

# Recent Developments in UN Law on International Sales (CISG)<sup>1</sup>

From the perspective of almost all European States except for the United Kingdom, Ireland, Malta and Portugal, the UN Convention on Contracts for the International Sale of Goods (CISG) is the primary starting point for the legal assessment of import and export contracts. Although the CISG can be excluded, in many cases it appears to be quite advantageous compared to national sales law.<sup>2</sup> Therefore, the CISG should not be excluded without an accurate assessment of the consequences that may occur in each case. The following article updates the list of Contracting States, indicates newer material on the CISG and summarizes – following the structure of preceding articles (most recently *EJCCL* 2011, pp. 75 *et seq.*) – the domestic and foreign court decisions which have been published in the meantime.

## I. Contracting States

As of 1 November 2013,<sup>3</sup> the United Nations Convention on Contracts for the International Sale of Goods of 11 April 1980 has been ratified or accepted by a total of 80 countries. Since 1 August 2011<sup>4</sup> the following countries have acceded to the Convention as Contracting States:

- Bahrain, in force from 1 October 2014;
- Brazil, in force from 1 April 2014;
- San Marino, in force since 1 March 2013.

In addition, the People's Republic of China and Latvia withdrew their declaration according to Article 96, and Denmark, Finland and Sweden withdrew theirs according to Article 92. They also provided declarations regarding Article 94. Since 1 March 2013 the United Nations Convention on the Use of Electronic Communications in International Contracts<sup>5</sup> is in force in the Dominican Republic, Honduras and Singapore. In addition to the CISG, this treaty – from a European point of view – can be of importance especially regarding import contracts.<sup>6</sup>

## II. Newer Materials on the UN Law on International Sales

A number of new materials on UN Law on International Sales have been published since the previous article on this subject. The materials include not only the CISG Advisory Council Opinion No. 10 regarding contractual penalties on CISG contracts,<sup>7</sup> but further monographs

and new editions of established commentaries relating to the CISG, in particular:

- Schlechtriem/Schroeter, *Internationales UN-Kaufrecht* (5th edn, Tübingen: 2013)
- Schlechtriem/Schwenzer, *Kommentar zum Einheitslichen UN-Kaufrecht CISG* (6th edn, Munich: 2013)
- Benicke/Ferrari/Mankowski, *Münchener Kommentar zum Handelsgesetzbuch* (3rd edn, Munich: 2013)
- Staudinger/Magnus, *Wiener UN-Kaufrecht (CISG)* (Berlin: 2013)
- Ferrari/Kieninger/Mankowski/Otte/Saenger/Staudinger, *Internationales Vertragsrecht* (2nd edn, Munich: 2012)
- Ferrari, *Contracts for the International Sale of Goods* (Leiden: 2012)
- Magnus, *CISG vs. Regional Sales Law Unification* (Munich: 2012)
- Garro/Zuppi, *Compraventa internacional de mercaderías* (Buenos Aires: 2012)
- Saenger, in: Bamberger/Roth, *Kommentar zum Bürgerlichen Gesetzbuch* (3rd edn, Munich: 2012)
- Lookofsky, *Convention on Contracts for the International Sale of Goods (CISG)* (Alphen aan den Rijn: 2012)
- Westermann/Gruber/Huber, in: *Münchener Kommentar zum Bürgerlichen Gesetzbuch* (6th edn, Munich: 2012)
- Neumann, *The Duty to cooperate in International Sales* (Munich: 2012)
- Schwenzer/Muñoz, Schlechtriem & Schwenzer, *Comentario sobre la Convención de las Naciones Unidas sobre los Contratos de Compraventa Internacional de Mercaderías, Tomo I y II* (Cizur Menor (Spain: 2011))
- Schubert, *Drittschadensliquidation und UN-Kaufrecht* (Hamburg: 2011)

Furthermore, internet databases are valuable sources of information on this subject. Beside the database of UNCITRAL, which also contains information on the current status of ratifications, this article refers to the following:

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1. doi: 10.7590/187714613X13875292587681

A German version of this article, which may be particularly appealing to German readers, has been published in *NJW* 2013, 2567 *et seq.*

2. For further details see Piltz, *NJW* 2012, 3061 *et seq.*

3. A list of all Contracting States is available at [www.uncitral.org](http://www.uncitral.org) and in *IHR* 2013, 133 *et seq.*

4. On the status of the Contracting States on 1 July 2011 see *EJCCL* 2011, 75.

5. For more details see [www.uncitral.org](http://www.uncitral.org).

6. See Hilberg, *IHR* 2007, 12 *et seq.*, 56 *et seq.*

7. *IHR* 2013, 126 *et seq.*

- [www.cisg.law.pace.edu](http://www.cisg.law.pace.edu): contains materials and commentaries, extensive references to literature and court decisions as well as further links.<sup>8</sup>
- [www.globalsaleslaw.org](http://www.globalsaleslaw.org): an extensive database containing, to some extent, the full text of court decisions.<sup>9</sup>
- [www.law.kuleuven.de/apps/cisg/nl/search/basic/](http://www.law.kuleuven.de/apps/cisg/nl/search/basic/): Belgian jurisdiction.<sup>10</sup>
- [www.rechtspraak.nl](http://www.rechtspraak.nl): Dutch court decisions.<sup>11</sup>

The current collection of texts of the CISG (updated 5th version 2013) can be retrieved in 39 languages at: [cisg7.institut-e-business.de/index2.php?lang=1](http://cisg7.institut-e-business.de/index2.php?lang=1)

