) 115, 122, available online at http://www.cisg.law.pace.edu/cisg/biblio/shinn.html.

662 Art. 2(viii) of the 1967 Convention states that it includes rights relating to: literary, artistic and scientific works; performances of performing artists, sound recordings, and broadcasts; inventions in all fields of human endeavor; scientific discoveries; industrial designs; trademarks, service marks, and commercial names and designations; protection against unfair competition; and, all other rights resulting from intellectual activity in the industrial, scientific, literary or artistic fields. This final phrase ("all other rights resulting from intellectual activity in the industrial, scientific, literary or artistic fields") makes it clear that "intellectual property" is a broad concept, and can include productions and matters not forming part of the existing categories of intellectual property, provided they result "from intellectual activity in the industrial, scientific, literary or artistic fields." (The above passage is taken from http://www.wipo.int/tk/en/glossary/index.html).

663 See *Schwenzer*, in: Schlechtriem/Schwenzer, Commentary, Art. 42 para. 5; *Gruber*, in: Münchener Kommentar zum Bürgerlichen Gesetzbuch, Art. 42 para. 7. But see for a differing view *Rauda/Etier*, Warranty for Intellectual Property Rights in the International Sale of Goods, 4 Vindobona Journal of International Commercial Law and Arbitration (2000) 30, 35 (available online at http://www.cisg.law.pace.edu/cisg/biblio/raudaetier2.html).

2. Territorial limitations

Art. 42 CISG places limits on the states in which the seller will be liable in respect of third party rights or claims based on intellectual property rights affecting the goods. It is the case that the law of most states requires that the seller deliver the goods free of intellectual property rights or claims. Such a rule is probably appropriate in the case of domestic sales: a seller should be aware of, and responsible for, any infringement of intellectual property rights in the country in which he is trading. The situation is however different in international sales where the goods may eventually be brought to a variety of states and where it is considerably more difficult to get information about the potential existence of such rights and about the legal regime applied to them.[664] In the light of this, a decision was taken by the drafters of the Convention to hold sellers liable for third party rights based on intellectual property only where these affect the goods in a limited group of states.

Under Art. 42(1) lit. (a) CISG a seller may be liable where the right or claim is based on intellectual or industrial property under the law of the State where the goods will be resold or otherwise used. While there need not be an express agreement as to the state in which the goods will be resold or used, it is for the buyer to prove that 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.[665] In the event that the buyer cannot prove that the parties at the time of conclusion of the contract contemplated any particular state or states as the place in which the goods would be used or resold, the seller must deliver goods free from any right or claim based on industrial or intellectual property under the law of the state where the buyer has his place of business[666] (Art. 42(1) lit. (b) CISG).[667]

---

664 See, e.g., *Secretariat Commentary*, Art. 40 para. 4; *Schwenzer*, in: Schlechtriem/Schwenzer, Commentary, Art. 42 para. 1.

665 *Schwenzer*, in: Schlechtriem/Schwenzer, Commentary, Art. 42 para. 29.

666 Where the buyer has more than one place of business, the relevant place of business will be determined by reference to Art. 10 CISG.

667 It should be noted that while the existence of a right or claim based on intellectual property under the law of the seller's country will not as such give rise to liability, it may prevent the seller from being able to deliver the goods thereby amounting to a breach of Art. 30 CISG.

3. Seller's actual or "imputed" knowledge

Under Art. 42(1) CISG, a seller is only liable if at the time of the conclusion of the contract, he knew or could not have been unaware of the existence of a relevant third party claim or right based on intellectual property. The meaning of "could not have been unaware" in this context has been a matter of some debate. On one view,[668] the phrase "could not have been unaware" in Art. 42(1) places an affirmative obligation on the seller to research such intellectual property registries as exist in the state in which the buyer will use or resell the goods. According to this view, a failure to examine these registries where examination would have revealed the existence of third party rights would mean that a seller "could not have been unaware" of the existence of third party rights. Others have argued that this view imposes too heavy a burden on the seller.[669] The better view is, it is suggested, that the phrase "could not have been unaware" places a duty on the seller not to shut his eyes to obvious facts or be grossly negligent about information that is reasonably at hand at the time the parties concluded the contract, especially if the other side is not likely to have the same information. It follows from this that a failure to examine relevant registries which would have shown a third party right need not lead to the conclusion that the seller "could not have been unaware" of the existence of the right. Instead, the answer will depend on whether in the circumstances the buyer has established that it would have been grossly negligent[670] of the seller not to have been aware of the existence of a third party right or claim. The existence of an easily searchable registry would be a relevant but by no means conclusive factor.

4. Exclusion of liability

The seller's liability under Art. 42 CISG is excluded in two situations. First, the seller is not liable if at the time of the conclusion of the contract the buy-

668 See in that direction *Secretariat Commentary*, Art. 40 para. 5; *Schwenzer*, in: Schlechtriem/Schwenzer, Commentary, Art. 42 para. 14; *Rauda/Etier*, Warranty for Intellectual Property Rights in the International Sale of Goods, 4 Vindobona Journal of International Commercial Law and Arbitration (2000) 30, 45 (available online at http://www.cisg.law.pace.edu/cisg/biblio/raudaetier2.html).

669 See the careful arguments marshalled by *Shinn* in: Liabilities under Art. 42 of the United Nations Convention on International Sales, 2 Minnesota Journal of Global Trade (1993) 115, 125 et seq., available online at http://www.cisg.law.pace.edu/cisg/biblio/shinn.html.

670 See in that direction *Magnus*, in: Staudinger Kommentar zum Bürgerlichen Gesetzbuch, Art. 42 para. 22.

er knew or could not have been unaware of the existence of the third party right or claim (lit. (a)).[671] The language of this provision is similar to that in Art. 35(3) CISG and, as in that provision, "could not have been unaware" denotes more than mere negligence and requires proof of something much closer to "blind eye" recklessness or at the very least gross negligence.[672] Under the second exception to Art. 42 CISG, the seller is not liable if the right or claim results from the seller's compliance with technical drawings, designs, formulae or other such specifications furnished by the buyer (lit.(b)).

IV. Notice requirements (Art. 43, 44 CISG)

The buyer's right to rely on the seller's liability for the existence of third party rights or claims depends upon having fulfilled the notice requirement in Art. 43 CISG. Pursuant to para. 1 of that provision the buyer loses the right to rely on Art. 41 or 42 CISG if he does not give notice to the seller specifying the nature of the third party right or claim within a reasonable time after he has become aware or ought to have become aware of that right. This rule is similar to the notice requirement of Art. 39(1) CISG so that, as a general rule, the considerations concerning that provision will also apply with regard to Art. 43 CISG.[673] It should be noted however that (unlike in Art. 38 CISG) there is no duty to examine the goods for the existence of third party rights or claims. It follows that the buyer "ought to have become aware of the right" only when there were concrete indications that such a right or claim existed.[674] In assessing whether notice has been given within a "reasonable time" under Art. 43 CISG, the need for the buyer to take legal advice about the existence, or otherwise, of the third party right will frequently be a relevant factor.[675]

Under Art. 43(2) CISG the seller is not entitled to rely on the buyer's failure to give notice under Art. 43(1) CISG if the seller knew of the third party right or claim and the nature of it. It is submitted that the relevant time to assess whether such knowledge is given is the time when the buyer's notice under Art. 43(1) CISG would have reached the seller.[676] Unlike under

671 Art. 42(2) lit. (a) CISG.

672 See in that direction *Magnus*, in: Staudinger Kommentar zum Bürgerlichen Gesetzbuch, Art. 42 para. 26.

673 See in that direction *Schwenzer*, in: Schlechtriem/Schwenzer, Commentary, Art. 43 para. 2 et seq.

674 *Schwenzer*, in: Schlechtriem/Schwenzer, Commentary, Art. 43 para. 4.

675 *Schwenzer*, in: Schlechtriem/Schwenzer, Commentary, Art. 43 para. 3.

676 *Schwenzer*, in: Schlechtriem/Schwenzer, Commentary, Art. 43 para. 11.

Art. 40 CISG the mere fact that the seller "could not have been unaware" of the third party right is irrelevant under Art. 43(2) CISG which requires positive knowledge. What is more, unlike in Art. 39(2) CISG there is no absolute "cut off" period in Art. 43 CISG.

If the buyer fails to give notice under Art. 43(1) CISG and if the seller is not precluded from invoking this failure under Art. 43(2) CISG the buyer will not be able to rely on the existence of the third party right or claim (in the sense of Art. 41, 42 CISG). As a rule, the buyer will therefore not have any of the remedies under Art. 45 et seq. CISG based on the seller's breach of Art. 41 or 42 CISG. The situation will be different however where Art. 44 CISG applies: if the buyer has a reasonable excuse for his failure to give the required notice under Art. 43(1) CISG, he may reduce the price under Art. 50 CISG or claim damages (except for loss of profit).[677]

---

[677] Art. 44 CISG has been discussed above p. 165 et seq.

Part 5:
Remedies of the buyer

§ 9. Outline of the buyer's remedies

The starting point for an assessment of the buyer's remedies under the CISG is Art. 45(1) CISG which provides: "If the seller fails to perform any of his obligations under the contract or this Convention, the buyer may: (a) exercise the rights provided in articles 46 to 52; (b) claim damages as provided in articles 74 to 77 CISG."

This means that the buyer can resort to the following remedies:
- performance, including substitute delivery and repair in the cases of non-conformity (Art. 46 CISG)
- avoidance of the contract (Art. 49 CISG)
- reduction of the purchase price (Art. 50 CISG)
- damages (Art. 45(1)(b), Art. 74 et seq. CISG)

Further, there are specific provisions for instalment contracts (Art. 73 CISG) and for cases of anticipatory breach of contract (Art. 71, 72 CISG) which modify the general system of remedies under Art. 45 et seq. CISG. These provisions will be dealt with in a separate chapter (§§ 17, 18).

What is more, there are specific provisions for partial breaches (Art. 51 CISG), for early delivery (Art. 52(1) CISG) and for delivery of an excess quantity (Art. 52(2) CISG); see § 14.

I. General outline of the buyer's remedies under Art. 45 et seq. CISG

1. Performance

Art. 46 CISG governs the buyer's right to claim performance from the seller. Art. 46(1) CISG deals with the general claim for performance. Art. 46(2) and (3) CISG provide specific rules for substitute delivery or repair in cases where the seller has delivered goods that do not conform with the contract.

According to Art. 46(3) CISG the buyer has the right to require the seller to remedy the lack of conformity by repair, unless this is unreasonable having regard to the circumstances. The provision on substitute delivery (Art. 46(2) CISG) is more restrictive: the buyer can only claim delivery of substitute goods if the lack of conformity constitutes a fundamental breach of contract in the sense of Art. 25 CISG.

All claims for performance are subject to certain restrictions which will be dealt with below (§ 10). One of them shall however be mentioned already, namely the possibility for the courts to refuse an order for specific performance if it would do so under its national law (Art. 28 CISG).

2. Avoidance of the contract

The buyer's right to avoid the contract is governed by Art. 49 CISG. Article 49(1) CISG names the two grounds for avoidance, Art. 49(2) CISG submits avoidance to a highly complicated regime of time limits. In principle avoidance is limited to cases of fundamental breach (Art. 49(1) lit. (a)). The only exception to that rule is Art. 49(1) lit. (b) CISG which allows the buyer to "upgrade" a non-fundamental breach to one which justifies avoidance by using the so-called "Nachfrist"-procedure provided for in Art. 47 CISG. This possibility is, however, limited to cases of non-delivery. In other cases than non-delivery the Convention does not give the buyer the chance to upgrade a non-fundamental breach by using the "Nachfrist"-procedure.

3. Reduction of the purchase price

Art. 50 CISG gives the buyer the right to reduce the contract price if the goods do not conform to the contract. The provision, however, explicitly provides that the seller's right to cure takes priority over the buyer's right to reduce the price.

4. Damages

Any breach of contract by the seller will give the buyer a right to claim damages. The basis for the claim is Art. 45(1) lit. (b) CISG; the measure and the calculation of the damages are governed by the general rules in Art. 74 to 77 CISG. Damages are not fault-based in the CISG. In principle, liability is

strict, but there are certain grounds of exemption in Art. 79, 80 CISG (impediments beyond the seller's control, failure caused by the buyer himself).

5. Right to suspend performance

It is submitted that there is a general principle (Art. 7(2) CISG) which allows one party (here: the buyer) to suspend or withhold his own performance (e.g. payment of the price) until the other party (here: the seller) has performed his duties.[678] This general principle can be derived from the rules in Art. 58(1), 71, 85, 86(1) CISG. The right to suspend may however not exist where it would be inconsistent with the parties' agreement (e.g. where the contract requires the buyer to pay the price before the seller makes performance).

II. The fundamental objective: saving the contract and avoiding restitution

1. An international trend

The most defining feature of the system of remedies[679] in the CISG is that it aims at keeping the contract alive as long as possible in order to avoid the necessity to unwind the contract. The prime consequence of this is that termination of the contract will only be available as a remedy of last resort.[680] It does, however, also have effects on other remedies such as claims for performance and the right to reduce the contract price.

In taking that approach the CISG is in line with (and actually a very important cause for) an international trend which has arisen during the 20th

678 See (Austrian) Oberster Gerichtshof 8 November 2005, Internationales Handelsrecht (IHR) 2006, 87 = CISG-Online No. 1156; *Müller-Chen*, in: Schlechtriem/Schwenzer, Commentary, Art. 45 para. 22.

679 See in more detail *P. Huber*, Rabels Zeitschrift für ausländisches und internationales Privatrecht (RabelsZ) 71 (2007), 13 with further references.

680 See for example (German) Bundesgerichtshof 3 April 1996 CISG-Online No. 135 („last possibility for the creditor"); (Austrian) Oberster Gerichtshof Internationales Handelsrecht (IHR) 2001, 42 = CISG-Online No. 642; *Müller-Chen*, in: Schlechtriem/Schwenzer, Commentary, Art. 49 para. 2; *Schlechtriem*, in: Schlechtriem/Schwenzer, Commentary, Art. 25 para. 21a.

century.[681] Several modern sales laws (such as the new German law[682] and the Scandinavian laws[683]) and international instruments (such as the UNIDROIT Principles[684] and the Principles of European Contract Law[685]) regard the termination of the contract as a remedy of last resort which should only be granted if other remedies (such as performance, price reduction or damages) will not lead to an adequate result.

2. Policy considerations

There are several reasons and policy considerations for restraining the availability of termination. The first reason can be described by the old principle of "pacta sunt servanda". The agreement which the parties have reached by their free will should be honoured and enforced by the law as long as possible or sensible.[686]

The second reason for being opposed to termination as a remedy is an economic one. Termination of the contract for defective delivery leads to a restitution of the goods originally delivered and possibly to a restitution of money paid by the buyer. Restitution of the goods in particular may lead to considerable costs and risks which could be avoided if the contract were not terminated and if the buyer's interest in getting conforming goods were remedied by either repair or a claim for damages.[687] From an economic perspective, therefore, termination may prove to be a very expensive remedy.

---

681 For a comparative overview see: *Sivesand*, The Buyer's Remedies for non-conforming Goods (2005), p. 68 et seq.; *Torsello*, Common Features of Commercial Uniform Commercial Law Conventions (2004), p. 187 et seq.; *P. Huber*, Comparative Sales Law, in: Reimann/Zimmermann (eds.), The Oxford Handbook of Comparative Law, 2006, p. 938, 960 et seq.

682 (German) § 323 Bürgerliches Gesetzbuch (BGB). For more detail on these rules see *Zimmermann*, The New German Law of Obligations (2005), p. 66 et seq.

683 Cf. *Lookofsky*, in: Ferrari (ed.), The 1980 Uniform Sales Law, Old Issues Revisited in the Light of Recent Experiences (2003) p. 95, 113.

684 Art. 7.3.1. UNIDROIT Principles.

685 Art. 9:310 Principles of European Contract Law.

686 Cf. *Bonell*, An international restatement of contract law, 1997, p. 76 et seq.; *Beale*, Remedies: Termination, in: Hartkamp/Hesselink/Hondius/du Perron/Vranken (ed.), Towards a European Civil Code (1998), p. 348, 350.

687 *Will*, in: Bianca/Bonell, Art. 49 para. 2.1.2; *Magnus*, in: Staudinger Kommentar zum Bürgerlichen Gesetzbuch, Art. 49 para. 4; *Schlechtriem*, in: Schlechtriem/Schwenzer, Commentary, Art. 25 para. 21a.

A third reason for restraining the scope of termination results from an analysis of the legitimate interests of the parties. On the one hand, the seller in many cases will have a good argument by saying that the efforts that he made in order to effect performance should not be frustrated by a minor defect which could easily be cured at his expense. The buyer on the other hand faces a difficult task if he wants to refuse the seller's offer to cure in such a situation, provided that he is accorded damages for any loss suffered until cure is effected and that he does not have to bear the costs of cure. Of course, there may be situations where the buyer is justified in not accepting cure, for instance if time and exact conformity of delivery were of the essence in the contract. Often, however, this is not the case and the buyer, who strictly insists on termination, will face the question of whether he tries to use the non-conformity to disguise his real motives such as a fall in market prices for the goods etc.

3. Instruments used in order to save the contract

A comparative analysis of the modern rules reveals three instruments which can – on their own or combined with each other – serve to restrain the scope of termination as a remedy:[688]

The first instrument is the so-called "Nachfrist"-mechanism which in principle requires the buyer to fix an additional period of time ("Nachfrist") for performance (i.e. for repair or substitute delivery): Termination of the contract will only be available for the buyer if the "Nachfrist" has expired without success, i.e. without the seller having performed properly. The "Nachfrist"-mechanism therefore gives the seller an effective right to cure, a second chance to perform, before the buyer can terminate the contract.

The second mechanism can be labelled "seller's right to cure". This approach is closely related to the "Nachfrist"-mechanism, does, however, start from a different angle: If the buyer complains about the non-conformity of the goods and announces that he wants to terminate the contract, the seller has the right to prevent the termination by performing properly (repair or substitute delivery) within a reasonable period of time and under adequate circumstances.

[688] See *P. Huber*, Rabels Zeitschrift für ausländisches und internationales Privatrecht (RabelsZ) 71 (2007), 13, 20 et seq.

The third technique is the doctrine of fundamental breach. This doctrine restricts the buyer's right to terminate the contract for defective delivery to cases which are so serious that they amount to a fundamental breach.

4. The position of the CISG

The CISG primarily relies on the fundamental breach doctrine, does, however, also use the other two techniques to a certain extent. Pursuant to Art. 49(1) lit. (a) CISG, the avoidance of the contract will only be available if the seller committed a fundamental breach of contract. In cases of non-delivery, however, the buyer may also avoid the contract under Art. 49(1) lit. (b) CISG by using the "Nachfrist"-procedure provided for in Art. 47 CISG. Art. 48 CISG gives the seller a right to cure which is however "subject to" the buyer's right to avoid the contract under Art. 49 CISG; this has led to a considerable amount of debate and will be discussed below at p. 221 et seq.

The fundamental breach doctrine is also applied to substitute delivery under Art. 46(2) CISG. Viewed from an economic perspective, this is understandable: Substitute delivery leads to the restitution of the originally tendered goods and to the delivery of the substitute goods, causing additional cost and risk to the parties.[689]

Price reduction under Art. 50 CISG is not subject to the fundamental breach requirement, but subject to the seller's right to cure under Art. 48 CISG.

Claims for damages depend on an avoidance of the contract (and on the strict requirements set in Art. 49 CISG) if they are to be calculated under the specific provisions of Art. 75 et seq. CISG. The question in how far similar principles should also apply to "other" claims of damages (i.e. those which are simply governed by Art. 74 CISG) is a complicated one which will be discussed below (p. 282).

---

[689] See Official Records, p. 337 and 112, in: Honnold, Documentary History, p. 558; *Müller-Chen*, in: Schlechtriem/Schwenzer, Commentary, Art. 46 para. 4; *P. Huber*, in: Münchener Kommentar zum Bürgerlichen Gesetzbuch, Art. 46 para. 24.

§ 10. Performance

Art. 46 CISG deals with the buyer's right to require performance by the seller. Art. 46(1) CISG sets out the general rule which entitles the buyer to require performance unless he has resorted to a remedy which is inconsistent with this requirement. Art. 46(2) and (3) CISG contain specific provisons for those cases in which the seller has delivered non-conforming goods. Where this is the case, the buyer may then be entitled to require delivery of substitute goods (Art. 46(2) CISG) or for the lack of conformity to be repaired (Art. 46(3) CISG). The availability of both the remedy of substitute delivery and that of repair are subject to additional requirements.

The CISG sets up a number of general requirements that will be necessary for every type of performance claim (be it the general claim in Art. 46(1) CISG, the claim for substitute delivery (Art. 46(2) CISG) or the claim for repair (Art. 46(3) CISG)); these requirements will be dealt with first (cf. below I.). We will then address the two types or remedies that will be most relevant in practice, i.e. substitute delivery (cf. below II.) and repair (cf. below III.), before dealing with the general claim for performance (cf. below IV.).

I. General requirements for performance claims

1. Breach of contract

The first requirement for a performance claim under Art. 46 CISG is that the seller has breached an obligation under the CISG or under the contract. For Art. 46(2) and (3) CISG to be applicable, this must be the obligation to deliver conforming goods (Art. 35 et seq. CISG). Art. 46(1) CISG on the other hand will apply to all other types of breach.

2. Domestic law defence (Art. 28 CISG)

In providing for a general claim for performance the Convention is more in line with the Civil Law approach than the Common Law approach.[690] Civil Law systems regard a claim for performance as the natural and primary consequence of a contractual obligation.[691] Common Law jurisdictions, on the other hand, tend to view claims for performance more restrictively; the primary remedy for a breach of contract being a claim for damages. Only in exceptional circumstances will a Common Law court grant specific performance.[692] While the practical importance of this difference in approach may only be slight,[693] the Convention nevertheless seeks to strike a balance between Common Law and Civil Law countries by allowing a court applying the Convention to refuse to enter a judgment for specific performance if they would do so under their own law. This compromise provision is found in Art. 28 CISG.

a) Claims for performance

Art. 28 CISG covers cases where one party is entitled to require performance of any obligation from the other party. Claims for performance under Art. 46 CISG will therefore fall under Art. 28 CISG.[694] It does not matter whether they refer to an obligation which is based on the Convention (e.g. delivery, Art. 30 CISG) or have been assumed by the seller in the contract itself (e.g. an obligation to assemble the goods).[695] On the other hand, if the

690 *P. Huber*, in: Münchener Kommentar zum Bürgerlichen Gesetzbuch, Art. 46 para. 2; *Magnus*, in: Ferrari/Flechtner/Brand, The Draft UNCITRAL Digest and Beyond, p. 325 et seq.

691 Cf. § 241 (German) Bürgerliches Gesetzbuch; Art. 1184 para. 2, Art. 1610 (French) Code Civil. Cf. also *Zimmermann*, Law of Obligations, p. 770 et seq.; *Zweigert/Kötz*, Introduction to Comparative Law, § 35.

692 Cf. *Müller-Chen*, in: Schlechtriem/Schwenzer, Commentary, Art. 28 para. 2. As to these different approaches see for instance *Herman*, 7 Edinburgh Law Review (2003), 5 and 194.

693 It could be argued that those cases in which the buyer will actually sue for performance under Civil Law will correspond to those in which a Common Law court would also grant specific performance, cf. *Müller-Chen*, in: Schlechtriem/Schwenzer, Commentary, Art. 28 para. 4; *Lando*, in: Bianca/Bonell, Commentary, Art. 28 para. 1.3.1.; *Magnus*, in: Ferrari/Flechtner/Brand, The Draft UNCITRAL Digest and Beyond, p. 326.

694 *UNCITRAL Digest*, Art. 46 para. 2.

695 *Müller-Chen*, in: Schlechtriem/Schwenzer, Commentary, Art. 28 para. 6. But see as to the different situation with regard to foreign exchange and currency law *idem.*, Art. 28 para. 7.

buyer claims damages or restitution after having avoided the contract, Art. 28 CISG will not apply.[696] One could therefore say that Art. 28 CISG only refers to the performance of primary obligations but not to the performance of secondary obligations.

b) Court

For the purpose of Art. 28 CISG, the term "Court" should not be limited to courts of Contracting States of the Convention, but should also apply to courts in Non-Contracting States which have to apply the Convention (e.g. on the basis of Art. 1(1) lit. (b) CISG or of choice by the parties).[697] It is submitted that Art. 28 CISG also covers decisions by arbitral tribunals if they apply the rules of the Convention.[698]

c) Reference to domestic law

Art. 28 CISG allows the court to consult "its own law" in order to decide on the issue of specific performance. The court therefore has to undertake a hypothetical assessment of the case under this legal system. This procedure raises several questions. Which law is to be looked at? In how far can it be taken into account? What are the questions the court has to ask under that particular legal system? How does the court have to react to its findings under that law?

aa) "Lex fori"

When applying Art. 28 CISG, it must first be decided whether the reference to the court's "own law" aims directly at the substantive law of the forum (the "lex fori") or at the law which would be applicable to the contract under the private international law of the forum (the "lex causae"). The correct answer is that one has to look at the "lex fori"[699] as it is submitted (in the light of

---

696 *Müller-Chen*, in: Schlechtriem/Schwenzer, Commentary, Art. 28 para. 6; *Karollus*, in: Honsell, Kommentar, Art. 28 para. 7. But see for the opposite view concerning restitution claims *Hornung*, in: Schlechtriem/Schwenzer, Commentary, Art. 81 para. 12.

697 *Müller-Chen*, in: Schlechtriem/Schwenzer, Commentary, Art. 28 para. 8 (Fn. 32); *Gruber*, in: Münchener Kommentar zum Bürgerlichen Gesetzbuch, Art. 28 para. 6; *Karollus*, in: Honsell, Kommentar, Art. 28 para. 9.

698 The "own law" of the "court" declared as relevant in Art. 28 CISG should in those cases be the "lex arbitri", i.e. the law which governs the arbitral procedure. Cf. *Müller-Chen*, in: Schlechtriem/Schwenzer, Commentary, Art. 28 para. 8 et seq.; *Gruber*, in: Münchener Kommentar zum Bürgerlichen Gesetzbuch, Art. 28 para. 9.

699 U.S. District Court (Northern District of Illinois) 7 December 1999, CISG-Online No. 439; *Müller-Chen*, in: Schlechtriem/Schwenzer, Commentary, Art. 28 para. 9

Art. 7(2) CISG[700]) that the Convention would have stated it expressly if it intended to refer to the "lex causae". Thus, by way of example, a U.S. court should look directly to the U.S. law of contract (e.g. UCC) without determining the applicable law under its private international law.

bb) Scope of the reference to the "lex fori"

Art. 28 CISG allows the court to rely on the "lex fori" in order to refuse to enter a judgment for specific performance. This raises the question in how far the "lex fori" may (or must) be taken into account. Should it be regarded in its entirety so that Art. 28 CISG would entitle the court to refuse specific performance whenever there were no valid performance claim under the "lex fori"? Or is the reference to the lex fori limited to certain type of rules excluding a claim for performance, and if so, how does one have to draw the line?

On one view, the wording of Art. 28 CISG might seem to indicate that the "lex fori" is relevant in its entirety, the relevant criterion being simply whether the court would enter a judgment for performance under the "lex fori". Such a view – proposed by some writers[701] – is certainly tenable as the provision does not mention any restriction as to the type of rule that bars the performance claim. If this view is correct then Art. 28 CISG would import into the Convention the entirety of the court's domestic law of breach of contract in so far as it relates to the remedy of specific performance. The issue of impossibility, for instance, which is not specifically addressed in the Convention, could (and, arguably, would have to) be decided according to the lex fori.

Such a wide recourse to the domestic law of the forum is not however without difficulties.[702] First, it appears from the history of the provision that it was meant to protect Common Law courts from having to enforce the wide Civil Law doctrine of specific performance. The provision was not intended to pave the way for the application of the entire domestic contract law re-

(with further references, also to a differing opinion); *Honnold*, para. 195; *Walt*, 26 Texas International Law Journal (1991), 211, 218 et seq.; G*ruber*, in: Münchener Kommentar zum Bürgerlichen Gesetzbuch, Art. 28 para. 8.

700 "(…) the law applicable by virtue of the rules of private international law". For a further argument derived from the drafting history see *Honnold*, para. 195.

701 Cf. *Lando*, in: Bianca/Bonell, Commentary, Art. 28 para. 2.2; *Neumayer/Ming*, Commentary, Art. 28 para. 4; *Walt*, 26 Texas International Law Journal (1991), 211, 218 (Note 37).

702 Cf. *Müller-Chen*, in: Schlechtriem/Schwenzer, Commentary, Art. 28 para. 10 et seq.; *Karollus*, in: Honsell, Kommentar, Art. 28 para. 5, 13 et seq.

lating to the remedy of performance.[703] This leads to the second argument. In Art. 7(2) CISG the Convention has a rule concerning the filling of gaps within its sphere of application. It stipulates that recourse should be had to general principles which can be discerned from the Convention and, in the absence of those, to the domestic law applicable by virtue of the rules of private international law. It would be surprising if there were another general "gap-filling-rule" for performance claims elsewhere in the Convention. It is even less likely that such an additional provision would refer to another system of domestic law than the one chosen by Art. 7(2) CISG, i.e. to the "lex fori" instead of the "lex causae". Moreover, if it is accepted that Art. 28 CISG leaves the application of the "lex fori" to the discretion of the court by providing that "the court is not bound" to order performance,[704] the drafters of the Convention, had they wanted to fill (supposed) gaps by domestic law provisions, would surely have expressly stated that the court *must* apply all the rules of the "lex fori" (this is, by the way, what Art. 7(2) CISG does). On the other hand, if Art. 28 CISG is only meant to protect a (e.g. Common Law) court from having to apply a foreign and unwanted doctrine of specific performance, it makes sense to leave the issue to its discretion thus giving it the possibility to "waive" that protection if it sees fit.[705]

It is therefore submitted that Art. 28 CISG only covers those restrictions on specific performance which result from a *general scepticism* towards the appropriateness of the remedy of compulsory performance (as opposed to a claim for damages).[706] Art. 28 CISG does not, therefore, leave room for national doctrines of impossibility, frustration, "force majeure" or other instruments which concern impediments to perform.[707]

In practice, this will lead to the result that Art. 28 CISG applies to the traditional restrictions which the Common Law systems impose on the claim for performance, especially the requirement that the buyer has a particular interest in obtaining performance because an award of damages would not provide adequate relief.[708] Of course, if other systems of law have similar restrictions on claims for specific performance, Art. 28 CISG will also be available to their courts.

---

703 Cf. *Secretariat Commentary*, Art. 26 para. 3.

704 This submission is, however, disputed, cf. below.

705 Cf. *Karollus*, in: Honsell, Kommentar, Art. 28 para. 5, 13 et seq.

706 *Müller-Chen*, in: Schlechtriem/Schwenzer, Commentary, Art. 38 para. 10.

707 Art. 28 CISG is not concerned with exchange control or currency laws either, cf. *Müller-Chen*, in: Schlechtriem/Schwenzer, Commentary, Art. 28 para. 7.

708 For a view on U.S. law cf. *Walt*, 26 Texas International Law Journal (1991), 212.

cc) Discretion of the court

Art. 28 CISG provides only that the court "is not bound" to order specific performance. This indicates that the decision is at the discretion of the court. It may therefore enter a judgment for performance despite the fact that it would not do so under the "lex fori".[709] If it is accepted that the purpose of Art. 28 CISG is to protect the courts in Common Law states from having to do under the Convention what they would not have to do under domestic law, it is only reasonable to allow such a court to "waive" that protection.

It should be noted that if the court decides to refuse a judgment for specific performance, this will simply release the seller from being forced to perform, but will not change the fact that he is in breach of his obligations and may have to face other sanctions (e.g. damages, avoidance).[710]

d) Mandatory character

The predominant academic view is that the parties do not have the power to derogate from Art. 28 CISG. The argument advanced in favour of this approach is that the provision excludes this particular performance issue from the scope of the Convention and thus also from Art. 6 CISG.[711] This view corresponds to the idea that Art. 28 CISG is meant to protect the courts, but not the parties.

It is submitted that this view is correct so that the application of Art. 28 CISG cannot be excluded by party agreement. It is further submitted, however, that if there is an agreement by the parties to the effect that they accept being subject to claims for performance without the typical restrictions of, for instance, the Common Law, the court will be free to take that into account when evaluating the case under its domestic law[712] or when exercising its discretion under Art. 28 CISG.

---

709 Cf. *Müller-Chen*, in: Schlechtriem/Schwenzer, Commentary, Art. 28 para. 22; *Honnold*, para. 195; *Lando*, in: Bianca/Bonell, Commentary, Art. 28 para. 2.1; *Karollus*, in: Honsell, Kommentar, Art. 28 para. 21 et seq.; *Neumayer/Ming*, Commentary, Art. 28 para. 5.

710 *Müller-Chen*, in: Schlechtriem/Schwenzer, Commentary, Art. 28 para. 21.

711 Cf. *Müller-Chen*, in: Schlechtriem/Schwenzer, Commentary, Art. 28 para. 24; *Karollus*, in: Honsell, Kommentar, Art. 28 para. 25; *Neumayer/Ming*, Commentary, Art. 28 para. 6. But see for a different view *Lando*, in: Bianca/Bonell, Commentary, Art. 28 para. 3.1.

712 *Müller-Chen*, in: Schlechtriem/Schwenzer, Commentary, Art. 28 para. 24; *Gruber*, in: Münchener Kommentar zum Bürgerlichen Gesetzbuch, Art. 28 para. 13.

3. Inconsistent remedy

Art. 46(1) CISG excludes the buyer's claim for performance if he has resorted to a remedy which is inconsistent with this claim. This restriction of the claim for performance is explicitely mentioned only in Art. 46(1) CISG. It should, however, also apply to the performance claims provided for in Art. 46(2) and (3) CISG.[713]

The concept of "inconsistency" has given rise to some intricate questions. In the author's opinion, the following guidelines should be followed:

a) Avoidance

A rightful and effective avoidance of the contract will be inconsistent with a claim for performance.[714] In fact, in such cases the claim for performance will not only be excluded by the inconsistency defence of Art. 46(1) CISG, but also by virtue of Art. 81(1) CISG, first sentence.[715]

The situation will be different, however, if the buyer's declaration of avoidance was not justified (for instance because the requirements of Art. 49 CISG were not given). In this case a further distinction needs to be made. If the seller accepts the buyer's avoidance, the contract will come to an end by virtue of this agreement[716] and there will of course be no room left for a claim for performance. If, on the other hand, the seller rejects the buyer's attempt to avoid, the contract will continue to exist and the buyer can still claim performance from the seller.[717]

It follows therefore that the buyer's declaration of avoidance is only inconsistent with the claim for performance if it was effective in the sense that the contract was actually terminated, be it because the requirements of Art. 49 CISG were met or because the seller accepted the avoidance.

---

713 *P. Huber*, in: Münchener Kommentar zum Bürgerlichen Gesetzbuch, Art. 46 para. 5, 12.

714 Cf. *Secretariat Commentary*, Art. 42 para. 7.

715 Cf. *Müller-Chen*, in: Schlechtriem/Schwenzer, Commentary, Art. 46 para. 7 (Fn. 9).

716 And not as an immediate result of the breach by the seller, cf. *Magnus*, in: Staudinger Kommentar zum Bürgerlichen Gesetzbuch, Art. 46 para. 21.

717 *Müller-Chen*, in: Schlechtriem/Schwenzer, Commentary, Art. 49 para. 47; *Magnus*, in: Staudinger Kommentar zum Bürgerlichen Gesetzbuch, Art. 46 para. 22. Cf. ibid. as to the possibility for the seller to treat the buyer's insistence on avoidance as a fundamental breach giving the seller a right to avoid the contract (Art. 61, 64 or 71 et seq. CISG).

b) Damages

With regard to claims for damages it is submitted that a distinction should be drawn depending on whether the buyer claims compensation for an impairment of his performance intest (e.g. for the reduced value of the goods or for the costs of repair) or whether he claims compensation for damage to his "integrity interest" (e.g. damages caused to his property by the defective goods which the seller had delivered)[718]. Only in the former case should the claim for damages be regarded as inconsistent with a claim for performance, because both remedies aim to compensate the same interest of the buyer (i.e. his interest in getting what was contractually promised).[719]

It is submitted that a further distinction needs to be drawn similar to the one made with regard to avoidance. The damages claim for the performance interest will only be inconsistent with a claim for performance if it was either justified and effective or accepted by the seller.

c) Price reduction

It seems to be widely accepted that a claim for price reduction is inconsistent with a demand for performance. Again, this statement needs to be qualified by stating that a claim to reduce the price will only bar avoidance where the claimed price reduction is either justified and effective or is accepted by the seller.

4. Exemption under Art. 79 CISG and cases of impossibility

a) Application of Art. 79 CISG to performance claims?

According to Art. 79(1) CISG a party is not liable for a failure to perform any of his obligations if he proves that the failure was due to an unforeseeable and unavoidable impediment beyond his control. However, Art. 79(5) CISG provides that "nothing in this Article prevents either party from exercising any right other than to claim damages under this Convention". Read literally this would seem to indicate that the exemption contained in Art. 79 CISG

---

[718] It is submitted that cases of damage to the buyer's "integrity interest" typically arise when the seller has delivered defective goods. Those cases will lead to claims under Art. 46(2) or (3) CISG.

[719] Cf. *Magnus*, in: Staudinger Kommentar zum Bürgerlichen Gesetzbuch, Art. 46 para. 19 et seq.; *Müller-Chen*, in: Schlechtriem/Schwenzer, Commentary, Art. 46 para. 7; *Schnyder/Straub*, in: Honsell, Kommentar, Art. 46, para. 24. For a different view see: *Will*, in: Bianca/Bonell, Commentary, Art. 46 para. 2.1.2; *Enderlein/Maskow/Strohbach*, Commentary, Art. 46 para. 2.

does not cover claims for performance.[720] However, several writers take the view that Art. 79 CISG also exempts the non-performing party from a claim for performance by the other party. They argue that the purpose of Art. 79 CISG is to relieve the promisor from having to overcome certain impediments and that it would be inconsistent with this objective if one allowed a claim for performance.[721]

In the author's opinion, Art. 79 CISG should not, as a general rule, be applied (directly) to a claim for performance. Such a view is in accordance with the clear wording of Art. 79(5) CISG and also derives support from the legislative history.[722] However, it is submitted that there are situations where a claim for performance should be excluded although there is no explicit rule to that effect in the Convention. This is true in particular with regard to certain fact patterns that are commonly dealt with under the headings "impossibility to perform", "hardship", "frustration" etc. These can, it is suggested, be solved by resorting to the gap filling mechanism provided for in Art. 7(2) CISG, i.e. by referring to "general principles underlying the Convention". It is further submitted that Art. 79 CISG can serve as a basis for discerning those general principles so that the basic policy considerations of Art. 79 CISG will not be disregarded (in so far as they are appropriate for claims for performance).[723]

b) Hardship and impossibility of performance

The question of whether Art. 79 CISG should be applied to performance claims will become particularly relevant in cases of impossibility or hardship. Notwithstanding the fact that domestic legal systems may draw the lines differently, the following distinction between cases of objective impossibility to perform and hardship is suggested here:

Cases of objective impossibility are likely to be relatively rare in practice. If they do occur, it will usually involve a contract for the sale of specific goods, such as a particular painting by Picasso or the entire load of a named ship which are destroyed before delivery.

---

720 Cf. *Schnyder/Straub*, in: Honsell, Kommentar, Art. 46 para. 27 et seq.; *Herber/Czerwenka*, Kommentar, Art. 79 para. 23.

721 *Honnold*, para. 435.5; *Magnus*, in: Staudinger Kommentar zum Bürgerlichen Gesetzbuch, Art. 46 para. 25.

722 A (German) proposal to apply the provision in certain situations to performance claims was rejected at the Diplomatic Conference; cf. in more detail *Stoll/Gruber*, in: Schlechtriem/Schwenzer, Commentary, Art. 79 para. 46.

723 *P. Huber*, in: Münchener Kommentar zum Bürgerlichen Gesetzbuch, Art. 46 para. 18.

Cases of hardship will, on the other hand, be more frequent. For the purposes of this book, hardship means that performance may still be objectively possible but that the obligor (seller) faces serious obstacles that he would have to overcome in order to make performance. The law will then have to decide under which conditions these obstacles should be regarded as so important that it is justified to exempt the seller from his duty to perform.

So far as cases of *objective impossibility* are concerned, there is widespread agreement that a claim for performance should not be granted.[724] Such a result is the only reasonable solution as it would be highly inappropriate for the court to order the seller to do something that is impossible.

The situation is, however, different if one deals with cases of *hardship*. In relation to such cases, an all-or-nothing-approach, either always refusing to take into account any hardship or relieving the seller from his obligation in every case where he faces difficulties in effecting his performance, does not offer an attractive solution. The issue is instead one of drawing the line between those impediments which free the seller from his obligations and those which do not. It is at this point that the above-mentioned controversy on the scope of Art. 79 CISG enters the stage. As mentioned, some authors would apply Art. 79 CISG and decide according to the criteria given there. Those authors who do not want to apply Art. 79 CISG can – "grosso modo" – be divided into two groups. Some would find a solution by reference to domestic law with the help of Art. 28 CISG;[725] it has, however, already been submitted that this is not the correct understanding of Art. 28 CISG.[726] Others stipulate that hardship relieves the seller in exceptional cases from his duty to perform and refer for instance to the principle of good faith (Art. 7(1) CISG).[727]

In the author's opinion, the correct solution requires use of the gap-filling mechanism provided for in Art. 7(2) CISG. It is submitted that the "principles underlying the Convention" can be discerned by taking into account the rules contained in Art. 79 CISG. This would lead to the following results: In the case of objective impossibility the seller will be freed from his duty to per-

724 *Müller-Chen*, in: Schlechtriem/Schwenzer, Commentary, Art. 46 para. 12; *Stoll/Gruber*, in: Schlechtriem/Schwenzer, Commentary, Art. 79 para. 48; *Magnus*, in: Staudinger Kommentar zum Bürgerlichen Gesetzbuch, Art. 46 para. 26; *Schnyder/Straub*, in: Honsell, Kommentar, Art. 46 para. 30.

725 *Herber/Czerwenka*, Kommentar, Art. 46 para. 4; cf. also *Honnold*, para. 435.5 (as a second resort after having argued that one should apply Art. 79 CISG).

726 Cf. above p. 187 et seq.

727 *Schnyder/Straub*, in: Honsell, Kommentar, Art. 46 para. 31; for a similar approach see *Stoll/Gruber*, in: Schlechtriem/Schwenzer, Commentary, Art. 79 para. 48.

form. It is submitted that this result should not depend on whether he could not reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract although Art. 79(1) CISG sets up that requirement. Deviation from the wording of Art. 79(1) CISG is justified because the provision is not directly applicable but serves only as the basis for developing the general principles meant in Art. 7(2) CISG. The rules expressed in Art. 79(1) CISG should only be regarded as general principles relating to limits to performance claims in so far as they fit the particular scenario. With regard to objective impossibility the foreseeability rule simply does not make sense: it is just as useless to order the seller to perform an impossible act if the impossibility was foreseeable as it is if the impossibility was not foreseeable.[728]

Hardship cases, on the other hand, should be dealt with by a stricter application of the criteria set out in Art. 79 CISG (in particular the notion of "beyond his control", the foreseeability criterion and the possibility to avoid or overcome the consequences of the impediment). Where, for example, generic goods prove to be more difficult and expensive than expected to obtain, the basic principle should be that this is a risk that has to be borne by the seller so that he will only be exempt from his duty to perform in highly exceptional circumstances.[729]

It should be noted, however, that the approach suggested in the preceding paragraphs is only concerned with a performance claim. The situation is, of course, different with regard to claims for damages. In such a case, Art. 79 CISG will of course apply directly. The seller's liability for damages is therefore simply governed by the ordinary rules on damages, i.e. Art. 45, 74 et seq., 79 et seq. CISG. This may lead to the result that the seller was exempted from his duty to perform under a "general principle" in the sense of Art. 7(2) CISG, but is still liable for damages.

---

728 It is of course an entirely different matter whether the seller should be liable for damages. Here it is perfectly arguable that a seller should only be exempted from his liability if the impediment was not foreseeable. And that is exactly what Art. 79(1) CISG does by setting up the foreseeability requirement. It should be remembered in that context that Art. 79 CISG will of course apply directly to the damages issue.

729 Cf. *Müller-Chen*, in: Schlechtriem/Schwenzer, Commentary, Art. 46 para. 12.

5. Art. 80 CISG

Unlike Art. 79 CISG, the exemption contained in Art. 80 CISG also applies to claims for performance. The buyer will therefore not be able to rely on the seller's breach to the extent that this breach was caused by his own (the buyer's) act or omission.[730]

6. Declaration

The buyer has to declare his claim for performance. According to the general principle of informality[731] the Convention does not prescribe a particular form to be kept.[732] In the case of Art. 46(2) and (3) CISG, however, the Convention imposes certain time limits which will be dealt with below. Irrespective of that, the applicable (national) rules on the limitation of claims will have to be kept in mind.

II. Substitute delivery in the case of non-conforming goods (Art. 46(2) CISG)

Art. 46(2) CISG states that 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 Art. 39 CISG or within a reasonable time thereafter. Under the provision, therefore, three requirements must be met, in addition to the general requirements described above, before the buyer is permitted to require delivery of substitute goods. First, the goods must be non-confoming (cf. below 1). Second, the non-conformity must amount to a fundamental breach of contract (cf. below 2) and, finally, a timely request for substitute delivery must be made (cf. below 3). Moreover, Art. 82(1) CISG provides that the buyer may lose his right to require substitute delivery if he is not able to return the goods substantially in the condition in which he received them (cf. below 4). Several specific issues relating to the claim for substitute delivery will be discussed under 5.

730 For a more detailed analysis of Art. 80 CISG see the chapter on damages (p. 265 et seq.).

731 Cf. p. 37 et seq. (Introduction/General Principles).

732 Cf. *Schnyder/Straub*, in: Honsell, Kommentar, Art. 46 para. 33 et seq.

1. Non-conformity

a) Basic principle

Art. 46(2) CISG only applies if the goods do not conform to the contract. This is clearly the case where the seller has delivered goods which do not comply with the requirements mentioned in Art. 35 to 37 CISG. Art. 46(2) CISG does not, however, apply where there has been no delivery of the goods at all. If, therefore, the buyer's complaint is that the time for delivery has passed without any attempt at delivery, the buyer's claim for performance must be dealt with under Art. 46(1) CISG. So too, where the seller has tendered the goods at another place than required by Art. 31 CISG with the buyer having rejected that particular tender and now claiming delivery in the correct place.

While the above seems fairly clear, doubts have been raised as to whether the following situations can be brought within the notion of "non-conformity". The first situation arises where a so-called "aliud" is delivered. The second situation arises where the seller is in breach of Art. 41 or 42 CISG and the final situation concerns the case of partial deliveries. These will be discussed in turn.

b) "Aliud"

In Civil Law jurisdictions there have been discussions on how to treat the delivery of a so-called "aliud". The classic examples are taken from sales of specific goods: The buyer purchases one particular object, for example a specified painting by Picasso, a specified used machine or the whole load of one particular ship, and the seller does not deliver the chosen object but another one, i.e. another painting by Picasso, another machine or the load of another vessel.[733] At first sight, it might appear that such a case involves not the delivery of non-conforming goods but the delivery of something completely different ("aliud") and it should, as a consequence, fall under the general performance claim in Art. 46(1) CISG.[734] The predominant opinion, however, regards these situations as cases of "non-conformity".[735] It is submitted that

[733] In principle one can also think of "aliud"-cases in sales of generic goods: The seller delivers stones instead of salt etc. However, the exact line may be difficult to draw: What if the seller delivers oil of grade C instead of grade B?

[734] See in that direction *Bianca*, in: Bianca/Bonell, Commentary, Art. 35 para. 2.4. It should be noted that in the author's opinion the decision of (German) Oberlandesgericht Düsseldorf 10 February 1994, CISG-Online No. 115 which is sometimes mentioned as supporting that view is not clear on that point.

[735] (German) Bundesgerichtshof 3 April 1996, CISG-Online No. 135; *Schwenzer*, in: Schlechtriem/Schwenzer, Commentary, Art. 35 para. 10; *Müller-Chen*, in:

this is correct because the wording of Art. 35 CISG ("description") also covers the delivery of an aliud.

c) Defects in title

If the seller does not fulfill his obligation under Art. 41 or 42 CISG to deliver goods which are free from third party claims, this should not be regarded as a case of non-conformity in the sense of Art. 46(2) CISG.[736] This position is supported by two considerations deriving from the Convention itself. First, the heading to Section II of Chapter III clearly distinguishes between conformity of the goods on the one hand and third party claims on the other. Consequently, both areas are treated separately, i.e. in Art. 35 to 40 CISG and Art. 41 to 43 CISG. If therefore Art. 46(2) CISG refers to the notion of "conformity", this is not intended to include third party claims. Secondly, the time limit in Art. 46(2) CISG is related to the notice requirement of Art. 39 CISG and this provision only applies to non-conformity under Art. 35 to 37 CISG. For third party claims, however, there is a separate notice provision in Art. 43 CISG which is not mentioned in Art. 46(2) CISG.[737] The logical conclusion seems to be that defects in title under Art. 41 et seq. CISG do not fall within the scope of Art. 46(2) (or (3)) CISG. The buyer's claim for performance will therefore be based on Art. 46(1) CISG exclusively.

d) Partial delivery

At first sight, it would seem that if if the seller delivers less than required under the contract, this would amount to a non-conformity, as Art. 35(1) CISG regards the quantity of the goods as one of the elements that make a delivery conforming or non-conforming. On closer analysis, however, the matter becomes more complicated as Art. 51(1) CISG (i.a.) provides that in cases of partial delivery Art. 46 to 50 CISG apply in respect of the part which is missing. Art. 51 CISG will be dealt with in more detail below (cf. § 14). Suffice it to say here that in the author's opinion Art. 51(1) CISG "narrows down"

Schlechtriem/Schwenzer, Commentary, Art. 46 para. 20; *Will*, in: Bianca/Bonell, Commentary, Art. 46 para. 2.1.1.1; *P. Huber*, in: Münchener Kommentar zum Bürgerlichen Gesetzbuch, Art. 46 para. 7.

736 This seems to be the predominant view, cf. *Müller-Chen*, in: Schlechtriem/Schwenzer, Commentary, Art. 46 para. 22; *Schwenzer*, in: Schlechtriem/Schwenzer, Commentary, Art. 41 para. 20, Art. 42 para. 25 (hesitating however with regard to intellectual property rights); *Honnold*, para. 280; *Secretariat Commentary*, Art. 39 para. 7 et seq.; *P. Huber*, in: Münchener Kommentar zum Bürgerlichen Gesetzbuch, Art. 46 para. 9. For the opposite view see *Enderlein/Maskow/Strohbach*, Commentary, Art. 46 para. 3.

737 Cf. *Magnus*, in: Staudinger Kommentar zum Bürgerlichen Gesetzbuch, Art. 46 para. 15 et seq.

the focus on the part which is missing: If, for instance, the seller has only delivered 80 items (instead of 100 as required by the contract), one should only look at at the missing 20 items when applying Art. 46 et seq. CISG: As a consequence, the seller will be liable for a non-delivery, but not for a non-conformity as none of the missing 20 items have been delivered.[738] The buyer's claim for performance will therefore not be subject to the particular requirements of Art. 46(2) CISG, but simply be based on Art. 46(1) CISG.

2. Fundamental breach

Art. 46(2) CISG requires that the lack of conformity constitutes a fundamental breach of the contract. The notion of fundamental breach is defined in Art. 25 CISG: "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 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." The details concerning the concept of a fundamental breach by the seller will be discussed below in the chapter on the right of avoidance (cf. p. 213 et seq.).[739] For present purposes, it is sufficient to say that there will only be a fundamental breach when the breach is particularly severe.

The fact that Art. 46(2) CISG requires a fundamental breach for the remedy of substitute delivery is in line with one of the major policy considerations that underlies the Convention, that is to say, the objective to keep the contract alive and to avoid unnecessary transfers of goods ("ultima ratio").[740] Unnecessary transfers of the goods can be caused as much by a claim for delivery of substitute goods as by an avoidance of the contract. In both cases, the goods originally delivered have to be transported back to the seller or to be disposed of in another matter. In addition, a new transport is necessary with respect to the substitute goods. These transactions can be avoided by restricting the buyer to a claim for repair, for damages or for price reduction. It does therefore seem reasonable to treat claims for delivery of substitute goods

738 See also *Müller-Chen*, in: Schlechtriem, Commentary, Art. 46 para. 21; *P. Huber*, in: Münchener Kommentar zum Bürgerlichen Gesetzbuch, Art. 46 para. 8; *Magnus*, in Staudinger Kommentar zum Bürgerlichen Gesetzbuch, Art. 46 para. 10. For the opposite view see *Schnyder/Straub*, in: Honsell, Kommentar, Art. 46 para. 19.

739 The notion of a fundamental breach under Art. 46(2) CISG has to be defined in the same way as under Art. 49(1) lit. (a) CISG, cf. *UNCITRAL Digest*, Art. 46 para. 13.

740 *UNCITRAL Digest*, Art. 46 para. 3. See also above p. 181 et seq.

and the remedy of avoidance along similar lines. The Convention does so by submitting both remedies to the fundamental breach requirement.

3. Time limit

Art. 46(2) CISG requires the buyer to make the request for substitute goods either in conjunction with notice given under Art. 39 CISG or within a reasonable time thereafter. If no notice has been given (but the buyer is nevertheless entitled to rely on the lack of conformity for instance due to Art. 40 CISG), the period should begin to run when the buyer actually discovered the defect.[741] According to Art. 27 CISG, it is sufficient if the buyer dispatches the declaration by appropriate means within that time; the risk of delay or loss has to be borne by the seller.[742]

There has been some discussion as to whether "reasonable time" in Art. 46(2) CISG should have the meaning it has in Art. 49(2) lit. (b) CISG[743] or whether instead it should rather be construed as in Art. 39(1) CISG.[744] Proponents of the latter view tend to keep the reasonable time period rather short, suggesting that it should, as a general rule, be no more than about 2 weeks.[745] In the author's view, however, a more generous approach is appropriate as it will frequently not be easy for the buyer to make his choice of remedy (for instance between substitute delivery and repair). As a general rule, therefore, a longer period may be allowed under Art. 46(2) CISG. Such an approach is in line with recent decisions based on Art. 39(1) CISG which point towards a period of one month as a rough average for the notice period.[746]

---

741 *P. Huber*, in: Münchener Kommentar zum Bürgerlichen Gesetzbuch, Art. 46 para. 34; *Magnus*, in Staudinger Kommentar zum Bürgerlichen Gesetzbuch, Art. 46 para. 45. But see also *Herber/Czerwenka*, Kommentar, Art. 46 para. 8 (time when notice should have been given).

742 *Müller-Chen*, in: Schlechtriem/Schwenzer, Commentary, Art. 46 para. 33.

743 *P. Huber*, in: Münchener Kommentar zum Bürgerlichen Gesetzbuch, Art. 46 para. 34.

744 *Magnus*, in Staudinger Kommentar zum Bürgerlichen Gesetzbuch, Art. 46 para. 43.

