

International Sales Contracts II

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About me

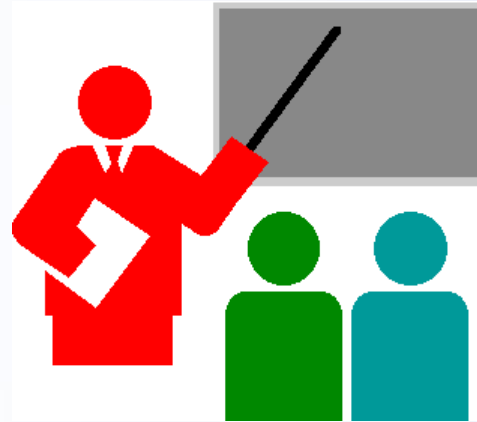
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1st and 2nd German State Exam

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Before we commence

- Your CISG knowledge?
- Your expectations?
- Limitations of this course
- Overview and focal point of this course (on classic *practical* issues plus some *new hot topics*)
- This is (in theory) the second part of the International Sales Contracts course (intensifying your CISG knowledge)



Overview

- General CISG sources
- Introduction and applicability of the CISG
- General provisions of the CISG
- Formation of contract and standard contract terms
- Obligations of the parties
- (Buyer's) remedies
- Impact of COVID-19, wars and sanctions on International Sales Contracts
- To exclude or not to exclude the CISG?
- Case studies



General CISG Sources



General CISG Sources

- **Data banks (very important):**
 - CISG-online: <https://cisg-online.org/home>
 - Pace Law School: <https://iicl.law.pace.edu/>
- **Commentaries/Treatises (selection):**
 - *Kröll/Mistelis/Perales Viscasillas*, UN Convention on Contracts for the International Sale of Goods (CISG), Commentary, Beck, 2nd ed. 2018
 - *DiMatteo/Janssen/Schulze/Magnus*, International Sales Law, Beck/Hart 2016 (2nd ed. 2021)



General CISG Sources

- **(English) Text books (selection):**
 - *Janssen/Meyer*, CISG Methodology, Sellier 2009
 - *Schlechtriem/Butler*, UN Law on International Sales, Springer 2009
 - *Huber/Mullis*, The CISG: A new textbook for students and practitioners, Sellier, 2nd ed. 2014
- **CISG Advisory Council (CISG-AC):**
 - Numerous opinions
 - See more <https://www.cisgac.com/>



Introduction and Applicability of the CISG



Contracting States

- **97 contracting states** (see provided list with contracting states)
- Except UK and Ireland all important industry nations are contracting states
- Almost all EU-member states are contracting states
- NL since 1992 > Dutch courts have wide experience
- Latest (important) contracting states are Brazil, Japan, Congo, Vietnam, Turkey, Portugal, Rwanda and Saudi-Arabia
- Applicable law since 1988 (in six languages)
- One of **most successful conventions** of all time
- More than **80-90 % of worldwide trade** governed directly by CISG



Structure and Main Features

- CISG consists of four parts:
 - **Applicability and general provisions** (Art. 1-13 CISG)
 - **Formation** (Art. 14-24 CISG)
 - **Substantive rules** (Art. 25-88 CISG)
 - **Final provisions** (Art. 89-101 CISG)



Factual Sphere of Application

Contract of Sale (Art. 1(1) CISG)

- General requirements for application CISG?
 - (1) Sales contract
 - (2) Goods
 - (3) (Recognisable) internationality
- Art. 1(1) CISG regulates sales contracts without expressly defining term
 - However, content of sales contracts can be found in Art. 30 and 53 CISG
 - Generally = **delivery of goods for money** (problem: payment with cryptocurrency)



Factual Sphere of Application

Contract of Sale (Art. 1(1) CISG)

- **Sales contracts e.g. (-) =**
 - Contracts for exchange of products
 - Framework agreements like franchise contracts (unless framework agreement clearly lays down sales obligations, see e.g. Advanced Purchase Agreement of the European Commission with AstraZeneca)
 - Pure service contracts
 - Pure labour contracts



Factual Sphere of Application

Other Related Contracts (Art. 3 CISG)

- (1) Contracts for work and materials (Art. 3(1) CISG):
 - Rule: Contracts for **sale of goods to be produced or manufactured** are governed by CISG
 - Exception: 'Buyer' supplies **substantial part of material**
 - Problem: What is 'substantial part'?
 - Unclear
 - Sometimes: 15-50%
 - Vast majority: Above 50%
 - What parameter at all? → value or quantity?
 - What if 'buyer' provides digital elements of e.g. smart product?
 - And is it one mixed contract at all or rather two separate contracts?



Factual Sphere of Application

Other Related Contracts (Art. 3 CISG)

- (2) Contracts for supply of labour/other services (Art. 3(2) CISG):
 - Rule: CISG does **not** apply to contracts in which **preponderant part** of obligation of the “seller” consists in **supply of labour or other services**
 - Problem: What is ‘preponderant part’?
 - Unclear
 - Sometimes: At least more than 50%
 - Often: Part must ‘significantly exceed 50%’
 - And is it one mixed contract at all or rather two separate contracts?



Factual Sphere of Application

Definition of 'Goods' (Art. 1(1) CISG)

- Goods = **moveable, tangible objects**
- Goods (+)
 - Living animals (e.g. sheep) or plants
 - Works of art
 - Liquid gas
 - Vaccines
- Goods (-) =
 - Sale of rights (e.g. licences)
 - Immovable, M&A deals
 - Software (partly different court decisions) and data



Factual Sphere of Application

Internationality of Sales Contract (Art. 1 CISG)

- CISG applicable when contract has **international character**
 - Criterion: **Place of business of contracting parties in two different states** (Art. 1(1) CISG)
 - If one party has several places of businesses >closest connection to contract (Art. 10 CISG)
 - Nationality of parties irrelevant (Art. 1(3) CISG)
- What if one or both parties are public entities (e.g. a state)?
- Multiparty agreements governed by CISG
 - But what if on one side several parties are involved and not all have their place of business in a member state?
- Two ways to apply CISG: **Direct and indirect application**

CPO

Factual Sphere of Application

Internationality of Sales Contract (Art. 1 CISG)

- **Direct application (Art. 1(1)(a) CISG):**
 - Contract between parties whose places of business are in different contracting states
 - E.g. a Dutch seller and a Chinese buyer
 - By far most important way of applying CISG



Factual Sphere of Application

Internationality of Sales Contract (Art. 1 CISG)

- **Indirect application (Art. 1(1)(b) CISG):**
 - In case rules of PIL of forum state leads to application of law of a contracting state, the CISG is applicable
 - Example: Seller resident in the Netherlands / buyer resident in England / seller sues buyer for payment of contracting price / valid jurisdiction clause: district court Amsterdam / no choice of law clause
 - Art. 4(1)(a) EU Rome I regulation = 'a contract for the sale of goods shall be governed by the law of the country *where the seller has his habitual residence*'



Factual Sphere of Application

Applicability of the CISG in arbitration

- Is an arbitral tribunal obliged to apply the CISG under Art. 1 CISG?
- How does an arbitral tribunal come to the applicability of the CISG then?
 - Two different concepts in arbitration rules
 - Direct application: The arbitral tribunal shall apply “**the law(s) or rules of law which it considers appropriate**” (e.g. Art. 17(1)2 ICC Arbitration Rules)
 - Indirect application: The arbitral tribunal shall apply “**the law determined by the conflict of laws rules which it considers applicable**” (e.g. Art. 35(1)1 UNCITRAL Arbitration Rules)



Factual Sphere of Application

Exceptions (Art. 2 CISG)

- **International consumer sales**
- Sales by auction
- Sales on execution or otherwise by authority of law
- Sales of stocks, shares investment securities, negotiable instruments or money (includes the exclusion of sales of cryptocurrencies)
- Sales of ships, vessels, hovercrafts or aircrafts (now problematic: drones)
- Sales of electricity



