International Sales Law
A Critical Analysis of CISG Jurisprudence

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This book is the product of extended research by five scholars working in the area of private international law. It provides a comprehensive review and analysis of the jurisprudence surrounding the United Nations Convention on Contracts for the International Sale of Goods (CISG). As of February 15, 2005, sixty-four countries have adopted the CISG as their international sales law. Given its importance as the world's preeminent sales law, the authors believe that a fresh analysis of the evolving case and arbitral law is needed at this time. It has been fifteen years since the adoption of the CISG, and in those years a critical mass of interpretive jurisprudence has developed. The analysis in the book is undertaken at two levels – the practical interpretation of the CISG and the theoretical limits of interpreting of supranational conventions.

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To Colleen and Ian Griffith DiMatteo,
and to friends old and wise: Jeffery and Janet Barat, Lucy DiVirgilio,
Pat and Anne Dooley, Nadim and Christine Habib, Jeffrey and Marcie LePine,
Michael Meagher, Robert and Ann Marie Morrow, Joseph and Rita Zinni

LAD

To Julia

LJD

To Tom, Tucker, Natasha, and Melissa Greene

SG

To the guys – Ralph Gerald, Ralph Emmett, and William Edward Maurer

VGM

To Marian and Peter Pagnattaro

MAP

CONTENTS

Preface *page* xi
Acknowledgments xiii

1 INTRODUCTION 1
CISG as International Convention 8
Principle of Uniformity 10
Strict or Absolute Uniformity versus Relative Uniformity 10
Uniformity through Original or Autonomous Interpretation 11
CISG as Soft Law: Uniformity through the Prism of Customary International Law 13

2 CISG METHODOLOGY AND JURISPRUDENCE 19
Interpretive Methodology 22
General Principles 23
Principle of Good Faith 27
General Default Rules and Specific Default Rule Creation 29

3 FORMATION: WRITING REQUIREMENTS 32
Precontractual Liability 32
Writing Requirements and the Parol Evidence Rule 38
The Writing Requirements of Articles 11, 12, and 13 40
Parol Evidence: National Courts and Articles 11 and 29 43
Admissibility of Parol Evidence 44
Types of Extrinsic Evidence 45
Contract Modification 47

4 FORMATION: OFFER AND ACCEPTANCE RULES 51
Offer Rules and Open Price Term: Articles 14 and 55 53
Firm Offers: Articles 15–17 and 20–24 59
Rules of Acceptance: Article 18 60

Battle of the Forms 66
National Courts and Article 19 67

5 OBLIGATIONS OF BUYERS 76
The Duty to Inspect, Give Notice, and Preserve Goods 76
Inspection Duties and Rights: Article 38 78
Notice of Nonconformity: Article 39 84
Reasonable Excuse: Article 44 91
Payment of Price and the Taking of Delivery 93
Formalities of Payment: Article 54 94
Price: Article 55 95
Place of Payment: Article 57 97
Time of Payment: Article 58 99

6 OBLIGATIONS OF SELLERS 101
The Duty of Delivery 101
Place of Delivery: Article 31 104
Time of Delivery: Article 33 107
Express and Implied Warranties 107
Warranties: Article 35 110
Risk of Loss and Warranties: Article 36 118
Effect of Seller's Knowledge: Article 40 119

7 COMMON OBLIGATIONS OF BUYERS AND SELLERS 121
Passing of Risk 121
Fundamental and Anticipatory Breach 123
Fundamental Breach: Article 25 125
Anticipatory Breach, Adequate Assurance, and Installment Contracts: Articles 71–73 128

8 BREACH OF CONTRACT BY SELLER 132
Right to Substituted or Repaired Goods 133
Right to Affix Additional Time 134
Right to Avoid Contract 135
Right to a Price Reduction 138

9 BREACH OF CONTRACT BY BUYER 140
Nachfrist Notice: Article 47 142
Late Performance: Article 48 145
Avoidance of Contract: Article 64 146
Effects of Avoidance: Articles 81–84 149

10 DAMAGES, EXCUSE, AND PRESERVATION 151
Calculation of Damages: Articles 75 and 76 151
Limiting Doctrines: Articles 74 and 77 153
Doctrine of Foreseeability 154
Attorney Fees and Debt Collection 156
Doctrine of Mitigation 157
Impediment (Excuse) to Performance: Article 79 158
Preservation of Goods: Articles 87 and 88 160

11 SUMMARY AND OBSERVATIONS 163
Developing an International Jurisprudence 164
Filling in the Gaps and the Fabrication of Specific Default Rules 165
Particularized Express Consent 166
Importance of Trade Usage in CISG Rule Application 168
Importance of Notice 171
Burden of Proof 172
Persistence of *Homeward Trend* 174
Summary 177

TABLE OF AUTHORITIES AND CASES 179

APPENDIX A: UNITED NATIONS CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS (CISG) (APRIL 11, 1980) 209

APPENDIX B: CISG: TABLE OF CONTRACTING STATES (AS OF FEBRUARY 8, 2005) 231

Index 233

PREFACE

This book is the product of extended research by five scholars working in the area of private international law. It provides a comprehensive review and analysis of the jurisprudence surrounding the United Nations Convention on Contracts for the International Sale of Goods (CISG). As of February 8, 2005, sixty-four countries have adopted the CISG as their international sales law. Given its importance as the world's preeminent sales law, the authors believe that a fresh analysis of the evolving case and arbitral law is needed. It has been fifteen years since the CISG, went into effect on January 1, 1988, and in those years a critical mass of interpretive jurisprudence has developed. The analysis in the book is undertaken at two levels – the practical interpretation of the CISG and the theoretical limits of interpretation of supranational conventions.

Critics have argued that the benefits of uniform international business law are minimal and that national courts will inevitably be the conscious or subconscious victims of *homeward trend* or *domestic gloss* analysis. In responding to this criticism, the authors address the following four questions:

- How has the CISG in fact been interpreted and applied by the various national courts?
- Is there evidence of convergence or divergence among the national courts in interpreting the CISG?
- Is the current level of disharmony associated with divergent national interpretations acceptable from the perspective of the CISG's mandate of uniformity?
- How does divergence in national interpretations impact the effectiveness or functionality of the CISG?

The book concludes that despite the problem of diverging interpretations, there are signs that courts are taking more seriously their role in applying CISG

interpretive methodology. There is evidence of a coalescing of the different interpretations through the formulation of more specific default rules and the recognition of factors to be used in applying CISG articles.

This book provides an analysis of those provisions of the CISG that have been applied in a "critical mass" of court and arbitral decisions. In doing so, the book assesses the state of international sales law. The book is timely given the maturing state of CISG jurisprudence.

INTENDED AUDIENCE

The book presents some theoretical themes but is mostly a descriptive work. It reviews case law and arbitral decisions in order to gain insight into the various interpretations rendered on the general and often ambiguous provisions of the CISG. Cases are described and analyzed to determine interpretive trends such as evolving default rules and factors analyses. The authors believe that the book's ultimate character is as a general reference work aimed at practitioner and scholarly researchers. It is not meant to compete with the more comprehensive volumes currently in existence. It is meant to add to that literature by providing a fresh analysis of CISG jurisprudence. Legal cases, arbitral decisions, and the secondary literature are listed in the Table of Authorities and Cases, which is segmented by areas and CISG articles. Finally, the text of the CISG and a list of signatory countries are provided in the Appendices.

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Gainesville, Florida
October 1, 2004

CHAPTER ONE

INTRODUCTION

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

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

A hopeful note was expounded 250 years ago by Lord Mansfield when he stated that "mercantile law . . . is the same all over the world. For from the same premises, the sound conclusions of reason and justice must universally be the same."[3] The universality of commerical practice provides the opportunity to structure a uniform law of sales premised upon the commonality of practice. It is on this view of the universality of commercial practice that the success of a uniform international sales law is hinged. Critics of such a view assert that such uniformity efforts are both unwise and doomed to failure. Unwise, because there are substantial and reasonable differences in national practices that are reflected in differences in national laws. Doomed to failure, because legal and cultural differences will necessarily be reflected in the national courts' interpretations of a supranational sales law. Thus, the uniformity of form (a single body of rules) will lose to non-uniform application (jurisprudential chaos). A middle view between Mansfield's idealism and the realist critque will be discussed later in this chapter. The middle view is that absolute uniformity of application should not be the test to measure the success of any international

[1] R. J. C. Munday, *The Uniform Interpretation of International Conventions*, 27 Int'l & Comp. L.Q. 450, 450 (1978).

[2] Franco Ferrari, *Ten Years of the U.N. Convention: CISG Case Law – A New Challenge for Interpreters?*, 17 J. L. & Com. 245, 254 (1998).

[3] *Pelly v. Royal Exchange Assurance Co.*, 97 Eng. Rep. 342, 346 (1757).

sales law. Instead, a standard of common discourse or relative uniformity of application is a more appropriate measurement. In the end, the true test should be whether a uniform law of sales has reduced the legal impediments to international trade. Does the uniform law provide a common legal discourse that is facilitative of international business transactions?

Despite the questions involving uniformity of application, the United Nations Convention on Contracts for the International Sale of Goods (CISG) was adopted on April 11, 1980, and entered into force on January 1, 1988, under the auspices of the United Nations Commission on International Trade Law (UNCITRAL).[4] Critics have argued that the benefits of uniform international business law are minimal,[5] and that national courts will inevitably be the conscious or subconscious victims of *homeward trend*.[6] Homeward trend

[4] United Nations Convention on Contracts for the International Sale of Goods, April 11, 1980, 1489 U.N.T.S. 3, 19 I.L.M. 671, *available at* Pace Law School Institute of International Commerce Law, http://www.cisg.law.pace.edu (hereafter CISG). The CISG was incorporated into the law of the United States on January 1, 1988. *See generally* E. Allan Farnsworth, *The Vienna Convention: History and Scope*, 18 Int'l Law. 17 (1984); John O. Honnold, Documentary History of the Uniform Law for International Sales (1989) (hereafter, Honnold, Documentary History). The CISG officially went into force on January 1, 1988. As of February 8, 2005, sixty-four countries had acceded to the CISG. *See* UNICTRAL at http://www.uncitral.org/english/status/status-e.htm. The countries that have ratified the CISG, in alphabetical order, are: Argentina, Australia, Austria, Belarus, Belgium, Bosnia-Herzegovina, Bulgaria, Burundi, Canada, Chile, China (PRC), Colombia, Croatia, Cuba, Czech Republic, Denmark, Ecuador, Egypt, Estonia, Finland, France, Gabon, Georgia, Germany, Greece, Guinea, Honduras, Hungary, Iceland, Iraq, Israel, Italy, Kyrgyzstan, Republic of Korea, Latvia, Lesotho, Lithuania, Luxembourg, Mauritania, Mexico, Mongolia, Netherlands, New Zealand, Norway, Peru, Poland, Moldova, Romania, Russian Federation, Saint Vincent & the Grenadines, Serbia & Montenegro, Singapore, Slovakia, Slovenia, Spain, Sweden, Switzerland, Syria, Uganda, Ukraine, United States, Uruguay, Uzbekistan, and Zambia. Notable exceptions include Brazil, Indonesia, India, Japan, Malaysia, and the United Kingdom. In a 1990 article, Professor Farnsworth stated generally that the internationalization of contract law and the adoption of the CISG was one of the "Top Ten" developments in contract law during the 1980s. Regarding the CISG he states that "the 1980's saw the internationalization of contract law – a legislative event that was the culmination of an effort spanning a half century." E. Allan Farnsworth, *Developments in Contract Law During the 1980's: The Top Ten*, 41 Case West. L. Rev. 203, 204 (1990).

[5] *See generally* Paul B. Stephan, *The Futility of Unification and Harmonization in International Commercial Law*, 39 Va. J. Int'l L. 743 (1999).

[6] For a discussion of the problem of homeward trend *see* Honnold, Documentary History, *supra* Note 4. *See also* Harry M. Flechtner, *The Several Texts of the CISG in a Decentralized System: Observations on Translations, Reservations and Other Challenges to the Uniformity Principle in Article 7 (1)*, 17 J. L. & Com. 187 (1998). "Perhaps the single most important source of non-uniformity in the CISG is the different background assumptions and conceptions that those charged with interpreting and applying the Convention bring to the task." *Id.* at 200. One commentator argues that homeward trend can be minimized if the CISG is re-titled, enacted as a piece of federal legislation, and state law [UCC] expressly refers to it. *See* James E. Bailey, *Facing the Truth: Seeing the Convention on Contracts for the International Sale of Goods*

reflects the fear that national courts will ignore the mandate of autonomous-international interpretations of the CISG in favor of interpretations permeated with domestic gloss. It is most difficult for a court to "transcend its domestic perspective and become a different court that is no longer influenced by the law of its own nation state."[7]

An example of homeward trend jurisprudence is the Italian case of *Italdecor SAS v. Yiu Industries*.[8] The court ignored the interpretive methodology of the CISG[9] that is explored in Chapter 2. For current purposes, a brief introduction is needed. CISG interpretive methodology includes the use of analogical reasoning by using CISG articles not directly related to the issue in a case and the use of the general principles of the CISG in fabricating default rules. Furthermore, for the sake of uniformity, national courts should review holdings of foreign courts and arbitration panels for insight in rendering well-reasoned decisions. In the *Italdecor SAS* case, the court failed to review pertinent foreign cases and arbitral decisions. Its failure to review existing cases resulted in rendering a decision without the guidance provided in the cases dealing with the determination of fundamental breach.[10] If any semblance of applied uniformity is to be achieved, it is imperative that courts look to relevant foreign decisions for guidance.

One can argue that substantive uniformity can be obtained only through the use of foreign case law, especially of upper-level or supreme courts, as binding precedent. Others have rejected such a common law view of precedent in favor of the use of foreign cases as persuasive precedent. The latter opinion is the correct one given that the CISG fails to provide an express

as an Obstacle to a Uniform Law on International Sales, 32 Cornell Int'l L.J. 273 (1999). The drafters of the CISG were aware and concerned by the problems of homeward trend: "[I]t is especially important to avoid differing constructions of the provisions of this Convention by national courts, each dependent upon the concepts used in the legal system of the country of the forum" Guide to CISG, Article 7, *available at* http://cisgw3.law.pace.edu/cisg/text/e-text-07.html.

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

8 *Italdecor SAS v. Yiu Industries*, CA Milano, Mar. 20, 1998, (It.), *available at* http://cisgw3.law.pace.edu/cisg/wais/db/cases2/980320i3.html#ct.

9 *Infra* Chapter 2.

10 Angela Maria Romito & Charles Sant'Elia, Case Comment, *CISG: Italian Court and Homeward Trend*, 14 Pace Int'l L. Rev. 179, 195 (2002) (hereafter, Romito & Sant'Elia, *Homeward Trend*).

mandate to view foreign cases as binding precedent. Furthermore, the lack of an international appellate body renders such a view impracticable and unwise. One co-author has asserted the persuasive precedent approach in which courts and arbitral panels have a duty to review all relevant cases on the contested legal issues. They also have a duty to explain their decisions using CISG interpretive methodology. In this regard, Professor Ferrari misunderstood Professor DiMatteo's analysis of this subject.[11] Ferrari correctly criticizes the binding precedent view as follows:

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

The co-author is in complete agreement with this statement. Also, the co-author's use of the phrase *supranational stare decisis* may have been inappropriate. The use of the phrase was not meant to indicate that all foreign decisions, at whatever level of the judicial system and whatever the quality of the analysis, should be accepted as binding precedent. This is indicated by the fact that the full phrase used was "*informal* supranational stare decisis."[12] The term *informal* highlights the point that Professor Ferrari makes that because there is no supranational appellate process to speak of, binding precedent is nonsensical. The point being made by Professor DiMatteo is that courts should (not must) follow well-reasoned foreign case law opinions; they are free to disregard foreign cases that demonstrate poor reasoning and those that fail to comply with CISG interpretive methodology.

Whether as voluntarily applied precedent or as persuasive (semi-binding) precedent, courts should review CISG jurisprudence before rendering a decision. In the case of diverging interpretations, the interpreter should select,

[11] Ferrari, *CISG Case Law*, *supra* Note 2, at 259 (emphasis added). Larry A. DiMatteo, *The CISG and the Presumption of Enforceability: Unintended Contractual Liability in International Business Dealings*, 22 Yale J. Int'l L. 111, 133 (1997) (hereafter DiMatteo, *Presumption of Enforceability*). In reviewing *Italdecor SAS v. Yiu Industries*, Romito and Sant'Elia conclude that "because of the inconsistencies in the reasoning . . . its opinion will probably have little persuasive value for other CISG cases." Romito & Sant'Elia, *Homeward Trend, supra* Note 10, at 203.

[12] DiMatteo, *Presumption of Enforceability*.

modify, or reconcile such decisions through the proper use of the CISG's interpretive methodology:

> [C]ourts [should serve] two primary functions [in their roles as *informal* appellate courts]. First, they would look to decisions of foreign courts for guidance. Second, they should actively unify international sales law by distinguishing seemingly inconsistent prior decisions and by harmonizing differences in foreign interpretations.[13]

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

One commentator concluded that the Court's decision in *Italdecor SAS* was "cryptic, and parochial, and it is written in a way that is hard to understand even for an Italian."[14] The court not only failed to review foreign case law on the CISG, but also failed to use relevant articles of the CISG. In one example, the court applied Article 49(1) without analyzing the related Article 25.[15] Article 49(1) allows for the avoidance of a contract in the event of a fundamental breach. The court held that an untimely delivery was fundamental without applying Article 25 which provides the CISG's parameters for determining whether a breach is fundamental. Without the use of the Article 25 template of "substantiality" and "foreseeability," and without the guidance of foreign cases applying the Article 25 template, there is no deterrent to a homeward trend perspective of fundamentality.

Given the above, the "middle view" is the proper measurement to judge the success of the CISG. The likelihood of substantive uniformity of application is unrealistic, but the utter failure of the CISG as a device to remove legal impediments to international trade is equally implausible. This middle view is found in the ongoing development of CISG jurisprudence. It is the jurisprudence of the CISG that this book seeks to uncover in gauging the impact of the CISG on international sales law.

This is not a book that will focus on the normative aspects of uniformity. The focus of this book is not whether the CISG mandates or should mandate absolute uniformity of application. The literature on this subject is quite extensive.[16] Instead, this book recognizes that many CISG provisions are the

[13] DiMatteo, *supra* Note 11, at 136.
[14] Romito & Sant'Elia, *Homeward Trend, supra* Note 10, at 203.
[15] *Id.* at 192.
[16] *See generally* Michael P. Van Alstine, *Dynamic Treaty Interpretation*, 146 U. Pa. L. Rev. 687 (1998); Frank Diedrich, *Maintaining Uniformity in International Uniform Law via Autonomous Interpretation: Software Contracts and the CISG*, 8 Pace Int'l L. Rev. 303

product of compromise and asks whether these compromises have proven to be effective or have resulted in a chaotic jurisprudence. How have the articles of the CISG actually been interpreted and applied by the various national courts? At the interpretive level, is there evidence of convergence or divergence among the national courts?

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

The review of CISG jurisprudence in Chapters 2 through 10 will highlight the problems of non-uniform applications. This will be done by highlighting poorly reasoned opinions as well as those that are a product of more exemplary reasoning. The poorly reasoned opinions are generally characterized by decisions that merely apply the legal concepts of the Court's domestic legal system. The exemplary opinions are characterized by the application of CISG interpretive methodology, as discussed in Chapter 2, in pursuit of autonomous interpretations. Finally, numerous arbitral cases will be examined to assess the application of the CISG by arbitral panels.

Chapters 3 through 10 provide a more practical view of the CISG at work. These chapters are intended to provide a descriptive review of the jurisprudence that has developed around major provisions of the CISG as well as the raw material necessary to judge the CISG's functionality in lowering the legal obstacles to the international sale of goods. This review is meant to illustrate the types of issues and interpretation problems encountered by national courts and arbitration tribunals in the fifteen years since the CISG's adoption. It also

(1996); Franco Ferrari, *Uniform Interpretation of the 1980 Uniform Sales Law*, 24 Ga. J. Int'l & Comp. L. 183 (1994); Mark N. Rosenberg, *The Vienna Convention: Uniformity in Interpretation for Gap-Filling – An Analysis and Application*, 20 Austl. Bus. L. Rev. 442 (1992); Amy H. Kastely, *Unification and Community: A Rhetorical Analysis of the United Nations Sales Convention*, 8 Nw. J. Int'l L. & Bus. 574 (1988); Michael F. Sturley, *The 1980 United Nations Convention on Contracts for the International Sale of Goods: Will a Homeward Trend Emerge?*, 21 Tex. Int'l L. J. 540 (1986).

recognizes that courts have developed specific default rules to make the CISG more functional. The use or misuse of CISG interpretive methodology and the development of specific default rules will be highlighted throughout the book.

Chapters 3 through 10 review CISG jurisprudence according to the main substantive areas of the convention: contract formation (Chapters 3 and 4), obligations of buyers and consequences of buyers' breach (Chapters 5 and 9), obligations of sellers and consequences of sellers' breach (Chapters 6 and 8), common obligations (Chapter 7), and damages-excuse (Chapter 10). In each of these chapters, the provisions with the largest volume of case and arbitral law are given the most coverage. In Chapter 3, the review focuses on the writing requirements and the use of extrinsic evidence. In Chapter 4, the focus is on offer-acceptance rules, including the battle of the forms scenario. Chapter 5 concentrates on the duties of the buyer to inspect and to give timely notice of nonconformity (defect), to pay the price, and to take delivery. Chapter 6 discusses the sellers' duty of delivery and warranty obligations. Chapter 7 focuses on the issue of the passing of risk, definition of fundamental breach, and the use of anticipatory breach. Chapter 8 examines the rights of the buyer upon seller's breach, including the rights to substituted performance, time extension, avoidance, and price reduction. Chapter 9 reviews the civil law concept of *nachfrist notice* as codified in Article 47, the seller's right to cure in Article 48, and the remedy of avoidance. Chapter 10 reviews the remedial provisions of the CISG. This review includes the calculation of damages, the doctrines limiting damages recovery, the excuse of "impediment" found in Article 79, and the preservation of goods. Throughout this analysis, divergent interpretations, the use and nonuse of CISG interpretive methodology, and the development of specific default rules are highlighted.

Chapter 11's "Summary and Observations" concludes that the CISG is an evolving legal code. Consequently, its jurisprudence reflects the courts' confusion and use of different methodologies to contend with the CISG's perceived shortcomings. Because case law commonly brings necessary depth and clarity to statutory acts, this concluding chapter offers five characteristics or examples of such developing jurisprudence and discusses the persistence of homeward trend reasoning in CISG opinions.

The book concludes that the current level of disharmony associated with divergent national interpretations is acceptable. Some divergence in interpretation is expected and acceptable given the difference in national legal systems and in the very nature of codes. This divergence is expected not only because of the code's multi-jurisdictional application, but also because – like the civil and commercial codes of Europe and the U.S. Uniform Commercial Code (UCC) – the CISG is an evolving, living law. As such, it provides for the contextual

input of the reasonable person,[17] including the recognition of evolving trade usage,[18] in the re-formulation and application of its rules. The benefit of such a dynamic, contextual interpretive methodology is that the code consistently updates its provisions in response to novel cases and new trade usages. This process should ultimately overcome the initial divergent interpretations and result in an effective and functional international sales law. The success of the living, contextual nature of the CISG is dependent upon the courts balancing the need for flexibility in application against the need to minimize divergent interpretations so as to ensure that the CISG remains attentive to its mandate of uniformity.

We can look to the U.S. UCC as an example. It is held up as an example of a successful harmonization of commercial law among multiple jurisdictions. In fact, the different state court systems have rendered divergent interpretations of UCC provisions. Despite such divergence, can we still say that the UCC has served its function of uniformity?[19] The answer depends on one's definition of uniformity or harmonization. The CISG has worked to harmonize international sales law despite the production of divergent interpretations and despite failing the test of absolute uniformity. Nonetheless, it remains an enduring code that continues to evolve along the side of modern commerce.

CISG as international convention

It is important to understand that the CISG is written in the form of a convention[20] and not as a uniform or model law. The paramount characteristic of a convention is its international character. This characteristic implies that its

[17] "[S]tatements made by and other conduct of a party are to be interpreted according to the understanding that a reasonable person of the same kind as the other party would have had in the circumstances" CISG at Art. 8(2).

[18] "The parties are considered . . . to have impliedly made applicable to their contract or its formation a usage . . . " CISG at Art. 9(2).

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

[20] *See infra* Chapter 2, section on "Interpretive Methodology" (discussing the importance of viewing the CISG as a code).

overall purpose is the standardization of law at a level above that of national law.[21] This standardization provides the important benefit of avoiding the long-standing problem of conflict of laws among nation states.

In the short term, however, international conventions often produce a problem referred to by Professors Enderlein and Maskow as the *cleavage of statutes*.[22] This is caused by the fact that although the CISG is not meant to be integrated into national legal systems, it is incorporated and applied by national courts. For example, the CISG is not integrated into the domestic sales law (UCC) of the United States. Instead it is incorporated as a separate, independent statute with a separate jurisdictional domain. The presence of two sales laws within a single legal system inevitably produces norm conflict. The differences in the use of general contract and interpretation principles, along with substantive differences in the formal legal rules, cause a degree of conceptual dissonance. It is hoped that with any new trans-jurisdictional standardizing law, whether in the form of a uniform law, model law, or convention, the effect of such dissonance will diminish over time. In the end, it is hoped that a solid jurisprudential framework will develop in which the interpreter will "manage with the standardizing rules"[23] independently of the influence of divergent domestic law.

The international nature of the CISG is demonstrated by the fact that its jurisdiction is transaction-focused and not party-focused. This fact is evident in that a transaction crossing national borders is the linchpin of CISG jurisdiction – not the nationality of the parties. For example, Article 10(a) provides that the place of business is that which has the closest relationship to the transaction. The nationality of the parties, the place of incorporation of a party, and the place of its headquarters are largely irrelevant. Article 10(a) states the rule that "the nationality of the parties is not to be taken into consideration"[24] in determining the applicability of the CISG. Therefore, a contract between two nationals of the same country may be subject to the CISG if it involves a trans-border shipment and one of the parties has its CISG "place of business" in another country.[25]

[21] Professors Enderlein and Maskow state that "there is a *difference with uniform laws* insofar as this incorporation elucidates the international character of the perspective rule, underlines its special position in domestic law, and furthers an interpretation and application which is oriented to the standardization of law." Fritz Enderlein & Dietrich Maskow, International Sales Law 8 (1992) (emphasis in original) (hereafter, Enderlein & Maskow).

[22] *Id.* at 11.

[23] *Id.*

[24] Guide to CISG, at Art. 1, Secretariat Commentary, *available at* http://cisgw3.law.pace.edu/cisg/text/e-text-01.html.

[25] Should parties whose countries have ratified the CISG wish to opt out of the Convention, they should do so by explicit mention in the contract. *See generally* Paul M. McIntosh,

Another example of the international nature of the CISG is its exclusion of the types of sales transactions that are more likely to be exposed to the peculiarities of national laws. Article 2 excludes consumer sales, auction sales, sales of ships and aircraft, and forced or judicially mandated sales. The rationale behind excluding these types of sales is that they are subject to special national regulations. Examples of such specialty laws are consumer protection laws and special registration laws (ships and aircraft).[26]

PRINCIPLE OF UNIFORMITY

A recent article is entitled: *Is the United Nations Convention on the International Sale of Goods Achieving Uniformity?*[27] The author correctly replies that the question itself is improper. The answer is yes and no depending on how the word *uniformity* is defined. If by uniformity one means substantive or absolute uniformity of application, then the answer is a commonsensical no. The better question is: Has the CISG become a functional code? Have functional default rules developed through the application of CISG's general principles? Has it resulted in at least a manageable level of uniform application to have decreased the legal impediments to international sales?[28] Finally, what is the likelihood of greater uniformity of application in the future?

Strict or Absolute Uniformity versus Relative Uniformity

The degree that the CISG has been successful at unifying international sales law has been debated. In order to gauge its perceived impact on unifying international sales law, a standard is needed in which to measure CISG jurisprudence. Numerous standards can be offered, including the standards of strict[29] or absolute uniformity,[30] relative uniformity, and the lessening of

Selected Legal Aspects of International Sales Transactions: The United Nations Convention on Contracts for the International Sale of Goods, Bus. Credit, Oct. 1, 2001, *available at* 2001 WL 12570546.

[26] *Id., available at* http://cisgw3.law.pace.edu/cisg/text/e-text-02.html.

[27] Philip Hackney, *Is the United Nations Convention on the International Sale of Goods Achieving Uniformity?*, 61 La. L. Rev. 473 (2001).

[28] Professor Hackney rejects the argument that the CISG has increased the legal impediments to trade because it produces greater complexity. He responds that "this objection should fade with time, as a body of case law builds around the Convention" *Id.* at 476.

[29] *See generally* Fred H. Miller, *Realism Not Idealism in Uniform Laws – Observations from the Revision of the UCC*, 39 So. Texas L. Rev. 707, 721–6 (1998).

[30] Professor Robert Scott discusses the difference between formal uniformity and substantive uniformity. He further discusses the different dimensions of substantive uniformity as being

legal impediments to international trade.[31] "It is generally acknowledged that the existence of different national legal systems impedes the development of international economic relations with complicated problems arising from the conflict of laws."[32] The success of the CISG should be measured using a standard of relative uniformity or a standard of the lessening of legal impediments to trade. Thus, a relative or useful level of uniformity[33] should be the benchmark to measure the success of the CISG. This is what Professor Miller has referred to as "a more specific goal uniformity." The fact that Article 7 prefaces its uniformity mandate with "regard has to be had"[34] implies that a standard below strict uniformity in application was envisioned. The uniformity mandate itself indicates that strict uniformity is not a realizable goal. Instead of using active words like *establish* or *create*, the CISG merely states the "need to promote uniformity in its application. . . ."[35] The benchmark of relative or useful uniformity is superior to the previous system of private international law characterized by the full panoply of different domestic laws and systems.

The CISG was never intended to achieve the lofty goal of absolute uniformity. In the words of Johan Steyn, "[n]o convention can eliminate uncertainties in its application. But a convention such as the Vienna Sales Convention [CISG] will *tend* to reduce differences and to eliminate uncertainty."[36] If it helps to relieve the impediment noted previously of conflicts of national laws then it is to be considered a progressive, albeit a transitory, step to uniform private international law.

Uniformity through Original or Autonomous Interpretation

The interpretive methodology of the CISG mandates that interpreters seek original or autonomous interpretations. As discussed earlier, the CISG is an example of a convention. The importance of the fact that the CISG is

the interpretive function and the standardizing function. The interpretive function involves the uniform interpretation of contract terms. The standardizing function involves the "task of creating broadly suitable default rules." Robert E. Scott, *The Uniformity Norm in Commercial Law*, in The Jurisprudential Foundations of Corporate and Commercial Law 149–50 (Jody S. Kraus & Steven D. Walt, eds. 2000) (hereafter Scott, *Uniformity Norm*).

31 *See also* Flechtner, *supra* Note 6, at 206–9 (distinguishing varieties of non-uniformity).

32 Enderlein & Maskow, *supra* Note 21, at 1.

33 Hackney, *supra* Note 27, at 476.

34 CISG at Art. 7(1).

35 *Id.*

36 Johan Steyn, *A Kind of Esperanto?*, in The Frontiers of Liability 14–15 (Peter Birks, ed. 1994) (emphasis added).

a *convention* pertains to its international character. This international character calls for a non-domestic, autonomous interpretation of CISG rules. It is hoped that such autonomous interpretations, divorced from the idiosyncrasies of domestic jurisprudence, will result in a more truly supranational law. "The Convention is meant to be interpreted based upon its uniqueness and not its similarities to any one of the legal systems from which it was created."[37] The development of autonomous interpretations is positively related to a greater uniformity of application. Homeward trend reasoned opinions are likely to produce numerous divergent interpretations. An autonomous interpretation is less likely to be disregarded by other courts because it will be recognized as well-reasoned and not the product of a biased, idiosyncratic national perspective.

An example of autonomous interpretation is given in Chapter 6's discussion of the warranty provisions in Article 35. An Austrian Court[38] noted the distinction between the non-delivery of goods and the delivery of nonconforming goods. It determined that the case involved the delivery of nonconforming goods. As such, it held that the seller could not benefit from the buyer's duty to provide restitution under Article 82 of the CISG. This was despite the fact that Austrian law would have resulted in a different determination. In rendering the decision, the court cited commentary on the CISG in reasoning toward an autonomous interpretation.

The CISG's interpetive methodology can also be characterized as code-like. The use of a code-like interpretive methodology will be more fully examined in Chapter 2. For our present purposes, it is important to note that its code-like quality is represented by the fact that it possesses a built-in interpretive methodology.[39] This is made apparent in Article 7(2)'s statement that "questions concerning matters governed by the [CISG] which are not expressly settled in it are to be settled in conformity with the general principles on which it is based." Thus, those whose task it is to interpret and apply the CISG are to look within it for the methods of application and interpretation. Professor Scott defines a code as "a preemptive, systematic, and comprehensive enactment of a whole field of law."[40] Thus, problems of interpretation such as gaps in the code are to be solved by means internal to the code. A

[37] DiMatteo, *supra* Note 11, at 133.

[38] OGH, SZ 1 Ob 74/99k, Jun. 29, 1999, (Aus.), *available at* http://cisgw3.law.pace.edu/cases/990629a3.html

[39] The uniformity of code application requires that it provide a "built-in methodology." John L. Gedid, *U.C.C. Methodology: Taking a Realistic Look at the Code*, 29 Will. & Mary L. Rev. 341, 342 (1988).

[40] Scott, *Uniformity Norm, supra* Note 30, at 171.

court or arbitral panel is given the duty "to use the processes of analogy and extrapolation to find a solution consistent with the purposes and policy of the codifying law. In this way, the code itself provides the best evidence of what it means."[41] The CISG is code-*like* because it fails to satisfy Professor Scott's requirement of comprehensiveness. However, it is systematic and preemptive within the scope of its intended coverage. It is within the scope of its intended coverage that its built-in interpretive methodology applies. Chapter 2 will discuss the importance of the use of general principles and analogical reasoning in intepretating the CISG.

The CISG invites the interpreter to construct autonomous interpretations through its use of nomenclature independent of any domestic legal system. The CISG uses terms such as contract "avoidance"[42] and language such as "among other things,"[43] "extent of one party's liability to the other,"[44] "handing the goods over,"[45] and "appropriate means."[46] CISG phraseology is relatively vague and abstract, which invites original interpretations. Simultaneously, the CISG's flexibility enables a wide scope for application and reasonable but divergent "national" interpretations. The problem of divergent autonomous interpretations will be a focus of the CISG jurisprudential review in Chapters 3 through 10.

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

The importance of reviewing not only case law but also arbitral decisions is that the impact of the CISG is not restricted to its application as the mandatory law of a dispute. Courts, and more likely arbitration panels, may elect to voluntarily use it as customary international law or *soft law*.[47] In fact, there

[41] *Id.*

[42] *See* CISG at Art. 26 ("declaration of avoidance"), Art. 49(1) & (2) ("declare the contract avoided"), Art. 51(2) ("contract avoided"), Art. 64 ("declare contract avoided"), Art. 72(1) & (2) ("contract avoided"), Art. 73(3) ("contract avoided"), Art. 76 ("time of avoidance"), Art. 81 ("avoidance of the contract", Art. 83 ("contract avoided"), Art. 84(2) ("substantially in the condition").

[43] *Id.* Art. 19(3).

[44] *Id.*

[45] *Id.* Art. 31(a). *See also id.* Art. 57(1) ("the handing over"), Art. 58(1) ("handing over"), Art. 58(2) ("not be handed over"), Art. 60(b) ("taking over"), Art. 67(1) ("handed over"), Art. 69(1) & (2) ("takes over the goods"), Art. 71(2) ("handing over").

[46] *See* Article 88. "A party bound to preserve the goods . . . may sell them by any appropriate means" and Chapter 10's coverage of preservation of goods.

[47] For an example of soft law uses in a different context *see* Larry A. DiMatteo, *Contract Talk: Reviewing the Historical and Practical Significance of the Principles of European Contract*

are at least two uses of the CISG as soft law including (1) the voluntary use of the CISG as a choice of law by private parties not automatically subject to CISG jurisdiction and (2) the use by courts and arbitral panels of the CISG as evidence of customary international law. In researching the jurisprudence of the CISG it is important to ask whether the CISG has been used where it is not mandatory law.[48] This includes examining the decisions of arbitration panels. Unfortunately, arbitration decisions are not universally reported, the decisions are at times not well detailed and reasoned, and there is often a considerable lag between the time of the decision and the time of its reporting or publication. Fortunately, a number of reporting services have been established, including CLOUT, Pace Law School, and Unilex.[49] These reports, although not comprehensive, indicate CISG usage as a source of soft law or customary international law. Because arbitral panels are often not required to apply a given national law, they are less susceptible to the legal centricity inherent in courts operating within a domestic legal system.[50] To this end, this book's analysis draws from both case law and arbitral decisions.

The importance of the soft law applications of the CISG is that its goals of relative uniformity of international sales law are enhanced by its application to greater numbers of cases. It provides additional incentive to businesspeople and their lawyers to become knowledgeable of its substance since opting out of its coverage may not prevent its application as customary international law. The following excerpt discusses the soft law application of the CISG.

Law, 43 Harv. Int'l L. J. 569 (2002) (discussing the soft law nature of the Principles of European Contract Law). *See generally* Harold J. Berman, *The Law of International Commercial Transactions (Lex Mercatoria)*, 2 Emory J. Int'l Disp. Resol. 235 (1988).

[48] The CISG can be used as a compromise choice of law for parties from different national legal systems. This voluntary use of the CISG by international businesspersons is premised on the categorization of the CISG as a neutral set of legal rules. As Zeller states, "To adopt the CISG certainly does not give an advantage to either party and is in the true sense a *neutral* system of law." Bruno Zeller, *The Development of Uniform Laws – A Historical Perspective*, 14 Pace Int'l L. Rev, 163, 176–7 (2002) (emphasis added). The CISG can be used to prevent the break down of contract negotiations over the choice of law or to prevent the appearance of overreaching by the insertion of the national law of one of the parties. Contract negotiators can opt into the CISG when the contract is not within the jurisdiction of the CISG or elect not to opt out in case of its mandatory default application.

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

[50] This is especially true when arbitrators are authorized to decide *ex aequo bonos* or as *amiables compositeurs*.

Larry A. DiMatteo, *Resolving International Contract Disputes*, American Arbitration Association, Dispute Resolution Journal (November 1998) pp. 75–79

The impact of the United Nations Convention on Contracts for the International Sale of Goods (CISG) on international arbitration has been felt in two areas. First, its adoption as the domestic sales law of the individual signatories will require its application by judges and arbitrators under conflict of law rules or choice of law clauses. Second, it may be voluntarily applied as evidence of customary international law. Arbitation tribunals are especially likely to recognize it as a source of customary international sales law. It is the product of compromise between three of the world's major legal systems – common law, civil law, and socialist law.[51] Thus, it possesses a universal appeal that many arbitrators will find appealing in their search for a *lex mercatoria–type* of justification for their awards. It is this second use of the CISG by arbitral tribunals – as evidence of customary international sales law – that is the focus here.

Basis in International Contract Law

General principles of international law often play pivotal roles in international dispute resolution. "Modern judges and arbitrators tend more to seek to interpret and supplement instruments according to autonomous and internationally uniform principles."[52] The CISG, as with most private law codes, reflects a recognition of generalized principles of law. For example, from the medieval *lex mercatoria* to the present, most specific rules of business can be traced to the norms of good faith and fair dealing. The obligation of good faith is found in most national legal *systems*.[53]

The CISG as *Lex Mercatoria*

A secondary concern is the place and importance of the CISG within the general movement toward the internationalization of sales law and the creation of a new *lex mercatoria*. The unification of sales law stems from

[51] For the legislative history of the CISG, *see* the United Nations Conference on Contracts for the International Sale of Goods, (Vienna, March 10 – April 11, 1980), Official Records, UN Document No. A/CONF. 97/19 (E.81.IV.3).

[52] Michael J. Bonell, *The UNIDROIT Principles of International Commercial Contracts: Why? What? How?*, 69 Tulane L. Rev. 1121, 1142 (1995).

[53] "Common and civil law jurisdictions recognize a principle of good faith requiring 'fair dealing, affirmative disclosure of material facts, and assistance to others in achieving the free benefit of contractual relationships'" R. Newman, *The General Principles of Equity*, Equity in the World's Legal Systems 589, 600–8 (1978).

numerous sources. These sources include the increase in economic and legal unions, most noticeably in Europe, the use of "neutral" country laws, and the increased recognition of general principles of contract law. The most profound evidence of the move toward the unification of sales law is the adoption of the CISG. The development of a new jurisprudence to interpret and bolster the CISG is likely to have important consequences for the enforcement of international sales contracts by arbitral tribunals.

In many ways, international commercial law or the *lex mercatoria* can be seen as the world's first uniform law, albeit in an uncodified form. Merchants have long developed usage and practices that have given them the ability to communicate with one another without the distractions presented by the nuances of culture, language, and national legal systems. Successful sales law unification entails a body of rules that are event-specific and void of unnecessary legalese. Arbitrators are more likely to make decisions based upon pro-arbitration norms, such as equity and fairness, than on any predisposition toward a domestic law. The concise and nonlegal language of the CISG provides arbitrators a source of such supranational rules of commerce.[54]

Arbitral Tribunals' Use of the CISG as Trade Usage

Can the CISG itself be considered a usage of trade and be applied outside of its direct application as domestic law? In *ICC Arbitration Case No. 5713 of 1989*, an ICC panel reasoned that "there is no better source to determine the prevailing trade usage than the terms of the CISG."[55] This is so, even when neither party is from a country that is a signatory to the CISG. For example, in the ICC case, the issue was the amount of time the purchaser had to give notice of defect. The arbitration panel disregarded a domestic law's shorter statute of limitations period in favor of the two-year period provided in the CISG. "As the applicable provisions of the law of the country where the seller had his place of business appeared to deviate from the generally accepted trade usage reflected in the CISG in that it imposed extremely short and specific requirements in respect of the buyer giving notice to the seller in case of defects, the tribunal applied the CISG."[56] Therefore, arbitration tribunals may imply the CISG into a contract dispute as evidence of international custom or trade usage.

[54] *See generally* Lord Justice Mustill, *The New Lex Mercatoria: The First Twenty-Five Years*, 4 Arb. Int'l 86, 108 (1988).

[55] *Seller v. Buyer*, Int'l Comm. Arb. No. 5713 (1989), *reprinted in* 15 Yearbook of Commercial Arbitration 70 (1999), *as reported in* UN Commission on International Trade, Cases on Uncitral Texts, A/CN.9/SER.C/ABSTRACTS/3 (1994).

[56] *Id.*

The use of international conventions and documents as sources of customary international law was recognized in relation to the nonbinding Principles for International Commercial Contracts sponsored by the UNIDROIT: "With the assistance of the Principles, arbitrators called upon to decide questions of interpretation will find it easier to avoid recourse to rules peculiar to this or that domestic law and to adopt an autonomous and internationally uniform solution."[57] In short, the general principles and conditions of international conventions like the CISG have been regarded as evidence of trade usage. Like the medieval *lex mercatoria*, the CISG can be seen as a collection of trade usage that arbitration tribunals can resort to in international commercial disputes.

The CISG is the latest attempt at codifying the *lex mercatoria* for international sale of goods transactions. Its importance has been advanced by its judicial application as the law of the case and by its recognition as customary international law by arbitral tribunals. In regard to the latter, the CISG's underlying principles of fairness, good faith, equity, and civility are consistent with the approach of arbitral tribunals in international contract dispute resolution. Instead of strict rule application, arbitrators are often motivated by the equities of the case in rendering fair and equitable decisions. The CISG is ready-made for such an approach because its meaning and terms are to be originally interpreted. *A priori* meanings taken from national legal systems are to be abandoned in favor of the independent meanings consistent with the above underlying principles.

Conclusion

International arbitration panels are best positioned to apply a general principles approach to international contract law. The role of arbitrators as providers of business-oriented, fair decisions has been recognized. For example, the Superior Court of Quebec declined to set aside an arbitral award due to the "alleged lack of coherent and comprehensible reasons." The court ruled that "arbitrators cannot be criticized for expressing themselves as commercial men and not as lawyers."[58] The international character of the CISG will be inviting for arbitrators more concerned with how businesspersons transact business than with the idiosyncrasies of nation-specific contract

[57] Michael J. Bonell, "Non-Legislative Means of Harmonization," *Proceedings of the Congress of the United Nations Commission on International Trade*, Uniform Commercial Law in the Twenty-First Century 38 (1995).

[58] *Navigation Sonamar Inc. v. Algoma Steamships Ltd.*, Rapports Judiciaires de Quebec, *as reported in* UN Commission on International Trade, Cases on Uncitral Texts, A/CN.9/SER.C/ABSTRACTS/1 (UN Pub. No. E.94.V.8) (1994).

rules. The CISG, much like the International Chamber of Commerce's *Uniform Customs and Practices for Documentary Credits* and *Incoterms*, can be used by international arbitration panels as a neutral source for international customary law. The more specific rules found in the CISG can and have been used as evidence of international trade usage. As such, they can be used as an alternative to more harsh national laws. By recognizing the CISG as customary international law in cases where it is not directly applicable, arbitral tribunals can avoid the intricacies of conflict of law rules and help promote the unification of international sales law.

CHAPTER TWO

CISG METHODOLOGY AND JURISPRUDENCE

Chapters 3 through 10 offer a relatively comprehensive review of CISG jurisprudence.[1] This review will allow an assessment of the problem of diverging national interpretations of the CISG. Before assessing the uniformity of CISG jurisprudence relating to its substantive rules, an understanding of the interpretive methodology provided by the CISG is necessary. Failure to understand and apply the CISG's interpretive methodology increases the likelihood of divergent interpretations through the improper use of domestic methodologies and legal constructs. This holds true for any multi-jurisdictional law, domestic or international. Professor Hawkland, referring to the Uniform Commercial Code (UCC) (United States), asserts that "a court should look no further than the code itself for solution[s] to disputes governed by it – its purposes and policies should dictate the result even where there is no express language."[2]

CISG's interpretive methodology provides a template for addressing substantive gaps or issues of law not directly (expressly) dealt with by the CISG. This template includes analogical reasoning by using CISG articles not directly

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

[2] Robert A. Hillman, *Construction of the Uniform Commercial Code: UCC Section 1-103 and "Code" Methodology*, 18 B. C. Ind. & Com. L. Rev. 655, 657 (1977). *See also* William D. Hawkland, *Uniform Commercial 'Code' Methodology*, 1962 U. Ill. L. Forum 291, 292 (1961).

related to the issue at bar and the use of the general principles of the CISG in fabricating default rules.[3] Even though it is the job of a sales code, like the CISG or UCC, to provide default rules to be used to fill in the gaps of a contract, it is the role of the courts to give meaning to the rules in their applications to real world contract disputes. In reality, most rules found in a sales code are inherently written at a general or abstract level in order for them to apply to a wide variety of cases. The default rules of the CISG, by and large, provide a framework for the courts to develop more specific default rules for application in narrower groups of cases. At times, these more specific rules are represented by the development of different factors that are to be weighed in the application of the general default rule. The analysis of CISG jurisprudence in Chapters 3–10 will highlight examples of this phenomenon.

The notion of analogical reasoning is not expressly mentioned in the general provisions. However, such a methodology is implied in any code-like law. The application of a CISG article to a novel case should not only fit that article to that specific dispute, but also fit and justify the CISG as a whole. Alternatively, when an article fails to provide a clear answer to a legal dispute or issue, other articles should be mined for guidance with regard to the best way to apply (interpret) that article. There are instances where analogical reasoning is more directly indicated. For example, Article 14 in the area of formation states that for an offer to be *sufficiently definite* it must expressly or implicitly fix the price of the contract. Although it fails to expressly refer to Article 55, Article 55's gap filler provision should be referred to when determining what is meant by sufficiently definite. Article 55 creates a presumption that the parties had implicitly agreed to a price "generally charged at the time of the conclusion of the contract." Chapter 4's coverage of open price terms discusses this interrelationship between Articles 14 and 55 in further detail. The information given in Chapter 6 regarding Article 31 (place of delivery) notes the importance of that article in the determination of the risk of loss under Articles 67–9.[4]

[3] "Before the reference to the proper domestic law . . . one may follow two methods . . . first is the analogical application of specific provisions . . . second is the reference to general principles which are explicitly stated . . . or are derived from the set of the Convention's provisions." Anna Kazimierska, *The Remedy of Avoidance under the Vienna Convention on the International Sale of Goods*, Pace Int'l L. Review, Review of the Convention on Contracts for the International Sale of Goods: 1999–2000, 172 (2000) (hereafter Kazimierska, *Remedy of Avoidance*) (reference to the Review of the Convention on Contracts for the International Sale of Goods: 1999–2000) [hereafter, Review of the Convention].

[4] *Infra* Chapter 7 (passing of risk).

Although the CISG is not a comprehensive code in the civilian sense, it is code-like in its interpretive methodology. Article 7(2) states that "questions concerning matters governed by this Convention which are not expressly settled in it are to be settled in conformity with the general principles on which it is based." A broad interpretation of this methodology would require the use of express and implied general principles. General principles cover all CISG provisions and can be utilized to uncover implied principles that underlie specific provisions. These principles – express or implied – are to be used for guidance in the interpretation of specific CISG provisions. This entails analogical reasoning in order to ensure that article-specific interpretations fit within the framework of the CISG as a whole.[5]

There is a debate as to which priority these rules have in the interpretive methodology of codes. Some argue that general principles are the first recourse to filling in a gap or ambiguity in a code provision.[6] Others argue that reasoning by analogy takes precedent, especially when a solution provided in one code provision is analogous to an issue covered under another provision.[7] For example, the determination of contractual intent as outlined in Article 8 is difficult to imagine without reference to the offer-acceptance rules in Articles 14 and 18. This interrelationship was the focus of a case before the Federal Supreme Court of Germany.[8]

The best interpretive methodology would include both types of analysis.[9] The two levels of the interpretive discourse are likely to merge in most applications. It is the recognition and application of general principles underlying specific CISG articles that make analogical reasoning a functional

[5] *Contra* Henry Gabriel, Practitioner's Guide to CISG and UCC (1994). "[I]f the express words of a particular article fails to resolve a conflict, the CISG requires the conflict to be resolved by the underlying principles that led to the adoption of the provision in question." *Id.* at 29.

[6] *See generally* Michel J. Bonell, *Introduction to the Convention*, in Commentary on the International Sales Law 79 (Cesare M. Bianca & Michael J. Bonell, eds. 1987). *See also* Phanesh Koneru, *The International Interpretation of the UN Convention on Contracts for the International Sale of Goods: An Approach Based on General Principles*, 6 Minn. J. Global Trade 105 (1997).

[7] "If the Convention failed to anticipate and thus provide a specific solution to an issue, an analogical extension from the existing provisions to the new situation is then appropriate." Koneru, *supra* Note 6, at 122, citing, John O. Honnold, Uniform Law for International Sales 3 (1991). *See also* Mark N. Rosenberg, *The Vienna Convention: Uniformity in Interpretation for Gap-Filling – An Analysis and Application*, 20 Australian Bus. L. Rev. 442: (1992).

[8] *See* Chapter 4's coverage of the rules of acceptance.

[9] *See generally* Kazimierska, *Remedy of Avoidance*, *supra* Note 3, at 172 (arguing that both methods are non-hierarchical in application).

methodology. The third level of the CISG's interpretive methodology is recourse to private international law. Only after the failure to provide a CISG-generated solution from analogical reasoning or application of general principles should a court resort to private international law (domestic law).[10] The last resort status of domestic sales law is meant to deter the threat of *homeward trend* decisions. This is especially crucial in the case of the CISG, because its provisions were the product of intense debate and compromise. In cases of application, especially in areas of ambiguity or gaps, the temptation exists for the courts to seek the familiarity of domestic default rules.[11]

INTERPRETIVE METHODOLOGY

As highlighted above, the CISG provides an interpretive methodology for interpreting and applying its substantive rules. The spirit of this methodology is that of excluding recourse to domestic legal methodologies. This is implicit in the view that the CISG directs decision makers to develop *autonomous interpretations*[12] of CISG provisions. It is only in this way that the CISG can rise above the inherent differences between national contract laws and legal systems. Article 7(1) states that the CISG is to be interpreted in "good faith," "to promote uniformity," and with regard "to its international character."[13] The more difficult questions are not the fabrication of autonomous interpretations of the CISG, but the development of different autonomous interpretations. Examples of this phenomenon are illustrated by two divergent views of the interpretation of Article 55's implication of the price term. The Farnsworth-Honnold (restrictive-liberal) views are given in Chapter 4.[14] Again, the interpetations of the Article 9(2) mandate that parties impliedly agree to international trade usage ("the parties are considered to have impliedly made

[10] The use of domestic law "represents under the . . . uniform law a last resort to be used only if and to the extent a solution cannot be found either by analogical application of specific provisions or by the application of general principles underlying the uniform law as such" Bonell, *supra* Note 6, at 83.

[11] Professor Miller states the importance of deterring interpreters from acting on such temptation. Uniformity is especially important "where the uniform provision perhaps represents a less desirable position but nonetheless forms an important part of a compromise reflecting a desirable, overall balance and where, if one provision is altered by non-uniformity, significant threat to the overall consensus is posed" Fred H. Miller, *Realism Not Idealism in Uniform Laws – Observations from the Revision of the UCC*, 39 So. Texas L. Rev. 707, 722–3 (1998).

[12] Franco Ferrari, *Uniform Interpretation of the 1980 Uniform Sales Law*, 24 Ga J. Int'l & Comp. L. 183 (1994), at 198–201.

[13] "In the interpretation of this Convention, regard is to be had to its international character and to the need to promote uniformity in its application and the observance of good faith in international trade" CISG at art. 7(1).

[14] *Infra* Chapter 4 "Firm Offers and Open Price Term."

applicable to their contract a usage that the parties knew or should have known") has produced divergent interpretations. These interpetations have differed in the definition of international trade usage. Attention is given to this issue in relationship to acceptance rules (Article 18) in Chapter 4.[15]

The problem of divergent autonomous interpretations is a special concern, because the CISG is a product of studied ambiguity or compromise and there are numerous substantive gaps in its rules. The courts and arbitral panels will invariably face issues that are within the *scope* of the CISG but where the CISG fails to provide an express rule.[16] Once again the previously described methodology of analogical reasoning and general principles is consistent with the presumption that CISG provisions are to be interpreted broadly. A mandate of broad interpretation is consistent with the code-based interpretive methodology.[17]

GENERAL PRINCIPLES

In order to diminish the frequency of divergent national interpretations, the CISG mandates the use of general principles, both express and implied, found within its articles. The CISG displays two noticeable characteristics relevant to legal interpretation. First, it fails to explicitly enunciate many of its general principles. Article 7(2) states that if "matters governed by [it] are not expressly settled in it [they] are to be settled in conformity with the general principles by which it is based."[18] The general principles can be characterized as either general or specific and either express or implied. The general, expressed principles are found in Article 7(1). It provides that "[i]n the interpretation of this Convention, regard is to be had to its international character and to the need to promote uniformity in its application and the observance of good faith in international trade."[19] The general principle of international character is directed at preventing the problem of homeward trend discussed earlier.[20]

[15] *Infra* Chapter 4.

[16] Ferrari, *supra* Note 12, at 215–17.

[17] "[T]he Convention, once adopted, is intended to replace all rules in [domestic] legal systems previously governing matters within its scope. . . . This means that in applying the Convention there is no valid reason to adopt a narrow interpretation" *Id.* at 202. *See also* Kazimierska, *Remedy of Avoidance, supra* Note 3, at 160–7 (arguing that the validity exclusion in Article 4(a) should be interpreted narrowly so that the scope of the CISG is more broadly applied).

[18] CISG at Art. 7(2).

[19] *Id.* Art. 9(1). For a discussion of the principles of "international character" and "good faith," *see generally* Bruno Zeller, *The UN Convention on Contracts for the International Sale of Goods – A Leap Forward Towards Unified International Sales Law*, 12 Pace Int'l L. Rev. 79 (2000).

[20] *See generally* Lisa M. Ryan, *The Convention for the International Sale of Goods: Divergent Interpretations*, 4 Tul. J. Int'l L & Comp. L. 99, 100 (1995); Amy Kastely, *Unification and*

An example of an implied general principle is "the principle of favoring the continuation of a contract."[21] The fact that goods can only be rejected for fundamental defects requires buyers to accept defective goods in most instances. The restrictive nature of fundamental breach is given in Chapter 7.[22] The importance of completing the transaction in long distance sales, as compared to the broad right of rejection under the perfect tender rule (UCC) for domestic sales,[23] limits the right of avoidance under the CISG. This is somewhat offset by the incorporation of a uniquely non-common law remedy of price reduction. Thus, the buyer is forced to complete the transaction, but is allowed to unilaterally reduce the price by the diminishment of value related to the defect. "The principle [of continuation of performance] can be extracted from Articles 34, 37, 48, 49, 51, 64, 71, and 72 of the CISG."[24]

The Helsinki Court of Appeals recognized the importance of the continuation of a contract within the principle of loyalty. "The so-called principle of loyalty has been recognized in scholarly writings. According to the principle, the parties to a contract have to act in favor of the common goal; they have to reasonably consider the interests of the other party."[25] In essence, each party owes a duty of loyalty to the other party to preserve the viability of the transaction. From such a duty, the court recognized an implied general principle in an expanded notion of duty to continue a sales relationship beyond the discrete individual sales transactions. The case involved a buyer who purchased carpets for resale on an ad hoc basis. The seller abruptly ended its relationship with the buyer. The court held that on the basis of a two-year business relationship, the buyer's "operations cannot be based on

Community: A Rhetorical Analysis of the United Nations Convention, 8 NW J. Int'l L. & Bus. 601, 601–2. (1988)(stating that the CISG must be interpreted "as a text that is shared by an international community").

21 Kazimierska, *Remedy of Avoidance, supra* Note 3 at 175. *See also* Romito & Saint Elia, *supra* Note 10, at 200 ("requiring that notice be given by an avoiding party of a remedy as drastic as avoidance to encourage certainty in transactions") and Article 57(1)'s default rule that place of payment is based upon the general principle that payment should be made at the domicile of the creditor. *SCEA des Beauches v. Société TesoTen Elsen*, CA Grenoble [Regional Court of Appeals], 94/3859, Oct. 23, 1996, (Fr.), Beraudo, *available at* http://www.uncitral.org/english/clout/abstract/abstr15.htm.

22 Under Article 25, a fundamental breach of contract occurs when an act by one of the parties results in the other party being substantially deprived of what it expected under the contract. *Infra* Chapter 7. *See also infra* Chapter 6 (duty of delivery).

23 UCC § 2-601 (1977).

24 Kazimierska, *Remedy of Avoidance, supra* Note 3, at 175.

25 HO Helsinki S 00/82, Oct. 26, 2000, (Fin.), *available at* http://cisgw3.law.pace.edu/cisg/wais/db/cases2/001026f5.html.

a risk of an abrupt ending of a contract."[26] Therefore, the seller was restricted in its right to not sell to the buyer despite the fact that there was no agency or long-term supply contract in place. The court reasoned that the buyer had "obtained *de facto* exclusive selling rights."[27] Such implied rights, based upon good faith and trade usage, make the seller of multiple discrete transactions susceptible to damage claims under Article 74.[28] In essence, the court held that principles of reasonableness and trade usage require an extended notice of termination where damages to a buyer are foreseeable, regardless of the fact that the discrete contract failed to require such notice.[29]

Another example of the use of general principles, both express and implied, is a Netherlands Arbitration Institute[30] decision discussed in Chapter 6's coverage of Article 35 (warranties). The arbitration panel in attempting to define merchantability looked to the general principle of "international character" of the CISG and reviewed different CISG articles in attempting to find implied principles. The panel stated that it was its duty not just to simply adopt a national law's defintion of merchantability but to seek one out based on the general principles of the CISG.

Many of the CISG's rules are open-textured and allow application of contextual inputs, such as trade usage and custom.[31] For example, it makes repeated use of the "reasonableness standard" in its gap-filling provisions. The authors counted thirty-eight examples where the reasonableness standard is

[26] *Id.* at 12.

[27] *Id.*

[28] A party must pay damages "in the light of the facts and matters of which he knew or ought to have known, as a possible consequence of the breach of contract." CISG at Art. 74.