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

#### 1. Scope of Application of the CISG

The courts of the Contracting States apply the CISG to contracts of international sales or production of goods. The term ‘contract of sale’ is thereby to be determined autonomously based on Articles 30, 53 CISG.<sup>12</sup> According to jurisdiction, the CISG is not applicable to the substantive agreement of a court settlement, which contains the restitution of a sales contract. The reasoning by the court was that the settlement is not provided with a commitment concerning delivery in return for payment and therefore constitutes a different legal relation.<sup>13</sup> However, the court should have reasoned this question more finely, especially due to the obvious possibility that the CISG is also applicable to settlements regarding claims under the sales contract.<sup>14</sup> According to Article 3 CISG, contracts of sale regarding goods that have to be produced also fall within the scope of application of the CISG as long as the buyer does not provide the essential part of resources or the seller does not provide more labor than goods.<sup>15</sup> Therefore, according to Article 3 CISG, a sales contract also exists if the buyer provides the chassis frame of the truck, but the platform and other parts required for the complete assembly of the truck exceed the worth of the chassis more than four times.<sup>16</sup> Moreover, a sales contract in terms of Article 3 CISG exists if the seller is obliged to install a steel fence and the charges for the installation represent not more than 10 percent of the contract value.<sup>17</sup> Unlike the law applicable in Maryland

USA, and in contrast to the individual delivery transactions concluded in the course of executing a contract of distribution, the contract of distribution itself is not a contract of sale in terms of the CISG.<sup>18</sup>

Article 2 lit. a) CISG explicitly excludes from the scope of application of the CISG purchases of goods for personal use. However, if a buyer purchasing a car signs a contract stating it is a merchant transaction and using the abbreviation ‘Fa.’ together with his signature, the seller cannot recognize any personal use.<sup>19</sup> In contrast to the solely objective qualification in the national consumer protection laws, Article 2 lit. a) CISG remains applicable if the seller neither knew nor ought to have known that the goods were actually bought only for private purposes. However, Article 2 lit. a) CISG only applies to the last tier of a chain of sales, that is the sale by the last seller to the private buyer. Provisions such as §§ 478 *seq.* German Civil Code which deal with prior stages of a chain of sales, do not exist in the CISG.

The CISG governs its scope of application autonomously. Thus no prior deliberations concerning Private International Law are required by users resident in one of the Contracting States.<sup>20</sup> The CISG rather applies directly to discernible international contracts for the sale of goods if these feature a relation with at least one of the current 80 Contracting States (Article 1 par. 1 and 2 CISG). However, there is no international sales contract in terms of the CISG if a party with headquarters in one Contracting State conducts business via an established branch located in the State where the other contracting party is domiciled.<sup>21</sup> Aside from this issue, the CISG is on the one hand applicable if the places of business of the seller and of the buyer are located in different Contracting States (Article 1 par. 1 lit. a) CISG); the vast majority of the cases arising in practice are correctly subsumed under this alternative.<sup>22</sup> On the other hand, the CISG is also applicable if one or both of the countries in which the parties are located do not qualify as a Contracting State, but the Private International Law of the court seized leads to the application of the legal order of a Contracting State<sup>23</sup> (Article 1 par. 1 lit. b) CISG). This alternative means that either when selecting the national law of a Contracting State or also in the case of a European seller

8. Hereinafter referred to as ‘CISG-Pace’.

9. Hereinafter referred to as ‘CISG-online’.

10. Hereinafter referred to as ‘CISG-Belgium’.

11. Hereinafter referred to as ‘CISG-Netherlands’.

12. Tribunale de Forli, CISG-online No. 2336.

13. See Oberlandesgericht Cologne, CISG-online No. 2401.

14. Handelsgericht Zürich, CISG-online No. 857.

15. Hof van Beroep Antwerp, judgment of 28 June 2010, CISG-Belgium.

16. Oberlandesgericht Stuttgart, *IHR* 2011, 236 at 239.

17. Foreign Trade Court of Arbitration (Serbia), CISG-online no. 2373.

18. United States District Court, Maryland, CISG-online no. 2223; in contrast insufficiently assessed by Oberlandesgericht Düsseldorf, judgment of 16 December 2010 (I-6 U 44/10), [www.justiz-nrw.de](http://www.justiz-nrw.de).

19. Oberlandesgericht Hamm, *IHR* 2012, 241 at 242.

20. Tribunale de Forli, CISG-online no. 2336; not realized by Rechtbank Arnhem, judgment of 23 May 2012, CISG Netherlands.

21. Hof van Beroep Hasselt, judgment of 22 October 2008, CISG-Belgium.

22. However, see the incorrect approach of the United States District Court, Southern District of Florida, judgment of 7 November 2011, CISG-Pace that considers the United Arab Emirates a Contracting State.