745 *Magnus*, in Staudinger Kommentar zum Bürgerlichen Gesetzbuch, Art. 46 para. 43.

746 See for instance *Schwenzer*, in: Schlechtriem/Schwenzer, Commentary, Art. 39 para. 17. See also CISG-AC Opinion No. 2 (*Bergsten*), Internationales Handelsrecht (IHR) 2004, 163 with detailed references to case law, being sceptical, however, towards formulating any general rule.

4. Return of non-conforming goods

According to Art. 82(1) CISG, the buyer loses his right to claim delivery of substitute goods[747] if it is impossible for him to make restitution of the originally delivered goods substantially in the condition in which he received them. It will be different, however, if one of the exceptions named in Art. 82(2) CISG applies, i.e. if the impossibility to make restitution is not due to the buyer's act or omission (lit. (a)), if it is due to the examination provided for in Art. 38 CISG (lit. (b)), or if the goods have been sold, consumed or tranformed in the normal course of business or use before the buyer had or ought to have discovered the lack of conformity, lit. (c).

Art. 82 CISG does not explicitly state, but clearly presupposes, that the buyer who claims substitute delivery will be under a duty to make restitution of the (non-conforming) goods that had originally been delivered. This of course raises the question how the buyer's claim for delivery of substitute goods and the seller's claim for restitution relate to each other. In particular, do they have to be performed concurrently? If so, this would lead to the result that the buyer could refuse to make restitution until the seller offers substitute delivery and vice versa. It is submitted, however, that these two obligations are not concurrent. Whereas the Convention in Art. 81(2) CISG in its second sentence explicitely says that the restitutionary duties which arise out of an avoidance of the contract have to be performed concurrently, there is no such rule for the relationship between substitute delivery and restitution. Indeed a Norwegian proposal to include a provision to that effect has been rejected by the Diplomatic Conference.[748] This submission also seems reasonable from a practical perspective as the concurrent exchange of goods for goods would create considerable practical problems. In that respect the situation is different from the avoidance cases addressed in Art. 81(2) CISG, second sentence, which provides for a concurrent exchange of goods for money which does not present particular problems for commercial sales.[749]

---

747 The same is true for the buyer's right to avoid the contract. This shows again the Convention's policy to treat substitute delivery and avoidance alike in so far as it is necessary to avoid restitution of goods that have already been delivered. See above p. 199.

748 Cf. O.R. Doc. C (5), Art. 66 para. 3, 5, p. 136 (in: *Honnold*, Documentary History, p. 708) and Doc. C(4), Art. 66 para. 67 et seq., p. 387 et seq. (in: *Honnold*, Documentary History, p. 608 et seq.).

749 *Müller-Chen*, in: Schlechtriem/Schwenzer, Commentary, Art. 46 para. 34.

5. Specific issues

a) Substitute delivery and sale of specific goods

Art. 46(2) CISG entitles the buyer to claim delivery of substitute goods. This means that the seller has to make a new tender of goods which conform to the contract. This will usually not create major problems where generic goods are the subject matter of the contract (e.g. oil, sugar, grain). It may, however, lead to problems where there is a sale of specific goods, for instance one particular second-hand machine or a specific shipment of clothes. In the author's opinion, substitute delivery will usually not be possible in these cases. A machine different from that selected by the buyer will not be the object that he bought and thus cannot be claimed (or offered) as (substitute) delivery under the original contract.[750] Some authors have argued that even in those cases the buyer should have a claim for substitute performance if the seller has replacement goods that are economically equivalent to the one bought originally.[751] It is submitted, however, that this view should not be followed. In many cases, the seller will have designed the sale as one for an identified object only with the specific intention of avoiding having to perform a delivery of substitute goods which would force him to keep similar goods on stock or to obtain them on the market. Of course, if the seller in such a case does have similar goods in stock and he is willing to deliver them, the parties can easily agree on a new sales contract and terminate the original contract.

The situation will be different where the seller has delivered the wrong object, i.e. an aliud (e.g. another machine than the one chosen by the buyer). In this case the original delivery of the wrong machine will be a (fundamental) breach of contract and the buyer's claim for delivery of the chosen machine will have to be regarded as a claim for substitute delivery.

b) Costs and place of performance

It is submitted that it is the seller who has to bear the *costs* of the substitute delivery.[752] This is not explicitly said in the Convention but it can be de-

---

750 *P. Huber*, in: Münchener Kommentar zum Bürgerlichen Gesetzbuch, Art. 46 para. 38.

751 See for instance *Müller-Chen*, in: Schlechtriem/Schwenzer, Commentary, Art. 46 para. 18. The (German) Bundesgerichtshof has recently taken a similar position with regard to national German sales law (German) Bundesgerichtshof 7 June 2006, Neue Juristische Wochenschrift (NJW) 2006, 2839 et seq.

752 See (German) Oberlandesgericht Hamm 9 June 1995, CISG-Online No. 146; *Müller-Chen*, in: Schlechtriem/Schwenzer, Commentary, Art. 46 para. 36; *Magnus*, in Staudinger Kommentar zum Bürgerlichen Gesetzbuch, Art. 46 para. 50.

rived from Art. 48(1) CISG as a general principle (Art. 7(2) CISG) of the Convention.[753]

It is disputed where the substitute delivery has to be made. Some authors argue that it should be made where the originally delivered (non-conforming) goods are at the time when substitute delivery is required (provided that this is the place of destination where they were originally meant to be and that the buyer did not redirect the goods thereby raising the costs for substitute delivery).[754] In the author's opinion, however, it is more convincing to locate the *place of performance* for substitute delivery where the place of performance of the original obligation to deliver was situated, i.e. according to Art. 31 CISG.[755] In a case which involves carriage of the goods (Art. 31(1) lit. (a) CISG) this would lead to the result that substitute delivery would have to be performed by handing over the goods to the first carrier for transmission to the buyer. It should be noted, however, that the buyer will usually be entitled to claim the transport costs to the place of destination as damages under Art. 45(1) lit. (a), Art. 74 CISG.

If the goods that are tendered by way of substitute delivery are defective, this may have different kinds of consequences. First, the non-conforming tender will amount to a new breach of contract which may once more trigger the remedies of Art. 45 CISG, for instance claims under Art. 46 CISG. It is submitted that the buyer should also be subject to the notification requirements of Art. 38 et seq. CISG.[756] Secondly, the fact that substitute delivery was not successful may be the one element that makes the first breach (i.e. the original delivery of non-conforming goods) "fundamental" in the sense of Art. 49(1) lit. (a), Art. 25 CISG and therefore gives the buyer a right to avoid the contract.[757]

c) Choice between substitute delivery and repair

At first sight, it would appear that it is the buyer who has the right to choose between substitute delivery and repair. The predominant opinion, however,

753 *P. Huber*, in: Münchener Kommentar zum Bürgerlichen Gesetzbuch, Art. 46 para. 40.

754 See in that direction *Magnus*, in: Staudinger Kommentar zum Bürgerlichen Gesetzbuch, Art. 46 para. 50; *Schnyder/Straub*, in: Honsell, Kommentar, Art. 46 para. 71.

755 *P. Huber*, in: Münchener Kommentar zum Bürgerlichen Gesetzbuch, Art. 46 para. 41; (French) Cour d'Appel Paris 4 March 1998, CISG-Online No. 535.

756 *Müller-Chen*, in: Schlechtriem/Schwenzer, Commentary, Art. 46 para. 37.

757 *P. Huber*, in: Münchener Kommentar zum Bürgerlichen Gesetzbuch, Art. 46 para. 47.

seems to be that the seller can defeat the buyer's choice by offering repair instead of substitute delivery as long as both methods are equally suitable and sufficient to remedy the initial breach of contract.[758] Several arguments support this view. First, Art. 48 CISG gives the seller a right to cure the defect (subject to several requirements of reasonableness). Secondly, it is the case that the seller's breach as a rule will not be fundamental if it can still be cured without undue burden for the buyer.[759] In principle, there seems to be no reason why cure cannot be effected by repair (unless of course repair would be unreasonable because, for example, it would lead to inacceptable disturbance to the buyer's business or because the buyer simply has no use for mended goods). In many cases, therefore, the seller will be able to defeat the buyer's claim for substitute delivery by reasonably offering and effecting repair. Thirdly, there is an economic argument for that view. It is the seller who has to bear the costs and the risk of failure of the non-performance, so that it should be up to him to choose between several equally suited measures.

d) Substitute delivery before transport?

As discussed above, the policy behind the fundamental breach requirement is to limit the circumstances in which substitute delivery should be available so that additional transport costs and risks with regard to the restitution of the original goods and the delivery of the new goods are avoided. If this is the policy that underlies the existence of the rule, then it might be argued that a fundamental breach may be unnecessary where the goods are still at their original starting point at the time the buyer discovers their lack of conformity and therefore rejects them. Thus, the buyer could claim performance even if the defects do not amount to a fundamental breach.[760]

However one should keep in mind that while the cost-based argument may be one of the underlying policies of Art. 46(2) CISG, the wording of the provision does not contain a specific exception for the cases just mentioned. It is submitted that one should not create an unwritten modification of Art. 46(2) CISG, but strictly adhere to the system that the wording of the provision sets up: As soon as the seller has made a non-conforming "delivery" (whatever that may encompass under Art. 31 CISG in the case at hand), a claim for de-

---

758 *Müller-Chen*, in: Schlechtriem/Schwenzer, Commentary, Art. 46 para. 35 with further references; *P. Huber*, in: Münchener Kommentar zum Bürgerlichen Gesetzbuch, Art. 46 para. 44 et seq.

759 See in more detail below p. 218 et seq. [avoidance]. There are, of course, exceptions to that principle, i.e. those cases where the buyer has a legitimate interest in avoiding the contract without giving the seller the chance to cure the defect.

760 *Müller-Chen*, in: Schlechtriem/Schwenzer, Commentary, Art. 46 para. 19.

livery of other goods (which conform to the contract) will have to be treated as a substitute delivery which requires a fundamental breach.

III. The right to require repair, Art. 46(3) CISG

Art. 46(3) CISG gives the buyer the right to require the seller to remedy the lack of conformity by repair, unless this is unreasonable having regard to all the circumstances. The request for repair must be made either in conjunction with notice given under Art. 39 CISG or within a reasonable time thereafter.

1. Preconditions

a) General requirements and non-conformity

The right to require repair from the seller depends on the general conditions which apply to every claim for performance under Art. 46 CISG (cf. p. 185 et seq.). Art. 46(3) CISG further requires that there has been a delivery of non-conforming goods, and in this respect, the pre-condition is the same as under Art. 46(2) CISG (cf. p. 197 et seq.).

b) Reasonableness

The buyer can claim repair, "unless this is unreasonable having regard to all the circumstances". Whether the unreasonableness "defence" is available, has to be decided by taking into account all the circumstances of the case and by weighing the buyer's interest in getting repair against the seller's expense[761] and inconvenience. The result obviously has to be reached on a case-by-case-basis. It is submitted, however, that the following elements can play a role in that process:

The fact that the costs of repair are considerably higher than the costs of substitute delivery or than the advantage which the buyer will derive from the repair, is a strong indication of unreasonableness in the sense of Art. 46(3) CISG.[762] It is a matter of dispute whether the purchase price should be integrated into that equation.[763]

---

761 *Müller-Chen*, in: Schlechtriem/Schwenzer, Commentary, Art. 46 para. 39.

762 *Müller-Chen*, in: Schlechtriem/Schwenzer, Commentary, Art. 46 para. 40.

763 *Müller-Chen*, in: Schlechtriem/Schwenzer, Commentary, Art. 46 para. 40 with further references.

What is more, one should also take into account which side is in a better position to perform or to organize the repair of the goods. If the defect can be easily removed by the buyer (or by contractors easily available to him) and if the distant seller would have considerable difficulties in organising repair at the place where the goods are, it may prove unreasonable to require the seller to do so; the seller would then have to bear the costs of repair as damages under Art. 45(1) lit. (b), Art. 74 et seq. CISG.

c) Time limit

Art. 46(3) CISG submits the claim for repair to the same time limit as the claim for delivery of substitute goods.[764]

2. Repair

Repair may, in particular, be made by mending the goods or by exchanging defective parts. Repair may even consist in the delivery of a part which had not been delivered originally, as long as this partial failure to deliver amounts to a non-conformity under Art. 35 CISG.[765]

The costs of repair have to be borne by the seller.[766] As for the place of performance, similar arguments may be made as with regard to the claim for substitute delivery (cf. p. 202 et seq.). In the author's opinion, however, the solution should be different with regard to repair. As it would be economically unreasonable to transport the defective goods back to the original place of delivery for repair, it is submitted that the repair should be made at the place where the goods are presently located.[767]

If the buyer claims repair under Art. 46(3) CISG, the question will arise whether the seller can choose to deliver subsitute goods under Art. 46(2) CISG instead. This is the reverse situation to the one discussed above (p. 203 et seq.), but the legal background is somewhat different in so far as the claim

---

764 Cf. above p. 200.

765 This will not be the case if Art. 51 CISG applies to the partial delivery. In that case, the missing part will be regarded as a non-delivery and dealt with under Art. 46(1) CISG, cf. above p. 198 et seq.

766 (German) Oberlandesgericht Hamm 9 June 1995, CISG-Online No. 146; *Müller-Chen*, in: Schlechtriem/Schwenzer, Commentary, Art. 46 para. 45; *P. Huber*, in: Münchener Kommentar zum Bürgerlichen Gesetzbuch, Art. 46 para. 59.

767 *P. Huber*, in: Münchener Kommentar zum Bürgerlichen Gesetzbuch, Art. 46 para. 59; see also *Müller-Chen*, in: Schlechtriem/Schwenzer, Commentary, Art. 46 para. 45 (where the goods are pursuant to the contract).

for repair is not subject to the fundamental breach requirement. Despite that fact, it is submitted that it follows from Art. 48 CISG that the seller can defeat the buyer's claim for repair by making substitute delivery under the conditions of Art. 48 CISG (reasonableness requirements).[768]

IV. The general claim for performance

Art. 46(1) CISG governs the buyer's claim for performance where the seller's breach of duty does not consist in the delivery of non-conforming goods (cf. p. 197 et seq.). Cases which (directly and solely) fall under Art. 46(1) CISG are, for instance: the failure to deliver at all, to deliver on time (Art. 30, 33 CISG) or in the right place (Art. 30, 31 CISG); the failure to transfer the property in the goods to the buyer (Art. 30 CISG); an incorrect tender of documents (Art. 34 CISG); the breach of an agreed duty to instruct the buyer or to undertake sales promotion[769]. The general claim for performance under Art. 46(1) CISG will be subject to the general requirements discussed above (cf. p. 185 et seq.).

V. Burden of proof

In the author's opinion, the following considerations should apply with regard to the burden of proof.[770] The buyer has to prove that the seller's obligation exists. Once he has succeeded in doing so and claimed that there was a breach, it should in principle be for the seller to prove that he actually performed; with regard to the non-conformity of the goods, however, the burden should shift on the buyer as soon as he has accepted the goods.[771] The seller, for his part, bears the burden of proof with regard to his defences arising out of

768 *P. Huber*, in: Münchener Kommentar zum Bürgerlichen Gesetzbuch, Art. 46 para. 61. But see for a different view *Magnus*, in Staudinger Kommentar zum Bürgerlichen Gesetzbuch, Art. 46 para. 53.

769 Cf. *P. Huber*, in: Münchener Kommentar zum Bürgerlichen Gesetzbuch, Art. 46 para. 11; *Magnus*, in: Staudinger Kommentar zum Bürgerlichen Gesetzbuch, Art. 46 Rn. 11.

770 Cf. *P. Huber*, in: Münchener Kommentar zum Bürgerlichen Gesetzbuch, Art. 46 para. 67; see also *Müller-Chen*, in: Schlechtriem/Schwenzer, Commentary, Art. 46 para. 16, 31.

771 See, e.g., (Swiss) Bundesgericht 13 November 2003, Internationales Handelsrecht (IHR) 2004, 215, 218 = CISG-Online No. 840; (German) Bundesgerichtshof 8 March 1995, CISG-Online No. 144. See in more detail *Schwenzer*, in: Schlechtriem/Schwenzer, Commentary, Art. 35 para. 49 et seq.

Art. 79, 80 CISG and out of the inconsistent remedy argument of Art. 46(1) CISG. The burden for the fundamental breach requirement and for the time limits should be on the buyer, whereas the burden for the unreasonableness defence should be on the seller.

§ 11. Avoidance of the contract

I. Introduction

The buyer's right to avoid the contract is governed by Art. 49 CISG. Art. 49(1) CISG sets out the grounds for avoidance while Art. 49(2) CISG submits the remedy to a rather complicated regime of time limits. The effects of avoidance are dealt with in Art. 81 et seq. CISG.

Art. 49(1) CISG is the central element of the Convention's strategy to keep the contract in existence as far as possible and to avoid the costs and risks of restitution which would arise out of its termination. In the eyes of the Convention, avoidance of the contract should only be granted to the buyer as a last resort, i.e. if his legitimate interests cannot be satisfied by any other means.[772] Art. 49(1) CISG gives effect to this policy by strictly limiting the situations in which the buyer has a right to avoid the contract. It reads:

> "The buyer may declare the contract avoided:
> (a) if the failure by the seller to perform any of his obligations under the contract or this Convention amounts to a fundamental breach of contract; or
> (b) in case of non-delivery, if the seller does not deliver the goods within the additional period of time fixed by the buyer in accordance with paragraph (1) of article 47 or declares that he will not deliver within the period so fixed."

In principle, therefore, avoidance is limited to cases of fundamental breach as defined in Art. 25 CISG. The only exception to that rule is Art. 49(1) lit. (b) CISG which allows the buyer to "upgrade" a non-fundamental breach to one which justifies avoidance by using the "Nachfrist"-procedure provided for in Art. 47 CISG. However, this possibility is limited to cases of non-delivery. Thus, if the seller has actually delivered goods and the buyer complains that these are not of the standard required by the contract, he cannot rely on Art. 49(1) lit. (b) CISG, but must instead rely on Art. 49(1) lit. (a) CISG which requires proof of fundamental breach.[773]

---

[772] See p. 181 et seq.

[773] Cf. *Müller-Chen*, in: Schlechtriem/Schwenzer, Commentary, Art. 49 para. 15.

II. Outline: Preconditions for avoidance

The buyer's right to avoid the contract under Art. 49 CISG is subject to the following requirements:

1. Breach of contract by the seller

There must be a breach of contract. Where the breach consists in the delivery of non-conforming goods or of goods infringing third party rights, the buyer must comply with the notice provisions (Art. 39 et seq., 43 et seq. CISG) to be able to declare the contract avoided.[774]

2. Ground of avoidance

There must be a ground of avoidance under Art. 49(1) lit. (a) CISG (fundamental breach) or under Art. 49(1) lit. (b) CISG ("Nachfrist"-procedure).

3. Declaration of avoidance

There must be a declaration of avoidance. This becomes apparent from the wording of Art. 49 CISG and from Art. 26 CISG. Avoidance will therefore not occur "ipso facto" or by operation of the law. It will have to be declared by the buyer.

The declaration need not be made in any particular form. Neither is it necessary that it contains the word "avoidance". It must however make clear that the buyer is no longer prepared to perform the contract as a result of the seller's breach.[775]

---

774 Cf. *Will*, in: Bianca/Bonell, Commentary, Art. 49 para. 2.2.2.

775 *Müller-Chen*, in: Schlechtriem/Schwenzer, Commentary, Art. 49 para. 24; *P. Huber*, in: Münchener Kommentar zum Bürgerlichen Gesetzbuch, Art. 49 para. 11 et seq. See also (Austrian) Oberster Gerichtshof 5 July 2001, Internationales Handelsrecht (IHR) 2002, 73 = CISG-Online No. 652; (Austrian) Oberster Gerichtshof 6 February 1996, CISG-Online No. 224; (German) Oberlandesgericht Köln 14 October 2002, Internationales Handelsrecht (IHR) 2003, 15 = CISG-Online No. 709; (German) Oberlandesgericht Karlsruhe 19 December 2002, Internationales Handelsrecht (IHR) 2003, 125 = CISG-Online No. 125.

Declaration of avoidance falls under the provision of Art. 27 CISG.[776] Thus if it is made by means appropriate in the circumstances, a delay or error in the transmission of the communication or its failure to arrive does not deprive the buyer of the right to rely on the declaration.

4. Time limit

In cases falling within Art. 49(2) CISG, the declaration must be made within the time limits set there (see below p. 239 et seq.). As described above, sending the declaration by appropriate means may suffice to meet these time limits under Art. 27 CISG.

5. Possibility to make restitution of the goods

In principle, it must be possible for the buyer to make restitution of the goods (Art. 82 CISG). According to Art. 82(1) CISG, the buyer loses his right to avoid the contract[777] if it is impossible for him to make restitution of the originally delivered goods substantially in the condition in which he received them. Whether there is impossibility to make restitution has to be ascertained as of the moment when the buyer declared the contract avoided.[778] According to the principle underlying Art. 27 CISG, this must be the moment when he dispatches it in an appropriate way.[779] If proper restitution becomes impossible after that moment, Art. 82(1) CISG will not apply and the buyer will not be retroactively deprived of his right to avoid the contract. The avoidance remains effective. The buyer may, however, be liable in damages.[780]

---

776 *Müller-Chen*, in: Schlechtriem/Schwenzer, Commentary, Art. 49 para. 25.

777 The same is true for the buyer's right to claim substitute delivery. This shows again the Convention's policy to treat substitute delivery and avoidance alike in so far as it is necessary to avoid restitution of goods that have already been delivered. See above p. 199).

778 Art. 82(1) CISG provides that the buyer loses his right to *declare* the contract avoided. Cf. *Hornung*, in: Schlechtriem/Schwenzer, Commentary, Art 82 para. 6, 13; (German) OLG Frankfurt 17 September 1991, CISG-Online No. 28.

779 *Magnus*, in: Staudinger Kommentar zum Bürgerlichen Gesetzbuch, Art. 82 para. 14 et seq.

780 Cf. *Hornung*, in Schlechtriem/Schwenzer, Commentary, Art. 82 para. 13 et seq.; *Weber*, in: Honsell, Kommentar, Art. 82 para. 13; *Magnus*, in: Staudinger Kommentar zum Bürgerlichen Gesetzbuch, Art. 82 CISG para. 14 et seq. It is submitted that this liability arises from the breach of his obligation to keep the goods intact and ready for return after having declared avoidance of the contract. That

Art. 82(2) CISG, however, restricts substantially the principle set out in Art. 82(1) CISG. It provides that the buyer will not lose his right to declare the contract avoided in any of the following three situations.

First, the right to avoid the contract will not be lost if the impossibility of making "proper" restitution of the goods is not due to the buyer's act or omission. Whether the impossibility to make restitution is due to an act or omission by the buyer may not prove to be an easy question to answer (Art. 82(2) lit. (a) CISG). On the one hand, the buyer's responsibility is not limited to cases where he can be shown to have been at fault. The impossibility of making restitution may, for example, be due to an act for which he is responsible but which was not his fault. On the other hand, the causality requirement has to be restricted in some way in order to avoid the buyer being held responsible for every item of damage to the goods that happens while the goods are under his control. It is submitted that the line should be drawn according to the spheres of control and influence, having regard to the principles underlying Art. 79 CISG. In short, this will usually mean that the buyer will have to bear those risks which he could have foreseen or controlled.[781]

Secondly, Art. 82(2) lit. (b) CISG exempts the buyer from those impediments which arose from the examination provided for in Art. 38 CISG. This

---

obligation can be derived either from Art. 86 CISG or from the nature of the legal relationship which continues to exist between the parties for the purpose of winding up the contract (cf. *Weber*, in: Honsell, Kommentar, Art. 82 para. 13; *Hornung*, in: Schlechtriem/Schwenzer, Commentary, Art. 82 para. 13, Art. 81 para. 10. It does not fall under the proviso in Art. 81(1) CISG, first sentence, which only covers claims already in existence at the moment of avoidance (cf. *Weber*, in: Honsell, Kommentar, Art. 91 para. 9 et seq.). Given the fact that the claim is for damages it would also seem to be right to exempt the buyer from his liability in the cases of Art. 79 CISG (cf. *Weber*, in: Honsell, Kommentar, Art. 82 para. 13; *Magnus*, in: Staudinger Kommentar zum Bürgerlichen Gesetzbuch, Art. 82 para. 15). Another possibility would be to exempt the buyer along the lines of Art. 82(2) CISG (cf. *Hornung*, in: Schlechtriem/Schwenzer, Commentary, Art. 82 para. 13). In practice that would boil down to Art. 82(2) lit. (a) CISG, because the situations envisaged in Art. 82(2) lit. (b) and (c) CISG will not arise after the buyer has declared avoidance. Alternatively, the buyer could be exempted if either Art. 79 or 82(2) CISG applies (cf. *Magnus*, in: Staudinger Kommentar zum Bürgerlichen Gesetzbuch, Art. 82 para. 15).

781 Cf. *Hornung*, in: Schlechtriem/Schwenzer, Commentary, Art. 82 para. 20; *P. Huber*, in: Münchener Kommentar zum Bürgerlichen Gesetzbuch, Art. 82 para. 12 et seq.

is a logical consequence from the fact that Art. 38 CISG requires him to undertake such an examination.

Finally, under Art. 82(2) lit. (c) CISG the buyer will not lose his right to declare the contract avoided if the impossibility of making proper restitution is due to the use he has made of them in the normal course of business, be it by resale, consumption or transformation. However, that is true only where the relevant acts have been done before he knew or ought to have known of the lack of conformity.

6. No defence under Art. 80 CISG

There must be no defence of the seller under Art. 80 CISG. The buyer will therefore not be able to rely on the seller's breach to the extent that this breach was caused by his own (the buyer's) act or omission.[782]

III. Avoidance for fundamental breach

1. General concept of fundamental breach

According to Art. 25 CISG a breach is fundamental "if it results in such detriment to the other party as to substantially deprive him of what he is entitled to expect under the contract, unless the party in breach did not foresee and a reasonable person of the same kind in the same circumstances would not have foreseen such a result".

The provision therefore sets up two criteria for the fundamental breach test: the substantial deprivation requirement and the foreseeability requirement. Each criterion will be discussed in turn. It should be borne in mind, however, that any general definition of the concept of fundamental breach must necessarily remain vague because of the variety of situations it has to cover. It will therefore not be possible to find concise abstract formulas which will automatically lead to the correct results in practice. The concept of fundamental breach will rather have to be approached by distinguishing between different typical case scenarios. In fact, there is a substantial amount of case law and legal writing which makes that task possible (cf. below p. 225 et seq.). As a consequence, the discussion of the general issues will be kept short.

782 For a more detailed analysis of Art. 80 CISG see the chapter on damages p. 265 et seq.

a) Substantial deprivation

The substantial deprivation requirement may in theory be divided into two parts. The first part is that the breach must have resulted in a "detriment" to the other party (the promisee). It is submitted that this is not the decisive part of the formula and that it should be construed in a very wide way. In particular, it does not mean that the promisee must actually have suffered a loss or a damage as a result of the breach. The crucial question will arise under the second part of the formula, i.e. whether the promisee was "substantially deprived of what it was entitled to expect under the contract." In the author's opinion one should therefore primarily look at that second part of the formula: If it turns out that the promisee was deprived of what he was entitled to expect under the contract, there will automatically be a "detriment", too.

That approach can also be based on the legislative history of the provision at the Vienna Conference where different versions were discussed and where it was difficult to find an agreement on the final wording. In fact, one of the proposals had been to define the fundamental breach simply by referring to a "substantial detriment" caused to the promisee. This was regarded by the majority as misleading as one wanted to define the concept no longer by reference to the extent of the damage caused, but rather by reference to the legitimate interests of the promisee as evidenced in particular in the contract. This is why the second part of the formula was inserted into the text of the Convention. It is therefore clearly that part which is the crucial one.[783]

Again, it would be hard to find a precise abstract definition of when a breach substantially deprives the innocent party of what it could expect under the contract. It is submitted, however, that a few general principles can be deduced from the provision. First, it is clear that the contractual agreement will be of paramount importance. The parties can expressly or implicitly attach a particular weight to certain obligations with the consequence that their breach will be regarded as fundamental.[784] If no contractual agreement can be ascertained, one will have to look at the general purpose of the contract and see whether it will be frustrated by the breach.[785]

Secondly, the formula looks rather to the side of the promisee (here the buyer) than to that of the promisor (here the seller). It is less important how drasti-

783 Cf. *Schlechtriem*, in: Schlechtriem/Schwenzer, Commentary, Art. 25 para. 2.

784 *Schlechtriem*, in: Schlechtriem/Schwenzer, Commentary, Art. 25 para. 9.

785 Cf. *Magnus*, in: Staudinger Kommentar zum Bürgerlichen Gesetzbuch, Art. 25 para. 13; *Schlechtriem*, in: Schlechtriem/Schwenzer, Commentary, Art. 25 para. 14; *Karollus*, in: Honsell, Kommentar, Art. 25 para. 15 et seq. with differences in detail.

cally the seller disregarded his duties (in other words: how badly he behaved), the question of fundamental breach depending instead on how important a proper performance would have been for the buyer. On the buyer's side, the focus is rather on the importance of his interest in proper performance than on the extent of the damage caused by the breach. Of course, the fact that there has been substantial damage may be an indication that performance of that particular obligation was of great importance for the buyer. However, a breach may substantially deprive the buyer of what he was entitled to expect under the contract although no actual damage was suffered. Suppose, for example, a contract where delivery was required by a fixed date and where it was made clear that time was of the essence. In that case, any delay in performance will substantially deprive the buyer of what he was entitled to expect under the contract.[786]

Finally, it follows from the words of Art. 25 CISG that the test is objective rather than subjective. It does not really matter what the promisee actually expected, but what he was entitled (reasonably) to expect, i.e. what a reasonable third party would have expected under the circumstances.

b) Foreseeability

Even if the seller's breach will substantially deprive the buyer of what he was entitled to expect under the contract, the breach will not be fundamental, if that result was not foreseeable. The foreseeability test is both subjective and objective in that it depends not only upon whether the party in breach actually foresaw the result, but also on whether a reasonable person of the same kind in the same circumstances would have foreseen it. The party in breach therefore will only be able to rely on the foreseeability requirement if it neither foresaw nor should have foreseen that result.

Given the wording of the provision ("unless"), it is submitted that the burden of proof with regard to the foreseeability exception should be on the seller.[787] Such a conclusion is in line with the predominant opinion on the legal nature of the rule which regards it as an exception or as a ground for excusing the promisor from certain types of remedies which require a fundamental breach (in particular avoidance and substitute delivery).[788]

---

786 Cf. *Schlechtriem*, in: Schlechtriem/Schwenzer, Commentary, Art. 25 para. 9.

787 Cf. (German) Bundesgerichtshof 3 April 1996, CISG-Online No. 135 ("cobalt sulphate"); *Magnus*, in: Ferrari/Flechtner/Brand, The Draft UNCITRAL Digest and Beyond, p. 324. But see also for a more differentiated view *Schlechtriem*, in Schlechtriem/Schwenzer, Commentary, Art. 25 para. 16.

788 For the legal nature of that provision see in great detail (but with a differing view) *Schlechtriem*, in: Schlechtriem/Schwenzer, Commentary, Art. 25 para. 11 et seq.

The sole point of reference of the foreseeability test is the consequence of the breach, i.e. the fact that the breach actually deprived the promisee of what he was entitled to expect under the contract. It is therefore irrelevant whether the promisor foresaw (or could have foreseen) the breach himself.[789]

There is some controversy as to the relevant time for determining the foreseeability issue. Should one solely look to the conclusion of the contract or should one take later elements into account? The issue was deliberately left open by the Diplomatic Conference.[790] The predominant view seems to be that it will depend on the time of the conclusion of the contract.[791] It is submitted that this view is correct. It is in line with the purpose of the foreseeability rule, which is to enable the promising party to assess its liability risks at the time of the conclusion of the contract. What is more, the related foreseeability rule in Art. 74 CISG makes express reference to the time when the contract was concluded. That can be regarded as an expression of a general principle of the Convention (Art. 7(2) CISG) to the effect that the foreseeability should be assessed as of the date of the conclusion of the contract.

In the author's opinion, the practical relevance of the foreseeability requirement in Art. 25 CISG will in all likelihood be limited because the substantial deprivation test uses similar criteria to that of the foreseeability test. The substantial deprivation test looks to the contract to see what the buyer was entitled to expect and does so from an objective point of view. If this requirement is met, i.e. if the buyer actually was deprived of what he was *entitled to* expect *under the contract*, it will be very hard for the seller to show that this consequence could not have been foreseen by a reasonable person in the same circumstances.

2. Criteria for assessing the fundamental character of the breach

There is abundant case law and legal writing on the fundamental breach doctrine.[792] It is, of course, not possible to even attempt to give a complete

789 *Magnus*, in: Staudinger Kommentar zum Bürgerlichen Gesetzbuch, Art. 25 para. 14.

790 See *Schlechtriem*, in: Schlechtriem/Schwenzer, Commentary, Art. 25 para. 15.

791 (German) Oberlandesgericht Düsseldorf 24 April 1997, CISG-Online 385; *Schlechtriem*, in: Schlechtriem/Schwenzer, Commentary, Art. 25 para. 15; *Magnus*, in: Ferrari/Flechtner/Brand, The Draft UNCITRAL Digest and Beyond, p. 324; *Ferrari*, Internationales Handelsrecht (IHR) 2005, 1, 7. But see also *Will*, in: Bianca/Bonell, Commentary, Art. 25, para. 2.2.2.2.5 for a view that wants to take later developments into account.

792 See for a short outline of the case law: *UNCITRAL Digest* Art. 49 para. 5 seq.

picture here. In the author's opinion, however, it is possible to discern from those sources a consistent approach to the criteria that may be used when deciding on whether the seller's breach was fundamental in the sense of Art. 25 CISG. It is submitted that there are in essence four criteria which can be taken into account when deciding on the fundamental character of the non-conforming delivery. These will be analysed in turn.

a) Contractual agreement

The first criterion is self-evident and generally accepted. The parties may in their contract define which of the requirements shall be fundamental in the sense that their breach will lead to a right of avoidance.[793] They may do so explicitly or in an implied manner. What is more, it is submitted that the fundamental character of a term or of an obligation may result from the commercial background of the case.

b) Seriousness of the breach

The second criterion is the seriousness of the breach.[794] As explained above, this criterion should primarily be assessed from the perspective of the buyer: How important was that particular obligation for him, on the basis of an objective interpretation of the contract ("was entitled to expect under the contract")? Within that perspective, it may of course also be relevant to see how "bad" the seller's breach was, i.e. how far he was away from what he had promised in the contract.

c) Seller's right to cure?

One of the most hotly disputed questions under the CISG has been how far the possibilty of cure can be taken into account when deciding on whether a breach was fundamental in the sense of Art. 25 CISG. The issue will be dealt with in more detail under 3. Suffice it to say here that today the predominant opinion takes the view that, as a rule, the curability of the breach should be taken into account when deciding on whether the breach was fundamental under Art. 49(1) lit. (a), Art. 25 CISG, unless the buyer has a particular and legitimate interest in being allowed to avoid the contract immediately. As a

---

793 See for instance (German) Bundesgerichtshof 3 April 1996, CISG-Online No. 135; *Magnus*, in: Ferrari/Flechtner/Brand, The Draft UNCITRAL Digest and Beyond, p. 322; *P. Huber*, in; Münchener Kommentar zum Bürgerlichen Gesetzbuch, Art. 49 para. 36; *Schlechtriem*, in: Schlechtriem/Schwenzer, Commentary, Art. 25 para. 21a; *Bernstein/Lookofsky*, Understanding the CISG in Europe, p. 125.

794 See for instance (German) Oberlandesgericht München 2 March 1994, CISG-Online No. 108; U.S. Court of Appeals (2nd Circuit) 6 December 1995, CISG-Online No. 140 (Rotorex Corp. v Delchi Carrier S.p.A.).

rule, therefore, even a serious breach will not be fundamental if the seller offers to cure it under Art. 48 CISG.

d) Reasonable use test?

Where the seller had delivered non-conforming goods several courts have looked to whether the buyer could make some (other) reasonable use of the goods. They have for example, refused the right to avoid the contract if it was possible and reasonable for the buyer to resell the goods in the ordinary course of business, albeit for a lower price, and to claim damages for the losses incurred. This criterion will be discussed in more detail below (p. 228 et seq.).

3. Seller's right to cure

The Convention contains two provisions on the seller's right to cure a breach. Art. 37 CISG is concerned with the situation where the seller has delivered goods before the date for delivery and wants to cure certain breaches before that date (this provision has been dealt with above (p. 146)). The more important provision in practice is Art. 48 CISG which deals with the seller's right to cure a breach *after* the time of performance. Art. 48 CISG recognises that the right to cure may arise in two situation, the first of which depends upon an application of the requirements of Art. 48(1) CISG (cf. below a), while the second is founded on an (implied) "agreement" between the parties (Art. 48(2) CISG, cf. below b). The interaction between the seller's right to cure and the buyer's right to avoid the contract may lead to intricate questions which will be dealt with under c.

a) Right to cure under Art. 48(1) CISG

Under certain circumstances Art. 48(1) CISG gives the seller a right to remedy (at his own expense) a failure to perform his obligations. Art. 48 CISG applies to *an*y failure by the seller to perform his obligations under the contract. In practice, however, its main field of application will be the delivery of non-conforming goods.[795]

The seller's right to cure is subject to a reasonableness requirement. The seller must be able to effect cure "without unreasonable delay and without causing the buyer unreasonable inconvenience or uncertainty of reimbursement by the seller of expenses advanced by the buyer". It goes without saying that Art. 48(1) CISG also presupposes that cure must actually be possible.[796]

---

[795] *Müller-Chen*, in: Schlechtriem/Schwenzer, Commentary, Art. 48 para. 3, 1.

[796] Cf. *Müller-Chen*, in: Schlechtriem/Schwenzer, Commentary, Art. 48 para. 5.

The delay caused will usually be "unreasonable" at any rate if it is so serious as to amount to a fundamental breach in itself.[797] It can, however, also be unreasonable below that threshold. It has been held, for instance, that the delay may be unreasonable, if it makes the buyer liable towards his own sub-buyers.[798] The term "unreasonable inconvenience" refers for instance to the disturbances that cure would bring to the buyer's business.[799] The reference to uncertainty of reimbursement may at first sight appear surprising as Art. 48(1) CISG explicitly presupposes that the seller effects cure at his own expense. The provision may, however, become relevant if cure could only by effected if the buyer cooperated and if such cooperation would create costs; in that case, the seller will only have a right to cure under Art. 48(1) CISG if there is no uncertainty concerning the reimbursement of the buyer's expenses. The seller could, for instance, create certainty in that regard by providing security for those expenses.[800]

According to the clear wording of Art. 48(1) CISG the seller's right to cure is "subject to article 49", i.e. to the buyer's right to avoid the contract. It is this part of the provision which has created considerable controversy with regard to the relationship between the seller's right to cure and the fundamental breach doctrine. This will be dealt with below (p. 221-225).

In principle, the seller is not restricted to any particular measures of cure, as long as they are suited to remedy the defect to the full satisfaction of the buyer's legitimate interests. If different methods of cure exist, the choice of which method to adopt is for the seller subject only to the reasonableness requirement. He should, however, try to choose the one that causes the least inconvenience for the buyer.[801] In the author's opinion, it will also be for the seller to choose between substitute delivery and repair, provided both are equally suited and acceptable to the buyer.[802]

---

797 *Secretariat Commentary* Art. 44 para. 3; *Will*, in: Bianca/Bonell, Art. 48 para. 2.1.1.1.2; *P. Huber*, in: Münchener Kommentar zum Bürgerlichen Gesetzbuch, Art. 48 para. 6.

798 (German) Amtsgericht München 23 June 1995, CISG-Online No. 368.

799 *P. Huber*, in: Münchener Kommentar zum Bürgerlichen Gesetzbuch, Art. 48 para. 7.

800 *P. Huber*, in: Münchener Kommentar zum Bürgerlichen Gesetzbuch, Art. 48 para. 8; moreover cf. *Will*, in: Bianca/Bonell, Commentary Art. 48 para. 2.1.1.1.2.

801 *P. Huber*, in: Münchener Kommentar zum Bürgerlichen Gesetzbuch, Art. 48 para. 13.

802 See. p. 203 et seq. above (chapter on performance); *P. Huber*, in: Münchener Kommentar zum Bürgerlichen Gesetzbuch, Art. 48 para. 13. But see for a different view *Magnus*, in: Staudinger Kommentar zum Bürgerlichen Gesetzbuch, Art. 48

It is submitted that the place of performance for the cure should be the place of performance of the original obligation. If, however, cure is made by substitute delivery or by repair, the special considerations regarding the place of performance of those obligations should be taken into account.[803]

The seller will have to cure the breach at his own expense. As mentioned above, this rule also applies to the expenses that may arise for the buyer who has to cooperate in order to make cure work (for instance by providing personnel in order to enable the seller's employees to get access to the sold machine).

Art. 48(1) CISG in its second sentence provides that cure by the seller will not have any effect on the buyer's right to claim damages under the Convention. Two points should, however, be noted with regard to that provision. First, it does not by itself form the basis for a claim for damages, but simply says that cure does not exclude a claim for damages if such a claim exists. The buyer will therefore (only) be able to claim damages, if the general requirements for such a claim (Art. 45(1) lit. (b), Art. 74 et seq. CISG) are met. Secondly, the provision obviously only refers to those types of damage which result from the original breach and which cannot be removed by the cure.[804] If, for instance, a machine is delivered two weeks after the agreed time, the buyer may – if the requirements of Art. 45(1) lit. (b), Art. 74 et seq. CISG are met – claim damages for any loss of profit which results from the fact that he could not use the machine during that period. The same would be true if the machine was delivered in time, but had a defect (Art. 35 CISG) the repair of which took the seller two weeks. In the latter case damages would be recoverable for any lost profit incurred while the machine was being repaired and not for the difference in value between the (unrepaired) machine and the value that a conforming machine would have had at the time of delivery.

b) Right to cure under Art. 48(2) CISG

A seller who is willing to cure will usually not know whether the buyer is ready to accept his offer or whether he is likely to reject it, for instance by relying on the reservation of his right under Art. 49 CISG or by arguing that cure would be unreasonable in the sense of Art. 48(1) CISG. Art. 48(2) and

---

para. 32 and *Will*, in: Bianca/Bonell, Commentary, Art. 48 para. 3.1 (as a rule buyer's choice unless Art. 48(2) CISG applies and binds the buyer).

803 See p. 202 et seq. and p. 206 (chapter performance).

804 See *P. Huber*, in: Münchener Kommentar zum Bürgerlichen Gesetzbuch, Art. 48 para. 20; *Müller-Chen*, in: Schlechtriem/Schwenzer, Commentary, Art. 49 para. 21.

(3) CISG give the seller the chance to clarify the situation by contacting the buyer.

Under these provisions, the seller must indicate to the buyer that he is willing to perform within a certain period and request him to make known whether he will accept performance.[805] Art. 48(3) CISG provides that a notice by the seller that he will perform within a specified period of time is assumed to include such a request. It is important to note however that, according to Art. 48(4) CISG, the seller's request is not effective unless received by the buyer.[806]

If the buyer does not respond within a reasonable time, or if he accepts the seller's offer, the seller will have a right to cure irrespective of whether the requirements of Art. 48(1) CISG are actually met.[807] If, on the other hand, the buyer rejects the seller's offer within a reasonable time, Art. 48(2) CISG will have no effect on the existence of a right to cure. Whether such a right to cure exists will then have to be decided according to the general criteria of Art. 48(1) CISG.

c) Interaction between right to cure and avoidance

The interaction between the seller's right to cure and the buyer's right to avoid the contract may lead to problems if the right to cure is based on Art. 48(1) CISG, but not if it is based on Art. 48(2) CISG.

If the buyer has, expressly or by remaining silent, "accepted" the seller's offer under Art. 48(2) CISG, the seller's right to cure takes precedence over the buyer's right to avoid the contract. This follows from both the agreement the parties have reached and the second sentence of Art. 48(2) CISG which provides that during the time the seller has indicated for his attempts at cure, the buyer may not resort to any remedy which is inconsistent with performance by the seller.

If, however, there is no "agreement" in the sense of Art. 48(2) CISG, the seller's right to cure can only result from the general rule in Art. 48(1) CISG. The crucial point here is the reservation which is made there in favour of Art. 49 CISG. At first sight, this seems to be clear enough: The right to cure

805 *Müller-Chen*, in: Schlechtriem/Schwenzer, Commentary, Art. 48 para. 25.

806 This is an exception to the general principle of Art. 27 CISG.

807 *P. Huber*, in: Münchener Kommentar zum Bürgerlichen Gesetzbuch, Art. 48 para. 23; *Müller-Chen*, in: Schlechtriem/Schwenzer, Commentary, Art. 48 para. 27; *Magnus*, in: Staudinger Kommentar zum Bürgerlichen Gesetzbuch, Art. 48 CISG para. 41.

is "subject to article 49", so that the buyer's right to avoid the contract takes precedence over the right to cure. If, therefore, the requirements of Art. 49 CISG are met, avoidance will be available for the buyer. This does not, however, solve the problem. It only shifts it to the interpretation of Art. 49 CISG. One now has to decide whether the possibility of cure has to be taken into account when it comes to determine whether the seller's breach was "fundamental" for the purposes of Art. 49(1) lit. (a), Art. 25 CISG. To put it in other words, can the seller's breach be fundamental if it can be (and finally is) cured in accordance with Art. 48(1) CISG?

The history of Art. 48, 49 CISG does not permit definite conclusions in that respect. A proposal not to insert any reservation in favour of Art. 49 CISG (thus strenghtening the seller's right to cure) was rejected at the Vienna Conference.[808] This, however, only allows the conclusion that, in principle, the right of avoidance, *if it exists*, shall not be impaired by the cure provision. It does not necessarily mean that the curability of the defect must not be regarded when it comes to examine the *preconditions* of the right to avoid, i.e. the concept of fundamental breach.

The issue concerning the interaction between the seller's right to cure and the buyer's right to avoid the contract was intensively debated in the "early years" of the Convention.[809]

In the author's opinion, the best solution to the problem is the one advocated by the (now) predominant opinion both in case law[810] and in legal writing[811]. According to this, the curability of the breach should, as a general rule, be

---

808 O.R. Doc. C(5), Art. 44 para. 3, 10 p. 114, 116 (in: *Honnold*, Documentary History, p. 686, 688) and O.R. Doc. C(4), Art. 44, p. 341-344 para. 37-90, especially: para. 37, 50 (in: *Honnold*, Documentary History, p. 562-565).

809 For more detail and further references see *P. Huber*, in: Münchener Kommentar zum Bürgerlichen Gesetzbuch, Art. 48 para. 21 et seq.; *Will*, in: Bianca/Bonell, Commentary, Art. 48 para. 3.2 and 2.1.1.1.1.

810 See for instance (German) Oberlandesgericht Köln 14 October 2002, Internationales Handelsrecht (IHR) 2003, 15 = CISG-Online No. 709; (German) Oberlandesgericht Koblenz 31 January 1997, Internationales Handelsrecht (IHR) 2003, 172 = CISG-Online No. 256; (Swiss) Handelsgericht des Kantons Aargau 5 November 2002, Internationales Handelsrecht (IHR) 2003, 178 = CISG-Online No. 715.

811 *Müller-Chen*, in: Schlechtriem/Schwenzer, Commentary, Art. 48 para. 15; *P. Huber*, in: Münchener Kommentar zum Bürgerlichen Gesetzbuch, Art. 49 para. 28 et seq.; *Magnus*, in: Ferrari/Flechtner/Brand, The Draft UNCITRAL Digest and Beyond, p. 323.

taken into account when deciding whether the breach was fundamental under Art. 49(1) lit. (a), Art. 25 CISG. Thus a breach that can be cured in accordance with the requirements of Art. 48(1) CISG will usually not be regarded as fundamental, unless the seller refuses or fails to cure. By way of an exception, however, the curability of the breach should not be taken into account, where the buyer has a particular and legitimate interest in being allowed to avoid the contract immediately. In such a case the breach should be regarded as fundamental without regard to its curability.

It is submitted that, broadly speaking, a legitimate interest in immediate avoidance can derive either from the particular gravity of the breach or from the contractual agreement in its widest sense.

The first alternative will, for example, cover those cases where the basis of trust between the parties has been destroyed as a result of the seller's breach. That may in particular result from deceitful conduct by the seller (e.g. deliberate delivery of cheap imitations under a sale of technical equipment of a particular brand) or from his obvious incapability to perform his obligations. A good example of the latter case is the decision of the Oberlandesgericht Köln of October 14th, 2002[812a]. There, a sale of clothes had gone terribly wrong, as many items delivered in the first consignment were seriously defective because they were far too small, prone to tear easily and badly cut. As a result the clothes were more or less unusable and the court therefore concluded that due to the seriousness of the seller's breaches the buyer was entitled to avoid the contract for fundamental breach right away, without being obliged to accept the seller's offer to cure.

Under the second alternative, the buyer's legitimate interest in immediate avoidance results from the contractual agreement construed in its widest sense. Thus, where the contract requires performance by a fixed date or where late performance will be of no interest to the buyer, time will be treated as of the essence of the contract and any delay will entitle the buyer to avoid the contract.[812] The fact that time is of the essence can arise from an explicit stipulation in the contract or from the commercial background of the transaction. So for instance, time will usually be of the essence in most so-called

[812] Cf. *Müller-Chen*, in: Schlechtriem/Schwenzer, Commentary, Art. 48 para. 15; *P. Huber*, in: Münchener Kommentar zum Bürgerlichen Gesetzbuch, Art. 49 para. 28.

[812a] (German) Oberlandesgericht Köln 14 October 2002, CISG-Online No. 709; the court also took into consideration that due to the "seasonal" character of the clothes there was not much time left for cure.

documentary sales contracts, particularly where the subject matter of the sale is a commodity the price of which is subject to regular market fluctuations.[813]

Under the second alternative, the buyer may also have a legitimate interest in immediate avoidance where according to the contract it was essential that the subject matter of the sale should be exactly as promised, as for instance when a work of art or an antique piece of furniture are sold on the condition that they are 100 percent original and there have not been any measures of restoration.

It remains to be examined whether anything turns on which side acts first. Does it make a difference if the buyer declares the contract avoided before the seller has offered cure under Art. 48 CISG or vice versa? It is submitted that the answer should be "No". If the buyer declares avoidance of the contract without waiting for the seller's reaction to the breach, it will depend on whether avoidance is justified under Art. 49(1) lit. (a) CISG. However, under the view taken here, the requirements of Art. 49(1) lit. (a) CISG will only be met in that case if the buyer had a legitimate interest in avoiding the contract immediately. If he did not the breach will only be fundamental after an attempt at cure has failed. The seller will therefore get his chance to cure, irrespective of whether he offered it before or after the seller's declaration of avoidance. The situation is not materially different if the seller has offered cure before the buyer declares avoidance. Again, the crucial question will be whether the requirements of Art. 49(1) lit. (a) CISG are met. If that is the case (because the buyer has a legitimate interest in avoiding the contract immediately) then, as a matter of principle, there is a right to avoid the contract. According to the reservation in Art. 48(1) CISG, this will take precedence over the seller's right to cure.[814] Neither the wording nor the history[815]

---

[813] *P. Huber*, in: Münchener Kommentar zum Bürgerlichen Gesetzbuch, Art. 49 para. 28. See for more detail on the general issue *Schlechtriem*, 18 Pace International Law Review, (2006) 83 et seq.; *Mullis*, in: Andreas & Jarborg (eds.), Anglo-Swedish Studies in Law (1998) p. 326 et seq.

[814] *Müller-Chen*, in: Schlechtriem/Schwenzer, Commentary, Art. 48 para. 15; *Magnus*, in: Staudinger Kommentar zum Bürgerlichen Gesetzbuch, Art. 48 para. 22 et seq.; *P. Huber*, in: Münchener Kommentar zum Bürgerlichen Gesetzbuch, Art. 49 para. 33. But see for a differing opinion *Will*, in: Bianca/Bonell, Commentary, Art. 48 para. 3.2.1.; *Honnold*, para. 296; *Schnyder/Straub*, in: Honsell, Kommentar, Art. 48 para. 35 et seq.

[815] Cf. O.R. Doc. C(5), Art. 44, p. 114 et seq. (in: *Honnold*, Documentary History, p. 686 et seq.): The original version ("Unless the buyer has declared the contract avoided in accordance with …") was not included in the final text, but replaced by the provision: "Subject to …".

of that reservation supports the conclusion that it depends on the buyer actually having declared his right to avoid before the seller offered cure.

4. Specific case scenarios

a) Delay in delivery

As a general rule, the mere fact that the seller has not delivered the goods on the agreed date for delivery does not amount to a fundamental breach. This submission is supported by ample authority.[816] It can also be derived from the structure of Art. 49(1) CISG which provides in lit. (b) that in cases of delay in performance the buyer may fix an additional period of time under Art. 47 CISG and declare the contract avoided after that period has expired without delivery being made. That "Nachfrist"-mechanism would be meaningless if every delay per se consituted a fundamental breach under lit. (a). The submission made above is also in line with the general criteria for the assessment of the fundamental character of a breach in that normally the consequences of a delay for the buyer will not be so serious as to substantially deprive him of what he was entitled to expect under the contract ("seriousness-criterion"). What is more, the non-delivery may be "cured" by later delivery with the damage resulting from the delay being compensated by a claim under Art. 45(1) lit. (b), Art. 74 et seq. CISG.

A delay in performance may, however, amount to a fundamental breach if time was of the essence, i.e. if punctual delivery was of crucial importance to the buyer, and if that was apparent to the seller at the conclusion of the contract. The fact that time was of the essence can result from an express stipulation in the contract or from the circumstances of the case, in particular from the commercial background of the transaction.[817] Thus, for instance, the use

[816] See for instance (German) Oberlandesgericht Hamburg 28 February 1997, CISG-Online No. 261; (German) Oberlandesgericht Düsseldorf 24 April 1997, CISG-Online No. 385; Arbitral Award, ICC 8128/1995, 1 January 1995, CISG-Online No. 526; *Müller-Chen*, in: Schlechtriem/Schwenzer, Commentary, Art. 49 para. 5; *P. Huber*, in: Münchener Kommentar zum Bürgerlichen Gesetzbuch, Art. 49 para. 34. See also for a somewhat complicated case on delay in delivery US Federal District Court New Jersey 4 April 2006, CISG-Online No. 1216.

[817] See for example (German) Oberlandesgericht Düsseldorf 21 April 2004, Internationales Handelsrecht (IHR) 2005, 24 = CISG-Online No. 915.

of the term "CIF (Incoterms)" will usually lead to such a result.[818] The same will usually be true if a "just-in-time"-delivery was agreed or where the nature of the sold goods indicates that time was of the essence, for instance in case of goods which are quickly perishable.[819] The situation is similar in case of seasonal articles which are delivered too late to be marketed in the relevant season.[820] In the author's opinion the delay will also be fundamental where it was evident to the seller that the buyer had already re-sold the goods and that the buyer would become liable to his sub-buyers if he delivered late.[821]

If time was not intended by the parties to be of the essence, the question arises whether a delay may nevertheless, by virtue of its long duration, entitle the buyer to treat the delay as a fundamental breach. On the one hand, it might be argued that as the buyer can always avoid the contract by using the "Nachfrist"-procedure in Art. 49(1) lit. (b), Art. 47 CISG, a delay however lengthy should never, in itself, entitle the buyer to avoid the contract. It is submitted however that such an approach should not be followed and that a delay may become fundamental after a certain time.[822] It goes without saying that it will be difficult to define the exact moment when this is the case.