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

[30] Netherlands Arbitration Institute, No. 2319, Oct. 15, 2002, (Neth.), *available at* http://cisgw3.law.pace.edu/cases/021015n1.html.

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

imposed by the rules of the CISG.[32] Open-ended rules derive their content from post-hoc application to real world cases.[33] Such rules allow for expansive interpretations to deal with novel cases and for use in analogical reasoning. The analogical reasoning can be used to fill in gaps within the scope of the CISG. As discussed earlier, one way this is done is through the deduction of general principles underlying the CISG in order to interpret CISG rules.[34]

Because the CISG is in a code format and many of its rules are open-ended, it is important to interpret its provisions as part of a whole. In interpreting an open-ended rule, the interpreter should not only recognize the underlying rationales for that particular CISG provision, but should also recognize more general principles and other relevant provisions.[35] This methodology

[32] *See generally* CISG at Art. 8 ("reasonable person"), Art. 18(2) ("reasonable time"), Art. 25 ("reasonable person"), Art. 27 "means appropriate in the circumstances"), Art. 33(c) ("within a reasonable time"), Art. 34 "(unreasonable inconvenience or unreasonable expense"), Art. 35(b) ("unreasonable for him to rely"), Art. 37 "(unreasonable inconvenience or unreasonable expense"), Art. 38(1) ("short a period as is practical under the circumstances"), Art. 39 ("reasonable time"), Art. 43(1) ("reasonable time"), Art. 44 ("reasonable excuse"), Art. 46(2) ("reasonable time"), Art. 46(3) ("unreasonable having regard to all circumstances" and "reasonable time"), Art. 47(1) ("reasonable length for performance"), Art. 48(1)("without unreasonable delay" and "unreasonable inconvenience and uncertainty"), Art. 48(2) ("unreasonable time"), Art. 55 ("price generally charged"), Art. 60(a) ("reasonably be expected"), Art. 63 (1) ("time of reasonable length"), Art. 64 (2) ("within a reasonable time"), Art. 65(1) ("within a reasonable time"), Art. 65 (2) ("fix a reasonable time"), Art. 68 ("if the circumstances so indicate"), Art. 75 ("reasonable manner and within a reasonable time"), Art. 76(2) ("reasonable substitute"), Art. 77 ("measures as are reasonable in the circumstances"), Art. 79(1) ("could not reasonably be expected"), Art. 79(4) ("within a reasonable time"), Art. 85 ("takes steps as are reasonable in the circumstances"), Art. 86(1) ("reasonable in the circumstances"), Art. 86 (2) ("without unreasonable inconvenience or unreasonable expense"), Art. 87 ("not unreasonable"), Art. 88(1) ("any appropriate means," "unreasonable delay," and "reasonable notice"). *See, e.g.*, *infra* Chapter 6 (time of delivery).

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

[34] Professor Ferrari states that "most general principles have not been expressly provided for by the Convention. Consequently, they must be deduced from its specific provisions . . . " Ferrari, *supra* Note 12, at 224.

[35] *See, e.g.*, Kazimierska, *Remedy of Avoidance, supra* Note 3, at 79. "The remedy of avoidance should not be analyzed without taking into account the general provisions of the Convention. . . . The Convention constitutes one whole and its general provisions are of the utmost importance while considering particular issues regulated under it" *Id.* at 155.

was applied in an Austrian court decision.[36] The court held that the payment of interest was within the scope of the CISG[37] even though it was not expressly explained. The court concluded that any issues regarding the payment of interest should be settled according to the general principles underlying the CISG. The court then recognized "full compensation" as an underlying general principle that required payment of interest.[38] The court further supported its decision by recognizing payment of interest as a trade usage permitted under Article 9(2).[39]

Principle of Good Faith

Article 7 requires that CISG interpretations should be accomplished with regard to "the observance of good faith in international trade."[40] The legislative history of Article 7 demonstrates that the inclusion of a duty of good faith was the subject of contentious debate.[41] The result was the muted compromise of including a good faith principle in the interpretive methodology of the CISG. Despite the confinement of the express duty of good faith to CISG interpretation, courts and arbitral panels have implied a general duty of good faith to dealings between contracting parties. The Columbia Constitutional Court enunciated a broad good faith principle by referencing its own *Magna Charta*:

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

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

[37] CISG at Art. 74 (losses that are a consequence of breach), Art. 78 (buyer must pay interest on payments in arrears), Art. 84 (seller must pay interest on monies refunded).

[38] An Argentine court incorrectly argued that the "CISG contains no express provision recognizing payment of interest." *See* "Elastar Sacifia," Juzgado Nacional de Primera Instancia en lo Comercial No. 7 (Buenos Aires), 50.272, May 20, 1991, (Arg.), *available at* http://www.cisg.law.pace.edu/cisg/wais/db/cases2/910520a1.html.

[39] "It was also found that in relations between merchants it was expected that the seller, due to delayed payment, would resort to bank credit at the interest rate commonly practiced in its own country" *Id.* The implication of a principle of full compensation will be further discussed in Part VI.C.2.a.'s discussion of "foreseeability."

[40] CISG at Art. 7(1).

[41] John O. Honnold, Documentary History of the Uniform Law for International Sales 369 (1989).

> performances. Indeed, . . . good faith, in conformity with article 83 of the Magna Charta is presumed. . . .[42]

A Hungarian arbitration court ruled that "the observance of good faith is not only a criterion to be used in the interpretation of the CISG, but also as a standard to be observed by the parties in the performance of the contract."[43] The scholarly literature has generally favored the expanded use of Article 7's good faith principle to dealings between the parties.[44] One argument is that the use of the reasonableness standard throughout the CISG inherently requires the application of good faith to the conduct of the parties.[45] In support of this argument, the Secretariat Commentary references CISG provisions that are "manifestations of the requirement of the observance of good faith."[46] The reasonable person is seen as always acting in good faith. Moreover, the recognition of trade usage in the interpretive process has historically been premised upon the commercial norm of good faith and fair dealing.[47] In the area of acceptance, a Swiss court held that good faith is the key to determining whether a sender may assume the recipient of the confirmation letter accepted the terms of the letter.[48] A recent Belgian appellate court characterized Article 40 as the application of "the good faith principle," noting that if the seller knows of the nonconformity and fails to reveal it, he cannot fall back upon the buyer's failure to tell him what he knew already (notice).[49]

A number of CISG articles are directly related to the principle of good faith. A case in point is Article 54. Article 54 requires the buyer to take "such steps"

[42] Corte Constitucional, Sentencia C-529/00; Referencia: expediente LAT-154, May 10, 2000, (Mex.), *available at* http://cisgw3.law.pace.edu/cases/00051oc7.html.

[43] Hungarian Chamber of Commerce and Industry Court of Arbitration, Unilex Database No. VB/94 124, Nov. 17, 1995, (Hung.) *at* http://www.unilex.info/ case/cfm?pid=1 &do= case&id=389&step=Abstract.

[44] "It is suggested that the good faith principle, applied in the interpretation of the provisions of the Convention, has at the same time an effect on the contract between the parties to which the Convention is applied." Review of the Convention, *supra* Note 3, at 169.

[45] "[T]he general principles underlying many provisions of the Convention collectively impose an obligation of good faith on the parties" *See, e.g.*, Koneru, *supra* Note 6, at 107.

[46] The commentary refers to Articles 16(2)(b), 21(2), 29(2), 37, 38,39, 40, 49(2), 64 (2), 82, & 85–8 as examples of the influence of the principle of good faith on CISG rules. *See* Secretariat Commentrary, Guide to CISG, at Art. 7, *available at* http://www.cisg.law.pace.edu/cisg/text/secomm/secomm-07.html.

[47] "From the medieval *lex mercatoria* to the present, most specific rules of business can be traced to the norm of good faith and fair dealing" Larry A. DiMatteo, *The CISG and the Presumption of Enforceability: Unintended Contractual Liability in International Business Dealings*, 22 Yale J. Int'l L. 111, 146 (1997).

[48] *Infra* Part III.B.3 and Note 281 .

[49] *Infra* Part V.B.3, *S.r.l. R.C. v. BV BA R.T.* [Appellate Court Antwerp], 1997/AR/1554, Jun. 27, 2001, (Belg.), *available at* http://cisgw3.law.pace.edu/cases/010627b1.html.

and comply "with such formalities as may be required" in order to effectuate payment to the seller. Chapter 5's coverage of Article 54 shows that courts have generally interpreted this to impose a good faith duty on both the buyer and seller. The buyer must make a good faith effort to satisfy the requirements of the contract and cannot use its own lack of action as an excuse for failure. Therefore, the buyer is not guilty of breach for failing to meet its duty to obtain a letter or credit or to obtain currency transfer authorization. He is guilty of breach for failure to use good faith efforts to obtain such formalities. In addition, the seller cannot hinder the buyer's attempts to comply with these formalities.

The concepts of *nachfrist* notice, as discussed in Chapter 8's coverage of the seller's right to affix additional time and Chapter 9's examination of the buyer's right to affix additional time for performance, and the right to cure (Chapter 9's review of Article 48) are examples where the concept of good faith is expressly or implicitly acknowledged. Article 48 gives the seller the right to cure a defective performance after the date of delivery as long as the late performance does not cause the buyer undue delay, inconvenience, or uncertainty. Alternatively, the buyer must in good faith accept the late performance. Article 47 and 63 give sellers and buyers rights to request additional time for performance. The courts have interpreted this to mean that parties receiving such requests must grant them unless they can provide good faith reasons for not granting an extension.

GENERAL DEFAULT RULES AND SPECIFIC DEFAULT RULE CREATION

Many of the CISG articles provide very general, vague default rules tied to the concept of reasonableness. It is interesting to evaluate whether CISG jurisprudence has begun to fashion more specific, functional default rules.[50] The alternative approach is a hasty devolution to the rules found in domestic

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

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

An interesting case in point is the excuse provision provided by Article 44. Article 44 allows a buyer to assert a "reasonable excuse" for failure to give timely notice of nonconformity (defect) under Article 39(1). This article is an example of the lack of clarity that characterizes many of the CISG's articles. It simply states that a buyer has the right to sue for damages or seek a price reduction "if he has a reasonable excuse for his failure to give the required notice." Chapter 5's coverage of Article 44 shows that courts have been generally unwilling to excuse a buyer from his notice duty under Article 39(1). However, a number of factors or specific default rules have surfaced in the cases. Some of the factors recognized by the courts, including the ease of detection, the sophisication of the buyer, and undue delay in reporting consumer complaints, are all positively related to not granting an excuse. A potential default rule offered by a number of courts is the effect of the use of neutral third-party inspectors. An excuse is more likely when the delay in inspection was due to the acts of a government inspection agency or a third-party inspection company that both parties had agreed upon.

An exercise akin to the development of specific default rules is the creation of factors that can be applied in the analysis of various types of cases under the scope of CISG provisions. These factors provide substance to the borderless reaches of reasonableness and enable the formulation of specific default rules. A Swiss Court enunciated a number of such factors by quantifying Article 38(1)'s mandate that a buyer must inspect delivered goods "within as short a period as is practicable in the circumstances."[51] The court listed a number of factors that can be used to categorize "in the circumstances." They include:

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

[51] OG des Kantons Luzern, 11 95 123/357, Jan. 8, 1997, (Switz.), *available at* http://cisgw3.law.pace.edu/cases/970108s1.html.

> with other dealings. . . . Where a large quantity of goods is delivered, the buyer does not need to examine the entire load but must test samples. Where an examination may damage the substance of the goods, the buyer must check the weight, appearance, etc. In addition to that, she must also take samples even if the examined goods are destroyed in the process or cannot be used afterwards. However, the number of samples taken in such cases can be reduced to a few per thousand. This rule also applies to goods in their original packaging which cannot be sold after being opened.[52]

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

Another example can be found in the German Supreme Court's interpretation of the excuse doctrine of impediment.[53] Article 79 allows a party a legal excuse in the event of the unexpected existence of an "impediment beyond his control."[54] The CISG fails to define what it means by an "impediment" and "beyond his control." The court reasoned that the word impediment does not allow for a reallocation of contract risk. In this case, the seller argued for impediment due to the acts of a third-party supplier that it had hired to fulfill its contract. The court rejected third-party non-performance as a ground for impediment. It defined "beyond control" more broadly than mere physical control.[55] According to the court, it also included "economic risk control."[56] Because the third-party supplier was within the "seller's sphere of influence,"[57] the economic risk remained with the seller. The seller could not argue impediment simply because it could not physically control the actions of a third party.

[52] *Id.*

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

[54] CISG at Art. 79(1).

[55] *Id.*

[56] Albert H. Kritzer, Case Commentary for German Supreme Court, *available at* http://cisgw3.law.pace.edu/cases/990324g1.html#cc.

[57] *Id.*

CHAPTER THREE

FORMATION: WRITING REQUIREMENTS

The CISG embodies a modern approach to contract formation, recognizing that contracts are often concluded quickly and without a formal writing. The CISG provisions dealing with contract formation are found in Part II of the convention, which contains the rules of formality and offer-acceptance. The rules of formality refer to the writing requirements, definiteness of terms, and types of admissible evidence. Offer-acceptance rules include issues dealing with the mechanics of formation, the battle of the forms scenario, and the firm offer rule. Article 29, found in Part III of the CISG, is concurrently analyzed for contract modification requirements. Before discussing the specific contract formation rules of the CISG, the first section of this chapter will briefly focus on the issue of precontractual liability. The CISG does not expressly cover the issue of precontractual liability. Nonetheless, the possibility for such liability is an important issue and will be examined first.

PRECONTRACTUAL LIABILITY

The subject of precontractual liability can be divided into two areas: first, the liability for the bad faith breaking off of negotiations; second, the enforceability of representations or informal writings given during the precontract or negotiation stage. According to American and English common law, a negotiating party owes no duty of good faith to the other party. One may terminate negotiations in bad faith without liability for the other parties' expenses. One major exception to this freedom of negotiation without liability is *promissory estoppel* or reliance theory. Reliance theory may be used to extend contractual liability to protect someone who reasonably relied upon the belief that the parties would conclude a final agreement.[1]

[1] *See* American Law Institute, Restatement (Contracts) of Contracts § 90 (1981) ("promise reasonably inducing action or forbearance").

Contrary to the common law approach followed in the United States, the idea of precontractual liability is accepted in most of the world's national legal systems. In civil law, one form of precontractual liability, *culpa in contrahendo*, has been a firm part of contract and tort laws. Precontractual liability is generally premised on the implied duty of the parties to act in good faith during the negotiations of a contract. In contrast, the American Uniform Commercial Code (UCC) mandates good faith only during the performance and enforcement of contracts. Good faith under the civil law system, however, means more than the breaking off of negotiations in bad faith. Numerous duties are attributed to the negotiating parties. Under Dutch law, for example, there are duties to disclose essential information, a duty to investigate in order to obtain necessary information, and a duty to refrain from negotiating with third parties.[2]

The following excerpt discusses the potential liability based upon the enforceability of informal writings and the role that the CISG may play in the area of precontractual liability. The name given to informal business or legal writings during the precontract or negotiations stage is *comfort instruments*.[3]

Larry A. DiMatteo, *The CISG and the Presumption of Enforceability: Unintended Contractual Liability in International Business Dealings* 22 The Yale Journal of International Law 111 (1997) Excerpts from pages 133–34, 137–39, 141–43, 158–60, 165–67

One area of contract law that the CISG may help to unify is the disparate treatment of precontractual liability and the enforceability of comfort instruments (informal business and legal writings) by national legal systems. The CISG's notion of *original interpretation* may help to unify the diverging national opinions regarding precontractual liability and comfort instrument enforceability.

[2] *See, e.g.*, Plas v. Valburg, Hoge Road, 18-6 Nederlandse Jurisprudentie 723 (1983) (discusses three stages of the negotiation process with liability attaching to the final two stages). This case was extracted from Michael Tegethoff, *Culpa in Contrahendo* in German and Dutch Law – A Comparison of Precontractual Liability, 5 Maastricht Journal of European & Comparative Law 341, 347 (1998).

[3] These instruments or written correspondences are often given in letter form. They are found in all forms of law and business. Business parties, and their lawyers, use informal letters or writings in order to communicate during contract negotiations. A letter or writing is given by one party to another in a negotiation or by a third party to the negotiations in order to encourage one of the parties to enter into a prospective transaction. For an analysis of precontractual liability in conjunction with the CISG see, Michael Joachim Bonnell, *Formation of Contracts and Precontractual Liability Under the Vienna Convention on International Sale of Goods*, in Formation of Contracts and Precontractual Liability 157 (Paris: ICC Publishing, S.A. 1990).

General Principles and Enforceability

The enforceability of quasi-contractual and preliminary instruments has long been debated. The line between contract and precontract or noncontract has never been precisely fixed.[4] [American] courts have at times rescued those who relied upon noncontractual instruments by using flexible concepts such as promissory estoppel and good faith to give recourse to those whose claims would have been precluded by one of contract law's formalities. The uncertainty of liability is compounded in the area of international contracts because of variations in contractual formalities among different legal systems. For example, an American businessperson involved in a sales transaction can rely on the statute of frauds to avoid incurring liability when giving an oral assurance or representation.[5] In contrast to the American approach, a verbal guaranty or assurance is likely to be enforced under the CISG and in civil legal systems. According to the CISG and the civil law approach, the party seeking enforcement of a comfort letter or an oral assurance would need to show that the parties' actions would indicate to a reasonable person that an agreement had been made or that an intent to be bound had been expressed. Thus, when the parties contemplate a formal written agreement, the court may find a contract prior to its final integration: "[T]he mere fact that the parties contemplate memorializing their agreement in a formal document does not prevent their informal agreement from taking effect prior to that event."[6]

Letters of intent and agreements in principle have long tested the ability of American courts to differentiate between contract and mere negotiation. Parties (and courts) take three views toward preliminary agreements, letters of intent, comfort instruments, and other inchoate agreements. First, a party may believe that she is not legally bound until a formal writing is signed, despite an oral agreement or assurance. Second, a party may believe that the execution of a more formal writing is a mere formality and that the informal instruments or oral assurances are legally binding. Third, the party may think that the preliminary agreement formalizes the parties' intent to enter into a formal agreement pending successful negotiations by their attorneys and other representatives. The party may believe, however,

[4] *See, e.g.*, G. Richard Shell, *Opportunism and Trust in the Negotiation of Commercial Contracts: Toward a New Cause of Action*, 44 Vanderbilt L. Rev. 221 (1991); E. Allan Farnsworth, *Precontractual Liability and Preliminary Agreements: Fair Dealing and Failed Negotiations*, 87 Colum. L. Rev. 217 (1987); Charles L. Knapp, *Enforcing the Contract to Bargain*, 44 N.Y.U. L. Rev. 673 (1969).

[5] It should be noted, however, that the importance of the statute of frauds in Anglo-American jurisprudence is often overstated. The lack of a writing or the lack of a final, integrated expression of agreement has rarely prevented a court from admitting evidence in order to fill in gaps in a contract.

[6] V'Soske v. Barwick, 404 F.2d 495, 499 (2d Cir. 1968).

that failure by these representatives to finalize the terms of the agreement releases the principals from their good faith intentions to enter into a formal, binding agreement.

In American jurisprudence, the enforceability of preliminary agreements and correspondences remains unclear. It is clear, however, that reliance theory has been used to expand the contractual liability net into areas of precontract or quasi-contractual instruments in ways not previously seen. This expansion of contractual liability is likely to include international contract negotiations and use of comfort instruments.

> Recent changes in modern international transactions have lead to an increased reliance on precontractual instruments. Commercial transactions are increasingly consummated between parties of diverse cultural and legal traditions. Parties are often unfamiliar with the ethical and legal ramifications of the negotiating process in other countries, which may lead the parties to write out their goals at a relatively early stage of the negotiations.[7]

Given this tendency to use precontractual agreements or instruments, the question becomes whether the relevant business community would consider such instruments to be binding. Ultimately, the potential for liability in the area of precontract and comfort instruments will be detemined by commercial practice. The more such instruments are a product of hard bargaining and the more contracting parties rely on them, the greater the likelihood of contractual liability.

The CISG and Comfort Instrument Enforceability

How comfort instruments are *originally* interpreted under the CISG by a court of first impression will play a key role in determining their enforceability. That court will face the daunting task of harmonizing the divergence in the world's different legal systems regarding comfort instrument enforceability. The courts will hopefully look to general principles of contract law for guidance in determining the enforceability of these business instruments. Contract norms include the principles of good faith, fairness in the exchange, compensation for justifiable reliance, and the belief that one should keep promises. If a party agrees to a seemingly one-sided agreement based on its reliance on a third party assurance, then a court may feel inclined to enforce the assurance as a way of equalizing the underlying agreement. For example, the use of comfort instruments to motivate a party to enter into an agreement, followed by refusal to provide such comfort, could be construed under the German AGBG as something that works "to the disadvantage of

[7] John Klein & Carla Bachechi, *Precontractual Liability and the Duty of Good Faith Negotiation in International Transactions*, 17 Houston Journal of Int'l L. 1, 8 (1994).

a party in a way irreconcilable with good faith."[8] A civil law court, in reviewing a CISG sales transaction, is likely to respond to the bad faith use of comfort instruments by awarding foreseeable reliance damages. Finally, the great stock that international businesspersons place on the duty to notify can be applied, by analogy, to comfort instruments. If a comfort issuer's defense is that there has been a policy change subsequent to the issuance of the comfort letter, then at the very least, she should be required to notify the other party of that policy change. This would allow the receivers of comfort instruments to seek other assurances in order to protect themselves.

The enforceability of comfort instruments under the CISG is not likely to be determined in the near future. Nonetheless, the aids of interpretation used under the civil law system may be applied in order to predict a possible judicial response. The Italian Civil Code of 1942 provides the means of interpretation that analogously applies to the CISG's dictate that its articles are to be interpreted *originally*:

> In interpreting the (CISG), no other meaning can be attributed to it than that made clear by the actual significance *of* the words according *to* the connection between them, and by the intention of the [drafters]. If a controversy cannot be decided by a precise provision, consideration is given to provisions that regulate similar cases or analogous matters; if the case still remains in doubt, it is decided according to the general principles [on which the CISG is based].[9]

There is no article within the CISG that specifically deals with precontractual liability or with liability stemming from *informal* instruments of business such as comfort letters. Instead, liability will have to be premised on a composite of relevant articles of the CISG. The creation of the composite should be guided by the founding principles and "general" articles of the CISG and the general principles of contract law.

The CISG's lack of both a writing requirement and a parol evidence rule gives the receiver of a comfort instrument a strategic advantage in proving enforceability. Contemporaneous oral assurances as to the legality of the instrument may be admitted into evidence to prove the issuer's intent to be bound. Moreover, evidence of the depth of negotiations over the wording of the instrument and the importance attached to it by the parties will help support a claim of justifiable reliance.

Because of the different approaches of the common and civil law, the future enforceability of comfort instruments is likely to depend on which courts are called upon to render a decision in a case of first impression. The civil law countries' less formal requirements for finding contractual liability,

[8] *See* §§ 157 & 242 HGB (F.R.G.).
[9] Codicle Civile (C. civ) Art. 2 (Italy 1942).

coupled with the CISG's liberal evidentiary requirements, may predispose civil law courts to enforce such instruments. Once such a precedent for enforceability is in place, it may be difficult for U.S. courts to avoid similar decisions.

Evidentiary Requirements

For the American businessperson, the level of evidence needed to meet the threshold of agreement under the CISG has made international contracting a riskier endeavor. The writing requirement of the U.S. Uniform Commercial Code eliminates liability for oral agreements and "informal" letter agreements. The writing must be "sufficient to indicate that a contract for sale has been made . . . and [must be] signed by the party against whom enforcement is sought."[10] In contrast, the CISG's evidentiary threshold is easier to meet for two reasons. First, a purely oral agreememt or one evidenced by informal correspondence or comfort instruments is sufficient to evidence the formation of a contract. Second, contractual obligations "may be proved by any means,"[11] which would include a prior agreement or a contemporaneous oral agreement. A decision rendered by the Mexican Commission for the Protection of Foreign Trade, for example, cited Article 11 of the CISG in holding that a number of commercial invoices and evidence of the delivery of the goods were sufficient to support a finding of a contract of sale.[12] The informality, both in form and substance, of most comfort instruments is not likely to be as meaningful under the CISG as it is under U.S. jurisprudence.

It is important for American businesspersons to understand the potential for precontractual liability in international business dealings. First, there is no true counterpart to such liability in the common law system. Thus, what is considered *mere negotiations* in American law can lead to unexpected legal liability in an international business negotiation. Second, the damages given for a bad faith termination of negotiations can be substantial. Under the doctrine of *culpa in contrahendo*, a court has the authority to grant full contract damages, including lost profits for a bad faith termination of negotiations.

[10] UCC § 2-201 (1).
[11] CISG at Art. 11.
[12] *See*, Albert H. Kritzer, Guide to Practical Applications of the United Nations Convention on Contracts for the International Sale of Goods 3 (1994).

WRITING REQUIREMENTS AND THE PAROL EVIDENCE RULE

Consistent with its freedom of form approach, the CISG does not require a writing for the formation of a contract. In the area of contract modification, it requires neither a writing nor consideration. Articles 11, 12, 13, and 29 contain the CISG's writing, evidence, and consideration requirements for formation, modification, and termination. Although freedom from formalities is the rule of both Articles 11 and 29, these articles allow contracting states to preserve writing requirements if they wish to do so. Moreover, the convention's principle of party autonomy allows parties to impose their own requirements.

Article 11 of the convention states that a "contract of sale need not be concluded in or evidenced by writing and is not subject to any other requirement as to form."[13] Consequently, under the convention, oral agreements are valid.[14] Article 12 allows a contracting state to make a declaration under Article 96 of the convention in order to exempt itself from the informalities of Articles 11 (addressing issues regarding formation and proof of a contract's existence), Part II (addressing offer and acceptance), and Article 29 (addressing modification and termination).[15] Article 96 declarations are available, however, only to contracting states "whose legislation requires contracts of sale to be concluded in or evidenced by writing."[16] Moreover, Article 96 requires that at least one of the parties to the contract have its place of business in the declaring state.[17] Because Article 12 refers only to formalities required under Articles 11, 29, and Part II, other notices or indications of intention unrelated to these articles are not affected by an Article 96 declaration. CISG default rules on formality not relating to Articles 11, 12, and Part II remain in place.[18]

[13] CISG at Art. 11.

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

[15] Although most Western legal systems abandoned the requirement of a writing for the sale of movable property, the UCC § 2-201 requires contracts for the sale of goods over $500 to be in writing. At the time of drafting, many socialist legal systems also required a writing for a binding contract. CISG at Art. 12.

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

[17] CISG at Art. 96.

[18] *See* Secretariat Commentary to Article 12, *available at* http://www.cisg.law.pace.edu/cisg/text/secomm/secomm-12.html.

Article 13 specifies that telegrams and telexes qualify as "writings."[19] Given the drafters' concern for efficient communication, courts interpreting the CISG would most likely recognize more modern forms of electronic communication, not anticipated at the time of drafting.[20] When a contracting state makes an Article 96 declaration, private international law determines whether a writing is necessary and what constitutes a writing. If domestic law applies because of a reservation pursuant to Articles 12 and 96, Article 13 demands that "domestic form requirements are always satisfied by the use of telegrams and telexes."[21]

Although a writing is not required in general, some international conventions may override the CISG with regard to specific provisions in a contract for the sale of goods. For example, the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958 requires arbitration clauses to be in writing and the Brussels Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters requires jurisdiction clauses to be in writing. In such cases, the CISG may apply to determine whether the writing requirement is satisfied.[22]

The CISG contains no express statement on the role of parol evidence. Article 11, however, provides that a contract "may be proved by any means, including witnesses."[23] This provision indicates that the CISG admits not only oral testimony related to the contract, but also evidence, such as negotiations, the intent of the parties, prior course of dealing, and conduct. Article 8 of the convention instructs that a party's statements and conduct are to be interpreted according to the subjective intent of the party "where the other party knew or could not have been unaware what that intent was."[24] Otherwise, intent is determined according to a reasonable person standard.[25] To determine intent, courts must consider "all relevant circumstances."[26] The

[19] CISG at Art. 13.

[20] Eiselen, *supra* note 16, at 35. Article 1.10 of the UNIDROIT Principles extends the meaning of "written" to "any mode of communication that preserves a record of the information contained therein and is capable of being reproduced in tangible form." *See* Seig Eiselen, *Remarks on the Manner in Which the Unidroit Principles of International Commercial Contracts May Be Used to Interpret or Supplement Article 29 of the CISG*, 14 Pace Int'l L. Rev. 379, 382 (2002) (suggesting that Article 13 should be extended to include the modern language of Article 1.10 of the UNIDROIT Principles).

[21] *See, e.g.*, Peter Schlechtriem, Uniform Sales Law – the U.N. Convention on Contracts for the International Sale of Goods 45 (1986), *available at* http://www.cisg.law.pace.edu/cisg/biblio/schlechtriem.html.

[22] *See, e.g.*, Filanto S.p.A. v. Chilewich Int'l Corp., 789 F. Supp. 1229 (S.D.N.Y. 1992).

[23] CISG at Art. 11.

[24] *Id.* Art. 8(1).

[25] *Id.* Art. 8(2).

[26] *Id.* Art. 8(3).

CISG's permissiveness, demonstrated by Article 8's instructions to consider "all relevant circumstances" and Article 11's statement that a contract may be proved by "any means," is contrary to the common law approach of excluding parol evidence.

Although contracting parties may insist on certain formalities for modification or termination, the CISG does not require any.[27] The CISG makes no reference to consideration, which is required for modification under common law. Article 29(1) states that "a contract may be modified or terminated by the mere agreement of the parties."[28] If parties have prescribed formalities in a written agreement, however, Article 29(2) makes it clear that such formalities must be observed in order to make the amendment or termination valid. A writing requirement, such as a no oral modification clause, however, will be ignored if one party's conduct causes the other to rely on oral statements or other conduct.[29]

The Writing Requirements of Articles 11, 12, and 13

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

The lack of a writing requirement under the CISG does not pose many problems because so many signatory countries abandoned the statute of frauds concept even before adopting the convention.[30] A notable exception is the United States, where the UCC still requires that contracts for the sale of goods for more than $500 be in writing.[31] Although Article 11 makes it clear that a

[27] *Id.* Art. 29(1).

[28] *Id.* Art. 29(1). *See* Alejandro M. Garro, *Reconciliation of Legal Traditions in the U.N. Convention on Contracts for the International Sale of Goods*, 23 Int'l Law 443–83 (1989), *available at* http://www.cisg.law.pace.edu/cisg/biblio/garro1.html.

[29] CISG at Art. 29(2).

[30] *See* Garro, *supra* note 28. *See also* Jacob S. Ziegel, *Report to the Uniform Law Conference of Canada on Convention on Contracts for the International Sale of Goods* (1981), *available at* http://www.cisg.law.pace.edu/cisg/test/ziegell11.html (noting that writing requirements for contracts of sale were repealed in the United Kingdom in 1954 and in British Columbia in 1954 with no adverse consequences).

[31] UCC. § 2-201(1). Revised Article 2 increases the threshold for when a writing is necessary to $5,000, as approved at the Annual Meeting of the American Law Institute (May 13, 2003). A 2002 Draft of Revised Article 2 is *available at* http://www.law.upenn.edu/bll/ulc/

contract may be evidenced by "any means," national courts must still consider whether the evidence provided is sufficient to determine that a contract exists. A U.S. court stated that under the CISG, a "contract may be proven by a document, oral representations, conduct, or some combination of the three."[32] An unsigned fax,[33] an invoice together with documents for the carriage of goods,[34] telegrams and telexes,[35] conduct such as the opening of a letter of credit,[36] and witnesses' testimony about the intent of the parties[37] have all been introduced to prove the existence of a contract. A few courts have insisted that the parties should "get it in writing," but such comments appear to be made merely as cautionary statements.[38]

Articles 8 and 9 assist courts in determining whether an oral agreement has been validly concluded. These provisions embody the CISG's emphasis on upholding the parties' intentions and expectations as well as trade usage and industry customs. A case decided by the Helsinki Court of First Instance and upheld by the Court of Appeals found that an oral agreement regarding an exclusive distributorship arrangement was validly concluded and that one party had failed to give proper notice of termination.[39] In reaching its

ulc_frame.htm. An exception to the writing requirement is an oral agreement between merchants that is followed by a written confirmation. *See* UCC § 2-201(2).

32 *See* Geneva Pharmaceuticals Technology Corp. v. Barr Laboratories, Inc. et al., 201 F. Supp. 2d 236, 281 (S.D.N.Y. 2002).

33 Handelsgericht [HG][Commercial Court] 45/1994, Dec. 5, 1995, (Switz.), *available at* http://www.unilex.info/dynasite.cfm?dssid=2376&dsmid=13356&x=1.

34 "Jose Luis Morales y/o Son Export, S.A. de C.V., de Hermosillo Sonora, Mex.," Compromex Arbitration proceeding, M/66/92, May 4, 1993, (Mex.), *available at* http://cisgw3.law.pace.edu/cisg/wais/db/cases2/930504m1.html. *See also* Alejandro M. Garro, *The U.N. Sales Convention in the Americas: Recent Developments*, 17 J.L. & Com. 219–44.

35 Helsingin hoviokeus [Helsinki Court of Appeals], S00/82, Oct. 26, 2000, (Fin.), *available at* http://cisgw3.law.pace.edu/cisg/wais/db/cases2/001026f5.html.

36 "La Costeña S.A.," Compromex Arbitration Proceeding Apr. 29, 1996, M/21/95 (Mex.), *available at* http://http://www.cisg.law.pace.edu/cisg/wais/db/cases2/960429m1.html.

37 V. Russian German Joint Venture v. Fa. Va. Gesellschaft fur Wirtschaftskooperation mbH, 7 U 5460/94 Oberlandesgericht [OLG] München [Provincial Court of Appeal], Mar. 8, 1995, (F.R.G.), *available at* http://www.unilex.info/case.cfm?pid=1&do=case&id=119&step=Abstract.

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

39 *See* Helsingin hoviokeus, S 00/82, Oct. 26, 2000, (Fin.), *available at* http://cisgw3.law.pace.edu/cisg/wais/db/cases2/001026f5.html.

decision, the court considered "all relevant circumstances" as required by Article 8.[40] This consideration included the incorporation into the contract of any "usage of which the parties knew or ought to have known and which in international trade is widely known to, and regularly observed by, parties to contracts of the type involved in the particular trade concerned."[41] A U.S. court used a similar approach to determine whether, as one party claimed, it was "a well-established custom in the industry . . . to rely on implied, unwritten supply commitments."[42] Although the court did not refer specifically to Articles 8 or 9, it cited the CISG's "strong preference for enforcing obligations and representations customarily relied upon by others in the industry," as well as Article 7(1)'s focus on observing "good faith in international trade."[43]

A major complication in the CISG's "no writing requirement" regime is Article 12's allowance that contracting states may exempt themselves from the informalities of Articles 11 and 29. The use of an Article 96 declaration to exempt a contracting state from Article 11 does not necessarily dictate that a writing will be required. Two interpretations have been suggested regarding which law applies for Article 12 purposes. The first interpretation is that form requirements will always be preserved if one of the contracting parties has made such a declaration.[44]

The second interpretation is that the forum's conflict of law principles pertain and the applicable national law determines whether a writing is required for a contract to be enforceable. If the applicable law points to the state that requires a writing, then the formalities must be observed. If the private law points to a state that does not have a writing requirement or to the CISG, then no writing is required. For example, let's look at a Hungarian case because Hungary is a state that has made an Article 96 declaration.[45] Here, the

[40] *Id.*

[41] CISG at Art. 9(2). Further, the court stated that the contracting parties must "reasonably consider the interests of the other party."

[42] *See* Geneva Pharmaceuticals Techn. Corp. v. Barr Laboratories, Inc. et al., 201 F. Supp. 2d 236, 281 (S.D.N.Y. 2002).

[43] *Id.*

[44] *See* Peter Schlechtriem, Commentary on the UN Convention on the International Sale of Goods (CISG) 91, (2d ed. 1998) (stating that the minority view, which would have the rules of the reservation state always prevail must be rejected because "the reservation state's universal claim to the validity of its formal requirements would then exclude the private international law rules of other Contracting States and make those requirements internationally applicable uniform law").

[45] CISG. Table of Contracting States: Hungary. Pace Law School CISG Database, *at* http://www.cisg.law.pace.edu/cisg/countries/cntries-Hungary.html (last updated Jan. 21, 2004).

Metropolitan Court of Budapest held that the contract concluded over the telephone was valid because the law of the forum state, Germany, pointed to German law, which does not require a writing.[46] Similarly, a Dutch court found that a contract based on an oral offer was valid despite the fact that one of the parties had its place of business in the Russian Federation, a state which had made an Article 96 declaration, because the private international law of the forum pointed to the law of the Netherlands, which required the court to apply the CISG as adopted by the Netherlands.[47]

While Article 12 applies only to those states that qualify for an exemption through an Article 96 declaration, parties may impose their own private statute of fraud requirements. In doing so, the party imposing the writing requirement must be sure that the other party is aware of the requirement. An Austrian court held that where the seller had standard terms that required acceptance to be in writing, such terms would apply only if the buyer had knowledge of such standard terms; otherwise, the oral acceptance would not prevent the conclusion of a valid contract under the CISG.[48] This notion of *particularized express consent* is further discussed in Chapter 11.

Parol Evidence: National Courts and Articles 11 and 29

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

[46] *See* Adamfi Video Production GmbH v. Alkotók Studiósa Kisszövetkezet, Fővárosi Bíróság [FB]Budapest [Metropolitan Court], AZ 12.G.41.471/1991, Mar. 24, 1992, (Hung.), *available at* http://www.unilex.info/dynasite.cfm?dssid=2376&dsmid=13356&x=1.

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

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

ADMISSIBILITY OF PAROL EVIDENCE. Cases involving the application of the parol evidence rule to the CISG have been limited to courts of the United States.[49] The United States instituted a statute of frauds and parol evidence rule in Section 2-201 of the UCC.[50] Consequently, parties bringing cases in the United States have raised the parol evidence rule, attempting to exclude evidence that a contract existed or evidence of unfavorable contract terms. The majority of U.S. courts have resisted the temptation of homeward trend in barring the application of the parol evidence rule to contract disputes governed by the CISG.[51] Article 11 clearly recognizes the validity of oral contracts, which logically would allow parol evidence to prove that a contract has been agreed to by the parties and what the agreement included. Moreover, courts have interpreted Article 8(3) of the CISG, which directs courts to give "due consideration . . . to all relevant circumstances of the case including the negotiations . . . " to determine the intent of the parties as a clear instruction to admit parol evidence, even in cases where there is a formal written contract.[52] The stronger argument, then, is that given the existence of the provisions in Articles 11 and 8(3), the admissibility of evidence in a contract dispute is within the *scope* of the CISG. Furthermore, application of nation-specific rules like the American parol evidence rule is antithetical to the CISG's general principles of uniformity and international character.[53]

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

[50] Virtually all states in the United States apply the UCC to contracts for the sale of goods valued at $500 ($5,000) or more. UCC § 2-201(1) provides: "a contract for the sale of goods for the price of $500 (5,000) or more is not enforceable by way of action or defense unless there is some writing sufficient to indicate that a contract for sale has been made between the parties and signed by the party against whom enforcement is sought or by his authorized agent or broker." Revised Article 2 increases the amount to $5,000).

[51] *See* Shuttle Packaging Sys. v. Jacob Tsonakis, INA, S.A., No. 1:01-CV-691, 2001 U.S. Dist. LEXIS 21630, at *22 (W.D. Mich. Dec. 17, 2001); Fercus v. Palazzo, No. 98 CIV. 7728 (NRB), 2000 U.S. Dist. LEXIS 11086, at *11–12 (S.D.N.Y. Aug. 8, 2000); MCC-Marble, 144 F.3d at 1390 & n.17; Claudia v. Olivieri Footwear Ltd., No. 96 CIV. 8052 (HB) (THK) 1998 U.S. Dist. LEXIS 4586, at *18 (S.D.N.Y. Apr. 6, 1998); Filanto v. Chilewich Int'l Corp., 789 F. Supp. 1229, 1238, n.7 (S.D.N.Y. 1992). *But see* Beijing Metals & Minerals Import/Export Corp. v. American Business Ctr., Inc., 993 F.2d 1178 (5th Cir. 1993). The Court of Appeals for the Fifth Circuit applied Texas law, stating that it "need not resolve the choice of law issue, because . . . discussion is limited to application of the parol evidence rule (which applies regardless . . .)." *Id.* at 1183.

[52] *MCC-Marble*, *supra* note 49, at 1389.

[53] *Id.* at 1391. *See also* Harry M. Fletchner, *Recent Developments: CISG*, 14 J.L. & COM. 153, 157 (1995) (criticizing the *Beijing Metals* opinion and noting that "[c]ommentators generally agree that article 8(3) rejects the approach to the parol evidence questions taken by U.S.

TYPES OF EXTRINSIC EVIDENCE. The CISG allows a broad spectrum of admissible evidence for construing the terms of the parties' agreement.[54] Using Articles 8 and 9 as gap fillers, U.S. courts have complied with the CISG's mandate to admit a broad range of extrinsic evidence in proving the existence of a contract or the content of contracts. In cases involving both written and oral agreements, the CISG allows a court to consider not only the written agreement, but also statements made prior to the agreement and statements that contradict the written documentation.[55] Regardless of whether the original agreement was in writing, the CISG allows a court to admit all information relevant to the formation of the contract.[56] In a case where the parties disagreed on the terms of the contract, one U.S. court noted that evidence could include "any negotiations, agreements, or statements made prior to the issuance of the invoices in issue," as well as any prior course of dealings.[57]

The permissiveness of the CISG evidence regime is apparent in cases where courts have admitted not only evidence pertaining to negotiations, and agreements or statements made prior to a written agreement, but also evidence of the parties' subjective intent.[58] The court in *MCC Marble Ceramic Center, Inc.*[59] stated that "the CISG appears to permit a substantial inquiry into the parties' subjective intent, even if the parties did not engage in any objectively ascertainable means of registering this intent."[60] The court held that it had

domestic law" (citations omitted)). *But see* David H. Moore, *Note, The Parol Evidence Rule and the United Nations Convention on Contracts for the International Sale of Goods: Justifying* Beijing Metals & Minerals Import/Export Corp. v. American Business Center, Inc., 1995 BYU L. REV. 1347, 1361–63 (arguing that the parol evidence rule could be an appropriate way to discern what consideration is "due" under Article 8(3) and that the parol evidence rule discourages perjury and bad faith thereby promoting good faith and uniformity in the interpretation of contracts as expressed in CISG, Article 7). *See generally* Philip Hackney, *Is the United Nations Convention on the International Sale of Goods Achieving Uniformity?* 61 LA. L. REV. 473, 481–82 (2000) (discussing *Beijing Metals* and the commentators fear that courts will interpret the CISG by reference to domestic law because of the lack of case law).

54 *See* Larry A. DiMatteo, *The CISG and the Presumption of Enforceability: Unintended Contractual Liability in International Business Dealings*, 22 YALE J. INT'L L. 111, 127 (1997).

55 *Id.*

56 *See Claudia*, No. 96 CIV. 8052.

57 *Id.* at *19–20.

58 Article 8(1) states that "statements made by and other conduct of a party are to be interpreted according to *his* intent where the other party knew or could not have been unaware what that intent was." *See MCC-Marble*, 144 F.3d at 1391; Shuttle Packaging Sys. v. Jacob Tsonakis, INA, S.A., No. 1:01-CV-691, 2001 U.S. Dist. LEXIS 21630, at *22 (W.D. Mich. Dec. 17, 2001); Mitchell Aircraft Spares, Inc. v. European Aircraft Service AB, 23 F. Supp.2d 915, 921 (N.D. Ill. 1998).

59 *MCC-Marble*, 144 F.3d at 1387.

60 *Id.*

to consider evidence of the parties' subjective intent that certain terms of a written agreement were not binding.[61] The plaintiff had argued that the defendant was aware of the plaintiff's subjective intent not to be bound by the terms on the reverse side of the pre-printed form, despite a provision directly below the signature line that expressly and specifically incorporated those terms.[62] This case illustrates the difference in approach between the UCC and the CISG evidence regimes. Although parol evidence is generally admissible under the UCC only to resolve patent ambiguities, the CISG allows evidence of the parties' subjective intent, even when there is no ambiguity in the written contract or reasonable dispute as to an applicable trade usage.[63]

The lack of knowledge of the inner workings of the CISG in areas such as subjective intent and the use of extrinsic evidence was apparent in *GPL Treatment v. Louisiana-Pacific Corp.*[64] The CISG's applicability as the appropriate law was an issue in the case. Applying the UCC, the Oregon Court of Appeals

[61] *Id.*

[62] *Id.*

[63] The court admitted evidence of the parties' subjective intent, but stated that, "[w]e find it nothing short of astounding that an individual, purportedly experienced in commercial matters, would sign a contract in a foreign language and expect not to be bound simply because he could not comprehend its terms." *MCC-Marble*, 144 F.3d at 1387 n.9. The court noted that the CISG's adoption of subjective intent is a rejection of Holmesian objectivity: "The law has nothing to do with the actual state of the parties' minds. In contract, as elsewhere, it must go by externals and judge parties by their conduct." *Id.* at 1387 n.8. Following the lead of the *MCC-Marble* decision, other U.S. courts have found that the parol evidence rule does not apply to agreements governed by the convention and that the subjective intent of the parties must be considered in determining the scope of the agreement. One court held that the subjective intent of the parties had to be considered where a purchase order was ambiguous. *Mitchell Aircraft*, 23 F. Supp.2d at 921. Another court held that a non-competition agreement was not invalid for failing to specify the restricted area, because the parties' intent to apply the restriction to the United States' market was evident by its statements and conduct. *Shuttle Packaging Sys.*, 2001 U.S. Dist. LEXIS 21630, at *22. *Contra*, Alta-Medine v. Crompton Corp., No. 00 CIV. 5901 (HB), 2001 U.S. Dist. LEXIS 18107, at *15 & n.6 (S.D.N.Y. Nov. 7, 2001). This case involved a disputed distributorship agreement in which the court focused on an informal writing as significant evidence because it was "the only clear communication between the parties. . . . " It further stated that it was "immaterial . . . whether the . . . CISG applies." The court concluded that there was "no agreement for the Court to enforce, written or otherwise. . . . " The court failed to realize that the CISG treats the admissibility of evidence quite differently and that evidence, such as the subjective intent of the parties as well as their prior relationship and course of dealings, might have influenced its conclusion.

[64] *See* GPL Treatment v. Louisiana-Pacific Corp., 894 P.2d 470 (Or. Ct. App. 1995). *See generally* Charles Sukurs, *Harmonizing the Battle of the Forms: A Comparison of the United States, Canada, and the United Nations Convention on Contracts for the International Sale of Goods*, 34 Vand. J. Transnat'l L. 1481, 1512–13 (2001) (discussing challenges in harmonizing CISG and domestic law).

found that an oral agreement followed by a written confirmation was valid due to the UCC's "merchant exception" to the statute of frauds. The merchant exception states that when one merchant receives a written confirmation of an oral contract from another merchant "sufficient against the sender," the contract becomes enforceable unless the recipient objects within ten days.[65] The dissenting judge disagreed with the sufficiency finding, but correctly maintained that the CISG should have applied and that under Article 11 the oral agreement itself would have been valid, thereby eliminating the need for the court to analyze the sufficiency of the written confirmation.[66]

CONTRACT MODIFICATION. Article 29 allows contracts to be modified or terminated by the "mere agreement" of the parties. This provision reinforces the principle that no particular form is required for either modification or termination.[67] Oral terminations or modifications, however, are ineffective if the parties have previously prescribed formalities to such acts. National courts will find modifications to be invalid in at least three situations. First, when the modification does not represent "agreement" by the parties. Second, when a writing is required because one of the parties has its place of business in a contracting state that made a declaration pursuant to Articles 12 and 96. In such a situation Article 29 prohibits oral modifications.[68] Third, when the parties include a no oral modification clause in a written contract.

Just as intent is critical in determining the existence or scope of a contract under Article 11, intent is also important in examining the validity of a modification. Whether or not the parties have agreed on the modification is a question that incorporates the offer and acceptance rules under Articles 14, 18, and 19, as well as interpretation rules under Articles 8 and 9. A U.S. court

[65] UCC § 2-201 (1) & (2)(1977). Revised Article 2 retains the ten day objection period. The Oregon statute used by the court is a verbatim codification of the UCC section.

[66] *See GPL Treatment*, 894 P.2d at 646 n.4.

[67] CISG at Art. 29.

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

in *Chateau des Charmes Wines Ltd. v. Sabate USA Inc.* found that one party's unilateral attempt to modify an agreement failed where there was no indication that the other party accepted or agreed to the new terms.[69] The parties had orally agreed to the essential terms of the contract, but a forum selection clause, which was not part of the original agreement, was included in subsequent invoices.[70] According to the court, it would not be logical to make the forum selection clause contained in the invoices part of the contract.[71] The court stated that "[n]othing in the Convention suggests that the failure to object to a party's unilateral attempt to alter materially the terms of an otherwise valid agreement is an 'agreement' within the terms of Article 29."[72] The court took into account the various circumstances recommended in Article 8(3) to determine the parties' intent, but concluded that there was no evidence or conduct that indicated the party had agreed to the modifications added to the invoice.[73] Other courts have also insisted on evidence of an agreement. For example, a French court considered affidavits from the buyers' witnesses who were present at a meeting to determine whether the parties had concluded a valid price modification.[74] Because the affidavits did not mention the seller's agreement to the price, however, the court held that "the modification of a sale price can not result from the general environment of a meeting."[75]

Parties may avoid parol evidence difficulties, such as those raised in the previous section, by inserting a merger or no oral modification clause that "extinguishes any and all prior agreements and understandings not expressed in the writing."[76] Enforcing such clauses preserves the intent of the parties as well as the convention's principle of freedom of contract. The exception to Article 29's general rule, however, is that a "party may be precluded by his conduct from asserting such a provision to the extent that the other party has relied on that conduct."[77] Several decisions indicate that national courts respect clauses that prohibit oral modifications or the use of extrinsic evidence, where there is no evidence that one party acted in a manner to induce reliance

69 Chateau des Charmes Wines Ltd. v. Sabate USA Inc., 328 F.3d 528, 531 (9th Cir. 2003).
70 *Id.* at 529.
71 *Id.* at 531.
72 *Id.*
73 *Id.*
74 *See* Société Cámara Agraria Provincial de Guipuzcoa v. André Margaron, CA Grenoble, Mar. 29, 1995, (Fr.), *available at* http://www.cisg.law.pace.edu/cisg/wais/db/cases2/950329f1.html.
75 *Id.*
76 *See* CISG at Art. 29; *MCC- Marble* 144 F.3d at 1391.
77 *See* CISG at Art. 29(2). *See also* Graves Import Co. v. Chilewich Int'l Corp., No. 92 Civ. 3655 (JFK) 1994 U.S. Dist. LEXIS 13393 at *13 n.2 (S.D.N.Y. Sept. 22, 1994).

on oral modifications.[78] Nevertheless, where a no oral modification or merger clause exists, a party is allowed to establish conduct, such as a course of dealing, to override the modification clause.[79] Despite academic concerns about the difficulty of interpreting Article 29(2), cases addressing the issue have yet to surface.[80]

Article 29 allows contracts to be modified or terminated by the "mere agreement" of the parties. The Secretariat's Commentary indicates that this provision overcomes the common law requirement of consideration.[81] At least one U.S. court and the Court of Arbitration of the International Chamber of Commerce have recognized that under the CISG, a contract for the sale of goods may be modified without consideration.[82] In one recent U.S. decision, however, the court approached the consideration issue as a question of contract validity, which Article 4 of the CISG specifically states is not governed by the convention.[83] This interpretation is a questionable extension of the

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

[79] CISG at Art. 29(2).

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

[81] *See* Secretariat Commentary to CISG Art. 29, *available at* http://www.cisg.law.pace.edu/cisg/text/secomm/secomm-29.html.

[82] *See Shuttle Packaging*, 2001 U.S. Dist. LEXIS 21630, at *21 (citing Michael Van Alstine, 37 Va. J. Int'l. Law 1 & n.47 (1996)); ICC Arbitration Case No. 7331 (1994), *available at* http://cisgw3.law.pace.edu/cases/947331i1.html.; ICC Arbitration Case No. 9474 (Feb. 1999), *available at* http://www.unilex.info/case.cfm?pid=1&do=case&id=716&step=FullText.

[83] *See* Geneva Pharm. Tech. Corp. v. Barr Laboratories, Inc. et al., 201 F. Supp. 2d 236, 282–83 (S.D.N.Y. 2002) (court used New Jersey law to determine whether there was consideration). S*ee generally* Helen Elizabeth Hartnell, *Rousing the Sleeping Dog: The Validity Exception to the Convention on Contracts for the International Sale of Goods*, 18 Yale J. of Int'l Law 1, 45 (1993) (proposing that courts seek a middle course in approaching the validity issue, looking to domestic law to determine whether an issue is one of validity, but also considering the international aspect of the CISG); Gyula Eörsi, *Problems of Unifying Law on the Formation of Contracts for the International Sale of Goods*, *available at*

validity delegation under Article 4. Article 29 brings contract modification within the scope of the CISG. The specific default rules of Article 29, namely no writing or consideration requirements, preempts the more general charge that issues of validity are to be determined by national law.

http://www.cisg.law.pace.edu/cisg/text/eorsi29.html (recognizing that lack of consideration could be a validity issue, but it is more likely that contract formation does not require consideration, which is a conclusion that he maintains is supported by "the fact that the question did not even surface, in connection with the 1964 Hague Convention on Formation (ULF)."

CHAPTER FOUR

FORMATION: OFFER AND ACCEPTANCE RULES

Despite its general informality and incorporation of flexible, open-ended rules, the CISG provides specific rules of offer and acceptance to determine whether a valid contract has been concluded. The rules of offer and acceptance, concerning the necessary content, timing, and revocation of offers, are contained in Articles 14 through 24. A valid offer must "be addressed to one or more specific persons," be "sufficiently definite," and indicate the offeror's intention "to be bound in case of acceptance."[1] If the offer is not addressed to "one or more specific persons, it is merely an invitation to offer, unless the contrary is clearly indicated by the person making the proposal.[2] Identification of the goods, quantity, and price are the essential elements that determine whether the offer fulfills the "sufficiently definite" requirement.[3] An offer does not fail for lack of definiteness, however, if these terms are not expressly fixed. Article 14(1) allows such terms to be "implicitly" fixed or provided for in some other way.

There are numerous, highly specific rules that control the effectiveness of offers and revocation of offers. An offer becomes effective when it reaches the offeree.[4] Article 24 interprets "reaches" to mean that the offer has been communicated orally, delivered personally, or delivered to the offeree's place of business, mailing address, or habitual residence.[5] If the offer is revoked before it reaches the offeree, it becomes ineffective even if the offer stated that it was irrevocable.[6] If a revocation reaches the offeree at the same time as the

1 CISG at Art. 14(1).
2 *Id.*
3 *Id.*
4 *Id.* at Art. 15(1).
5 *Id.* at Art. 24.
6 *Id.* at Art. 15(2).

offer, the offer does not become effective.[7] Finally, an offeree can not accept an offer until it is received even if he has knowledge of it.[8]

If a revocation reaches the offeree before the dispatch of the acceptance, the revocation is effective.[9] An important exception to the right to revoke prior to acceptance is the CISG's expanded version of the common law's firm offer rule. Unlike, the Uniform Commercial Code's (UCC) firm offer rule,[10] a firm offer under the CISG need not fix a time or make an assurance of irrevocability. If an offer does not state a specific period of time for acceptance, the question may still arise whether the offer indicates it is irrevocable or whether the offeree reasonably relied on the offer being held open.[11]

The CISG's acceptance and rejection of offer rules are as specific as its offer rules. If an acceptance is withdrawn before it is received, no expectations have been created and the acceptance is not effective upon receipt.[12] An offer, even if it is irrevocable, is terminated when a rejection reaches the offeror.[13] Article 17 may be linked to Article 19 when the rejection is ambiguous, because it may be interpreted as a counteroffer (rejection) or as an acceptance. If a reply is a rejection under Article 17, then a court need not get into the more complicated issues raised by Article 19, because no contract is concluded.

Article 18 specifies the criteria, time, and manner for a valid acceptance. Determining if and when there has been a valid acceptance is crucial because a contract "is concluded at the moment when an acceptance of an offer becomes effective. . . . "[14] Either statements or conduct may constitute a valid acceptance. "Silence or inactivity does not in itself amount to acceptance," so that the recipient may ignore an offer, even if that offer states that it will assume acceptance if there is no reply.[15] The "in itself" qualification to this provision leaves open the possibility that in some cases silence or inactivity may amount to acceptance. How assent is indicated is left open but it must

7 *Id.*

8 *See* Secretariat Commentary to CISG, at Art. 15, *available at* http://www.cisg.law.pace.edu/cisg/text/secomm/secomm-15.html.

9 CISG at Art. 16(1).

10 UCC § 2-205 (1977). Section 2-205 states that to be a firm offer, an offer must "by its terms gives assurance that it will be held open. . . . "

11 CISG at Art. 16(2)(b).

12 *Id.* at Art. 22. The right to withdraw while an acceptance is in transit is created due to the CISG's rejection of the common law's mailbox rule.

13 *See* CISG at Art. 17. *See generally* Commentary to CISG, at Art. 17, *available at* http://www.cisg.law.pace.edu/cisg/text/secomm/secomm-17.html.

14 *Id.* at Art. 23.

15 *Id.* at Art. 18(1).

be communicated. Just as an offer is not valid until it reaches the offeree, an acceptance is not valid until it reaches the offeror.[16] Furthermore, the acceptance must reach the offeror within the stated period of time or, if no time is fixed, within a reasonable period of time.[17] Performance of an act may also constitute acceptance if it is accepted usage or practice between the parties.[18]

Article 20 provides rules for calculating the time for acceptance "fixed" in the offer. If a period of time rather than a precise date is given, by which the offeror must respond, Article 20 specifies that the time for acceptance begins to run from the time of dispatch in the case of a telegram, from the date given on a letter, or if none is given, by the date on the envelope.[19] If the communication is instantaneous, the time begins to run immediately.[20] Official holidays and nonbusiness days are calculated in the time period, unless the offer cannot be delivered on the last day of the period, in which case "the period is extended until the first business day that follows."[21]

Article 21 addresses issues of late acceptance. In general, an offer must be accepted before it expires. However, the offeror may elect to "accept" a late acceptance by informing the offeree of his acceptance.[22] This rule, in essence, converts, the acceptance into an offer giving the original offeror a power of acceptance. A late acceptance is distinguished from a late arrival. The late arrival occurs when some unforeseen delay in transmission occurs through no fault of the offeree. The late arrival will be effective as an acceptance, unless the offeror, without delay, otherwise informs the offeree.[23]

Offer Rules and Open Price Term: Articles 14 and 55

Cases interpreting Article 14 appear to rely mostly on the language of the CISG, with a modest amount of cross-references to other provisions in the convention. Article 14's requirement that a valid offer be addressed to one or more specific persons has spurred academic debate, but it has not surfaced in

[16] *Id.* at Art. 18(2). According to Professor Honnold, the drafters purposely put the burden on the sender of a communication to assure receipt. *See* John O. Honnold, Uniform Law For International Sales, § 162, at 184 (1999).
[17] *Id.*
[18] *Id.* at Art. 18(3).
[19] *Id.* at Art. 20(1).
[20] *Id.*
[21] *Id.* at Art. 20(2).
[22] *Id.* at Art. 21 (1).
[23] *Id.* at Art. 21 (2).

a meaningful way in litigation.[24] Two areas of contract dispute that have been analyzed in the courts are the offeror's intent to be bound upon acceptance of the alleged offer and contract requirements regarding the specificity of quantity and price. Consequently, reference to Article 8's methodology for interpreting intent is a vital component in determining whether a term is *sufficiently definite* under Article 14.[25]

The essential terms of the contract – identification of the goods, quantity, and price – must be specified; there are many methods of determining what the terms are if they are not stated expressly.[26] Whether an offer fails to specify a sufficiently definite price is the issue that has created the most discussion under Article 14. Article 14's rule that the price may be implicitly fixed was a compromise between countries that supported open price offers and those that opposed such offers.[27] Article 55, which allows "the price generally charged," has served as a gap filler in determining whether an offer is "sufficiently definite" as required by Article 14(1). National courts have shown

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

[25] "A Proposal . . . constitutes an offer if it is *sufficiently definite* and indicates the *intention* of the offeror to be bound in case of acceptance." CISG at Art. 14(1) (emphasis added).

