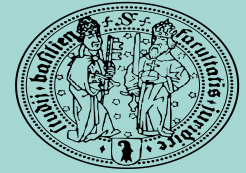




University  
of Basel

Faculty of Law



# **In-depth Analysis of the Main Provisions of the CISG**

## **CISG Legal Training Workshop: Essential Know-How for Lawyers**

### **21 February 2022**

Professor Dr Ulrich G. Schroeter  
University of Basel

# Overview

1. Applicability of the CISG
2. General rules (Party autonomy; Interpretation of the CISG; freedom of form; interpretation of contracts)
3. Formation of contracts
4. Obligations of sellers and of buyers
5. Remedies of buyers and sellers

# Applicability of the Convention, Art. 1(1)(a) CISG (1)

## Art. 1 CISG [Sphere of application]

- (1) This Convention applies to contracts of sale of goods between **parties** whose places of business **are in different States**:
  - (a) when the States are **Contracting States**; or
  - (b) when the rules of private international law lead to the application of the law of a Contracting State.
- (2) The fact that the parties have their places of business in different States is to be disregarded whenever this fact does not appear either from the contract or from any dealings between, or from information disclosed by, the parties at any time before or at the conclusion of the contract.
- (3) [...]

- Basic rule, Art. 1(1)(a) CISG: Buyer/seller from **different CISG Contracting States**
  - therefore: no applicability of CISG to HK-mainland China contracts

# Applicability of the Convention, Art. 1(1)(a) CISG (2)

- currently 94 CISG Contracting States
  - among them: China, US, Singapore, Japan, Russia, Korea, Vietnam, 25 of 27 EU States (including Germany, Netherlands, France, Italy), Switzerland, Brazil
  - not: UK, India, Philippines, Thailand
- extension of CISG to Hong Kong will make Hong Kong CISG Contracting State territory
  - China has been CISG Contracting State since 1988
  - DOJ Consultation Paper: “Confusion in foreign legal systems as to the position of Hong Kong under the CISG”
  - expected declaration by China to CISG depositary will provide clarity for the future  
⇒ Hong Kong SAR as “Contracting State” territory for purposes of Art. 1(1)(a) and (b) CISG

# Current confusion about HK's status under the CISG



***New York State Dept. of Health v. Rusi Technology Co., Ltd.***  
**25 January 2022 – 907022-21, CISG-online 5781**

“Both the United States and China have adopted the Convention (see [...]).

‘In the absence of an agreement to the contrary, the CISG governs contracts for the sale of goods between parties in different countries that are signatories to the convention’ (*Microgem Corp., Inc. v Homecast Co., Ltd.*, 2012 WL 1608709, \*2, 2012 US Dist LEXIS 65166, \*7 [SD NY, Apr. 27, 2012, No. 10 CIV 3330 (RJS)]).”

# Applicability of the Convention, Art. 1(1)(b) CISG

## Art. 1 CISG [Sphere of application]

**(1) This Convention applies** to contracts of sale of goods between parties whose places of business are in different States:

(a) [...]

(b) when the **rules of private international law** lead to the application of the **law of a Contracting State**.

- Art. 1(1)(b) CISG: **only** relevant where **Art. 1(1)(a) CISG does not apply**
  - the “road less travelled” ⇒ Art. 1(1)(a) CISG much more important
- “rules of private international law”: (any) conflict-of-laws rules of the forum
- if pointing to law of (any) CISG Contracting State ⇒ CISG applies
  - also: if Hong Kong law applies

# Art. 95 CISG and its (very limited) effects for Hong Kong

## Art. 95 CISG [Reservation against Art. 1(1)(b)]

Any State may declare at the time of the deposit of its instrument of ratification, acceptance, approval or accession that it will not be bound by subparagraph (1)(b) of article 1 of this Convention.

- Art. 95 CISG authorizes States to make a reservation against application of Art. 1(1)(b) CISG
  - Art. 95 reservation will **not** be made for **Hong Kong**
  - but: China, Singapore, USA did make Art. 95 reservations
- effect of Art. 95 in Hong Kong courts: (probably) none
  - Art. 95 CISG reservation does *per se* not affect Art. 1(1)(a) CISG
  - no Art. 95 reservation for Hong Kong: Art. 1(1)(b) CISG applies in HK courts
  - no indirect effect of other Art. 95 reservations (prevailing view) ⇒ reservation States remain “Contracting States”

# Temporal sphere of application, Art. 100 CISG

## Art. 100 CISG [Temporal applicability]

(1) This Convention applies to the formation of a contract **only** when the **proposal for concluding the contract is made on or after the date** when the Convention **enters into force** in respect of the **Contracting States** referred to in subparagraph (1)(a) or the **Contracting State** referred to in subparagraph (1)(b) of article 1.

(2) [...]

