

**PRACTICAL APPLICATION OF THE UNITED NATIONS
CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE
OF GOODS ("CISG"¹)**

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It is not unusual for the model international sales contracts in use in many law firms to include a choice-of-law clause such as the following:

"This Agreement shall be governed by the substantive law of the Federal Republic of Germany. The United Nations Convention on the International Sale of Goods shall not be applicable to this Agreement."

I would like to begin with a practical example: a lawyer must draft a distributor agreement for a German client for use with its Mexican distributor. Two preliminary issues must be resolved: (i) Do distributor agreements even fall within the scope of the CISG? and (ii) Why do we seek to exclude the application of the CISG in the first place? The first question will be examined below under "Sphere of Application," but it is the second question that will be the primary focus throughout the following discussion. Law firms should rethink their policy of excluding the application of the CISG from their international sales contracts.

The CISG has now reached a status of practical significance and international acceptance that can no longer be ignored by practitioners. Where applicable, the CISG has fundamentally changed the basis for legal interpretation of international contracts for the sale of goods.

The significance of the CISG is magnified by the fact that once it enters into force in a Contracting State, it automatically becomes a part of the domestic law of that State. Its application prevails over other regulations of domestic civil and commercial law with respect to cases found to be within the scope of the Convention. After numerous cases, in particular, cases tried in German courts, established the fact of the priority of the CISG over other domestic provisions, international lawyers began to expressly exclude the Convention's application in their international contracts for the sale of goods. One reason for excluding the application of the

¹ A plethora of short titles have been employed to designate the CISG, both in English: "Uniform Law," "International Sales Law," "Vienna Convention," as well as in German: "*Einheitliches Kaufrecht*," "*UN-Kaufrecht*," and "*Wiener Kaufrecht*." However, it appears that the abbreviation "CISG" is gaining in international acceptance as a universal short title that is recognized in all languages. It is recommended here to use the designation "CISG" consistently.

CISG is that the practitioner who is unfamiliar with the provisions of the CISG feels unable to adequately assess, and appropriately advise clients of, advantages and disadvantages that are not immediately obvious in the application of the CISG. To a certain extent, the exclusion of the CISG in these international contracts continues because young lawyers rely on model forms in use in their law firms.

This introduction on the practical application of the CISG is intended to encourage lawyers to advise clients to ensure application of the CISG in their international contracts on the sale of goods. The international lawyer who is familiar with the provisions of the CISG and its interpretation as established by international caselaw and commentary can grasp the opportunity to take control over a dispute in which the CISG is applicable but where the court or arbitrators, as well as opposing counsel, may yet lack fundamental knowledge of CISG provisions.

Lawyers who have experience in both civil-law and common-law systems will be familiar with the legal concepts embodied in the CISG. Having read the provisions, practitioners will recognize the CISG as the compromise that it is between civil-law and common-law principals. Especially the regulations on breach of contract and impediments to performance in the CISG are less complicated and abstract than the German Civil and Commercial Code provisions governing the sale of goods.

Application of the CISG can be advantageous to clients engaged in international sales, especially when the alternative is to agree on the application of a law that is foreign to them. Commentaries on the CISG are now readily available in English, French, German, Italian and Spanish. The practitioner can rely on caselaw interpreting the CISG regardless of where the case was decided and regardless of whether the case was decided by a national court or international arbitral tribunal. In particular, the continuing research and publications of such institutions as the Centre for Comparative and Foreign Law Studies in Rome, which publishes UNILEX, a compilation of international caselaw and bibliography on the CISG, ensures that the practitioner has the necessary tools to advise his or her clients in the conclusion of contracts and resolution of disputes for which the CISG is the applicable law. A short bibliography of materials as well as websites accessible over the Internet are attached to this manuscript.

I. Sphere of Application

1. Contracting States

Since the CISG first entered into force on January 1, 1988, its significance has increased as major industrial nations throughout the world have acceded or seceded to the Convention. As of January 17, 2001, the CISG had entered into force for 57 States, including the USA on January 1, 1988, Germany on January 1, 1991, and Mexico on January 1, 1989. The number of Contracting States is continually increasing; the most recent accessions are Kyrgyzstan, Mauritania, Peru, and Uruguay, for which the CISG entered into force in 2000, and Saint Vincent and the Grenadines, for which the CISG will enter into force on October 1, 2001.

The practitioner must keep informed of the current status of Contracting States, including any declarations allowed under Articles 90 to 96 CISG that these States have made. These declarations bind the Contracting States that have not themselves made such declarations. The Scandinavian States, for instance, declared in accordance with Article 92(1) CISG that they would not be bound by Part II of the Convention (Formation of Contract) and, in accordance with Article 94(1) and (2) CISG, 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. In accordance with Article 93 CISG, Canada enumerated the provinces to which the Convention extend, and several States have declared in accordance with Article 94 CISG that any provision of the Convention that allows certain contracts to be made in any form other than in writing would not apply. As permitted by Article 95 CISG, China, the Czech Republic, Slovakia, Singapore, and the USA have declared that they would not be bound by Article 1(1)(b) CISG, and Germany declared that it would not apply Article 1(1)(b) CISG in respect of any State that has made the Article 95 declaration. Hungary declared that it considers 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 CISG.

2. Subject Matter of the Contract

a. Contracts of Sale vs. Other Related Contracts , Articles 1 and 3 CISG.

