An Introduction to the UN Convention on the International Sale of Goods

Introduction

This chapter is intended to introduce the reader to the UN Convention on the International Sale of Goods otherwise known as the 'Vienna' Convention or the 'Convention of the International Sale of Goods' (CISG). It starts by explaining some of the CISG's background moving on to look at its scope, i.e. when it applies to a contract, including the right of parties to exclude the Convention. It then looks at the problems of interpretation posed when the international sales law of over 80 countries (including the vexed issue of the role good faith plays under the Convention) before moving to contract formation and variation and the CISG's solution to the 'battle of the forms'. The CISG contains provisions for determining the intentions of the parties and consideration of these is considered next, before moving finally to outline the rights duties and remedies of the parties but with some commentary on some of the remedies which will either be unfamiliar to a common lawyer for or where the CISG takes a radically different view to the common law.

It should be noted that Table 1 (which is included for ease of reference at the back of this chapter) contains in summary form not only the CISG's provisions relating to contract formation and content the rights, duties, and remedies of the parties which are dealt with in narrative form in the chapter, but also matters like the passing of risk, *force majeure*, and frustration which are not otherwise covered. The table includes a comparison between the provisions of the CISG and the Law of England and Wales which it is hoped will assist understanding of the Convention.

What is the UN Convention on the International Sale of Goods?

At the time of writing there are 193 members of the United Nations. Each has its own legal system and consequently its own set of laws on sales of goods.[1] In the late 1920s Ernst Rabel suggested and a uniform international sales law and his work

[1] The number of legal systems in the world is higher than this, for example in the UK there are three legal systems, England and Wales, Scotland and Northern Ireland while in the USA there are 51, one for each of the states and then federal law. In the US most states have to a greater or lesser extent adopted the Uniform Commercial Code but interpretation of its meaning can vary widely from state to state.

was developed by UNIDROIT[2] leading, after lengthy delays,[3] to the two Hague 1964 Conventions—ULIS (the 'Uniform Law on International Sale of Goods') and ULF (the 'Uniform Law on the Formation of Contracts for the International Sale of Goods'). These Conventions were not widely ratified[4] but they provided the starting point for the drafting of the CISG when UNCITRAL (the 'United Nations Commission on International Trade') concluded that it was unlikely that ULIS and ULF would have a major impact. The work on producing an international sales law started in 1968 with the first draft in 1976. A four week diplomatic conference in Vienna ended in the adoption of the Convention on 11 April 1980. The Convention stated that it would come into force a year after 10 UN Member States had ratified it,[5] this was achieved in December 1986 and the Convention came into force on 1 January 1988.

The CISG has been ratified by 84 states including the USA, the Peoples' Republic of China, and most of the other leading trading nations but excluding India and the UK. The UK decision not to ratify initially seems to have been driven by two perceived issues with the CISG. Firstly the fact that it requires (to a disputed degree) the application of 'good faith' in interpreting the Convention and secondly that it is difficult to confident when the right to terminate a contract is available under the Convention. Its subsequent inactivity seems to have been driven by a perception of a lack of pressing need to ratify among exporters.[6]

When a state has ratified the Convention then it is part of that state's national law and will apply to the parties to a contract in accordance with its terms. It is to this issue of the scope of the Convention that we turn to next.

Scope

A key issue facing a court is 'what law applies to the case in hand'? Consideration of this question is in the realm of private international law suffice it to say that with consensual arrangements, a professionally drawn agreement will contain a choice of law clause and although this may not be definitive, in a business-to-business (B2B) arrangement courts in the common law world[7] will normally give effect to such a clause.

---

[2] UNIDROIT is 'The International Institute for the Unification of Private Law' an intergovernmental organization formed in 1926 to study and assist the harmonization of private and particularly commercial law inter alia by proposing uniform laws on specific legal areas.

[3] Not least some 'little local difficulties' caused by the Second World War.

[4] It took until 1972 for the necessary number of ratifications for it to come into force.

[5] Art 99.

[6] See Sally Moss, 'Why the United Kingdom Has Not Ratified the CISG' (2005) 25 JL and Comm, 483–485. See also Nathalie Hofmann, 'Interpretation Rules and Good Faith as Obstacles to the UK's Ratification of the CISG and to the Harmonization of Contract Law in Europe' (2010) 22 Pace International Law Review, 141–181.

[7] The position in some US states is slightly different, especially where the law is based on the Uniform Commercial Code where freedom of choice of law is restricted to the law of states to which the transaction has some connection. This latter approach is more common in civil law jurisdictions. However, for EU parties the law is contained in 'Rome I' (Regulation (EC) No 593/2008) which preserves B2B autonomy but in the absence of clear agreement on choice of law the applicable law to a sale of goods is the law of the place of the seller's habitual residence.

As we have seen, the effect of the Vienna Convention is to make the law set out in the Convention the law of each Contracting State but it only supersedes a state's domestic law in a given situation if it applies that is to say that the Convention is engaged and then only in if the issue at hand is not excluded from its application. However, as we shall see, in some instances even though the Convention applies to the issue before the court, since it is not a comprehensive sales law, gaps have to be filled by reference to the choice of law rules of the forum state.[8]

When is the CISG engaged with a contract?

For the purposes of explanation in this chapter we use the concepts of 'engagement' and 'application'. By 'engagement' we mean that a particular law has the potential to apply to a specific situation, and will apply unless its application is somehow excluded. And when we say that the law applies we mean that it has been engaged and not excluded. However you should note that the Convention itself does not distinguish between the two.

By virtue of Art 1(1), the CISG is engaged with an arrangement of the parties if:

1. It has the required degree of internationality.
2. It is a contract.
3. It is for sale of goods.

We deal with these in turn below.

1. CISG and internationality

Art 1(1) sets out the relevant requirements for a contract to be 'international' for the purposes of the Convention. Art 1(1) requires that the parties have places of business in different states and either:

- Art 1(1)(a)—those states are Contracting States; or
- Art 1(1)(b)—the rules of private international law make the law of a Contracting State the law of that contract.

Eg

COMCORP LTD

ComCorp had 10,000 kilos of unlabelled cheese in its warehouse which it agreed in writing to sell to a Ruritanian supermarket chain, Ocean Sarl. Before they entered into the contract ComCorp told Ocean that the cheese was Camembert. There is clause in the contract stating Ruritanian law is to apply and the Courts of England and Wales have exclusive jurisdiction. Ruritania is a Contracting State and a Member of the EU. Greg, who sometimes gives unwanted legal advice to ComCorp's board says that the provisions of the CISG may apply. The other directors disagree because England and Wales is not a Contracting Party to the Convention. Who is right?

It is important to note that by virtue of private international law, courts in one country may have to apply the law of another country, indeed in England and Wales this is comparatively common since London is a major commercial legal centre.[9] As a

[8] By virtue of Art 7(2).

[9] That said English courts have almost no experience of dealing with contracts to which the CISG applies.

result, if we look at the ComCorp example, the fact that an English court will hear a case involving a dispute does not mean that because England and Wales is not a Contracting State the CISG does not apply. In fact, in this case it will because:

1. Although the CISG is not part of the law of the forum, England and Wales, the private international law of the forum gives effect to the parties' choice of law.[10]
2. The English courts will therefore apply Ruritanian law to determine whether the CISG applies.
3. In applying Ruritanian law it is as if the English court is a Ruritanian Court and a Ruritanian Court in applying Ruritanian law would say the CISG is engaged because:
   - (a) the CISG is engaged under Ruritanian law where either, the parties have places of business in different states (which is not true, England and Wales is not a Contracting State), or the law of the contract under the private international law of Ruritania is the law of a Contracting State;
   - (b) Ruritanian private international law gives effect to an agreement to choose Ruritanian law and Ruritania is a Contracting State;
   - (c) therefore the CISG is engaged with the contract.

