

**UNITED NATIONS CONVENTION ON INTERNATIONAL SALE OF GOODS
An International Law As Domestic Law**

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The United Nations Convention on International Sale of Goods (CISG) promulgates a set of uniform and coherent rules according to which private parties in different countries can sell and buy goods to and from one another. The CISG is the functional equivalent at the international level of the Uniform Commercial Code (UCC) at the domestic level. The United States ratified CISG as of December, 1986 and CISG took effect on January 1, 1988. CISG is a “self-executing” treaty so that CISG became part of the federal law of the United States as soon as it took effect.¹ No implementing legislation was necessary to make CISG binding as a matter of law. U.S. practitioners have been found to be particularly ignorant of CISG primarily because of a pervasive failure to teach CISG in contract courses.² An estimated two-thirds of international trade is conducted between and among the more than 70 nations which are signatories to CISG. U.S. practitioners involved in international trade must possess at least a professional working knowledge of CISG.

CISG in Concept

The CISG is an international code established by treaty so that it is superior to the national law of the signatory nations, it is meant to be applied in a uniform manner and not modified to conform with national law and it is a default code which governs only if and to the extent that the parties to an international sales contract have not manifested an agreement on an issue governed by CISG so that freedom of contract is preserved.

Each signatory nation must assure that either its national law conforms to the CISG or that CISG is enforced within the nation despite national or local laws that may be contrary to or inconsistent with CISG. This concept is particularly significant in signatory nations that have a federal system such as the United States in which matters such as the sale of goods are governed by state law rather than by the federal law. Practitioners and courts must look to and be bound by the jurisprudence that the courts of all signatory nations have developed in the years since the CISG took effect. Because CISG is a default code rather than a mandatory code, the practitioner must know enough about the provisions of CISG to counsel the client as to which provisions, if any, are acceptable and which are unacceptable such that the parties will seek to draft around the CISG provisions to avoid any unacceptable CISG provision.³

Transactions to which CISG Applies

Whether or not CISG applies is determined by the nature and substance of the transaction in question. The transaction must satisfy each of the following requirements to be governed by CISG:

- A. The transaction must be a contract for the sale of goods and not for labor or services,
- B. At least two of the parties must have their places of business in different States, or the rules of private international law apply the law of a Contracting State and
- C. Each of the States in which a party has its place of business is a Contracting State.⁴

Sale of Goods

The CISG does not define the term “sale”. However, CISG sets forth obligations which are imposed on a seller and a buyer from which a definition of a “sale” can be inferred. The seller must transfer ownership and possession of goods to the buyer and, in exchange, the buyer must

pay the purchase price and take ownership and possession of the goods.⁵ Gifts of goods or transactions in which there is no bargained for exchange in a commercial context are not sales and not governed by CISG.

Although CISG does not define “goods”, the term means material items that are movable and tangible.⁶ Any item that is immovable such as real estate is not a “good” so that a real estate transaction cannot be governed by CISG. Items which contain usable digital or electronic impulses such as software, discs or tapes which the buyer intends to distribute in general commercial are governed by CISG. However, software, discs or tapes which contain usable digital or electronic impulses customized to the unique specifications of the buyer are not “goods” subject to CISG. “Goods” that are to be manufactured or produced are subject to CISG unless the buyer provides a substantial portion of the materials from which the goods are to be manufactured or produced.⁷

Even if the transaction meets the definition of a contract for the sale of goods, the transaction is not governed by CISG if the buyer intends to use the goods for personal or household purposes and the seller knows or should have known that the buyer intended to use the goods for those purposes.⁸ Contracts in stocks, commercial paper of any kind, aircraft, vessels or electricity are specifically excluded from CISG.⁹ Contracts for the exchange of goods by auction or levy are specifically excluded from CISG.¹⁰

Contracts that are in essence distribution agreements are excluded from CISG.¹¹ In a distribution agreement the bargained for exchange is the ability of the buyer to re-sell the goods of seller at a future time and not the goods themselves. Distribution agreements typically contain provisions on the exclusive re-sell rights of buyer, compensation to buyer based on the volume of

re-sales, minimum or maximum amounts of goods that the buyer must purchase and standards of performance. However, unlike contract for the sale of goods, distribution agreements either do not set specific quantities and specific prices or leave pricing on re-sale to the discretion of the buyer.¹²

Contracts for the supply of labor or services are excluded from CISG if the preponderant part of the obligations of the seller consists of labor or services rather than goods.¹³ Where the object of the contract is a good which must be constructed or assembled and the materials for the ultimate good are supplied by the seller then the contract is governed by CISG.

Places of Business in Different Contracting States or Operation of National Law

The CISG applies to a transaction in which the parties have places of business in different Contracting States or the national law of a Contracting State mandates that the CISG applies. A “place of business” means a place of continuous and deliberate activity rather than a transient and occasional place. Each party must know or have reason to know that the other party has a place of business in a different Contracting State. If a seller deals with an agent of buyer whose identity and location are not disclosed to seller or the fact that the buyer has its place of business in a different Contracting State is not evident from the contract, then CISG does not apply.¹⁴ If a party has a place of business in more than one Contracting State, then the place of business that bears the closest relationship to the contract and the performance of the contract is the place of business for CISG purposes.¹⁵ If a party does not have a place of business, then the habitual residence of the party is used and substitutes for a place of business.¹⁶

Where a party has a place of business in a Contracting State and the other party has a place a business in non-Contracting State the CISG can still apply if the rules of private

international law mandate that the law of the Contracting State applies.¹⁷ Sometimes referred to as the conflicts of law provision, the effect of this provision is that where international law mandates that the national law of Contracting State applies to a contract, CISG, as part of the national law of the Contracting State, applies to the contract despite the fact that the other party has its place of business in a non-Contracting State.