The CISG regulates contracts for sale (Article 1(1) CISG) without precisely defining this term. Expressly excluded are sales by auction and sales made during enforcement proceedings or other measures ordered by a court of law (Article 2(b) and (c) CISG).

Contracts for the exchange of products or barter contracts are not covered by the CISG. Contracts for the sale of goods to be produced or manufactured are governed by the CISG unless the party who orders the goods supplies a substantial part of the material necessary for the production of the goods (Article 3(1) CISG). The CISG is not applicable when the seller is also obligated to provide work or services in addition to the delivery of goods, and these obligations for services outweigh the party's typical obligations as seller (Article 3(2) CISG).

Generally, legal authority considers framework agreements between a principal and its distributors to be outside the scope of the CISG, although subsequent orders for the delivery of specific goods are governed by the CISG (*Schlechtriem, Ferrari, Honnold, Piltz, Metropolitan Court of Budapest March 19, 1996, CLOUT No. 126; OLG Düsseldorf July 11, 1996, RIW 1996, 958*). However, in a decision dated September 22, 1995, the Higher Regional Court (*Oberlandesgericht* or "OLG") at Munich found that a framework distribution agreement falls within the scope of the CISG when the obligations of the parties to delivery and accept delivery of goods arise upon conclusion of the contract (*RIW 1996, 1036*). Future caselaw will certainly refine the circumstances in which the CISG can be the governing law applicable to distributor agreements when such agreements stipulate immediate sale and purchase obligations between the parties. However, distributor agreements usually contain other stipulations such as cooperation and noncompetition obligations that are atypical for sales agreements. If a court finds that these atypical obligations outweigh the obligations typical for a contract of sale of goods, the CISG is not applicable (Article 3(2) CISG).

b. Definition of "Goods," Article 1 CISG

The term "goods" applies only to movable property so that the CISG does not govern contracts for the sale of rights such as industrial property rights or contracts for the sale of real property nor the share sale and purchase of a company (*Hungarian Chamber of Commerce Court of Arbitration, Award dated December 20, 1993, V b 92 205*). On the other hand, an asset deal in which more than 50 % of the assets sold are goods within the meaning of the CISG, falls within the scope of the CISG (*Merkt, in: Reithmann / Martiny, marginal no. 763*)

The following items have been found to be "goods" within the meaning of the CISG;

Living sheep (*Hof Amhem August 22, 1995, NIPR 1995 No. 514*);

Living plants (*OLG Innsbruck July 1, 1994, SZIER 1996, 51*);

Works of art (*Rb Amsterdam June 15, 1994, NIPR 1995 No. 230*);

Medicine (*AG Munich June 23, 1995, 271 C 18968/94, UNILEX*);

Standard software (*Lg Munich I February 8, 1995, CLOUT No. 131; OLG Koblenz September 17, 1993, RIW 1993, 934, 936; OLG Cologne August 28, 1994, RIW 1994, 970 (971)*); and

Liquid gas (*OGH February 6, 1996, (Austria) RdW 1996, 203*)).

Expert opinions and academic reports do not come within the scope of the CISG (*OLG Cologne NJW-RR 1995, 245*). Article 2 CISG expressly excludes contracts for the sale of stocks, shares, investment securities, negotiable instruments or money; ships, vessels, hovercraft or aircraft; and electricity. The Supreme Court of Hungary in its decision dated September 25, 1992 (*UNILEX, D.1992-20*) held that although the CISG does not apply to the sale of aircraft, it does apply to the sale of single components of aircraft (in this case, engines).

c. Consumer Sales

The applicability of the CISG is not affected by the characterization of the parties as merchants or non-merchants, and the civil or commercial character of the parties or of the contracts is without significance (Article 1(3) CISG). Excluded from the scope of the CISG are only sales of goods that are clearly destined for the personal or private use of the parties, which must be clear to the seller at the time the contract is concluded (Article 2(a) CISG). This provision can lead to conflicts with domestic mandatory law on the protection of consumers.

3. Territorial and Personal Sphere of Application

According to Article 1 CISG, the Convention is applicable when the contract has an international character and does not pertain to exclusively domestic transactions. The essential criterion for the territorial and personal applicability is the place of business of the contracting parties. Nationality of seller or buyer is without significance (Article 1(3) CISG). The transaction has an international character when the parties have their places of business in different States at the time the contract is concluded. These States must not necessarily be Contracting States to the CISG.

The international character of the transaction is not sufficient, however, to trigger automatic application of the CISG. The subject matter of the contract must also have sufficient contact to a Contracting State. This contact can be fulfilled in two ways:

- (i) Sufficient contact is given when the places of business of the parties are each located in different Contracting States (Article 1(1)(a) CISG). If both parties have their places of business in different Contracting States, the CISG is applicable without reference to further requirements. Although not expressly defined, a "place of business" is considered to be established at a place where a party has given authority to conclude or perform contracts, and this place has been established for a certain length of time. Article 10 CISG addresses the situation in which a party has more than one place of business or has no place of business.

- (ii) Application is extended in Article 1(1)(b) CISG, which provides that a contract with international character is governed by the CISG when the rules of private international law of the forum state lead to the application of the law of a Contracting State. As mentioned above, China, the USA, Slovakia, the Czech Republic, and Singapore have excluded the application of Article 1(1)(b) CISG by the declaration allowed in Article 95.