- Hong Kong is expected to become a CISG Contracting territory in or around the **third quarter of 2022**
  - exact date to be announced by DOJ
- Art. 1(1)(a) or (b) CISG may result in applicability of the Convention to contracts with HK party that are **concluded after that date**, Art. 100 CISG
  - no retroactive applicability of CISG



# Parties with multiple places of business, Art. 10 CISG

## Art. 10 CISG [Place of business]

For the purposes of this Convention:

(a) if a party has more than one place of business, the place of business is that which has the closest relationship to the contract and its performance, having regard to the circumstances known to or contemplated by the parties at any time before or at the conclusion of the contract;

- CISG does not define “place of business”
  - case law: factual concept; place of registration (eg BVI) may not be decisive
- relevant: information contemplated **by other party** at moment of contract formation
  - test, Art. 10(a) CISG: closest connection
  - manufacture of goods in mainland China alone insufficient (and: limited difference ⇒ CISG applies in either case)

# Contracts for the sale of goods, Arts. 1, 3 CISG

- no explicit definition of term in Convention
- “goods”:
  - in practice: broad range of raw materials, manufactured goods, etc.
  - generally understood as “movable” goods; software sales not entirely clear
- also included: goods that are still to be manufactured, Art. 3(1)

## **Art. 3 CISG [Sale of goods still to be manufactured]**

(1) Contracts for the supply of goods to be manufactured or produced are to be considered sales unless the party who orders the goods undertakes to supply a substantial part of the materials necessary for such manufacture or production.

- Convention also applies to “mixed” contracts including service obligations, Art. 3(2) CISG
  - unless services preponderant part

# Party autonomy under the Convention, Art. 6 CISG

## Art. 6 CISG [Exclusion, variation or derogation by the parties]

The parties may exclude the application of this Convention or, subject to article 12, derogate from or vary the effect of any of its provisions.

- **Party autonomy** as most important principle of CISG, Art. 6 CISG
- **Parties may contractually** (*agreement* of both parties needed):
  - entirely **exclude application** of the CISG to their contract
    - **but** (CISG case law): **sufficient clarity** of exclusion intent needed
    - choice of law of CISG Contracting State (“This contract is governed by Hong Kong law”) is not sufficient
  - **derogate** from specific CISG provisions

# Clear opting-out clause required under Art. 6 CISG



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

“Although selection of a particular choice of 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, Defendant’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 Plaintiff’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 ([...]). Thus, under general California law, **the CISG** is applicable to contracts where the contracting parties are from different countries that have adopted the CISG.”

# Interpretation of the Convention (Art. 7(1) CISG)

## Art. 7 CISG [Interpretation of the Convention; gap-filling]

(1) In the interpretation of this Convention, regard is to be had to its international character and to the need to promote uniformity in its application and the observance of good faith in international trade.

(2) [...]

- Interpretative goals to “have regard to”, Art. 7(1) CISG
  - **Uniform interpretation** of the CISG
    - “autonomous” interpretation; avoidance of “homeward trend”
    - **good faith** in *interpretation of CISG* (not: as party obligation; but: disputed)
- Practical consequence: Consideration of **foreign CISG case law**
  - as persuasive (not: binding) precedents
  - CISG Advisory Council Opinions as (unofficial) source (cisgac.com)

# Interpretation of the Convention (Art. 7(1) CISG): Practical sources

- Websites on CISG case law
  - Albert H. Kritzer database, Pace Law School ([iicl.law.pace.edu/cisg/cisg](http://iicl.law.pace.edu/cisg/cisg))
  - CISG-online database ([www.cisg-online.org](http://www.cisg-online.org))
- Article-by-article commentaries on the CISG
  - Harry M. Flechtner, *Honnold's Uniform Law for International Sales under the 1980 United Nations Convention*, 5th ed., Kluwer (2021), 984 pages
  - Stefan Kröll, Loukas Mistelis & Pilar Perales Viscasillas (eds.), *UN Convention on Contracts for the International Sale of Goods (CISG)*, 2<sup>nd</sup> ed., Beck/Hart/Nomos (2018), 1,354 pages
  - Ingeborg Schwenzer & Ulrich G. Schroeter (eds.), *Schlechtriem & Schwenzer Commentary on the UN Convention on the International Sale of Goods (CISG)*, 5<sup>th</sup> ed., Oxford University Press (forthcoming July 2022), approx. 2,300 pages

# Gaps in the Convention and gap-filling (Art. 7(2) CISG)

## Art. 7 CISG [Interpretation of the Convention; gap-filling]

(1) [...]

(2) Questions concerning matters governed by this Convention which are not expressly settled in it are to be settled in conformity with the general principles on which it is based or, in the absence of such principles, in conformity with the law applicable by virtue of the rules of private international law.