The conflicts of law provision is controversial. The CISG enables a Contracting State to take a reservation to this provision.¹⁸ The United States as well as China (PRC), Singapore, St. Vincent & Grenadines have taken such a reservation so that neither the United States nor any of the foregoing Contracting States is bound by the conflicts of law provision. The effect of the reservation is that CISG will never apply to a contract between a party with a place of business in the United States and a party with a place of business in a non-Contracting State. The conflicts of law provision becomes increasingly irrelevant as more nations become Contracting States.

Legal Issues Governed by CISG

The CISG governs only the formation of the contract and the rights and obligations of the seller and buyer under the contract.¹⁹ In the U.S., CISG preempts any state law that governs the rights and obligations of the seller and buyer. The CISG does not govern either the validity of the contract nor any effect the contract has on the property of the goods sold.²⁰ Issues such as the sufficiency of consideration, capacity and authority to contract and promissory estoppel are issues of validity and do not arise under CISG and are governed by the national law of the forum.²¹ The CISG does not govern any contract claim which is actually a tort claim. Claims such as negligent misrepresentation or tortious interference with a contractual advantage are not governed by CISG.²² The CISG does not govern any tort claim against the seller arising from the death or

injury of any person caused by the goods.²³

The contracts claims that are governed by CISG are strictly claims that the seller and buyer have against one another. CISG does not govern the claims of a third party who alleges a security interest in the goods which are the subject of the contract. Any such rights must be determined under the applicable national law which, in the United States, would be the relevant state version of the UCC.²⁴

If CISG does not address or resolve an issue, the forum hearing the matter must first look to the general principles upon which the CISG is based and then to the rules of private international law.²⁵ As a practical matter, this provision obligates the forum to consider the CISG decisions of forums in other Contracting States and not just the decisions of the Contracting State in which the forum is located. While case law from another Contracting State may not be binding, it is highly persuasive.²⁶

A forum in the U.S. may also look to case law which construes provisions of the UCC which are analogous to provisions of the CISG. While neither the provisions of the UCC nor the case law construing it are binding on the forum, those provisions and case law have persuasive value.²⁷

Formation of the Contract

The formation of a contract is a sequential process. The process of forming a contract consists of three elements which must be manifested in sequence. Those elements are a proposal, an offer and an acceptance. A contract is formed under CISG only if the three elements occur in sequence.

The CISG takes a practical approach to determine whether the elements have occurred.

No contract under CISG is required to be in any particular form. Neither the contract nor any offer or acceptance need be set forth in writing to be binding and enforceable.²⁸ The parties can agree to modify or terminate a contract.²⁹ If the contract is in writing and it contains a provision that requires that any modification or termination be in writing, then only a written modification or termination will be enforceable.³⁰ Oral contracts as well as contracts set forth in multiple writings are enforceable under CISG. For CISG purposes, a “writing” includes any form of electronic communication such as emails.³¹

The Proposal

Forming a contract begins with a proposal. The proposal is the affirmative act of a party to communicate an interest in initiating the contracting process to another party. The proposal is not intended to impose legal obligations on either party. It is merely a communication to which the recipient can respond or ignore without incurring any legal obligation of any kind.

The Offer

A proposal that is directed to one or more specific persons is or becomes an offer if it is sufficiently definite and the intent of the proposer to form a contract can be inferred from the proposal. A proposal is sufficiently definite to be an offer if it identifies the goods, fixes a price or a means of determining a price and fixes a quantity or a means for determining a quantity.³² Unless otherwise indicated by the proposer, if the proposal is directed to more than one specific person, then the proposal is not an offer even if it is sufficiently definite but merely an invitation to receive offers from the persons to whom it is directed.³³

The offer becomes an element of the contract when the offer is received by the person to whom it is directed.³⁴ As long as the offer is in the possession of the proposer or in transit it is

not an element of the contract and no contract can be formed. An offer can be unilaterally withdrawn by the proposer at any time before the offer is received without any legal consequence of any kind to the proposer.³⁵

Once the offeree receives the offer, the offer can no longer be withdrawn but the offeror can revoke the offer at any time as long as the offeree has not accepted the offer. If the offeror revokes the offer, then, just as with a withdrawal, there is no legal consequence of any kind to the offeror. An offer becomes irrevocable if the offer indicates on its face that the offeror will not revoke it.³⁶ An offer can also become irrevocable if an inference can be drawn from the facts or circumstances that the offeree relied reasonably that the offer was irrevocable and the offeree acted in reliance on the offer.³⁷ Even if the offer is irrevocable, it has no legal effect and no contract can be formed if the offeror receives a rejection of the offer from the offeree.³⁸

The Acceptance

Acceptance occurs by an affirmative statement of acceptance or conduct which indicates that the offer is accepted. Silence or inactivity does not manifest acceptance so that no contract is formed if the offeree ignores the offer.³⁹ The offeree must communicate the acceptance to the offeror in such a way that the acceptance can be deemed received by the offeror. The offeror must receive the acceptance either within the time set by the offeror or if no time is set then within a reasonable time given the means used by the offeror to communicate the offer.⁴⁰ The offeror may but is not required to deem an acceptance effective that is out of time by informing the offeree that the late acceptance is effective.⁴¹ Once the acceptance is communicated to and received by the offeree, the acceptance is effective and a contract is formed.⁴²

If the acceptance contains additions, limitations or modifications which materially alter the

terms of the offer, then the offeree has not accepted the offer but rather the offeree has made a counter-offer to the offeror and contract formation process begins. If the additions, limitations or modifications are not material, the manifestation of acceptance is effective and contract is formed. Material terms are changes in price, payment, quality, quantity, terms of delivery, extent of liability and settlement of disputes.⁴³

Obligations of Seller and Remedies of Buyer

The seller has three fundamental obligations under CISG. One, the seller must deliver the goods to the buyer, two, the seller must transfer title to the goods to buyer and, three, the goods must conform to the terms of the contract. The parties may and should agree on the terms and conditions of each of the foregoing obligations. If the parties do not agree then the seller is bound by the rules set forth in CISG.