Courts and arbitral tribunals have consistently found that a choice-of-law clause stipulating "the substantive laws of a Contracting State" as the governing law of the contract leads to the applicability of the CISG (*Hamburg Chamber of Commerce Court of Arbitration, March 21, 1996, MDR 1996, 778 = RIW 1996, 766; OLG Cologne, RIW 1994, 972; OLG Düsseldorf, RIW 1993, 325; ICC Arbitration Case No. 6653/1993, JDI 1993, 1040; Tribunale Civile di Monza, il Foro Ital 1994, 918*). In a 1998 case before an AAA arbitral tribunal in New York in which I was involved as counsel for the plaintiff, the parties had chosen New York law to govern their contract. The tribunal followed our lead in finding that "[s]ince Mexico, the place of business of the seller, and Germany, the place of business of the buyer, are both parties to the United Nations Convention on Contracts for the International Sale of Goods 1980 (the Vienna Sales Convention), and since the choice of New York law without more cannot be construed as an intent to exclude application of the Convention, the Vienna Sales Convention is also applicable to the extent it addresses the questions in controversy."

For the daily practice of the international law firm located in Germany, it is important to recognize that almost without exception, the CISG governs German export contracts unless the application of the CISG has been expressly excluded. In addition, the CISG governs German import contracts for goods from other Contracting States. With respect to imports from noncontracting States, as a rule, the law of the State in which the foreign seller has its business governs the contract (*e.g.*, according to the provisions of German private international law, Article 28(2) of the Introductory Law to the Civil Code. *Einführungsgesetz zum Bürgerlichen Gesetzbuch* or "EGBGB"), unless the parties have agreed on another choice of law. Other than in a few exceptional cases, the provisions for the sale of goods in accordance with the German Civil Code and the German Commercial Code are almost never automatically applicable in a transaction involving the international sale of goods.

4. Temporal Sphere of Application

With regard to temporal application, Article 100 CISG differentiates between the regulations on conclusion of contract on the one hand and the provisions regulating performance of contractual obligations on the other hand. The provisions on the formation of contract are applicable with respect to Contracting States referred to in Article 1(1)(a) CISG or Article 1(1)(b) if the offer is made on or after the date when the Convention enters into force in those States. The CISG is applicable to the performance of contractual obligations if the contract is concluded on or after the dates on which the CISG enters into force in respect of those States.

5. Express Party Agreement

When the requirements of application of the CISG as discussed above are fulfilled, the CISG is automatically applicable without a conscious expression of will of the parties. Article 6 CISG, however, allows the parties to exclude application.

The exclusion can be either express or implied. An express choice of law of a specific domestic law of a Contracting State does not include an implied exclusion. German caselaw has determined that legal arguments of lawyers based on provisions of the German Civil Code in their submissions to a court or arbitral tribunal do not indicate an implied exclusion of the CISG (*OLG Hamm, IPRax 1996, 269 = RIW 1996, 689*).

Particular attention should be given to exclusion of the CISG in a party's General Terms and Conditions, which is valid only if their content can withstand the scrutiny of domestic laws on unfair contract terms such as the German Law Governing General Terms and Conditions, (*Gesetz zur Regelung des Rechts der Allgemeinen Geschäftsbedingungen* or "AGBG"). The German party to an international contract for the sale of goods must be aware that the failure of its foreign contractual partner to reply to its letter of confirmation in which the General Terms and Conditions are initially referred to is not deemed to be an approval of the contents of the confirmation. By and large the concept "in commerce the failure to reply to a letter of confirmation is deemed an approval of its content" (*Schweigen auf ein kaufmännisches Bestätigungsschreiben*) is given no legal significance in other legal systems. A German court applying German law must also have regard to this circumstance (Article 31(2) EGBGB). The German seller must ensure that its General Terms and Conditions are drafted in a language and manner that are fully understandable to its foreign partner. When both parties declare their own General Terms and Conditions to be part of the contract, and both include choice-of-law clauses that contradict one another, then neither of the clauses has been agreed upon by the parties and therefore not incorporated in the contract. The exclusion of the CISG can thus be a fruitless exercise.

Parties to a contract are at liberty to agree on the application of the CISG outside of its stated sphere of application. The validity of such an agreement, however, is decided on the basis of the applicable private international law.

6. Legal Scope of the CISG

The CISG does not regulate conclusively all legal aspects that can be of significance in the resolution of a dispute on a contract for the sale of goods.

Article 4, Sentence 1 CISG confirms its applicability for legal questions arising from the formation of the contract of sale as well as modifications of the contract. It also regulates the form of contracts in Articles 11 and 29 CISG, with the exception of those States that have made an declaration in accordance with Article 96 CISG. Such Contracting States include Argentina, Chile, China, Estonia, Lithuania, Russia, the Ukraine and Hungary. The CISG regulates the rights and obligations of the seller and the buyer arising from the contract of sale (Article 4, Sentence 1).

Expressly excluded from its scope in Article 4(a) CISG are legal questions on the validity of the contract. The effect that the contract has on ownership in the goods sold (Article 4(b) CISG) and liability of the seller for harm caused by the goods to any person (Article 5) CISG are also excluded.

In the 1998 AAA arbitration in New York mentioned above, the parties submitted legal argument on whether an alleged misrepresentation affecting the validity of the contract is governed by the CISG. The parties were essentially in agreement that this is not the case, citing Joseph Lookofsky, "Understanding the CISG in the USA" at p. 14:

"Because the CISG is generally 'not concerned' with sales contract validity, problems which fall under this heading (fraud, duress, etc.) must be resolved in accordance with national rules of law (to be selected using the rules of private international law of the forum). Put another way, the CISG is only 'concerned' with situations where the parties exercise their contractual freedom within an acceptable behavioral range, so courts faced with defenses to contract enforcement have no choice but to look to national rules of law to help define that range."

