

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

From the perspective of the Contracting States of the UN Convention on Contracts for the International Sale of Goods (CISG), the CISG is the primary starting point for the legal assessment of both import and export contracts. In comparison to national sales laws, the CISG provides attractive options to both the exporter as well as the importer. As a general rule, the CISG is clearly superior where sales of consumer goods or purchases from intermediaries are concerned. The following article updates the list of Contracting States, indicates newer material on the CISG and summarises – following the structure of the preceding articles (most recently, EJCL 2009, pp. 139 et seq.) – the domestic and foreign court decisions which have since been published.

I. Contracting States

As of 1 August 2011¹ the United Nations Convention on Contracts for the International Sale of Goods of 11 April 1980 (CISG)² has been ratified or accepted by a total of 77 countries. Since 1 June 2009³ the following countries have acceded to the convention as Contracting States:

- Benin, in force from 1 August 2012
- Dominican Republic, in force since 1 July 2011
- Turkey, in force since 1 August 2011

In addition, the ratification procedure has been initiated in Brazil.

II. Newer Materials on the UN Law on International Sales

A number of new materials on the UN Law on International Sales have been published in the time preceding this article. The materials include not only further monographs, but also new editions of established commentaries as well as a new commentary on the subject. Such new materials include, in particular:

- Kröll/Mistelis/Perales Viscasillas (eds), *UN Convention on Contracts for the International Sale of Goods (CISG)* (Munich: 2011)
- Bertrams/Kruisinga, *Overeenkomsten in het internationale privaatrecht en het Weens Koopverdrag* (4th edn, Deventer: 2010)
- Honsell (ed.), *Kommentar zum UN-Kaufrecht* (2nd edn, Heidelberg: 2010)
- Ostendorf, *International Sales Terms* (Munich: 2010)
- Schlechtriem/Schwenzer (eds), *Commentary on the UN Convention on the International Sale of Goods (CISG)* (3rd edn, Munich: 2010)

- Gillette/Walt, *Sales Law, Domestic and International* (2nd edn, New York: 2009)
- Honnold/Flechtner, *Uniform Law for International Sales* (4th edn, Alphen: 2009)
- Jungemeyer, *Kaufvertragliche Durchgriffsrechte in grenzüberschreitenden Lieferketten und ihr Verhältnis zum Einheitlichen UN-Kaufrecht* (Jena: 2009)
- Kiene, *Vertragsaufhebung und Rücktritt des Käufers im UN-Kaufrecht und BGB* (Baden-Baden: 2010)

Internet databases are also especially valuable sources of information on this subject. The article refers to the following:

- <www.uncitral.org>: UNCITRAL database which also contains information on the current status of ratification.
- <www.globalsaleslaw.org>: an extensive database containing, to some extent, the full text of judgments.⁴
- <www.cisg.law.pace.edu>: contains materials and commentaries, extensive references to literature and court decisions as well as further links.⁵
- <www.cisg-france.org>: decisions of French courts.⁶
- <www.rechtspraak.nl>: decisions of Dutch courts.⁷
- <www.uc3m.es/uc3m/dpto/PR/dppr03/cisg>: court decisions (in Spanish).⁸

* Prof. Dr. Burghard Piltz is lawyer in the Gütersloh office of *Brandt* and Professor at University of Bielefeld.

** A German version of this article, which may be particularly appealing to German readers, has been published in NJW 2011, pp. 2061 et seq.

1. A list of all Contracting states is available at <www.uncitral.org> and IHR 2011, pp. 46 seq.
2. The text is available online at, for example, <www.uncitral.org>.
3. On the status of the Contracting States on 1 June 2009 see EJCL 2009, 139.
4. Hereafter referred to as 'CISG online'.
5. Hereafter referred to as 'CISG Pace'.
6. Hereafter referred to as 'CISG France'.
7. Hereafter referred to as 'CISG Netherlands'.
8. Hereafter referred to as 'CISG Carlos III'.

III. Court Decisions on the UN Law on International Sales

1. Scope of Application of the CISG

The courts of the Contracting States are obliged to apply the CISG *ex officio*.⁹ In particular, if an international contract of sale is the subject of dispute, a reference given by the parties that the CISG is the governing law is not necessary.¹⁰ The term ‘contract of sale’ is thereby to be determined autonomously. A contract of sale and not, for example, a contract of exchange exists if the main part of the consideration to be rendered by the buyer is a payment of money and if only a significantly smaller part is the delivery of goods.¹¹ In contrast to individually contracted delivery transactions concluded in the course of executing a contract of distribution, the contract of distribution itself is not a contract of sale in the context of the CISG.¹² Article 2 lit a) CISG explicitly excludes, however, purchases of goods for personal use, e.g. the purchase of a leisure boat for private purposes.¹³ In comparison to the solely objective distinction in national consumer protection laws, the CISG remains applicable if the seller assumed that the buyer acted as an intermediary – for example because the buyer stated that ‘a customer has already been found for the specific car’¹⁴ – and thus he had neither known nor should have known that the goods, in this case the vehicle, was actually bought for private purposes. In general, the seller is not obliged to inquire about the buyer’s intended use of the goods.¹⁵ Whether the delivery of prefabricated parts for the construction of a prefabricated house designed as a family apartment falls within the exception of Article 2 lit. a) CISG, has not been decided by the court before which this issue was brought.¹⁶ However, Article 2 lit. a) CISG applies only to the last stage of a sale, namely the sale to the private buyer.