Opt-out

- When requirements of CISG application are met =
 - **CISG automatically applicable**
 - **Even if parties do not know CISG at all**
- But Art. 6 CISG allows parties to vary from the CISG or exclude its application (latter is called '**opt-out**')
 - Exclusion can be **expressly** or **impliedly**
 - But high requirements for exclusion of CISG in practice



Opt-out

- Express choice of law of a specific domestic law of a contracting state (e.g. choice of ‘Dutch law’) **does not include an implied exclusion** (according to leading case law)
 - Often malpractice in ‘real world’
- CISG exclusion must be clear and precise
 - Example: ‘The contract is governed by the German Civil Code (BGB). The application of the CISG is excluded.’
- Also no implied exclusion:
 - **Litigating without reference to CISG (but only to national law) > disputed**
 - **Jurisdiction clause for a court of a non-CISG contracting state**



Opt-out

- If practitioners advice their clients to exclude CISG and choose national law instead (without making a comprehensive legal evaluation before):
 - **Often opting for the ‘wrong law’**
 - **Can become liability case**
 - **Remember: CISG = Party autonomy high value**



Legal Scope of CISG

- CISG does not govern all legal aspects of an international sales contract (= CISG has gaps)
- Rationale?
 - Political
 - But also legal reasons
- **Expressly included** (Art. 4 s. 1 CISG):
 - Formation of contracts
 - Rights + obligations of seller/buyer (including remedies)



Legal Scope of CISG

- **Expressly excluded:**
 - **Validity questions** (Art. 4 s. 2(a) CISG, e.g. illegality, mistake, misrepresentation)
 - Questions of **ownership** in goods sold (Art. 4 s. 2(b) CISG)
 - Seller's liability for **death or personal injury** caused by goods (Art. 5 CISG)
- **Implicitly excluded** (Art. 4 s. 2 CISG 'in particular') are e.g.:
 - Procedural questions (→ lex fori > but burden of proof according to leading opinion inside the scope of the CISG)
 - Prescription/limitation period (but see cut-off period in Art. 39(2) CISG)
 - Agency



Check List CISG Application

- (1) Sales contract (Art. 1 CISG) or related contract (Art. 3 CISG)?
 - (2) Goods involved (Art. 1 CISG)?
 - (3) Is contract international (Art. 1 CISG)?
 - (4) No exceptions (Art. 2 CISG)?
 - (5) No valid opt-out (Art. 6 CISG)?
 - (6) Legal issue governed by CISG (Art. 4 CISG)?
- If all (+) = Application of CISG (+)



Some practitioner's tips

- **(1) Make a choice: litigation or arbitration (plus mediation or not)?**
- **(2) Choose place of litigation or arbitration (and arbitration rules)**
- **(3) Do not exclude CISG blindly (make a pro / con analysis)**
- **(4) Make contractual changes to CISG if needed**
- **(5) Decide which CISG language version should apply**
- **(6) Choose the national law for legal areas not governed by CISG**



General Provisions of the CISG



General provisions

- Interpretation and gap-filling (Art. 7 CISG)
- Interpretation of statements or conduct (Art. 8 CISG)
- Usages and practices (Art. 9 CISG)
- Freedom of form (Art. 11 CISG)



General Provisions

Interpretation (Art. 7(1) CISG)

- Art. 7(1) CISG deals with interpretation of CISG
- **Three guidelines** for CISG interpretation:
 - (1) International character
 - (2) Need to promote uniformity of application
 - (3) Observance of good faith in international trade
- **Why important at all?**
 - No 'Common Supreme Court' + no doctrine of judicial precedent
 - Danger of different interpretations CISG



General Provisions

Interpretation of CISG (Art. 7(1) CISG)

- ***Methods of interpretation?***
 - ***Wording***
 - Different wording?
 - English CISG text dominating?
 - Tip: Put in contract which CISG language version prevails
 - ***Travaux préparatoires (preparatory work)***
 - Possible?
 - Value?
 - ***Systematic position (of provision)***



General Provisions

Interpretation of CISG (Art. 7(1) CISG)

- ***Methods of interpretation?***
 - ***Teleological interpretation***
 - Rationale of CISG or of provision in question
- ***What is value of each and every method?***
 - Ranking order of different methods?
- ***Examples for interpretation:***
 - Use of the term “goods”
 - Use of term “reasonableness”



General Provisions

Interpretation of CISG (Art. 7(1) CISG)

- Which means to achieve uniform interpretation in practice?
 - CISG Advisory Council Opinions
 - International databases (e.g. Pace University)
 - With translated decisions (litigation and arbitration)
 - Legal literature



General Provisions

Gap-Filling (Art. 7(2) CISG)

- **Internal gaps** (Art. 7(2) CISG):
 - (1) Questions concerning matters governed by CISG +
 - (2) which are not expressly settled
- **Solution 1 (Internal gap-filling): → general principles**
 - Settlement in **conformity with general principles** on which it is based
 - General principles are e.g.
 - good faith
 - duty to cooperate
 - party autonomy
 - principles of full compensation
 - can soft law principles like PICC reflect CISG general principles?



General Provisions

Gap-Filling (Art. 7(2) CISG)

- ***Solution 1 (Internal gap-filling): → general principles***
 - Examples for gap-filling via general principles
 - Battle of forms (offer and acceptance mechanism)
 - Prohibition of contradictory behaviour (venire contra factum proprium) / estoppel
 - Burden of proof (inherent in CISG)



General Provisions

Gap-Filling (Art. 7(2) CISG)

- ***Solution 2 (Internal gap-filling): → domestic law via Private International Law***
 - In absence of a general principle
 - In ***conformity with domestic law applicable by virtue of rules of Private International Law*** of forum (or agreed law → choice of law by parties)



General Provisions

Gap-Filling

- ***External gaps (not governed by Art. 7(2) CISG):***
 - Questions ***not*** concerning matters governed by CISG
 - See e.g. Art. 4 s. 2 CISG or Art. 5 CISG
- How to fill external gaps?
- ***Domestic law applicable by virtue of rules of Private International Law*** of forum (or agreed law → choice of law by parties) → like second solution of Art. 7(2) CISG



General Provisions

Gap-Filling

- External gaps (see again Art. 4 and 5 CISG) are e.g.:
 - Misrepresentation
 - Validity of contracts in general
 - Limitations of claims
 - Transfer of property
 - Illegality
 - Tort



General provisions

Gap-Filling

- In general for gap-filling:
 - Very disputed area
 - ***Four hot issues are in particular:***
 - (1) Gap at all (or is only CISG interpretation necessary)?
 - (2) Gap internal or external?
 - (3) Are there general principles to fill internal gap?
 - (4) Value of PICC to fill gaps?
 - Especially: Do they reflect general principles of CISG?



General provisions

Gap-filling exercise: Interest rate (Art. 78 CISG)

- ***External gap?***
 - → seldomly argued → Private Int. Law → domestic law
- ***Internal gap according to Art. 7(2) CISG)?***
 - → Likely
 - Filled with CISG general principles (internal solution)?
 - General principles not to extract from CISG
 - Filled with PICC as general principles?
 - → Art. 7.4.9(2) PICC: average short-term lending rate
 - Last resort: gap-filling via Private Int. Law → domestic law
 - Predominant view

General Provisions

Interpretation of Statements or Conduct (Art. 8 CISG)

- Party's ***subjective intention*** takes priority where other party knew or could not have been unaware (Art. 8(1) CISG)
- Only if Art. 8(1) CISG is not applicable:
 - ***Objective interpretation***
 - 'reasonable person'-standard of Art. 8(2), (3) CISG
- Unless parties declare that only the text of the contract is decisive (Art. 6 CISG)



General Provisions

Usages and practices (Art. 9 CISG)

- **Practices** (Art. 9(1) CISG):
 - Binding when established between parties
 - e.g. period of time to pay price, discount for prompt payment
- **Usages** (Art. 9(1) CISG):
 - In any case binding when agreement between parties



General Provisions

Usages and practices (Art. 9 CISG)

- ***International usages*** (Art. 9(2) CISG) even binding (without agreement between parties) when:
 - (a) Parties know or ought to have known them
 - (b) Are widely known in international trade
 - (c) Are regularly observed by parties of that kind



General Provisions

Usages and practices (Art. 9 CISG)

- Remember:
 - Corresponding CISG-provisions not applicable in case of different usages or practices
 - ***Usages and practices are overruling CISG !!!***
 - Reason: party autonomy
- Problem: Identification of international trade usages
 - E.g. letter of confirmation
 - Use of PICC to identify usages?
 - Incoterms as international usage?



