

# Recent Developments in UN Law on International Sales (CISG)

By 1 August 2009 74 nations had ratified the United Nations Convention on Contracts for the International Sale of Goods (CISG). From the perspective of the European Contracting States, the CISG applies to practically all export sales as well as to 80% of the imports. The following article indicates newer material on the CISG and summarises the court decisions that have been published in the last two years.

## 1. Contracting States

The United Nations Convention on Contracts for the International Sale of Goods of 11 April 1980 (CISG)<sup>1</sup> has been ratified or adopted by 74 countries as of 1 August 2009.<sup>2</sup> Since 2007 the following nations have joined the convention as further Contracting States:

- Paraguay, in force since 1 February 2007
- El Salvador, in force since 1 December 2007
- Japan, in force since 1 August 2009
- Lebanon, in force from 1 December 2009
- Armenia, in force from 1 January 2010
- Albania, in force from 1 June 2010

Furthermore, the ratification by Turkey is imminent after the Turkish parliament has resolved to become a party to the CISG at the end of April.

## 2. Indications of Newer Materials on the UN Law on International Sales

In the last two years many books are dealing with specific questions concerning the CISG and cannot be regarded in this article, as well as handbooks and revised editions of commentaries on the CISG, have been published, notably the following:

- Gillette and Walt, *Sales Law, Domestic and International* (2nd edn, New York, 2009)
- Schlechtriem and Butler, *UN Law on International Sales* (Berlin Heidelberg, 2009)
- Anderson and Schroeter, *Sharing International Commercial Law across National Boundaries, Festschrift for Albert H. Kritzer on the Occasion of his Eightieth Birthday* (London, 2008)
- Flechtner, Brand and Walter, *Drafting Contracts under the CISG* (New York, 2008)
- Piltz, *Internationales Kaufrecht* (2nd edn, Munich, 2008)
- Schlechtriem and Schwenger, *Kommentar zum Einheitlichen UN-Kaufrecht: CISG* (5th edn, Munich, 2008)

- Westermann, Gruber and Huber, in *Münchener Kommentar zum Bürgerlichen Gesetzbuch* (5th edn, Munich, 2008)
- Verweyen, Foerster and Toufar, *Handbuch des Internationalen Warenkaufs UN-Kaufrecht* (2nd edn, Stuttgart, 2008)
- Achilles, in Ensthaler, *Gemeinschaftskommentar zum Handelsgesetzbuch mit UN-Kaufrecht* (7th edn, Neuwied, 2007)
- Benicke, Ferrari and Mankowski, in *Münchener Kommentar zum Handelsgesetzbuch*, vol. 6 (2nd edn, Munich, 2007)
- Bertrams and Kruisinga, *Overeenkomsten in het internationale privaatrecht en het Weens Koopverdrag* (3rd edn, Deventer, 2007)
- Bridge, *The International Sale of Goods* (2nd edn, Oxford, 2007)
- Ferrari, Kieninger, Mankowski, Otte, Saenger and Staudinger, *Internationales Vertragsrecht* (Munich, 2007)
- Huber and Mullis, *The CISG: A New Textbook for Students and Practitioners* (Munich, 2007)
- Saenger, in Bamberger and Roth, *Kommentar zum Bürgerlichen Gesetzbuch*, vol. 1 (2nd edn, Munich, 2007)
- Schwenger and Fountoulakis, *International Sales Law* (London, 2007)
- Zeller, *CISG and the Unification of International Trade Law* (New York, 2007)

Internet databases are helpful resources. This article refers to the following:

- <[www.uncitral.org](http://www.uncitral.org)>: database of UNCITRAL, in which the latest state of ratification can be found.
- <[www.globalsaleslaw.org](http://www.globalsaleslaw.org)>: extensive database, full texts of judgments to some extent.<sup>3</sup>
- <[www.cisg.law.pace.edu](http://www.cisg.law.pace.edu)>: materials and commentaries, extensive reference to literature and court decisions as well as further links.<sup>4</sup>

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1. For the text of the CISG see e.g. <[www.uncitral.org](http://www.uncitral.org)> or <[web.law-and-business.de/cisg7/index2.php?lang=1](http://web.law-and-business.de/cisg7/index2.php?lang=1)>.
2. List of all Contracting States is available at <[www.uncitral.org](http://www.uncitral.org)>.
3. Hereafter: CISG-online.
4. Hereafter: CISG-Pace.

- <jur.juridat.just.fgov.be>: Belgian court decisions.<sup>5</sup>
- <www.cisg-france.org>: French court decisions.<sup>6</sup>
- <www.rechtspraak.nl>: Dutch court decisions.<sup>7</sup>
- <www.uc3m.es/cisg>: Spanish-speaking court decisions.<sup>8</sup>

### 3. Court Decisions on the UN Law on International Sales

#### 3.1. Sphere of Application of the CISG

The courts of the Contracting States are obliged to apply the CISG *ex officio*.<sup>9</sup> In cases of international sales, the application of the CISG does not occur unexpectedly and thus does not require particular judicial explanation.<sup>10</sup> In fact, the CISG constitutes the starting point of any judicial evaluation of an international contract of sale of goods in the Contracting States. The terms ‘contract of sale’ and ‘goods’ have to be interpreted autonomously irrespective of national law.<sup>11</sup> The name the parties choose for the contract is irrelevant (‘Leasing Contract’).<sup>12</sup>

The CISG is not applicable to transactions on commission<sup>13</sup> or to acknowledgements of a debt by third parties.<sup>14</sup> Neither does an import licence establish a contract of sale.<sup>15</sup> The CISG also does not apply if goods are sold which first have to be produced and the purchaser has to supply a substantial part of the materials that are necessary for the production (Article 3 para. 1 CISG). In order to determine the contribution of the purchaser, not only does a solely quantitative assessment need to be undertaken but the parties’ interests have to be considered as well.<sup>16</sup> Furthermore, the CISG is not applicable if the seller is obliged to further, duties not typical of a seller and these obligations predominate (cf. Article 3 para. 2 CISG). This does not apply if only 30% of the purchase price is intended for additional performance.<sup>17</sup> If, however, more than 50% of the total purchase price are intended for additional services in the sense of Article 3 para. 2 CISG, the whole contract is not subject to the CISG.<sup>18</sup> The production of the goods sold as such does not result in the application of Article 3 para. 2 CISG.<sup>19</sup>