23. Overlooked by Oberlandesgericht Hamm, judgment 29 September 2011 (2 U 101/90), [www.justiz-nrw.de](http://www.justiz-nrw.de).

domiciled in a Contracting State who exports without a choice of law clause in his contract, due to objective connection to the national law of the seller,<sup>24</sup> the CISG applies even to a contract with a party who is not located in a Contracting State.<sup>25</sup> In non-Contracting States the CISG is not directly applicable. Nevertheless, even users in Non-Contracting States have to apply the CISG if their Private International Law leads to the legal system of a Contracting State and a judge in that State would apply the CISG in the given situation.<sup>26</sup>

The parties are free to exclude the application of the CISG (Article 6 CISG). However, this requires an enforceable agreement between the buyer and the seller. Exclusion clauses in standard terms and conditions are thus only effective if the standard terms and conditions are incorporated validly into the contract of sale which, irrespective of the exclusion clause, is evaluated according to the rules of the CISG.<sup>27</sup> If the parties agree upon the application of the law of a Contracting State,<sup>28</sup> the CISG may still be applicable if the chosen law is that of a CISG Contracting State, since the CISG is part of that legal system.<sup>29</sup> Even in situations where the CISG is already applicable without a choice of law clause, according to the prevailing opinion<sup>30</sup> an agreement to apply 'German law' or the law of any other Contracting State does not exclude the CISG.<sup>31</sup> Rather, the intention of the parties to exclude the CISG has to be certain.<sup>32</sup> Merely arguing before the judge on the basis of a national sales law is therefore hardly an implicit exclusion,<sup>33</sup> but rather rests upon a misjudgment of the legal situation.

Within its scope of application, the CISG is primarily relevant and the recourse to regulations or statutes of a national origin is precluded.<sup>34</sup> The CISG regulates the formation of a contract of sale including the incorporation of standard terms and conditions, the formalities to be observed as well as the primary and secondary obligations of the buyer and the seller (Articles 4, 11 and 29 par. 1 CISG). With the exception of personal injuries (Article 5 CISG), the CISG is altogether exclusive and supersedes tort cause actions based on a national law if the liability for damages resulting from the delivery of non-conforming goods or from a breach of collateral duties has to be assessed.<sup>35</sup> As a consequence and in contrast to the German law, concurring causes of action cannot come up under the CISG. Although an explicit provision is missing, the CISG also applies if the resulting damage is caused by separate acts of each party<sup>36</sup> and covers the distribution of the burden of proof.<sup>37</sup>

The CISG does not regulate the rights of third parties, in particular the rights of the buyer's customers.<sup>38</sup> However, this does not lead to the conclusion that the seller has to face a contractual claim by a third party that exceeds his obligations under the CISG.<sup>39</sup> Furthermore, the CISG does not cover the validity of the contract or of any of its provisions<sup>40</sup> (Article 4 lit. a) CISG), the set-off,<sup>41</sup> the set-off<sup>42</sup> and the limitation of action.<sup>43</sup>

## 2. Formation of Contract

Legal issues regarding the formation of contracts have appeared repeatedly since the previous article on this subject. Accordingly, pursuant to the CISG, a declaration in the English language signed by a managing director is

24. See Article 4 I lit. (a) Rom I-VO and furthermore Article 3 Hague Convention on the law applicable to international sales of goods of 1955.

25. Bundesgericht (Switzerland), CISG-online no. 2371; Rechtbank Arnhem, judgment of 10 October 2012, CISG-Netherlands, Cour de Justice de Genève, CISG-online no. 2426.

26. See Superior Tribunal de Justiça (Brazil), CISG-online no. 2382 and High Court of Justice, Queen's Bench Division, CISG-online no. 2391.

27. Handelsgericht St. Gallen, *IHR* 2011, 149 at 150.

28. E.g. 'German national law applies to this contract'.

29. Foreign Trade Court of Arbitration (Serbia), CISG-online no. 2358; Cour de Cassation, CISG-online no. 2311; Handelsgericht Kanton Aargau, CISG-online no. 2431.

30. For a comprehensive treatment of this issue see Piltz, *Internationales Kaufrecht* (2nd edn, Munich: 2008), marginal note 2-116.

31. In contrast Oberlandesgericht Düsseldorf, judgment of 16 December 2010 (I-6 U 44/10), <http://justiz.nrw.de>, marginal number 82.

32. Cour de Cassation, CISG-online no. 2004.

33. Oberster Gerichtshof (Austria), *IHR* 2012, 193 at 195; Hof Leeuwarden, judgment of 24 January 2012, CISG-Netherlands; diff. view Rechtbank Dordrecht, judgment of 5 December 2012, CISG-Netherlands.

34. Foreign Trade Court of Arbitration (Serbia), CISG-online no. 2274; not consistently respected by Oberlandesgericht Koblenz, CISG-online no. 2405.

35. Oberlandesgericht Koblenz, *IHR* 2012, 148 at 158.

36. Bundesgerichtshof (Germany), *NJW* 2013, 304 at 308.

37. Bundesgericht (Switzerland), CISG-online no. 2371; for the invoice as proof of the contract of sale see Hof van Beroep Brussels, judgment of 22 June 2011, CISG-Belgium.

38. Rechtbank van Eerste Aanleg Gent, judgment of 9 September 2009, CISG-Belgium and United States District Court, New Jersey, CISG-online no. 2357.

39. For more details on this topic see Piltz (fn. 29), marginal notes 2-138.

40. Cour de Cassation (France), CISG-online no. 2311 on Article 1116 Code Civil, ICC Arbitration Case no. 14792, *Yearbook Commercial Arbitration XXXVII*, 2012, p. 110 at 115 on the validity of arbitration clauses and United States District Court, Maryland, CISG-online no. 2222 on the validity of limitation of liability clauses.