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

[27] Some countries objected to the elimination of the price requirement, because they viewed unilateral price determination as a disadvantage to the weaker party; socialist countries objected, because open price terms did not satisfy state planning agency requirements. *See* Jacob S. Ziegel, *"Article 14" in Report to the Uniform Law Conference of Canada on Convention on Contracts for the International Sale of Goods, July 1981*, *available at* http://www.cisg.law.pace.edu/cisg/text/ziegel1114.html. *See also* Claude Witz, *Case Commentary, The First Decision of France's Court of Cassation Applying the U.N. Convention on Contracts for the International Sale of Goods*, (1995), *available at* http://www.cisg.law.pace.edu/cisg/wais/db/cases2/950102f1.html (noting that "traditional French case law is very demanding with respect to the determinable character of price," but that it is in the process of abandoning "this harsh position").

flexibility in finding that a price is sufficiently definite if it can be fixed or determinable in some way, such as a reference to market prices.[28]

National courts have used other CISG articles to fill in missing price and quantity terms. Article 8, which determines intent based upon a *totality of the circumstances analysis*[29] (prior dealings, course of performance, usage), as well as Article 9 (usage, prior dealings), which addresses industry practices and prior dealings between the parties, supplement Article 14 in determining whether the parties intended to be bound and whether the terms of the agreement are sufficiently definite in light of that intent. For example, national courts have held that price and quantity may be impliedly fixed by a long time commercial relationship between the parties.[30] Similarly, the ICC Court of Arbitration found that a contract was sufficiently definite even though the price agreed on by the parties was provisional and subject to revision depending on the price obtained from the final buyer.[31] The court's finding relied on Article 9(2), which assumes that parties apply customary trade usage, as well as Article 8(3), which allows all relevant circumstances of the case, including negotiations, usages, and practices, to be taken into account in determining the parties' intent.[32] The tendency of national courts to respect industry practice and custom is also reflected in a case where the plaintiff claimed that well-established industry custom was to rely on unwritten supply commitments. Noting that the CISG has "a strong preference for enforcing obligations and representations customarily relied upon by others in the industry," the U.S.

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

[29] For a discussion of the "totality of the circumstances analysis" approach to contract interpretation see generally Larry A. DiMatteo, *The Counterpoise of Contracts: The Reasonable Person Standard and the Subjectivity of Judgment*, 48 S. Car. L. Rev. 293, 318–24 (1997); Larry A. DiMatteo, Contract Theory: The Evolution of Contractual Intent 56–60 (1998).

[30] *See* Adamfi Video Production GmbH v. Alkotók Studiósa Kisszövetkezet, FB, Budapest, AZ 12.G.41.471/1991, Mar. 24, 1992, (Hung.), *available at* http://www.unilex.info/dynasite.cfm?dssid=2376&dsmid=13356&x=1 (quality, quantity, and price of goods impliedly fixed by the established practice of the parties where the seller repeatedly delivered the same type of goods and the buyer paid after delivery).

[31] ICC Court of Arbitration – Paris 8324/1995 (Arbitral Award 1995) (flexible price was valid where no market price was established by the common exchange institution for manganese)(on file with author).

[32] *Id.*

court in *Geneva Pharmaceutical Tech. Corp. v. Barr Labs., Inc.*[33] held that a purchase order for "commercial quantities" of a product was sufficiently definite under Article 14, because it was supported by evidence of industry custom.[34]

Article 8(2)'s emphasis on the "reasonable person" interpretation of statements and conduct and Article 8(3)'s inclusion of subsequent conduct to determine intent have also been used by national courts to determine whether parties intended to be bound according to Article 14. Article 8(2) instructs that statements and conduct of a party "are to be interpreted according to the understanding that a reasonable person of the same kind as the other party would have had in the same circumstances."[35] A German court found that a contract for three "truck loads" of eggs was sufficiently definite, based on Article 8(2)'s interpretation of intent, because a reasonable buyer would expect a quantity equivalent to the full load capacity of the trucks.[36] A Hungarian court, although not referencing Article 8, held that the goods were unambiguously identified, and the quantity and price sufficiently definite, even where the offer "allowed unilateral power to the buyer" in choosing the quantity and model types of the products being purchased.[37] Relying on Article 8(2) and 8(3), an Austrian court found that a contract for a "certain quantity" of chinchilla furs was sufficiently definite as evidenced by the buyer's subsequent conduct of immediately selling the furs delivered.[38] Similarly, a Swiss court, found that when the buyer of fashion textiles requested the seller to send an invoice to the embroiderer of the textiles, this conduct subsequent to the delivery of the goods indicated the buyer's intent to be bound as to the quantity of goods delivered.[39]

[33] Geneva Pharmaceuticals Technology Corp. v. Barr Laboratories, Inc. et al., 201 F. Supp. 2d 236, 281 (S.D.N.Y. 2002).

[34] *Id.*

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

[36] *See* Landgericht Oldenburg 12 O 2943/94, Feb. 28, 1996, (F.R.G.), *available at* http://www.cisg.law.pace.edu/cisg/wais/db/cases2/960228g1.html.

[37] *See* Legfelsobb Bíróság, Gf.I. 31 349/1992/9, *available at* http://www.cisg.law.pace.edu/cisg/wais/db/cases2/920110h1.html.

[38] *See* OGH Ob 547/93, *available at* http://www.unilex.info/case.cfm?pid=1&do=case&id=110&step=Abstract.

[39] *See* Bezirksgericht [BG] St. Gallen [District Court], 3PZ 97/18, *available at* http://www.cisg.law.pace.edu/cisg/wais/db/cases2/970703s1.html.

When an offeror claims that he intended to be bound, courts evaluating the validity of the offer must also consider whether the other party was reasonably aware of such intent. A German court held that a seller's fax offering to sell yarn did not communicate the requisite intent to be bound, because the fax referred to instructions from its parent company.[40] The court found that the communication did not clearly identify who the seller was, because the purported offeror referred to itself as "exporter" not "seller."[41]

There are two issues arising from Article 55 that national courts have addressed in their opinions. The first issue is whether the failure of the parties to state a price prevents contract formation. The second issue is which factors determine the "price generally charged at the time of the conclusion of the contract for such goods sold under comparable circumstances in the trade concerned."[42] As to the initial issue of contract formation, two divergent views have developed regarding the price requirement, one restrictive and the other liberal. Professor Farnsworth maintains that some method of determining the price must be included in the offer for a valid contract to be concluded. This restrictive view is consistent with established contract law in many states that require the setting of a specific price in order for an enforceable contract to be formed. Under this view, Article 55 would only be used to set a price after an enforceable contract had been determined to exist.[43]

The alternative view argues that the restrictive interpretation of the CISG's provisions requiring a definite or determinable price, conflicts with the very existence of Article 55.[44] A more liberal view has been advocated by Professor Honnold who maintains that Article 55 allows "the price generally charged at the time of the conclusion of the contract" to cure the lack of a price or a method for determining the price.[45] Professor Honnold insists that as long as

[40] *See* OLG Frankfurt, 9 U 13/00, Aug. 30. 2000, (F.R.G.), *available at* http://www.cisg.law.pace.edu/cisg/wais/db/cases2/000830g1.html.

[41] *Id.*

[42] CISG at Art. 55.

[43] *See* Peter Schlechtriem, Commentary on the UN Convention on the International Sale of Goods (CISG) 80, (2d ed. 1998).

[44] *Id.* As a result, "a contradiction remains between [this] requirement . . . on the one hand and the possibility of fixing the price after the contract is concluded on the other." Professor Schlechtriem concludes that, although most likely unacceptable to many states, this contradiction may be resolved by interpreting the term *validity* in Article 55 to relate to all contractual requirements other than the determination of price. *Id.* at 80, n.319. If such an interpretation is adopted, "[a]n offer that is indefinite with respect to the price could then be interpreted . . . as an implied reference to the price generally charged for such goods."

[45] *See* John E. Murray, Jr., *An Essay on the Formation of Contracts and Related Matters Under the United Nations Convention on Contracts for the International Sale of Goods*, 8 J.L. & Com. 11, 14–17 (1988); Harry M. Fletchner, *Transcript of a Workshop on the Sales Convention: Leading CISG Scholars Discuss Contract Formation, Validity, Excuse for Hardship, Avoidance, Nachfrist, Contract Interpretation, Parol Evidence, Analogical Application, and Much More,*

the parties' intention to contract is clear, the construction of the convention allows the parties to vary the effect of any of the convention's provisions, including Article 14's price provision.[46]

Professor Honnold's view is supported by the Secretariat's Commentary to Article 14, which states that as long as there is intent to be bound, the law of sales can supply missing terms.[47] Several national courts have also favored Professor Honnold's view. A Swiss court in *C. v. W., Bezirksgericht St. Gallen* used Article 55 to interpret the price stated in a seller's corrected invoice to be the price generally charged under comparable circumstances in the trade.[48] The indefiniteness of the price term was apparently not fatal, because the court was convinced that the parties had manifested their intent to be bound.[49] In a dispute concerning the sale of chinchilla pelts by a German seller to an Austrian buyer, the Austrian Supreme Court concluded that the agreement of the parties setting a price range for the pelts depending upon quality did not defeat the formation of a contract.[50] In reaching this conclusion, the court held that, pursuant to Article 55, if the parties' agreement failed to explicitly or implicitly establish a specific price, then the court could imply an agreement based upon the "usual market price."[51] The court specifically noted that the parties did not object to the price of fifty German marks per pelt established by the court of first instance in its initial review of the case.[52] As such, the court concluded that the price was sufficiently definite as to constitute a contract and make the application of Article 55 unnecessary.[53] By contrast, the Russian Tribunal of International Commercial Arbitration rejected the gap-filling role of Article 55 where the parties agreed to fix a price "ten days prior to the beginning of the new year" and were unable to do so.[54] The

18 J.L. & Com. 191, 202–06 (1999). Professor Farnsworth disagrees with this interpretation, because Article 55 allows this method of determining a price only when "a contract has been validly concluded." *Id.*

46 John O. Honnold, Uniform Law, *supra* note 16, at §137.6 at 154. Art. 6 provides: "The parties may exclude the application of this Convention or, subject to article 12, derogate from or vary the effect of *any* of its provisions." (emphasis added), CISG at Art. 6. Professor Farnsworth disagrees with this interpretation, because Article 55 allows this method of determining a price only when "a contract has been validly concluded."

47 *See* Secretariat Commentary to Art. 14, *available at* http://www.cisg.law.pace.edu/cisg/text/secomm/secomm-14.html.

48 *See supra* note 39.

49 *Id.*

50 *See supra* note 38.

51 *Id.*

52 *Id.*

53 *Id.*

54 Tribunal of International Commercial Arbitration at the Russian Federation of Chamber of Commerce 309/1993, Mar. 3, 1995, (Russ.), *available at* http://www.cisg.law.pace.edu/cisg/wais/db/cases2/950303r1.html.

subsequent failure of the parties to reach an agreement with respect to price went to the heart of the transaction and specifically defeated the formation of a contract.[55]

The second issue addressed by national courts with respect to Article 55 is which factors determine "the price generally charged at the time of the conclusion of the contract for such goods sold under comparable circumstances in the trade concerned."[56] Initially, at least one national court has concluded that the reference to market price in Article 55 is overridden by a contrary agreement of the parties as determined by application of the CISG in its entirety.[57] Based upon this opinion, the parties are free to list any number of factors that may be utilized to establish the price. Included on the list of acceptable factors are the price range established by the parties with respect to the goods at issue and individual pricing guidelines dependent upon the quality of the goods.[58] An additional relevant factor is the absence of objection by the buyer within a "short time period" to the price set forth in invoices delivered by the seller.[59] In such a case, national courts assume that the buyer's agreement to the price stated in the seller's invoice is the price generally charged under comparable circumstances in the trade concerned according to Article 55.[60]

FIRM OFFERS: ARTICLES 15–17 AND 20–24

Articles 15 and 17, along with Articles 20 through 24, have not been the subject of judicial attention. Article 16, however, has been subject to judicial and arbitral interpretations.[61] In *Geneva Pharmaceuticals Technology Corp. v. Barr Laboratories, Inc.*,[62] the court addressed the question of promissory estoppel under the CISG. Article 16(2)(b) provides that an offer is irrevocable "if it was reasonable for the offeree to rely on the offer as being irrevocable and

[55] *Id.*

[56] CISG at Art. 55.

[57] *See* CA Grenoble, 93/1613, Apr. 26, 1995, (Fr.), *available at* http://witz.jura.unisb.de/CISG/decisions/2604952v.htm.

[58] *See, e.g, supra* note 38.

[59] BG St. Gallen, Switzerland 84–85 Jul. 3, 1997 (involving an oral contract for the sale of textiles by a Dutch seller to a Swiss buyer), CLOUT Case No. 215 *available at* www.uncitral.org/en-index.htm.

[60] *Id.*

[61] An arbitrator in Austria, cited Article 16(2)(b) as further support for recognition that the principle of estoppel, although not addressed expressly in the convention, is incorporated by the good faith provision of Article 7(1). *See* Internationales Schiedsgericht der Bundeskammer der gewerblichen Wirtschaft [Arbitral Tribunal], SCH-4318, Jun. 15, 1994, (Aus.), *available at* http://www.cisg.law.pace.edu/cisg/wais/db/cases2/940615a4.html.

[62] 201 F. Supp. 2d 236, 286–87 (S.D.N.Y. 2002).

the offeree has *acted in reliance* on the offer."[63] The U.S. court recognized this provision as a "modified version of promissory estoppel that does not require foreseeability or detriment."[64] More importantly, it stated that other promissory estoppel claims outside the area of firm offers could be preempted by the CISG because "to apply an American or other version of promissory estoppel that does require [foreseeability or detriment] would contradict the CISG and stymie its goal of uniformity."[65] This statement by an American court expressly urges against the homeward trend approach to CISG interpretation.[66]

RULES OF ACCEPTANCE: ARTICLE 18

Because Article 23 states that "a contract is concluded at the moment when an acceptance of an offer becomes effective in accordance with the provisions of this Convention," ascertaining whether an offer has been accepted according to Article 18 is critical in determining the parties' contract rights and remedies. Professor Honnold emphasizes the theme of open communication that runs through Article 18.[67] Difficult issues of communication arise most frequently in cases involving when silence or inactivity may be a valid method of acceptance, when commercial letters of confirmation indicate assent, and whether standard terms included in the offer and acceptance have been fairly communicated so as to become part of the contract.

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

National courts have concluded that silence indicated acceptance when silence *qua* acceptance was reasonable under the circumstances. When a seller offered to terminate a contract after receiving notice of nonconformity and announced that he would resell the goods himself, the buyer's silence and

[63] CISG at Art. 16(2)(b) (emphasis added).
[64] *Geneva Pharmaceuticals*, *supra* note 62, at 287.
[65] *Id.* at 287. *See generally* Henry Mather, *Firm Offers Under the UCC and the CISG*, 105 DICK. L. REV. 31 (2000) (predicting that courts will use Art. 16(2)(b) as American courts have used promissory estoppel).
[66] *See infra* Chapter 11.
[67] JOHN O. HONNOLD, UNIFORM LAW, *supra* note 16, §164, at 179.

failure to seek remedy for breach was an implied acceptance, according to a German court.[68] Although the court recognized that silence or inactivity alone is not enough for acceptance under Article 18(1), it concluded that "together with other circumstances . . . silence can indeed be important and may be interpreted as the acceptance of an offer of cancellation."[69] A French court also found that silence operated as acceptance when a buyer accepted goods without reservation.[70] The buyer subsequently sought to reject the goods, claiming that his silence about the condition of the goods did not indicate acceptance, but the court found that the nonconformity claimed by the buyer was obvious to an expert, such as the buyer who had specified the modifications in the goods.[71]

Silence may also be acceptance where the parties have an established pattern or practice in their dealings. If a seller has an established practice of filling orders without expressly accepting them, then the buyer has a right to expect that its orders will be filled.[72] In the French case of *Sté Calzados Magnanni v. Sarl Shoes General Int'l*, the seller maintained that it had never received the orders. The French court was unconvinced and found acceptance of the orders by silence based on the practices established between the parties.[73] The circumstances that indicated acceptance by silence also included the seller's awareness of the buyer's intention to enter the footwear market.[74] A U.S. court also found that silence was acceptance when a seller did not object to an arbitration clause in a contract for a period of five months. The court held that the prior practices of the parties placed a duty on the seller to alert the buyer of its objection to the incorporation of the clause.[75] The court supported its conclusion by citing Articles 18(1) and 18(3) of the CISG, the Restatement (Second) of Contracts, and several cases from its jurisdiction.[76]

[68] *See* OLG Köln, 22 U 202/93, Feb. 22, 1994, (F.R.G.), *available at* http://www.cisg.law.pace.edu/cisg/wais/db/cases2/940222g1.html.

[69] *Id.*

[70] *See* Hughes v. Société Technocontact, Cour de Cassation [Highest Court of Ordinary Jurisdiction], B 95–19.448, 180 P, Jan. 27, 1998, (Fr.), *available at* http://www.cisg.law.pace.edu/cisg/wais/db/cases2/980127f1.html.

[71] *Id.*

[72] *See* Sté Calzados Magnanni v. Sarl Shoes General Int'l, Cour d'Appel de Grenoble, 96J/00101, Oct. 21, 1999, (Fr.), *available at* http://www.cisg.law.pace.edu/cisg/wais/db/cases2/991021fl1.html.

[73] *Id.*

[74] *Id.*

[75] Filanto, S.p.A. v. Chilewich Int'l Corp., 789 F. Supp. 1229, 1240 (S.D.N.Y. 1992).

[76] *Id.*

Commercial letters of confirmation raise special issues regarding acceptance by silence.[77] In some national legal systems, most notably Germany, silence upon receipt of a commercial letter of confirmation indicates acceptance.[78] According to Professor Schlechtriem, the German rule that allows unanswered letters of confirmation to become part of the contract was expressly rejected at the Vienna Convention.[79] Consequently, Professor Schlechtriem maintains that letters of confirmation that modify or add to a contract are ineffective under the CISG, unless the sending of such letters amounts to a usage under Article 9(2).[80]

National courts have differed in how they interpret the trade usage provision regarding commercial letters of confirmation. A Swiss court found that the buyer's failure to respond to a letter of confirmation from the Austrian seller constituted acceptance according to trade usage.[81] The court stated that both parties knew or ought to have known that under both Swiss and Austrian law, silence or inactivity can be regarded as an acceptance when there is no reply to a commercial letter of confirmation.[82] Professor Schlechtriem criticized this ruling on two counts. First, the court misstated the law of Austria, where the purported rule had been rejected. Second, "the usage must apply to the parties in the *particular* trade, and must be observed by them," for the exception to Article 18(1) to apply.[83]

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

77 *See generally* Maria del Pilar Perales Viscasillas, *Battle of the Forms, Modification of Contract, Commercial Letters of Confirmation: Comparison of the United Nations Convention on Contracts for the International Sale of Goods (CISG) with the Principles of European Contract Law (PECL)*, 14 Pace Int'l Rev. 153 (2002) (describing the variability in legal interpretations of silence).

78 *See also* UCC § 2-201(2) (written confirmation rule). *See* Michael Esser, *Commercial Letters of Confirmation in International Trade: Austrian, French, German and Swiss Law and Uniform Law Under the 1980 Sales Convention*, 18 Ga. J. Int'l & Comp. L., 427, *available at* http://www.cisg.law.pace.edu.cisg/biblio/esser.html (explaining that in Germany, silence after receipt of a commercial letter of confirmation will usually have the effect of an acceptance); Martin Karollus, *Judicial Interpretation and Application of the CISG in Germany 1988–1994, available at* http://www.cisg.law.pace.edu/cisg/biblio/karollus.html (explaining that if one party does not contest a confirmation, the contract is regarded as having the content of the confirmation note).

79 *See* Fletchner, *supra* note 45, at 246–47.

80 *Id.*

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

82 *Id.*

83 *See* Fletchner, *supra* note 45, at 246–47.

terms.[84] The court stated that good faith is the key to determining whether a sender may assume the recipient of the confirmation letter intended to consent to the terms of the letter.[85] Although the court did not discuss prior practices or usage in this case, the recipient's conduct, accepting the first check that was attached to the letter of confirmation, was sufficient to support a conclusion that the recipient intended to be bound by the terms of the confirmation letter.[86]

Two German cases reiterated the more conservative view that trade usage must be *international* in order for it to be implied into a contract. In one case, the court distinguished the use of letters of confirmation in a national context from the international context.[87] A French buyer and a German seller had concluded an oral contract regarding the price of chocolates. When the buyer was silent as to the different terms in the seller's letter of confirmation, the court held that the terms of the confirmation letter were not part of the contract as such letters could not be considered part of international trade usage as required by Article 9(2). The court concluded that although the practice was well recognized in Germany, it was not so recognized in France.[88] A German court held that a buyer seeking to hold a seller to the modified price contained in a letter of confirmation did not establish that there was a usage known in international trade recognizing silence as acceptance to a commercial letter of confirmation.[89]

[84] *See* BG Sissach, A 98/126, Nov. 5, 1998, (Switz.), *at* http://www.cisg.law.pace.edu/cisg/wais/db/cases2/981105s1.html.

[85] *Id.*

[86] *Id.*

[87] LG Frankfurt, 3/13 O 3/94, Jul. 5, 1995, (F.R.G.), *available at* http://cisgw3.law.pace.edu/cases/950705g.html.

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

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

When a party seeks to incorporate standard terms into an offer or acceptance, courts consider whether such terms have been fairly communicated to the other party. Although the CISG does not specifically address the incorporation of standard terms, national courts generally agree that its provisions on contract formation and interpretation determine whether standard terms have been validly incorporated into the contract. An alternative view is that Article 4 makes it clear that the validity of standard terms is beyond the scope of the convention, so that validity issues are determined by domestic law.[90] Civil law legal systems have emphasized that a party must be reasonably aware of the terms the other seeks to incorporate, but how much information about standard terms must be communicated is less clear from the decisions.

In general, a party that wishes to incorporate standard terms must show good faith efforts to communicate those terms to the other party. Failure to provide standard terms in the other party's language, failure to note that standard terms are listed on the back of a form, and failure to provide the text of standard terms have led courts to exclude such terms from the contract. In *ISEA Industrie S.p.A. and Compagnie d'Assurances*,[91] a French court held that when the buyer's standard terms were printed on the back of the form and the seller had signed only the front page, the standard terms were not part of the contract. The court held that the terms of the contract had already been determined and the seller's attempt to impose additional terms was ineffective. A German court, however, held that when standard terms were printed on the back of the order form in both parties' languages and the front side of the order form specifically referred to the standard terms, the terms were validly incorporated into the contract.[92] Likewise, when an offer made reference in bold letters to particular industry standards and the seller made repeated reference to such standards throughout the negotiations, the buyer was aware or should have been aware that the general conditions were part of the agreement, according to Articles 8 (1) and (3).[93]

[90] CISG at Art. 4.

[91] Sté ISEA Industrie S.p.A. v. Lu S.A. C.A. Paris, 95-018179, Dec. 13, 1995, (Fr.), *available at* http://cisgw3.law.pace.edu/cases/951213fi.html. In the same case, the court held that standard terms in a confirmation letter from the seller were not valid when the letter was sent after the contract had been performed.

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

[93] S.A. Gantry v. Société de Droit Suisse, Tribunal [District Court] de Commerce Nivelles, R.G. 1707/93, Sept. 19, 1995, (Fr.), *available at* http://cisgw3.law.pace.edu/cases/950919b1.html.

The Federal Supreme Court of Germany addressed the issue of the type of information needed to prove intent to accept standard or general terms.[94] Using Articles 14 and 18, supplemented by Article 8's rules on interpretation, the court held that the seller's "sales and delivery terms," which included a notice of warranty exclusion, were not part of the parties' contract. Although the contract referred to such terms, a copy of the seller's sales and delivery terms was never transmitted to the buyer. The court held that "the user of general terms and conditions is required to transmit the text to the other party or make it available in another way."[95] According to the court, the burden to provide the terms was on the party wishing to insert such clauses.[96] The court emphasized the fact that parties to an international contract should not be expected to know the particular terms and conditions that might be familiar to parties that share the same national legal system and business customs.[97] Requiring one party to make general terms and conditions available to the other party, would, according to the court, promote the CISG's goals of good faith and uniformity.[98] Similarly, an Austrian court held that a seller's attempt to incorporate standard terms requiring a contract to be in writing was not valid.[99] Although the seller had proposed such terms as part of a master contract prior to a subsequent sales contract, the master contract was never concluded, so that reference to terms in that agreement could not be binding on the buyer in the subsequent contract.[100] The court

[94] BGH VII ZR 60/01, Oct. 31, 2001, *available at* http://www.cisg.law.pace.edu/cisg/wais/db/cases2/981105s1.html.

[95] *Id.*

[96] *Id.*

[97] *Id.*

[98] *Id.* Although the court relied on the CISG, it also noted that the Uniform Sales Law requires users of general terms and conditions to transmit the text or make it available in another way. The Supreme Court of Germany's decision to require the terms to be transmitted has been criticized as "contrary to commercial practice." Whether or not the terms should be incorporated in the contract should turn on whether a reasonable party was aware or could not have been unaware of the intent to include such terms. One author maintains that a general duty to transmit standard terms goes too far and is not supported by the convention. This author fears that the development of a general duty to transmit may prevent even better known standard terms from being included, absent transmission. *See* Dr. Martin Schmidt-Kessel, *On the Treatment of General Terms and Conditions of Business Under the UN Convention on Contracts for the International Sale of Goods (CISG)*, *available at* http://www.cisg.law.pace.edu/cisg/wais/db/cases2/011031g1.html. "The development of a general duty to transmit without recognizable exceptions would have the effect that other, better known standard clauses – such as Incoterms 2000, the several ECE-Terms, or branch-specific terms such as GAFTA 100 or the rules of the Sugar Association of London – could not become the basis of contracts without being transmitted." *Id.*

[99] OGH, SZ 10 Ob 518/95, Feb. 6, 1996, (Aus.), http://cisgw3.law.pace.edu/cases/960206a3.html.

[100] *Id.*

recognized that contractual negotiations, prior practices, and trade usages may provide evidence that the offeree was aware of the inclusion of standard terms. This transaction was the parties' first together, however, and the court found that the offeree had no reason to be aware that the general terms were to be included in this deal.[101]

BATTLE OF THE FORMS

Article 19 raises the difficult issue of an acceptance with modification or the exchange of forms containing additional or conflicting terms. Negotiated terms, essential to the contract, may appear on the front of a form whereas additional terms and general conditions appear on the reverse side. Buyers' and sellers' forms undoubtedly contain provisions that favor their respective positions. The boilerplate terms are routinely ignored until a dispute arises. Forms are exchanged in what one author termed *une conversation des sourds* (a conversation of the deaf).[102] Two questions arise when there is a dispute. First, was a valid contract formed despite the existence of conflicting, nondickered terms? Second, if a valid contract was concluded, what are the terms of the contract? Article 19(1) provides that an offer that "contains additions, limitations, or other modifications is a rejection of the offer and constitutes a counteroffer."[103] If the additional terms do not materially alter the offer, however, a valid contract is formed and the additional terms become part of the contract unless the receiving party promptly objects to their inclusion.[104] This provision prevents a party from escaping from contractual obligations for immaterial differences between the offer and acceptance.

Article 19(3) sets a broad materiality standard by listing "price, payment, quality and quantity of the goods, place and time of delivery, extent of one party's liability to the other or the settlement of disputes" as terms that would materially alter the offer.[105] The breadth of these categories of material terms is susceptible to even further extension by the open-endedness

[101] *Id.* Another Belgian case stated that standard terms regarding contractual damages mentioned in a seller's invoice were not part of the contract, because there was no evidence that the buyer had knowledge of the standard terms and, therefore, could not accept them. The written contract did not include or even mention the standard terms. BV BA G-2 v. AS C.B., Rechtbank van Koophandel Veurne A/00/00665, Apr. 25, 2001, (Belg.), *available at* http://www.cisg.law.pace.edu/cisg/wais/db/cases2/010425bl.html.

[102] *See* John O. Honnold, International Sales Law §165 at 188.

[103] CISG at Art. 19(1).

[104] *Id.* Art. 19(2).

[105] *Id.* Art. 19(3).

of the introductory phrase "among other things."[106] Article 19 is essentially an adoption of the now-discarded common law mirror image rule with the exception that minor differences do not defeat an otherwise valid acceptance. The breadth of Article 19(3) severely limits the scope of the minor term.

National Courts and Article 19

A battle of the forms arises when parties exchange forms that have inconsistent terms. One commentator explained that the CISG has not been able to "create a consistent pattern that satisfies our basic sense of fairness and justice," with regard to the battle of forms.[107] Although some theorists maintain that the CISG in general and Article 19 in particular do not apply to the battle of the forms, many national courts apply Article 19 in interpreting and resolving such conflicts by using the rules of offer and acceptance.[108] The drafters considered various methods of treating the exchange of inconsistent forms. Under the common law, the offer and acceptance have to match exactly or create a mirror image to conclude a valid contract. The UCC's section 2-207 tried to rectify injustices that occurred when one party failed to perform under a contract because of some minor discrepancies between the terms in the exchanged forms. Under section 2-207, a written acceptance or a written confirmation is valid "even though it states terms additional to or different from those offered or agreed upon, unless acceptance is expressly made conditional on assent to the additional terms."[109] It should be noted that revised 2-207 even further facilitates the finding of a contract by deleting all conflicting terms and replacing them with gap fillers provided by other UCC provisions.[110]

[106] *Id.*

[107] V. Susanne Cook, *Symposium – Ten Years of the United Nations Sales Convention: CISG: From the Perspective of the Practitioner*, 17 J.L. & Com. 343, 349 (1998).

[108] *See generally* Maria del Pilar Perales Viscasillas, *"Battle of the Forms" Under the 1980 United Nations Convention on Contracts for the International Sale of Goods: a Comparison with Section 2-207 UCC and the UNIDROIT Principles*, 10 Pace Int'l L. Rev. 97, 104–36 (2001) (describing various interpretive approaches to the convention and arguing that the convention rules are sufficient to solve the battle of the forms conflict) [hereafter Viscasillas *Battle of the Forms*].

[109] UCC § 2-207(1).

[110] Revised 2-207 in the 2002 Draft states:

> In essence, Revised 2-207 recognizes the existence of a contract even if the offer and acceptance contains different terms if the parties recognize the existence of a contract through their actions, through an offer and acceptance, or through a confirmation. The terms of the contract include those terms in which the respective forms agree, terms the parties have agreed to otherwise, and terms supplied through the Code. UCC §2-207 Terms of Contract; Effect of Confirmation is available at the National Conference of Commissioners on Uniform State Laws depository at the University of Pennsylvania Law School: http://www.law.upenn.edu/bll/ulc/ulc_frame.htm.

Article 19 of the CISG adopts the mirror image rule due to its broad definition of materiality in Article 19(3)

In considering the battle of the forms dilemma, Professor Schlechtriem states that "the different situations of collision" and the "various possible behaviors of the parties" make it difficult to find "a single formula" that addresses this difficult issue.[111] Courts seem willing to find a valid contract where there is an exchange of forms and a general intent to enter into a binding agreement. The more difficult issue to predict is the courts' determinations of which terms enter into the contract.[112] Three solutions to the issue of conflicting terms in the battle of the forms scenario have been offered. First, the effect of conflicting terms in the battle of the forms scenario is not governed by the CISG. In short, the effect of conflicting terms on contract formation is a validity issue that Article 4 delegates to national law. Second, the existence of conflicting terms creates a gap that the court can fill by recourse to Article 7(1)'s principle of good faith referred to as the *knock out rule*. A third solution that has been offered is the *last shot rule*, which means that the terms provided in the acceptance control the contract.[113] The logic is that the offeror has an implied duty to object to the additional or conflicting terms. Failing to object to additional or conflicting terms and then proceeding to perform on the contract results in a finding of an implied consent to the terms of the acceptance.

Under the *knock out rule*, if the essential terms of the contract – identification of the goods, quantity, quality, and price – are agreed upon and the parties have commenced performance,[114] then the court will find there was a valid contract and ignore the conflicting terms.[115] Even though the conflicting

[111] *See* Peter Schlechtriem, *Kollidierende Geschäftsbedingungen im internationalen Vertragsrecht [Battle of the Forms in International Contract Law]*, in Festschrift für Rolf Herber 70, (Karl-Heinz Thume ed., 1999), *available at* http://www.cisg.law.pace.edu/cisg/biblio/schlechtriem5.html (Martin Eimer, transl., 2002).

[112] *Id.*

[113] *See* Maria del Pilar Perales Viscasillas, *Battle of the Forms and the Burden of Proof; An Analysis of BGH 9 January 2002*, vol 6, no. 2, Vindobona J. of Int'l Comm. L. & Arb. 217–228 (2002), *available at* http://www.cisg.law.pace.edu/cisg/biblio/perales2.html.

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

[115] This approach is followed by UCC § 2-207, provisions of the German Civil Code, the Principles of the European Contract Law, and the UNIDROIT Principles.

terms in such cases could be considered material under Article 19(3), courts prefer to dismiss the conflicting terms rather than find that no contract was concluded. Unless there is clear evidence that at least one of the parties did not want to contract without the inclusion of the particular provision in dispute, then "the intent to enter a contract on the part of both parties trumps the Article 19 argument for invalidity."[116] This approach seems to uphold the intentions of the parties, because in these cases the parties usually have at least partially performed.

Two cases decided by the German courts applied the *knock out rule*. In a case involving the sale of knitwear by an Italian seller to a German buyer, the parties had agreed on the essential terms of the contract and had performed.[117] When a dispute arose about whether the goods conformed to the contract, the parties disagreed on whether certain general terms were part of the contract. The German buyer had included in its general terms a forum selection clause that was additional to the terms in the seller's form. Under Article 19, it could be argued that no contract was formed, because the forum selection clause was a material alteration to the offer. Article 19(3) identifies differing terms regarding "the settlement of disputes" as material.[118] Because the parties had performed based on the essential terms of the agreement, the court found that there was a valid contract and that the parties had either "waived their claim to the application of their respective standard business terms or derogated from Article 19 in exercise of their party autonomy under Article 6."[119] The court held that neither party's general conditions became part of the contract.[120]

The Federal Supreme Court of Germany confirmed the *knock out rule* approach to cases where the parties have agreed on the essential terms of the contract for the sale and have performed.[121] Professor Schlechtriem has asserted that the German Supreme Court's message was that "[c]onflicting

[116] Martin Karollus, *Judicial Interpretation and Application of the CISG in Germany 1988–1994* in Review of the Convention on Contracts for the International Sale of Goods 51–94 (1995) (Cornell J. Int'l. L., eds.), *available at* http://www.cisg.law.pace.edu/cisg/wais/db/editorial/karollus910814g1.html.

[117] *See* AG Kehl, 3 C 925/93, Oct. 6, 1995, (F.R.G.), *available at* http://cisgw3.law.pace.edu/cases/951006g1.html.

[118] CISG at Art. 19(3).

[119] *Id.*

[120] *Id.*

[121] *See* BGH VIII ZR 304/00, Jan. 9, 2002, (F.R.G.), *available at* http://www.cisg.law.pace.edu/cisg/wais/db/cases2/020109g1.html (powdered milk). Professor Viscasillas disagrees with the theory that there is a tacit derogation from Article 19 when parties have agreed on the essential terms and performed despite contradictory terms, maintaining that "performance by the recipient of the counter-offer indicates objective, subjective, and reasonable assent to the offer." viscasillas, *Battle of the Forms, supra* note 108.

standard forms [terms] are entirely invalid and are replaced by CISG provisions, while the contract as such remains valid."[122] In that case, a dispute arose when customers of a buyer complained that the powdered milk delivered by the seller had a sour taste. The standard terms exchanged by the parties contained conflicting terms regarding the extent of the seller's liability. The court found that the contradiction in terms "did not prevent the existence of the sales contracts because the parties did not view this contradiction as an obstacle to the execution of the contracts."[123] The seller argued that the CISG was derogated by a clause in its standard forms and that under the applicable German Civil Code, no damages could be claimed. In concluding that neither the buyer's nor the seller's standard forms were included in the contractual arrangement, the court refused to single out some clauses that might be beneficial to one side or the other.

The *Cour de Cassation* in France also applied the *knock out rule* regarding conflicting jurisdiction clauses.[124] Recognizing that jurisdiction provisions are material terms according to Article 19(3), the court, instead of invalidating the contract, applied traditional conflict of law rules to determine jurisdiction.[125] A U.S. court, addressing a similar, issue found that a forum selection clause was not part of a contract because UCC. 2-207 requires "express consent of the parties."[126] Without explanation, the court stated that the "same conclusion" would be reached under the CISG.[127]

[122] Schlechtriem, *supra* note 111. Professor Schlechtriem states that the last shot doctrine "seems to be the most-followed," but that the German Federal Supreme Court (BGH) considers the knock out rule to be the prevailing view. *Id.* Article 209(1) PECL also follows the knock out rule, excluding conflicting terms from the contract. The European Principles make specific reference to conflicting general conditions, which will ordinarily not be part of an otherwise valid contract. According to Article 2:209(2) PECL, however, no contract will be formed if one party has indicated in advance, explicitly, and not by general conditions, that it does not intend to be bound by a contract on the basis of paragraph (1) or if he informs the other party without delay that he does not intend to be bound by such a contract.

[123] *Id.*

[124] *See* Société Les Verreries de Saint Gobain, SA v. Martinswerk GmbH, Cour de Cassation, J 96-11.984, Jul. 16, 1998, (Fr.), *available at* http://cisgw3.law.pace.edu/cases/980716f1.html.

[125] *Id.*

[126] Primewood, Inc. v. Roxan GmbH & Co., No. A3-97-28, 1998 U.S. Dist. WL 1777501, at *3 (D.N.D. Feb. 19, 1998).

[127] *Id.* Two cases from Argentina upheld forum selection clauses in standard forms, but the rationale employed by the courts regarding the CISG is not clear. In one case, an Argentine buyer maintained that a forum selection clause was invalid, because it was written in a foreign language on the back of the seller's invoice. *See* "Quilmes Combustibles S.A." v. Vigan S.A., Cámara Nacional de Apelaciones en lo Commercial [Second Instance Court of Appeal], Division C, 44.786, Mar. 15, 1991, (Arg.), *available at* http://www.cisg.law.pace.edu/cisg/wais/db/cases2/910315a1.html. The trial court found that the clause was part of the agreement. On appeal, the buyer argued that Argentine law required express written acceptance of such provisions. The court, however, stated that forum

Some national courts have used the last shot doctrine to resolve cases involving the battle of the forms. According to this approach, courts interpret an action or performance by one of the parties as an indication of assent to additional terms. The last shot doctrine can be seen as evolving from the rules of offer and acceptance with each new offer being a counteroffer until the last one is accepted when one party indicates assent by performance or other conduct.[128] Therefore, if a party fails to object to an additional or modified term and performs or partially performs, then he has accepted the additional or modified term. Whereas the knock out rule would ignore conflicting terms, the last shot approach incorporates the terms of last communication. Some commentators maintain that the last shot rule is out of touch with commercial reality and encourages parties to act in bad faith by producing numerous forms with standard terms in hopes of controlling the contract through the last shot.[129] Others consider the last shot rule to be the best approach to a difficult situation, because it provides "certainty and legal security."[130]

A German court held that an eight-day notice of defects provision in a confirmation letter was enforceable at the time the buyer took delivery of the goods.[131] The notification terms contained in the seller's confirmation

selection clauses are valid even if contained in a standard form, under the law of Argentina, unless there is a disparity of bargaining power between the parties. *Id.* A subsequent case in Argentina reached the same result. In this case, however, a Procurator noted that Article 4 of the CISG excludes questions of validity and decided the validity of the case according to the *lex fori*, referring to the CISG only for further support that the clause was enforceable. *See Inta*, Cámara Nacional de Apelaciones en lo Comercial [Appellate Court], Div. E., 45.626, Oct. 14, 1993, *available at* http://www.cisg.law.pace.edu/cisg/wais/db/cases2/931014a1.html. According to one commentator, Article 4, which states that validity issues are beyond the scope of the convention, and Article 81 (1), which "provides a clause for the settlement of disputes with a certain degree of autonomy vis-à-vis the other contractual terms," should have steered the Argentine tribunals away from considering the CISG in these cases. *See* Alejandro M. Garro, *The U.N. Sales Convention in the Americas: Recent Developments*, 17 J.L. & Com. 219, 236 (1998) (maintaining that neither the *Quilmes* nor the *Inta* decision addressed whether a contract was validly concluded under Article 19 of the CISG, because the forum selection clause was a material alteration of the offer).

[128] *See* Charles Sukurs, *Harmonizing the Battle of the Forms: A Comparison of the United States, Canada, and the United Nations Convention on Contracts for the International Sale of Goods*, 34 Vand. J. Transnat'l L. 1481, 1512–13 (2001).

[129] *See* Henry D. Gabriel, *The Battle of the Forms: A Comparison of the United Nations Convention for the International Sale of Goods and the Uniform Commercial Code*, 49 Bus. Law 1053 (1994); Sukurs, *supra* note 178, at 1487; Honnold, *supra* note 16, at 192 (stating that "'last shot' theories have been rightly criticized as casuistic and unfair").

[130] *See* Viscasillas, *Battle of the Forms*, *supra* note 108, at 183 (arguing that "the mirror-image and last shot rule provide a certainty and legal security for the parties," and though rigid, provide "adequate protection to the parties in the majority of cases and permits enterprises to more perfectly plan their standardized transactions").

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

letter were additional material terms that amounted to a counteroffer under Article 19(1), but the court found that the buyer accepted those terms by accepting delivery.[132] Another German court found that a buyer of cashmere sweaters accepted the seller's additional terms, which incorporated the Standard Conditions of the German Textile Industry by performing under the contract.[133] The court merely cited Articles 18 and 19 without comment.[134] Similarly, another German court held that acceptance of delivery indicated assent to a material modification. When the buyer claimed to have ordered a certain quantity of shoes and the seller delivered a different quantity, the court interpreted the delivery of a different quantity as a material alteration under Article 19(3). The court held, however, that the delivery was a counteroffer that the buyer accepted by taking the goods.[135] In contrast, a U.S. court in *Claudia v. Olivieri Footwear Ltd.*[136] held that even though the goods had been delivered, it could not hold as a matter of law that a valid contract had been concluded when the parties disagreed on a delivery term subsequent to an oral agreement.[137] The court considered the parties' prior course of dealings, which included thirteen transactions, but found insufficient evidence to conclude that they had always used the same delivery term.[138]

If a party continues to perform or fails to object in a timely manner to additional terms, she runs the risk that her conduct, silence, or act of performance will be interpreted by a court as an acceptance of the disputed term.[139] This issue arose in *Filanto v. Chilewich*,[140] where the court found that a manufacturer accepted an arbitration provision as part of the agreement, because he failed to object in a timely manner and commenced performance by opening a letter of credit. The court held that the term was accepted despite the fact that the manufacturer repeatedly objected during negotiations to the incorporation of an arbitration clause and that such a clause is a material term

[132] *Id.*

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

[134] *See id.*

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

[136] *See Claudia*, No. 96 CIV. 8052.

[137] *Id.* at *26–*28.

[138] The court refers to Article 19 only in a footnote, but evidently considered alteration of a delivery term to be a material modification and thus a counteroffer, instead of an acceptance. *Id.* at *25, n.7.

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

[140] *Id.*

under Article 19(3). In *Magellan Int'l Corp. v. Salzgitter Handel GmbH*, the court found that a contract was formed when a distributor indicated assent by opening a letter of credit.[141] The court held that the terms of the contract were those agreed on at the time the letter of credit was opened.

Despite Article 19(2)'s distinction between material and nonmaterial terms in contracts, courts, using the knock out and last shot rules, have generally disregarded the distinction between material and nonmaterial terms. The Austrian Supreme Court rationalized the diminishment of the distinction by arguing that the list of examples of materiality in Article 19(3) are merely general presumptions that may be rebutted. The presumption of materiality may be rebutted by evidence, including the practices between the parties, trade usages, conduct during negotiations, and other relevant circumstances. For example, modifications that are favorable to one party do not require counter-acceptance by the benefited party.[142]

The illusiveness of CISG jurisprudence in the interpretation of materiality is evident in a German case in which the court held that a notice provision that limited the time for rejection of goods was not a material term.[143] Interpreting the provision in the invoice as a modified acceptance of the contract, the court held that the notice provision became part of the contract according to Article 19(2), which puts the burden on the offeree to reject nonmaterial modifications.[144] Because the buyer did not object, the court found that the provision was valid. Several commentators disagreed with the decision, arguing that the notice provision was clearly material under the broad language of Article 19(3).[145]

A French court in *Fauba France FDIS GC Electronique v. Fujitsu Microelectronik GmbH*[146] held that a purchase order that altered price and delivery

[141] *Magellan Int'l Corp. v. Salzgitter Handel GmbH*, No., 99 C 5153, 1999 U.S. Dist. LEXIS 19386 (N.D. Ill. Dec. 7, 1999).

[142] *See* OLG, 2 Ob 58/97, Mar. 20, 1997, (remanding a case to determine if a modification by the seller regarding specifications of the product was favorable to the buyer); *see also* William Posch & Thomas Petz, "Editorial Remarks" OLG Frankfurt M, 2 Ob 58/9, Mar. 20, 1997, (F.R.G.), *available at* http://www.cisg.law.pace.edu/cisg/wais/db/cases2/940304g1.html.

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

[144] *Id.*

[145] *See, e.g.*, Martin Karollus, *Judicial Interpretation and Application of the CISG in Germany 1988–1994*, Cornell Review of the CISG, 51–94 (1995); Larry A. DiMatteo, *The CISG and the Presumption of Enforceability: Unintended Contractual Liability in International Business Dealings*, 22 Yale J. Int'l L. 111, 154–55 (1997).

[146] *See* Fujitsu Microelectronik GmbH Co. v. Fauba France Co., Cour de Cassation, 92–16.993, Jan. 4, 1995, (Fr.), *available at* http://www.cisg.law.pace.edu/cisg/wais/db/cases2/950104f1.html.

terms did not materially alter the terms of the offer. On appeal, the Court of Cassation held that a valid contract was formed because the offer, which allowed prices to be modified "according to market increases and decreases," was sufficiently definite. Unfortunately, both the Court of Appeals and the Court of Cassation failed to discuss the fact that Article 19(3) specifically declares price and delivery terms as material alterations.[147]

A Hungarian court in *Technologies Int'l Inc. Pratt & Whitney Commercial Engine Business v. Magyar*[148] distinguished between the insertion of a material additional term and "a simple request" for a material modification. The court held that a letter of acceptance which contained a provision requesting that the letter be treated confidentially until the parties made a joint announcement regarding the purchase of jet engines, was a valid acceptance. The plaintiff's offer had a paragraph whereby the defendant agreed to allow the plaintiff to publish a press release announcing the defendant's choice of engine. The court found that the letter was an unambiguous acceptance, not an amendment, restriction, or other change that would amount to a rejection under 19(1).

It is important to understand the reach of Article 19. It is limited to issues of contract formation and not to modifications of contract. Thus, it is universally accepted that when a contract has been validly concluded, one party may not change a material term in the contract without the acceptance of the other party. The court in *Chateau des Charmes Wines Ltd. v. Sabate USA Inc.* found that when an oral agreement did not contain a forum selection clause, one party's attempt to include such a provision in subsequent invoices did not alter the contract.[149] Because the contract had already been concluded, any new terms were merely offers that required express assent and did not create an obligation to reject the term. The court noted that the mere performance of obligations under the oral contract did not indicate assent to what would be additional material terms under Article 19(3).[150]

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

[148] *See* United Tech. Int'l Inc. Pratt and Whitney Commercial Engine Business v. Magyar Legi Kozlekedesi Vallalat (Malev Hungarian Airlines), Fovárosi Bíróság [FB]Budapest [Metropolitan Court], 3 G 50.289/1991/32, Jan. 10, 1992, *available at* http://www.cisg.law.pace.edu/cisg/wais/db/cases2/920110h1.html (airplane engines).

[149] *See* Chateau des Charmes Wines Ltd. v. Sabate USA Inc., 328 F.3d 528 (9th Cir. 2003).

[150] *Id.* at *531. The Supreme Court of Spain took a similar approach in a case where one party attempted to renegotiate the price of a concluded contract and the proposed modification was not accepted. *See* Internationale Jute Maatschappij BV v. Marín Palomares S.L., STS 454/2000, Jan. 28, 2000 (Spain), *available at* http://www.cisg.law.pace.edu/cisg/wais/db/

As found in the other areas of contract formation, a review of CISG jurisprudence involving the battles of the form scenario finds courts struggling to devise a unified framework for applying CISG rules. Most troubling is that courts seldom use cases from other contracting states. Because these battles are so prevalent in international transactions and Article 19 offers the flexibility for courts to adopt several approaches, Article 19 is one of the areas where the CISG could most benefit from the adoption of official comments, examples, and guidance that some commentators have suggested.[151]

cases2/000128s4.html. Finding that the original contract was not impaired by the subsequent attempt to modify, the court cited Article 19: "a reply to an offer which purports to be an acceptance but contains additions, limitations or other modifications is a rejection of the offer and constitutes a counter-offer." *Id.* The court's reasoning is difficult to ascertain as it referred primarily to Spanish civil law and its previous rulings throughout the opinion, but its approach appears consonant with that of the U.S. court.

[151] *See, e.g.*, John E. Murray, Jr., *The Neglect of the CISG: A Workable Solution*, 17 J.L. & Com 365, 378–79 (1998) (endorsing Professor Michael Bonell's idea that UNCITRAL should create a board similar to that of the National Conference of Commissioners on Uniform State Laws for the UCC to provide interpretations and illustrations for each article). *See also* James E. Bailey, *Facing the Truth: Seeing the Convention on Contracts for the International Sale of Goods as an Obstacle to a Uniform Law on International Sales*, 32 Cornell Int'l L.J. 273, 276 (1999). (Arguing that the CISG undermines its goal of uniformity for a variety of reasons, including the obscurity of its rules on interpretation, its provisions on contractual freedom, and its allowance for reservations and suggesting that uniformity would be improved by measures, such as UNCITRAL review of CISG court decisions as well as the official adoption of the Secretariat Commentary to the 1978 draft).

CHAPTER FIVE

OBLIGATIONS OF BUYERS

This part focuses on the duties of buyers in the CISG-governed transaction. Given the limited right of rejection (avoidance) provided to the CISG, the buyer is burdened with numerous duties including the duty to inspect, give notice of nonconformity, give notice of avoidance, duty to preserve the goods, duty to pay the price, and duty to take delivery. The analysis reviews how courts and arbitral panels have defined the duties enunciated in the CISG.

THE DUTY TO INSPECT, GIVE NOTICE, AND PRESERVE GOODS

The CISG requires buyers to inspect goods, and provide adequate and timely notice, with respect to any defects in the seller's performance and preserve the goods in the event the buyer elects to reject the seller's tender. These obligations are set forth in Articles 38, 39, 44, and 86. The initial obligation of all buyers is the duty of inspection. Article 38 provides that the buyer "must examine the goods, or cause them to be examined, within as short a period as is practicable in the circumstances."[1] Special rules apply in the event the contract involves the carriage of goods or their redirection in transit. Examination *may* be deferred until after the goods arrive at their destination in the event the contract involves carriage.[2] By contrast, examination of the goods may be deferred until after their arrival at their ultimate destination in the event they have been redirected in transit or redispatched by the buyer.[3] However, the inspection may be deferred under these circumstances only if the redirection or redispatch occurred without a "reasonable opportunity" for examination.[4] In addition, the buyer must demonstrate that the seller knew

1 CISG at Art. 38(1).
2 *Id.* Art. 38(2).
3 *Id.* Art. 38(3).
4 *Id.*

or should have known of the possibility of such redirection or redispatch at the time of the conclusion of the contract.[5]

The failure to comply with the provisions of Article 38 deprives the buyer of the right to rely upon the defense of nonconformity of the goods in a future dispute with the seller. The buyer also loses this defense in the event its notice does not specify "the nature of the lack of conformity within a reasonable time."[6] The time for providing this notice begins to run from the time of the actual discovery of the nonconformity or from when the buyer should have discovered it.[7] In any event, the buyer loses the right to rely upon nonconformity of the tendered goods if it does not give notice to the seller "at the latest within a period of two years from the date on which the goods were actually handed over to the buyer."[8] This two-year window for notice is inapplicable to the extent that it is inconsistent with any guarantees set forth in the sales contract.[9] Furthermore, the buyer retains the right to reduce the price payable to the seller or claim damages, except for loss of profits, if it has a "reasonable excuse" for its failure to provide the required notice.[10]

The buyer's ability to reject nonconforming goods is accompanied by a corresponding duty to preserve such goods for the benefit of the seller. Article 86 provides that the buyer must take steps to preserve the goods as is "reasonable in the circumstances."[11] The buyer is entitled to reimbursement from the seller of reasonable expenses incurred in the preservation of the goods and is entitled to retain the goods until its receipt of such payment.[12] In the event the goods have been placed at its disposal by the seller and are subsequently rejected, the buyer must take possession on the seller's behalf.[13] The buyer's obligation in this regard is contingent upon its ability to take possession of the goods without payment of the price and without "unreasonable inconvenience or . . . expense."[14] Buyer's duties under Article 86 are inapplicable in the event the seller or a person authorized to take control of the goods on its behalf is present at the destination at the time of the arrival of the goods.[15]

5 *Id.*
6 *Id.* Art. 39(1).
7 *Id.*
8 *Id.* Art. 39(2).
9 *Id.*
10 *Id.* Art. 44.
11 *Id.* Art. 86(1).
12 *Id.*
13 *Id.* Art. 86(2).
14 *Id.*
15 *Id.*

Inspection Duties and Rights: Article 38

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

The initial issue addressed by national courts with respect to Article 38 is the time within which buyers must inspect goods purchased from their vendors. Article 38(1) provides that this inspection must occur within "as short a period as practicable in the circumstances."[16] This language does not establish a definite time within which such inspection must occur in order to permit the buyer to reject the goods on the basis of nonconformity.[17] Rather, it appears that the time within which such inspection must occur is flexible depending upon the individual circumstances in each case.[18] Indeed, commentators have noted that "[t]his language seems to acknowledge that the shortest applicable period to inspect complex machinery received by a buyer in an isolated town of a developing country may be different from the shortest applicable period to inspect other types of goods by a sophisticated buyer in a big industrial city."[19] This result has been subject to criticism by some commentators who have advocated the necessity of uniform interpretation of Article 38.[20] Conversely, some commentators have praised this flexibility as necessary in order to facilitate the functioning of the CISG in developing states suffering from diminished communications capacity due to lack of infrastructure or geographic remoteness.[21]

There is some acknowledgment of the flexibility of this standard in the opinions of national courts. A Swiss interpretation of Article 38 noted that

[16] *Id.* Art. 38(1).

[17] *See* Herbert Bernstein & Joseph Lookofsky, Understanding the Convention on the International Sale of Goods in Europe 4–9 (2d ed. 2002); *see also* Joseph Lookofsky, *In Dubio Pro Conventione? Some Thoughts About Opt-Outs, Computer Programs and Preemption Under the 1980 Vienna Sales Convention*, 13 Duke J. Comp. & Int'l L. 263, 269 (2003).

[18] For criticism of the flexibility in the interpretation of the time in which inspection is to occur pursuant to Article 38, *see* Amy H. Kastely, *Reflections on the International Unification of Sales Law: Unification and Community: A Rhetorical Analysis of the United Nations Sales Convention*, 8 NW. J. Int'l L. & Bus. 574, 618–19 (1988).

[19] Alejandro M. Garro, *Reconciliation of Legal Traditions in the U.N. Convention on Contracts for the International Sale of Goods*, 23 Intl'l L. 443 (1989).

[20] *See, e.g.*, Franco Ferrari, *Uniform Interpretation of the 1980 Uniform Sales Law*, 24 Ga. J. Int'l & Comp. L. 183 (1994); Sunil R. Harjani, *The Convention on Contracts for the International Sale of Goods in United States Courts*, 23 Hous. J. Intl'l L. 49 (2000).

[21] *See* Lisa M. Ryan, *The Convention on Contracts for the International Sale of Goods: Divergent Interpretations*, 4 Tul. J. Int'l & Comp. L. 99, 111 (1995).

courts must take into account the nature of the goods, their quantity, the packaging, and all other relevant circumstances in determining the time within which the inspection must occur.[22] This interpretation has been echoed by a U.S. court that noted it was required to take into account the uniqueness of the goods involved, the method of delivery (including installments), and the familiarity of the buyer's employees with the goods.[23] Courts adopting this approach have noted that buyers may produce proof demonstrating why under the specific circumstances an inspection could not occur in a diligent fashion.[24] Although not expressly stated in the CISG, buyers seeking additional time to conduct an inspection bear the burden of proof with regard to justifying why additional time is needed.[25]

However, this interpretive "flexibility" has not been universally accepted. Instead, the majority of cases have rejected this approach in favor of less flexibility in the inspection requirement.[26] These courts have adopted two different approaches to determine whether the buyer's inspection was within as short a time period as practicable. The first approach requires the buyer to prove a special burden existed prior to the request for additional time for inspection. These courts have refused to grant time extensions for the inspection of goods based upon the absence of a burden upon the buyer. Courts adopting this approach have focused upon the ease with which the inspection could have occurred at the time of delivery[27] or the obviousness of the alleged nonconformity, such as readily apparent defects and disparities in

[22] *See* Obergericht Kanton Luzern, SJZ 94 515–18, Nov. 30, 1998.

[23] *See Shuttle Packaging Sys. v. Jacob Tsonakis*, INA, S.A., No. 1:01-CV-691, 2001 U.S. Dist. LEXIS 21630 (W. D. Mich. Dec. 17, 2001).

[24] *See, e.g.*, OLG Koblenz, 14 S 358/94, Jul. 7, 1995, (F.R.G.), a*vailable at* http://www.cisg.law.pace.edu/cisg/wais/db/cases2/950707g1.html.

[25] *See* HG Zürich, SZIER 930634/O, Nov. 30, 1998, (Switz.), *available at* http://www.cisg.law.pace.edu/cisg/wais/db/cases2/981130s1.html.

[26] *See* OLG Düsseldorf, Recht der Internationalen Wirtschaft [RIW], 1050–51, Feb 10, 1994, (F.R.G.), *available at* http://www.cisg.law.pace.edu/cisg/wais/db/cases2/940210g1.html; *Rheinland Versicherungen v. Atlarex S.r.l.*, Trib. Di Vigevano, July 12, 2000, n. 405, *available at* http://www.cisg.law.pace.edu/cisg/wais/db/cases2/000712i3.html. For criticism of the lack of flexibility in the interpretation of Article 38 by German courts, *see* Michael Joachim Bonell & Fabio Liguiri, *The United Nations Convention on the International Sale of Goods: A Critical Analysis of Current International Case Law (Part II)*, 1 Uniform L. Rev. 359, 360 (1996); *see also* Danielle Alexis Thompson, *Translation of Oberlandesgericht Karlsruhe Decision of 25-06-1997 including Commentary – Buyer Beware: German Interpretation of the CISG has Led to Results Unfavorable to Buyers*, 19 J.L. & Com. 245, 254–57 (2000).

[27] *See, e.g.*, *Handelsagentur v. DAT-SCHAUB A/S*, Mar. and Commercial Ct. of Copenhagen, n. H-0126-98, Jan. 31, 2002, (Den.), *available at* http://www.cisg.dk/shd310102.htm; OLG Düsseldorf, Recht der Internationalen Wirtschaft [RIW], 1050–51, Feb 10, 1994, (F.R.G.), *available at* http://www.cisg.law.pace.edu/cisg/wais/db/cases2/940210g1.html.

color and weight.[28] The uniqueness of the goods, their complicated nature, their delivery in installments, and the need for training of employees may also place unique burdens on the buyer justifying additional time within which to perform inspections.[29] Moreover, the ultimate disposition of the goods after delivery also may be relevant to this inquiry. The two states that have placed primary importance on this factor have not set specific times for the occurrence of inspections, although they require that these inspections occur prior to the processing, transformation, or incorporation of goods into the manufacturing process.[30]

By contrast, other courts have established specific deadlines for the completion of the buyer's inspection and have specifically supported a deadline for inspection with respect to perishable goods. In this regard, national courts have required the inspection occur immediately upon delivery of the goods to the buyer.[31] This is an understandable result given the consequences of delays in inspections with respect to such goods. However, several national courts have expanded the inspection upon delivery requirement to include non-perishable goods as well.[32] Courts in two states have adopted a more lenient approach by granting buyers one week from the time of delivery to complete their inspection.[33]

[28] *See* HG Zürich, HG 930634/O, Nov. 30, 1998, (Switz.), *available at* http://www.cisg.law.pace.edu/cisg/wais/db/cases2/981130s1.html.