---

818 See (German) Oberlandesgericht Hamburg 28 February 1997, CISG-Online No. 261; *P. Huber*, in: Münchener Kommentar zum Bürgerlichen Gesetzbuch, Art. 49 para. 34.

819 *P. Huber*, in: Münchener Kommentar zum Bürgerlichen Gesetzbuch, Art. 49 para. 34; *Ferrari*, Internationales Handelsrecht (IHR) 2005, 1, 8; *Graffi*, in: Ferrari, The 1980 Uniform Sales Law, p. 313. But see also (German) Oberlandesgericht Hamm 12 November 2001, CISG-Online. No. 1430.

820 As for seasonal goods see for instance: (German) Oberlandesgericht Düsseldorf 24 April 1997, CISG-Online No. 385 (holding, however, that in the case at hand the sale was not such a sale of "seasonal" goods as the buyer still had an interest in the sold shoes); (Italian) Corte di Appello di Milano 28 March 1998, CISG-Online No. 348 ("end of year" sales; in the author's estimation, however, the court also based its ruling on the fact that the date of delivery had been made "of the essence" in the contract); (German) Landgericht Oldenburg 27 March 1996, CISG-Online No. 188 (where the fact that the fashion goods for the summer season were sent one day to late was not regarded as a fundamental breach).

821 *P. Huber*, in: Münchener Kommentar zum Bürgerlichen Gesetzbuch, Art. 49 para. 34. See also (Canadian) Supreme Court of Justice Ontario 6 October 2003, CISG-Online No. 1436.

822 See for instance *Müller-Chen*, in: Schlechtriem/Schwenzer, Commentary, Art. 49 para. 5 (with references to a differing opinion); (German) Landgericht Halle 27 March 1998, CISG-Online No. 521; (Italian) Pretura di Parma-Firenze 24 November 1989, CISG-Online No. 316.

b) Definite non-delivery

A definite failure to deliver will usually amount to a fundamental breach per se. The definite failure to deliver may arise for instance from the fact that performance has become impossible[823] or from the fact that the seller is no longer bound to deliver under the hardship-exception (irrespective of how one construes that exception under the CISG, cf. in more detail above p. 193 et seq.) So too, a declaration by the seller that he definitely will not perform will usually be treated as a fundamental breach.[824] This may be the case for instance if the seller informs the buyer in a sale of a specific item (e.g. the load of one specific ship) that he has sold and delivered the goods to a third party.[825] A similar situation arises where the seller indicates without justification that he will only perform if the buyer makes additional payments (which he is not obliged to make under the contract).[826]

c) Delivery of non-conforming goods

The delivery of non-conforming goods is the most difficult area within the fundamental breach doctrine. It has led to a great number of court decisions. It is, of course, not possible to give a complete picture here and it must be remembered that the decision whether any breach is fundamental will always have to be made on a case-by-case-basis. Any attempt to generalise relevant factors must therefore be treated carefully. Bearing that in mind, however, it is suggested that it is possible to develop a number of guidelines. These are based on the four general criteria described above (p. 216 et seq.). They may be used as a starting point (but only as a starting point) for the analysis of each individual case.

(1) First, one should look to the parties' explicit or implicit agreement: The parties may in their contract define which of the requirements shall be fun-

---

823 *Müller-Chen*, in: Schlechtriem/Schwenzer, Commentary, Art. 49 para. 6; *P. Huber*, in: Münchener Kommentar zum Bürgerlichen Gesetzbuch, Art. 49 para. 35; *Magnus*, in Staudinger Kommentar zum Bürgerlichen Gesetzbuch, Art. 49 para. 13.

824 See for instance (German) Oberlandesgericht Celle 24 May 1995, CISG-Online No. 152; (German) Oberlandesgericht Hamburg 28 February 1997, CISG-Online No. 261; (German) Oberlandesgericht Düsseldorf 24 April 1997, CISG-Online No. 385; *Müller-Chen*, in: Schlechtriem/Schwenzer, Commentary, Art. 49 para. 6.

825 See for instance (German) Oberlandesgericht Celle 24 May 1995, CISG-Online No. 152.

826 For a similar scenario see Arbitral Award, Hamburg Friendly Arbitrage, 29 December 1998, Internationales Handelsrecht (IHR) 2001, 35 = CISG-Online No. 638. See also *Müller-Chen*, in: Schlechtriem/Schwenzer, Commentary, Art. 49 para. 6.

damental in the sense that their breach will lead to a right of avoidance.[827] Regard should also be had to the commercial background of the transaction.

(2) If there is no contractual agreement classifying the particular breach in question as fundamental, one should look to the seriousness of the breach.[828] As explained above (p. 217), the main focus should be on the perspective of the buyer, i.e. on the consequences of the breach for him. Within that perspective, however, one may also take into account how far the goods departed from the standard required by Art. 35 CISG.

(3) Even if the breach is serious it will not necessarily be fundamental in the sense of Art. 49(1) lit. (a), Art. 25 CISG because the seller has a right to cure the defect unless the buyer has a legitimate interest in immediate avoidance of the contract; see p. 218-225. It should be noted that fixing a "Nachfrist" according to Art. 47 CISG may be useful in that context. It is true that this will not lead automatically to a right to avoid the contract under Art. 49(1) lit. (b) CISG (because there was a "delivery"), but the fruitless expiry of the "Nachfrist" may help to show that the seller was given his chance to cure under Art. 48 CISG. On the other side, the buyer who fixes the "Nachfrist" will also have to accept being bound in his choice of remedies unter Art. 47(2) CISG while the "Nachfrist" is running.

(4) The fourth and most disputed factor is the reasonable-use-test.

(i) Both the highest German[829] and Swiss[830] courts have attached considerable weight to the question whether the buyer can make some other reasonable use of the non-conforming goods. They have for example, refused the right to terminate the contract if it is possible and reasonable for the buyer to resell the goods in the ordinary course of business, albeit for a lower

827 (German) Bundesgerichtshof 3 April 1996, CISG-Online No. 135; *P. Huber*, in: Münchener Kommentar zum Bürgerlichen Gesetzbuch, Art. 49 para. 36; *Schlechtriem*, in: Schlechtriem/Schwenzer, Commentary, Art. 25 para. 21a.

828 See Oberlandesgericht München 2 March 1994, Recht der internationalen Wirtschaft (RIW) 1994, 595, 596 = CISG-Online No. 108; U.S. Court of Appeals (2nd Circuit) 6 December 1995, CISG-Online No. 140 = UNILEX E.1995-31 (Rotorex Corp. v Delchi Carrier S.p.A.).

829 (German) Bundesgerichtshof 3 April 1996, CISG-Online No. 135 ("cobalt sulphate"); cf. also (German) Oberlandesgericht Köln 14 October 2002, Internationales Handelsrecht (IHR) 2003, 115, 116 = CISG-Online No. 709; (German) Oberlandesgericht Frankfurt 18 January 1994, Neue Juristische Wochenschrift (NJW) 1994, 1013, 1014 = CISG-Online No. 123.

830 (Swiss) Bundesgericht 28 October 1998, CISG-Online 413.

price. The leading case is the cobalt sulphate case, decided by the German Bundesgerichtshof in April 1996. The facts were rather complicated. Suffice it here to give a shortened and somewhat simplified version: The seller had sold different quantities of cobalt sulphate to the buyer, a German company. It was agreed that the goods should be of British origin.[831] The buyer tried to avoid the contract on several grounds. One of the buyer's arguments was that the cobalt sulphate originated from South Africa and that this caused him serious difficulties, as he "primarily" exported to India and South East Asia where there was an embargo on South African products. The buyer did not succeed with this line of argument. According to the Bundesgerichtshof, the 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 them into another country. The actual decision of the case is based on procedural reasons, namely on the lack of proof by the buyer.[832] It is, however, an interesting question what the court would have decided if the buyer actually had proven that he could not resell the goods in a considerable part of the world. In light of the reasoning adopted, it seems likely that the court would have told the buyer to look for a country where there was no embargo, sell the goods there (albeit for a lower price) and claim damages for the losses incurred by doing so (for instance for the price difference).

The facts of a case decided by the Swiss Bundesgericht in 1998 were more straightforward. [833] The contract was for the sale of frozen meat. The meat which was delivered did not live up to the agreed standards. As a consequence the value of the delivered goods was about 25 percent less than agreed. The Swiss Bundesgericht explicitly referred to the cobalt sulphate judgment of the German Bundesgerichtshof and held that there was no fundamental breach as the delivered meat could have been reasonably sold on

831 The seller was also obliged to supply certificates of origin and of quality. The consequences of the breach of his documentary obligations will not be discussed here, however.

832 The situation was the same in the case of (German) Oberlandesgericht Frankfurt 18 January 1994, Neue Juristische Wochenschrift (NJW) 1994, 1013, 1014 = CISG-Online No. 123: A stock of shoes had been sold from Italy to Germany. The buyer refused to pay on the ground that he had avoided the contract because the goods did not conform to the contract. The court found against the buyer on the ground that he had not alleged and proven to a sufficiently detailed extent that the goods were defective and that it would have been unreasonable to make some other use of them.

833 (Swiss) Bundesgericht 28 October 1998, CISG-Online No. 413.

by the buyer for a lower price (which might then have been compensated by a claim for damages).

(ii) Although the reasonable use criterion seems to be widely accepted in Germany and in Switzerland, it is by no means certain that it will find worldwide support. There are judgments which regard the breach as fundamental without using the reasonable-use-criterion, the most well-known of which[834] is the American case of Delchi vs. Rotorex.[835] The parties had contracted for the sale of air conditioner compressors. The compressors delivered by the seller were less efficient than the sample model and had lower cooling capacity and consumed more energy than the specifications indicated. The Court of Appeals for the Second Circuit 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".[836] The court did not take into account whether the buyer could have reasonably expected to resell the defective goods or make any other use of them and claim damages or price reduction.

Delchi and cases like it do not necessarily mean that the reasonable use criterion should not be applied at all. It is possible to explain them on the basis that there was no other reasonable use to which the goods could have been put and that thus the court did not have to address directly the reasonable use issue. To date, therefore, no definite answer exists in the case law as to whether the reasonable-use-criterion will find general acceptance.

(iii) It is submitted, however, that the reasonable use criterion is in accordance with the policy, implicit in the choice of the fundamental breach pre-

---

834 Another case is: (German) Oberlandesgericht Hamburg 26 November 1999, Internationales Handelsrecht (IHR) 2001, 19, 21 = CISG-Online No. 515. The position of the French courts is not clear yet: cf. (French) Cour de Cassation, 23 January 1996, CISG-Online No. 159, where artificially sugared wine was regarded as a fundamental breach without examining the question of whether it could have been resold (for instance for industrial purposes), but on the other hand stating that the wine was not suited for consumption thus virtually excluding the very use wine is made for; (French) Cour de Cassation 26 Mai 1999, CISG-Online No. 487, where the Court may have been indirectly influenced by the fact that the goods were not usable.

835 U.S. Court of Appeals (2nd Circuit) 6 December 1995, CISG-Online No. 140 = UNILEX E.1995-31 (Rotorex Corp. v Delchi Carrier S.p.A.).

836 U.S. Court of Appeals (2nd Circuit) 6 December 1995, CISG-Online No. 140 = UNILEX E.1995-31 (Rotorex Corp. v Delchi Carrier S.p.A.).

condition, of restricting the availability of avoidance as a remedy.[837] If the right to terminate the contract requires proof that the buyer has essentially lost what he was entitled to expect under the contract, then it does make sense not to allow him to avoid the contract where he still can make some reasonable use of the goods. In such a situation, the award of damages is an adequate remedy.

If one accepts the reasonable use test as being an important component of the fundamental breach doctrine, then in addressing the question whether the breach is fundamental or not, the court must decide whether the defect on circumstances of the case is of such a nature that the buyer can no longer make any reasonable use of the goods. In this respect, it is submitted that the concept of reasonable use should be given a restrictive interpretation. Particular importance should be attached to the commercial background of the transaction which may lead to the result that there was no reasonable use for the buyer (or even to the conclusion that there should be no "reasonable use" analysis at all).

Thus, where it appears from the commercial background of the contract that time and/or quality were of the essence of the contract, the delivery of non-conforming goods will amount to a fundamental breach from the outset and there will therefore be neither room nor justification for embarking on a "reasonable use" analysis.

So too, where the buyer needs the goods for use in his production process it will often appear from the commercial background that he cannot reasonably use materials of a lower quality. The position may, however, be different if the buyer also produces goods of a lower quality so that he can simply use the delivered goods for that part of his business (provided of course that he has a need for the delivered materials there and that he will not create an overload of material on stock there). A buyer who purchases a profit making machine is entitled to expect it to perform according to the specifications agreed upon. If it does not do so, the commercial background may indicate that the machine is not of any reasonable use to him. However, the mere fact that the machine does not operate as quickly or efficiently as agreed in the contract should not mean that the buyer is entitled to avoid the contract. A buyer who can still make reasonable use of the machine should be obliged to do so, albeit that any loss he suffers would be compensated by damages.

---

[837] See for further considerations for instance CISG-AC Opinion No. 5 (*Schwenzer*), Internationales Handelsrecht (IHR) 2005, 35.

Where the buyer buys goods for resale similar criteria should apply. Here, much will turn on the question whether the buyer only sells high-quality goods or whether he also deals in goods of a lower quality and could use the goods delivered by the seller for that line of his business. Thus, the mere fact that the goods are resaleable by the buyer does not mean that there will be no fundamental breach. If for instance the buyer runs an exclusive boutique, it would not be reasonable to expect him to use part of his up-market showroom for the sale of low-quality goods at discount prices. In this respect, considerable importance should be given to the issues of reputation, brand image and related matters. The reasonable use test should not lead to the result that the buyer is left with goods that he cannot sell on without risking damage to his reputation.

d) Third party rights

Where the goods sold are subject to third party claims (Art. 41 et seq. CISG) the position is similar to the cases of non-conformity. In principle, therefore, the relevant criteria for the fundamental breach analysis should be the same. It is submitted that particular emphasis should be placed on whether the breach can be cured by the seller under reasonable conditions, for instance by discharging the third party's right or – in a sale of generic goods – by delivering other goods of the same type which are not subject to third party rights.

e) Documents

As a general rule, the delivery of discrepant documents should be treated in a similar way to the delivery of non-conforming goods.[838] In the absence of an agreement that strict conformity is of the essence of the contract, the major criteria should therefore be the seriousness of the breach and the question whether the seller can cure the defect. Application of the reasonable use test has however been modified in the case of documents. Where there has been a non-confoming presentation, rather than asking whether the buyer can make reasonable use of the documents tendered, at least one court has instead asked whether it is reasonable to expect the buyer to acquire conforming documents for himself. Only if it is not will the breach be treated as fundamental.[839]

While there is no good theoretical reason for treating documents differently from goods, interpretation of the contract in light of the commercial context is likely in many, perhaps even most, cases to lead to the conclusion that any

---

838 Cf. *Müller-Chen*, in: Schlechtriem/Schwenzer, Commentary, Art. 49 para. 11.

839 (German) Bundesgerichtshof 3 April 1996, CISG-Online No. 135 ("cobalt sulphate").

lack of conformity in the documents will be treated as fundamental. This is particularly so where documentary sales of commodities are concerned, where proper documents are needed for the agreed payment mechanism (e.g. letter of credit) or where the buyer is in the business of reselling the goods under such payment terms.[840] There may, however, be cases where the commercial background is such that it is perfectly reasonable to expect the buyer to get missing documents himself. This may, for instance, be the case where the seller does not tender correct certificates of analysis or certificates of origin and where the buyer did not urgently need these correct certificates (for instance because he could sell the goods on without those documents or because he bought the goods for use in his own production process).[841]

f) Breach of ancillary obligations

The breach of ancillary obligations (e.g. duties to give instructions to the buyer, to provide additional services etc.) may amount to a fundamental breach. It is submitted that the most important criteria will be the seriousness of the breach and the question of cure.[842] The breach of exclusive distribution agreements may also amount to a fundamental breach.[843]

5. Fundamental breach and avoidance of uncertainty in commercial law

It has been argued by some, particularly Common Law, scholars that the fundamental breach doctrine is unsatisfactory because it creates uncertainty in circumstances where the commercial background of the transaction requires the parties to be able to make certain and swift decisions on whether to terminate the contract or not.[844] The examples given are documentary sales or contracts where time and quality of the goods are of the essence.

In the author's view, this line of criticism is somewhat overstated. The CISG can, properly interpreted, accommodate those cases without endangering the

840 Cf. *Müller-Chen*, in: Schlechtriem/Schwenzer, Commentary, Art. 49 para. 11.

841 Cf. *Müller-Chen*, in: Schlechtriem/Schwenzer, Commentary, Art. 49 para. 11.

842 *Müller-Chen*, in: Schlechtriem/Schwenzer, Commentary, Art. 49 para. 12; *P. Huber*, in: Münchener Kommentar zum Bürgerlichen Gesetzbuch, Art. 49 para. 45.

843 Cf. for instance (German) Oberlandesgericht Frankfurt 17 September 1991, CISG-Online No. 28.

844 See for instance Benjamin's Sale of Goods, para. 18-004. See also *Bridge*, 15 Pace International Law Review 2003, 55.

principle of legal certainty.[845] If it appears from the commercial background of the contract that time and quality were of the essence then any breach of these requirements will be fundamental from the outset. There will be no right to cure (because the buyer has a legitimate interest in immediate avoidance), there is no reasonable alternative use and the necessary degree of seriousness is always reached. With regard to the dogmatic construction there are two ways to reach that result. Either one derives from the commercial background an implied agreement of the parties that any breach should be fundamental, or one uses this background as an argument why cure is not adequate and any other use is not reasonable.

IV. Avoidance using the "Nachfrist"-procedure

1. Function of Art. 49(1) lit. (b) CISG

In cases of non-delivery, the buyer may also declare the contract avoided under Art. 49(1) lit. (b) CISG, if the seller does not deliver the goods within the additional period of time ("Nachfrist") fixed by the buyer in accordance with Art. 47(1) CISG or if the seller declares that he will not deliver within that period. This route to the avoidance of the contract is often called the "Nachfrist"-mechanism.[846]

Art. 49(1) lit. (b) CISG does not require the breach to be fundamental in the sense of Art. 25 CISG. The buyer must, however, have given the seller a second chance to perform by fixing an additional period under Art. 47(1) CISG. The buyer can, in other words, "upgrade" a non-fundamental breach to one which justifies avoidance. However, the requirement of an additional period shows that the Convention still tries to enforce its general policy to restrict the scope of the remedy of avoidance in favour of other remedies.

In the author's opinion it is clear from the structure of the provision that the "Nachfrist"-mechanism of Art. 49(1) lit. (b) CISG provides an option for the buyer which he is not bound to take. Even in cases of non-delivery the buyer may, therefore, choose to proceed under Art. 49(1) lit. (a) CISG by proving that the non-delivery was a fundamental breach of contract (for instance

[845] Cf. CISG-AC Opinion No. 5 (*Schwenzer*), Internationales Handelsrecht (IHR) 2005, 35. What is more, the reasonable use doctrine is flexible enough to accomodate different factual settings, for instance a distinction according to whether the buyer needs the goods for his own use (e.g. in production) or whether he is in the resale business; cf. idem and above p. 228 et seq.

[846] Cf. *Will*, in: Bianca/Bonell, Commentary, Art. 49 para. 2.1.3.

because time was of the essence or because the delay was so long that it constituted a fundamental breach);[847] in such a case the buyer will have the right to avoid the contract without having to fix an additional period of time for performance.

2. Non-delivery

a) General definition of non-delivery

The right to avoid the contract under Art. 49(1) lit. (b) is strictly limited to cases of non-delivery by the seller.[848] As a rule, non-delivery presupposes that the seller failed to fulfil his delivery obligations under the contract or under the Convention (Art. 31 CISG).[849] If the seller has in fact delivered any goods in purported performance of the contract, there is a "delivery", irrespective of whether the goods conform to the contract (Art. 35 et seq. CISG) and irrespective of whether they are free from third party rights (Art. 41 et seq. CISG). Even the delivery of an aliud is a delivery in that sense (albeit a non-conforming one).[850] In all the cases mentioned above, the buyer can only claim avoidance under Art. 49(1) lit. (a) CISG and therefore needs to show that the breach was fundamental.

With regard to the applicable time frame, two points should be noted. First, Art. 49(1) lit. (b) CISG will only apply if the time of delivery has already passed. A failure to deliver before that time would not, of course, amount to a breach of contract though there may be circumstances in which the buyer would be entitled to remedies for the seller's anticipatory breach (Art. 71 et seq. CISG, cf. below § 17). Secondly, Art. 49(1) lit. (b) CISG presupposes that there has not been a delivery when the buyer fixes the additional period of time.[851] If therefore the seller has delivered after the agreed time for deliv-

[847] *P. Huber*, in: Münchener Kommentar zum Bürgerlichen Gesetzbuch, Art. 49 para. 47 (with references to cases that may appear to assume the contrary); *Magnus*, in: Staudinger Kommentar zum Bürgerlichen Gesetzbuch, Art. 49 para. 12; see also the references above (p. 225 et seq.) which assume that a delay in performance may amount to a fundamental breach and entitle the buyer to avoid the contract.

[848] Cf. *Will*, in: Bianca/Bonell, Commentary, Art. 49 para. 2.1.3.

[849] Cf. *P. Huber*, in: Münchener Kommentar zum Bürgerlichen Gesetzbuch, Art. 49 para. 48; *Müller-Chen*, in: Schlechtriem/Schwenzer, Commentary, Art. 49 para. 15.

[850] As for the qualification of an aliud-delivery as a non-conformity see p. 197 et seq.

[851] *P. Huber*, in: Münchener Kommentar zum Bürgerlichen Gesetzbuch, Art. 49 para. 48.

ery, but before the buyer had fixed the "Nachfrist", the buyer will only be able to rely on Art. 49(1) lit. (a) CISG.

b) Delivery where goods have not been moved yet?

It is sometimes argued that the concept of non-delivery should also cover those exceptional cases where the seller has already made delivery but where the goods have not yet been physically moved from the seller's place of business.[852] The argument advanced in support of this is that the fundamental breach requirement primarily aims at avoiding the costs and risks of restitution of the goods. This concern does not arise in cases where the goods have not been moved. Therefore, one may also allow the more lenient way to avoidance, i.e. the "Nachfrist"-procedure under Art. 49(1) lit. (b) CISG.

In the author's opinion this view does not find any basis in the wording of the provision which clearly refers to the concept of delivery and not to the question of whether the goods have been moved. What is more, the objective to lower the threshold for an avoidance can also be reached under the fundamental breach rule of Art. 49(1) lit. (a) CISG. In fact, the buyer may fix an additional period of time under Art. 47 CISG even if he wants to proceed under Art. 49(1) lit. (a) CISG. It is true that its fruitless expiry will not lead to an automatic right to avoid the contract (as it would be the case under Art. 49(1) lit. (b) CISG), but it will nevertheless be an indication for the fundamental character of the breach (p. 228).

c) Documents

In documentary sales, the seller usually has an obligation to deliver the goods (often performed by handing over the goods to the carrier) and an obligation to hand over the proper documents. If the seller does not tender these documents, the question arises whether this can amount to a non-delivery for the purposes of Art. 49(1) lit. (b) CISG. On the one hand, Art. 30 CISG clearly distinguishes between the *delivery* of the goods and the obligation to *hand over* the documents. This is an argument in favour of the submission that the term "non-delivery" in Art. 49(1) lit. (b) CISG only refers to the former obligation regarding the goods. However, it has to be recognised that documents often "take the place" of the goods in the sense that they are necessary in order to get hold of the goods. The predominant opinion therefore assumes that a failure to tender documents amounts to a "non-delivery" if the missing documents are of the type that the buyer needs in order to be able to dispose

852 *Müller-Chen*, in: Schlechtriem/Schwenzer, Commentary, Art. 49 para. 17.

of the goods, for instance bills of lading or warehouse warrants.[853] With regard to the documentary side of the transaction that leads to the following results. If the buyer does not tender the documents at the required time and place, there will be a non-delivery in respect of those and the buyer can proceed under Art. 49(1) lit. (b) CISG by fixing an additional period for the tender of the documents. Of course, if the failure to tender the documents (as will often be the case) in itself constitutes a fundamental breach, he can also avail himself of Art. 49(1) lit. (a) CISG and avoid the contract immediately. If, on the other hand, the seller does tender the documents at the required place and time, but they are not in conformity with the contractual requirements, this will not constitute a "non-delivery" and has to be treated exclusively under Art. 49(1) lit. (a) CISG.

The failure to deliver other documents (that may be required by the contract, but are not needed for the disposition of the goods, as for instance an insurance policy or a certificate of origin or phytosanitary health), however, will not amount to a non-delivery in the sense of Art. 49(1) lit. (b) CISG. The buyer will have to rely on the fundamental breach doctrine under Art. 49(1) lit. (a) CISG if he wants to avoid the contract. In fact, under strict documentary sales where payment is based on a letter of credit or on the basis of "cash against documents" and where those documents are required under the payment terms, there will usually be a fundamental breach.[854]

3. Details concerning the "Nachfrist"-procedure

a) "Nachfrist" under Art. 47 CISG

Art. 49(1) lit. (b) CISG refers to the "Nachfrist" provision of Art. 47(1) CISG. The buyer therefore has to demand performance from the buyer within a specified period of time.[855]

Whether the period chosen by the buyer is reasonable for the purposes of Art. 47(1) and 49(1) lit. (b) CISG will depend on the circumstances of the case.

---

853 *Müller-Chen*, in: Schlechtriem/Schwenzer, Commentary, Art. 49 para. 18; *P. Huber*, in: Münchener Kommentar zum Bürgerlichen Gesetzbuch, Art. 49 para. 52.

854 Cf. *Müller-Chen*, in: Schlechtriem/Schwenzer, Commentary, Art. 49 para. 19.

855 *Müller-Chen*, in: Schlechtriem/Schwenzer, Commentary, Art. 47 para. 4; Art. 49 para. 15 et seq.

If the buyer sets a time limit which is too short, the prevailing opinion seems to be that this is not entirely ineffective, but initiates a period of reasonable length.[856] In practice, this means that if the buyer declares avoidance immediately after the expiry of the insufficient period of time, this will have no effect under Art. 49(1) lit. (b) CISG.[857] In fact, the untimely declaration of avoidance may itself constitute a fundamental breach of contract which entitles the seller to avoid the contract. The situation will, however, be different if the buyer does not declare avoidance immediately after the expiry of the period of time he had granted. Here, the rule that a too short period will start the appropriate one comes into effect. If the buyer delays giving a notice of avoidance until after a reasonable period of time has expired, such notice will be valid under Art. 49(1) lit. (b) CISG.[858] He can do so without having to worry about the time bars in Art. 49(2) CISG which do not apply to cases where the seller has not (yet) delivered. If, however, the seller does deliver in the extra time the buyer has added to the original period, the buyer will lose his right to avoid under Art. 49(1) lit. (b) CISG.

It should also be borne in mind that the seller may counter the buyer's time limit by offering cure under Art. 48(2), (3) CISG within a period of time which is longer than the one set by the buyer. If the buyer does not reject that proposal within reasonable time, Art. 48(2) CISG will have the effect that the period suggested by the seller takes precedence over the one fixed by the buyer. According to the second sentence of Art. 48(2) CISG the buyer cannot declare avoidance because that would be inconsistent with the seller's right to effect performance.

b) Absence of delivery or refusal to deliver

Art. 49(2) lit. (b) CISG presupposes that the seller has not delivered or has declared that he will not deliver within the period of time specified by the buyer. As a rule, the buyer should wait until the period expires and if the seller has not delivered the goods, the buyer may declare the contract avoided. In principle, the buyer may not declare the contract avoided before that date even if the seller's breach is or has become fundamental and would as such justify avoidance under Art. 49(1) lit. (a) CISG. This is due to Art. 47(2)

---

856 (German) Oberlandesgericht Celle 24 May 1995, CISG-Online No. 152; *Müller-Chen*, in: Schlechtriem/Schwenzer, Commentary, Art. 47 para. 8; *Magnus*, in: Staudinger Kommentar zum Bürgerlichen Gesetzbuch, Art. 47 para. 20;

857 If the delay in delivery as such constitutes a fundamental breach, it will justify avoidance under Art. 49(1) lit. (a) CISG, but not under Art. 49(1) lit. (b) CISG, cf. *Müller-Chen*, in: Schlechtriem/Schwenzer, Commentary, Art. 47 para. 9.

858 Cf. (German) Oberlandesgericht Celle 24 May 1995, CISG-Online No. 152; *Müller-Chen*, in: Schlechtriem/Schwenzer, Commentary, Art. 47 para. 9.

CISG which provides that during the period, the buyer may not resort to any remedy for breach of contract, except for damages for the delay.[859]

The situation is different, however, if the seller has declared his refusal to perform within the additional period.[860] In that case the buyer may declare avoidance of the contract right away, even before the expiry of the additional period. That results both from the purpose of Art. 49(1) lit. (b) CISG and from the "unless"-proviso in Art. 47(2) CISG.

V. Time limits

1. Structure of Art. 49(2) CISG

Art. 49(2) CISG submits the buyer's right to avoid the contract to a complicated regime of time limits. These time limits will apply independently of the issue of limitation (prescription). Limitation of actions or claims is not governed by the Convention. The applicable limitation periods will be determined by the UN Limitation Convention or by the applicable limitation law; for more details see above p. 29 et seq. Irrespective of whether or when the right to avoid the contract may be excluded by the applicable limitation rules, the buyer will have to comply with the time limits set in Art. 49(2) CISG.

Art. 49(2) CISG presupposes that the seller has delivered the goods at some point in time.[861] The provision applies to both alternatives of Art. 49(1)

---

[859] If the breach was fundamental from the beginning, the buyer could, of course, have proceeded under Art. 49(1) lit. (a) CISG right away. If he did not do so, but chose to set an additional period, he will be bound by Art. 47(2) CISG. See further U.S. Court of Appeals (3rd Circuit) 19 July 2007, CISG-Online No. 1510.

[860] Or if the seller offers performance, but makes this offer subject to a counter performance to which he is not entitled, see (Swiss) Bundesgericht 20 December 2006, CISG-Online No. 1426.

[861] It is submitted that one should not construe the reference to the seller too narrowly. Art. 49(2) CISG should also apply where a third party makes delivery obviously on behalf of the seller. See *P. Huber*, in: Münchener Kommentar zum Bürgerlichen Gesetzbuch, Art. 49 para. 60. It should be noted, however, that the (German) Bundesgerichtshof 15 February 1995, Neue Juristische Wochenschrift (NJW) 1995, 2101 = CISG-Online No. 149 has applied Art. 49(2) CISG in a complicated case where the contract of sale had been concluded with a distributor of the manufacturer and where – as a result of controversies between the manufacturer and the distributor – the manufacturer had delivered the machine himself. The court excluded the buyer's right to avoid referring Art. 49(2) CISG. It did

CISG. At first sight, this may be surprising with regard to Art. 49(1) lit. (b) CISG, which only applies to non-delivery. There is, however, a scenario where both provisions can be met and that is where the seller has not delivered by the contractual delivery date and the buyer has fixed an additional period of time under Art. 49(1) lit. (b), 47 CISG which has expired and the seller has delivered after that date. In such a case, the buyer has a right of avoidance under Art. 49(1) lit. (b) CISG but the time limits of Art. 49(2) CISG will apply because there was, in the end, a delivery of the goods.[862]

If Art. 49(2) CISG is applicable because there was a delivery by the seller, one has to distinguish between the type of breach that has led to the right of avoidance: If it was a late delivery, lit. (a) will apply (see 2.). If it was another type of breach, lit. (b) will apply (see 3.).

It should be noted that the declaration of avoidance falls under Art. 27 CISG. According to that provision, it is sufficient if the buyer dispatches the declaration by appropriate means within the time limit set by Art. 49(2) CISG; the risk of delay or loss has to be borne by the seller.[863]

2. Time limit in cases of late delivery (Art. 49(2) lit. (a) CISG)

Pursuant to Art. 49(2) lit. (a) CISG, the buyer loses the right to declare the contract avoided in respect of late delivery unless he does so within a reasonable time after he has become aware that delivery has been made, for example by receiving the transport documents or the goods. A reasonable period of time in this context is generally regarded as being very short.[864] It is submitted that it should rather be measured in days than in weeks. The reason for such a strict position lies in an analysis of the legitimate interests of the parties in the case where the seller has finally delivered the goods. The buyer, for his part, does not need much time to decide whether he can and wants to

not specifically discuss the question in how far third parties can be regarded as the "seller". In the author's opinion, the facts of the case rather indicated that the manufacturer did not want to deliver on behalf of the distributor so that the application of Art. 49(2) CISG was not correct.

862 *P. Huber*, in: Münchener Kommentar zum Bürgerlichen Gesetzbuch, Art. 49 para. 57; *Magnus*, in: Staudinger Kommentar zum Bürgerlichen Gesetzbuch, Art. 49 para. 37.

863 *Müller-Chen*, in: Schlechtriem/Schwenzer, Commentary, Art. 49 para. 28, 30.

864 *Müller-Chen*, in: Schlechtriem/Schwenzer, Commentary, Art. 49 para. 29; *P. Huber*, in: Münchener Kommentar zum Bürgerlichen Gesetzbuch, Art. 49 para. 62.

use the late delivered goods[865]; he should not be given the chance to speculate on market fluctuations. The seller, however, needs to know as quickly as possible whether he will have to dispose of the goods.[866]

3. Time limit for other types of breach (Art. 49(2) lit. (b) CISG)

Art. 49(2) lit. (b) CISG governs cases involving any breach other than late delivery. Thus, cases of delivery of defective goods would, for example, come within this provision. Under this provision, the buyer has a reasonable time to declare the contract avoided after the commencement of the relevant time period. So far as the relevant commencement time is concerned, the basic rule is that the period begins to run after the buyer knew or ought to have known of the breach, lit. (b)(i). There are, however, different rules for two specific situations. If the buyer had proceeded under the "Nachfrist"-procedure of Art. 47 CISG, the period will begin to run after the expiration of the "Nachfrist" (or after the seller's declaration that he will not perform within that period), lit. (b)(ii). Where, however, the seller has proceeded under Art. 48(2) CISG by offering performance, the period will begin to run after the expiration of the period of time indicated by the seller (or after the buyer has declared that he will not accept performance), lit. (b)(iii).

It seems to be widely accepted that the length of the reasonable period of time under Art. 49(2) lit. (b) CISG has to be measured in a much more generous way than under Art. 49(2) lit. (a) CISG. In particular, the buyer should be given more time than for giving notice under Art. 39 CISG.[867] It is submitted that one should apply similar standards as have been applied to the time limit for performance claims under Art. 46(2), (3) CISG (cf. above p. 200) because the buyer will often have to choose between substitute delivery and avoidance. There is case law which has – always on the facts of the specific cases – regarded periods of about a month (and sometimes even more) as "reasonable".[868] Periods of several months have, however, not been

---

[865] It should be noted that lit. (a) covers the case where the breach is only the late delivery. If the goods do not conform to the contract, the situation is different and may lead to a longer period under lit. (b).

[866] *Müller-Chen*, in: Schlechtriem/Schwenzer, Commentary, Art. 49 para. 29; *P. Huber*, in: Münchener Kommentar zum Bürgerlichen Gesetzbuch, Art. 49 para. 62.

[867] *Müller-Chen*, in: Schlechtriem/Schwenzer, Commentary, Art. 49 para. 32.

[868] See for instance (German) Oberlandesgericht Oldenburg 8 September 1998, CISG-Online No. 508; (German) Oberlandesgericht Celle 24 May 1995, CISG-Online No. 152; (German) Landgericht Freiburg 22 August 2002, Internationales

regarded as reasonable in other situations.[869] Of course, the matter will always have to be decided in light of the facts of the individual case. If for instance the goods are perishable, seasonal or if they are subject to strong fluctuations in the market price, the buyer will have to make a fast decision.[870]

Where the seller has a right to cure, the period necessary for effecting it must be taken into account. If the buyer has proceeded under Art. 47 CISG (fixing a "Nachfrist" for the cure) or if the seller has used the procedure of Art. 48(2) CISG in order to offer cure, the following results naturally from the application of Art. 49(2) lit. (b)(ii) or (iii) CISG: the reasonable period of time will only begin to run after the expiry of the cure period. If the case does not fall under lit. (ii) or (iii), so that lit. (i) is applicable, the same result can be reached by simply adding the period which is necessary for curing the defect to the period which would normally be regarded as reasonable in the sense of Art. 49(2)(b) CISG.[871]

VI. Burden of proof

With regard to the breach of contract the situation is the same as under Art. 46 (see above p. 207 et seq.). It is further submitted that the buyer bears the burden of proof concerning the fundamental breach requirement (including – where relevant – his legitimate interest in immediate avoidance and the absence of any reasonable use)[872] and for the fact that he fixed an

---

Handelsrecht (IHR) 2003, 22 = CISG-Online No. 711 (three months!); (Swiss) Kantonsgericht Wallis 21 February 1995, Internationales Handelsrecht (IHR) 2006, 155 = CISG-Online No. 1193.

869 See for instance (German) Bundesgerichtshof 15 February 1995, Neue Juristische Wochenschrift (NJW) 1995, 2101 = CISG-Online No. 149 (five months); (German) Oberlandesgericht München 2 March 1994, CISG-Online No. 108 (more than four months). For a stricter view see (German) Oberlandesgericht Koblenz 31 January 1997, Internationales Handelsrecht (IHR) 2003, 172 = CISG-Online No. 256 (seven weeks). But see also (German) Landgericht Freiburg 22 August 2002, Internationales Handelsrecht (IHR) 2003, 22 = CISG-Online No. 711 (three months reasonable under Art. 49(2) lit. (b)(i) CISG).

870 *Müller-Chen*, in: Schlechtriem/Schwenzer, Commentary, Art. 49 para. 32. For an example see (Danish) Vestre Landsret 10 November 1999, CISG-Online No. 704 (avoidance of contract for delivery of Christmas trees in December: period of seven days held to be too long as the seller did not have much time left for disposing otherwise of the Christmas trees before December 24th).

871 See in that direction *Müller-Chen*, in: Schlechtriem/Schwenzer, Commentary, Art. 49 para. 32.

additional period of time for performance under Art. 49(1)(b) CISG; it is however submitted that it will then be for the seller to prove that he made performance within that additional period of time.[873] With regard to the time limits it is submitted that it will be for the seller to prove the commencement of the reasonable time period whereas it will be for the buyer to prove that he made the declaration of avoidance in time.[874]

VII. Effects of avoidance

1. Release from the respective obligations

Art. 81(1) CISG provides that avoidance of the contract releases both parties from their obligations under it. As a consequence, those primary obligations of the parties which have not been fulfilled, will be cancelled as of the moment when the declaration of avoidance becomes effective, i.e. – in the author's opinion – by its appropriate dispatch (Art. 26, 27 CISG).[875]

The contractual relationship does not disappear entirely, however. It will continue to exist as a framework for winding up the contract.[876] This is exemplified by Art. 82(1) CISG itself. It expressly preserves claims for damages which may be due and those provisions of the contract which govern the settlement of disputes or the consequences of avoidance. It seems to be widely accepted that this list is not exhaustive. There may be other obligations arising from the "winding-up-relations" which remain or even come into existence after the declaration of avoidance, such as the duty to restore (Art. 81(2) CISG) or the duty to preserve the goods (Art. 86(1) CISG).[877]

---

872 *Müller-Chen*, in: Schlechtriem/Schwenzer, Commentary, Art. 49 para. 13; *P. Huber*, in: Münchener Kommentar zum Bürgerlichen Gesetzbuch, Art. 49 para. 86. See also, e.g., (German) Bundesgerichtshof 3 April 1996, CISG-Online No. 135.

873 *Müller-Chen*, in: Schlechtriem/Schwenzer, Commentary, Art. 49 para. 20; *P. Huber*, in: Münchener Kommentar zum Bürgerlichen Gesetzbuch, Art. 49 para. 86.

874 See *Müller-Chen*, in: Schlechtriem/Schwenzer, Commentary, Art. 49 para. 25, 28, 34, 39; *P. Huber*, in: Münchener Kommentar zum Bürgerlichen Gesetzbuch, Art. 49 para. 87. See also (Swiss) Kantongsgericht des Kantons Wallis 21 February 2005, Internationales Handelsrecht (IHR) 2006, 155 = CISG-Online No. 1193.

875 *Weber*, in: Honsell, Kommentar, Art. 81 para. 6 et seq.; *Schlechtriem*, in: Schlechtriem/Schwenzer, Commentary, Art. 27 para. 13; but see for a different opinion *Hornung*, in: Schlechtriem/Schwenzer, Commentary, Art. 26 para. 12

876 See *Hornung*, in: Schlechtriem/Schwenzer, Commentary, Art. 81 para. 10.

877 *Weber*, in: Honsell, Kommentar, Art. 81 para. 8 et seq.; *Secretariat Commentary*, Art. 66 para. 6.

2. Duty to make restitution

Whereas Art. 81(1) CISG, first sentence, concerns the release from duties which have not yet been fulfilled, Art. 81(2) CISG deals with those obligations which have already been performed. It orders each party to make restitution of what he has received from the other. Both obligations are concurrent so that each side must restore in return for restitution by the other.[878]

a) Place of performance

The Convention does not specifically lay down any rules on the place of performance for these restitutionary obligations. Some favour a recourse to domestic law via the private international law rules of the forum.[879] It is submitted, however, that this is not correct as it is possible to discern general principles of the Convention which take precedence over the recourse to domestic law (Art. 7(2) CISG).

In the author's opinion the gap should be filled according to Art. 7(2) CISG by applying the rules for the original performance claims in Art. 31, 57 CISG in a reversed way (or as a "mirror image").[880] By way of example, the buyer's obligation to restore the goods can be treated in the same way as the seller's duty to deliver the goods. Art. 31 CISG will apply with the proviso that the words "seller" and "buyer" have to be exchanged for each other. If, for instance, the contract of sale involved carriage of the goods (Art. 31 lit. (a) CISG), the buyer will have to hand over the goods to the first carrier for transmission to the seller.[881] The seller's obligation to pay back the price would have to be treated under a reversed application of Art. 57 CISG. In most cases this would lead to (the reversed application of) Art. 57(1) lit. (a) CISG, i.e. to the buyer's place of business.

A further possible approach would be to locate the place of performance of the restitutionary obligation where the original performance had to be per-

878 As for the possibility of set-off: *Hornung*, in: Schlechtriem/Schwenzer, Commentary, Art. 81 para. 16; (German) Landgericht München I 20 March 1995, Praxis des Internationalen Privat- und Verfahrensrechts (IPRax) 1996, 31, 32.

879 (French) Cour d'Appel Paris 14 January 1998, CISG-Online No. 347.

880 See in that direction (Austrian) Oberster Gerichtshof 29 June 1999, CISG-Online No. 483; (German) Oberlandesgericht Düsseldorf 2 July 1993, CISG-Online No. 74; *P. Huber*, in: Münchener Kommentar zum Bürgerlichen Gesetzbuch, Art. 81 para. 15; *Hornung*, in: Schlechtriem/Schwenzer, Commentary, Art. 81 para. 17 et seq.

881 *Hornung*, in: Schlechtriem/Schwenzer, Commentary, Art. 81 para. 18; *Magnus*, in: Staudinger Kommentar zum Bürgerlichen Gesetzbuch, Art. 81 para. 19.

formed. Thus restitution of the goods would have to be made where the seller originally had to deliver and restitution of the price where the buyer originally had to pay.

b) Cost of restitution

Another matter not expressly dealt with is the question which side has to bear the costs of restitution. The correct approach seems to be that the party in breach will have to bear its costs alone. The innocent party (who rightfully avoided the contract, i.e. the buyer) can claim the costs he incurs from making restitution as damages under Art. 45(1) lit. (b) CISG.[882] This presupposes, of course, that the requirements for a damages claim are made out. This would not be the case, for instance, where the seller is exempted from liability by virtue of Art. 79 CISG (for instance due to "force majeure"); in such a case the buyer will have to bear the costs that arise on his side.[883]

3. Duty to account for benefits

Art. 84(2) CISG provides: "The buyer must account to the seller for all benefits which he has derived from the goods of 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."

Art. 84(2) lit. (a) CISG covers those cases where the buyer is able to make restitution of the goods in substantially the condition in which he received them. The duty to account for the benefits he derived from the goods here is a supplement to the actual duty to make restitution. It will cover, for instance, any rental he has received from leasing the goods or from granting licences with regard to their use. He also has to pay for the objective value of the use he made of the goods himself.[884]

Art. 84(2) lit. (b) CISG has been designed to cover those cases where there is substantial impossibility to make restitution under Art. 82(1) CISG, but

[882] *Magnus*, in: Staudinger Kommentar zum Bürgerlichen Gesetzbuch, Art. 81 para. 17; *Hornung*, in: Schlechtriem/Schwenzer, Commentary, Art. 81 para. 19; *Weber*, in: Honsell, Kommentar, Art. 81 para. 22.

[883] *P. Huber*, in: Münchener Kommentar zum Bürgerlichen Gesetzbuch, Art. 81 para. 14.

[884] *Hornung*, in: Schlechtriem/Schwenzer, Commentary, Art. 84 para. 18.

the buyer's right to avoid the contract is preserved by one of the exceptions in Art. 82(2) CISG. If the buyer does declare the contract avoided in such circumstances, he has to account for the benefits he derived from the circumstances which have caused the impossibility to make restitution. Accounting for the benefits here takes the place of the actual restitution. Art. 84(2) lit. (b) CISG will in particular cover the proceeds of a contract of resale which the buyer has concluded (so-called commodum ex negotiatione). It can, however, also cover an insurance claim that the buyer has received as a result of the destruction of the goods (so-called commodum ex re).[885]

In both cases the buyer is entitled to deduct from the gross benefit his costs for the maintenance of the goods or the expenses he has incurred as a result of their resale, their consumption or their tranformation. This can be inferred from the fact that Art. 82(2) CISG speaks of the "benefit" he has derived from it.[886]

4. Seller's duty to pay interest

Art. 84(1) CISG further provides that the seller who has to refund the price, must also pay interest on it from the date on which the price was paid. The provision applies irrespective of which side avoided the contract.

As in the more general interest provision of Art. 78 CISG, the Convention does not prescribe the interest rate owed by the seller. In the author's opinion, the same considerations should apply in both cases. The prevailing view seems to be that this issue has to be determined according to the law applicable to the contract.[887]

If the buyer incurred higher credit costs than he will be able to recover under Art. 84(1) CISG, he may claim those as damages under Art. 45(1) lit. (b), 74 CISG if the requirements for such a claim are met.[888]

---

885 *P. Huber*, in: Münchener Kommentar zum Bürgerlichen Gesetzbuch, Art. 84 para. 17 et seq.; *Hornung*, in: Schlechtriem/Schwenzer, Commentary, Art. 84 para. 25 et seq. (in more detail).

886 *Hornung*, in: Schlechtriem/Schwenzer, Commentary, Art. 84 para. 28, 20; *P. Huber*, in: Münchener Kommentar zum Bürgerlichen Gesetzbuch, Art. 84 para. 16, 14.

887 Cf. p. 358 et seq. and the references there. But see for a different approach under Art. 84(1) CISG *Hornung*, in: Schlechtriem/Schwenzer, Commentary, Art. 84 para. 13 (usual interest rate at seller's place of business).

888 *Hornung*, in: Schlechtriem/Schwenzer, Commentary, Art. 84 para. 12; *P. Huber*, in: Münchener Kommentar zum Bürgerlichen Gesetzbuch, Art. 84 para. 6.

§ 12. Reduction of the price

I. Introduction

Subject to certain conditions, Art. 50 CISG gives the buyer the right to reduce the contract price if the goods do not conform to the contract. The first sentence of Art. 50 CISG provides: "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."

The remedy of price reduction will not be particularly familiar to Common Lawyers. It has its origins in Roman law[889] and is still widely known in Civil Law countries.[890] It had also been part of the Uniform Law of International Sales (Art. 46 ULIS). The idea behind the remedy of price reduction is that the contract remains in existence, but that the buyer is entitled to a reduction of the contract price on the basis that the goods are defective.

II. Non-conformity

Art. 50 CISG only applies, "if the goods do not conform with the contract". Here again, the notion of non-conformity has to be distinguished from other forms of non-performance. It is obvious that goods which do not live up to the standard required by Art. 35, 36 CISG are non-conforming within that meaning.[891] However, price reduction cannot be claimed for late delivery or for the breach of any other obligation by the seller.[892] As we have already seen, that also covers the delivery of an aliud (p. 197 et seq.). It is disputed whether the buyer can reduce the price for defects in title or for the existence of third party rights (Art. 41 et seq. CISG). The history of the provision

---

889 The so-called actio quanti minoris, cf. *Zimmermann*, The Law of Obligations, p. 318 et seq.

890 Cf. for instance § 441 (German) Bürgerliches Gesetzbuch (BGB); Art. 1644 (French) Code Civil.

891 *P. Huber*, in: Münchener Kommentar zum Bürgerlichen Gesetzbuch, Art. 50 para. 7; *UNCITRAL Digest*, Art. 50 para. 2.

892 *UNCITRAL Digest*, Art. 50 para. 2.

does not allow a definite answer. The matter was discussed at the Vienna Conference but not definitely decided. The delegates seem to have thought that the question should be left for the courts to settle.[893] In legal writing, opinion is divided. One group of authors has argued that the notion of "non-conformity" is a technical term used by the Convention in several situations and should always be understood in the same way, i.e. as referring to conformity under Art. 35, 36 CISG and excluding the rules on third party rights (Art. 41 et seq. CISG).[894] Others have, however, relied on Art. 44 CISG which preserves the buyer's right to claim damages or to reduce the price, if he has a reasonable excuse for not giving notice of the defect. That provision applies both to the notice requirement of Art. 39 CISG and to its equivalent in Art. 43(1) CISG. From that they conclude that the Convention permits price reduction not only in cases of non-conformity under Art. 35, 36 CISG but also in cases where there has been a breach of third party rights under Art. 41 et seq. CISG.[895] It is submitted that the first view is preferable. As we have already seen,[896] it appears from the heading of Section II of Chapter II that the Convention clearly distinguishes the concept of "conformity of the goods" from "third party claims". It would bring unneccessary uncertainty to the application of the Convention, if one construed the term "non-conformity" in different ways according to the situation in which it arises. As for the reference to price reduction in Art. 44 CISG, it has to be kept in mind that this reference also includes the words "in accordance with Article 50". One may very well argue that Art. 44 CISG only preserves these claims in so far as they are justified under Art. 50 CISG, i.e. in cases of non-conformity in the narrow sense. The fact that Art. 44 CISG mentions Art. 43(1) CISG will not become meaningless by such an interpretation because it still has full effect when the buyer claims damages.

As price reduction will only be available if the seller has delivered non-conforming goods, the general rules on non-conformity will apply. The buyer will therefore be deprived of his right to reduce the price if he did not give notice under Art. 39 CISG.[897] However, the requirement to give notice is softened by Art. 44 CISG: If the buyer has a reasonable excuse for his failure to give

---

893 Cf. *Will*, in: Bianca/Bonell, Commentary, Art. 50 para. 3.4.; *Honnold*, para. 313.1.

894 *Honnold*, para. 313.1; *Müller-Chen*, in: Schlechtriem/Schwenzer, Commentary, Art. 50 para. 2 with further references; *Schnyder/Straub*, in: Honsell, Kommentar, Art. 50 para. 11; *Secretariat Commentary*, Art. 39 para. 8.

895 See in that direction *Magnus*, in: Staudinger Kommentar zum Bürgerlichen Gesetzbuch, Art. 50 para. 9; *Enderlein/Maskow/Strohbach*, Commentary, Art. 50 para. 1.

896 Cf. above, p. 198 (Claims for performance).

897 Cf. *UNCITRAL Digest*, Art. 50 para. 4.

the required notice, he will still be able to claim price reduction (or damages other than for loss of profit).[898]

III. Priority of the seller's right to cure

The second sentence of Art. 50 CISG provides that the buyer may not reduce the price if the seller remedies any failure to perform his obligations in accordance with Art. 37 or 48 CISG or if the buyer refuses to accept performance by the seller in accordance with those articles. Art. 50 CISG effectively provides that the seller's right to cure takes precedence over the buyer's right to reduce the price. As long as the seller has a right to cure the defect the buyer cannot rightfully and effectively reduce the price under Art. 50 CISG.[899] That result does not depend upon which side acts first. If the buyer declares the reduction of the price first and the seller afterwards rightfully offers and actually performs cure under Art. 48 CISG, the buyer's declaration will not entitle him to a reduction of the price.[900] If the seller rightfully offers cure first, the buyer will not be entitled to reject the offer and reduce the price immediately. He will have to wait and see whether the seller successfully cures the defect within the time limit set by Art. 48 CISG. Only if the seller does not succeed in doing so the buyer can reduce the price under Art. 50 CISG. It is submitted that these results can best be explained by the concept of the resolutory condition: The buyer's declaration is, at first, temporarily effective, but this effectiveness will disappear retroactively if the seller has rightfully offered and successfully performed cure.[901]

If the buyer does not want to wait for the entire reasonable period allowed by Art. 48 CISG, he can proceed under Art. 47 CISG and fix an additional period of time of reasonable length for the cure to be effected ("Nachfrist").[902] If that period has expired without result, the seller will, as a rule, no longer

---

898 Note that the situation would be the same, if one included the cases of third party rights into the scope of Art. 50 CISG. The notice requirement would then result from Art. 43(1) CISG and Art. 44 CISG would apply, too.

899 Cf. *Magnus*, in: Staudinger Kommentar zum Bürgerlichen Gesetzbuch, Art. 50 para. 27 et seq.; *Müller-Chen*, in: Schlechtriem/Schwenzer, Commentary, Art. 50 para. 7.

900 *Müller-Chen*, in: Schlechtriem/Schwenzer, Commentary, Art. 50 para. 7; *Secretariat Commentary*, Art. 46 para. 14.

901 Cf. *Schnyder/Straub*, in: Honsell, Kommentar, Art. 50 para. 22.

902 Note that while the additional period lasts, the buyer may not resort to any remedy except a claim for damages for the delay in performance, Art. 47(2) CISG.

be able to offer cure "without reasonable delay" as it is required by Art. 48(1) CISG and the buyer can claim price reduction right away.[903]

IV. Declaration

The buyer has to declare his intention to reduce the price.[904] The declaration does not have to be made in any particular form. Art. 27 CISG will apply. As soon as the buyer has made the declaration, the price reduction will take effect, provided of course that all the requirements of Art. 50 CISG are met. As a rule, the buyer will be bound by his choice to reduce the price.[905]

Art. 50 CISG does not set up a particular time limit for the right to reduce the price. The buyer will therefore only be limited by the applicable rules on limitation and by the time limits arising from Art. 39 CISG.[906]

V. Irrelevant issues

Art. 50 CISG expressly provides that the buyer can claim price reduction even after he has already paid. He can then claim back the exceeding part.[907] It is further irrelevant whether the breach by the seller was fundamental or whether the seller was at fault. He will not even be saved from the buyer's right to price reduction if he was exempted under Art. 79 CISG. This follows from Art. 79(5) CISG.