The CISG governs its scope of application autonomously, thus no steps concerning Private International Law are required beforehand.¹⁷ The CISG rather applies directly to clear international contracts of sale of goods if these display a relation to at least one of the current Contracting States (Article 1 par. 1 and 2 CISG). However, debate continues as to whether Hong Kong is a Contracting State or not.¹⁸ Aside from this issue, the CISG is, on the one hand, applicable if the places of business of the seller and buyer are located in different Contracting States (Article 1 par. 1 lit. a) CISG); the vast majority of the cases arising in practice are correctly subsumed under this alternative.¹⁹ On the other hand, the CISG is applicable also if one or both of the countries in which the places of business are located are not Contracting States but the Private International Law leads to the application of the legal order of a Contracting State²⁰ (Article 1 par. 1 lit. b) CISG). For exporters in EU countries, this alternative means that either when selecting a national law²¹ or also without a choice of law (due to the rules for conflict of laws now regulated in Article 4 par. 1 lit. a) of the Regulation (EC) 593/2008 on the Law Applicable to

Contractual Obligations (Rome I)²², the CISG applies even to contracts with buyers who are not located in Contracting States of the CISG. However, the CISG does not apply if Private International Law leads to the legal system of a non-Contracting State.²³

The parties are free to alter the CISG with regard to its content or to exclude its application completely (Article 6 CISG). However, this requires a corresponding agreement between the buyer and the seller. The objection by only one party against the application of the CISG is not sufficient.²⁴ If both parties want to exclude the CISG but do not agree on the applicable law, agreement on the exclusion is also missing.²⁵ Yet, even if the parties agree on the applicable law, the CISG may still be applicable if the chosen law is that of a CISG Contracting State, since the CISG is part of that legal system.²⁶ For example, even the wording ‘Swiss internal law’ does not exclude the application

9. In contrast *Landgericht Ellwangen* – 20 O 12/10: The court commenced the hearing of 11 November 2010 in a German – US-American case by stating that one of the parties had referred to UN Sales Convention, with which nobody had dealt with ‘here’ before. The court therefore advanced the urgent proposal to conclude the case by settlement and continued that today’s hearing was scheduled to reach such a settlement.
10. In contrast *Supreme Court of Western Australia*, CISG online no. 2133.
11. *Hof ’s-Hertogenbosch*, CISG online no. 2179.
12. *High Commercial Court* (Serbia), CISG online no. 1990 and United States District Court, Maryland, judgment of 7 July 2011, CISG Pace.
13. *Efetio Pireos 520/2008* (Greece), CISG Pace.
14. *Oberlandesgericht Hamm*, IHR 2010, 59 *et seq.*, 61.
15. *Oberlandesgericht Hamm*, IHR 2010, 59 *et seq.*, 62.
16. *Obergericht des Kantons Aargau*, IHR 2010, 209 *et seq.*, 211.
17. In contrast *Landgericht Dresden*, CISG online no. 2174 and *Kantonsgericht Glarus*, CISG online no. 1996.
18. In favour: *United States District Court, Eastern District of Arkansas*, CISG online no. 2149, opposed: *United States District Court, Eastern District of Tennessee*, judgment of 20 October 2010, CISG Pace.
19. See the incorrect approach in *Audiencia Provincial de Valencia*, CISG online no. 2099, which applies the CISG towards the non-Contracting State United Kingdom based on Art. 1 I lit a) CISG.
20. *Cámara Nacional de Apelaciones en lo Comercial – Sala F, Buenos Aires*, CISG online no. 2156; *Tribunal Supremo* (Cuba), judgment of 16 June 2008, CISG Carlos III; *ICC Arbitration*, Yearbook of Commercial Arbitration XXXV, 2010, 129 *et seq.*, 131, 135; *Rechtbank Arnhem*, judgment of 10 February 2010, CISG Netherlands.
21. *Bundesgerichtshof*, IHR 2010, 216 *seq.*
22. Cf. *Landgericht Potsdam*, IHR 2009, 205.
23. *Rechtbank Rotterdam*, judgment of 30 June 2010, CISG Netherlands.
24. In contrast *Shanghai Higher People’s Court*, CISG online no. 1976.
25. *United States District Court, Southern District of New York*, CISG online no. 2178.
26. *Tribunal Supremo* (Cuba), judgment of 16 June 2008, CISG Carlos III.

of the CISG as the CISG is ‘internal and not foreign law’;²⁷ however the clause ‘*nationaal*’ Dutch law was deemed to be an effective exclusion.²⁸ Agreements such as ‘Australian law applicable under exclusion of UNCITRAL law’²⁹ are more distinct if the CISG is not mentioned specifically, whereas the text ‘Austrian law, excluding Private International Law, and UN Sales law’³⁰ could only be understood as an exclusion of the CISG contrary to its grammatical interpretation. Moreover, the agreement on the exclusion has to be concluded validly: exclusion clauses in standard terms and conditions are thus only effective if the standard terms and conditions are incorporated into the contract which, irrespective of the exclusion clause, is evaluated according to the terms of the CISG.³¹ An implicit exclusion can only be derived from other conduct if the parties are aware of the problem of application of law in international settings and thus their statements are based on this awareness and the will to exclude the CISG. Mere deliberation on the basis of a national sales law is therefore hardly an implicit exclusion, but rather rests upon a misjudgment of the legal situation.³² These court decisions seem to be critical of the attorney as they reproach him with having misjudged the legal situation, being unaware of the applicability of the CISG. But they are in effect not disadvantageous for the legal profession as the losing party cannot later accuse his legal advisor of derogating from the CISG, which would have been favourable in the specific case, without further examination.