[29] *See, e.g.*, *Shuttle Packaging Sys. v. Jacob Tsonakis*, INA, S.A., No. 1:01-CV-691, 2001 U.S. Dist. LEXIS 21630 (W. D. Mich. Dec. 17, 2001).

[30] *See Silver Int'l v. Pochon Tissage*, S.A., Rechtbank van Koophandel, Kortrjik, A.R 651/97, June 27, 1997, (Belg.), *available at* http://www.law.kuleuven.ac.be/int/tradelaw/WK/1997-06-27.htm; Nurka Furs/ Nertsenfokkerij De Ruiter, Hof Hertogenbosch [HOF][District Court of Appeal], Dec. 15, 1997, NIPR 201 (Neth.), *available at* http://www.cisg.law.pace.edu/cisg/wais/db/cases2/971215n1.html; CME Coop. Mar. Etaploise/Bos Fishproducts, Rb. Zwolle, Mar. 5, 1997, NIPR 230 (Neth.), *available at* http://www.cisg.law.pace.edu/cisg/wais/db/cases2/970305n1.html.

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

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

[33] *See, e.g.*, OLG Koblenz, 14 S 358/94, Jul. 7, 1995, (F.R.G.), a*vailable at* http://www.cisg.law.pace.edu/cisg/wais/db/cases2/950707g1.html#cs; Handelsgericht Zürich, HG 930634/O,

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

There is less case law with respect to the timeliness of inspection in the event of transshipment. Nevertheless, existing jurisprudence has exhibited a common theme of strict construction. Strict construction of Article 38(3) is evident in three separate holdings. First, the inspection may be deferred pursuant to Article 38(3) only when the buyer is a mere intermediary or when the goods are delivered directly to end users.[34] By contrast, the inspection may not be deferred when the buyer takes possession of the goods without advance knowledge to what extent, when, and to whom the goods will ultimately be resold.[35] Second, if the buyer serves as a mere intermediary or direct delivery occurs, the inspection may be deferred only if the buyer can demonstrate the absence of a "real opportunity" to examine all of the goods.[36] By contrast, if only a portion of the goods is retransmitted to the ultimate end user, the buyer is still under an obligation to inspect those goods remaining in its possession.[37] The failure to conduct a timely inspection prevents the buyer from rejecting the goods for nonconformity pursuant to Article 38. The buyer may also lose its ability to defer the inspection pursuant to Article 38(3), if the goods were reprocessed or repackaged prior to their shipment to the end user. Finally, any delays by the end user in inspecting the goods or transmitting notice of nonconformity are attributable to the buyer and may prevent the utilization of Article 38 as a basis for rejection.[38]

A separate issue addressed by national courts is what constitutes a reasonable inspection. The buyer is not required to make an examination that would reveal every possible defect. Rather, the buyer's inspection must be reasonable

Nov. 30, 1998, (Switz.), *available at* http://www.cisg.law.pace.edu/cisg/wais/db/cases2/98113os1.html.

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

35 *Id.*

36 Obergericht [OG] Kanton Luzern [Appellate Court], 94 SJZ 515–18, Nov. 30, 1998, (Switz.).

37 *Id.*

38 OLG München, 7 U 3758/94 Feb. 8, 1995, (F.R.G.), *available at* http://www.cisg.law.pace.edu/cisg/wais/db/cases2/950208g4.html.

under the circumstances and is dependent upon the provisions of the contract in question, usage of the trade, the type of goods, and the technical facilities and expertise of the parties.

Four general rules emerge from an examination of the opinions with respect to the thoroughness of the inspection required by Article 38. Initially, buyers must examine the packaging of the product for evidence of nonconformity.[39] The buyer has an affirmative obligation to discover any nonconformity readily apparent from such inspection, including labeling, weight, and date of production.[40] Failure to discover any such nonconformity will prevent the buyer from rejecting the goods pursuant to Article 38. Next, buyers are required to examine carefully the goods themselves and discover readily apparent nonconformities. The opinions have not defined what constitutes an apparent nonconformity. However, national courts have held discrepancies in color, weight, and consistency to be apparent nonconformities.[41] Additionally, buyers are excused from a complete examination of the goods in the event the quantity or nature of the product renders comprehensive inspection unreasonable. However, buyers are not completely excused from conducting inspections under such circumstances. Rather, buyers are required to sample or spot check the product upon delivery and discover and report any apparent nonconformities.[42] Buyers may not rely upon sampling or spot checking in the event previous shipments from the seller, if any, were nonconforming.[43] Buyers are not required to discover nonconformities that have been actively concealed by their sellers.[44] In any event, the burden of proving that a reasonable inspection took place rests with the buyer.[45]

39 *See Handelsagentur v. DAT-SCHAUB A/S*, Mar. and Commercial Ct. of Copenhagen, n. H-0126-98, Jan. 31, 2002, (Den.), *available at* http://www.cisg.dk/shd310102.htm.

40 *Id.*

41 *See* HG Zürich, HG 930634/O, Nov. 30, 1998, (Switz.), *available at* http://www.cisg.law.pace.edu /cisg/wais/db/cases2/98113os1.html.

42 *See* OLG Koblenz, 14 S 358/94, Jul. 7, 1995, (F.R.G.), a*vailable at* http://www.cisg.law.pace.edu/cisg/wais/db/cases2/950707g1.html#cs (chemicals); Obergericht Kanton Luzern, 94 SJZ 515–18, Nov. 30, 1998, (medical devices).

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

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

45 *See, e.g.*, Obergericht [OG] des Kantons Luzern [Appellate Court], 11 95 123/357, Jan. 8, 1997, (Switz.), *available at* http://cisgw3.law.pace.edu/cases/970108s1.html

The final issue addressed by national courts is the enforceability of contractual provisions abrogating the inspection duties of Article 38. Commentators have noted that the provisions of Article 38 are optional, and the parties are free to contract upon different terms, including provisions for the inspection of goods and notice.[46] Several national courts have addressed this issue in their opinions. The intent of the parties to derogate from the provisions of Article 38 must be clearly stated in the parties' agreement. In this regard, the party seeking enforcement of such a provision must demonstrate that both parties were aware of the potential applicability of the CISG and expressly intended to exclude it from their agreement.[47] Language purporting to derogate from Article 38 must clearly provide for exclusion of its provisions and cannot be implied from related terms.[48]

Upon a finding of an express intent to derogate from Article 38, the parties may elect to set specific time periods for the performance of inspections or to rely upon time periods established by usage and custom of the trade. If the parties elect to set specific dates in their contract, notices must be sent within these time periods in order to be valid.[49] Periods of time upheld in the opinions of national courts range from eight to fourteen days of delivery.[50] The time periods for inspection and the provision of notice may also be based upon usage and custom of the trade.[51] However, parties relying upon

[46] *See, e.g.*, Peter Schlechtriem, Uniform Sales Law – The U.N. Convention on Contracts for the International Sale of Goods 72 (1986); Louis F. Del Duca & Patrick Del Duca, *Tenth Biennial Conference of the International Academy of Commercial and Consumer Law: Convention on the International Sale of Goods: Selected Topics Under the Convention on International Sale of Goods*, 106 Dick. L. Rev. 205, 227 (2001) (noting the advantages of the parties setting their own time for inspection and notice of nonconformity as a method of avoiding the uncertainties inherent in Articles 38 and 39).

[47] *See, e.g.*, Obergericht [OG] des Kantons Luzern [Appellate Court], 11 95 123/357, Jan. 8, 1997, (Switz.), *available at* http://cisgw3.law.pace.edu/cases/970108s1.html

[48] *See, e.g.*, Int'l Chamber of Commerce, Pub. No. 7565/1994, 6 ICC Int'l Ct. of Arb. Bull. 64, 64–6 (Nov. 1995) (refusing to imply a derogation from Article 38 on the basis of a related provision fixing a thirty day time limit to file a request for arbitration upon the failure of negotiation).

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

[50] *See, e.g.*, OLG Saarbrücken, 1 U 69/92, Jan. 13, 1993, (F.R.G.), *available at* http://www.cisg.law.pace.edu/cisg/wais/db/cases2/930113g1.html (eight-day period for the provision of notice of nonconformity in the purchase of doors); LG Hannover, 22 O 107/93, Dec. 1, 1993, (F.R.G.), *available at* http://www.cisg.law.pace.edu/cisg/wais/db/cases2/931201g1 (ten-day period for the provision of notice of nonconformity in the purchase of shoes).

[51] *See, e.g.*, OLG Saarbrücken, 1 U 69/92, Jan. 13, 1993, (F.R.G.), *available at* http://www.cisg.law.pace.edu/cisg/wais/db/cases2/930113g1.html; CME Coop. Mar. Etaploise/Bos Fishproducts, Rb. Zwolle, Mar. 5, 1997, NIPR 230 (Neth.), *available at* http://www.cisg.law.pace.edu/cisg/wais/db/cases2/970305n1.html.

such provisions bear the burden of proof with respect to the custom or usage, its applicability to the trade at issue, and the intent of the parties to incorporate it in their agreement.[52] In addition, parties cannot rely upon usage and custom if the agreement establishes specific periods for the performance of inspections and provision of notice of nonconformity.[53]

Notice of Nonconformity: Article 39

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

There are numerous opinions of national courts addressing the time in which the buyer must give notice of lack of conformity to the seller. Unfortunately, these opinions are completely lacking in uniformity. The opinions have required notice within a wide range of time from immediate to an extended period of time after delivery. As noted with respect to Article 38, this flexibility has been subject to criticism for the resultant uncertainty as well as praise for the reflection of realities with respect to notice by buyers located in developing states.[54] The one common element of these opinions is the placement of the burden on the buyer to demonstrate the reasonableness of the time in which it gave notice of nonconformity to the seller.[55]

An initial group of opinions held that notice of nonconformity needed to be sent within an immediate or very short period of time. For example, a national court in Denmark required a Russian purchaser of a load of fish to give "prompt" notice of the nonconformity of the species ultimately delivered by the seller.[56] In a similar vein, a Belgian court held that a Dutch buyer of neon signage was required to give notice of nonconformity to the Belgian

[52] *See, e.g.*, OLG Saarbrücken, 1 U 69/92, Jan. 13, 1993, (F.R.G.), *available at* http://www.cisg.law.pace.edu/cisg/wais/db/cases2/930113g1.html.

[53] *Id.*

[54] For criticism of the flexibility of interpretation for the time within which to provide notice pursuant to Article 39, *see* Kastely, *supra* note 18, at 618–19. For the contention that flexibility in the interpretation of Article 39 is necessary in order for the CISG to function properly in developing states, *see* Ryan, *supra* note 21 , at 111.

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

[56] *Handelsagentur v. DAT-SCHAUB A/S*, Mar. and Commercial Ct. of Copenhagen, n. H-0126-98, Jan. 31, 2002, (Den.), *available at* http://www.cisg.dk/shd310102.htm.

seller within a "short time."[57] By contrast, a Dutch court required notice of nonconformity of cheese products within a short period of time after delivery.[58] Similarly, a German court held that a German buyer of textiles that failed to provide notice of nonconformity to the French seller within a few days of delivery was not in compliance with the requirement of reasonable notice set forth in Article 39.[59]

Some courts have linked the time within which the inspection must occur pursuant to Article 38 to the time within which notice of nonconformity must be given pursuant to Article 39. For example if the buyer is required to perform an immediate inspection of the goods pursuant to Article 38, then the buyer is also required to provide immediate notice of nonconformities. A German court required immediate inspection and notice of nonconformity by a German purchaser of flowers from an Italian seller.[60] Similarly, another court required that a German buyer of shoes provide the Italian seller notice of nonconformities one day after delivery.[61] These opinions have been subject to criticism for their pro-seller skew and perceived lack of fairness to buyers.[62]

There are another group of opinions that have granted buyers extended periods of time to give notice of nonconformities. For example, despite the ease of discovery of nonconformities in a shipment of lambskin jackets from a Swiss seller to a buyer in Liechtenstein, a Swiss court held that the buyer had seven to fourteen days within which to notify the seller.[63] In a similar fashion, a German court required an Austrian buyer to inform a German seller of nonconformities in plastic granulate within eight days of delivery.[64] This period of time was extended to ten days by a different German

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

[58] *See* Fallini Stefano & Co./Foodik, Rb. Roermond, Dec. 19, 1991, NIPR 394 (Neth.), *available at* http://www.cisg.law.pace.edu/cisg/wais/db/cases2/911219n1.html.

[59] *See* OLG Düsseldorf, RIW, 1050–51, Feb 10, 1994,(F.R.G.), *available at* http://www.cisg.law.pace.edu/cisg/wais/db/cases2/940210g1.html.

[60] OLG Saarbrücken, 1 U 703/97-143 June 3, 1998, (F.R.G.), *available at* http://www.cisg.law.pace.edu/cisg/wais/db/cases2/980603g1.html.

[61] *See* LG Aachen, 41 O 198/89 Apr. 3,1990, (F.R.G.), *available at* http://www.cisg.law.pace.edu/cisg/wais/db/cases2/900403g1.html.

[62] *See* Michael G. Bridges, *Uniformity and Diversity in the Law of International Sale*, 15 Pace Int'l L. Rev. 55, 78 (2003); *see also* Thompson, *supra* note 26, at 261.

[63] *See* HG Zürich, SZIER HG 930634/O, Nov. 30, 1998, (Switz.), *available at* http://www.cisg.law.pace.edu/cisg/wais/db/cases2/981130s1.html.

[64] OLG München, 7 U 3758/94, Feb. 8, 1995, (F.R.G.), *available at* http://www.cisg.law.pace.edu/cisg/wais/db/cases2/950208g4.html.

court.[65] Two courts have extended the notice period to two weeks for similar goods.[66]

The national courts of four states have extended the period of notification beyond two weeks. These cases have set a specific time for notification of nonconformities beyond two weeks or have set an indefinite period of time for such notification depending on the circumstances. For example, courts in Germany and Switzerland have granted buyers one month from the date of delivery to notify sellers of nonconformities. This one-month period has been deemed applicable to a wide range of perishable and nonperishable goods.[67] By contrast, national courts in Italy and the Netherlands have refused to set specific dates for the buyer's notification. Specifically, an Italian court held that a German buyer of vulcanized rubber should have provided notice to the Italian seller of nonconformities immediately upon processing the product.[68] However, the court did not set a time within which such processing was to occur other than to note that four months after delivery was untimely.[69] A similar result was reached by a court in the Netherlands in its determination that a Greek buyer of furs from a Dutch seller should have provided notice of nonconformities prior to the processing of the product.[70] The Dutch court did not set a specific time for such processing to occur other than to conclude that notice provided three weeks after delivery was untimely.[71]

There are far fewer cases addressing the time within which notice must be given in the event of redirection of the goods in transit by the buyer to a third party. Opinions have established preconditions for granting delays in providing notice of nonconformity. Initially, delays in providing notice will only be permitted when the buyer serves as a simple intermediary or when the

[65] *See* OLG Karlsruhe, 1 U 280/96, Jun. 25, 1997, (Switz.), *available at* http://www.cisg.law.pace.edu/cisg/wais/db/cases2/970625g1.html.

[66] *See Giustina Int'l Sp.A. v. Perfect Circle Europe SARL*, CA Versailles, Cass. Com., No. 56, Jan. 29, 1998, (Fr.), *available at* http://witz.jura.uni-sb.de/CISG/decisions/290198v.htm; *see also* OLG Koblenz, 14 S 358/94, Jul. 7, 1995, (F.R.G.), a*vailable at* http://www.cisg.law.pace.edu/cisg/wais/db/cases2/950707g1.html#cs (chemical compounds).

[67] *See, e.g.*, OLG München, Forum des Internationalen Rechts 106–7, (F.R.G.) (textiles); OLG Thüringener, OLGR Thüringener 4–6 (F.R.G. 1998) (live fish); OLG Stuttgart, RIW, 943–44 (F.R.G. 1995) (machinery); AG Augsburg, n. 11 C 4004/95, (F.R.G. 1996), *available at* http://www.jura.uni-freiburg.de/ipr1/cisg/urteile/text/172.htm (shoes); OG Kanton Luzern, 94 SJZ 515–18 (Switz.) 1998 (medical devices).

[68] *See Rheinland Versicherungen v. Atlarex S.r.l.,* Trib. Di Vigevano, July 12, 2000, n. 405, *available at* http://www.cisg.law.pace.edu/cisg/wais/db/cases2/000712;3html.

[69] *Id.*

[70] *See* Nurka Furs/Nertsenfokkerij De Ruiter, Hof Hertogenbosch, 15 Dec. 1997, NIPR 201 (Neth.).

[71] *Id.*

goods are directly delivered to the end user.[72] Delays in providing notice will not be excused when, at the time of the delivery at the buyer's facilities, the buyer does not know to what extent and when the goods will be resold to its customers.[73] In addition, delays will not be countenanced in the event that the buyer has a "real opportunity" to examine the goods despite their transshipment to a third-party end user.[74]

In the event of transshipment, national courts have not permitted prolonged delays in the giving of notice. In a case involving the sale of adhesive foil covers by a German seller to an Austrian buyer, the court held that the notice of defects provided twenty-four days after the delivery of the goods to the ultimate end user was untimely.[75] The court held that notice within ten or eleven days after delivery was reasonable under the circumstances.[76] A key fact was that the defect was apparent and could easily have been discovered by the buyer and its end user upon delivery.[77]

A number of decisions have upheld the enforceability of contractual provisions altering the notice requirements of Article 39.[78] However, in order for such an alteration to be effective, particularized consent[79] must be given by the disadvantaged party. The party must have been aware that the CISG is applicable to the specific contract in question and demonstrate an affirmative intent to exclude its application.[80] Furthermore, the period of time selected by the parties for the provision of notice must be reasonable.[81] The opinions of national courts to date have found contractually designated periods of time

[72] *See* OLG Saarbrücken, n. 1 U 69/92, (F.R.G. Jan. 13, 1993), *available at* http://www.jura.uni-freiburg.de/ipr1/cisg/urteile/text/83.htm.

[73] *Id.*

[74] OG Luzern, 11 95 123/357, Jan. 8, 1997, (Switz.), *available at* http://cisgw3.law.pace.edu/cisg/wais/db/cases2/970108s1.html.

[75] *See* OLG Karlsruhe, 1 U 280/96, June 25, 1997, (F.R.G.), *available at* http://www.cisg.law.pace.edu/cisg/wais/db/cases2/970625g1.html.

[76] *Id.*

[77] *Id.* Similarly, in a case involving the purchase of plastic granulate by an Austrian buyer from a German seller, the court held that the Danish end user's notice of defects one month after delivery was untimely. OLG München, 7 U 3758/94, Feb. 8, 1995, (F.R.G.) *available at* http://www.unilex.info/case.cfm?pid=1&do=case&id=117&step= FullText. This conclusion was further bolstered by the Austrian buyer's additional two-month delay in communicating this notice of nonconformity to the German seller, *Id.*

[78] *See, e.g.*, LG Hannover, 22 O 107/93, Dec. 1, 1993, (F.R.G.), *available at* http://www.unilex.info/case.cfm?pid=1&do=167&step=FullText.

[79] *Infra* Chapter 11.

[80] *See, e.g.*, OG Luzern 11 95 123/357, Jan. 8, 1997, (Switz.), *available at* http://cisgw3.law.pace.edu/cases/970108s1.html.

[81] *See, e.g.*, OLG München, 7 U 4427/97, Mar. 11, 1998, (F.R.G.), http://cisgw3.law.pace.edu/cisg/wais/db/cases2/980311g1.html#cabc.

ranging from eight to fourteen days to be reasonable and thus enforceable.[82] Courts in Germany and the Netherlands have also accepted notification periods consistent with accepted usages within the trade.[83]

The requirement of timely notice also raises the issue of the buyer's obligation with respect to the discovery of defects. The court opinions focus on the ease of discovery of the alleged nonconformity. In addition, court opinions concluding that the buyer's notice was untimely have concentrated on whether the defect was apparent from examination of the goods at the time of their delivery, from the time of subsequent processing, or at the time they were incorporated as a component in an end product. In *Handelsagentur v. DAT-SCHAUB A/S*,[84] a Danish court refused to excuse an untimely notice with respect to nonconformities that were easily detectable upon the completion of a reasonable inspection at the time of delivery. German and Dutch courts have declined to give effect to notices when the defects were readily apparent upon subsequent processing that was to occur as soon as practicable after delivery.[85] The buyer's notice obligations are also triggered by

[82] OLG München, 7 U 4427/97, Mar. 11, 1998, (F.R.G.), *available at* http://cisgw3.law.pace.edu/cisg/wais/db/cases2/980311g1.html (fourteen days after delivery for the provision of notice of nonconformity in the sale of cashmere textiles); *see also*, OLG Saarbrücken, 1 U 69/92, Jan. 13, 1993, (F.R.G.), *available at* http://www.unilex.info/case.cfm?pid=1&do=case&id=180&step=FullText (eight days after delivery for the provision of notice of nonconformity in the sale of doors), LG Hannover, 22 O 107/93, Dec. 1, 1993, (F.R.G.), *available at* http://www.unilex.info/case.cfm?pid=1&do=case&id=167&step=FullText (ten days from the date of delivery for the provision of notice of nonconformity in the sale of shoes).

[83] *See, e.g.*, OLG Saarbrücken, 1 U 69/92, Jan. 13, 1993, (F.R.G.) (trade usages in the door manufacturing industry), *available at* http://www.unilex.info/case.cfm?pid=1&do=case&id=180&step=FullText; CME Coop. Mar. Etaploise/Bos Fishproducts Rb. Zwolle, Mar. 5, 1997, NIPR 230 (Neth.) (trade usages in the fish industry), *available at* http://cisgw3.law.pace.edu/cisg/wais/db/cases2/970305n1.html. However, usages are superseded by the specific notification requirements contained in the contract.

[84] *See* Mar. and Comm. Ct. of Copenhagen, H-0126-98, Jan. 31, 2002, (Den.) (nonconformity of species of fish sold by Danish seller to Russian buyer easily detectable from examination of the label and packaging), *available at* http://cisgw3.law.pace.edu/cisg/wais/db/cases2/020131d1.html; *see also* OLG München, 7 U 4427/97, Mar. 11, 1998, (F.R.G.) (spot checks of cashmere textiles by the German buyer at the time of their delivery by the Italian seller would have disclosed defects), *available at* http://cisgw3.law.pace.edu/cisg/wais/db/cases2/980311g1.html.

[85] *See* OLG Koblenz, 2 U 580/96, Sept. 11, 1998, (F.R.G.) (nonconformity of chemicals purchased by a Moroccan buyer from a German seller were readily apparent when chemicals were utilized to manufacture plastic tubes one month after delivery), *available at* http://cisgw3.law.pace.edu/cisg/wais/db/cases2/980911g1.html; *see also* OLG Karlsruhe, 1 U 280/96, June 25, 1997, (F.R.G.) (nonconformity of adhesive foil covers purchased by an Austrian buyer from a German seller was readily discoverable at the time of their subsequent processing), *available at* http://cisgw3.law.pace.edu/cisg/wais/db/cases2/970625g1.html; CME Coop. Mar. Etaploise/Bos Fishproducts Rb. Zwolle, Mar. 5, 1997, NIPR 230 (Neth.)

defects that become apparent when the goods are incorporated into an end product.[86]

By contrast, untimely notice of defects will be excused in the event the nonconformity was one of which the seller knew and actively concealed from the buyer. Thus, a German court excused an untimely notice from a German buyer with respect to wine that was intentionally adulterated with water by an Italian seller.[87] Similarly, a Dutch court excused untimely notice from a Dutch buyer with respect to infested cheese delivered by an Italian seller.[88] National courts have also excused untimely notice in the event the defect could only have been discovered through the performance of inspections that are not customary in the trade.[89] At least one court has also excused untimely notice when the nonconformity is such that its existence could only have been detected by a highly trained expert, such as a health professional.[90] In any event, the burden of presenting evidence with respect to the seller's misconduct or knowledge or the latency of the nonconformity rests with the buyer.[91]

The courts have dealt with Article 39's requirement of specificity of notice. The specificity of notice is important in informing the seller of what actions are necessary to remedy the nonconformity and provides the seller with a basis for conducting his own examination of the goods.[92] As a result, a notice

(nonconformity of fish purchased by a Dutch buyer from a French seller was readily apparent upon processing, which should have occurred as soon as practicable after delivery given the perishable nature of the product), *available at* http://cisgw3.law.pace.edu/cisg/wais/db/cases2/970305n1.html.

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

87 *See* LG Trier, 7 HO 78/95, Oct. 12, 1995, (F.R.G.), *available at* http://cisgw3.law.pace.edu/cisg/wais/db/cases2/951012g1.html.

88 *See* Fallini Stefano & Co./ Foodik, Rb. Roermond, Dec. 19, 1991, NIPR 394 (Neth.), *available at* http://www.cisg.law.pace.edu/cisg/wais/db/cases2/911219n1.html.

89 *See, e.g.*, LG Trier, 7 HO 78/95, Oct. 12, 1995, (F.R.G.) (holding that inspections to determine if wine had been adulterated with water were not customarily undertaken in the wine industry), *available at* http://cisgw3.law.pace.edu/cisg/wais/db/cases2/951012g1.html.

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

91 *Id., see also*, Trib. [District Court] di Vigevano, n.405, July 12, 2000, (It.), *available at* http://cisgw3.law.pace.edu/cases/000712i3.html#cabc; HG Zürich, HG 930634, Nov. 11, 1998, (Switz.), *available at* http://cisgw3.law.pace.edu/cisg/wais/db/cases2/98113os1.html#cabc.

92 *See* LG Erfurt, 3 HKO 43/98, Jul. 29, 1998, (F.R.G.), *available at* http://www.unilex.info/case.cfm?pid=1&do=case&id=449&step=FullText.

merely stating that the goods are nonconforming is insufficient to excuse the buyer's contractual performance.[93] If the nonconformity is capable of precise description, such description must be provided to the seller on a timely basis.[94] Furthermore, the notice must identify defects and demand remediation rather than constitute a request for assistance in addressing specific problems.[95]

There are numerous cases in which buyers have lost their rights to reject goods because their notices lacked specificity. A German court refused to give effect to a notice that informed the seller of flowers that its goods were of "bad quality" and "poor appearance."[96] Similarly, German and Italian courts have deemed notices stating that the goods are "defective" or "present problems" as lacking sufficient specificity to be effective pursuant to Article 39.[97] A Swiss court refused to give effect to a notice given to an Italian seller that its furniture had "wrong parts" and was "full of breakages."[98]

German courts have devised rules with respect to specificity of the required notice in the event the subject matter of the contract consists of an integrated system or multiple components or deliveries. With respect to an integrated system containing defects, the notice of nonconformity must

[93] *See* LG Hannover, 22 O 107/93, Dec. 1, 1993, (F.R.G.), *available at* http://www.unilex.info/case.cfm?pid=1&do=case&id=167&step=FullText.

[94] *Id.*; *See also*, LG Regensberg, 6 O 107/98, Sept 24, 1998, (F.R.G.) (textiles), *available at* http://cisgw3.law.pace.edu/cisg/wais/db/cases2/980924g1.html#ctoc; LG Erfurt, 3 HKO 43/98, Jul. 29, 1998, (F.R.G.), *available at* http://www.jura.unifreiburg.de/ipr1/cisg/urteile/text/561.htm (soles); Bronneberg/Ceramica Belvedere, HR, Feb. 20, 1998, NJ 480 (Neth.) (floor tiles), *available at* http://cisgw3.law.pace.edu/cisg/wais/db/cases2/980220n1.html; HG Zürich, HG 930634, Nov. 11, 1998, (Switz.) (lambskin jackets), *available at* http://cisgw3.law.pace.edu/cisg/wais/db/cases2/981130s1.html#cabc.

[95] *See* LG München, 8 HKO 24667/93, Feb. 8, 1995, (F.R.G.) (sale of computer programs), *available at* http://www.unilex.info/case.cfm?pid=1&do=case&id=225&step=FullText.

[96] OLG Saarbrücken, 1 U 703/97-143, Jun. 3, 1998, (F.R.G.), *available at* http://www.cisg.law.pace.edu/cisg/wais/db/cases2/980603g1.html.

[97] LG Erfurt, 3 HKO 43/98, Jul. 29, 1998, (F.R.G) (soles), *available at* http://www.unilex.info/case.cfm?pid=1&do=case&id=449&step=FullText. *See also* Trib. di Vigevano, Note 435, Jul. 12, 2000, (It.) (buyer did not retain samples of vulcanized rubber for trial and thus were unable to prove that the seller sold defective rubber for shoes), *available at* http://cisgw3.law.pace.edu/cases/000712i3.html#cabc. Another German court reached the same conclusion with respect to a notice given by a German purchaser of leather goods from an Italian seller that the merchandise was "badly stamped" and incapable of sale to customers. OLG München, 7 U 2070, Jul. 9, 1997, (F.R.G.), *available at* http://cisgw3.law.pace.edu/cisg/wais/db/cases2/970709g1.html#ctoc.

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

specifically identify the defective components.[99] Reference to the system in its entirety is insufficient to satisfy the requirements of Article 39.[100] Rather, the notice must precisely identify the defective components by serial number and date of delivery.[101] Similar rules are applicable to sales consisting of multiple items or deliveries. In such circumstances, the notice must identify those items or deliveries that are defective.[102] A notice deeming the entire performance to be defective and not specifically identifying the items or specific deliveries does not meet the strict requirements of Article 39.[103]

Reasonable Excuse: Article 44

National courts interpreting Article 44 have focused on one primary issue, which is specifically the determination of reasonable excuses for failure to give notice of nonconformity of goods as required by Article 39. This provision has been subject to criticism by academics for its lack of clarity and liberal nature in excusing tardy or absent notices pursuant to Article 39.[104] Article 44 has also been criticized for its lack of clarity as to what constitutes a "reasonable excuse."[105] Conversely, this lack of clarity has been praised as providing different standards for different buyers depending upon their level of sophistication.[106] As a result, at least one commentator has recommended that sellers protect themselves from the uncertainty arising from Article 44 by varying the CISG's notice provisions by agreement, including the elimination of excuses for failure to provide notice.[107]

[99] *See* BGH VIII ZR 306/95, Dec. 4, 1996, (F.R.G.), *available at* http://cisgw3.law.pace.edu/cisg/wais/db/cases2/961204g1.html#ctoc (sale of a printing system).

[100] *Id.*

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

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

[103] LG Marburg, 2 O 246/95, Dec. 12, 1995, (F.R.G.) (sale of agricultural machinery), *available at* http://cisgw3.law.pace.edu/cisg/wais/db/cases2/951212g1.html. Furthermore, as previously noted with respect to integrated systems, the serial numbers and dates of delivery of such components must be included in the notice in order to spare the seller the inconvenience of researching the sales documentation with respect to all of the components or deliveries.

[104] *See* Schlechtriem, *supra* note 46, at 70.

[105] *See* Garro, *supra* note 19.

[106] *See* Ryan, *supra* note 21, at 111–12.

[107] *See* E. Allan Farnsworth, *The Vienna Convention: An International Law for the Sale of Goods, in* Private Investors Abroad – Problems and Solutions in International Business 121, 127, 134 (Martha L. Landwehr ed., 1983).

The sparse case law interpreting the reasonable excuse provision of Article 44 is inconsistent with these criticisms. Rather, the national courts that have addressed this issue have proven most reluctant to excuse non-compliance with Article 39. These opinions have cited numerous reasons for refusing to conclude that a buyer's failure or delay in providing notice was excusable. A Dutch court noted that a Greek buyer could not use Article 44 as an excuse for a three-week delay in providing notice to a Dutch furrier, because the defects were easily detectable through a sampling of the goods.[108] Reasonable excuse does not exist if the buyer delays in communicating consumer complaints.[109] A German court rationalized that a restrictive use of excuse is necessary due to the fast paced nature of business. There is often need for prompt action that is dependent upon timely notice.[110] However, this same court found that the granting of an excuse for untimely notice is less justified when the purchaser is an experienced and sophisticated participant in the international marketplace.[111] The court noted that it would be easier to accept excuses from single traders and artisans.[112] At this time, the nature of the differences necessary to justify different treatment and the specific excuses that would be acceptable to a national court remain indeterminate.

There have been, however, a few cases that have granted a buyer an excuse under Article 44 for failing to give due notice as required under Article 39. An ICC arbitration held that a faulty inspection by a neutral third party, such as a government agency, provided grounds for such an excuse.[113] In that case, the arbitral panel found that the time of the buyer's inspection was fixed at the port of loading. Therefore, the discovery of the defect at the port of unloading was too late for timely notice under Article 39(1). The panel then excused the buyer for failure to give timely notice, because the inspection at the port of loading was faulty and was performed by a neutral party. It stated that because

[108] *See* Nurka Furs/Nertsenfokkerij De Ruiter, Hof [District Appeals Court] Hertogenbosch, Dec. 15, 1997, NIPR 201 (Neth.), *available at* http://cisgw3.law.pace.edu/cisg/wais/db/cases2/971215n1.html.

[109] *See* Bezirksgericht Unterrheintal, EV. 1998.2 (1KZ. 1998.7), Sept. 16, 1998, (Switz.) (nine-month delay in communicating customer complaints about furniture sold by a German seller to a Swiss buyer), *available at* http://cisgw3.law.pace.edu/cisg/wais/db/cases2/980916s1.html#ctoc.

[110] *See* OLG München, 7 U 3758/94, Feb. 8, 1995, (F.R.G.) (sale and purchase of plastic granulate), *available at* http://www.unilex.info/case.cfm?pid=1&do=case&id=117&step=FullText.

[111] *Id.*

[112] *Id.*

[113] ICC Arbitration No. 9187 of June 1999, *available at* http://www.cisg-online.ch/cisg/urteile/705.htm.

"both parties had agreed to a neutral inspection body the buyer was relieved from bearing the consequences of an incorrect inspection alone."[114]

Article 44 was also applied by a Russian arbitration panel in granting an excuse to a buyer of defective goods.[115] In the contract, the buyer had the right to an inspection by a neutral organization at the port of destination. However, the buyer argued that the inspection was not made due to "technical reasons." The interesting part of the case was that the buyer failed to make a timely claim (*pretenziya*) under a notice provision of the contract. Therefore, the ruling is suspect, because Article 44 only grants an excuse for a notice of nonconformity (Article 39) and notice of third party claims (Article 43). It does not apply to other types of notices, especially express notice provisions in a contract.[116]

PAYMENT OF THE PRICE AND THE TAKING OF DELIVERY

The buyer is obligated to pay the contract price for the goods and take delivery in the event they are conforming or have otherwise been accepted without objection. These obligations are set forth in Articles 54 through 60 of the CISG. Initially, the buyer's obligation to pay the contract price includes compliance with all formalities as may be required by the contract or pursuant to applicable laws and regulations to enable payment to be made.[117] Where the sales contract has been concluded, but the parties have failed to expressly or implicitly fix or make a provision for the price, the parties are considered "to have impliedly made reference to the price generally charged at the time of the conclusion of the contract for such goods sold under comparable circumstances in the trade concerned."[118] In addition, if the price is fixed according to the weight of the goods the reference will be interpreted as the net weight in the absence of language to the contrary.[119]

Article 57 governs the place of the buyer's obligation to remit payment. In the event the contract does not specify the place of payment, the buyer must make the payment at the seller's place of business.[120] However, if the

[114] *Id.*

[115] Arbitration Tribunal of Russian Federation Chamber of Commerce and Industry, Case No. 54/1999 of January 24, 2000, CLOUT Abstract No. 474, *available at* http://cisgw3.law.pace.edu/cases/000124r1.html.

[116] This is the position taken in the a commentary by Djakhongir Saidov in 7 Vindobona J. Int'l Com. L. & Arb. 1, 28–30 (2003).

[117] CISG, Art. 54.

[118] *Id.* Art. 55.

[119] *Id.* Art. 56.

[120] *Id.* Art. 57(1)(a).

payment is to be made against the handing over of goods or documents, the buyer is to make the payment at the place of the handing over.[121] The seller is responsible for increased expenses incurred by the buyer in satisfying its payment obligation caused by the seller's change in its place of business subsequent to the conclusion of the sales contract.[122]

Article 58 governs the circumstance where the sales contract fails to establish a specific time for payment. In the event of the absence of a specific time, the buyer must remit payment when the seller places the goods or documents controlling their disposition at the buyer's disposal.[123] The seller is permitted to make the handing over of the goods or controlling documents conditional upon such payment.[124] By contrast, if the contract provides for carriage of the goods, the seller may dispatch the goods on terms whereby the goods or controlling documents thereto are not to be handed over to the buyer without payment of the price.[125] In any event, the buyer is under no obligation to pay the contract price until the buyer has the opportunity to examine the goods.[126] However, the buyer must remit the contract price in the event the procedures for delivery or payment agreed upon by the parties are inconsistent with the opportunity for the inspection.[127]

Regardless of any uncertainty with respect to the price or place and time of payment, the buyer must pay the contract price without the necessity of a request by the seller or its compliance with any formality.[128] The buyer must also take delivery of the goods, which consists of the performance of all acts reasonably necessary to enable the seller to make delivery and the buyer to take possession of the goods.[129]

Formalities of Payment: Article 54

National courts have focused on one issue arising from Article 54. This issue is the enumeration of formalities with which the buyer must comply in order to enable payment of the price. The formalities identified by the national courts consist of two requirements. The courts of Austria and Switzerland, and the Court of Arbitration of the International Chamber of Commerce, have required buyers to open letters of credit where required by the terms

[121] *Id.* Art. 57(1)(b).
[122] *Id.* Art. 57(2).
[123] *Id.* Art. 58(1).
[124] *Id.*
[125] *Id.* Art. 58(2).
[126] *Id.* Art. 58(3).
[127] *Id.*
[128] *Id.* Art. 59.
[129] *Id.* Art. 60(a-b).

of the sales contract.[130] Compliance with Article 54 also requires the buyer, where necessary, to comply with currency exchange regulations, including authorization to transfer currency.[131] However, despite these opinions, there is no requirement that the buyer needs to succeed in its efforts to comply with contractual formalities. Failure to satisfy required formalities does not constitute a breach. The buyer must make a good faith effort to satisfy the requirements of the contract and cannot use its own lack of action as an excuse for failure.[132] The seller cannot hinder the buyer's attempts to comply with these formalities.[133]

Price: Article 55

There are two issues arising from Article 55 that national courts have addressed in their opinions. These issues are whether the failure of the parties to state a price prevents contract formation and the enumeration of the factors utilized to determine the "price generally charged at the time of the conclusion of the contract for such goods sold under comparable circumstances in the trade concerned."[134] As an initial matter, Article 55 appears to conflict with established contract law in many states that requires the setting of a specific price in order for an enforceable contract to be formed.[135] One method of resolving this inconsistency is to apply Article 55 only after an enforceable contract has been determined to exist.[136]

[130] *See* OGH, 10 Ob 518/95, Feb. 6, 1996, (Aus.), *available at* http://cisgw3.law.pace.edu/cases/960206a3.html. *See also*, Bezirksgericht der Saane, T 171/95, Feb. 20, 1997, (Switz.); ICC Arbitration Case No. 7197/1992, J. DU DROIT INT'L 1028–37 (1993).

[131] *See* ICC Arbitration Case No. 7197/1992, J. DU DROIT INT'L 1028–37 (1993). Furthermore, Article 54 does not require the seller to demand compliance with contractual formalities from the buyer. *See* Arbitration Court of the Chamber of Commerce & Indus. of Budapest, Vb 94124, Nov. 17, 1995, (Hung.), *available at* http://www.cisg.law.pace.edu/cisg/wais/db/cases2/951117h1.html. *See also* Trib. of Int'l Commercial Arbitration at the Chamber of Commerce & Indus., 123/192, Oct. 17, 1995, (Russ.) *available at* http://www.cisg.law.pace.edu/cisg/wais/db/cases2/951017r1.html.

[132] *See, e.g., See also* Trib. of Int'l Commercial Arbitration at the Chamber of Commerce & Indus., 123/192, Oct. 17, 1995, (Russ.) *available at* http://www.cisg.law.pace.edu/cisg/wais/db/cases2/951017r1.html (Russian buyer could not excuse failure to obtain letter of credit on the basis of an absence of funds).

[133] *See* OGH, 10 Ob 518/95, Feb 6, 1996 (Aus.), *available at* http://cisgw3.law.pace.edu/cases/960206a3.html (failure of German seller to name the port of origin of the goods, which caused the Austrian buyer to be unable to obtain a letter of credit).

[134] CISG, *supra* note _, art. 55.

[135] *See* Monica Kilian, *CISG and the Problem with Common Law Jurisidictions*, 10 J. TRANSNAT'L L. & POL'Y 217, 236 (2001); *see also* Arthur Rosett, *Critical Reflections on the United Nations Convention on Contracts for the International Sale of Goods*, 45 OHIO ST. L.J. 265, 289 (1984).

[136] *See* SCHLECHTRIEM, UNIFORM SALES LAW, *supra* note 46, at 80.

However, as noted by Professor Schlechtriem, a restrictive interpretation of the CISG's provisions with respect to contract formation requires the existence of a definite or determinable price.[137] As a result, "a contradiction remains between [this] requirement . . . on the one hand and the possibility of fixing the price after the contract is concluded on the other."[138] Professor Schlechtriem concludes that, although most likely unacceptable to many states, this contradiction may be resolved by interpreting the term "validity" in Article 55 to relate to all contractual requirements other than the determination of price.[139] If such an interpretation is adopted, "[a]n offer that is indefinite with respect to the price could then be interpreted . . . as an implied reference to the price generally charged for such goods."[140]

Another interpretation is that a missing price term is not fatal to the formation of a valid contract pursuant to the CISG. Rather, Article 55 serves as a gap filler with respect to price.[141] This interpretation is justified on the basis of assessment of the intent of the parties from their conduct, protection of the reasonable reliance of the parties, the discouragement of technical interpretations of the CISG and its "overarching principle of preservation of contract."[142]

The opinions of the two tribunals that have addressed this issue are demonstrative of the contradictions that exist in Article 55. Initially, in a dispute concerning the sale of chinchilla pelts by a German seller to an Austrian buyer, the Austrian Supreme Court concluded that the agreement of the parties setting a price range for the pelts depending upon quality did not defeat the formation of a contract.[143] In reaching this conclusion, the court held that, pursuant to Article 55, if the parties' agreement failed to explicitly or implicitly establish a specific price, the court could imply an agreement based upon the "usual market price."[144] The court specifically noted that the parties did not object to the price of fifty German marks per pelt established by the court of first instance in its initial review of the case.[145] As such, the court concluded that the price was sufficiently definite as to constitute a contract and make the

[137] *Id.*
[138] *Id.*
[139] *Id.* at 80, n.319.
[140] *Id.*
[141] *See* Phanesh Koneru, *The International Interpretation of the U.N. Convention on Contracts for the International Sale of Goods: An Approach Based on General Principles*, 6 Minn. J. Global Trade 105, 148 (1997).
[142] *Id.* at 149.
[143] *See* M. v. K., Oberster Gerichtshof, SZ 67/197 (Aus. 1994).
[144] *Id.*
[145] *See id.*

application of Article 55 unnecessary.[146] By contrast, the Russian Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry concluded that Article 55 was not applicable as the parties implicitly indicated the need to reach agreement on the price in the future.[147] The subsequent failure of the parties to reach an agreement with respect to price went to the heart of the transaction and specifically defeated the formation of a contract.[148]

The second issue addressed by national courts with respect to Article 55 is the enumeration of the factors utilized to determine "the price generally charged at the time of the conclusion of the contract for such goods sold under comparable circumstances in the trade concerned."[149] Initially, at least one national court has concluded that the reference to market price in Article 55 is overridden by a contrary agreement of the parties as determined by application of the CISG in its entirety.[150] Based upon this opinion, the parties are free to list any number of factors that may be utilized to establish the price. Included on the list of acceptable factors are the price range established by the parties with respect to the goods at issue and individual pricing guidelines dependent upon quality of the goods.[151] An additional relevant factor is the absence of objection by the buyer within a "short time period" to the price set forth in invoices delivered by the seller.[152] In such a case, national courts assume the buyer's agreement that the price stated in the seller's invoice is the price generally charged under comparable circumstances in the trade concerned according to Article 55.[153]

Place of Payment: Article 57

National courts interpreting Article 57 have focused their attention on two issues. These issues are whether Article 57 is a grant of personal jurisdiction to national courts and the enforceability of forum selection agreements to

[146] *See id.*

[147] *See* Trib. of Int'l Comm. Arbitration at the Chamber of Commerce & Indus., n. 304/1993, Mar. 3, 1995 (Russ.), *available at* http://www.cisg.law.pace.edu/cisg/wais/db/cases2/950303r1.htm.

[148] *See id.*

[149] CISG at Art. 55.

[150] *See* Entreprise Alain Veyron v. Societe Ambrosio, CA Grenoble, Cass. com., Apr. 26, 1995 (Fr.), *available at* http://witz.jura.uni-sb.de/CISG/decisions/2604952v.htm.

[151] *See, e.g.*, M. v. K., Oberster Gerichtshof, SZ 67/197 (Aus. 1994).

[152] C. v. W., Bezirksgericht St. Gallen, SZIER 84–85 (Switz. 1998) (involving an oral contract for the sale of textiles by a Dutch seller to a Swiss buyer).

[153] *See id.*

avoid the exercise of such jurisdiction. The issue of whether Article 57 grants jurisdiction to national courts with respect to disputes concerning payment of the purchase price independent of national laws remains unresolved. There is no shortage of judicial opinions confirming jurisdiction where the seller's place of business is located within the court's national boundaries.[154] However, none of these opinions expressly conclude that Article 57 constitutes a grant of jurisdiction separate and apart from national laws. As such, the better interpretation is that Article 57 confirms the conclusion reached in domestic rules of procedure, jurisdiction and venue, specifically, that the place of business or habitual residence of the seller will serve as the forum for all disputes with respect to payment of the purchase price absent a contrary agreement of the parties. The issue may ultimately prove irrelevant to the extent that the result reached through the application of Article 57 is the same as if it constituted a separate grant of jurisdiction by requiring disputes arising from the payment of the purchase price to be determined in the national courts of the seller's place of business.

Regardless of the ultimate resolution of the issue mentioned previously, parties to sales transactions subject to the CISG are well-advised to utilize choice of forum provisions. Unlike many other provisions within the CISG, there is broad consensus among national courts with respect to the enforceability of forum selection agreements and their impact on the operation of Article 57. These opinions have uniformly held that courts must give effect to the provisions of Article 57 with respect to the location of dispute resolution in the absence of a contrary selection by the parties in the sales contract.[155]

In order to supplant the operation of Article 57, the forum selection agreement must comply with stringent requirements established by national courts. The forum selection provision should be express.[156] Past practices

[154] *See, e.g.*, *SA Mo. v. SA Ma.*, Trib. de Commerce, Charleroi, A 2000/01451, Oct. 20, 2000, (Belg.), *available at* http://www.law.kuleuven.ac.be/int/tradelaw/WK/2000-10-20.htm; *Silver Int'l v. Pochon Tissage, S.A,* Rechtbank van Koophandel, Kortrjik, A.R651/97, June 27, 1997, (Belg.), *available at* http://www.law.kuleuven.ac.be/int/tradelaw/WK/1997-06-27.htm; *Dänisches Bettenlager & Co. v. Forenede Factors*, Østre Landsret [Eastern Appellate Court] København (ØLK), B-3112-95, Jan. 22, 1996, (Den.), *available at* http://www.cisg.law.pace.edu/cisg/wais/db/cases2/960122d1.html.

[155] *See, e.g., SA Mo. v. . SA Ma.*, Trib. de Commerce, Charleroi, A 2000/01451, Oct. 20, 2000, (Belg.), *available at* http://cisgw3.law.pace.edu/cases/960206a3.html; *BJR Trading v. Ekasa*, Østre Landsret [Eastern Appellate Court] København (ØLK), B-1145–00, Dec. 4, 2000, (Den.), *available at* http://www.cisgdk/old04122000danskversion.htm; *Sodime-La Rosa SARL v. Softlife Design Ltd.*, CA Paris, 1 e ch., Oct. 15, 1997, (Fr.), *available at* http://witz.jura.uni-sb.de/CISG/decisions/151097v.htm.

[156] *See Silver Int'l v. Pochon Tissage, S.A,* Rechtbank van Koophandel, Kortrjik, A.R651/97, June 27, 1997, (Belg.), *available at* http://www.law.kuleuven.ac.be/int/tradelaw/WK/1997-06-27.htm.

between the parties in prior transactions are not sufficient to overcome this requirement.[157] In addition, the mention of bank accounts and other commercial relationships in states other than where the delivery of the goods occurs is insufficient to constitute a forum selection agreement in the absence of an express intent by the parties.[158] Finally, usage of the trade in question also fails to constitute a forum selection agreement in most circumstances.[159] Such usages would only serve to select the forum if it was widely known in the trade that certain actions undertaken by the parties to the transaction had the indelible effect of selecting an exclusive forum for the resolution of disputes between the parties other than as established by Article 57.[160]

Time of Payment: Article 58

Courts interpreting Article 58 have focused the identity of the documents controlling the disposition of the goods. Academics commenting on Article 58 have noted the uncertainty associated with specific identification of these documents. One commentator has concluded that this reference is extremely broad and is not necessarily limited to negotiable documents of title.[161] Rather, other documents, such as insurance policies and certificates of origin, may also relate to the goods and affect the buyer's ability to accept their delivery.[162] Under such circumstances, the delivery of such documents must be part of the seller's performance in order to trigger the buyer's payment obligation.[163] By contrast, the buyer would be required to pay the purchase price upon the seller's failure to deliver other documents of less importance to the consummation of the transaction.[164] Under such circumstances, the buyer may still avail itself of legal or equitable remedies, such as specific performance, in the appropriate national court.[165]

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

[158] HG Zurich, 980280.1, Apr. 8, 1999, (Switz.), *available at* http://www.cisg.law.pace.edu/cisg/wais/db/cases2/990408s1.html. *See also* Zivilgericht Kanton Basel-Stadt, P4 1996/00448, Dec. 3, 1997, (Switz.), *available at* http://www.cisg.law.pace.edu/cisg/wais/db/cases2/97120352.html

[159] *See* Zivilgericht Kanton Basel-Stadt, P4 1996/00448, Dec. 3, 1997, (Switz.), *available at* http://www.cisg.law.pace.edu/cisg/wais/db/cases 2/971203s2.html.

[160] *See id.*

[161] *See* Schlechtriem, Uniform Sales Law, *supra* note 46, at 81 n. 327.

[162] *Id.*

[163] *Id.*

[164] *Id.*

[165] *Id.*

It is clear from the opinions to date that, in the absence of specific provisions within the contract establishing the time for the buyer's payment of the price, payment is due upon delivery.[166] In addition, as a general rule, documents controlling the disposition of the goods are to be procured by the party responsible for their exportation.[167] It is important to note that this does not necessarily refer to the seller in every case.[168] Rather, in the one case addressing this issue, the court held that the seller was responsible for procuring customs documents only if so provided by the sales contract.[169] The absence of a developed body of case law surrounding this issue perhaps suggests that the uncertainty is more of an academic interest rather than one presenting practical difficulties for businesses operating in the global marketplace.

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

[167] *See, e.g.*, Kantonsgericht [KG] St. Gallen [District Court], 3 ZK 96–145, Aug. 12, 1997, (Switz.), *available at* http://www.cisg.law.pace.edu/cisg/wais/db/cases2/970812s1.html (rejecting the claim of a Swiss buyer that it was not obligated to pay the purchase price for clothing delivered by a German seller due to the seller's failure to obtain necessary documents to allow the goods to clear Swiss customs).

[168] *Id.*

[169] *Id.*

CHAPTER SIX

OBLIGATIONS OF SELLERS

This chapter focuses on the duties of sellers in the CISG-governed transaction. The seller has the basic duty, of course, to attend to timely delivery of conforming goods and documents, free of the unexpected claims of third parties. This chapter analyzes the issues associated with the delivery of goods and the handing over of documents and the conformity of the goods and third-party claims. It reviews how courts and arbitral panels have interpreted the CISG obligations of the seller.[1]

THE DUTY OF DELIVERY

The CISG requires the seller to "deliver the goods, hand over any documents relating to them and transfer the property in the goods, as required by the contract."[2] The CISG specifies the seller's obligations with respect to the place for delivery, arranging for the carriage of goods and their insurance, the time of delivery, and the time and place at which documents are to be handed over. These obligations are set forth in Articles 30–34.

As noted in Chapter 2, an underlying (implied) principle of the CISG is the continuance of the contractual *relationship*. Some commentators have noted that Article 30 contains "the beginnings of an obligation to cooperate."[3] The Article 30 obligation is general and references the actual agreement of the

[1] There is significant literature on sellers' obligations. S*ee, e.g.*, Fritz Enderlein, *Rights and Obligations of the Seller Under the UN Convention on Contracts for the International Sale of Goods*, in International Sale of Goods: Dubrovnik Lectures 133 (Petar Sarcevic & Paul Volken, eds. 1996) (hereafter, Dubrovnik Lectures).

[2] United Nations Convention on Contracts for the International Sale of Goods, April 11, 1980, 1489 U.N.T.S. 3, 19 I.L.M. 671, *available at* Pace Law School Institute of International Commercial Law, http://www.cisg.law.pace.edu (last updated Sept. 2003) (here after CISG), at Art. 30.

[3] Fritz Enderlein & Dietrich Maskow, International Sales Law 127 (1992).

parties and the particulars of national law. It "states the obvious,"[4] that the seller must deliver the goods, a principle of sales law that is near universal, for "there is no sale without delivery and transfer of property."[5] Article 4 excludes from the scope of the CISG "the effect which the contract may have on the property in the goods sold."[6] Thus, the duty to transfer the property in the goods under Article 30 is subject to the requirements of national law with respect to property rights in goods.[7]

Article 31 addresses the circumstance in which the contract does not specify the place of delivery.[8] In most transactions these terms are specified by the use of customary delivery terms as provided by INCOTERMS.[9] In the absence of such a specification, Article 31 serves as a "gap-filling" provision. If the contract requires delivery to a carrier, then the seller's obligation of delivery is satisfied by its handing the goods over to the first carrier.[10] If delivery of the goods does not involve carriage, but the contract relates to specific goods or goods yet to be identified to the contract or to be manufactured at a specific place of which the parties were aware at the time of the contract, such as a warehouse or a manufacturing facility, then delivery is accomplished by "placing the goods at the buyer's disposal at that place."[11] In other cases the seller's obligation with respect to the place of delivery is met by "placing the goods at the buyer's disposal at the place where the seller had his place of business at the time of the conclusion of the contract."[12]

The seller's obligations with respect to the carriage of the goods depend upon its obligations for carriage provided in the contract. Normally, these

[4] The purpose of Article 30 is to set the stage for more particularized rules on delivery and the required character of the goods set forth in the succeeding chapters.

[5] Enderlein, Dubrovnik Lectures, *supra* Note 1, at 144.

[6] CISG at Art. 4(b)

[7] Although the custom in Anglo-American and Roman legal families is that property in identified goods passes on the conclusion of the contract and in generic goods at the time of identification to the contract, other legal systems vary in this respect. *Id. See* Enderlein & Maskow, *supra* Note 2. The *lex sitae* is a commonly applied conflict of law rule, and transfer of property under the law of the seller's country is effective even if not all conditions are satisfied for transfer of property under the law of the buyer's country.

[8] CISG at Art. 67 (providing the default rule for the transfer of risk of loss).

[9] INCOTERMS is a manual of 13 trade terms published by the International Chamber of Commerce. The most recent revision of INCOTERMS was issued in 2000. *See generally* Jan Ramberg, Icc Guide to Incoterms 2000 (1999).

[10] CISG at Art. 3(a).

[11] *Id.* at Art. 31(b).

[12] *Id.* at Art. 31(c); *see also* Enderlein & Maskow, *supra* Note 3, at 134 (describing the circumstances that have to be taken into account, including the category and quantity of the goods, their packaging, the distance that will have to be covered by transport, the available means of transport, and existing transport routes).

obligations are implicated by the use of INCOTERMS or customary delivery clauses. Article 32 of the CISG requires that if the seller hands goods over to a carrier, then he must give notice of consignment specifying the goods to the buyer, unless the goods are clearly identified to the contract by markings on the goods or shipping documents. There is no obligation to mark the goods apart from those mandated in the contract.[13] If the seller is obligated by the shipping terms to arrange for carriage of the goods, he must "make such contracts as are necessary for carriage to the place fixed by means of transportation appropriate to the circumstances and according to the usual terms for such transportation."[14] Finally, if delivery terms do not require the seller to obtain insurance of the goods during carriage, then he must nonetheless provide the buyer with "all available information necessary to enable him to effect such insurance."[15]

The time for delivery of the goods is an integral part of the delivery obligation. Article 33 requires the seller to deliver the goods on the date "fixed by or determinable from the contract."[16] Or, if a period of time is specified within which the goods are to be delivered, the seller can deliver the goods at any time within that period, "unless circumstances indicate that the buyer is to choose a date."[17] A final gap filling provision permits the seller to meet his obligation with respect to the time of delivery by delivery within a reasonable time after the conclusion of the contract.[18]

The contract may – by its specific terms or by its reference to customary terms such as INCOTERMS – require the seller to hand over documents, such as bills of lading, warehouse receipts, insurance certificates, invoices, and certificates of origin, necessary for the buyer to take possession of the goods. In that event, the seller is required by the CISG to hand over the documents relating to the goods "at the time and place and in the form required by the contract."[19] If the seller hands over the documents prior to that time, "he may, up to that time, cure any lack of conformity in the documents, if [doing so] does not cause the buyer unreasonable inconvenience or unreasonable expense."[20]

[13] Enderlein, Dubrovnik Lectures, *supra* Note 1, at 149.
[14] CISG at Art. 32(2).
[15] *Id.* at Art. 32(3).
[16] *Id.* at Art. 33(a).
[17] *Id.* at Art. 33(b).
[18] *Id.* at Art. 33(c). In normal commerce, however, the seller gives the buyer notice of the consignment. *See, e.g.*, 755/95-C, Audiencia Provincial de Barcelona, seccion 16, Jun. 20, 1997, (Spain), *available at* http://cisgw3.law.pace.edu/cases/970620s4.html.
[19] CISG at Art. 34.
[20] *Id.*

Finally, the seller has a further obligation to the buyer to preserve goods under circumstances in which the buyer has delayed in taking delivery of the goods or where delivery of the goods and payment for them are concurrent obligations and the buyer fails to pay the price. The seller is obligated to take reasonable steps to preserve the goods and can withhold delivery until the payment of any reasonable expenses incurred in preserving them.[21]

Place of Delivery: Article 31

The place where the seller is obligated to deliver the goods matters in a variety of contexts. The language of Article 31 makes clear that a contract that requires delivery to a third-party carrier is effective when the goods are handed over to the first carrier, and not when they cross the border into international commerce, or when they arrive or are handed over to the buyer.[22] This applies, however, only where the parties have not agreed otherwise. Typically, they do otherwise agree.[23]

Most national courts interpret the place of delivery under Article 31 as the place of performance of delivery for purposes of determining jurisdiction where the CISG governs the place of delivery.[24] In a 1998 case, the French Court of Appeals in Paris[25] addressed a situation in which the buyer, a French company, ordered winter clothing from a German seller. The goods were

[21] CISG at Art. 85. *See infra* Part VI.C.5. Few cases have been decided under this article. *See* Tribunal of International Commercial Arbitration, 340/1999 Russian Federation Chamber of Commerce and Industry, Feb. 10, 2000, (Russ.), *available at* http://cisgw3.law.pace.edu/cases/000210r1.html.

[22] *See generally* Enderlein, Dubrovnik Lectures, *supra* Note 1, at 1132–33.