Obligations of Seller

Delivery of Goods - The delivery obligations of seller consist of the place for delivery, time for delivery and the means of delivery.⁴⁴ If the buyer has not specified a place for delivery but has specified as carrier for the goods then seller must deliver the goods to that carrier.⁴⁵ If the buyer has not specified either a place for delivery or a carrier but the parties know at the time the contract is formed that the goods will be available at a particular place, then seller must place the goods at the disposal of buyer at that place.⁴⁶ In all other instances, the seller must place the goods at the disposal of buyer at the place of business that seller had when the contract was formed.⁴⁷ If the contract requires seller to arrange for the goods to be transported, then seller must make all arrangement as are necessary and appropriate under the circumstances. If seller is not required to effect insurance then seller must provide buyer will all information necessary for

buyer to effect insurance.⁴⁸ The seller must deliver the goods on the date set by the contract or within a time period set by the contract.⁴⁹ If no date or time period is set by the parties, then seller must deliver the goods within a reasonable time after the contract is concluded.⁵⁰

Transfer of Free Title to the Goods - Title is evidenced by legal documents such as bills of lading or bills of sale. The CISG does not require any particular form of document to pass title, although any entity financing the transaction may require particular documents. For CISG purposes, any document that demonstrates that the seller affirmatively and presently conveys title to buyer is sufficient to pass title. Whatever document is used to transfer title, seller is obligated to deliver such document to buyer. The seller must pass a title which is free from any right or claim whatsoever.⁵¹

Title Free from Intellectual Property Claims - The seller must deliver goods free from intellectual property rights or claims such as patent, trademark, copyright.⁵² The nature, substance and enforceability of the intellectual rights is determined under the law of the Contracting State of the buyer's place of business or in any other state in which both buyer and seller knew or the contract contemplated the goods would used or resold.⁵³ The obligation of seller with respect intellectual rights does not apply where buyer knew or must have known of the intellectual property right or claim or the goods were fashioned according to specifications which buyer gave to seller.⁵⁴ If buyer discovers a third party right or claim, buyer must notify seller of the third party claim in sufficient detail and within sufficient time for seller to defend against the claim.⁵⁵

Conforming Goods - The seller must deliver goods that conform to the contract so that buyer receives the benefit of the bargain *i.e.* the value buyer expects to receive in exchange for the

purchase price.⁵⁶ Goods conform to the contract as long as the goods are either fit for the purpose for which the goods are ordinarily used or fit for whatever purpose specified by buyer.⁵⁷ If buyer knew or must have known at the time the contract was concluded that the goods did not conform, seller is not liable for any non-conformance.⁵⁸

Fundamental Breach by Seller

A seller breaches a contract when it fails to perform each of its obligations under CISG. Not every breach is a breach that entitles buyer to a remedy. Only if seller commits a fundamental breach is buyer able to pursue the remedies of buyer. A fundamental breach is a breach which results in such detriment to the other party as to substantially deprive the other party of its bargained for expectation, unless the breaching party did not foresee and a reasonable person of the same kind in the same circumstances would not have foreseen such detriment.⁵⁹

Whether a breach by seller is fundamental will always be a question of fact under the circumstances. Compressors in air conditioners that did not meet contract specifications was a fundamental breach by seller.⁶⁰ Medical equipment that was denied entry into the U.S. because it did not satisfy U.S. regulations was a fundamental breach by seller.⁶¹

Remedies of Buyer

Referred to as “self help remedies” which are available without legal process, the buyer may either avoid the contract or adjust the price to reflect the diminution in the value that buyer receives because of the breach by seller. The buyer may also seek specific performance and damages but only through legal process.

Avoiding the Contract

The most effective and least costly remedy for buyer is to avoid the contract. The legal

effect of avoiding the contract is that buyer is relieved from any obligation to perform under the contract and seller has no right or remedy against buyer. However, the buyer can avoid the contract only if the seller committed a fundamental breach.⁶²

The CISG imposes strict requirements on how buyer must exercise the remedy of avoidance of the contract. If the breach is that the goods have been delivered later than the time set by the parties, buyer loses the right to avoid the contract unless buyer declares the contract avoided within a reasonable time after buyer becomes aware that the goods have been delivered.⁶³ If the breach is any breach other than late delivery, then buyer loses the right to avoid the contract unless buyer declares the contract avoided within a reasonable time after he knows of the breach.⁶⁴

If seller partially performs meaning that some but not all of the goods conform or some but not all of the goods are timely delivered, buyer can only avoid the contract as to the undelivered goods or the late delivered goods.⁶⁵ The buyer may avoid the entire contract only if the failure to deliver all of the goods or to timely deliver all of the goods in itself constitutes a fundamental breach.⁶⁶ If a contract provides for delivery of installments and a particular installment is non-conforming or late, then buyer may avoid only that installment and not the entire contract unless the buyer can demonstrate that the failure of one installment denied to buyer the benefit of the bargain of the entire contract.

