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Selected Topics Under the Convention on International Sale of Goods (CISG)

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The Convention on International Sale of Goods (CISG)[1] has been in effect since January 1, 1988 following its ratification by ten States (including the United States). The CISG has now been ratified and is in effect in 60 countries, including all three of the North American Free Trade Area countries (i.e., Canada, Mexico and the United States) and most of the European Community Member States as well as China and Russia. It covers much of the same ground as Article 2 of the Uniform Commercial Code and substantial similarities exist between the CISG and the Uniform Commercial Code. However, as this article illustrates, the CISG handles many important issues in ways different from the UCC.

I. Applicability—Statute of Frauds and Parol Evidence Issues

Overview

There are four bases for applying the CISG:

(1) Places Of Business In Different Contracting States

The parties to the contract have their places of business in different states and such states are Contracting States (hereafter referred to as the *"places of business in different contracting states"* basis for applying the CISG).

(2) Private International Law—Conflict of Laws

Only one of the parties has a place of business in a contracting state and the rules of private international law lead to the application of the law of a state that has ratified the Convention (hereafter referred to as the *"private international law-conflict of laws"* basis for applying the CISG);

(3) Opt In

The parties to the contract include a choice of law clause making the CISG applicable to their contract (hereafter referred to as the *"opt in"* basis for applying the CISG); or

(4) Lex Mercatoria

The CISG can be applied because it is part of the *"lex mercatoria"*.

The CISG is applicable if: (a) the parties to the contract have their places of business in different states and such states are

1. CISG (The United Nations Convention on Contracts for International Sale of Goods, U.N. Doc. A/Conf.97/19 (1981); 19 I.L.M. 668 (1980). The U.N. English language text is reproduced in 52 Fed. Reg. 6264 (1987); 15 USCA App.). Article 99 of the CISG provides in part that "This convention enters into force . . . on the first day of the month following the expiration of twelve months after the date of deposit of the tenth instrument of ratification . . . ." CISG, Art. 99(1).

Contracting States; or (b) if the rules of private international law lead to the application of the law of a state which has ratified the Convention.[2] The CISG may also be applicable despite the fact that a transaction is not covered by the "place of business" or "conflict of laws" rules. The parties may include in their contract a provision to make the CISG applicable (i.e. opt in to the CISG). The Convention then will be applicable if such a provision is permitted under domestic law. The Convention has also been applied on a *"lex mercatoria"* basis (i.e. as a restatement of generally recognized rules of commercial law).

Places of Business In Different Contracting States: Statute of Frauds and Parol Evidence Issues

If the individual parties to the sales transaction have places of business in more than one state, selection of the state to be used in determining whether the parties have places of business in different Contracting States is made under the "place of business" definition in Article 10. This provides that for purposes of the CISG, the "place of business" is the one "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." The term "conclusion of the contract" is used in this context to refer to the time of formation of the contract.

Recent United States cases have routinely recognized the applicability of the CISG where Seller and Buyer have their place of business in different contracting states. Statute of fraud and parol evidence issues have arisen in recent "applicability" cases noted below.

Unlike the statute of frauds requirement in Section 2-201 of the Uniform Commercial Code (U.C.C.), Article 11 of the CISG makes an oral contract for the sale of goods enforceable despite the absence of any writing evidencing the contract. However, Article 96 allows ratifying countries to make a reservation that makes the CISG Article 11 inapplicable. The United States has not made such a reservation.

CISG Article 8(3), in effect, abolishes the parol evidence rule by directing courts to consider all relevant circumstances of the case, including negotiations, to determine the parties' intent.

2. *See* CISG Articles 1(1)(a), 1(1)(b).

Recent cases suggest that courts are beginning to correctly apply the Article 8(3) abolition of the parol evidence rule.

Case No. 1:

In sharp contrast to the earlier decision in *GPL* (discussed *infra*), the court in *Calzaturificio Claudia* recognized the applicability of CISG under the "places of business in different contracting states" rule.[3] *Claudia* involved a contract for a sale of shoes between an Italian manufacturer and a United States buyer. Applying Article (1)(1)(a), the court stated that the CISG was applicable "because the contractual relationship between the seller, an Italian shoe manufacturer, and a buyer, a United States corporation, did not provide for a choice of law . . . ."[4]

Applying CISG Article 11, the court rejected the buyer's argument that in the absence of a written contract or any purchase order setting forth the terms of the parties' sales transaction no enforceable agreement existed between the buyer of the shoes and the manufacturer. The court concluded that "unlike the U.C.C., under the CISG a contract need not be [in writing] or evidenced by a writing . . . and is not subject to any other requirement as to form."

The court also noted that under CISG Article 8(3) a contract may be proved by any means and any evidence that may bear on the issue of formation is admissible. This provision frees the CISG contracts from the limits of the parol evidence rule and any evidence that may bear on the issue of formation is admissible. The court stated: "Consequently, the standard U.C.C. inquiry regarding whether a writing is fully or partially integrated has little meaning under the CISG and courts are therefore less constrained by the four corners of the instrument in construing the terms of the contract."

Case No. 2:

An American buyer brought an action against an Italian seller of tiles for breach of contract. The seller counterclaimed seeking damages for non-payment. The court stated that since the parties had their place of business in different contracting states (the United States for buyer and Italy for seller), Article

3. CISG Article 1(1)(a).

4. Calzaturificio Claudia s.n.c. v. Olivieri Footwear Ltd, 1998 WL 164824 (S.D.N.Y.) (Not reported in F. Supp.).

1(1)(a) governs. The court also considered evidence of the parties' subjective intent that certain terms of their written agreement were not applicable. It ruled that the U.C.C. parol evidence rule does not apply to cases involving the CISG.[5]

Case No. 3:

In a dispute over allegedly defective fruit sold by an Argentinean seller to a Mexican buyer, COMPROMEX[6] ruled that the CISG was applicable and that Argentina had effectively exercised its reservation right under Article 96 of the CISG to make Article 11 inapplicable.

COMPROMEX nevertheless decided that despite the inapplicability of Article 11, a contract of sale was concluded between the parties under Argentina law because of the exchange of documents, payment under the letter of credit, the parties' course of conduct, and the Argentinean seller's own admissions. COMPROMEX concluded that there was therefore no need for the parties to draft a formal contract and that a different interpretation"would be in conflict with the general principles of the CISG."[7]

Case No. 4:

The *Morales* case highlights the distinction between Art. 11 of the CISG and Section 2-201 of the U.C.C. The Mexican Commission for the Protection of Foreign Trade

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5. MCC-Marble Ceramic Center, Inc. v. Ceramica Nuova D'Agostino, S.P.A, 144 F.3d 1384 (11th Cir. 1998).

6. The Mexican Commission for the Protection of Foreign Commerce ("COMPROMEX") is a governmental entity established in 1956 for the purpose of supervising ethical standards in the practice of foreign commerce. COMPROMEX has set up a committee composed of representatives of various official bodies, which provides Mexican importers and exporters, as well as those who trade with them, with a forum of conciliation and arbitration to which any of those parties may submit commercial disputes. Claims may be submitted directly to COMPROMEX or through Mexican trade representatives at Mexican embassies and consulates. The claim procedure is divided into two stages. First, COMPROMEX tries to reach a settlement through a hearing conducted before a conciliation board. If no settlement is reached, the parties are urged to go to arbitration administered by COMPROMEX (Organic Law of COMPROMEX, Art. 12). If those efforts fail, COMPROMEX may proceed with the examination of the evidence and issue a non-binding opinion (dictamen) (Organic Law of COMPROMEX, Articles 2.IV and 14), see GISGW3 database, Pace University School of Law *at* http://cisgw3.law.pace.edu.

7. Conservas La Costena S.A. de C.V. v. Lanin San Luis S.A. & Agroindustrial Santa Adela, M/21/95, April 29, 1996 (Mexico COMPROMEX Comision para la Proteccion del Commercio Exterior de Mexico), UNILEX 1997.

(COMPROMEX) held enforceable an oral agreement for the sale of twenty-four tons of garlic between a Mexican seller and a California buyer. Article 11 of the CISG was applicable to the transaction because the parties had places of business in different contracting states (i.e., states which had ratified the CISG). The invoice sent to the buyer and the documents of carriage were sufficient evidence of the contract's existence.[8]

Case No. 5:

The earlier United States *Beijing* case completely failed to recognize the applicability of the CISG. In a dispute between a Chinese seller and a U. S. buyer, the trial court, by erroneously applying the parol evidence rule, did not allow the buyer to introduce evidence that its obligation to pay was conditioned on the seller's shipment of back orders.[9]

So ruling, the Court stated erroneously that "[w]e need not resolve the choice of law question of whether Texas law or the CISG is applicable because our discussion is limited to application of the parol evidence rule *(which applies regardless)*."

Note that Article 8(3) of the CISG in effect abolishes the parol evidence rule by providing that:

> In determining the intent of a party or the understanding a reasonable person would have had, due consideration is to be given to all relevant circumstances of the case including the negotiations, any practices which the parties have established between themselves, usages and any subsequent conduct of the parties.

Since both China and the United States are contracting parties to the CISG and the seller had a place of business in China and the buyer had a place of business in the United States, the CISG was applicable under the "place of business" test of Article 1(1)(a). Contrary to the result reached by the Court, parol evidence should have been allowed.

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8. Jose Luis Morales y/o Son Export, S.A. de C.V. v. Nez Marketing, M/66/92, MAY 4, 1993 (Mexico COMPROMEX, Comision para la Proteccion del Commercio Exterior de Mexico), UNILEX 1994.

9. Beijing Metals & Minerals Import-Export Corp. v. American Business Center, Inc., 993 F.2d 1178 (5th Cir. 1993), UNILEX 1994, CLOUT abstract no. 24, LEXIS 14211.

Case No. 6:

A Canadian-based seller sued a U. S.-based buyer for breach of an oral contract for sale of wood products.[10] The majority opinion overlooked the clear applicability of the CISG and undertook a complicated application of U.C.C. Section 2-201(2) "failure to object to a confirmatory memorandum"statute of frauds requirement. The court concluded that the communication sent by the seller to the buyer after the alleged oral contract was entered into qualified as a confirmation of the oral contract. Accordingly, the seller was entitled to enforce the oral agreement. The dissent concluded that:

(1) Buyer's response did not qualify as a confirmation of an oral contract. However, the CISG is probably applicable because the parties have a place of business in different "contracting states" and,

(2) application of the CISG would enable the seller to enforce the oral agreement because CISG Article 11 abolishes the statute of frauds requirement.