[23] Where, for example, the parties agreed to delivery *frei Haus*, delivery occurs where the goods are handed over to the buyer at the buyer's place of business. LG Aachen, 43 O 136/92, May 14, 1993, (F.R.G.), *available at* http://www.unilex.info/case.cfm?pid=1&do=case&id=23&step=Abstract. *See* Martin Karollus, *Judicial Interpretation and Application of The CISG in Germany 1988–1994*, 1995 Cornell Rev. Convention on Contracts for the Int'l Sale Goods 51–94.

[24] *Societe Anton Huber GmbH & Co. KG v. SA Polyspace*, E 99–14.844, Cour de cassation, Jun. 21, 2001, (Fr.), *available at* http://cisgw3.law.pace.edu/cases/010626f1.html (The European Community Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters [Brussels Convention 1968] identified the place of delivery as the place of performance for purposes of determining jurisdiction.); *see* Michael Joachim Bonell & Fabio Liguori, *The U.N. Convention on the International Sale of Goods: A Critical Analysis of Current International Case Law* – 1997 (Part 1), 2 uniform l. rev., 385, 385–95 (1997) (discussing jurisdiction cases based on identifying the place of performance of delivery under Art. 31).

[25] *Ste Franco-africaine de distribution textile v. Ste More and More Textilfabrik GmbH*, 97/25212 Cour d'appel Paris, March 18, 1998, (Fr.), *available at* http://cisgw3.law.pace.edu/cases/980318f1.html.

subject to a contract specifying the INCOTERM "ex works," which the French court determined to be the defendant's principal place of business in Germany. It declined jurisdiction in favor of the courts of Germany.[26] Where the parties have not specified a place for delivery, French courts have, consistent with Article 31 (a), identified the place of delivery to be the place where the goods were handed over to the first carrier for transmission to the buyer.[27] In these cases, the French courts have observed that the place of performance of the obligation to deliver goods and the place of performance of the obligation to deliver conforming goods must be the same.[28]

In a pair of 1998 cases, the Austrian Supreme Court ruled that the identification of the place of delivery under Article 31 was not conclusive under the Lugano Convention on Jurisdiction and the Enforcement of Judgment in Civil and Commercial Matters.[29] In the first case, the parties identified delivery terms as "free construction site Vienna" and in the second as "free domicile Klagenfurt." The German sellers in both cases claimed that the place of performance of the delivery obligation were the respective towns in Austria, and that they could, therefore, bring suit in Austria. The court rejected the claim, refused jurisdiction, and argued that "according to Article 31 CISG, terms like the ones used in the contract in question were insufficient to constitute a place of performance and entail jurisdiction of the courts in the Austrian cites mentioned therein."[30] In the absence of clear delivery terms, Article 31(a) would identify the place of delivery in Germany where the goods were handed over to the first carrier. These cases are inconsistent with the French decisions on

[26] *Societe Laborall v. S.A. Matis*, 97/24418 Cour d'appel Paris, Mar. 4, 1998, (Fr.), *available at* http://www.cisg.law.pace.edu/cisg/wais/db/cases2/980304fi.html. In the same month, this court ruled similarly on a contract where goods sold by an Italian manufacturer to a French buyer subject to a contract specifying delivery "ex works." *See Societe TCE Diffusion S.a.r.l. v. Societe Elettrotecnica Ricci*, 514 Cour d'appel d'Orleans, Mar. 29, 2001, (Fr.), *available at* http://cisgw3.law.pace.edu/cases/010329fi.html (declining jurisdiction in favor of Milan, Italy, the place of delivery under CISG Art. 3).

[27] *Societe Mode jeune diffusion v. Societe Maglificio il Falco di Tiziana Goti e Fabio Goti et al*, 95-20.809 Court of Cassation, Dec. 2, 1997, (Fr.), *available at* http://cisgw3.law.pace.edu/cases/971202fi.html; *Societe ISEA Industrie S.p.A./Compagnie d'Assurances Generali v. Lu S.A./et al.*, 95-018179 Cour d'appel Paris, 95-018179, Dec. 13, 1995, (Fr.), *available at* http://cisgw3.law.pace.edu/cases/951213fl.html.

[28] Where the obligation in question is the obligation to pay, CISG at Art. 57 may be used to identify the place of the obligation to pay, and jurisdiction over disputes based on the obligation to pay may be resolved with reference to Article 57. *See, e.g., Societe Camara Agraria Provincial de Guipuzcoa v. Andre Margaron*, 93/2821 Cour d'appel Grenoble, Mar. 29, 1995, (Fr.), *available at* http://cisgw3.law.pace.edu/cases/950329fi.html.

[29] Ob 208/98, Sept. 10, 1998, (Aus.), *available at* http://cisgw3.law.pace.edu/cases/980910a4.html.

[30] Willibald Posch & Thomas Petz, *Austrian Cases on the UN Convention for the International Sale of Goods*, 6 Vinobona J. Int'l Com. L. & Arb. 1, 14–15 (2002).

analogous facts. However, they may be distinguishable because of the lack of clarity in identifying the seller's obligation of delivery in the contracts under review by the Austrian courts.

In a 1996 German Supreme Court case,[31] the German seller delivered almond paste to a French buyer. The buyer brought an action for damages in a French court, while the seller brought an action in a German court seeking a declaration of non-obligation to pay damages. The German appellate court examined the various pieces of communication between the parties, in particular communiqués in which the price was quoted "duty unpaid, untaxed, delivery being free to the door of the place of the buyer's business." The appellate court held that the parties did not intend this language to alter the place of performance, but rather to relate to transportation costs and the allocation of risk. Thus, the court upheld jurisdiction of the German courts. The court interpreted the term "delivery being free to the door of the place of the buyer's business" under Article 31 as being the handing over to the first carrier or at seller's place of business.[32]

Determination of the place of delivery under Article 31 is relevant to the buyer's obligation to pay and to the passing of the risk of loss under CISG Articles 67, 68, and 69. In a German case,[33] the sellers were located in Austria and customarily placed manufactured furniture in a warehouse in Hungary and then sent invoices to the buyer. According to a series of contracts governing various partial deliveries of furniture, the buyer was to take possession of the goods at the manufacturing works and load the furniture into railway wagons or trucks. The buyer would pay the sellers based on the delivery invoices after taking delivery of the furniture. However, no delivery was taken; the manufacturer went bankrupt; the warehouse closed, and the furniture disappeared. The seller sued for the purchase price, which was denied on the ground that delivery had not occurred under Article 31(b). The delivery was due at the buyer's demand, which had not been made, and the sellers had failed to place the furniture at the buyer's disposal. Thus, the buyer's

[31] BGH, VIII ZR 145/95, Dec. 11, 1996, (F.R.G.), *available at* http://cisgw3.law.pace.edu/cases/961211g1.html

[32] Another example of confusion in this area is reflected in a German appellate court opinion in which the parties stipulated "ex works on lorry." See OLG Koln, 27 U 58/96, Jun. 14, 1994, (F.R.G.), *available at* http://cisgw3.law.pace.edu/cases/970108g1.html (finding that, notwithstanding the language "ex works on lorry," the parties had agreed that the buyer's place of business in Germany would be the place of performance). In this case, however, it appears that the seller actually delivered the goods to the buyer's principal place of business using its own people rather than a third-party carrier. *Id.*

[33] OLG Hamm, 19 U 127/97, Jun. 23, 1998, (F.R.G.), *available at* http://www.cisg.law.pace.edu/cisg/wais/db/cases2/980623g1.html.

obligation to pay did not arise and the risk of the loss of the goods did not pass to the buyer.[34]

Time of Delivery: Article 33

Article 33 fixes the obligation of the seller to deliver the goods according to the contract terms or, if the time of delivery cannot be ascertained from the contract, then within a reasonable time after the conclusion of the contract. National courts and arbitral panels have applied this article in cases involving questions of whether a time for delivery was fixed in the contract;[35] in cases in which a time was fixed but not met and whether the delay constituted a fundamental breach;[36] in cases in which no time for delivery was fixed and the reasonability of the time taken was in question;[37] and in cases in which the buyer may have provided an additional period of time for delivery under Article 47.[38] The scope of these cases indicates that the "reasonability" standard in Article 33 provides courts with the flexibility to vary the time frame for delivering goods depending on the nature of the goods and distance covered.

EXPRESS AND IMPLIED WARRANTIES

The section on express and implied warranties addresses the issues of the seller's obligation regarding nonconforming goods or regarding goods to

[34] *Id.*

[35] AG Nordhoin, 3 C 75/94, Jun. 14, 1994, (F.R.G.), *available at* http://cisgw3.law.pace.edu/cases/940614g1.html (deciding whether handwritten addition "before the holidays, no later" constituted, under trade usage, an agreement that shoes would be delivered before Aug. 1).

[36] *T, SA v. E, 729/96-B Audiencia Provincial [Appellate Court] de Barcelona*, seccion 16a, Nov. 3, 1997, (Spain), *available at* http://cisgw3.law.pace.edu/cases/971103s4.html.

[37] *See, e.g.*, Tribunal Cantanol Valais [Canton Appellate Court], C1 97 167, Oct. 28, 1997, (Switz.), available at http://cisgw3.law.pace.edu/cases/971028s1.html; 9117 of March 1998, Court of Arbitration of the International Chamber of Commerce [ICC], *available at* http://cisgw3.law.pace.edu/cases/989117i1.html; OLG Naumberg, 9U 146/98, Apr. 27, 1999, (F.R.G.), *available at* http://cisgw3.law.pace.edu/cases/990427g1.html; Court of Arbitration of the International Chamber of Commerce, 8611/HV/JK, Jan. 23, 1997, *available at* http://cisgw3.law.pace.edu/cases/978611i1.html.

[38] *See e.g., S.A.P. v. AWS*, R.G. no. 985/01 Tribunal de Nemur [District Court], Jan. 15, 2002, (Belg.), available at http://cisgw3.law.pace.edu/cases/020115b1.html; *T, SA v. E*, 729/96-B Audiencia Provincial [Appellate Court] de Barcelona, seccion 16a, Nov. 3, 1997, (Spain), *available at* http://cisgw3.law.pace.edu/cases/971103s4.html. A controversy, of sorts, exists between commentators over whether only express assurances about the goods become contract obligation or whether both descriptions of the goods and promised characteristics become contract obligations. *See* Enderlein & Maskow, International Sales Law, *supra* Note 3, at 141.

which third parties assert claims. These obligations are found in Articles 35–44 of the CISG. Article 35 states the basic obligation of the seller to deliver goods of the quantity, quality, and description[39] required by the contract.[40] Unless the parties have otherwise agreed, this obligation is not met unless the goods conform to any express warranties or if there are no such warranties, then certain implied warranties. The basic implied warranty requires that goods be "fit for the purposes for which goods of the same description would ordinarily be used."[41] They must be fit for the special purposes of the buyer, where that purpose is expressly or impliedly made known to the seller at the time of the contract. The seller also warrants, unless otherwise agreed, that the goods will be "contained or packaged in the usual manner for such goods or, where there is no such manner, in a manner adequate to preserve and protect the goods."[42] The implied warranties do not attach where circumstances indicate that the buyer did not rely on the seller's skill or judgment or where the circumstances indicate that it would be unreasonable for the buyer to do so.[43] In addition, these warranties do not pertain to nonconformities the buyer knew about, or could not have been unaware of, at the time of the conclusion of the contract.[44]

Whereas Article 35 establishes the obligations of the seller with respect to the conformity of the goods, Article 36 governs the seller's liability for the lack of conformity of the goods. It identifies the point of reference for the nonconformity at the time the risk passes to the buyer.[45] The CISG permits the seller to cure any lack of conformity if he has delivered the goods before the "date for delivery," which would be the date fixed in the contract for delivery

[39] In addition, if the seller has held out a sample or a model to show the qualities of the goods, the seller warrants that the goods possess the qualities exemplified in the model or sample. CISG at Art. 35.

[40] CISG at Art. 5(1). Professor Kazimierska traces this basic obligation to the *pacta sunt servanda* of Roman law, the obligation to perform a contract "in a way that complies to its terms, even if the performance becomes unfavourable for one of the parties or excessively difficult." Anna Kazimierska, *The Remedy of Avoidance under the Vienna Convention on the International Sale of Goods*, Pace Int'l Review, Review of the Convention on Contracts for the International Sale of Goods: 1999–2000, 80 (2000) (hereafter Kazimierska, *Remedy of Avoidance*).

[41] CISG at Art. 35(2)(a).

[42] CISG at Art. 35(2)(c).

[43] *Id.* at Art. 35(2)(b).

[44] *Id.* at Art. 35(3).

[45] The seller, however, remains liable for lack of conformity that occurs after the passage of the risk of loss if the lack of conformity is due to "a breach of any of his obligations, including a breach of any guarantee that for a period of time the goods will remain fit for their ordinary purpose or for some particular purpose, or will retain specified qualities or characteristics" CISG at Art. 36(2).

or a date within the period for delivery identified in the contract. The cure may include delivering missing parts or making up deficiencies in quantity of the goods or replacing nonconforming goods with conforming goods. The cure must not cause unreasonable inconvenience or unreasonable expense to the buyer.[46]

The seller's obligation to deliver conforming goods relates to the reciprocal obligations of the buyer to examine the goods (Article 38) and to give notice to the seller of nonconformities (Article 39).[47] Failure to do either within a practicable or reasonable time causes the buyer to lose the right to rely on a lack of conformity of the goods, unless the seller knew, or could not have been unaware of the nonconformity and failed to disclose the nonconformity to the buyer.[48]

Third party claims pose special issues of lack of conformity. The seller is obligated under Article 41 to "deliver goods which are free from any right or claim of a third party unless the buyer agreed to take the goods subject to that claim or right."[49] However, Article 41 does not apply to rights or claims based on "industrial property or other intellectual property" rights.[50] In that case, Article 42 governs the obligations of the seller.

Article 42 requires generally that the seller deliver goods "which are free from any right or claim of a third party based on industrial property or intellectual property, of which at the time of the conclusion of the contract the seller knew or could not have been unaware." This obligation only pertains to third-party claims[51] based on the law of the state in which the buyer has his place of business or the law of the state where the goods will be resold or used, provided that the parties contemplated their resale or use in that state at the time the contract was concluded.[52] This obligation of the seller does

[46] CISG at Art. 37.

[47] *See supra* Chapter 5.

[48] CISG at Art. 40. *See* Arbitration Institute of the Stockholm Chamber of Commerce Award, Jun. 5, 1998, *available at* http://cisg.law.pace.edu/cisg/biblio/limbach.html; Francis Limbach and Brandon Ahearn, *Conformity of Goods, Derogation from Article 40 by the Parties and Conditions of Art 40 CISG* (Case Commentary), *available at* http://www.cisg.law.pace.edu/cisg/biblio/limbach.html.

[49] CISG at Art. 41. The rights or claims referenced in Article 41, include "rights of title, rights to possession, and possessory/non-possessory pledges." Enderlein & Maskow, *supra* Note 1, at 141.

[50] CISG at Art. 41.

[51] Whereas industrial property refers, most likely, to patents, the broader term "intellectual property" suggests a broader set of rights, including not only patents but also, registered designs, copyrights, company names, tradenames, trademarks, and other similar intangibles. *See* Enderlein & Maskow, *supra* Note 1, at 141.

[52] CISG at Art. 42(1).

not extend to cases where the buyer knew "or could not have been unaware" of the right or claim and the seller has complied with technical drawings, designs, formulae, or other such specifications that are the basis for the third-party claim or right.[53] Unless he has a reasonable excuse for failing to do so,[54] or unless the seller knew the right or claim of the third party and the nature of it, the buyer loses the right to rely on Article 41 or Article 42 if he fails to give notice to the seller of the right or claim, and the nature of it, within a reasonable time after he has become, or ought to have become, aware of it.[55]

Warranties: Article 35

Article 35 is implicated in many commercial sales disputes, undoubtedly because it goes to the very heart of the seller's contract obligation. Many conflicts involve reconciling Article 35 with related articles identifying the rights of buyers when sellers breach their obligations under Article 35.[56] A variety of issues, both factual and interpretive, arise under Article 35(1) that govern the seller's obligation to provide goods of the "same quality, quantity, and description required by the contract."[57] The factual cases, often in courts of first instances, involve evidential inquiry to identify whether there was a nonconformity and, if so, its nature;[58] whether the buyer inspected the goods in

[53] *Id.* at Art. 42(2).

[54] *Id.* at Art. 44.

[55] *Id.* at Art. 43.

[56] OLG München, 7 U 4419/93, Mar. 2, 1994, (F.R.G.), *available at* http://www.cisg.law.pace.edu/cisg/wais/db/cases2/940302g1.html (reconciling Art. 35 with Art. 45); *Rheinland Versicherungen v. S.r.l.Atlarex and Allianz Subalpina S.p.A.*, n. 405 Tribunale [District Court] di Bigevano, July 12, 2000, n. 405 (It.), *available at* http://cisgw3.law.pace.edu/cases/000712i3.html (reconciling Art. 35 with Art. 44); 2 U 27/01 OLG Zweibrucken [Provincial Court of Appeal], Jul. 26, 2002, (F.R.G.), *available at* http://cisgw3.law.pace.edu/cases/020726g1.html (reconciling Art. 35 with Art. 45); BGH, VIII ZR 121/98 Mar. 24, 1999, (F.R.G.), *available at* http://cisgw3.law.pace.edu/cases/990324g1.html (reconciling Art. 35 with Art. 45); VIII BGH, ZR 304/00 Jan. 9, 2002, (F.R.G.), *available at* http://cisgw3.law.pace.edu/cases/020109g1.html (reconciling Art. 35 with Art. 45); *S.A. Vetimo v. SARL Aubert*, R.G. 242/99 Cour d'appel [Appellate Court], Mar. 8, 2000, (Belg.), *available at* http://cisgw3.law.pace.edu/cases/010308b1.html (reconciling Art 35 with Art. 49); Tampere Court of First Instance, Jan. 17, 1997, (Fin.), *available at* http://cisgw3.law.pace.edu/cases/970117f5.html (reconciling Art. 35 with Art. 50); 6 R 194/95 OLG Graz, Nov. 9, 1995, (Aus.), *available at* http://cisgw3.law.pace.edu/cases/951109a3.html (reconciling Art. 35 with Art. 50).

[57] CISG at Art. 31(1).

[58] *See, e.g.*, Tampere Court of First Instance, Fin. (Jan. 17, 1997), *supra* Note 56, *available at* http://cisgw3.law.pace.edu/cases/970117f5.html; *La San Giuseppe v. Forti Moulding Ltd.*, 98 – CV-1493CM, 1999 Ont. Sup. C.J. LEXIS 853 (Aug. 31, 1999), *available at* http://casgw3.law.pace.edu/cases/990831c4.html (last updated Jul. 2003);

a timely manner and gave the seller adequate notice of the nonconformity;[59] and whether the goods were adequately packaged.[60] Other cases involve interpretation of the contract description. Because national law may vary on this, court applications have provided insight into questions of *homeward trend*[61] and uniformity of interpretation.[62]

In a 1999 case,[63] the Austrian Supreme Court heard a dispute involving wall panels that were to be sold "ex factory" from a business in Germany to a buyer in Vienna. The panels that were shipped were nonconforming panels, because they were not "formatted" (cut and drilled) as agreed in the contract. The parties agreed, by telephone, that the panels would be shipped back by the buyer. On inspection by the seller, the panels were found to be badly damaged and useless for resale. The seller invoiced the buyer for the value of the panels, claiming that they were not shipped correctly and that buyer had assumed the transportation risk.

The appellate court held that the shipping of nonconforming panels constituted a delivery of nonconforming goods and a breach of contract under Article 35 rather than a non-delivery of goods. The significance of the distinction lay in the seller's retention of the risk of loss under CISG Article 82(2)(a) and (b). Under the Austrian Commercial Code ("HGB") a distinction would have been made between delivery of nonconforming goods (Falschlieferung) and non-delivery of conforming goods (Nichtlieferung). The distinction would turn on the extent of the deviation from the contract and on whether the incorrect delivery was subject to approval. In refraining from applying the domestic law, the court drew the distinction based on the authoritative CISG

S.A. Vetimo v. SARL Aubert, R.G. 242/99 Cour d'appel [Appellate Court], Mar. 8, 2000, (Belg.), *available at* http://cisgw3.law.pace.edu/cases/010308b1.html; BGH, VIII ZR 121/98, *supra* Note 548, *available at* http://cisgw3.law.pace.edu/cases/990324g1.html; Landergericht [LG][Trial Court] Berlin, 52 S 247/94 Sept. 15, 1994, (F.R.G.), *available at* http://cisgw3.law.pace.edu/cases/940915g1.html (last updated Jun. 2003); *Thermo King v. Cigna Insurance Company of Europe Sa-NV*; Transports Norbert Dentressengle SA; Societe Frapp SA; Societe Sorhofroid SARL, Cour d'appel Grenoble, 94/0258, May 15, 1996, (Fr.), *available at* http://cisgw3.law.pace.edu/cases/970515fl.html (last updated May 2002).

[59] *See, e.g.*, Audiencia Provincial de Barcelona, Jun. 20, 1997, (R.J.C., IV, p. 1036), *supra* Note 510, *available at* http://cisgw3.law.pace.edu/cases/970620s4.html; OLG Hamm 8 U 46/97, Mar. 31, 1994, (F.R.G.), *available at* http://cisgw3.law.pace.edu/cases/980331g1.html (last updated Aug. 2003); *Rheinland Versicherungen v. S. r.l. Atlarex and Allianz Subalpina S.a.A.*, Tribunale (district court) di Vigevano Jul. 12, 2000, *available at* http://cisgw3.law.pace.edu/cases/000712i3.html.

[60] *See, e.g.*, CA Paris, Dec. 13, 1995, J.C.P. 1997, I, 53–55, *available at* http://www.unilex.info/dynasite.cfm?dssid=2376&dsmid=13354&x=1 (last visited Jan. 2004).

[61] *See infra* Chapter 11.

[62] *See supra* Chapter 1.

[63] OGH, SZ 1 Ob 74/99k, Jun. 29, 1999, (Aus.), *available at* http://cisgw3.law.pace.edu/cases/990629a3.html; *see* Posch & Petz, *supra* Note 30, at 15.

commentary[64] used to interpret and apply the CISG articles. Reliance on such commentary indicates a commitment to interpret the CISG in a manner that tends to promote uniformity of interpretation.[65]

Resistance to homeward trend interpretations was demonstrated again in a 2001 Belgian case.[66] In that case, the buyer sought avoidance of the obligation to pay the contract price. The buyer framed its case on "nonconforming delivery" and "latent defects," drawing on the Belgian Civil Code for authority. Relying on existing case law[67] and authoritative commentary,[68] the Belgian court further held the CISG alone to be applicable law and insisted that "[t]he CISG knows only one uniform concept of conformity."[69] Within the CISG "no distinction is made between a guarantee against latent defects and the seller's obligation to deliver. The seller must deliver conforming goods and that is all."[70]

An example of a court's application of CISG interpretive methodology is the 2000 Italian decision in *Rheinland Versicherungen v. S. r.l.Atlarex and Allianz*

[64] *Id. See also* Rolf Herber & Beate Czerwenka, Internationales Kaufrecht: Kommentar zu dem Uebereinkommen der Vereinten Nationen vom, 11. April 1980, Art. 29 unk (Munchen 1991); Peter Schlechtriem et al., Kommentar zum Einheitlichen UN-Kaufrecht (2nd ed. 1995).

[65] *See also* BGH, VIII ZR 51/95, Apr. 3, 1996 (F.R.G.), *available at* http://cisgw.law.pace.edu/cases/960403gl.html (last updated Sep. 2003). The German Supreme Court held that the CISG does not differentiate between delivery of different goods and delivery of goods that do not conform to the contract. The court noted that the CISG diverged from German civil law on this point, citing scholarly commentary as authority.

[66] BV BA G-2 v. AS C.B., Rechtbank van Koophandel [District Court]Veurne A/00/00665, Apr. 25, 2001, (Neth.), *available at* http://www.cisg.law.pace.edu/cisg/wais/db/cases2/010425b1.html.

[67] Commercial Court of Courtrai, 29 April 1998, T.W.VR. vol.3, p.70. (add URL).

[68] S. DeGroot, "Nonconformiteit voogens het Weens Koopverdrag," 3 T.P.R. (1999); H. Van Houtte et al., *Het Weenskoopverdrag*, 129, at n. 4.36.

[69] BV BA G-2 v. AS C.B., Rechtbank van Koophandel [District Court]Veurne A/00/00665, Apr. 25, 2001, (Neth.), *available at* http://www.cisg.law.pace.edu/cisg/wais/db/cases2/010425b1.html

[70] *Id.* But see Cass. ass. Plen., Dec. 17, 1996, D. 1997, 337 (Fr.), *available at* http://www2.gov.si/uncitral/clout.nsf/70dd6f602c1773bec12566ca005c864d/7be5a231df8 (last updated Jul. 2003) (distinguishing between the application of latent defect in the French Civil Code and Article 31(2)(a) in such way as to apply the homeward trend law in the face of conflicting CISG jurisprudence). Similarly, in 2000, the Swiss Federal Supreme Court rejected homeward trend attempts by the parties to impose concepts of local law in a dispute over whether a rotary printing machine met contract specifications. Under Swiss law, issues associated with the impressions of the buyer with respect to the quality of the goods would have been significant, or even dispositive. The Supreme Court overturned the Court of First Instance, applied CISG Article 35(1), and relied upon authoritative commentary for its application. Roland Schmidt GmbH c. Textil-Werke Blumenegg [Supreme Court], 4C.296/2000/rnd Dec. 22, 2000, (Switz.), *available at* http://cisgw3.law.pace.edu/cases/001222s1.html.

Subalpina S.a.A.[71] The case turned on whether adequate and timely notice of the non-conformity was given by the buyer to the seller. In making the determination, the court referenced CISG case law from several nations, including Italy,[72] Germany,[73] Austria, The Netherlands,[74] United States,[75] France,[76] and Switzerland.[77] The court recognized the non-binding nature of these cases, pointing out that the purpose of the case analysis was not to observe binding authority but "to assure and promote uniform enforcement of the United Nations Convention."[78] This opinion serves as an example of using CISG interpretive methodology to advance the goal of uniformity and to discourage resorting to a *homeward trend* analysis.[79]

[71] *See* Trib. Di Vigevano, n. 405, Jul. 12, 2002, *supra* Note 59, *available at* http://cisgw3.law.pace.edu/cases/000712i3.html. *See also* Franco Ferrari, *Tribunale di Vigevano: Specific Aspects of the CISG Uniformly Dealt With*, 20 J. L. & Com. 225–239 (2001); Franco Ferrari, *Truly Uniform Application of CISG: Tribunale de Vigevano*, Uniform L. Rev. 203 (2001); Pilar P. Viscsillas, *Battle of the Forms and Burden of Proof: An Analysis of the BGH 9 January 2002*, 6 2002 Vindobona J. Int'l L. 217 (2002) at n. 23.

[72] *See e.g.*, Pret. di Torino [District Court of First Instance], Jan. 30, 1997, Giur. I. 1998, II, 982–985 (It.), *available at* http://cisgw3.law.pace.edu/cisg/wais/db/cases2/970130i3.html. *See also* Trib. Civile di Cuneo [District Court], Sez. 145/96, Jan. 31, 1996, *available at* http://cisgw3.law.pace.edu/cases/960131i3.html (last updated Jul. 2002).

[73] *See e.g.*, OLG Dusseldorf, 6 U 119/9, Feb. 10, 1994, 1050, *available at* http://cisgw3.law.pace.edu/cases/940210g2.html; OLG München, 7 U 3758/94, Feb. 8, 1995, *supra* Note 376, *available at* http://cisgw3.law.pace.edu/cases/950208g2.html; AG Augsburg, 11 C 4004/95, Jan. 29, 1996, *available at* http://cisgw3.law.pace.edu/cases/960129g1.html; AG Kehl, 3 C 925/93, Oct. 6, 1995, (F.R.G.), *available at* http://cisgw3.law.pace.edu/cases/951006g1.html.

[74] *See e.g.*, W.M.J.M. Bronneberg/ Ceramica Belvedere SpA, HR 20 Feb. 1998, NJ 568, *available at* http://www.unilex.info/case.cfm?pid=1&do=case&id=328&step=FullText (last visited Jan. 2004); Fallini Stefano & Co./Foodik, Rb. Roermond, Dec. 19, 1991, NIPR 394 (Neth.), *available at* http://www.cisg.law.pace.edu/cisg/wais/db/cases2/911219n1.html; CME Coop. Mar. Etaploise/Bos Fishproducts, Rb. Zwolle, Mar. 5, 1997, NIPR 230 (Neth.), *available at* http://www.cisg.law.pace.edu/cisg/wais/db/cases2/970305n1.html.

[75] *See e.g.*, *Orbisphere Corp. v. United States*, 726 F. Supp. 1344 (Ct. Int'l Trade 1989), *available at* http://cisgw3.law.pace.edu/cases/891024u1.html (last udpated May 2002).

[76] *See e.g.*, *Societé Ceramique Culinaire de France v. Musgrave, Ltd.*, Cass. ass. plen., Dec. 17, 1996, (Fr.), *available at* http://cisgw3.law.pace.edu/cases/961217fl.html; CA Colmar [Regional Court of Appeal], 94-00488, Sept. 26, 1995, (Fr.), *available at* http://cisgw3.law.pace.edu/cisg/wais/db/cases2/950926f1.html.

[77] *Se e.g.*, HG Zurich, 930634/0, Nov. 30, 1998, (Switz.), *available at* http://cisgw3.law.pace.edu/cases/981130s1.html (last updated Dec. 2003); HG Zurich, 920670, Apr. 26, 1995, (Switz.), *available at* http://cisgw3.law.pace.edu/cases/950426s1.html (last updated Sep. 2003).

[78] Trib. di Vigevano, n. 405, Jul. 12, 2002, *supra* Note 59, *available at* http://cisgw3.law.pace.edu/cases/000712i3.html.

[79] A United States example of the proper application of CISG interpretive methodology is *Medical Marketing International, Inc., v. Internazionale Medico Scientifica*, S.R.L., No. 99-0380, 1999 U.S. Dist. LEXIS 7380, at *6 (E.D. La. May 17, 1999), *available at* http://cisgw3.law.pace.edu/cases/990517u1.html. The District Court cited a German Supreme Court case

Article 35(2)(b) addresses the sale of goods in which the seller is aware of the particular purpose for which the buyer will use the goods and the

for the proposition that Article 35 of the CISG does not require the seller to supply goods that conform to laws and regulations in effect in the buyer's country. *See* Einscheidunger des Bundesgerichtshof in Zivilsachen [BGHZ][Supreme Court, Civil Matter] VIII ZR 159/94, Mar. 8, 1995, (F.R.G.), *available at* http://cisgw3.law.pace.edu/cases/950308g3.html (last updated Dec. 2003). The German case involved the sale of New Zealand mussels by a Swiss company to a German importer. The cadmium content of the mussels exceeded the allowable limits under German law but was acceptable under Swiss law. The decision process under Article 35 required the court to first determine whether a violation of government regulations constitutes a defect under Article 35(2)(a), which requires that the goods be "fit for the purposes for which goods of the same description would ordinarily be used or whether the regulations are simply a feature of the local environment affecting use of the goods. Because health, safety, and environmental regulations vary dramatically from country to country, the real question – assuming that regulations affect fitness of purpose – is whether it is the regulations of the seller's country or the buyer's country that affect fitness" CISG, *supra* Note 2, Art. 35(2)(a). The German Supreme Court held for the seller's country, unless the buyer stipulated its own country requirements should have been met. The German court depended heavily upon authoritative commentary to reason to this conclusion, stating: "According to the absolutely prevailing opinion in the legal literature, which this Court follows, the compliance with specialized public law provisions of the buyer's country or the country of use cannot be expected" BGHZ, VIII ZR 159/94. *See generally* Peter Schlechtriem, Case Commentary, *Conformity of the Goods and Standards Established by Public Law: Treatment of Foreign Court Decision as Precedent*, *available at* http://cisgw3.law.pace.edu/cases/990517u1.html (last updated Dec. 2003); Andrew J. Kennedy, *Recent Developments: Nonconforming Goods Under the CISG – What's a Buyer to Do?*, 16 Dick. J. Int'l L. 319 (1998). An abundant literature has chronicled and commented upon this decision. *See, e.g.*, Honnold, Uniform Law for International Sales (1999) 257 [Art. 35]; Karollus, Cornell Review of the CISG (1995) 51 [Arts. 67–8] (comment on conformity-of-the-goods ruling); Schwenzer In Schlechtriem, Commentary on the UN Convention on the International Sale of Goods 280 (1998) [Art. 35] at n.57; Bernstein & Lookofsky, Understanding the CISG in Europe, 2d ed. (2003), § 2-8 at n.113 & § 4-7 at n.94. The *Medical Marketing* decision is an example of the convergence in CISG interpretation based first on learned commentary and then the integration of the thinking of the best foreign decisions on the given issue. Courts in both Argentina and Austria came to similar results drawing upon reasoning from other national courts' experience to produce a more uniform interpretation of the CISG. *See* Camara Nacional de Apelaciones en lo Comercial [Second Instance Court of Appeal], Apr. 24, 2000, (Arg.), *available at* http://cisgw3.law.pace.edu/cisg/wais/db/cases2/000424a1.html; OG 2 Ob 100/00w, Apr. 13, 2000, (Aus.), *available at* http://cisgw3.law.pace.edu/cisg/wais/db/cases2/000413a3.html. The Austrian court noted, "[a] seller cannot be expected to know all special rules of the buyer's country or the country of usage. . . . It is rather for the buyer to observe her country's public law provisions and specify these requirements – either according to Art. 35(1) or (2)(b) CISG – in the sales contract . . . [t]he requirements of the buyer's country should only be taken into account if they also apply in the seller's country, if they are agreed on, or if they are submitted to the seller at the time of the formation of the contract, according to Art. 35 (2)(b)." This use of the uniformity principle is not without critics. *See, e.g.*, Harry M. Flechner, The Several Texts of the CISG in a Decentralized System: Observations on Translations, Reservations and Other Challenges to the Uniformity Principle in Article 7(1), 17 J. L. & Com 187 (1998) [arguing that the German court applied an unduly rigid standard of uniformity].

buyer is relying upon the seller to use skill and judgment to provide the goods. In effect, it creates an implied warranty for a particular purpose. The implied warranty for a particular purpose[80] has been the subject of several court cases.[81] Some of these cases involved simply an analysis of whether the facts constituted a failure to conform to the contract.[82] Others, discussed later, involved legal analysis that provides greater insight into the court's and arbitral panel's interpretation of this warranty.

As is the case under Article 35(2)(a) (implied warranty of merchantability), a seller is not responsible to conform its products to the nuances of the national law of the buyer's country. However, the seller may be responsible for such conformity under Article 35(2)(b) (implied warranty for a particular purpose). In a German case,[83] the issue of whether a Spanish paprika seller had to certify that its product complied with the German Food Safety Laws demonstrates this nuance. The court found that the seller had prior knowledge of the laws and, therefore, could not argue that it was ignorant of the requirement that the goods comply with the German laws. The court held that because the paprika contained more ethylene oxide than permitted under German law, the goods failed to conform to the

[80] *See* UCC §2-315.

[81] *See, e.g.*, BGH, VIII ZR 121/98, *supra* Note 56, *available at* http://cisgw3.law.pace.edu/cases/990324g1.html; Netherlands Arbitration Institute, No. 2319, Oct. 15, 2002, (Neth.), *available at* http://cisgw3.law.pace.edu/cases/021015n1.html; *Schmitz-Werke GmbH & Co. v. Rockland Industries*, 37 FED App. 687 (4th Cir. 2002), *available at* http://cisgw3.law.pace.edu/cases/020621u1.html; *Mayer Alejandro v. Onda Hofferle*, Camara Nacional de Apelaciones en lo Comercial, Second Instance Court of Appeal, Apr. 24, 2000, *available at* http://cisgw3.law.pace.edu/cases/000424al.html; LG Ellwangen [Landgericht] 1 KfH O 32/95, Aug. 21, 1995, (F.R.G.), *available at* http://cisgw3.law.pace.edu/cases/950821g2.html (last updated Dec. 03); *Manipulados del Papel y Carton SA v. Sugem Europa SL RA*, 340/1997 Audiencia Provincial de Carclona, seccion 16a, Appellate Court Barcelona, RA 340/1997, Feb. 4, 1997, (Spain), *available at* http://cisgw3.law.pace.edu/cases/970204s4.html; *M. Marques Roque Joachim v. La Sarl Holding Manin Riviere*, CA Grenoble, 93/4879, Apr. 26, 1995, (Fr.), *available at* http://cisgw3.law.pace.edu/cases/950426f2.html.

[82] *See, e.g.*, CA Grenoble, 93/4879, *available at* http://cisgw3.law.pace.edu/cases/950426f2.html; OLG Dusseldorf, RIW, 1050/51 40 (1994), *available at* http://cisgw3.law.pace.edu/cases/940210g2.html; *Manipulados del Papel y Carton SA v. Sugem Europa,* SL RA 340/1997; Audiencia Provincial de Barcelona, seccion 16a, *available at* http://cisgw3.law.pace.edu/cases/970204s4.html; *Mayer Alejandro v. Onda Hofferle*, Camara Nacional de Apelaciones en lo Comercial, Second Instance Court of Appeal, Apr. 24, 2000, *available at* http://cisgw3.law.pace.edu/cases/000424al.html.; Netherlands Arbitration Institute n. 2319, *supra* Note 81, *available at* http://cisgw3.law.pace.edu/cases/021015n1.html; BGH, VIII ZR 121/98, *supra* Note 56, *available at* http://cisgw3.law.pace.edu/cases/990324g1.html.

[83] LG Elwangen, 1 KfH O 32/95, *supra* Note 81, *available at* http://cisgw3.law.pace.edu/cases/950821g2.html.

contract and specifically failed to meet the buyer's purpose known to the seller.[84]

The crucial factors for applying the implied warranty for a particular purpose are the buyer communicating the intended use of the product and the seller's knowledge of the nuances of the foreign law or standards. A Netherlands Arbitration Institute case involving a dispute concerning the conformity of a petroleum product illustrates the intended use criterion.[85] The buyer argued that the product contained excessive amounts of mercury, which the seller knew – because it was in the refining business – would make the product unusable to the buyer. The arbitral tribunal concluded as a factual matter that the buyer did not expressly or impliedly indicate to the seller the use it intended to make of the product, and that the product had other uses in the refining industry. Thus, the panel rejected the Article 35(2)(b) claim.[86]

The panel, however, did find for the buyer on its Article 35(2)(a) claim. In doing so, it reviewed different interpretations of merchantability. It first drew on the concept of "merchantability" or "merchantable quality," a standard of conformity found in English common law. The second interpretation is the *average quality rule* found in the German, Austrian, French, and Swiss civil codes. The tribunal also found this interpretation to be unsatisfactory. Instead, the panel drew on the history of the drafting of the CISG and its interpretive methodology. First, the panel looked to general principles, namely, that "[i]n the interpretation of this Convention, regard is to be had to its international character and to the need to promote uniformity in its application and the observance of good faith in international trade."[87] Second, it attempted to find an appropriate interpretation through the use of implied principles taken from the different articles of the CISG.[88]

It interpreted this mandate to suggest that neither the merchantability test nor the average quality test should apply, based as they are in domestic notions of quality. Rather, it resorted to the history of the CISG and the preparatory papers preceding its adoption. In reviewing these documents, the tribunal became convinced that the drafters declined to articulate a standard, leaving an "open-textured" provision. In the final analysis, emphasizing the absence of alternative buyers willing to pay the contract price for a product with that

[84] *Id.*

[85] Netherlands Arbitration Institute, No. 2319, Oct. 15, 2002, (Neth.), *available at* http://cisgw3.law.pace.edu/cases/021015n1.html.

[86] *Id.*

[87] CISG at Art. 7(1).

[88] *See* Netherlands Arbitration Institute, No. 2319, Oct. 15, 2002 (Neth.), *available at* http://cisgw3.law.pace.edu/cases/021015n1.html.

level of mercury, the tribunal concluded that the goods were not merchantable judged by any of the available interpretations.[89]

In sharp contrast, the United States court in *Circuit Schmitz-Werke GmbH & Co. v. Rockland Industries, Inc.*[90] disregarded CISG interpretive methodology and resorted to a homeward trend analysis. The court cited only United States cases and ignored other national court or arbitral decisions and scholarly commentaries on the CISG. The court expressly ignored those sources by concluding that if the CISG is "not settled under its own terms," then a court could resort to private international law. It then proceeded to analyze the problem under Article 2 of the Uniform Commercial Code.[91]

Often times a contract is based upon a sample or model. Article 35(2)(c) requires the seller to provide goods of equivalent quality to a sample or model upon which the contract was formed. A Finnish court dealt with the issue of a contract based upon a sample and a seller's representation that the product had a "shelf life" of 30 months.[92] The sample of the product tested before delivery contained the specified vitamin content, but the product – both on delivery and increasingly over its life on the shelf – deteriorated in Vitamin A content. The seller argued, pursuant to Article 35(3),[93] that the buyer was aware of the Vitamin A deterioration over time and thus could not have expected the content to remain in constant conformance with the sample for thirty months.

In deciding in favor of the buyer, the court relied not on Swiss law or trade usage, but pointed instead to the fact that the seller "must have been aware of the international content of the shelf-life concept."[94] With respect to the seller's argument under Article 35(3), the court found it irrelevant that the buyer knew Vitamin A deteriorated. "[I]t appears that the buyer counted on the seller's expertise in terms of how the seller reaches the required Vitamin

[89] *Id.*

[90] *See Schmitz-Werke GmbH & Co. v. Rockland Industries, Inc.*, 37 Fed. Appx 687 (4th Cir. 2002), *available at* http://cisgw3.law.pace.edu/cases/020621u1.html. Although ultimately the circuit court upheld the lower court ruling, which was apparently reached using the CISG, the praxis of the circuit court in applying the CISG is noteworthy.

[91] Another example of homeward trend analysis is the Italian decision of the Corte d'Appello di Milano *Italdecor s.a.s. v. Yiu's Industries (H.K.) Limited*, CA Milano, Mar. 20, 1998, (It.), *available at* http://cisgw3.law.pace.edu/cisg/wais/db/cases2/980320i3.html.

[92] *See* Helsinki Court of Appeals, *EP S.A. v. FP Oy*, s96/1215, Jun. 30, 1998, (Fin.), *available at* http://cisgw3.law.pace.edu/cases/980630f5.html.

[93] CISG at Art. 35(3).

[94] *See EP S.A. v. FP Oy*, *supra* Note 584; *see also* Kuoppala, Examination of the Goods under the CISG and the Finnish Sale of Goods Act, § 3.4.1 (2000), *available at* http://www.cisg.law.pace.edu/cisg/biblio/kuoppala.html.

A content and how the required preservation is carried out."[95] The court resisted a homeward trend solution by rejecting the application of domestic law. However, it also failed to consider the experience of other national courts in interpreting the CISG.[96]

Risk of Loss and Warranties: Article 36

Article 36 fixes the point when the seller's obligations pertaining to the conformity of goods expires, which is when the risk of loss passes to the buyer or at the expiration of any express or implied guaranty. The buyer is allocated the burden of proving that the goods were defective prior to the expiration of the seller's obligation point. This was the issue in a German case involving the sale of meat products.[97] Upon receipt, the buyer objected to the quality of the meat and sued for a refund. The court reasoned that because the parties had not agreed otherwise, the risk of loss had passed to the buyer when the seller handed over the goods to the first carrier. Therefore, under CISG Articles 36 and 66, the buyer had the burden of proving that the goods did not conform to the contract at the time the risk of loss passed. This burden, demonstrated here, is often difficult to sustain.[98]

[95] *See EP S.A. v. FP Oy*, *supra* Note 92.

[96] The other cases involving Article 35(3), which negates implied warranties if at the time of conclusion of the contract the buyer knew of the non-conformity, tend to involve the factual question of what the buyer knew, and when. *See generally* Tribunal Cantonal Valais, CI 97 167 28, Oct. 28, 1997, (Switz.), *available at* http://www.cisg.law.pace.edu/cases/971028s1.html; *see also* Sø og Handelsretten [Maritime Commercial Court] 31 H-0126-98, Jan. 31, 2002, (Den.), *available at* http://cisgw3.law.pace.edu/cases/020131d1.html. *See* OLG Köln 22 U 4/96, *available at* http://cisgw3.law.pace.edu/cases/960521g1.html. A 1996 German case provided an opportunity for an appellate court to place a gloss on 35(3), denying the defendant the ability to invoke the provision where he himself had engaged in fraud. The case involved the international sale of a late model apparently low mileage car in which the date of original sale had been adjusted. The buyer resold the car to someone who detected the deception and exacted damages, which the buyer sought to recover from the seller. The German court denied the seller access to the defense that the buyer could have detected the car's lack of conformity to the contract because the seller himself knew of the age of the car and thus behaved fraudulently. "The [seller] thus had to reckon that the delivery of non-conforming goods would make the [buyer] liable towards his customer" *Id.*

[97] *See* LG Flensburg, 2O 291/98, Mar. 24, 1999, (F.R.G.), *available at* http://cisgw3.law.pace.edu/cases/990324g2.html.

[98] On the issue of the burden of proof, *see generally* Lugano, Cantone del Ticino, La seconda Camera civile del Tribunale d'appello [Appellate Court], 12.97.00193, Jan. 15, 1988, (Switz.), *available at* http://cisgw3.law.pace.edu/ cases/980115s1.html; CA Grenoble, 94/0258, May 15, 1996, (Fr.), *available at* http://cisgw3.law.pace.edu/cases/960515f1.html. Often decisions under Article 36 turn on factual analysis when the risk of loss passed. *See* Cairo Chamber

Effect of Seller's Knowledge: Article 40

Articles 38[99] and 39[100] require the buyer to examine the goods and give timely notice to the seller of nonconformities. Article 40, in effect, excuses the buyer from the consequences of failing to make a timely examination of the goods and to give notice of the nonconformities. If the seller "knew or could not have been unaware" of the nonconformities and then failed to disclose them to the buyer, the seller cannot rely on the buyer's failure of examination and notice. This provision has occasioned discussion in case law[101] and commentary.[102] Some cases turn on whether the buyer can provide proof of the seller's knowledge of the nonconformity[103] or on whether the seller disclosed the nonconformity to the buyer.[104] To the latter point, a recent Belgian case characterized Article 40 as the application of "the good faith principle,"[105] noting

of Commerce and Industry, Egypt Arbitration Award, 19/1990, Apr. 13, 1991, (Egypt), *available at* http://cisgw3.law.pace.edu/cases/910413e1.html; *S.r.l. R.C. v. BV BA R. T.*, Hof van Beroep Antwerp [Appellate Court], 1997/AR/1554, Jun. 27, 2001, (Belg.), *available at* http://cisgw3.law.pace.edu/cases/0110627b1.html; FB Budapest, 12.G.75.715/1996/20, Jul. 1, 1997, (Hung.), *available at* http://cisgw3.law.pace.edu/cisg/wais/db/cases2/970701h1.html; *BP Int'l, Ltd. v. Empressa Estatal Petroleos de Ecuador*, 332 F.3d 333 (5th Cir. 2003), *available at* http://cisgw3.law.pace.edu/cases/030611u1.html.

[99] CISG at Art. 38.

[100] *Id.* at Art. 39.

[101] *See La San Giuseppe v. Forti Moulding, Ltd.*, [1999] O.J. No. 3352, *available at* http://is.dal.ca/~cisg/cases/forti.htm; *BP Oil Int'l v. Empressa Estalal Petroleos de Excuador*, 332 F.3d 333 (5th Cir. 2003), *available at* http://cisgw3.law.pace.edu/cases/030611u1.html, *available at* http://cisgw3.law.pace.edu/cases/030611u1.html; S.r.l. R.C. v. BV BA R.T., Hof van Beroep Antwerp [Appellate Court], 1997/AR/1554, Jun. 27, 2001, (Belg.), *available at* http://cisgw3.law.pace.edu/cases/010627b1.html; ICC International Court of Arbitration No. 5713 of 1989, *available at* http://www.cisg.law.pace.edu/cisg/wais/db/cases2/895713i1.html; *available at* OLG Zweibrücken, 2 U 27/01, Jul. 26, 2002, (F.R.G.), *available at* http://cisgw3.law.pace.edu/cases/020726g1.html; *T.SA v. R. Establlissement*, HG Zürich, HG 930634/O, Nov. 30, 1998, (Switz.), *available at* http://cisgw3.law.pace.edu/cases/981130s1.html; ICC International Court of Arbitration No. 9083 of 1999, *available at* http://cisgw3.law.pace.edu/cases/990083i1.html;

[102] *See* Franco Ferrari, *Specific Topics of the CISG in the Light of Judicial Application and Scholarly Writing*, 15 J. L. & Com. 1 (1995), *available at* http://cisg.law.pace.edu/casg/wais/db/editorial/ferrari950308g3.html.

[103] *See, e.g.*, OLG Zweibrücken, 2 U 27/01, *supra* Note 56; ICC International Court of Arbitration No. 5713 of 1989, *supra* Note 101; BP Oil Int'l, *supra* Note 101; HG Zürich, HG 930634/O, *supra* Note 101; La San Giuseppe, *supra* Note 101.

[104] *See, e.g.*, ICC International Court of Arbitration 1999, Case No. 9083, *available at* http://cisgw3.law.pace.edu/cases/990083i1.html; La San Giuseppe v. Forti Moulding, Ltd., [1999] O.J. No. 3352, *available at* http://is.dal.ca/~cisg/cases/forti.htm.

[105] *See S.r.l. R.C. v. BV BA R.T.*, Hof van Beroep Antwerp [Appellate Court], 1997/AR/1554, Jun. 27, 2001, (Belg.), *available at* http://cisgw3.law.pace.edu/cases/010627b1.html; *see also*

that if the seller knows of the nonconformity and fails to reveal it, he cannot fall back upon the buyer's failure to tell him what he already knew.[106]

Arbitration Institute of the Stockholm Chamber of Commerce Arbitration Award of Jun. 5, 1998, *available at* http://cisg.law.pace.edu/980605s5.html; Francis Limbach & Brandon Ahearn, *Conformity of Goods, Derogation From Article 40 by the Parties and Conditions of Art. 40 CISG*, *available at* http://www.cisg.law.pace.edu/cisg/biblio/limbach.html.

[106] *Id.*

CHAPTER SEVEN

COMMON OBLIGATIONS OF BUYERS AND SELLERS

This chapter focuses on the common obligations of buyers and sellers under the CISG. These common obligations and concepts pertain to the passing of risk, fundamental breach, anticipatory breach, and adequate assurance. The first section reviews the passing of risk, which is the subject of a separate chapter of the CISG.[1] Common Obligations is found in Chapter V of the CISG. It includes six sections: Section I, anticipatory breach and installment contracts; Section II, damages; Section III, interest; Section IV, exemptions; Section V, effects of avoidance; and Section VI, preservation of goods. Section I's coverage of anticipatory breach will be examined in the present chapter. Section II (damages), Section IV (impediment), and Section VI (preservation) will be examined in Chapter 10. Avoidance (Section V) will be examined along with the *nachfrist* notice in Chapter 9.

PASSING OF RISK

The CISG sets forth the basic principle for the passing of risk in Article 67.[2] A pivotal issue for determining risk is where the contract requires the seller to hand over the goods. If the seller is not bound to hand over the goods at a particular place, the risk passes to the buyer when the goods are handed over to the first carrier for transmission to the buyer.[3] If, however, the seller is bound to hand over the goods to a carrier at a particular place, the risk does

[1] United Nations Convention on Contracts for the International Sale of Goods, April 11, 1980, 1489 U.N.T.S. 3, 19 I.L.M. 671, *available at* Pace Law School Institute of International Commerce Law, http://www.cisg.law.pace.edu (last updated Sept. 2003) (hereafter CISG), Chapter IV, Passing of Risk.

[2] CISG at Art. 67.

[3] *Id.* at Art. 67(1). *See generally* Secretariat Commentary to Art. 67, *available at* http://www.cisg.law.pace.edu/cisg/text/secomm/secomm-67.html (if the contract specifies the passage of the risk of loss by the use of trade terms or otherwise, Article 67 does not apply).

not pass to the buyer until the goods are handed over to the carrier at that place.[4] In any event, risk of loss does not pass to the buyer until the goods are clearly identified in the contract.[5] Identification can be demonstrated by markings on the goods, shipping documents, notice to the buyer, or otherwise appropriate means.[6]

Courts interpreting Article 67 have focused on two issues. The first issue pertains to the consequences of damage to or deterioration of goods after they are handed over to the carrier. A number of courts have considered the liability of buyers and sellers in this context. A second issue regards the effect of additional contract terms on the application of Article 67.

When risk of loss passes to the buyer pursuant to Article 67, the seller is held not to be responsible for any deterioration or damage to the goods. In *B.P. Oil International, Ltd. v. Empresa Estatal Petroleos De Ecuador*,[7] the buyer refused to accept delivery claiming that the goods did not conform to the contract specifications.[8] The contract provided that the goods were to be delivered "CFR" and undergo a pre-shipment inspection for conformity.[9] The U.S. Fifth Circuit Court of Appeals found that the goods should have been tested for conformity *before* risk of loss passed to the buyer at the port of shipment.[10] The court also stated that the general principle in the event of subsequent damage or loss was that the buyer must first seek a remedy against the carrier or insurer.[11]

4 *Id.*
5 *Id.* at Art. 67(2).
6 *Id.*
7 332 F.3d 333 (5th Cir. 2003).
8 *Id.* at 335.
9 *Id.* at 338.
10 *Id.*
11 *Id.* at 338, *citing In re Daewoo Intl (Am.) Corp.*, 2001 WL 1537687, 2001 U.S. Dist. LEXIS 19796, at *8 (S.D.N.Y. 2001). Because there was a question of fact, however, as to whether the seller fulfilled its contractual obligations regarding the specifications of the goods before they passed the ship's rail, the court ordered the district court to permit the parties to conduct discovery on this limited issue. *Id.* at 339. German courts have likewise held that under Article 67 the seller is not responsible for the depreciation of goods. OLG Schleswig 11 U 40/01, Aug. 22, 2002, (F.R.G.), *available at* http://cisgw3.law.pace.edu/cases/020822g2.html. Another German court held that a seller is not responsible for subsequent damage to goods once they are handed over to the carrier. AG Duisburg, 49 C 502/00, April 13, 2000, (F.R.G.), *available at* http://cisgw3.law.pace.edu/cases/000413g1.html. In that case, the court held that Article 67 applied because the buyer was not able to prove that there was an agreement between the parties for risk of loss to pass to the buyer at a different location. A third German court stated that a seller is only be liable for any defect if it gave a mandate to the carrier regarding the means of shipment. OLG Schleswig, 11 U 40/01, Aug. 22, 2002, (F.R.G.), *available at* http://cisgw3.law.pace.edu/cases/020822g2.html. An Argentine court reached the same conclusion and held that after the risk of loss passed to the buyer, it was obligated to

Issues of the application of Article 67 often hinge on a court's interpretation of contract terms that impact the passage of risk of loss. In one case, a French seller sold goods to a German buyer pursuant to a contract with a clause that it would deliver the goods to a carrier in accordance with its general business conditions of "free delivery, duty-paid, untaxed."[12] The dispute arose after the buyer denied that delivery had taken place, even after the seller produced an unsigned receipt with the buyer's stamp.[13] The court held that the clause "free delivery . . ." should be interpreted under German law. As such, the seller undertook the risk of transportation of the goods.[14] Moreover, the parties' past course of dealings included the seller using its own means of transportation to deliver to the buyer. The court found this to be added evidence of the parties' intention to pass the risk to the buyer's place of business in Germany. Because the seller was unable to prove that the goods were delivered to the buyer, no passing of risk to the buyer took place, and the seller was not entitled to claim the purchase price.[15] It should be noted that when the risk of loss passes to the buyer pursuant to Article 67, the risk passes irrespective of whether the contract contains a C & F clause[16] or whether the buyer has arranged to insure the goods while they are being transported.[17]

FUNDAMENTAL AND ANTICIPATORY BREACH

Essential to a determination of the liability of buyers and sellers is whether there has been a fundamental breach or anticipatory breach of contract. Under Article 25, a fundamental breach of contract occurs when an act by one of the parties results in the other party being substantially deprived of what it expected under the contract.[18] However, the detriment caused by the breach must have been foreseeable. If the breaching party did not foresee, and a reasonable person in the same circumstances would not have foreseen such

pay the purchase price unless the loss or damage to the goods was due to an act or omission by the seller. *Bedial, S. A. v. Paul Müggenburg and Co. GmbH*, Oct. 31, 1995, (Arg.); CLOUT Case No. 191, *available at* http://www.uncitral.org/english/clout/abstract/index.htm.

[12] OLG Karlsruhe, 15 U 29/92, Nov. 20, 1992, (F.R.G.), CLOUT Case No. 317, *available at* http://www.uncitral.org/english/clout/abstract/abst-30.pdf.

[13] *Id.*

[14] *Id.*

[15] *Id.*

[16] *Bedial v. Müggenburg, supra* Note 609.

[17] *Audiencia Provincial de Córdoba* [Division 3], Oct. 31, 1997, (Spain); CLOUT Case No. 247, *available at* http://www.uncitral.org/english/clout/abstract/abst-24.pdf.

[18] CISG, *supra* Note 1, at Art. 25. *See, e.g., Medical Marketing International, Inc. v. Internazionale Medico Scientifica*, No. 99-0380-5(1), S.R.L., 1999 WL 311945 (E.D.La. May 17, 1999).

a result, there is no fundamental breach.[19] A fundamental breach gives the non-breaching party the right to avoid the contract or to require the delivery of substitute goods.[20] If the breach is considered nonmaterial, the aggrieved party is entitled to damages, but not the remedy of avoidance.[21]

The CISG provisions set a high threshold before a party anticipates a breach and can suspend performance.[22] Anticipatory breach under Articles 71, 72, and 73 can occur in various contexts in the performance of a contract.[23] These articles aim to provide a remedy while keeping the contract intact. A party may suspend the performance of his obligations if it becomes apparent that the other party will not substantially perform as a result of a serious deficiency in its ability to perform, such as poor creditworthiness, or in its failure to prepare to perform.[24] If these preconditions exist, a party can suspend performance. Alternatively, if a seller has dispatched the goods, he may prevent the goods from being handed over to the buyer.[25] Article 72 allows the suspending party to terminate the contract by electing the remedy of avoidance.[26]

The narrowness of the preconditions for suspension of performance is designed to prevent abuse of anticipatory breach. Another limitation on suspension of performance is that the party suspending performance must immediately give notice of suspension to the other party.[27] "Reasonable notice"

[19] *Id.* Art. 25. *See generally* Robert Koch, *The Concept at Fundamental Breach of Contract Under the United Nations Convention for the International Sale of Goods*, in Review of the Convention on Contracts for the International Sale of Goods (1999), *available at* http://cisg.law.pace.edu/cisg/biblio/koch.html. (discussing the concept of fundamental breach under the CISG); Clemens Pauly, *The Concept of Fundamental Breach as an International Principle to Create Uniformity of Commercial Law*, 19 J.L. & Com. 221, 229–32 (2000) (discussion includes German concepts related to fundamental breach, including the fact that German sales law does not distinguish between general and fundamental breach).

[20] *See* CISG at Arts. 46, 49, 51, 64, 70, and 72, which specifically refer to the concept of a "fundamental breach" to determine liability.

[21] *See id.* arts. 49(1)(a), 51(2), 64(1)(a), 72(1), and 73.

[22] Jelena Vilus, *Provisions Common to the Obligations of the Seller and the Buyer*, *in* International Sale of Goods; Dubrovnik Lectures 239, 239–64 (Paul Volken and Petar Sarcevic, eds., 1986).

[23] *See generally* Seig Eiselen, *Remarks on the Manner in Which the UNIDROIT Principles of International Commmercial Contracts may be Used to Interpret or Supplement Articles 71 and 72 of the CISG* (Sept. 2002), *available at* http://cisgw3.law.pace.edu/cisg/principles/uni71,72.html (using the UNIDROIT principles as an aid to the interpretation of Articles 71–72 of the CISG); Seig Eiselen, *Remarks on the Manner In Which The Principles of European Contact Law May Be Used to Interpret or Supplement Articles 71 and 72 of the CISG* (Sept. 2002), *available at* http://cisgw3.law.pace.edu/cisg/text/peclcomp71,72.html (using the European Union legal principles as an aid to the interpretation of Articles 71–72 of the CISG).

[24] CISG at Arts. 71(1)(a) and (b).