Sales contracts concerning objects which are not goods or are excluded according to Article 2 CISG are not subject to the CISG. Under the terms of Article 2 lit. e) CISG, the CISG is not applicable to sales contracts including ships which are intended to be used on the high seas (seaworthy sailing yacht).<sup>20</sup> However, Article 2 lit. e) CISG does not exclude the application of the CISG if only parts of a marine engine are sold.<sup>21</sup> Also excluded are purchases for personal use (Article 2 lit. a) CISG). In contrast to national consumer protection regulations which usually define the term ‘personal use’ by objective criteria only, the exemption of Article 2 lit a) CISG does not apply and the CISG remains applicable if the seller did not know or ought not to have known about the personal use of the goods by the buyer.<sup>22</sup>

The CISG regulates contracts of sale of goods if these are of an international nature and also involve a contact with at least one of the 74 Contracting States (Article 1 para. 1, 2 CISG). The contract of sale is international if the places of business of the buyer and the seller are located in different States. Chinese courts also affirm this requirement if the business partner is located in Hong Kong.<sup>23</sup> The later assignment of a claim to a party which is located in the same country as the business partner does not abolish the internationality of the contract of sale.<sup>24</sup> If a party has more than one place of business, the place of business which had the leading role at the time of the conclusion and performance of the contract has to be taken into account (cf. Article 10 lit. a) CISG).<sup>25</sup>

The additional requirement of a contact with a Contracting State is given if both the buyer and the seller are located in Contracting States (Article 1 lit. a) CISG). This applies to the clearly large number of cases that arise in practice. In this case the CISG applies directly. Consideration of conflict of laws is

5. Hereafter: CISG-Belgium.

6. Hereafter: CISG-France.

7. Hereafter: CISG-Netherlands.

8. Hereafter: CISG-Carlos III.

9. Cf. Acuerdo del Cuarto Tribunal Colegiado del Decimoquinto Circuito, judgment of 9 August 2007, CISG-Pace (fn. 4).

10. Oberlandesgericht Linz, IHR 2008, 28 *et seq.*, 30.

11. Tribunale di Forli, CISG-online (fn. 3) no. 1729; diverging Handelsgericht Kanton Aargau, CISG-online (fn. 3) no. 1739.

12. Foreign Trade Court of Arbitration (Serbia), award of 15 July 2008, CISG-Pace (fn. 4).

13. Handelsgericht Kanton Aargau, CISG-online (fn. 3) no. 1739.

14. Obergericht Kanton Thurgau, SZIER 2008, 201 *et seq.*

15. Rechtbank Haarlem, judgment of 3 December 2008, CISG-Netherlands (fn. 7).

16. Oberlandesgericht Innsbruck, judgment of 18 December 2007, CISG-Pace (fn. 4).

17. Rechtbank van Koophandel Kortrijk, judgment of 12 December 2007, CISG-Belgium (fn. 5).

18. Tribunale di Forli, CISG-online (fn. 3) no. 1780.

19. Cour d’Appel de Colmar, judgment of 26 February 2008, CISG-France (fn. 6).

20. Rechtbank Middelburg, judgment of 2 April 2008, CISG-Netherlands (fn. 7).

21. Cf. Rechtbank Dordrecht, judgment of 31 October 2007, CISG-Netherlands (fn. 7).

22. Cf. regarding the sale of a vehicle Oberlandesgericht Stuttgart, IHR 2008, 102 *et seq.*, 104 and Hof ’s-Gravenhage, judgment of 17 February 2009, CISG-Pace (fn. 4).

23. China International Economic and Trade Arbitration Commission (CIETAC), award of 10 August 1999, CISG-Pace (fn. 4).

24. Cour de Justice Genève, SZIER 2008, 194 *et seq.*

25. Foreign Trade Court of Arbitration (Serbia), award of 15 July 2008, CISG-Pace (fn. 4).

unnecessary.<sup>26</sup> If the requirements of Article 1 para. 1 lit. a) CISG are not met, the CISG is nevertheless applicable if the relevant private international law of the forum leads to the law of a Contracting State<sup>27</sup> (Article 1 para. 1 lit. b) CISG). For exporters in EU countries which are also Contracting States of the CISG,<sup>28</sup> this alternative means, as a rule, that, even without an agreement on the applicable law, the CISG is applicable to contracts concluded with buyers who are not located in a Contracting State of the CISG because of the relegation by the private international law to the country of the exporter (Article 4 para. 2 of the Rome Convention on the Law Applicable to Contractual Obligations or, respectively, Article 4 para. 1 lit. a) Regulation (EC) 593/2008 (Rome I)).<sup>29</sup>

If the CISG is applicable, the parties are free to exclude its application (Article 6 CISG). An explicit exclusion is not required.<sup>30</sup> A requirement for the exclusion is nevertheless that the parties were aware that their case required clarification regarding the applicable law, that there was more than one option and that they nevertheless opted for a national, non-uniform law.<sup>31</sup> Furthermore, the agreement on the exclusion must have effectively come into existence. The exclusion of the CISG in standard terms and conditions thus requires the effective incorporation of the standard terms and conditions into the sales contract, which again is evaluated according to the CISG, regardless of the exclusion clause stipulated in the standard terms and conditions.<sup>32</sup> The agreement on the legal system of one of the Contracting States (e.g. 'Belgian law is applicable') is not accepted as an implicit exclusion of the CISG.<sup>33</sup> Neither does the agreement of a place of jurisdiction in Germany lead to the exclusion of the CISG.<sup>34</sup> It becomes more difficult though if within a pending litigation the parties refer to national regulations<sup>35</sup> or orientate themselves by national patterns of regulation.<sup>36</sup> In contrast to foreign courts, which in such cases to some extent approve an implicit exclusion of the CISG quite generously, a closer examination would often reveal a lack of the parties' awareness that their case requires clarification regarding the applicable law and thus a lack of will to exclude the CISG.<sup>37</sup> It is different though if a 'court-notorious ... internationally active lawyer' first invokes national regulations of the law of a Contracting State and then, in the second instance, claims that the general reference to the law of the Contracting States does not lead to the exclusion of the CISG.<sup>38</sup>