Liaison Office Which Does Not Qualify as Place of Business

A new type of issue was raised in a recent case before the French Supreme Court (Cour de Cassation) where the question was whether a mere contact office (Bureau de Liaison) constituted a "place of business:"

Case No. 1:

The French Supreme Court ruled that the CISG was applicable even though the transaction appeared to be a purely French transaction entirely within the boundaries of France where the French buyer had ordered electronics components through the German seller's liaison office in France. The court rejected the German seller's argument that since both the French buyer's "place of business" and the German seller's "bureau de liaison" were in France, the contract was not governed by the CISG. In so ruling, the court concluded that the liaison office "was not an autonomous legal entity but rather a branch of the German seller in France."[11]

10. GPL Treatment, Ltd. v. Louisiana-Pacific Corp., 894 P.2d 470 (Or. Ct. App. 1995), UNILEX, CLOUT abstract no. 137.

11. Fauba France case. Sté Fauba France FDIS GC Electronique v. Ste

Private International Law—Conflict of Laws

Under CISG Article 1(1)(b), if one of the parties to the international sales transaction has its place of business in a contracting state and the other does not, the CISG will be applicable if the conflicts of law rule applied by the forum court makes the law of the state that has ratified the CISG applicable. However, Article 95 of the CISG gives a ratifying state the right to declare, at the time of the deposit of its instrument of ratification, that it would not be so bound. The United States exercised this right as part of the ratification process. It was decided that because of the availability of the sophisticated body of sales law provided by Article 2 of the U.C.C., that body of law is preferable to the more general provisions of the CISG in cases where United States law would otherwise be applicable under private international conflict of law rules.

Conflicts Rule of the Forum State Leads to the Application of the Law of the State that Has Ratified the CISG

Case No. 1:

> The buyer had its place of business in the United States and the seller had its place of business in Hong Kong at the time when Hong Kong was still a British colony (in 1995). Britain has not ratified the CISG.
>
> In ratifying the CISG, the United States filed an Article 95 reservation stating that it chooses not to be bound by Article 1(1)(b). The court properly ruled that while the United States law was applicable, the CISG was not applicable under either CISG Article 1(1)(a) or 1(1)(b).[12]

Case No. 2:

> In a dispute between a German buyer and an Italian seller, where the contract was silent as to excluding or including the CISG, and the German private international law rules led to the application of the law of Italy, a country that ratified the CISG, the court concluded that the CISG was applicable.[13]

Fujitsu Mikroelectronik GmbH, Jan. 4, 1995 (France, Cour de Cassation), UNILEX, CLOUT abstract no. 155.

12. Kahn Lucas Lancaster, Inc. v. Lark Int'l, Ltd., 956 F. Supp. 1131 (S.D.N.Y 1997).

13. (Parties not reported), 17 HKO 3726/89, July 3, 1989 (Germany, Landgericht Munchen I), UNILEX 1994, CLOUT abstract no. 3; *see also*

Case No. 3:

> Even though an Italian seller and the Swedish buyers included in their contract a choice of law clause making the "Italian law" applicable, the CISG was inapplicable because: (1) Article 1(1)(b) (private international law—conflict of laws) operates only in the absence of a choice of law clause in the contract between the parties; and (2) the parties choice of "Italian Law" without specifying "Italian law including the CISG" made the CISG inapplicable.[14]

Opt In

The CISG may also be applied where the parties in their agreement have so provided, even though it would not otherwise be applicable under the "places of business in different contracting states" or "private international law—conflict of laws" bases. If the parties include in their contract a provision to make the CISG applicable, it will be applied if such a provision is permitted under domestic law.

The split of authority in the cases that follow illustrates the importance of explicitly excluding or including the CISG where the choice of law clause in the contract makes applicable the law of a country which has ratified the CISG. Explicit inclusion or exclusion of the CISG in such a case will avoid unnecessary litigation.

Ambiguities Created by Opting into the Law of a Contracting State Without Explicitly Specifying that the CISG is Included or Excluded

Cases Holding the CISG Applicable:

Case No. 1:

The United States District Court in California has recently held the CISG applicable where a California buyer's purchase orders were expressly conditioned upon acceptance by the Canadian seller of the buyer's terms and conditions which, *inter alia,* provided that the contract should be governed by the "laws of" the state of California. Conversely, the Canadian seller's terms and conditions of sale in its shipment documents provided that the contract should be governed by the laws of the Canadian province

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Cofacredit S.A. v. Import-en Exportmaatschappij Renza BV, 350/1988, Feb. 8, 1990 (Netherlands, Arrondissementsrechtbank Alkmaar), UNILEX 1994.

14. Nuevo Fucinati S.p.A. v. Fondmetal International A.B. (no number in original), Jan.14, 1993 (Tribunale Civile di Monza), UNILEX, CLOUT abstract no. 54. *See also* case cited at note 23, *infra.*

of British Columbia. Nothing that both Canada and the United States have ratified the CISG and that the buyer's place of business was in the United States and seller's place of business was in Canada, the court ruled that the CISG was applicable under the Article 1(1)(a) "place of business in different contracting states" basis for applying the Convention.[15]

The court stated in reference to the effect of choice of law clauses:

> [Buyer] next argues that, even if the Parties are from two nations that have adopted the CISG, the choice of law provisions in the "Terms and Conditions" set forth by both Parties reflect the Parties' intent to "opt out" of application of the treaty. Article 6 of the CISG provides that "the parties may exclude the application of the Convention or, . . . derogate from or vary the effect of any of its provisions." 15 U.S.C. App., Art. 6. [Seller] asserts that merely choosing the law of a jurisdiction is insufficient to opt out of the CISG, absent express exclusion of the CISG. The Court finds that the particular choice of law provisions in the "Terms and Conditions" of both parties are inadequate to effectuate an opt out of the CISG.
>
> Although selection of a particular choice if law, such as "the California Commercial Code" or the "Uniform Commercial Code" *could* amount to implied exclusion of the CISG, the choice of law clauses at issue here do not evince a clear intent to opt out of the CISG. For example, [seller's] choice of applicable law adopts the law of British Columbia, and it is undisputed that the CISG is the law of British Columbia. (International Sale of Goods Act. ch. 236, 1996 S.B.C. 1 et seq. (B.C.).) Furthermore, even [buyer's] choice of applicable law generally adopts the "laws of" the State of California, and California is bound by the Supremacy Clause to the treaties of the United States. U.S. Const. art. VI, cl. 2 ("This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land.") Thus, under general California law, the CISG is applicable to contracts where the contracting parties are from different countries that have adopted the CISG. In the absence of clear language indicating that both contracting parties intended to opt out of the CISG, and in view of [seller's] Terms and Conditions which would apply the CISG, the Court rejects [buyer's]

15. Asante Techs., Inc., v. PMC - Sierra, Inc., 164 F. Supp. 2d 1142 (N.D. Cal. 2001).

contention that the choice of law provisions preclude the applicability of the CISG.

Because the CISG was applicable as federal law under the Supremacy Clause of the United States Constitution, the court concluded that the buyer's complaint arose under federal law thereby entitling the seller to have the case removed from state to federal court.

The so-called "well-pleaded complaint rule," for removal of a case from a state to the federal court, was also complied with even though the CISG was not specifically mentioned in the buyer's complaint. Under that rule, a cause of action arises under federal law only when the well-pleaded complaint raises issues of federal law. Conceding that the CISG was not mentioned in the buyer's complaint, the court ruled nevertheless that where Congress as in the instant case, in ratifying the CISG establishes a federal law that so completely preempts a particular area of the law that any civil complaint raising that select group of claims is necessarily federal in character, the federal law applies.

In the case of the CISG Treaty, this intent was discernible from the introductory text which states 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."[16] These objectives were further reiterated in the President's letter of transmittal of the CISG to the Senate as well as the Secretary of State's letter of submittal of the CISG to the President.[17]

Case No. 2:

An Italian seller and a Czech buyer agreed to a contract that provided that Austrian law governed, without specifically "including" or "excluding" the CISG. The Arbitral Court held that Austria's ratification of the CISG made the Convention part of Austrian law. Therefore, Austrian law "including" the CISG should be applied.[18]

16. 15 U.S.C. App. at 53.
17. *Id.* at 70-72.
18. (Parties not reported), 7660/JK, Aug. 23, 1994 (International Chamber of Commerce Court of Arbitration (Paris)), UNILEX 1994.

Case No. 3:

A similar result was reached by a German court which ruled that reference to provisions of the German Civil Code was not sufficient to exclude application of the CISG even though the reference to German law was a valid choice of law under German conflicts of law.[19]

A Czech seller and an Austrian buyer concluded several contracts for the sale of umbrellas. As the installments delivered under the first contract remained unpaid, the seller suspended delivery of the umbrellas. The seller sued to recover the unpaid price. The parties agreed to the choice of law clause in favor of Austrian law as the governing law of the contract. The German Supreme Court held that the contract was governed by CISG. It stated that where the parties agree upon a choice of law in favor of the law of a contracting state as the governing law of the contract, CISG is applicable even if the parties did not indicate that CISG is the applicable law.[20]

Cases Holding the CISG Inapplicable:

Case No. 4:

The French Cour de Cassation ruled in Ceramique Culinaire de France S.A. v. Musgrave, Ltd.,[21] that when the parties have explicitly chosen that the domestic law of one the parties governs, the CISG is excluded by virtue of the opt-out procedure authorized by CISG Article 6.

Case No. 5:

In a dispute between an Italian seller and a Japanese buyer about the sale of leather and textile wear, a contract clause specified that the contract was to be "governed exclusively by Italian law." The arbitral tribunal in Florence, Italy decided that the CISG was not applicable, either because Japan had not yet ratified the Convention or because the contract itself had specified that the parties were exclusively subject to Italian law. The choice of Italian law by the parties amounted to an implicit exclusion of CISG by virtue of Article

19. (Parties not reported) 54 0644/94, Apr. 5, 1995 (Germany, Landgericht Landshut), UNILEX 1995.

20. (Parties not reported) 2ob328/97r, Feb. 12, 1998 (Austria Oberster Gerichtshof) (applying Article 1(1)(b) CISG), UNILEX 1999.

21. 2205 D, Dec. 17, 1996 (France, Cour de Cassation), UNILEX 1997, CLOUT abstract no. 206.

6. A dissenting opinion held that the CISG was applicable since the choice of Italian law confirmed that the parties actually intended to apply CISG according to Article 1 (1)(b).[22]

Case No. 6:

German seller and a Swiss buyer concluded a contact for the sale of milking machines. After the buyer suspended payment of the goods, the seller sued for recovery of the unpaid price. The seller's general conditions of sale referred to German law as the law governing the contract. The buyer never signed the seller's conditions and never objected to the choice of law clause favoring German law.

Holding: CISG is not applicable because the parties impliedly excluded it by integrating in the contract a choice of law clause favoring German law.[23]

Lex Mercatoria

The Court of Arbitration of the International Chamber of Commerce and the Iran-United States Claims Tribunal and other arbitral bodies have applied the CISG as a part of the lex mercatoria (the customs and practices governing commercial law) where the "places of business in different contracting states, the "private international law-conflicts of law" and the "opt-in" bases are all inapplicable.