41. Landgericht Bielefeld, *IHR* 2011, 190 at 191.

42. Oberlandesgericht Oldenburg, *IHR* 2013, 63.

43. Oberlandesgericht Düsseldorf, judgment of 16 December 2010 (I-6 U 44/10), [www.justiz-nrw.de](http://www.justiz-nrw.de), marginal note 82.

effective regardless of whether the managing director understands the extent of its legal effect due to his lack of English language skills.<sup>44</sup> A 'quotation ... without engagement' is a not binding offer without the intention to create legal relations.<sup>45</sup> It seems questionable, however, to consider the delivery of goods in response to a possibly non-effective order as an implied offer to conclude a contract.<sup>46</sup> This is because it cannot be assumed that the seller would deliver the goods to a foreign country at his own expense merely on spec and would hence be willing to bear the costs of the re-transport and prospective problems at customs if the potential buyer is not interested in the offer. Rather, it is to be assumed that the seller delivers the goods because he believes to be obliged to deliver; however, such a delivery cannot at the same time be considered an offer for concluding a contract. Characteristics for an implied acceptance of an offer are the shipment of the goods<sup>47</sup> by the seller, taking delivery of the goods by the buyer,<sup>48</sup> the usage of most parts of the delivered goods<sup>49</sup> and the payment of a deposit.<sup>50</sup> Delivery of goods precisely matching the demands communicated by the buyer and with an invoice enclosed can be considered as a waiver by the seller of the need to dispatch a declaration of acceptance<sup>51</sup> so that the contract is therefore concluded as soon as the act performing the acceptance is conducted (Article 18 par. 3 CISG) and thus no indication of acceptance reaching the buyer is required. However, the change of the place of delivery,<sup>52</sup> the addition of an arbitration clause<sup>53</sup> or a reference to one's own standard terms and conditions<sup>54</sup> in the indication of acceptance are considered as substantive modifications (Article 19 par. 1 CISG) and therefore constitute a counter-offer. In case of doubt, a mutually agreed clause requiring written form has constitutive meaning.<sup>55</sup>

Even without individualizable mutual consent, standard terms and conditions can become part of the contract if the offer made by the user of the standard terms and conditions by the time of the contract's conclusion indicates their application, the text of the standard terms and

conditions is available to the other party by the time of the contract's conclusion and the other party accepts the offer without objecting to the standard terms and conditions.<sup>56</sup> However, it is unlikely that the buyer includes the seller's standard terms and conditions in his offer.<sup>57</sup> Standard terms and conditions merely printed on the back of the offeror's company letterhead, without any further reference to their effective inclusion, is insufficient.<sup>58</sup> It rather has to be clear to the other party that the user of the standard terms and conditions is only willing to enter a contract based on his standard terms and conditions.<sup>59</sup> Furthermore, a general notice of new standard terms and conditions ('please find enclosed an example of our renewed ... replace all previous ones') is insufficient as an indication of their application for a specific transaction.<sup>60</sup> A reference on the application of the standard terms and conditions on a delivery note subsequent the formation of the contract is only considerable if an amendment of the closed contract is intended and documented by the parties as well as if the standard terms and conditions are meant to be applied to future contracts in an ongoing business relationship.<sup>61</sup> Furthermore, the actual text of the standard terms and conditions has to be with the other party no later than when the contract is concluded.<sup>62</sup> Therefore, the party using its standard terms and conditions has to send the text of its standard terms and conditions to the other party or has to make it somehow accessible to the other party. The deposit of the standard terms and conditions at a Chamber, the willingness to provide the other party on its demand with standard terms and conditions or a reference to a website, if the contract is not concluded electronically, is not sufficient.<sup>63</sup> Sending the standard terms and conditions enclosed with the invoice, after the contract has already been concluded, is also insufficient.<sup>64</sup>

44. Tribunal van Koophandel Antwerp, judgment of 1 December 2009, CISG-Belgium.

45. Landgericht Hannover, *IHR* 2012, 59 *et seq.*

46. See Oberster Gerichtshof (Austria), *IHR* 2013, 114 *et seq.* regarding this question, which remained undisputed.

47. Arbitration Chamber of Paris, case no. 3089, *Yearbook of Commercial Arbitration* 2011, 30 at 35.

48. Presidium of the Supreme Arbitration Court of Russia, judgment of 2 November 2010, CISG-Pace.

49. Oberster Gerichtshof (Austria), *IHR* 2013, 149 at 150.

50. Handelsgericht St. Gallen, *IHR* 2011, 149 at 150.

51. Oberster Gerichtshof (Austria), *IHR* 2013, 114 at 116.

52. Oberlandesgericht Stuttgart, *IHR* 2012, 38 at 41.

53. Arbitration Chamber of Paris, case no. 3089, *Yearbook of Commercial Arbitration* 2011, 30 at 34.

54. Handelsgericht St. Gallen, *IHR* 2011, 149 at 151.

55. Oberlandesgericht Hamm, *IHR* 2012, 186 at 188.

56. Expressly by referring to Bundesgerichtshof (Germany), *NJW* 2002, 372, Rechtbank Arnhem, judgment of 23 May 2012 and Rechtbank 's-Hertogenbosch, judgment of 28 March 2012, both CISG-Netherlands.