- Coverage of CISG is not comprehensive (“internal gaps”)
  - Examples (Art. 4 CISG): validity of contract terms; effect on property
  - Other examples: assignment; interest rate; limitation period; set-off (disputed)
- Gap-filling, Art. 7(2) CISG
  - primarily: through general principles underlying the Convention
  - only as last resort: domestic law applicable by virtue of conflict-of-laws rules

# Freedom of form, Art. 11 CISG

## Art. 11 CISG [Freedom of form]

A contract of sale need not be concluded in or evidenced by writing and is not subject to any other requirement as to form. It may be proved by any means, including witnesses.

- no writing requirement ⇒ CISG contracts can be concluded orally or implicitly
  - domestic form requirements preempted
  - **no requirement of consideration** (domestic consideration requirements preempted)
  - **no parol evidence rule**



# Interpretation of CISG contracts, Art. 8 CISG

- Rules on interpretation of party declarations and of CISG contracts, Art. 8 CISG
- Main rule in practice: “understanding that a **reasonable person** of the same kind as the other party [addressee] would have had in the same circumstances”, Art. 8(2) CISG
  - “objective” interpretation decisive under Art. 8(2) CISG
  - but: **circumstances** are to be taken into account, **Art. 8(3) CISG**

## Art. 8(3) CISG [Interpretation of party declarations]

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.

- therefore: **no “four corner rule” under CISG** (unless the parties agree on such rule in their contract)

# Formation of contracts (Art. 14–24 CISG)

- CISG uses “classic” **offer-acceptance** model
  - Art. 14–17: offer; Art. 18–22: acceptance; Art. 23, 24: general questions
- **Notable contract formation issues** in CISG case law
  - determinability of the contract price, Arts. 14(1) and 55 CISG
  - incorporation of standard terms by reference
  - “battle of the forms” (but: mostly theoretical discussion ⇒ less relevant in practice under the CISG)

## Art. 14 CISG [Offer]

(1) A proposal for concluding a contract addressed to one or more specific persons constitutes an offer if it is sufficiently definite and indicates the intention of the offeror to be bound in case of acceptance. A proposal is sufficiently definite if it indicates the goods and expressly or implicitly fixes or makes provision for determining the quantity and the price.

# Incorporation of standard terms and conditions by reference (1): Basics

- Very frequently arising issue in CISG case law
  - one of the most frequently litigated issues under the CISG ⇒ may also affect parties' agreement on forum selection clauses or arbitration clauses contained in standard terms
- **Basic position of CISG**
  - no specific provisions about standard terms ⇒ general rules apply
  - therefore: standard terms **must be made part of offer** (Art. 14 CISG) as interpreted in accordance with Art. 8 CISG; offer must then be accepted (Art. 18 CISG)
  - offer must: (1) **refer** to standard terms and (2) **make terms text available** to the **other party** (the “making available” test)

# Incorporation of standard terms and conditions by reference (2): Basics



*Machinery case*, German Supreme Court,  
31 October 2001 – VIII ZR 60/01, CISG-online 617

“There is unanimous agreement that the recipient of an offer that is seeks to incorporate standard terms and conditions must have the possibility to become aware of the standard terms in a reasonable manner ([...]).

An effective inclusion of standard terms and conditions [into a CISG contract] thus first requires that the offeror’s intention to include his terms and conditions into the contract be apparent to the offeree.

In addition, as the Court of Appeal correctly assumed, **the CISG requires the user of standard terms and conditions to send the standard terms’ text or to make it available to the other party in a different way.**”

# Incorporation of standard terms and conditions by reference (3): Particular questions

- Making standard terms' text available: **How?**
  - no formal requirements, but **active** “making available” necessary
  - **sufficient**: sending full text by mail, or as e-mail attachment (practically important: **proof** of other party's receipt)
  - insufficient: offer to make terms available “upon request”; deposit of terms with local Chamber of Commerce or Court
  - disputed: availability of standard terms on offeror's internet **website** sufficient?
  - important: “making available” test is **no form requirement** ⇒ no need to repeat it with every follow-up contract ⇒ sufficient if standard terms **were made available** at **beginning** of business relationship (first CISG contract)

# Incorporation of standard terms and conditions by reference (4): Particular questions

- Making standard terms text' available: **When?**
  - Before contract formation (= **before** the **other party accepts** offer)
  - insufficient (too late): sending of standard terms' text for the first time with/on **invoice**, on shipping documents etc.
    - ↳ may be offer to *modify* contract (but: unlikely to be accepted)
- **Language** in which standard terms' text is written
  - principle: reasonable person in offeree's shoes must be able to understand terms (Art. 8(2) CISG)
  - sufficient: language of contract negotiations; language understandable to the offeree
  - “world language” per se understandable?