However, the line between formation and validity was found to be difficult to maintain since both subjects deal with the process by which a contract comes into existence. As Lookofsky explains on p. 37:

"For example, although a CISG 'contract' is said to be 'formed' upon timely receipt of the offeree's acceptance, there is no real consent - and thus no binding contract at all - if the offeree asserts a viable enforcement defense (fraud, duress, misrepresentation, etc.)."

An interesting discussion between the parties and the tribunal on the applicability of Article 8 CISG arose and remained unresolved as ultimately immaterial to the decision of the case. Article 8 CISG furnishes rules to be followed in interpreting statements and the conduct of a party for the purposes of the Convention, including whether the parties had come to a "meeting of the minds" in determining whether a contract has been concluded. As was the case in the AAA arbitration, a defense alleging lack of consensus often accompanies defenses such as misrepresentation and fraud, because intent of the other party to misrepresent or to commit a fraud is more onerous to prove than lack of consensus. Lack of consensus is also the initial question underlying the more serious allegations of fraud and misrepresentation.

Article 8(1) CISG provides a subjective test for interpreting a party's statements or conduct, whereby the party invoking Article 8(1) must prove that the other party knew or could not have been unaware of the first party's intent. This proof is subject to a high threshold. If the requirements set forth in Article 8(1) are not met or uncertainty remains, a party's statements and conduct is interpreted in accordance with the objective standards set in Article 8(2) and (3) CISG, whereby the understanding that a reasonable person of the same kind as the other party would have had in the same relevant circumstances (negotiations, established practices, usages, and subsequent conduct) is controlling.

Insofar as decisive legal issues are not regulated by the CISG and cannot be settled in conformity with the general principles on which the CISG is based, such disputes are to be settled by the law applicable in accordance with domestic law (Article 7(2) CISG). Recent German caselaw has found that the assignment of claims arising from a contract of sale does not come within the scope of the CISG and is to be decided on the basis of the national law applicable in accordance with private international law rules (*OLG Hamm, IPRax 1996, 197*). A 1994 decision of the OLG Düsseldorf (*IPRax 1996, 139*) found that a declaration of set-off was not governed by the CISG.

It is thus evident that despite the intention of parties to choose the CISG as the law governing their contract for the international sale of goods, they must nevertheless give due consideration to the national law that is to be applied to the legal issues outside the scope of the CISG.

II. Formation of Contract

The provisions on formation of contract are found in Articles 14 - 24 CISG. These provisions can be excluded by declaration in accordance with Article 92 CISG. The Scandinavian States in particular have made such Article 92 declarations.

1. Offer and Acceptance

a. Offer

In accordance with Article 14 CISG, a valid offer must be sufficiently specific with regard to the offeree(s) and have a sufficiently definite content. As a rule, a proposal is sufficiently definite if it indicates the goods and expressly or implicitly fixes or makes provision for determining the quantity of goods to be delivered and the price. This sentence 2 of Article 14(1) CISG clearly conflicts with Article 55 CISG, which addresses the case that the parties have not expressly or implicitly fixed or made provision for determining the price (*Supreme Court of Hungary September 25, 1992, UNILEX, D.1992-20; Journal of Law and Commerce, University of Pittsburgh, 1993, 31; OLG Frankfurt March 4, 1994, UNILEX, D.1994-7.1*).

A recognizable intention of the offeror to be bound by an acceptance of the offer must be indicated, and the offer must reach the addressee (*see* Article 24 CISG).

An offer may be revoked if the revocation reaches the offeree before the offeree has dispatched its acceptance (Article 16(1) CISG) unless the offer (a) indicates that it is irrevocable, e.g., by stating a fixed time for acceptance, or (b) if it was reasonable for the offeree to rely on the offer as being irrevocable (Article 16(2)). In contrast to German domestic law, under the CISG, the offeror can withdraw even an irrevocable offer if the withdrawal reaches the offeree before or at the same time as the offer (Article 15(2) CISG).

b. Acceptance

Acceptance of an offer is made by the express or conclusive declaration of the addressee that it accepts the offer (Article 18 CISG). Silence alone does not lead to the conclusion of a contract. As a rule, the acceptance is valid once it has reached the offeror although in certain circumstances, an acceptance can be indicated by the performance of the contract.

Every type of indication of acceptance must be made within either the time fixed by the offeror or within a reasonable time. A late acceptance is not at the same time a counteroffer, in contrast to German domestic law.

2. Particular Requirements

a. Acceptance that Modifies an Offer

If an acceptance does not conform in some way to the offer, Article 19 CISG differentiates between the following cases:

- If the modified acceptance contains a material modification, the acceptance is to be interpreted as a counteroffer (Article 19(1) and (3) CISG);

- If the acceptance does not materially alter the terms of the offer, the contract is concluded in accordance with the modified acceptance. The offeror, however, has the option of objecting to the discrepancy, but must do so without undue delay (Article 19(2) CISG).

b. Late Acceptance

Article 21 CISG also differentiates between two cases of late acceptance:

- If the late acceptance is due to circumstances whereby a transmission has been sent and normally should have reached the offeror in due time, this late acceptance is viewed exceptionally as effective unless the offeror has notified the addressee of the lapse of the offer without undue delay (Article 21(2) CISG);
- An acceptance that is made late is not considered to be a counteroffer as is the case in German domestic law. The offer is considered to lapse if an acceptance is late, unless without undue delay the offeror informs that the late acceptance is nevertheless effective (Article 21(1) CISG).