General Provisions

Principle of freedom of form (Art. 11 CISG)

- Formation/modification of contract = freedom of form (no parol evidence rule)
- ***Even oral contracts are binding***
- However, contracting states can exclude applicability (Art. 12, 96 CISG)
- Argentina, Armenia, Belarus, Chile, Paraguay, Russia, Ukraine, and Vietnam made use of this possibility
- And of course party can agree on form requirement (Art. 6 CISG)



Formation of Contract and Standard Contract Terms



Formation of contracts and standard contract terms

- General concept *formation of contracts*
- Problems regarding *offer* (e.g. no price indication, invitation to treat)
- Problems regarding *acceptance* (e.g. silence, conduct)
- *Standard contract terms* (e.g. battle of forms)



Formation of contracts

Introduction

- Formation of contract = Art. 14 - 24 CISG
- What do we need for a binding contract?
 - *Offer*
 - *Acceptance*
 - *Meeting of minds*
 - *Consideration?*
- Sometimes hard to identify (e.g. long-term negotiations, online purchases)



Formation of contracts

Offer (Art. 14 ff. CISG)

- A valid offer must be sufficiently specific regarding (see Art. 14(1) s. 1 CISG):
 - *(a) offeree(s)*
 - *(b) sufficiently definite content* (see more details in Art. 14(1) s. 2 CISG and next slide)
 - *(c) intention* of offeror to be bound



Formation of contracts

Offer (Art. 14 ff. CISG)

- Proposal is ***sufficiently definite*** if it indicates (Art. 14(1) s. 2 CISG):
 - (a) ***quality of the goods***
 - (b) ***quantity of the goods***
 - (c) ***price***



Formation of contracts

Offer (Art. 14 ff. CISG)

- Problem: Conflict Art. 14 CISG – Art. 55 CISG
- Offers to public?
- Proposal to several ***specific persons***
 - = valid offer (Art. 14(1)1 CISG)
- Proposal to (several) ***unspecific persons***
 - = invitation to treat (Art. 14(2) CISG)



Formation of contracts

Offer (Art. 14 ff. CISG)

- Offer must **reach** offeree to be effective (Art. 15(1) CISG)
- Problem: **When do statements (offer, acceptance (Art. 18(2)1 CISG), other declarations) 'reach' other party?:** → see Art. 24 CISG
 - Orally = directly
 - In writing:
 - When delivered to (business) address of other party
 - Common or Civil Law approach?



Formation of contracts

Acceptance (Art. 18 CISG)

- ***(1) Acceptance (Art. 18(1) s. 1 CISG)***
 - Express/conclusive declaration of addressee that offer is accepted
 - Emojis?



Formation of contracts

Acceptance (Art. 18 CISG)

- **(2) Silence?**
 - Silence alone not an acceptance (Art. 18(1) s. 2 CISG)
 - But remember Art. 9 CISG
- **(3) Acceptance by conduct (Art. 18(1), (3) CISG)**
 - E.g. sending goods or payment of price



Formation of contracts

Acceptance that Modifies an Offer (Art. 19 CISG)

- If acceptance modifies offer, one has to differentiate between two situations:
 - **(1) Basic rule (Art. 19(1) CISG):**
 - If acceptance contains material modification
 - = ***acceptance is counteroffer***
 - **(2) Exception (Art. 19(2), (3) CISG):**
 - If acceptance does not materially alter terms of offer
 - = contract concluded in accordance with modified acceptance
 - Exception from mirror image-rule
 - However, offeror can object to discrepancy without undue delay



Formation of contracts

Late Acceptance (Art. 21 CISG)

- Art. 21 CISG: two cases of late acceptance
 - **(1) Basic rule (Art. 21(1) CISG):**
 - Late acceptance no legal effect (= no counteroffer)
 - Unless offeror informs offeree without undue delay that late acceptance is effective
 - **(2) Exception (Art. 21(2) CISG):**
 - Late acceptance due to circumstances whereby a transmission has been sent and normally should have reached offeror in due time = generally effective
 - Unless offeror has informed offeree of lapse of offer without undue delay



Standard Contract Terms

- Formation of contract rules apply also for **inclusion** of standard contract terms (their **validity** is outside CISG, Art. 4 CISG)
- No particular CISG provisions on inclusion of standard contract terms
- Following statements are based on CISG case law only
- Standard contract terms are included in a contract when:
 - (1) parties have **expressly or impliedly agreed** to their inclusion,
 - (2) **before or at the time of contract formation,**
 - (3) and other party had a **reasonable opportunity to take notice**



Standard Contract Terms

- Normally standard contract terms must be:
 - (1) In **language of negotiations / offeree's native language**
 - (2) In a (permanent) **written form**
 - Problem: reference to website sufficient?
 - (3) Supplied **before or with contract conclusion**
 - Not e.g. reference on invoice delivered with goods
 - (4) **Non-surprising**
 - Surprising terms do not become part of contract
 - (5) **Not conflicting with negotiated terms**
 - If there is a conflict: negotiated terms prevail



Standard Contract Terms

- Problem: '**battle of forms**'
- Not governed explicitly by CISG, but falls within its scope
- What are the options?
- How do courts deal with this problem?
- See the difference between Dutch Law and CISG
- Battle of forms shows that exclusion of CISG in standard contract terms might be quite problematic



Obligations of the Parties



Obligations of the Seller

- Seller's duties are determined primarily from contractual terms
- If contract is silent: Art. 30 CISG
- **Art. 30 CISG** states that seller must (= primary obligations)
 - (1) **Deliver goods** (Art. 31-33 CISG)
 - In practice: Incoterms 2020
 - (2) **Deliver related documents** (Art. 34 CISG)
 - In practice: Incoterms 2020
 - (3) **Transfer of property** in goods (Art. 30 CISG)
 - Domestic law decides how transfer takes place
- Secondary obligation: **Delivery of conforming goods** (Art. 35, 41 ff. CISG)

Obligations of the Seller

Delivery of the Goods (Art. 31-33 CISG):

Place of Delivery (Art. 31 CISG)

- In practice terms of delivery (place, time, passing the risk) are often regulated by ***Incoterms 2020***
- Art. 31 CISG differentiates between ***three situations*** for place of delivery:
 - ***(1) Parties agree that goods must be delivered to particular place (see Art. 31 s. 1 CISG)***
= seller responsible for delivery of goods to that place (“Bringschuld”)



Obligations of the Seller

Delivery of the Goods (Art. 31-33 CISG):

Place of Delivery (Art. 31 CISG)

- **(2) If sales contract involves carriage of goods (Art. 31(a) CISG)**
 - = seller must hand goods over to first **independent carrier** (“Schickschuld”)
 - Insufficient = hand goods over to seller’s employees
- **(3) In other cases (Art. 31(b)(c) CISG)**
 - = seller performs his delivery obligation by making goods available to buyer (“Holschuld”)



Obligations of the Seller

Delivery of the Goods (Art. 31-33 CISG): Time of Delivery (Art. 33 CISG)

- Art. 33 CISG distinguishes **three situations** for time of delivery:
 - (1) Agreement **fixed or determinable date** for delivery (lit. a)
 - (2) **Agreement period of time** during which delivery can be made (lit. b)
 - (3) **No express provision** regarding date for delivery?
 - delivery within **reasonable time** after contract conclusion (lit. c)
 - we will read “reasonable” a lot in the CISG