[25] *Id.* at Art. 71(2).

[26] *Id.* at Art. 72.

[27] *Id.* at Art. 71(3).

to the other party enables the opportunity to provide adequate assurance of his performance.[28] If a party declares that he will not perform his obligations, notice need not be given.[29] Finally, a party's right to suspend performance is limited by the reciprocal right of the other party to provide adequate assurance that it will perform. If the party provides such assurance, then the party is prohibited from continuing the suspension.[30]

The final context in which the CISG addresses common obligations of buyers and sellers for anticipatory breach is Article 73. Article 73 provides the threshold for fundamental breach in the context of installment contracts.[31] If one party's failure to perform any of his obligations constitutes a fundamental breach of contract with respect to that installment, the other party may declare the contract avoided only with respect to that installment.[32] However, if the failure to perform with respect to one installment gives the non-breaching party reasonable grounds to believe that the breaching party will not deliver a future installment, the anticipation of future breaches equates to a fundamental breach allowing the non-breaching party to declare the contract avoided.[33] The issues of fundamental breach as they pertain to installment contracts will be explored more fully later in the chapter.

Fundamental Breach: Article 25

The concept of fundamental breach under Article 25 is very restrictive. A breach must concern the essential content of the contract in order for it to be considered fundamental.[34] Courts and arbitral decisions have focused on three types of breaches as potentially fundamental – late delivery, deficiencies in the goods, and failure to uphold specific contractual terms.

[28] *Id.* at Art. 72(2).
[29] *Id.* at Art. 71(3).
[30] *Id.*
[31] *Id.* at Art. 73.
[32] *Id.* at Art. 73(1).
[33] *Id.* at Art. 73(2). As is the case in other examples of avoidance, however, notice must be provided to the other party within a reasonable time. *Id.* Note that a buyer who declares the contract avoided in respect to any delivery may, at the same time, declare it avoided in respect to deliveries already made or of future deliveries if, by reason of interdependence, those deliveries could not be used for the purpose contemplated by the parties at the time of the conclusion of the contract. *Id.* at Art. 73(3).
[34] *See, e.g., FCF S. A. v. Adriafil Commerciale S.r.l.*, BGE 4C.105/2000, Sept. 15, 2000, (Switz.), *available at* http://cisgw3.law.pace.edu/cases/000915s2.html (The breach must concern the essential content of the contract, the goods, or the payment of the price concerned, and it must lead to serious consequences to the economic goal pursued by the parties).

First, late delivery does not generally constitute a fundamental breach.[35] Similarly, there cannot be a fundamental breach for failure to deliver where the parties have not agreed on a precise date of delivery.[36] A buyer's refusal to take delivery of goods may also not be considered a fundamental breach under certain circumstances. In one case involving staggered deliveries from May to December, the parties agreed that in return for a price reduction, the September delivery would take place in late August.[37] At the time of delivery, the buyer refused the goods and demanded the delivery be postponed until September. A French court determined that the buyer did not commit a fundamental breach, because the buyer was entitled to regard the bringing forward of the delivery date to late August as merely a reciprocal concession for a financial advantage.[38] As such, it could not be expected to have understood that a few days' delay in taking delivery would constitute a fundamental breach on its part. Accordingly, the seller should have granted the buyer additional time in which to take delivery.

However, a delay in delivery can rise to a level of a fundamental breach when a timely delivery is in the special interest of the buyer.[39] The importance of the delivery date must be foreseeable at the time of the conclusion of the contract.[40] Depending on the circumstances of the transaction, such as the need to honor obligations to downstream purchasers, the delivery time may be considered a material term.

Second, a common type of breach is the delivery of deficient or defective goods or documents. In a German case of nonconformity of documents, a buyer made alternative arguments of nonconforming delivery amounting to fundamental breach and nonconforming delivery amounting to a non-delivery.[41] This case, popularly known as the "blue cobalt" case, involved a contract that required the goods to be of British origin and accompanied by a certificate of origin. The seller delivered the goods to a warehouse in Antwerp,

[35] OLG München, 10 O 5423/01, July 1, 2002, (F.R.G.), *available at* http://cisgw3.law.pace.edu/ cases/020701g1.html.

[36] OLG München, 7 U 1720/94, Feb. 8, 1995, (F.R.G.), *available at* http://cisgw3.law.pace.edu/ cases/ 950208g1.html.

[37] *SARL Ego Fruits v. La Verja*, RG 98/02700, Feb. 4, 1999, (Fr.), CLOUT Case No. 243, *available at* http://www.uncitral.org/english/clout/abstract/index.htm.

[38] *Id.*

[39] OLG Hamburg, 1 U 167/95, Feb. 28, 1997, (F.R.G.), CLOUT Case No. 277, *available at* http://www.uncitral.org/english/clout/abstract/index.htm.

[40] For example, the use of the Incoterm "CIF" by definition determines the contract to be a transaction for delivery by a fixed date. *Id.*

[41] BGHZ VIII ZR 51/95, Apr. 3, 1996, (F.R.G.), *available at* http://cisgw3.law.pace.edu/cases/960403g1.html.

as required by the contract, and sent certificates of origin to the buyer. The certificates of origin indicated that the goods were of South African origin. The buyer declared the contract avoided on the grounds that the nonconforming certificate constituted a fundamental breach and that, because of the defective document, there was no true delivery. The court rejected the buyer's Article 49(1)(b) (non-delivery) claim that the nonconforming delivery was a non-delivery. The court reasoned that under the CISG, nonconforming delivery still constitutes delivery, making Article 49(1)(b) not available to the buyer. The court also rejected the buyer's avoidance claim under Article 49(1)(a) (fundamental breach) holding that it failed to prove a fundamental breach. It asserted that the buyer failed to present evidence that South African cobalt could not be sold or that the seller could not obtain conforming documents of origin. The later assertion seems fanciful since the cobalt was clearly not of British origin. This case demonstrates that the concept of fundamental breach is narrowly construed under the CISG.[42]

Third, defects are considered fundamental only when the buyer is substantially deprived of what he was entitled to under the contract.[43] For example, tiles sold as "impermeable" that turned out to be easily stained by household items, such as juice, constituted a fundamental breach of the contract.[44] A shipment of jeans that contained the wrong quantity and were incorrectly labeled with the wrong sizes fundamentally breached the contract.[45] In *Delchi Carrier SpA v. Rotorex Corp.*, the U.S. Second Circuit Court of Appeals held that a fundamental breach of contract occurred when air compressors did not conform to the sample model and the accompanying specifications regarding cooling capacity and energy consumption.[46] However, the burden remains on the buyer to prove that due to the nonconformity, the goods provided were substantially below what was stipulated in the contract.[47]

Fundamental breach under Article 25 is not confined to untimely delivery or delivery of nonconforming goods. Under certain circumstances, any provision in a contract can be considered material and the breach would be

[42] *Id.*

[43] International Chamber of Commerce Arbitral Award 1994, ICC International Court of Arbitration Bulletin Vol. 6, No. 2, 67, CLOUT Case No. 304, *available at* http://www.uncitral.org/english/clout/abstract/index.htm.

[44] LG Saarbrücken, 8 O 49/02, July 2, 2002, (F.R.G.), *available at* http://cisgw3.law.pace.edu/cases/020702g1.html.

[45] OLG Hamburg 1 U 31/99, Nov. 26, 1999, (F.R.G.), *available at* http://cisgw3.law.pace.edu/cases/991126g1.html.

[46] 71 F.3d 1024, 1027–29 (2d Cir. 1995).

[47] *See, e.g.*, BGHZ VIII ZR 51/95 (buyer was unable to demonstrate that the quality of the goods it received was inferior to what was agreed upon).

considered fundamental. For example, a French seller of jeans negotiated a contract with an American buyer that specified that the ultimate destination of the goods was to be either South America or Africa.[48] During the performance of the contract, the buyer repeatedly ignored the seller's demand for proof of destination. Subsequently, the seller learned that a shipment of the jeans was delivered in Spain. A French court found that the buyer disregarded the seller's destination requirement and that this "attitude" constituted a fundamental breach of the contract.[49]

Failure to abide by exclusivity provisions can also give rise to a fundamental breach under Article 25. In one case, an Italian manufacturer agreed to produce shoes according to a German buyer's specifications. At a trade fair, the seller displayed some of the shoes produced under the specifications, bearing a trademark of which the buyer was the licensee.[50] After the seller refused to remove the shoes, the buyer avoided the contract. The court held that the seller's breach of the ancillary duty of preserving exclusivity constituted a fundamental breach of the contract.[51]

Anticipatory Breach, Adequate Assurance, and Installment Contracts: Articles 71–73

The concept of fundamental breach is also a determining factor in the context of anticipatory breach. The CISG affords both buyers and sellers the right to suspend or avoid a contract due to a fundamental breach under Articles 71–73.[52] If a fundamental breach occurs or is likely to occur, the

[48] *S.A.R.L. Bri Prod. "Bonaventure" v. Société Pan Africa Export* (Feb. 22, 1995, (France), CLOUT Case No. 154, *available at* http://www.uncitral.org/english/clout/abstract/index.htm. In another case, it was determined that a buyer's failure to pay large sums due as "performance payments" was a fundamental breach of contract. *Shuttle Packaging Sys., L.L.C. v. Jacob Tsonakis*, INA S.A., 2001 WL 34046276 (W. D. Mich. 2001).

[49] *S.A.R.L. Bri Prod. "Bonaventure,"* Clout Case No. 154.

[50] OLG Frankfurt, 5 U 164/90, Sept. 17, 1991, (F.R.G.), CLOUT Case No. 2, *available at* http://www.uncitral.org/english/clout/abstract/index.htm.

[51] *Id.* Compare *FCF S.A. v. Adriafil Commerciale S.r.l.*, BGE, Sept. 15, 2000, (Switz.), *available at* http://cisgw3.law.pace.edu/cases/00091552.html. The case involved a buyer who purchased shoes through a commercial agent. After the buyer learned that identical shoes made by an Italian manufacturer were being offered for sale by a competing retailer at a considerably lower price, the buyer attempted to avoid the contract. Holding that the buyer was not entitled to avoid the contract, the court stated that there was no fundamental breach because the manufacturer had no knowledge about the branches of its business partners. Ultimately, the two cases can be reconciled under the principle that an ancillary obligation can only be a basis for a fundamental breach when it goes to the principle performance under the contract. *See, e.g.*, LG Frankfurt, 3/11 O 3/91 Sept. 16, 1991, (F.R.G.), CLOUT Case No. 6, *available at* http://www.uncitral.org/english/clout/abstract/index.htm.

[52] CISG at Arts. 71–3. *See Shuttle Packaging Systems, L.L.C. v. Jacob Tsonakis*, INA S.A.

non-breaching party may seek to suspend performance under Article 71 or to avoid the contract under Article 72. Although there is no bright-line standard for determining the degree of certainty needed to anticipate fundamental breach, there should be a very high degree of probability that the breach will occur.[53]

The installment contract requires a more complicated analysis. A breach of an installment must be analyzed to determine if the breach is to be considered fundamental within the installment and the contract as a whole. Article 73(1) implies that as a general rule, a breach of an installment performance gives the other party the right to declare the contract avoided only with respect to the installment.[54] If, however, it is determined to be fundamental to the whole, then the non-breaching party may avoid obligations in connection with future deliveries.[55] A stronger case for fundamental breach is made when there are a series of defective installment performances. This occured in the Spanish case of *T. SA v. E.*[56] Here, the seller delivered three installments four and eight weeks past the agreed upon dates, causing disruption to the buyer's

[53] LG Berlin, 99 O 123/92, Sept. 30, 1992, (F.R.G.), *available at* http://cisgw3.law.pace.edu/cases/920930g1.html. The chance of a breach should be "clear" or obvious to anyone. In German, the standard is defined by the words "it is clear" or *offensichtlich. Id.* For example, in a German case, a seller delivered the goods to a third-party's warehouse; after the third-party declared bankruptcy and the goods disappeared, the seller attempted to collect the alleged outstanding purchase price from the buyer. The court held that the buyer was not obligated to pay the purchase price, because the seller did not prove that the goods were lost after the risk passed to the buyer. OLG Hamm, 19 U 127/97, Jun. 23, 1998, (F.R.G.), CLOUT Case No. 338, *available at* http://www.uncitral.org/english/clout/abstract/index.htm. Parties are generally allowed to avoid a contract under similar circumstances under Article 72. For example, a buyer was entitled to terminate a contract concerning non-delivered goods where the seller only made a partial delivery after the price of the goods rose significantly. Arbitration Court attached to the Hungarian Chamber of Commerce and Industry, Vb/97142, May 15, 1999, (Hung.), CLOUT Case No. 265, *available at* http://www.uncitral.org/english/clout/abstract/index.htm. In another case, a seller was entitled to avoid a contract after the buyer failed to settle other bills with the seller. The buyer ordered 140 pairs of winter shoes from the seller; after the shoes were manufactured, the seller demanded security for the sales price as the buyer still had other unsettled bills with the seller. Because the buyer did not pay and did not furnish the security, the court held that the seller had the right to avoid the contract. OLG Düsseldorf, 17 U 146/93, Jan. 14, 1994, (F.R.G.), *available at* http://cisgw3.law.pace.edu/cases/940114g1.html.

[54] CISG at Art. 73(1). *See, e.g.*, *Schiedsgericht der Hamburger freundschaftlichen Arbitrage* [Arbitral Award], Dec. 29, 1998, (F.R.G.), CLOUT Case No. 293, *available at* http://www.uncitral.org/english/clout/abstract/ index.htm.

[55] *S.A.R.L. Bri Production "Bonaventure" v. Société Pan Africa Export.*

[56] *T, SA v. E*, Audiencia Provincial [Appellate Court] de Barcelona, sección 16ª, Nov. 3, 1997, (Spain), CLOUT Case No. 246, *available at* http://www.uncitral.org/english/clout/abstract/index.htm.

production process. The court ruled that avoidance was proper and canceled the remaining installments due under the contract.[57]

In addition to fundamental breach, a second issue that often arises in connection with anticipatory breach is the sufficiency of notice. In many instances, notice is improperly made or given too late. It should be noted that consistent with Article 27, if any notice is made by "means appropriate in the circumstances," a delay or error in the transmission of the communication or its failure to arrive does not deprive that party of the right to rely on the communication.[58] Under Article 71, a party suspending performance must "immediately" give notice of the suspension to the other party.[59] Such notice is to be given as soon as the party makes the decision to suspend performance.[60] For example, simply failing to pay the purchase price does not replace the notification that payment of the purchase price is being suspended until the other party properly fulfills the contract or provides adequate assurance.

The importance of notice is a general theme found throughout the CISG.[61] It is particularly evident in Article 71 (3). Failure to give proper notice under Article 71 (3) results in the revocation of an otherwise reasonable suspension of performance. A German court held that reasonable doubts about the buyer's creditworthiness were not sufficient to overcome the seller's failure to give notice pursuant to Article 71 (3).[62] The court reasoned that if the seller wanted to exercise his right of suspension, he was obligated to inform the buyer about any doubts regarding her creditworthiness or ability to perform her duties and liabilities under the sales contract. Inasmuch as the seller did not demonstrate that he gave any such notice and information to the buyer, he was not permitted to suspend performance. Hence, notification is an absolutely

[57] *Id.* To protect the right of avoidance, the avoiding party must give "reasonable notice" that a fundamental breach will occur with respect to future installments. CISG, *supra* Note 4, Art. 73(2). *See generally* HG Zürich, HG 930634, Nov. 30, 1998 (Switz.), *available at* http://cisgw3.law.pace.edu/cases/981130s1.html.

[58] CISG at Art. 27; *see* LG Stendal, 22 S 234/94, Oct. 12, 2000, (F.R.G.), *available at* http://cisgw3.law.pace.edu/cases/001012g1.html.

[59] CISG at Art. 71 (3).

[60] This was particularly true in a case in which the parties agreed upon a modification of the contract by reducing the purchase price. LG Stendal, 22 S 234/94, Oct. 12, 2000, (F.R.G.), *available at* http://cisgw3.law.pace.edu/cases/ 001012g1.html.

[61] *See, e.g.*, CISG at Arts. 18(3), 19(2), 21, 26, 27, 39, 43(1), 46(2), 47(1), 48, 63(2), 65(2), 71(3), 72(2), 73(2), 79(4), and 88(1).

[62] AG Frankfurt, 32 C 1074/90-41, Jan. 31, 1991 (F.R.G.). *available at* http://cisgw3.law.pace.edu/cases/910131 g1.html.

necessary prerequisite for exercising the right of suspension for anticipatory breach.[63]

Proper notice must also be given for a party to avail itself of the avoidance provisions in Article 72, except that the standard is slightly different.[64] Under Article 72, the party intending to declare the contract avoided must give "reasonable notice" to the other party to allow that party the opportunity to provide adequate assurance of performance.[65] The substance of the notice is just as important as the timing; notice must be given prior to the date of performance.[66] After the parties have performed the contract, neither party is entitled to declare the contract avoided under Article 72.

[63] *Id. See generally Hof van Beroep Gent*, 1997/AR/2235, Apr. 28, 2000, (Belg.), available at http://cisgw3.law.pace.edu/cases/000428b1.html; Netherlands Arbitration Institute 2319, Oct. 15, 2002, (Neth.), *available at* http://cisgw3.law.pace.edu/cases/021015n1.html.

[64] CISG at Art. 72.

[65] *Id.* Art. 72(2). The plain language of Article 72 reveals that a party needs to "simply allege (1) that the defendant intended to breach the contract before the contract's performance date and (2) that such breach was fundamental." *See Magellan Int'l Corp. v. Salzgitter Handel GmbH*, 76 F.Supp. 2d 919, 925–26 (N.D. Ill. 1999).

[66] *See generally* BGH VIII ZR 18/94, Feb. 15, 1995, (F.R.G.), *available at* http://cisgw3.law.pace.edu/cases/950215g1.html. One way that reasonable notice is given is when goods are examined upon receipt and a message is promptly faxed noting the nonconformity. *See generally* HO Helsinki, S 96/1215, Jun. 30, 1998, (Fin.), *available at* http://cisgw3.law.pace.edu/cases/980630f5.

CHAPTER EIGHT

BREACH OF CONTRACT BY SELLER

The remedies for breach of a contract by the seller are addressed in CISG Articles 45 through 52. Article 45 outlines the basic remedies of the buyer for the seller's breach.[1] Article 45's remedial framework does not distinguish between material and nonmaterial breaches.[2] Therefore, Article 45 must be read in conjunction with the notion of a fundamental breach described in Article 25.[3] Enforcing its rights to substituted goods, extension of time, and avoidance found in Articles 46 through 52 does not prevent the buyer from subsequently seeking damages under Articles 74–6 (reviewed in Chapter 10).[4] To this end, the following sections will review the range of buyer remedies outlined in Article 45.[5]

[1] *See, e.g.*, OLG Dusseldorf, 17 U 82/92, Jan. 8, 1998, (F.R.G.), *available at* http://cisgw3.law.pace.edu/cisg/wais/db/cases2/930108g1.html; AG Frankfurt 32 C 1074/90-41, Jan. 13, 1991, (F.R.G.), *available at* http://www.cisg.law.pace.edu/cisg/wais/db/cases2/910131g1.html; HG Zürich, HG 95 0347 Feb. 5, 1997, (Switz.), *available at* http://www.cisg.law.pace.edu/cisg/wais/db/cases2/970205s1.html; Schiedsgericht der Handelskammer Hamberg [Arbitration Tribunal], Mar. 21, 1996, (F.R.G.), *available at* http://www.cisg.law.pace.edu/cisg/wais/db/cases2/960321g1.html; OLG Zweibrucken, 2 U 27/01, Jul. 26, 2002, (F.R.G.), *available at* http://cisgw3.law.pace.edu/cases/020726g1.html; *SA P. v. AWS, R.G.* no. 982/01, Jan. 15, 2002, (Belg.), *available at* http://cisgw3.law.pace.edu/cases/020115b1.html; OGH 10 OB 518/95, Feb. 6, 1996, (Aus.), *available at* http://cisgw3.law.pace.edu/cases/960206a3.html.

[2] *See* Fritz Enderlein & Dietrich Maskow, International Sales Law 177 (1992).

[3] *See generally* Robert Koch, *The Concept of Fundamental Breach of Contract Under the United Nations Convention for the International Sale of Goods*, *in* Review of the Convention on Contracts for the International Sale of Goods, 1999, at 177–354, *available at* http://cisg.law.pace.edu/cisg/biblio/koch.html

[4] United Nations Convention on Contracts for the International Sale of Goods, April 11, 1980, 1489 U.N.T.S. 3, 19 I.L.M. 671, *available at* Pace Law School Institute of International Commerce Law, http://www.cisg.law.pace.edu (last updated Sept. 2003) (hereafter CISG) at Art. 45.

[5] *Id.* at Art. 45(1); *see also* OLG Koln, 27 U 58/96, Jun. 14, 1994, (F.R.G.), *available at* http://cisgw3.law.pace.edu/cases/970108g1.html. This German case provided an opportunity for interpretation of Article 45 (1). A Dutch seller delivered tannery machines to a

RIGHT TO SUBSTITUTED OR REPAIRED GOODS

Article 46 gives the buyer the right to demand performance of the unperformed elements of a contract, which is a concept that draws from the civil law system but is considered an extraordinary remedy in the common law system.[6] Under Article 46, the buyer may demand delivery of substitute goods if the lack of conformity of the goods constitutes a fundamental breach if he gives notice under article 39 or within a reasonable time thereafter.[7] However, this right may be limited in some countries by Article 28, which relieves a court of the obligation to order specific performance if such a remedy would not be granted under domestic law.[8] Finally, unless it is unreasonable under the circumstances, the buyer may require the seller to remedy the lack of conformity by repair. The request for repair must be made either in conjunction with notice given under Article 39 or within a reasonable time thereafter.[9] The buyer is not obliged to require the seller to remedy a breach;[10] he may instead move to his own remedies such as declaring avoidance and seeking damages.

German buyer, but he retrieved them to make adjustments. The seller agreed to return the machines at a certain time. When he failed to do so, the buyer was forced to contract with a third party for the tanning of hides. The seller's suit for the price of the machines was met with a counterclaim against the seller for the expense of covering with the third party contract. The Seller argued that the failure to perform a secondary obligation collateral to the contract did not give rise to a claim for damages under the CISG Article 45 (1). Citing authoritative commentary, the court refused to distinguish between primary and secondary obligations, noting that the duty to return the machines was a contractual duty without regard to its relation to the initial delivery pursuant to the contract. The court stated:

> *Inter alia*, Art. 45 (1) CISG applies if the seller fails to perform any other obligation under the contract or the Convention [Huber in: v. Caemmerer/Schlechtriem, Art. 45, n.10). Whether the obligation breached is a primary or a secondary obligation is only of importance in regarding the question of the existence of a fundamental breach of contract (Herber.Czerwenka, Art. 45 n.2). Without doubt, the [seller]'s contractual obligation to return the tanning barrels to the [buyer] is fundamental.

[6] *See* Enderlein & Maskow, *supra* Note 2, at 177. Enderlein and Maskow describe the right to require performance of the contract in Article 46 as "an expression of the *maxim pacta sunt servanda.*" They note that specific performance is a secondary remedy under the common law principles and in the UCC, but in theory it is more available under civil codes. *See also*, Siegfried Eiselen, *A Comparison of the Remedies for Breach of Contract Under the CISG and South African Law*, in Aufbruch nach Europea (Basedow et al. eds., 2001) *available at* http://www.cisg.law.pace.edu/cisg/biblio/eiselen2.html (comparing specific performance in Article 46(1) with principles drawn from common law countries).

[7] CISG at Art. 46(2).

[8] *Id.* at Art. 28 ("unless the court would do so under its own law in respect of similar contracts of sale not governed by this Convention").

[9] *Id.* at Art. 46(3).

[10] *See* Arbitration Court of the Chamber of Commerce and Industry of Budapest, VB/94131, Dec. 5, 1995, (Hung.), *available at* http://cisgw3.law.pace.edu/cases/951205h1.html.

If the seller delivers only part of the goods, or if only part of the goods delivered is in conformity with the contract, the buyer's remedies apply with respect to the missing or nonconforming part.[11] Partial non-performance can be the basis for avoidance of the contract only if it amounts to a fundamental breach.[12] Conversely, if the seller delivers the goods early, or if the seller delivers a quantity of goods greater than that provided in the contract, the buyer may refuse early delivery[13] and refuse delivery of excess goods.[14] If the buyer does take delivery of the excess goods, he is obligated to pay for them at the contract rate.[15]

RIGHT TO AFFIX ADDITIONAL TIME

Under Article 47, the buyer may fix a reasonable period of additional time for performance by the seller.[16] During that time, the buyer may not resort to other remedies unless the seller has notified the buyer that he will not perform within the period fixed by the buyer.[17] The buyer may unilaterally fix a time extension to overcome the presumption that a delayed performance does not generally constitute a fundamental breach and to limit the time for the seller to cure its breach. Article 48 allows the seller to cure any nonconformity and "even after the date for delivery, remedy at his own expense any failure to perform his obligations, if he can do so without unreasonable delay and without causing the buyer unreasonable inconvenience."[18] However, the seller must notify the buyer of its intent to deliver late. The buyer is then obligated to notify the seller if he intends to accept the late delivery. In the event that the buyer does not respond, then the seller is automatically granted the time extension.[19] From the buyer's perspective, the time extension provision in Article 47 can be used to limit the seller's right to cure and to ensure that the seller's failure to deliver at the expiration of the extended time period is a fundamental breach under the CISG. The elevation of untimely performance to the status of fundamental breach allows the buyer to avoid the contract. The relationship between contract extension or *nachfrist* and contract avoidance will be further explored in the next section.

[11] CISG at Art. 51(1). Few cases have been decided under Article 51. See LG Baden-Baden, 4 O 113/90, Aug. 14, 1991, (F.R.G.), *available at* http://www.cisg.law.pace.edu/cisg/wais/db/cases2/910814g1.html.
[12] CISG at Art 51(2).
[13] *Id.* at Art. 52(1).
[14] *Id.* at Art. 52(2).
[15] *Id.*
[16] *Id.* at Art. 47(1).
[17] *Id.* at Art. 47(2).
[18] *Id.* at Art. 48 (1).
[19] *Id.* at Art. 48(2).

RIGHT TO AVOID CONTRACT

As discussed in the preceding section, the buyer's right to avoid the contract under Article 49[20] arises as a result of a fundamental breach of contract [21] or non-delivery by the seller within the additional period of time fixed by the buyer under Article 47.[22] If, however, the seller delivers the goods, the buyer's options change. If the goods are delivered late, the buyer must declare the contract avoided within a reasonable period of time after he becomes aware of the late delivery.[23] In the case of a lack of conformity, other than late delivery, the buyer must avoid the contract within a reasonable time after he knew or should have known of the breach,[24] after the seller has failed to cure the breach within the period set by the buyer under Article 47,[25] after the seller has declared that he will not perform within such a period,[26] after the expiration of any additional time period indicated by the seller under Article 48, or after the buyer has indicated that he will not accept performance under Article 48.[27] The limitation of the avoidance remedy to the above events is consistent with the CISG's underlying policy of contract continuance. The importance of completing transactions is based upon the recognition of the high costs of contract avoidance associated with international sales.[28]

Courts and tribunals have evolved a substantial body of law associated with Article 49.[29] Conflicts appear to arise often as problems of whether a

[20] *See generally* Catherine Piche, *The Convention on Contracts for the International Sale of Goods and the Uniform Commercial Code Remedies in Light of Remedial Principles Recognized Under U.S. Law: Are the Remedies of Granting Additional Time to the Defaulting Parties and of Reduction of Price Fair and Efficient Ones?*, 28 N.C. Int'l L. & Com. Reg. 519 (2003).

[21] *See generally*, Robert Koch, *The Concept of Fundamental Breach of Contract Under the United Nations Convention for the International Sale of Goods*, in Review of the Convention on Contracts for the International Sale of Goods (1999), at 300, *available at* http://cisg.law.pace.edu/cisg/biblio/koch.html. (discussing the relationship of seller's fundamental breach and the right of avoidance).

[22] CISG at Art. 49(1)(a)-(b). *See* Piche, *supra* Note 684, at 526 (Avoidance "relieves both parties of executory performance obligations").

[23] CISG at Art. 49(2)(a) *See* Enderlein & Maskow, *supra* Note 2, at 191 ("The declaration is unilateral, does not permit conditions, and cannot be revoked.")

[24] CISG at Art. 49(2)(b)(i).

[25] *Id.* at Art. 49(2)(b)(ii)

[26] *Id.*

[27] *Id.* at Art. 49(2)(b)(iii).

[28] Piche, *supra* Note 20, at 531.

[29] Unfortunately, the jurisprudence has been divergent and has evidenced homeward trend tendencies. *FCF S.A. v. Adriafil Commerciale S.r.l.*, Bundesgericht [BGE] [Federal Supreme Court], Sept. 15, 2000, (Switz.), *available at* http://cisgw3.law.pace.edu/cases/000915s2.html. In this case, a Swiss court used language that to the common law lawyer appears to reflect a homeward trend in its mode of interpretation. The court was faced with a contract for cotton to be delivered between certain dates with the payment to be made by a letter of credit due sixty days after the date of customs clearance. The buyer and seller contracted

fundamental breach has occurred such as to give rise to the buyer's right of avoidance under Article 49(1)(a). Normally, the outcome in those cases turns on interpretation of CISG Article 25.[30] Article 25's definition of fundamental breach was discussed in Chapter 7.[31]

Some cases have addressed the buyer's obligation to give notice of avoidance.[32] There is a good deal of variability on the kinds of actions that constitute sufficient notice. One German court held that under Article 27, the buyer need only prove that notice of avoidance was sent, not that it arrived.[33] In contrast, another German court declared that the buyer "must expressly declare the agreement avoided vis-à-vis the opposite party so that there are not any remaining doubts. . . . [S]uch a declaration of avoidance must be explicitly recognizable and realizable to the other party."[34] A Russian arbitration panel

for a series of cotton deliveries that, to condense the facts, did not materialize according to the times specified in the contract. The buyer sued for the costs of cover, and the seller complained that the buyer had unilaterally cancelled the contracts with no justification. One of the issues for the court to consider was the significance of avoidance under Article 49 (1). Citing commentary on the CISG, the court characterized avoidance under the CISG in this manner: "It is not an avoidance in the juridical way of the words with effects *ex tunc*, but a *resiliation* which releases both parties from their contractual obligations yet to be executed and which executes itself *ex nunc*." *Id.* The court in explaining its decision in a manner sensible to Swiss lawyers is doing so at the expense of hindering the development of uniform concepts.

30 The typical cases involve two types of fact patterns: (1) non-delivery of the goods, *see, e.g.*, Helsinki Court of Appeal, S 96/605, Mar. 27, 1997, (Fin.), *available at* http://cisgw3.law.pace.edu/cases/970327f5.html; Turku Court of Appeal S 95/1023, Feb. 18, 1997, (Fin.), *available at* http://cisgw3.law.pace.edu/cases/970218f5.html; FCF S.A. v. Adriafil Commerciale S.r.l., Bundesgericht [BGer][Supreme Court], 4C.105/2000, Sep. 15, 2000, (Switz.), *available at* http://cisgw3.law.pace.edu/cases/000915s2.html; Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, 7531 of 1994, May 11, 1997, (Russ.), *available at* http://cisgw3.law.pace.edu/cases/947531i1.html; BGH, VIII ZR 306/95, Dec. 4, 1996, (F.R.G.), *available at* http://cisgw3.law.pace.edu/cases/961204g1.html. (2) Delivery of goods whose nonconformity is alleged to be fundamental, *see, e.g.*, OLG Frankfurt, 5 U 15/93, Jan. 18, 1994, (F.R.G.), *available at* http://cisgw3.law.pace.edu/cases/940118g1.html; LG Munchen, 10 O 5423/01, Feb. 20, 2002, (F.R.G.), *available at* http://cisgw3.law.pace.edu/ cases/020220g1.html; ICC Arbitration Case No. 7531 of 1994, *available at* http://cisgw3.law.pace.edu/cases/ 947531i1.html.

31 *See supra*, Chapter 7.

32 *See, e.g.*, LG Frankfurt a.M. 3/11 O 3/91, Sept. 16, 1991, (F.R.G.), Case No. 6; Appellate Court Frankfurt 5 U 164/90, Sept. 17, 1991, *available at* http://cisgw3.law.pace.edu/cases/910917g1.html; Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, May 11, 1997, (Russ.), abstract *available at* http://cisgw3.law.pace.edu/cases/947531i1.html.

33 Appellate Court Naumberg, Apr. 27, 1999, (F.R.G.), *available at* http://cisgw3.law.pace.edu/cases/990427g1.html.

34 Bezirksgericht der Saane (Zivilgericht) [District court] T 171/95 (Feb. 20, 1997, Switzerland), *available at* http://cisgw3.law.pace.edu/cases/970220s1.html. Yet another German court held that a cancellation of the "order of March 1990" was insufficient notice of avoidance.

disregarded the need for such a formal declaration.[35] It did not identify any specific action that the buyer needed to take, but indicated simply that a study of the evidence demonstrated that "the [buyer] has demonstrated by [buyer's] statement of action, if not earlier, that [buyer] had considered the contract as avoided."[36] Thus, the formality and the content needed to satisfy the notice requirement under Article 49 has not been clearly resolved.

The importance of the prompt notice was emphasized by another German court.[37] It denied the buyer the right to avoidance because the declaration of avoidance occurred five months after the breach. Although Article 49(1)(b) does not explicitly require notice of avoidance within a reasonable time, the court construed the language of the section (remedies for breach of contract by seller), as a whole, to require reasonably prompt notice.[38]

Landgericht Frankfurt [District Court] a.M. 3/11 O 3/91, Sept. 16, 1991, (F.R.G.), CLOUT Case No. 6. Abstract abstract *available at* http://cisgw3.law.pace.edu/cisg/wais/db/cases2/910916g1.html. A subsequent court found the contents of a buyer's telegram to the seller to be a sufficiently specific declaration of avoidance. "An explicit reference to the avoidance of the contract, pursuant to the CISG, was not required for the validity of the legal effects of the avoidance of the contract. . . . It was sufficient that the [buyer] made clear that she wouldn't pay the [seller's] bill because of her breach of contract" Appellate Court Frankfurt 5 U 164/90, Sep. 17, 1991, (F.R.G.), *available at* http://cisgw3.law.pace.edu/cases/910917g1.html.

35 Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, May 11, 1997, (Russ.), *available at* http://cisgw3.law.pace.edu/cases/947531i1.html. It cited an earlier arbitral decision in which it was held that an arguably late declaration of avoidance by a buyer was excused by bad faith behavior of the seller. ICC Arbitration Case No. 7645 of March 1995, *available at* http://cisgw3.law.pace.edu/cases/957645i1.html.

36 *Id.*

37 BGH, VIII ZR 18/94, Feb. 15, 1995, (F.R.G.), *available at* CLOUT Case No. 124, http://www.uncitral.org/english/clout/abstract/abstr9.htm.

38 Article 49(1)(b) permits the buyer to avoid the contract if the seller does not deliver the goods within the time frame permitted under the time extension provision of Article 47. The right to avoidance can be lost for failure to provide additional time under Article 47. *See, e.g.*, Oberlandesgericht Koln U 202/93, Feb. 22, 1994, (F.R.G.), CLOUT Case No. 120, Abstract, *available at* http://www.uncitral.org/english/clout/abstract/abstr9.htm. The question arises, in interpreting this article, of the timeliness of the buyer's declaration of avoidance following the expiration of the additional time period given pursuant to Article 47. Often this is a judgment based on the nature of the goods and the circumstances of the parties. In a German case involving the sale of printing machines by a German seller to an Egyptian buyer, an additional period of two weeks was provided the seller. When the machines still had not been delivered seven weeks after the additional time was announced, the buyer declared avoidance of the contract, and the court found this to be within a reasonable time period. Oberlandesgerichthof Celle 10 U 76/94, May 24, 1995, (F.R.G.), CLOUT Case No. 136, Abstract, *available at* http:/www.uncitral.org/english/clout/abstract/abstr10.htm. Another German district court reached the same result on similar facts that year, noting contrary scholarly authority. LG Ellwangen, Aug. 21, 1995, (F.R.G.), *available at* http://cisgw3.law.pace.edu/cases/950821g2.html.

The question of timeliness of the notice of avoidance has arisen in cases involving Article 49(2) as well. In *T, SA v. E Audiencia Provincial de Barcelona*,[39] a Spanish court found 48 hours to be a reasonable time after a fundamental breach for giving notice of avoidance. In a novel fact situation, the buyer was held to have forfeited the right to avoid the contract because the buyer failed to abide by contractual terms obligating it to notify the seller of its intent to avoid within a specified time frame.[40] In holding a one-day notice of avoidance to be timely and reasonable, a German court likened the "reasonable time period" language of Article 49(2)(b) to the concept of promptness or *unverzüglisch* in the German civil code.[41] But in a 2002 case involving the international sale of a stolen car, another German court held three months to be a reasonable time period after learning of the failure of title in which to give notice of avoidance to the seller.[42] In a Finnish case, the court held that three years was not a reasonable time period in which to give notice of avoidance.[43] Thus, although timeliness is a continuing issue under Article 49, the fact-specific nature of most cases of timeliness makes uniformity of interpretation and application difficult to assess.

RIGHT TO A PRICE REDUCTION

Under Article 50, the buyer can reduce the price of goods[44] that do not conform to the contract, even if the price has already been paid.[45] To reduce the price, the buyer must simply disclose the reduction, which does not preclude a claim for damages sustained due to the nonconformity. The reduction must be proportionate to the value at the time of delivery that the non-conforming

[39] T, SA v. E Audiencia Provincial de Barcelona, seccion 16a, Nov. 3, 1997, (Spain), *available at* http://cisgw3.law.pace.edu/cases/971103s4.html.

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

[41] Appellate Court Frankfurt 5 U 164/90, Sep. 17, 1991, (F.R.G.), *available at* http://cisgw3.law.pace.edu/cases/910917g1.html.

[42] LG Freiburg 8 O 75/02 22, August 2002, (F.R.G.), *available at* http://cisgw3.law.pace.edu/cases/020822g1.html.

[43] "In this kind of commercial transaction, a reasonable time for notice is most often very short, at most a few months. To extend this period would require pressing circumstances indeed" Turku Court of Appeals, Apr. 12, 2002, (Fin.), *available at* http://cisgw3.law.pace.edu/cases/020412f5.html.

[44] *See* Piche, *supra* Note 20, at 548, 558–65 (tracing the principle of price reduction to the *actio quanti minoris* of Roman law through the Justinian Compilations, and explaining the justifications for the price reduction remedy).

[45] There is some controversy among commentators with respect to whether a nonconformity of quantity, as opposed to quality, justifies a price reduction. Piche, *supra* Note 20, at 551.

goods bore to the value of the conforming goods. The CISG does not indicate the place where the value of the goods will be assessed, but better thinking suggests it would be the place "where the seller has to perform."[46]

The major issue under CISG Article 50 is the proper measure of price reduction.[47] Article 50 refers to "value" rather than to contract price. At least one arbitral tribunal, citing scholarly authority, has identified the buyer's place of business or the place where the goods will be directed as the market in which value is to be ascertained.[48] Beyond that, ascertaining a ratio of the value of the nonconforming goods relative to the value of conforming goods is an evidentiary matter.[49]

[46] Enderlein & Maskow *supra* Note 2, at 196; Piche, *supra* Note 20, at 555. The buyer may not reduce the price if the seller has remedied his failure to perform in accordance with Article 37 or Article 48 or if the buyer refuses to accept performance by the seller in accordance with those Articles. CISG, *supra* Note 4, Art. 50.

[47] Budapest Arbitration proceeding VB/94131 Arbitration Court of the Chamber of Commerce and Industry of Budapest, Dec. 5, 1995, (Hungary), *available at* http://cisgw3.law.pace.edu/cases/951205h1.html; Landesgericht Aachen 41 0 198/89 [District Court], Apr. 3, 1989, (F.R.G.), *available at* http://cisgw3.law.pace.edu/cases/900403g1.html; CLOUT Case No. 46, Jan. 17, 1997, (F.R.G.); Tampere Court of First Instance, Nov. 9, 1995, (Fin.), abstract, *available at* http://cisgw3.law.pace.edu/cases/970117f5.html; Overlandesgericht [OLG] (Provincial Court of Appeal] 6 R 194/95, *available at* http://cisgw3.law.pace.edu/cases/95110 9a3.html; Canton of Ticino: Pretore della giurisdizione di Locarno Campagna, Apr. 27, 1992, CLOUT Case No. 56 (Switzerland), Abstract, *available at* http://www.uncitral.org/english/clout/abstract/abstr4.htm.

[48] Budapest Arbitration proceeding VB/94131 Arbitration Court of the Chamber of Commerce and Industry of Budapest, Dec. 5, 1995, (Hungary), *available at* http://cisgw3.law.pace.edu/cases/951205h1.html.

[49] *See, e.g.*, Landesgericht Aachen 41 0 198/89, Apr. 3, 1989, (F.R.G.), CLOUT Case No. 46, Abstract, a*vailable at* http://www.uncitral.org/english/clout/abstract/abstr3.htm. *See also* Tampere Court of First Instance, Jan. 17, 1997, (Fin.), *available at* http://cisgw3.law.pace.edu/cases/970117f5.html (the court held, however, that the right of price reduction for nonconforming goods is "independent of whether the buyer has sold the goods further and at what price or whether the buyer has been subject to complaints or demands for compensation"); Canton of Ticino: Pretore della giurisdizione di Locarno Campagna, Apr. 27, 1992, (Switzerland), CLOUT Case No. 56, *available at* http://www.uncitral.org/english/clout/abstract/abstr3.htm (rejected a seller's plea that the price reduction should equal the cost of repairing the nonconforming goods, in favor of the Article 50 measure of reduction based on proportionality of value).

CHAPTER NINE

BREACH OF CONTRACT BY BUYER

The CISG provides for numerous procedures and remedies in the event of late performance by the seller or default by the buyer. These procedures and remedies are set forth in Articles 47, 48 and 61 through 65. The initial procedure established by these articles relates to late performance by the seller. In such circumstances, the buyer may set an additional period of time of "reasonable length" for the seller's performance.[1] The buyer may not resort to any remedy for breach of contract during this period of time unless the buyer receives notice from the seller that it will not perform the contract regardless of any such extension.[2] However, the buyer may claim damages resulting from the seller's delay in performance.[3] In addition, the seller may, after the date of delivery, remedy, at its own expense, its failure to perform.[4] Despite this provision, the seller must be able to remedy its failure without "unreasonable delay and without causing the buyer unreasonable inconvenience or uncertainty of reimbursement of expenses advanced by it."[5] The seller may request the buyer to make known whether it will accept such performance, and the buyer is required to respond to this request within a reasonable time.[6] Such request is in fact assumed to be contained in any notice by the seller that it will perform within a specified time.[7] If the buyer does not respond, the seller may perform the contract within the time set forth in the

1 CISG at Art. 47(1).
2 *Id.* at Art. 47(2).
3 *Id.*
4 *Id.* at Art. 48(1).
5 *Id.*
6 *Id.* at Art. 48(2).
7 *Id.* at Art. 48(3).

request.[8] However, the request is not effective unless actually received by the buyer.[9]

Articles 61 through 65 provide remedies for breach of contract by the buyer. As a general proposition, in the event of default by the buyer, the seller may exercise its rights pursuant to Articles 62 through 65 and Articles 74 through 77.[10] The exercise of these remedies does not deprive the seller of any rights to claim damages pursuant to other provisions of the CISG.[11] Furthermore, the buyer is not entitled to receive additional time to perform by a court or arbitral tribunal in the event the seller seeks relief for breach of contract.[12] However, the seller may not seek a remedy inconsistent with any attempt to require the buyer to pay the price, take delivery of the goods, or perform other contractual duties.[13]

The seller has numerous options in the event of the failure of the buyer to perform its contractual obligations. Article 63 provides that the seller may fix an "additional period of time of reasonable length" for the buyer's performance.[14] The seller may not resort to any remedy for breach of contract during any extension granted pursuant to Article 63.[15] The seller is, however, entitled to claim damages incurred as a result of the buyer's delay in performance.[16]

The seller also retains the option of declaring the contract avoided. This declaration is limited to two specific circumstances. Initially, the seller may declare the contract avoided in the event that the buyer's failure to perform its obligations amounts to a fundamental breach of contract.[17] Second, the seller may declare the contract avoided if the buyer fails to perform the contract within the additional period of time granted by the seller pursuant to Article 63 or states its intention not to perform within this period of time.[18] This right to declare the contract avoided is further limited in those circumstances where the buyer has paid the price. In such circumstances, the seller may not declare the contract avoided unless it does so "in respect of late performance by the buyer, before the seller . . . become[s] aware that performance has been

[8] *Id.* at Art. 48(2).
[9] *Id.* at Art. 48(4).
[10] *Id.* at Art. 61(1)(a–b).
[11] *Id.* at Art. 61(2).
[12] *Id.* at Art. 61(3).
[13] *Id.* at Art. 62.
[14] *Id.* at Art. 63(1).
[15] *Id.* at Art. 63(2).
[16] *Id.*
[17] *Id.* at Art. 64(1)(a).
[18] *Id.* at Art. 64(1)(b).

rendered."[19] The seller may also declare the contract avoided in the event of breaches other than late performance "within a reasonable time after the seller knew or ought to have known of the breach."[20] The right to avoid the contract also exists when the buyer fails to perform its obligations within any additional period of time fixed by the seller or advises the seller that it will not perform its obligations within such additional time.[21]

Finally, Article 65 governs in the event that the buyer's breach consists of its failure to advise the seller of the form, measurement, or other features of the goods that are the subject matter of the contract. In the event the buyer fails to provide the seller with such specifications within the time provided by the contract or within a reasonable time after receipt of a request from the seller, the seller may make the specification itself in accordance with the buyer's requirements that are known to the seller.[22] The seller is required to inform the buyer of the details of the selected specifications and set a reasonable time within which the buyer must provide different specifications.[23] The seller is entitled to utilize its selected specifications if the buyer fails to communicate different specifications within the set by the seller.[24]

NACHFRIST NOTICE: ARTICLE 47

Article 47 gives the buyer the right to grant additional time to the seller for performance. The failure of the seller to perform within this additional period of time permits the buyer to avoid the contract. This request for additional time, known as *nachfrist* notice in German law, is commonly found in the civil law legal systems.[25] The underlying premise behind the concept is that delayed performance does not necessarily translate into a material breach. National courts called upon to interpret the CISG's provisions with respect to breach of contract have concentrated on two issues raised by Article 47. The first issue is what constitutes a reasonable period of time granted by the buyer in order for the seller to complete performance? The time extension must be reasonable in length in order to prevent buyers from avoiding contracts on the basis of inconsequential delays in performance.

[19] *Id.* at Art. 64(2)(a).
[20] *Id.* at Art. 64(2)(b)(i).
[21] *Id.* at Art. 64(2)(b)(ii).
[22] *Id.* at Art. 65(1).
[23] *Id.* at Art. 65(2).
[24] *Id.*
[25] *See generally* Larry A. DiMatteo, The Law of International Business Transactions 229–231 (2003).

Commentators addressing this issue have devised different tests with respect to what constitutes a reasonable period of time. For example, Professor Schlechtriem defines a reasonable period of time to be provided pursuant to a buyer's *nachfrist* notice as based upon:

> [1] Length of time of the contractual delivery period (transactions with short delivery dates justify a shorter additional period, long delivery dates require a longer additional period); [2] the buyer's recognizable interest in rapid delivery, if the seller should have been aware of that interest upon conclusion of the contract; [3] the nature of the seller's obligation (a longer period is reasonable for delivery of complicated apparatus and machinery of the seller's own manufacture than for delivery of fungible goods by a wholesaler); [4] the nature of the impediment to delivery (if the seller is affected by a fire or strike, the buyer can be expected to wait for a certain time if the delivery is not particularly urgent).[26]

Other commentators have emphasized the seller's side of the transaction by focusing on the length of the contractual period for delivery, the nature of the seller's performance, and the nature of the obstacle impeding delivery.[27] By contrast, other commentators have concluded that the primary factor in the determination of reasonableness is "the buyer's need for delivery of the goods without further delay . . . considered in the light of the basic policy decision . . . that contracts should not be avoided on insubstantial grounds."[28]

The three national courts that have addressed this issue have taken somewhat different approaches. One German court focused upon the need for specificity in setting the time extension.[29] A buyer granted an eleven day extension to a seller to deliver all components of the printing machinery that was the subject matter of the contract. In upholding the buyer's right to declare the contract to be in breach, the court held that the specific period of additional time established by the buyer for performance was not unreasonable. Thus, the buyer was entitled to avoid performance of the contract. Other courts have permitted buyers to avoid sales contracts on the basis of notices that were not specific with respect to the additional period of time granted to

[26] Peter Schlechtriem, Uniform Sales Law – The UN Convention for the International Sale of Goods 396 (1986).

[27] *See* Fritz Enderlein & Dietrich Maskow, International Sales Law 183 (1992); *see also* Ericson P. Kimbel, *Nachfrist Notice and Avoidance under the CISG*, 18 J.L. & Com. 301 (1999).

[28] John Honnold, Uniform Law for International Sales Under the 1980 United Nations' Convention § 289, at 370–71 (2d ed. 1991).

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

the sellers for performance. A French court for example, permitted a buyer to avoid performance of a sales contract for high technology machinery on the basis that the seller advised the buyer of its intent to repair the machinery subsequent to its delivery.[30] The failure of the seller to effect adequate repairs pursuant to its promise justified the buyer's attempt to avoid the contract even in the absence of a specific time granted by the buyer for such repairs.[31] Under this version of Article 47, the time extension need not be precise but rather only capable of judicial interpretation as reasonable.[32]

The second issue addressed by the courts is the effect of the buyer's failure to grant the seller additional time for performance under Articles 47. Decisions on this issue have varied depending on whether the buyer ultimately seeks equitable or legal relief. The buyer may be barred from declaring contract avoidance by its refusal to grant the seller additional time[33] However, the buyer has been allowed to declare the contract to be avoided in two circumstances. First, the buyer is free to declare the contract avoided if the seller notifies the buyer that it does not intend to perform the contract regardless of whether the buyer grants an additional period of time for performance.[34] Second, the buyer may declare the contract to be avoided in the absence of a grant of additional time if the seller promises to perform the contract but only upon terms inconsistent with the existing agreement between the parties or upon a renegotiation of the contract.[35]

[30] *See Giustina Int'l Sp.A. v. Perfect Circle Europe SARL*, CA Versailles, 1e ch. Jan. 29, 1998, *available at* http://witz.jura.uni-sb.de/CISG/decisions/290198v.htm.

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

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

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

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

[35] *See* Schiedsgericht der Handelskammer, Recht der Internationalen Wirtschaft [RIW], 766–74 (F.R.G. 1996). The buyer is not required to grant the seller additional time to perform as a precondition to declaring the contract to be avoided if the seller states that it will only perform upon the buyer's satisfaction of additional terms not within the parties' original agreement or upon a renegotiation of the contract between the parties. *See* Schiedsgericht Hamburger Freundschaftliche Arbitrage, Recht der Internationalen Wirtschaft [RIW], 394–96 (F.R.G. 1999).

The buyer's failure or refusal to grant the seller additional time does not prevent him from obtaining legal, as opposed to equitable, remedies.[36] Buyers are free to seek any number of damage awards against breaching sellers. For example, an injured buyer may seek compensatory damages resulting from the seller's breach of its obligations.[37] Buyers are also free to recover additional costs associated with obtaining substitute performance, such as the difference between the contract price and the price ultimately paid by the seller to obtain substitute goods.[38] In the absence of a substitute purchase, the buyer's recovery is calculated as the difference between the contract price and the current price of the goods at the time of the seller's breach by the buyer.[39] Finally, the buyer may seek consequential damages consisting of lost profits assuming that proper proof thereof is presented to the court.[40]

LATE PERFORMANCE: ARTICLE 48

Courts applying Article 48 have focused on two issues. The initial issue addressed by national courts is what constitutes an unreasonable delay in performance as to constitute a fundamental breach of contract. Article 48 recognizes the buyer's right to use or resell tendered goods or to seek substitute performance. However, the buyer's rights are to be balanced against the seller's right to remedy its defective performance. In striking this balance, courts must first consider the nature of the nonconformity of the tendered goods and the readiness of the seller to remedy the nonconformity.[41] This determination is also dependent upon the consent of the buyer to the late performance. However, the buyer may not unjustifiably reject attempts by the seller to remedy the nonconformity through the delivery of substitute goods in a prompt fashion.[42] This conclusion has caused one arbitral panel to conclude that the seller has a right to remedy nonconformities in its performance, which is impervious to interference by the buyer.[43] The buyer may decline to accept

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

[37] *Id.* (permitting a German buyer to seek compensation for the cost of treatment and remediation of defective chemicals delivered by an Italian seller).

[38] *See, e.g.*, OLG Hamburg, 1 U 143/95, Jul. 4, 1997, (F.R.G.), *available at* www.cisg.law.pace.edu/cisg/wais/db/cases2/970704g1.html.

[39] *Id.*

[40] *See, e.g.*, *SA P. v. AWS*, Trib. de Commerce Namur [District Court], RG. no. 985/01, Jan. 15, 2002, (Neth.), *available at* http://www.cisg.law.pace.edu/cisg/wais/db/cases2/020115b1.html.

[41] *See* OLG Koblenz, 37–39, 1997). *See also* Int'l Chamber of Commerce, n. 7531/1994, ICC Int'l Ct. of Arb. Bull. 67–68 (Nov. 1995).

[42] *See* OLG Koblenz, 37–39, 1997).

[43] *See* Int'l Chamber of Commerce, n. 7754, ICC Int'l Ct. of Arbitration Bull. 46–49 (2000).

the seller's tender of conforming goods only if it would have incurred *substantial and serious injury* by waiting. In defining substantial and serious injury, one national court has focused upon the production stoppage caused by the delivery of non-conforming goods.[44]

The second issue addressed by courts interpreting Article 48 is identification of damages that are properly recoverable by buyers. As set forth in judicial interpretations of Article 47, buyers are entitled to a wide variety of damages in the event the seller fails to tender conforming goods or where late tender causes unreasonable inconvenience. Buyers are generally entitled to compensatory damages. One example in this regard is the cost to the buyer of purchasing substitute performance from third parties.[45] By contrast, the buyer who retains the goods is entitled to a price reduction equal to the reduced value of the goods.[46] Buyers may recover other damages incurred by its retention of nonconforming goods, such as treatment costs and other costs associated with remedying the nonconformities.[47]

AVOIDANCE OF CONTRACT: ARTICLE 64

Courts interpreting Article 64 have focused on what constitutes a fundamental breach by the buyer such as to permit the seller to declare the contract avoided. The opinions have failed to reach a definition of fundamental breach. However, it is apparent from the opinions that, in order to constitute a fundamental breach, the buyer's failure to act must not be easily repairable.[48] Based upon this general conclusion, the opinions of the national courts may be organized into three separate categories.

[44] AG München, 271 C 18968/94, June 23, 1995, (F.R.G.), *available at* http://www.cisg.law.pace.edu/cisg/wais/db/cases2/950623g1.html. In addition, a substantial and serious injury may occur in the event the nonconforming goods are sold by the buyer to third parties, which in turn results in stoppage of their production and resultant claims of damages against the buyer. *Id.*

[45] *See* OLG Hamm, Recht der Internationalen Wirtschaft [RIW] 689–90 (F.R.G. 1996).

[46] *See* OLG Koblenz, 37–39, 1997).

[47] AG München, 271 C 18968/94, June 23, 1995, (F.R.G.), *available at* http://www.cisg.law.pace.edu/cisg/wais/db/cases2/950623g1.html. Other damages recoverable by the buyer include loss of value of the goods as a result of delivery delays and additional transportation costs incurred by the buyer as a result of such delays. *See* Joachim v. La Sarl Holding Manin Riviere, CA Grenoble, Cass. Com., RG 93/4879, Apr. 26, 1995, *available at* http://witz.jura.uni-sb.de/CISG/decisions/260495v.htm.

[48] *See, e.g.*, HG Zürich, SZIER 51–53 (Switz. 1995) (concluding that a flaw in a salt water container resulting in leakage was easily repairable and thus did not constitute a fundamental breach of contract between the Swiss seller and the German buyer).

The first category of cases concerns delays in the buyer's performance. In this regard, a fundamental breach occurs if it is readily apparent to the seller that the buyer has no intention of fulfilling its contractual duties.[49] Under such circumstances, the seller is relieved of its obligation to tender a performance rendered useless as a result of the buyer's anticipatory breach.[50] In a similar fashion, the failure of the buyer to perform the contract during any additional period of time granted by the seller may also be deemed a fundamental breach.[51] This same conclusion holds true when the seller does not formally grant an additional period of time to perform but nevertheless delays in filing litigation or seeking other remedies against the buyer.

It is important to note that not all delays in performance constitute a fundamental breach. Minor delays in performance do not constitute fundamental breaches of contract.[52] One court concluded that, in order for the seller to declare the buyer's delayed performance to be a fundamental breach, the contract must provide that the time of performance is of the essence.[53] Time may be of the essence either through the express declaration of the parties or through surrounding circumstances, such as the foreseeability of damage to the subject matter of the contract in the event of a delay.[54]

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

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

[50] *Id.*

[51] *See, e.g.*, Oberster Gerichtshof, [2000] RdW No. 643 (Aus.); Bielloni Castello SpA v. EGO, SpA, Corte app. di Milano, (It.), Dec. 11, 1998, Rivista trimestrale di diritto e procedura civile, 112–16 (1999); Handelsgericht Aargau, SZIER 78–80 (Switz. 1997).

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

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

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

formal demand from their sellers.[55] As a result, the failure of the buyer to remit payment to the seller for conforming goods tendered pursuant to a sales contract within the CISG constitutes a fundamental breach permitting the seller to avoid performance. This failure to remit payment may take many forms. However, the most common form is the buyer's failure to open or establish a letter of credit as required by the sales contract.[56] Less certain with respect to the determination of a fundamental breach are circumstances surrounding the buyer's operations that indicate the unlikelihood of payment. Chief in this regard is the appointment of a receiver or the placement of the buyer's business operations under the administration of a receiver.[57]

The third category of decisions relating to the identification of fundamental breach concerns issues arising from delivery. An initial group of cases found a fundamental breach arising from the buyer's unjustifiable refusal to accept delivery of goods from the seller. The buyer's non-acceptance may simply consist of a refusal to accept a delivery of conforming goods tendered pursuant to the contract.[58] However, the refusal to take delivery need not consist of a rejection of the entire delivery tendered. At least one court has concluded that the buyer's failure to take delivery of fifty percent or more of the goods tendered constitutes a fundamental breach upon which the seller may avoid further performance.[59] In addition, the buyer's express refusal to

[55] *See, e.g.*, Tribunal of International Arbitration at the Russian Federation Chamber of Commerce and Industry [ICA Arbitral Tribunal], Case No. 387/1995, Apr. 4, 1998, (Russ.), *available at* http://www.cisg.law.pace.edu/cisg/wais/db/cases2/980404r1.html.

[56] *See, e.g., Helen Kaminski PTY Ltd. v. Mktg. Australian Prods., Inc.*, No. M-47(DLC), 1997 U.S. Dist. LEXIS 10630 (S.D.N.Y. July 21, 1997); *see also* Supreme Court of Queensland [Q.S. Ct.], *Down Investments v. Perwaja Steel*, Nov. 17, 2000, (Aust.); Rechtbank van Koophandel [District Court] [Kh] Hasselt, AR 1849/94, May 2, 1995, (Belg.), *available at* http://www.cisg.law.pace.edu/cisg/wais/ddb/cases2/950502b1.html; *Zhong v. Xiamen Trade*, Analysis of Modern Chinese Commercial Disputes with Foreign Elements, at 132–36 (Guo Jiufenan ed. 1995) (Xiamen Intermediate People's Court, Dec. 31, 1992). One arbitral panel has refused to conclude that the buyer's failure to open or establish a letter of credit automatically constitutes a fundamental breach of contract. *See* Int'l Chamber of Commerce, Case No. . 7585/1992, ICC Int'l Ct. of Arb. Bull. 60–64 (Nov. 1995). Nevertheless, this holding may be disregarded to the extent that the court found an independent basis for determining the existence of a fundamental breach of contract, specifically, the buyer's initial failure to perform its contractual obligations within the period of time between the buyer's failure and the time the seller declared the existence of a fundamental breach.