# Incorporation of standard terms and conditions by reference (5): Particular questions



*Chateau des Charmes Wines Ltd. v. Sabaté USA, Inc.*,  
328 F.3d 528 (9th Cir. 2003), CISG-online 767

“Indeed, Sabaté France and Sabaté USA do not contend that a forum selection clause was part of their **oral agreements**, but merely that the clauses in the **invoices** became part of a binding agreement. The logic of this contention is defective. Under the Convention, a ‘contract may be modified or terminated by the mere agreement of the parties.’ *Id.*, art. 29(1). However, the Convention clearly states that ‘[a]dditional or different terms relating, among other things, to ... the settlement of disputes are considered to alter the terms of the offer materially.’ *Id.*, art. 19(3). There is no indication that Chateau des Charmes conducted itself in a manner that evidenced any affirmative assent to the forum selection clauses in the invoices. Rather, Chateau des Charmes merely performed its obligations under the oral contract. **Nothing** in the Convention suggests that the **failure to object** to a party’s unilateral attempt to alter materially the terms of an otherwise valid agreement **is an ‘agreement’ within the terms of Article 29.**”

# “Acceptance” diverging from offer, Art. 19 CISG (1)

## Art. 19 CISG [Additions or modifications to the offer]

(1) A reply to an offer which purports to be an acceptance but contains additions, limitations or other modifications is a rejection of the offer and constitutes a counter-offer.

(2) However, a reply to an offer which purports to be an acceptance but contains additional or different terms **which do not materially alter the terms of the offer** constitutes **an acceptance**, unless the offeror, without undue delay, objects orally to the discrepancy or dispatches a notice to that effect. If he does not so object, the terms of the contract are the terms of the offer with the modifications contained in the acceptance.

(3) Additional or different terms relating, among other things, to the **price, payment, quality and quantity of the goods, place and time of delivery, extent of one party's liability to the other or the settlement of disputes** are considered to alter the terms of the offer **materially**.



# “Acceptance” diverging from offer, Art. 19 CISG (2)

- Art. 19 CISG: **“mitigated” mirror-image rule**
  - Art. 19(1) CISG: mirror-image rule ⇒ diverging acceptance = counter-offer
  - but: merely immaterial differences ⇒ acceptance, Art. 19(2) CISG
    - problem: broad list of material terms in Art. 19(3) CISG
- **“battle of the forms”**: approach under the CISG controversial
  - approach 1: “last shot rule”
  - approach 2: “knock-out rule”
  - but: issue in practice of limited importance under CISG
    - reason: freedom of form (Art. 11 CISG) ⇒ contract was often already concluded orally
    - forms therefore at best offer to modify contract (Art. 29(1) CISG)

# Modification of contract, Art. 29 CISG

- by “mere agreement” of the parties, Art. 29(1) CISG
  - therefore: no consideration necessary  $\Rightarrow$  consideration requirements of domestic laws preempted
  - no form requirement
- but: Sales Convention respects NOM clauses, Art. 29(2) CISG
  - parties may include No Oral Modification clause in their CISG contract
    - if they do  $\Rightarrow$  oral modifications ineffective
    - (narrow) exception, Art. 29(2), sentence 2 CISG

# No Oral Modification clauses (Art. 29(2) CISG)



## *Rock Advertising Limited v MWB Business Exchange Centres Limited* [2018] UKSC 24

“The reasons advanced in the case law for disregarding [NOM clauses] are entirely conceptual. The argument is that it is conceptually impossible for the parties to agree not to vary their contract by word of mouth because any such agreement would automatically be destroyed upon their doing so. The difficulty about this is that if it is conceptually impossible, then it cannot be done, short of an overriding rule of law (presumably statutory) requiring writing as a condition of formal validity. Yet it is plain that it can. **There are legal systems which have squared this particular circle. They impose no formal requirements for the validity of a commercial contract, and yet give effect to No Oral Modification clauses.**”

The Vienna Convention on Contracts for the International Sale of Goods (1980) has been ratified by 89 states, not including the United Kingdom. It provides ... [citing Arts. 11 and 29(2) CISG]...”

# Obligations of the seller: Overview

- Delivery of the goods (and/or documents)
  - according to the contract (for example through INCOTERM)
  - default rules, Arts. 31–34 CISG
- Conformity of the goods, Art. 35 CISG
  - autonomous (“unitary”) non-conformity concept of the CISG ⇒ domestic law categories preempted
  - but: buyer’s duty to notify seller about rights/claims, Arts. 38, 39 CISG
- Freedom of goods from third-party rights and claims, Arts. 41, 42 CISG
  - but: buyer’s duty to notify seller about rights/claims, Art. 43 CISG
- Any other obligation agreed in the contract

# Conformity of the goods, Art. 35 CISG (1)

## Art. 35 CISG [Conformity of the goods]

- (1) The seller must deliver goods which are of the quantity, quality and description **required by the contract** and which are contained or packaged in the manner required by the contract.
- (2) Except where the parties have agreed otherwise, the goods do not conform with the contract unless they:
  - (a) are **fit for the purposes** for which goods of the same description would **ordinarily** be used;
  - (b) are fit for any **particular purpose** expressly or impliedly made known to the seller at the time of the conclusion of the contract, except where the circumstances show that the buyer did not rely, or that it was unreasonable for him to rely, on the seller's skill and judgement;