57. Oberlandesgericht Düsseldorf, *IHR* 2012, 237 at 240.

58. Landgericht Hannover, *IHR* 2012, 59 *et seq.* and Hof Leeuwarden, judgment of 20 September 2011, CISG-Netherlands.

59. Hof 's-Hertogenbosch, judgments of 7 September 2011 and 1 August 2012, both CISG-Netherlands.

60. Rechtbank Amsterdam, judgment of 14 November 2012, CISG-Netherlands.

61. Oberlandesgericht Cologne, judgment of 19 October 2011 (16 U 161/10), [www.justiz-nrw.de](http://www.justiz-nrw.de).

62. Rechtbank 's-Hertogenbosch, judgment of 23 January 2013, Rechtbank Arnhem, judgment of 23 May 2012, Rechtbank Breda, judgment of 29 June 2011, all CISG-Netherlands, more generous Rechtbank Almelo, judgment of 26 September 2012, CISG-Netherlands.

63. Rechtbank 's-Hertogenbosch, judgment of 1 August 2012, more generous Rechtbank Arnhem, judgment of 1 November 2012, and Rechtbank Rotterdam, judgment of 20 March 2013, all CISG Netherlands.

64. Rechtbank Arnhem, judgment of 10 October 2012, CISG-Netherlands.

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

#### a. Obligations of the Seller

With regard to the seller's obligations to deliver the goods, the provisions of the CISG distinguish between a sale involving carriage of the goods and other configurations. A sale involving carriage of the goods pursuant to Article 31 lit a) CISG does not apply if the place of delivery and the final destination are the same, e.g. by applying Incoterm DDP.<sup>65</sup> This means, e contrario, that if the place of delivery, where the seller is obliged to conduct his performance of delivery and the place where the buyer is obliged to take delivery are not identical, a sale involving carriage of the goods as stipulated in Article 31 lit. a) CISG applies. The intervention of an independent third party conducting the transport may be typical for a sale involving carriage of the goods,<sup>66</sup> it is, however, not suitable as a criterion of demarcation.<sup>67</sup> By applying the Incoterm DDP, a place of performance differing from the one stipulated in Article 31 CISG is agreed upon.<sup>68</sup> Whereas the mere assumption of the transportation costs does not affect the place of performance contractually agreed upon,<sup>69</sup> any agreements as for transportation costs can provide conclusions regarding the place of delivery, if no place of delivery has been agreed upon.<sup>70</sup> The mere statement of a shipping address does not derogate the Incoterm clause 'ex works'.<sup>71</sup>

According to the principle of good faith, if the seller recognizes, due to superior knowledge regarding the course of the respective good's use agreed upon, that the sold goods are not suitable for the buyer's intended course of use and the seller would hence have the buyer 'walk right into a trap', the seller will be obliged to clarify the circumstances.<sup>72</sup>

#### b. Obligations of the Buyer

Article 53 CISG stipulates that the buyer must pay the purchase price for the purchased goods. The payment must be made as soon as it is due and without any further demand of payment by the seller; also no further formalities apply.<sup>73</sup> However, subject to conflicting circumstances, the purchase price will only be due when the buyer had the opportunity to examine the goods (Article

58 par. 3 CISG). Therefore, the seller has to assert and, if necessary, to prove this prerequisite for the payment to become due.<sup>74</sup> Generally, the seller is entitled to the entire purchase price owed by the buyer. In the case of an intra-community purchase, the buyer is not allowed to deduct value added tax accrued pursuant to § 13 (a) par. 1 UStG from the purchase price and only pay the remaining sum. Subject to special arrangements, pursuant to § 13 (a) par. 1 UStG the buyer is the only debtor and thus has to pay the value added tax in addition to the purchase price.<sup>75</sup>

#### c. Common Provisions

In the case of a right of suspension pursuant to Article 71 CISG, or exoneration pursuant to Article 80 CISG, the respective entitled party will not be liable for noncompliance with its contractual obligations. A debtor may refer to Article 80 CISG with exonerating effect if any of the creditor's acts or omissions contrary to his duty have led to the precise result that has occurred.<sup>76</sup> Therefore, the unfounded refusal by the buyer of the cure offered by the seller results in the loss of the buyer's right to avoid the contract.<sup>77</sup> If both parties, independently of each other, are responsible for damage caused, Articles 77, 80 CISG are decisive.<sup>78</sup> Subject to very limited conditions, Article 79 CISG further stipulates that the party not complying with its contractual obligations, and which is neither exonerated pursuant to Article 71 nor pursuant to Article 81 CISG and is hence generally liable for the breach of contract, does not have to pay damages. If delivery problems with suppliers from the Far East are known and are a common occurrence, the actual failure of delivery does not release the seller from its obligations.<sup>79</sup>

### 4. Breach of Contract by the Seller

#### a. Non-conformity of Goods

If the contracting parties have effectively excluded liability for non-conformity of goods,<sup>80</sup> further considerations are not necessary. Otherwise, if the delivered goods do not conform to what is contractually agreed upon, a breach of contract is constituted (Article 35 par. 1 CISG). However, any arrangement regarding the quality which deviates from the commercial practice must be made ex-

65. Bundesgerichtshof (Germany), *NJW-RR* 2013, 309 *et seq.* = *IHR* 2013, 15 *et seq.*, no. 17.

66. So Oberlandesgericht Koblenz, *IHR* 2011, 145 at 148.

67. For more details on this topic see Piltz, *NTHR* 2012, 86 *et seq.*; also Ernst/Lauko, in: Honsell, *UN-Kaufrecht* (2nd edn, Heidelberg: 2010), Article 31 marginal note 7.