In its scope of application, the CISG is primarily applicable and recourse to other regulations is precluded.³³ The CISG regulates the formation of the contract including the incorporation of standard terms and conditions, the formalities to be observed as well as the primary and secondary obligations of the buyer and the seller (Article 4, 11 and 29 par. 1 CISG). As far as a forum selection clause requires a substantive contract, its formation is also to be evaluated according to the CISG.³⁴ Moreover, due to its exhaustive rules, a discharge from performance cannot arise for any reason other than those listed in the CISG.³⁵ In contrast, the CISG does not contain rules concerning agency,³⁶ set-off³⁷ or limitation of actions.³⁸

2. Formation of Contract

In order to include standard terms and conditions into CISG-governed contracts it is important in the first instance to determine whether one can, using Article 14 *et seq.* CISG, ascertain a meeting of minds of the parties.³⁹ Even without discernible mutual consent in a given case, standard terms and conditions can become part of the contract if the other party has continuously received and paid invoices issued by the user of these terms where the terms and conditions were printed on the back of the invoice, and has also repeatedly accepted order confirmations that indicated the application of the standard terms and conditions.⁴⁰ Particular consideration regarding the use of mouse clicks is due when a purchasing portal is used.⁴¹ In the

absence of other agreements, customs, conventions or circumstances, standard 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 noticeably – which means, in cases of doubt, in the language of the negotiations⁴² – refers to the application of the standard terms and conditions to the pending contract⁴³ and the other party confirms the offer without objecting to the standard terms and conditions.⁴⁴ The text of the standard terms and conditions has to be presented to the other party no later than at the time of the offer.⁴⁵ The standard terms and conditions are thus not effectively agreed upon if the other party still has to procure the text of such terms and conditions.⁴⁶ As

27. *ICC Arbitration*, Case No. 12365, CISG online 2143.
28. *Rechtbank Dordrecht*, judgment of 16 February 2011, CISG Netherlands.
29. *Federal Court of Australia*, IHR 2009, 160 *et seq.*
30. *Oberster Gerichtshof* (Austria), ZfRV 2009, 124 *et seq.*
31. *Kantonsgericht St. Gallen*, CISG online no. 2159; differing *Rechtbank Rotterdam*, judgment of 13 October 2010, CISG Netherlands.
32. *Oberlandesgericht Hamm*, NJW-RR 2010, 708 *et seq.*; clearly more generous *United States District Court, Southern District of New York*, CISG online no. 2170.
33. *Audiencia Provincial de Murcia*, CISG online no. 2130 on the non-application of Art. 1.454 Código Civil.
34. *Oberlandesgericht Celle*, IHR 2010, 81 *et seq.*; *Rechtbank Rotterdam*, CISG online no. 2180; *Rechtbank Amsterdam*, CISG online no. 2065; *United States District Court, M. D. Alabama, Eastern Division*, CISG online no. 2092; *United States District Court, Eastern District of California*, CISG online no. 2089.
35. *Hof van Cassatie*, CISG online no. 1963 (‘*imprevisieeler*’ not applicable).
36. *Rechtbank Amsterdam*, CISG online no. 2067; *Oberlandesgericht Schleswig*, IHR 2009, 243 *et seq.*
37. *Bundesgerichtshof*, IHR 2010, 217 *et seq.*, 221; on the set-off of claims arising under contracts to which the Convention is applicable, also, see *Landgericht Stuttgart*, CISG online no. 2017 and *Kantonsgericht Zug*, CISG online no. 2026.
38. *Rechtbank Rotterdam*, judgment of 2 June 2010, CISG Netherlands.
39. *Rechtbank Arnhem*, judgment of 10 February 2010, CISG Netherlands.
40. *Hof ’s-Gravenhage*, judgment of 19 April 2011, CISG Netherlands; cf. also *Rechtbank Rotterdam*, CISG online no. 2181.
41. *Rechtbank Rotterdam*, CISG online no. 2180.
42. *Oberster Gerichtshof* (Austria), IHR 2009, 126 *seq.*
43. *Oberlandesgericht Jena*, IHR 2011, 79 *et seq.*, 80; *Rechtbank Zwolle*, CISG online no. 2069; *United States District Court, Maryland*, CISG online no. 2177.
44. Closer on this matter *Hof ’s-Hertogenbosch*, judgment of 17 May 2011, CISG Netherlands.
45. *Landgericht Aachen*, IHR 2011, 82 *et seq.*, 85.
46. *Oberlandesgericht Jena*, IHR 2011, 79 *et seq.*, 81; *Oberlandesgericht Celle*, IHR 2010, 81 *et seq.*, 83; *Rechtbank Almelo*, judgment of 27 April 2011, CISG Netherlands; *Rechtbank ’s-Hertogenbosch*, judgment of 26 January 2011, CISG Netherlands; *Rechtbank Arnhem*, CISG online no. 2070; more generous *Rechtbank ’s-Gravenhage*, judgment of 7 July 2010, CISG Netherlands.

such, in contrast to an attachment containing the standard terms and conditions in an e-mail,⁴⁷ accessibility on a website⁴⁸ is not considered to be sufficient mode of communication.