Obligations of the Seller

Transfer of Property (Art. 30 CISG)

- CISG requires from seller transfer of property (Art. 30 CISG)
- Problem: Matter of transfer of property excluded (Art. 4 s. 2(b) CISG)
- Rationale?
 - Important differences property law
 - Almost impossible to harmonize this aspect
- **External gap** (not Art. 7(2) CISG):
 - Domestic law is applicable (via Private International Law)



Obligations of the Seller

Transfer of Documents (Art. 34 CISG)

- Documents important factor
- In practice regulated often by *Incoterms 2020*
- Art. 34 s. 1 CISG = Documents relating to purchased goods must be handed over
 - (1) *at time and place required by contract*, and
 - (2) *in form required by contract*



Obligations of the Seller

Transfer of Documents (Art. 34 CISG)

- Which documents?
 - ***(1) Transportation documents***
 - e.g. bill of lading, consignment bill and warehouse warrant
 - ***(2) Accompanying documents for export and import***
 - e.g. export licences, custom delivery notes, cargo declarations, commercial invoices, packing list and insurance policies



Obligations of the Seller

Overview: Conformity of goods

- Art. 35 CISG has two 'tiers':

Art. 35(1) CISG = subjective tier/express terms

- Quantity
- Quality
- Description
- Packaging

Art. 35(2) CISG = objective tier/implied terms

- Fit for ordinary purpose
- Fit for particular purpose
- Sample or model
- Packaged or contained in a customary manner or in a manner adequate to preserve and protect the goods

Obligations of the Seller

General remarks: Conformity of goods

- Relationship between both “tiers”?
- Express terms supersede implied terms
- But ***border between express terms and implied terms can be blurry*** (and is at the end not of such an importance if non-conformity question can be solved properly)
- Remember: Art. 8 CISG (interpretation of parties’ conduct) and Art. 9 CISG (usages and practices) can play an important role for non-conformity question
- We discuss now the most important aspects of Art. 35 CISG



Obligations of the Seller

Conformity of goods: Express terms (Art. 35(1) CISG)

Contractual Quantity

- Seller must deliver correct quantity
- ***If buyer receives too few or too much*** = non-conformity (with the consequence of Art. 38, 39 CISG)
- Clauses like “more or less” / “not less than” / “about” create some flexibility
- Variations can be normal in certain trades (Art. 9 CISG)



Obligations of the Seller

Conformity of goods: Express terms (Art. 35(1) CISG) Contractual Quality

- Seller must deliver goods in contractual quality
- Term “quality” should be given a wide interpretation
- Not restricted to physical characteristics of goods
 - E.g. fact that goods did not come from agreed country of origin
- Hot topic right: ***Violation of fair trade standards/supply chain liability***
 - Art. 35 CISG applicable at all?
 - Obligation of the seller: Achieve specific result or only best efforts?



Obligations of the Seller

Conformity of goods: Express terms (Art. 35(1) CISG) Contractual Description

- Discuss salt instead sugar case
- How to treat delivery of “*aliud*” (= goods of a different “kind”)?
- Question: is salt “defective sugar”?
- If yes (according to majority opinion):
 - Then Art. 35 CISG → Art. 38, 39 CISG → duty to examine and to notify
- If no (according to other opinion):
 - Salt cannot be “defective sugar” but is something else
 - No Art. 35 CISG and therefore no Art. 38, 39 CISG
 - Seller did not fulfill the obligation to deliver under Art. 30 CISG at all



Obligations of the Seller

Conformity of goods: Implied terms (Art. 35(2) CISG)

Fitness for ordinary purpose (Art. 35(2) (a) CISG)

- Relevant (public law) standards: seller's or buyer's state? Why is it important? For what kind of cases?
- (German) Bundesgerichtshof 8 March 1995, CISG-Online No. 144 (leading case)
- What did the court decide?
 - Normally *seller's standards* apply
 - Unless *seller knows (or ought to have known)* the relevant standards in the buyer's country (e.g. he is regularly exporting to buyer's country)
 - Why? Rationale?
- **Hot topic: Defective/missing updates for smart products**



Obligations of the Seller

Conformity of goods: Implied terms (Art. 35(2) CISG)

Fitness for particular purpose (Art. 35(2) (b) CISG)

- What is a particular purpose?
- **1. Requirement: Purpose must be made known to the seller**
 - not required that there was an actual agreement on that particular purpose between parties
 - Example: Appellate Court of Graz rejected a claim by a buyer because the seller was not informed of the particular heating oil that was needed. The seller was not aware that the buyer had a particular stove, which could not use the oil sold by the seller. (OLG Graz 19 June 2013 (Oil case))
- **2. Requirement: Buyer's reliance on seller's skills/judgment**



Obligations of the Seller

Conformity of goods: Implied terms (Art. 35(2) CISG)

Sample or model (Art. 35(2) (c) CISG)

- Goods must be in conformity with seller's sample or model shown before contract conclusion
- Problem: What happens in a **conflict between Art. 35(2) (a) (or (b)) CISG and Art. 35(2) (c) CISG?**
 - Cases in which goods correspond with the qualities of the sample but are not fit for their ordinary (or particular) use
 - Wood for roof case / seller gives sample / delivered wood in conformity with sample but not fit for use (= roof)
 - Majority view: lit. (c) should normally take priority over lit. (a) and (b) as lit. (c) can be regarded as some sort of parties' agreement which is generally regarded as more important than the purely objective standard in lit. (a) and (b)



Obligations of the Seller

Conformity of goods: Implied terms (Art. 35(2) CISG)

Packaging (Art. 35(2) (d) CISG)

- Applies if contract is silent on manner how to package the goods
- Normally: usual manner
- If not applicable: manner that is adequate to preserve and protect goods
- Depends on usages and circumstances
- ***Inadequate packaging case***
 - Seller's inadequate packaging leads after passing the risk (Art. 36 CISG) to damages
 - Here Art. 35(2) (d) CISG is applicable (to **all** damages even after passing the risk)



Obligations of the Seller

Exclusion of Liability (Art. 35(3) CISG) and time of non-conformity

- Seller is not liable for any lack of conformity if at the time of conclusion of the contract **the buyer** “*knew or could not have been unaware* of such lack of conformity.”
- “Could not have been unaware” = at least gross negligence or better “blind eye” recklessness
- There is **no precontractual duty to examine the goods** before passing the risk
- Burden of proof for Art. 35(3) CISG?
 - Burden of proof on the seller
 - In practice often difficult to prove

- Time of non-conformity (Art. 36 CISG): **Passing of risk** or guarantee period



Obligations of the Seller

Duty of the Buyer to Examine and to Notify (Art. 38-40 CISG)

- Practically some of **most important CISG articles**
- **Beginning of examination period (Art. 38 CISG)**
 - Normally when seller factually hands over goods to buyer
 - If carriage of goods involved = examination after goods arrive at destination (Art. 38(2) CISG)
 - For redirected or redispached goods see Art. 38(3) CISG



Obligations of the Seller

Duty of the Buyer to Examine and to Notify (Art. 38-40 CISG)

- Length of examination period (Art. 38(1) CISG)
 - Buyer must **examine goods within as short a period** as is practicable in the circumstances
 - Types of goods play important role
 - Rule of thumb for length examination period (for non-perishable goods): **two weeks (disputed)**
 - Common Law courts tend(ed) to grant more time
 - Courts from the German Law family tend(ed) to grant less time



Obligations of the Seller

Duty of the Buyer to Examine and to Notify (Art. 38-40 CISG)

- **Quality of examination**
 - Problem: Did buyer examine the goods properly?
 - Buyer must use **methods which are suitable to detect non-conformities**
 - **Does buyer need to hire an expert?**
 - How many goods need to be examined? And how?