[57] *See, e.g., Roder-Zelt und Hallenkonstruktionen GmbH v. Rosedown Park Pty Ltd.*, 17 A.C.S.R. 153 (Aust. 1995).

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

[59] *See* OLG Hamm, 8 U 250/91, Jan. 25, 1993, (F.R.G.), *available at* http://www.cisg.law.pace.edu/cisg/wais/db/cases2/930125g1.html (refusal to accept delivery of 120 tons of bacon

accept future deliveries without justification pursuant to an installment sales contract may constitute a fundamental breach.[60] Finally, the seller may avoid further contractual performances in the event that the buyer fails to disclose the ultimate destination of the goods.[61] A fraudulent disclosure in this regard also constitutes a fundamental breach.[62]

EFFECTS OF AVOIDANCE: ARTICLES 81–84

The effects of avoidance are set forth in Articles 81, 83, and 84.[63] Avoidance of the contract releases both parties from their obligations subject to any damages attributed to them.[64] Additionally, a party who has wholly or partially performed the contract may claim restitution from the other party consisting of whatever has been paid or supplied under the contract.[65] Articles 83 and 84 also contain provisions setting forth specific rights and liabilities of buyers

tendered by an Italian seller pursuant to a contract for the sale of 200 tons of bacon to a German buyer).

60 *See P v. P*, Schiedsgericht der Börse für Landwirtschaftliche Produkte, Wien, Österreichische Zeitschrift für Rechtsvergleichung 211–20 (Austria 1998) (refusal by Polish buyer to accept future deliveries from Austrian seller pursuant to installment contract for the sale of barley).

61 *See Bri Prod. Bonaventure v. Société Pan African Exp.*, Feb. 22, 1995, CA Grenoble, Cass. (refusal by U.S. purchaser to disclose the ultimate destination of clothing purchased from French seller).

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

63 CISG at Arts. 81 and 83–84. For a general discussion of notice and avoidance, *see* Ericson P. Kimbel, *Nachfrist Notice and Avoidance Under the CISG*, 18 J.L. & Com. 301 (1999). *See also* Secretariat Commentary to Art. 81, *available at* http://www.cisg.law.pace.edu/cisg/text/secomm/secomm-81.html.

64 CISG at Art. 81 (1).

65 *Id.* Art. 81 (2). Note that if both parties are required to make restitution, they must do concurrently. *Id.* A classic illustration of this situation took place when a German buyer entered into a contract with a French seller for the delivery of sunflower oil. The buyer paid a timely installment for the first delivery, yet the seller did not ship the goods. Accordingly, the seller had to refund the price paid. OLG München, 7 U 1720/94, Feb. 8, 1995, (F.R.G.), *available at* http://cisgw3.law.pace.edu/cases/950208g1.html. This was also the case in a dispute involving multiple shipments of machines. OLG Celle, 20 U 76/94, May 24, 1995, (F.R.G.), *available at* http://cisgw3.law.pace.edu/cases/950524g1.html. Because the first shipment contained only half of the machines specified by the contract, and the buyer had already paid a considerable part of the contract price before the shipment, the court found that the parties mutually terminated the contract. Accordingly, it found that the buyer's repayment claim was justified under Article 81 (2). *Id. See also* ICC Court of Arbitration no. 978, Mar. 1999, *available at* http://www.unilex.info/case.cfm?pid=1&do=case&id=471&step=FullText (tribunal found that the buyer was allowed to avoid the contract since non-delivery was a fundamental breach of contract and awarded restitution under Article 82, along with interest under Article 84).

and sellers. For example, if it is impossible to return the goods in the same condition in which the buyer received them, a buyer is not entitled to avoid the contract.[66] A buyer who has lost the right to declare the contract avoided or to require the seller to deliver substitute goods in accordance with Article 82 retains all other remedies set forth in the contract and under the provisions of the CISG.[67]

As discussed in the coverage of notice of nonconformity,[68] a party must declare a contract avoided in a timely fashion. This duty of timely avoidance can be implied from Article 49's language that the non-breaching party must declare avoidance "within a reasonable time."[69] A German court looked to the general principles of the CISG in fashioning the principle of timely avoidance. It held that a plaintiff's attempt to declare a contract avoided after two and one half years was a violation of the principle of good faith contained in Article 7(1) CISG.[70]

Under Article 83, the loss of the right to declare the contract avoided or to require the seller to deliver substitute goods does not deprive the buyer of the right to claim damages, to require that any defects be cured, or to declare a reduction in price.[71] In addition, Article 84 states that if the seller is required to refund the price "he must also pay interest from the date on which the price was paid."[72] Despite this reference to the payment of interest, the CISG does not specify how the applicable interest rate is to be determined.[73] A Swiss court offered a reasonable answer by holding that the rate of interest the seller had to pay was determined on the basis of the prevailing rate of interest at the seller's place of business.[74]

66 CISG at Art. 82(2). *See generally* OLG Koblenz, 2 U 1899/89, Sept. 27, 1991, (F.R.G.), *available at* http://cisgw3.law.pace.edu/cases/910927g1.html.

67 CISG at Art. 83.

68 *Supra* Part V.B.1.

69 CISG at Art. 49(2).

70 OLG München, 7 U 1720/94, Feb. 8, 1995, (F.R.G.), *available at* http://cisgw3.law.pace.edu/cases/950208g1.html.

71 CISG at Art. 83. *See id.* Arts. 45(a)(b), 46, and 50.

72 *Id.* Art. 84(1). *See generally* OLG Celle, 20 U 76/94, May 24, 1995 (F.R.G.), *available at* http://cisgw3.law.pace.edu/cases/950524g1.html. However, contrary to this provision with regard to the time of accrual of interest, an Italian court held that interest was payable from the date of avoidance of the contract. *Foliopack Ag v. Daniplast S.p.A.*, 77/89, Nov. 24, 1989, (It.), *available at* http://cisgw3.law.pace.edu/cases/891124i3.html.

73 ICC International Court of Arbitration no. 7197 (1993), *available at* http://cisgw3.law.pace.edu/cases/927197i1.html.

74 HG Zürich, HG 950347, Feb. 5, 1997, (Switz.), CLOUT Case No. 214, *available at* http://www.uncitral.org/english/clout/abstract/abstr18.htm.

CHAPTER TEN

DAMAGES, EXCUSE, AND PRESERVATION

Upon breach by either party, a number of consequences result that are common to buyers and sellers. The CISG provides a series of procedures that impact the consequences of breach. First, it provides rules for the calculation of damages. Second, it provides a number of limiting doctrines that may be used to reduce the amount of damages awarded. Third, it provides the excuse of impediment that allows the breaching party to avoid damages. Fourth, it provides rules for the consequences of contractual avoidance. Finally, it allocates certain obligations pertaining to the preservation of goods.

CALCULATION OF DAMAGES: ARTICLES 75 AND 76

Articles 74, 75, and 76 set out general formulas for the calculation of damages.[1] Pursuant to Article 74, damages consist of a sum equal to the loss, including loss of profit, suffered by the other party as a consequence of the breach.[2] Under Article 75, if the contract is avoided, and the buyer has bought goods in replacement or the seller has resold the goods, the party claiming damages may recover "the difference between the contract price and the price in the substitute transaction."[3] The substitute transaction must be made in a reasonable manner and within a reasonable time after avoidance.[4] If the substitute

[1] CISG at Arts. 74–76. *See generally* Harry M. Flechtner, *Remedies Under the New International Sales Convention: The Perspective From Article 2 of the U.C.C.*, 8 J.L. & Com. 53 (1988) (elaborating on the use of Article 2 of the UCC to interpret the remedy provisions of the CISG); Jeffrey S. Sutton, *Measuring Damages Under the United Nations Convention on the International Sale of Goods*, 50 Ohio S. L.J. 737 (1989) (comparing Article 2 of the UCC with the CISG).

[2] CISG at Art. 74.

[3] *Id.* at Art. 75.

[4] *See id.* The time limit does not begin to run until the injured party has in fact declared the contract avoided.

transaction occurs in a different place from the original transaction or is on different terms, the amount of damages must be adjusted to recognize any increase in costs, less any expenses saved as a consequence of the breach.[5] Moreover, the time limit within which the resale or cover purchase must be made does not begin until the injured party has, in fact, declared the contract avoided.[6] Failure to abide by the requirements of Article 75 will result in a party being precluded from recovering damages.[7] Consequently, the buyer who does not declare a contract avoided is not entitled to recover the expenses incurred in procuring replacement goods.[8]

If the contract has been avoided but no substitute transaction followed, then Article 76 sets forth an alternative means of measuring damages. Article 76 provides that if the contract is avoided and there is a current sale price for the goods, the party claiming damages may, if he has not made a purchase or sale under Article 75, recover "the difference between the price fixed by the contract and the current price at the time of avoidance."[9] If, however, the party claiming damages avoided the contract after taking the goods, then the current price at the time of the taking over shall be applied.[10] If no current

[5] Secretariat Commentary to Art. 75, *available at* http://www.cisg.law.pace.edu/cisg/text/secomm/secomm-75.html.

[6] *Id.*

[7] Issues of proof can be raised as to whether a substitute purchase was carried out at the price claimed or whether the purchase is justifiable. LG Braunschweig, 21 0 703/01 (028), Jul. 30, 2001, (F.R.G.), a*vailable at* http://cisgw3.law.pace.edu/cases/010730g1.html. A plaintiff, however, is not obliged to resell the goods before the date of avoidance. OLG Düseldorf, 17 U 146/93, Jan. 14, 1994, (F.R.G.), a*vailable at* http://cisgw3.law.pace.edu/cases/940114g1.html (resale nearly two months after avoidance was still within a reasonable time). Furthermore, a substitute purchase cannot replace a notice of declaration of avoidance of a contract. OLG Bamberg, 3 U 83/98, Jan. 13, 1999, (F.R.G.), *available at* http://cisgw3.law.pace.edu/cases/990113g1.html. Likewise, once avoidance of the contract is clear, a buyer does not need to wait before purchasing substitute goods. *FCF S.A. v. Adriafil Commerciale S.r.l. BGE*, 4C.105/2000, Sept. 15, 2000, (Switz.), *available at* http://cisgw3.law.pace.edu/cases/000915s2.html. (except in the case in which the seller could prove that the buyer was able to find goods at a more favorable price).

[8] OLG Bamberg, 3 U 83/98, Jan. 13, 1999, (F.R.G.), *available at* http://cisgw3.law.pace.edu/cases/990113g1.html.

[9] CISG at Art. 76. The "current price" is that for goods of the contract description in the contract amount; the concept of "current price" does not require the existence of official or unofficial market quotations, but the lack thereof may raise the question whether there is a current price for the goods. Secretariat Commentary to Art. 76, *available at* http://www.cisg.law.pace.edu/cisg/text/secomm/secomm-76.html.

[10] CISG at Art. 76. *See* KG Zug, A3 1997 61, Oct. 21, 1999, (Switz.), *available at* http://cisgw3.law.pace.edu/cases/991021s1.html (court held that damages resulting from non-performance of the contract by the seller had to be assessed on the basis of an abstract calculation under Article 76).

price is presented in connection with a claim for damages under Article 76, a party is precluded from recovering under this Article.[11] A party collecting under Articles 75 and 76 may also recover additional damages under Article 74.[12]

A number of cases have dealt with the ability of the claiming party to recover interest. Generally, interest is awarded for any claim of damages.[13] In fact, one arbitration tribunal awarded a rate above the legal rate.[14] The rationale given was that the entitlement to interest under Article 78 is independent of any claim for damages under Article 74. The tribunal found that the seller operated on the basis of credit for which it had to pay interest at the rate of 12%. It then applied that rate since the seller would have to obtain credit in order to replace the funds missing due to non-payment by the buyer

LIMITING DOCTRINES: ARTICLES 74 AND 77

The damages available under Articles 74 and 75 are subject to the limiting doctrines of foreseeabilty, found in Article 74, and the principle of mitigation, found in Article 77. Under Article 74, damages "may not exceed the loss which the party in breach foresaw or ought to have foreseen at the time of the conclusion of the contract," in light of the facts and matters of which he then knew or ought to have known, as a possible consequence of the breach of contract.[15] A party may increase the scope of foreseeability by communicating to the other party that a breach would cause him exceptionally heavy losses or losses of an unusual nature.[16]

Issues arising under Article 74 fall into two major categories. First, there are cases addressing whether or not certain damages are foreseeable. The

[11] OLG Celle, 3 U 246/97, Sept. 2, 1998, (F.R.G.), *available at* http://cisgw3.law.pace.edu/cases/980902g1.html (the court was not able to make a calculation under Article 76 for damages because the buyer failed to present any evidence of the current market price of the goods).

[12] CISG at Art. 74.

[13] *Id.* Art. 78.

[14] International Chamber of Commerce Arbitration 7197 (1993), CLOUT Case No. 104, *available at* http://www.uncitral.org/english/clout/abstract/abstr8.htm.

[15] CISG at Art. 74. *See* Arthur G., Murphy, Jr., *Consequential Damages in Contracts for the International Sale of Goods and the Legacy of* Hadley, 23 Geo. Wash. J. Int'l L. & Econ. 415 (1989); *see generally* CA Grenoble, RG 98/02700, Feb. 4, 1999, (Fr.), CLOUT Case No. 243, *available at* http://www.uncitral.org/english/clout/abstract/index.htm (judges applied Art. 74 to calculate the damages awarded to the buyer after seller refused to deliver and buyer obtained supplies elsewhere).

[16] Secretariat Commentary to Art. 74, *available at* http://www.cisg.law.pace.edu/cisg/text/secomm/secomm-74.html.

burden of proof is on the non-breaching party to prove that the damages were a foreseeable consequence of breach. Second, there is the issue of whether attorneys' fees and the costs of debt collection are allowed under Article 74. Article 77 places a duty on the non-breaching party to mitigate damages. A key determination in the application of the doctrine of mitigation is the timing of the mitigation.

Doctrine of Foreseeability

The Supreme Court of Germany applied the foreseeability limitation at the time of contract formation, rather than, as under national law, at the time of the breach.[17] In that case, the buyer was a German cheese importer who entered into a contract to purchase cheese from a Dutch exporter. Because 3 percent of the cheese delivered was defective, the buyer sought damages, including lost profits as a result of the loss of four wholesale customers, damages paid to one of the buyer's customers who lost his own customers as a result of the defective cheese, and the loss of a group delivery arrangement causing an increase in the buyer's transportation costs.[18] Two lower courts denied the buyer's claims, stating that he could only recover lost profits if the seller could have foreseen such damages because 3 percent of the cheese was defective. The German Supreme Court reversed and remanded noting that the seller knew at the time of the formation of the contract that the buyer was a middleman or reseller of the goods.

In *Delchi Carrier SpA v. Rotorex Corp.*,[19] the Court of Appeals for the Second Circuit emphasized that the CISG requires damages to be limited by the "familiar principle of foreseeability established in *Hadley v. Baxendale*."[20] Accordingly, the court found that a CISG plaintiff may collect damages to compensate for the full loss, including lost profits, "subject only to the familiar limitation that the breaching party must have foreseen, or should have foreseen, the loss as a probable consequence."[21] The court held that damages were foreseeable and could be recovered for lost profits due to lost sales

[17] BGH VIII ZR 210/78, Oct. 24, 1979, (F.R.G.), *available at* http://cisgw3.law.pace.edu/cases/791024g1; *see also* Arbitral Tribunal Vienna, SCH-4366, Jun. 15, 1994, (Aus.), a*vailable at* http://cisgw3.law.pace.edu/cases/940615a4.html (issue of foreseeability). For a discussion of this case, *see* Eric C. Schneider, *Consequential Damages in the International Sale of Goods: Analysis of Two Decisions*, 16 U. Penn. J. of Int'l B.L. 615 (1995).

[18] *Id.*

[19] 71 F.3d 1024 (2d Cir. 1995).

[20] *Id.* at 1029 (citing Hadley v. Baxendale, 156 Eng. Rep. 145 (1854)).

[21] *Id.* at 1030.

from having to shut down manufacturing operations, along with expenses for storage, shipping, and retooling.[22] In so holding, the court stated that to award damages for such costs actually incurred in no way creates a double recovery and instead furthers the purpose of giving the injured party damages "equal to the loss" as provided for by Article 74.[23]

As demonstrated in *Delchi Carrier SpA v. Rotorex Corp.*, the general principle that there should be "full compensation" for damages under the CISG not only allows for recovery of lost profits, but also additional out of pocket expenses.[24] Damages have been awarded for a variety of expenses including costs of obtaining credit,[25] damages caused by liability to a customer when goods are sold to a dealer who intends to resell them,[26] and damages for the costs relating to a dishonored check.[27] Damages were not awarded where they were not reasonably foreseeable. Damages have been denied where the party seeking damages fails to do the following: prove that additional costs of obtaining goods were foreseeable at the time the contract was concluded;[28] prove the buyer was forewarned by complaints concerning an initial delivery, but still failed to carefully examine a second shipment for defects in a timely manner;[29] prove the buyer lost profits associated with a general distribution agreement with other parties;[30] prove the buyer failed to state a claim for

[22] *Id.* at 1029–30. *See also* HG Zürich, HG 95 0347, Feb. 5, 1997, (Switz.), *available at* http://cisgw3.law.pace.edu/cases/970205s1.html (buyer proved that it had the opportunity to resell the first shipment from the seller at a higher price). *Compare*, OLG Celle, 3 U 246/97, Sept. 2, 1998, (F.R.G.), *available at* http://cisgw3.law.pace.edu/cases/910902g1.html (court held that the buyer was not entitled to a claim for loss of profit, in view of the fact that it had omitted to assess its damages on the basis of a specific calculation as required by Art. 74).

[23] Delchi Carrier SpA, 71 F.3d at 1030. In so doing, the Second Circuit disagreed with lower court holdings that denied recovery of such damages as "double recovery." *Id.*

[24] *See generally* OLG Hamburg, 1 U 31/99, Nov. 26, 1999, (F.R.G.), *available at* http://cisgw3.law.pace.edu/cases/991126g1.html (damages cover the whole loss resulting from non-performance).

[25] ICC International Court of Arbitration 7531 (1994), CLOUT Case No. 304, *available at* http://www.uncitral.org/english/clout/abstract/abst-27.pdf.

[26] *See generally* OLG Köln, 22 U 4/96, May 21, 1996, (F.R.G.), *available at* http://cisgw3.law.pace.edu/cases/960521g1; BGer I. Zivilabteilung 4C.179/1998/odi, Oct. 28, 1998, (Switzerland), *available at* http://cisgw3.law.pace.edu/cases/981028s1.

[27] OLG Stuttgart, 5 U 195/94, Aug. 21, 1995, (F.R.G), *available at* http://cisgw3.law.pace.edu/cases/950821g1.

[28] OLG Bamberg, 3 U 83/98, Jan. 13, 1999, (F.R.G.), *available at* http://cisgw3.law.pace.edu/cases/990113g1.html.

[29] LG Stuttgart, 3 KfH O 97/89, Aug. 31, 1989, (F.R.G.), *available at* http://cisgw3.law.pace.edu/cases/890831g1.html.

[30] Schiedsgericht der Handelskammer Hamburg [Arbital Tribunal], Mar. 21, 1996, (F.R.G.), *available at* http://cisgw3.law.pace.edu/cases/960321g1.html.

damages within a reasonable time;[31] prove a party sought compensation for impairment to its "trading image";[32] prove the buyer claiming damages failed to specify the nature of the lack of conformity of the goods;[33] and prove the buyer did not produce any evidence that the seller knew about the terms and conditions of a contract between the buyer and a third party.[34]

Attorneys' Fees and Debt Collection

A second major issue under Article 74 is whether attorneys' fees are recoverable.[35] Authority is split on this point. German courts have required parties to pay attorneys' fees under Article 74.[36] Recently, a German district court held that the buyer was responsible to pay the seller's attorneys' fee incurred plus interest accrued since the commencement of the legal action as a result of the buyer's failure to pay in a timely manner.[37] In the United States, however, the Court of Appeals for the Seventh Circuit held in *Zapata Hermanos Sucesores v. Hearthside Baking Co.* that the loss recoverable in Article 74 does not include attorneys' fees.[38] In reaching this conclusion, Judge Posner noted that there was nothing in the background of the CISG about whether "loss" was intended to include attorneys' fees.[39] In *Ajax Tool Works, Inc. v. Can-Eng Manufacturing Ltd.*,[40] the Federal District Court for the Northern District of Illinois held that since the granting of "attorneys' fees are a procedural matter governed by the law of the forum," they are not recoverable in the United States under Article 74.[41]

[31] HG Zürich, HG 92 0670, Apr. 26, 1995, (Switz.), *available at* http://cisgw3.law.pace.edu/cases/950426s1.html.

[32] *Société Calzados Magnanni v. SARL Shoes General International*, Oct. 21, 1999 (Fr.), CLOUT Case No. 313, *available at* http://www.uncitral.org/english/clout/abstract/abst-29.pdf.

[33] LG Köln, 89 O 20/99, Nov. 30, 1999, (F.R.G.), *available at* http://cisgw3.law.pace.edu/cases/991130g1.html.

[34] Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry 406/1998, Jun. 6, 2000, (Russ.). *available at* http://cisgw3.law.pace.edu/cases/000606r1.html.

[35] *See* Peter Schlechtriem, *Attorneys' Fees as Part of Recoverable Damages*, 14 Pace Int'l L. Rev. 205 (2002) (note that this discussion precedes the most recent cases discussed later).

[36] In one case, the court held that the plaintiff could claim attorneys' fees for a reminder that was sent prior to the lawsuit. OLG Düsseldorf 6 U 152/95, Jul. 11, 1996, (F.R.G.), *available at* http://cisgw3.law.pace.edu/cases/960711g1.html.

[37] LG Berlin, 103 o 213/02, Mar. 23, 2003, (F.R.G.), *available at* http://cisgw3.law.pace.edu/cases/030321g1.html.

[38] *Zapata Hermanos Sucesores v. Hearthside Baking Co.*, 313 F.3d 385, 389 (7th Cir. 2002).

[39] *Id.* at 388.

[40] Prod. Liab. Rep. (CCH) P16,516, 2003 WL 223187, at *7 (N.D. Ill. 2003).

[41] *Id.*

In the related area of debt collection, a German court held that debt collection costs are not recoverable under Article 74.[42] The court, however, did not totally exclude the possibility of recovering the costs associated with debt collection. It rejected the claim because it found that the plaintiff failed to follow the most economical means to collect the debt.[43] In another case, a Swiss court held that the buyer had to indemnify the seller for debt collection costs.[44] The seller was awarded default interest and reimbursement of debt collection costs.

Doctrine of Mitigation

In accordance with Article 77, a party who is subject to a breach of contract must take "such measures as are reasonable in the circumstances to mitigate the loss, including loss of profit, resulting from the breach."[45] If a party fails to take measures to mitigate damages, the party in breach may claim a reduction in damages in the amount by which the loss should have been mitigated.[46] The duty to mitigate damages also applies to an anticipatory breach of contract.[47]

The timing of the non-breaching party's mitigation efforts is crucial to the ultimate calculation of damages owed. A party is not required to mitigate before the date of avoidance. However, mitigation must take place within a reasonable time. The reasonable time standard provides the flexibility needed to consider a wide range of divergent fact patterns. For example, a two-month time frame for mitigation would be deemed, under most circumstances, to be unreasonable. In a case involving the sale of winter shoes, one court held

[42] AG Berlin-Tiergarten, 2 C 22/97, Mar. 13, 1997, (F.R.G.), *available at* http://cisgw3.law.pace.edu/cases/970313g1.

[43] *Id.*

[44] KG Zug, A3 1998 153, Feb. 25, 1999, (Switz.), CLOUT Case No. 327, *available at* http://www.uncitral.org/english/clout/abstract/ABST-31.pdf.

[45] CISG at Art. 77. *See* Arbitral Tribunal Vienna, SCH-4366, Jun. 15, 1994, *available at* http://cisgw3.law.pace.edu/cases/940615a3.html; Netherlands Arbitration Institute, 2319, Oct. 15, 2002, (Neth.), *available at* http://cisgw3.law.pace.edu/cases/021015n1.html; OLG München, 7 U 1720/94, Feb. 8, 1995, (F.R.G.), CLOUT Case No. 133, *available at* http://www.uncitral.org/english/clout/abstract/abstr10.htm. Note that there is no need to mitigate as long as a contract between the parties still exists. *See, e.g.*, OLG Braunschweig, 2 U 27/99, Oct. 28, 1999, (F.R.G.), *available at* http://cisgw3.law.pace.edu/cases/991028g1.html. ICC Court of Arbitration 7331 of 1994, *available at* http://cisgw3.law.pace.edu/cases/947331i1.html (party must mitigate even if timely notice is given to the other party).

[46] *Id. See generally*, BGH VIII ZR 121/98, Mar. 24, 1999, (F.R.G.), a*vailable at* http://cisgw3.law.pace.edu/cases/990324g1.html.

[47] Secretariat Commentary to Art. 77, *available at* http://www.cisg.law.pace.edu/cisg/text/secomm/secomm-77.html.

that resale nearly two months after avoidance was within a reasonable time frame, especially in light of the fact that most retailers had already filled their winter orders by the date of the avoidance.[48]

In mitigating its loss, a party obligated to resell goods should make reasonable efforts to undertake a profitable resale.[49] Examples of failure to mitigate include only making efforts to effect replacement purchases in the buyer's region, without taking into account other suppliers in the country or abroad,[50] and failure to make a covering purchase after the seller terminated a contract with respect to non-delivered goods.[51]

impediment (excuse) to performance: article 79

A plaintiff may still be barred from recovering foreseeable damages if the defendant can prove that non-performance was due to an *impediment*. Under Article 79, a party will not be held liable for failure to perform his contractual obligations if he proves that "the failure was due to an impediment beyond his control" and that he could not reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract or to have avoided or overcome it or its consequences.[52] A party may also be excused from performance, under limited circumstances, if the failure to perform is due to the failure of a third person.[53] As is the case with avoidance, a party who fails to perform because of an impediment must provide notice to the other party within a "reasonable time" after the party who fails to perform knew or ought to have known of the impediment.[54] If the other party does not receive such notice, then the party who fails to perform will be liable for damages that could have been avoided if proper notice had been given.[55]

[48] OLG Düsseldorf, 17 U 146/93, Jan. 14, 1994, (F.R.G.), *available at* http://cisgw3.law.pace.edu/cases/940114g1.html.

[49] OLG Rostock, 1 U 247/94, Jul. 27, 1995, (F.R.G.), *available at* http://cisgw3.law.pace.edu/cases/950727g1.html.

[50] OLG Celle, 3 U 246/97, Sept. 2, 1998, (F.R.G.), *available at* http://cisgw3.law.pace.edu/cases/910902g1.html.

[51] Hungarian Chamber of Commerce and Industry Arbitration Court Budapest Vb/97142, May 25, 1999, (Hung.), *available at* http://cisgw3.law.pace.edu/cases/990525h1.html.

[52] CISG at Art. 79(1).

[53] *Id.* Art. 79(2). To be excused from performance due to the failure by a third party, both the party to the contract and the third party must be able to meet the requirements of Article 79(1).

[54] *Id.* Art. 79(4).

[55] *Id.*

To be excused, the circumstances constituting the impediment must be beyond the party's control.[56] The burden of proof is on the non-performing party to prove the circumstances entitling it to an excuse from liability.[57] For example, a seller who fully performed his obligations under the contract, then placed the goods in the hands of a carrier, was not held liable for the carrier's failure to deliver on time.[58]

As a general rule, however, national courts are not inclined to excuse a party for an impediment to performance.[59] A party cannot rely on the exemption merely on the ground that performance has become unforeseeably more difficult or unprofitable.[60] For example, in International Chamber of Commerce *Case 6281 of 1989*,[61] an arbitration panel held that a seller could not be relieved of the obligation to deliver the goods at the contract price due to a change in the market price. It reasoned that the increase in the market price was neither sudden nor unforeseeable.[62] In another case involving the sale of defective powdered milk, the German Supreme Court held that the seller could only be freed from its obligation to pay damages by proving that the infestation of the delivered milk could not have been

[56] *Id.* Art. 77; Russian Federation Resolution No. 7-P, Apr. 27, 2001, (Russ.), *available at* http://cisgw3.law.pace.edu/cases/010427r1.html.

[57] Trib. di Vigevano, Jul. 12, 2000, n. 405 (It.), *available at* http://cisgw3.law.pace.edu/cases/000712i3.html.

[58] HG Zürich, HG 97 0238.1, Feb. 10, 1999, (Switz.), *available at* http://cisgw3.law.pace.edu/cases/990210s1.html.

[59] *See, e.g.*, BGH VIII ZR 121/98, Mar. 24, 1999, (F.R.G.), *available at* http://cisgw3.law.pace.edu/cases/990324g1.html. The German Supreme Court considered a seller's liability for the delivery of non-conforming goods when the seller was only acting as an intermediary. In that case, the nonconformity was caused during the time the goods were in the control of either his supplier or his supplier's supplier. *See generally*, Peter Schlechtriem, *Federal Supreme Court (Bundesgerichtshof), Civil Panel VII March 24, 1999*, Index No. VIII ZR 121/98, Kluwer Law International 383–407 (2000–2001), *available at* http://cisgw3.law.pace.edu/cases/990324g1.html.

[60] *See generally* Dionysios Flambouras, *Remarks on the Manner in Which the PECL may be Used to Interpret or Supplement Article 79 CISG* (May 2002), *available at* http://cisgw3.law.pace.edu/cisg/text/anno-art-79.html (the drafting history of the CISG reveals that Article 79 is a stricter version of its predecessor, which was criticized for excusing non-performance too readily, such as where performance merely became more difficult). *See generally FCF S.A. v. Adriafil Commerciale S.r.l.*, BGE 4C.105/2000, Sept. 15, 2000, (Switz.), *available at* http://cisgw3.law.pace.edu/cases/000915s2.html (determinative facts do not reveal the existence of circumstances that may constitute an unforeseeable or unavoidable impediment or an obstacle that the party could not have reasonably overcome).

[61] ICC International Court of Arbitration no. 6281 (1989), *available at* http://cisgw3.law.pace.edu/cases/896281i1.html.

[62] *Id.*

detected and that the probable source of infestation was outside of its sphere of influence.[63]

Other circumstances where parties were not granted an excuse under Article 79 include the buyer's inability to obtain foreign currency,[64] "hardship" caused by an almost 30 percent increase in the cost of goods,[65] inability to deliver the goods because of an emergency production stoppage,[66] and financial difficulties of the seller's main supplier.[67] In cases of shortage, a seller can only claim impediment if goods of an equal or similar quality are no longer available on the market. In the case of price fluctuations, the seller is allocated the risk of increasing market prices at the time of the substitute transaction. As is evidenced by these representative cases, a high standard is set for a party to successfully claim excuse due to impediment.

PRESERVATION OF GOODS: ARTICLES 87 AND 88

This section addresses the requirement for the preservation of goods dictated under Articles 87 and 88. The general rule is that a party who is bound to take steps to preserve the goods may deposit them in a warehouse of a third person at the expense of the other party provided that the expense incurred is not unreasonable.[68] Articles 87 and 88 provide for the preservation of goods when there is some instance of delay.[69] Failure to appropriately store or to sell goods

[63] BHG VIII ZR 304/00, Jan. 9, 2002, (F.R.G.), a*vailable at* http://cisgw3.law.pace.edu/cases/020109g1.html.

[64] Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry 123/1992, Oct. 17, 1995 (Russ.), CLOUT Case No. 142, *available at* http://cisgw3.law.pace.edu/cases/951017r1.html.

[65] *Nuova Fucinati S.p.A. v. Fondmetal International A.B.*, R.G. 4267/88, Jan. 14, 1993, (It.), *available at* http://cisgw3.law.pace.edu/cases/930114i3.

[66] Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry 155/1994, Mar. 16, 1995, (Russ.), CLOUT Case No. 140, *available at* http://www.uncitral.org/english/clout/abstract/abstr10.htm.

[67] Schiedsgericht der Handelskammer Hamburg 1996, 3229, Mar. 21, 1996, (F.R.G.), *available at* http://cisgw3.law.pace.edu/cases/960321g1.html. *See also*, OLG Hamburg, 1 U 167/95, Feb. 28, 1997, (F.R.G.), Clout Case No. 277, *available at* http://www.uncitral.org/english/clout/abstract/abst-26.pdf (sellers excuse was denied when it did not receive goods from its supplier). The seller would only be able to claim impediment if goods of an equal or similar quality are no longer available on the market; furthermore, it is also incumbent on a seller to bear the risk of increasing market prices at the time of the substitute transaction. *Id.* The court also held that although the market price had risen to triple the agreed-upon price, this did not amount to a "sacrificial sale price," as the transaction (sale of iron-molybdenum from China) was said to be highly speculative. *Id.*

[68] CISG at Art. 87.

[69] *Id.* Arts. 87 and 88. *See generally* ICC Arbitration 7531 of 1994 (1994) *available at* http://cisgw3.law.pace.edu/cases/947531i1.html (the tribunal, without elaboration, allowed

can affect the amount of damages a party will be awarded.[70] For example, a buyer was held not liable for the full amount of goods after the seller, who was storing the goods, gave some of the goods to charity and the remainder were spoiled.[71] In general, the requirement in Article 87 that a party who is under an obligation to preserve the goods by depositing them in the warehouse of a third party is intended to be interpreted broadly to mean any appropriate place for the storage of the type of goods in question.[72]

A party who is bound to preserve the goods in accordance with Articles 85 or 86 *may* sell them by "any appropriate means" if there is an unreasonable delay in the other party re-taking possession of the goods, or in paying the price, as long as reasonable notice of the intention to sell is given to the other party.[73] If, however, the goods are subject to rapid deterioration or their preservation would involve unreasonable expense, a party who is bound to preserve them *must* take reasonable measures to sell them.[74] The party selling the goods has the right to retain from the proceeds of sale an amount equal to the reasonable expenses incurred to preserve and sell the goods.[75]

Under Article 88, the sale of goods may be by "any appropriate means" if there has been an unreasonable delay by the other party in taking possession.[76] Unfortunately, the CISG does not specify what constitutes "appropriate means." Appropriate means can vary depending on the conditions in the country. As a result, reference should be made to the means required for sales in similar circumstances under the law of the country where the sale occurs.[77]

such damage costs, expenses, and losses related to the buyer's reasonable expenses for the preservation of goods).

70 *See, e.g.*, Schiedsgericht Hamburger Freundschaftliche Arbitage, Dec. 29, 1998, (F.R.G.), CLOUT Case No. 293, *available at* http://cisgw3.law.pace.edu/cases/981229g1.html (seller failed to meet the prerequisites for damages by not fulfilling its obligations under Article 87 to store the goods and/or engaging in a self-help sale).

71 Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, Feb. 10, 2000, (Russ.), *available at* http://cisgw3.law.pace.edu/cases/000210r1.html.

72 Secretariat Commentary to Art. 87, *available at* http://www.cisg.law.pace.edu/cisg/text/secomm/secomm-87.html.

73 CISG at Art. 88(1).

74 *Id.* Art. 88(2). To the extent possible, he is also required to give notice to the other party of his intention to sell.

75 *Id.* Art. 88(3).

76 *Id.* Art. 88(1). *See* Tribunal Cantonal Vaud, 01 93 1308, May 17, 1994, (Switz.), *available at* http://cisgw3.law.pace.edu/cases/940517s1.html (seller sought to sell a base of a product immediately in accordance with Article 88(1)).

77 Secretariat Commentary to art. 88, Right to Reimbursement, para. 93 [sic], *available at* http://www.cisg.law.pace.edu/cisg/text/secomm/secomm-88.html (the party selling the goods has the right to retain an amount equal to the reasonable expenses of preserving

The resale of goods is especially important when the goods are subject to rapid deterioration.[78] Moreover, the concept of loss is not limited to the physical deterioration of the goods.[79] It also includes situations in which the goods threaten to decline rapidly in value due to market changes.[80]

the goods and of selling them, but he must account to the other party for the remainder of the balance). *See, e.g.*, OLG Hamburg, 1 U 31/99, Nov. 26, 1999, (F.R.G.), *available at* http://cisgw3.law.pace.edu/cases/991126g1.html.

78 *See, e.g.*, China International Economic and Trade Arbitration Commission (CIETAC) – Shenzhen Commission, Jun. 6, 1991, (China), *available at* http://cisgw3.law.pace.edu/cases/910606c1.html (deterioration of chemicals).

79 Secretariat Commentary to Art. 88, Right to Reimbursement, para. 2.

80 *Id.*

CHAPTER ELEVEN

SUMMARY AND OBSERVATIONS

CISG jurisprudence has done more good than harm in removing legal obstacles to international trade. It has helped to overcome what Franco Ferrari has called the problem of "nationality of law."[1] Although it has not yet attained critical mass, CISG jurisprudence has grown significantly. As it has grown, greater uniformity of application has been evidenced. One commentator predicts that "[a]s more case law and commentary on the Convention develops, courts will apply the Convention with more regularity. . . . This will bring more predictability in international sales law."[2]

This Chapter will make observations taken from the analysis presented in the earlier Chapters of this book. These observations show that existing jurisprudence has *already* witnessed the coalescence or regularity of opinion pertaining to the development of specific default rules to fill in gaps in the CISG. These gaps are a result of both the vagueness in wording of many express CISG provisions and lack of express provisions in areas arguably within the scope of the CISG. The section on "Developing an International Jurisprudence" specifically discusses the importance of notice, trade usage, and particularized consent in CISG jurisprudence. This section also examines how courts have had to develop rules due to the CISG's failure to expressly allocate the burden of proof. This Chapter concludes with a note of caution represented by the persistence of *homeward trend* analysis found in too many CISG decisions.

[1] Franco Ferrari, *Uniform Interpretation of the 1980 Uniform Sales Law*, 24 Ga J. Int'l & Comp. L. 183, 184 (1994). ("[S]ince the end of the last century and with increasing intensity since the beginning of this century, efforts have been made to . . . overcome the nationality of law.").

[2] Philip Hackney, *Is the United Nations Convention on the International Sale of Goods Achieving Uniformity?*, 61 La. L. Rev. 473, 486 (2001).

DEVELOPING AN INTERNATIONAL JURISPRUDENCE

In cases where the CISG fails to provide a specific default rule, courts have been tempted to apply the default rules provided under their domestic laws. The better reasoned cases have taken the "international character" mandate of Article 7 seriously. They have explored foreign cases dealing with gaps in the CISG. In addition, in cases where CISG general principles or analogical reasoning have failed to provide a solution the better reasoned cases have avoided the hasty application of the local default rule in favor of an analysis of the default rules of various countries. This approach is aligned with the mandate of "international character." An example of this is the Italian case of *Sport d'Hiver Genevieve Cutlet v. Ets. Louys et Fils* in which the court reviewed both German and Swiss law to determine the reasonableness of a notice of nonconformity.[3] The court pointed out that the notice provision of CISG Article 39 is "intentionally elastic . . . in terms of reasonableness, so that the degree of flexibility will be evaluated in accordance with the practicalities of each case."[4] It found that a notice sent twenty-three days after delivery for defects that were apparent was unreasonable under Swiss and German law and therefore under the CISG.[5]

A Swiss court in trying to determine a "reasonable time"[6] for sending a notice of nonconformity, recognized the divergent views of prompt notice in different legal systems. It noted that the calculation of the time limit to give a notice of defect varies. "Whereas jurisdictions of the Germanic legal family demand an immediate notice . . . in Anglo-American and Dutch law the notification . . . of defect given several months after discovery of the defect is deemed to be within an appropriate time limit."[7]

The court then fabricated a one-month limit of giving notice as a compromise between the divergent views. It then reasoned that it was necessary to narrow this gap when interpreting Article 39 of the CISG.[8] "To avoid too wide a gap in interpretation, a convergence of those points of view seems inevitable. Therefore, an approximate medium time frame of at least one month seems appropriate."[9] The court, in essence, fabricated a specific default rule of one

[3] Trib. Civile di Cuneo, 45/96, Jan. 31, 1996, (It.), *translation available at* http://cisgw3.law.pace.edu/cases/960131i3.html.
[4] *Id.*
[5] *Id.*
[6] CISG at Art. 39 (1).
[7] OG des Kantons Luzern, 11 95 123/357, Jan. 8, 1997, (Switz.), *available at* http://cisgw3.law.pace.edu/cases/970108s1.html.
[8] *Id.*
[9] *Id.*

month under Article 39's general default rule of giving prompt notice. However, this is not an inflexible, bright line rule. The court also lists a number of factors that impact the reasonableness of the one-month rule and asserted that the one-month rule is to be adjusted upward or downward depending upon the mix of the enunciated factors.[10]

The next five subsections examines five issues (development of specific default rules, particularized consent, notice requirements, trade usage, burden of proof) that illustrate the developing nature of CISG jurisprudence.

Filling in the Gaps and the Fabrication of Specific Default Rules

The open-ended nature of CISG default rules has expectedly produced divergent interpretations. The interpretations that are a product of reasoned analysis within the framework of the CISG's interpretive methodology will hopefully be given persuasive effect. The issue of gaps presents special problems for the interpreter. A true gap is an issue not contemplated by the drafters. This was the case in *Usinor Industeel v. Leeco Steel Products, Inc.*[11] in which a U.S. District Court was confronted with a case of first impression. The case involved a French seller and an American buyer. The American buyer secured a loan and provided the American bank with a security interest in goods. The issue was whether a claim of a third party could preclude CISG jurisdiction.[12] The CISG provides for jurisdiction when two parties to a contract are from different signatory countries.[13] It does not deal directly with the issue of whether that jurisdiction is affected when a third party with a security interest in the goods enters the litigation. The American court cited an Australian case on the validity of retention of title clauses. In doing so, it correctly recognized that "commentators on the CISG have noted that courts should consider the decisions issued by foreign courts on the CISG."[14] The case hinged upon the court's interpretation of Article 4(b) of the CISG, which states that the CISG does not cover "the effect which the contract may have on property in the goods sold."[15] The buyer argued that Article 4(b) implies that security interests of third parties are covered under domestic law. The seller argued that the Article 4(b) exclusion pertains only to property interests occurring prior to the sale. The court cited scholarly commentary in rejecting

[10] *Id.*

[11] *Usinor Industeel v. Leeco Steel Products, Inc.*, 209 F.Supp.2d 880 (N.D. Ill. 2002).

[12] *Id.*

[13] The United States opted out of Article 1 (1)(b) jurisdiction that allows for the application of the CISG where one of the parties is from a CISG country.

[14] *Usinor Industreel*, *supra* note 11 at 886.

[15] *Id.* at 885.

the Seller's argument.[16] Thus, the seller could not obtain avoidance of the contract and retake possession of the goods because the bank had a perfected security interest under domestic law.

As discussed in the previous section, courts have, when necessary, grafted specific default rules on to the CISG in order to make its express default rules functional. These specific default rules allow for the uniform handling of categories of similar cases. For example, Article 38 makes it the buyer's duty to inspect delivered goods. It fails to express a standard for an adequate inspection. In response, courts have provided parameters for a legally adequate inspection through the development of specific default rules.[17]

An alternative to the development of more specific default rules is the development of factors to be used in the application of CISG articles. Once again, Article 38 provides an example of courts recognizing factors to be weighed in the case of assessing the timeliness of the buyer's inspection. Chapter 5 noted cases by United States and Swiss courts that recognized a number of items to be used in a factors analysis in determining whether a buyer has sustained its duty under Article 38 to examine goods "within as short a time as is practicable." The Swiss court listed the nature of the goods, their quantity, and nature of the packaging as relevant factors. The U.S. court listed the uniqueness of the goods involved, the method of delivery (including installments), and the familiarity of the buyer's employees with the goods as other factors to be taken into account in applying Article 38.

Unfortunately, the fabrication of more specific default rules can lead to divergent interpretations. An example was given in the application of Article 19 to the battle of the forms scenario. Chapter 4's coverage of Article 19 revealed a divergence in interpetations among scholars and courts between a *knock-out* rule and a *last shot* interpretation of Article 19.[18]

Particularized Express Consent

Some courts have refused to enforce derogation from CISG rules without proof of particularized express consent. Article 6 states that "parties may

[16] *Id.* at 885. The Court cites Richard Speidel, *The Revision of Article 2, Sales in Light of the United Nations Convention on Contracts for the International Sale of Goods*, 16 Nw J. Int'l L. & Bus. 165, 173 (1995); Caroline D. Klepper, *The Convention for the International Sale of Goods: A Practical Guide for the State of Maryland and Its Trade Community*, 15 Md. J. Int'l L. & Trade 235, 239 (1991); John O. Honnold, Uniform Law for International Sales § 444 (2d., ed. 1991).

[17] *Supra* Chapter 5.

[18] *Supra* Chapter 4 (Battle of the Forms).

exclude the application of the Convention or derogate from or vary the effect of any of its provisions."[19] However, excluding or varying the application of a CISG provision may require more than inserting an express term in the written contract. A civil law court or an arbitral tribunal is likely to be dissuaded from *implying* derogation from a reading of related terms in the contract. The party wanting to derogate from a specific provision of the CISG should disclose the derogation to the other party and expressly state in the contract the intent to derogate from that specific CISG provision.

The importance of particularized consent was discussed in Chapter 3's (writing requirements) and Chapter 4's coverage of the acceptance rules of Article 18. For example, parties are free to derogate from Article 11 and require that any contracts or modifications are enforceable only when concluded in writing. However, an Austrian court rejected such a derogation from Article 11's *no writing requirement* when it failed to enforce a writing requirement clause inserted into a standard form contract.[20] It held that such a writing requirement is only enforceable if the nonderogating party gives informed assent.[21]

The civil law legal systems have emphasized that a party must be reasonably aware of the terms the other seeks to incorporate.[22] In contrast, American law does not distinguish between dickered and standard or boilerplate terms. For example, it is generally presumed that a party gives blanket (implied) consent to all reasonable boilerplate terms in a standard form contract. American law more narrowly polices abuse through the application of the doctrine of unconscionability primarily in consumer and not commercial contracts.

The need for express consent in standard form contracting is an example of a domestic gloss interpretation of the CISG. As discussed in Chapters 3 and 4, the CISG does not specifically address the enforceability of standard terms or what is necessary to validly incorporate them into a contract. The courts that have required the noninserting party to be aware of the terms and their meanings are from civil law countries. Examples of this were seen in Chapter 3's coverage of the writing requirement and contract modification

[19] CISG at Art. 6.

[20] *See* OGH, 10 Ob 518/95, Feb. 6, 1996, (Aus.), *available at* http://www.cisg.law.pace.edu/cisg/wais/db/cases2/960206a3.html.

[21] *Id.*

[22] *Supra* Chapter 4.

in which Austrian[23] and French[24] courts required actual or knowledgeable consent. Another example, involves the enforceability of standard form terms. In Chapter 4's coverage of acceptance a number of courts emphasized the need for particularized conent. The case of *ISEA Industrie S.p.A. and Compagnie d'Assurances*,[25] was given as an illustration. In that case, the French court held that the terms on the back of a form were not consented to because the receiving party only signed at the bottom of the front page.

In the area of notice of nonconformity, Article 39 requires the buyer to give such notice within a "reasonable time." Of course, what is considered a reasonable time may be different between the parties and the courts. Article 39 also provides that in any event notice must be given within two years. It is generally accepted that the parties may agree on their own notice requirements under their derogation rights provided in Article 6.[26] However, at least one court has held that the derogation can only be made through particularized consent. The court reasoned that the parties must be aware that the CISG is applicable to the specific contract in question and demonstrate an affirmative intent to exclude the application of the notice provisions found in Article 39.[27]

Importance of Trade Usage in CISG Rule Application

Articles 8 and 9 recognize the importance of trade usage in the interpretation of CISG contracts. Article 8(3) notes that in determining the parties' intent due consideration is to be given to "usage." Article 9(2) states that the parties are bound by "a usage . . . which in international trade is widely known to, and regularly observed by, parties to contracts of the type involved in the particular trade concerned."[28] The role of trade usage is a general principle that affects the application of many of the CISG's provisions. For example,

[23] *See* Oberster Gerichtshof [Supreme Court][OGH], 10 Ob 518/95, Feb. 6, 1996, (Aus.), *available at* http://www.cisg.law.pace.edu/cisg/wais/db/cases2/960206a3.html (standard term requiring written acceptance not enforceable unless other party had knowedge of its existence).

[24] *See Société Cámara Agraria Provincial de Guipuzcoa v. André Margaron*, CA Grenoble, Mar. 29, 1995, (Fr.) *available at* http://www.cisg.law.pace.edu/cisg/wais/db/cases2/950329f1.html (there needs to be clear evidence of agreement for an enforceable contract modification).

[25] *Sté ISEA Industrie S.p.A. v. Lu S.A.* C.A. Paris 95-018179, Dec. 13, 1995, (Fr.), *at* http://cisgw3.law.pace.edu/cases/951213f1.html.

[26] Article 6 states that "the parties may derogate from or vary the effect of any of its provisions."

[27] Obergericht [OG] des Kantons Luzern [Appellate Court], 11 95 123/357, Jan. 8, 1997, (Switz.), *available at* http://cisgw3.law.pace.edu/cases/970108s1.html, *supra* Chapter 5 at Notice of Nonconformity.

[28] CISG at Art. 9(2).

national courts have excused untimely notice when a defect could only have been discovered through an inspection that is not customary in the trade concerned. As previously discussed in Chapter 4, the courts are split in their views as to the applicability of trade usage under the CISG. The conservative view holds that a trade usage must have a distinct international character. For example, a German court held that a trade usage that was common in Germany but not in France could not be used in a dispute between German and French parties.[29] In contrast, the liberal view allows for the admission of local trade usage.

An example of an innovative use of trade usage to fill a gap in the CISG is Article 84's obligation to pay interest. It states that the seller must pay interest on price refunds.[30] However, it fails to mention any buyer's obligation to pay interest for non-payment or how the interest is to be calculated. It can be argued that its statement on interest brings the issue within the scope of the CISG. An Argentine court resorted to the concept of trade usage to fill in the gaps. "[N]otwithstanding the fact that CISG contains no express provision recognizing the payment of interest [by the buyer], [i]t is considered that payment of interest is a widely known usage in international trade."[31]

In a more sweeping acceptance of international trade usage, the court in *St. Paul Insurance Co. v. Neuromed Medical Systems* implied INCOTERMS into the CISG through Article 9(2).[32] It correctly avoided the temptation of finding that trade terms were not within the scope of the CISG by applying the trade terms found in the UCC.[33] Instead, the court found that trade term issues were within the scope of the CISG. It based that decision on the transfer of risk provision found in Article 67(1). It then held that "INCOTERMS are incorporated into the CISG through Article 9(2)."[34] Although this was an easy decision given the universal recognition of INCOTERMS, it is still significant because it was handed down by an American court. Furthermore, the court references German law and case precedent as well as scholarly writings on the CISG.[35] More importantly, it recognized the importance of uniformity in interpreting the CISG by using the appropriate interpretive methodology. It

[29] LG Frankfurt, 3/13 O 3/94, Jul. 5, 1995, (F.R.G.), *at* http://cisgw3.law.pace.edu/cases/950705g.html.

[30] *Id.* Art. 84.

[31] CLOUT Case No. 21, May 20, 1991, *available at* http://www.uncitral.org/english/clout/abstract/abstr2.htm. The court cited Article 9(2) for its application of trade usage.

[32] St. Paul Ins. Co., No. 00 Civ. 9344(SHS), 2002 U.S. Dist. LEXIS 5096 (S.D.N.Y. Mar. 26, 2002).

[33] *See* UCC §§ 2-319, 2-320, 2-321, 2-322, 3-223, 2-509, and 2-510.

[34] St. Paul Ins. Co., 2002 U.S. Dist. LEXIS 5096, at *9.

[35] *Id.* at *7–8.

states that "interpretations [should be] grounded in its underlying principles rather than in specific national conventions."[36] This is a clear rejection of homeward trend bias.

The potential use and misuse of trade usage was also demonstrated in a Swiss court decision.[37] The court used Articles 9(1) (inter-party usage) and 9(2) (international trade usage) to recognize the binding nature of a written confirmation. It creatively argued that the parties "knew or ought to have known the binding nature of such confirmations under both Austrian and Swiss law."[38] The court asserted that due to that knowledge, and that there was no other practice prevailing in the particular trade, the binding nature of a confirmation was a usage under both Articles 9(1) and 9(2).[39] Although the court was correct in recognizing the binding nature of confirmations as a general trade usage, it is a dangerous precedent to use domestic law as a vehicle in establishing an international trade usage.

The above case and a decision of an Austrian court illustrate how the problem of homeward trend can present itself in various ways.[40] These cases demonstrate that homeward trend bias can influence the recognition of trade usage. An Austrian court held that Article 9(2) "could not be interpreted as barring the application of national or local usage in interpreting a contract."[41] This is a contradiction of Article 9(2)'s requirement that any such usage must be widely known in international trade. The court's decision is reconcilable with the express mandate in Article 9(2) given the court's emphasis on the fact that the seller had done business in the country of the local usage for many years and, thus, could not have been unaware of the usage, and is therefore admissible under Article 9(1) as a usage agreed to by the parties. Instead of declaring national and local usages to be generally applicable, the court should have crafted an exception based upon the facts of the case. In short, a more specific default rule would have made local usage available to the court if the adverse party knew of its existence and knew there was no conflicting international usage. Nonetheless, the importance of trade usage to CISG contract interpretation was duly noted by the U.S. court in *Geneva*

[36] *Id.* at *8.

[37] Civil Court of Basel-Stadt, P4 1991.238, Dec. 21, 1992, (Switz.), CLOUT Case No. 95, *available at* http://www.uncitral.org/english/clout/abstract/abstr7.htm.

[38] *Id.*

[39] *Id.*

[40] *Id.* Court of Appeal Graz, 6 R 194/95, Nov. 9, 1995, (Aus.), CLOUT Case No. 175, *available at* http://www.uncitral.org/english/clout/abstract/abstr13.htm.

[41] *Id.*

Pharmaceutical Tech. Corp. v. Barr Labs., Inc. when it stated that the CISG has "a strong preference for enforcing obligations and representations customarily relied upon by others in the industry."[42]

Importance of Notice

One element that runs throughout the CISG is the importance of notice. Notice is expressly mandated in the following CISG provisions: notice of objection to additional terms (Article 19), notice of acceptance of a belated acceptance (Article 21), notice of avoidance (Article 26 and 49), sufficiency of notice (Article 27), notice of consignment (Article 32), notice of nonconformity and sufficiency of notice of nonconformity (Article 39), notice of third party claims (Article 43), notice of demand for substituted goods (Article 46), notice of time extension (Articles 47, 48 and 63), notice of specifications (Article 65), notice of delivery (Article 67), and notice of intention to sell (Article 88). Failure to communicate to the other party on numerous issues (including avoidance, suspension, fundamental breach, and nonconformity) meets with dire consequence. As discussed in Chapter 7, insufficiency of notice, either "improperly made or given too late,"[43] results in the loss of a right to declare an anticipatory breach or right to avoidance under Articles 71–73. Article 79 removes the liability exemption for a party declaring avoidance if it fails to notify the other party within a reasonable time after it knew or ought to have known of the impediment.[44]

The importance of giving notice is also highlighted in Chapter 7's coverage of anticipatory breach. A party's failure to give notice of a suspension of performance by anticipating a breach (Article 71) may result in the party losing a right to avoid the contract or being liable for damages. Given the pervasiveness of notice requirements, an implied general principle of communication may be recognized. Awareness of the importance of communication or notice, whether extrapolated from first order principles of good faith or commercial reasonableness, is vital to the international trade of goods. It is likely that courts will imply notice requirements in situations not expressly mandated by the CISG. An example of an implied notice requirement was discussed in Chapter 8. A German court denied the buyer the right to avoidance because

[42] *Geneva Pharmaceuticals Technology Corp. v. Barr Laboratories, Inc.* et al., 201 F. Supp. 2d 236, 281 (S.D.N.Y. 2002).
[43] *Supra* Chapter 7.
[44] *Supra* Chapter 7.

the declaration of avoidance occurred five months after the breach.[45] Although Article 49(1)(b) does not explicitly require notice of avoidance within a reasonable time, the court construed the general theme of the CISG's Section on Remedies for Breach of Contract by Seller to require reasonably prompt notice.[46]

Article 49 is also a good example of the problems of nonspecific notice provisions. It is one thing to advise that notice should be given as a general precaution, it is another to provide advice as to what is reasonable notice both as to time and content. Chapter 8's coverage of the right to avoidance concluded that the timeliness of notice remains a continuing issue under Article 49. It also noted that the fact-specific nature of most cases of timeliness makes uniformity of interpretation and application difficult to assess. The problem of content is highlighted in the jurisprudence surrounding Article 47. Chapter 9's coverage of *nachfrist* notice noted divergent interpretations of what is required for a buyer to affix additional time for seller's performance. Under one version of Article 47, the time extension need not be precise but rather only capable of judicial interpretation as reasonable. The other interpretation requires the buyer to specify the exact length of the extension.

Burden of Proof

Generally, the CISG does not expressly provide rules on which party has the burden of proof.[47] A court's allocation of the burden of proof becomes as important as the substantive rule itself. That allocation often shifts within the dictates of a single article. For example, Article 2 excludes from the reach of the CISG sales of goods bought for "personal use."[48] The party seeking to enforce the exclusion has the burden of proving that the goods were purchased for personal use. It also provides that the exclusion does not affix to the transaction if the seller "neither knew nor ought to have known that the goods were bought for any such use."[49] In submitting such a claim, the other party would have to satisfy the burden of proof regarding lack of knowledge of the personal nature of the purchase.

[45] BGH VIII ZR 18/94, Feb. 15, 1995, (F.R.G.), CLOUT Case No. 124, *available at* http://www.uncitral.org/english/clout/abstract/abstr9.htm.

[46] *Id.*

[47] One exception is Article 79(1) on proving the excuse of "impediment." It states that "[a] party is not liable for a failure to perform any of his obligations if he *proves* that the failure was due to an impediment beyond his control." CISG at Art. 79(1) (emphasis added).

[48] *Id.* Art. 2(a).

[49] *Id.*

If a rule or issue is within the scope of the CISG, then the allocation of the burden of proof should be determined through the interpretive methodology of the CISG. An Italian court in *Rheinland Versicherungen v. Atlarex*[50] concluded that an underlying principle of the CISG is that the party that benefits from a finding has the burden of proving it. The case is an example of a court totally committed to the quest for uniformity through the application of the CISG's interpretive methodology. First, it determined that the issue of the burden of proof is within the scope of the CISG. Second, it performed a comprehensive review of foreign case law to see if decisions on the issue of burden of proof provide persuasive rationales. The court refers to approximately forty foreign cases and arbitral decisions.[51]

Third, the court concluded that since there was no express provision allocating the burden of proof in Articles 38 and 39 regarding inspection and notice of nonconformity the allocations were to be determined through the application of CISG general principles. This was noted in Chapter 5's coverage of inspection duties under Article 38. It was asserted that the general principles support the view that buyers seeking additional time to inspect should bear the burden of proof with respect to the reasons justifying such additional time. In the area of notice of nonconformity (Article 39), Chapter 5's review found cases that placed the burden on the buyer to demonstrate the reasonableness of the time in which it gave notice of nonconformity to the seller. Chapter 6's coverage of Article 36 (nonconformity and risk of loss) is another case in point. Article 36 simply states that a seller is liable for any defects in the goods prior to the passing of the risk. It fails to expressly state which party has the burden of proof. A German court[52] allocated to the buyer the burden of proving that the goods were defective prior to the passing of the risk of loss. Some issues of burden of proof are universally recognized.

[50] Trib. di Vigevano n. 405, Jul. 12, 2000, (It.), CLOUT Case No. 378, *available at* http://cisgw3.law.pace.edu/cases/000712i3.html. *See* Alessandro Rizzieri, *Decision of the Tribunal of Vigevano, Italy, July 12, 2000*, 20 J.L. & Com. 209 (2001). A commentary on that case states that "a close examination of both the legislative history of the various provisions, as well as their wording . . . elaborate[s] the general principle that each party has to prove the existence of the factual prerequisites contained in the provision from which it wants to derive beneficial consequence." Franco Ferrari, *Tribunale di Vigevano*: Specific Aspects of the CISG *Uniformly Dealt with*, 20 J.L. & Com. 225, 238 (2001). *See also supra* Chapter 6 ("courts have required the imposition of a burden on the buyer prior to granting additional time for inspection").