There is an exception to Art 1(1), the CISG is not engaged if the fact that the parties have places of business in different countries '. . . does not appear either from the contract or from any dealings between, or from information disclosed by, the parties . . .'. One way this might occur is if the contract was negotiated by persons with places of business in the same country but where one of them was acting for an undisclosed principal in another country.[11] Alternatively one of the parties might have branch offices in a number of states which might not be apparent to the other party, though whether the CISG be engaged would depend on whether the court regarded the branch as a 'place of business'. Obviously contracting parties may have places of business in multiple countries but for the purposes of the Convention, 'place of business' means the place ' . . . which has the closest relationship to the contract and its performance, having regard to the circumstances known to or contemplated by the parties'. . .'. There is no indication what 'closest relationship' means nor what constitutes a 'place of business' though in some jurisdictions, some degree of permanence and the capacity to make independent decisions has been held to be important.[12]

Under Art 95, a state may enter a reservation when it accedes to the treaty that it does not have to apply the Convention in accordance with Art 1(1)(b). The USA has done so as have the People's Republic of China, Singapore, the Czech Republic, and Slovakia.[13] The effect of such a reservation appears to be that when its courts[14] apply

[10] Because, at the time of writing, Rome I Art 3(1) which generally gives effect to a clear choice of law clause is part of English private international law.

[11] This example comes from the 'Text of Secretariat Commentary on article 1' available at: https://www.cisg.law.pace.edu/cisg/text/secomm/secomm-01.html. In fact this would be true only if, under the law of the forum an undisclosed principal was to be treated as a party to the contract since there is no definition what 'parties' means in the Convention.

[12] See *VLM Food Trading International v Illinois Trading Co* (2013) 2 DC 8154. Available at: http://cisgw3.law.pace.edu/cases/130305u1.html.

[13] See *Impuls Internacional v Psion-Teklogix* (2002) 234 F. Supp.2d 1267 (SD FLA) 2002). Abstract available at https://www.cisg.law.pace.edu/cisg/wais/db/cases2/021122u1.html.

[14] There is an alternative view that courts in all Contracting States can treat an Art 95 reservation as rendering the reserving state a non-Contracting State for the purposes of Art 1(1)(b).

Art (1)(b) they do not have to treat the state as a Contracting State so that in these forums domestic sales law is disapplied only where both parties have places of business in Contracting States.[15] In the courts of other Contracting States Art 10(1)(b) will apply as normal, though how to deal with a situation where the private international law in a forum in a Contracting State stipulates the application of the law of a state which had entered an Art 95 reservation remains open question.

2. What is a 'contract' for the purposes of the CISG?

The Convention contains no definition as such of the word 'contract'. As we shall see, because the Convention is to apply across many jurisdictions, there is a need for its terminology to have an autonomous meaning if any degree of uniformity of construction is to be maintained in them. For example the Nordic[16] understanding of contract formation is rather different to that in both the civil and common law systems. We look at the problems of interpretation of the CISG and what is needed for contract formation in more detail below but suffice it to say by way of example, that instead of automatically leaping to a conclusion that an arrangement is not contractual through lack of consideration, a more careful examination of whether consideration is necessary under an arrangement governed by the CISG is called for, and then, if the answer is 'yes', considering what constitutes consideration for the purposes of the CISG.

3. What is a 'sale of goods' for the purposes of the CISG?

As with the word 'contract' there is no definition in the Convention of the words 'sale' or 'goods' and the same caveats on interpretation of the terms used in the CISG apply here too. However a meaning (perhaps partial) of what amounts to a sale can be deduced from the CISG itself. Article 30 requires the seller to deliver goods and to pass property in them. Article 53 requires the buyer to pay the price and to take delivery. We might therefore conjecture that as a minimum, a sale requires a transfer of title and possession of goods for a price. There is no indication whether the price has to be a price in money though the word 'price' in English does imply money, and in the District Court for Zug the exchange of goods for money was has been found to characterize a sale of goods[17] while the Tribunal of International Commercial Arbitration has held a barter contract is not within the CISG.[18] However Schwenzer and Hachem argue that barter contracts ought to be regarded as falling inside the Convention since suggestions to the contrary by other commentators have been unduly influenced by their own domestic law.[19] So too Gillette and Walt who persuasively argue that there would be no difficulty in applying the CISG to a barter contract and point to problems

---

[15] Though see Roy Goode, Herbert Kronk, and Ewan McKendrick, *Transnational Commercial Law* (2nd edn, OUP 2015) 223 who argue that the effect of an Art 95 reservation is only permissive so that the courts could apply CISG if they wished.

[16] Denmark, Sweden, Norway, and Finland have similar contract laws which though influenced by German nineteenth century experience are distinctive. For a pungent short critique of Nordic contract law see Cristina Ramberg 'The Hidden Secrets of Scandinavian Contract Law' available at http://www.scandinavianlaw.se/pdf/50-15.pdf. For a more measured discussion see Jan Hellner 'Contracts and Sales' in Stig Stromberg (ed) *An Introduction to Swedish Law* (Springer 2013).

[17] The Kantonsgericht (Zug) said ' The CISG is applicable only to movable property and to legal transactions where goods are exchanged for money' Switzerland) 21 October 1999.

[18] Award of 9 March 2004. Available at: http://cisgw3.law.pace.edu/cases/040309r1.html.

[19] Ingeborg Schwenzer and Pascal Hachem in Ingeborg Schwenzer (ed), *Schlechtreim and Schwenzer Commentary on the UN Convention on the International Sale of Goods* (4th edn, OUP 2016).

of characterization where consideration is part in cash part in kind or where the parties ascribe a value to the goods bartered.[20]

Certain types of sale are excluded, as are sales of certain types of goods. Ships, vessels, hovercraft, and aircraft though clearly goods are excluded from the CISG by Art 2(e) as some are things in action which can have a physical expression on paper namely 'stocks, shares, investment securities, negotiable instruments [and] money' by virtue of Art 2(d). We might infer that to be goods property must be tangible since it only if this is true that the Art 2(d) exclusions would be needed though the force of this argument is reduced a little because Art 2(f) excludes the clearly intangible electricity. Equally one might also deduce that 'goods' are *moveable* tangible assets so that for example a sale of land is excluded.[21]

As elsewhere, whether software is goods has caused some difficulty. In *American Mint v GoSoftware Inc*[22] the US District Court for the Middle District of Pennsylvania assumed the CISG applied to a contract which was delivered in a physical medium. So too the Swiss Commercial Court which held that the CISG applied to a contract to supply bespoke hardware and generic software but only by virtue of Art 3(2) which makes it clear that the CISG applies to contracts for goods and services unless the preponderant part of the contract is for the supply of services.[23] By inference therefore the court must have concluded that the supply of software alone amounts to a supply of services. There is an apparently similar case in the German Federal Supreme Court[24] though because of the lack of detail in the report it is difficult to determine the basis for the court's decision. It may be that since the court stated that it did not matter whether Art 3(2) applied or not and yet applied provisions of the CISG nevertheless, no distinction is to be made between contracts for software alone and contracts for goods and services.[25]

When does the CISG apply?

The CISG applies if it is engaged by virtue of Art 1 and is not excluded by provisions in Arts 2–5. For ease of explanation, we deal with these out of numerical order.

1. The Article 4 Exclusions: Validity and Property

The CISG does not seek to provide a complete sale of goods law and this is expressly recognized in Art 4 which states that it only governs 'the formation of the contract of sale and the rights and obligations of the seller and the buyer arising from such a contract.' As a result for example it does not deal with third party rights nor fully how contracts are to be interpreted.[26] Vitiating factors such as mistake, misrepresentation,

[20] Clayton P Gillette and Steven P Walt, *The UN Convention on Contracts for the Sale of Goods Theory and Practice* (2nd edn, Cambridge 2016) 55–60.

[21] See John O Honnold, *Uniform Law for International Sales under the 1980 United Nations Convention* (3rd edn, Kluwer 1999) 46–55. Available at: https://cisgw3.law.pace.edu/cisg/biblio/ho2.html. There is no web access to the 2009 4th edn. See also footnote 11 above.