Provided no alternative provisions are applicable, an offer has to be accepted 'within a reasonable time', (Article 18 par. 2 CISG). An offer submitted via e-mail is thus to be accepted promptly, in any case within eight days.⁴⁹ If the acceptance deviates substantially from the offer, the offer is rejected and the reply constitutes a counter-offer (Article 19 par. 1 CISG). A typical example of a substantial deviation is an acceptance which refers to standard terms and conditions with a choice-of-forum clause.⁵⁰ On the other hand, a contract may be formed if the deviation is not substantial (Article 19 par. 2 CISG), for example, if a mere optional technical configuration of the goods is refused.⁵¹

3. Primary Obligations of the Seller and the Buyer

With regard to the obligation of the seller to deliver the goods, Article 31 CISG distinguishes as to whether or not a sale involving carriage of goods has been concluded. Delivery obligations which are provided with the Incoterm clause 'CIP' constitute a sale involving carriage as under Article 31 lit. a) CISG.⁵² The same is true for all other Incoterm C clauses. As it cannot be assumed that the 'legal concept of the place of performance and of the place of delivery will be correctly kept apart in everyday and commercial speech',⁵³ agreements concluded without using an Incoterm clause require interpretation as to their meaning. If the seller is to transport the goods to the buyer with its own staff and vehicle, none of the variants of Article 31 CISG are applicable. Instead, the parties have agreed on an obligation for the seller to be performed at the buyer's place of business ('*Bringschuld*').⁵⁴ However, clauses such as 'Free ...' continue to be interpreted inconsistently, namely partly as an agreement on the place of performance⁵⁵ and partly as a mere cost clause.⁵⁶ Legal practice should thus avoid the use of clauses which are not consistently interpreted and instead draw upon Incoterms as these prevent such doubts from arising. The current version of the Incoterms (Incoterms 2010) was published on 1 January 2011.⁵⁷

Article 53 CISG provides that the buyer has to pay the purchase price for the goods. In case of doubt about the agreement and the amount of a discount on the purchase price, the burden of proof rests with the buyer.⁵⁸ However, a difference arises if the purchase price can only be determined by consideration of a bulk discount that depends on the size of the order.⁵⁹ In case of doubt, the place of payment is the place of business of the seller (Article 57 par. 1 lit. a) CISG). This does not change if the payment shall only be made 'after' arriving of the container, because such a stipulation does not qualify as an agreement to pay against the handing over of the goods.⁶⁰

Subject to a right to suspension according to Article 71 CISG⁶¹ or an exemption according to Article 80 CISG, each party to the contract is liable for its failure to fulfil its obligations. Only under very limited conditions does Article 79 CISG provide that the party that does not perform according to the contract is nonetheless not liable for its failure and does not have to pay damages. Other facts that are not specified in the CISG, such as 'hardship' or '*imprévision*',⁶² do not as a matter of course lead to a release from an obligation.

4. Breach of Contract by the Seller

a) *Non-conformity of the goods.* After delivery has taken place, the burden of proving the existence of the non-conformity of the goods rests upon the buyer.⁶³ Even the fast and mainly oral dealings in the flower industry do not justify deviation from this rule.⁶⁴ Non-conformity is present if the delivered goods do not conform to the deal or the characteristics agreed upon (Article 35 par. 1 CISG). Aside therefrom, the goods are deemed to be non-conforming if they do not meet the requirements of Article 35 par. 2 CISG. The fitness for ordinary use prescribed in Article 35 par. 2 lit a) CISG requires in commercial trade that the goods can be resold.⁶⁵ Standards which are valid in the country of the seller as well as of the buyer are to be taken into account; if the goods do not comply with these standards they are non-conforming.⁶⁶ In case of differing standards, the fitness of the goods for ordinary use is determined by the provisions in the country of the