Within its sphere of application, the CISG as uniform law agreed on by a treaty<sup>39</sup> has priority over private international laws<sup>40</sup> as well as national laws. Therefore, it is incorrect to only refer to the CISG insofar as it departs from the otherwise relevant national law.<sup>41</sup> On the contrary, the CISG has to be applied primarily, and every recourse to other regulations is precluded within its sphere of application. Neither can national regulations be referred to in order to interpret the CISG.<sup>42</sup> The CISG regulates the formation of a contract of sale,

its formalities and the rights and obligations of buyer and seller arising from it (Article 4, 11 and 29 CISG). Inasmuch as a forum selection clause requires a substantive contract, its formation will also be evaluated according to the CISG.<sup>43</sup> The CISG is also applicable to the contractual agreement of retention of title, but not to its effect in rem (cf. Article 4 lit. b) CISG),<sup>44</sup> as well as to the incorporation of general terms and conditions.<sup>45</sup> In particular, the requirements and consequences of a breach of contract are determined

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26. Apparently dissenting Oberlandesgericht Hamburg, IHR 2008, 98 *et seq.*, 99 as well as Rechtbank Arnhem, judgment of 14 November 2007, CISG-Netherlands (fn. 7).
  27. Cour d'Appel de Versailles, judgment of 19 February 2004, CISG-France (fn. 6) (application of the CISG in relation to Venezuela), Bundesgericht (Switzerland), IHR 2007, 206 *et seq.*, 207 *et seq.* (Taiwan), Foreign Trade Court of Arbitration (Serbia), award of 28 January 2009, CISG-Pace (fn. 4) (Albania); for inexplicable reasons Art. 1 para. 1 lit. b) CISG was not looked into by Corte Suprema de Justicia de la Nación (Argentina), judgment of 19 February 2008, CISG-Pace (fn. 4).
  28. All Member States of the EU except Great Britain, Ireland, Malta and Portugal.
  29. *Official Journal*, 2008, L177/6.
  30. Dissenting United States District Court, Eastern District of Michigan, IHR 2008, 34 *et seq.*, United States District Court, Southern District of New York, IHR 2007, 243 *et seq.*
  31. Hof 's-Hertogenbosch, judgment of 2 January 2007, CISG-Netherlands (fn. 7), cf. also Oberlandesgericht Stuttgart, IHR 2008, 102 *et seq.*, 104.
  32. Oberlandesgericht Oldenburg, IHR 2008, 112 *et seq.*; apparently dissenting Rechtbank Zutphen, judgment of 28 October 2008, CISG-Pace (fn. 4).
  33. Cour de Cassation (France), judgment of 13 February 2007, CISG-France (fn. 6), Rechtbank Rotterdam, judgment of 15 October 2008, CISG-Netherlands (fn. 7).
  34. Oberlandesgericht Stuttgart, IHR 2008, 102 *et seq.*, 104.
  35. Corte Suprema (Chile), judgment of 22 September 2008, CISG-Carlos III (fn. 8), Rechtbank Utrecht, judgment of 15 April 2009, CISG-Netherlands (fn. 7), Regional Court Bratislava, judgment of 10 October 2007, CISG-Pace (fn. 4).
  36. Rechtbank van Koophandel Kortrijk, judgment of 20 December 2006, CISG-Belgium (fn. 5).
  37. Oberlandesgericht Stuttgart, IHR 2008, 102 *et seq.*, 104.
  38. Obergericht Thurgau, CISG-online (fn. 3) no. 1810.
  39. Quinto Tribunal Colegiado en Materia Civil del Primer Circuito, judgment of 20 May 2005, CISG-Pace (fn. 4).
  40. Tribunale di Forli, CISG-online (fn. 3) no. 1729, Tribunale di Rovereto, CISG-online (fn. 3) no. 1590 and Obergericht Thurgau, CISG-online (fn. 3) no. 1810.
  41. In this way Shanghai No. 1 Intermediate People's Court, judgment of 23 June 2003 and Alexandria Center for International Arbitration, award of 16 January 2005, both CISG Pace (fn. 4).
  42. Dissenting United States District Court, Southern District of New York, CISG-online (fn. 3) no. 1777.
  43. Tribunale di Rovereto, CISG-online (fn. 3) no. 1590 for Art. 23 of Regulation (EC) No. 44/2001 and United States District Court, Minnesota, CISG-online (fn. 3) no. 1773.
  44. Hof 's-Hertogenbosch, judgment of 29 May 2007, CISG-online (fn. 3) no. 1550.
  45. Rechtbank Breda, judgment of 27 February 2008, CISG-Netherlands (fn. 7).



according to the CISG.<sup>46</sup> Burden of proof is – at least indirectly – regulated by the CISG.<sup>47</sup>

If one of the parties to the contract is located in a Contracting State which has declared a reservation according to Article 96 CISG,<sup>48</sup> the formalities that need to be complied with regarding the formation and modification of a contract of sale are evaluated according to the national law indicated by the respective private international law.<sup>49</sup> Moreover, the CISG does not govern the legal relationship to third parties that are not a party to the contract of sale.<sup>50</sup> The validity of penalty clauses<sup>51</sup> and warranty disclaimers<sup>52</sup> as well as signatory powers of persons acting on behalf of another party<sup>53</sup> are also not regulated by the CISG but remain subject to the applicable national law (cf. Article 4 lit. a) CISG). Set-off<sup>54</sup> and limitation of actions are also not matters for the CISG but are regulated by national law.