68. Bundesgerichtshof (Germany), *NJW-RR* 2013, 309 *et seq.* = *IHR* 2013 15 *et seq.* no. 16; dissenting the first Instance Landgericht Cologne, judgment of 29 March 2011 (87 O 158/09), [www.justiz-nrw.de](http://www.justiz-nrw.de).

69. Oberlandesgericht Koblenz, *IHR* 2011, 145 at 148.

70. Oberlandesgericht Stuttgart, *IHR* 2011, 236 at 239.

71. Cour de Cassation (France), CISG-online no. 2246.

72. OLG Koblenz, *IHR* 2012, 148 at 153.

73. Foreign Trade Court of Arbitration (Serbia), CISG-online no. 2358.

74. In contrast ICC Arbitration Case no. 14792, *Yearbook of Commercial Arbitration* XXXVII, 2012, pp. 110 at 119.

75. Amtsgericht Geldern, *IHR* 2012, 190 *et seq.*, with remark Piltz.

76. Oberlandesgericht Brandenburg, CISG-online no. 2400.

77. Oberster Gerichtshof (Austria), *IHR* 2012, 114 at 117.

78. Bundesgerichtshof (Germany), *NJW* 2013, 304 *et seq.*, no. 33.

79. Handelsgericht Zürich, *IHR* 2011, 151 at 153.

80. Closer to this matter Oberlandesgericht Hamm, *IHR* 2012, 241 *et seq.*

pressly and unambiguously.<sup>81</sup> Furthermore, the goods are deemed to be non-conforming if they do not meet the requirements stipulated in Article 35 par. 2 CISG. Accordingly, the seller is in principle not responsible for the compliance with the standards applying to the respective goods in the country of the buyer.<sup>82</sup> Conversely, if the seller knew about the goods' usage in the buyer's country, was willing to obtain all documents necessary for the good's registration and even operates a subsidiary with similar products in the country of the buyer.<sup>83</sup> The ordinary usage stipulated in Article 35 par. 2 lit. a) CISG does not cover all types of possible use, but indeed the general<sup>84</sup> and obvious<sup>85</sup> ones.

In order to preserve the remedies existing in the case of delivery of non-conforming goods, the buyer has to give notice of the non-conformity to the seller (Article 39 CISG). The notice has to indicate clearly that the buyer is not satisfied with the goods delivered.<sup>86</sup> Article 39 par. 1 CISG provides a reasonable period of time for the buyer to issue this notice. Whereas the courts in Central Europe tend to set a general period of time of about one month for both the examination of the goods and the filing of the notice,<sup>87</sup> the courts in Italy<sup>88</sup> and especially the courts in Spain<sup>89</sup> tend to apply more generous periods of time for notification. The period of time for the notice commences as soon as the buyer discovers or ought to have discovered the non-conformity (Article 39 par. 1 CISG). To detect undiscovered or otherwise indistinguishable non-conformities of the goods, the buyer has to examine the goods within a short period of time<sup>90</sup> after delivery (Article 38 CISG), whereas par. 2 and 3 provide the opportunity to delay the beginning of the period of time for the examination.<sup>91</sup> Ignorance or a lack of expertise do not release the buyer from the obligation to examine the goods delivered.<sup>92</sup> If the seller inspires trust in certain characteristics of the goods, however, this can affect the extent and intensity of the examination expected by the buyer.<sup>93</sup> The buyer loses any right to rely on any non-conformity of the goods two years after the goods were actually handed over (Arti-

cle 39 par. 2 CISG). However, the seller is not entitled to rely on Articles 38 and 39 CISG if he knew or could not have been unaware of the non-conformity and did not disclose it to the buyer<sup>94</sup> (Article 40 CISG). Whereas if the buyer has filed the notice of the non-conformity of the goods correctly, all remedies pursuant to Article 45 CISG are available.

#### b. Remedies for the Buyer

Any case of breach of contract by the seller entitles the buyer to claim performance and damages<sup>95</sup> or, provided that certain additional requirements are fulfilled, to avoid the contract (Articles 45 et seq. CISG). If non-conforming goods are delivered, the buyer can also reduce the purchase price (Article 50 CISG), and, instead of the right to claim performance may claim to remedy the lack of conformity either by way of repair or by delivery of substitute goods (Article 46 par. 2, 3 CISG).

The buyer only is entitled to claim delivery of substitute goods or to avoid the contract on the grounds of the delivery of non-conforming goods, if the breach of contract committed is considered fundamental in terms of Article 25 CISG and is thus considered severe after an overall assessment of all objective criteria (Article 49 par. 1 lit. a) CISG). Therefore, the kind, extent and impact of the non-conformity are to be weighed against, inter alia, the remedies of repair of the non-conforming goods or delivery of substitute goods along with their expenses as well as in particular with their reasonableness for the buyer.<sup>96</sup> The weighing-up regarding other remedies, in particular the consideration whether another possible utilization of the goods<sup>97</sup> is reasonable for the buyer, is not always conducted. In fact, the weighing-up is often merely carried out on the basis of how severe the infringement of contract was, as such.<sup>98</sup> If the object of the contract (here: a manufacturing facility) is sold as an aggregated asset, each and every part that is crucial for the operation, does not constitute an individual object of the purchase contract in terms of Article 51 par. 1 CISG, so that accordingly, a partial avoidance of the contract does not apply.<sup>99</sup>

81. Oberlandesgericht Hamm, *IHR* 2012, 186 at 188.

82. Oberlandesgericht Hamm, *IHR* 2012, 186 at 189 and Court of Appeal (Australia), *IHR* 2012, 117 at 124.

83. Rechtbank 's-Hertogenbosch, CISG-online no. 2394.

84. Oberlandesgericht Koblenz, *IHR* 2012, 148 at 152.

85. Bundesgerichtshof (Germany), *NJW* 2013, 304 et seq., no. 20.

86. High Court of Justice, Queens Bench Division, CISG-online no. 2391, no. 1005.

87. See Staudinger/Magnus, *Wiener UN-Kaufrecht (CISG)* (revised edition, Berlin: 2013), Article 39 marginal notes 41 et seq., as well as Rechtbank 's-Hertogenbosch, judgment of 22 August 2012, CISG-Netherlands.