Obligations of the Seller

Duty of the Buyer to Examine and to Notify (Art. 38-40 CISG)

- **Beginning of notification period (Art. 39(1) CISG)**
 - Buyer must **notify seller within a reasonable time**
 - Notification period begins when buyer either:
 - discovers non-conformity or
 - should have discovered non-conformity



Obligations of the Seller

Duty of the Buyer to Examine and to Notify (Art. 38-40 CISG)

- **Length of notification period (Art. 39(1) CISG)**
 - Disputed
 - Rule of thumb for length of notification period (for non-perishable goods): 1 month (disputed)
 - Common Law courts tend(ed) to grant more time
 - Courts from the German Law family tend(ed) to grant less time
- **Quality of notification (Art. 39(1) CISG)**
 - Specification of the nature of lack of conformity
 - Often high requirements in practice



Obligations of the Seller

Duty of the Buyer to Examine and to Notify (Art. 38-40 CISG)

- Legal consequence in case of violation:
 - **Buyer loses all remedies arising from non-conformity (Art. 35 CISG)**
- **Exception 1 (Art. 40 CISG)**
 - Seller knew or should have known of lack of conformity and did not disclose to buyer
- **Exception 2 (Art. 44 CISG)**
 - Reasonable excuse (hardly ever applied successfully)
 - If applicable: Price reduction and damages (expect loss of profits)



Obligations of the Seller

Duty of the Buyer to Examine and to Notify (Art. 38-40 CISG)

- Do not forget the **2-year cut-off period of Art. 39(2) CISG**
 - Starts with delivery
 - Cannot be stopped or interrupted (unlike limitation periods)
 - Ex-officio application
 - In practice very important
 - Strong argument for the seller *not* to exclude the CISG



Obligations of the Seller

Third party rights (Art. 41, 42 CISG)

- Art. 41, 42 CISG deal with legal defects (defects in title) of the goods
- In practice of great importance (burden of proof on buyer)
- Read both provisions carefully
- Similar to material defects (Art. 38, 39 CISG) Art. 43 CISG foresees a duty to examine and to notify any defects in title
- Art. 41 and 42 CISG regulate general defects in title:
 - General rule: seller must deliver goods which are ***free from any right or claim of a third party*** (Art. 41 CISG)
 - Special rule for ***industrial property rights*** or other ***intellectual property rights*** of third party (Art. 42 CISG)



Obligation of the Seller

Third party right: General rule of Art. 41 CISG

- General rule: seller must deliver goods which are ***free from any right or claim of a third party*** (Art. 41 CISG)
- Exception: buyer agrees to take goods subject to that right or claim
- Core question is whether a third party ***can prevent, or claims to be able to prevent***, buyer from having quiet enjoyment of the sold goods
- Not applicable to industrial property or other intellectual property (then Art. 42 CISG)
- Invent an example



Obligations of the Seller

Third party right: General rule of Art. 41 CISG

- What are rights or claims of a third party?
 - Can be “rights in rem” and “rights in personam”
 - Security rights of a third party, lien
 - Seller is not owner of sold goods (= he cannot transfer the property in the goods)
- Knowledge of seller about third party rights irrelevant
- No territorial restrictions
- Problem case: Likelihood of third parties’ claim to be successful of importance for Art. 41 CISG?
 - Frivolous claims?
 - Prevailing opinion says even in that case Art. 41 CISG is violated
 - Tip: Seller should inform buyer even about frivolous claims (to exclude Art. 41 CISG liability)



Obligations of the Seller

Third party right: Special rule of Art. 42 CISG

- Read Art. 42: What is the purpose of the provision?
- **Purpose of Art. 42 CISG:**
 - **Limitation of seller's responsibility** in comparison to general liability for defects in title according to Art. 41 CISG with respect to industrial or intellectual property rights
 - **(Subjective) Limitation 1:** Seller knew or could not have been unaware at the time of contract conclusion about infringements of industrial or intellectual property rights (Art. 41 CISG is different in this respect)
 - **(Territorial) Limitation 2:** Just some markets are relevant (see Art. 42(1) (a) and (b) CISG)



Obligations of the Seller

Third party right: Special rule of Art. 42 CISG

- ***What are industrial or intellectual property right at all?***
 - patents
 - copyrights
 - industrial design
 - trademarks
 - commercial names
 - trade secrets
 - right to names and personality rights
 - According to prevailing opinion (by analogy): right to names and personality rights under Art. 42 CISG



Obligations of the Seller

Third party right: Special rule of Art. 42 CISG

- ***(Subjective) Limitation 1:***
 - ***Seller knew or could not have been unaware*** at the time of contract conclusion about infringements of industrial or intellectual property rights
- ***(Territorial) Limitation 2:***
 - ***Law of state where goods will be resold*** or otherwise used, if it was contemplated by parties at time of conclusion of contract that goods ***would be resold or otherwise used in that state***
 - in any other case, under ***law of state where buyer has his place of business***



Obligations of the Seller

Third party right: Special rule of Art. 42 CISG

- **Exclusion of seller's liability Art. 42(2) CISG:**
 - If at time of conclusion of contract **buyer knew or could not have been unaware of right or claim** (like Art. 35(3) CISG for material defects); or
 - Right or claim results from seller's compliance with **technical drawings, designs, formulae or other such specifications furnished by the buyer**
- **Art. 43 CISG establishes notification duty like Art. 39 CISG**



Obligations of the Buyer

Paying the Price (Art. 53-59 CISG)

- Art. 53 CISG: *two obligations of buyer*
 - (1) *Paying price*
 - (2) *Taking delivery* (both not regulated by Incoterms 2020)
- *Time of payment (Art. 58, 59 CISG):*
 - Not often problem in practice
 - Why? = normally fixed in contract (Art. 59 CISG)
 - If time to pay not fixed in contract?
 - General rule (Art. 58 CISG):
 - As soon as *goods (or related documents) have been made available to buyer*



Obligations of the Buyer

Paying the Price (Art. 53-59 CISG)

- ***Content of obligation to pay price (Art. 54 CISG):***
 - Includes all measures agreed upon in contract to enable payment
 - E.g. duty to provide letter of credit or bank guarantee of payment
- ***Place of payment (Art. 57 CISG):***
 - General rule (if not agreed otherwise):
 - → Seller's place of business (different Art. 31(c) CISG for seller's obligations)



Obligations of the Buyer

Taking Delivery (Art. 60 CISG)

- Buyer's obligation to ***take delivery*** consist of **two elements** (Art. 60 CISG):
 - ***(1) Undertaking all acts which can be expected to enable seller to make delivery***
 - e.g. keeping facilities ready for delivery as oil tanks/ storage place
 - ***(2) Take over goods (factually)***



Remedies



Remedies

Introduction: Main Features

- (1) **Damages** not the only main remedy (unlike Common Law)
- (2) **Specific performance** ‘regular’ remedy (unlike Common Law)
- (3) **No differentiation** between various legal figures of impairment of performance (unlike many Civil Law systems)
 - Like impossibility, defect in quality or delay



Remedies

Introduction: Main Features

- **(4) Sole requirement: breach of contract**
 - Regardless of fault (unlike most Civil Law systems for damages)
- **(5) Only one differentiation: breach fundamental or not (Art. 25 CISG)?**
 - **Not type** of breach, but **weight** of breach is important
 - Read Art. 25 CISG



Remedies

Introduction: Fundamental Breach (Art. 25 CISG)

- Read Art. 25 CISG
- Provision has the following limbs:
 - (1) **Breach of contract** (objective limb)
 - (2) **Substantial detriment** to the other party of what he is entitled to expect (objective limb)
 - (3) Result of breach must be **foreseeable** for breaching party or reasonable person of the same kind in the same circumstances (subjective limb)
- Is it clear now when there is a fundamental breach or not?