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47. *United States District Court, Eastern District of California*, CISG online no. 2089.
 48. *Oberlandesgericht Celle*, IHR 2010, 81 *et seq.*, 83.
 49. *Oberlandesgericht Dresden*, CISG online no. 2183.
 50. *Kantonsgericht St. Gallen*, CISG online no. 2159; *United States District Court, Maryland*, CISG online no. 2177; *United States District Court, M. D. Alabama*, CISG online no. 2092.
 51. *Oberlandesgericht Koblenz*, NJW-RR 2010, 1004 *seq.*
 52. *Cour d'Appel de Paris*, judgment of 19 November 2010, CISG France.
 53. *Obergericht des Kantons Zürich*, IHR 2010, 108 *et seq.*, 112.
 54. *Obergericht des Kantons Zürich*, IHR 2010, 108 *et seq.*, 112.
 55. *Oberlandesgericht Düsseldorf* ('Free house'), CISG online no. 2173.
 56. *Oberlandesgericht München* ('Free building site'), CISG online no. 2011 und *Oberlandesgericht München* ('Delivery free dispatch'/'Resa: Franco Partenza'), judgment of 17 April 2008, <www.juris.de>.
 57. For more detail see *Piltz*, EJCCL 2011, 1 *et seq.*
 58. *Oberlandesgericht Saarbrücken*, IHR 2010, 202 *et seq.*, 205.
 59. *Oberlandesgericht Saarbrücken*, IHR 2010, 202 *et seq.*, 205.
 60. *Oberlandesgericht Saarbrücken*, IHR 2010, 202 *et seq.*, 204.
 61. Approving a general right of retention beyond this, *Rechtbank Arnhem*, CISG online no. 1939.
 62. *Hof van Cassatie*, CISG online no. 1963.
 63. *Hof van Beroep te Gent*, judgment of 7 October 2009, <jur.juridat.just.fgov.be>.
 64. *Landgericht München*, IHR 2010, 150 *et seq.*, 151.
 65. *Audiencia Provincial de Zaragoza*, CISG online no. 2085.
 66. *Rechtbank Zwolle*, CISG online no. 2069.

seller;⁶⁷ this even applies if the seller knew about the 'destination of the goods'.⁶⁸ The particular trust of the buyer in the seller's skill and judgment – in the meaning of Article 35 par. 2 lit. b) CISG – is not justified if the seller recommended that an expert be consulted.⁶⁹

In order to ensure the provision of a remedy in case of delivery of non-conforming goods, the buyer has to give notice of the non-conformity to the seller (Article 39 CISG). The submission of an examination report without comment or the mere notification of a short circuit is deemed not to be indicative of the buyer's intention to object to the goods delivered and thus does not constitute notice in the sense of Article 39 CISG.⁷⁰ This approach, however, goes beyond the requirement of a 'notice' in Article 39 par. 1 CISG, which only determines that the lack of conformity is to be notified, not a particular complaint. Rather, whether such notifications give a sufficient description of the lack of conformity would have to be examined. In general, each non-conformity is to be specified⁷¹ and an adequate description of the indications thereof is required. Statements such as 'substantial defects of the vehicle' and 'not professionally fixed' do not meet these requirements;⁷² the same is also true for observations that the agreed standard of quality has not been reached.⁷³ However, it is in accordance with the provisions of Article 39 CISG if the seller is able to react appropriately to the notice.⁷⁴

According to Article 39 par. 1 CISG, the buyer has to give notice within a reasonable period of time. Whereas the courts in Austria continue to set a general period of 14 days,⁷⁵ the German and Swiss courts tend to set a period of one month.⁷⁶ Yet, a period of three months is not accepted, not even with respect to a printing machine.⁷⁷ Where groceries and plants are concerned, the periods of time are significantly shorter (delayed by 10-16 days for mushrooms⁷⁸ and 12 days for citrus fruits;⁷⁹ delayed by 3-6 days for potatoes;⁸⁰ delayed by four weeks for larch trees⁸¹). Dutch court decisions have approved periods of time for reclamation, which were contained in the standard terms and conditions, of 72 hours for prawns⁸² and frozen meat⁸³ and of five working days for trees, plants and flower bulbs.⁸⁴

The time period for the notice begins as soon as the buyer has discovered or ought to have discovered the non-conformity (Article 39 par. 1 CISG). If the non-conformity has not 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). In the potato industry, it was concluded from the agreement 'good quality accepted in Holland and Germany' that the examination was allowed to be postponed until the goods arrived at the customers in the Netherlands and Germany respectively.⁸⁵ Otherwise, the buyer cannot defer the notice to be made to the seller of non-conformities claimed by his customer until the result of another examination is available.⁸⁶ According to Article 39 par. 2 CISG, the

buyer loses any right to rely on non-conformity of the goods if a period of two years has passed since the goods were actually handed over.⁸⁷ This two-year time limit is not a limitation period regarding legal action but an absolute cut-off period.⁸⁸ The time limit can be reduced, but is not shortened simply by a contractual guarantee of one year.⁸⁹

In the event that the buyer does not give correct notification of the non-conformity, he risks the loss of a remedy. However, remedies may nevertheless still be available if the seller waives the requirement of proper notice, or if the buyer can excuse his failure to give proper notice (Article 44 CISG) or if he can rely on Article 40 CISG. However, if the seller possesses a negative test certificate, that he knew or could not have been unaware of the non-conformity in the sense of Article 40 CISG cannot be held against him.⁹⁰ Yet, if the seller delivers products other than those contractually agreed upon, it seems likely that the seller knew or could not have been unaware of this non-conformity.⁹¹ If, on the other hand, the buyer has given proper notification of the non-conformity, he is