[22] *American Mint v GoSoftware Inc* (2006) available at: http://www.unilex.info/case.cfm?id=1084.

[23] Handelsgericht (Zurich) 17 February 2000. Available at: http://cisgw3.law.pace.edu/cases/000217s1.html.

[24] Bundesgerichtshoff, 4 December 1996. Available at: https://cisgw3.law.pace.edu/cases/961204g1.html.

[25] Though under the terms of the contract the hardware and software were to be treated as one thing not two.

[26] Though there is assistance from Arts 7–9.

duress, fraud, and so forth are not expressly dealt with, though, since they impact of remedies and may concern validity, Art 4(a) may have an impact. Art 4 contains two express matters which 'except as otherwise expressly provided' for in the Convention are excluded from its scope namely 'validity of the contract or any of its terms' (Art 4(a)) and when property passes under a contract (Art 4(b)). To the extent that the Art 4 exclusions apply, the contract falls to be dealt with according to the private international choice of law rules of the forum.

'Validity' is not defined in the CISG as a consensus could not be reached on its scope, but by virtue of the Art 7 requirement on uniform interpretation the inference suggests that it does have a meaning independent of any state's domestic law.

Eg

COMCORP LTD: RETURNING TO THE PROBLEMS COMCORP HAS WITH OCEAN

ComCorp delivered the cheese to Ocean and it proved very popular with their customers. However neither party knew when they made the contract that the cheese was made in Northampton and so cannot be sold as 'Camembert'. When Ocean discovered the origin of the cheese they withdraw it from their shelves but they failed to notify ComCorp of the problem for five weeks by which time the cheese was past its best. The parties accept:

1 That if the CISG applies Ocean only has its remedy in damages[27] and has failed to mitigate the loss and

2 That if Ruritanian domestic law applies the contract is void and therefore Ocean could claim the price with no duty to mitigate.

ComCorp argues that the contract is valid and so is governed by the CISG. Ocean argues that the contract is void and so CISG is inapplicable. Who is right?

The possible meanings range from 'any matter that might make a contract unenforceable'[28] to those matters involved in the formation of a contract which would render it void as a matter domestic public policy in the forum state. On the former view frustration might be regarded as a matter of validity while on the latter only lack of capacity, fraud, duress, and illegality would be clearly covered while lack of an agent's authority, mistake, and unconscionability might not. Similarly, misrepresentations which fail to become contract terms may in some jurisdictions render the contract void or voidable and so these situations too may be encompassed by the CISG term 'validity'.

It should be noted that Art 4 not only applies to the contract as a whole but to individual terms in it. So for example a term limiting liability or liquidating damages might be unenforceable in some jurisdictions while an agreement unsupported by consideration might not be a contract at all. These matters might or might not be regarded in different legal systems as ones going to validity or merely enforceability while others may make no distinction between these two concepts.

---

[27] By virtue of Art 43.

[28] H Hartnell 'Rousing the Sleeping Dog: The Validity Exception to the Convention for the International Sale of Goods' (1993) 18 Yale LJ of Int'l Law 1, 45.

However the CISG only defers to the domestic law of the forum in relation to matters for which it does not expressly provide and as is noted in the Secretariat Commentary on Article 4 there is only one apparent example, Art 11 which states that contracts need not be in writing.[29] Thus for example although the CISG Advisory Council stated that while 'it is the undisputed view' that Articles 14–24 CISG govern contract terms for liquidated damages[30] nevertheless it concluded that a protective mechanism for example rendering penalty clauses void or permitting a court to reduce a liquidated demand also apply. The reasoning behind this opinion is that:

> [f]rom the perspective of the CISG . . .these protection mechanisms concern the validity of agreed sums. . .[31] [and as] the CISG is not concerned with questions of validity, domestic protection mechanisms generally remain applicable to agreed sums in CISG contracts.

The only exception being where the protective mechanism requires liquidated damages clauses to be in a particular form to which, as we have seen, the CISG makes express reference.

Whilst the analytical process employed by the Advisory Committee is instructive and can be adapted to other types of clause since by implication it seems to proceed on the basis that domestic law rights and remedies apply where the CISG does not provide for a *functional* equivalent, if we follow this approach in relation to our ComCorp example because Ruritanian law renders contracts void when induced by a misrepresentation, Ocean's argument seems to be based on a validity issue to which the CISG has no application. However, often misrepresentation claims can be re-characterized as assertions that the goods do not have the represented qualities and the CISG does expressly deal with issues of non-conformity, i.e. potentially it has a functional equivalent to Ruritanian law if, but only if, the representation forms part of the contract. Whilst this 'functional equivalence' approach has the benefit of comparative simplicity it would seem peculiar that domestic law should not apply where the representation is incorporated in the contract especially if it is made fraudulently, but the domestic law should supplant the CISG where the statement remains a mere misrepresentation and not part of the contract terms.

It should be noted that in our ComCorp analysis we have given an autonomous meaning to 'validity' outside domestic national analyses since by inference, we have excluded from its scope invalidity arising from breach of duties under Art 35. It seems that the meaning of 'validity' in the CISG may have a lot of work to do!

As noted above, when and whether property passes under a contract is to be dealt with according to the private international law of the forum. Consequently the characterization of chattel leases and other bailments as sales or not depends on the way in which the law of the contract would characterize them. It is open to question whether this characterization takes precedence over the meaning of 'sale' in the CISG.

---

[29] Available at: https://cisgw3.law.pace.edu/cisg/text/secomm/secomm-04.html. The undisputed view of the academic commentators cited being that the combination of the general principle of parties' freedom to contract as they see fit, their right to contract out of the CISG's provisions dealing with measure of damages through Art 6, along with the silence on the matter in Arts 14-24 (offer and acceptance) means that liquidated damages clauses can be incorporated into contracts subject to the CISG.

[30] Opinion No. 10 available at: http://www.cisg.law.pace.edu/cisg/CISG-AC-op10.html.

[31] Note that the court's right to substitute a reasonable amount for the agreed sum is construed as relating to validity notwithstanding the form the protective mechanism takes.

2. *The Article 5 Exclusion: Death and Personal Injury*

Article 5 excludes application of the CISG to the issue of a seller's liability for death or personal injury to the buyer or a third party caused by the goods. This issue is a matter for the private international choice of law rules of the forum.

3. *The Article 2 Exclusions: Consumer Sales, etc.*

Sales of goods 'bought for personal, family or household use' are excluded from the CISG, unless the seller did not know the buyer intended them for domestic use.[32] Similarly sales by auction[33] and sales by authority of law[34] are excluded from the CISG.

Eg **COMCORP LTD**

ComCorp has just opened a new business in France, ComCorp (Paris). In order to advertise its products it commissioned an advertising agency 'Francomensonges' to produce an advertising video to be supplied to ComCorp (Paris) on a USB memory stick. ComCorp (Paris) sent copies to each of its potential customers and put a download version on its website. Some recipients who viewed the advertising video found their computers were corrupted because of a virus in the video software. ComCorp (Paris) wants to know whether it has any claim against Francomensonges under the CISG.

4. *The Article 3 Exclusions: Goods and Services Contracts and Contracts for Production*

Article 3 deals with a particular situation where the buyer of goods also supplies some of the raw materials to the manufacturer/seller. Here, whether the supply is by way of actual sale or merely as a bailment for production services it falls under the CISG unless the buyer agrees to supply 'a substantial part of the materials necessary for such manufacture'.[35] So in such cases the application or otherwise is independent of whether property passes in respect of the goods supplied by the buyer. The meaning of 'substantial' is not clear, is it a substantial part of the materials by value, weight, volume, how essential they are to the finished product and is substantial 10%, 20% . . .?

Similarly the CISG does not apply to contracts for the supply of goods and services where 'the preponderant part of the obligations of [the supplier] consists in the supply of labour or other services'.[36] Here too the interpretation of the meaning of 'preponderant part' is not without its problems, for example is the test quantitative or qualitative[37] and there is the issue of whether the supply of computer software embedded in hardware falls within the CISG only where Art 3(2) applies and the supply of goods forms the preponderant part of the seller's duties.