### 3.2. Formation of Contract

In the last two years, apart from aspects regarding general terms and conditions, courts only had to attend to the principle of determinability of price and the requirements for an implicit acceptance of a contract. Because of the requirement for determinability of the purchase price (Article 14 para. 1 sentence 2 CISG), an order lacking an indication of any price whatsoever cannot be regarded as an offer to conclude a contract but merely as an invitation.<sup>55</sup> The delivery of the goods was then recognised by the court as the offer to conclude the contract and taking delivery of the goods as the acceptance of the offer. Because the seller also did not indicate a price, and an intention to create legal relations between the parties was beyond doubt, the customary price had to be paid.<sup>56</sup> Furthermore, making of a significant part payment<sup>57</sup> or issuing of a pro forma invoice<sup>58</sup> is typical of implicit acceptance of a contract. Similarly, the transmission of an invoice and packing list as a reaction to an order can be interpreted as an implicit acceptance of an offer to conclude a contract.<sup>59</sup>

The incorporation of general terms and conditions in UN contracts of sale is principally to be evaluated according to Articles 14 *et seq.* CISG.<sup>60</sup> Whether non-standard clauses have to be observed or not is regarded to be a question of incorporation,<sup>61</sup> although better arguments indicate a subsumption under the law which is relevant for the control of validity of general terms and conditions according to Article 4 lit. a) CISG.<sup>62</sup> If no other agreements, customs or usages apply, general terms and conditions become part of the contract if they are handed over to the other party before the formation of the contract, the offer explicitly refers to the application of the general terms and conditions and the other party confirms the offer without opposing the general terms and conditions. Thus, the user of general terms and conditions has to point out their application before formation of the contract. Therefore, general terms and conditions that appear only on invoices do not become part of the contract, neither by silence nor by a missing reaction from the other party.<sup>63</sup> With

the payment of the invoice the buyer solely complies with his obligations resulting from the contract of sale which existed beforehand. Doing so without reservation cannot be regarded as acceptance of general terms and conditions which the seller only referred to in an invoice after the formation of the contract, as long as no other circumstances support such an acceptance.<sup>64</sup> It is different, however, if the contract of sale is only concluded through the payment.<sup>65</sup>

According to the CISG, the text of the general terms and conditions has to be handed over or made available by other means to the other party not later than at the time of the formation of the contract.<sup>66</sup> The general terms and conditions are not effectively agreed upon

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46. Incorrect application of national regulations concerning notice of defects Tribunal Superior de Justicia, Sala Regional de Toluca, judgment of 22 March 2007, CISG-Carlos III (fn. 8).
  47. Oberlandesgericht Köln, IHR 2009, 62.
  48. Currently Argentina, Armenia, Chile, Latvia, Lithuania, Paraguay, Russia, Ukraine, Hungary, People's Republic of China and Belarus.
  49. Piltz, *Internationales Kaufrecht* (2nd edn, 2008), marginal number 2-132. Dissentingly applying the law regarding formalities of the country which declared the reservation United States District Court, New Jersey, judgment of 7 October 2008, CISG-online (fn. 3) no. 1779, United States District Court, Southern District of Florida, judgment of 19 May 2008, CISG-Pace (fn. 4).
  50. Hof van Cassatie (Belgium), judgment of 23 April 2007, CISG-Belgium (fn. 5), United States District Court, Southern District of New York, IHR 2007, 243 *et seq.*, 245.
  51. District Court Nitra, CISG-online (fn. 3) no. 1757, *CIETAC* (fn. 23), award of 20 September 2006, CISG-Pace (fn. 4).
  52. United States District Court, Western District of Pennsylvania, CISG-online (fn. 3) no. 1776.
  53. Amtsgericht Sursee, IHR 2009, 63 *et seq.*
  54. Rechtbank Dordrecht, judgment of 16 May 2007, CISG-Netherlands (fn. 7).
  55. Tribunal Cantonal Valais, SZIER 2008, 184 *et seq.*, 185.
  56. Tribunal Cantonal Valais, SZIER 2008, 184 *et seq.*
  57. Oberlandesgericht Jena, NJW 2009, 689 *et seq.*
  58. District Court Nitra, judgment of 27 February 2006, CISG-Pace (fn. 4).
  59. United States District Court, Southern District of Florida, judgment of 19 May 2008, CISG-Pace (fn. 4).
  60. Landgericht Landshut, IHR 2008, 184 *et seq.*
  61. Landgericht Landshut, IHR 2008, 184 *et seq.*, 185.
  62. Rechtbank Arnhem, judgment of 14 November 2007, CISG-Netherlands (fn. 7).
  63. Rechtbank van Koophandel Kortrijk, judgment of 4 October 2007, CISG-Belgium (fn. 5), United States District Court, Delaware, judgment of 9 May 2008, CISG-Pace (fn. 4).
  64. Dissenting Rechtbank Breda, judgment of 27 February 2008, CISG-Netherlands (fn. 7) and Rechtbank Breda, judgment of 23 May 2007, CISG-online (fn. 3) no. 1643.
  65. Cf. Oberlandesgericht München, judgment of 14 January 2009, CISG-Pace (fn. 4).
  66. Landgericht Landshut, IHR 2008, 184 *et seq.*, 186, *Rechtbank Rotterdam*, CISG-online (fn. 3) no. 1812, Rechtbank Utrecht, judgment of 21 January 2009, CISG-Netherlands (fn. 7), Cour Supreme du Canton de Berne, CISG-online (fn. 3) no. 1738.

if the other party still has to procure the text. In cases of conflicting general terms and conditions (battle of forms) the opinion prevailing in court decisions continues to be that the declaration of acceptance of the contract under reference to the acceptor's own general terms and conditions has to be evaluated according to Article 19 CISG.<sup>67</sup> Arbitration clauses in general terms and conditions are a substantial alteration within the meaning of Article 19 para. 3 CISG.<sup>68</sup> The starting point to the solution of the problem of conflicting general terms and conditions in Article 19 CISG, on the other hand, does not exclude the possibility that the parties nevertheless want a legally binding relationship despite contradicting general terms and conditions.<sup>69</sup>

### 3.3. Primary Obligations of the Seller and the Buyer

The seller has to deliver the goods and to transfer the property (cf. Article 30 CISG). In contrast to many national sales laws, the CISG does not oblige the seller to 'hand the goods over to the buyer'. In fact, the CISG distinguishes whether a contract involving carriage of the goods has been concluded or not. In the latter case, the seller only has to place the goods at the buyer's disposal at his place of business (Article 31 lit. c) CISG),<sup>70</sup> conditional on another place indicated (Article 31 lit. b) CISG). In case of doubt<sup>71</sup> even when using the clause 'carriage paid', international contracts of sale are contracts involving carriage of the goods<sup>72</sup> leading to the consequence that the seller is obliged to hand the goods over to the first carrier for transmission to the buyer (Article 31 lit. a) CISG).<sup>73</sup> To hand the goods over means the actual handing over, which includes the responsibility of the seller for the loading into or onto the respective means of transportation.<sup>74</sup> Place of delivery is the place at which the seller hands over the goods to the first carrier. However, the parties may agree on a different type of delivery and/or a different place of delivery. Additional clauses such as 'delivered free construction site'<sup>75</sup> or the specification of the place of destination applying the delivery condition 'C+F'<sup>76</sup> do not alter the place of delivery indicated by Article 31 CISG.