---

903 Cf. *P. Huber*, in: Münchener Kommentar zum Bürgerlichen Gesetzbuch, Art. 50 para. 12. In practice, however, the buyer will not profit too much from using the procedure under Art. 47 CISG, because he has to give the seller a period of time *of reasonable length*. He cannot fix an extremely short period. Therefore, he might as well wait for the reasonable delay mentioned in Art. 48 CISG to pass by.

904 *UNCITRAL Digest*, Art. 50 para. 5.

905 (German) Oberlandesgericht München 12 March 1994, CISG-Online No. 108; *Will*, in: Bianca/Bonell, Commentary, Art. 50 para. 2.1.3; *P. Huber*, in: Münchener Kommentar zum Bürgerlichen Gesetzbuch, Art. 50 para. 14; *Magnus*, in Staudinger Kommentar zum Bürgerlichen Gesetzbuch, Art. 50 para. 15.

906 *Magnus*, in: Staudinger Kommentar zum Bürgerlichen Gesetzbuch, Art. 50 para. 17.

907 Cf. below p. 251.

VI. Burden of proof

With regard to the breach requirement the situation is the same as under Art. 46 CISG (see p. 207 et seq.). It is submitted that the burden of proof concerning the exception based on the right to cure (Art. 50 second sentence CISG) should be on the seller[908] and that the burden of proof concerning the evaluation of the goods should be on the buyer.[909]

VII. Effects of price reduction

1. General effects

If the buyer rightfully proceeds under Art. 50 CISG, the price will be reduced by the relevant amount. The buyer will be regarded as owing only the reduced amount. Where he has not yet paid, he need pay only the reduced amount. If he has already paid, he can claim back the relevant portion, such a claim being permitted directly by Art. 50 CISG.[910] It seems to be widely agreed that the buyer can claim interest on the part of the price he can claim back, although there is some dispute as to whether that right is based on Art. 78 CISG or on Art. 84(1) CISG.[911]

2. Calculation

a) Method

So far as the calculation of the amount of the reduction is concerned, in theory, two different ways are possible. The first method would determine the difference in value between the (non-conforming) goods actually delivered and the value that conforming goods would have had at the time of delivery and then simply deduct that sum from the price which had been contractually agreed (so-called linear method). The second method is more complicat-

908 *P. Huber*, in: Münchener Kommentar zum Bürgerlichen Gesetzbuch, Art. 50 para. 35.

909 *Müller-Chen*, in: Schlechtriem/Schwenzer, Commentary, Art. 50 para. 15.

910 *Müller-Chen*, in: Schlechtriem/Schwenzer, Commentary, Art. 50 para. 16; *Magnus*, in: Staudinger Kommentar zum Bürgerlichen Gesetzbuch, Art. 50 para. 25. Alternatively one could apply Art. 81(2) CISG by analogy, cf. *Karollus*, UN-Kaufrecht, p. 157.

911 Cf. *Müller-Chen*, in: Schlechtriem/Schwenzer, Commentary, Art. 50 para. 16 (ad Art. 78 CISG); *Magnus*, in: Staudinger Kommentar zum Bürgerlichen Gesetzbuch, Art. 50 para. 26 (ad Art. 84(1) CISG).

ed. This method divides the actual value of the delivered (non-conforming) goods by the value of conforming goods and then reduces the contract price by the resulting fraction (so-called proportional method).

Art. 50 CISG chooses the *proportional method*. The reduced contract price can therefore be found by applying the following formula:

$$\text{Reduced Price} = \frac{\text{Value of delivered (non-conforming goods)}}{\text{Value of promised (conforming) goods}} \times \text{Contract Price}$$

Assume, for example, that goods are sold for 100. If the goods are defective and as a result are only worth 70, the buyer would be entitled to reduce the original contract price (100) by the ratio of 70 to 100. In other words, he would have to pay 70. If the goods had originally been sold for 80, the reduced would amound to 70 percent of that sum, i.e. 56. If the had been sold for 120, the buyer would have to pay 70 percent of 120, i.e. 84.

The solution chosen by the Convention preserves the parties' original bargain in cases where the market price has fallen between the conclusion of the contract price and the delivery of the goods which is the relevant date for determining their – actual and hypothetical – value. If in the first example, the market price for (conforming) goods had fallen to 50, the value of the delivered (non-conforming) goods would be 70 percent of 50, i.e. 35. The original contract price (100) would have to be cut by the ratio of 35 to 50, i.e. by 70 percent again. The buyer would have to pay 70 instead of 100. Thus, the fact that the market price has fallen does not influence the result. The solution would have been quite different, if the CISG had followed the linear method: Under that method the buyer could simply reduce the contract price (100) by (50 minus 35, i.e.) 15, so that he would have to pay 85.

b) Relevant time and place

As we have seen, under Art. 50 CISG regard must be had both to the actual value of the delivered (non-conforming) goods and to the market value of conforming goods. The relevant time for assessment is the time of delivery (Art. 50 CISG). It is submitted that this aims at the moment in which the seller performs the acts which are necessary for him to effect "delivery" for the purposes of Art. 31 CISG or any express term in the contract as to the form of delivery. In the case of Art. 31 lit. (b) or (c) CISG the relevant time

would therefore be the moment when the seller places the goods at the buyer's disposal at the place mentioned there.[912]

The formula described above may create some difficulties with regard to contracts involving carriage. Art. 31(1) CISG provides that delivery is effected by handing the goods over to the first carrier. However, the buyer will of course only take delivery of the goods and be able to examine them at a later date. The question arises in such a case whether the value of the goods ought to be assessed at the time of delivery (as defined in Art. 31(1) CISG) or at the time that the buyer actually gets physical possession of the goods. Some authors have suggested that in contracts for the carriage of goods or for the sale of goods in transit, the relevant date should be the time when the goods reach their destination. Where the goods have deteriorated during transit, this view would have to undertake a hypothetical evaluation on the basis that the deterioration has not occurred, so as to comply with the rule in Art. 66 CISG that risk has already passed to the buyer on shipment.[913] It is submitted that this proposal should not be followed because it does not seem to be compatible with the use of the term "delivery" which is a concept clearly defined by the Convention in Art. 31 CISG.[914]

Market prices for a particular sort of goods may vary from one place to another. As a result, the question by reference to which place the actual or hypothetical value has to be determined can be of great importance in international sales. Unfortunately, the Convention does not give an answer to it. The issue has been extensively discussed in legal writing. The predominant view seems to accept as a general rule that the place of delivery should be relevant, but makes an exception by looking to the place of destination in cases of sales involving carriage or sales of goods in transit.[915]

---

912 *Müller-Chen*, in: Schlechtriem/Schwenzer, Commentary, Art. 50 para. 9; *Schnyder/Straub*, in: Honsell, Kommentar, Art. 50 para. 38 et seq.

913 *Müller-Chen*, in: Schlechtriem/Schwenzer, Commentary, Art. 50 para. 10.

914 Cf. *Schnyder/Straub*, in: Honsell, Kommentar, Art. 50 para. 39.

915 *Müller-Chen*, in: Schlechtriem/Schwenzer, Commentary, Art. 50 para. 11; *Magnus*, in: Staudinger Kommentar zum Bürgerlichen Gesetzbuch, Art. 50 para. 22. But see also *P. Huber*, in: Münchener Kommentar zum Bürgerlichen Gesetzbuch, Art. 50 para. 21 et seq.; *Will*, in: Bianca/Bonell, Commentary, Art. 50 para. 3.3; *Schnyder/Straub*, in: Honsell, Kommentar, Art. 50 para. 41 et seq.

3. Price reduction to zero?

If the goods that were delivered are completely worthless, the question arises whether the buyer can reduce the price to zero under Art. 50 CISG. If one simply applies the formula described above, this will be possible in that, if the actual value of the goods is zero, the reduced price will also be zero.

From a different perspective, however, this solution may give rise to certain objections. In fact, price reduction will in those cases lead to similar effects as an avoidance of the contract without being subject to some of the particular requirements for avoidance. This may in particular be the case where the buyer has missed the time limits of Art. 49(2) CISG or where he has not given timely notice under Art. 39 CISG, but is still entitled to claim price reduction by virtue of Art. 44 CISG.[916]

Despite these considerations, the predominant opinion accepts that the buyer may reduce the price to zero under Art. 50 CISG.[917] It is submitted that this is correct because the wording of Art. 50 CISG does not make any restrictions against reducing the price to zero.

VIII. Price Reduction and Damages

It has already been said that price reduction resembles in a number of respects a claim for damages and in many cases a buyer to whom defective goods are delivered will usually be able to claim damages under Art. 45(1) lit. (b) CISG for the difference in value of the goods. However, the method of determining the buyer's loss is different from the calculation of price reduction, in that it is not proportional, but linear in the sense described above (p. 251 et seq.). Under a claim for damages one would simply deduct from the contract price the difference in value between conforming goods and the actually delivered (non-conforming) goods. As we have seen, the proportional method is more

---

916 The fundamental breach requirement in Art. 49(1) lit. (a) CISG will not lead to problems because the delivery of goods which are completely worthless and which cannot be cured will usually amount to a fundamental breach.

917 (Austrian) Oberster Gerichtshof 23 May 2005, Internationales Handelsrecht (IHR) 2005, 165 = CISG-Online No. 1041; (German) Bundesgerichtshof 2 March 2005, Internationales Handelsrecht (IHR) 2005, 158 = CISG-Online No. 999; *Müller-Chen*, in: Schlechtriem/Schwenzer, Commentary, Art. 50 para. 13; *P. Huber*, in: Münchener Kommentar zum Bürgerlichen Gesetzbuch, Art. 50 para. 24. But see for a different view *Schnyder/Straub*, in: Honsell, Kommentar, Art. 50 para. 46.

favourable to the buyer if the market price has fallen between the conclusion of the contract and delivery.

On the other hand, if the seller has suffered additional losses as a result of the defective delivery, he can recover those only by claiming damages. He may, however, combine a claim for price reduction with such a claim for damages.[918] Thus, in so far as the buyer only seeks financial recovery for the defectiveness of the goods as such, he can choose between price reduction and a claim for damages. However, the buyer may have an interest in going for price reduction in two cases in particular: if the seller is exempted from having to pay damages under Art. 79 CISG[919] or if the market price has fallen between the conclusion of the contract and delivery.[920] In so far as the buyer seeks compensation for additional or consequential losses, he will have to (and may) resort to a claim for damages.

---

[918] *Müller-Chen*, in: Schlechtriem/Schwenzer, Commentary, Art. 50 para. 18.

[919] Art. 79(5) CISG leaves other remedies, inter alia price reduction, unaffected by the exemption.

[920] Cf. *Müller-Chen*, in: Schlechtriem/Schwenzer, Commentary, Art. 50 para. 3. There, a third case is included: if the buyer has difficulty in proving his loss, e.g. because he did not buy for resale but for altruistic purposes. These cases will be rare.

§ 13. Damages

I. Outline

Under Art. 45(1) lit. (b) CISG the buyer may claim damages as provided in Articles 74 to 77 CISG if the seller fails to perform any of his obligations under the contract. Art. 45(1) lit. (b) CISG therefore provides the basis for the buyer's claim to damages. The issue of calculation and measure of damage are dealt with in Art. 74-77 CISG. Finally, Art. 79, 80 CISG provide for certain exemptions to the seller's liability. It should be noted that the application of Art. 74-80 CISG is not limited to the liability of the seller. The provisions also apply to the buyer's liability, as is evidenced by the fact that they are to be found in Chapter V of the Convention which is entitled: "Provisions Common to the Obligations of the Seller and of the Buyer".

Art. 45(2) CISG provides that the buyer is not deprived of any right he may have to claim damages by exercising his right to other remedies. Thus the buyer may, for example, claim both repair and damages or he may avoid the contract and claim damages. While damages may be awarded in addition to another remedy, damages are not available where their award would lead to the buyer being overcompensated. Any claim will therefore be restricted to loss that has not been compensated by the other remedy.[921] Assume, for example, that the seller has delivered a non-conforming profit-earning machine and the buyer has successfully claimed repair under Art. 46(3) CISG. In such a case, the buyer will not be able to claim damages to reflect the fact that the machine when delivered was worth less than a conforming machine would have been because after the successful repair there is no longer such damage. He will, however, be able to claim compensation for the loss of profit that he suffered during the repair period because he could not use the machine for production purposes.

Damages are not fault-based in the CISG.[922] The seller will therefore be liable for damages even if he was not negligent. In setting up a system of strict liability the CISG follows the Common Law example. The seller is, however,

---

921 *Müller-Chen*, in: Schlechtriem/Schwenzer, Commentary, Art. 45 para. 25.

922 *Müller-Chen*, in: Schlechtriem/Schwenzer, Commentary, Art. 45 para. 23; *UNCITRAL Digest*, Art. 74 para. 11.

protected to a certain extent by the exemptions provided for in Art. 79, 80 CISG and by the foreseeability-rule in Art. 74 second sentence CISG which provides that the 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 as a possible consequence of the breach (cf. p. 271 et seq. below).

II. Requirements for the buyer's claim for damages

For the buyer to recover damages there must be a breach of contract by the seller (cf. Art. 45(1) lit. b CISG) in respect of which he cannot claim to be exempt under either Art. 79 CISG or Art. 80 CISG. Additionally, further restrictions on the buyer's right to claim damages may result from, for example, Art. 47(2) CISG or from Art. 48(2) CISG. The issues of breach (III) and exemption (IV, V) will be discussed in more detail before turning to the calculation of damages (VI, VII).

III. Breach of contract

The basic requirement for the buyer's claim for damages is that the seller fails to perform any of his obligations arising under the contract or under the CISG, as provided for in Art. 45(1) CISG. Damages are therefore in principle available for the violation of "any" obligation that the seller may have undertaken, irrespective of whether it is based on the contract or on the Convention.

If the seller's breach lies in the delivery of non-conforming goods (Art. 35 et seq. CISG) or of goods which are subject to third party rights (Art. 41 et seq. CISG), the buyer will have to comply with the notice requirements in Art. 38 et seq. CISG or Art. 43 et seq. CISG respectively.

IV. Exemption under Art. 79 CISG

1. Outline

Pursuant to Art. 79(1) CISG 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. Art. 79(5) CISG pro-

vides that nothing in this article prevents either party from exercising any right other than to claim damages. The primary effect of Art. 79 CISG therefore is as a ground for exemption from liability for damages.[923]

The provision aims to protect the party in breach (in our case, the seller) from liability for those risks that he was not able to control or to avoid. It is a necessary limitation to the system of strict liability for damages that the CISG sets up in Art. 45, 74 et seq. CISG. In practice, however, there have been few cases in which the courts have exempted the party in breach from liability under Art. 79 CISG.[924]

Whether or not the delivery of non-conforming goods can be brought within Art. 79(1) CISG, which of course speaks of "impediments to perform", has been the subject of some debate.[925] The predominant opinion is that Art. 79 CISG applies to every type of breach by the seller.[926] It is submitted that this is correct as the provision uses the words "failure to perform any of his obligations" thus drawing a parallel to the wide concept of breach of contract in Art. 45(1) CISG.

---

923 See *Stoll/Gruber*, in: Schlechtriem/Schwenzer, Commentary, Art. 79 para. 43 et seq.

924 See for example (Swiss) Amtsgericht Willisau 12 March 2004, CISG-Online No. 961; (German) Amtsgericht Charlottenburg 4 May 1994, CISG-Online No. 386; (French) Tribunal de Commerce de Besançon 19 January 1998, CISG-Online No. 557; Arbitral Award, Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce 22 January 1997, CISG-Online No. 1296. See also US District Court, N.D. of Illinois, Eastern Division (Raw Materials Inc. v Manfred Forberich GmbH & Co. KG) 6 July 2004, CISG-Online No. 925 where the court referred to domestic law for guidance. See also *UNCITRAL Digest*, Art. 79 para. 7; *Winship* Rabels Zeitschrift für ausländisches und internationales Recht (RabelsZ) 68 (2004), 495.

925 See for instance *Honnold*, para. 427.

926 *Stoll/Gruber*, in: Schlechtriem/Schwenzer, Commentary, Art. 79 para. 6 (with a detailed analysis); *Secretariat Commentary*, Art. 65 para. 9; *Magnus*, in: Staudinger Kommentar zum Bürgerlichen Gesetzbuch, Art. 79 para. 12; *P. Huber*, in: Münchener Kommentar zum Bürgerlichen Gesetzbuch, Art. 79 para. 3; *UNCITRAL Digest*, Art. 79 para. 8. The (German) Bundesgerichtshof 9 January 2002, Internationales Handelsrecht (IHR) 2002, 16, 21 = CISG-Online No. 651 now also seems to favour that position. The (French) Tribunal de Commerce Besançon 19 January 1998, CISG-Online No. 557 applied Art. 79 CISG to a delivery of non-conforming goods, albeit in a decision which is not entirely clear.

It should be noted that the parties may, of course (Art. 6 CISG), derogate from the provision of Art. 79 CISG or modify it. This is often done by so-called force majeure clauses.[927]

The structure of the provision is as follows: Art. 79(1) CISG sets out the basic rule, Art. 79(2) CISG deals with the (exemption from) liability for the acts of a third party, Art. 79(3) CISG contains a provision on temporary impediments and Art. 79(4) CISG sets up a duty to inform the other party of the impediment to perform.

2. Basic rule (Art. 79(1) CISG)

Art. 79(1) CISG will exempt the debtor from his liability if three requirements are met: First, the breach must be due to an impediment beyond his control; secondly, the impediment must have been one that he could not reasonably be expected to have taken into account at the conclusion of the contract, thirdly, the seller could not reasonably be expected to have overcome the impediment or its consequences.

a) Impediment beyond seller's control

In order to determine whether the impediment was beyond the seller's control, one has to undertake a risk analysis, i.e. to look at whether the risk of the occurrence of the impediment was something within the seller's or the buyer's sphere of control.[928] Thus, the court should have regard to any allocation of risk that is apparent from the contract and to any usages or practices (Art. 9 CISG) that may be relevant.[929] In the absence of any express or implied agreement, recourse should be had to the CISG rules on the allocation of risk.

As a rule, the debtor's (here, the seller's) sphere of control is wide. In fact, there will rarely be impediments which are beyond his control. The most important examples for such cases are natural disasters (hurricanes, earthquakes, diseases etc.), effects of war or terrorist attacks, governmental measures affecting trade (export/import bans, embargoes, blocking of traffic routes

927 See in more detail *Stoll/Gruber*, in: Schlechtriem/Schwenzer, Commentary, Art. 79 para. 51 et seq.

928 See *UNCITRAL Digest*, Art. 79 para. 6 with further references.

929 See (German) Bundesgerichtshof 24 March 1999, CISG-Online No. 396; (German) Oberlandesgericht Hamburg 28 February 1997, CISG-Online No. 261; *P. Huber*, in: Münchener Kommentar zum Bürgerlichen Gesetzbuch, Art. 79 para. 7.

etc.).[930] As a rule, the seller will have to bear all the risks which result from the organisation of his business. If therefore the seller suffers from a shortage in his production because important employees have left his company, this should not be regarded as "beyond his control". The same is true for breakdowns in his production machinery or computer systems.[931] Furthermore, the seller will in principle be liable for the behaviour of his employees, even if they have acted against his instructions.[932] It is submitted, however, that there should be limitations to the responsibility for its own employees if their behaviour was due to a general strike,[933] to force majeure or to an intentional act of sabotage,[934] provided, of course, that the requirements of unforeseeability and unavoidability are met.

The fact that the goods are not in conformity with the contract (Art. 35 et seq. CISG) will usually fall into the the seller's sphere of control. As a rule he will not be able to claim exemption by showing that the non-conformity was caused by his supplier or by the producer.[935] This rule does not follow from an application of Art. 79(2) CISG, but rather directly from the application of Art. 79(1) CISG, as the supplier or the producer are not engaged by the seller to "perform" his obligations towards the buyer (as would be required by Art. 79(2) CISG), but rather form part of the seller's own acquisition process.[936] Where non-conforming goods are shipped directly from the producer or supplier to the buyer, by-passing the seller, some commentators have argued that an exception to the strict liability rule should exist if the defect could not have been discovered by measures of inspection that could

930 See *Stoll/Gruber,* in: Schlechtriem/Schwenzer, Commentary, Art. 79 para. 14.

931 *P. Huber,* in: Münchener Kommentar zum Bürgerlichen Gesetzbuch, Art. 79 para. 12.

932 *Stoll/Gruber,* in: Schlechtriem/Schwenzer, Commentary, Art. 79 para. 21; *P. Huber,* in: Münchener Kommentar zum Bürgerlichen Gesetzbuch, Art. 79 para. 12 et seq.

933 See in more detail *Stoll/Gruber,* in: Schlechtriem/Schwenzer, Commentary, Art. 79 para. 33 et seq.

934 See *Stoll/Gruber,* in: Schlechtriem/Schwenzer, Commentary, Art. 79 para. 14; *P. Huber,* in: Münchener Kommentar zum Bürgerlichen Gesetzbuch, Art. 79 para. 15 with further references.

935 (German) Bundesgerichtshof 24 March 1999, CISG-Online No. 396; *P. Huber,* in: Münchener Kommentar zum Bürgerlichen Gesetzbuch, Art. 79 para. 19 with further references, also to differing opinions. See also *UNCITRAL Digest,* Art. 79 para. 14.

936 The problem is discussed in *UNCITRAL Digest*, Art. 79 para. 21.

reasonably be expected of a reasonable person in the seller's position.[937] It is submitted, however, that it is preferable not to make such an exception. It does not find any basis in the provisions of the CISG which is based on strict liability and, furthermore, when considered from the buyer's point of view it is usually irrelevant whether the seller produces the goods himself or whether he obtains them from a supplier or from the producer. If the seller does not want to take that risk, he should ensure that an exemption clause is included in his contract with the buyer exempting him from liability for failure by his supplier and/or the producer.[938]

Where the seller has sold generic goods, he will, it is argued, have to bear the so-called "acquisition risk" (or "procurement risk").[939] Where other sources of supply exist, even if more expensive than the one from which the seller intended to purchase the goods, the seller must purchase from any available source and will not be able to rely on Art. 79 CISG if he does not. Certain limitations however exist to the principle that the seller has to bear the acquisition risk. First, if the contract provides expressly or impliedly that the seller was to supply the goods from a particular source, or if the seller promised to deliver "provided that" he received the necessary deliveries from his supplier, then a failure of the intended source or a failure by the supplier to deliver will exempt the seller from having to perform.[940] Secondly, even if no specific source of goods is identified in the contract, it is suggested that there may come a time when a post-contract market rise has been so extreme that the seller will be entitled to claim exemption under Art. 79 CISG. It is true that the seller takes the risk of market rises (even significant ones) and he

---

[937] See for instance *Stoll/Gruber,* in: Schlechtriem/Schwenzer, Commentary, Art. 79 para. 39 et seq.; followed by (German) Landgericht Köln 16 November 1995, CISG-Online No. 265. Possibly, a decision of the (German) Bundesgerichtshof 9 January 2002, Internationales Handelsrecht (IHR) 2002, 16, 21 = CISG-Online No. 651, may not be hostile to such considerations; it did not, however, actually decide the issue.

[938] *P. Huber,* in: Münchener Kommentar zum Bürgerlichen Gesetzbuch, Art. 79 para. 20.

[939] See for instance (German) Bundesgerichtshof 24 March 1999, CISG-Online No. 396; (German) Oberlandesgericht Hamburg 28 February 1997, CISG-Online No. 261; Arbitral Award, ICC 8128/1995, CISG-Online No. 526; Arbitral Award, Chamber of Commerce Hamburg 21 March 1996, CISG-Online No. 187; *Stoll/Gruber,* in: Schlechtriem/Schwenzer, Commentary, Art. 79 para. 18 et seq.; *UNCITRAL Digest,* Art. 79 para. 14.

[940] *Stoll/Gruber,* in: Schlechtriem/Schwenzer, Commentary, Art. 79 para. 18 et seq.; *P. Huber,* in: Münchener Kommentar zum Bürgerlichen Gesetzbuch, Art. 79 para. 18.

may therefore have to pay a higher price than he had originally expected in order to be able to procure the goods, but only to the point where this would be extraordinarily expensive.[941] It will of course be difficult to draw the line in practice. A German court has held that the seller has to make greater efforts where the transaction had a speculative character and that – in such a case – the fact that the market price had tripled was not sufficient to exempt the seller.[942]

b) Unforeseeability

Art. 79(1) CISG requires that the debtor (here, the seller) could not reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract. This does not necessarily mean that the provision can only apply to impediments that arise after the conclusion of the contract. It may be the case that the impediment already existed at that time, but that it was not recognisable to the debtor (here, the seller). In such a case, the unforeseeability requirement of Art. 79(1) CISG will be met.[943]

c) Unavoidability

Finally, Art. 79(1) CISG presupposes that the debtor (here, the seller) could not reasonably be expected to have overcome the impediment or its consequences. This requirement asks, in essence, how much effort must the seller make in order to overcome the impediment that has arisen. Again, the (contractual or statutory) allocation of risks will have to play a major role. As a rule, it is suggested that the seller will only be excused where extraordinary expense and effort would be required in order to overcome the impediment.[944] Specific case scenarios will be discussed below (3).

---

941 See *Honnold*, para. 432.2; *P. Huber,* in: Münchener Kommentar zum Bürgerlichen Gesetzbuch, Art. 79 para. 17. But see also *Stoll/Gruber,* in: Schlechtriem/Schwenzer, Commentary, Art. 79 para. 30 et seq. for a very detailed elaboration of a different view.

942 (German) Oberlandesgericht Hamburg 28 February 1997, CISG-Online No. 261. See also (obiter) (Italian) Tribunale Civile Monza 14 January 1993, CISG-Online No. 540. See also *UNCITRAL Digest,* Art. 79 para. 15 with further examples.

943 *P. Huber,* in: Münchener Kommentar zum Bürgerlichen Gesetzbuch, Art. 79 para. 8; *Secretariat Commentary,* Art. 65 para. 4; *Magnus,* in: Staudinger Kommentar zum Bürgerlichen Gesetzbuch, Art. 79 para. 33. But see for a differing view *Tallon,* in: Bianca/Bonell, Commentary, Art. 79 para. 2.4.3.

944 *Stoll/Gruber,* in: Schlechtriem/Schwenzer, Commentary, Art. 79 para. 23; *P. Huber,* in: Münchener Kommentar zum Bürgerlichen Gesetzbuch, Art. 79 para. 9.

3. Liability for third parties

If third parties have been involved on the seller's side, the question will arise in how far the seller is responsible for their behaviour. For certain scenarios, the answer is provided by Art. 79(2) CISG; in other cases, Art. 79(1) CISG will be relevant.

Under Art. 79(2) CISG, if the seller's[945] failure is due to the failure of a third person whom the seller has engaged to perform (parts of) the contract, the seller is exempt from liability only if (a) he is exempt under Art. 79(1) CISG and (b) if the third person would be exempt under that provision, too (if it were applicable to him). For the provision to apply therefore the requirements for exemption must be met by both the seller and the third person. The seller therefore cannot get an exemption by simply proving that the impediment was beyond control, unforeseeable and unavoidable for him; he further has to prove that this was the case for the third person, too.[946]

Art. 79(2) CISG only applies if the third person has been engaged to perform at least a part of the contract. This requirement is not met where the third party provides something that the seller was not contractually obliged to perform. A good example of this arises where under a contract which requires the seller to hand over the goods to the carrier (cf. Art. 31 lit. (a) CISG) the carrier delivers late or damages the goods. In such a case, the seller will not be liable for the carrier's conduct as he was not contractually obliged to transport the goods. To put it differently, the seller is not in breach and therefore there is no need to consider Art. 79(2) CISG.[947]

According to the predominant opinion, Art. 79(2) CISG only applies to persons which are independent from the seller. It follows from this that the seller's liability for the behaviour of his employees or for persons or entities within his business organisation will not be governed by Art. 79(2) CISG,

---

945 Art. 79(2) CISG refers to a "party" so that it will of course apply to the buyer's liability, too.

946 See *Tallon,* in: Bianca/Bonell, Commentary, Art. 79 para. 2.7.3.

947 (Swiss) Handelsgericht Kanton Zürich 10 February 1999, Internationales Handelsrecht (IHR) 2001, 44, 45 = CISG-Online No. 488; *P. Huber,* in: Münchener Kommentar zum Bürgerlichen Gesetzbuch, Art. 79 para. 23. But see for a different view concerning the characterisation of these cases (Art. 79 CISG) *UNCITRAL Digest*, Art. 79 para. 6.

but by Art. 79(1) CISG.[948] Under that provision, the basic rule is that the seller is responsible for his own sphere of organisation.

As mentioned above, the seller will usually be liable for his own suppliers or producers. In the author's opinion, this results from a direct application of Art. 79(1) CISG (see above p. 260); others deduce that rule from an application of Art. 79(2) CISG.[949]

An example for the applicability of Art. 79(2) CISG is the delivery contract which requires the seller to actually deliver the goods to the buyer (e.g. under one of the D-terms of the Incoterms) and where he uses an independent carrier to do so. A further example is the case where the seller is obliged to perform certain services (e.g. montage, instructions) and uses an independent third party for that.

4. Consequences

a) Exemption from liability for damages

The most important consequence of an exemption under Art. 79 CISG is that the seller will not be liable for damages that result from his breach. Pursuant to the clear wording of Art. 79(5) CISG, other remedies of the buyer will not be affected by the exemption. Thus the right to avoid, to claim price reduction and – where relevant – to claim interest are not affected by the provision. Nor should the right to claim performance be affected by the exemption; the provision may however be regarded as containing "general principles" (Art. 7 CISG) in that regard (for more detail see below p. 324).

If the impediment is only temporary, the exemption will only have effect for the time during which the impediment exists (Art. 79(3) CISG). The seller will therefore not be liable for damages that result from the fact that he did not perform (properly) during that particular period. This does not exclude, however, the possibility that the buyer may have other remedies with regard to that period, for instance a right to avoid the contract.

---

948 *Stoll/Gruber,* in: Schlechtriem/Schwenzer, Commentary, Art. 79 para. 25 (in more detail); *P. Huber,* in: Münchener Kommentar zum Bürgerlichen Gesetzbuch, Art. 79 para. 23; (Swiss) Tribunale d'appello Ticino 29 October 2003, CISG-Online No. 912.

949 See for instance Arbitral Award, ICC 8128/1995, CISG-Online No. 526; (Swiss) Tribunale d'appello Ticino 29 October 2003, CISG-Online No. 912.

b) Contractual penalty clauses

It is a disputed question whether (or in how far) an exemption also affects contractual penalty clauses. In the author's opinion, this issue should primarily be solved by interpreting the relevant clauses. In the unlikely event that this does not lead to a clear conclusion, it seems to be conceivable to regard Art. 79 CISG as containing "general principles" of the CISG which may be applied. As a result, there would be no need to resort to the applicable national law.[950]

c) Duty to inform

Pursuant to Art. 79(4) CISG, the seller must give notice to the buyer of the impediment and of its effects. If such notice is not received[951] by the buyer within a reasonable time after the seller knew or ought to have known of the impediment, the seller will be liable for damages resulting from not giving notice.

V. Exemption under Art. 80 CISG

1. Outline

Art. 80 CISG provides that a party (the promisee; here, the buyer) may not rely on a failure of the other party (the promisor; here, the seller) to the extent that such failure was caused by the first party's act or omission. This provision has its basis in the good faith principle in the sense that it would be contrary to good faith if the promisee could rely on a non-performance that was caused by his own behaviour in order to make claims against the promisor.[952] The provision is not limited to claims by the buyer against the seller, but can apply to both sides.

The rule in Art. 80 CISG is not limited to claims for damages. It excludes any remedy under the CISG that the promisee may have against the promisor as a result of the non-performance (e.g. performance, avoidance, price reduction, interest).

The only requirement that the wording of Art. 80 CISG sets is that the promisee has, by an act or an omission, caused the promisor's non-performance. It

950 See *P. Huber,* in: Münchener Kommentar zum Bürgerlichen Gesetzbuch, Art. 79 para. 27. But see also *Stoll/Gruber,* in: Schlechtriem/Schwenzer, Commentary, Art. 79 para. 9 for the opposite view (national law).

951 The dispatch rule in Art. 27 CISG does not apply here, see *Stoll/Gruber*, in: Schlechtriem/Schwenzer, Commentary, Art 79 para. 49.

952 *Stoll/Gruber,* in: Schlechtriem/Schwenzer, Commentary, Art. 80 para. 1.

is therefore irrelevant whether the promisee's conduct amounted to a breach of contract, whether there was fault on the promisee's part[953] or whether the promisee could rely on an exemption under Art. 79 CISG with regard to his behaviour.[954] It should be noted, however, that an omission will only be sufficient if the promisee had a duty to act, for instance because the act was necessary in order to enable the promisor to perform.[955] With regard to the promisee's "responsibility under Art. 80 CISG" for the behaviour of third persons, it is submitted that the rules on the responsibility for third parties which are contained in Art. 79(2) CISG may be applied as "general principles" of the CISG (Art. 7(2) CISG).[956]

Examples where Art. 80 CISG may apply include cases where: the buyer has given incorrect specifications concerning the (manufacture of the) goods; [957] the buyer has not fulfilled his (contractual or statutory) duties to cooperate, for instance to take delivery or to call off the goods[958], to accept (proper) substitute delivery or repair under Art. 46 CISG[959], to nominate the ship (or the port of loading, if so agreed) under an FOB-contract[960] or to obtain the necessary import licence (if that was for him to obtain).[961]

In principle, there is no requirement that the impediment which the promisee has created by his act or omission should be insurmountable for the promisor. The principle of good faith may, however, require the promisee to

953 (German) Oberlandesgericht Koblenz 31 January 1997, CISG-Online No. 256; *Stoll/Gruber,* in: Schlechtriem/Schwenzer, Commentary, Art. 80 para. 3.

954 *Stoll/Gruber,* in: Schlechtriem/Schwenzer, Commentary, Art. 80 para. 3; *Schlechtriem,* Internationales Kaufrecht, para. 297 et seq.

955 See *Stoll/Gruber,* in: Schlechtriem/Schwenzer, Commentary, Art. 80 para. 3.

956 *Stoll/Gruber,* in: Schlechtriem/Schwenzer, Commentary, Art. 80 para. 3.

957 *Stoll/Gruber,* in: Schlechtriem/Schwenzer, Commentary, Art. 80 para. 3; *Tallon,* in: Bianca/Bonell, Commentary, Art. 80 para. 2.3.

958 See for instance (German) Oberlandesgericht München 8 February 1995, CISG-Online No. 143. See also (German) Landgericht München II 20 February 2002, Internationales Handelsrecht (IHR) 2003, 24 = CISG-Online No. 712 (seller's refusal to deliver due to buyer's breach to pay earlier deliveries), affirmed by (German) Oberlandesgericht München 1 July 2002, CISG-Online No. 656.

959 See for instance (German) Oberlandesgericht Koblenz 31 January 1997, CISG-Online No. 256.

960 See for instance (Austrian) Oberster Gerichtshof 6 February 1996, CISG-Online No. 224 (for a more complicated situation).

961 See *Stoll/Gruber,* in: Schlechtriem/Schwenzer, Commentary, Art. 80 para. 3; *P. Huber,* in: Münchener Kommentar zum Bürgerlichen Gesetzbuch, Art. 80 para. 4.

take certain steps in order to overcome the impediment, if this was possible and reasonable under the circumstances: Thus, for instance, if under a FOB contract the buyer has given unclear instructions concerning shipment, the seller may be under an obligation to ask for clarification.[962]

2. Joint responsibility

Particular problems arise where both parties have caused the non-performance (so-called cases of joint responsibility). Examples of this would include the situation where the (irreparable) non-conformity of the goods is due both to defective specifications given by the buyer and to mistakes made in the seller's production process; or the situation where the seller was obliged to deliver to the buyer's place of business (e.g. DDP Incoterms 2000) and where the goods have been destroyed because the buyer's unloading facilities were not working properly *and* because the seller's carrier (for whom the seller would be responsible under Art. 79(2) CISG in that scenario) did not act carefully enough.

Whether Art. 80 CISG applies in such a case has been disputed.[963] However, irrespective of whether the wording of Art. 80 CISG can or cannot cover these situations, it is submitted that the all-or-nothing effect of the provision is not suitable to deal with (all) cases of joint responsibility in an appropriate manner. Thus, in the author's opinion, Art. 80 CISG should not, as a general rule, be applied directly to cases of joint responsibility. The promisee (here, the buyer) will therefore be entitled to claim the remedies that the CISG accords to him for the promisor's (here, the seller's) breach. The promisee should, however, be held liable in damages to the promisor to the extent of his part of the responsibility for the non-performance. Thus, in the examples given above, the buyer will be entitled to the remedies under Art. 45 CISG as a result of the seller's breach, in particular to an avoidance of the contract, if the requirements of Art. 49 CISG are met (as will often be the case in the situations described above). Further, his rights are not excluded by Art. 80 CISG. The buyer, however, by breaching an obligation not to disturb the seller's ability to perform properly is liable under Art. 61(1) lit. (b), 74 et seq. CISG for the consequences of that breach. If the buyer has avoided the contract, the seller's damage will be the lost purchase price (or rather, the lost profit under the contract). The seller's claim for compensation of this damage

962 *Stoll/Gruber,* in: Schlechtriem/Schwenzer, Commentary, Art. 80 para. 5.

963 See *Stoll/Gruber,* in: Schlechtriem/Schwenzer, Commentary, Art. 80 para. 6 with further references.

will, however, have to be discounted by the percentage of his part in the causation of the non-performance. This can be deduced from a general principle (Art. 7 CISG) that underlies the provisions of Art. 80, 77 CISG.[964]

VI. The general rule: damages under Art. 74 CISG

Art. 74 CISG sets forth the basic principles concerning the recovery and the calculation of damages under the Convention. The first sentence of the provision states that damages consist of a sum equal to the loss (including loss of profit) that the other party suffered as a consequence of the breach (see below 1). The second sentence of the provision introduces the famous foreseeabilityrule. Under this, the damages recoverable 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 as a possible consequence of the breach (see below 2). The practical effects of the provision may be best understood by looking at different types of cases (see below 3).

1. General rules

a) Compensation for loss

The first principle that one can derive from the first sentence of Art. 74 CISG is that damages under the Convention are meant to compensate the injured party for its losses. They are not meant to sanction or punish the other party's behaviour and thus a claim for "punitive damages" will not lie under the Convention.[965]

b) Types of compensable loss

Art. 74 CISG does not exclude specific types of loss from being relevant under the CISG. As a rule, therefore, every type of loss is compensable (provided that the foreseeability requirement in Art. 74 second sentence CISG is met). This principle is often called the principle of full compensation.[966]

---

964 See *P. Huber,* in: Münchener Kommentar zum Bürgerlichen Gesetzbuch, Art. 80 para. 6.

965 *Knapp,* in: Bianca/Bonell, Commentary, Art. 74 para. 3.7; CISG-AC Opinion No. 6 (*Gotanda*), para. 9.5; *P. Huber,* in: Münchener Kommentar zum Bürgerlichen Gesetzbuch, Art. 74 para. 16.

966 See *Stoll/Gruber,* in: Schlechtriem/Schwenzer, Commentary, Art. 74 para. 2; CISG-AC Opinion No. 6 (*Gotanda*), para. 1.

Classifications made by some domestic laws, such as for example the distinctions drawn between "non-performance loss", "incidental loss" and "consequential loss" or distinctions between the "performance interest" (or "expectation interest"), the "integrity interest" (or "indemnity interest") or the "reliance interest"[967] may be helpful in identifying the types of loss that can be suffered.[968] They should not, however, be used as clear cut criteria in order to decide whether a specific type of loss is recoverable under the CISG. Once again, it is submitted that one should start from the assumption that every one of these types of losses may be recoverable under the Convention, as long as all the requirements are met.[969] More precise case scenarios will be dealt with below.

Art. 74 CISG specifically states that loss of profit may also be compensable under the Convention. In the light of the principle of full compensation and of the wording of the provision ("including") it is submitted that the reference to loss of profit is merely declaratory. It is meant to make it clear that restrictions on the recoverability of loss of profit that may exist in certain domestic legal systems will not apply within the Convention.[970]

c) Compensation in money

The English version of the CISG clearly states that compensation under the CISG must be made in money ("a *sum* equal to the loss"[971]). Although other translations of the Convention are not as explicit[972]; it is submitted that this should be regarded as a general rule. As a consequence, damages cannot be

967 See for example below p. 278.

968 See for more detail on these classifications *Stoll/Gruber,* in: Schlechtriem/Schwenzer, Commentary, Art. 74 para. 2, 13 et seq.

969 See for instance (Austrian) Oberster Gerichtshof 14 January 2002, Internationales Handelsrecht (IHR) 2002, 76, 79 et seq. = CISG-Online No. 643; *Stoll/Gruber,* in: Schlechtriem/Schwenzer, Commentary, Art. 74 para. 2.

970 See *Secretariat Commentary,* Art. 70 para. 3; *Magnus,* in: Staudinger Kommentar zum Bürgerlichen Gesetzbuch, Art. 74 para. 19; *P. Huber,* in: Münchener Kommentar zum Bürgerlichen Gesetzbuch, Art. 74 para. 17.

971 Emphasis added.

972 See for instance the French version («égaux à la perte subie») and the (not authentic, see the Final Clause of the Convention) German translation („entstandene Verlust").

claimed or "paid" by making restitution in kind.[973] Where, for instance, the buyer's loss consists in being liable to his sub-buyer due to the non-conformity of the goods delivered by the seller, the buyer's claim for damages under Art. 45(1) lit. (b), 74 CISG as a rule will be for the sum that he owes to the sub-buyer (compensation in money), but not for the discharge of the buyer's obligation towards the sub-buyer.[974]

d) Causation

Art. 74 CISG requires that the loss must have been suffered "as a consequence of the breach". This causation requirement refers to the well-known "conditio sine qua non"- formula or "but for"-test:[975] would the loss have been suffered but for the breach? It is submitted that there is no "probability"-requirement (in the sense that only those losses that were reasonably probable would be compensable).[976] The only limitation placed on liability where factual causation is established is that of foreseeability: even if the breach caused the loss, damages will be limited to the extent of loss that was foreseeable under Art. 74 second sentence CISG.

e) Calculation of loss

It is submitted that under Art. 74 CISG the amount of damages due should be calculated by comparing two different situations: first, the situation as it actually is as a result of the breach; secondly, the hypothetical situation that would exist if the breach had not occurred.[977] As a rule, this comparison should include every aspect which has an economic value so that for instance the buyer's loss of "good will" as a result of having distributed the defective products supplied to him by the seller may be recoverable provided that this loss can be measured in money (and that it was foreseeable).[978]

---

973 *Stoll/Gruber,* in: Schlechtriem/Schwenzer, Commentary, Art. 74 para. 24. See also (Austrian) Oberster Gerichtshof 14 January 2002, Internationales Handelsrecht (IHR) 2002, 76, 80 = CISG-Online No. 643.

974 See for more detail *Stoll/Gruber,* in: Schlechtriem/Schwenzer, Commentary, Art. 74 para. 24; *P. Huber,* in: Münchener Kommentar zum Bürgerlichen Gesetzbuch, Art. 74 para. 16.

975 *Stoll/Gruber,* in: Schlechtriem/Schwenzer, Commentary, Art. 74 para. 23.

976 *Stoll/Gruber,* in: Schlechtriem/Schwenzer, Commentary, Art. 74 para. 23.

977 *Stoll/Gruber,* in: Schlechtriem/Schwenzer, Commentary, Art. 74 para. 2; *Secretariat Commentary*, Art. 70 para. 5 et seq.; *P. Huber,* in: Münchener Kommentar zum Bürgerlichen Gesetzbuch, Art. 74 para. 22. But see for a different view *Honsell,* Schweizerische Juristenzeitung 1992, 361, 362.

978 *P. Huber,* in: Münchener Kommentar zum Bürgerlichen Gesetzbuch, Art. 74 para. 22; *Magnus,* in Staudinger Kommentar zum Bürgerlichen Gesetzbuch, Art. 74 para. 27.

As a consequence of that comparison, any benefits that the buyer may have drawn from the seller's breach will be included in the equation. Thus, if the parties had contracted for sale of 1000 units at 100 each and in breach of contract the seller failed to deliver any units, damages would be calculated by comparing the contract price with the market price at the date when delivery was due. The actual situation is that the buyer has no goods that he can resell. The hypothetical situation in the absence of breach would be that the buyer would have 1000 units that he could resell. Damages are awarded to compensate him for that loss. Thus if the market price had risen to 130 each (and the buyer could therefore have resold them at this price), the loss of profit would be 30,000. If, however, the buyer would have incurred resale transaction costs of 5 per item, his overall claim for loss of resale profit will amount to 25,000 only. As a rule, the calculation has to be done in a concrete manner. This means that the party who claims damages (here, the buyer) has to prove that he suffered or will suffer with reasonable certainty[979] the losses claimed (e.g. that he has lost a resale opportunity for a higher price). As a rule therefore, the buyer cannot rely on an abstract presumption that a businessman would normally have had the chance to make a resale profit.[980] Matters are different, however, where Art. 76 CISG applies which permits an abstract calculation of damages under certain circumstances (see below p. 287 et seq.).

2. Foreseeability (contemplation rule)

a) Purpose

The second sentence of Art. 74 CISG limits the recoverable losses to those "which the party in breach foresaw or ought to have foreseen at the time of the conclusion of the contract, in the light of the facts and matters of which he then knew or ought to have known, as a possible consequence of the breach of contract". Put shortly, only foreseeable losses will be recoverable under the Convention.

The foreseeablility rule (or contemplation rule, as it is sometimes called[981]), which has its roots in English and US law, is widely regarded as a necessary limitation to the strict liability regime of the Convention and to the fact that Art. 74 first sentence CISG only requires causation in the sense of the

979 See CISG-AC Opinion No. 6 (*Gotanda*), para. 2.

980 See *Stoll/Gruber,* in: Schlechtriem/Schwenzer, Commentary, Art. 74 para. 29; (German) Oberlandesgericht Hamburg 26 November 1999, Internationales Handelsrecht (IHR) 2001, 19, 21 = CISG-Online No. 515.

981 See for instance *Stoll/Gruber,* in: Schlechtriem/Schwenzer, Commentary, Art. 74 para. 3.

"condicio sine qua non"-formula.[982] It aims at limiting the risk of liability to the extent that the party in breach ought to have taken into account at the conclusion of the contract, thus enabling that party to consider taking the risk, taking out insurance or abstaining from concluding the contract.[983]

b) Possible consequence of the breach

The contemplation rule relates to the consequences of the breach, but not to the occurrence of the breach itself. It is, in other words, irrelevant whether the seller could have foreseen that he would breach the contract. All that matters is whether he could have foreseen the actual damage suffered by the buyer as a possible consequence in the case that such a breach would occur.[984]

c) Standard

The second sentence of Art. 74 CISG sets out an objective and a subjective test of foreseeability. While in many cases, both tests will be satisfied, in that the party in breach will not only have actually foreseen the loss which occurred but a reasonable person would also have foreseen the loss, proof of either is sufficient. In both cases, whether the foreseeability test is met is decided by reference to what was foreseen or foreseeable at the time of conclusion of the contract.

So far as the subjective standard is concerned, the party in breach will only be liable for those losses which he actually foresaw as a possible consequence of the breach. This standard will rarely come into application in practice, as it will not be easy for the injured party to prove that the party in breach actually foresaw that type of loss. It may be different, however, where the injured

---

982 *Stoll/Gruber,* in: Schlechtriem/Schwenzer, Commentary, Art. 74 para. 3; *P. Huber,* in: Münchener Kommentar zum Bürgerlichen Gesetzbuch, Art. 74 para. 25.

983 See *Stoll/Gruber,* in: Schlechtriem/Schwenzer, Commentary, Art. 74 para. 3; *P. Huber,* in: Münchener Kommentar zum Bürgerlichen Gesetzbuch, Art. 74 para. 2; *Magnus,* in Staudinger Kommentar zum Bürgerlichen Gesetzbuch, Art. 74 para. 31. But see for a different approach *Faust,* Die Vorhersehbarkeit des Schadens gemäß Art. 74 Satz 2 UN-Kaufrecht (CISG), 1996, p. 225 et seq.

984 (Austrian) Oberster Gerichtshof 14 January 2002, Internationales Handelsrecht (IHR) 2002, 76, 80 = CISG-Online No. 643; *Magnus,* in Staudinger Kommentar zum Bürgerlichen Gesetzbuch, Art. 74 para. 32; *Knapp,* in: Bianca/Bonell, Commentary, Art. 74 para. 2.9; *P. Huber,* in: Münchener Kommentar zum Bürgerlichen Gesetzbuch, Art. 74 para. 27.

party explicitly warned the other party of the risk of these types of loss before the contract was concluded.[985]

The second standard is likely to be more relevant in practice. Under this, the party in breach will be liable for those types of losses that he ought to have foreseen as a possible consequence of the breach. This standard is an objective one ("ought to have foreseen"). It will of course be a matter in each individual case to decide whether the loss in question was actually foreseeable at the time of the conclusion of the contract (as to specific case scenarios see below 3); however, some general guidance may be derived from a judgment by the highest Austrian court[986] in which the following was said:

> "According to prevailing opinion, Art. 74 CISG does not require precise and detailed foreseeability of losses, and certainly not a numbered sum on the extent of loss (…). On the other hand, the invariably foreseeable possibility that a breach of contract will produce some type of loss is not sufficient. However, a (typical) loss due to non-performance is under prevailing opinion generally foreseeable (…). It is necessary that the obligor could recognize that a breach of contract would produce a loss essentially of the type and extent that actually occurred (…). Generally an objective standard is applied for foreseeability here. The obligor must reckon with the consequences that a reasonable person in his situation (Art. 8(2) CISG) would have foreseen considering the particular circumstances of the case. Whether he actually did foresee this is as insignificant as whether there was fault (…). Yet, subjective risk evaluation cannot be completely ignored: if the obligor knows that a breach of contract would produce unusual or unusually high losses, then these consequences are imputable to him (…)."

In the author's opinion, one should assume *as a general rule* that the typical consequences of the usual ways of using the goods (e.g. resale, production facilities, raw material for production) will usually be foreseeable, whereas losses resulting from extraordinary uses or losses reaching extraordinary di-

---

985 *P. Huber,* in: Münchener Kommentar zum Bürgerlichen Gesetzbuch, Art. 74 para. 30; *Faust,* Die Vorhersehbarkeit des Schadens gemäß Art. 74 Satz 2 UN-Kaufrecht (CISG), 1996, p. 13; *Magnus,* in: Staudinger Kommentar zum Bürgerlichen Gesetzbuch, Art. 74 para. 36.

986 (Austrian) Oberster Gerichtshof 14 January 2002, Internationales Handelsrecht (IHR) 2002, 76, 80 = CISG-Online No. 643; translation taken from Pace Database: www.cisg.law.pace.edu references omitted.

mensions will fail to meet the foreseeability requirement.[987] In the latter cases, the foreseeability condition will only be met if the buyer had specifically pointed the seller to these risks before the conclusion of the contract.

d) Normative criteria

In the author's opinion, the contemplation rule in Art. 74 second sentence CISG should not be limited to an empirical test (how probable was it that this type of loss would occur?). Rather it should also take into account normative elements, in particular the allocation of risks under the contract.[988] One should therefore take into account whether the injured party (here, the buyer) could actually rely on the fact that the risk of this particular type of loss was to be borne by the other party (here, the seller).[989]

3. Case scenarios

As mentioned above (p. 268), the application of Art. 74 CISG, and in particular of the contemplation rule[990], will usually depend on a case-by-case analysis. It is therefore difficult to formulate clear cut general rules. It may, however, be useful to give some indications which may serve as a starting point for a more detailed analysis in typical case scenarios. In all these cases it should be kept in mind that there may be a duty to mitigate under Art. 77 CISG (see below p. 289 et seq.).

a) Defect-related losses

The loss of value that results from the seller's breach (in particular: from the non-conformity of the goods) will normally be foreseeable and therefore compensable under Art. 74 CISG.[991] It is submitted, however, that the seller's right to cure (in particular: Art. 48 CISG) must be respected. Thus, if the seller remedies the breach or if the buyer refuses to accept such cure, he may not claim the loss of value. This conclusion may be derived from Art. 48

---

987 *P. Huber,* in: Münchener Kommentar zum Bürgerlichen Gesetzbuch, Art. 74 para. 31.

988 See also *Stoll/Gruber,* in: Schlechtriem/Schwenzer, Commentary, Art. 74 para. 38; see also (German) Landgericht Stuttgart 4 June 2002, CISG-Online No. 909.

989 *P. Huber,* in: Münchener Kommentar zum Bürgerlichen Gesetzbuch, Art. 74 para. 32.

990 For examples where the foreseeability was not given see *UNCITRAL Digest,* Art. 74 para. 33.

991 *Stoll/Gruber,* in: Schlechtriem/Schwenzer, Commentary, Art. 74 para. 41; *P. Huber,* in: Münchener Kommentar zum Bürgerlichen Gesetzbuch, Art. 74 para. 35; *Magnus,* in: Staudinger Kommentar zum Bürgerlichen Gesetzbuch, Art. 74 para. 41.

CISG[992] or from an analogy to Art. 50 second sentence CISG. It is submitted that this provision may be applied by analogy because a damages claim for loss of value (due to the non-conformity) basically serves the same purpose as the remedy of price reduction. Therefore, the stricter requirement in Art. 50 second sentence CISG should not be cirumvented by an unrestricted application of Art. 74 CISG.[993]

If a buyer has the non-conforming goods repaired by a third party, the question arises whether he can claim the cost of repair from the seller. It is submitted as a general rule that he can[994] but that he must respect the seller's right to cure.[995] Thus, the buyer will normally only be entitled to claim the costs of repair if the seller did not have a right to cure under Art. 48 CISG, e.g. because cure was impossible, refused or unreasonable etc. What is more, costs of repair will normally not meet the foreseeability requirement if they are unreasonably high.[996]

As a general rule, the cost of a necessary inspection, and the cost of transport back to the seller and the cost for the preservation[997] of the goods will be foreseeable and compensable. With regard to the preservation costs it is submitted, however, that damages should not be awarded beyond the restrictions

---

992 It is submitted that the proviso in Art. 48(1) second sentence CISG does not cover the present situation because it only refers to those types of damage that result from the original breach and cannot be removed by the cure; see p. 220; *P. Huber,* in: Münchener Kommentar zum Bürgerlichen Gesetzbuch, Art. 48 para. 20; *Müller-Chen,* in: Schlechtriem/Schwenzer, Commentary, Art. 49 para. 21.

993 *P. Huber,* in: Münchener Kommentar zum Bürgerlichen Gesetzbuch, Art. 74 para. 35, 13.