[51] Trib. di Vigevano Jul. 12, 2000, n. 405 (It.), CLOUT Case No. 378, *available at* http://cisgw3.law.pace.edu/cases/000712i3.html; Ferrari, *Tribunale Di Vegevano*, *supra* Note 50 at 231.

[52] *See* LG Flensburg, 2O 291/98, Mar. 24, 1999 (F.R.G.), *available at* http://cisgw3.law.pace.edu/cases/990324g2.html.

For example, Chapter 10's coverage notes that even though Article 74 fails to allocate the burden of proof it is assumed that the party claiming damages has the burden of proving those damages.

The court found an implicit general principle in Article 79(1)'s placement of the burden of proof on the party claiming an impediment. It reasoned that Article 79(1) brought the issue of the burden of proof within the scope of the CISG.[53] Based upon the Article 79(1) allocation it further reasoned that the implied general principle is that the burden of proof is on the party who would benefit from the evidentiary finding. It stated that the "Convention's general principle on the burden of proof seems to be *ei incumbit probation qui dicit, non qui negat*: The burden of proof rests upon the one who affirms, not the one who denies."[54] A Swiss court rationalized the placement of the burden of proof on a party seeking an excuse for a delayed inspection of goods. It held that buyers seeking such additional time should bear the burden of proof with respect to the reasons justifying such additional time.[55]

PERSISTENCE OF *HOMEWARD TREND*

Despite the existence of enlightened decision-making by courts and arbitral panels using CISG interpretive methodology, the persistence of *homeward trend* remains a problem. We have seen that some areas, such as the battle of forms, are particularly subject to homeward trend interpretations.[56] This is likely due to the vagueness and open-endedness of CISG language. Chapter 3's discussion of the parol evidence rule provides an example. The U.S. Court of Appeals for the Fifth Circuit held that the parol evidence rule applied to cases of written contracts within the scope of the CISG because of its nature as a rule of procedure and not of substantive law.[57] This is an example of

[53] "Thus, the issue of the burden of proof cannot be deemed beyond the ambit of the Convention. . . . " Trib. di Vigevano, 12 Jul. 2000 n. 405, par 23 (It.), *available at* http://cisgw3.law.pace.edu/cases/000712i3.html. *See* Rizzieri, *supra* Note 50, at 220.

[54] Trib. di Vigevano, Jul. 12, 2000, n. 405 par 4, (It.), *available at* http://cisgw3.law.pace.edu/cases/000712i3.html. *See* Rizzieri, *supra* Note 915, at 221. *See also* HG Zürich, HG930138. U/HG93, Sept. 9, 1993, (Switz.), CLOUT Case No. 97, *available at* http://www.uncitral.org/english/clout/abstract/abstr7.htm (burden of proof on buyer to provide defect and that it sent proper notice).

[55] *T. S.A. v. R. Etablissement*, HG Zürich, HG 930 634/O, Nov. 30, 1998, (Switz.), *available at* http://cisgw3.law.pace.edu/cases/981130s1 .

[56] *See, e.g., supra* Chapter 4 (Battle of the Forms).

[57] *Beijing Metals & Minerals v. Am. Bus. Ctr., Inc.*, 993 F.2d 1178 (5th Cir. 1993). Another example of the use of the procedural-substantive distinction to avoid application of the CISG is Justice Posner's opinion in *Zapata Hermanos v. Hearthside Baking Co.*, Inc., 313 F.3d 385 (7th Cir. 2002). He reasoned that attorney fees could not be given under Article 79

judicial parochialism. The court failed to use CISG interpretive methodology. A reasoned analysis would have involved the court's recognition of a general principle that, under the CISG, legal formalities are not to be used to preclude admission of relevant evidence. First, Article 11 states that a contract "need not be evidenced by a writing" and that "it may be proved by any means, including witnesses."[58] Article 8(3) states that "due consideration is to be given to all relevant circumstances of the case including negotiations."[59] Nonetheless, the court applied the Texas parol evidence rule to a case involving the CISG. It did so without a review of foreign case law and scholarly commentary.[60]

In comparison, the U.S. Court of Appeals for the Eleventh Circuit in *MCC-Marble Center* rejected the homeward trend temptation and correctly held that the admissibility of parol evidence was a rule of substantive law and within the scope of the CISG.[61] In addition, the court appropriately cited scholarly writings and foreign case law to buttress its holding. In doing so, it reasoned that it is important to provide parties to international contracts for the sale of goods with some degree of certainty as to the principles of law that would govern potential disputes. "Courts applying the CISG cannot, therefore, upset the parties' reliance on the Convention by substituting familiar principles of domestic law."[62] It also refered to the express general principles of freedom of contract by holding that the parties could adopt the parol evidence rule by inserting a merger clause into their contracts.[63]

More recently, the U.S. Court of Appeals for the Fourth Circuit in *Schmitz-WerkeGmbh v. Rockland Industries, Inc.*[64] badly misapplied CISG's interpretive methodology. It placed domestic jurisprudence on a non-hierarchical level

because they are a matter of procedure. In reaching his decision, Posner poses a question that is left unanswered: "And how likely is it that the United States would have signed the convention had it thought in doing so it was abandoning the hallowed American rule?" 313 F.3d at 389. The question begs a more substantive response then the implied response offered by Posner. It should be remembered that the United States failed to opt out of Article 11 and in the process jettisoning the more long-standing statute of frauds and parol evidence rule, and in the process creating a stark contradiction between the CISG and the UCC. *But cf.*, OLG Düsseldorf, 6 U 152/95 Jul. 11, 1996, (F.R.G.), CLOUT Case No. 169, *available at* http://www.uncitral.org/english/clout/abstract/abstr12.htm (under Articles 61(1)(b) and 74, party could collect attorney fees).

58 CISG at Art. 11.

59 *Id.* Art. 8(3).

60 Beijing Metals & Minerals, 993 F.2d 1178 (5th Cir. 1993).

61 *MCC-Marble Ceramic Ctr. v. Ceramica Nuova D'Agostino, S.P.A.*, 144 F.3d 1384 (11th Cir. 1998). *See generally* Paolo Torzilli, *The Aftermath of MCC-Marble: Is This the Death Knell for the Parol Evidence Rule?* 74 St. John's L. R. 843 (2000).

62 MCC-Marble, 144 F.3d at 1391.

63 *Id.*

64 Schmitz-Werke, No. 00-1125, 2002 U.S. App. LEXIS 12336 (4th Cir. Jun. 21, 2002).

with the express language of the CISG and its general principles. It nonchalantly states that "[c]ase law interpreting provisions of Article 2 of the Uniform Commercial Code that are similar to provisions in the CISG can also be helpful in interpreting the Convention."[65] The court correctly notes that recourse to domestic law is a matter of last resort. It then, however, argues that the CISG is silent as to the type of evidence needed to prove a breach of an express warranty. The important question is not whether the CISG is silent as to the nature of the buyer's burden of proof but whether the issue is within the scope of the CISG. Given Article 35's warranty coverage, the issue of how a party proves nonconformity is within the scope of the CISG. Instead of devolving to UCC law, the court should have based its answer upon general principles and by reviewing foreign case law interpreting Article 35.

There are signs, however, that U.S. courts are becoming more sophisticated in their applications of the CISG.[66] The references in *MCC-Marble Center* to international authorities and cases are aligned with Article 7's mandate that decisions should be based on due considerations of international character and the need for uniformity. This mindset was again on display in the U.S. Eastern District Court of Louisiana case of *Medical Marketing v. Internazionale Medico Scientifica S.R.L.*[67] The issue in that case was the role of public regulations on the seller's warranty obligations under Article 35(2).[68] The drafters of the CISG did not consider the role of governmental standards and regulations on the merchantability of goods.[69]

In reviewing a foreign arbitration award, the American court recited the German case reviewed in the arbitral decision and treated it as a persuasive precedent.[70] The German Supreme Court held that the general rule was that a seller was not obligated to supply goods that conform to the laws of the buyer's country. The American court agreed with the arbitral decision that the case at bar came within an exception, namely, that the seller was obligated to provide goods that conform to foreign regulations "if due to 'special circumstances,'

65 *Id.* at *8–9.

66 *See, e.g.*, St. Paul Ins. Co., No. 00 Civ. 9344(SHS), 2002 U.S. Dist. LEXIS 5096 (S.D.N.Y. Mar. 26, 2002).

67 Med. Mktg. Int'l, Civ. Action No. 99-0380 § "K"(1), 1999 U.S. LEXIS 7380 (E.D. La. May 17, 1999), CLOUT Case No. 418, *available at* http://www.uncitral.org/english/clout/abstract/Abst-36.pdf.

68 *Id.*

69 "This problem was evidently overlooked at the creation of the CISG." Case Commentary, Peter Schlechtriem, *Conformity of the Goods and Standards Established by Public Law Treatment of Foreign Court Decision as Precedent* (Andre Corterier trans., 1999), *available at* http://cisgw3.law.pace.edu/cases/990517ul.html.

70 Med. Mktg. Int'l, 1999 U.S. LEXIS 7380, at *5–6.

such as the existence of a seller's branch office in the buyer's state, the seller knew or should have known about the regulations at issue."[71] This case, along with the Austrian, Belgium, and German cases discussed in Chapter 6 interpreting the warranty provisions of Article 35, provide an example of the proper application of CISG interpretive methodology to resist homeward trend decisions.[72] This resistence to homeward trend analysis was admirably demonstrated by the Belgium court.[73] The court noted that Belgium law makes a distinction between delivery of nonconforming goods and latent defects. It then disregarded the distinction in holding that the CISG controls and that it does not provide for any distinction.

As is apparent from the previous discussion, CISG jurisprudence is mixed regarding the avoidance of homeward trend analysis. There remains, however, troubling evidence of national courts failing to recognize the international character of the CISG. One example is the creative use made by a U.S. court[74] of Article 4's edict that questions of validity are to be answered by reference to national law. The court then reasoned that whether new consideration is required for a contract modification is such an issue of validity to be determined under national law. This despite Article 29's clear pronouncement that a modification can be made by "mere agreement of the parties."

Some of the homeward trend interpretations could have been prevented by clear and more detailed drafting of the CISG. In the area of parol evidence, the split interpetations discussed in this Chapter and in Chapter 3 would have been prevented with a clearer statement regarding the admissability of parol evidence and the enforceability of merger and written modification clauses. Again the divergence on the issue of whether a party can recover attorneys' fees and the cost of debt collection under Article 74, as examined in Chapter 10, could have been prevented with an express statement or provision in the CISG.

SUMMARY

A review of CISG jurisprudence is an enlightening experience in the creation and interpretation of a living commercial code. The extremes that are found

[71] *Id.* at *6.

[72] *Supra* Chapter 6 (Warranties: Article 35).

[73] BV BA G-2 v. AS C. B., Rechtbank van Koophandel [District Court] Veurne A/00/00665, Apr. 25, 2001, (Neth.), *available at* http://www.cisg.law.pace.edu/cisg/wais/db/cases2/010425b1.html.

[74] *Geneva Pharm. Tech. Corp. v. Barr Laboratories, Inc. et al.*, 201 F. Supp. 2d 236, 282–83 (S.D.N.Y. 2002) (court used New Jersey law to determine whether there was consideration).

in the national interpretations of any international convention are evidenced in CISG jurisprudence. At one extreme, some courts have largely ignored the CISG's mandate that interpretations are to be formulated with an eye toward the international character of the transaction and the need for uniformity of application. At the other extreme are courts, and more often arbitral panels, that have taken the previously mentioned mandates seriously and have resisted the temptation of homeward trend interpretations. In the middle, are the majority of cases that have attempted to provide autonomous interpretations with various degrees of success.

Despite the problem of diverging interpretations, there are signs that courts are taking their role more seriously in applying CISG interpretive methodology. The result has produced a coalescing of different interpretations through the formulation of more specific default rules and the recognition of factors to be used in applying CISG articles. In the end, poorly reasoned interpretations will hopefully be largely ignored. This coalescence of jurisprudence is evidence that the CISG is evolving as a living, functional code. It is this process of evolution that allows us to conclude that the CISG has obtained a significant degree of success in reducing legal impediments to international sales transactions. For even in case of divergence, a certain level of uniformity is achieved in comparison to the realm of conflicts of private international law. It is the hope that this process will create a more uniform jurisprudence in the years to come.

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APPENDIX A

UNITED NATIONS CONVENTION ON CISG (1980)*

THE STATES PARTIES TO THIS CONVENTION,

BEARING IN MIND the broad objectives in the resolutions adopted by the sixth special session of the General Assembly of the United Nations on the establishment of a new International Economic Order,

CONSIDERING that the development of international trade on the basis of equality and mutual benefit is an important element in promoting friendly relations among States,

BEING OF THE OPINION that the adoption of uniform rules which govern contracts for the international sale of goods and take into account the different social, economic and legal systems would contribute to the removal of legal barriers in international trade and promote the development of international trade,

HAVE AGREED as follows:

PART I: Sphere of Application and General Provisions

Chapter I: Sphere of Application

Article 1

(1) This Convention applies to contracts of sale of goods between parties whose places of business are in different States:

(a) when the States are Contracting States; or

(b) when the rules of private international law lead to the application of the law of a Contracting State.

(2) The fact that the parties have their places of business in different States is to be disregarded whenever this fact does not appear either from the contract or

* (Part IV Final Provisions, Articles 89–101, have been deleted)

from any dealings between, or from information disclosed by, the parties at any time before or at the conclusion of the contract.

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

Article 2

This Convention does not apply to sales:

(a) of goods bought for personal, family or household use, unless the seller, at any time before or at the conclusion of the contract, neither knew nor ought to have known that the goods were bought for any such use;
(b) by auction;
(c) on execution or otherwise by authority of law,
(d) of stocks, shares, investment securities, negotiable instruments or money,
(e) of ships, vessels, hovercraft or aircraft;
(f) of electricity.

Article 3

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

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

Article 4

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

(a) the validity of the contract or of any of its provisions or of any usage;
(b) the effect which the contract may have on the property in the goods sold.

Article 5

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

Article 6

The parties may exclude the application of this Convention or, subject to article 12, derogate from or vary the effect of any of its provisions.

Chapter II: General Provisions

Article 7

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

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

Article 8

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

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

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

Article 9

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

(2) The parties are considered, unless otherwise agreed, to have impliedly made applicable to their contract or its formation a usage of which the parties knew or ought to have known and which in international trade is widely known to, and regularly observed by, parties to contracts of the type involved in the particular trade concerned.

Article 10

For the purposes of this Convention:

(a) if a party has more than one place of business, the place of the business is that which has the closest relationship to the contract and its performance, having regard to the circumstances known to or contemplated by the parties at any time before or at the conclusion of the contract;
(b) if a party does not have a place of business, reference is to be made to his habitual residence.

Article 11
A contract of sale need not be concluded in or evidenced by writing and is not subject to any other requirement as to form. It may be proved by any means, including witnesses.

Article 12
Any provision of article 11, article 29 or Part 11 of this Convention that allows a contract of sale or its modification or termination by agreement or any offer, acceptance or other indication of intention to be made in any form other than in writing does not apply where any party has his place of business in a Contracting State which has made a declaration under article 96 of this Convention. The parties may not derogate from or vary the effect of this article.

Article 13
For the purposes of this Convention "writing" includes telegram and telex.

PART II: Formation of the Contract

Article 14
(1) A proposal for concluding a contract addressed to one or more specific persons constitutes an offer if it is sufficiently definite and indicates the intention of the offeror to be bound in case of acceptance. A proposal is sufficiently definite if it indicates the goods and expressly or implicitly fixes or makes provision for determining the quantity and the price.

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

Article 15
(1) An offer becomes effective when it reaches the offeree.

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

Article 16
(1) Until a contract is concluded an offer may be revoked if the revocation reaches the offeree before he has dispatched an acceptance.

(2) However, an offer cannot be revoked:
   (a) if it indicates, whether by stating a fixed time for acceptance or otherwise, that it is irrevocable; or
   (b) if it was reasonable for the offeree to rely on the offer as being irrevocable and the offeree has acted in reliance on the offer.

Article 17
An offer, even if it is irrevocable, is terminated when a rejection reaches the offeror.

Article 18
(1) A statement made by or other conduct of the offeree indicating assent to an offer is an acceptance. Silence or inactivity does not in itself amount to acceptance.

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

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

Article 19
(1) A reply to an offer which purports to be an acceptance but contains additions, limitations or other modifications is a rejection of the offer and constitutes a counter-offer.

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

(3) Additional or different terms relating, among other things, to the price, payment, quality and quantity of the goods, place and time of delivery, extent of one party's liability to the other or the settlement of disputes are considered to alter the terms of the offer materially.

Article 20
(1) A period of time for acceptance fixed by the offeror in a telegram or a letter begins to run from the moment the telegram is handed in for dispatch or from the date shown on the letter or, if no such date is shown, from the date shown on the envelope. A period of time for acceptance fixed by the offeror by telephone,

telex or other means of instantaneous communication, begins to run from the moment that the offer reaches the offeree.

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

Article 21
(1) A late acceptance is nevertheless effective as an acceptance if without delay the offeror orally so informs the offeree or dispatches a notice to that effect.

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

Article 22
An acceptance may be withdrawn if the withdrawal reaches the offeror before or at the same time as the acceptance would have become effective.

Article 23
A contract is concluded at the moment when an acceptance of an offer becomes effective in accordance with the provisions of this Convention.

Article 24
For the purposes of this part of the Convention, an offer, declaration of acceptance o any other indication of intention "reaches" the addressee when it is made orally to him or delivered by any other means to him personally, to his place of business or mailing address or, if he does not have a place of business or mailing address, to his habitual residence.

PART III: Sale of Goods

Chapter I: General Provisions

Article 25
A breach of contract committed by one of the parties is fundamental if it results in such detriment to the other party as substantially to deprive him of what he is entitled to expect under the contract, unless the party in breach did not foresee and a reasonable person of the same kind in the same circumstances would not have foreseen such a result.

Article 26
A declaration of avoidance of the contract is effective only if made by notice to the other party.

Article 27
Unless otherwise expressly provided in this Part of the Convention, if any notice, request or other communication is given or made by a party in accordance with this Part and by means appropriate in the circumstances, a delay or error in the transmission of the communication or its failure to arrive does not deprive that party of the right to rely on the communication.

Article 28
If, in accordance with the provisions of this Convention, one party is entitled to require performance of any obligation by the other party, a court is not bound to enter a judgement for specific performance unless the court would do so under its own law in respect of similar contracts of sale not governed by this Convention.

Article 29
(1) A contract may be modified or terminated by the mere agreement of the parties.

(2) A contract in writing which contains a provision requiring any modification or termination by agreement to be in writing may not be otherwise modified or terminated by agreement. However, a party may be precluded by his conduct from asserting such a provision to the extent that the other party has relied on that conduct.

Chapter H: Obligations of the Seller

Article 30
The seller must deliver the goods, hand over any documents relating to them and transfer the property in the goods, as required by the contract and this Convention.

Section I: Delivery of the Goods and Handing Over of Documents

Article 31
If the seller is not bound to deliver the goods at any other particular place, his obligation to deliver consists:

(a) if the contract of sale involves carriage of the goods – in handing the goods over to the first carrier for transmission to the buyer;
(b) if, in cases not within the preceding subparagraph, the contract relates to specific goods, or unidentified goods to be drawn from a specific stock or to be manufactured or produced, and at the time of the conclusion of the contract the parties knew that the goods were at, or were to be

manufactured or produced at a particular place – in placing the goods at the buyer's disposal at that place;

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

Article 32

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

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

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

Article 33

The seller must deliver the goods:

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

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

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

Article 34

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

Section II: Conformity of the Goods and Third Party Claims

Article 35

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

(2) Except where the parties have agreed otherwise, the goods do not conform with the contract unless there:

(a) are fit for the purposes for which goods of the same description would ordinarily be used;

(b) are fit for any particular purpose expressly or impliedly made known to the seller at the time of the conclusion of the contract, except where the circumstances show that the buyer did not rely, or that it was unreasonable for him to rely, on the seller's skill and judgement;

(c) possess the qualities of goods which the seller has held out to the buyer as a sample or model,

(d) are contained or packaged in the manner usual for such goods or, where there is no such manner, in a manner adequate to preserve and protect the goods.

(3) The seller is not liable under subparagraphs (a) to (d) of the preceding paragraph for any lack of conformity of the goods if at the time of the conclusion of the contract the buyer knew or could not have been unaware of such lack of conformity.

Article 36

(1) The seller is liable in accordance with the contract and this Convention for any lack of conformity which exists at the time when the risk passes to the buyer, even though the lack of conformity becomes apparent only after that time.

(2) The seller is also liable for any lack of conformity which occurs after the time indicated in the preceding paragraph and which is due to a breach of any of his obligations, including a breach of any guarantee that for a period of time the goods will remain fit for their ordinary purpose or for some particular purpose or will retain specified qualities or characteristics.

Article 37

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

Article 38

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

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

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

Article 39

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

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

Article 40

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

Article 41

The seller must deliver goods which are free from any right or claim of a third party, unless the buyer agreed to take the goods subject to that right or claim. However, if such right or claim is based on industrial property or other intellectual property, the seller's obligation is governed by article 42.

Article 42

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

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

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

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

(a) at the time of the conclusion of the contract the buyer knew or could not have been unaware of the right or claim; or

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

Article 43

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

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

Article 44

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

Section III: Remedies for Breach of Contract by the Seller

Article 45

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

(a) exercise the rights provided in articles 46 to 52;

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

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

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

Article 46

(1) The buyer may require performance by the seller of his obligations unless the buyer has resorted to a remedy which is inconsistent with this requirement.

(2) If the goods do not conform with the contract, the buyer may require delivery of substitute goods only if the lack of conformity constitutes a fundamental breach of contract and a request for substitute goods is made either in conjunction with notice given under article 39 or within a reasonable time thereafter.

(3) If the goods do not conform with the contract, the buyer may require the seller to remedy the lack of conformity by repair, unless this is unreasonable having regard to all the circumstances. A request for repair must be made either

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

Article 47

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

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

Article 48

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

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

(3) A notice by the seller that he will perform within a specified period of time is assumed to include a request, under the preceding paragraph, that the buyer make known his decision.

(4) A request or notice by the seller under paragraph (2) or (3) of this article is not effective unless received by the buyer.

Article 49

(1) The buyer may declare the contract avoided:

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

(b) in case of non-delivery, if the seller does not deliver the goods within the additional period of time fixed by the buyer in accordance with paragraph (1) of article 47 or declares that he will not deliver within the period so fixed.

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

(a) in respect of late delivery, within a reasonable time after he has become aware that delivery has been made;

(b) in respect of any breach other than late delivery, within a reasonable time:
  (i) after he knew or ought to have known of the breach;
  (ii) after the expiration of any additional period of time fixed by the buyer in accordance with paragraph (1) of article 47, or after the seller has declared that he will not perform his obligations within such an additional period; or
  (iii) after the expiration of any additional period of time indicated by the seller in accordance with paragraph (2) of article 48, or after the buyer has declared that he will not accept performance.

Article 50
If the goods do not conform with the contract and whether or not the price has already been paid, the buyer may reduce the price in the same proportion as the value that the goods actually delivered had at the time of the delivery bears to the value that conforming goods would have had at that time. However, if the seller remedies any failure to perform his obligations in accordance with article 37 or article 48 or if the buyer refuses to accept performance by the seller in accordance with those articles, the buyer may not reduce the price.

Article 51
(1) If the seller delivers only a part of the goods or if only a part of the goods delivered is in conformity with. the contract, articles 46 to 50 apply in respect of the part which is missing or which does not conform.

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

Article 52
(1) If the seller delivers the goods before the date fixed, the buyer may take delivery or refuse to take delivery.

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

Chapter III: Obligations of the Buyer

Article 53
The buyer must pay the price for the goods and take delivery of them as required by the contract and this Convention.

Section 1: Payment of the Price

Article 54
The buyer's obligation to pay the price includes taking such steps and complying with such formalities as may be required under the contract or any laws and regulations to enable payment to be made.

Article 55
Where a contract has been validly concluded but does not expressly or implicitly fix or make provision for determining the price, the parties are considered, in the absence of any indication to the contrary, to have impliedly made reference to the price generally charged at the time of the conclusion of the contract for such goods sold under comparable circumstances in the trade concerned.

Article 56
If the price is fixed according to the weight of the goods, in case of doubt it is to be determined by the net weight.

Article 57
(1) If the buyer is not bound to pay the price at any other particular place, he must pay it to the seller:
(a) at the seller's place of business; or
(b) if the payment is to be made against the handing over of the goods or of documents, at the place where the handing over takes place.

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

Article 58
(1) If the buyer is not bound to pay the price at any other specific time, he must pay it when the seller places either the goods or documents controlling their disposition at the buyer's disposal in accordance with the contract and this Convention. The seller may make such payment a condition for handing over the goods or documents.

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

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

Article 59
The buyer must pay the price on the date fixed by or determinable from the contract and this Convention without the need for any request or compliance with any formality on the part of the seller.

Section H: Taking delivery

Article 60
The buyer's obligation to take delivery consists:
(a) in doing all the acts which could reasonably be expected of him in order to enable the seller to make delivery; and
(b) in taking over the goods.

Section I: Remedies for Breach of Contract by the Buyer

Article 61
(1) If the buyer fails to perform any of his obligations under the contract or this Convention, the seller may:
(a) exercise the rights provided in articles 62 to 65;
(b) claim damages as provided in articles 74 to 77

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

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

Article 62
The seller may require the buyer to pay the price, take delivery or perform his other obligations, unless the seller has resorted to a remedy which is inconsistent with this requirement.

Article 63
(1) The seller may fix an additional period of time of reasonable length for performance by the buyer of his obligations.

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

Article 64
(1) The seller may declare the contract avoided:
(a) if the failure by the buyer to perform any of his obligations under the contract or this Convention amounts to a fundamental breach of contract; or

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

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

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

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

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

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

Article 65

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

(2) If the seller makes the specification himself, he must inform the buyer of the details thereof and must fix a reasonable time within which the buyer may make a different specification. If, after receipt of such a communication, the buyer fails to do so within the time so fixed, the specification made by the seller is binding.

Chapter IV: Passing of Risk

Article 66

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

Article 67

(1) If the contract of sale involves carriage of the goods and the seller is not bound to hand them over at a particular place, the risk passes to the buyer when the goods are handed over to the first carrier for transmission to the buyer in accordance with the contract of sale. If the seller is bound to hand the goods over to a carrier at a particular place, the risk does not pass to the buyer until the goods are handed over to the carrier at that place. The fact that the seller is authorized to retain

documents controlling the disposition of the goods does not affect the passage of the risk.

(2) Nevertheless, the risk does not pass to the buyer until the goods are clearly identified to the contract, whether by markings on the goods, by shipping documents, by notice given to the buver or otherwise.

Article 68
The risk in respect of goods sold in transit passes to the buyer from the time of the conclusion of the contract. However, if the circumstances so indicate, the risk is assumed by the buyer from the time the goods were handed over to the carrier who issued the documents embodying the contract of carriage. Nevertheless, if at the time of the conclusion of the contract of sale the seller knew or ought to have known that the goods had been lost or damaged and did not disclose this to the buyer, the loss or damage is at the risk of the seller.

Article 69
(1) In cases not within articles 67 and 68, the risk passes to the buyer when he takes over the goods or, if he does not do so in due time, from the time when the goods are placed at his disposal and he commits a breach of contract by failing to take delivery.

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

(3) If the contract relates to goods not then identified, the goods are considered not to be placed at the disposal of the buyer until they are clearly identified to the contract.

Article 70
If the seller had committed a fundamental breach of contract, articles 67, 68 and 69 do not impair the remedies available to the buyer on account of the breach.

Chapter V: Provisions Common to the Obligations of the Seller and of the Buyer

Section 1: Anticipatory Breach and Installment Contracts

Article 71
(1) A party may suspend the performance of his obligations if, after the conclusion of the contract, it becomes apparent that the other party will not perform a substantial part of his obligations as a result of:

(a) a serious deficiency in his ability to perform or in his creditworthiness; or
(b) his conduct in preparing to perform or in performing the contract.

(2) If the seller has already dispatched the goods before the grounds described in the preceding paragraph become evident, he may prevent the handing over of the goods to the buyer even though the buyer holds a document which entitles him to obtain them. The present paragraph relates only to the rights in the goods as between the buyer and the seller.

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

Article 72

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

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

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

Article 73

(1) In the case of a contract for delivery of goods by installments, if the failure of one party to perform any of his obligations in respect of any installment constitutes a fundamental breach of contract with respect to that installment, the other party may declare the contract avoided with respect to that installment.

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

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

Section VI: Damages

Article 74

Damages for breach of contract by one party consist of a sum equal to the loss, including loss of profit, suffered by the other party as a consequence of the breach. Such damages may not exceed the loss which the party in breach foresaw or ought

to have foreseen at the time of the conclusion of the contract, in the light of the facts and matters of which he then knew or ought to have known, as a possible consequence of the breach of contract.

Article 75
If the contract is avoided and if, in a reasonable manner and within a reasonable time after avoidance, the buyer has bought goods in replacement or the seller has resold the goods, the party claiming damages may recover the difference between the contract price and the price in the substitute transaction as well as any further damages recoverable under article 74.

Article 76
(1) If the contract is avoided and there is a current price for the goods, the party claiming damages may, if he has not made a purchase or resale under article 75, recover the difference between the price fixed by the contract and the current price at the time of avoidance as well as any further damages recoverable under article 74. If, however, the party claiming damages has avoided the contract after taking over the goods, the current price at the time of such taking over shall be applied instead of the current price at the time of avoidance.

(2) For the purposes of the preceding paragraph, the current price is the price prevailing at the place where delivery of the goods should have been made or, if there is no current price at that place, the price at such other place as serves as a reasonable substitute, making due allowance for differences in the cost of transporting the goods.

Article 77
A party who relies on a breach of contract must take such measures as are reasonable in the circumstances to mitigate the loss, including loss of profit, resulting from the breach. If he fails to take such measures, the party in breach may claim a reduction in the damages in the amount by which the loss should have been mitigated.

Article 78
If a party fails to pay the price or any other sum that is in arrears, the other party is entitled to interest on it, without prejudice to any claim for damages recoverable under article 74.

Section IV: Exemptions

Article 79
(1) A party is not liable for a failure to perform any of his obligations if he proves that the failure was due to an impediment beyond his control and that he could not reasonably be expected to have taken the impediment into account at the

time of the conclusion of the contract or to have avoided or overcome it or its consequences.

(2) if the party's failure is due to the failure by a third person whom he has engaged to perform the whole or a part of the contract, that party is exempt from liability only if:

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

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

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

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

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

Article 80

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

Section V: Effects of Avoidance

Article 81

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

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

Article 82

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

(2) The preceding paragraph does not apply:
(a) if the impossibility of making restitution of the goods or of making restitution of the goods substantially in the condition in which the buyer received them is not due to his act or omission;
(b) if the goods or part of the goods have perished or deteriorated as a result of the examination provided for in article 38; or if the goods or part of the goods have been sold in the normal course of business or have been consumed or transformed by the buyer in the course of normal use before he discovered or ought to have discovered the lack of conformity.

Article 83
A buyer who has lost the right to declare the contract avoided or to require the seller to deliver substitute goods in accordance with article 82 retains all other remedies under the contract and this Convention.

Article 84
(1) If the seller is bound to refund the price, he must also pay interest on it, from the date on which the price was paid.

(2) The buyer must account to the seller for all benefits which he has derived from the goods or part of them:
(a) if he must make restitution of the goods or part of them; or
(b) if it is impossible for him to make restitution of all or part of the goods or to make restitution of all or part of the goods substantially in the condition in which he received them, but he has nevertheless declared the contract avoided or required the seller to deliver substitute goods.

Section VI: Preservation of the Goods

Article 85
If the buyer is in delay in taking delivery of the goods or, where payment of the price and delivery of the goods are to be made concurrently, if he *fails* to pay the price, and the seller is either in possession of the goods or otherwise able to control their disposition, the seller must take such steps as are reasonable in the circumstances to preserve them. He is entitled to retain them until he has been reimbursed his reasonable expenses by the buyer.

Article 86
(1) If the buyer has received the goods and intends to exercise any right under the contract or this Convention to reject them, he must take such steps to preserve them as are reasonable in the circumstances. He is entitled to retain them until he has been reimbursed his reasonable expenses by the seller.

(2) If goods dispatched to the buyer have been placed at his disposal at their destination and he exercises the right to reject them, he must take possession of them on behalf of the seller, provided that this can be done without payment of the price and without unreasonable inconvenience or unreasonable expense. This provision does not apply if the seller or a person authorized to take charge of the goods on his behalf is present at the destination. If the buyer takes possession of the goods under this paragraph, his rights and obligations, are governed by the preceding paragraph.

Article 87

A party who is bound to take steps to preserve the goods may deposit them in a warehouse of a third person at the expense of the other party provided that the expense incurred is not unreasonable.

Article 88

(1) A party who is bound to preserve the goods in accordance with article 85 or 86 may sell them by any appropriate means if there has been an unreasonable delay by the other party in taking possession of the goods or in taking them back or in paying the price or the cost of preservation, provided that reasonable notice of the intention to sell has been given to the other party.

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

(3) A party selling the goods has the right to retain out of the proceeds of sale an amount equal to the reasonable expenses of preserving the goods and of selling them. He must account to the other party for the balance.

APPENDIX B

CISG: TABLE OF CONTRACTING STATES[1] (As of February 8, 2005)

State	Signature	Ratification, accession, approval, acceptance, or succession	Entry into force
Argentina		July 19, 1983	January 1, 1988
Australia		March 17, 1988	April 1, 1989
Austria	April 11, 1980	December 29, 1987	January 1, 1989
Belarus		October 9, 1989	November 1, 1990
Belgium		October 31, 1996	November 1, 1997
Bosnia and Herzegovina		January 12, 1994	March 6, 1992
Bulgaria		July 9, 1990 a	August 1, 1991
Burundi		September 4, 1998	October 1, 1999
Canada		April 23, 1991	May 1, 1992
Chile	April 11, 1980	February 7, 1990	March 1, 1991
China	September 30, 1981	December 11, 1986	January 1, 1988
Colombia		July 10, 2001	August 1, 2002
Croatia		June 8, 1998	October 8, 1991
Cuba		November 2, 1994	December 1, 1995
Czech Republic		September 30, 1993	January 1, 1993
Denmark	May 26, 1981	February 14, 1989	March 1, 1990
Ecuador		January 27, 1992	February 1, 1993
Egypt		December 6, 1982	January 1, 1988
Estonia		September 20, 1993	October 1, 1994
Finland	May 26, 1981	December 15, 1987	January 1, 1989
France	August 27, 1981	August 6, 1982	January 1, 1988
Gabon		December 15, 2004	January 1, 2006
Georgia		August 16, 1994	September 1, 1995
Germany	May 26, 1981	December 21, 1989	January 1, 1991

[1] UNCITRAL reports that 64 countries have adopted the CISG *available at* http://www.uncitral.org/en-contents.htm or http://www.cisg.law.pace.edu/cisg/countries/entries.html. (Feb. 8, 2005)

State	Signature	Ratification, accession, approval, acceptance, or succession	Entry into force
Greece		January 12, 1998	February 1, 1999
Guinea		January 23, 1991	February 1, 1992
Honduras		October 10, 2002	November 1, 2003
Hungary	April 11, 1980	June 16, 1983	January 1, 1988
Iceland		May 10, 2001	June 1, 2002
Iraq		March 5, 1990	April 1, 1991
Israel		January 22, 2002	February 1, 2003
Italy	September 30, 1981	December 11, 1986	January 1, 1988
Kyrgyzstan		May 11, 1999	June 1, 2000
Latvia		July 31, 1997	August 1, 1998
Lesotho	June 18, 1981	June 18, 1981	January 1, 1988
Lithuania		January 18, 1995	February 1, 1996
Luxembourg		January 30, 1997	February 1, 1998
Mauritania		August 20, 1999	September 1, 2000
Mexico		December 29, 1987	January 1, 1989
Mongolia		December 31, 1997	January 1, 1999
Netherlands	May 29, 1981	December 13, 1990	January 1, 1992
New Zealand		September 22, 1994	October 1, 1995
Norway	May 26, 1981	July 20, 1988	August 1, 1989
Peru		March 25, 1999	April 1, 2000
Poland	September 28, 1981	May 19, 1995	June 1, 1996
Republic of Korea		February 17, 2004	March 1, 2005
Republic of Moldova		October 13, 1994	November 1, 1995
Romania		May 22, 1991	June 1, 1992
Russian Federation		August 16, 1990	September 1, 1991
Saint Vincent and the Grenadines		September 12, 2000	October 1, 2001
Serbia and Montenegro		March 12, 2001	April 27, 1992
Singapore	April 11, 1980	February 16, 1995	March 1, 1996
Slovakia		May 28, 1993	January 1, 1993
Slovenia		January 7, 1994	June 25, 1991
Spain		July 24, 1990	August 1, 1991
Sweden	May 26, 1981	December 15, 1987	January 1, 1989
Switzerland		February 21, 1990	March 1, 1991
Syrian Arab Republic		October 19, 1982	January 1, 1988
Uganda		February 12, 1992	March 1, 1993
Ukraine		January 3, 1990	February 1, 1991
United States of America	August 31, 1981	December 11, 1986	January 1, 1988
Uruguay		January 25, 1999	February 1, 2000
Uzbekistan		November 27, 1996	December 1, 1997
Zambia		June 6, 1986	January 1, 1988

INDEX

agreements in principle, 34–35
Ajax Tool Works, Inc. v. Can-Eng Manufacturing Ltd., 156
arbitration, 13–14
  CISG as trade usage, 16
  firm offers and, 59–60
  role of, 17, 18
  writing requirements and, 39
Argentinian courts, interest on refunds, 169
Articles (CISG)
  1: 46, 72
  2: 10, 172
  4: 68, 102, 165–166, 177
  6: 166, 168
  7: 11, 12, 21, 22, 23, 27–28, 30, 42, 68, 150, 164, 176
  8: 21, 39, 41–42, 44, 45, 47, 48, 54–55, 56, 64–65, 168
  9: 22, 27, 41–42, 45, 47, 55–56, 62–63, 168
  10: 9
  11: 37, 38–39, 40–41, 42, 43, 44, 167, 175
  12: 38, 39, 40, 42–43, 47
  13: 38, 39, 40
  14: 20, 21, 47, 51, 53, 54–55, 56, 65
  15: 51, 59
  16: 51, 59–60
  17: 51, 52, 59
  18: 21, 23, 47, 51, 52–53, 60–61, 63, 65, 72, 167
  19: 47, 51, 52, 66, 67, 72, 73, 74, 166, 171
  20: 51, 53, 59
  21: 51, 53, 59, 171
  22: 51, 59
  23: 51, 59, 60
  24: 51, 59
  25: 5, 123, 125, 132, 136
  26: 171
  27: 130, 136, 171
  28: 133
  29: 32, 38, 40, 42, 43, 47, 177
  30: 101–102
  31: 20, 102, 104
  32: 103, 171
  33: 103, 107
  34: 24
  35: 12, 25, 108, 110, 114–116, 117, 176, 177
  36: 108, 118, 173–174
  37: 24
  38: 30–31, 76–77, 78, 81, 85, 109, 166, 173
  39: 30, 76, 84, 85, 91, 109, 133, 164–165, 168, 171, 173
  40: 28, 119
  41: 109–110
  42: 109–110
  43: 171
  44: 30, 76, 91
  45: 132–133
  46: 132, 133, 171
  47: 29, 107, 132, 134–135, 146, 171, 172
  48: 24, 29, 64, 132, 134, 135, 145, 171
  49: 5, 24, 127, 132, 135–138, 150, 171, 172
  50: 132
  51: 24, 132
  52: 132
  54: 28–29, 94
  55: 20, 22, 53, 56, 57–58
  57: 93–94, 97
  58: 94, 99
  61: 141–142
  62: 141–142
  63: 29, 141–142, 171
  64: 24, 141–142, 146
  65: 141–142, 171

Articles (CISG) (*cont.*)
66: 118
67: 20, 106, 121, 169, 171
68: 20, 106
69: 20, 106
71: 24, 124, 128, 171
72: 24, 124, 128, 171
73: 124, 125, 128, 171
74: 25, 132, 141, 151, 153, 174, 177
75: 132, 141, 151, 153
76: 132, 141, 151, 153
77: 141, 153
78: 153
79: 31, 171, 174
81: 149
82: 12, 111, 149
83: 149
84: 149, 169
86: 76, 77
87: 160
88: 160, 171
96: 38–39, 40, 42–43, 47
See also specific topics, issues
attorney fees, recovery of, 177
Austrian courts
Article 96 declarations, 43
contract modifications, 167–168
deliveries, place of, 105–106
interest payments, 27
letters of confirmation, 62
letters of credit, 94–95
materiality of contract terms, 73
private statute of frauds, 43
standard terms, 65–66
sufficiently definite offers, 56
trade usage, 170–171
warranties, 12, 111–112
writing requirements, 167–168
autonomous interpretations, 17
divergence of, 22–23
homeward trend and, 12
interpretive methodology and, 6, 11, 22
uniformity goal and, 11
average quality rule, 116

battle of forms, 32, 66, 174–175
Article 19 vagueness, 75
default rules, 166
good-faith-principle, 68
knock-out rule, 68–70, 73, 166
last-shot doctrine, 71–72, 73, 166
materiality of contract terms, 73–74
national courts, 67
Schlechtriem on, 68, 69–70
second-shot rule, 68
using cases from other contracting states, 75
Belgian courts
good faith principle, 28
notice of nonconformity, 84–85
seller's knowledge of defects, 119
warranties, 112
Belgium courts
nonconforming goods, 177
blue cobalt case, 126–127
B.P. Oil Int'l, Ltd. V. Empresa Estatal Petroleos De Ecuador, 122
breach of contract
adequate assurance, 128
anticipatory, 123, 124, 128, 171
by buyer, 29, 140, 141, 142, 143–145, 146, 147
buyer's refusal to grant additional time, 144–145
contract avoidance, 135, 141–142, 146, 149
contract vagueness, 142
contractual terms, failure to uphold, 125
damages. *See* damages
defective documents, 126
exclusivity provisions, 128
foreseeability of detriment, 123–124
fundamental, 123–124, 125, 126, 127–128, 141
fundamental, CISG failure to define, 25
goods deficiencies, 125, 126
goods preservation, 151
goods, right to substitute, 133
impediment excuse, 151
installment contracts, 125, 128
materiality of contract provisions, 127–128
nachfrist. See nachfrist notice
non-material breach, 124
notice, importance of, 128, 171
notice, sufficiency of, 130–131
reasonability test for, 123–124
by seller, 132, 133, 134–135
seller, late delivery by, 125–126, 134–135
seller, late performance by, 142, 143–144, 145
suspension of performance, 124–125
time extensions, 134, 141, 143–144
Brussels Convention, 39
burden of proof, 172
inspection duty and, 79, 83–84
interpretive methodology and, 173
risk-of-loss and, 118

buyer's obligations, 76, 121
final-destination requirements, 127–128, 149
give-notice duty, 76
inspection duty. *See* inspection duty
notice of avoidance, 136–138
payment obligation. *See* payment obligation
performance delays, 147
preservation-of-goods duty, 76
taking of delivery, 93, 148–149
See also breach of contract
buyer's right to affix additional time for performance, 29

Canadian courts, arbitration rulings and, 17
certificates of origin, 99
Chateau des Charmes Wines Ltd. v. Sabate USA, 48, 74
Circuit Schmitz-Werke GmbH & Co. v. Rockland Industries, Inc., 117
CISG. *See* Contracts for the International Sale of Goods
Claudia v. Olivieri Footwear Ltd., 72
cleavage-of-statutes problem, 9
comfort instruments, 33, 34
common v. civil law, 36–37
duty-to-notify analogy, 36
enforceability of, 35
evidentiary requirements and, 37
common law, 15
comfort instruments and, 36–37
consideration and. *See* consideration
good faith and, 32
mirror image rule, 67–68
persuasive v. binding precedent and, 3–4
compensation for justifiable reliance norm, 35
consideration, 49
contract formation and, 37, 38
contract modification and, 38, 40, 49
continuation of contract principle, 24, 101, 135
continuation of performance principle, 24
contract avoidance, 24, 135, 136–138, 141–142, 146, 149, 156. *See also specific national courts*
contract formation, 20, 32, 51
consideration and, 38
open price terms and, 20
permissiveness of CISG evidentiary regime, 45
terms, definiteness of, 32
writing requirements. *See* writing requirements
See also offer-acceptance rules; standard terms
contract modification, 32, 38, 40, 47, 177
buyer's inspection and, 78, 83–84
civil law countries, 167–168
consideration and, 38, 40, 49
homeward trend and, 177
intent, 47–48
offer-acceptance rules and, 47–48
oral modifications, 47
parol evidence and, 43, 48–49
contract termination, 38, 40
parol evidence and, 43
See also breach of contract
Contracting States, table of, 231
Contracts for the International Sale of Goods (CISG)
applied by national courts, but not integrated into legal systems, 9
basis of, in international contract law, 15
code-like format of, 19, 21, 26–27
as a convention, 11–12
as evidence of customary international law, 6
as evolving-living law, 7–8
functionality of, 10
as an international code, 6
as international convention, 8
neither party from signatory country, 16
open-ended rules, 25–27
open-textured rules, 25–27
original interpretation and, 36
as soft law, 6, 13
text of (appendix A), 209
as trade usage, 16
transaction-focused jurisdiction, 9
vague-abstract phraseology of, 13
writing requirements and, 36, 40, 42
See also Articles
culpa in contrahendo, 33, 37
currency exchange regulations, 95
customs documents, 100

damages, 145, 146, 151
attorneys' fees, 156
calculation of, 151
debt collection, 156
impediment excuse, 158

damages (*cont.*)
limiting doctrines, 153
mitigation doctrine, 157
See also interest
Danish courts, notice of nonconformity, 84–85
debt collection costs, homeward trend in, 177
default rules, 20, 22, 164
battle of forms and, 166
creation of, 29
fabrication of, 165
factor analysis approach vs., 166
interpretive methodology and, 3, 165
specific v. general rules, 29
Delchi Carrier SpA v. Rotorex Corp., 127, 154–155
delivery of goods, 101
carriage of goods, 102–103
late delivery, 125–126, 134–135, 140–141
passing of risk, 121
place of delivery, 20, 102, 104, 106–107
seller's documents, 103, 126
taking of delivery, 93, 148–149
third-party carriers, 104
time for, 103
time of, 107
See also breach of contract
"Dispute Resolution Journal" (excerpt), 15–18
domestic gloss. *See* homeward trend
Dutch courts
Article 96 declarations and, 43
notice of nonconformity, 84–85, 86, 88–89, 92
precontractual liability, 33
warranties, 25, 116–117

ei incumbit probation qui dicit, non qui negat, 174
evidence
admissible types of, 32
CISG regime and, 45
comfort instruments and, 37
precontractual liability and, 37
See also parol evidence; writing requirements

fairness norm, 15–16, 17, 28, 35
Fauba France FDIS GC Electronique v. Fujitsu Microelectronik GmbH, 73
faxes, unsigned, 41
Filanto v. Chilewich, 72
Finnish courts
continuation of contract principle, 24
notice of avoidance, 138
oral agreements, 41–42
warranties, 117
firm offers, 32, 52, 59
promissory estoppel and, 59–60
foreign case law, persuasive v. binding precedent and, 3–4
foreseeability, 5, 153, 154
breach and, 123–124
formality, rules of, 32
freedom-of-contract principle, 48–49
freedom-of-form approach, 38
French courts
acceptance rules, 61
contract modification, 167–168
deliveries, place of, 104–105
final-destination requirements, 128
fundamental breach, 126, 128
knock-out rule, 70
late delivery, 126
later performance by seller, 144
material-nonmaterial contract terms, 73–74
open price terms and, 54
particularized express consent, 168
standard terms and, 64
writing requirements, 167–168
full-compensation principle, 27

general principles
analogical reasoning v., 21–22
express v. implied, 23
general v. specific, 23
interpretive methodology and, 21–22, 23
See also particular general principles
Geneva Pharmaceuticals Technology Corp. v. Barr Laboratories, Inc., 59–60, 170–171
German courts
acceptance rules, 61
anticipatory breach, 130
avoidance, timeliness of, 150
debt collection, 157
defective documents, 126–127
deliveries, place of, 106–107
excuse doctrine of impediment, 31
foreseeability doctrine, 154
fundamental breach, 126–127

knock-out rule, 69–70
last-shot doctrine, 71–72
later performance by seller, 143–144
letters of confirmation, 62, 63
material-nonmaterial contract terms, 73
notice of avoidance, 136, 137, 138
notice of nonconformity, 85–86, 88–89, 92
offeror's intent to be bound
open price terms, 55
passing-of-risk, 173–174
risk-of-loss and, 118, 123
standard terms, 64–65
sufficiently definite offers, 55
warranties, 115–116
good faith, 27
article 7(1) and, 42
English common law and, 32
norm of, 15, 17, 28, 35
precontractual liability and, 35–36
reasonable person standard, 28
right to cure, 29
seller's knowledge of defects, 119
goods
latent defects v. nonconforming, 177
nonconforming v. non-delivery of, 12
perishable, 161–162
preservation of, 76, 160
samples, contracts based upon, 117–118, 127
See also specific topics
GPL Treatment v. Louisiana-Pacific Corp., 46–47

Hadley v. Baxendale, 154
Handelsagentur v. DAT-SCHAUB A/S, 88
homeward trend, xi, 2, 22, 170, 177
article 25 and, 5
autonomous interpretation and, 12
battle of forms, 174–175
parol evidence rule and, 44
persistence of, 174
trade usage and, 170–171
UCC and, 117
warranties, 112, 118
See also uniformity goal
Hungarian courts
Article 96 declarations, 42–43
good faith principle, 28
material-nonmaterial contract terms, 74
sufficiently definite offers, 56

ICC. *See* International Chamber of Commerce
impediment excuse, 31, 174
breach of contract and, 151
damages and, 158
notice, importance of, 171
INCOTERMS, 18, 102–103, 104–105, 169
inspection duty, 76, 78, 88–89, 109, 173
adequacy of, 78, 81–82, 166
burden of proof and, 79, 83–84
contract modifications and, 78, 83–84
perishable goods and, 80–81
reshipment and, 81
third party inspectors, 30
timeliness of, 78–81, 83, 166, 169
See also notice of noncomformity
installment contracts, 149
breach and, 125, 128
insurance, 99, 103
intellectual property, Article 42 and, 109
intent, 21, 39, 45–46
contract modification, 47–48
letters of, 34, 35
parol evidence and, 46, 47
witness testimony about, 41
interest, 27, 150, 153
on price refunds, 169
International Chamber of Commerce (ICC), 18
consideration and, 49
contract modification and, 49
ICC Arbitration Case 9187, 92
ICC Arbitration Case No. 5713 of 1989, 16
ICC Case 6281 of 1989
impediment excuse
letters of credit, 94–95
sufficiently definite offers, 55
international sales law, success measures for, 1–2
interpretive methodology, xii, 3, 19, 20, 22, 164
analogical reasoning and, 3, 19–22, 23, 26
analogical reasoning v. general principles, 21–22
autonomous interpretation and, 6, 11, 22
broad-interpretation mandate, 23
burden of proof and, 173
code-like nature of, 12, 21, 23
default rules and, 3, 165
general principles and. *See* general principles

interpretive methodology (*cont.*)
precedent rules and, 3–4
private international law and, 22
rule of procedure v. substantive law, 175
UCC and, 117
uniformity, importance of, 169–170
warranties and, 113, 116
ISEA Industrie S.p.A. and Compagnie d'Assurances, 64, 168
Italdecor SAS v. Yiu Industries, 3, 5
Italian courts
burden of proof, 173
notice of nonconformity, 86, 90, 164
original interpretation, 36
warranties, 113

jurisdiction
CISG as transaction-focused, 9
third party claims, 165–166
writing requirements and, 39
See also specific topics

legal systems
civil codes, 7–8
civil law, 15, 36–37, 167–168
cleavage-of-statutes problem, 9
comfort instruments and, 36–37
commercial codes, 7–8
common law. *See* common law
open price terms and, 54
socialist law, 15, 54
UCC, 7–8
See also lex mercatoria
letters of confirmation, 62, 63
letters of credit, 29, 41, 72–73, 94–95, 148
lex mercatoria, 15–17
lex sitae, 102
loyalty principle, 24
Lugano Convention, 105–106

Magellan Int'l Corp. v. Salzgitter Handel GmbH, 73
MCC Marble Ceramic Center, Inc., 45–46, 175, 176–177
Medical Marketing v. Internationazionale Medico Scientifica S.R.L., 176
merchantability, 25, 116–117, 176
Mexican Commission for the Protection of Foreign Trade, 37
mirror image rule, 67–68
mitigation principle, 153, 154

nachfrist notice, 29, 134, 142, 172
negotiations
bad faith breaking off of, 32, 37
depth of, 36
informal writings during, 32
representations made during, 32
See also precontractual liability
New York Convention on Foreign Arbitral Awards, 39
notice, general importance of, 171
notice of nonconformity, 84, 109, 173
contract modifications and, 87
divergence of court opinions on, 84
reasonable excuse assertion, 30, 91
reasonable person standard, 164–165
seller-concealment and, 89
specificity of, 89–91
timing of, 16, 30, 84–88, 168
transshipments and, 86–87

offer-acceptance rules, 21, 32, 38, 51
acceptance, 23, 52–53, 60, 167, 168
acceptance, silence and, 60–63
acceptance, timing of, 52, 53
address requirement, 51
contract modification and, 47–48
effectiveness of offers, 51–52
firm offers. *See* firm offers
Honnold on, 60
intent, 55–56
offeror's intent to be bound, 51, 54, 55–56
open communication theme, 60
open price terms and. *See* open price terms
particularized express consent, 43, 166, 168
reasonable person standard, 55–56
rejection of offer, 52
revocation of offer, 51–52
sufficiently definite offers, 20, 51, 54–55, 56
See also letters of confirmation
open price terms, 53, 93
Farnsworth on, 56
Honnold on, 57–59
intent to be bound
intention to contract, 57
price determination methods, 56, 58
oral agreements, 38, 41–42, 44, 45, 47. *See also* statute of frauds
original interpretation approach, 36
precontractual liability and, 33
See also autonomous interpretation

pacta sunt servanda, 108, 133
parol evidence, 43, 174–175
  admissibility of, 44
  article 11 and, 39–40
  CISG and, 46, 47
  contract modification and, 48–49
  extrinsic evidence, types of, 45
  homeward trend and, 177
  intent and, 46, 47
  rule of, defined, 43
  UCC and, 46, 47
  writing requirements and, 38, 40
party autonomy principle, 38
payment obligation, 93, 106–107, 147–148
  formalities of, 94
  forum selection agreements and, 97
  jurisdiction and, 97
  place of, 93–94, 97
  time of, 94, 99
  See also open price terms
Pharmaceutical Tech. Corp. v. Barr Labs., Inc., 55–56
precedent rules, 3–4
precontractual liability, 32
  comfort instruments. *See* comfort instruments
  enforceability of, 33–37
  evidentiary requirements and, 37
  general principles and, 34
  imprecise line, contract v. pre-contract, 34
  informal writings, 33
  negotiations. *See* negotiations
  oral assurances, 34, 36
  original interpretation approach, 33
  precontractual instruments, 35
  preliminary agreements, 34
  promissory estoppel, 34
  statute of frauds. *See* statute of frauds
Principles for International Commercial Contracts, 17
private international law
  interpretive methodology and, 22
  last-resort status of, 22
promise-keeping norm, 35
promissory estoppel
  firm offers and, 59–60
  precontractual liability and, 34
  uniformity goal, 60
  See also reliance theory
reasonability standard, 7–8, 25–26
  breach and, 123–124
  good faith and, 28
  intent and, 39
  offeror's intent to be bound, 55–56
  time frames for goods delivery, 107
receivership, 148
reliance theory, 32, 35
reporting services, 14
Rheinland Versicherungen v. Atlarex, 173
risk-of-loss, 118, 173–174
risk, transfer of, 169
Russian courts
  Article 96 declarations, 43
  notice of avoidance, 136–137
  notice of nonconformity, 93
  open price terms, 57–58

sales, types excluded from CISG, 10
Schmitz-WerkeGmbh v. Rockland Industries, Inc., 175
seller's obligations, 101, 121
  damages to buyers, 145, 146
  delivery of goods. *See* delivery of goods
  fundamental breach, 145
  goods insurance, 103
  goods need not conform to laws of buyer's country, 176–177
  goods preservation, 104
  knowledge of defects and, 119
  late performance by seller, 142, 143–144, 145, 146
  risk-of-loss and, 118
  warranties, 107, 110, 118
seller's right to affix additional time, 29
shelf-life concept, 117
Spanish courts
  fundamental breach, 129
  installment contracts, 129
  notice of avoidance, 138
Sport d'Hiver Genevieve Cutlet v. Ets. Louys et Fils, 164
St. Paul Insurance Co. v. Neuromed Medical Systems, 169
standard terms, 64, 66, 167
  enforceability of, 167–168
  express consent for, 167–168
statute of frauds, 34, 40, 44
  Article 96 declarations and, 43
  merchant exception to, 47

Ste Calzados Magnanni v. Sarl Shoes General Int'l
supranational stare decisis, 4
Swiss courts
buyer's inspection, 30–31, 78–79, 166, 174
good faith principle and, 28
interest rates, 150
letters of confirmation, 62–63
letters of credit, 94–95
notice of nonconformity, 85–86, 90, 164–165
open price terms and
sufficiently definite offers
trade usage, 170

T, SA v. E Audiencia Provincial de Barcelona, 138
Technologies Int'l Inc. Pratt & Whitney Commercial Engine Business v. Magyar, 74
telegrams and telexes, 39, 41
third party claims, 109–110
jursidiction issues and, 165–166
trade usage, 22–23
admission of local trade usage, 169
distinct international character view, 169
domestic law and, 170
evolving character of, 7–8
homeward trend analysis, 170–171
importance in CISG rule application, 168

UCC. *See* Uniform Commercial Code
UN Commission on International Trade Law (UNCITRAL), 2
UNCITRAL. *See* UN Commission on International Trade Law
unconscionability doctrine, 167
UNIDROIT, 17
Uniform Commercial Code (UCC), 19, 176
firm offer rule, 52
homeward trend analysis, 117
interpretive methodology and, 117
knock-out rule, 70
mirror image rule and, 67–68
as model for CISG, 8
parol evidence and, 44, 46, 47
perfect tender rule, 24
precontractual liability, 33
statute of frauds. *See* statute of frauds
trade usages and, 169
uniformity in, 8
writing requirement of, 37
Uniform Customs and Practices for Documentary Credits, 18
uniformity goal, xi, 1–2, 5–6, 10
absolute v. relative, 6, 10
autonomous interpretation and, 11
coalescence of jurisprudence around, 163
customary international law and, 13
defined, 10
Mansfield idealism of, 1, 5
mercantilism and, 1
Miller on, 11
normative aspects of, 5
notice-of-nonconformity and, 84–88
promissory estoppel and, 60
realist critique of, 1, 5
UCC as model for, 8
useful level of, 11
See also homeward trend
United States Courts
acceptance rules, 61
attorney fees, 156
bad faith termination of negotiations, 37
breach of express warranty, 175
buyer's inspections, timeliness of, 79
consideration and, 49
contract modification and, 48, 49
contract modifications, 177
defective goods and, 127
foreseeability doctrine, 154
fundamental breach, 127
good faith principle, 27–28
good faith principle and, 34
homeward trend and, 60
increasing sophistication of, 176–177
knock-out rule, 70
last-shot doctrine, 72
oral agreements and, 47
parol evidence rules, 174–175
parol evidence rules and, 44–49
precontractual liability, 33, 34–35, 37
promissory estoppel, 34, 60
risk-of-loss and, 122
standard terms, 167
statute of frauds. *See* statute of frauds
sufficiently definite offers, 55–56
third party claims, 165–166

timeliness of buyer's inspection, 166
transfer of risk, 169
warranties, 117, 176
See also Uniform Commercial Code
Usinor Industeel v. Leeco Steel Products, 165–166

warranties, 12, 25, 117, 176, 177
writing requirements, 32, 40, 167
CISG does not require, 38
civil law countries, 167–168
parol evidence, 38, 40. *See* parol evidence
statute of frauds. *See* statute of frauds
UCC and, 37

"Yale Journal of International Law" (excerpt), 33–37

Zapata Hermano Sucesores v. Hearthside Baking Co., 156