# Conformity of the goods, Art. 35 CISG (2)

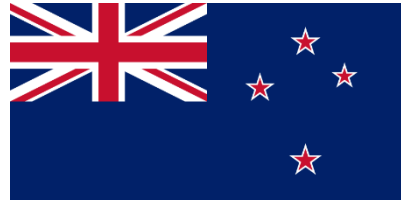
## Art. 35 CISG [Conformity of the goods] (*continued*)

- (c) possess the qualities of goods which the seller has held out to the buyer as a **sample or model**;
  - (d) are contained or **packaged** in the manner usual for such goods or, where there is no such manner, in a manner adequate to preserve and protect the goods.
- (3) The seller is **not liable** under subparagraphs (a) to (d) of the preceding paragraph for any lack of conformity of the goods if at the **time of the conclusion of the contract** the **buyer knew or could not have been unaware** of such lack of conformity.

# Conformity of the goods, Art. 35 CISG (3)

- primary standard for goods' conformity: **requirements of the contract**, Art. 35(1) CISG
  - express or implicit standards (Art. 8(3))
  - categories of domestic laws: irrelevant
- default standards, Art. 35(2) CISG: focus on **goods' fitness for their purpose**
  - fitness for **usual** purpose, Art. 35(2)(a) CISG
    - if goods usable for more than one purpose: fitness for all such purposes
  - fitness for **particular (i.e. non-usual)** purpose, Art. 35(2)(b) CISG
    - if particular purpose was made known to seller
    - and buyer could reasonably rely on seller's skill and judgment

# Compliance of goods with regulatory standards in buyer's country required under Art. 35(2) CISG?



*Smallmon v. Transport Sales Limited*, Court of Appeal of New Zealand, 22 July 2011 – [2011] NZCA 340, CISG-online 2215

“[46] The international authorities and articles support the proposition that the **seller will not be liable** for goods that **do not conform to the regulatory provisions or standards of the buyer's country unless the seller knew** or ought to have known of the requirements **because of special circumstances**. It seems that this principle can apply to the provisions of both art 35(2)(a) and 35(2)(b).

[47] With respect to proof of particular circumstances, the examples identified in the cases and the literature include the seller maintaining a branch in the buyer's country, a long-standing business connection between the parties, the seller making regular exports to the buyer's country and the provision of goods in the buyer's country. These are illustrative of the factors that may enable a buyer to establish liability on the seller, despite the general principle to the contrary. [...]”



# Buyer's duty to notify the seller about non-conformities of the delivered goods, Arts. 38, 39 CISG

## **Art. 38 CISG [Buyer's duty to inspect the goods]**

- (1) The buyer must examine the goods, or cause them to be examined, within as short a period as is practicable in the circumstances.
- (2) – (3) [...]

## **Art. 39 CISG [Buyer's duty to notify the seller about non-conformities]**

- (1) The buyer loses the right to rely on a lack of conformity of the goods if he does not give notice to the seller specifying the nature of the lack of conformity within a reasonable time after he has discovered it or ought to have discovered it.
- (2) In any event, the buyer loses the right to rely on a lack of conformity of the goods if he does not give the seller notice thereof at the latest within a period of two years from the date on which the goods were actually handed over to the buyer, unless this time-limit is inconsistent with a contractual period of guarantee.

# Buyer's duty to inspect the goods & notify the seller about non-conformities, Art. 39(1) CISG

- Art. 39(1) CISG obliges every buyer to **notify the seller** of any non-conformity of the goods “within a reasonable time” after buyer discovered/ought to have discovered it
  - Art. 38(1) CISG: buyer must examine the goods within as short a period as is practicable in the circumstances
- What is “**a reasonable time**” (Art. 39(1) CISG)?
  - decisive: circumstances of transaction (in particular: type of goods)
  - CISG case law: “noble month” as rule of thumb
- (Harsh) **effect** of missing/late notice of non-conformity: **buyer loses all remedies (!!)**
  - narrow exceptions: Art. 40 CISG (seller's constructive awareness); Art. 44 CISG (buyer's reasonable excuse)

# The two-year cut-off rule, Art. 39(2) CISG

- all remedies of buyer are **cut off** for any non-conformity not notified to seller once **two years** from handing-over of goods have passed
  - relevant for hidden defects ⇒ those are not covered by Art. 39(1)
  - no counterpart to Art. 39(2) CISG in most domestic laws
  - two-year cut-off period problematic in case of long-lasting goods
- **Exceptions to Art. 39(2) CISG:**
  - contractual guarantee for goods; contractual derogation from Art. 39(2) CISG (possible according to Art. 6 CISG)
  - Art. 40 CISG (buyer's constructive awareness); not: Art. 44 CISG
- Art. 39(2) CISG applies independently of and in addition to limitation (prescription) periods under domestic law

# Obligations of the buyer: Overview

- Payment of price for the goods
  - according to the contract
    - agreed time for payment(s)
    - agreed currency
    - agreed payment type (L/C, TT or others)
  - default rules, Arts. 54–58 CISG
    - if no agreed price: market price, Art. 55 CISG
    - payment when goods/documents are put at buyer's disposal, Art. 58 CISG
- Taking delivery of the goods
- Any other obligation agreed in the contract
  - FOB contract: arrangement of vessel etc.