994 See CISG-AC Opinion No. 6 (*Gotanda*), para. 3.1 et seq.

995 See for instance (German) Bundesgerichtshof 25 June 1997, CISG-Online No. 277; (Austrian) Oberster Gerichtshof 14 January 2002, Internationales Handelsrecht (IHR) 2002, 76, 80 = CISG-Online No. 643; (German) Oberlandesgericht Hamm 9 January 1995, CISG-Online No. 146. See also Arbitral Award, CIETAC CISG/2000/09, CISG-Online No. 1076. See also for considerations to this issue U.S. District Court, N.D. of New York (Rotorex v Delchi) 7 September 1994, CISG-Online No. 113, in part affirmed by U.S. Court of Appeals 2nd Circuit (Delchi v Rotorex) 6 December 1995, CISG-Online No. 140.

996 (German) Bundesgerichtshof 25 June 1997, CISG-Online No. 277; (Austrian) Oberster Gerichtshof 14 January 2002, Internationales Handelsrecht (IHR) 2002, 76, 80 = CISG-Online No. 643.

997 See (German) Oberlandesgericht Braunschweig 28 October 1999, CISG-Online No. 510; Arbitral Award, ICC 7197/1992, CISG-Online No. 36; Arbitral Award, ICC 7585/1992, CISG-Online No. 105.

contained in the specific preservation provision of Art. 85 CISG[998] in order to prevent these restrictions from being circumvented.[999]

b) Loss of resale profit

If as a result of the seller's breach the buyer loses a resale opportunity, the loss of the resale profit will normally be foreseeable.[1000] With a view to the foreseeability requirement, it may be different, however, if the loss was exceptionally and extraordinarily high.[1001]

It is submitted that the buyer must prove the loss of profit with reasonable certainty.[1002] On that basis the buyer may also recover damages for loss of profits that would only be incurred after the time of the decision of the tribunal.[1003] However, damages for the loss of a mere chance to make a profit ("loss of a chance") will generally not be compensable.[1004]

When calculating the loss of resale profit, one should take into account the fact that the buyer may have saved specific costs which the resale would have caused and reduce the amount of damages accordingly.[1005] General overheads of running the business should not, however, be taken into account.[1006]

---

[998] See § 20 infra.

[999] *Schlechtriem*, Internationales UN-Kaufrecht, para. 303; *P. Huber*, in: Münchener Kommentar zum Bürgerlichen Gesetzbuch, Art. 74 para. 35; *Magnus*, in Staudinger Kommentar zum Bürgerlichen Gesetzbuch, Art. 74 para. 42.

[1000] (Austrian) Oberster Gerichtshof 6 February 1996, CISG-Online No. 224; (Austrian) Oberster Gerichtshof 28 April 2000, Internationales Handelsrecht (IHR) 2001, 206, 208 = CISG-Online No. 581; U.S. Court of Appeals 2nd Circuit (Delchi v Rotorex) 6 December 1995, CISG-Online No. 140; (Swiss) Handelsgericht St. Gallen 3 December 2002, CISG-Online No. 727; *Stoll/Gruber*, in: Schlechtriem/Schwenzer, Commentary, Art. 74 para. 22, 44; *P. Huber*, in: Münchener Kommentar zum Bürgerlichen Gesetzbuch, Art. 74 para. 36.

[1001] *Schlechtriem*, Internationales UN-Kaufrecht, para. 304. See also for example Arbitral Award, CIETAC CISG/2003/01, CISG-Online No. 1451.

[1002] CISG-AC Opinion No. 6 (*Gotanda*), para. 2.

[1003] CISG-AC Opinion No. 6 (*Gotanda*), para. 3.19; *Stoll/Gruber*, in: Schlechtriem/Schwenzer, Commentary, Art. 74 para. 22.

[1004] See CISG-AC Opinion No. 6 (*Gotanda*), para. 3.15 et seq.; *Stoll/Gruber*, in: Schlechtriem/Schwenzer, Commentary, Art. 74 para. 22, also on an exception to this rule where the contract specifically aims at granting the buyer such a chance to make a profit (sale of a racehorse).

[1005] See for example CISG-AC Opinion No. 6 (*Gotanda*), para. 9.

[1006] See (German) Oberlandesgericht Hamburg 26 November 1999, Internationales Handelsrecht (IHR) 2001, 19, 21 et seq. = CISG-Online No. 515; U.S. Court of

c) Loss of production

If production in the buyer's factory is interrupted or stopped as a result of the seller's breach (e.g. seller delivers the machines 2 weeks to late thus preventing the buyer from producing during that period) damages may be recovered for any loss of profit suffered and this should be quanitified on the same basis as that described for loss of resale profit above.[1007]

d) Damage to buyer's property

If the non-conforming goods damage the buyer's property[1008] (e.g. his production facilities), this will normally be foreseeable and compensable if that type of damage belongs to the typical risks that may arise from the delivery of non-conforming goods. This will not be the case, however, where the buyer uses the goods contrary to the instructions of use or, more generally, in a manner that was not appropriate for this type of goods (use of normative criteria, see above p. 274).[1009]

e) Loss resulting from buyer's liability

Where in a string of sales the seller's breach (e.g. non-conformity) has made the buyer liable to his sub-buyers (e.g. for damages), the buyer's losses will, as a general rule, be foreseeable and compensable.[1010] Again, the situation will be different if the buyer's losses are exceptionally high (for instance because the buyer's contract with his sub-buyer contained an unusually onerous penalty clause)[1011] or were actually unforeseeable in the case at hand.[1012]

Appeals 2nd Circuit (Delchi v Rotorex) 6 December 1995, CISG-Online No. 140; *P. Huber,* in: Münchener Kommentar zum Bürgerlichen Gesetzbuch, Art. 74 para. 36; *UNCITRAL Digest,* Art. 74 para. 27.

[1007] *Magnus,* in: Staudinger Kommentar zum Bürgerlichen Gesetzbuch, Art. 74 para. 40; *P. Huber,* in: Münchener Kommentar zum Bürgerlichen Gesetzbuch, Art. 74 para. 40; but see for a more restrictive view *Schlechtriem,* Internationales UN-Kaufrecht, para. 305.

[1008] Damage to the person is not governed by the Convention, Art. 5 CISG.

[1009] See *Stoll/Gruber,* in: Schlechtriem/Schwenzer, Commentary, Art. 74 para. 47.

[1010] (German) Bundesgerichtshof 25 November 1998, CISG-Online No. 353; (German) Oberlandesgericht Köln 21 May 1996, CISG-Online No. 254; (Austrian) Oberster Gerichtshof 6 February 1996, CISG-Online No. 224; Arbitral Award ICC 20 December 1999, Internationales Handelsrecht (IHR) 2004, 21; *Stoll/Gruber,* in: Schlechtriem/Schwenzer, Commentary, Art. 74 para. 45; CISG-AC Opinion No. 6 (*Gotanda*), para. 6.

[1011] See *Stoll/Gruber,* in: Schlechtriem/Schwenzer, Commentary, Art. 74 para. 45; (German) Oberlandesgericht Köln 21 May 1996, CISG-Online No. 254.

[1012] See for example Arbitral Awards CIETAC: CISG/1997/11, CISG-Online No. 1152; CISG/1995/05 CISG-Online No. 1118; CISG/1997/07 CISG-Online No. 1163.

f) Wasted expenses

It is submitted that Art. 74 CISG also protects the reliance interest so that wasted expenses may be recoverable if the following requirements are met: (1) The expenses incurred by the buyer were reasonably incurred in reliance on the contract. (2) As a result of the seller's breach these expenses were wasted.[1013] An example would be the case where the buyer hires storage facilities which as a result of the seller's non-delivery he does not need.

g) Legal costs

It is a disputed issue whether the buyer can claim as damages any legal costs and attorneys fees which arose out of court proceedings. The issue is practically relevant with regard to those (parts of the) costs which were not imposed on the seller under the lex fori (i.e. the law of the court's state). In the author's opinion there should be no such claim for damages under the CISG because the cost allocation rules of the lex fori should be regarded as a comprehensive and exclusive regime for that matter.[1014] Thus, in a legal system which follows the so-called American Rule and does not allocate the fees according to who won the litigation, the party who won the litigation may not invoke the CISG to recover its attorneys fees.

See also Arbitral Award, Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, CISG-Online No. 888.

[1013] See (Austrian) Oberster Gerichtshof 14 January 2002, Internationales Handelsrecht (IHR) 2002, 76, 81 = CISG-Online No. 643; U.S. Court of Appeals 2nd Circuit (Delchi v Rotorex) 6 December 1995, CISG-Online No. 140; *Magnus*, in: Staudinger Kommentar zum Bürgerlichen Gesetzbuch, Art. 74 para. 53; *P. Huber*, in: Münchener Kommentar zum Bürgerlichen Gesetzbuch, Art. 74 para. 47 et seq.; *UNCITRAL Digest*, Art. 74 para. 20 et seq.

[1014] See in that direction U.S. Court of Appeals 7th Circuit (Zapata Hermanos v Hearthside Baking Company) 19 November 2002, Internationales Handelsrecht (IHR) 2003, 128 = CISG-Online No. 684; U.S. District Court, N.D. of Illinois, Eastern Division (Ajax Toolworks v Can-Eng Manufacturing) 29 January 2003, CISG-Online No. 772; *P. Huber*, in: Münchener Kommentar zum Bürgerlichen Gesetzbuch, Art. 74 para. 43; *Stoll/Gruber*, in: Schlechtriem/Schwenzer, Commentary, Art. 74 para. 20; CISG-AC Opinion No. 6 (*Gotanda*), para. 5.1 et seq (also pointing to exceptions); *Mullis*, Rabels Zeitschrift für ausländisches und internationales Privatrecht (RabelsZ) 71 (2007), 33, 43 et seq. But see for a different view *Magnus*, in: Staudinger Kommentar zum Bürgerlichen Gesetzbuch, Art. 74 para. 52; *Mankowski*, in: Münchener Kommentar zum Handelsgesetzbuch, Art. 74 para. 35; possibly also Arbitral Award, CIETAC CISG/1999/09, CISG-Online No. 1113.

It is submitted that with regard to extra-judicial costs, such as the costs for hiring a debt-collecting agency or legal expenses for advice not closely related to court proceedings, a different view should be taken. These types of costs will typically not fall under the procedural cost allocation regime. There is therefore no reason why they should not be recoverable if the requirements of Art. 74 CISG are met.[1015] This will often be the case when it was justified and reasonable to incur the costs in order to facilitate the enforcement of the buyer's claims. With regard to lawyer's fees (for extra-judicial services such as advice on how to proceed after the seller's breach), provided it was reasonable and justified for the innocent party to take the advice, these would be recoverable.[1016] The involvement of debt collecting agencies, on the other hand, will rarely be compensable.[1017]

h) Loss of customers and loss of good will

If a seller delivers non-conforming goods to the buyer which he resells to third parties, problems arising from the lack of conformity may cause damage to the buyer's reputation with the consequential effect of loss of (potential) customers. The Swiss Bundesgericht has taken the position that the loss of customers may be recoverable under certain circumstances.[1018]

The question whether these types of losses can be recovered under the Convention raises difficult issues. The first issue is whether the CISG grants claims for immaterial damages. It is submitted that as a rule this is not the case, as one can deduce from Art. 74 CISG which defines the damages to be awarded as a "sum equal to the loss".[1019] A mere loss of reputation which has not led to any measurable financial consequences will therefore hardly be compensable. If, however, the loss of reputation has led to an economic damage, then a second question arises, namely whether this type of damages is recoverable under the contemplation rule in Art. 74 CISG. If one understood that rule in a purely empirical way, the answer would seem to be "yes". It is surely entirely conceivable that such a loss may arise as a result of breach by

---

[1015] See *Stoll/Gruber,* in: Schlechtriem/Schwenzer, Commentary, Art. 74 para. 20.

[1016] See (German) Amtsgericht Viechtach 11 April 2002, CISG-Online No. 755 for a similar case.

[1017] *Stoll/Gruber,* in: Schlechtriem/Schwenzer, Commentary, Art. 74 para. 20. See also (German) Oberlandesgericht Köln 3 April 2006, CISG-Online No. 1218 („strict requirements").

[1018] (Swiss) Bundesgericht 28 October 1998, CISG-Online No. 413; see also *Schlechtriem,* Internationales Kaufrecht, para. 306; CISG-AC Opinion No. 6 (*Gotanda*), para. 7.1 et seq.; *UNCITRAL Digest,* Art. 74 para. 18.

[1019] *Stoll/Gruber,* in: Schlechtriem/Schwenzer, Commentary, Art. 74 para. 12 (mentioning an exception, however).

the seller. If, however, as it is submitted here, one also takes account of normative criteria, in particular considerations of the allocation of risk, a more restrictive view may be appropriate. It is suggested therefore that, as a general rule, it should not be assumed that the seller wanted to undertake such an unpredictable risk. Therefore damages for loss of reputation should not be recoverable unless the buyer had highlighted the risks to the seller before the conclusion of the contract.[1020]

4. Specific issues

a) Third parties

Art. 74 CISG refers to the loss of "the other party". As a rule therefore, claims for damages under the CISG are only available to the other party to the contract, and not to third parties. The CISG does not recognise any doctrine that may integrate third parties into the sphere of protection of the contract (as for instance the German doctrine of "Vertrag mit Schutzwirkung für Dritte"). It is submitted that whether a third party can claim the protection of a contract to which the CISG applies is a matter for the applicable contract law to decide.[1021] What is more the parties are free to include third parties in their contract (Art. 6 CISG) thus entitling them to the ordinary claims under the CISG.[1022]

b) Currency

It is submitted that damages should as a rule be calculated in the currency under which the damage arose.[1023] This will often be the currency of the place of business of the damaged party, though where there has been a substi-

---

[1020] Stoll/Gruber, in: Schlechtriem/Schwenzer, Commentary, Art. 74 para. 46; Magnus, in: Staudinger Kommentar zum Bürgerlichen Gesetzbuch, Art. 74 para. 50; P. Huber, in: Münchener Kommentar zum Bürgerlichen Gesetzbuch, Art. 74 para. 39. But see also the differing view by U. Huber, Rabels Zeitschrift für ausländisches und internationales Privatrecht (RabelsZ) 43 (1979), 413, 499. See also Arbitral Award, CIETAC CISG/1996/49, CISG-Online No. 1410.

[1021] *P. Huber,* in: Münchener Kommentar zum Bürgerlichen Gesetzbuch, Art. 74 para. 6; *Knapp,* in: Bianca/Bonell, Commentary, Art. 74 para. 2.1.

[1022] See *Magnus,* in: Staudinger Kommentar zum Bürgerlichen Gesetzbuch, Art. 74 para. 14.

[1023] (Geman) Oberlandesgericht Hamburg 28 February 1997, CISG-Online No. 261 (on Art. 75 CISG); *Stoll/Gruber,* in: Schlechtriem/Schwenzer, Commentary, Art. 74 para. 30; *Magnus,* in: Staudinger Kommentar zum Bürgerlichen Gesetzbuch, Art. 74 para. 56; *P. Huber,* in: Münchener Kommentar zum Bürgerlichen Gesetzbuch, Art. 74 para. 53. But see for differing views (German) Landgericht

tute transaction, damages should be calculated in the currency of that transaction.[1024]

c) Place of performance for payment of damages

The place of performance for the payment of damages is not explicitly regulated in the CISG and there has been some dispute about the matter. According to one view, the place of performance of the damages claim is the place of performance of the breached obligation.[1025] In the author's view, however, the place of performance should be determined by applying the general principle underlying Art. 57 CISG that monetary obligations are to be performed at the place of business of the monetary creditor unless the parties have agreed otherwise (see p. 309 et seq., 313 et seq.).[1026] In the case of damages claims this would lead to the place of business of the party which claims damages.

d) Burden of proof

It is submitted that as a rule it is the party claiming damages that has the burden of proof concerning the requirements for a claim for damages.[1027] This should also be so with regard to the foreseeability rule.[1028] In accordance with an Opinion of the CISG-Advisory Council is submitted that the standard is that of "reasonable certainty" and that the extent of the damage need not be

---

Berlin 30 September 1990, CISG-Online No. 70; (Australian) Supreme Court of Queensland 17 November 200, CISG-Online No. 587.

[1024] For the question in how far losses resulting from fluctuating exchange rates can be recoverable see CISG-AC Opinion No. 6 (*Gotanda*), para. 3.5 et seq.; *P. Huber*, in: Münchener Kommentar zum Bürgerlichen Gesetzbuch, Art. 74 para. 49 et seq.; *Stoll/Gruber*, in: Schlechtriem/Schwenzer, Commentary, Art. 74 para. 17.

[1025] *Stoll/Gruber,* in: Schlechtriem/Schwenzer, Commentary, Art. 74 para. 27.

[1026] See for instance (German) Oberlandesgericht Düsseldorf 2 July 1993, CISG-Online No. 74; *P. Huber,* in: Münchener Kommentar zum Bürgerlichen Gesetzbuch, Art. 74 para. 54; *UNCITRAL Digest,* Art. 74 para. 38.

[1027] (German) Oberlandesgericht Zweibrücken 31 March 1998, CISG-Online No. 481; (Italian) Tribunale di Vigevano 12 July 2000, Internationales Handelsrecht (IHR) 2001, 72 = CISG-Online No. 493; *Stoll/Gruber,* in: Schlechtriem/Schwenzer, Commentary, Art. 74 para. 51 with further references; *UNCITRAL Digest,* Art. 74 para. 35 et seq.

[1028] (German) Oberlandesgericht Bamberg 13 January 1999, CISG-Online No. 516; (Swiss) Handelsgericht Zürich 26 April 1995, CISG-Online No. 248; *Stoll/Gruber,* in: Schlechtriem/Schwenzer, Commentary, Art. 74 para. 51; *P. Huber,* in: Münchener Kommentar zum Bürgerlichen Gesetzbuch, Art. 74 para. 58. But see for differing view *Magnus,* in: Staudinger Kommentar zum Bürgerlichen Gesetzbuch, Art. 74 para. 62.

proven with mathematical precision so that it is sufficient to provide a basis upon which the court can reasonably estimate the extent of the damage.[1029]

As a general rule, the "liable" party should bear the burden with regard to his defences (e.g. that he actually made performance so that there is no breach) or to the exceptions to the liability for damages (e.g. Art. 79, 80 CISG).[1030]

5. Damages and avoidance

There is some debate on the question of whether the buyer can claim so-called damages for non-performance under Art. 74 CISG without avoiding the contract under Art. 49 CISG. Assume for instance that the seller has delivered non-conforming goods, but that the breach is not fundamental so that there is no right to avoid the contract under Art. 49 CISG. Can the buyer in such a case buy the same goods from another supplier, reject the delivered goods and claim damages in the amount of the purchase price paid to the other supplier (or to the extent that the price in the substitute transaction was higher if he also gets back the price from the seller)?

There is case law[1031] and legal writing[1032] which, correctly in the author's opinion, states that the buyer cannot claim damages on this basis because otherwise the specific policy considerations of the law of avoidance could be undermined. This is true in particular for the fundamental breach requirement, but also for the time limits provided for in Art. 49(2) CISG.[1033] A further argument derives from the very existence of Art. 75, 76 CISG which envisage just that type of situation and require an avoidance of the contract. This shows that the CISG is based on the assumption that one cannot claim the entire performance interest without avoiding the contract.

[1029] CISG-AC Opinion No. 6 (*Gotanda*), para. 2.

[1030] See *Stoll/Gruber*, in: Schlechtriem/Schwenzer, Commentary, Art. 74 para. 52, Art. 79 para. 53 et seq., Art. 80 para. 8.

[1031] (Austrian) Oberster Gerichtshof 6 February 1996, CISG-Online No. 224; (Austrian) Oberster Gerichtshof 14 January 2002, Internationales Handelsrecht (IHR) 2002, 76, 81 = CISG-Online No. 643. But see also for example Arbitral Award CIETAC CISG/1999/25, CISG-Online No. 1356.

[1032] *P. Huber*, in: Münchener Kommentar zum Bürgerlichen Gesetzbuch, Art. 74 para. 9 et seq.; *Müller-Chen*, in: Schlechtriem/Schwenzer, Commentary, Art. 45 para. 27; *Magnus*, in: Staudinger, Art. 45 para. 22. For partly different approach see *Schlechtriem*, Festschrift Apostolos Georgiades, Athen (2005), p. 383 et seq.

[1033] The same would be true with regard to Art. 64(2) CISG if it were a case where the seller avoided the contract.

VII. Specific methods of calculation (substitute transaction)

1. Outline

As we have seen, Art. 74 CISG sets forth the basic principle to be applied for the calculation of damages. However, the Convention also contains in Art. 75 and Art. 76 CISG specific rules to govern the calculation of damages where the contract has been avoided. Art. 75 CISG applies if the buyer[1034] has avoided the contract and concluded a cover (or substitute) contract. In such a case, damages are assessed on the basis of the difference between the contract price and price in the substitute transaction. Art. 76 CISG applies where the buyer has avoided the contract but, unlike Art. 75 CISG, not concluded a cover contract. In such a case, provided that the goods have a current price, the buyer may recover as damages the difference between the contract price and the current price at the time of avoidance. The major advantage for the buyer of proceeding under Art. 75 or Art. 76 CISG is that, as a rule, the foreseeability requirement (Art. 74 second sentence CISG) will not be applicable. The types of damages described in these two provisions are deemed to be foreseeable.

Neither Art. 75 CISG nor Art. 76 CISG are mandatory in their application. Thus, even if by the provisions by their terms apply the aggrieved party can choose whether or not to calculate damages by reference to them. The party entitled to damages may therefore also choose to proceed under Art. 74 CISG instead.[1035] Moreover, both Art. 75 CISG and Art. 76 CISG explicitly provide that *further* damages may be claimed under Art. 74 CISG.

2. Concrete calculation of damages (Art. 75 CISG)

a) Requirements

For Art. 75 CISG potentially to apply, three requirements must be met. The burden of proof is on the party invoking the provision.[1036]

[1034] It should be noted however that Art. 75 CISG and Art. 76 CISG may also be invoked by the seller ("the party claiming damages"); see p. 334.

[1035] (Austrian) Oberster Gerichtshof 28 April 2000, Internationales Handelsrecht (IHR) 2001, 206, 208 = CISG-Online No. 581; *Stoll/Gruber,* in: Schlechtriem/Schwenzer, Commentary, Art. 75 para. 2; *UNCITRAL Digest,* Art. 75 para. 3 and Art. 76 para. 3; *Knapp,* in: Bianca/Bonell, Commentary, Art. 75 para. 2.7.

[1036] See *Stoll/Gruber,* in: Schlechtriem/Schwenzer, Commentary, Art. 75 para. 8 with further references (also to a differing view concerning the reasonableness criterion); *UNCITRAL Digest,* Art. 75 para. 15.

aa) Avoidance of the contract

First, Art. 75 CISG only applies where the contract has been avoided. This presupposes that one party had a right to avoid the contract, i.e. under Art. 49, Art. 73 or Art. 61 CISG, and, as a general rule, that he has given a notice of avoidance. While giving a notice of avoidance is generally required, it is submitted that such declaration is not necessary if the other party (in our case: the seller) has seriously and definitely refused to perform.[1037] In that case, the party in breach (in our case: the seller) is not worthy of protection.[1038] The seller, in such a case, has to expect that the buyer will react to his refusal to perform by making a substitute transaction so that it would not be in accordance with good faith to insist on the mere formality that the buyer make a declaration of avoidance before making the substitute transaction.[1039]

bb) Reasonable substitute transaction

Secondly, Art. 75 CISG requires that the buyer must have purchased goods in replacement in a reasonable manner (cover purchase).[1040] While conclusion of a substitute transaction must have taken place, it is not necessary

---

[1037] See (German) Oberlandesgericht Hamburg 28 February 1997, CISG-Online No. 261; (German) Oberlandesgericht Bamberg 13 January 1999, CISG-Online No. 516; (German) Oberlandesgericht München 15 September 2004, Internationales Handelsrecht (IHR) 2005, 70 = CISG-Online No. 1013; *P. Huber,* in: Münchener Kommentar zum Bürgerlichen Gesetzbuch, Art. 75 para. 4; *Stoll/Gruber,* in: Schlechtriem/Schwenzer, Commentary, Art. 75 para. 5. But see for a different view *Mankowski*, in: Münchener Kommentar zum Handelsgesetzbuch, Art. 75 para. 4. The same principles will of course apply vice versa if it is the buyer who is in breach and the seller who claims damages on the basis of Art. 75 CISG; this is, however, not the situation dealt with in this chapter.

[1038] This is why, in the author's opinion, one should not extend this exception to cases of impossibility: The simple fact that there is impossibility does not necessarily mean that the promisor has lost his worthiness of protection to the same extent as a party who could perform but simply refuses to do so; see *P. Huber,* in: Münchener Kommentar zum Bürgerlichen Gesetzbuch, Art. 75 para. 5.

[1039] It should be noted, however, that the declaration of avoidance will still be necessary in order to trigger the other consequences of avoidance. It is submitted that when the buyer makes the claim for damages based on the substitute transaction this may be regarded as an implicit declaration of avoidance.

[1040] Of course, pursuant to its wording Art. 75 CISG can also apply to damages claims of the seller. In that case the substitute transaction would be a resale of the goods. These cases are not dealt with in the present chapter, however.

that it has already been performed.[1041] Goods will be treated as having been bought in replacement if they are suited to satisfy the buyer's performance interest which had been violated by the seller's breach.[1042] As a rule, the cover purchase will have to be concluded with a third party. Thus, if the buyer produces the goods himself this will not be regarded as a cover purchase under Art. 75 CISG so that the buyer will have to rely on Art. 74 CISG for the reimbursement of his production cost.[1043]

Where the buyer continuously deals in the type of goods concerned (so-called rolling stock) it may be difficult to identify one of his numerous transactions as a cover purchase. The burden of doing so is on the buyer.[1044] It is submitted that it will be strong evidence in favour of such identification if the buyer gives anticipatory notice of his intent to make a cover purchase.[1045] Further, it is submitted that even in the absence of such a notice the identification may be made by assuming that the first purchase of the relevant quantity that the buyer made after the declaration of avoidance is the cover purchase.[1046] In fact, the purpose of the identification requirement is to prevent the buyer from unloading his most expensive purchase on the seller. This purpose can also be met by using the "first purchase after avoidance"-rule.

The cover purchase must be concluded "in a reasonable manner", i.e. at reasonable conditions (e.g. price, modalities of performance). The relevant test

---

[1041] See *P. Huber,* in: Münchener Kommentar zum Bürgerlichen Gesetzbuch, Art. 75 para. 8; *Magnus,* in: Staudinger Kommentar zum Bürgerlichen Gesetzbuch, Art. 75 para. 13.

[1042] See (German) Oberlandesgericht Hamburg 28 February 1997, CISG-Online No. 261; *Stoll/Gruber,* in: Schlechtriem/Schwenzer, Commentary, Art. 75 para. 3.

[1043] See *Magnus,* in: Staudinger, Art. 75 para. 11. It is submitted, however, that the general principle underlying Art. 75 CISG may be applied in the sense that this type of damage has to be regarded as foreseeable under Art. 74 second sentence CISG; see *P. Huber,* in: Münchener Kommentar zum Bürgerlichen Gesetzbuch, Art. 75 para. 9; *Magnus,* in: Staudinger, Art. 75 para. 11. For a slightly different view see *Stoll/Gruber,* in: Schlechtriem/Schwenzer, Commentary, Art. 75 para. 3.

[1044] *Stoll/Gruber,* in: Schlechtriem/Schwenzer, Commentary, Art. 75 para. 8. See also Arbitral Award, Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, CISG-Online No. 1479.

[1045] See *Stoll/Gruber,* in: Schlechtriem/Schwenzer, Commentary, Art. 75 para. 3; *Secretariat Commentary,* Art. 72 para. 3; *Magnus,* in: Staudinger Kommentar zum Bürgerlichen Gesetzbuch, Art. 75 para. 12; *Knapp,* in: Bianca/Bonell, Commentary, Art. 75 para. 2.6.

[1046] *Honnold,* para. 410.1; *P. Huber,* in: Münchener Kommentar zum Bürgerlichen Gesetzbuch, Art. 75 para. 10.

is whether an ordinary businessperson in the buyer's shoes would have concluded that transaction.[1047] The buyer should try to reach conditions which are similar to the original contract with the seller.[1048] It is submitted, however, that a substitute transaction may be reasonable notwithstanding that the price achieved in the substitute transaction may not have been the lowest possible. The buyer need only take reasonable steps to ascertain what the best price is and this does not necessarily require him to conduct a detailed market analysis.[1049] What is reasonable will of course depend on all the circumstances with matters such as the urgency with which the buyer needs the goods being important.[1050] If the cover purchase has not been made "in a reasonable manner" (for instance at too high a price) it is submitted that Art. 75 CISG will not apply and the buyer's claim, if any, will fall to be assessed under Art. 76 or Art. 74 CISG.[1051]

cc) Timing of cover contract

Finally, the cover purchase must have been made within a reasonable time after avoidance. This requirement aims at preventing the buyer from speculating on the market to the disadvantage of the seller. This does not however mean that the buyer has to react immediately. The precise duration will have to be determined according to the circumstances of each individual case. There is case law which regarded a period of two weeks as reasonable under the circumstances[1052], but there are also decisions which granted a much longer period under certain specific circumstances.[1053]

[1047] See Arbitral Award, ICC 8128/1995, CISG-Online No. 526; *Stoll/Gruber,* in: Schlechtriem/Schwenzer, Commentary, Art. 75 para. 6.

[1048] *Stoll/Gruber,* in: Schlechtriem/Schwenzer, Commentary, Art. 75 para. 6.

[1049] *P. Huber,* in: Münchener Kommentar zum Bürgerlichen Gesetzbuch, Art. 75 para. 13, *Stoll/Gruber,* in: Schlechtriem/Schwenzer, Commentary, Art. 75 para. 6.

[1050] See Arbitral Award, ICC 8128/1995, CISG-Online No. 526.

[1051] See (German) Oberlandesgericht Hamm 22 September 1992, CISG-Online No. 57; *Secretariat Commentary,* Art. 71 para. 6; *Knapp,* in: Bianca/Bonell, Commentary, Art. 75 para. 2.3; *P. Huber,* in: Münchener Kommentar zum Bürgerlichen Gesetzbuch, Art. 75 para. 15. But see for a differing view *Stoll/Gruber,* in: Schlechtriem/Schwenzer, Commentary, Art. 75 para. 9 (damages under Art. 75 CISG, albeit limited to the "reasonable amount"); see also *UNCITRAL Digest,* Art. 75 para. 9. In the author's opinion, this solution would create unnecessary uncertainty and is too far from the wording of the provisions which clearly points to either Art. 76 or Art. 74 CISG in those cases.

[1052] (German) Oberlandesgericht Hamburg 28 February 1997, CISG-Online No. 261.

[1053] For substitute sales by the seller: (German) Oberlandesgericht Düsseldorf 14 January 1994, CISG-Online No. 119 (3 months); (Australian) Supreme Court of Queensland 17 November 2000, CISG-Online No. 587.

b) Consequences

If the requirements of Art. 75 CISG are met, the buyer may claim as damages the difference between the contract price and the price in the substitute transaction.[1054] This head of damages is due in the currency in which the substitute transaction was made.[1055]

The buyer may also claim damages for any additional loss suffered under Art. 74 CISG. Examples of situations where additional damages may be recoverable include specific costs incurred in procuring the substitute transaction or the costs for inspection, storage or transport of the goods.[1056] Whether a claim for additional damages under Art. 74 CISG may include damages for loss of profit has been the subject of debate. The predominant opinion is opposed to recovery on the basis that the substitute transaction is intended to enable the buyer to make that profit.[1057] It is submitted that as a rule this is correct. There may, however, be cases where a more differentiated approach should be taken;[1058] this is true in particular with regard to the "lost volume seller" situation (see below p. 335 et seq.).

The buyer is not bound to take the route offered by Art. 75 CISG ("may"). He may also choose to calculate the damages entirely under Art. 74 CISG.[1059]

3. Abstract calculation of damages (Art. 76 CISG)

Where the goods have a current price, and where the contract has been avoided but no cover contract has been concluded, Art. 76 CISG permits the party entitled to damages to recover damages assessed on the basis of the difference between the contract price and the current price at the time of avoidance. This rule is based on the assumption that the difference between the

[1054] For an example see (Swiss) Kantonsgericht Zug 12 December 2002, Internationales Handelsrecht (IHR) 2004, 65 = CISG-Online No. 720.

[1055] (German) Oberlandesgericht Hamburg 28 February 1997, CISG-Online No. 261; *Magnus,* in: Staudinger Kommentar zum Bürgerlichen Gesetzbuch, Art. 75 para. 19.

[1056] See *Stoll/Gruber,* in: Schlechtriem/Schwenzer, Commentary, Art. 75 para. 10.

[1057] *Stoll/Gruber,* in: Schlechtriem/Schwenzer, Commentary, Art. 75 para. 11 with further references.

[1058] See *P. Huber,* in: Münchener Kommentar zum Bürgerlichen Gesetzbuch, Art. 75 para. 20.

[1059] *Stoll/Gruber,* in: Schlechtriem/Schwenzer, Commentary, Art. 75 para. 11; CISG-AC Opinion No. 6 (*Gotanda*), para. 8; *P. Huber,* in: Münchener Kommentar zum Bürgerlichen Gesetzbuch, Art. 75 para. 18.

current price and the contract price is the typical type of damage suffered in commercial sales. Therefore, the Convention provides a specific provision to deal with this situation. One of the advantages of proceeding under Art. 76 CISG is that the party entitled to damages need not disclose the commercial conditions under which it can make cover purchases.

a) Requirements

aa) Avoidance

The contract must have been avoided. The situation is the same as under Art. 75 CISG (cf. above p. 284).

bb) No substitute transaction

Art. 76 CISG is only applicable if there has been no substitute transaction which meets the requirements of Art. 75 CISG.[1060] Under the view taken here, however, Art. 76 CISG may also apply where the buyer has made a cover purchase which does not meet the requirements of Art. 75 CISG (in particular the reasonableness criterion), cf above p. 284 et seq.. Moreover it is submitted that where the buyer is in a "rolling stock" situation i.e where he is continuously in the market selling and buying the goods in question, he may choose to calculate his damages under Art. 76 CISG rather than being forced to choose the "first purchase" rule under Art. 75 CISG.[1061]

cc) Current price

There must be a current price for the goods concerned (see Art. 76(2) CISG) and this will usually be the market price. Art. 76 CISG requires that such a market price must be ascertainable. It is not necessary that it is an officially quoted price.[1062]

b) Consequences

Under Art. 76 CISG, the buyer[1063] may claim the difference between the contract price and the current price (market price) as damages. It is submit-

---

[1060] See (German) Oberlandesgericht Hamm 22 September 1992, CISG-Online No. 57; *Stoll/Gruber*, in: Schlechtriem/Schwenzer, Commentary, Art. 76 para. 2; *P. Huber*, in: Münchener Kommentar zum Bürgerlichen Gesetzbuch, Art. 76 para. 3.

[1061] See *Stoll/Gruber*, in: Schlechtriem/Schwenzer, Commentary, Art. 76 para. 2 with further references.

[1062] *Stoll/Gruber*, in: Schlechtriem/Schwenzer, Commentary, Art. 76 para. 4.

[1063] The same applies vice versa for the seller.

ted that the foreseeability rule in Art. 74 second sentence CISG is not applicable.[1064]

The relevant time for determining the current price is the time of avoidance unless Art. 76(1) second sentence CISG applies. The relevant place for determining the current price is determined by Art. 76(2) CISG.[1065]

The fact that the buyer did not conclude a cover purchase[1066] may be a violation of the duty to mitigate damages under Art. 77 CISG, for instance (in the rare case) where a suitable cover purchase would have been easily possible at lower cost than the current price. In that case the amount of damages may be reduced under Art. 77 CISG.

VIII. Mitigation of loss

1. Purpose and scope of application

Art. 77 CISG establishes the duty to mitigate the loss. This is not however a duty in the sense that the party who claims damages will himself be liable for breach of contract if he fails to mitigate. All that is meant is that the party who claims damages for breach of contract must take such measures as are reasonable in the circumstances to mitigate the loss and if he fails to do so, the party in breach may claim a reduction of the amount of damages.[1067] The provision is an expression of the principle of good faith (Art. 7(1) CISG).[1068] It is submitted as a general rule that it should be for the party which is liable in damages to prove that the other party has failed to mitigate the loss.[1069]

[1064] *P. Huber,* in: Münchener Kommentar zum Bürgerlichen Gesetzbuch, Art. 76 para. 11. But see for a slightly differing view *Stoll/Gruber,* in: Schlechtriem/Schwenzer, Commentary, Art. 76 para. 6.

[1065] See for more detail *Stoll/Gruber,* in: Schlechtriem/Schwenzer, Commentary, Art. 76 para. 9.

[1066] Vice versa, this also applies to claims by the seller.

[1067] See (Austrian) Oberlandesgericht Graz 24 January 2002, CISG-Online No. 801.

[1068] *Stoll/Gruber,* in: Schlechtriem/Schwenzer, Commentary, Art. 77 para. 1.

[1069] See (Austrian) Oberster Gerichtshof 6 February 1996, CISG-Online No. 224; (German) Oberlandesgericht Hamm 22 September 1992, CISG-Online No. 57; (German) Oberlandesgericht Hamburg 28 February 1997, CISG-Online No. 261. See also Arbitral Award, Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, CISG-Online No. 1188.

Art. 77 CISG only applies to claims for damages. An American proposal to extend the duty to mitigate to other remedies was rejected at the Vienna Conference.[1070] In particular, the mitigation principle does not apply to claims for performance.[1071]

2. Reasonable measures

Art. 77 CISG requires the party claiming damages to take such measures as are reasonable in the circumstances to mitigate the loss. The standard for the reasonableness criterion is that of a prudent businessperson in the position of the party claiming damages.[1072] It is submitted that regard should be had on the one hand to the amount of the damage that could arise if nothing were done and on the other hand to the question which party is in a better position to take measures to mitigate.[1073] The duty to mitigate does not require the taking of excessive or extraordinary measures.[1074] All that is required is that the party claiming damages take reasonable measures to avoid the loss. What is reasonable will of course vary from case to case and in that sense care should be taken in articulating general rules.[1075] However, from the buyer's perspective, it will often be a reasonable mitigation measure to stop using the delivered goods once they have turned out to be defective.[1076] As a rule, however, the buyer need not take specific measures before the breach has manifested itself. Normally therefore it will not be a violation of the duty to mitigate if the buyer did not take insurance for loss of production.[1077] It may be reasonable to take steps in order to preserve the goods, even if no formal obligation to do so exists under Art. 85 et seq. CISG.[1078]

[1070] See *Stoll/Gruber,* in: Schlechtriem/Schwenzer, Commentary, Art. 77 para. 4 et seq. with further references.

[1071] See *Stoll/Gruber,* in: Schlechtriem/Schwenzer, Commentary, Art. 77 para. 4 in more detail.

[1072] *Stoll/Gruber,* in: Schlechtriem/Schwenzer, Commentary, Art. 77 para. 7.

[1073] *P. Huber,* in: Münchener Kommentar zum Bürgerlichen Gesetzbuch, Art. 77 para. 4.

[1074] *Stoll/Gruber,* in: Schlechtriem/Schwenzer, Commentary, Art. 77 para. 7.

[1075] For examples see *UNCITRAL Digest,* Art. 77 para. 8 et seq.

[1076] See for instance (German) Bundesgerichtshof 24 March 1999, CISG-Online No. 396; *Magnus,* in: Staudinger Kommentar zum Bürgerlichen Gesetzbuch, Art. 77 para. 11.

[1077] See *Stoll/Gruber,* in: Schlechtriem/Schwenzer, Commentary, Art. 77 para. 8 with further references, also to differing opinions.

[1078] *Stoll/Gruber,* in: Schlechtriem/Schwenzer, Commentary, Art. 77 para. 7; Arbitral Award, ICC 7197/1992, CISG-Online No. 36.

It is a controversial question whether or in how far the buyer is under an obligation to make a cover purchase in order to mitigate the loss. In the author's opinion, the following guidelines should apply:[1079]

Where the cover purchase is not meant to substitute the seller's performance, but simply to complement it, the cover purchase will often be a reasonable measure to take (example: seller has not delivered, buyer needs the goods for his production process and orders a certain quantity to bridge the gap until the seller will make delivery).[1080]

Where, however, the cover purchase is meant to take the place of the seller's delivery, the situation is more complicated because here the duty to make a cover purchase as a mitigation measure would effectively mean that the buyer is forced to avoid the contract. The starting point should be that the buyer should not be forced to abandon his right to claim performance too quickly. He may therefore insist on performance for a certain time. The duty to make the cover purchase may, however, arise when the buyer wants to speculate on the market or when the period of time is so long that the seller now has a justified interest in knowing whether the buyer will claim performance or not.[1081]

3. Consequences

Where the buyer[1082] has taken reasonable measures to mitigate the loss he can claim the resulting costs as part of his damages claim under Art. 45(1) lit. (b), 74 CISG.[1083] This is so even if the (reasonable) measures have not been successful.[1084]

[1079] See *P. Huber,* in: Münchener Kommentar zum Bürgerlichen Gesetzbuch, Art. 77 para. 7 et seq.

[1080] *Stoll/Gruber,* in: Schlechtriem/Schwenzer, Commentary, Art. 77 para. 9.

[1081] See for these issues (German) Oberlandesgericht Braunschweig 28 October 1999, CISG-Online No. 510; (German) Oberlandesgericht Hamm 22 September 1992, CISG-Online No. 57; *Stoll/Gruber,* in: Schlechtriem/Schwenzer, Commentary, Art. 77 para. 9; *P. Huber,* in: Münchener Kommentar zum Bürgerlichen Gesetzbuch, Art. 77 para. 9. See also (Belgian) Hof van Beroep 10 May 2004, CISG-Online No. 991.

[1082] The same applies, vice versa, for the seller.

[1083] (German) Bundesgerichtshof 25 June 1997, CISG-Online No. 277; *Stoll/Gruber,* in: Schlechtriem/Schwenzer, Commentary, Art. 77 para. 11.

[1084] *P. Huber,* in: Münchener Kommentar zum Bürgerlichen Gesetzbuch, Art. 77 para. 12.

If the reasonable measures required by Art. 77 CISG have not been taken, the other party may claim a reduction in the damages in the amount by which the loss should have been mitigated (Art. 77 second sentence CISG). This may lead, in appropriate cases, to a reduction to zero.[1085] As a rule the party which is under a duty to mitigate will be responsible for the acts and omissions of third parties according to the general principles that can be derived from Art. 79 CISG.[1086] It is submitted that – despite the wording of the provision ("may claim") – the court should examine the issue of mitigation ex officio, i.e. also if the mitigation defence has not been raised by the respondent in the action.[1087] With regard to the underlying facts, the burden of proof should as a rule be placed on the party that invokes the reduction of the damages claim under Art. 77 CISG.[1088]

[1085] See (German) Bundesgerichtshof 24 March 1999, CISG-Online No. 396.

[1086] *Stoll/Gruber,* in: Schlechtriem/Schwenzer, Commentary, Art. 77 para. 2; *P. Huber,* in: Münchener Kommentar zum Bürgerlichen Gesetzbuch, Art. 77 para. 14 with reference to different solutions that may result from Art. 85 et seq. CISG.

[1087] See in that direction (German) Bundesgerichtshof 24 March 1999, CISG-Online No. 396; (Austrian) Oberster Gerichtshof 6 February 1996, CISG-Online No. 224; *Stoll/Gruber,* in: Schlechtriem/Schwenzer, Commentary, Art. 77 para. 12; *P. Huber,* in: Münchener Kommentar zum Bürgerlichen Gesetzbuch, Art. 77 para. 15. But see for a different view *Schlechtriem,* Internationales UN-Kaufrecht, para. 316.

[1088] See (Austrian) Oberster Gerichtshof 6 February 1996, CISG-Online No. 224; (German) Oberlandesgericht Hamm 22 September 1992, CISG-Online No. 57; (German) Oberlandesgericht Hamburg 28 February 1997, CISG-Online No. 261; *P. Huber,* in: Münchener Kommentar zum Bürgerlichen Gesetzbuch, Art. 77 para. 16.

§ 14. Specific issues

I. Partial breach of contract

Art. 51 CISG provides rules on partial breaches of contract. If the seller delivers only part of the goods or if only a part of the goods are in conformity with the contract, Art. 46-50 CISG apply only in respect of the missing or non-conforming part, Art. 51(1) CISG. Only if the partial breach itself amounts to a fundamental breach of the contract the buyer will be entitled to avoid the contract in its entirety, Art. 51(2) CISG.

1. Scope of application

According to the predominant opinion, Art. 51 CISG will only apply if the contract provides for the delivery of a number of separate and separable items, such as 1000 bales of cotton, 100 production machines, 10 container loads of cocoa etc. The provision will not apply, however, where a single item was sold, even if that item is composed of different parts. Thus, by way of example, the sale of a machine cannot be brought under Art. 51 CISG by arguing that the machine is composed of so-and-so many spare parts.[1089]

Art. 51 CISG further presupposes that at least one part of the contract has been performed and another part has not been properly performed (non-delivery or non-conformity). Take the example of a sale of 1000 pieces of meat, each weighing 500 g: If 1000 pieces are delivered, 800 of which weigh 500 g whereas the remaining 200 weigh only 300 g, then Art. 51 CISG will apply. If, however, 1000 pieces are delivered but each weighs only 300 g, this will not fall under Art. 51 CISG as it is not possible to separate properly one part which has been performed and another part which has not been performed.[1090]

[1089] *Müller-Chen*, in: Schlechtriem/Schwenzer, Commentary, Art. 51 para. 2; *P. Huber*, in: Münchener Kommentar zum Bürgerlichen Gesetzbuch, Art. 51 para. 2 et seq.

[1090] *P. Huber*, in: Münchener Kommentar zum Bürgerlichen Gesetzbuch, Art. 51 para. 4.

2. "Narrowing the focus" to the breached part

Art. 51(1) CISG provides that Art. 46-50 CISG will apply in respect of the part which is missing or which does not conform to the contract. The provision therefore narrows the focus to the missing (or non-conforming) part. It is only with regard to that part that the remedial provisions of Art. 46-50 CISG will be applied. This will for instance mean that avoidance will be limited to that part. An avoidance of the entire contract will only be possible under the conditions of Art. 51(2) CISG.

Although the operation of Art. 51 CISG appears fairly straightforward, a closer look at the provision reveals some intricate questions with regard to partial non-deliveries. Take the example of a contract for 100 items, where only 80 items are delivered. On the one hand Art. 51(1) CISG requires us to narrow the focus to the 20 missing items and, as a consequence, the seller's breach seems to be a non-delivery. Yet, under Art. 35(1) CISG, a defect in quantity amounts to a non-conformity for the purposes of the Convention. Of course, the question whether this amounts to a non-delivery or a non-conformity may be one of considerable importance, in particular with regard to the following issues: The applicability of the notice provision in Art. 39 CISG (which applies only to non-conformity); the time limits of Art. 49(2) CISG (which require a "delivery"), the basis of partial avoidance under Art. 49(1) lit. (b) CISG ("Nachfrist"-procedure in cases of non-delivery) or Art. 49(1) lit. (a) CISG (fundamental breach); the right to resort to the remedy of price reduction (which is limited to cases of non-conformity).

In the author's opinion the proper approach to be taken is as follows. Whenever the issue turns on the application of Art. 46-50 CISG, full regard should be given to Art. 51(1) CISG and the breach should be treated as a non-delivery. This is consistent with the wording of Art. 51(1) CISG which explicitly refers to these articles and which should be regarded as a lex specialis to Art. 35(1) CISG. With regard to the above-mentioned matters of avoidance, price reduction or performance, the breach should therefore be treated as a non-delivery and not as a non-conformity. With regard to Art. 38 et seq. CISG, however, the provision of Art. 51(1) CISG is not applicable so that Art. 35(1) CISG should be given full effect: The delivery of a lesser quantity therefore amounts to a non-conformity so that the examination and notice requirements of Art. 38 et seq. CISG will apply.[1091]

[1091] *P. Huber*, in: Münchener Kommentar zum Bürgerlichen Gesetzbuch, Art. 51 para. 8 et seq.; *UNCITRAL Digest*, Art. 51 para. 3. See also (with slight differences in detail) *Müller-Chen*, in: Schlechtriem/Schwenzer, Commentary, Art. 51 para. 5

If in the example mentioned above the seller had delivered all 100 items and of these 20 were defective, the questions identified above will not arise. Art. 51(1) CISG narrows the focus to the 20 defective items. The breach with regard to those items clearly is a non-conformity so both Art. 38 et seq. CISG and the non-conformity rules of Art. 46 et seq. CISG will apply. Thus, for instance, performance claims will fall under Art. 46(2), (3) CISG, (partial) avoidance can only be claimed under Art. 49(1) lit. (a) CISG and the remedy of price reduction will be available.[1092]

3. Avoidance of the entire contract

Pursuant to Art. 51(2) CISG the buyer may declare the contract avoided in its entirety only if the partial breach amounts to a fundamental breach (with regard to the entire contract).[1093] The fundamental breach analysis should be made according to the general standards described above (p. 213 et seq.). Thus, avoidance of the entire contract will only be possible if the partial breach as such essentially deprives the buyer of what he was entitled to expect from the entire contract. Where, for instance, in a sale of different models of new shoes all the items of sizes 7-11 are defective so that the buyer could only resell shoes of size 12 he may argue that the delivery is of no use to him as he needs to be able to offer shoes of all sizes in order to attract his customers.

4. Art. 51 CISG and instalment contracts

In the case of instalment contracts, a potential conflict exists between Art. 51 CISG and Art. 73 CISG. In the author's opinion the following approach should be taken. As a general rule, Art. 73 CISG will be the governing provision. If an instalment is delivered in its entirety but a part is non-conforming, the buyer may have recourse to the remedies granted by Art. 73 CISG. To such a case Art. 51 CISG is not applicable. If, however, there is a partial delivery with regard to one instalment (e.g. each instalment has to consist of 100 units and the instalment delivered only comprises 80 units), Art. 51 CISG will apply in conjunction with Art. 73 CISG. Thus, Art. 73(1)

---

et seq. For a different view see *Schnyder/Straub*, in: Honsell, Kommentar, Art. 51 para. 34 et seq.

[1092] *P. Huber*, in: Münchener Kommentar zum Bürgerlichen Gesetzbuch, Art. 51 para. 15.

[1093] See for an application of the provision (Austrian) Oberster Gerichtshof 21 June 2005, CISG-Online No. 1047.

CISG restricts the buyer to remedies concerning that particular instalment. Art. 51(1) CISG further restricts the buyer to remedies for the missing 20 units; an avoidance with regard to the entire instalment will only be possible under the conditions of Art. 51(2) CISG. Whether that particular breach with regard to one instalment will entitle the buyer to remedies concerning the entire contract, will again be governed by Art. 73 (2) and (3) CISG.[1094]

II. Early delivery

Pursuant to Art. 52(1) CISG, if the seller delivers the goods before the date fixed for delivery, the buyer has an unfettered choice whether to take delivery. It should be noted, however, that the buyer may be obliged under Art. 86(2) CISG to take possession of the goods on behalf of the seller in order to ensure the preservation of the goods.[1095] Some authors argue that in exceptional cases the buyer may also be precluded from choosing rejection by the good faith principle (Art. 7(1) CISG), for instance if the choice to reject is abusive.[1096] In the light of the duty to accept possession under Art. 86(2) CISG, however, one should be very careful in creating further restrictions on the buyer's choice.

If the buyer chooses to reject the goods, the seller's obligation to deliver at the fixed date will continue to exist.[1097] The fact that the seller delivered before the fixed date amounts to a breach of contract and may as such give rise to a claim for damages under Art. 45(1) lit. (b), Art. 74 et seq. CISG. It may also, rarely, give rise to a right to avoid the contract, if the requirements of Art. 72 CISG are met.

If the buyer chooses to accept the goods, the question will arise whether this amounts to an implicit modification of the agreed delivery date. The consequences of such a modification would be considerable. Thus, the examination and notice periods of Art. 38 et seq. CISG would begin to run at that moment, payment could become due at that moment (provided it was due upon delivery) and claims for damages might be lost because the seller might argue that due to the modification his early delivery was now in accordance with the contract.

[1094] *P. Huber*, in: Münchener Kommentar zum Bürgerlichen Gesetzbuch, Art. 51 para. 5.

[1095] *UNCITRAL Digest*, Art. 52 para. 2.

[1096] See for instance *Müller-Chen*, in: Schlechtriem/Schwenzer, Commentary, Art. 52 para. 3 with further references.

[1097] *UNCITRAL Digest*, Art. 52 para. 2.

In the author's opinion, one should only assume such a modification if there are specific indications for such an intention of the parties. The mere fact that the buyer accepts the early delivery should not be sufficient.[1098] This result can be based on the principle underlying Art. 18(1) CISG, second sentence (silence does not in itself amount to acceptance).[1099]

If there is no modification of the contractual delivery date, it is submitted that the consequences are as follows. The buyer may have a claim for damages under Art. 45(1) lit. (b), Art. 74 et seq. CISG. The "obligation" to examine the goods (and the consequential requirement to give notice of any lack of conformity) will not arise before the agreed date for delivery. If payment was to be made against delivery, it will not become due before the agreed date for delivery. The latter two consequences are justified by the fact that the buyer did not have to expect that he would have to examine the goods or to make preparations for payment before the agreed date for delivery.[1100]

III. Delivery of excess quantity

By the terms of Art. 52(2) CISG, 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 he takes delivery of the excess quantity, he must pay for it at the contract rate.

1. Scope of application

It is clear that Art. 52(2) CISG covers those cases where the excess quantity can be easily separated from the owed quantity. Thus, if the contract requires delivery of 100 items and the seller delivers 120 items, Art. 52(2) CISG will apply. The same is true where the contract requires delivery of 1000 litres

[1098] *Müller-Chen*, in: Schlechtriem/Schwenzer, Commentary, Art. 52 para. 5; *P. Huber*, in: Münchener Kommentar zum Bürgerlichen Gesetzbuch, Art. 52 para. 9 et seq.

[1099] *P. Huber*, in: Münchener Kommentar zum Bürgerlichen Gesetzbuch, Art. 52 para. 10.

[1100] *Müller-Chen*, in: Schlechtriem/Schwenzer, Commentary, Art. 52 para. 4; *P. Huber*, in: Münchener Kommentar zum Bürgerlichen Gesetzbuch, Art. 52 para. 11. But see for contrary views *Schnyder/Straub*, in: Honsell, Kommentar, Art. 52 para. 24; *Secretariat Commentary*, Art. 48 para. 2; *Will*, in: Bianca/Bonell, Commentary, Art. 52 para. 2.1.2.

of a certain liquid and 1200 litres are delivered.[1101] It is disputed, however, whether Art. 52 CISG will apply if the excess quantity cannot be easily separated from the owed quantity, for instance where the seller undertakes to deliver 100 cakes weighing 200 g each and he delivers instead 100 cakes weighing 250 g each. In the author's opinion, this case should not fall under Art. 52(2) CISG because the provision does not fit for this situation. In such a case, it will not be possible to reject only the excess quantity, as provided for in Art. 52(2) CISG. One should therefore simply treat this case as one of non-conformity as the goods do not conform to the contract with regard to their quantity (Art. 35(1) CISG). The buyer may as a result resort to the general remedies of Art. 45-50 CISG.[1102]

Some authors argue that Art. 52(2) CISG should be applied by analogy to cases where the seller has delivered goods which are more valuable than the ones owed by the contract (for instance machines of a higher quality than the ones that were sold).[1103] It is submitted that this is not correct for the reasons mentioned above. It will usually not be possible to separate the conforming from the excessive part of the delivery so that the rejection of the "excessive part" as provided in Art. 52(2) CISG does not make sense.[1104] What is more, it will be difficult to determine the contract rate for the more valuable goods that the seller has delivered. The situation should instead be treated as an offer by the seller to sell the more valuable goods instead of the originally ordered goods. The buyer may accept that offer by keeping the goods. If he does not do so, the seller will have to rely on remedies of domestic law (for instance unjust enrichment) in order to get back the delivered goods.