88. Tribunale di Bolzano, *IHR* 2012, 42 et seq. with adverse remark Laimer/Nagel; stricter Tribunale di Reggio Emilia, CISG-online no. 2229.

89. Audiencia Provincial de Asturias, CISG-online no. 2313 and Audiencia Provincial de Navarra, CISG-online no. 2315.

90. 1-2 weeks for chairs, Landgericht Lübeck, *IHR* 2012, 61 et seq.

91. Unrecognized by Rechtbank 's-Gravenhage, judgment of 11 July 2012, CISG-Netherlands; see also Landgericht Lübeck, *IHR* 2012, 61 et seq.

92. Rechtbank 's-Hertogenbosch, judgment of 1 November 2012, CISG-Netherlands.

93. Oberster Gerichtshof (Austria), *IHR* 2013, 25 seq.

94. See Bundesgerichtshof (Germany), *NJW* 2013, 304 et seq., Cour d'Appel de Lyon, judgment of 18 October 2012, CISG-online no. 2402 and Oberster Gerichtshof (Austria), *IHR* 2012, 193 at 196 seq.

95. See below III.6.

96. Oberster Gerichtshof (Austria), *IHR* 2012, 114 at 117.

97. See the fundamental decision of the Bundesgerichtshof (Germany), *NJW* 1996, 2364 et seq.

98. See Rechtbank Arnhem, judgments of 10 October 2012 and 23 May 2012, Hof Arnhem, judgment of 20 March 2012, all CISG-Netherlands, as well as Audiencia Provincial de Navarra, CISG-online no. 2315.

99. Bundesgericht (Switzerland), CISG-online no. 2371, no. 7.4.

For the avoidance of the contract on the grounds of other types of breach of contract, fundamentality of the breach of contract is generally required (Article 49 par. 1 lit. a) CISG). Therefore, in the case of delayed delivery and if the date of delivery cannot be considered fundamental, even a delay of four months may not justify the avoidance of the contract.<sup>100</sup> However, in the case of non-delivery, the buyer can take action based on Article 49 par. 1 lit. b) CISG by setting a deadline according to Art. 47 CISG within which the seller must perform. A mere demand to perform under the contract is not sufficient; in fact the buyer has to set a deadline of a certain period of time.<sup>101</sup> On the other hand, the breach of contract is indeed fundamental in terms of Article 49 par. 1 lit. a) CISG if the seller not only delays the delivery but furthermore refuses to deliver entirely.<sup>102</sup> Also, disregarding other material obligations can constitute a right to avoid the contract. However, the violation of a contractual exclusive purchase right is not considered fundamental if the buyer himself offers to maintain the contract in return for a reduction of the purchase price.<sup>103</sup>

The avoidance of the contract requires a declaration<sup>104</sup> from the buyer to the seller (Article 26 CISG). This declaration can also be made by conduct implying intent, e.g. if the buyer demands that the seller return the paid purchase price.<sup>105</sup> However, the declaration of avoidance has to be made within a reasonable period of time (Article 49 par. 2 CISG). Thus, for scooters for example, a declaration of avoidance two months after the breach of contract ought to be known is considered within a reasonable period of time.<sup>106</sup> However, a declaration of avoidance issued after eighteen months is considered late, even for machinery.<sup>107</sup>

In the case of delivery of non-conforming goods, the buyer also is entitled to reduce the price (Article 50 CISG), regardless of the breach of contract being fundamental or an actual loss being suffered by the buyer. If the respective goods are entirely worthless (here: the delivered bottles of wine had to be destroyed due to a regulatory action) the purchase price can even be reduced to

zero.<sup>108</sup> Under the given circumstances it is indicated that the prerequisites for avoidance of the contract were also met and thus no reason to assess a reduction of the price to zero if these requirements were not met was given.<sup>109</sup>

##### 5. *Breach of Contract by the Buyer*

The basis for the claim to enforce the payment of the purchase price not having been paid according to the contract is Article 62 CISG.<sup>110</sup> Irrespective of whether or not there is a loss, the creditor is entitled pursuant to Article 78 CISG to interest on any payment from the date it is due.<sup>111</sup> Usually, and with no further consideration, the applied interest rate is determined by the relevant case-law on the grounds of the national law which is applicable pursuant to the Private International Law regarding those issues not addressed by the CISG<sup>112</sup> (gap-filling law). Others apply the interest rate applicable in the creditor's country,<sup>113</sup> while others follow a more 'autonomous' approach by applying the interest rate of the currency in which the late payment is to be made.<sup>114</sup> However, the applicability of the interest rate on arrears<sup>115</sup> determined by the gap-filling national law raises concerns. Whereas the obligation for interest payments pursuant to Article 78 CISG is solely triggered on the grounds of delayed payment, the payment of interest on arrears moreover generally requires a kind of fault of the defaulter, which in fact is not required pursuant to Article 78 CISG. Article 78 CISG does not stipulate any provisions on compound interest, thus it is neither excluded nor stipulated by the CISG.<sup>116</sup>