As a rule, German principals with respect to the buyer's failure to reply to a letter of confirmation being deemed an approval of its contents (*Schweigen auf ein kaufmännisches Bestätigungsschreiben*) are not applicable within the scope of the CISG. This lack of recognition has led many companies to change the manner in which they confirm orders vis-à-vis foreign buyers.

3. General Terms and Conditions

The techniques described above for formation of contract apply in the same manner to inclusion of General Terms and Conditions into contracts for the sale of goods. General Terms and Conditions are usually to be supplied either in the language of negotiations or the native language of the addressee. The mere allusion to the inclusion of General Terms and Conditions will normally not be sufficient, in contrast to the commercial practice under domestic German law. On the other hand, the question of the validity of the contents of General Terms and Conditions is a question of validity and in accordance with Article 4(a) CISG excluded from the scope of the CISG. The standard of scrutiny for the control of the contents of General Terms and Conditions is, however, again governed by the CISG. Altogether, the proper handling of General Terms and Conditions included in contracts governed by the CISG has not been definitively clarified.

4. Form Requirements

The CISG foresees no particular form requirements for contracts of sale (Articles 11 and 29(1) CISG). On the other hand, the parties are at liberty to agree on particular form requirements to be observed in their relationship (Article 29(2) CISG). Unless exceptional circumstances indicate otherwise, party agreements as to written requirements must be strictly observed. Article 13 CISG clarifies that any agreement of the parties requiring written form includes telegrams and telexes.

III. Rights and Obligations of Seller and Buyer

The CISG requires that the seller deliver the goods and transfer property in the goods (Article 30 CISG). The buyer must accept the goods and pay the purchase price. The manner of transfer of property is not regulated in the CISG (Article 4(b) CISG).

1. Primary Obligations of Seller

In accordance with Articles 30 through 55 CISG, the seller must deliver the goods, transfer any documents referring to the goods and transfer property in the goods.

The object of the delivery is the goods bought by the buyer, which the buyer may have to specify in accordance with Article 65 CISG. The seller performs its delivery obligation by making the goods available to the buyer. If the contract of sale involves carriage of the goods, the seller must hand the goods over to the first carrier for transmission to the buyer (Article 31(a) CISG). When the parties agree in the contract that the goods must be delivered to a particular place, or this place of delivery is determined by law, the seller is responsible for the delivery of the goods to that particular place (Article 31 CISG). The OLG Karlsruhe (*NJW-RR 1993, 1316*) interpreted an agreement of the parties to deliver "free house" (*frei Haus*) to require delivery at buyer's place of business.

Seller must perform the required act of delivery at the time agreed upon by the parties or at the time determined by law (Article 33 CISG). In addition to early delivery (Article 52(1) CISG), the CISG allows the seller under observation of strict requirements to deliver goods after the agreed date for delivery (Article 48 CISG).

In addition to delivery of the contractual goods, seller must transmit to buyer any documents relating to the goods (Article 34 CISG). The exact documents that are covered by this regulation, as well as the time, place, and form of transmission of documents, must be designated in the contract of sale, by relevant business usages and/or custom.

In accordance with Article 30 CISG, seller must transfer to buyer property in the goods. Although this obligation lies at the core of sales contracts, the CISG contains no further regulations on transfer of property. Indeed, as noted above, Article 4(b) CISG states expressly that the Convention is not applicable to property-related aspects of sales contracts.

As a rule, in sales involving the carriage of goods, the seller is obligated to conclude at the cost of buyer all necessary contracts for the carriage of the goods. Whenever the apparent right of the buyer to the goods is not guaranteed, seller must give the buyer notice of the consignment specifying the goods (Article 32(1) CISG). On the other hand, the seller is not required to insure the carriage of the goods unless particular circumstances require the seller to do so (Article 32(3) CISG).

Seller is required to ensure that the goods are appropriately packaged. In addition, seller must carry the costs incurred in making the goods available to the buyer at the agreed place of delivery. The CISG requires the seller to give notice to buyer of any impediment to performance (Article 79(4) CISG).

2. Primary Obligations of Buyer

Buyer's primary obligations are to pay the purchase price and accept delivery of the goods (Articles 53 - 70 CISG). Buyer must make payments in legal form and in the relevant currency. Whenever doubt arises, payment is to be made in the legal currency in use at the seat of buyer's business. The purchase price of the goods can usually be determined by the agreements of the parties or relevant circumstances at the time the contract was concluded. Articles 55 and 56 CISG contain specific regulations on determining the proper price.

Article 57 CISG regulates the place at which payment is to be made. When payment is made against the handing over the goods or documents, payment is to be made at the place at which the goods or documents are transferred to buyer, Article 57(1)(b) CISG. Otherwise, in contrast to German law, payment is to be made at seller's place of business (Article 57(1)(a) CISG).

Buyer must make payments at the proper time. Determinative is the timely receipt of payment at the place of payment. Unless other circumstances for the due date of payment are obvious, payment must be made as soon as the goods or the documents relating to the goods have been made available to buyer (Article 58 CISG). In contrast to the German Civil Code, this provision implies that the seller must perform its obligations before the buyer. For instance, in the decision by the OLG Karlsruhe mentioned above (*NJW-RR 1993, 1317*), the court found that for the delivery *frei Haus* payment was due only after the goods were made available at buyer's seat of business.