Remedies

Introduction: Fundamental Breach (Art. 25 CISG)

- Still not easy to decide when a breach is fundamental or not
- Idea derives from Common Law with the differentiation breach of a condition and breach of a warranty
- Typical breaches of contracts considered to be fundamental:
 - **(1) Goods are defective in title (see Art. 41 and 42 CISG)**
 - it cannot be expected that buyer is able to make use of goods in another manner
 - **(2) Seller refuses to deliver goods at all**
 - **(3) Buyer refuses to accept goods without any legal reason**
 - **(4) Delayed delivery is normally not a fundamental breach**
 - unless buyer's interest in exact compliance with delivery dates is decisive ("time is of the essence" or "Fixgeschäft")



Remedies

Introduction: Fundamental Breach (Art. 25 CISG)

- Normally the most problematic subject area here: Leads non-conformity of a good (Art. 35 CISG) to a fundamental breach?
- It depends on the circumstance
- But what is clear is that non-conformity does not lead automatically to fundamental breach
- Examples (for non-fundamental breaches):
 - Shoe producer is delivering shoes of a wrong size
 - Goods are not organic as agreed
 - Shirts have a different color



Remedies

Introduction: Fundamental Breach (Art. 25 CISG)

- So normally non-conformity will not lead to a fundamental breach
- Unless buyer cannot make use of the goods at all
- Examples (for fundamental breaches):
 - Violation of product/food safety standards (see German mussels-case)
 - Delivery of non-organic food to a “organic food only” supermarket
 - Delivery of small shoes to a “tall persons only” supermarket
- You see: circumstances fundamental



Remedies

Buyer's Remedies (Art. 45-52 CISG): Overview (Art. 45 CISG)

- (1) Right to require **performance** (Art. 46 CISG)
- (2) **Avoidance** (Art. 49 CISG)
- (3) **Price reduction** (Art. 50 CISG)
- (4) **Damages** (Art. 45 (1)(b) CISG)

- Plus the independent remedy **right to require interest** (Art. 78 CISG)
 - Advantage: No losses need to be proved



Remedies

Right to require performance (Art. 46 CISG)

- 3 different rights to require performance (Art. 46 CISG):
 - **General right to require performance** (Art. 46(1) CISG)
 - **Delivery of substitute goods** (Art. 46(2) CISG)
 - Fundamental breach required
 - **Repair** (Art. 46(3) CISG)
- Requirement for all these rights:
 - **Additional period of time** for performance set by buyer (Art. 47 CISG, 'Nachfrist')



Remedies

Avoidance (Art. 49 CISG)

- Avoidance in two situations:
 - (1) **Fundamental breach** (Art. 49(1)(a) CISG), or
 - (2) **Non-delivery** (Art. 49(1)(b) CISG):
 - Within additional period of time (Art. 47(1) CISG), or
 - Refusal of seller to deliver within that set additional fixed period



Remedies

Avoidance (Art. 49 CISG)

- Time for avoidance declaration:
 - Within a **reasonable period** (Art. 49(2) CISG)
- Consequences if time for declaration has lapsed:
 - Buyer loses his right to avoid contract
 - Other remedies remain
- For consequences of avoidance → Art. 81-84 CISG



Remedies

Avoidance (Art. 49 CISG)

- **Basic rule** (Art. 81, 82(1) CISG):
 - Parties are **released** from their obligations
 - Parties need to **return** what they got
 - No avoidance if goods **cannot be returned in same conditions**



Remedies

Avoidance (Art. 49 CISG) and Price Reduction (Art. 50 CISG)

- **Exceptions (Art. 82(2) CISG):**
 - (1) Impossibility of returning goods **not due to buyer's act/omission** (= act of god)
 - (2) Goods have perished/deteriorated as **result of examination**
 - (3) Goods have been **sold in normal course of business or consumed or transformed by buyer in normal course of use (but what happens then?)**
- For **price reduction** see Art. 50 CISG (Civil Law element)



Remedies

Damages (Art. 45(1)(b) CISG)

- **Strict liability approach** (unlike most Civil Law systems)
- Only breach of contract/no fault
- Legal consequences → Art. 74-77 CISG
- Principle of full compensation, including loss of profit (Art. 74 s. 1 CISG)



Remedies

Damages (Art. 45(1)(b) CISG)

- **Limitations for damages:**
 - (1) **Foreseeability** of loss > remoteness-test (Art. 74 s. 2 CISG)
 - (2) Failure to perform caused by **act or omission of other party** (Art. 80 CISG)
 - (3) Party's obligation to **mitigate losses** (Art. 77 CISG)
 - (4) **Objective impediment** (Art. 79 CISG)?
 - E.g. sabotage, flood, hurricane
 - Other remedies are not excluded (Art. 79(4) CISG)
 - Actual problem: COVID-19, wars and export sanctions as force majeure?



Remedies

Seller's Remedies (Art. 61-65 CISG): Overview (Art. 61 CISG)

- ***Almost same structure as buyer's remedies*** (Art. 61 CISG):
 - (1) Right to require ***performance*** (Art. 62 CISG)
 - (2) ***Avoidance*** of contract (Art. 64 CISG)
 - (3) ***Compensatory damages*** (Art. 61(1)(b) CISG)
 - Accumulation with other remedies possible (Art. 61(2) CISG)
- Of course ***no price reduction***



Remedies

Seller's Remedies (Art. 61-65 CISG): Right to Require Performance (Art. 62 CISG)

- ***For any kind of buyer's breach of contract:***
 - Right to demand performance (Art. 62 CISG)
 - Exception: claim inconsistent with other remedies (e.g. with avoidance)
 - Of course ***no repair or delivery of a substitute***
- Enforcement of claim for performance can be bound to a requirement to set a time limit (Art. 63 CISG)



Remedies

Seller's Remedies (Art. 61-65 CISG): Avoidance of contract (Art. 64 CISG) and damages (Art. 61(1)(b) CISG)

- ***Avoidance of contract*** (Art. 64 CISG):
 - Art. 64 CISG: Same structure as buyer's avoidance (Art. 49 CISG)
 - For consequences of avoidance of contract see Art. 81-84 CISG and the previous slides for buyer's remedies
- ***Compensatory damages*** (Art. 61(1)(b) CISG):
 - Same as buyer's remedies



Impact of COVID-19, wars and sanctions on International Sales Contracts



Impact of COVID-19, wars and sanctions

Introduction

- Main question: Impact of COVID-19 on existing international sales contracts
- But similar and pressing topic: War or war-related embargos
- CISG follows ***strict liability approach*** (you already know)
 - In principle only one requirement: breach of contract
 - But to counterbalance limitless liability: Art. 79 CISG (exemption from liability for force majeure (and hardship?))
 - We discuss Art. 79 CISG now / then contractual force majeure (and hardship) clauses



Impact of COVID-19, wars and sanctions

Exemption from liability under Art. 79 CISG: General Structure

- Art. 79(1) CISG: Three prerequisites of exemption
 - ***Uncontrollability***
 - ***Unforeseeability***
 - ***Unavoidability***
- Art. 79(3) CISG: Exemption from liability for time impediment exists
- Art. 79(4) CISG: Duty to notify impediment
- Art. 79(5) CISG: Exemption from claim for damages



Impact of COVID-19, wars and sanctions

Exemption from liability under Art. 79 CISG: Legal requirements of Art. 79(1) CISG

- In the past: few cases where Art. 79 CISG was applied successfully
- General opinion: Art. 79 CISG has high requirements
- Can (some) COVID-19 cases and wars and sanctions fulfil those requirements?
- Remember the three prerequisites:
 - ***Uncontrollability***
 - ***Unforeseeability***
 - ***Unavoidability***



Impact of COVID-19, wars and sanctions

Exemption from liability under Art. 79 CISG: Legal requirements of Art. 79(1) CISG

- **(1) Uncontrollability**
 - Pandemic *the* example for impediment beyond control
 - Wars and war-related sanctions as well
- **(2) Unforeseeability (most discussed here)**
 - Difference COVID-19 and SARS (2002, 2003) / MERS (2012)?
 - What about wars and export embargos etc.?
 - Crucial: Where and when? / no one-size-fits-all answer
 - Kind *and* extent of impediment must be unforeseeable



Impact of COVID-19, wars and sanctions

Exemption from liability under Art. 79 CISG: Legal requirements of Art. 79(1) CISG