Reference on the issues outlined above can be made to CISG Advisory Opinion 4, 'Contracts for the Sale of Goods to be Manufactured or Produced and Mixed Contracts (Article 3 CISG)' which though not binding is a very helpful commentary.

---

[32] Art 2(a). [33] Art 2(b). [34] Art 2(c), e.g. sales by a sheriff in execution of a judgment.
[35] Art 3(1). [36] Art 3(2).
[37] Available at: https://www.cisg.law.pace.edu/cisg/CISG-AC-op4.html.

Application: Opting in and out of the CISG

Although the CISG provides a set of default rules in relation to the formation of the contract and the rights and remedies of the parties, by virtue of Art 6 the parties may exclude the Convention from, or vary its application to their contract.[38] Consequently, prima facie, it is possible to exclude the Art 35 requirements for quality and conformity though there is at least one implicit limitation on the parties' freedom of contract. As we shall shortly see, Art 7(1) requires the Convention to be interpreted 'having regard . . . the observance of good faith in international trade.' On this basis it may be that the parties' autonomy under Art 6 is subject to an overriding requirement for good faith. On this interpretation a seller, for example, would be required to reveal to the buyer any hidden defects of which he knows and a term in the contract to the contrary would be ineffective to exclude Art 35. It would appear that such an interpretation would be unlikely.[39] A commonly met problem is determining the effect of the incorporation of an INCOTERM,[40] for example 'FoB'. The standard conclusion is that because INCOTERMS do not purport to be comprehensive, the incorporation of an INCOTERM into a contract effects a partial exclusion of the CISG to the extent that the two sets of rules differ. Thus for example in *BP Oil International v Empresa Estatal Petroleos De Ecuador*[41] the INCOTERM 'CFR' superseded Arts 66–70 of the CISG but otherwise the CISG continued to apply, for example in determining the remedies of the parties.

BP Oil International Ltd v Empresa Estatal Petroleos De Ecuador (2003) 332 F.3d 333(5th Cir. 2003).

FACTS: PetroEcuador agreed with BP to buy 140,000 barrels of petrol[42] containing a minimum gum content, 'CFR La Libertad - Ecuador'. The contract also stated; ' Jurisdiction: Laws of the Republic of Ecuador'. The INCOTERM 'CFR means 'cost and freight' meaning that BP had to deliver the goods to a suitable ship and pay for their loading and transport to the named destination port—La Libertad. BP did this and had an expert test the oil for gum content at the port of loading, Deer Park Texas. The oil was within specification. However on arrival in Ecuador the buyer tested the oil again and refused to accept it claiming the gum content was too high. BP sold the oil to a third party at a loss and sued PetroEcuador in Texas for damages.

HELD: At first instance in the District Court of Texas the judge held:

i. That Texas private international law gives effect to a choice of law clause, therefore Ecuadorian law applied and

ii. Having heard from Ecuadorian legal experts, under Ecuadorian domestic law, the goods had to meet the contractual specification on delivery in Ecuador so

iii. He refused judgment in favour of BP.

---

[38] The right to vary is subject to Art 12, the effect in this instance being that the parties cannot override a reservation made by the forum state requiring formalities in the formation or variation of a contract.

[39] See below on the meaning and effect of Art 7.

[40] See Chapter 20 of the physical book.

[41] *BP Oil International Ltd v Empresa Estatal Petroleos De Ecuador* (2003) 332 F.3d 333(5th Cir. 2003).

[42] 'Barrels' in this context does not literally mean 'drums'. A barrel of oil is a measure of volume and means 42 US gallons equal to 35 Imperial gallons or about 160 litres.

On appeal the United States Court of Appeals for the 5th Circuit held that the analysis of the judge at first instance was wrong. His approach should have been as follows:

i. The CISG was engaged with the contract as a whole because both the US and Ecuador had ratified the CISG.

ii. Under the CISG the parties had freedom of contract and so could select the law of any jurisdiction therefore Ecuadorian law applied.

iii. 'A signatory's assent to the CISG necessarily incorporates the treaty as part of that nation's domestic law' so since CISG was part of Ecuadorian law CISG applied to the contract unless the parties disapplied it in whole or in part under Art 6.

iv. By contracting 'CFR' they had unambiguously disapplied the CISG in respect of the passage of risk, which under CFR was 'when the goods pass the ship's rail'.[43] Therefore BP was entitled to damages calculated according to Arts 74–79 CISG.

COMMENT:

1. The first move of the first instance judge was to ignore the CISG and apply Texan private international law. This approach is typical in far too many cases where the CISG is involved. The conclusion that the law of Ecuador meant the domestic law of Ecuador ignoring that the CISG is actually part of Ecuadorian law is less typical but not uncommon.
2. Our explanation of the approach adopted by Appeals Court rather simplifies the judgment in that it ignores some of the irrelevancies and fills in some of the jumps in logic.
3. Whether the parties intended to apply Ecuadorian law (excluding the CISG) is a matter for the intent of the parties and not as implied in the appeal judgment a matter of law. What they actually intended is further clouded by the fact that the parties labelled what was taken as a choice of law clause 'Jurisdiction' which is concerned not with what law applies but which forum has the right to hear the case.
4. An interesting point is that the Appeals Court held that if BP knew that notwithstanding the test by its expert the petrol was outside the contractual specification then risk would not pass citing Art 40 CISG as authority. This has to be wrong, being a misreading of the effect of Art 40, probably confusing it with Art 68 which only applies to sales of goods in transit and in any event must be excluded because of a clear conflict with the CFR INCOTERM. Nevertheless the general approach treats the CISG as excluded only to the extent necessary to give effect to the express intent of the parties seems correct.

Opting out of the application of the CISG entirely is very common,[44] the conjecture being that lawyers are generally unfamiliar with the CISG and 'better the devil you know', though in order to be confident that they have done so the parties must manifest their intention expressly.[45] It is an open question whether the CISG can be excluded by implication. Certainly in the USA the stated consensus appears to be that any exclusion must be express.[46]

---

[43] This was true under INCOTERMS 2000 which applied at the time. Now risk passes ' on loading' under INCOTERMS 2010.

[44] See Ulrich G Schroeter, *To Exclude, to Ignore, or to Use? Empirical Evidence on Courts', Parties' and Counsels' Approach to the CISG (With Some Remarks on Professional Liability)* (December 16, 2011). Available at SSRN: https://ssrn.com/abstract=1981742 or http://dx.doi.org/10.2139/ssrn.1981742.

[45] ULIS, the predecessor to the CISG, permitted express and implied disapplication.

[46] See eg Custom Polymers PET LLC V Gamma Meccanica SpA (2016) 185 F.Supp. 3d 741.

One way of opting out is through choosing the law of a particular state but care must be taken in so doing. For example a choice of law clause might read: 'This contract shall be governed by the law of the State of South Carolina'[47] but such a clause has been held to be ineffective to exclude the CISG since the law of South Carolina includes the CISG,[48] indeed one way of interpreting the clause is that far from excluding the CISG it actually confirms that the CISG is to apply[49] though there are US decisions to the contrary.[50] However had the clause named the law of a non-Contracting State, for example England and Wales then the CISG would have been effectively excluded.