The buyer has to pay the purchase price for the goods. In case of doubt about the existence of a contract of sale from which the obligation of payment arises, the burden of proof lies on the seller.<sup>77</sup> In case of doubt, the price for the goods has to be paid in the currency which is effective at the place of payment.<sup>78</sup> Even though the buyer generally has a right to an invoice, the issuance of the invoice is no requirement for maturity.<sup>79</sup> In fact, the payment of the purchase price for the goods is due, subject to other stipulations, as soon as the goods are available to the buyer (Article 58 para. 1 CISG). A different date on which the payment is due which is set unilaterally by the seller does not change this rule and thus does not alter the beginning of the limitation of claims connected to maturity.<sup>80</sup>

According to Article 71 CISG, both the buyer and the seller can be entitled to suspend the performance of

their obligations. However, this right to suspension ceases to apply if a claim by the creditor for performance is not available because the legal requirements are no longer given or because the creditor has resorted to legal remedies, which are incompatible with the claim for performance.<sup>81</sup> The notice indicated in Article 71 para. 3 CISG is no requirement for the exercise of the right to suspension<sup>82</sup> but merely an obligation of the person exercising the right. Subject to a right to suspension or a discharge according to Article 80 CISG, every party to the contract of sale is liable for their failure to fulfil their obligations. Only under very limited conditions does Article 79 CISG provide that the party which does not perform according to the contract is not liable for their failure and thus does not have to pay damages. The fact that the vehicle sold was stolen and the seller therefore could not transfer the title does not constitute an impediment in the sense of Article 79 CISG.<sup>83</sup>

### 3.4. Breach of Contract by the Seller

#### 3.4.1. Non-conformity of the Goods

To determine whether non-conformity of the goods sold is relevant, the point in time at which the risk passes to the buyer must be considered (Article 36 para. 1 CISG). The burden of proof for the existence of the non-conformity rests on the buyer once he

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67. Hof van Beroep te Gent, judgment of 7 November 2005, CISG-Belgium (fn. 5), Tribunale di Rovereto, CISG-online (fn. 3) no. 1590.
  68. Oberlandesgericht Frankfurt, IPRax 2008, 517 *et seq.*, 518.
  69. Oberlandesgericht Dresden, judgment of 23 October 2000, CISG-Pace (fn. 4).
  70. Cf. Oberlandesgericht Köln, IHR 2007, 164 *et seq.*
  71. Misunderstood by Rechtbank van Koophandel Kortrijk, judgment of 4 October 2007, CISG-Belgium (fn. 5).
  72. Landgericht Bamberg, IHR 2007, 113 *et seq.*, 116, cf. Oberlandesgericht Köln, IHR 2007, 164 *et seq.*
  73. Hof Arnhem, judgment of 21 August 2007, CISG-Netherlands (fn. 7).
  74. Landgericht Bamberg, IHR 2007, 113 *et seq.*, 116.
  75. Oberlandesgericht München, judgment of 14 January 2009, CISG-Pace (fn. 4).
  76. Hof Arnhem, judgment of 21 August 2007, CISG-Netherlands (fn. 7).
  77. Cf. Cour de Justice Genève, SZIER 2008, 194 *et seq.* as well as District Court Brezno, judgment of 18 October 2007, CISG-Pace (fn. 4).
  78. Piltz, Internationales Kaufrecht (2nd edn, 2008), marginal number 4-127; dissenting Tribunal Cantonal Valais, SZIER 2008, 184 *et seq.*, 185.
  79. Supreme Court (Slovakia), judgment of 3 April 2008, CISG-Pace (fn. 4).
  80. Supreme Court (Slovakia), judgment of 19 June 2008, CISG-Pace (fn. 4).
  81. Cf. Oberlandesgericht Köln, IHR 2008, 181 *et seq.*, 183.
  82. Obviously dissenting Rechtbank van Koophandel Kortrijk, judgment of 4 October 2007, CISG-Belgium (fn. 5), Rechtbank Utrecht, judgment of 18 July 2007, CISG-Netherlands (fn. 7).
  83. Oberlandesgericht München, IHR 2008, 253 *et seq.*, 256.

has taken delivery of the goods without reservation.<sup>84</sup> Non-conformity in the sense of Article 35 para. 1 CISG occurs when the delivered goods do not conform to the characteristics agreed upon. If the seller sells an individual machine, which the buyer selected beforehand, the buyer cannot claim that he did not want a machine of that kind.<sup>85</sup> To the extent that the parties did not agree otherwise,<sup>86</sup> non-conformity occurs if the goods do not conform to the requirements of Article 35 para. 2 CISG. According to this provision, the seller must provide packaging that is suitable to prevent damages to the goods on the foreseeable route to their destination.<sup>87</sup> Moreover, in international trade the goods are only fit for ordinary purpose if they are resaleable.<sup>88</sup> Besides, the fitness of the goods for ordinary purpose is principally determined according to the standards of the seller's country. Even if the seller is informed about the place of use of the goods, this knowledge does not lead to an obligation on the seller to regard the local regulations for the goods established by public law, unless the seller knows about these regulations or the buyer can assume the seller has such knowledge.<sup>89</sup>

In order to ensure the remedies provided in case of delivery of non-conforming goods, the buyer is bound to give notice of the non-conformity, for which he asserts a remedy, to the seller (Article 39 CISG). The notice is unnecessary if the seller was already informed about the non-conformity through an intermediary.<sup>90</sup> On the other hand, the obligation to give notice according to Article 39 CISG applies only to non-conformities of the goods and not if the seller did not deliver on time<sup>91</sup> or violated the contract in any other way. If necessary, the buyer has to prove that the non-conformity was notified in time as well as in proper form.<sup>92</sup> It is also to the buyer's disadvantage if his declaration is not recognised as a notice of non-conformity but as a request for performance of outstanding operations ('lack of installation ready for use').<sup>93</sup>