▪ *(3) Unavoidability*

- Only few case law on that
- Unavoidability: if obligor cannot secure his ability to perform with all reasonable measures (eg hiring additional staff)
- So reasonableness of avoidance measures is key
- Extra costs do not lead directly to unavoidability



Impact of COVID-19, wars and sanctions

Exemption from liability under Art. 79 CISG: Risk allocation in specific COVID-19 cases (and war and sanction cases)

- ***(1) Production stoppages***
 - Caused by national measures (like in Wuhan)
 - But when caused by internal measures of seller only?
- ***(2) Disrupted supply chain***
 - Risk allocation seller
 - Unless also alternative supply chains are unavailable at the market



Impact of COVID-19, wars and sanctions

Exemption from liability under Art. 79 CISG: Risk allocation in specific COVID-19 cases (and war and sanction cases)

- **(3) Illiquidity buyer**
 - Risk allocation buyer
 - Unless buyer proves his illiquidity is *only* caused by COVID-19, war or sanctions
 - Hard for buyer to prove



Impact of COVID-19, wars and sanctions

Exemption from liability under Art. 79 CISG: Risk allocation in specific COVID-19 cases (and war and sanction cases)

- **(4) *Disrupted transport***
 - Risk allocation seller (if in charge for transport)
 - Even if prices for transport increase considerably
 - Unless alternative transport is unavailable at the market
- **(5) *National export restrictions***
 - Eg German restriction to export face masks, war related export restrictions
 - Can trigger Art. 79 CISG

Impact of COVID-19, wars and sanctions

Exemption from liability under Art. 79 CISG: Risk allocation in specific COVID-19 cases (and war and sanction cases)

- **(6) Economic hardship?**
 - = Unforeseen event that fundamentally alters equilibrium of contract resulting in an excessive burden for one party
 - Examples: Hyperinflation or *extreme* increase of purchase price
 - Problem: Covered by CISG and Art. 79 CISG at all?



Impact of COVID-19, wars and sanctions

Exemption from liability under Art. 79 CISG: Hardship cases

- Case law on economic hardship for purchase price increase:
 - Belgian Court of Cassation: *70 % suffices* (CISG-online no. 1963)
 - French Court of Cassation: *115 % insufficient* (IHR 2017, 111, 113)
 - Court of Appeal Hamburg: *300 % insufficient* (BeckRS 1997, 15842)
- COVID-19, war and embargos will not often lead to economic hardship
- But not impossible (e.g. price for FFP2 face masks increased up to 3000%)



Impact of COVID-19, wars and sanctions

Exemption from liability under Art. 79 CISG: Legal consequences

- What happens if some situations really trigger applicability of Art. 79(1) CISG?
- For legal consequences see Art. 79(1), (3) and (5) CISG (read them)
- ***(1) No claim for damages***
- ***(2) Problem: Penalty clauses also covered?***
 - According to (English) wording no
 - Interpretation of penalty clauses justifies different result?



Impact of COVID-19, wars and sanctions

Exemption from liability under Art. 79 CISG: Legal consequences

- **(4) Other remedies remain:**
 - Price reduction (Art. 50 CISG)
 - Interest on money due (Art. 78 CISG)
 - Most relevant: Avoidance (Art. 49 CISG)
 - But only if fundamental breach (Art. 25 CISG)
 - Won't happen often for COVID-19/war related delays



Impact of COVID-19, wars and sanctions

Exemption from liability under Art. 79 CISG: Legal consequences

- ***(5) Duty to perform***
 - Suspended for time impediment exists
- ***(6) Problem: Duty to renegotiate / contract adaption in hardship cases?***
 - Opinion 1: Outside scope of CISG (Art. 4 CISG or Art. 7(2) 2nd alternative CISG)
 - Opinion 2: Inside CISG
 - PICC (Art. 6.2.3 PICC) as general principle (Art. 7(2) 1st alternative CISG or usage (Art. 9 CISG)?
 - Or as expression of good faith (Art. 7(1) CISG)?



Impact of COVID-19, wars and sanctions

Contractual force majeure (and hardship) provisions

- Derogation from Art. 79 CISG possible (= Art. 6 CISG)
- Often used in practice?
- Numerous different contractual provisions
- Inclusion according to Art. 14 ff. CISG
- Interpretation according to Art. 8 CISG
- But validity of provisions outside CISG (Art. 4 CISG)



Impact of COVID-19, wars and sanctions

Contractual force majeure (and hardship) provisions

- ICC strongly recommends inclusion of such provisions
- ICC Model Clause Force Majeure Clause 2003 (now 2020)
- ICC: Both versions cover pandemics (as COVID-19)
- Prerequisites for force majeure similar to three tier test of Art. 79 CISG (but more detailed)
- See for more details: <https://iccwbo.org/wp-content/uploads/sites/3/2020/03/icc-forcemajeure-hardship-clauses-march2020.pdf> n



Impact of COVID-19, wars and sanctions

Conclusions

- Interpretation of Art. 79 CISG is deciding the COVID-19 cases/war and embargo cases
- Not all COVID-19/war/embargo related disruptions of international contracts will automatically be force majeure or hardship
- But on a case-by-case basis *some* of those disruptions can trigger the applicability of Art. 79 CISG
- Courts and arbitral tribunals are dealing with these questions right now
- Further reading: Janssen/Wahnschaffe, COVID-19 and international sale contracts: unprecedented grounds for exemption or business as usual?, in: (2020) *Uniform Law Review (ULR)*, pp. 466-495



To exclude or not to exclude the CISG?



To exclude or not to exclude the CISG?

- My typical conversation with legal practitioners about CISG was until a few years ago: “We exclude it anyway.”
- Main reasons for opt-out I heard:
 - I don’t know the CISG
 - “My” national law is “the better law”
- Is my experience just a coincidence?
- No, as three new empirical legal studies demonstrate



To exclude or not to exclude the CISG?

Exclusion of CISG among attorneys and in-house lawyers

| Meyer (RabelsZ 2021, 357 ff.) | Lehnert/Schäfer (IHR 2021, 145 ff.) | Kampf/Marenkov (IHR 2021, 2 ff.) |
|--|--|---|
| <p>Germany: Exclusion rate 53 %</p> <p>Switzerland: Exclusion rate 56 %</p> <p>Austria: Exclusion rate 75 %</p> | <p>Germany: Exclusion rate 63 %</p> | <p>Germany: 36 % are always excluding CISG 14 % depending on the circumstances</p> |

To exclude or not to exclude the CISG?

| Mentioned arguments for CISG exclusion | Evaluation |
|--|---|
| CISG is unknown to me | Worst argument Unreflected or even blind exclusions are „cursed“ and can lead to liability |
| CISG is in favour of seller / of buyer | Neutral law with pros and cons for both sides Con for seller/pro for buyer: <ul style="list-style-type: none">- Strict liability (art. 78, 79 CISG) Pros for seller/con for buyer: <ul style="list-style-type: none">- Fundamental breach requirement for avoidance and right to require a substitute good (art. 46(2), 49 CISG)- Cut-off period (art. 39(2) CISG) |

To exclude or not to exclude the CISG?

| Mentioned arguments for CISG exclusion | Evaluation |
|--|---|
| Confusing structure | Not really |
| Use of open terms | Correct, but: Also national laws operate with open terms Specify open terms if necessary (art. 6 CISG) |
| Few case law and academic writing | Not really: More than 6,400 published judgments and arbitral awards More than 10,000 articles available for free |

To exclude or not to exclude the CISG?

| Mentioned arguments for CISG exclusion | Evaluation |
|---|---|
| Client wants to exclude it | Fair argument, but: Inform client about pros and cons of exclusion Otherwise this can lead to liability |
| CISG is incomplete | Fair argument, but: You can choose the law applicable for legal aspects not governed by CISG Hence, a CISG plus national law solution might be a good option |

To exclude or not to exclude the CISG?