The potential for expanded use of the CISG on the *lex mercatoria* basis is potently conveyed by the language of the arbitration panel of the International Chamber of Commerce which follows.

Use of "Lex Mercatoria" as Basis for Applying the CISG Where the Convention Is Not Otherwise Applicable

Case No. 1:

Where neither buyer nor seller were located in contracting states and the contract contained no choice of law clause, the ICC Court of Arbitration nevertheless applied the CISG. It determined the applicable law governing the non-conformity of goods by looking to the ICC rules which

22. Societa X v. Societa Y, April 1994 (Italy, Ad hoc Arbitral Tribunal-Florence), UNILEX 1995, CLOUT abstract no. 92.; Accord case no. 1, Scenario 3, *supra*.

23. (Parties not reported) Nov. 23, 1998 (Switzerland, Bezirksgericht Weinfelden) (applying CISG Article 6), UNILEX 1998.

required it to consider the relevant trade usages. In making its decision it stated:

> There is no better source to determine the prevailing trade usages than the terms of the United Nations Convention on the International Sale of goods of 11 April 1980, usually called the "Vienna Convention." This is so even though neither the [country of the Buyer] not the [country of the Seller] are parties to that Convention.[24]

Case No. 2:

The Islamic Republic of Iran entered into a contract with a U. S. company to buy electronic communications equipment and related services. When Iran did not pay the U.S. seller the entire purchase price, the U.S. seller notified Iran of its intention to sell the equipment not yet delivered. It then sold the equipment.

The Iran-United States Claims Tribunal applied the CISG as part of the *lex mercatoria* even though no other basis for applying the CISG was applicable. It held that under Article 88(1) of the CISG, the seller had the right to mitigate its damages by selling the undelivered equipment. So ruling, it noted that this right was "consistent with recognized international law of commercial contracts."[25]

II. Timely Discovery and Notification of Nonconformity of Goods

Examination Requirement

The CISG requires the buyer to examine the goods, or cause them to be examined "within as short a period as is practicable in the circumstances."[26] The buyer loses the right to rely on lack of conformity of the goods if notice is not given to the seller specifying the nature of the lack of conformity "within a reasonable time after buyer has discovered it or ought to have discovered it."[27] Such time in any event is not to exceed two years from the date on which the

24. (Parties not reported), 5713/1989, 1989 (ICC, Court of Arbitration of the International Chamber of Commerce), UNILEX 1994; CLOUT abstract no. 45.

25. Watkins-Johnson Co. & Watkins-Johnson, Ltd. v. The Islamic Republic of Iran & Bank Saderat Iran, 370 (429-370-1) July 28, 1989 (Iran-United States Claims Tribunal), UNILEX 1994.

26. CISG Article 38.

27. CISG Article 39.

goods were actually handed over to the buyer, unless this time limit is inconsistent with a contractual period of guarantee.[28]

The factual difficulty of determining whether a buyer has complied with these time requirements is primarily due to the factual sensitivity of determining whether the buyer has examined the goods "as soon as is practicable" and has given notice "within a reasonable time"of any nonconformity to the seller. In reaching these determinations, the court must take into account the circumstances of the case such as the perishable or non-perishable nature of the goods and the opportunities of the parties to the contract to examine the goods.

CISG Article 40 limits the extent to which a seller can rely on the provisions of Articles 38 and 39 "if the lack of conformity relates to facts which he knew or could not have been unaware and which he did not disclose to the buyer." Article 40 allows the seller to avoid liability for the defect where the seller knew or could not have been unaware of the defect but did not disclose it to the buyer. The factual sensitivity of applying Articles 38, 39 and 40 is illustrated by the following cases.

How Much Time Does the Buyer Have to Examine the Goods and Discover Defects?

Case No. 1:

> A Dutch buyer lost its right to rely on a lack of conformity of the goods because they did not discover the defects by examining all the goods as soon as practicable[29] and did not give notice to the French seller within a reasonable time after it ought to have discovered the lack of conformity.[30] The French seller delivered fish to the Dutch buyer, which transformed it into filets and sold it to various customers. Following receipt of customers' complaints about the quality of the product, the buyer refused to pay part of the price and claimed a set-off.
>
> The court ruled that a very short term for examination of goods was necessary in this case in view of the perishable nature of the food product and because the goods had to be transformed by the buyer, thereby making it impossible for the seller to confirm whether the goods sold were really defective. In addition, the buyer had the opportunity to examine all the

28. *Id.*
29. *See* CISG Article 38.
30. *See* CISG Article 39.

fish since each fish had to be individually fileted and the buyer could sample part of the fish before reselling the filets to its customers. The defects therefore should have been discovered and notice of the defect should have been given within a reasonable time thereafter to the seller.[31]

Case No. 2:

A Dutch court held that the buyer bears the burden of proving that the goods were inspected within a reasonable time. Although the cheese ordered by the buyer had been delivered frozen, the buyer was not exempt from the duty to make a timely examination. According to the court, the buyer could have defrosted a portion of the cheese and discovered the nonconformity.[32]

Case No. 3:

In another case, a German buyer lost the right to rely on lack of conformity by failing to promptly inspect ham delivered by the seller. Because the alleged defect (inadequate seasoning) was easily recognizable, the buyer should have examined the goods within three days.[33]

Case No. 4:

Even where the buyer had to install the seller's engines in order to discover possible defects, a German court has held that the duty to examine promptly imposes a duty on the buyer to examine the goods as soon as practicable. Waiting to examine the engines "a full four months" after delivery could not be considered "as short as is practicable under the circumstances."[34]

Case No. 5:

In another case dealing with insufficient quantity as a defect, a German court held that the Article 38 duty to examine the quantity of the items delivered must be

31. CME Cooperative Maritime Etaploise S.A.C.V. v. Bos Fishproducts Urk BV, HA ZA 95-640, March 5, 1997 (Netherlands, Rb. Zwolle), UNILEX 1998.

32. Fallini Stefano & Co. S.N.C. v. Foodic BV, 90036, Dec 19, 1991 (Netherlands, Arrondissementsrechtbank Roermond), UNILEX 1994, CLOUT abstract no 98.

33. (Parties not reported), 2 C 395/93, Oct. 21, 1994 (Germany, Amtsgericht Riedlingen), UNILEX 1995.

34. (Parties not reported), 31 O 231/94, June 23, 1994 (Germany, Landgericht Dusseldorf), UNILEX 1995.

immediately complied with at the place of performance of the obligation. According to the court, the Swiss buyer of German clothing should have examined or caused the goods to be examined as soon as they arrived at the agreed destination. The court found that examination of the quantity of the items delivered more than a week after delivery was unreasonable under the circumstances.[35]

Case No. 6:

A buyer lost the right to rely on a lack of conformity because it had not made a timely examination of the goods and it did not give notice of non conformity in timely manner to the seller where:

(1) An Italian seller delivered a certain number of medical devices to a Swiss buyer who was its exclusive distributor;
(2) The Swiss buyer immediately resold a small quantity of the goods to a Swiss hospital; and
(3) The Hospital refused acceptance after discovering defects in the goods.

The court ruled that the buyer should have examined the goods at the time of delivery, since it re-dispatched only a small quantity of the delivered goods and kept the rest in its warehouse.

Pursuant to CISG Article 38(1) and given the circumstances of the case, the court found that ten days would have been enough time to check the goods. The devices could have been easily removed from the boxes without being damaged. Additionally, the transparent wrapping made it possible to discover defects in the goods.[36]

Timely Notification of Nonconformity by the Buyer

Many cases deal with the issue of what constitutes a reasonable time for giving notice of nonconformity under CISG Article 39.

Case No. 1:

Notice of nonconformity was held to be given within a reasonable time by a French Court of Appeals where:

35. (Parties not reported), 54 O 644/94, April 5, 1995 (Germany, Landgericht Landshut), UNILEX 1995.

36. (Parties not reported) 11 95 123/357, January 8, 1997 (Switzerland, Obergericht Luzern), UNILEX 1997, CLOUT abstract no. 192.

(1) A French buyer sent a letter to an Italian machinery seller's agent in France two weeks after a provisional test had been performed at the seller's premises, and informed the seller of the nonconformities discovered and specified the improvements to be made before a new test was made;
(2) One month after the second test, the buyer sent another letter informing the seller of its refusal to take delivery until certain modifications were made;
(3) Subsequently, on the seller's request to test a machine at the buyer's premises, the two machines were delivered and installed;
(4) The buyer sent further letters specifying the defects six months after delivery of the first machine and eleven months after delivery of the second machine.

The combination of notices of nonconformity satisfied the reasonable time requirements of Article 39 CISG.[37]

Case No. 2:

A buyer lost its right to rely on lack of conformity of the goods where it failed to give the seller notice after receiving complaints from customers regarding defective fabric in textile goods it purchased from the seller and subsequently resold to the customers. The court noted that the buyer did not give notice to the seller of the defect until it had been sued by its customers.[38]

Case No. 3:

Correspondence between a buyer and its customers in which the customers complained about defects in furniture which the buyer had resold to them would not be considered a proper notice of nonconformity because the correspondence was external to the contractual relationships between the seller and the buyer. In addition, the correspondence between the buyer and the seller was not sufficient to meet the requirement of a notice of nonconformity because the phrases included in this correspondence were too general and did not specify the

37. Societe Giustina Int'l v. Societe Perfect Circle Europe, 56 R.G. no.1222/95, Jan. 29, 1998 (France, Cour d'Appel de Versailles), UNILEX 1998, CLOUT abstract no. 225.

38. (Parties not reported)—June 20, 1997 (Spain, Audiencia de Barcelona), UNILEX 1998.

nature of the lack of conformity of the goods as required by Article 39 of the CISG.[39]

Case No. 4:

The Court of Arbitration of the International Chamber of Commerce has held that notice given within eight days after publication of a report by the buyer's inspector who had examined the seller's goods prior to shipment, satisfied the Article 39 requirements.[40]

Case No. 5:

A notice given twenty-three days after delivery was not timely and the buyer had therefore lost the right to rely on the lack of conformity where the clothes which had been sold turned out to be of bigger sizes than the ones agreed upon and it was impossible to resell them. The court stated that the reasonableness of the time of notice of nonconformity provided in CISG Article 39 is strictly related to the duty to examine the goods within as short a period as practicable in the circumstances set forth in CISG Article 38. Therefore, when the defects are easy to discover by a prompt examination of the goods, the time of notice must be reduced.[41]

Case No. 6:

Notice of defects in nonseason-dependent goods was not timely when an Austrian buyer had entered into a contract with a German seller to deliver goods to a Danish company and waited two months after the Danish company received delivery before notifying seller of nonconformity. The court stated that under normal circumstances in a sale of durable non season-dependent goods, eight days is a reasonable time for giving notice[42]

39. P v. I., 15/96Z, Dec. 3, 1997 (Switzerland, Kantonsgericht Nidwalden), UNILEX 1998.

40. (Parties not reported) 5713/1989, 1989 (Paris, ICC Court of Arbitration), UNILEX 1994, CLOUT abstract no. 45.