In addition to payment obligations, the buyer must take delivery of the goods delivered by seller (Article 60 CISG). Taking delivery is the counterpart of seller's obligation to deliver and applies also to accepting delivery of relevant documents.

Article 54 CISG requires that the buyer take all steps and comply with required formalities under the contract or any applicable laws and regulations to enable payment to be made. Otherwise the buyer is in breach of contract so that the seller may seek such remedies as provided in Articles 61 - 65 CISG.

3. Common Provisions

Article 71 CISG gives to each party the right to suspend performance when it becomes apparent that the other party will not duly perform an essential part of its obligations after the contract has been concluded, independent of any obligation of first performance.

Articles 66 - 70 CISG regulate passing of price and performance risk. The passing of risk takes place at different times dependent on the specific mode of delivery (Articles 67 to 69 CISG). The legal effects of the passing of risk are regulated in Articles 66 and 70 CISG.

Articles 79 - 84 CISG play a key role in the CISG law governing failure of performance. The CISG as a rule foresees payments of damages for failure of performance regardless of a party's fault. Therefore the manner in which a party can exempt itself from paying damages is of great practical importance. A party is not liable for failure to perform if:

- The failure is caused by the other party (Article 80 CISG); or
- The failure is due to circumstances that are beyond the control of the defaulting party. However, not all remedies of the injured party are forfeited, but only the liability for damages, (Article 79(5) CISG). It is irrelevant whether the impediment arose prior to or

after conclusion of the contract. A party is exempt from paying damages under Article 79 CISG if:

- C The impediment is an objective impediment to performance; and
- C The impediment does not belong to the sphere of influence of the party that owes performance; and
- C The impediment was not known to the defaulting party at the time the contract was concluded and the defaulting party could not have reasonably be expected to have taken the impediment into account at that time; or
- C The defaulting party could not reasonably have been expected to avoid or overcome the impediment or its consequences.

In all other cases, both seller and buyer are held liable for all due performance of all obligations. Only Article 71 CISG gives a party the right so suspend performance when it becomes apparent that the other party will not perform a substantial part of its obligations.

Regardless of which party carries the risk for the goods, Articles 85 - 87 CISG impose on both seller and buyer the duty to take measures to preserve the goods under certain circumstances. Thus, Articles 85 - 87 CISG broaden the sphere of risk for both seller and buyer.

IV. Remedies for Breach of Contract

In contrast to the provisions of the German Civil Code and Commercial Code, the CISG does not differentiate between various legal figures of impairment of performance (*culpa in contrahendo*, *positive Vertragsverletzung* (pVv), initial and subsequent impossibility or inability, warranty, or delay).

Rather, the CISG has a uniform understanding of breach of contract. A breach of contract is always given when solely on an objective evaluation, regardless of fault, a party does not perform its obligation in compliance with the contract and/or law.

The only differentiation that the CISG makes with respect to the breach of the contract and the legal consequences is whether the impediment to performance is fundamental or non-fundamental (Article 25 CISG). Thus, not the type of the breach of contract, but rather its weight is the point of departure for evaluating the legal effects of a breach of contract. In contrast to German domestic law, a claim for damages is always given cumulatively to other remedies, unless the party who is unable to perform its obligation can excuse itself within the meaning of Article 79 CISG.

1. Breach of Contractual Obligations by Seller

a. Conformity of Goods

The contractual conformity of the goods is measured on the basis of Articles 35 and 36 CISG. In contrast to German law, a breach of contract not only arises when the goods are defective in quality, but also when the goods are not delivered in the proper quantity or do not conform to their description.

According to Article 35(2)(b) CISG, the buyer can give notice of the nonconformity of the goods when the goods are not fit for the buyer's particular purpose as long as the buyer gave notice in some form of this particular purpose upon conclusion of the contract, unless special circumstances prevail.

The buyer must observe a two-stage procedure in order to retain the remedies arising from a delivery of defective goods within the meaning of Articles 35 and 36 CISG. First, the buyer must examine the goods within as short a period as is practicable in the circumstances (Article 38 CISG). Second, within a reasonable time after the buyer has discovered the lack of conformity of the goods, the buyer must notify the seller of the lack of conformity giving specific description of the kind and extent. The reasonable time begins to run when the buyer either discovers the lack of conformity or should have discovered it (Article 39(1) CISG). This provision has the following consequences:

- The reasonable time begins to run automatically once the buyer has recognized the lack of conformity;
- The reasonable time begins to run at the latest with handing over of the goods to the buyer where the lack of conformity is apparent;
- The notice period of Article 39(1) CISG begins to run after the short period for examination provided in Article 38 CISG when the lack of conformity should have been discovered upon examination;
- For other breaches of contract, the notification period begins to run at the moment the buyer actually discovered or should have discovered the lack of conformity.
- In accordance with Article 39(2) CISG, the buyer's right of complaint is lost within a period of two years after the date on which the goods were actually handed over to the buyer, unless this time limit is inconsistent with a contractual period of guarantee.