Because avoiding the contract is an extreme remedy, the use of the remedy has certain legal effects for buyer. Avoidance of the contract releases the seller from the contract although seller remains bound by any provision in the contract which governs settlement of disputes or the effect of seller being released from the contract. If buyer has partially or wholly performed then

seller must make restitution to buyer of any value that buyer has provided to seller. If both parties are bound to make restitution then it must be done simultaneously.⁶⁷

Adjustment of Price

The other self help remedy is unilateral price adjustment. If the goods do not conform, the buyer is entitled to reduce the price on a proportional basis to reflect the loss of value to buyer of the non conformance.⁶⁸ The buyer may reduce the price whether or not the funds have actually been paid. If the price has not yet been paid or funds are in escrow, buyer may withhold the requisite funds or order the escrow agent to refund the requisite funds to buyer. If buyer has already paid the price then it will have to rely on the goodwill of seller to refund the requisite funds. Otherwise, buyer must resort to legal process.

To determine the amount of the reduction, buyer must value the non conforming goods delivered at the time of delivery to the value of the conforming goods would have had at the time of delivery.⁶⁹ CISG does not set forth a method to calculate the value of the goods.

Specific Performance

Specific performance is a remedy issued by legal process which requires that the seller perform its obligations under the contract under penalty of the powers of the legal forum to hold the seller in contempt if seller does not perform.⁷⁰ The policy underlying the CISG remedy of specific performance is that an aggrieved buyer will basically desire that it receive the benefit of the bargain and its expectations under the contract. If the goods do not conform and non conformance is a fundamental breach, then the seller can be required to either deliver substitute goods that conform or repair the delivered goods to conform.⁷¹

The grant of the remedy of specific performance is circumscribed. The buyer cannot seek

specific performance if it has resorted to any of the other remedies because each of the other remedies would be inconsistent with specific performance.⁷² The legal forum is not obligated to grant the remedy unless it would be obligated to grant the remedy under the laws of the Contracting State in which the cause of action is being heard in similar cases which are not governed by CISG.⁷³ If the legal forum is in the U.S., then the applicable law in similar cases not governed by CISG would most likely be the UCC. Specific performance is available under the UCC though the scope of the remedy is more narrow.⁷⁴ The U.S. legal forum can grant the remedy of specific performance within the scope of the specific performance remedy available under the UCC.⁷⁵ The UCC limits the grant of specific performance to cases where the goods at issue are "unique or in other proper circumstances."⁷⁶ To be entitled to specific performance under the UCC, buyer must demonstrate that, as a practical matter, it would be difficult to replace the goods on the open market.

Damages

The buyer may seek damages against seller for any breach which causes buyer to lose the benefit of the bargained for exchange.⁷⁷ Damages are meant to make buyer whole by compensating buyer for any value that buyer was denied as the result of the breach by seller. Damages consist of an amount of money which is equal to the loss in money incurred by buyer. That loss includes lost profits.⁷⁸ The buyer must take such measures as are reasonable under the circumstances to mitigate its damages including lost profits.⁷⁹ The total amount of damages must be an amount equal to the total amount of damages that, at the time the contract was concluded, seller foresaw or should have foreseen that buyer would incur if seller breached the contract.⁸⁰ Foreseeable damages include cost of reinspection/testing, cost of expediting substitute goods, cost

of storing and preserving non-conforming goods and labor costs related to production line shut down.⁸¹

The buyer may combine an action for damages with the remedy of avoiding the contract. The buyer may purchase substitute goods from a source other than seller and claim damages for any costs or losses incurred by buyer in purchasing the substitute goods in addition to any other damages.⁸² If the goods have a current price, such as a price on a exchange, and buyer has not purchased substitute goods, then buyer is entitled to the difference if any between the price fixed in the contract and the current price at the time of avoidance. If the buyer has taken delivery of the goods then the current price is the price as of the time buyer took delivery.⁸³

Obligations of Buyer and Remedies of Seller

The buyer has obligations under the contract and obligations which arise when buyer uses any of its remedies under CISG. Like the obligations of seller and remedies of buyer, the obligations of buyer and remedies of seller are sequential and not simultaneous.

Obligations of Buyer

Contract Obligations and Right of Inspection - The buyer must pay the contract price and take delivery of the goods. Payment is an absolute obligation and seller is not required to provide any notice or demand or for payment.⁸⁴ The CISG does not define the term “payment” but obligates buyer to take such steps and comply with such formalities as are necessary to cause payment to be made. Such steps and formalities will depend on the method used by the parties for payment.⁸⁵ Unless the parties have set another time for payment, buyer must pay the purchase price at the same time at which seller has either placed the goods at the disposal of buyer or placed the title documents at the disposal of buyer.⁸⁶ Unless the parties have set another place for

payment, buyer shall make payment either at seller's place of business or the place at which the goods are delivered to buyer.⁸⁷ If the parties have not agreed on a price or on a method for determining the price, the price is the price for which the same goods under similar circumstances would be sold in the same trade or industry.⁸⁸

The buyer is obligated to take all necessary steps to enable seller to deliver the goods and then to take actual possession of the goods. Although the obligation of buyer to take delivery of the goods is stated in absolute terms,⁸⁹ it is subject to the right of buyer to inspect the goods in as short a time as is practicable under the circumstances.⁹⁰ The right of inspection enables buyer to determine whether or not the goods conform and, if not, to decide which remedy to pursue. If buyer finds that the goods do not conform, it must notify the seller in detail as to the nature of the defect within a reasonable time after buyer discovers the defect but not later than two years.⁹¹ The buyer has no obligation to notify seller of the defect if seller knew or should have known of the defect and did not disclose the defect or the underlying facts to buyer.⁹²