41. Sport d'Hiver di Genevieve Culet v. Ets Louys et Fils, 45 /96, Jan. 31, 1996 (Italy, Tribunale Civile di Cuneo), UNILEX 1996.

42. (Parties not reported), 7 U 3758/94, Feb. 8, 1995 (Germany, Oberlandesgericht Munchen), UNILEX 1995, CLOUT abstract no. 167.

Case No. 7:

A buyer bears the burden to show that notice of nonconformity has been given within a reasonable time.[43]

Case No. 8:

Instead of giving notice to the seller of a nonconformity following its own inspection of the seller's engines, the buyer sent the engines to a university for further examination. The court ruled that the reasonable time for giving notice started to run at the moment when the buyer had concluded its own examination.[44]

Case No. 9:

As between merchants, if the defect is apparent under CISG Article 39, a buyer should give immediate notice of the nonconformity rather than waiting until customer complaints are received [45]

Case No. 10:

Where a buyer failed to introduce evidence demonstrating that the notice had specified the nature of the nonconformity, the buyer's notice was ineffective and therefore the buyer was obliged to pay the purchase price of the goods[46]

Seller's Knowledge or Reason to Know of Nonconformity Bars Use of Defense That Buyer Failed to Make Timely Discovery or Give Timely Notice of Nonconformity

Case No. 1:

A seller diluted wine with 9 percent water. Even though the buyer did not examine the wine after delivery and therefore did not comply with Articles 38 and 39, the buyer did not lose its right to rely on nonconformity because the seller could not have been unaware of the nonconformity. [47]

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43. (Parties not reported), 3/15 O 3/94, July 13, 1994 (Germany, Landgericht Frankfurt am Main), UNILEX 1995.

44. (Parties not reported), 31 O 231/94, June 23, 1994 (Germany, Landgericht Dusseldorf), UNILEX 1995.

45. (Parties not reported), 6252, Apr. 27, 1992 (Switzerland, Preturea della giurisdizione di Locarno-Capmagna), UNILEX 1994, CLOUT abstract no 56.

46. (Parties not reported), 3/13 O 3/94, July 13, 1994 (Germany, Landgericht Frankfurt am Main), UNILEX 1995.

47. (Article 40 CISG) (parties not reported) 7 HO 78/95, October 12, 1995 (Germany, Langericht Trier), UNILEX 1996, CLOUT abstract no. 170.

Case No. 2:

A United States seller replaced a part of a press with a substitute part but did not inform the Chinese buyer or instruct the buyer's engineer as to how to install it. The press was disassembled in the United States for delivery to the buyer's factory in China where it was reassembled by the buyer's technicians and put into operation. The press worked without incident for almost three years while in continuous use. Thereafter the press failed, resulting in serious damage to the press itself. Only after the press failed did the buyer become aware that part of the press was replaced with a device that deviated from the seller's drawing.

In Buyer's suit for damages due to nonconformity of the press, it was agreed that the buyer had given notice of the alleged nonconformity well beyond the eighteen month contractual period and also beyond the two-year limitation period of CISG Article 39(2). Nevertheless, the court ruled that the CISG was applicable because the lack of conformity related to facts that the seller new or could not have been unaware of, and that the seller failed to disclose these facts to the buyer. Article 40 of the CISG therefore barred the seller from relying on the examination and notice requirements of Articles 38 and 39 of the CISG. [48]

Case No. 3:

The difficulty of giving specific meaning to the requirement that the seller is not entitled to rely on the provisions of Article 38 and 39 if the lack of conformity "relates the facts of which he new or could not have been unaware" and which Seller did not disclose to the buyer, is illustrated by this case. A German seller sold a chemical substance to be used for the production of plastic tubes to a Moroccan buyer. Approximately one month after delivery, the buyer attempted to produce the plastic tubes with used machinery. The tubes caught fire and the buyer was unable to produce the product. The German court ruled that the buyer was barred from recovery because of his failure to comply with

48. Beijing Light Auto. Co., Ltd. v. Conell Ltd. P'ship, June 5, 1998 (Arbitral award, Arbitration Institute of the Stockholm Chamber of Commerce, Stockholm, Sweden), UNILEX 1998, CLOUT abstract no. 237.

the examination and notice requirements of Articles 38 and 39 of the CISG.

The court also ruled that the buyer was not exempt from these requirements on the ground that the seller did not give any warning regarding the type of machinery that should have been used for treatment of the chemical substance. The court ruled that the seller was not barred by Article 40 of the CISG from using the Article 38 and 39 defenses because he had delivered a standard blend which did not cause any problems when used with a standard machine. The seller was not required to inform the buyer that the product could not be used by an outdated machine. The court concluded that it was up to the buyer to inform the seller that it intended to operate a twenty-year old machine in producing its product, since the buyer was to be considered a "competent tradesman." In light of the fact that, in developing countries, it is generally known that used rather than new machinery is commonly used in production activities, the question has been raised as to whether the seller should be required to disclose to such buyers that only updated, new machinery may be used with the product being sold.[49]

Advantage of Clause Providing for Explicit Time for Giving Notice

To minimize litigation over whether examination and notice were performed within a reasonable time, the parties may wish to utilize the derogation right of Article 6 to exclude applicability of the notice provisions of Articles 38 and 39 and incorporate into the contract a clause specifying the time within which the buyer is required to notify the seller of a nonconformity.

Cases No. 1 and 2:

For example, the validity of a clause providing that any complaints concerning defects in the goods could only be raised within eight days after receipt of the goods has been sustained. Because a buyer did not give notice within the agreed period of eight days, the court held that buyer had lost the right to rely on a nonconformity under CISG Article 39.[50]

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49. (Parties not reported) 2U5801 96 Sept. 11, 1998 (Germany, Ofberlandsgericht Koblenz), UNILEX 1998.

50. (Parties not reported), 6 O 85/93, July 5, 1994 (Germany, Landgericht Giessen), UNILEX 1995; *see also* (Parties not reported), 7660/JK, Aug. 23, 1994 (Arbitral Award, International Chamber of Commerce Court of Arbitration

A clause fixing a maximum time limit of eighteen months for buyer to notify seller of a nonconformity has also been sustained.[51]

Case No. 3:

The degree of specificity required for proper notice has also been considered in at least one instance. Despite the buyer's timely notice, the buyer had failed to comply with the CISG's notice provisions because notice of "poor workmanship and improper fitting" was not sufficiently specific. Buyer thus lost its right to rely on nonconformity.[52]

Ineffective Cure—New Notice Required

When receiving goods that are offered as a cure for nonconforming goods, a buyer must give new notice of any defects should the new goods also be nonconforming. For example, in one case,[53] a German court held that a German buyer that had claimed that the Italian seller's cure was ineffective lost the right to claim a lack of conformity by failing to renew notice of nonconformity upon discovery that the cure was also ineffective. Because the court held that a failed repair represents another nonperformance of the contract, the buyer's exercise of remedies for breach of contract by seller requires another notice.[54]

III. New Concepts in Breach and Remedies

Specific Performance

A basic assumption of the remedies provisions of the CISG is that the contract of the parties should normally be specifically performed.[55] This is unlike the U.C.C., under which damages rather than specific performance is the preferred remedy.[56] However, by

(Paris)), UNILEX 1995.

51. (Parties not reported) 7U442F197, March 11, 1998 (Germany, Oberlandesgericht Munchen), UNILEX 1998.

52. (Parties not reported), 17 HKO 3726/89 July 3, 1989 (Germany, Landgericht Munchen I), UNILEX 1994, CLOUT abstract no. 3.

53. (Parties not reported), 12 O 674/93, Nov. 9, 1994 (Germany, Landgericht Oldenburg), UNILEX.

54. *Id.*

55. CISG, *supra* note 1, arts. 46(1) (specific performance for buyers), 62 (specific performance for sellers) and 28 (applicability of the specific performance law of the forum state). *Compare* U.C.C. § 2-716, *infra* note 56.

56. U.C.C. §2-716 provides:

providing that in a case involving application of the CISG a court is not bound to enter an order for specific performance if it would not be required to do so under the law of the forum state in which litigation is initiated, the CISG makes it possible to bypass its normally applicable specific performance remedy. Thus, if a U.S. court is selected as the forum for resolution of disputes, the narrower specific performance remedy of U.C.C. section 2-716 rather than the broader CISG specific performance remedies would be applicable. The interplay between the CISG and United States' law of specific performance is illustrated by *Magellan International Corp v. Salzgitter Handel GMGH.*[57]

In *Magellan*, the court denied a German seller's motion to dismiss an Illinois buyer's action for specific performance of a contract to sell specified quantities of steel. The court concluded that if proven, allegations in the complaint would establish that the seller had breached the contract and that the buyer was entitled to specific performance under the special rule of Article 28 which would make U.C.C. section 2-716 rather than Article 46 of the CISG applicable. After ruling that the buyer's allegations were sufficient to establish the seller's breach of contract, the court addressed the buyer's specific performance claim. It noted that Article 46(a) of the Convention makes specific performance routinely available by providing that a buyer may require the seller to perform its obligations unless the buyer has resorted to an inconsistent remedy. This contrasts with the limited availability of specific performance under section 2-716 of the UCC.

The court also noted that although Article 46 makes specific performance the preferred remedy for aggrieved buyers, Article 28 of the Convention conditions the availability of this remedy as follows:

> If, in accordance with provisions of the Convention, one party is entitled to require performance of any obligation by the other party, a court is not bound to enter judgment for specific

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(1) Specific performance may be decreed where the goods are unique or in other proper circumstances.
(2) The decree for specific performance may include such terms and conditions as to payment of the price, damages, or other relief as the court may deem just.
(3) The buyer has a right of replevin for goods identified to the contract if after reasonable effort he us unable to effect cover for such goods or the circumstances reasonably indicate that such effort will be unavailing or if the goods have been shipped under reservation and satisfaction of the security interest in them has been made or tendered.

57. 76 F. Supp. 2d 919 (N.D. Ill. 1999), 40 U.C.C. Rep. Serv. 2d 321.

> performance unless the court would do so under its own law in respect of similar contracts of sale not governed by this Convention.

Since Illinois had enacted the U.C.C., availability of specific performance in the Illinois court was therefore governed by section 2-716 of the Uniform Commercial Code, which provides that a court may grant specific performance "where the goods are unique or *in other proper circumstances*." (emphasis added)

The limited common law grant of specific performance for sale of goods contracts in cases where the goods are unique has been expanded by addition of the "other proper circumstances" language in U.C.C. section 2-716. The Official Commentary to this section notes that the test appears to be whether goods are replaceable as a practical matter—for example, whether it would be difficult to obtain similar goods on the open market.[58]

Given the centrality of the replaceability issue in determining the availability of specific performance under the U.C.C., the court ruled that a pleader need allege only the difficulty of cover to state a claim under section 2-716. In denying the motion to dismiss it noted however that perhaps when the facts were further developed through discovery, the buyer's claims against the seller might succumb either to lack of proof or to some other deficiency.