The buyer has a reasonable period of time during which he has to give the notice (Article 39 para. 1 CISG). As a rough guide, 14 days to a month at the longest is considered reasonable.<sup>94</sup> Belgian courts categorically concede a period of one month.<sup>95</sup> However, in a case in which frozen meat was sold, a notice after two weeks was considered as already being too late.<sup>96</sup> For citrus fruits, much shorter deadlines are also applicable.<sup>97</sup> The period begins as soon as the buyer has discovered or ought to have discovered the non-conformity (Art 39 para. 1 CISG). Thus, the buyer cannot await the reaction of his customer 'in every case'.<sup>98</sup> If the non-conformity has not been discovered or ought not to have been discovered at the time of delivery, the buyer has to examine the goods within a short period of time in order to detect possible non-conformities (Article 38 CISG). Generally, the short period for examination commences at the time of delivery of the goods,<sup>99</sup> and in cases of contracts that involve carriage of the goods<sup>100</sup> at the time of arrival of the goods at

their destination (Article 38 para. 2 CISG), unless the examination is made earlier.<sup>101</sup> External examinations are always required, whereas measures leading to unsaleability of the goods only have to be done using spot checks.<sup>102</sup> Lids and frames of manhole covers need to be put together and exposed to slight pressure in order to be examined.<sup>103</sup> The correct labelling of the goods also needs to be subject to examination.<sup>104</sup>

Article 27 CISG is applicable to the notice of non-conformity, i.e. the buyer has to prove that the notice was dispatched in time and properly.<sup>105</sup> Furthermore, the buyer has to specify the nature of non-conformity (Article 39 para. 1 CISG). The mere allegation to have contested some of the delivered goods as being defective is not sufficient.<sup>106</sup> In order to establish

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84. Rechtbank van Koophandel Kortrijk, judgment of 22 November 2006, CISG-Belgium (fn. 5), Rechtbank Arnhem, judgment of 11 February 2009, CISG-Netherlands (fn. 7) und Cour de Justice Genève, SZIER 2008, 194 *et seq.*
  85. Arbitration Institute of the Stockholm Chamber of Commerce, case 90/2004, Stockholm Arbitration Report 2007:2, 211 *et seq.*, 220.
  86. Oberster Gerichtshof (Austria), CISG-online (fn. 3) no. 1495 and Supreme Court (Czech Republic), judgment of 29 March 2006, CISG-Pace (fn. 4).
  87. Oberlandesgericht Saarbrücken, IHR 2008, 55 *et seq.*, 58.
  88. Tribunale di Forlì, CISG-online (fn. 3) no. 1729.
  89. Rechtbank Rotterdam, judgment of 15 October 2008, CISG-Netherlands (fn. 7).
  90. Juzgado de primera instancia de La Laguna, judgment of 23 October 2007, CISG-Carlos III (fn. 8).
  91. Dissenting United States District Court, Eastern District of Kentucky, IHR 2009, 24 *et seq.*, 26.
  92. Rechtbank Breda, judgment of 16 January 2009, CISG-Netherlands (fn. 7), Rechtbank Zutphen, CISG-online (fn. 3) no. 1692 and Cour de Justice Genève, SZIER 2008, 194 *et seq.*
  93. Oberlandesgericht Hamburg, IHR 2008, 98 *et seq.*, 100.
  94. Oberlandesgericht Hamburg, IHR 2008, 98 *et seq.*, 99, Landgericht Bamberg, IHR 2007, 113 *et seq.*, 115.
  95. Rechtbank van eerste aanleg Turnhout, judgment of 4 February 2008, Rechtbank van Koophandel Kortrijk, judgment of 7 June 2007 and Rechtbank van Koophandel Kortrijk, judgment of 13 December 2006, all CISG-Belgium (fn. 5).
  96. Hof van Beroep te Gent, judgment of 16 April 2007, <www.law.kuleuven.ac.be/ipr/eng/cisg>, along the same lines Audiencia Provincial de Pontevedra, judgment of 19 December 2007, CISG-Carlos III (fn. 7).
  97. Rechtbank Zutphen, CISG-online (fn. 3) no. 1692.
  98. Dissenting Landgericht Berlin, IHR 2008, 168 *et seq.*
  99. Rechtbank Breda, judgment of 16 January 2009, CISG-Netherlands (fn. 7).
  100. See fn. 71 *et seq.*
  101. Tribunal Supremo (Spain), judgment of 17 January 2008, CISG-Carlos III (fn. 8).
  102. Oberlandesgericht Köln, IHR 2007, 200 *et seq.*, 205; too generous Regional Court Zilina (Slovakia), judgment of 25 October 2007, and Supreme Court (Slovakia), judgment of 27 June 2008, both CISG-Pace (fn. 4).
  103. Oberlandesgericht Dresden, CISG-online (fn. 3) no. 1624.
  104. Rechtbank Rotterdam, CISG-online (fn. 3) no. 1750.
  105. Amtsgericht Freiburg, CISG-online (fn. 3) no. 1596.
  106. Handelsgericht Kanton Aargau, CISG-online (fn. 3) no. 1739.



whether the notice is specific enough, the buyer's and seller's positions in the economic intercourse, the type of goods sold as well as possible cultural differences need to be taken into consideration.<sup>107</sup> Two years after handing over the goods, the buyer loses any right to rely on non-conformity of the goods (Article 39 para. 2 CISG). The time-limit of Article 39 para. 2 CISG is an absolute cut-off period which applies to any kind of non-conformity<sup>108</sup> but only becomes significant if the reasonable time-limit for giving notice according to Article 39 para. 1 CISG has not yet expired.<sup>109</sup> In no situation does Article 39 para. 2 CISG lead to the conclusion that the buyer can always exhaust the two-year time-limit of Article 39 para. 2 CISG for giving notice.