Obligations of Buyer Arising from Use of Remedies - The primary obligation of buyer in exercising the of avoidance of contract is to provide notice to seller within a reasonable time after discovering the breach. Although the term "notice" is not defined, CISG does not require any notice to be in writing unless a provision of CISG uses the term "writing".⁹³ For CISG purposes, notice should be considered a common sense act of a party that is calculated to communicate information about a matter in connection with the contract possessed by one party to the other party who does not possess that information. The means of notice must be appropriate under the circumstances so that if there is an error or delay in the communication, the party making the communication is deemed to have complied with its notice obligations.⁹⁴ While not required

under CISG, it is standard practice under *lex mercatoria* that notice should be communicated by a party using at least the same or more rapid means as the means which the other party used to communicate with the former party in the immediately preceding communication.. Notices about breaches or non-conformance should be made under the most rapid means available. The CISG adopts the objective standard of reasonableness. In determining whether a party has acted reasonably, the issue is whether a person in the same circumstances who knew the negotiations between the parties, the custom and usages of the parties and the subsequent conduct of the parties would have acted in the same way in which the party acted.⁹⁵

The remedy of avoidance of the contract by buyer is only effective if buyer notifies seller of the avoidance.⁹⁶ If seller delivers the goods late, then buyer can declare the contract avoided only if buyer makes notice of avoidance within a reasonable time after buyer know or should have known about the late delivery. If the goods have been timely delivered but buyer determines that the goods do not conform or determines there is some other breach, then buyer can declare the contract avoided only if buyer makes notice of avoidance within a reasonable time after discovering the defect or any other breach.⁹⁷

Obligation to Accept Cure by Seller - The seller may cure non-conforming goods under certain circumstances. The buyer must accept the cure and remain bound by the contract as long as the cure is accomplished in a manner consistent with CISG.⁹⁸

Remedies of Seller

Avoiding the Contract - Like buyer, the seller may avoid the contract if the breach amounts to a fundamental breach.⁹⁹ However, because the seller is usually the first party to perform or to begin performing, the remedy is less effective as a practical matter to seller than it is

to buyer. Where buyer has already paid the purchase price but paid it late, seller cannot avoid the contract unless it declares the contract avoided before seller knew that payment had been made.¹⁰⁰ Where buyer has committed any fundamental breach other than late payment, then seller can avoid the contract as long as it declares the contract avoided within a reasonable time after seller knows or should have known of the breach.¹⁰¹

The legal effect of avoidance of the contract is that each party is released from any obligation under the contract but each party must make restitution if any item supplied to the other party under the contract.¹⁰² The restitution requirement is usually of greater concern to seller than to buyer. If seller avoids the contract and seller has received funds from buyer, seller must make a refund. If seller does not refund, buyer has comparatively simple non-CISG domestic remedies to obtain the funds such as attachment and garnishment. However, if buyer does not return the goods, seller must reclaim them through non-CISG domestic remedies which can be inefficient and cumbersome. The buyer is obligated to take reasonable steps to preserve the goods.¹⁰³ If the goods are perishable, buyer is obligated to sell them and account for the proceeds to the other party less the expense of preserving and selling them.¹⁰⁴

Failure of Buyer to Provide Specifications - If buyer requires seller to deliver goods which meet certain specification such as form or size and buyer does not provide the specifications to seller, then seller may deliver goods which meet such specifications of buyer as seller may know, then seller may deliver goods meeting the presumed specifications to buyer.¹⁰⁵ However, seller must inform buyer that seller is delivering goods which accord with the presumed specifications, detail those specifications to buyer and allow buyer a reasonable time to make specifications different from the presumed specifications. If buyer does not respond after

receiving the foregoing communication, then buyer is bound by the presumed specifications and must pay and take delivery.¹⁰⁶

Specific Performance - Like a buyer, seller may seek an order through legal process which requires buyer to perform its obligations under the contract.¹⁰⁷ The legal forum is not obligated to grant the remedy of specific performance unless it would be obligated to grant the remedy under the laws of the Contracting State in which the cause of action is being heard in similar cases which are not governed by CISG.¹⁰⁸

Damages - The seller may seek damages against buyer for any breach which causes seller to lose the benefit of the bargained for exchange.¹⁰⁹ The measure of damages for the seller is the same as it is for the buyer. The total amount of damages must be an amount equal to the total amount of damages that, at the time the contract was concluded, buyer foresaw or should have foreseen that seller would incur if buyer breached the contract.¹¹⁰

Right to Cure Non-Conforming Goods - The most useful collateral remedy that a seller has is the right to cure by either supplying conforming goods or repairing non-conforming goods. The seller has the right to cure only where seller has breached by supplying non-conforming goods but seller does not have that right if the goods, whether conforming or not conforming, have been delivered late.