Of course, the issue is one of determining the intention of the parties so that it may be that other evidence available to the court in South Carolina might have indicated a different intention, for example that a clause in an earlier draft of the contract expressly made the CISG applicable but one of the parties insisted on its removal.[51] More difficult is interpreting a clause nominating the *domestic* law of a Contracting State. In this chapter we have used the expression 'domestic law' to mean the law of the forum excluding the CISG but this is not the only sense in which the expression can be used, it can just as easily mean no more than the law as it applies in that state, which of course includes the CISG, however courts have shown more readiness to conclude that the parties did not intend the CISG to apply in such cases.[52]

Although the CISG does not deal with the matter there seems no reason, subject to the domestic law of the forum state, why parties whose places of business are not in Contracting States or to whom the CISG would not otherwise apply cannot opt in so that by agreement the CISG could apply to their contract. For example, a seller in India and a buyer in England and Wales (both non-signatories) might select the law of New South Wales (Australia is a signatory) though they would need to make it clear that they want the CISG to apply to them even though under NSW law it does not apply automatically. But suppose they simply state: 'The CISG shall apply to this contract'. Here the court would have to use the private international law of that forum to decide which state's legal system *prima facie* applies to the contract. Having done so it would have to decide whether the effect of the clause in that legal system is simply that it is incorporated into the contract as a term or whether under that system the parties would be treated as if they have implicitly selected the law of a Contracting State. The approach in common law based systems at least would be to treat the CISG as if its provisions were contract terms which would therefore be subject to any compulsory controls under that system's sales law.

---

[47] This was the clause in the *Custom Polymers* case.

[48] The technical reason for this is that under the US Constitution, Art IV (2) federal law (which includes the CISG) becomes part of the law of each of the individual States making up the USA.

[49] *BP Oil International Ltd v Empresa Estatal* Petroleos De Ecuador (2003) 332 F.3d 333(5th Cir. 2003).

[50] E.g. *Am Biophysics Corp v Dubois Marine Specialities* 411F. Supp 2d 61, 64. (Rhode Island).

[51] Even where such evidence exists, the state may have a strong parol evidence rule that prevents it being used or there may be an 'entire agreement' clause in the agreement which might have the same effect.

[52] See for example the 'Aluminium Rings Case' where the choice of law was 'the domestic law of Germany' which the Supreme Court of Germany held excluded the CISG from a contract between a German buyer and an English seller. Available at http://cisgw3.law.pace.edu/cases/100511g1.html. See OLG Hamburg (Germany) available at http://CISGw3.law.pace.edu/cases/080125g1.html (opt in by choosing Hamburg as the forum).

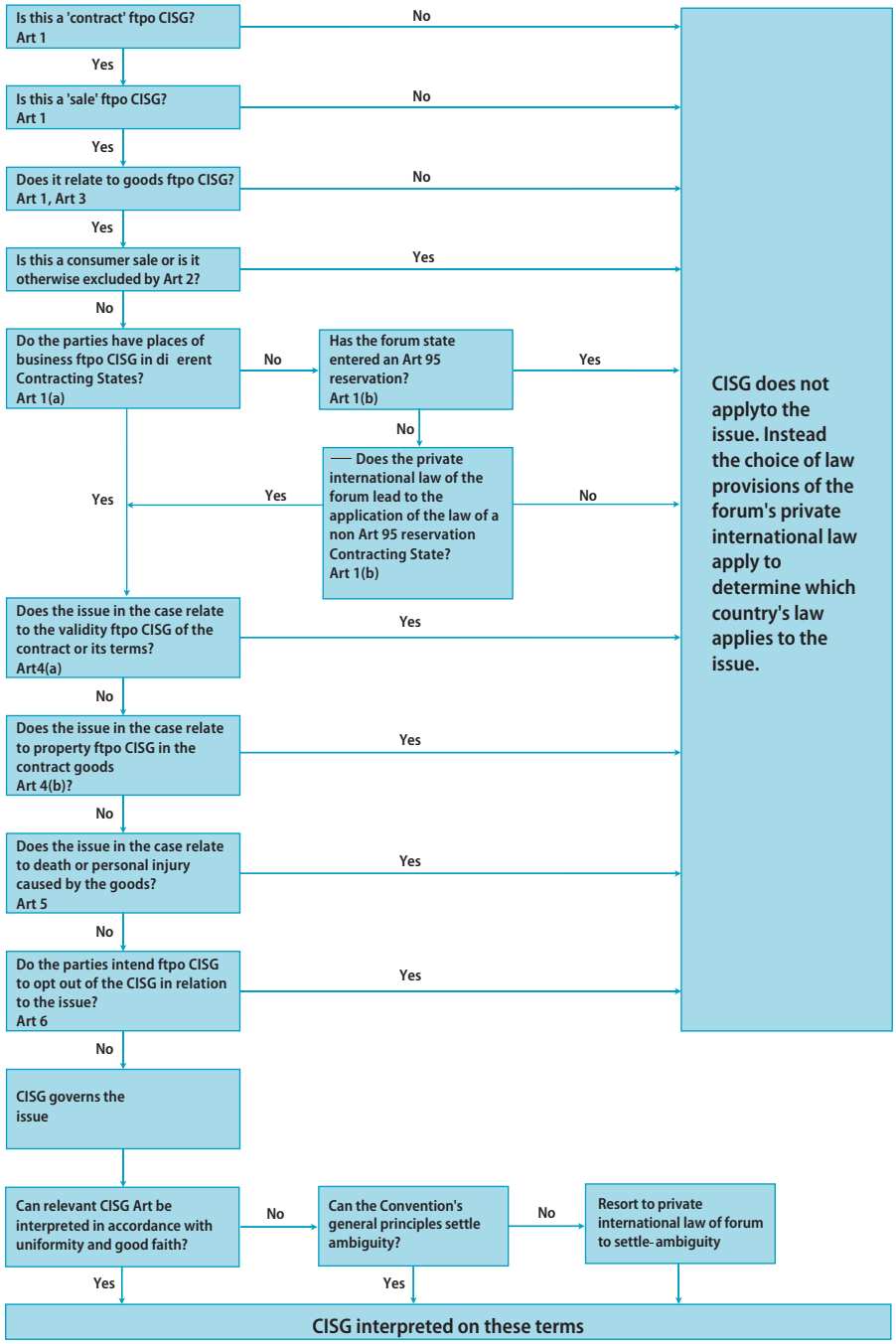
A flow chart summarizing the issues raised in relation to the application of the CISG is included in Table 2.

In this Table the expression 'ftpo' means 'for the purposes of'.

Table 2 also includes consideration of how problems arising in relation to the interpretation of the Convention should be resolved. And it is to these problems that we now turn.

TABLE 2 Decision tree for a judge where CISG may apply to a Case

In this Table the expression 'ftpo' means 'for the purposes of'.



The Problems of Interpretation and their Resolution

Achieving uniformity

The preamble to the Convention sets out its objective, namely that the

> . . .adoption of uniform rules which govern contracts for the international sale of goods and take into account the different social, economic and legal systems would contribute to the removal of legal barriers in international trade and promote the development of international trade. . .

The most obvious way of achieving uniformity would have been to have had a supranational appeal court but bearing in mind the need to persuade as many states as possible to ratify the treaty this was clearly politically impossible. Instead, Art 7 sets out an approach to be adopted by forums interpreting its provisions in order to ensure, so far as practicable, that the CISG means the same thing in each of these forums.

Firstly, before resorting to domestic law the forum should interpret the CISG 'having regard to its international character and the need to promote uniformity and the observance of good faith.'

Secondly, assuming that the issue has not been resolved any ambiguities 'are to be settled in conformity with the general principles on which [the Convention] is based.'

Finally, assuming the issue has not been resolved, only then should the forum resort to the law applicable by virtue of the rules of private international law' and so fill a gap in the CISG.

It can be seen that the drafters of the Convention are seeking to achieve two things with Art 7. Firstly there is pressure to ensure a uniform interpretation of the Convention, by making reference to national law a last resort. This is a matter of practical necessity if the Convention is to have any international utility. But then, by reference to good faith and general principles there is pressure in relation to the content of the interpretation.

From this it seems clear that lawyers are being exhorted to treat the Convention as a new autonomous code requiring an international rather than domestic jurisprudence since without this there cannot be uniformity of interpretation in the legal forums of the 83 signatories.[53] But how might this be done? Kasterly[54] suggested as long ago as 1988 that in striving to avoid a parochial non-uniform approach it was important to pay detailed attention to the text itself[55] and to its drafting history. Equally important must be that courts must pay attention to the views of scholarly commentators—something more familiar to civilian lawyers than their common law counterparts—whilst

[53] Or indeed any other forum required to apply the CISG.