The CISG specific performance provisions are further softened by their inclusion in a mixed traditional and sometimes innovative set of breach and performance rules addressed elsewhere in this article. These provisions pertain to: (1) requiring buyers to discover and give timely notice of lack of conformity;[59] (2) giving sellers opportunity to cure defects;[60] and (3) utilizing innovative concepts like "fundamental breach,"[61] "Nachfrist,"[62] "avoidance"[63] and "reduction in purchase price to the extent of the defect."[64]

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58. U.C.C. § 2-716, Official Comment 2. The court also cited Andrea G. Nadel, Annotation, *Specific Performance of Sale of Goods Under Section 2-716*, A.L.R. 4th 294 (1983).

59. CISG, *supra* note 1, art. 38; see discussion *supra* at 219-228.

60. CISG, *supra* note 1, art. 48; see discussion *infra* at 231.

61. CISG, *supra* note 1, art. 25; see discussion *infra* at 232.

62. CISG, *supra* note 1, arts. 47, 49(I) (i.e., buyer's Nachfrist) and 63(1)-64(1)(b) (i.e., seller's Nachfrist); see discussion *infra* at 236-240.

63. CISG, *supra* note 1, art. 49; see discussion *infra* at 232.

64. CISG, *supra* note 1, art. 50; see discussion *infra* at 244.

Seller's Right to Cure

A seller's right under the CISG to cure defective performance is substantially similar to that of a seller under the U.C.C.[65] Under the CISG, where the seller has delivered goods before the date for delivery, any defective delivery up to the delivery date may be cured by the seller, provided that the exercise of this right does not cause the buyer unreasonable inconvenience or unreasonable expense.[66] The buyer nevertheless retains any right to claim damages provided elsewhere by the Convention.[67] The seller may, even after the date for delivery,[68] remedy a defective tender if this can be done without unreasonable delay and without causing the buyer unreasonable inconvenience or "uncertainty of reimbursement by the seller of expenses advanced by the buyer."[69] Again, the buyer retains any right to claim damages as provided elsewhere in the Convention.

A recent Swiss case, discussed previously, illustrates this right of the seller. Recall the case where the Swiss buyer notified the Italian seller of defects in upholstery after receiving consumer complaints. The seller offered to cure the defect by replacing the

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65. U.C.C. § 2-508 provides:
(1) Where any tender or delivery by the seller is rejected because non-conforming and the time for performance has not yet expired, the seller may seasonably notify the buyer of his intention to cure and may then within the contract time make a conforming delivery.
(2) Where the buyer rejects a non-conforming tender which the seller has reasonable grounds to believe would be acceptable with or without money allowance the seller may if he seasonably notifies the buyer have a further reasonable time to substitute a conforming tender.

66. CISG, *supra* note 1, art. 37 provides:
[i]f 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.

67. *Id.*

68. CISG, *supra* note 1, art. 48(1) provides:
(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.

69. *Id.*

upholstery, but the buyer refused. The Swiss court held that the buyer erred in refusing to allow the seller to cure.[70]

In another previously discussed case, where a French seller and a Portuguese buyer contracted for the sale and dismantlement of a second-hand airplane hangar,[71] the seller had delivered nonconforming metallic elements. The court held that although the seller had effectively cured the nonconformity by repair of the elements, the buyer was entitled nonetheless to claim damages because the seller had delayed in delivering the conforming goods thereby requiring the buyer to arrange for transportation of the goods twice.

In another case,[72] the arbitrator for an International Chamber of Commerce arbitration ruled that where the breach by the seller was of such a substantial character as to constitute a fundamental breach under Article 25,[73] the buyer was entitled to avoid[74] the contract. Furthermore, the seller was not entitled to exercise a right of cure under CISG Article 48(1), apparently because the defect was of such a serious nature in the sole arbitrator's view that the seller only had a right to cure after the due date for delivery if the buyer so consented.

Fundamental Breach and Avoidance

If the seller's failure to cure a defective delivery results in a detriment to the buyer so as to substantially deprive the buyer of

70. (Parties not reported), 6252, Apr. 27, 1992 (Switzerland, Pretura della giurisdizione di Locarno-Campagna), UNILEX.

71. Marques Roque Joachim v. La Sarl Holding Manin Riviere, RG 93/4879, Apr. 26, 1995 (France, Cour d'Appel de Grenoble Chambre Commerciale), UNILEX.

72. (Parties not reported), 7531/1994, 1994 (Court of Arbitration of the International Chamber of Commerce, (Paris)), UNILEX.

73. CISG, *supra* note 1, art. 25 provides:

> (a) breach of contract committed by one of the parties is fundamental if it results in such detriment to the other party as to substantially deprive him of what he is entitled to expect under the contract, unless the party in breach did not foresee and a reasonable person of the same kind in the same circumstances would not have foreseen such a result.

74. CISG, *supra* note 1, art. 49(I) provides:

> (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.

what buyer was entitled to expect according to the contract, such a breach is deemed to be "fundamental" unless the party in breach did not foresee the result, and a reasonable person of the same kind in the same circumstances would not have foreseen such a result.[75] Such a breach gives the buyer the right to avoid (i.e., cancel) the contract.[76]

The concept of fundamental breach has been examined in a number of cases. For example, in one case involving a German buyer and an Italian seller,[77] the buyer had ordered 120 pairs of shoes from the seller through a commercial agent. The contract included a clause that granted the buyer the exclusive right to distribute the shoes in a certain geographical district. After selling twenty pairs of shoes, the buyer learned that the seller had supplied the identical shoe to a competing local retailer who was offering the shoe at a considerably lower price. The buyer attempted to cancel the remainder of the order and avoid the contract. The German court found no fundamental breach of the exclusive contract by the seller because the seller had no way of knowing that the competing retailer had a branch within the buyer's district and that, in the judgment of the court, the seller could not reasonably have foreseen this circumstance.[78]

In another case, a German buyer ordered shoes from an Italian seller and provided specifications.[79] The seller produced the shoes, which bore the buyer's trademark, and subsequently displayed them at a trade fair. When the buyer gave notice of its intention to avoid the contract because of the seller's refusal to remove the shoes from the trade fair, the seller sued to recover the price of the shoes. The German court found that the seller's display of the shoes at the trade fair was a fundamental breach of the contract. It was foreseeable to the seller that its conduct would endanger the buyer's interest in controlling all sales of that shoe under its

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75. CISG, *supra* note 1, art. 25.

76. CISG, *supra* note 1, art. 49(1)(a) provides:

(1) The buyer may declare the contract avoided:
(a) if the failure by the seller to perform any of his obligations under the contract of this Convention amounts to a fundamental breach of contract. . . .

77. (Parties not reported), 3/11 O 3/91, Sept. 16, 1991 (Germany, Landgericht Frankfurt am Main).

78. *Id.*

79. (Parties not reported), 5 U 164/90, Sept. 17, 1991 (Germany, Oberlandesgericht Frankfurt am Main). *See* Interpretive Decisions Applying CISG, 12 J.L. & COM. 261 (1993).

trademark to such an extent that the buyer's interest would be virtually nonexistent.

The issue of fundamental breach also arose in the previously discussed airplane hangar case.[80] There, the court ruled that because the nonconformity related only to a part of the hangar and seller had been able to repair the defective parts, the lack of conformity did not constitute a fundamental breach of contract. So ruling, the court reasoned that the buyer had not been substantially deprived of what it was entitled to under the contract and that, therefore, avoidance was not a proper remedy.

Partial delivery of goods as a basis for establishing fundamental breach of contract was recently litigated.[81] In that case, a German buyer had ordered eleven computer parts from an American seller in order to fulfill its contract with an Austrian company. The buyer faxed its order to the seller and included the price of only five of the parts. The seller, in turn, delivered only five parts and the buyer was forced to obtain substitute goods to cover the remaining six component parts that it needed. The buyer subsequently refused to pay the purchase price of the goods, claiming that the seller's partial delivery constituted a fundamental breach of the contract. The court, however, held for the seller because the seller's partial delivery had not substantially deprived the buyer of what it was entitled to expect under the contract because the buyer had been able to obtain substitute goods.[82]

Another recent decision[83] also addressed nonconformity of goods as a basis for establishing fundamental breach. In this case, a German buyer and an Italian seller entered into a contract for the sale of women's shoes. The buyer refused to pay the purchase price, claiming that delivery had been late and that the goods were nonconforming. The German court held that a contract may be avoided on the basis of nonconforming goods only when that nonconformity constitutes a fundamental breach. Because the buyer failed to establish that the goods could not be reasonably used for their original purpose, the nonconformity of the goods under the contract did not amount to a fundamental breach.

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80. Marques Roque Joachim v. La Sarl Holding Manin Riviere, RG 93/4879, Apr. 26, 1995 (France, Cour d'Appel de Grenoble Chambre Commerciale).

81. (Parties not reported), O 42/92, July 3, 1992 (Germany, Landgericht Heidelberg), UNILEX. *See also* (Parties not reported), 19 U 97/91, Sept. 22, 1992 (Germany, Oberlandesgericht Hamm), UNILEX (buyer's failure to take delivery of more than half of the goods constituted fundamental breach).

82. *Id.*

83. (Parties not reported), 5 U 15/93, Jan. 18, 1994 (Germany, Oberlandesgericht Frankfurt am Main), UNILEX, CLOUT abstract no. 79.

A German court has recently found no fundamental breach of a contract involving a Swiss seller and a German buyer in a contract for the sale of New Zealand mussels.[84] The buyer was not entitled to avoid the contract and refuse to pay the purchase price on the grounds that the mussels were not completely safe[85] because of the quantity of cadmium they contained. The cadmium concentration admittedly exceeded the threshold level published by the German Federal Health Department. However, the court concluded that the mussels were nonetheless conforming to the contract because they were fit for the purpose for which goods of the same description would ordinarily be used.[86] The court reasoned that sellers normally cannot be expected to observe public law, that is, regulatory requirements of the buyer's state. A seller could only be expected to do so where the same rules exist in both the seller's and the buyer's countries or where the buyer draws the seller's attention to their existence.

The Court d' Appel de Grenoble Chambre Commerciale in France has held that the buyer's breach of a contract by reselling to a Spanish buyer rather than to a South American buyer constituted a fundamental breach that entitled the seller to declare the contract avoided.[87] The court found that the parties clearly understood that resale was to be in South America and that the seller's expectations under the contract were substantially impaired because sale of its products in Spain had been seriously hampered by the parallel distribution caused when the buyer resold the goods in Spain rather than in South America.