# Non-performance and resulting remedies: Overview

## **Art. 45 CISG [Buyer's remedies]**

(1) If the seller fails to perform any of his obligations under the contract or this Convention, the buyer may:

(a) exercise the rights provided in articles 46 to 52;

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

(2) The buyer is not deprived of any right he may have to claim damages by exercising his right to other remedies.

(3) [...]

## **Art. 61 CISG [Seller's remedies]**

(1) If the buyer fails to perform any of his obligations under the contract or this Convention, the seller may:

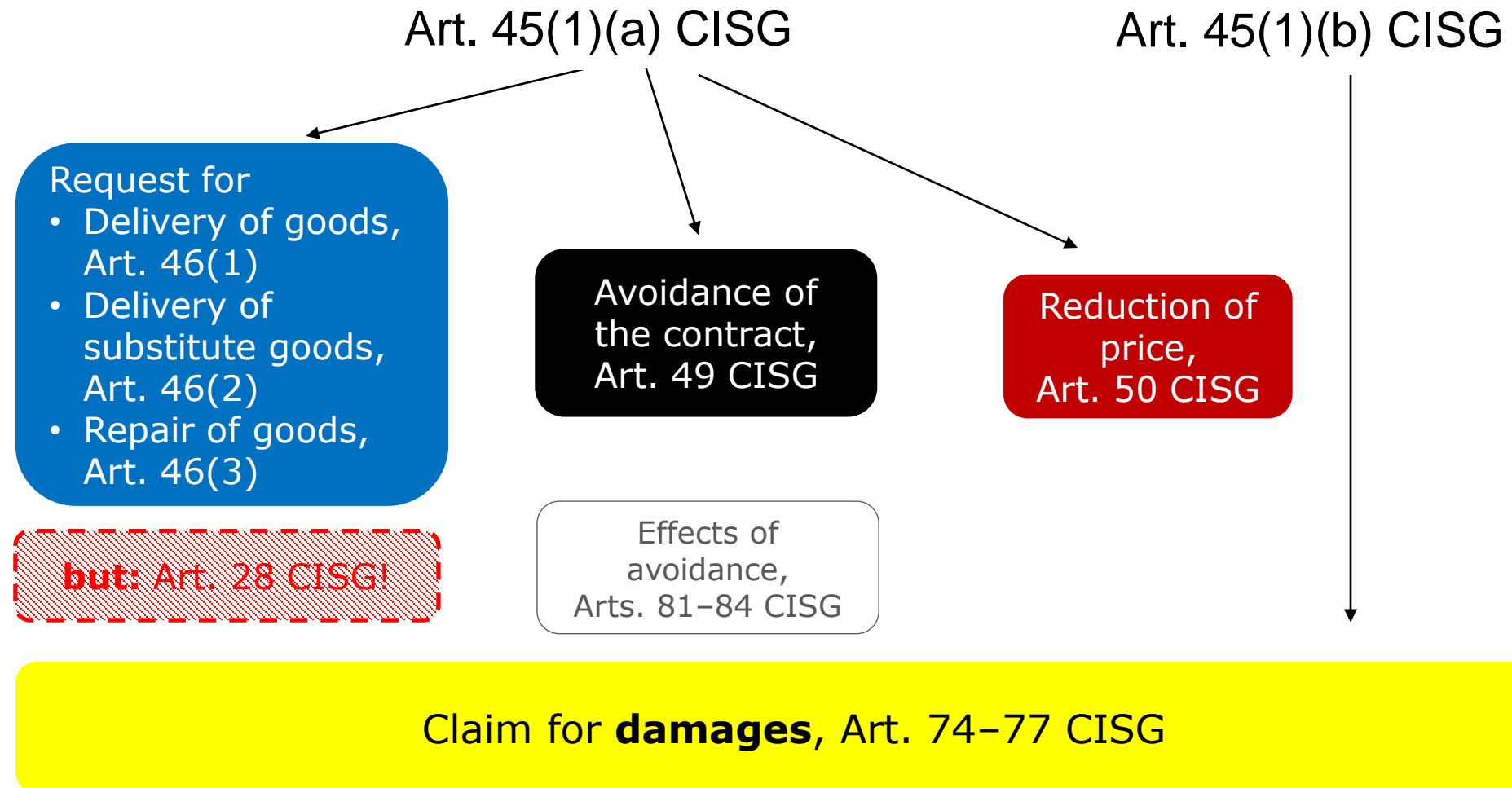
(a) exercise the rights provided in articles 62 to 65;

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

(2) The seller is not deprived of any right he may have to claim damages by exercising his right to other remedies.