[54] Amy H Kasterly, 'The Right to Require Performance in International Sales: Towards an International Interpretation of the Geneva Convention' (1988) 63 Wash LR 607, 651.

[55] But which text? There are six equally authentic texts in Arabic, Chinese, English, French, Russian, and Spanish and unfortunately (inevitably?) the texts are not exact linguistic equivalents. For an example see Federal Supreme Court (Switzerland) 13 November 2003 struggling with the French and English texts against the non-authentic German translation at para 4.3. Available at: http://cisgw3.law.pace.edu/cases/031113s1.html.

civilians must pay more attention to previous legal decisions which are the bedrock for interpretation for common lawyers.[56] This in itself creates further problems of language, unfamiliar legal concepts and access to reports of legal decisions. Common lawyers are often unaware of how fortunate they are with the wealth of reported materials readily available to them[57] but accessing decisions elsewhere is not as easy. To help solve this problem there are some invaluable databases available on the web, in particular that run by the Institute for International Commercial Law at Pace University New York[58] though access to post-2014 material is limited. Pace also maintains a web page containing links to a network of CISG resources maintained in other countries.[59] UNCITRAL has the 'CLOUT' database which is regularly updated with international developments and useful English language versions of a number of important cases. An unofficial, self-appointed 'CISG Advisory Council' comprised of a panel of academic experts has issued a number of opinions on troublesome issues,[60] but whilst these are helpful they are no more authoritative than any other well researched scholarly writing.

Even if access to non-domestic material is possible there is the issue of the weight that ought to be given to non-domestic cases and to academic commentary. Clearly a decision in Germany, say, cannot be binding in a US Court[61] but what does 'have regard to' in Art 7 mean? The purist would say that it must be given an autonomous meaning but we can see that rendering such a meaning is a circular process requiring reference to non–domestic legal material.

Kasterly went further and pointed to the requirement for courts to extract and apply the general principles underlying the Convention in construing its terms. There is no settled conclusion on what these principles might be but Kasterly suggested that in addition to the need for uniformity of construction they included:

- equal treatment and respect for the different social, legal and cultural backgrounds of international traders;
- an emphasis on making the contract work, performance (however imperfect) rather than termination;
- good honest and open communication between the parties;
- good faith;
- trust; and
- forgiveness of human error.[62]

To this list might be added an emphasis on full compensation and party autonomy by giving effect to the parties' intentions.

[56] There has been a tendency in US courts to ignore 'foreign' legal decisions though this may be in the process of change.

[57] Though generations of law students (and practitioners) have found this a mixed blessing at best.

[58] Available at: http://www.cisg.law.pace.edu/.

[59] Available at: http://iicl.law.pace.edu/cisg/page/autonomous-network-cisg-websites.

[60] Available at: http://www.cisg.law.pace.edu/cisg/CISG-AC-op.html.

[61] Where for example a Federal Court decision in one Circuit is merely persuasive in the Federal Court of another.

[62] These can be derived from looking at the substantive content of the Convention.

Good faith: Interpretive tool or implied duty?

Writers differ in their assessment of the role good faith plays under the CISG. We have included consideration of the concept under the 'interpretation' heading because that is how it is presented in the Convention. However that presentation reflects a compromise on behalf of the drafting committee reflecting the extensive debate between typically civil lawyers who wanted acting in good faith as a positive duty under the Convention and those from common law jurisdictions (particularly England)[63] who saw the concept as being so vague that it would lead to substantial uncertainty in determining the rights and duties of contracting parties.

Clearly there is a potential conflict between the range of possible domestic conceptions of what inequities require a good faith interpretations so that in the cause of uniformity of interpretation an international understanding of the scope of good faith is needed; yet Goode, Kronk, and McKendrick[64] identify at least three main views on the role of Art 7.Of these three the one most commonly met in decisions of European jurisdictions is that Art 7 imposes a duty of good faith on the parties. This is well illustrated in a typical decision of the District Court Neubrandenburg - the *'Sour Cherries' Case*.[65]

***The Sour Cherries Case*. Decision of the District Court Neubrandenburg, 3 August 2005. English translation available at: http://cisgw3.law.pace.edu/cases/050803g1.html**

FACTS: The Seller (unnamed) was a fruit processor in Belgium and the Buyer (unnamed) was a fruit trader in Germany. The Seller sent a letter to the Buyer on 13 June 2003 confirming an oral conversation of earlier that day involving the sale and purchase of 400,000, 720 gram jars of pitted sour cherries at prices '[t]o be fixed during the season' for delivery to a German destination on dates between July 2003 and May 2004. Each delivery to be separately invoiced. A little later the buyer requested delivery of 50,000 jars and agreed a price of 0.95EUR per jar for that consignment and these were duly delivered accompanied by an invoice endorsed with the Seller's standard terms, including a clause giving a Brussels Court sole jurisdiction and choosing Belgian law as the law of the contract.

On 15 October 2003 the Seller wrote again to the buyer under the heading 'Contract Agreement' again confirming the June agreement and quoting a price of 0.90EUR per jar and setting a delivery schedule.

On 20 October 2003 the Buyer wrote to the Seller saying it could not agree to a fixed price because they had to agree prices with their customers in January 2004. Between January and July 2004 the Buyer accepted a further 130,000 jars of sour cherries in six deliveries each accompanied by an invoice endorsed as before at a price between EUR 0.87 and EUR 0.90 per jar. On 25 August 2004, the Seller requested the Buyer to accept the balance of the 400,000 jars in accordance with the agreements of 13 June and 15 October 2003 at a price of EUR 0.90 per

[63] Bearing in mind the UK has not ratified the Convention this is perhaps ironic.

[64] Roy Goode, Herbert Kronk and Ewan McKendrick *Transnational Commercial Law* (2nd edn, OUP 2015) 233.

[65] Decision of the District Court Neubrandenburg, 3 August 2005. Available at: http://cisgw3.law.pace.edu/cases/050803g1.html.

jar. The Buyer applied to the District Court of Neubrandenburg Germany for a declaration that it was not liable to buy the further 270,000 jars of cherries. The Seller argued that the court did not have jurisdiction because of the jurisdiction clause.

Held: The Seller's standard terms, including the 'Jurisdiction' and 'Choice of law' clauses were not validly incorporated into the contract and so were not part of the contract because:

1. The contract had been concluded in the oral communication[66] and confirmed by the letter of 13 June.
2. Art 8 which deals with how to determine the intention of the parties requires that 'the recipient of a contractual offer, which is intended to be subject to standard terms of business, must have the opportunity to gain knowledge of these in a reasonable way.' And
3. '[I]t would contradict the principle of good faith in international trade (Art 7(1) CISG), as well as the general obligation on the parties to cooperate and provide information. . . to burden the contractual partner with a duty to familiarize itself with clauses which were not even sent to it [before the contract was concluded] and with the risks and disadvantages of standard business terms stemming from the other side, of which it was not aware.'

Consequently the court had jurisdiction,[67] applied the CISG,[68] and concluded that under the oral contract the Buyer was bound to buy 400,000 jars in total.

Comment:

1. In relation to the issue of the role of good faith in the CISG the court was faced with an issue of how standard terms can become incorporated into a contract and properly avoided directly applying German domestic sales law. In German *internal* sales law a party is bound by standard terms if at the point of contract either:
   i He is aware of their content or
   ii Has reasonable means becoming aware of them eg by requesting a copy.

That said, on a cursory analysis of Art 8 which deals with how to determine the intention of the parties, the court managed to reach the same conclusion. The court then made an assumption not only that Art 7(1) imposes a duty of good faith on the parties but that in not providing the terms the Seller was acting in bad faith. From this the court can rapidly conclude that the terms cannot fairly be regarded as having been incorporated. Interestingly German domestic *international* sales law disapplies alternative ii just as the court held the CISG does!