Deviations from the quality and quantity of the goods originally ordered under a contract have also been litigated as constituting fundamental breaches of contract. For example, a German court has held that a German buyer of coal could not avoid the contract where the quality of the coal actually deviated from that specified in the contract but not enough to amount to a fundamental breach.[88]

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84. (Parties not reported), VIII ZR 159/94, Mar. 8, 1995 (Germany, Bundesgerichtshof), UNILEX.

85. *Id.*

86. CISG, *supra* note 1, art. 35(2)(a) provides:

> (2) Except where the parties have agreed otherwise, the goods do not conform with the contract unless they:
>
> (a) are fit for the purposes for which goods of the same description would ordinarily be used.

87. SARL Bri Production "Bonaventure" v. Societe Pan African Export, 53, Feb. 22, 1995 (France, Cour d' Appel de Grenoble Chambre Commerciale).

88. (Parties not reported), 7 U 4419/93, Mar. 2, 1994 (Germany,

An Italian court has held that delay of the seller in delivering only one-third of the goods ordered two months after conclusion of the contract, amounted to a fundamental breach that entitled the buyer to avoid the contract.[89] So ruling, the court noted that the parties had specified in their agreement that the seller was bound to dispatch all of the goods within one week after the contract was concluded.

"Nachfrist"

"Nachfrist" is a procedure[90] taken from German law and

Oberlandesgericht Munchen), CLOUT abstract no. 83.

89. Foliopack AG v. Daniplast S.p.A., 77/89, Nov. 24, 1989 (Italy, Pretura di Parma-Fidenza), CLOUT abstract no. 90.

90. The Nachfrist procedure is incorporated into the CISG for the buyer in Articles 47 and 49. CISG art. 47 provides:

> (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.

CISG, art. 49(1) provides:

> [t]he 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 the 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.

The Nachfrist procedure that applies to the seller is incorporated into the CISG in articles 63(1) and 64. CISG, art. 63(1) provides:

> (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 (10 of article 63, perform his obligation to pay the price or take delivery of the goods, or if he declares that he will not do so within the period so fixed.
>
> (2) However, in cases where the buyer has paid the price, the seller loses the right to declare the contract avoided unless he does so:
>
> (a) in respect of late performance by the buyer, before the sellers has become aware that performance has been rendered; or
>
> (b) in respect of nay breach other than late performance by the buyer, within a reasonable time:
>
> (i) 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 obligation

incorporated into the CISG.[91] It can be utilized by either a buyer or seller. We first discuss the buyer's Nachfrist right.

Under the Nachfrist concept incorporated into the CISG, a buyer may avoid a contract where performance by the seller has been delayed even though such delay does not rise to the level of a fundamental breach if:

1. The buyer gives the seller an additional reasonable period of time for performance, fixing a new deadline beyond the contract delivery date by which the seller must perform; and

2. seller does not perform within the additional reasonable period of time.[92]

Although the CISG does not provide that expiration of the additional period of time without performance by the seller creates a fundamental breach, it does provide that the buyer may nevertheless avoid the contract after the expiration of such period of time.[93]

Applying the relevant CISG Nachfrist provisions, a German court[94] held that an Egyptian buyer was entitled to avoid the contract where the German seller failed to deliver goods within an eleven-day extension period fixed by the buyer for performance of the remainder of an installment contract that seller had only partially performed. The court found that the additional eleven-day period was not unreasonable in the context of the particular transaction. Accordingly, the court awarded the buyer the amount

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within such an additional period.

91. The German Civil Code II §326 provides:

(1) If, in the case of mutual contract, one party is in default in performing, the other party may give him a reasonable period within which to perform his part with a declaration that he will refuse to accept the performance after the expiration of the period. After the expiration of the period he is entitled to demand compensation for non-performance, or to withdraw from the contract, if the performance has not been made in due time; the claim for performance is barred. If the performance is only partly made before the expiration of the period, the provision of §325(1) sent. 2, applies mutatis mutadis.

(2) If, in consequence of the default, the performance of the contract is of no use to the other party, such other party has the rights specified in (1) without giving any period. Ian S. Forrester et al., THE GERMAN CIVIL CODE (Fred B. Rothman & Co. 1975).

92. CISG, *supra* note 1, art. 47.

93. CISG, *supra* note 1, art. 49(1).

94. (Parties not reported), 20 U 76/94, May 24, 1995 (Germany, Oberlandesgericht Celle), UNILEX.

by which pre-payment exceeded the amount due for the limited amount of goods actually delivered.[95]

Another German case[96] illustrates the consequences of failure to utilize the Nachfrist procedure. In this case, a German buyer and an Italian seller of fashion goods entered into a contract that specified that the goods were "to be delivered July, August, September + - ."[97] The seller made the first delivery in September, but the buyer refused the goods claiming the quoted language required that one-third of the goods should have been delivered in July, one-third in August, and one-third in September. The court held that the seller was entitled to the full purchase price, even if the goods had been delivered late, because the buyer had not established a fundamental breach by the seller or offered the seller an additional reasonable period of time to perform.

The court reached the same result where a German buyer and an Italian seller entered a contract for the sale of women's shoes and the buyer refused to pay the entire purchase price, claiming in part that delivery of the goods been untimely.[98] The court held that the buyer, in the absence of a fundamental breach by seller, had not validly avoided the contract because it had failed to provide an additional time period for the seller to perform.

Avoidance of the contract, either for reasons of fundamental breach or because of compliance with the Nachfrist procedure, releases both parties from their obligations under the contract, subject to any damages that may be due.[99]

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95. *See* CISG, *supra* note 1, art. 81(2), which provides:

(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.

See also CISG, art. 84(1) which provides:

(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.

96. (Parties not reported), 5 C. 73/89, Apr. 24, 1990 (Germany, Amtsgericht Oldenburg in Holstein), CLOUT abstract no. 7.

97. *Id.* The "+ or -" is the actual content of the contract clause specifying time for performance.

98. (Parties not reported), 5 U 15/93, Jan. 18, 1994 (Germany Oberlandesgericht Frankfurt am Main), UNILEX, CLOUT abstract no. 79.

99. *See* CISG, art. 81(1), which provides:

(1) Avoidance of the contract releases both parties from their obligations under it, subject to any damages which may be due. Avoidance does not affect any provision of the contract for the settlement of disputes or any other provision of the contract governing the rights and obligations of the parties consequent upon the avoidance of the contract.

The CISG also provides Nachfrist rights for sellers. Under Article 63,[100] the seller may fix an additional period of time of reasonable length for performance by the buyer of its obligations. Under Article 64,[101] a seller is empowered to avoid a contract because of fundamental breach by the buyer or failure of the buyer within the additional period of time fixed by the seller to perform its obligation to pay the contract price or to take delivery of the goods, or if the buyer declares that it will not do so within the period so fixed.

Sellers' Nachfrist right was recently litigated in a German case[102] where a German seller had given an Italian buyer an additional time period within which to take delivery of acoustic prostheses at the seller's place of business. The court held that the seller was entitled to recover damages for failure of the buyer to perform within the additional period of time granted by the seller.

A decision of an International Chamber of Commerce arbitration panel[103] awarded damages to an Austrian seller where a

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100. CISG, *supra* note 1, art. 63 provides:

(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 had 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.

101. CISG, *supra* note 1, art. 64 provides:

(1) The seller may declare the contract avoided:

(a) if the failure by the buyer to perform any of his obligation under the contract or this Convention amounts to a fundamental breach of contract; or

(b) if the buyer does not, within the additional period of time fixed by the seller in accordance with paragraph (1) of article 63, perform his obligation to pay the price or take delivery of the goods, or if he declares that he will not do so withing 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 performances has been rendered; or

(b) in respect of any breach other than late performance by the buyer, within a reasonable time:

(i) after the seller knew or ought to have known of the breach; or

(ii) after the expiration of any additional period of time fixed by the seller in accordance with paragraph (10 of article 63, or after the buyer has declared that he will not perform his obligations within such an additional period.

102. (Parties not reported), 43 O 136/92, May 4, 1993 (Germany, Landgericht Aachen), UNILEX, CLOUT abstract no. 47.

103. (Parties not reported), 7197/1992 — 1992 (ICC International Chamber of

Bulgarian buyer had failed to perform its obligation of opening a document of credit for payment within the additional period of time fixed for such performance by the seller. In so ruling, the court held that the suspension of payment of foreign debts ordered by the Bulgarian government did not constitute a "force-majeure" that prevented the buyer from opening a documentary credit.

In another arbitral award by the International Chamber of Commerce Court of Arbitration,[104] although a delay in opening a documentary credit by itself did not amount to a fundamental breach, the Italian seller was nevertheless entitled to avoid the contract. According to the arbitration award, the fact that the seller waited several months before declaring the contract avoided was "equivalent to the fixing of an 'additional period of time' for performance pursuant to Article 63 CISG" with the result that failure by the Finnish buyer to perform within that period of time entitled the seller to avoid the contract under CISG Article 64(1)(b).[105]

"Adequate Grounds for Insecurity—Anticipatory Repudiation"

Under the CISG, a party may suspend performance of its obligations if it becomes apparent that the other party will not perform a substantial part of its obligations as a result of;

1. Serious deficiency in its ability to perform or in this credit worthiness or
2. Because of its conduct in preparing to perform or in performing the contract.

A party suspending performance must immediately give notice of suspension to the other party and must continue with performance if the other party provides adequate assurance of performance.[106] Although this is similar to the U.C.C. provision[107]

Commerce Court of Arbitration (Paris)), UNILEX, CLOUT abstract no.104.

104. (Parties not reported, 7585/1992 — 1992 (ICC International Chamber of Commerce Court of Arbitration (Paris)).

105. CISG, *supra* note 93, art. 61(1)(b) provides:

(1) The seller may declare the contract avoided:

(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 of take delivery of the goods, or if he declares that he will not do so within the period so fixed.

106. CISG, *supra* note 1, art. 71(1) provides:

(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 obligation as a result of:

(a) a serious deficiency in his ability to perform or in his

pertaining to a party's right to adequate assurance where reasonable grounds for insecurity arise indicating that the other party will not be able to perform the contract, it is not identical as illustrated by the following cases.

The CISG further provides that where the seller has already dispatched the goods before the grounds for insecurity have become evident, the seller may prevent the handing over of the goods to the buyer even though the buyer holds a document that entitles the buyer to obtain them.[108]

The CISG grants the aggrieved party the right to avoid the contract if, prior to the date of performance of the contract, it is clear that one of the parties will commit a fundamental breach of contract,[109] or if one of the parties has declared that it will not perform its obligation under the contract.[110] This latter provision, in

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creditworthiness; or

(b) his conduct in preparing to perform or in performing the contract.

CISG, *supra* note 1, art. 71(3) provides:

(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.

107. U.C.C. §2-609 provides:

(1) A contract for sale imposes an obligation on each party that the other's expectation of receiving due performance will not be impaired. When reasonable grounds for insecurity arise with respect to the performance of either party the other may in writing demand adequate assurance of due performance and until he receives such assurance may if commercially reasonable suspend any performance for which he has not already received the agreed return.