The nature and extent of the right to cure depends on whether the goods are delivered before the time set for delivery or at or after the time set for delivery. If seller delivers non-conforming goods before the date set for delivery, then seller may, at any time before the delivery date, replace or repair the non-conforming goods as long as buyer is not unreasonably inconvenienced or damaged by seller in making the replacement or repair.¹¹¹ In the foregoing

circumstance, the contract remains in effect and buyer cannot avoid the contract although buyer may seek damages against seller. If seller delivers the non-conforming goods at or after the time for delivery and buyer has not avoided the contract, then seller may still cure as long as the cure can be accomplished without any unreasonable delay and the contract remains in effect. If seller cannot cure without unreasonable delay and asks buyer whether or not buyer will accept the tendered cured performance, then buyer may either accept or not accept it. If buyer does not respond to the request, then seller may perform within the time set in the request.¹¹²

Obligations and Rights of Both Seller and Buyer

Passing of Risk of Loss

Sellers and buyers have long recognized that goods can be destroyed or stolen after the contract is concluded but before each party has fully performed. At *lex mercatoria*, risk of loss followed possession or control over the goods. Therefore, the party who possessed or controlled the goods at the time of loss incurred the loss and the other party was discharged from performing under the contract. The CISG embodies this concept in holding that once risk of loss has passed to buyer, buyer must pay the purchase price even if the goods are lost or damaged unless the seller acted or failed to act in a way that caused the loss or damage.¹¹³

As the producer of the goods, seller always assumes the risk of loss in the first instance. If the contract sets the place for delivery at the place of business of seller, then seller has the risk of loss until buyer takes possession of the goods at the time set for delivery. If buyer does not take possession of the goods at the time set in the contract, then seller has the risk of loss until the goods are placed at the disposal of buyer. Once the goods are placed at the disposal of buyer, buyer assumes the risk of loss.¹¹⁴ The goods must not be generic goods but rather goods

identified to the contract.¹¹⁵ The policy underlying this rule is that the party in possession of the goods is in the best position to preserve and protect the goods and should bear the cost if the goods are lost or damaged..

In modern international commerce, sale of goods contracts which are concluded without a carrier are exceedingly rare. Most often, the parties will engage a third party carrier to transport the goods. The risk of loss issue is more complicated when a carrier is involved. There are three general types of carriage contracts: a shipment contract, a destination contract and a transshipment contract. In a shipment contract, seller is required to deliver the goods to a carrier designated by buyer and therefore retains the risk of loss until the goods have been delivered to the carrier or duly made available to the carrier. In a destination contract, the seller is required to arrange carriage for the goods and deliver them to a destination specified by buyer. The seller retains the risk of loss until the goods are delivered to the specified destination. In a transshipment contract, seller is required to deliver the goods to a particular vessel or vehicle which will further carry the goods to buyer. The seller retains the risk of loss until it delivers the goods to the designated vessel or vehicle.¹¹⁶

Title is irrelevant to when risk of loss passes. A party does not have to own the goods to still have the risk of loss. The policy underlying this principle is that the issue is which party is in the best position as a practical matter to preserve and protect the goods and prevent loss or damage.¹¹⁷

Excuse of Performance

The CISG adopts a variation of the concept of *force majeure*. This concept relieves a party to a contract from having to perform without liability to the other party if an impediment,

other than the act or omission of a third party, beyond the control of the party causes the party to be unable to perform and the party could not reasonably have accounted for the impediment when the contract was concluded or have avoided or overcome the impediment.¹¹⁸ The CISG does not define “impediment”. However, circumstances that would qualify as *force majeure* would satisfy the definition such as natural catastrophe, war and labor strife. Unlike *force majeure*, unforeseen financial hardship or economic detriment such as significant changes in world prices of commodities involved in the contract may satisfy the definition.

If the impediment is caused by a third party who the party claiming excuse engaged to perform any part of the contract, the party is relieved from performing only if the foregoing principles apply to both the party seeking relief and to the third party who caused the impediment. Mere failure to perform or negligence by the third party which impedes the party from performing is not sufficient to relieve the party.¹¹⁹

The party claiming excuse from performance must notify the other party of the impediment within a reasonable time after the former party knows or should have known of the impediment.¹²⁰ The time for which the party is relieved from performance lasts only as long as the impediment lasts.¹²¹ No party can be relieved from performance if that party caused the other party to be unable to perform.¹²²

Anticipatory Breach and Suspending Performance

The CISG adopts the concept of anticipatory breach. A party may suspend performance or cause performance to be stopped if, after the contract is concluded, it becomes apparent that the other party cannot substantially perform because the party has a serious deficiency, lacks creditworthiness or the manner in which the other party is performing. The party suspending

must notify the other party that the party is suspending performance. The suspending party must continue to perform if, in response to the notice, the other party provides adequate assurance that it will perform. The concept of anticipatory breach can be used as a predicate for avoiding the contract if the time for performance has not yet arrived and the alleged breach is a fundamental breach.¹²³

The concept of anticipatory breach is disfavored under CISG and is rarely used. The anticipatory breach provision sets a nearly impossible standard of proof. The provision holds that it must be “apparent” that the other party “will not substantially” perform. Consequently, the party must make a judgment that the facts are such that it is obvious and certain that the party will not “substantially” perform. As a practical matter, as long as the other party can demonstrate some ability to perform, the party who invokes anticipatory breach does so at its peril.

Interest and Attorneys’ Fees

A party to whom a sum of money is owed in arrears is entitled to interest on that amount for the time for which the amount was due and owing.¹²⁴ The rate and method of calculating interest will be determined under the law of Contracting State in which the legal forum hears the case. A federal court will apply the choice of law provisions of the state in which the court sits to determine which state law applies with respect to interest.¹²⁵

The CISG is silent on whether attorneys’ fees can be awarded as damages. Attorneys’ fees do not satisfy the definition of damages under CISG.¹²⁶ While it may be foreseeable that the aggrieved party will incur attorneys’ fees, the text of the relevant CISG provisions does not contemplate attorneys’ fees as a loss that is compensable as damages. The aggrieved party will be awarded attorneys’ fees only if the applicable domestic law allows such an award.