2. Refusal to take delivery

The buyer may refuse to take delivery of the excess quantity. He will usually do so if the market price of the goods has fallen and is now lower than the price agreed in the contract. A buyer who decides to reject the excess is entitled to require the seller to take them back, but may be under an obligation to take

[1101] *Müller-Chen*, in: Schlechtriem/Schwenzer, Commentary, Art. 52 para. 6; *P. Huber*, in: Münchener Kommentar zum Bürgerlichen Gesetzbuch, Art. 52 para. 14.

[1102] *P. Huber*, in: Münchener Kommentar zum Bürgerlichen Gesetzbuch, Art. 52 para. 14; *Benicke*, in: Münchener Kommentar zum Handelsgesetzbuch, Art. 52 para. 13.

[1103] *Müller-Chen*, in: Schlechtriem/Schwenzer, Commentary, Art. 52 para. 11; *Magnus*, in Staudinger Kommentar zum Bürgerlichen Gesetzbuch, Art. 52 para. 27.

[1104] *P. Huber*, in: Münchener Kommentar zum Bürgerlichen Gesetzbuch, Art. 52 para. 26.

preliminary possession of the goods on behalf of the seller under Art. 86(2) CISG.[1105] With respect to the remedies available to the buyer for delivery of an excess quantity, the provisions of Art. 45 et seq. CISG will apply. Thus, the seller's breach may entitle the buyer to claim damages (Art. 45(1) lit. (b), Art. 74 et seq. CISG) or to avoid the entire contract under Art. 49(1) lit. (a) CISG, if the breach (the delivery of the excess quantity, Art. 35(1) CISG) was fundamental.[1106]

When the buyer loses his right to reject an excess delivery through *lapse of time* has been the subject of discussion. According to one view, the buyer loses his right to reject when he takes physical possession of the goods ("take delivery"), unless he only does so in order to comply with his obligations to preserve the goods, Art. 86(2) CISG.[1107]

In the author's opinion, however, one should draw a parallel to the notice provisions of Art. 39 et seq. CISG. Delivery of an excess quantity is a delivery of non-conforming goods (Art. 35(1) CISG) which therefore falls under the examination and notice provisions of Art. 38 et seq. CISG.[1108] Thus, the buyer will have the period of time specified in Art. 39 CISG for giving notice of any non-conformity.[1109] If the buyer gives timely notice of the excess quantity under Art. 39 CISG, this should be treated as an implicit refusal to take delivery of the excess quantity. A failure to give notice within the time specified in Art. 39 CISG will however amount to an implicit acceptance of the goods and oblige the buyer to pay the contract price for the excess quantity under the second sentence of Art. 52(2) CISG.[1110]

It follows from the above that Art. 40 CISG will also apply to cases of delivery of an excess quantity. This may be relevant, for instance, in a falling market where the seller might be tempted to deliver a greater quantity hoping that the buyer does not (give) notice in time thus obliging the buyer to pay

---

[1105] *UNCITRAL Digest*, Art. 52 para. 5.

[1106] *Will*, in: Bianca/Bonell, Commentary, Art. 51 para. 2.2.

[1107] *Schnyder/Straub*, in: Honsell, Kommentar, Art. 52 para. 48 et seq.

[1108] See (German) Oberlandesgericht Rostock 25 September 2002, Internationales Handelsrecht (IHR) 2003, 19 = CISG-Online No. 672.

[1109] *P. Huber*, in: Münchener Kommentar zum Bürgerlichen Gesetzbuch, Art. 52 para. 17 et seq.; *Magnus*, in: Staudinger Kommentar zum Bürgerlichen Gesetzbuch, Art. 52 para. 21; see in that direction also *Müller-Chen*, in: Schlechtriem/Schwenzer, Commentary, Art. 52 para. 7; cf. for the opposite view: *Will*, in: Bianca/Bonell, Commentary, Art. 52 para. 2.2.1.

[1110] *P. Huber*, in: Münchener Kommentar zum Bürgerlichen Gesetzbuch, Art. 52 para. 18; *Müller-Chen*, in: Schlechtriem/Schwenzer, Commentary, Art. 52 para. 7.

the excess quantity for the contract rate according to the second sentence of Art. 52(2) CISG. It is suggested that such sharp practice will not succeed as Art. 40 CISG will prevent the seller from relying on Art. 39 CISG (i.e. on the implied acceptance that may result from the failure to give notice according to the principles described above). It should be noted, however, that in many cases the excess quantity will be discernible from the documents. This will lead to the conclusion that the seller actually "disclosed" the excess quantity to the buyer so that the exception contained in the last words of Art. 40 CISG will apply. In such a case, the seller will be able to rely on Art. 39 CISG and the buyer will be regarded as having accepted the excess quantity by not giving timely notice.[1111]

Art. 52(2) CISG only gives the buyer the right to reject the excess quantity. In exceptional cases, however, the buyer may be entitled to reject the *entire delivery*. An important example in practice arises where goods are sold on "CIF" terms and the seller tenders a bill of lading for a larger quantity than agreed. As a bill of lading is not separable, it has been argued that the buyer in such a case should have the right to reject the bill of lading under Art. 52(2) CISG.[1112] In the light of the above-mentioned rule that Art. 52 CISG should only apply to cases where the excess quantity can be separated from the owed quantity, some doubt must exist whether this argument is correct as this could easily be treated as a simple case of non-conformity which entitles the buyer to the remedies under Art. 45-50 CISG, but not to the specific right to reject under Art. 52(2) CISG. If therefore the breach is fundamental (as will usually be the case in the CIF-case described above), the buyer may for instance avoid the contract under Art. 49(1) lit. (a) CISG[1113] or claim substitute delivery under Art. 46(2) CISG.

[1111] See *Müller-Chen*, in: Schlechtriem/Schwenzer, Commentary, Art. 50 para. 7; *P. Huber*, in: Münchener Kommentar zum Bürgerlichen Gesetzbuch, Art. 52 para. 17.

[1112] *Müller-Chen*, in: Schlechtriem/Schwenzer, Commentary, Art. 52 para. 8; *Magnus*, in: Staudinger Kommentar zum Bürgerlichen Gesetzbuch, Art. 52 para. 22. According to the predominant opinion this would not require a fundamental breach, as the rejection under Art. 52(2) CISG does not lead to an avoidance of the contract but simply means that the seller has to re-tender a proper quantity, see *Müller-Chen*, in: Schlechtriem/Schwenzer, Commentary, Art. 52 para. 8 with further references, also to a contrary view.

[1113] Cf. to the question whether an avoidance of contract under Art. 49(1) lit. (b) CISG was intended: *Will*, in: Bianca/Bonell, Commentary, Art. 51 para. 2.2.

It is sometimes said that the right to reject under Art. 52(2) CISG is subject to the *good faith* principle (Art. 7(1) CISG).[1114] In principle, this is correct; however, it is argued that it should be very rare that the exercise of the right to reject could be regarded as a violation of good faith. In the author's opinion, there is no general rule that the good faith principle is violated merely because the buyer rejects a small excess in quantity; on the contrary, as a rule the buyer is entitled to reject even a very small excess.[1115] The situation is different, of course, if under the customs of the trade (Art. 9 CISG) or under the contract certain variations in quantity are deemed to be acceptable. This, however, does not result from the good faith principle, but from an interpretation of the contract or from Art. 9 CISG.

3. Taking delivery

The buyer may choose to take delivery of all or part of the excess quantity and if he does he must pay for it at the contract rate (Art. 52(2) CISG, second sentence). It follows that in practice the buyer is most likely to take delivery of an excess if the market price of goods has risen after the conclusion of the contract but not if the market price has fallen.

Taking delivery is the opposite of refusing to take delivery. In accordance with the principles submitted above (see p. 298 et seq.), the simple fact that the buyer takes physical possession of the goods will not necessarily amount to "taking delivery": it will only do so, when the notice period of Art. 39 CISG has passed without the buyer having given notice of the excess quantity.

Where the buyer takes delivery, this will, it is argued, amount to a modification of the contract at least so far as the quantity is concerned. Post-modification, therefore, the contract quantity includes both the original contractual amount and the excess that was delivered. Such a conclusion follows from the second sentence of Art. 52(2) CISG that the buyer has to pay for the excess quantity at the contract rate. Because the contract has been modified, the fact that the seller has delivered more than was originally agreed will no longer be regarded as a breach of contract. As a consequence, the buyer will

[1114] See for instance *Magnus*, in Staudinger Kommentar zum Bürgerlichen Gesetzbuch, Art. 52 para. 23; see also for a similar view *Honnold*, para. 320.

[1115] *Müller-Chen*, in: Schlechtriem/Schwenzer, Commentary, Art. 52 para. 7; *P. Huber*, in: Münchener Kommentar zum Bürgerlichen Gesetzbuch, Art. 52 para. 21.

not be entitled to claim damages (for instance for the higher storage costs incurred with regard to the excess quantity).[1116]

[1116] *Müller-Chen*, in: Schlechtriem/Schwenzer, Commentary, Art. 52 para. 10; *P. Huber*, in: Münchener Kommentar zum Bürgerlichen Gesetzbuch, Art. 52 para. 25; but see also *UNCITRAL Digest*, Art. 52 para. 5.

Part 6:
Obligations of the buyer, passing of risk and remedies of the seller

§ 15. Obligations of the buyer and passing of risk

I. Outline

Chapter III of the Convention governs the obligations of the buyer (Art. 53-60 CISG) and the remedies of the seller (Art. 61-65 CISG). Art. 53 CISG contains the basic rule on the buyer's obligations: "The buyer must pay the price for the goods and take delivery of them as required by the contract and this Convention." The two central obligations of the buyer are, therefore, payment of the price (which is dealt with in more detail in Art. 54-59 CISG) and taking delivery (Art. 60 CISG).

Art. 53 CISG is, however, not exhaustive. The buyer may (and often will) have additional obligations which may arise out of the contract, out of usages or practices (Art. 9 CISG) or even out of other provisions of the Convention (for example Art. 54, 65, 86 CISG).[1117] The rule that such further obligations may exist is widely accepted and has also found some basis in the Convention itself. Thus, Art. 62 CISG expressly mentions "other obligations" than payment and taking delivery and the general rule of the seller's remedies (Art. 61 CISG) applies if the buyer fails to perform "any of his obligations".

II. Payment

Art. 54-59 CISG govern certain issues with regard to the payment of the price. Art. 55 and 56 CISG provide default rules concerning the determination of the price. Art. 57 CISG determines the place of payment, Art. 58 and

[1117] *Hager*, in: Schlechtriem/Schwenzer, Commentary, Art. 53 para. 3; *P. Huber*, in: Münchener Kommentar zum Bürgerlichen Gesetzbuch, Art. 53 para. 3; *Maskow*, in: Bianca/Bonell, Commentary, Art. 53 para. 2.3.

59 CISG deal with the time of payment. Art. 54 CISG is concerned with the necessary steps for effecting payment (and imposes them on the buyer). Several issues are, however, not expressly governed by the CISG, in particular the currency of payment.[1118] The most important issues will be dealt with in turn.

1. Determination of the price

In most cases the price will have been determined in the contract, be it expressly or implicitly. Where, however, the contract (has been validly concluded but) does not expressly or implicitly fix the price or provide for a mechanism to determine the price, Art. 55 CISG gives a default rule for determining the price. Thus, the parties are considered 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. In short, the price shall be the usual price for such goods. The CISG thus follows the Common Law example albeit that the measure chosen is different.[1119] The practical importance of Art. 55 CISG will probably be rather limited.

a) Failure to determine the price

Art. 55 CISG will only apply if the parties have not expressly or implicitly fixed the price or made provision for determining the price. This will rarely be the case. It is submitted that the notion of an implicit agreement on the price should be construed liberally.[1120] An implicit agreement on the price

[1118] *Hager*, in: Schlechtriem/Schwenzer, Commentary, Art. 54 para. 8 et seq.; *Maskow*, in: Bianca/Bonell, Commentary, Art. 54 para. 3.1; *Murray*, in: Ferrari/Flechtner/Brand, The Draft UNCITRAL Digest and Beyond, p. 443; *De Ly*, in: Ferrari/Flechtner/Brand, The Draft UNCITRAL Digest and Beyond, p. 476 et seq.

[1119] Cf. Section 8(2) English Sale of Goods Act; § 2-305(2) UCC.

[1120] *Hager*, in: Schlechtriem/Schwenzer, Commentary, Art. 55 para. 7.

can, for instance, result from previous dealings between the parties or from trade usages concerning the determination of the price. What is more, if the buyer accepts the goods without objecting to the indicated price, this will usually amount to an implicit acceptance of that price. If the buyer orders urgently needed spare parts without there being any discussion about the price, there will often be an implicit agreement on the prices contained in the seller's usual price list.[1121]

The concept of "fixing" the price or of "making provision for determining" it should also be construed rather liberally. The Austrian Supreme Court for instance has found that a sales contract on a number of furs of medium or superior quality in a price range of 35 to 65 German Marks per fur was sufficiently definite because the parties provided sufficient criteria from which a definite price can be drawn depending on the quality of the delivered furs.[1122]

b) Validity requirement

Art. 55 CISG only applies if the contract has been validly concluded without determining the price. Art. 14 CISG on the other hand provides that the contract is only validly concluded if the parties have determined the price. At first sight, therefore, both provisions seem to be inconsistent with each other.[1123] In fact, this problem had been discussed but not solved during the negotiations on the Convention.[1124]

The issue has been discussed in more detail above.[1125] Suffice it here to give a short summary.

The prevailing opinion gives precedence to Art. 14 CISG.[1126] Under this approach Art. 55 CISG can only be applied if the case is such that the parties

---

[1121] *Schlechtriem*, in: Schlechtriem/Schwenzer, Commentary, Art. 14 para. 11; *Gruber*, in: Münchener Kommentar zum Bürgerlichen Gesetzbuch, Art. 14 para. 23; *Hager*, in: Schlechtriem/Schwenzer, Commentary, Art. 55 para. 7.

[1122] (Austrian) Oberster Gerichtshof 10 November 1994, Praxis des Internationalen Privat- und Verfahrensrechts (IPRax) 1996, 137 = CISG-Online No. 117.

[1123] For a detailed discussion of this issue see *Schlechtiem*, in: Schlechtriem/Schwenzer, Commentary, Art. 14 para. 8 et seq.

[1124] For an account of the legislative history see *Hager*, in: Schlechtriem/Schwenzer, Commentary, Art. 55 para. 2 et seq.

[1125] See p. 76 et seq..

[1126] Cf. *Hager*, in: Schlechtriem/Schwenzer, Commentary, Art. 55 para. 5 et seq.; *P. Huber*, in: Münchener Kommentar zum Bürgerlichen Gesetzbuch, Art. 55 para. 7 et seq.; *Schnyder/Straub*, in: Honsell, Kommentar, Art. 55 para. 8; *Gruber*, in: Münchener Kommentar zum Bürgerlichen Gesetzbuch, Art. 14 para. 24.

have concluded a valid contract despite failing to determine the price. It is submitted that there will be primarily two groups of cases which lead to this result:

The first group consists of those cases in which the parties knew and agreed that they wanted to conclude the contract without (expressly or implicitly) determining the price, thus derogating from Art. 14(1) second sentence CISG.[1127]

The second group consists of those cases in which the sales contract is governed by the CISG with the exception of Art. 14-24 CISG,[1128] for instance as a result of a reservation under Art. 92 CISG or of a derogation by the parties (Art. 6 CISG).[1129]

Whether there is a third group of cases in which Art. 55 CISG will apply, namely those cases in which the contract was not concluded by a clear-cut exchange of offer and acceptance, but by a series of communications, etc.,[1130] has been a matter of debate.[1131]

All in all it is submitted that a contract will only rarely be invalid for failure to fix the price (Art. 14(1) CISG).[1132] In many cases there will either be an implicit agreement on the price or an (implicit) derogation of Art. 14(1) second sentence CISG.

[1127] *Schlechtriem*, in: Schlechtriem/Schwenzer, Commentary, Art. 14 para. 11; *Hager*, in: Schlechtriem/Schwenzer, Commentary, Art. 55 para. 7; *P. Huber*, in: Münchener Kommentar zum Bürgerlichen Gesetzbuch, Art. 55 para. 9; *Schnyder/Straub*, in: Honsell, Kommentar, Art. 55 para. 10. In fact, the view which wants to give precedence to Art. 55 CISG over Art. 14 CISG (Fn. 1125 above) would probably reach the same result.

[1128] *Hager*, in: Schlechtriem/Schwenzer, Commentary, Art. 55 para. 6; *Gruber*, in: Münchener Kommentar zum Bürgerlichen Gesetzbuch, Art. 14 para. 26.

[1129] See in more detail above p. 77.

[1130] See *Honnold*, para. 137.5 et seq.

[1131] See above p. 77.

[1132] See above p. 77. But see for examples to the opposite (Hungarian) Supreme Court 25 September 1992, CISG-Online No. 63; Arbitral Award, Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce, CISG-Online No. 204.

2. Time of payment

The time of payment is governed by Art. 58 and 59 CISG. According to Art. 58(1) first sentence CISG, if the buyer is not bound to pay the price at any other specific time (for instance due to a contractual agreement or due to usages or practices), he must pay it when the seller places either the goods or the documents controlling their disposition at the buyer's disposal.

At first sight this seems to oblige the seller to perform first (by putting the goods or documents at the disposal of the buyer) before payment is due.

A closer examination of the provision reveals, however, that delivery and payment will usually be concurrent obligations which have to be performed at the same time as each other. In fact, Art. 58(1) second sentence CISG and Art. 58(2) CISG[1133] expressly give the seller the right to make payment a condition for handing over the goods or documents.[1134] The overall picture therefore is that the placing of the goods or documents at the buyer's disposal makes payment due. The actual handing over, however, may be refused until payment is made. In the end, therefore, seller and buyer will often perform concurrently.[1135]

[1133] For carriage contracts.

[1134] For further details see *Hager*, in: Schlechtriem/Schwenzer, Commentary, Art. 58 para. 3 et seq.

[1135] For problems arising from concurrent performance see *Maskow*, in: Bianca/Bonell, Commentary, Art. 58 para. 3.4.

According to Art. 58(3) CISG, the buyer is not bound to pay until he has had an opportunity to examine the goods, unless the procedures agreed upon by the parties are inconsistent with such a right of examination. The examination that Art. 58(3) CISG envisages is only a short, superficial inspection; it is not equivalent to the examination dealt with in Art. 38 CISG.[1136] If the buyer has the right of examination, the time for payment will be postponed accordingly. As the provision clearly states, however, the buyer will not have a right to examine the goods, if this would be inconsistent with the payment or delivery procedures agreed upon in the contract. Thus, for example, many of the commercial payment clauses will lead to the assumption that there is no such right of examination. This is usually true, by way of example, for the clause "cash against documents"[1137] or if payment by way of letter of credit is agreed upon.[1138]

At the time when payment becomes due, the buyer must effect payment without any further request by the seller, as Art. 59 CISG clearly states. The buyer will therefore be in breach of his obligations without there being any notice requirement on the side of the seller.[1139] As a consequence the seller may be entitled to remedies under Art. 61 et seq. CISG, in particular to damages (Art. 61(1) lit. (b), Art. 74 et seq. CISG). What is more, irrespective of the fact that the buyer will be in breach, the seller will have the right to claim interest under Art. 78 CISG from the moment payment was due.

[1136] *Hager*, in: Schlechtriem/Schwenzer, Commentary, Art. 58 para. 11; *Schnyder/Straub*, in: Honsell, Kommentar, Art. 58 para. 70 et seq.; *Honnold*, para. 339.1.

[1137] *Hager*, in: Schlechtriem/Schwenzer, Commentary, Art. 58 para. 12; *Secretariat Commentary*, Art. 54 para. 7, 9; *P. Huber*, in: Münchener Kommentar zum Bürgerlichen Gesetzbuch, Art. 58 para. 7; *Schnyder/Straub*, in: Honsell, Kommentar, Art. 58 para. 80. The clause "cash against documents upon arrival of the goods" on the other hand will usually not be inconsistent with the right of examination, op. cit.

[1138] *P. Huber*, in: Münchener Kommentar zum Bürgerlichen Gesetzbuch, Art. 58 para. 7; *Magnus*, in: Staudinger Kommentar zum Bürgerlichen Gesetzbuch, Art. 58 para. 28; *Schnyder/Straub*, in: Honsell, Kommentar, Art. 58 para. 80.

[1139] *Hager*, in: Schlechtriem/Schwenzer, Commentary, Art. 59 para. 2. For a very specific situation see (Swiss) Handelsgericht St. Gallen 11 February 2003, CISG-Online No. 900 (where the court assumed that the seller's notice may lead to the consequence that the buyer will only be in breach from the moment when the additional period given in the notice expires rather than from the moment when the goods were placed at the buyer's disposal; the facts of the case were, however, very specific).

3. Place of payment

Art. 57 CISG governs the place of payment by using a three-step-test. The prime criterion is the parties' agreement, as the first part of Art. 57(1) CISG makes clear. In the absence of a contractual agreement on the place of payment the next step will be Art. 57(1) lit. (b) CISG. This provides that if the payment is to be made against the handing over of the goods or of documents (i.e. if payment and delivery are concurrent conditions), the place of payment shall be at the place where the handing over takes place. However, where payment and delivery are not concurrent conditions in that sense Art. 57(1) lit. (a) CISG will apply and the place of payment is the seller's place of business.

a) Contractual agreement and trade usages

Art. 57(1) CISG respects the parties' agreement on the place of payment ("If the buyer is not bound to pay the price at any other particular place …"). Such an agreement will often be reached by using standardised payment terms. If, for example, payment is to be made "cash before delivery" then the predominant opinion is that the place of payment is meant to be the seller's place of business.[1140] A German decision has held that the term "cash against delivery"[1141] leads to a place of payment at the place of delivery.[1142] In consequence, the term "documents against payment" should lead to the place

[1140] *Magnus*, in: Staudinger Kommentar zum Bürgerlichen Gesetzbuch, Art. 57 para. 7; *P. Huber*, in: Münchener Kommentar zum Bürgerlichen Gesetzbuch, Art. 57 para. 4; *Schnyder/Straub*, in: Honsell, Kommentar, Art. 57 para. 7.

[1141] Whether the same applies to the term „cash on delivery" seems to be a matter of dispute, cf. *Magnus*, in: Staudinger Kommentar zum Bürgerlichen Gesetzbuch, Art. 57 para. 7; *P. Huber*, in: Münchener Kommentar zum Bürgerlichen Gesetzbuch, Art. 57 para. 4, Art. 53 para. 15.

[1142] (German) Landgericht Nürnberg-Fürth 27 February 2003, Internationales Handelsrecht (IHR) 2004, 20 = CISG-Online No. 818. The Court based its decision on Art. 57(1) lit. (b) CISG, apparently regarding the clause as one which leads to a concurrent exchange of performance and thus triggers Art. 57(1) lit. (b) CISG which fixes the place of payment at the place of the exchange of performance. In the author's opinion, however, it is also arguable that the payment clause as such constitutes a direct agreement on the actual place of payment thus falling under the first sentence of Art. 57(1) CISG. The result is the same.

where the documents have to be handed over.[1143] If payment is to be made by letter of credit the place of payment will usually be at the advising (or confirming) bank in the seller's country.[1144] All in all, the result will in each individual case depend on the interpretation of the term used by the parties so that generalisations are not possible in this context. The crucial element from the perspective of the CISG is, however, that the parties' agreement on the place of payment should be respected.

Where not determined expressly or impliedly, the place of payment can also be determined through usages or practices (Art. 9 CISG). In this respect, the first part of Art. 57(1) CISG is not limited to contractual agreements but can also cover such usages or practices.

b) Concurrent obligations (Art. 57(1) lit. (b) CISG)

If payment is to be made against the handing over of the goods or of documents, the place of payment is the place where the handing over takes place (Art. 57(1) lit. (b) CISG). This rule presupposes that payment and handing over of goods or documents are concurrent obligations ("against"). The concurrent character of these obligations can derive from the contract (for instance from certain payment terms such as "cash against delivery"[1145]), from usages and practices (Art. 9 CISG) or – in the absence of those – from Art. 58 CISG, which stipulates that – as a rule – payment and delivery are concurrent obligations. It will be a matter of each individual case to find out whether the relevant obligations are concurrent in the sense of Art. 57(1) lit. (b) CISG. As a general rule, however, the provision usually requires that the parties (or their representatives) meet at one place in order to exchange their performances there.[1146] It will not apply if one party has to perform before the other.

If payment and delivery are concurrent obligations in the above-mentioned sense, the place of payment will be the place of the actual exchange.[1147] In practice, this place will often be determined by the relevant trade terms, in

---

[1143] *Magnus*, in: Staudinger Kommentar zum Bürgerlichen Gesetzbuch, Art. 57 para. 7; *Hager*, in: Schlechtriem/Schwenzer, Commentary, Art. 57 para. 22.

[1144] Cf. *Hager*, in: Schlechtriem/Schwenzer, Commentary, Art. 57 para. 22; *Maskow*, in: Bianca/Bonell, Commentary, Art. 57 para. 2.8; UCP 500 Art. 2(ii); see also (German) Oberlandesgericht München 9 July 1997, CISG-Online No. 281.

[1145] See Fn. 1141 above (a).

[1146] *P. Huber*, in: Münchener Kommentar zum Bürgerlichen Gesetzbuch, Art. 57 para. 6; *Hager*, in: Schlechtriem/Schwenzer, Commentary, Art. 57 para. 14.

[1147] *Schnyder/Straub*, in: Honsell, Kommentar, Art. 57 para. 10-12.

particular the Incoterms. The clause "EXW…" (Incoterms 2000) for instance points to the indicated place (often the place of business of the seller).

c) Default rule (Art. 57(1) lit. (a) CISG)

In cases where there is no contractual agreement (or trade usage or practice) and if payment and delivery are not concurrent obligations, Art. 57(1) lit. (a) CISG provides as a default rule that payment is to be made at the seller's place of business.[1148] It is therefore the buyer who bears the risk that payment is delayed or lost.[1149]

d) Specific examples

If one tries to classify international sales contracts according to how far the seller's delivery obligation reaches, three types of contracts can be distinguished, namely the arrival contract, the collection contract and the shipment contract. Where will the place of payment be located in these types of contracts if there is no agreement (or usage or practice) in that regard? It is submitted that the answer has to be given in accordance with the following guidelines:

Under the *collection contract*, the seller has no carriage obligation. This is the type of contract envisaged by the Incoterm EXW (ex works) or by Art. 31 lit. (b), (c) CISG. The seller's duty to deliver the goods is performed when he places the goods at the buyer's disposal at the seller's place of business (to be precise, at the place named in the contract or in Art. 31 lit. (b), (c) CISG). In the absence of any agreement (or usage or practice) concerning the place of payment, the answer will depend on whether payment has to be made in exchange for delivery (then Art. 57(1) lit. (b) CISG: place of exchange) or not (then Art. 57(1) lit. (a) CISG: seller's place of business). The fact that payment has to be made in exchange for delivery can result from the contract (or usages or practices) or from the fact that the seller has exercised his right of retention under Art. 58(1) second sentence CISG.

Under an *arrival-type contract* the seller undertakes to deliver the goods in the buyer's country (or at a point of delivery specified by the buyer). This is the

---

[1148] As for the place of business see Art. 10 CISG. As for a change in the seller's place of business see Art. 57(2) CISG; *Hager*, in: Schlechtriem/Schwenzer, Commentary, Art. 57 para. 6 et seq.; *Schnyder/Straub*, in: Honsell, Kommentar, Art. 57 para. 19 et seq. Aa for assignment as a ground for a change in the seller's place of business, *Witz*, in: Ferrari/Flechtner/Brand, The Draft UNCITRAL Digest and Beyond, p. 433 et seq.

[1149] (German) Oberlandesgericht München 9 July 1997, CISG-Online No. 282; *Hager*, in: Schlechtriem/Schwenzer, Commentary, Art. 57 para. 4.

type of contract envisaged by the "D-Terms" of the Incoterms 2000, for instance DDU, DDP, DAF or DES. The CISG recognizes such types of contract in the first sentence of Art. 31 CISG if there is a contractual agreement or a usage or practice to that effect. Here again, the location of the place of payment – if not specified by contract, usage or practice – will depend on whether payment and delivery are to be effected in exchange or not. The exchange character of the contract can result from the contract (or usages or practices) or from the fact that the seller has exercised his right of retention under Art. 58(1) second sentence CISG; in both cases, however, it is necessary that the seller has authorized the carrier to collect payment of the price.[1150]

Under the *shipment-type contract* the seller's delivery obligation consists in handing the goods over to a carrier for transmission to the buyer (as under Art. 31 lit. (a) CISG or under the F-Terms or the C-Terms of the Incoterms 2000), irrespective of whether the costs of carriage are to be borne by the seller (C-Terms) or by the buyer (F-Terms). In these cases payment will normally not be made in exchange for delivery of the goods. The place of payment will therefore be the seller's place of business (Art. 57(1) lit. (a) CISG, provided of course that there is no agreement, usage or practice in that regard). It is submitted, however, that in exceptional cases Art. 57(1) lit. (b) CISG may be applied, i.e. in cases where it has been agreed that payment has to be made against delivery made through the carrier and in cases where the seller has exercised his right of retention under Art. 58(2) CISG. In both situations the application of Art. 57(1) lit. (b) CISG presupposes that the carrier has been authorized to collect payment from the buyer.[1151] In these cases there is a real exchange between delivery and payment so that they actually resemble the payment mechanism under an arrival contract with concurrent obligations. This justifies the application of Art. 57(1) lit. (b) CISG. The place of payment therefore is the place of the exchange.

These guidelines show that the crucial test for determining the place of payment in the absence of any agreement, usage or practice will be whether the

[1150] *Hager*, in: Schlechtriem/Schwenzer, Commentary, Art. 57 para. 13; *P. Huber*, in: Münchener Kommentar zum Bürgerlichen Gesetzbuch, Art. 57 para. 15.

[1151] Cf. (Austrian) Oberster Gerichtshof 10 November 1994, Praxis des Internationalen Privat- und Verfahrensrechts (IPRax) 1996, 137 = CISG-Online No. 117; *Hager*, in: Schlechtriem/Schwenzer, Commentary, Art. 57 para. 17 et seq.; *P. Huber*, in: Münchener Kommentar zum Bürgerlichen Gesetzbuch, Art. 57 para. 11 et seq. But see also an old German decision on the ULIS where the (German) Bundesgerichtshof was reluctant to proceed that way at least in the cases where the seller exercises his right of retention: (German) Bundesgerichtshof 4 April 1979, Neue Juristische Wochenschrift (NJW) 1979, 1782.

parties (or their representatives) actually have to meet in order to exchange delivery for payment.

e) Importance of the place of payment

The main function of the place of payment is of course to fix the place where payment has to be effectively made, i.e. where the money has to be at the seller's disposal at the relevant time. The buyer therefore bears the risk that the money does not reach the place of payment in time or at all.

What is more, the place of payment may have important procedural consequences. Many legal systems will have a rule which grants international jurisdiction in contractual matters at the place where the obligation in question has to be performed. This is true in particular with regard to Art. 5 No. 1 of the EC 1968 Convention on jurisdiction and enforcement of judgments in civil and commercial matters (Brussels Convention) and of the Lugano Convention on jurisdiction and the enforcement of judgments in civil and commercial matters.[1152] If – as is usually the case – the relevant legal system provides that the place of performance of the obligation in question has to be determined according to the applicable contract law and if this is the CISG, then Art. 57 CISG will in the last resort decide on the issue of international jurisdiction for the payment claim. It should be noted, however, that the new EC Regulation No. 44/2000 of December 2000 (the so-called Brussels-I-Regulation) which largely supersedes the Brussels Convention now contains an autonomous definition of the place of performance which in principle does not go back to the applicable contract law for determining the place of performance. The procedural role of Art. 57 CISG within this Regulation will therefore be rather limited.[1153]

f) Application of Art. 57 CISG to other monetary obligations

Art. 57 CISG is only concerned with the buyer's payment obligation. The CISG, however, knows other monetary obligations for which there is no rule as to the place of performance (for example, obligations to pay damages or to make restitution of the contract price after the avoidance of the contract). It is submitted that there are three possible ways to solve this problem. One view would regard the matter as not dealt with in the CISG and refer to the applicable (national) contract law.[1154] Another view would look at the place

[1152] See *Honnold*, para. 332; *Hager*, in: Schlechtriem/Schwenzer, Commentary, Art. 57 para. 11a.

[1153] *Hager*, in: Schlechtriem/Schwenzer, Commentary, Art. 57 para. 11a; *Murray*, in: Ferrari/Flechtner/Brand, The Draft UNCITRAL Digest and Beyond, p. 450.

[1154] (Austrian) Oberster Gerichtshof 10 March 1998, CISG-Online No. 356; (French) Cour d'Appel Paris 14 January 1998, CISG-Online No. 347.

of performance of the obligation which forms the basis of the claim in question (i.e. in the case of a claim for damages to the place of performance of the breached obligation).[1155] Finally one could argue that the matter is one which as such is governed but not expressly settled in the CISG (Art. 7(2) CISG) so that one should have recourse to the general principles underlying the CISG before having recourse to national law. It is submitted that one can regard Art. 57 CISG as an expression of the general principle that monetary obligations are to be performed at the place of business of the monetary creditor unless the parties have agreed otherwise. In the case of damages claims this would lead to the place of business of the party which claims damages.[1156]

4. Risk

The rules on the passing of risk are closely linked to the buyer's obligation to pay the purchase price. In fact, Art. 66 CISG provides that 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. The time at which the risk passes from the seller to the buyer will often be determined by the contract. In the absence of any agreement (or usage or practice, Art. 9 CISG), the passing of risk is governed by Art. 66-70 CISG.

As the interpretation of these provisions gives rise to a number of difficult questions it may be advisable for the parties to provide specifically for the passing of risk in their contract,[1157] for example by using the Incoterms. In practice many international contracts do make specific provisions for the

[1155] Cf. (German) Bundesgerichtshof 22 October 1980, Neue Juristische Wochenschrift (NJW) 1981, 1158 (albeit under the ULIS); *Magnus*, in: Staudinger Kommentar zum Bürgerlichen Gesetzbuch, Art. 57 para. 22.

[1156] Cf. (German) Oberlandesgericht Düsseldorf 2 July 1993, CISG-Online No. 74; (French) Cour d'Appel Grenoble 23 October 1996, CISG-Online No. 305; *Hager*, in: Schlechtriem/Schwenzer, Commentary, Art. 57 para. 25; *P. Huber*, in: Münchener Kommentar zum Bürgerlichen Gesetzbuch, Art. 58 para. 32; *Maskow*, in: Bianca/Bonell, Commentary, Art. 57 para. 3.2; *Witz*, in: Ferrari/Flechtner/Brand, The Draft UNCITRAL Digest and Beyond, p. 427 et seq., distinguishes between the source of the monetary debt and favours a solution taking into account which party is in breach of contract.

[1157] See for instance *de Vries*, European Transport Law (EurTranspL) 17 (1982) 495.

passing of risk and therefore the practical importance of Art. 66-70 CISG is rather limited.[1158]

a) Time of passing of risk

Art. 67-69 CISG distinguish between several types of sales contracts. In general, the rules on the passing of risk will to a large extent mirror the rules on the place of delivery (Art. 31 CISG).[1159] The basic principles are as follows:

If the contract of sale involves *carriage* of the goods (in the sense of Art. 31(a) CISG) and the seller is not bound to hand them over at a particular place, the risk in principle passes to the buyer when the goods are handed over to the first carrier for transmission to the buyer (Art. 67(1) CISG, with certain modifications[1160]).

If the goods are *sold in transit*, Art. 68 CISG provides a rather complicated set of rules. The starting point is that the risk passes at the time of the conclusion of the contract (first sentence of Art. 68 CISG). However, this rule can lead to problems in practice because it will often be difficult to determine the exact time when during the course of the carriage (i.e. before or after the conclusion of the contract) the goods were damaged. To deal with this problem, the second sentence of Art. 68 CISG provides that the risk is assumed by the buyer from the time the goods were handed over to the carrier (i.e. for the entire carriage period), if "the circumstances so indicate". It is still a matter of dispute when this is the case. Many authors argue that this provision should at any rate be applied if the whole carriage period is covered by a transport insurance (as for instance under a CIF-contract).[1161] On the other hand, it would probably extend the scope of the exception in this provision too far if one applied it to every case in which there is doubt as to the exact date of the damage to the goods.[1162] Finally, the third sentence of Art. 68 CISG places the risk on the seller if he knew or ought to have known that the goods had been lost or damaged and did not disclose this to the buyer.

[1158] *Hager*, in: Schlechtriem/Schwenzer, Commentary, Art. 67 para. 2; *Bernstein/Lookofsky*, Understanding the CISG in Europe, p. 106 et seq.

[1159] See *Hager*, in: Schlechtriem/Schwenzer, Commentary, Art. 69 para. 10.

[1160] For a detailed description see: *Erauw*, in: Ferrari/Flechtner/Brand, The Draft UNCITRAL Digest and Beyond, p. 306 et seq.

[1161] *Hager*, in: Schlechtriem/Schwenzer, Commentary, Art. 68 para. 4; *Honnold*, para. 372.2; *P. Huber*, in: Münchener Kommentar zum Bürgerlichen Gesetzbuch, Art. 68 para. 8; but see also *Viscasillas*, in: Ferrari/Flechtner/Brand, The Draft UNCITRAL Digest and Beyond, p. 284 et seq.

[1162] As suggested for instance by *Schönle*, in: Honsell, Kommentar, Art. 68 para. 11. As here *Hager*, in: Schlechtriem/Schwenzer, Commentary, Art. 68 para. 4.

In all *other cases*, the risk will pass according to the rules in Art. 69 CISG which distinguishes between two types of contracts. If the buyer is bound to take over the goods at the seller's place of business, the risk passes 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 (Art. 69(1) CISG). 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 there (Art. 69(2) CISG).[1163]

In any of the above mentioned cases, the risk will not pass to the buyer until the goods are clearly *identified* to the contract, for instance by marking of the goods, by the shipping documents, by notice to the buyer etc. This rule is expressly provided for in Art. 67(2) CISG and in Art. 69(3) CISG. It is submitted, however, that it can also apply to cases which fall under Art. 68 CISG[1164] as a general principle of the CISG (Art. 7(2) CISG).

b) Consequences

The most important effect of the passing of risk is that the buyer will not be freed from his *obligation to pay the price* if the goods are lost or damaged after risk has passed to him. This is clearly stated in Art. 66 CISG. Although this provision only names loss and damage explicitly, it is submitted that it should be interpreted in a broad sense as a general principle of the CISG (Art. 7(2) CISG). By way of example, therefore, after the passing of risk the buyer will also have to bear the consequences of shrinkage of the goods, of the emergence of defects (provided these are not due to a breach by the seller of his obligation to deliver conforming goods and in particular to deliver goods that are fit to endure a normal transit), of emergency unloading, of the carrier's negligence etc.[1165] There is also debate about whether the rules on the passing of risk should decide on which party has to bear the consequences of Acts of State (e.g. export bans, import bans, confiscation).

[1163] For an application of Art. 69(2) CISG see for instance (German) Oberlandesgericht Hamm 23 June 1998, CISG-Online No. 434; (German) Oberlandesgericht Oldenburg 8 September 1998, CISG-Online No. 508.

[1164] Such cases will be rare as sales of goods in transit usually relate to specific goods. It is, however, conceivable, for instance if an undivided bulk is sold to several buyers as a collective assignment. See for further details *Hager*, in: Schlechtriem/Schwenzer, Commentary, Art. 68 para. 6.

[1165] *Hager*, in: Schlechtriem/Schwenzer, Commentary, Art. 66 para. 3; *P. Huber*, in: Münchener Kommentar zum Bürgerlichen Gesetzbuch, Art. 66 para. 6.

In the author's opinion, it may be justified to refer to the rules on the passing of risk in those cases.[1166]

Furthermore, the time at which the risk passes to the buyer is the relevant time for determining whether the goods were in *conformity* with the contract under Art. 35 et seq. CISG. This is clearly stated in Art. 36 CISG.

An issue has been raised whether the seller's obligation to *deliver* the goods (Art. 30 et seq. CISG) ceases when he makes delivery under Art. 31 et seq. CISG or when the risk passes to the buyer under Art. 66 et seq. CISG.[1167] It is submitted that this discussion will usually not be relevant in practice as the rules on delivery and the rules on the passing of risk are largely parallel to each other.

c) Exceptions

To the general rule that where the risk has passed to the buyer he must pay the price notwithstanding that the goods have been lost or damaged, Art. 66 CISG provides an exception. Under the last part of that provision, the buyer will not be obliged to pay the price, where "the loss or damage is due to an *act or omission of the seller*". It is submitted that mere causality cannot be sufficient to trigger that exception; otherwise the mere fact that the seller has concluded the contract would suffice, which would of course lead to unreasonable results. In the author's opinion, only those acts or omissions are sufficient which amount to a breach of an obligation[1168] of the seller (be it one of the main obligations or any ancillary obligations, e.g. proper packaging etc.) and which are not justified; where for instance the seller exercises a right of stoppage in transit, he is justified and does not fall under the exception in Art. 66 CISG, so that the buyer is still bound to pay the price.

[1166] *P. Huber*, in: Münchener Kommentar zum Bürgerlichen Gesetzbuch, Art. 66 para. 7; *Magnus*, in: Staudinger Kommentar zum Bürgerlichen Gesetzbuch, Art. 66 para. 7; *Erauw*, in: The Draft UNCITRAL Digest and Beyond, p. 294; Arbitral Award, Arbitration Court of the Chamber of Commerce and Industry of Budapest, CISG-Online No. 774. But see also the differing opinion of *Hager*, in: Schlechtriem/Schwenzer, Commentary, Art. 66 para. 4.

[1167] See *Hager*, in: Schlechtriem/Schwenzer, Commentary, Art. 69 para. 10.

[1168] *P. Huber*, in: Münchener Kommentar zum Bürgerlichen Gesetzbuch, Art. 66 para. 12. See also Arbitral Award, CIETAC CISG/1995/01, CISG-Online No. 566. Breach of obligation in this context covers more than just a breach of contract, see *Hager*, in: Schlechtriem/Schwenzer, Commentary, Art. 66 para. 7; *Honnold*, para. 362, 448.1; *Nicholas*, in: Bianca/Bonell, Commentary, Art. 66 para. 2.2.

A further exception to the general rule is stipulated in *Art. 70 CISG*. This provides that if the seller has committed a fundamental breach of contract, Art. 67-69 CISG do not impair the remedies available to the buyer on account of the breach. This provision has given rise to a considerable amount of uncertainty. As its relevance seems to be limited it shall only be dealt with briefly.

It is submitted that Art. 70 CISG does not cover those cases where the seller's fundamental breach has caused loss of or damage to the goods which only manifests itself some time after delivery.[1169] Those cases, in fact, are not dealt with by Art. 66 et seq. CISG anyway, as becomes apparent from the second sentence of Art. 66 CISG. They will have to be dealt with under the normal provisions for breaches by the seller, i.e. under Art. 45 et seq. CISG.

If one accepts this, then the purpose of Art. 70 CISG is to make sure that accidental loss (or damage) which occurs after the risk has passed to the buyer will not deprive him of his remedies. So, for example, the buyer will not be barred from avoiding the contract for fundamental breach simply because the goods were accidentally lost while he had them in possession; Art. 70 CISG will in such cases operate as an exception to the rule in Art. 82(1) CISG. Or, to put it differently, the buyer's remedies for fundamental breach take priority over the risk provisions.[1170]

III. Taking delivery

Art. 53 CISG provides that the buyer must take delivery of the goods.[1171] According to Art. 60 CISG "taking delivery" consists in taking (i.e. physically taking possession[1172]) the goods (lit. (b)), and in doing all the acts which could reasonably be expected of him in order to enable the seller to make

[1169] *P. Huber*, in: Münchener Kommentar zum Bürgerlichen Gesetzbuch, Art. 70 para. 2; *Hager*, in: Schlechtriem/Schwenzer, Commentary, Art. 70 para. 2; *Erauw*, in: Ferrari/Flechtner/Brand, The Draft UNCITRAL Digest and Beyond, p. 315 et seq.

[1170] See *Hager*, in: Schlechtriem/Schwenzer, Commentary, Art. 70 para. 2 et seq.

[1171] The predominant opinion is that the obligation to take delivery also covers the documents which the seller has to hand over, cf. *Hager*, in: Schlechtriem/Schwenzer, Commentary, Art. 60 para. 2b; *P. Huber*, in: Münchener Kommentar zum Bürgerlichen Gesetzbuch, Art. 60 para. 3; *Maskow*, in: Bianca/Bonell, Commentary, Art. 60 para. 2.6.2.

[1172] *Hager*, in: Schlechtriem/Schwenzer, Commentary, Art. 60 para. 2a; *Maskow*, in: Bianca/Bonell, Commentary, Art. 60 para. 2.5.

delivery (lit. (a)). These duties to cooperate will often be specified in the contract, in particular where the parties have agreed on the Incoterms. So, for instance, under a FOB (Incoterms 2000) contract the buyer must (i.a.) contract for the carriage of the goods from the named port of shipment and give the seller sufficient notice of the vessel name, loading point and required delivery time.[1173] Depending on the contract the buyer may also have to call off or to specify the goods[1174] or to provide adequate storing capacity for the goods.[1175]

If the buyer refuses to take delivery of the goods, this amounts to a non-performance which will entitle the seller to the remedies specified in Art. 61 et seq. CISG, unless the buyer was justified in refusing to take delivery. Such a justification can result from Art. 52 CISG (delivery too early or of excess quantity).

In the case of other breaches (in particular late delivery or non-conformity of the tendered goods), the buyer should in the author's opinion be entitled to refuse to take delivery if the seller's breach is fundamental (Art. 25 CISG).[1176] The reason for this is that the buyer would in that case be entitled to avoid the contract under Art. 49(1) lit. (a) CISG or to claim substitute delivery under Art. 46(2) CISG anyway. However, it should be noted that despite his right to reject the goods the buyer may be under an obligation to take (provisional) possession of them under Art. 86 CISG.

If the seller's breach does not amount to a fundamental breach, the buyer will as a rule not be justified to refuse to take delivery. It is, however, sometimes argued that there may be exceptional situations where Art. 7(1) CISG (and in particular the good faith principle) nevertheless may justify refusal. By way of example, a refusal to take delivery would be justified in a case where the buyer claims repair of the goods which requires the goods to be transported

[1173] Incoterms 2000, FOB-term, Sections B3, B7. Further examples: *Maskow*, in: Bianca/Bonell, Commentary, Art. 60 para. 2.4.1 et seq.

[1174] *Hager*, in: Schlechtriem/Schwenzer, Commentary, Art. 60 para. 2.

[1175] *P. Huber*, in: Münchener Kommentar zum Bürgerlichen Gesetzbuch, Art. 60 para. 5 et seq.

[1176] Cf. *P. Huber*, in: Münchener Kommentar zum Bürgerlichen Gesetzbuch, Art. 60 para. 9; *Hager*, in: Schlechtriem/Schwenzer, Commentary, Art. 60 para. 3; *Maskow*, in: Bianca/Bonell, Commentary, Art. 53 para. 3.2.2.

back to the seller.[1177] Though exceptions to the general rule are possible, they should, in the author's view, be limited to strictly exceptional cases.[1178]

[1177] *Witz*, in: Witz/Salger/Lorenz, Kommentar, Art. 60 para. 10. Against this kind of exceptions, however, *Magnus*, in: Staudinger Kommentar zum Bürgerlichen Gesetzbuch, Art. 60 para. 21.

[1178] *P. Huber*, in: Münchener Kommentar zum Bürgerlichen Gesetzbuch, Art. 60 para. 9. But see also the rather far reaching approach by *Hager*, in: Schlechtriem/Schwenzer, Commentary, Art. 60 para. 3, who argues that the buyer who immediately rejects goods placed at his disposal at the seller's place of business or at a third place, may be justified.

§ 16. Remedies of the seller

I. Outline of the system of remedies

The remedies available to the seller are set out in Art. 61(1) CISG. By virtue of this provision, 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 Art. 62-65 CISG; (b) claim damages as provided in Art. 74-77 CISG. Whereas Art. 61(1) lit. (a) CISG simply refers to the remedies laid down in the named provisions, Art. 61(1) lit. (b) CISG is itself the actual basis for the claim for damages (with Art. 74 et seq. CISG only governing the calculation of damages). This leads to three standard types of remedies:

- performance (Art. 62 CISG)
- avoidance of the contract (Art. 64 CISG)
- damages (Art. 61(1) lit. (b), Art. 74 et seq. CISG)

In addition to these standard remedies, particular rights and remedies may arise in specific situations, in particular from Art. 65 CISG (specification of terms of the contract), Art. 71-73 CISG (anticipatory breach and instalment contracts[1179]), Art. 78 CISG (interest[1180]) and Art. 85-88 CISG (preservation of the goods[1181]).

In general, the remedial system in Art. 61 et seq. CISG does not distinguish between different types of breach and indeed it will apply to *an*y failure to perform by the buyer. However, there are a number of circumstances in which the Convention does differentiate between various types of breach. Thus, by way of example, Art. 64(1), (2) CISG draws a distinction between breach of contractual obligations generally and late performance, with different legal consequences flowing depending on which type of breach is complained of.

The remedial system of the CISG is not fault-based. The remedies (including the claim for damages) will be available to the seller irrespective of whether the buyer acted negligently or even wilfully. In certain cases, however, a buyer may be exempt from liability under Art. 79, 80 CISG.

[1179] See below § 17, 18.

[1180] See below § 19.

[1181] See below § 20.

II. Performance

According to Art. 62 CISG, 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. This provision is more or less the mirror-image of Art. 46(1) CISG so that many of the considerations regarding that provision will also be relevant here.

1. Buyer's breach

The claim for performance covers all types of breach. It is therefore not limited to the buyer's obligation to pay the price and to take delivery, but also covers any ancillary or additional obligations of the buyer (which may result, for example, from the contract, from usages and practices, from general principles of the Convention or from the principle of good faith). A claim for performance concerning the buyer's refusal to take delivery will, however, be rare in practice, because the seller will in such a case usually resort to his rights under Art. 87 et seq. CISG, i.e. store the goods at the buyer's expense or even proceed to a resale of the goods.[1182]

2. Limitations of the claim

The seller's claim for performance is subject to certain limitations.

a) Art. 62 CISG

Under Art. 62 CISG, the seller does not have a claim for performance if he has resorted to a remedy which is inconsistent with this claim. If the seller has already declared the contract avoided, this will obviously be inconsistent with a claim for performance. If the seller has fixed an additional period of time for performance of the buyer under Art. 63 CISG, this will be inconsistent with a claim for performance while the additional period of time is still running (cf. Art. 63(2) CISG).[1183]

[1182] *Hager*, in: Schlechtriem/Schwenzer, Commentary, Art. 62 para. 4.

[1183] *Hager*, in: Schlechtriem/Schwenzer, Commentary, Art. 62 para. 5; *Knapp*, in: Bianca/Bonell, Commentary, Art. 62 para. 3.4.

It is submitted that it is also inconsistent with a claim for performance if the seller has already claimed the performance interest as damages under Art. 61(1) lit. (b), Art. 74 et seq. CISG (damages for non-performance), because in that case the seller has expressed his desire not to receive specific performance from the buyer but to be compensated in money. Where, however, the seller claims damages other than for non-performance ("damages next to performance", i.e. damages for losses which arise even if there is a performance) or interest, this will usually not be inconsistent with a claim for performance.[1184]

If the seller has resorted to a resale under Art. 88 CISG, it is submitted that this will be inconsistent with a claim for taking delivery, but not with a claim for payment of the purchase price; the latter will, however, have to be reduced by the proceeds from the resale according to the standards laid down in Art. 88(3) CISG which lays down that the seller must account to the buyer for the balance.[1185]

b) Art. 28 CISG

In principle, the exception provided for in Art. 28 CISG[1186] also applies to the claim for performance under Art. 62 CISG. There is some debate, however, on whether Art. 28 CISG should also apply to the claim for payment of the price. Some authors argue that the exception provided for in Art. 28 CISG was only created in order to avoid the problems resulting from enforcing performance of non-monetary claims.[1187] In the author's view, however, it is preferable to follow the opposite view[1188] which would treat Art. 28 CISG as applicable to claims for both monetary and non-monetary performance. This view is supported both by the wording and by the systematic position of

[1184] *P. Huber*, in: Münchener Kommentar zum Bürgerlichen Gesetzbuch, Art. 62 para. 4; *Magnus*, in: Staudinger Kommentar zum Bürgerlichen Gesetzbuch, Art. 62 para. 13. But see also *Hager*, in: Schlechtriem/Schwenzer, Commentary, Art. 62 para. 5, who seems to regard damages as consistent with a claim for performance without making an exception for damages for non-performance.

[1185] *Hager*, in: Schlechtriem/Schwenzer, Commentary, Art. 62 para. 5, 15; *P. Huber*, in: Münchener Kommentar zum Bürgerlichen Gesetzbuch, Art. 62 para. 4.

[1186] As to Art. 28 CISG see above p. 186 et seq.

[1187] So for instance *Herber/Czerwenka*, Commentary, Art. 62 para. 7; *Plantard*, in: Lausanne Colloquium, p. 111, 115 et seq.

[1188] *Hager*, in: Schlechtriem/Schwenzer, Commentary, Art. 62 para. 8 et seq.; *Honnold*, para. 348 et seq.; *Kastely*, Washington Law Review 63 (1988), 607, 635; *Farnsworth*, American Journal of Comparative Law (AmJCompL) 27 (1979) 247, 249 et seq.

Art. 28 CISG within the Convention as neither criteria do give any ground for treating payment claims differently than other claims.

c) Further limitations

It is submitted that claims for performance under Art. 62 CISG should be submitted to the limits set up by Art. 80 CISG. If therefore the buyer's failure to perform is caused by any act or omission of the seller under Art. 80 CISG, the seller will not have a claim for performance.

With regard to the application of Art. 79 CISG, it is submitted that the situation is the same as under Art. 46 CISG.[1189] In the author's opinon, Art. 79 CISG should therefore not be applied to the claim for performance due to the explicit proviso in Art. 79(5) CISG. As for cases of impossibility or hardship (which will be rare with regard to the buyer's obligations, and rarer still in regard to the obligation to pay the price), the solution should be found by having regard to the general principles of the Convention (Art. 7(2) CISG) which will chiefly be derived from the concepts which underlie Art. 79 CISG (cf. above p. 264).