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67. *High Court of New Zealand*, CISG online no. 2113.
 68. *Ibid.*
 69. *Ibid.*
 70. *Oberlandesgericht Düsseldorf*, CISG online no. 2171; *Landgericht Stuttgart*, IHR 2010, 207 *seq.*
 71. For more detail see *Oberlandesgericht Düsseldorf*, CISG online no. 2171.
 72. *Oberlandesgericht Hamm*, NJW-RR 2010, 708 *et seq.*
 73. *Hof Arnhem*, CISG online no. 2072.
 74. *Oberster Gerichtshof (Austria)*, IHR 2011, 85 *et seq.*, 88.
 75. *Ibid.*
 76. *Oberlandesgericht Hamm*, NJW-RR 2010, 708 *et seq.*; *Landgericht Münster*, CISG online no. 2167; *Kantonsgericht Glarus*, IHR 2010, 152 *et seq.*, 153.
 77. *Landgericht Stuttgart*, IHR 2010, 207 *seq.*
 78. *Hof van Beroep te Gent*, judgment of 13 October 2010, <jur.juridat.just.fgov.be>.
 79. *Hof Arnhem*, CISG online no. 2072; *Hof Amsterdam*, judgment of 19 January 2009, CISG Netherlands.
 80. *Hof 's-Hertogenbosch*, judgment of 9 March 2010, CISG Netherlands.
 81. *Hof van Beroep te Gent*, judgment of 6 May 2009, <jur.juridat.just.fgov.be>.
 82. *Hof 's-Gravenhage*, judgment of 19 April 2011, CISG Netherlands.
 83. *Rechtbank Rotterdam*, CISG online no. 2181.
 84. *Hof Arnhem*, judgment of 22 February 2011, CISG Netherlands.
 85. *Hof 's-Hertogenbosch*, judgment of 9 March 2010, CISG Netherlands.
 86. *Hof Arnhem*, CISG online no. 2095.
 87. *Cour de Cassation*, CISG online no. 1977.
 88. Cf. *Cour de Cassation*, CISG online no. 1843 and the dissenting previous court *Cour d'Appel d'Amiens*, CISG online no. 1934.
 89. *Cour d'Appel de Paris*, CISG online no. 2034.
 90. *Cour d'Appel de Rouen*, CISG online no. 1933.
 91. Cf. *Shanghai First Immediate People's Court*, CISG online no. 2059.

entitled to the whole array of remedies provided for in Article 45 CISG to the extent that they have not been effectively excluded in the contract.⁹² The limitation of the remedies is assessed for those countries that have not ratified the UN Convention on the Limitation Period in the International Sale of Goods⁹³ according to the national law appointed by Private International Law.⁹⁴ A high court decision concerning the interaction between the two-year time limit of Article 39 par. 2 CISG⁹⁵ and the one-year limitation period of Article 210 of the Swiss Code of Obligations⁹⁶ is still awaited.

b) *Remedies for the buyer.* In case of a failure to perform by the seller, Article 45 CISG provides that the buyer can require performance, avoid the contract or claim damages. Article 74 *et seq.* CISG regulate the extent of the damages to be paid.⁹⁷ The sole basis for the claim of damages is Article 45 par. 1 lit. b) CISG. In contrast to some national laws, no kind of fault or negligence on the part of the seller is required. While exporters are thus advised to include appropriate limitations to liability, this characteristic makes the CISG very appealing for importers. This particularly applies if the importer purchases from an intermediary: under some national laws, a seller who is not the manufacturer is not, subject to certain circumstances, always liable to pay damages if he did not know of or cause the defect.

The buyer may declare the contract avoided if the breach of contract by the seller is deemed fundamental under the meaning of Article 25 CISG (Article 49 par. 1 lit. a) CISG). The term is to be interpreted restrictively: in case of doubt the presence of a fundamental breach of contract is to be negated.⁹⁸ In case of a failure to perform by the seller, the buyer shall first seek the other remedies provided in the CISG, particularly reduction of the purchase price and damages, but not be able to declare the contract avoided.⁹⁹ However, the breach of the contract by the seller is fundamental if he irrevocably and comprehensively negates his contractual obligations.¹⁰⁰ A fundamental breach of contract can also arise through the violation of an assurance of exclusivity.¹⁰¹ Yet, according to the CISG, the mere non-conformity of the delivered goods does not suffice in declaring the contract avoided.¹⁰² The same applies if only 5% of the delivery does not conform to the contractual agreement.¹⁰³ However, by contrast, the situation is different if an onward sale or another use of the delivered, non-conforming goods is not possible or not reasonable for the buyer.¹⁰⁴ Therefore, a fundamental breach of contract does not arise just because the delivered goods cannot be resold with their designated purpose due to the non-conformity.¹⁰⁵ In fact, it would be for the buyer further to prove that a different use of the goods was not reasonable. The latter may be the case if, for instance, the buyer is the ultimate buyer and does not trade with goods of that kind.¹⁰⁶ In other words, even if the breach of contract is not or cannot be rectified, it is not fundamental and thus an avoidance of the contract is not justified if the delivered

goods can be sold under reasonable conditions or can be used in a different way.¹⁰⁷