Normally, the failure to notify of defects leads to the buyer's forfeit of all legal remedies unless the seller either knew or should have known of the lack of conformity and did not disclose the defect to the buyer (Article 44 CISG).

b. Defect in Title

Articles 41 - 43 CISG regulate general defects in title and in particular impediments arising from industrial property rights or other intellectual property rights of third persons. The particular provision in Article 42 CISG with respect to industrial or intellectual property rights serves the purpose to limit the responsibility of the seller in relation to the general liability for defects in title according to Article 41 CISG. In order to conserve the remedies arising due to lack of title, buyer must give notice within a reasonable time, Article 43 CISG. If notice is not duly given, the buyer loses its rights of remedy, unless the seller knew of the right or claim of the third party and its nature (Article 43(2) CISG) or if the buyer has a reasonable excuse for its failure to give the required notice (Article 44 CISG).

c. Claim for Specific Performance

Article 46 CISG permits the buyer to demand performance from seller of its obligations for basically every kind of breach of contract. However, the buyer cannot demand performance

when such a claim is inconsistent with other remedies claimed by buyer (Article 46(1) CISG) or the buyer does not contradict a request by the seller to be allowed to perform within a specific extended period (Article 48(2) and (4) CISG).

If the seller has already made delivery and the goods are found to lack conformity, seller's claim for performance becomes a claim for substitute goods (Article 46(2) CISG) or for repair (Article 46(3) CISG). Where the requirements of a claim for substitute goods or repair do not exist, or the buyer has not made its demand within a reasonable period of time, the buyer can demand a reduction in the price in accordance with Article 50 CISG as well a claim damages. Thus, the CISG regime does not always allow the buyer to demand performance of the contract to its full extent. Unless one of the exceptions of Article 82 CISG is present, the rights of the buyer to demand substitute delivery from the seller is also lost when it is not possible for the seller to return to the buyer the goods substantially unchanged.

The claim to performance requires a declaration by the buyer that can include a period within which performance must be made (Article 47(1) CISG). Repair or delivery of substitute goods must also be demanded within a reasonable time after notification of the lack of conformity of the goods (Article 46(2) and (3) CISG). It is possible that domestic law must be observed whereby the claim to performance cannot be enforced (Article 28 CISG). In addition to the claim for performance, repair, or substitute delivery, the buyer is also always entitled to demand damages (Article 45(1)(b) and (2) CISG).

d. Avoidance of Contract

Independent of the type of breach of contract, Article 49 CISG allows the buyer to avoid the contract within a specific period of time, which does not affect buyer's claim for damages. Buyer's right to avoid the contract, however, can be suspended for the time that the buyer requests performance in accordance with Article 46 CISG or has set an extended time limit as permitted in Article 47(2) CISG or has accepted a second attempt of seller to deliver the goods according to Article 48(2 - 4) CISG.

Otherwise, the buyer is entitled to avoid the contract only when, despite an extended period to perform, no delivery is made or the breach of contract is fundamental within the meaning of Article 49(1) CISG. This last limitation is particularly important when the delivered goods are not in conformity with the contract or a defect in title is determined. In certain situations, the remedy of avoidance can be claimed before the delivery due date.

Article 72 CISG allows the buyer to avoid the contract if prior to the date for performance it is clear that one of the parties will commit a fundamental breach of contract, and Article 73 CISG allows either party to a contract for delivery of goods by installments to avoid the contract if the failure of a party to perform any of its obligations in respect of any installment constitutes a fundamental breach of contract with respect to that installment. Article 82 CISG, on the other hand, provides that the buyer forfeits its right to demand avoidance of the contract if it is not possible for the buyer to return the goods to the seller in substantially the same condition in which they were received, unless:

- (a) The impossibility of returning the goods is not due to the buyer's act or omission;
- (b) The goods have perished or deteriorated as a result of the examination provided for an Article 38 CISG or;

(c) The goods or parts of the goods have been sold in the normal course of business or consumed or transformed by the buyer in the normal course of use before the buyer discovered or should have discovered the lack of conformity.

Typical breaches of contracts by the seller considered to be a fundamental breach within the meaning of Article 25 CISG include:

- The defect cannot be cured within a time reasonable to make use of the goods and another use of the goods cannot be expected of the buyer; a defect that is not cured by the seller despite a demand by buyer is still not a fundamental breach of contract if the buyer can make use of the goods or sell them in a manner that is deemed to be reasonable for the buyer (*BGH, DB 1996, 1179 = RIW 1996, 594*);
- The goods are defective in title within the meaning of Articles 41 and 42 CISG; normally it will not be reasonable to expect that the buyer is able to make use of the goods in another manner;
- Seller refuses to deliver the goods completely, or delivery is not made at all for other reasons, without being able to foresee when a delivery can be performed;
- A mere delay in delivery does not usually constitute a fundamental breach of contract unless seller can recognize that buyer's interest in exact compliance with the delivery dates is decisive (*AG Oldenburg, IPRax 1991, 336*);
- Where secondary obligations are breached, the objective weight of the breach of contract and the extent to which the purpose of the contract is jeopardized for the aggrieved party must be considered in determining whether the breach is fundamental (*OLG Frankfurt, UNILEX, D.1991-9, violation of exclusivity clause*).

In accordance with Article 26 CISG, the enforcement of buyer's right to avoid the contract is dependent on a declaration by the buyer that must be made within a reasonable time (Article 49(2) CISG). Insofar as the seller has not delivered at all, compliance with the notification period is irrelevant. In this case, the contract is to be avoided in accordance with Articles 81 - 84 CISG. As mentioned above, in addition to the right to avoid the contract, the buyer can basically always demand damages in accordance with Article 45(1)(b) and (2) CISG. The buyer must be aware, however, that a right to set off a claim for damages against a claim for payment of purchase price that has been declared before a court is subject to the otherwise applicable domestic law.

e. Reduction in Purchase Price

Buyer's right to demand reduction of the purchase price in accordance with Article 50 CISG is essentially the same as that provided in the German Civil Code. However, in contrast to German law, the buyer can still demand damages in contracts governed by the CISG in accordance with Article 45(1)(b) and (2) CISG insofar as the seller cannot exonerate itself in accordance with Article 79 CISG. Articles 74 - 77 CISG provide guidelines for calculation of the amount of damages to be paid.