CISG and Parol Evidence

The primary legal culture clash between the U.S. and CISG is on the parol evidence rule.¹²⁷ The civil law tradition does not have a parol evidence. While CISG does not expressly make the parol evidence inapplicable to CISG contracts, Article 8 and Article 11 of CISG effectively negate the parol evidence rule as that rule is understood and applied in the U.S.

The Parol Evidence Rule

The parol evidence holds that if a written agreement is a wholly integrated writing, then no prior or contemporaneous agreements or negotiations that either contradict a term of the writing or are inconsistent with the writing can be admitted into evidence.¹²⁸ If the written agreement is partially integrated, then no prior or contemporaneous agreements or negotiations that contradict a term of the writing can be admitted but prior or contemporaneous agreements or negotiations that are consistent with the writing can be admitted into evidence to supplement the writing. The purpose of the parol evidence rule is to determine which terms and provisions out of all of the terms and provisions which the parties may have communicated to one another either orally or in writing are the terms and provisions which the parties intended to be the final written expression of the contents of the contract. To determine whether or not the parol evidence rule applies, the first issue is whether the written agreement is an integrated writing and , if so, the second issue is whether the written agreement is wholly or partially integrated.

Articles 8 and 11 of CISG and the Parol Evidence Rule

Under the CISG, it is the actual intent of the parties which must be ascertained and not the objective intent.¹²⁹ Only if the actual intent cannot be ascertained, then intent may be determined by inquiring into the intent a reasonable person under the same circumstances would have had, *i.e.*

the objective intent.¹³⁰ In determining either actual intent or objective intent, all relevant circumstances, negotiations, custom and usage and subsequent conduct of the parties can be considered and are admissible to prove the intent of the parties.¹³¹ The terms and provisions of a contract can be proven by any means including witnesses and prior drafts of the contract.¹³² Consequently, the legal effect of Articles 8 and 11 is that no legal forum can exclude any evidence of any kind that is introduced to prove either the intent of the parties or the contents of the contract.

The fact that the CISG not only does not contain a parol evidence rule but actually makes the parol evidence inapplicable to CISG contracts raises supremacy of law issues for U.S. courts. Because the parol evidence rule applies only where a contract is in writing and a CISG contract need not be in writing, the issue of whether the parol evidence rule applies does not even arise where the contract is oral. U.S. courts must apply the substantive law of the states in which they sit and the parol evidence rule is substantive law. However, because the CISG is a treaty which makes it federal law, it preempts the state law and the U.S. court cannot apply the parol evidence rule to a CISG contract.¹³³

Choosing CISG and Litigation

The CISG embodies the principle of freedom of contract. Parties whose transaction is otherwise governed by the CISG can nevertheless choose not to be governed by CISG in whole or in part.¹³⁴ Parties can also choose to vary or modify a provision of CISG, an act which is referred to as derogating from CISG.¹³⁵

The primary issue in choosing not to be governed by CISG is the manner in which the parties manifest that choice. The language of Article 6 leaves open the possibility that the parties

may impliedly choose that the transaction not be governed by CISG. A choice of law provision that merely designates that the law of a particular nation which happens to be a Contracting State shall govern the contract will cause the contract to be governed by CISG since, as a Contracting State, CISG is the law of that Contracting State.¹³⁶ Similarly, if the choice of law provision merely designates the law of a particular state of the United States as the governing law that choice is at best ambiguous. Because CISG is treaty is federal law and not the law of any particular state. However, since the federal law would preempt the state law, any state court would have to apply the CISG to the contract so the parties will deemed to have chosen CISG to apply. If the parties choose not to be governed by CISG, they must expressly manifest that choice by affirmatively stating that CISG does not govern the contract.¹³⁷ In addition, the parties should affirmatively designate which legal regime shall govern the contract.¹³⁸

Because CISG is federal law, federal courts not state courts have subject matter jurisdiction over any cause of action asserted under CISG. The federal courts have subject matter jurisdiction because a cause of action asserted under CISG raises a federal question.¹³⁹

1. *Delchi Carrier SpA v. Rotorex Corp.*, 71 Fed 3d 1024 (2d Cir 1995)
2. Dodge, William, *Teaching the CISG in Contracts*, 50 J Legal Educ 72 (March 2000)
3. *Geneva Pharmaceuticals Technology Corp. v. Barr Laboratories, Inc.* 201 F Supp 236 (SDNY 2002)
4. Art 1
5. Art 30, Art 53
6. Bradley J. Richards, *Note, Contracts for the International Sale of Goods: Applicability of the United Nations Convention*, 69 Iowa L R 209 (1983).
7. Art 3(1)
8. Art 2(a)
9. Art 2 (d) - (f)
10. Art (b)-(c)
11. *Helen Kaminski Pty. Ltd v. Marketing Australian Products, Inc.*, 1997 WL 414137 (SDNY 1997)
12. *Viva Vino Import Corp. v. Farnese Vini Srl*, 2000 WL 1224903 (ED Pa 2000)
13. Art 3(2)
14. Art 1(2)
15. Art 10(a)
16. Art 10(b)
17. Art 1(1)(b)
18. Art 95
19. Art 4
20. Art 4(a)(b)
21. *Caterpillar, Inc. v. Usinor Industeel*, 393 F Supp 2d 659 (ND Ill 2005)
22. *Geneva Pharmaceuticals Technology Corp v. Barr Laboratories, Inc.*, 201 F Supp 2d 236 (SDNY 2002)