Moreover, an avoidance of contract further requires that the buyer can return the received goods to the seller substantially intact or that the buyer can rely on one of the exceptions (Article 82 CISG). In case of divisible performance, the buyer only loses the right to avoid the contract with regard to the part of the delivery which he cannot return, even though he is obliged to do so.¹⁰⁸ Furthermore, the buyer has to give notice of the avoidance of the contract to the seller (Article 26 CISG). This notice, to which Article 27 CISG applies,¹⁰⁹ need not necessarily be formulated explicitly, yet has to be expressed unequivocally. A request made to the seller after the expiration of an extra time limit to refund payments meets these requirements.¹¹⁰ Moreover, the declaration of avoidance has to be made within a reasonable period of time (Article 49 par. 2 CISG). Where machines are concerned, a declaration of avoidance within one to two months after the breach of contract ought to have been known is considered a reasonable time.¹¹¹ However, according to present court decisions, a declaration of avoidance made after five months is considered to be late.¹¹²

92. *Oberlandesgericht Dresden*, CISG online no. 2182.

93. Currently, Contracting States are Egypt, Argentina, Belgium, Dominican Republic, Guinea, Cuba, Liberia, Mexico, Moldova, Paraguay, Poland, Romania, Zambia, Slovakia, Slovenia, Czech Republic, Uganda, Hungary, Uruguay, USA and Belarus.

94. See above fn. 38.

95. See above fn. 88.

96. *Bundesgericht*, IHR 2010, 27 *et seq.*

97. See section 6 below.

98. *Bundesgericht*, IHR 2010, 27 *et seq.*, 28.

99. *Ibid.*

100. *Oberlandesgericht Frankfurt*, IHR 2010, 250 *et seq.*, 253.

101. *Rechtbank Amsterdam*, CISG online no. 2067.

102. For a different approach, albeit without explanation, see *Regional Court Zilina*, CISG online no. 1865.

103. *Hof van Beroep te Gent*, judgment of 7 October 2009, <jur.juridat.just.fgov.be>.

104. See the fundamental decision of the *Bundesgerichtshof* on this matter, NJW 1996, 2364 *et seq.*

105. See *Oberlandesgericht Düsseldorf*, CISG online no. 2171; *Hof Leeuwarden*, judgment of 9 November 2010 and *Hof Amsterdam*, judgment of 13 February 2009, both CISG Netherlands; *Monomeles Protodikio Thessalonikis* 14953/2003, CISG Pace.

106. *Bundesgericht*, IHR 2010, 27 *et seq.*, 29.

107. *Tribunal Supremo* (Cuba), judgment of 16 June 2008, CISG Carlos III.

108. *Oberster Gerichtshof* (Austria), IHR 2011, 85 *et seq.*, 88.

109. *Rechtbank Arnhem*, CISG online no. 1939.

110. *Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry*, CISG online no. 1941.

111. *Bundesgericht*, IHR 2010, 27 *et seq.*, 30.

112. In contrast, yet without disputing with the converse jurisdiction, *Rechtbank Arnhem*, CISG online no. 1939.

In case of a delivery of non-conforming goods, the buyer also has the remedy of reducing the price instead of declaring the contract avoided (Article 50 CISG). In contrast to Articles 26, 49 CISG, Article 50 CISG requires neither a fundamental breach of contract¹¹³ nor a special declaration of the reduction of the purchase price, if it is clear that the buyer reduces the purchase price due to non-conforming goods while nevertheless maintaining the contract.¹¹⁴ If the buyer pleads its right to reduce the price, the remedy is executed.¹¹⁵ Subsequently, the agreed purchase price is to be adjusted in proportion to the deficit in performance of the seller.¹¹⁶ The basis for calculating this proportion is the relation between the objective value of flawless goods and of the non-conforming goods, which has to be proven by the buyer.¹¹⁷ However, it is not correct to simply reduce the agreed price by a percentage.¹¹⁸ In addition, the buyer is free to claim damages from the seller for continuing losses which are not covered, for example over-paid import duties, unless an agreement on the reduction of the price excludes such claims.¹¹⁹

5. Breach of Contract by the Buyer

The basis for a claim to enforce the payment of the purchase price not having been paid according to the contract is Article 62 CISG.¹²⁰ A payment not in time does not generally lead to a fundamental breach of contract that would justify the avoidance of the contract according to Article 64 par. 1 lit. a) CISG. This especially applies if the seller has repeatedly accepted delayed payments and, in the particular case, also continued to communicate with the buyer after the time limit for the payment had expired.¹²¹ In addition, the extraordinary termination of a distribution agreement does not automatically lead to an avoidance of the individual contracts of sale concluded on the basis of this agreement.¹²²

According to Article 78 CISG, the seller is entitled to claim interest on payments which are in arrears. As far as the parties have not concluded any agreements thereon,¹²³ the rate of the interest to be applied is in some cases determined by referring to the national law appointed by Private International Law,¹²⁴ whereas others consult the interest rate of the currency in which the payment is to be made¹²⁵ or the interest rate applicable at the seller's place of business.¹²⁶ However, Article 395 of the Russian Civil Code is not applicable to payments made in foreign currencies.¹²⁷ An approach often used is the reference to the national laws on interest, such as § 288 of the German Civil Code, that have been implemented in light of the Directive 2000/35/EC on combating late payment in commercial transactions.¹²⁸ However, according to Article 78 CISG, the interest is solely initiated by late payment, whereas the aforementioned Directive provides for continuing requirements, namely some kind of negligence or fault of the debtor. Consequently, this rate of interest does not correspond with the underlying objective of Article 78 CISG.