2. Breach of Contractual Obligations by Buyer

a. *Claim for Performance*

For any kind of breach of contract by the buyer, seller has the basic right to demand performance in accordance with Article 62 CISG, unless the claim is inconsistent with other remedies. The enforcement of the claim for performance can be bound to a requirement to set a time limit as provided by Article 63 CISG. This can be enforced until the statute of limitation bars enforcement. Article 28 CISG also foresees the possibility that a court will not be bound to enter judgment for specific performance if it could not do so under its own national law in respect of similar contracts of sale.

In addition to the claim for two specific performance, the seller is entitled to demand interest for delay of payment in accordance with Article 78 CISG and otherwise to demand damages in accordance with Article 61(1)(b) and (2) CISG.

b. *Avoidance of Contract*

When the buyer has not performed its obligations and this breach of contract is fundamental, the seller can avoid the contract and, as always within the scope of the CISG, demand damages. If the buyer performs with delay, the right to avoid the contract can be lost in accordance with Article 64(2)(a) CISG. In addition, the right of avoidance is suspended when the seller has extended the date for performance in accordance with Article 63(2) CISG.

Otherwise the seller is only entitled to avoid the contract when the buyer does not pay the purchase price in spite of an extended period or the buyer does not accept the goods or if the breach of contract by the buyer is fundamental, whereby an expired period to perform in accordance with Article 64(1) CISG is irrelevant. Article 72 CISG allows seller to avoid the contract if it becomes apparent that the buyer will commit a fundamental breach of contract, and Article 73 CISG allows the seller to avoid a contract for delivery of goods by installment if the failure of the buyer to perform any of its obligations in any respect constitutes a fundamental breach of contract with respect to that installment.

Article 26 CISG requires that seller give notice to buyer by declaration of avoidance of the contract within a reasonable period as provided by Article 64(2) CISG. As long as the buyer has not paid the purchase price, the observation of a limitation period is irrelevant. The effects of avoidance are regulated in Articles 81 - 84 CISG.

In addition to the right to avoid the contract, the seller can always demand damages (Article 61(1)(b) and (2) CISG). Further remedies, however, are excluded once the contract has been effectively avoided.

c. *Interest*

In accordance with Article 78 CISG, whenever a buyer fails to make due payments in time, the seller can automatically claim interest on delayed payments. The claim to interest is an independent remedy that exists whether or not the seller has suffered damage. The buyer cannot excuse itself from a claim for interest based on the provisions in Article 78 CISG.

Article 78 CISG, however, determines only the legal basis for interest and that interest is to be paid whenever a payment due is delayed. Other legal bases for payment of interest as well as

the rate or amount of interest to be paid is determined by the domestic law of the State whose provisions are otherwise applicable in accordance with its private international rules.

d. Damages

Article 61(1)(b) and (2) CISG provides that the seller can always demand damages in addition to the remedies of specific performance, avoidance of contract and payment of interest. The claim for damages is, however, contingent on the buyer being unable to exonerate itself in accordance with Article 79 CISG. The amount of damages is calculated in accordance with Article 74 - 77 CISG.

V. Conclusion

The international law firm should discuss with its clients the positive aspects of choosing the CISG to govern its contracts on the international sale of goods. The following aspects of CISG application are advantageous to clients and legal counsel:

- C The CISG is uniform law; neither party has the distinct disadvantage of having to deal with a foreign law in determining the rights and duties of the parties. Practitioners who are familiar with CISG provisions still have an advantage over many lawyers, arbitrators and courts that lack experience in applying the CISG to contracts of international sale. The lawyer familiar with the CISG and current commentary and caselaw can take initial control of contract negotiations and/or dispute proceedings and guide opposing counsel and the adjudicator through relevant legal issues;
- C Commentaries from both civil-law and common-law jurisdictions are readily available;
- C Comprehensive reports on caselaw from all jurisdictions are well organized and readily available;
- C The regulations on parties' obligations, breach of contract and remedies are straightforward and harmonized; the CISG does not contain complex individualized categories for claims of breach, such as *cic*, *pVv*, initial and subsequent impossibility and inability, or delay, each with its own systematic logic;
- C Advantages for seller:
 - The seller has an obligation to deliver substitute goods only if a lack of conformity constitutes a fundamental breach of contract;
 - The contract can be avoided only for a fundamental breach;
 - Buyer must prove that it has no other use for nonconforming goods.
- C Advantages for buyer:
 - Seller is strictly liable for damages;
 - The CISG recognizes no difference between defects in quality and in quantity.

Depending on whether the law firm is advising the buyer or the seller, the disadvantages of the CISG, i.e., seller's strict liability for damages and buyer's burden of proof for no other use for nonconforming goods, must be discussed. In addition, the negative aspects of various

declarations by Contracting States and the limited scope of applicability that excludes provisions on validity, transfer of property, assignment of claims and right of set-off must be assessed on the basis of the client's individual needs.

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**UNITED NATIONS CONVENTION ON CONTRACTS FOR THE
INTERNATIONAL SALE OF GOODS, concluded at VIENNA on 11 April 1980**

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