According to the clear wording and to the systematic structure of the CISG, the duty to mitigate loss (Art. 77 CISG) does not apply to the claim for performance. The CISG thus does not contain a rule which excludes the claim for performance if performance would be uneconomical. In this respect, the CISG follows the Civil Law example and gives considerable importance to the claim for performance. In extremely exceptional cases, however, it might be justified to assume that insisting on the claim for performance is contrary to the principle of good faith (Art. 7(2) CISG).[1190]

The CISG does not contain specific time limits for the claim for performance. It is therefore only submitted to the applicable limitation rules (for instance the UN Limitation Convention, if applicable, or the "lex contractus").

3. Burden of proof

It is submitted that the burden of proof with regard to the buyer's breach should lie on the seller whereas the burden of proof for the defences to the

---

[1189] See above p. 192 et seq.

[1190] *Hager*, in: Schlechtriem/Schwenzer, Commentary, Art. 62 para. 14; *P. Huber*, in: Münchener Kommentar zum Bürgerlichen Gesetzbuch, Art. 62 para. 9; *Kastely*, Washington Law Review 63 (1988) 607, 622 et seq.

claim for performance (e.g. the buyer's defence that he actually made performance or the limitations described under b-c above) should lie on the buyer.[1191]

III. Avoidance

1. Outline

Art. 64(1) CISG identifies two grounds of avoidance that will be available to the seller if the buyer breaches his obligations. The basic principle is stated in Art. 64(1) lit. (a) CISG. This provides that, irrespective of the nature of the breach, the seller may declare the contract avoided if the failure by the buyer to perform any of his obligations amounts to a fundamental breach of contract in the sense of Art. 25 CISG. For two types of breach (concerning payment and taking delivery, i.e. most cases of a breach by the buyer) Art. 64(1) lit. (b) CISG provides a second ground for avoidance, namely, that the seller can fix an additional period of time according to Art. 63(1) CISG during which the buyer must perform. If the buyer fails to perform or declares that he will not do so during that period, the seller will be entitled to avoid the contract irrespective of whether the buyer's breach was fundamental or not. In short, the seller will be able to avoid the contract under the fundamental breach doctrine or – in so far as payment or taking delivery are concerned – by using the so-called "Nachfrist"-procedure. The overall picture therefore resembles the one in Art. 49 CISG.

Art. 64(2) CISG sets certain time limits for those cases in which payment has already been made. These time limits are supposed to prevent the seller from speculating on market fluctuations by waiting unduely before declaring avoidance.[1192]

Apart from Art. 64(2) CISG, the seller's right to avoid the contract is subject to the general grounds of exclusion. Thus the applicable law will determine the limitation period. Within the CISG, Art. 80 CISG has to be respected so that the seller cannot rely on the buyer's breach if he (the seller) has caused that breach.[1193] It is submitted that neither Art. 79 CISG (see

[1191] *Huber*, in: Münchener Kommentar zum Bürgerlichen Gesetzbuch, Art. 62 para. 12; *Schnyder/Straub*, in: Honsell, Kommentar, para. 37 et seq.

[1192] *Magnus*, in: Staudinger Kommentar zum Bürgerlichen Gesetzbuch, Art. 64 para. 36.

[1193] As to Art. 80 CISG see above p. 265 et seq.

Art. 79(5) CISG) nor Art. 77 CISG should be applied to the seller's right to avoid the contract. The seller therefore is not under a duty to mitigate loss when deciding on whether to avoid the contract. As long as he keeps within the time limits of Art. 64(2) CISG, he can delay his decision. He should keep in mind, however, that the buyer may, in certain situations under Art. 64(2) lit. (a) CISG destroy his right to avoid the contract by effecting performance and informing him accordingly. What is more, if he wants to combine his avoidance with a claim for damages (which is possible, Art. 61(2) CISG), the latter will of course be subject to Art. 77 CISG so that the seller should think twice about delaying his decision to avoid in order to speculate on the market.

2. Avoidance for fundamental breach

Art. 64(1) lit. (a) CISG gives the seller the right to avoid the contract if the buyer has committed a fundamental breach. The breach may relate to any of the buyer's obligations under the contract or under the Convention. The fundamental character of the breach has to be determined according to the standards set in Art. 25 CISG. This provision has been analysed in more detail above in connection with Art. 49 CISG.[1194] The following remarks are therefore limited to giving some indications on the question when the *buyer's* breach can be regarded as fundamental. As a rough guideline, the main criterion for determining the fundamental character should be whether the breach substantially impairs the seller's interest in the performance of the contract,[1195] taken together of course with the foreseeability requirement of Art. 25 CISG.

a) Payment

A definite refusal to pay the purchase price will usually amount to a fundamental breach.[1196] However, it is submitted that the mere fact that the buyer has not paid at the time of payment does not as such amount to a fundamen-

[1194] See above p. 213 et seq.

[1195] *Hager*, in: Schlechtriem/Schwenzer, Commentary, Art. 64 para. 4.

[1196] *Hager*, in: Schlechtriem/Schwenzer, Commentary, Art. 64 para. 5; *P. Huber*, in: Münchener Kommentar zum Bürgerlichen Gesetzbuch, Art. 64 para. 8; *Magnus*, in: Staudinger Kommentar zum Bürgerlichen Gesetzbuch, Art. 64 para. 13; (German) Oberlandesgericht Braunschweig 28 October 1998, TransportR-Internationales Handelsrecht (IHR) 2000, 4, 5 = CISG-Online No. 510. In my opinion it is doubtful whether the often cited decision of (German) Oberlandesgericht Düsseldorf CLOUT para. 130 = CISG-Online No. 119 acutally is in point.

tal breach.[1197] Two reasons may be offered in support of this position. First, a mere delay in payment will usually (i.e. in the absence of specific elements which point to the contrary) not affect the seller's continued interest in the performance of the contract. Secondly, the very existence of the alternative "Nachfrist"-procedure provided for in Art. 64(1) lit. (b) CISG indicates that the Convention does not seem to regard the mere delay in payment as fundamental. To treat mere delay in payment, without more, as amounting to fundamental breach would render the provision in Art. 64(1) lit. (b) CISG more or less meaningless which it is suggested would be a surprising conclusion. It will be different, however, if timely payment was of the essence in the particular case. This will, of course, be the case if the contract or relevant practices or usages provide that time is of the essence. What is more, time can be of the essence in cases where there are strong currency fluctuations.[1198] The essential character of timely payment can also result from the commercial background of the transaction. By way of example, in sales on CIF or related terms which provide for payment by letter of credit, it is suggested that the time of payment will usually be of the essence and that the letter of credit must be opened no later than the first day of the agreed shipment period. In such cases, the seller's shipment obligation is of the essence and this also affects the character of the payment obligation because the seller should not be obliged to ship the goods without security of payment and should also have the possibility of shipping at any time during the shipment period.[1199] On the other hand, according to several authors,[1200] the mere fact that payment

[1197] *Hager*, in: Schlechtriem/Schwenzer, Commentary, Art. 64 para. 5; *P. Huber*, in: Münchener Kommentar zum Bürgerlichen Gesetzbuch, Art. 64 para. 6; *Murray*, in: Ferrari/Flechtner/Brand, The Draft UNCITRAL Digest and Beyond, p. 462; *Graffi*, International Business Law Journal (2003) No. 3, p. 338, 341. See also Arbitral Award, ICC 7585, CISG-Online No. 105 where, according to the case abstract, the tribunal stated that the mere fact that a buyer had some delay in payment was not always in itself a fundamental breach (and solved the case under Art. 64(1) lit. (b) CISG); (German) Oberlandesgericht Düsseldorf 22 July 2004, CISG-Online No. 916; but see for a different view U.S. District Court, Michigan 17 December 2003, CISG-Online No. 773.

[1198] *Hager*, in: Schlechtriem/Schwenzer, Commentary, Art. 64 para. 5; *Murray*, in: Ferrari/Flechtner/Brand, The Draft UNCITRAL Digest and Beyond, p. 462.

[1199] *Hager*, in: Schlechtriem/Schwenzer, Commentary, Art. 64 para. 5; *P. Huber*, in: Münchener Kommentar zum Bürgerlichen Gesetzbuch, Art. 64 para. 7.

[1200] *Magnus*, in: Staudinger Kommentar zum Bürgerlichen Gesetzbuch, Art. 64 para. 14; cf. also Arbitral Award, ICC 7585, CISG-Online No. 105. Sometimes reference is also made to the decision of the (German) Landgericht Kassel 21 September 1995, CISG-Online No. 192, although in my opinion the situation there was somewhat different.

is to be made by letter of credit (without there being any further elements such as the shipment obligation) does not necessarily mean that time is of the essence. While in principle this is probably correct, it is suggested that cases where the parties have agreed on payment by letter of credit without its timely opening being of the essence will be rare.[1201]

b) Taking delivery

The situation with regard to breaches of the obligation to take delivery is similar to the one with regard to the payment obligation. Thus, mere delay in taking delivery will only lead to a fundamental breach if time was of the essence in that respect.[1202] The essential character of the obligation to take delivery in time can for instance derive from the contract or from a legitimate interest of the seller (e.g. because he urgently needs his storage or transport facilities or because the goods are perishable).[1203] That said, a definite refusal to take delivery will usually amount to a fundamental breach.[1204] Even a partial refusal to take delivery can be sufficient. So a German Court has held that the buyer's refusal to take delivery of more than half of the agreed quantity amounted to a fundamental breach.[1205]

c) Other obligations

If the buyer breaches any of his other obligations (e.g. duties of cooperation or duties concerning limitations on distribution) it will be a question in each individual case whether the breach is fundamental or not.[1206] It should be borne in mind that for these types of breaches the fundamental breach doc-

---

[1201] See for instance (Australian) Supreme Court of Queensland, Court of Appeal, 12 October 2001 (Downs Investment v Perwaja Steel), CISG-Online No. 955. See also Arbitral Awards CIETAC: CISG/1997/22, CISG-Online No. 1071; CISG/1999/21, CISG-Online No. 1114; CISG/1999/12, CISG-Online No. 1136; but see also CISG/1995/07, CISG-Online No. 1031.

[1202] Cf. (German) Oberlandesgericht Düsseldorf 22 July 2004, CISG-Online No. 916.

[1203] See for instance: (French) Cour d'Appel Grenoble 4 February 1999, CISG-Online No. 443; *Hager*, in: Schlechtriem/Schwenzer, Commentary, Art. 64 para. 6; *Magnus*, in: Staudinger Staudinger Kommentar zum Bürgerlichen Gesetzbuch, Art. 64 para. 17.

[1204] *Hager*, in: Schlechtriem/Schwenzer, Commentary, Art. 64 para. 6; (Swiss) Kantonsgericht Zug 12 December 2002, Internationales Handelsrecht (IHR) 2004, 65 = CISG-Online No. 720. See also Arbitral Award, CIETAC: CISG/2001/02, CISG-Online No. 1442.

[1205] (German) Oberlandesgericht Hamm 22 September 1992, CISG-Online No. 57.

[1206] See for instance (French) Cour d'Appel Grenoble 22 February 1995, CISG-Online No. 151; (Swiss) Handelsgericht des Kantons Aargau 14 February 1992, CISG-Online No. 389.

trine of Art. 64(1) lit. (a) CISG is the only way to the avoidance of the contract, the "Nachfrist"-procedure under Art. 64(1) lit. (b) CISG being limited to payment and taking delivery. Nevertheless, fixing an additional period of time may be useful in practice because it may strengthen an argument in favour of the fundamental character of the breach if the buyer does not even comply with his obligation during that additional period of time.[1207]

3. Avoidance under the "Nachfrist"-procedure

According to Art. 64(1) lit. (b) CISG, the seller may declare the contract avoided if the buyer does not, within an additional period of time fixed by the seller in accordance with article 63(1) CISG ("Nachfrist"), 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. The "Nachfrist"-mechanism on the one hand gives the buyer a "second chance" to perform (thus serving the general objective of the CISG to avoid a termination of the contract as long as possible). On the other hand, however, it presents certain advantages for the seller, too. In many cases, without the giving of a "Nachfrist" notice, it may be very difficult to judge whether the buyer's breach actually is fundamental or not. If the seller does not want to run the risk of declaring avoidance under Art. 64(1) lit. (a) CISG and having the tribunal later classifying the breach as not fundamental (which would mean that the seller himself is in breach due to his unjustified avoidance), it may be advisable to use the "Nachfrist"-mechanism which provides more certainty.[1208]

a) Scope of application

The "Nachfrist"-procedure is limited to breaches of the payment obligation and of the obligation to take delivery. In practice, however, most breaches are likely to concern these obligations so that the scope of Art. 64(1) lit. (b) CISG is actually rather wide. Moreover, certain ancillary duties of the buyer are classified by the CISG as part of the obligation to pay the price[1209] (cf. Art. 54 CISG which also includes the steps necessary for establishing a letter

[1207] *Hager*, in: Schlechtriem/Schwenzer, Commentary, Art. 64 para. 8. See above p. 228.

[1208] *Hager*, in: Schlechtriem/Schwenzer, Commentary, Art. 64 para. 8.

[1209] *Hager*, in: Schlechtriem/Schwenzer, Commentary, Art. 64 para. 8; *Knapp*, in: Bianca/Bonell, Commentary, Art. 64 para. 3.4 et seq.; *Witz*, in: Ferrari/Flechtner/Brand, The Draft UNCITRAL Digest and Beyond, p. 436.

of credit[1210]) or to take delivery (cf. Art. 60 lit. (a) CISG which covers for instance duties to call off or to specifiy (Art. 65 CISG) the goods[1211]).

b) Fixing the "Nachfrist"

Art. 64(1) lit. (b) CISG requires that the seller has fixed an additional period of time of reasonable length in the sense of Art. 63(1) CISG. The declaration of the seller which fixes the additional period of time falls under the regime of Art. 27 CISG. If, therefore, the seller has complied with that provision (in particular if he has made the declaration by appropriate means), the buyer bears the risk of errors, delays or even a failure of the declaration to arrive.

The additional period which the seller fixes must meet two requirements. First, it must be definite in the sense that the end of the period is at least determinable from the calendar. A simple request to perform "promptly" will therefore not be sufficient, a request to perform on "April 30th at latest" will.[1212] In practice it will be advisable to avoid any risk of being unspecific on that point.

Secondly, the period must be of reasonable length. [1213] The precise determination of what is reasonable must of course be decided on a case by case basis. In deciding whether the period was of reasonable length, regard should be had to how quickly the seller needs the performance. Thus, if the market price for the goods sold is falling rapidly, the seller will have a legitimate interest in setting a short period so as to be able to avoid the contract as soon as possible.[1214] However, account must also be taken of any known impediments that the buyer will have to face. It is submitted that as a general rule a seller is entitled to expect that the buyer has taken some steps towards perform-

---

[1210] (Austrian) Oberster Gerichtshof 6 February 1996, CISG-Online No. 224. See also Arbitral Award CIETAC, CISG/2002/03, CISG-Online No. 1443.

[1211] As to preparatory measures for the manufacture of the goods (e.g. plans) see U.S. District Court, Southern District of New York (Geneva Pharmaceuticals v Barr Laboratories) 10 May 2002, CISG-Online No. 653; *Hager*, in: Schlechtriem/Schwenzer, Commentary, Art. 60 para. 2 (application of Art. 60 lit. (a) CISG) with references to differing opinions.

[1212] Cf. *Hager*, in: Schlechtriem/Schwenzer, Commentary, Art. 63 para. 3; *P. Huber*, in: Münchener Kommentar zum Bürgerlichen Gesetzbuch, Art. 63 para. 8; *Knapp*, in: Bianca/Bonell, Commentary, Art. 63 para. 2.10.

[1213] For examples see (Italian) Corte di Appello Milano 11 December 1998, CISG-Online No. 430; (German) Landgericht Bielefeld 18 January 1991, CISG-Online No. 174.

[1214] *Hager*, in: Schlechtriem/Schwenzer, Commentary, Art. 63 para. 3; *P. Huber*, in: Münchener Kommentar zum Bürgerlichen Gesetzbuch, Art. 63 para. 8.

ance when the original time for performance has arrived. [1215] Thus, a period of time may be reasonable notwithstanding that it would not allow a buyer to perform where the buyer had not, up until the giving of the notice, taken any steps towards performance.

If the seller has set a "Nachfrist" which is too short, it is submitted that this will not be without effect[1216], but should instead simply be treated as setting a reasonable period running.[1217] Thus, if in a given case a reasonable length would be two weeks and the seller has set a period of one week, the giving of notice will trigger the two-week-period after the expiry of which the seller may avoid the contract if the buyer has not performed.

c) Fruitless expiry of the "Nachfrist"

The right to avoid the contract under Art. 64(1) lit. (b) CISG further requires that the additional period of time has elapsed without the buyer having performed his obligations or that the buyer has declared[1218] that he will not do so within this period.[1219] It is submitted that – as under Art. 49(1) lit. (b) CISG – such a refusal to perform can also be given if the buyer makes his performance dependent on counter-performances by the seller to which he is not entitled.[1220]

[1215] *P. Huber*, in: Münchener Kommentar zum Bürgerlichen Gesetzbuch, Art. 63 para. 8.

[1216] As submitted for instance by *Schnyder/Straub*, in: Honsell, Kommentar, Art. 63 para. 20 et seq.

[1217] *Hager*, in: Schlechtriem/Schwenzer, Commentary, Art. 63 para. 3; *Magnus*, in: Staudinger Kommentar zum Bürgerlichen Gesetzbuch, Art. 63 para. 16; *P. Huber*, in: Münchener Kommentar zum Bürgerlichen Gesetzbuch, Art. 63 para. 10. The matter is, however, disputed, cf. it is submitted that the binding effect of the "Nachfrist" which is provided for in Art. 63(2) CISG will only last as long as the (too short) period that the seller has actually fixed; after its expiry the buyer can no longer expect the seller to feel bound.

[1218] As can be derived from Art. 63(2) CISG ("the seller has received notice") it is necessary that this declaration actually reaches the seller, *Hager*, in: Schlechtriem/Schwenzer, Commentary, Art. 64 para. 8.

[1219] *Witz*, in: Witz/Salger/Lorenz, Kommentar, Art. 64 para. 13

[1220] *P. Huber*, in: Münchener Kommentar zum Bürgerlichen Gesetzbuch, Art. 64 para. 13.

4. Declaration of avoidance

In order to effectively avoid the contract, the seller must give a declaration of avoidance. Under the CISG there is no "ipso facto avoidance" which would operate by law even in the absence of a declaration of one of the parties.[1221] This is clearly stated in Art. 26 CISG and in Art. 64 CISG ("may declare"). The declaration of avoidance does not have to be made in any particular form.[1222] It falls under Art. 27 CISG.[1223] As for the content of the declaration of avoidance, similar principles as for Art. 49 CISG[1224] will apply. As a general rule, the declaration must show without doubt that the seller does not want to be bound by the contract any longer.[1225]

5. Time limits

Art. 64(2) CISG provides a rather complicated and frequently criticized system of time limits for the seller's right to avoid the contract.[1226] Several steps have to be taken in order to apply the provision correctly.

The first question to ask is whether the buyer has already paid the price. Only if this is the case[1227], the time limits in Art. 64(2) CISG will apply. To put it differently, as long as the buyer has not paid the price, the CISG does not set any time limits for the seller's right to avoid the contract.[1228]

If the buyer has paid the price, the second question to address is whether the alleged breach of the buyer consists in late performance (then: Art. 64(2) lit. (a) CISG) or in another type of breach (then: Art. 64(2) lit. (b) CISG).

[1221] *P. Huber*, in: Münchener Kommentar zum Bürgerlichen Gesetzbuch, Art. 64 para. 14; *Magnus*, in: Staudinger Kommentar zum Bürgerlichen Gesetzbuch, Art. 64 para. 5, 27; *Hager*, in: Schlechtriem/Schwenzer, Commentary, Art. 64 para. 9.

[1222] (Austrian) Oberster Gerichtshof 28 April 2000, Internationales Handelsrecht (IHR) 2001, 207, 208 = CISG-Online No. 581.

[1223] As to Art. 27 CISG see above p. 330 (for the declaration setting the "Nachfrist").

[1224] See above p. 210 et seq.

[1225] See for instance (Austrian) Oberster Gerichtshof 28 April 2000, Internationales Handelsrecht (IHR) 2001, 207, 208 = CISG-Online No. 581.

[1226] Cf. *Hager*, in: Schlechtriem/Schwenzer, Commentary, Art. 64 para. 11.

[1227] This means that full payment has been made, *Hager*, in: Schlechtriem/Schwenzer, Commentary, Art. 64 para. 11; *Knapp*, in: Bianca/Bonell, Commentary, Art. 64 para. 3.7.

[1228] It should be noted, however, that the applicable limitation period will apply.

In a case of late performance, the seller loses the right to declare the contract avoided unless he does so before he has become aware that performance has been rendered (lit. (a)). In any other case of breach, the seller only loses his right to avoid the contract after a reasonable time has elapsed, the reasonable time period beginning to run after the seller knew or ought to have known of the breach (lit. (b)(i)) or – in the case of a „Nachfrist" under Art. 64 CISG with the expiry of the „Nachfrist" or with the buyer's declaration of his refusal to perform (lit (b)(ii)).

This set of rules can lead to complicated scenarios if one follows the predominant opinion:[1229]

If for example the buyer has not paid the price at the date of payment, this does as such not trigger any time limit under Art. 64(2) CISG. Assuming, for the purposes of this example, that time was of the essence, the seller would therefore have a right to avoid the contract under Art. 64(1) lit. (a) CISG. The buyer will have the possibility, however, to deprive him of this right by simply paying (with the consequence that Art. 64(2) CISG begins to apply) and informing him about the payment (thus causing him to lose the right to avoid under Art. 64(2) lit. (a) CISG).

A similar scenario is possible if the buyer (who has already paid the price) breaches his obligation to take delivery or any other obligation (except the payment obligation). In that case, Art. 64(2) CISG does apply (payment having been made). As long as the buyer has not performed, the case will not fall within Art. 64(2) lit. (a), but instead within Art. 64(2) lit. (b) CISG. The seller will therefore have a reasonable time for declaring the contract avoided, the period starting after he knew or ought to have known of the breach (lit. (b)(i)) or – if a „Nachfrist" had been fixed – according to lit. (b)(ii). As long as the seller has not declared avoidance, however, the buyer can still perform, thereby making his breach a case of "late performance" which would then lead to the application of Art. 64(2) lit. (a) CISG, i.e. to the loss of the right to avoid once the seller has become aware of the performance.

[1229] See for instance *Hager*, in: Schlechtriem/Schwenzer, Commentary, Art. 64 para. 21; *P. Huber*, in: Münchener Kommentar zum Bürgerlichen Gesetzbuch, Art. 64 para. 19 et seq.; *Magnus*, in: Staudinger Kommentar zum Bürgerlichen Gesetzbuch, Art. 64 para. 41 et seq. But see also – for a differing view – *Schnyder/Straub*, in: Honsell, Kommentar, Art. 64 para. 31 et seq.

6. Burden of proof

It is submitted that the seller has the burden of proof concerning the existence of the buyer's obligation, the fundamental breach requirements under Art. 64(1) lit. (a) CISG and the fact that a reasonable "Nachfrist" has been fixed under Art. 64(1) lit. (b) CISG. As a general rule the burden of proof with regard to the buyer's defences (e.g. that he actually made performance so that there is no breach) or to the limitations to the right of avoidance (see p. 325 et seq.) should be on the buyer. With regard to the time limits in Art. 64(2) CISG the burden of proof for the beginning and the end of the relevant period of time should be on the buyer, whereas the burden of proof with regard to the fact that the declaration of avoidance was effectively made within that period (Art. 27 CISG) should be on the seller.

IV. Damages

1. Outline

According to Art. 61(1) lit. (b) CISG the seller is entitled to claim damages as provided in Art. 74-77 CISG. The actual basis for the damages claim is Art. 61(1) lit. (b) CISG, whereas Art. 74-77 CISG govern the details on calculating the amount and the type of damages. The provisions of Art. 74 et seq. CISG have been explored in detail above with regard to the buyer.[1230] It is submitted that the general principles which have been established there will in principle also be valid for damages claims of the seller (for example, liability without the fault requirement, but subject to Art. 79, 80 CISG; foreseeability; the question of whether the performance interest can be liquidated without being entitled to avoid the contract; calculation of damages under Art. 75, 76 CISG etc.). The following considerations are therefore limited to selected issues which may in practice become particularly relevant where it is the seller who claims damages.

2. Specific issues

a) Late payment

In the case of late payment the question may arise whether the loss resulting from a depreciation of the contract currency between the agreed date of payment and the actual date of payment is recoverable under Art. 74 CISG.

[1230] See above p. 268 et seq.

It is submitted that in principle such a loss is recoverable but that it will be a question of foreseeability in each individual case.[1231] It will usually depend on whether the buyer ought, in the circumstances, to have foreseen that the seller was going to convert the owed debt from the contract currency to another currency. If for instance the contract currency is not the seller's home currency this will often be the case. It will usually be different if the contractual currency is the seller's home currency, unless the seller mainly operates under a foreign currency and this was foreseeable for the buyer.

b) Lost volume

Specific problems may arise with regard to the situation of the so-called lost volume seller, i.e. a seller which has more or less unlimited supply of the goods that he sells.

Assume the following example: The contract provides for delivery of goods for a price of 100,000, the seller's (S) profit being 20,000. The buyer (B) does not take delivery of the goods and definitely refuses to do so in the future. This breach amounts to a fundamental breach of contract so that S is entitled to avoid the contract under Art. 64(1) lit. (a) CISG. B will be liable for damages under Art. 61(1) lit. (b), Art. 74 et seq. CISG. S sells the goods which had originally been bookmarked for B within a reasonable time after avoidance and in a reasonable manner to X for 90,000.

In the author's opinion, S may claim 20,000 as damages. The reasons for this submission can be summarized as follows: Had B's breach not occurred S would have made a profit of 30,000, i.e. 20,000 from the contract with B and 10,000 from the contract with X; in fact, due to his unlimited access to supply, S could and would have made the contract with X anyway. As a result of B's breach S now only made the profit from the contract with X, i.e. 10,000. The resulting amount of damages is 20,000. To put it differently, the seller's damage is caused by the fact that he lost one of his transactions ("lost volume" of transactions). With regard to the legal basis for this claim it is submitted that S may either proceed entirely under Art. 74 CISG (the foreseeability requirement usually being met in cases like that) or under a combination of Art. 75 and 74 CISG (Art. 75 CISG concerning the 10,000 that constitute the difference between the contract price (contract S-B) and the price in the cover sale (S-X); Art. 74 CISG concerning the 10,000 which constitute the remaining loss of profit arising out of the fact that the contract

[1231] See for instance (German) Oberlandesgericht Düsseldorf 14 January 1994, CISG-Online No. 119; *P. Huber*, in: Münchener Kommentar zum Bürgerlichen Gesetzbuch, Art. 74 para. 49 et seq.

S-B was not performed).[1232] It should be noted, however, that these considerations only apply where there is a real "lost volume" situation, i.e. where the seller has unlimited supply and that he could easily have made the transaction with X anyway.

A further issue with regard to "lost volume" cases concerns the application of Art. 76 CISG. Where the seller wants to calculate the damages under Art. 76 CISG, the buyer might invoke the duty to mitigate (Art. 77 CISG) arguing that the seller should have conducted a cover sale. As a general rule, this defence may be successful where such a cover sale was reasonable under the circumstances. Where, however, the seller is in a "lost volume" situation, it is submitted that the mitigation defence will usually fail because – as shown above – the cover sale would not reduce the "lost volume" damage suffered by the seller.[1233]

c) Other issues

As a rule, the buyer is responsible for his *financial capacity* so that his chances for being exempt from liability under Art. 79 CISG are very low.[1234] The buyer also has to bear the risk that he cannot make the originally *intended use* of the goods. Thus he should not (normally) succeed in justifying his failure to take delivery of the goods by arguing that due to a change of circumstances he now has no more use for the ordered goods.[1235]

With regard to the *burden of proof* it is submitted that generally the seller should bear this burden with regard to the general requirements for a claim

---

[1232] See with regard to these issues *P. Huber*, in: Münchener Kommentar zum Bürgerlichen Gesetzbuch, Art. 75 para. 20, Art. 76 para. 12, Art. 77 para. 10; *Stoll/Gruber*, in: Schlechtriem/Schwenzer, Commentary, Art. 75 para. 11; (Austrian) Oberster Gerichtshof 28 April 2000, Internationales Handelsrecht (IHR) 2001, 207, 208 = CISG-Online No. 581.

[1233] *P. Huber*, in: Münchener Kommentar zum Bürgerlichen Gesetzbuch, Art. 76 para. 12, Art. 77 para. 10.

[1234] See *Stoll/Gruber*, in: Schlechtriem/Schwenzer, Commentary, Art. 79 para. 16, pointing out, however, that there may be an exemption where the financial difficulty is due to a State intervention. But see also Arbitral Award, Chamber of Commerce Hamburg, 21 March 1996, CISG-Online No. 187, which assumes a rather strict liability for the financial capacity.

[1235] See *P. Huber*, in: Münchener Kommentar zum Bürgerlichen Gesetzbuch, Art. 79 para. 22; (French) Cour d'Appel Colmar 12 June 2001, CISG-Online No. 694; Arbitral Award Bulgarian Chamber of Commerce and Industry CISG-Online No. 436.

for damages (including the contemplation requirement[1236]) whereas the buyer should bear the burden with regard to his defences (e.g. that he actually made performance so that there is no breach) or to the exceptions to the liability for damages (e.g. Art. 79, 80 CISG).[1237]

[1236] (German) Oberlandesgericht Bamberg 13 January 1999, CISG-Online No. 516. But see for a different view (German) Oberlandesgericht Zweibrücken 31 March 1998, CISG-Online No. 481 (reversed on other points in (German) Bundesgerichtshof 24 March 1999, CISG-Online No. 396); *Magnus*, in: Staudinger Kommentar zum Bürgerlichen Gesetzbuch, Art. 74 para. 62.

[1237] See *Stoll/Gruber*, in: Schlechtriem/Schwenzer, Commentary, Art. 74 para. 52, Art. 79 para. 53 et seq., Art. 80 para. 8.

Part 7:
Specific issues

§ 17. Anticipatory breach

I. Outline

Art. 71, 72 CISG deal with the issue of "anticipatory breach", i.e. with those cases in which it becomes apparent that one party will commit a breach of contract, although the date for performance has not yet arrived. Under certain circumstances Art. 71 CISG gives the other party a right to suspend his own performance and the seller the right to stop the goods which have already been dispatched. Where the threatened breach is a fundamental one, Art. 72 CISG allows the other party to avoid the contract.

The CISG rules on anticipatory breach (Art. 71, 72 CISG) should be regarded as a comprehensive set of rules which exclude any national remedy that the applicable law might provide in such cases.[1238] It is submitted, however, that it might be different in cases of fraud.[1239]

II. Right to suspend performance (Art. 71(1), (3) CISG)

According to Art. 71(1) CISG 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.

[1238] See for instance (Austrian) Oberster Gerichtshof 12 Februar 1998, CISG-Online No. 349, and 8 November 2005, CISG-Online No. 1156; *Hornung*, in: Schlechtriem/Schwenzer, Commentary, Art. 71 para. 25a; *P. Huber*, in: Münchener Kommentar zum Bürgerlichen Gesetzbuch, Art. 71 para. 25 et seq. (all with regard to Art. 71 CISG).

[1239] *P. Huber*, in: Münchener Kommentar zum Bürgerlichen Gesetzbuch, Art. 71 para. 27.

1. Threat of a breach

The first requirement for the right to suspend performance is that it becomes apparent after the conclusion of the contract that the other party will not perform a substantial part of his obligations. It is submitted that there must be a high degree of probability of such a breach.[1240]

The use of the term "substantial" does not mean that the breach must be "fundamental" in the sense of Art. 25 CISG[1241] (as can be seen from a comparison to Art. 72 CISG which explicitly requires a fundamental breach for the right to avoid the contract). It is sufficient if the effects of the anticipated breach concern a substantial part of the other party's obligations. Whether this is so will have to be decided on a case by case basis.[1242] Regard should "inter alia" be had to the importance that the affected obligations had to the other party and to the size of the anticipated breach relative to the contract as a whole. Thus, the German OLG Hamm has held in one case that the defective delivery of a very small part of the entire quantity owed (420 kg out of 22,400 kg, to be delivered in several instalments) did not – in the case at hand – entitle the buyer to suspend his own performance with regard to the future instalments.[1243]

There is no fault requirement under Art. 71 and it is therefore irrelevant whether the anticipated breach can be attributed to any negligence on the part of the breaching party. It is submitted that even if the breaching party might be entitled to rely on Art. 79 CISG in exempting him from having to perform, this will not impair the other party's right to suspend performance, as Art. 79(5) CISG explicitly says that this provision does not prevent the other party from exercising any other remedy than damages.

[1240] *Hornung*, in: Schlechtriem/Schwenzer, Commentary, Art. 71 para. 17; *P. Huber*, in: Münchener Kommentar zum Bürgerlichen Gesetzbuch, Art. 71 para. 10.

[1241] *Hornung*, in: Schlechtriem/Schwenzer, Commentary, Art. 71 para. 8; *P. Huber*, in: Münchener Kommentar zum Bürgerlichen Gesetzbuch, Art. 71 para. 4.

[1242] See for instance (German) Oberlandesgericht Hamm 22 September 1992, CISG-Online No. 57; (German) Oberlandesgericht Dresden 27 December 1999, CISG-Online No. 511; (German) Oberlandesgericht Düsseldorf 24 April 1994, CISG-Online No. 385; (German) Landgericht Berlin 15 September 1994, CISG-Online No. 399.

[1243] (German) Oberlandesgericht Hamm 22 September 1992, CISG-Online No. 57.

By way of contrast, if the requirements of Art. 80 CISG are met, the other party cannot rely on his own acts or omissions in order to suspend performance.[1244] It should, however, be noted that Art. 80 CISG will not bar the right to suspend merely because the suspending party was the one who under the contract had to perform first. By way of example, if delivery of the goods is due one week after payment, but the buyer refuses to pay because it has become apparent that the seller will not be able to deliver the goods, it is not possible to argue that the buyer here caused the seller's future breach by not paying. On the contrary, it is exactly in those cases – where one party has to perform before the other – where the party which has to perform first needs the protection of Art. 71 CISG if a substantial breach threatens to occur.[1245]

2. Origin of the breach (lit. (a) and (b))

The threat of the breach must result from one of the circumstances named in lit. (a) and (b). The first circumstance referred to is that of a "serious deficiency in his ability to perform". This may result from a number of different circumstances including strikes, wars or natural disasters, legal impediments (e.g. embargos) and individual impediments to performance, such as difficulties suffered by a seller in trying to obtain the promised goods. Thus, in one case, the German OLG Hamm has applied Art. 71(1) CISG in a case where the seller did not actually possess the furniture he had sold and could not find it.[1246] In a Belgian case where the buyer had placed two orders with the seller of fashion goods the court held – according to the Unilex-Abstract of the case – that "the seller had the right to suspend its performance, i.e. delivery of the second order, until full payment of the first delivery, especially taking into account that the buyer's serious delay in payment (over seven months) could reasonably lead to the suspicion that it would not perform in the future."[1247]

A party may also suspend if it becomes apparent that the other party will not perform as a result of a "serious deficiency in his creditworthiness". This may

[1244] *Hornung*, in: Schlechtriem/Schwenzer, Commentary, Art. 71 para. 9; *P. Huber*, in: Münchener Kommentar zum Bürgerlichen Gesetzbuch, Art. 71 para. 5 et seq.

[1245] *P. Huber*, in: Münchener Kommentar zum Bürgerlichen Gesetzbuch, Art. 71 para. 6; *Magnus*, in: Staudinger Kommentar zum Bürgerlichen Gesetzbuch, Art. 71 para. 24.

[1246] (German) Oberlandesgericht Hamm 23 June 1998, Transportrecht-Internationales Handelsrecht (IHR) 2000, 7 = CISG-Online No. 434.

[1247] (Belgian) Rechtbank Hasselt 1 March 2005, CISG-Online No. 373 = www.unilex.info.

be established by proof that insolvency proceedings have been opened over one party[1248] or in the case of a complete cessation of payment.[1249] A simple pattern of regular late payment has, on the other hand, been held in one case not to be sufficient.[1250]

Finally, according to lit. (b) the threat of a breach can also result from one party's conduct in preparing to perform or in performing the contract (e.g.: seller uses raw material for the production which is obviously not suited; the other party does not apply in time for the necessary licenses).[1251]

3. Right to suspend

Art. 71 CISG gives the aggrieved party the right to suspend his own performance without committing a breach of contract himself. As a rule, the aggrieved party will not only be entitled to suspend the performance himself but also to suspend his preparations for performance (e.g. procuring the goods).[1252]

On the other hand, Art. 71 CISG does not entitle him to avoid the contract. Such a right to avoid can only result from Art. 72 or 73 CISG[1253] or – after the breaching party's obligations have become due – from the general provisions of Art. 49 or 64 CISG.

If the aggrieved party exercises his right to suspend his performance, this does not affect the other party's obligations. In principle, therefore, the other party is still bound to perform.

If the contract is performed after the suspension, the contractual timetable may have to be adapted in order to take account of the fact that the con-

[1248] In that case, of course, the applicable insolvency law will also have to be taken into account and may take precedence over the contractual remedies.

[1249] (Austrian) Oberster Gerichtshof 12 February 1998, CISG-Online No. 349.

[1250] (Austrian) Oberster Gerichtshof 12 February 1998, CISG-Online No. 349. But see also (French) Cour de Cassation 20 February 2007, CISG-Online No. 1492.

[1251] See *Hornung*, in: Schlechtriem/Schwenzer, Commentary, Art. 71 para. 12.

[1252] *Hornung*, in: Schlechtriem/Schwenzer, Commentary, Art. 71 para. 6; *Honnold*, para. 389.

[1253] See for instance (Austrian) Oberster Gerichtshof 12 February 1998, CISG-Online No. 349; *P. Huber*, in: Münchener Kommentar zum Bürgerlichen Gesetzbuch, Art. 71 para. 17; *Magnus*, in: Staudinger Kommentar zum Bürgerlichen Gesetzbuch, Art. 71 para. 30.

tract was in suspension for some time. In particular, time should usually be granted to allow the aggrieved party adequate time to prepare his own performance.[1254]

The aggrieved party's right to suspend ends if the other party performs or provides adequate assurance of performance (Art. 73(3) CISG), if the threat of a breach disappears or if the aggrieved party rightfully avoids the contract (for instance under Art. 72 CISG or one of the other provisions named above).[1255]

4. Notice

Art. 71(3) CISG provides that the party suspending his performance must immediately give notice of the suspension to the other party[1256] and that he must continue with performance if the other party provides adequate assurance of his performance. It is submitted that a failure to give notice under Art. 71(3) CISG does not affect the actual right to suspend, but can only make the suspending party liable for damages.[1257]

5. Damages

In the author's opinion, the party which rightfully exercises his right to suspend should be entitled to claim damages for those losses which result directly from the suspension. If for instance the seller suspends performance and – as a consequence – also stops his efforts to procure the goods, he may

[1254] See *P. Huber*, in: Münchener Kommentar zum Bürgerlichen Gesetzbuch, Art. 71 para. 22; *Hornung*, in: Schlechtriem/Schwenzer, Commentary, Art. 71 para. 22; *Honnold*, para. 393.

[1255] *P. Huber*, in: Münchener Kommentar zum Bürgerlichen Gesetzbuch, Art. 71 para. 24; *Hornung*, in: Schlechtriem/Schwenzer, Commentary, Art. 71 para. 23 et seq.

[1256] See for instance: Arbitral Award, Netherlands Arbitration Institute, CISG-Online No. 780. For further detail see *UNCITRAL Digest*, Art. 71 para. 10 et seq.

[1257] *Hornung*, in: Schlechtriem/Schwenzer, Commentary, Art. 71 para. 21; *P. Huber*, in: Münchener Kommentar zum Bürgerlichen Gesetzbuch, Art. 71 para. 19; *Magnus*, in: Staudinger Kommentar zum Bürgerlichen Gesetzbuch, Art. 71 para. 47. But see for the contrary view (German) Amtsgericht Frankfurt 31 January 1991, CISG-Online No. 34; (German) Landgericht Darmstadt 29 May 2001, CISG-Online No. 686; (German) Landgericht Stendal 12 October 2000, CISG-Online No. 592; (German) OLG Karlsruhe 20 July 2004, CISG-Online No. 858.

have to buy the goods for a higher market price later when the contract is continued. That kind of loss should in principle be recoverable if the requirements of Art. 74 et seq. CISG (including Art. 77 CISG) are met. With regard to Art. 77 and 80 CISG, this means ("inter alia") that the suspending party's decision to also stop the preparations for his performance must have been justified on the facts of the individual case. As a rule, however, that will be the case as the right to suspend in principle also encompasses the right to stop preparations (see above).

It is true that such a claim for damages cannot be based directly on Art. 45(1) lit. (b), Art. 61(1) lit. (b) CISG as it arises before the breaching party's obligations become due, but it is submitted that these provisions should be applied here as a general principle of the CISG according to Art. 7(2) CISG.[1258]

III. Right of stoppage (Art. 71(2), (3) CISG)

Art. 71(2) CISG gives the seller a right to prevent the handing over of the goods to the buyer if the grounds described in Art. 71(1) CISG become evident after he has dispatched the goods. This right exists even if the buyer holds a document which entitles him to obtain the goods from the third party carrier. It is submitted that Art. 71(3) CISG should apply so that the seller has to give notice and thus give the buyer the chance to provide adequate assurance of his performance.

As the provision expressly states (Art. 71(2) second sentence CISG), the right to stop in transit relates only to the relation between the buyer and the seller. It therefore does not concern the rights of the seller or buyer as regards the carrier or the warehouse keeper. Whether the seller has a right of stoppage vis-à-vis those persons will depend on the respective contract concluded between them and on the law applicable to that contract.

If Art. 71(2) CISG is therefore limited to the relations between seller and buyer, what is its actual purpose? The answer to this question is that the buyer who takes delivery despite the seller having exercised his right of stoppage will be liable for breach of contract. Depending on the applicable procedural law (usually the lex fori) injunctive relief may also be possible.[1259]

[1258] *P. Huber*, in: Münchener Kommentar zum Bürgerlichen Gesetzbuch, Art. 71 para. 16.

[1259] *Hornung*, in: Schlechtriem/Schwenzer, Commentary, Art. 71 para. 31 et seq.

IV. Right to avoid the contract (Art. 72 CISG)

In particularly grave cases of anticipatory breach of contract Art. 72 CISG gives the aggrieved party the right to avoid the contract. The basic requirement for this right to avoid is that prior to the date for performance it is clear that one of the parties will commit a fundamental breach of contract.

1. Fundamental breach

The concept of fundamental breach in Art. 72 CISG is the same as under Art. 25, 49, 64 CISG. The fact that avoidance for anticipatory breach is limited to cases of fundamental breach once more shows the tendency of the CISG to restrict the availability of avoidance as a remedy.

2. Standard of probability

For a party to be able to avoid the contract in the case of anticipatory breach a higher degree of probability of such a breach must be established than in the case of a right to suspend in Art. 71 CISG. Indeed, Art. 72 CISG requires that it must be "clear" that a fundamental breach will be committed before a contract can be avoided. There does not seem to be a consensus yet on the precise formula to be used in this respect. In particular, it is a matter of debate whether what is required here is "virtual certainty" or whether "an obvious and evident risk" should suffice.[1260] There is case law that "virtual certainty" is not required.[1261] It is submitted that this is correct and that all that should be required is a very high degree of probability that a fundamental breach will occur.[1262]

[1260] See for instance the references in *Hornung*, in: Schlechtriem/Schwenzer, Commentary, Art. 72 para. 12.

[1261] See (German) Landgericht Berlin 30 September 1992, CISG-Online No. 70 where the court also held that the standard was rather a very high degree of probability which is obvious to everyone. A similar standard has been applied by (German) Landgericht Krefeld 28 April 1993, CISG-Online No. 101 (which was in that respect not criticised by the next instance Oberlandesgericht Düsseldorf 14 January 1994, CISG-Online No. 119). In the author's opinion it is doubtful whether the decision of Oberlandesgericht Düsseldorf 24 April 1997, CISG-Online No. 385, which is sometimes mentioned as possibly requiring a stricter standard, is really concerned with this particular issue under Art. 72 CISG.

[1262] *Hornung*, in: Schlechtriem/Schwenzer, Commentary, Art. 72 para. 12; *P. Huber*, in: Münchener Kommentar zum Bürgerlichen Gesetzbuch, Art. 72 para. 7.

Art. 72 CISG only applies in respect to threatened breaches prior to the date for performance. After that date, the general rules will apply, in particular Art. 49, 64 CISG. Unlike Art. 71 CISG, Art. 72 CISG does not explicitly require that the circumstances which give rise to the fear that a fundamental breach will occur appear after the conclusion of the contract. It is submitted, however, that this requirement should be extended to Art. 72 CISG as a general principle of the CISG (Art. 7(2) CISG).[1263]

3. Examples

Art. 72 CISG has been discussed in a number of cases.[1264] The German Supreme Court discussed, but did not finally decide the applicability of Art. 72 CISG in a case where the seller's supplier had withdrawn the seller's licence to distribute the goods which he had sold to the buyer. [1265] A U.S. court held that Art. 72 CISG could be applied in a case where one party required essential changes of the contract after its conclusion[1266] stating that it would refuse to perform if these changes were not made.[1267] On the other hand, a Swiss court has held that a choice by the seller of a different means of transport from the one desired by the buyer was not sufficient to trigger the application of Art. 72 CISG.[1268]

In cases where the other party has seriously and definitely announced that he will not perform at the time due, one should usually assume that the requirements of Art. 72 CISG are met.[1269] A similar approach should be taken where it becomes clear that the seller will have to face unsurmountable dif-

[1263] After all, a similar policy is to be found in Art. 35(3) CISG.

[1264] See for instance on the issue in how far delays and difficulties regarding payment can lead to the application of Art. 72 CISG: (German) Landgericht Krefeld 28 April 1993, CISG-Online No. 101; (German) Landgericht Berlin 30 September 1992, CISG-Online No. 70; Arbitral Award, Handelskammer Zürich 31 May 1996, CISG-Online No. 1291.

[1265] (German) Bundesgerichtshof 15 February 1995, CISG-Online No. 149.

[1266] In this particular case: changes concerning the specifications of the letter of credit.

[1267] U.S. District Court, Northern District of Illinois 7 December 1999, CISG-Online No. 439.

[1268] (Swiss) Bezirksgericht Saane 20 February 1997, CISG-Online No. 426.

[1269] *P. Huber*, in: Münchener Kommentar zum Bürgerlichen Gesetzbuch, Art. 72 para. 7; *Bennett*, in: Bianca/Bonell, Commentary, Art. 72 para. 2.3. What is more, Art. 72(3) CISG relieves the aggrieved party in those cases from the notice requirement of Art. 72(2) CISG.

ficulties in procuring the goods sold or where specific objects had been sold which have now been destroyed or lost.[1270]

4. Notice

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 (Art. 72(2) CISG). According to Art. 73(3) CISG, however, this is not necessary if the other party has declared that he will not perform his obligations.

The wording of the reasonableness requirement in Art. 72(2) CISG seems to indicate that it is limited to the details of the notice itself (e.g. means and form of notice). Several authors argue, however, that it should be given a wider interpretation and that it should rather be regarded as an indication that it must be reasonable under the circumstances to require the innocent party to give notice.[1271] It is submitted that this is correct as the reasonableness requirement should be read in conjunction with the proviso that notice shall be given, "if time allows". If one does so, notice may for instance be unnecessary where it is obvious that the other party will not be able to provide adequate assurance of performance or where the delay caused by the notice would be inacceptable, for instance in a sale of seasonal goods where an immediate cover purchase is necessary.[1272]

There is a controversy about the consequences that will arise if the avoiding party violates the notice requirement of Art. 72(2) CISG. One view regards the notice requirement as an actual precondition for the right to avoid such that if not complied with the avoiding party loses his right to avoid.[1273] According to the alternative view, a failure to give a valid declaration may lead to the other party being entitled to a claim for damages.[1274] In order to avoid potential risks, it may be advisable to give notice in practice. If notice

[1270] Cf. *Secretariat Commentary*, Art. 63 para. 2; *Magnus*, in: Staudinger Kommentar zum Bürgerlichen Gesetzbuch, Art. 72 para. 11; *P. Huber*, in: Münchener Kommentar zum Bürgerlichen Gesetzbuch, Art. 72 para. 9.

[1271] *Hornung*, in: Schlechtriem/Schwenzer, Commentary, Art. 72 para. 15 et seq., with further references.

[1272] See *Hornung*, in: Schlechtriem/Schwenzer, Commentary, Art. 72 para. 15 et seq.

[1273] *Hornung*, in: Schlechtriem/Schwenzer, Commentary, Art. 72 para. 21.

[1274] *Magnus*, in: Staudinger Kommentar zum Bürgerlichen Gesetzbuch, Art. 72 para. 28.

is given and the other party does not perform, this may also help in showing that it was "clear" that a fundamental breach was about to occur.[1275]

5. Avoidance

If Art. 72 CISG gives the aggrieved party the right to avoid the contract, the general rules on avoidance will apply. Thus, the aggrieved party has to declare avoidance and the effects of avoidance are governed by Art. 81 et seq. CISG.

[1275] *Bennett*, in: Bianca/Bonell, Commentary, Art. 72 para. 3.3.

§ 18. Instalment contracts

I. Outline

Instalment contracts as understood by the CISG are those contracts which provide that goods are to be delivered in at least two parts at different points of time. The Convention requires that the splitting up of the instalments is provided for in the contract, so that there will be no instalment contract if the seller who is bound to deliver the entire quantity of the goods at a fixed date only delivers half of it and wants to tender the remaining part two weeks later. This will simply be a partial delivery which is dealt with by Art. 51 CISG.

Because the seller's performance may extend over a longer period of time, instalment contracts give rise to a number of specific legal problems not shared by contracts where the delivery obligation is intended to be performed in a single instalment. Thus, where goods are delivered in instalments and there is a breach with regard to one of the instalments, what are the other party's rights in that respect? Is the other party entitled to take this singular breach as a reason to avoid the entire instalment contract? If so, should this avoidance have retroactive effect, i.e. also affect the instalments already delivered? Art. 73 CISG is intended to answer these, and other, questions by providing rules for three different scenarios which will be dealt with in turn.

II. Partial avoidance (Art. 73(1) CISG)

Art. 73(1) CISG only looks at the defective instalment itself and provides for a right to avoid the contract with regard to that instalment if the breach was fundamental in the sense of Art. 25 CISG. The fundamental character of the breach has to be assessed only with reference to the instalment concerned.[1276] If for instance 80 percent of the instalment is seriously and irreparably defective and useless to the buyer, this will usually lead to a fundamental breach in the sense of Art. 73(1) CISG, even if this instalment amounted only to a small portion of the entire contract. To put it differently, Art. 73(1) CISG

[1276] *P. Huber*, in: Münchener Kommentar zum Bürgerlichen Gesetzbuch, Art. 73 para. 6.

"narrows down" the focus on the instalment concerned, both with regard to the seriousness of the breach and with regard to the effects of avoidance (only in respect of this instalment).

It will be noted that – unlike other provisions on avoidance (Art. 49(1) lit. (b), Art. 64(1) lit. (b) CISG) – Art. 73(1) CISG only relies on the fundamental breach requirement and does not provide for the alternative "Nachfrist"-procedure. Nevertheless, fixing an additional period of time may be useful and may facilitate the finding that there was a fundamental breach particularly where the breach was one of late delivery. In fact, if a reasonable "Nachfrist" has been fixed and has expired without success, there will be a strong argument that the breach of the other party is now fundamental. It is submitted that this argument can be made directly within the concept of fundamental breach in the sense of Art. 25 CISG.[1277]

It is submitted that the general requirements for avoidance of the contract have to be met (if they are applicable to the instalment concerned). This is true in particular for the notice requirements of Art. 39, 43 CISG and for the loss of the right to avoid under Art. 82 CISG, but also for the rules in Art. 35(3), Art. 42(2) and Art. 80 CISG.

The declaration of avoidance is governed by the general rules (Art. 26 et seq. CISG).[1278] Art. 73 CISG does not set a time limit for the declaration of avoidance. In line with the view expressed by a number of authors, it is submitted that one should deduce from Art. 49(2), Art. 64(2), Art. 73(1) CISG a general principle (Art. 7(2) CISG) that avoidance must be declared within a reasonable time after the avoiding party knew or ought to have known of the breach.[1279]

[1277] *P. Huber*, in: Münchener Kommentar zum Bürgerlichen Gesetzbuch, Art. 73 para. 7. For a different technique of reaching a similar result see *Magnus*, in: Staudinger Kommentar zum Bürgerlichen Gesetzbuch, Art. 73 para. 10 (application of Art. 49, 64 CISG to the respective instalment).

[1278] See for instance Arbitral Award, Hamburger Freundschaftliche Arbitrage, CISG-Online No. 638.

[1279] See *Hornung*, in: Schlechtriem/Schwenzer, Commentary, Art. 73 para. 17; *Magnus*, in: Staudinger Kommentar zum Bürgerlichen Gesetzbuch, Art. 73 para. 15; *P. Huber*, in: Münchener Kommentar zum Bürgerlichen Gesetzbuch, Art. 73 para. 8.

III. Avoidance for future instalments (Art. 73(2) CISG)

Art. 73(2) CISG is to a certain extent similar to the rules on anticipatory breach. Where a breach (not necessarily a fundamental one) has occurred with respect to one instalment and this breach gives the other party "good grounds to conclude" that a *fundamental* breach will occur with respect to future instalments then the other party may declare the contract avoided provided that it does so within a reasonable time.

1. Breach with respect to one instalment

The first requirement of Art. 73(2) CISG is that there was a breach with regard to one instalment. The breach need not be fundamental in the sense of Art. 25 CISG. This may at first sight be surprising given the fact that the fundamental breach doctrine is the main test for rights of avoidance under the CISG. It can be explained, however, by looking at the policy behind Art. 73(2) CISG. In fact, it is not that particular breach itself which justifies the avoidance of the future instalments, but the fact that this breach allows the conclusion that there will be a *future*, this time fundamental, breach. If one accepts that to be the underlying policy, it is entirely understandable that it does not matter (for the avoidance of the future instalments) whether avoidance for the breach which has already occurred would still be possible (e.g. under Art. 73(1) CISG) or not (e.g. due to a failure to give notice under Art. 39 CISG).[1280]

2. Likelihood of a future fundamental breach

The right to avoid under Art. 73(2) CISG is dependent on the party not in breach having good grounds to believe that a fundamental breach will occur with respect to future instalments. When determining what the appropriate test of likelihood of a future fundamental breach is, it is useful to compare the provision in Art. 73(2) CISG with the other anticipatory breach provisions that require an assessment of the likelihood of future breach. In the author's opinion, Art. 71 CISG sets the lowest standard of probability ("becomes apparent") because it grants the softest remedy, a mere right of suspension. Art. 72(1) CISG on the other hand requires the strictest standard ("is clear")

[1280] Arbitral Award, Schiedsgericht der Börse für landwirtschaftliche Produkte Wien (Austria), CISG-Online No. 351; *Magnus*, in: Staudinger Kommentar zum Bürgerlichen Gesetzbuch, Art. 73 para. 18.

because it provides the most extensive remedy, the avoidance of the entire contract. Art. 73(2) CISG is situated in the middle because it gives a right to avoid the contract, but (subject to Art. 73(3) CISG) without retroactive effect. It is submitted that the standard will be met if there are plausible grounds for expecting a future (fundamental) breach as a result of the breach which has already occurred.[1281]

3. Declaration of avoidance within reasonable time

It is submitted that the reasonable period commences when the injured party becomes aware of the breach.[1282] As for the declaration and for the effects of avoidance, the general rules will apply (Art. 26 et seq., Art. 81 et seq. CISG). It should be noted that the avoidance under Art. 73(2) CISG will only be effective for the future, subject to Art. 73(3) CISG. It is submitted that this means that the breach already committed (which gives rise to the fear of the future breach) is not covered by Art. 73(2) CISG;[1283] avoidance for this instalment should therefore be sought under Art. 73(1) CISG.