Further arguments to consider before excluding the CISG

- No need to negotiate applicable law
- CISG in many language versions available
- CISG is tailor-made for *international* sales law
- CISG and Incoterms 2020 fit together well
- Unlike many domestic laws (eg. the right to redress) CISG provides full party autonomy (art. 6 CISG)
- Dynamic national law vs. static CISG



To exclude or not to exclude the CISG?

The decision to (not) exclude the CISG: My personal stance

- I don't want to convince you to never exclude CISG
- But I would like to create awareness
- Make a case-by-case decision/evaluate pros and cons
- Not every CISG exclusion is per se „cursed“, but an unreflected one is and can professional malpractice



Case Studies



Case Study ‘The Shower Cabinets’

S owns a factory in Shanghai specialising in bathroom furnishing. From Shanghai, its products are exported all over the world. B operates several do-it-yourself stores in Germany. On the 10th of March 2023, he orders 200 “Monsoon” shower cabinets at a total price of 60,000 RMB using an electronic order form on S’s homepage. S confirms the transaction via email. Both agree that the contract will be subject to “German law”.

The container with the goods is delivered to B on 8th of April 2023. B inspects the goods on 18th of April 2023. To his horror, he discovers that the transparent plastic panelling used for the doors do not comply with German statutory requirements relating to breakage resistance. As a result, the shower cabinets cannot be sold in Germany. Apart from this, B notices also that the sealant used is unusually porous and wears out in no time at all.

In the meantime, B has to take care of many other matters in his company and only gets round to writing the following email to S on the 15th of May 2023: *“Your shower cabinets are a total write-off! They are so badly finished that they fall to pieces just by looking at them! The plastic panelling is not even permitted in Germany. Under these circumstances I have no choice but to avoid the contract immediately!”*

S reads B’s message on the same day and is shocked. After all, so much time had passed since the delivery that he did not think B would make any claims. Besides, S says that B’s notice does not satisfy the requirements of the CISG anyway and it’s not his fault that German safety standards are so strict. He has never supplied these products to German customers before but his product satisfies all applicable Chinese standards and can be freely sold in his country (which is true).

Can S demand that B pays for the shower cabinets in accordance with Art. 62 CISG? What are the main legal questions to be answered? (Germany and China are both CISG member states)



Case Study 'The Shower Cabinets'

Claim S against B according to Art. 62 CISG to pay price?

A: CISG's applicability

- Territorial sphere of application: Art. 1(1)(a) CISG (+)
- Sales of goods contract (+)
- No exception according to Art. 2 CISG
- No opt-out (Art. 6 CISG) = Choice of „German law“ no implied CISG exclusion



Case Study 'The Shower Cabinets'

B: Formation

- Not problematic

C: Loss of right to claim payment due to avoidance of contract by B (Art. 49(1)(a) CISG)?

- Avoidance declaration (+)
- Breach of contract?
 - Obligation = delivery of conforming goods (Art. 35 CISG)



Case Study ‘The Shower Cabinets’

C: Loss of right to claim damage due to avoidance of contract by B (Art. 49(1)(a) CISG)?

- Goods do not conform with German statutory requirements relating to breakage resistance. Nonconformity under Art. 35(2)(a) CISG?
 - Problem: Fit for ordinary use in country of seller or buyer?
 - German Supreme Court („Mussels-case“): in principle in country of seller, because he cannot know all statutory requirements in country of buyer
 - = no nonconformity here
- But: Defective sealant is a nonconformity under Art. 35(2)(a) CISG



Case Study 'The Shower Cabinets'

C: Loss of right to claim damage due to avoidance of contract by B (Art. 49(1)(a) CISG)?

- But is this also a fundamental breach under Art. 25 CISG?
 - Yes, as goods cannot be sold like that at all (different opinion ok)
- Loss of right to rely on a lack of conformity under Art. 39(1) CISG
 - Examination (Art. 38(1) CISG): period of ten days ok
 - Notification (Art. 39(1) CISG): one month still ok
 - Specification of nonconformity (Art. 39(1) CISG)
 - B did **not specify nonconformity sufficiently** („total write-off“, „fall to pieces“)



Case Study 'The Shower Cabinets'

C: Loss of right to claim damage due to avoidance of contract by B (Art. 49(1)(a) CISG)?

- Loss of right to rely on a lack of conformity under Art. 39(1) CISG
 - Art. 40 CISG or Art. 44 CISG not applicable here
 - Duty to notify not fulfilled
 - B lost all rights arising from nonconformity

D: Result

- S can demand full payment against B according to Art. 62 CISG



Case Study 'The Grand Opening'

Scenario 1

Chinese company A has a grand opening of a shopping mall in Beijing on 10 October 2023 and wants to start a huge advertisement campaign for this important event. A's idea is to hang 200 huge posters all over the city with the slogan *"Come to our grand opening on 10 October 2023!"* to make this event public and to attract many people. A finds out that the Japanese company B produces the best posters of that size and asks B to make an offer for the production of the 200 posters. B sends the offer in an e-mail including the following clause: *"My standard contract terms apply."* However, the standard contract terms are not attached to the offer. Instead, there is only a hyperlink which leads to a HTML-version of the standard contract terms (thus they cannot be downloaded as a PDF). Clause 4 of B's standard contract terms reads as follows: *"A delayed performance of B does not give the buyer the right to avoid the contract."* A accepts B's offer without taking the time to read B's standard contract terms on the internet. The contractually agreed time of delivery of the 200 posters is 20 September 2023. Very unfortunately for A, B has problems within the production process and delivers A the promised posters on 11 October 2023. A is furious about this delay and writes immediately to B: *"I cannot accept your delayed performance. Under these circumstances I do not want the contract anymore. Please take your posters back."* B instead requires payment of the price. He replies that the quality of the posters is completely in conformity with the contract (what is true), that such a delay cannot lead to avoidance of the contract and that the right to avoid the contract is excluded anyway under his standard contract terms. Has B the right to require payment of the price from A under Art. 62 CISG? China and Japan are both member states of the CISG.



Case Study 'The Grand Opening'

Scenario 1

- One should discuss applicability of the CISG under **Art. 3(1) CISG** as posters still need to be produced (at the end applicability of CISG given)
- **Contract conclusion not a problem**
- No right to demand the payment of the price under Art. 62 CISG if A avoided the contract **under Art. 49(1)(a) CISG**
 - Problem area for avoidance of the contract: fundamental breach of B under Art. 25 CISG
 - Conclusion: there is a **fundamental breach** as posters cannot be used for the purpose anymore
 - All other requirements of Art. 49 CISG given (e.g. timely declaration of avoidance)



Case Study 'The Grand Opening'

- One should then discuss whether the right to avoid the contract is excluded because of B's standard contract terms
 - Problem here is the ***incorporation of the standard contract terms***: only hyperlink (not as downloadable PDF)
 - According to German Supreme Court a hyperlink which leads to standard contract terms is insufficient (however there are diverging opinions)
 - If we follow this decision the right to avoid the contract is not excluded



Case Study 'The Grand Opening'

Scenario 2

Like scenario 1, but this time B delivers the posters on 22 September 2023.



Case Study 'The Grand Opening'

Scenario 2

- One should see that in that scenario there is ***no fundamental breach under Art. 25 CISG*** as the posters can still be used to promote the grand opening
- No fundamental breach means in this case no right to avoid the contract under Art. 49 CISG = A must in principle pay the price
- But A could still ask for damages in this case



Case Study 'The Grand Opening'

Scenario 3

Like scenario 1, but this time B delivers the posters (including the invoice) on 7 October 2023 and does not mention his standard contract terms when making the offer. Instead, he refers to his standard contract terms (including clause 4) in the invoice only (which are printed on the backside of the invoice).



Case Study 'The Grand Opening'

Scenario 3

- One should see that this is a ***borderline case regarding the fundamental breach under Art. 25 CISG***
 - Posters can still be used to promote grand opening, but only for a very short period
 - One need to discuss this issue
- Another problem area (if one thinks this is a fundamental breach): ***Exclusion right to avoid the contract under B's standard contract terms?***
 - No, as they were sent after contract conclusion



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