(3) [...]

# Buyer's remedies: Overview



# Buyer's right to require specific performance, Art. 46 CISG (1)

## Art. 46 CISG [Buyer's right to require performance]

- (1) The buyer may **require performance** by the seller of his obligations unless the buyer has resorted to a remedy which is inconsistent with this requirement.
- (2) If the goods do not conform with the contract, the buyer may **require delivery of substitute goods** only if the lack of conformity constitutes **a fundamental breach of contract** and a request for substitute goods is made either in conjunction with notice given under article 39 or within a reasonable time thereafter.
- (3) If the goods do not conform with the contract, the buyer may **require the seller to remedy the lack of conformity by repair**, unless this is unreasonable having regard to all the circumstances. A request for repair must be made either in conjunction with notice given under article 39 or within a reasonable time thereafter.

# Buyer's right to require specific performance, Art. 46 CISG (2)

## Art. 28 CISG [Judgment for specific performance]

If, in accordance with the provisions of this Convention, one party is entitled to require performance of any obligation by the other party, a **court is not bound to enter a judgement for specific performance unless** the court **would do so under its own law** in respect of similar contracts of sale not governed by this Convention.

- Three forms of specific performance:
  - Right to require performance (= delivery of goods), Art. 46(1) CISG
  - Right to require delivery of substitute goods, Art. 46(2) CISG ⇒ only if defective (first) delivery amounted to **fundamental breach**, Art. 25 CISG
  - Right to require repair of defective goods, Art. 46(3) CISG
- Escape clause, Art. 28 CISG
  - included into Convention as compromise ⇒ but: irrelevant in practice



# Buyer's right to avoid the contract, Art. 49 CISG

## Art. 49 CISG [Buyer's right to avoid the contract]

(1) The buyer may declare the contract avoided:

- (a) if the failure by the seller to perform any of his obligations under the contract or this Convention amounts to a **fundamental breach of contract**; or
- (b) in **case of non-delivery**, if the seller does not deliver the goods within the **additional period of time fixed by the buyer** in accordance with paragraph (1) of article 47 or declares that he will not deliver within the period so fixed.

(2) [...]

## Art. 25 CISG [Fundamental breach of contract]

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

# Avoidance (termination) of the contract: The “fundamental breach” hurdle

- CISG treats contract avoidance as **remedy of last resort** (*ultima ratio*)
  - underlying reasoning: costs and risks of re-shipping goods over long distances; preservation of contractual bargain in cases of minor contract breach ⇒ compensation of innocent party through damages
- Arts. 49(1)(a), 64(1)(a) CISG: buyer’s/seller’s right to avoid contract only in case of “fundamental breach” (Art. 25 CISG)
  - in addition: limited “Nachfrist” procedure, Arts. 49(1)(b), 64(1)(b) CISG
- “fundamental breach” threshold: generally strictly construed
  - but: parties can (and should) **define** threshold in their contract (see Art. 25 CISG: “...entitled to expect *under the contract*...”)
  - contractual perfect tender rule possible under CISG

# Fundamental breach of contract (Art. 25 CISG) by the seller: Examples

- Refusal to deliver the goods
- Late delivery: only if time was of the essence
  - because of contractual agreement
  - due to circumstances (seasonal goods; purpose of goods; volatile market)
- Delivery of non-conforming goods
  - where contract defines certain features of goods as essential
  - curable non-conformity: not yet, if seller is willing and able to cure (see seller's right to cure, Art. 48 CISG)
  - not, if buyer can make "reasonable use" of non-conforming goods
    - e.g. resale (even at give-away price) ⇒ compensation through damages
- Documentary sales: Non-conforming documents (strict compliance)

# Fundamental breach of contract (Art. 25 CISG) by the buyer: Examples

- Refusal to pay or take delivery of goods
- Late payment
  - only if contract defines timely payment as of the essence
  - otherwise: seller's possibility to set *Nachfrist*, Art. 63(1) CISG
- Failure to open L/C on time: it depends (in particular on time for delivery and purpose to secure seller)
- Failure to take delivery: usually no fundamental breach
- FOB contracts: failure to nominate vessel on time

# Buyer's right to reduce the price, Art. 50 CISG (1)

## Art. 50 CISG [Reduction of price]

If the goods **do not conform with the contract** and whether or not the price has already been paid, the **buyer may reduce the price** in the **same proportion** as the value that the goods actually delivered had at the time of the delivery bears to the value that conforming goods would have had at that time. However, if the seller remedies any failure to perform his obligations in accordance with article 37 or article 48 or if the buyer refuses to accept performance by the seller in accordance with those articles, the buyer may not reduce the price.