(2) Between merchants the reasonableness of grounds for insecurity and the adequacy of any assurance offered shall be determined according to commercial standards.

(3) Acceptance of any improper delivery or payment does not prejudice the aggrieved party's right to demand adequate assurance of future performance.

(4) After receipt of a justified demand failure to provide within a reasonable time not exceeding thirty days such assurance of due performance as is adequate under the circumstances of the particular case is a repudiation of the contract.

108. CISG, *supra* note 1, art. 71(2) provides:

(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.

109. CISG, *supra* note 1, art. 72(1) provides:

(1) If prior to the date for the 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.

110. CISG, *supra* note 1, art. 72(3) provides:

(3) The requirements of the preceding paragraph do not apply if the

effect, explicitly makes anticipatory repudiation a basis for avoidance under the CISG.[111]

A German court[112] found that a German shoe retailer would not be able to pay the purchase price of the shoes ordered and thereby would commit a fundamental breach of contract. The court held that the probability of a future breach of contract was very high, and that complete certainty or inability of the retailer to pay for the shoes was not necessary. It found that there was reason to believe that the buyer would breach the later contract because the buyer had not paid for shoes delivered under two prior contracts.[113] The court rejected the buyer's claim that it had a right to suspend payment on grounds that the goods delivered under the earlier contract were nonconforming. The court refused to accept this argument because the buyer had not given notice of such nonconformity within a reasonable time as required by Article 39[114] of the CISG and held the buyer accountable for the purchase price.

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other party has declared that he will not perform his obligations.

111. *Id.* The anticipatory repudiation provisions of the U.C.C. are sections 2-610 and 2-611. Section 2-610 provides:

> [w]]hen either party repudiates the contract with respect to performance not yet due the loss of which will substantially impair the value of the contract to the other, the aggrieved party may
>
> (a) for a commercially reasonable time await performance by the repudiating party; or
>
> (b) resort to any remedy for breach (Section 2-703 or Section 2-711), even though he has notified the repudiating party that he would await the latter's performance and has urged retraction; and
>
> (c) in either case suspend his performance or proceed in accordance with the provisions of this Article on the Seller's right to identify goods to the contracts notwithstanding breach or to salvage unfinished goods (Section 2-704).

U.C.C. §2-611 provides:

> (1) Until the repudiating party's performance is due he can retract his repudiation the aggrieved party has since the repudiation canceled or materially changed his position or otherwise indicated that he considers the repudiation final.
>
> (2) Retraction may be by any method which clearly indicates to the aggrieved party that the repudiating party intends to perform, but must include any assurance justifiably demanded under the provisions of this Article (Section 2-609).
>
> (3) Retraction reinstates the repudiating party's rights under the contract with due excuse and allowance to the aggrieved party for any delay occasioned by the repudiation.

112. (Parties not reported), 99 O 123/92, Sept. 30, 1992 (Germany, Landericht Berlin). *Accord* (Parties not reported), 17 U 146/93, Jan. 14, 1994 (Germany, Oberlandesgericht Dusseldorf).

113. *Id.*

114. *Supra* notes 27-37.

The possible loss of remedies by an aggrieved party with reasonable grounds for insecurity who fails to give the other party an opportunity to provide adequate assurance of its performance is illustrated by a German case.[115] A German buyer and an Italian seller entered into a contract for the sale of shoes agreeing that the goods should be delivered to the buyer's place of business by the carrier after the buyer had paid 40 percent of the balance due within sixty days of delivery. The seller ordered the carrier to suspend delivery, which was subsequently resumed five months later after buyer had paid 40 percent of the agreed price. Following delivery of the goods, the buyer paid only one-sixth of the balance due and the seller sued to recover the balance of the purchase price.

Applying CISG Article 71(3)[116] literally, the court dismissed the seller's claim for the balance of the purchase price on grounds that the CISG requires a party suspending performance based on an assumption that the other party will not be able to perform its contract obligations to immediately give notice of suspension to the other party and to continue with performance if the other party provides adequate assurance of its performance. Having failed to give the buyer notice of its suspension of performance, the Italian seller not only lost its right to an action for the balance of the purchase price due but the German court also held that because seller had failed to perform its obligation of giving notice of suspension of performance to the buyer, the buyer was entitled to recover damages under CISG Articles 74-77.[117]

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115. (Parties not reported), 32 C 1074/90-91, Jan. 31, 1991 (Germany, Amtsgericht Frankfurt am Main), UNILEX, CLOUT abstract no. 52.

116. CISG, *supra* note 1, art. 71(3) provides:

> (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.

117. CISG, *supra* note 1, art. 74 provides:

> [d]amages 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.

CISG, *supra* note 1, art. 75 provides:

> [i]f 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. CISG, *supra* note 2, art. 76 provides:

Buyer's Damages and Reduction of Price

The buyer may claim damages if the seller fails to perform any of the obligations imposed by the Convention.[118] Breach of contract damages consist of a sum equal to the loss, including the loss of profit, suffered as a consequence to the breach.[119] These provisions resemble the direct, incidental, and consequential damages provisions of the U.C.C.[120] The CISG provides a novel "reduction

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(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 purpose 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 of such other place as serves as a reasonable substitute, making due allowance for differences in the cost of transporting the goods.

CISG, *supra* note 1, art. 77 provides:

[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 measure, the party in breach may claim a reduction in the damages in the amount by which the loss could have been mitigated.

118. CISG, *supra* note 1, art. 45 provides:

(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 46-52.

(b) claim damages as provided in articles 74-77.

(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.

119. CISG, *supra* note 1, art. 74 provides:

[d]amages 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 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.

120. U.C.C. § 2-714 provides:

(1) Where the buyer has accepted goods and given notification (subsection (3) of Section 2-607) he may recover as damages for any non-conformity of tender the loss resulting in the ordinary course of events from the seller's breach as determined in any manner which is reasonable.

(2) The measure of damages for breach of warranty is the difference at

of price" remedy. If the goods do not conform with the contract, the buyer may reduce the price by the difference between the value of the nonconforming goods at the time of delivery and the value that conforming goods would have had at that time.[121]

This remedy was utilized where a German Buyer and an Italian seller entered a contract for the sale of shoes.[122] When the buyer paid only half the purchase price, claiming that the goods were nonconforming under the contract, the seller sued for the entire purchase price. The court found that because the buyer had satisfied its obligations to timely inspect the goods and notify the seller of defects, it was entitled to a reduction in price of the goods.[123] However, the court noted that the buyer could not arbitrarily reduce the price. The price reduction must reflect the difference between the value of the goods as delivered and the value the goods would have had if they had been in conformity with the contract. Thus, the seller was entitled to recover the difference

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the time and place of acceptance between the value of the goods accepted and the value they would have had if they had been as warranted, unless special circumstances show proximate damages of a different amount.

(3) In a proper case any incidental and consequential damages under the next section may also be recovered.

U.C.C. § 2-715 provides:

(1) Incidental damages resulting from the seller's breach including expenses reasonably incurred in inspection, receipt, transportation and care and custody of goods rightfully rejected, any commercially reasonable charges, expenses or commissions in connection with effecting cover and any other reasonable expense incident to the delay or other breach.

(2) Consequential damages resulting from the seller's breach include

(a) any loss resulting from general or particular requirements and needs of which the seller at the time of contracting had reason to know and which could not reasonably be prevented by cover or otherwise; and

(b) injury to person or property proximately resulting from any breach of warranty.

121. CISG, *supra* note 1, art. 50 provides:

[i]f 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.

122. (Parties not reported), 41 O 198/89, Apr. 3, 1990 (Germany, Landgericht Aachen), UNILEX.

123. *Id.*

between the price reduction the buyer actually took and the price reduction the buyer was entitled to take.[124]

In a similar case,[125] an Italian seller and a Swiss buyer entered into a contract for the sale of furniture. The buyer claimed that one set of furniture was defective and when the seller refused to repair the defect, the buyer asked to be reimbursed for its repairs. When the seller sued to collect the entire purchase price, the court found that the buyer was entitled to a reduction in price, although the reduction would not necessarily be the equivalent of the buyer's repair expenses. The court held that the price reduction was to reflect the proportion the value of the goods as delivered bore to the value the goods would have had they been free from defect. The court further held that the latter value was to be determined by the price stated in the contract, unless the seller produced evidence to the contrary.[126]

IV. Award of Attorney's Fees to Prevailing Party—Statutory, Agreement, and Bad Faith Theories

In *Zapata Hermanos v. Hearthside Baking Co.*,[127] after prevailing before the jury in a breach of warranty case, Mexican Plaintiff Seller moved for an award of attorney's fees against United States Defendant Buyer. Granting Seller's motion, the Illinois District Court rejected Buyer's argument that Seller was not entitled to recovery of attorney's fees because Seller had sued in a United States court and the "American rule" for assessment of attorney's fees "which calls for litigants to bear their own legal expenses" was therefore applicable.

In so ruling, the court noted that the so-called "American rule" specifies that *in the absence of a statute or enforceable contract providing for such recovery*, attorneys' fees are ordinarily not recoverable. The seller was entitled to recover attorney's fees because the agreement between the parties provided that:

(1) in the event Buyer failed to pay the agreed purchase price, Buyer would, *inter alia,* be liable for court costs and attorney's fees as consequential damages; and
(2) claims and counterclaims under the contract were governed by the CISG (which had been ratified by the

124. *Id.*
125. (Parties not reported), 6252, Apr. 27, 1992 (Switzerland, Pretura di Locarno-Campagna), UNILEX.
126. *Id.*
127. No. 99 C 4040, U.S. Dist. LEXIS 15191 (N.D. Ill. Aug. 28, 2001), *available at* http://cisgw3.law.pace.edu/cases/01829ul.html.

United States and Mexico) thereby making the consequential damages provision of Article 74 of the CISG applicable.

Article 74 of the CISG provides that:

> Damages for breach of contract by one party consist of a sum equal to the loss, including loss of property, 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.* (emphasis added).