23. Art 5
24. *Usinor Industeel v. Leeco Steel Products Inc.*, 209 F Supp 2d 880 (ND Ill 2002)
25. Art 7(2); *Treibacher Industrie, A.G. v. Allegheny Technologies, Inc.*, 464 F.3d 1235 (11th Cir. 2006)
26. *Chicago Prime Packers, Inc. v. Northam Food Trading Co.*, 320 F Supp 702 (ND Ill 2004)
27. *Delchi Carrier SpA v. Rotorex Corp.*, 71 F 3d 1024 (2d Cir 1995)
28. Art 11
29. Art 29(1)
30. Art 29(2)
31. CISG Advisory Opinion No.1
32. Art 14(1)
33. Art 14(2); *Magellan Intern. Corp v. Salzgitter Handel GmbH*, 76 F Supp 2d 919 (ND Ill 1999)
34. Art 15(1)
35. Art 15(2)
36. Art 16(a)
37. Art 16(b)
38. Art 17
39. Art 18(1); *Chateau des Charmes Wines Ltd. v. Sabate USA, Inc.*, 328 F 3d 528 (9th Cir 2003)
40. Art 18(2)
41. Art 21
42. Art 18(2); Art 23
43. Art 19
44. *Geneva Pharmaceuticals Technology Corp v. Barr Laboratories, Inc.*, 201 F Supp 2d 236 (SDNY 2002)

45. Art 31(a); *St. Paul Guardian Ins. Co. v. Neuromed Medical Systems & Support, GmbH*, 2002 WL 465312 (SDNY 2002)
46. Art 31(b)
47. Art 31(c)
48. Art 32
49. Art 33(a)(b)
50. Art 33(c)
51. Art 41
52. Art 42(1)
53. Art 42(1)(a)(b)
54. Art 42(2)
55. Art 43(1)
56. Art 35(1)
57. Art 35(a)-(d); *Chicago Prime Packers Inc. v. Northam Food Training Co.*, F Supp 2d 702 (ND Ill 2004)
58. Art 35(3)
59. Art 25; *Medical Marketing Intern., Inc. v. Internazionale Mexico Scientifica SRL*, 1999 WL 311945 (ED La 1999); CISG AC Opinion No.5
60. *Delchi Carrier SpA v. Roroorex Corp*, 71 F 3d 1024 (2d Cir 1995)
61. *Medical Marketing Intern., Inc. v. Internazionale Mexico Scientifica SRL*, 1999 WL 311945 (ED La 1999)
62. Art 49(1)(a)
63. Art 49(2)(a)
64. Art 49(2)(b)(i)
65. Art 51(1)
66. Art 51(2)

67. Art 81
68. Art 50
69. *Ibid*
70. Art 46(1)
71. Art 46(2)-(3)
72. Art 46(1)
73. Art 28
74. UCC § 2-716
75. *Magellan Intern Group v. Salzgitter Handel GmbH*, 76 F Supp 2d 919 (ND Ill 1999)
76. UCC § 2-716
77. Art 74
78. *Delchi Carrier SpA v. Rotorex Corp*, 71 F 3d 1024 (2d Cir 1995)
79. Art 77
80. *Ibid*
81. *Delchi Carrier SpA v. Rotorex Corp*, 71 F 3d 1024 (2d Cir 1995)
82. Art 75
83. Art 76
84. Art 53; Art 59
85. Art 53; Art 54
86. Art 58(1)
87. Art 57(1)
88. Art 55
89. Art 60
90. Art 38

91. Art 39; *Shuttle Packaging Systems, LLC v. Tsonakis*, 2001 WL 34046276 (WD Mich 2001)
92. Art 40
93. Art 11; Art 13
94. Art 27
95. Art 8(2)(3)
96. Art 26
97. Art 49(2)
98. See C, Right to Cure Non-Conforming Goods, *infra*.
99. Art 64; Art 25
100. Art 64(2)(a)
101. Art 64(2)(b)
102. Art 81
103. Art 85
104. Art 88
105. Art 65(1)
106. Art 65(2)
107. Art 62; See §3.6
108. Art 28
109. Art 74
110. *Ibid*
111. Art 37
112. Art 48(1)-(2)
113. Art 66
114. Art 69(1)

115. Art 69(3)
116. Art 68
117. *St. Paul Guardian Ins. Co v. Neuromed Medical Systems & Support GmbH*, 2002 WL 465312 (SDNY 2002)
118. Art 79(1)
119. Art 79(2)
120. Art 79(4)
121. Art 79(3)
122. Art 80
123. Art 72
124. Art 78
125. *Chicago Prime Packers Inc v. Northam Food Trading Co*, 320 F Supp 2d 702 (ND Ill 2004)
126. Art 74
127. Peter J Calleo, *The Inapplicability of the Parol Evidence Rule to the U.N. Convention on Contracts for the International Sale of Goods*, 28 Hofstra L Rev 799 (Spring 2000)
128. Joseph M. Perillo, Calamari and Perillo on Contracts, (5th ed 2003) § 3.2
129. Art 8(1)
130. Art 8(2)
131. Art 8(3)
132. Art 11
133. *MCC-Marble Ceramic Center, Inc v. Ceramica Nuova d'Agostino, SpA*, 144 F 3d 1384 (11Cir 1998); Note that an earlier case held that the parol evidence rule did apply under CISG, *Biejing Metals 7 Minerals Import /Export Corp v. American Business Center*, 993 F 2d 1178 (5th Cir 1993). This case has been roundly rejected by the other circuits which have considered the issue primarily because the opinion simply makes the conclusory statement the the parol evidence rule applies under CISG but provides no analysis.
134. Art 6

135. *Ibid*

136. *BP Oil Intern Ltd v. Empresa Estatal Petoleos de Ecuador*, 332 F 3d 333 (5th Cir 2003)

137. *Ibid*

138. See

139. *Ibid*