A buyer not properly notifying non-conformities risks losing of the remedies provided in case of delivery of non-conforming goods, unless the seller waives the requirement of proper notice or the buyer can rely on Article 40 CISG or exceptionally excuse the omitted notice according to Article 44 CISG. If the seller confirms the contested non-conformity and declares his general willingness to avoid the contract, he impliedly waives the requirements of Articles 38 and 39 CISG.<sup>110</sup> For an excuse according to Article 44 CISG it is advised to balance the interests of the participating parties according to the rules of equity. Partial causation of the non-conformity by the seller that is only discovered by expert opinion, an earlier claim that was not reasonable and the seller not suffering any unreasonable disadvantage through the delay are all valid excuses.<sup>111</sup>

#### 3.4.2. Third Party Rights

If the seller sells a stolen vehicle and thus the goods cannot be transferred free of rights of third parties, the seller breaches Article 41 CISG. In this and the equivalent case in which the goods are not free from industrial property or other intellectual property rights of third parties (Article 42 CISG), the buyer is bound to give notice to the seller within a reasonable time (Article 43 CISG).<sup>112</sup> Otherwise the buyer risks losing possible legal remedies. As a requirement of the seller's responsibility that the goods were not free from industrial property or other intellectual property rights of third parties, and in contrast to the seller's responsibility for non-conforming goods, the seller needs to know or ought to have known about those rights (Article 42 para. 1 CISG).

#### 3.4.3. Buyer's Remedies

In case of breach of contract by the seller, the buyer is entitled to the legal remedies addressed in Article 45 CISG, namely the right to require performance, the right to avoid the contract, to reduce the price and to claim damages. Articles 74 *et seq.* CISG only regulate the quantum of damages that have to be compensated.<sup>113</sup> The basis for the claim for damages is solely Article 45 para. 1 lit. b) CISG. No kind of fault or negligence on behalf of the seller is required. This characteristic makes the CISG very appealing for any importer. Only if the conditions of Article 79 CISG

are met does the obligation to pay damages cease to apply.<sup>114</sup>

The buyer may declare the contract avoided if the seller has not delivered at all and an additional period of time for performance fixed by the buyer has expired to no avail (Article 49 para. 1 lit. b) CISG). The fixing of an additional period of time means that the seller realises that the buyer has given him a last chance to perform.<sup>115</sup> Otherwise, a reason for avoidance only exists if the breach of contract by the seller is fundamental within the meaning of Article 25 CISG (Article 49 para. 1 lit. a) CISG). Therefore, the avoidance of the contract is only possible in cases of serious shortcomings. As long as the deficiency in performance by the seller can be compensated through correction of the non-conformity or otherwise, the breach of contract is not fundamental.<sup>116</sup> Even if the breach of contract cannot be corrected, it is not fundamental as long as delivered non-conforming goods can be used in the ordinary commercial business, even at a lower price, without unreasonable effort and under reasonable conditions for the buyer.<sup>117</sup> Some courts focus solely on the breach of contract itself without further examining whether the breach is correctable or whether the buyer can nevertheless reasonably use the goods and whether the deficiency in performance can be compensated otherwise.<sup>118</sup> These courts therefore already affirm a fundamental breach of contract in situations that actually required further evaluation. If more than 90% of the delivered goods do not conform to the contract and are neither repairable nor replaceable and possibly not usable in any other way, a fundamental breach of the whole contract is established.<sup>119</sup> If, however, half of a delivered consignment of boots have been sold and only 20% of those have been reclaimed, apprehension

107. Kantonsgericht Zug, SZIER 2008, 187 *et seq.*, 188.

108. Oberster Gerichtshof (Austria), IHR 2008, 106 *et seq.*, 108 and Oberlandesgericht Linz, IHR 2008, 28 *et seq.*, 30.

109. Audiencia Provincial de Pontevedra, judgment of 8 February 2007, CISG-Carlos III (fn. 9).

110. Oberlandesgericht Dresden, judgment of 23 October 2000, CISG-Pace (fn. 4).

111. Oberlandesgericht Saarbrücken, IHR 2008, 55 *et seq.*, 59 *et seq.*

112. Oberlandesgericht Dresden, judgments of 18 January 2007 and 21 March 2007, CISG-online (fn. 3).

113. See fn. 142 *et seq.*

114. See fn. 83.

115. Hof Arnhem, judgment of 7 October 2008, CISG-Netherlands (fn. 7).

116. Tribunal Supremo (Spain), judgment of 17 January 2008, CISG-Carlos III (fn. 8).

117. Kantonsgericht Zug, SZIER 2008, 187 *et seq.*, 189.

118. For example Audiencia Provincial de Madrid, judgment of 20 February 2007, CISG-Carlos III (fn. 8), Foreign Trade Court of Arbitration (Serbia), award of 10 May 2002, CISG-Pace (fn. 4) and Audiencia Provincial de Castellón, judgment of 21 March 2006, CISG-Carlos III (fn. 8).

119. Tribunale di Forlì, CISG-online (fn. 3) no. 1729.

concerning the unsold half probably do not justify a fundamental breach of contract.<sup>120</sup>

Moreover, an avoidance of contract means that the buyer can make restitution of the received goods to the seller substantially in the condition in which he received them (Article 82 CISG).<sup>121</sup> Furthermore, the buyer has to give notice of the avoidance of the contract to the seller (Article 26 CISG), within a reasonable time (Article 49 para. 2 CISG). A demand for delivery within eight days is not a declaration of avoidance of a contract<sup>122</sup> whereas the unmistakable demand for refund of payments on account, which have been made already, must be considered as an implicit avoidance of the contract.<sup>123</sup> A declaration of avoidance within three months was held to be within a reasonable time for machines<sup>124</sup> while a declaration within two months and 18 days was considered to be late for the sale of a motor vehicle.<sup>125</sup> Declarations of avoidance after four and five months<sup>126</sup> have been discarded as not being made within a reasonable time. The granting of a time-limit for a declaration of avoidance of a contract of five months after the first occurrence of lack of conformity regarding shoes is not compatible with these standards.<sup>127</sup>

In case of non-conformity of the goods, the buyer also has the remedy to reduce the price (Article 50 CISG). The courts do not sufficiently take into consideration<sup>128</sup> that Article 50 CISG does not require, in contrast to Article 49 CISG, a declaration by the buyer or a specification of the amount of reduction or of the reduced price if the intention of the buyer to reduce the price due to the delivery of non-conforming goods becomes clear and the submitted facts purport the circumstances necessary to apply a reduction of the price according to Article 50 CISG. Even if a declaration of price reduction has been made, the parties are still free to agree on avoidance of the contract afterwards.<sup>129</sup>