##### 6. *Damages*

Articles 74 *et seq.* CISG contain provisions on the amount of the damage to be compensated. Article 45 par. 1 lit. b) and Article 61 par. 1 lit. b) CISG in particular constitute the basis for a claim for damages. However, fault of the party being in breach of the contract is not required. Subject to suspension pursuant to Article 71 CISG, exemption under Article 80 CISG or exoneration according to Article 79 CISG, every breach of a contractual obligation constitutes a claim for damages.<sup>117</sup>

100. Hof van Beroep te Gent, judgment of 26 May 2010, CISG-Belgium.

101. Oberlandesgericht Brandenburg, CISG-online no. 2400.

102. Oberlandesgericht Frankfurt, *IHR* 2010, 250 at 253.

103. Oberster Gerichtshof (Austria), CISG-online no. 2399.

104. Supreme Court (Slovenia), CISG-online no. 2345.

105. Rechtbank Arnhem, judgment of 23 May 2012, CISG-Netherlands.

106. *Ibid.*

107. Cour de Cassation (France), CISG-online no. 2310.

108. Oberlandesgericht Koblenz, CISG-online no. 2290.

109. For more detail see Staudinger/Magnus (fn. 86) and Piltz (fn. 29), marginal notes 5-357 *seq.*

110. Correct approach Oberlandesgericht Brandenburg, CISG-online no. 2289.

111. Hof van Beroep te Gent, judgment of 4 February 2009, CISG-Belgium.

112. See Landgericht Lübeck, *IHR* 2012, 61 at 62, Hof van Beroep te Brussels, judgment of 22 June 2011, CISG Belgium, as well as former articles, recently *EJCCL* 2011, pp. 75 *et seq.*

113. See Hof van Beroep Antwerp, judgment of 17 March 2008 and Hof van Beroep te Brussels, judgment of 22 June 2011, both CISG-Belgium; Foreign Trade Court of Arbitration (Serbia), CISG-online no. 2354.

114. See Hof van Beroep te Brussels, judgment of 22 June 2011, CISG Belgium; Foreign Trade Court of Arbitration (Serbia), CISG-online no. 2358; Foreign Trade Court of Arbitration (Serbia), CISG-online no. 2354.

115. Landgericht Lübeck, *IHR* 2012, 61 *et seq.*, 63 and Amtsgericht Geldern, *IHR* 2012, 190 *et seq.*, 191.

116. Hof van Beroep te Gent, judgment of 4 February 2009, CISG-Belgium.

117. On Article 71, 79 and 80 CISG see above 3 c).

If a contract is avoided due to a breach of contract, the creditor of the claim for damages may either recover all incremental costs, after considering all circumstances, of a corresponding cover transaction<sup>118</sup> (Article 75 CISG), or if such a transaction is out of the question, recover as damages the difference between the price fixed by the contract and the current market price (Article 76 CISG). Nonetheless, both these alternatives require avoidance of the contract,<sup>119</sup> particularly considering that a corresponding cover transaction can only be concluded after the avoidance of the contract that is to be substituted.<sup>120</sup> If the seller is aware of enormous time pressure experienced by the buyer (here: to prevent contractual penalties) this justifies accelerated handling of the corresponding cover transaction.<sup>121</sup>

Apart from that, all damages triggered by a breach of contract are recoverable to the extent they were objectively foreseeable<sup>122</sup> from the perspective of the party that is in breach of contract by the time of the conclusion of the contract, Article 74 CISG. In particular this includes out-of-court legal fees, provided that the type and extent of the breach of contract as well as the behavior of the party in breach of contract give reason for obtaining legal advice.<sup>123</sup> However, generally the creditor of the claim for damages violates his obligation to mitigate the loss<sup>124</sup> (Article 77 CISG), by merely hiring a domestic debt collection agency to collect the debts,<sup>125</sup> since a domestic debt collection agency most likely has no more efficient opportunities to collect the debts from foreign debtors than the creditor himself.

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118. See High Court Maribor (Slovenia), CISG-online no. 2331.

119. In contrast Oberlandesgericht Brandenburg, CISG-online no. 2400 in case of serious and final refusal of performance.

120. Oberlandesgericht Düsseldorf, *IHR* 2011, 116 at 121.

121. Oberster Gerichtshof (Austria), *IHR* 2013, 117 *et seq.*

122. For more detail see Federal Court of Australia, CISG-online no. 2219.

123. Landgericht Munich, *IHR* 2013, 72 *et seq.*, Landgericht Lübeck, *IHR* 2012, 61 *et seq.*, Rechtbank Almelo, judgment of 16 January 2013, CISG-Netherlands and ICC Arbitration Case no. 7585 of 1992, CISG-online no. 105; in contrast applying national law Landgericht Bielefeld, *IHR* 2011, 190 *et seq.*, Rechtbank 's-Gravenhage, judgment of 11 July 2012 and Rechtbank Arnhem, judgment of 23 May 2012, both CISG-Netherlands.

124. For more detail see Oberlandesgericht Koblenz, *IHR* 2012, 148 at 156.

125. Landgericht Munich, *IHR* 2013, 72 *et seq.* and Amtsgericht Geldern, *IHR* 2012, 190 *et seq.*