2. Perhaps an alternative analysis would have been more appropriate. Having decided that the contract was formed during the discussion on 13 October, the next question is to ask whether the contract was made expressly on the seller's standard terms. In fact there was no evidence of the content of the conversation in the parties' pleadings and the confirmatory letter of 13 June certainly makes no mention of them. Consequently, on the evidence before the court the terms cannot have been incorporated.
3. It should be noted that as the extract above reveals the court also relied on Art 7(2) on the basis that there are 'general obligations on the parties to cooperate and provide information.'

---

[66] It held, applying the usages of the fruit trade that prices '[t]o be fixed during the season' meant that a mechanism for settling the price had been agreed so that the requirement of Art 14 that a contract cannot be concluded until a price or price mechanism has been agreed had been satisfied and in any event Art 55 would have solved the problem.

[67] By virtue of Art 5(1)(a) Brussels I.

[68] In fact even if the Seller's standard terms had been validly incorporated the CISG would have applied since the CISG is the law of Belgium.

The prime argument in favour of this view is that the main alternative view, that good faith is merely an interpretive tool, is unsustainable on the basis that it is not possible to draw a clear line between interpretation in the light of good faith and the actions of the parties—interpretation does not exist in a vacuum. Indeed Art 7(1) acknowledges this when it states that the interpretation is explicitly to 'promote . . . the observance of good faith in international trade.' Thus for example, so the argument goes:

> compelling specific performance or avoiding a contract after a market change that permits a party to speculate at the other's expense may well be inconsistent with the Conventions provisions governing those remedies when they are construed in the light of good faith.[69]

This approach could apply equally for example to circumstances where under the Convention a party deliberately avoids an acceptance or a withdrawal of an acceptance reaching him by a certain time or indeed to many other potential situations in relation to a contract.[70] Other commentators would go much further. Klein[71] for example suggests that the duty of good faith and the principle of open communication between the parties requires the pre- and post-contractual disclosure of essential information potentially turning CISG sales contracts into contracts *'uberrimae fidei'*.[72] Similarly in *BRI Production 'Bonaventure v Societe Pan African Export* [73] the contract was formed on the basis that the goods (jeans) would only be exported to South America. In fact the buyer exported them to Spain and persistently failed before and after the contract was concluded to provide evidence of destination to the seller who, when he discovered the truth terminated the contract. The Grenoble Court of Appeals unsurprisingly held that the seller was entitled to terminate under Art 64 but then awarded FFR10,000 in punitive damages against the buyer for acting 'contrary to the principle of good faith in international trade laid down in article 7 CISG'.

The problem with this type of approach is that it fails to take account of the drafting history of the Convention and undermines the compromise the drafters reached. Goode et all point out that if Art 7 does indeed impose a positive duty of good faith on the parties they could nevertheless contract out of it by virtue of Art 6 which is surely and act of bad faith, thus suggesting that interpreting Art 7 in this way leads to some odd outcomes.[74]

The second view of the role of good faith proposes that there is no positive duty of good faith but it is merely a tool to be applied by a court in interpreting the Convention so as to minimize the occurrence of inequitable results. This has the advantage of being literally what the Conventions says and is faithful to drafting history.

---

[69] Michael J Bonell, 'Interpretation of Convention' in Cesare M Bianca and Michael J Bonell (eds) *Commentary on the International Sales Law* (Giuffre 1987) 85.

[70] For example, if *'The Sour Cherries'* case is right, not providing a copy of your standard trade terms even though the Buyer did not ask for one.

[71] John Klein, 'Good Faith in International Transactions' (1993) 15 Liverpool L Rev 115.

[72] Much as Lord Mansfield intended in *Carter v Boehm* (1766) 3 Burr 1905. Later cases confined the doctrine to insurance contracts only. English experience of contracts *uberrimae fidei* has not been an entirely happy one.

[73] Court of Appeals Grenoble (France) 22 February 1995. Available at:

[74] Roy Goode, Herbert Kronk and Ewan McKendrick, *Transnational Commercial Law* (2nd edn, OUP 2015) 236.

The final view is that exemplified by Kasterly in the work quoted above[75] namely that Art 7(1) does not impose a duty of good faith on the parties but is one of the general principles underpinning the Convention and so is to be used to aid interpretation of the Convention in cases of ambiguity for the purposes of Art 7(2). Schlechtriem also adopts this view and suggests Art 21(2) (giving effect to acceptances of offers delayed in transmission) and Art 19(2) (the CISG solution to the 'battle of the forms') as likely candidates for good faith interpretations.

One of the problems with treating good faith as a foundational principle is its vagueness and the lack of self-evident examples of it in the Convention. This latter point is perhaps well demonstrated by pointing out that Ferrari, Flechtner, and Brand[76] cite Art 21(2) as a source for the argument that good faith is a foundational principle, while as we have just seen Schlechtriem views the same Article as one be a good candidate for a good faith interpretation.

Obviously, there is no consensus on the role of good faith in the Convention, but bearing in mind the drafting history of Art 7(2), its stated function as an aid to settling ambiguity in the Convention and recognizing the international nature of the Convention which requires respect to be paid to differing legal traditions it is tentatively proposed that the second view is to be preferred. But, even though this is perhaps the most modest of the alternatives we are still left with the issue of ascribing a meaning to a term which is notoriously vague.

An example of the problems of interpretation

Eg **COMCORP LTD**

ComCorp agreed to buy a standing crop of *'Quercus Robur'* timber from a Croatian seller, Croak. ComCorp intended to sell the crop at a profit before it was cut but just as they decide to 'cash-in' their investment the price of oak fell very considerably so ComCorp was anxious to get out of the contract if possible. Lee went to inspect the crop and discovered it is not *Quercus Robur* but *Quercus Petraea* which although just as valuable as *Quercus Robur* is a different species of oak. ComCorp notified Croak that it was terminating the contract for non-conformity and Croak brought a case in the courts of Croatia claiming damages. The domestic law of Croatia is like that of England and Wales and would permit termination for this non-conformity: however the parties are agreed that the CISG applies to the contract but only if an agreement for sale of a standing crop is a contract for the sale of goods. Under the law of both Croatia and England and Wales a standing crop can be goods. Does the CISG apply?

In our ComCorp example there are a number of issues of detailed reference to the Convention which which we cover in more detail in a later section, however the purpose of this ComCorp example is to outline the process of how to construe the Convention .

[75] Amy H Kasterly, 'The Right to Require Performance in International Sales: Towards an International Interpretation of the Geneva Convention' (1988) 63 Wash LR 607. See also Peter Schlechtriem, *Uniform Sales Law: The UN Convention on Contracts for the International Sale of Goods* (Manz 1986) 39.

[76] Franco Ferrari, Harry M Flechtner, and Ronald A Brand (eds) *The Draft UNCITRAL Digest and Beyond: cases analysis and unresolved issues in the UN sales convention* (Sellier European Law Publishers 2004) 537. They also find support from Articles 16(b), 29(2), 37, 40, 46, 47(2), 64(2), 82, and 85–88.

Firstly, the immediate temptation of the Croatian court might be to turn to Croatian domestic law, after all it would have had to use Croatian choice of law rules under its private international law to determine that the CISG was engaged under Art 1(b).[77] However this is not what Art 7 mandates, rather it requires, so far as possible, giving the word 'goods' an autonomous uniform meaning, but what should that meaning be?

Secondlyc careful reading of the CISG might lead to Art 3 which states that '[c]ontracts for the supply of goods to be manufactured or produced are to be considered sales' but this seems to be simply clarifying whether agreements for what in English law is called 'future goods' are *sales* not whether what is sold is goods or not.[78]

Thirdly, the court would be unlikely to find any cases on whether a growing crop is goods or not ,nor is there much scholarly literature particularly in relation to sales where the buyer has no intention of taking delivery.[79]

Fourthly however there are several principles which might be helpful. ComCorp is certainly involved in sharp practice and if the contract were avoided, the emphasis would not be on 'making the contract work'. But, as we have seen, there is much controversy over what amounts to bad faith and over what effect bad faith has. Similarly, Croak's human error is not being forgiven if ComCorp can terminate for a technical non-detrimental breach of contract.