### 3.5. Breach of Contract by the Buyer

The basis for a claim to pay the purchase price that has not been paid according to the contract is Article 62 CISG.<sup>130</sup> Failure to pay the purchase price according to the contract or to issue a letter of credit agreed upon<sup>131</sup> as well as the failure to take delivery of 7.5% of the goods delivered<sup>132</sup> does not lead to a fundamental breach of contract in the sense of Article 64 para. 1 lit. a) CISG. It is different, however, in the case of a failure to take delivery of well over 15% of the goods delivered if the buyer is the principal purchaser of the seller who is bound over a long term, and the shortcoming in taking delivery caused by the buyer threatens the economic viability of the plant which produced the goods.<sup>133</sup> The seller can furthermore avoid the contract if he has fixed an additional period of time for the payment or taking of delivery by the buyer without success (Article 64 para. 1 lit. b) CISG). The additional period of time can already be set before the date of maturity if it only commences on the date of maturity.<sup>134</sup>

A set period of time which is too short automatically becomes a time-period which is reasonable.

According to Article 78 CISG, the seller is also entitled to claim interest on payments which are in arrears. In order to determine the extent of the interest to be paid, most courts, in line with previous court rulings, resort to the legal interest rate which is applicable according to the subsidiary applicable national law indicated by the relevant private international law.<sup>135</sup> Other courts apply the interest rate at the seller's place of business<sup>136</sup> or the interest rate of the currency in which the payment is to be made.<sup>137</sup> Regarding contracts between parties that are located in the EU, Directive 2000/35/EC on combating late payment in commercial transactions is often resorted to.<sup>138</sup> American courts decide according to a 'broad discretion'.<sup>139</sup>

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120. Dissenting Oberlandesgericht Koblenz, CISG-online (fn. 3) no. 1733.
  121. Closer on this matter Appellationsgericht Basel-Stadt, CISG-online (fn. 3) no. 1732.
  122. Hof van Beroep te Gent, judgment of 28 June 2006, <www.law.kuleuven.ac.be/ipr/eng/cisg>.
  123. Foreign Trade Court of Arbitration (Serbia), award of 1 October 2007, CISG-Pace (fn. 4).
  124. Zivilgericht Basel-Stadt, CISG-online (fn. 3) no. 1731.
  125. Oberlandesgericht Stuttgart, IHR 2008, 102 *et seq.*, 105.
  126. Rechtbank van Koophandel Kortrijk, judgment of 10 July 2008, CISG-Belgium (fn. 5) and Rechtbank Utrecht, judgment of 18 July 2007, CISG-Netherlands (fn. 7).
  127. Dissenting Oberlandesgericht Koblenz, CISG-online (fn. 3) no. 1733.
  128. Cf. for example CIETAC (fn. 23), award of 18 December 2002, CISG-Pace (fn. 4), Cour de Justice Genève, CISG-online (fn. 3) no. 853 and Handelsgericht Zürich, SZIER 2000, 111 *et seq.*
  129. Amtsgericht Sursee, CISG-online (fn. 3) no. 1728.
  130. Correct District Court Bratislava II, judgment of 7 November 2007, CISG-Pace (fn. 4).
  131. Dissenting CIETAC (fn. 23), award of 15 September 2005, CISG-Pace (fn. 4).
  132. Oberlandesgericht Brandenburg, IHR 2009, 105 *et seq.*, 111.
  133. Oberlandesgericht Brandenburg, IHR 2009, 105 *et seq.*, 114.
  134. Dissenting Oberlandesgericht Brandenburg, IHR 2009, 105 *et seq.*, 111.
  135. Rechtbank Zutphen, CISG-online (fn. 3) no. 1692, Handelsgericht Kanton Aargau, CISG-online (fn. 3) no. 1739 and 1741, District Court Nitra, judgment of 29 May 2008, CISG-online (fn. 3) no. 1766 and United States District Court, New Jersey, judgment of 15 April 2009, CISG-Pace (fn. 4).
  136. Regional Court Bratislava, judgment of 1 February 2007, CISG-Pace (fn. 4).
  137. Foreign Trade Court of Arbitration (Serbia), awards of 28 January 2009, 15 July 2008, 1 October 2007 und 12 April 2002, all CISG-Pace (fn. 4).
  138. Cf. for example Rechtbank van Koophandel Kortrijk, judgment of 8 March 2007, CISG-Belgium (fn. 5).
  139. United States District Court, New Jersey, judgment of 15 April 2009, CISG-Pace (fn. 4).



### 3.6. Damages

Subject to an exemption according to Article 79 CISG, every breach of contract creates a claim for damages to the benefit of the creditor (cf. Article 45 CISG and Article 61 CISG).<sup>140</sup> If the contract has been avoided, the creditor may enter into a reasonable replacement transaction<sup>141</sup> and recover the difference as damages or, irrespective of further damage,<sup>142</sup> recover the difference between the price fixed by the contract and the current market price, Article 76 CISG.

Apart from that, a foreseeable loss<sup>143</sup> can be recovered (Article 74 CISG). If the buyer does not pay in time, reasonable collection costs<sup>144</sup> and pre-litigation lawyer's fees<sup>145</sup> are generally foreseeable and thus recoverable. A prevailing opinion on the question as to whether or not costs incurred during litigation are recoverable has not yet been formed, so that appropriate contractual clauses remain recommended.

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140. See fn. 83 and 114.

141. Closer on this matter Cour d'Appel de Rennes, judgment of 27 May 2008, CISG-France (fn. 6) and Oberlandesgericht Graz, judgment of 29 July 2004, CISG-Pace (fn. 4).

142. Dissenting United States District Court, Minnesota, CISG-online (fn. 3) no. 1774.

143. Cf. United States District Court, Southern District of New York, judgment of 16 April 2008, CISG-Pace (fn. 4).

144. Rechtbank Breda, judgment of 16 January 2009, CISG-Netherlands (fn. 7).

145. Amtsgericht Freiburg, CISG-online (fn. 3) no. 1596, Tribunal Cantonal Valais, SZIER 2008, 206 *et seq.*, dissenting Rechtbank Rotterdam, CISG-online (fn. 3) no. 1815.