- Traditional Civil Law remedy (typically not found in domestic sales laws of Common Law jurisdictions)
  - in case of delivery of defective goods
  - not limited to cases of fundamental breach
  - sometimes confused with right to claim damages

# Buyer's right to reduce the price, Art. 50 CISG (2)

- exercise of remedy: through unilateral declaration of buyer ⇒ proportional reduction of price
  - thereby adjustment of price to actual value of delivered (non-conforming) goods ⇒ contractual bargain is maintained
  - case law: if goods worthless ⇒ reduction of price to zero possible
    - problem: commercial effect resembles contract avoidance ⇒ inherent contradiction to Art. 49(1)(a) CISG, because Art. 50 CISG does not require fundamental breach
- differences to buyer's right to claim damages
  - Art. 50 CISG is not subject to limits of Arts. 77, 79 CISG
  - reduction potentially less far-reaching than right to damages ⇒ buyer's (consequential) loss may exceed value of goods

# Right to withhold performance as general principle underlying the Convention (Art. 7(2) CISG)

***Glass recycling machine case, Austrian Supreme Court***  
**8 November 2005 – 4 Ob 179/05k, CISG-online 1156**

“The principle of simultaneous exchange of performances also acknowledged in the CISG enables the buyer to raise the objection that the contract has not been (properly) performed and to withhold his own performance until such time as the other party is prepared to render (simultaneous) performance ([...]). The right to withhold one’s own performance until the counter-performance has been rendered can also be found in other provisions of the CISG; for example, Arts. 58 and 86 CISG allow the retention of the goods if and so long as the costs necessary for their preservation have not been reimbursed. Therefore, according to the principles shown above and additional interpretation in accordance with Art. 7(2) CISG, the buyer [...] has the right to withhold payment of the price when the performance rendered is not in conformity with the contract. The [Buyer] – who here demands substitute delivery and repairs in accordance with Art. 46 CISG – thus also has the right according to the Convention to withhold the remaining remuneration until such time as the [Seller] has performed its obligations in conformity with the contract. [...]”

# Calculation of damages: General rule, Art. 74 CISG

## Art. 74 CISG [Calculation of damages: General rule]

Damages for breach of contract by one party consist of a sum equal to the loss, including loss of profit, suffered by the other party as a consequence of the breach. Such damages may not exceed the loss which the party in breach foresaw or ought to have foreseen at the time of the conclusion of the contract, in the light of the facts and matters of which he then knew or ought to have known, as a possible consequence of the breach of contract.

- Claim for damages as **most important CISG remedy**
  - Buyer's right to claim damages: Art. 45(1)(b) CISG
  - Seller's right to claim damages: Art. 61(1)(b) CISG
- **Calculation of damages, Art. 74 CISG**
  - principle of **full compensation**, sentence 1
  - limit: **contemplation rule**, sentence 2 (inspired by *Hadley v Baxendale*)



# Calculation of damages: additional rules, Arts. 75–77 CISG

- Calculation of damages based on **cover transaction**
  - in case of contract avoidance and concrete cover transaction, Art. 75 CISG
  - in case of contract avoidance with “abstract” calculation based on market price, Art. 76 CISG
- Parties’ freedom to **exclude/limit** right to damages in their contract, Art. 6 CISG
  - Complete exclusion of damages (validity: governed by domestic law, Art. 4(a) CISG)
  - Limitation of liability
- Innocent party’s duty to **mitigate** damages, Art. 77 CISG

# Exemption from liability for damages, Art. 79 CISG

## Art. 79 CISG [Exemption from liability]

(1) A party is not liable for a failure to perform any of his obligations if he proves that the failure was due to an impediment beyond his control and that he could not reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract or to have avoided or overcome it or its consequences.

(2) – (5) [...]

- prerequisites for exemption from liability, Art. 79(1) CISG:
  - impediment beyond breaching party's control
  - no foreseeability at moment of contract conclusion
  - no possibility to reasonably overcome impediment
- practical importance: **very limited** ⇒ prerequisites almost never fulfilled

# Right to claim interest on sum in arrears, Art. 78 CISG

## Art. 78 CISG [Interest]

If a party fails to pay the price or any other sum that is in arrears, the other party is entitled to interest on it, without prejudice to any claim for damages recoverable under article 74.

- Interest is owed on any sum “in arrears” under the CISG
  - mostly: contract price not paid on time
  - but also: damages; any other outstanding sum
  - no prior notice (reminder) necessary under Art. 78 CISG
- Gap: Interest rate ⇔ not mentioned in Art. 78 CISG
  - Gap-filling: disputed
  - prevailing view: applicable interest rate to be determined through rules of private international law, Art. 7(2) *in fine* CISG



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# Thank you for your attention.

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