4. Examples

The courts have applied Art. 73(2) CISG in a case where the seller had not made the first delivery of several instalments despite the fact that the buyer had already fixed an additional period of time.[1284] A German court applied Art. 73(2) CISG in a case where the first instalment of peppers was contaminated and not fit for consumption and where the seller was not capable of performing the substitute delivery of non-defective peppers which the parties had agreed upon. In the light of all the circumstances of the case (including

[1281] See *Hornung*, in: Schlechtriem/Schwenzer, Commentary, Art. 73 para. 23; *Magnus*, in: Staudinger Kommentar zum Bürgerlichen Gesetzbuch, Art. 73 para. 19; *P. Huber*, in: Münchener Kommentar zum Bürgerlichen Gesetzbuch, Art. 73 para. 13; *Bennett*, in: Bianca/Bonell, Commentary, Art. 73 para. 3.3. But see also for differing views (in particular the view that the standard in Art. 73(2) CISG is lower than in Art. 71 CISG) *Schnyder/Straub*, in: Honsell, Kommentar, Art. 72 para. 25; *Honnold*, para. 401, 388; Arbitral Award, Schiedsgericht der Börse für landwirtschaftliche Produkte Wien (Austria), CISG-Online No. 351.

[1282] *Hornung*, in: Schlechtriem/Schwenzer, Commentary, Art. 73 para. 26; *P. Huber*, in: Münchener Kommentar zum Bürgerlichen Gesetzbuch, Art. 73 para. 16.

[1283] *Hornung*, in: Schlechtriem/Schwenzer, Commentary, Art. 73 para. 25; *P. Huber*, in: Münchener Kommentar zum Bürgerlichen Gesetzbuch, Art. 73 para. 17.

[1284] (Swiss) Handelsgericht Zürich 5 February 1997, CISG-Online No. 327.

the fact that the seller failed to perform the agreed-upon substitute delivery of non-defective peppers), the court concluded that the buyer had been entitled to assume that the seller would not be able to deliver conforming peppers at all.[1285] It is submitted that the latter consideration is the crucial point, namely, does the non-performance with regard to the one instalment lead to the conclusion that there will also be (fundamental) breaches in respect of one or more future instalments?[1286] Where all the goods are coming from the same supply stock (which does not conform to the contractual requirements) and there is no alternative ready supply it is highly likely that the test will be met. This line of reasoning was adopted in another case where one of the instalments was defective and the seller was not able to show how he would avoid these types of defect in future instalments.[1287] A Spanish court applied Art. 73(2) CISG in a case where the seller had failed to meet the deadlines for three instalments, with delays of between four and eight weeks, thereby causing disruption to the buyer's production process. The court also held that the buyer had met the reasonable time-requirement by declaring avoidance within a period of 48 hours after delivery of the third overdue instalment.[1288] A French court applied Art. 73(2) CISG in a sale of jeans between a French seller and a South American buyer. As there was a suspicion that the buyer was marketing the jeans outside the contractually agreed marketing area the seller had demanded certain assurances concerning the final destination of the goods and the buyer's sub-buyers. When the buyer did not give these assurances the court applied Art. 73(2) CISG.[1289]

IV. Buyer's right to avoid the entire contract in case of interdependence

Art. 73(3) CISG gives a buyer who lawfully avoids the contract with regard to one instalment the right to avoid the contract in respect of future or even earlier deliveries if the instalments are so interdependent that the deliveries

[1285] (German) Landgericht Ellwangen 21 August 1995, CISG-Online No. 279.

[1286] See for instance Arbitral Award, Netherlands Arbitration Institute, CISG-Online No. 740.

[1287] Arbitral Award, Schiedsgericht der Börse für landwirtschaftliche Produkte Wien (Austria), CISG-Online No. 351.

[1288] (Spanish) Audiencia Provincial di Barcelona 3 November 1997, CISG-Online No. 442.

[1289] (French) Cour d'Appel Grenoble, CISG-Online No. 151. For a slightly different interpretation of the case see *Witz/Wolter*, Recht der Internationalen Wirtschaft (RIW) 1995, 810; *UNCITRAL Digest*, Art. 73 para. 8.

made could not be used for the purpose contemplated by the parties at the time of the conclusion of the contract.[1290] The provision thus requires that the buyer declare avoidance both with regard to the breached instalment(s) (usually under Art. 73(1) CISG) and in regard to the future or former performances (under Art. 73(3) CISG).

This provision leads to the most extensive right of avoidance, as it can also have retroactive effect. This is justified by the close interdependence between the breached instalment(s) and the other instalments.

V. Art. 73 CISG and other provisions

Art. 73 CISG provides a detailed regime concerning instalment contracts. In particular, it contains rules on avoidance of (part of) the contract and on situations which are similar to an anticipatory breach (Art. 73(2) CISG). The question of how Art. 73 CISG interacts with other provisions dealing with these issues therefore raises complicated problems.

1. Rules on anticipatory breach

Whereas the predominant opinion assumes that the right to suspend (Art. 71 CISG) can be exercised even in an instalment contract irrespective of whether the requirements of Art. 73 CISG are met,[1291] there has been some debate about the relations between Art. 73(2) CISG and Art. 72 CISG. According to some scholars, Art. 73(2) CISG should take precedence over Art. 72 CISG.[1292] Others have, however, argued that the innocent party has the right to choose if the requirements of both provisions are met.[1293] It is submitted, however, that there will rarely be a conflict between the two provisions as Art. 72 CISG only applies before the first performance becomes due whereas Art. 73(2) CISG requires that one breach has already occurred.[1294]

[1290] *Hornung*, in: Schlechtriem/Schwenzer, Commentary, Art. 73 para. 40; *Bennett*, in: Bianca/Bonell, Commentary, Art. 73 para. 3.5.

[1291] (Austrian) Oberster Gerichtshof 12 February 1998, CISG-Online No. 349; *Magnus*, in: Staudinger Kommentar zum Bürgerlichen Gesetzbuch, Art. 73 para. 30.

[1292] *Hornung*, in: Schlechtriem/Schwenzer, Commentary, Art. 73 para. 28.

[1293] *Bennett*, in: Bianca/Bonell, Commentary, Art. 73 para. 3.3.

[1294] See *Magnus*, in: Staudinger Kommentar zum Bürgerlichen Gesetzbuch, Art. 73 para. 28; *P. Huber*, in: Münchener Kommentar zum Bürgerlichen Gesetzbuch, Art. 73 para. 18.

2. Art. 73 and 49 CISG

It is submitted that when there is an instalment contract in the sense of Art. 73 CISG, the right to avoid the entire contract can only derive from Art. 73 CISG and not from Art. 49 CISG. In fact, Art. 73 CISG provides a tailor-made and comprehensive rule on the avoidance of instalment contracts and should not be circumvented by the application of the general rule in Art. 49 CISG. This does not, of course, apply to remedies which are not covered by Art. 73 CISG, in particular to claims for damages, which continue to be governed by the general rules.

§ 19. Interest

Art. 78 CISG provides a specific rule on the duty to pay interest on sums in arrears: "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."

I. Preconditions

The duty to pay interest under Art. 78 CISG arises if the buyer fails to pay the price or if any party fails to pay any other sum that is in arrears. In principle, the provision covers any obligation to pay a sum of money, whether it arises from the Convention or from the contractual agreement, for instance payment obligations arising from Art. 48(1), Art. 85, Art. 86(1), Art. 87 or Art. 88(3) CISG.[1295] It is submitted that Art. 78 CISG also applies to claims for damages.[1296] Art. 78 CISG does not, however, apply to the duty to pay interest itself. It does therefore not give a claim for "interest on interest".[1297]

With regard to restitution of the price after an avoidance of the contract, Art. 84(1) CISG gives the buyer a separate claim for interest from the date on which the price was paid. This provision will usually be more favourable to the buyer as he can claim interest not only from the date on which the contract was avoided (which would probably be the relevant starting point under Art. 78 CISG), but from the date of payment. It will therefore be rare that the buyer actually relies on Art. 78 CISG in such cases so that the dis-

---

[1295] *P. Huber*, in: Münchener Kommentar zum Bürgerlichen Gesetzbuch, Art. 78 para. 3.

[1296] See for instance (sometimes with certain restrictions) Arbitral Award, ICC 9187, CISG-Online No. 705; (Swiss) Handelsgericht Zürich 5 February 1997, CISG-Online No. 327; *Bacher*, in: Schlechtriem/Schwenzer, Commentary, Art. 78 para. 14; *Honnold*, para. 422; *Nicholas*, in: Bianca/Bonell, Commentary, Art. 78 para. 3.1; *UNCITRAL Digest*, Art. 78 para. 2. There is a dispute as to whether the existence of the duty to pay interest presupposes that the amount of damages has already been fixed (liquidated sum requirement), see below p. 358.

[1297] Arbitral Award, ICC 8611, CISG-Online No. 236; *Bacher*, in: Schlechtriem/Schwenzer, Commentary, Art. 78 para. 40; but see also *Karollus*, UN-Kaufrecht, p. 226 et seq.

cussion on whether Art. 78 CISG can be applied to the claim for restitution of the contract price[1298] will usually have no practical consequences. That said, it is submitted that Art. 78 CISG should not be applied to the interest claim that arises from Art. 84(1) CISG (no "interest on interest", cf. above).

The claim for interest arises when payment is due and is not made. Payment of the purchase price becomes due under the rules provided in Art. 58 CISG, other money obligations are due when they come into existence.[1299]

According to the predominant opinion there are no further requirements for the interest claim to arise. In particular, the creditor of the money claim does not have to give notice to the debtor or to alert him in any other way to the fact that payment has become due.[1300] What is more, it is not necessary that the debtor of the money obligation was negligent in not making payment on time.[1301] It is further submitted, based on the wording of Art. 79(5) CISG, that the creditor will not be released from his obligation to pay interest if he was actually exempted under Art. 79 CISG.[1302] However, Art. 80 CISG (or the general principle underlying this provision, Art. 7(2) CISG) should

[1298] See for instance *Ferrari,* Internationales Handelsrecht (IHR) 2003, 153 et seq.; *UNCITRAL Digest,* Art. 78 para. 1.

[1299] *Bacher*, in: Schlechtriem/Schwenzer, Commentary, Art. 78 para. 7, 9; *P. Huber*, in: Münchener Kommentar zum Bürgerlichen Gesetzbuch, Art. 78 para. 8; *Ferrari,* Internationales Handelsrecht (IHR) 2003, 153, 155. For an example in case law see (Swiss) Handelsgericht Zürich 5 February 1997, CISG-Online No. 327.

[1300] See for instance *Bacher*, in: Schlechtriem/Schwenzer, Commentary, Art. 78 para. 18; *Magnus*, in: Staudinger Kommentar zum Bürgerlichen Gesetzbuch, Art. 78 para. 5. For examples in case law see (German) Oberlandesgericht Köln 3 April 2006, CISG-Online No. 1218; (Swiss) Kantonsgericht Zug 12 December 2002, CISG-Online No. 720; (German) Landgericht Saarbrücken 25 November 2002, CISG-Online No. 718; (French) Cour d'Appel Grenoble 26 April 1995, CISG-Online No. 154. But see for a different view (interest due when the debtor receives a formal notice by the creditor claiming payment) (German) Landgericht Zwickau 19 March 1999, CISG-Online No. 519; Arbitral Award, Arbitration Court attached to the Bulgarian Chamber of Commerce and Industry, CISG-Online No. 436.

[1301] *P. Huber*, in: Münchener Kommentar zum Bürgerlichen Gesetzbuch, Art. 78 para. 7.

[1302] *P. Huber*, in: Münchener Kommentar zum Bürgerlichen Gesetzbuch, Art. 78 para. 7; *Nicholas*, in: Bianca/Bonell, Commentary, Art. 78 para. 3.1; *Magnus*, in: Staudinger Kommentar zum Bürgerlichen Gesetzbuch, Art. 78 para. 11.

be applied so that there is no claim for interest if the creditor of the money claim has caused[1303] the non-payment.[1304]

The question when the interest period commences has given rise to some debate in cases where the amount of the payment to be made is not exactly fixed until the moment when the obligation to pay arises. This situation can in particular arise with regard to claims for damages. If one lets the interest claim run from the moment when the damages claim exists (i.e. from the date of breach) the debtor will be faced with a situation that he will have to pay interest on the basis of an amount that he does not know yet. It is submitted, however, that this is justified if – as in the case of damages – the payment obligation results from a breach by the debtor so that he is not worthy of protection. One should therefore not postpone the start of the interest period to the moment when the exact amount of the payment obligation is determined.[1305] The situation will however be different where the payment obligation does not result from a breach by the debtor, as for instance with regard to the payment of the purchase price. In the perhaps rare cases where the amount is not fixed when it becomes due, it seems to be justified to postpone the start of the interest period to the moment when the amount is determined.[1306]

II. Rate of interest

Art. 78 CISG does not fix the rate of interest. The reason for this was that an agreement on this point could not be reached at the Diplomatic Conference in Vienna. In the light of this, it is perhaps not surprising that the solutions suggested in practice and in academic writing vary considerably.[1307] For the purposes of this book, a short outline of some of the major positions shall suffice.

[1303] As to the notion of "caused by his act or omission" in the sense of Art. 80 CISG see p. 265 et seq.

[1304] *P. Huber*, in: Münchener Kommentar zum Bürgerlichen Gesetzbuch, Art. 78 para. 7.

[1305] *Bacher*, in: Schlechtriem/Schwenzer, Commentary, Art. 78 para. 11 et seq.; *P. Huber*, in: Münchener Kommentar zum Bürgerlichen Gesetzbuch, Art. 78 para. 10.

[1306] *Bacher*, in: Schlechtriem/Schwenzer, Commentary, Art. 78 para. 12; *P. Huber*, in: Münchener Kommentar zum Bürgerlichen Gesetzbuch, Art. 78 para. 12. For a sceptical view towards the liquidated sum requirement see *Honnold*, para. 422. See also *Ferrari*, Internationales Handelesrecht (IHR) 2003, 153, 154.

[1307] For an overview see for instance *UNCITRAL Digest*, Art. 78 and the relevant databases.

One view suggests filling the gap autonomously, i.e. by referring to "general principles" of the Convention (Art. 7(2) CISG).[1308] This approach faces the problem that it seems to be very difficult to discern any such general principles on the rate of interest from the Convention. It is not surprising therefore that the submissions vary considerably in this regard. Amongst others, the following solutions have been suggested (with or without reference to the general principles in the sense of Art. 7(2) CISG): the interest rate in the creditor's state[1309]; the interest rate in the debtor's state[1310]; an internationally accepted interest rate such as the LIBOR (London Interbank Offered Rate)[1311] or the interest rate of the European Central Bank[1312]; the interest rate of the lex fori[1313]; the (complicated) rule of the UNIDROIT Principles (Art. 7.4.9).[1314]

Those holding the view that there are no general principles to answer this question seem to be in the majority. According to this group, the appropriate interest rate to apply is the interest rate of the law that is applicable to the contract[1315] by virtue of the private international law rules of the

[1308] *Bridge*, in: Ferrari/Flechtner/Brand, The Draft UNCITRAL Digest and Beyond, p. 235, 258.

[1309] See for instance (German) Landgericht Stuttgart 31 August 1989, CISG-Online No. 11; (German) Landgericht Frankfurt 13 June 1991, CISG-Online No. 23; Arbitral Award, ICC 7331, CISG-Online No. 106; Arbitral Award, Bundeskammer der gewerblichen Wirtschaft Österreich, SCH 4366, CISG-Online No. 691.

[1310] See for instance *Heuzé,* La Vente Internationale de Merchandises – Droit Uniforme, para. 449.

[1311] See for instance Arbitral Award, ICC 6653, CISG-Online No. 71; Arbitral Award, ICC 8908, CISG-Online No. 751.

[1312] See (Belgian) Rechtbank van Koophandel Hasselt 10 May 2006, CISG-Online No. 1259.

[1313] This position seems to have been taken by the U.S. District Court (Northern District New York) 7 September 1994, CISG-Online No. 113 (Delchi Carrier v Rotorex).

[1314] See for instance Arbitral Award, ICC 8128, CISG-Online No. 526; Arbitral Award, ICC 8769, CISG-Online No. 775; Arbitral Award, Bundeskammer der gewerblichen Wirtschaft Österreich, SCH 4366, CISG-Online No. 691; *Bacher*, in: Schlechtriem/Schwenzer, Commentary, Art. 78 para. 30 et seq., 36. It is, however, doubtful, whether the UNIDROIT Principles can actually be regarded as "general principles" underlying the Convention, cf. above p. 35 et seq.

[1315] For a differing view (law of the state of the currency of payment) see *Bacher*, in: Schlechtriem/Schwenzer, Commentary, Art. 78 para. 33 (admitting, however, that relying on the currency causes problems if payment is to be made in Euro); *Schlechtriem*, Internationales UN-Kaufrecht, para. 318.

forum.[1316] It is submitted that this is the correct view. Even if one regards the interest rate as an "internal gap" of the Convention (i.e. as a matter governed by but not expressly settled in the Convention, cf. Art. 7(2) CISG), it does not seem to be possible to discern from the Convention a general principle with regard to that issue. As a consequence, Art. 7(2) CISG points to the law which is applicable by virtue of the rules of private international law of the forum.

III. Practical details

The Convention does not determine the place and the currency of the payment of the interest owed under Art. 78 CISG. It is submitted, however, that the obligation to pay interest in those respects should follow the underlying payment obligation on which it is based.[1317]

Art. 78 CISG expressly states that the interest claim is "without prejudice" to any claim for damages recoverable under Art. 74 CISG. As a consequence, if the creditor has suffered an interest damage which is higher than the amount of interest recoverable under Art. 78 CISG (for instance because he took a bridging loan at an interest rate which is higher than the one granted under Art. 78 CISG), he may rely on Art. 74 CISG to claim the higher amount, provided of course that the requirements of Art. 74 CISG are met.[1318]

[1316] See for instance (Swiss) Bundesgericht 28 October 1998, CISG-Online No. 413; (Italian) Tribunale di Pavia 29 December 1999, CISG-Online No. 678; (German) Oberlandesgericht Köln 13 November 2000, CISG-Online No. 657; (German) Oberlandesgericht Koblenz 18 November 1999, CISG-Online No. 570; (German) Oberlandesgericht München 11 March 1998, CISG-Online No. 310; (German) Oberlandesgericht Braunschweig 28 October 1998, CISG-Online No. 510; U.S. Federal District Court, Northern District of Illionois, Eastern Division 21 May 2004 (Chicago Prime Packers, Inc. v Northam Food Trading Co.), Internationales Handelsrecht (IHR) 2004,1 56 = CISG-Online No. 851; Arbitral Award, ICC 7197, CISG-Online No. 36; Arbitral Award, ICC 7565, CISG-Online No. 566; *P. Huber*, in: Münchener Kommentar zum Bürgerlichen Gesetzbuch, Art. 78 para. 14 et seq.; *Magnus*, in: Staudinger Kommentar zum Bürgerlichen Gesetzbuch, Art. 78 para. 12; *Ferrari*, Internationales Handelsrecht (IHR) 2003, 153, 158.

[1317] *Bacher*, in: Schlechtriem/Schwenzer, Commentary, Art. 78 para. 25; *P. Huber*, in: Münchener Kommentar zum Bürgerlichen Gesetzbuch, Art. 78 para. 17.

[1318] See for instance the discussion of that issue in (German) Oberlandesgericht Frankfurt 18 January 1994, CISG-Online No. 123; *Bacher*, in: Schlechtriem/Schwenzer, Commentary, Art. 78 para. 40; *Ferrari*, Internationales Handelsrecht (IHR) 2003, 153, 159; *UNCITRAL Digest*, Art. 78 para. 6.

The burden of proof for the existence of the interest claim lies on the party that claims interest.[1319] With regard to the interest rate, it is submitted that if one applies the interest rate of the applicable contract law it should be left to the "lex fori" to decide in how far (foreign) law needs to be proven and which side should bear the burden of proof in that respect.

Given the difficulties that may arise when determining the applicable interest rate it may be advisable in practice to actually fix the interest rate in the contract.

[1319] *P. Huber*, in: Münchener Kommentar zum Bürgerlichen Gesetzbuch, Art. 78 para. 20.

§ 20. Preservation of goods

In the course of the performance of the contract there may be situations where one party still has actual possession of the goods although, from the legal point of view, the goods should be in the possession of the other party. Assume for instance that a buyer refuses to take delivery from the seller although the time for delivery has come. In doing so, the buyer breaches his obligation under Art. 53, 60 CISG and he may become liable to the seller under Art. 61 et seq. CISG. In such a case, it would usually not be in the interest of either party if the seller simply "dumped the goods on the street" at the place of delivery. This is why, subject to certain limitations, Art. 85 et seq. CISG impose on a party who is (still) actually in possession of the goods (or has control over them) a duty to preserve the goods, combined with a right to retain the goods until he has been reimbursed his reasonable expenses by the other party (who caused the trouble by not taking the goods as he was obliged to do).

I. Duty to preserve the goods

Art. 85 and 86 CISG stipulate when the duty to preserve the goods comes into existence, distinguishing in that respect between the seller (Art. 85 CISG) and the buyer (Art. 86 CISG).

1. Duty of the seller

Art. 85 CISG is concerned with the preservation duty that may arise for the seller. If the buyer delays taking delivery of the goods or, where payment of the price and delivery of the goods are to be made concurrently, 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. The seller will be entitled to retain the goods until he has been reimbursed his reasonable expenses by the buyer.

2. Duty of the buyer

Art. 86 CISG governs the buyer's duty to preserve the goods. According to Art. 86(1) CISG, 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 reasonable steps to preserve them. He will then be entitled to retain the goods until he has been reimbursed his reasonable expenses by the seller. Art. 86(1) CISG therefore presupposes that the buyer has already received the goods. If he has only received the documents (which entitle him to take possession) the duty to preserve will not be governed by Art. 86(1) CISG, but by Art. 86(2) CISG. The right to reject mentioned in the provision should not be regarded as a separate (and new) remedy that is introduced (rather inconspicuously) at the end of the Convention. In the author's opinion, it should simply be regarded as a label for those remedies of the Convention that entitle the buyer to give the goods back to the buyer, i.e. avoidance (Art. 49, Art. 51, Art. 72(1), Art. 73 CISG), substitute delivery (Art. 46(2) CISG) or the refusal to take delivery under Art. 52 CISG.[1320]

Art. 86(2) CISG is concerned with a different situation. The provision applies where the buyer has not yet received the goods (in the sense of having taken actual possession of them), but where the goods have been placed at his disposal at their destination. If the buyer in that case exercises his right to reject them (in the sense described above), 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. If he does take possession of the goods then his rights and obligations will be governed by Art. 86(1) CISG, as the final sentence of Art. 86(2) CISG indicates. The second sentence of Art. 86(2) CISG, however, contains an exception to these rules: if the seller or a person authorized to take charge of the goods[1321] on the seller's behalf is present at the destination, the buyer does not have the duty to preserve the goods.

[1320] *P. Huber*, in: Münchener Kommentar zum Bürgerlichen Gesetzbuch, Art. 86 para. 3.

[1321] Depending on the facts of the individual case this could be an employee of the seller, his commercial agent, but normally not the bank involved in the payment process, cf. *Bacher*, in: Schlechtriem/Schwenzer, Commentary, Art. 86 para. 17.

II. Preservation measures

Art. 87 and 88 CISG contain more detailed provisions on certain preservation measures. Art. 87 CISG stipulates that 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. It is submitted that the party making the deposit is under an obligation to choose a suitable warehouse keeper; if he chooses a warehouse that is obviously not suited to store that particular kinds of goods, he may be liable for damages.[1322] On the other hand, he should not be liable, if the warekeeper damages the goods during the time of deposit, as the actual deposit is not part of his obligations.

Art. 88 CISG contains specific provisions on the sale of the goods by the party who is bound to preserve them. Art. 88(1) CISG states when that party is entitled to sell the goods. Art. 88(2) CISG even obliges that party under certain circumstances to make reasonable efforts to sell the goods. Art. 88(3) CISG is concerned with the costs that the preservation may have caused and provides that the party selling the goods has the right to retain out of the proceeds of sale an amount equal to the reasonable expenses of preserving the goods and of selling them. He must however account to the other party for the balance.

It is submitted that Art. 87 and 88 CISG are not conclusive so that other measures of preservation may also be taken by the parties.[1323]

[1322] *Magnus*, in: Staudinger Kommentar zum Bürgerlichen Gesetzbuch, Art. 87 para. 5; *P. Huber*, in: Münchener Kommentar zum Bürgerlichen Gesetzbuch, Art. 87 para. 3.

[1323] *Magnus*, in Staudinger Kommentar zum Bürgerlichen Gesetzbuch, Art. 86 para. 9; *P. Huber*, in: Münchener Kommentar zum Bürgerlichen Gesetzbuch, Art. 85 para. 2.

Bibliography

The following books have been cited in an abbreviated form in this book:

Atiyah, Patrick S / Adams, John N. / Macqueen, Hector, The Sale of Goods, 10th edition, Pitman, London 2005

Audit, Bernard, La Vente Internationale de marchandises, Paris 1990

Benjamin's Sale of Goods, 7th edition, Sweet & Maxwell, London 2006

Bernstein, Herbert / Lookofsky, Joseph, Understanding the CISG in Europe, 2nd edition, Kluwer, The Hague/London/New York 2003

Bianca, C.M. / Bonell, M.J., Commentary on the International Sales Law: The 1980 Vienna Sales Convention, Giuffrè, Milan 1987

Bonell, Michael Joachim, An International Restatement of Contract Law, Transnational Publishers, Irvington-on-Hudson 1997

Bridge, Michael G., The Sale of Goods, Clarendon Press, Oxford 1997

Brunner, Christoph, UN-Kaufrecht – CISG, Kommentar zum Übereinkommen der Vereinten Nationen über Verträge über den internationalen Warenkauf von 1980, Stämpfli, Bern 2004

Enderlein, Fritz / Maskow, Dietrich / Strohbach, Heinz, Internationales Kaufrecht, Berlin 1991

Faust, Florian, Die Vorhersehbarkeit des Schadens gemäß Art. 74 Satz 2 UN-Kaufrecht (CISG), Mohr Siebeck, Tübingen 1996

Ferrari, Franco / Flechtner, Harry /Brand, Ronald A., The Draft UNCITRAL Digest and Beyond, Sellier. European Law Publishers, München 2004

Ferrari, Franco, The 1980 Uniform Sales Law – Old Issues – Revisited in the Light of Recent Experiences, Sellier. European Law Publishers, München 2003

Gruber, Urs P., Methoden des internationalen Einheitsrechts, Mohr Siebeck, Tübingen 2004

Herber, Rolf / Czerwenka, Beate, Internationales Kaufrecht: Kommentar zu dem Übereinkommen der Vereinten Nationen vom 11. April 1980 über Verträge über den internationalen Warenkauf, C.H. Beck, München 1991

Heuzé, Vincent, La Vente Internationale de Marchandises – Droit Uniforme, 2000

Honnold, John, Documentary History of the Uniform Law for International Sales, Kluwer, The Hague/London/New York 1989

Honsell, Heinrich, Kommentar zum UN-Kaufrecht: Übereinkommen der Vereinten Nationen über Verträge über den Internationalen Warenkauf (CISG), Springer, Berlin/New York 1997

Karollus, Martin, UN-Kaufrecht, Springer, New York/Wien 1991

Krüger, Kai, Norsk kjøpsrett (Norwegian Sales Law)", Bergen (Alma Mater), 4th edition 1999

Lew, Julian D.M. / Mistelis, Loukas A. / Kröll, Stefan, Comparative International Commercial Arbitration, Kluwer, The Hague/London/New York 2003

Münchener Kommentar zum Bürgerlichen Gesetzbuch: Vol. 3 Schuldrecht: Besonderer Teil – §§ 433-610, (…) CISG, 4th edition, C.H. Beck, München 2004

Münchener Kommentar zum Handelsgesetzbuch: Vol 6: 4. Buch. Handelsgeschäfte : Zweiter Abschnitt, Handelskauf; (…) Wiener UN-Übereinkommen über Verträge über den internationalen Warenkauf – CISG; C.H. Beck, München 2004

Neumayer, Karl H. / Ming, Catherine, Convention de Vienne sur les contrats de vente internationale de merchandises: Commentaire, Lausanne 1993

Rabel, Ernst, Das Recht des Warenkaufs: Eine rechtsvergleichende Darstellung, Vol. 1 (1957), Vol. 2 (1958)

Reimann, Mathias / Zimmermann, Reinhard, The Oxford Handbook of Comparative Law, Oxford University Press, Oxford 2006

Schlechtriem, Peter / Schwenzer, Ingeborg, Commentary on the UN Convention on the International Sale of Goods (CISG), 2nd (English) edition, Oxford, New York 2005

Schlechtriem, Peter / Schwenzer, Ingeborg, Kommentar zum Einheitlichen UN-Kaufrecht: CISG, 4th German edition, C.H. Beck, München 2004

Schlechtriem, Peter, Internationales UN-Kaufrecht, 4th edition, Mohr Siebeck, Tübingen 2007

Schlesinger, Rudolf B., Formation of Contracts: A Study of the Common Core of Legal Systems Vol. 2, Dobbs Ferry, Oceana 1968

Schwenzer, Ingeborg / Fountoulakis, Christiana, International Sales Law, Routledge Cavendish, 2007

Secretariat Commentary, in Honnold, John, Documentary History of the Uniform Law for International Sales", Kluwer 1989, or at: www.cisg.law.pace.edu

Sivesand, Hanna, The Buyer's Remedies for Non-Conforming Goods – Should there be Free Choice or are Restrictions Necessary?, Sellier. European Law Publishers, München 2005

Staudinger Kommentar zum Bürgerlichen Gesetzbuch: Wiener UN-Kaufrecht, Sellier/deGruyter, Berlin 2005

Torsello, Marco, Common Features of Uniform Commercial Law Conventions – A Comparative Study Beyond the 1980 Uniform Sales Law", Sellier. European Law Publishers, München 2004

Vogenauer, Stefan, Die Auslegung von Gesetzen in England und auf dem Kontinent (2 Vol.), Mohr Siebeck, Tübingen 2001

Witz, Wolfgang / Salger, Hanns-Christian / Lorenz, Manuel, Internationales Einheitliches Kaufrecht: Praktiker-Kommentar und Vertragsgestaltung, Recht und Wirtschaft, Heidelberg 2000

Zimmermann, Reinhard, The Law of Obligations, C.H. Beck, München 1993

Zweigert, Konrad / Kötz, Hein, An Introduction to Comparative Law, 3rd edition, Oxford University Press, Oxford 1998

References to cited articles or to books which are not cited in an abbreviated form are given in the relevant footnotes. For a more comprehensive bibliography see www.cisg.law.pace.edu or www.cisg-online.ch.

United Nations Convention on Contracts for the International Sale of Goods (1980)

Preambel

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 International Economic Order,

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,

Beeing 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,

have decreed as follows:

Part I

Sphere of Application and General Provisions

Chapter I

Sphere of Application

Article 1

(1) This Convention applies to contracts of sale of goods between parties whose places of business are in different States:

(a) when the States are Contracting States; or

(b) when the rules of private international law lead to the application of the law of a Contracting State.

(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

(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 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.
(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;
(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 or 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 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 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 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, 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.

Article 22
An acceptance may be withdrawn if the withdrawal reaches the offeror before or at the same time as the acceptance would have become effective.

Article 23
A contract is concluded at the moment when an acceptance of an offer becomes effective in accordance with the provisions of this Convention.

Article 24
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.

Part III
Sale of Goods
Chapter I
General Provisions

Article 25
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 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.

(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 related 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 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:
(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 agreed otherwise, the goods do not conform with the contract unless they:
(a) are fit for the purposes for which goods of the same description would ordinarily be used;
(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;
(c) possess the qualities of goods which the seller has held out to the buyer as a sample or model;
(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.
(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.

Article 36

(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 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 their destination.

(3) If the goods are redirected in transit or redispatched 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 redispatch, 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 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 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 of his obligations under the contract or this Convention, the buyer may:

(a) exercise the rights provided in articles 46 to 52;
(b) claim damages as provided in articles 74 to 77.
(2) The buyer 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 seller by a court or arbitral tribunal when the buyer resorts to a remedy for breach of contract.

Article 46
(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.
(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.
(3) If the goods do not conform with the contract, the buyer may require the seller to remedy the lack of conformity by repair, unless this is unreasonable having regard to all the circumstances. A request for repair must be made either in conjunction with notice given under article 39 or within a reasonable time thereafter.

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 of time, resort to any remedy which is inconsistent with performance by the seller.
(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.
(4) A request or notice by the seller under paragraph (2) or (3) of this article is not effective unless received by the buyer.

Article 49

(1) The buyer may declare the contract avoided:

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

(b) in case of non-delivery, if the seller does not deliver the goods within the additional period of time fixed by the buyer in accordance with paragraph (1) of article 47 or declares that he will not deliver within the period so fixed.

(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:

(a) in respect of late delivery, within a reasonable time after he has become aware that delivery has been made;

(b) in respect of any breach other than late delivery, within a reasonable time:

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

(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

(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.

Article 50

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.

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.

Section I
Payment of the price

Article 54
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.

Article 55
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.

Article 56
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.

Article 57
(1) If the buyer is not bound to pay the price at any other particular place, he must pay it to the seller:
(a) at the seller's place of business; or
(b) if the payment is to be made against the handing over of the 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 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
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.

(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) or 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 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 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 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 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 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 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 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 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
(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 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 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 goods

Article 85

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.

Article 86

(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.
(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 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 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 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 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-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 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.
(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 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.

(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 92 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.

(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 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 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.

Table of Abbreviations

Art.	Article(s)
cf.	See
CIETAC	China International Economic and Trade Arbitration Commission
CISG	United Nations Convention on Contracts for the International Sale of Goods
CISG-AC	CISG-Advisory Council (see p. 11)
CISG-Online	www.cisg-online.ch
CLOUT	Case Law on UNCITRAL Texts, www.uncitral.org/uncitral/en/case_law.html
EC	European Community
ed.	edition
eds.	editors
e.g.	for example
etc.	"et cetera", and so on
et seq.	And the following (pages, paragraphs …)
Fn.	Footnote
i.a.	"Inter alia", among other things
ICC	International Chamber of Commerce
idem	the same
i.e.	that is
Incoterms	International Commercial Terms of the International Chamber of Commerce revised in 2000
Lit.	Litera
No.	Number
op. cit.	from the cited work
p.	page
Pace Database	www.cisg.law.pace.edu
para.	paragraph(s)

UCC	U.S. Uniform Commercial Code
UCP	Uniform Customs and Practice for Documentary Credits
ULIS	Uniform Law for the International Sale of Goods
UNCITRAL	United Nations Commission on International Trade Law
UNCITRAL Digest	www.uncitral.org/uncitral/en/case_law/digests/cisg.html
v	versus
Vol.	Volume(s)

Index

Acceptance *p. 82, 84 et seq.*
after elapse of the offer *p. 97 et seq.*
by conduct *p. 95 et seq.*
delay in transmission *p. 98 et seq.*
dispatch *p. 82*
effectiveness *p. 95 et seq.*
fixed time *p. 82 et seq.*
modification *p. 88 et seq.*
time limit *p. 96 et seq.*
withdrawal *p. 100*
"Aliud" *p. 132 et seq.,197 et seq.*
Anticipatory breach *p. 339 et seq.*
damages *p. 343 et seq.*
instalment contracts *p. 354*
refusal to perform *p. 346 et seq.*
right of stoppage *p. 344*
right to avoid the contract *p. 345 et seq.*
right to suspend performance *p. 339 et seq., 342 et seq.*
threat of a breach *p. 340*
violation of the notice requirement *p. 347 et seq.*
Arbitral tribunals applying the CISG *p. 66 et seq.*
Avoidance of the contract by the buyer *p. 181 et seq., 209 et seq., 345 et seq., 349 et seq.*
anticipatory breach *p. 345 et seq.*
burden of proof *p. 242 et seq.*
declaration of avoidance *p. 210 et seq.*
effects of avoidance *p. 243 et seq.*
for fundamental breach *see:* Fundamental breach
future instalments *p. 351 et seq.*
in case of non-delivery *see:* Non-delivery
loss of the right to avoid the contract *p. 211 et seq.*
"Nachfrist"-procedure *p. 234 et seq.*
outline of preconditions *p. 210 et seq.*
partial avoidance *p. 349 et seq.*
remedy of last resort *p. 181 et seq.*
time limits *p. 239 et seq.*

Avoidance of the contract by the seller *p. 325 et seq., 345 et seq.*
anticipatory breach *p. 345 et seq.*
burden of proof *p. 334*
declaration of avoidance *p. 332*
fixing the "Nachfrist" *p. 330 et seq.*
for fundamental breach *see:* Fundamental breach
future instalments *p. 351 et seq.*
"Nachfrist"-procedure *p. 329 et seq.*
outline *p. 325 et seq.*
partial avoidance *p. 349 et seq.*
time limits *p. 332 et seq.*

"Battle of the forms" *p. 91 et seq.*
Burden of proof *p. 36 et seq.*
Buyer's knowledge of defects in the goods *p. 143*

Carriage of goods *p. 110 et seq., 315*
Claim for performance *p. 185 et seq., 322 et seq.*
burden of proof *p. 207 et seq., 324 et seq.*
by the buyer *p. 185 et seq.*
by the seller *p. 322 et seq.*
declaration *p. 196*
domestic law defence *see: ibid.*
exemption under Art. 79 CISG and cases of impossibility *p. 192 et seq., 324*
exemption under Art. 80 CISG *p. 196, 324*
inconsistent remedy *p. 191 et seq., 322 et seq.*
limitations of the seller's claim *p. 322 et seq.*
repair *see: ibid.*
requirements *p. 185 et seq.*
substitute delivery in the case of non conforming goods *see: ibid*
Commercial letters of confirmation *p. 19, 87 et seq., 100 et seq.*
Communication risks *p. 39 et seq.*
Conclusion of the contract *p. 69 et seq., 100 et seq.*
according to offer and acceptance model *p. 69 et seq.*
according to other rules *p. 100 et seq.*
Conformity of the goods *p. 130 et seq., 196 et seq., 205, 210, 247 et seq., 257*
contractual description *p. 132 et seq.*
correspondence with sample or model *p. 139 et seq.*
fitness for ordinary purpose *p. 135 et seq.*
fitness for particular purpose made known to seller *p. 138 et seq.*
guarantee of durability *p. 145 et seq.*
lack of conformity after the risk has passed *p. 145 et seq.*

non-conformity as requirement for remedies *p. 196 et seq., 205, 210, 247 et seq., 257*
notice of lack of conformity *see: ibid*
packaging *p. 134, 141*
quality of goods *p. 132*
quantity of goods *p. 131 et seq.*
relationship between Art. 35(2) lit. (c) and lit. (a) CISG *p. 140 et seq.*
relevant time *p. 144 et seq.*
requirements for conformity *p. 130 et seq.*
Connection to a Contracting State *p. 50 et seq.*
places of business in different Contracting States *p. 51 et seq.*
private international law leading to the law of a Contracting State *p. 52 et seq.*
Consideration *p. 24 et seq.*
Consumer contracts *p. 48 et seq.*
Contract of carriage *p. 120 et seq.*
Contract of sale *p. 43 et seq.*
contracts with a finance element *p. 48*
contracts with a service element *p. 45 et seq.*
distribution agreements *p. 48*
goods to be manufactured *p. 44*
"Contra proferentem" *p. 15*
"Culpa in contrahendo" *p. 28 et seq.*
Cure *see:* Right to cure

Damages *p. 256 et seq., 323, 334 et seq.*
abstract calculation *p. 287 et seq.*
burden of proof *p. 281 et seq., 336 et seq.*
calculation of loss *p. 270 et seq.*
causation *p. 270*
claim by third parties *p. 280*
compensation in money *p. 269 et seq.*
concrete calculation *p. 283 et seq.*
cover purchase *p. 284 et seq.*
currency *p. 280*
exemption from liability *p. 264*
foreseeability *see: ibid*
for non-performance *p. 282, 323*
irrelevance of fault *p. 256 et seq.*
late payment *p. 334 et seq.*
loss *see: ibid.*
loss of profit *p. 269*
lost volume *p. 335*

methods of calculation *p. 283*
next to performance *p. 323*
place of performance *p. 281*
principle of full compensation *p. 268 et seq.*
probability *p. 270*
punitive damages *p. 268*
reasonable substitute transaction *p. 284 et seq.*
relationship to other remedies *p. 256*
relationship to the seller's right to cure *p. 275 et seq.*
requirements for the buyer's claim for damages *p. 257*
resulting from suspension *p. 343 et seq.*
types of compensable loss *p. 268 et seq.*

Date for delivery *p. 122 et seq.*
Delivery *p. 106 et seq.*
Derogation
from the CISG *p. 66*
Documents *p. 117, 126 et seq., 232 et seq., 236 et seq.*
definition of documents relating to the goods *p. 127 et seq.*
fundamental breach *p. 232 et seq.*
handing over of the documents *p. 117, 126 et seq.*
non-delivery *p. 236 et seq.*
Domestic law defence (Art. 28 CISG) *p. 186 et seq., 323 et seq.*

Early delivery *p. 296 et seq.*
EC Product Liability Directive *p. 28 et seq.*
Error entitling to rescission of the contract *see:* Validity
"Essentialia negotii" *p. 72*
Examination of the goods *p. 143, 147 et seq.*
time period for examination *p. 152 et seq.*
Excess quantity *p. 297 et seq.*
Exclusion of liability according to Art. 35 (3) CISG *p. 142 et seq.*
Exemption from liability under Art. 79 CISG *p. 192 et seq., 257 et seq., 336 et seq.*
acquisition risk/procurement risk *p. 261 et seq.*
application of Art. 79 CISG to performance claims *p. 192 et seq.*
exemption of the buyer *p. 336 et seq.*
"force majeure" *p. 259, 260*
impediments beyond seller's control *p. 259*
liability for third parties *p. 263 et seq.*
market rise *p. 261 et seq.*
notice of the impediment *p. 265*
penalty clauses *p. 265*
sphere of control *p. 259 et seq.*

temporary impediment *p. 264*
unavoidability *p. 262*
unforeseeability *p. 262*
Exemption from liability under Art. 80 CISG *p. 196, 265 et seq.*
application of Art. 80 CISG to performance claims *p. 196*
causation of non-performance *p. 265 et seq.*
joint responsibility *p. 267 et seq.*
liability for third parties *p. 266*
obligation of the promisee to overcome the impediment *p. 266 et seq.*

"Falsa demonstratio non nocet" *p. 12*
First carrier *p. 112 et seq.*
Fitness for ordinary purpose *p. 135 et seq.*
public law standards *p. 136 et seq.*
quality standard *p. 135 et seq.*
relationship to particular purpose made known *p. 135*
Fitness for particular purpose made known to seller *p. 138 et seq.*
"Force majeure" *p. 189, 259, 260,*
Foreseeability *p. 215 et seq., 270 et seq.*
allocation of risk *p. 274*
degree of probability *p. 270, 274*
fundamental breach *p. 215 et seq.*
point of reference *p. 272*
purpose *p. 271 et seq.*
standard *p. 272 et seq.*
Formation of the contract *p. 69 et seq., 102 et seq.*
Form requirements *p. 37 et seq.*
principle of informality *p. 37 et seq.*
reservation according to Art. 96 CISG *p. 38 et seq.*
written agreement requiring writing *p. 39, 102 et seq.*
Freight forwarder as carrier *p. 113 et seq.*
Fundamental breach *p. 199 et seq., 213 et seq., 326 et seq., 349 et seq.*
breach of ancillary obligations *p. 233*
contractual agreement *p. 217*
criteria for assessing the fundamental character of the breach *p. 216 et seq.*
critique of the doctrine *p. 233 et seq.*
definite non-delivery *p. 227*
definite refusal to pay *p. 326*
delay in delivery *p. 225 et seq.*
delay in payment *p. 326 et seq.*
delivery of non-conforming goods *p. 227 et seq.*
documents *p. 232 et seq.*

foreseeability *p. 215 et seq.*
instalment contracts *p. 349 et seq., 351*
interaction between right to cure and avoidance *p. 221 et seq.*
reasonable use *p. 218, 228 et seq.*
seller's right to cure *see:* Right to cure
seriousness of the breach *p. 217*
substantial deprivation definition *p. 213 et seq.*
taking delivery *p. 328*
third party rights *p. 232*

Gap filling *p. 33 et seq.*
Good Faith
Interpretation of the CISG *p. 8*
Goods *p. 42 et seq.*

Handing over of the goods *p. 111 et seq.*
Hardship and performance claims *p. 193 et seq.*
History and background of the CISG *p. 2 et seq.*

Impossibility *p. 24, 193 et seq.*
consequence for performance claim *p. 193 et seq.*
initial *p. 24*
Incoterms *p. 19, 64, 110, 319*
no implicit exclusion of the CISG *p. 64*
obligation to take delivery *p. 319*
place of delivery *p. 110*
usages *p. 19*
Industrial or intellectual property rights *p. 173 et seq.*
Instalment contracts *p. 295 et seq., 349 et seq.*
anticipatory breach *p. 354*
avoidance of the entire contract in case of interdependence *p. 353 et seq.*
declaration of avoidance within reasonable time *p. 352*
exclusion of Art. 49 CISG *p. 355*
future instalments *p. 351 et seq.*
likelihood of a future fundamental breach *p. 351 et seq.*
partial avoidance *p. 349 et seq.*
partial breach *p. 295 et seq.*
Interest *p. 356 et seq.*
Interpretation of declarations of the parties *p. 12 et seq.*
consideration of negotiations *p. 13 et seq.*
"contra proferentem" *p. 15*
"falsa demonstratio non nocet" *p. 12*

language risk *p. 15 et seq.*
merger clauses/entire agreement clauses *p. 14*
objective test *p. 13*
parol evidence rule *p. 13 et seq.*
subjective approach *p. 12*
subsequent conduct *p. 14*
Interpretation of the CISG *p. 7 et seq.*
Insurance regarding transportation *p. 121 et seq.*
"Invitatio ad offerendum" *p. 71*

Language *p. 15 et seq., 79 et seq.*
interpretation of declarations of the parties *p. 15 et seq.*
of the offer *p. 79 et seq.*
Legal scope *p. 20 et seq.*
burden of proof *p. 36 et seq.*
"culpa in contrahendo"/precontractual liability *p. 28 et seq.*
limitation *p. 29 et seq.*
personal injury *p. 25 et seq.*
property *p. 25*
set-off *p. 30*
standard terms *see: ibid.*
tort claims *p. 26 et seq.*
validity *see:* Validity of the contract
Liability for third parties *p. 263 et seq., 266*
Limitation *p. 29 et seq.*
Loss *p. 269, 274 et seq.*
damage to buyer's property *p. 277*
defect-related losses *p. 274 et seq.*
legal costs *p. 278 et seq.*
loss of customers and good will *p. 279 et seq.*
loss of profit *p. 269*
mitigation *see:* Mitigation of loss
of a chance *p. 276*
of production *p. 277*
of resale profit *p. 276*
reasonable certainty *p. 276*
resulting from buyer's liability *p. 277*
wasted expenses *p. 278*

Merger clauses/entire agreement clauses *p. 14*
Mitigation of damages *p. 289 et seq., 336*
burden of proof *p. 292*

cover sale *p. 336*
obligation to make a cover purchase *p. 291*
reasonable measures *p. 290 et seq.*
violation *p. 292*
Modification
of acceptance *p. 88 et seq.*
of contract *p. 102 et seq.*

"Nachfrist" *see:* Avoidance of the contract by the buyer/by the seller
Non-conformity *see:* Conformity of the goods
Non-delivery *p. 235 et seq.*
Notice of consignment *p. 119 et seq.*
Notice of lack of conformity *p. 147 et seq.*
consequences of failure to give notice *p. 163 et seq.*
contents *p. 157 et seq.*
dispatch *p. 163*
exceptions according to Art. 40 CISG *p. 164*
exceptions according to Art. 44 CISG *p. 165*
requirements *p. 156 et seq.*
time limit according to Art. 39 (1) CISG *p. 159 et seq.*
time limit according to Art. 39 (2) CISG *p. 162 et seq.*
waiver *p. 167 et seq.*
Notice of third party rights *p. 177 et seq.*

Obligations of the buyer *p. 108, 296, 298 et seq., 303 et seq.*
payment of the purchase price *see: ibid.*
taking of delivery *p. 108, 296, 298 et seq., 318 et seq.*
Obligations of the seller *p. 105 et seq.*
conformity of the goods *see: ibid.*
third party rights *see: ibid.*
to deliver the goods *p. 107 et seq.*
to give notice to the buyer of the consignment *p. 119 et seq.*
to hand over the documents *p. 126 et seq.*
Offer *p. 70 et seq., 304 et seq.*
cross offers *p. 86 et seq.*
definite *p. 72 et seq.*
determination of the price *p. 75 et seq., 304 et seq.*
effectiveness *p. 78 et seq.*
elements *p. 73 et seq.*
intention to be bound *p. 71 et seq.*
language *p. 79 et seq.*
power of determination *p. 74 et seq.*

price requirement *p. 75 et seq.*
rejection *p. 84*
revocation *p. 80 et seq.*
termination *p. 80 et seq.*
to the public *p. 71 et seq.*
withdrawal *p. 80*
Opting in *p. 65 et seq.*
Opting out *p. 60*

Packaging *p. 134, 141*
Payment of the purchase price *p. 75 et seq., 303 et seq.*
Parol evidence rule *p. 13 et seq.*
Partial breach of contract *p. 293 et seq.*
Passing of risk *p. 108 et seq., 314 et seq.*
identification of the goods *p. 316*
time *p. 315 et seq.*
Performance claim *see:* Claim for performance
Personal injury
legal scope *p. 25 et seq.*
Place of delivery *p. 109 et seq.*
Place of payment *p. 309 et seq.*
Preservation of goods *p. 362 et seq.*
duty of the buyer *p. 363*
duty of the seller *p. 362*
preservation measures *p. 364*
Price reduction *see:* Reduction of the price
Principles of European Contract Law *p. 182*
Property *p. 25*

Reduction of the price *p. 247 et seq.*
after payment of purchase price *p. 250*
burden of proof *p. 251*
combination with damage claim *p. 254 et seq.*
declaration of price reduction *p. 250*
effects of price reduction *p. 251 et seq.*
in case of defects in title *p. 247 et seq.*
in case of worthless goods *p. 254*
interest on the claim for repayment *p. 251*
method of calculation *p. 251 et seq.*
priority of the seller's right to cure *p. 249 et seq.*
relevant place for the calculation *p. 252 et seq.*
relevant time for the calculation *p. 252 et seq.*

requirements *p. 247 et seq.*
Reliance on the seller's skill and judgement *p. 139*
Remedies of the buyer *p. 179 et seq.*
policy considerations *p. 182 et seq.*
principle of upholding the contract *p. 181 et seq.*
instruments used in order to uphold the contract *p. 183 et seq.*
Remedies of the seller *p. 321 et seq.*
Repair *p. 205 et seq.*
burden of proof *p. 207 et seq.*
general requirements and non-conformity *p. 205*
reasonableness *p. 205 et seq.*
time limit *p. 206*
way of repairing *p. 206 et seq.*
Restitution *p. 244 et seq., 356 et seq.*
Right of stoppage *p. 344*
Right to cure *p. 146, 217 et seq., 275 et seq.*
before delivery date *p. 146*
choice of method to cure *p. 219*
expenses *p. 220*
interaction between right to cure and avoidance *p. 221 et seq.*
place of performance *p. 220*
reasonable requirement *p. 218 et seq.*
relevance of cure for damage claim *p. 275 et seq.*
seller's request whether the buyer accepts performance *p. 220 et seq.*
Right to suspend performance *p. 181, 339 et seq.*

Sale of goods *see:* Contract of sale
Scope of application *p. 41 et seq.*
application of the CISG by arbitral tribunals *p. 66 et seq.*
connection to a contracting state *p. 50 et seq.*
contract of sale of goods *p. 41 et seq.*
international character *p. 49 et seq.*
party autonomy *p. 60 et seq.*
temporal scope of application *p. 59*
Seller's right to cure *see:* Right to cure
Set-off *p. 30*
Silence as acceptance *p. 85 et seq.*
Standard terms and conditions *p. 30 et seq.*
"battle of forms" *p. 33, 91 et seq.*
incorporation *p. 30, 91 et seq.*
material validity *p. 33*
Structure of the CISG *p. 4 et seq.*

Substitute delivery *p. 196 et seq.*
and sale of specific goods *p. 202*
before transport *p. 204 et seq.*
burden of proof *p. 207 et seq.*
choice between substitute delivery and repair *p. 203 et seq.*
costs and place of performance *p. 202 et seq.*
fundamental breach *p. 199 et seq.*
in the case of an "aliud" *p. 197 et seq.*
in the case of defects in title *p. 198*
in the case of non conforming goods *p. 196 et seq.*
in the case of partial delivery *p. 198 et seq.*
return of non-conforming goods *p. 201*
time limit *p. 200*

Taking delivery of the goods *p. 318 et seq.*
buyer's obligation *p. 318 et seq.*
Incoterms *p. 319*
remedies in case of breach *p. 319 et seq.*
Third party claims *p. 171 et seq.*
Third party rights *p. 169 et seq., 198, 232*
Time limits for remedies *see:* Avoidance of the contract, Repair, Substitute delivery
Time of delivery *p. 122 et seq.*
Tort claims *p. 26 et seq.*
EC Product Liability Directive *p. 28 et seq.*
parallel to contract claims *p. 26 et seq.*
Trade usages *see:* Usages
Transfer of property *p. 129*

UNCITRAL *p. 3 et seq.*
UNIDROIT Principles *p. 20, 35 et seq., 182*
gap filling *p. 35 et seq.*
usages *p. 20*
Uniform Law of International Sales *p. 3*
Usages *p. 16 et seq.*

Validity of the contract *p. 21 et seq.*
consideration not required *p. 24 et seq.*
error concerning the other party's ability to perform *p. 24*
error concerning the quality of the characteristics of the goods *p. 22 et seq.*
fraud *p. 24*
initial impossibility *p. 24*
interpretation of the term *p. 21 et seq.*

Withdrawal *p. 80, 100*
of acceptance *p. 100*
of offer p. 80
Written agreement requiring writing *p. 39, 102 et seq.*