6. Damages

Subject to an exemption under Article 79 CISG, every breach of a contractual obligation establishes a claim for damages (Article 45, 61 CISG). If the contract were avoided due to a breach of contract, irrespective of continuing losses, the creditor of the damages may either enter into a reasonable substitute transaction with a third party to the disadvantage of the debtor¹²⁹ (Article 75 CISG), or if such a transaction is not feasible,¹³⁰ recover the difference between the price fixed by the contract and the current market price (Article 76 CISG). The latter option also exists if the entitled buyer makes use of its own stock or does not undertake anything further.¹³¹ Nonetheless, the

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113. *Rechtbank Rotterdam*, judgment of 1 June 2011, CISG Netherlands.
114. See *Audiencia Provincial de Barcelona*, CISG online no. 2042.
115. *Oberlandesgericht Düsseldorf*, CISG online no. 2171.
116. See, for example, *Oberlandesgericht Düsseldorf*, CISG online no. 2171.
117. *ICC Arbitration Case No. 12355*, ICC International Court of Arbitration Bulletin 21/1 (2010), 79 *et seq.*
118. In contrast *Landgericht Stuttgart*, CISG online no. 2017 and *China International Economic and Trade Arbitration Commission (CIETAC)*, CISG online no. 1807.
119. See *Oberster Gerichtshof* (Austria), IHR 2011, 38 *seq.*
120. *Oberlandesgericht Brandenburg*, judgment of 19 March 2009, <www.iuris.de>.
121. For more detail see *Oberlandesgericht Frankfurt*, IHR 2010, 250 *et seq.*, 252; cf., however, not ultimately based on an avoidance of contract, *United States District Court, Southern District of New York*, CISG online no. 1892.
122. *Handelsgericht Kanton Aargau*, CISG online no. 2176.
123. *Cámara Nacional de Apelaciones en lo Comercial – Sala F, Buenos Aires*, CISG online no. 2156; *Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry*, CISG online no. 1943.
124. *Audiencia Provincial de Valencia*, CISG online no. 2083; *Tribunal Cantonal du Valais*, CISG online no. 2025; *United States District Court, New Jersey*, IHR 2010, 64 *seq.*
125. *Foreign Trade Court of Arbitration (Serbia)*, award of 16 March 2009, CISG Pace; *Foreign Trade Court of Arbitration (Serbia)*, CISG online no. 1856; *Judicial Board of Szeged (Hungary)*, CISG online no. 1937; *Supreme Economic Court of the Republic of Belarus*, judgment of 13 May 2000, CISG Pace
126. *Cámara Nacional de Apelaciones en lo Comercial – Sala F, Buenos Aires*, CISG online no. 2156.
127. *Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry*, CISG online no. 1484.
128. *Oberlandesgericht Saarbrücken*, IHR 2010, 202 *et seq.*, 207; *Rechtbank Almelo*, judgment of 17 May 2011, CISG Netherlands; *Tribunal Cantonal du Valais*, CISG online no. 2025.
129. *Cámara Nacional de Apelaciones en lo Comercial – Sala F, Buenos Aires*, CISG online no. 2132.
130. *Cámara Nacional de Apelaciones en lo Comercial – Sala F, Buenos Aires*, CISG online no. 2132.
131. *Oberlandesgericht Frankfurt*, IHR 2010, 250 *et seq.*, 254.

requirement for both options is that avoidance of the contract is declared.¹³²

As a general rule, precise evidence is required with respect to the damages claimed.¹³³ However, Article 74 CISG does not cover payments made as a penalty.¹³⁴ Aside from this, damages are recoverable to the extent that the losses were foreseen or foreseeable. Thus, a buyer who does not make a timely payment has, in principle, to also compensate for the costs of the seller for debt collection¹³⁵ as well as for pre-litigation legal fees¹³⁶ as far as the obligation to mitigate the loss (Article 77 CISG) has not been violated.¹³⁷ Even differences in exchange rates may be recoverable.¹³⁸

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132. In contrast *Oberlandesgericht Frankfurt*, IHR 2010, 250 *et seq.*, 253 in case of serious and final refusal of performance.
 133. *Bundesgericht*, CISG online no. 2022.
 134. *Cour d'Appel de Poitiers*, judgment of 26 February 2009, CISG France.
 135. *Rechtbank Almelo*, judgment of 17 May 2011, and *Rechtbank Utrecht*, judgment of 29 December 2010, both CISG Netherlands; *Rechtbank Rotterdam*, CISG online no. 2098.
 136. *Landgericht München*, IHR 2010, 150 *et seq.*, 152; *Landgericht Potsdam*, IHR 2009, 205; *Landgericht Hamburg*, CISG online no. 1999; *Kantonsgericht Zug*, CISG online no. 2024; also *Rechtbank Almelo*, judgment of 4 May 2011, CISG Netherlands.
 137. *Landgericht Stuttgart*, CISG online no. 2017.
 138. *Tribunal Cantonal du Valais*, CISG online no. 2025.