After finding that the buyer had acted in extremely bad faith in refusing to pay, both before and during the litigation, the court also concluded that the seller was entitled to recover its attorney's fees not only under the terms of the agreement between the parties and the consequential loss provision of the Convention but also under the court's inherent power to award attorney's fees in cases of bad faith. The court stated:

> Before trial the litigants entered into a June 8, 2001 Stipulation that provided in relevant part (again with emphasis added):
>
> > 1. As of the dates when [buyer] issued its purchase orders for the tins described in the invoices attached as Group Exhibit A to [seller's] Complaint in this case, [buyer] foresaw or should have foreseen that if Lenell failed to pay for the tins that it ordered, received and accepted, [seller] would incur litigation costs including attorneys fees, to seek payment of the invoices for said tins.
> >
> > 2. The Court shall determine if attorney's fees are recoverable as a matter of law.
> >
> > 3. The amount of litigation costs, including attorney's fees, to be assessed as consequential damages in this case, if any, will be for the Court to determine on a fee petition, rather than for the jury to decide.
>
> . . .
>
> When the searchlight of analysis is thus properly focused on the language of the Convention without any inappropriate overlay from the American Rule, the question becomes a simple one. As n.2 has said, it truly smacks of a shell game for [buyer] to

have entered into the commitment to which it has stipulated and yet to urge that [seller's] admittedly foreseeable legal expense ("which the party in breach [buyer] foresaw or ought to have foreseen," in the language of Article 74) was not "suffered by the other party [seller] as a consequence of the breach" (again the language of Article 74]. It is totally unpersuasive for [buyer's] counsel to contend instead that those commitments are [buyer's] admissions do not equate to saying that the attorneys' fees are "consequential damages" recoverable under the Convention.

. . .

In sum, the award of attorneys' fees has really been agreed to, although [buyer] does not now acknowledge it, by the combination of [buyer's] stipulation and Article 74.

. . .

Although what has been said to this point is dispositive of the issue, it is worth looking at [seller's] other string to its bow: its invocation of the inherent-power predicate for imposing a litigant's fees on its adversary where the adversary has "acted in bad faith, vexatiously, wantonly, or for oppressive reasons" (F.D. Rich, 417 U.S. at 429) in its prelitigation or litigation conduct or both. Although *Chambers v. NASCO, Inc.*, 501 U.S. 32, 45-46 (1991) has become the most recent definitive case in that respect, the Supreme Court had earlier confirmed that teaching in such cases as *Hall v. Cole*, 412 U.S. 1, 15 (1973), reconfirmed in *Roadway Express, Inc. v. Piper*, 447 U.S. 752, 766 (1980); *Alyeska Pipeline*, 421 U.S. at 258-59; and *Hutto v. Finney*, 437 U.S. 678, 689 n. 14 (1978).

This Court has already spoken and written at some length about the bad faith with which [buyer] and its people conducted their dealings with [seller] and then, when they ceased to do business with [seller] and the latter was forced to sue to collect for the unpaid sale price of its tins, with which they conducted this litigation. Instead of repeating that discussion, this opinion attaches [seller] Mem. 2-3, which provides an encapsuled and accurate description of [buyer's] activity. That conduct by [buyer] both leading up to and during the litigation supports an award of attorneys' fees pursuant to the inherent power doctrine under the cited Supreme Court decisions and such other cases as *United States v. Fidelity & Deposit Co.*, 986 F.2d 1110, 1120 (7th Cir. 1993).

V. Current Status of the United Nations Convention on Contracts for the Iinternational Sale of Goods[128]

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

State	*Signature*	*Ratification, Accession (a), Approval (AA), Acceptance (A), succession (d)*	*Entry into force*
Argentina 1/	.	19 July 1983 a	1 January 1988
Australia	.	17 March 1988 a	1 April 1989
Austria	11 April 1980	29 December 1987	1 January 1989
Belarus 1/	.	9 October 1989 a	1 November 1990
Belgium	.	31 October 1996 a	1 November 1997
Bosnia and Herzegovina	.	12 January 1994 d	6 March 1992
Bulgaria	.	9 July 1990 a	1 August 1991
Burundi	.	4 September 1998 a	1 October 1999
Canada 2/	.	23 April 1991 a	1 May 1992
Chile 1/	11 April 1980	7 February 1990	1 March 1991
China 3/	30 September 1981	11 December 1986 AA	1 January 1988
Colombia		10 July 2001 (a)	1 August 2002
Croatia 8/	.	8 June 1998 d	8 October 1991
Cuba	.	2 November 1994 a	1 December 1995
Czech Republic a/ 7/	.	30 September 1993 d	1 January 1993
Denmark 4/	26 May 1981	14 February 1989	1 March 1990
Ecuador	.	27 January 1992 a	1 February 1993
Egypt	.	6 December 1982 a	1 January 1988
Estonia 1/	.	20 September 1993 a	1 October 1994
Finland 4/	26 May 1981	15 December 1987	1 January 1989

128. The CISG current status of parties is based on the United Nations database, *available at* http://www.uncitral.org/en-index.htm (last updated on Oct. 30, 2001).

France	27 August 1981	6 August 1982 AA	1 January 1988
Georgia	.	16 August 1994 a	1 September 1995
Germany b/ 5/	26 May 1981	21 December 1989	1 January 1991
Ghana	11 April 1980	.	.
Greece	.	12 January 1998 a	1 February 1999
Guinea	.	23 January 1991 a	1 February 1992
Hungary 1/ 6/	11 April 1980	16 June 1983	1 January 1988
Iceland		10 May 2001 a	1 June 2002
Iraq	.	5 March 1990 a	1 April 1991
Italy	30 September 1981	11 December 1986	1 January 1988
Kyrgyzstan	.	11 May 1999 a	1 June 2000
Latvia 1/	.	31 July 1997 a	1 August 1998
Lesotho	18 June 1981	18 June 1981	1 January 1988
Lithuania 1/	.	18 January 1995 a	1 February 1996
Luxembourg	.	30 January 1997 a	1 February 1998
Mauritania	.	20 August 1999 a	1 September 2000
Mexico	.	29 December 1987 a	1 January 1989
Mongolia	.	31 December 1997 a	1 January 1999
Netherlands	29 May 1981	13 December 1990 A	1 January 1992
New Zealand	.	22 September 1994 a	1 October 1995
Norway 4/	26 May 1981	20 July 1988	1 August 1989
Peru	.	25 March 1999 a	1 April 2000
Poland	28 September 1981	19 May 1995	1 June 1996
Republic of Moldova	.	13 October 1994 a	1 November 1995
Romania	.	22 May 1991 a	1 June 1992
Russian Federation c/ 1/	.	16 August 1990 a	1 September 1991
Saint Vincent and the Grenadines 7/	.	12 September 2000 a	1 October 2001
Singapore 7/	11 April 1980	16 February 1995	1 March 1996
Slovakia a/ 7/	.	28 May 1993 d	1 January 1993

Slovenia	.	7 January 1994 d	25 June 1991
Spain	.	24 July 1990 a	1 August 1991
Sweden 4/	26 May 1981	15 December 1987	1 January 1989
Switzerland	.	21 February 1990 a	1 March 1991
Syrian Arab Republic	.	19 October 1982 a	1 January 1988
Uganda	.	12 February 1992 a	1 March 1993
Ukraine 1/	.	3 January 1990 a	1 February 1991
United States of America 7/	31 August 1981	11 December 1986	1 January 1988
Uruguay	.	25 January 1999 a	1 February 2000
Uzbekistan	.	27 November 1996 a	1 December 1997
Venezuela	28 September 1981	.	.
Yugoslavia d/		12 March 2001 d	Effective for Yugoslavia on 27April 1992, the date of State succession.
Zambia	.	6 June 1986 a	1 January 1988

Parties: 60

a/ The Convention was signed by the former Czechoslovakia on 1 September 1981 and an instrument of ratification was deposited on 5 March 1990, with the Convention entering into force for the former Czechoslovakia on 1 April 1991. 7/ On 28 May 1993 Slovakia, and on 30 September 1993 the Czech Republic, deposited instruments of succession, with effect from 1 January 1993, the date of succession of States.

b/ The Convention was signed by the former German Democratic Republic on 13 August 1981, ratified on 23 February 1989 and entered into force on 1 March 1990.

c/ The Russian Federation continues, as from 24 December 1991, the membership of the former Union of Soviet Socialist Republics (USSR) in the United Nations and maintains, as from that date, full responsibility for all the rights and obligations of the USSR under the Charter of the United Nations and multilateral treaties deposited with the Secretary-General.

d/ The former Yugoslavia had signed and ratified the Convention on 11 April 1980 and 27 March 1985, respectively. Reference C.N.254.2001.TREATIES-1 (Depositary Notification) regarding

Yugoslavia: Succession, states: "The Secretary-General of the United Nations, acting in his capacity as depositary, communicates the following: The above action was effected on 12 March 2001. The Convention became effective for Yugoslavia on 27 April 1992, the date of State succession."

Declarations and Reservations

1/ Upon ratifying, or acceding to, the Convention, Argentina, Belarus, Chile, Estonia, Hungary, Latvia, Lithuania, Ukraine and USSR declared, in accordance with articles 12 and 96 of the Convention, that any provision of article 11, article 29 or Part II of the 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, would not apply where any party had his place of business in their respective States.
2/ Upon accession, Canada declared that, in accordance with article 93 of the Convention, the Convention will extend to Alberta, British Columbia, Manitoba, New Brunswick, Newfoundland, Nova Scotia, Ontario, Prince Edward Island and the Northwest Territories. (Upon accession, Canada declared that, in accordance with article 95 of the Convention, with respect to British Columbia, it will not be bound by article 1(1)(b) of the Convention. In a notification received on 31 July 1992, Canada withdrew that declaration.) In a declaration received on 9 April 1992, Canada extended the application of the Convention to Quebec and Saskatchewan. In a notification received on 29 June 1992, Canada extended the application of the Convention to Yukon.
3/ Upon approving the Convention, the People's Republic of China declared that it did not consider itself bound by sub-paragraph (b) of paragraph (1) of article 1 and article 11 as well as the provisions in the Convention relating to the content of article 11.
4/ Upon ratifying the Convention, Denmark, Finland, Norway and Sweden declared in accordance with article 92(1) that they would not be bound by Part II of the Convention (Formation of the Contract). Upon ratifying the Convention, Denmark, Finland, Norway and Sweden declared, pursuant to article 94(1) and 94(2), that the Convention would not apply to contracts of sale where the parties have their places of business in Denmark, Finland, Sweden, Iceland or Norway.

5/ Upon ratifying the Convention, Germany declared that it would not apply article 1(1)(b) in respect of any State that had made a declaration that that State would not apply article 1(1)(b).
6/ Upon ratifying the Convention, Hungary declared that it considered the General Conditions of Delivery of Goods between Organizations of the Member Countries of the Council for Mutual Economic Assistance to be subject to the provisions of article 90 of the Convention.
7/ Upon ratifying the Convention, Czechoslovakia, Saint Vincent and the Grenadines, Singapore and the United States of America declared that they would not be bound by paragraph (1)(b) of article 1.
8/ Upon succeeding to the Convention, the Republic of Croatia has decided, on the basis of the Constitutional Decision on Sovereignty and Independence of the Republic of Croatia of 25 June 1991, and the Decision of the Croatian Parliament of 8 October 1991, and by virtue of succession of the Socialist Federal Republic of Yugoslavia in respect of the territory of the Republic of Croatia, to be considered a party to the Convention with effect as from 8 October 1991, the date on which the Republic of Croatia severed all constitutional and legal connections with the Socialist Federal Republic of Yugoslavia and took over its international obligations.

VI. CISG Reporting Services

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