Finally ,there is the point that, since presumably the CISG promotes its own principles, the more contracts it applies to the greater the application of those principles, suggesting therefore a wider rather than a narrower interpretation is called for where the text permits. The problem (or advantage) of this argument is that it could be applied to almost any issue arising in respect of the scope of the CISG. Returning to the ComCorp example involving the provision of software, one issue was whether, since it was supplied at no cost, the arrangement was not a contract. It would surely be tempting for a court to argue there is, because where there is a transfer of property in a commercial arrangement there must be a price even though it cannot be quantified, for example, the time taken to view the advertising material. In this way the scope of the CISG could be extended and its principles become even more widely applicable.

Contract Formation: Offer, Acceptance and Battle of the Forms

Arts 14–23 comprise Part II of the Convention and were a matter of controversy especially in Nordic countries so that it is possible under Art 92 for a state to make a declaration that it is not bound by Part II.[80] All declarations under the Article were withdrawn, instead the Nordic countries have made declarations under Art 94(1) that the CISG does not apply if both parties to a contract have a place of business in one or other of Denmark, Finland, Iceland, Norway, or Sweden.

---

[77] See below.

[78] Contra Hornold. John O Honnold, *Uniform Law for International Sales under the 1980 United Nations Convention* (3rd edn, Kluwer 1999) 46–55, 52. Available at: https://cisgw3.law.pace.edu/cisg/biblio/ho2.html. There is no web access to the 4th edn (2009).

[79] Hornold's comments seem predicated on his stipulation that that the crop will be cut and delivered.

[80] A list of accessions, reservations, and declarations can be found at: https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=X-10&chapter=10&lang=en#EndDec.

The Convention employs a formal process of offer and acceptance for contract formation and not as for example under the French Civil Code where a contract exists merely through each party's agreement, which may be evidenced solely by conduct, to confer a benefit on the other.[81] Thus the contract is concluded 'at the moment when an acceptance of an offer becomes effective in accordance with the provisions of this Convention' (Art 23) and an offer becomes effective when 'the indication of assent reaches the offeror' (Art 17(2)).

We must now consider what amounts to an offer and an acceptance.

Offers Acceptances and Counter Offers

What is an offer?

To be an offer within the CISG a 'proposal for a contract' must:

1. Be addressed to one or more persons Art 14(1) otherwise it is an invitation to treat (Art 14(2)). Consequently mass mailings are unlikely to be offers.
2. Be sufficiently definite by indicating the goods and either states or provide a mechanism for determining the quantity and/or price (Art 14(1)). As we saw in *The Sour Cherries Case* the term price '[t]o be fixed during the season' was held to be sufficient partially at least since the usages of the trade were that prices were not fixed in advance of the picking season and that contracts were made at the market price prevailing at delivery. Failure to fix a price is not necessarily fatal. Subject to contrary intent, Art 55 implies that the price is that 'generally charged at the time of the conclusion of the contract for such goods sold under comparable circumstances in the trade concerned'.
3. Indicate that the offeror intends to be legally bound. A detailed offer is likely to fulfil this criterion.[82]

What is an acceptance?

By virtue of Art 18(1) for a communication to constitute an acceptance for the purposes of the CISG it must:

1. Be a statement (including conduct but not silence) made by the offeree.
2. Indicate assent to an offer.

Art 19 deals with the problems if the acceptance is not a mirror image of the offer and is dealt with below under the heading 'The Battle of the Forms'.

When do offers and acceptances become effective?

By 'effective' the CISG means to 'have a legal effect'.

An offer becomes effective when it reaches the offeree (Art 15(1)) and so may be withdrawn even if expressed to be irrevocable if the revocation reaches the offeree before or at the same time as the offer (Art 15(2)).

An effective revocable offer may nevertheless be revoked if the revocation reaches the offeree before the offeree has despatched the acceptance (Arts 16(1) and (2)).

A timely acceptance becomes effective (and a contract is thereby concluded) 'at the moment the indication of assent reaches the offeror' (Art 18(2)). An acceptance is not

---

[81] Code Civil, Art 1108.

[82] Though see *Hanwha Corp v Cedar Petrochemicals* Inc 760 F. Supp 2d 426. District Court for the Southern District of New York, 30 August 2000. Available at: http://cisgw3.law.pace.edu/cases/110118u1.html.

timely unless it reaches the offeree within any time limit he has set and if none within a reasonable time. Subject to the circumstances, oral offers must be accepted immediately Art 18(2). There is some deliberate ambiguity here. Suppose an offer is made stating 'let me know if you accept this offer by [date]'. In most civil law countries such an offer would be treated as irrevocable until the given date had passed whilst in common law jurisdictions typically only offers which are clearly irrevocable cannot be withdrawn before the contract is made.[83]

We noted above that the 'indication of assent' under Art 18(1) might be by conduct and Art 18(3) clarifies what is meant. Performance of an act such as despatching the goods or paying the price constitutes an effective acceptance, but only if the offer indicates that it would or the act shows assent as a result of trade usage or practices the parties have established for themselves.

An acceptance may be withdrawn if the withdrawal reaches the offeree before or at the same time that the acceptance would have become effective (Art 22).

Clearly when a communication 'reaches' a potential party is vital and its meaning is given in Art 24, which applies to all 'indications of intent' made within Part II. The Article states that an 'indication of intention' reaches the addressee if made orally or is delivered to his place of business or mailing address.

These provisions provide a potential opportunity for the unscrupulous.[84] Suppose that a buyer of goods, the price of which is volatile sends an offer to buy to a seller at a quoted price. This is effective when it reaches the seller (Art 15(1). The seller, who wants to see how the market price moves, uses a slow means of delivery when he sends his acceptance which once despatched, makes a revocation by the seller impossible (Art 16(2)). If the market price falls, the seller simply sends a withdrawal of acceptance so that it reaches the buyer before or at the same time as the acceptance. As a result no contract has been concluded and he has no duty to buy (Art 22). Alternatively, if the market price rises the seller knows he can buy at the lower contract price. Perhaps there might be a role for Art 7(2) here - but what?

The Battle of the Forms

The common law insists on what has been called the 'mirror image' rule, namely that any acceptance must be on the same effective terms as the offer otherwise the 'acceptance' is re-characterized as a counter offer.[85] The effect of this rule is that the winner of the battle is the party who fired the 'last shot', normally when the recipient of a re-characterized acceptance proceeds to performance and thus is deemed to have accepted the counter-offer. This rule was abandoned in US Uniform Commercial Code.[86] Under the UCC an acceptance which contains additions or differences[87] remains an acceptance but one containing proposals for additions to the contract. Prima facie therefore unless (i) the offeror positively accepts the proposals so they become terms of the contract or (ii) the acceptance is expressly or impliedly effective on its terms only, the

[83] See Clayton P Gillette and Robert E Scott, 'The Political Economy of International Sales Law' (2005) 25 Int'l Rev L & Econ 446, 474–475.

[84] Or perhaps the 'strategic'. The choice of adjective might be important in the light of Art 7(2).

[85] See for example *Butler Machine Tool v Ex-Cell-O Corporation* [1979] 1 WLR 401 (CA).

[86] UCC 2-207.

[87] The interpretation of UCC 2-207 has been problematic. For example, a vast amount of jurisprudence exists on the meaning of additions or differences and what is material or not.

contract is concluded on the offeror's terms. First shot wins! However, any non-material additions or differences in an acceptance will become contractual terms unless the offeror has already objected to them or does so within a reasonable time of receipt.

CISG, Art 19 partially adopts the common law and partially the UCC approach. Under Art 19 an acceptance which has non-material 'additions, limitations or other modifications' remains an acceptance and as under the UCC these distortions in the 'mirror' will become terms unless objected to promptly either orally or by dispatching a notice of objection.[88] However unlike the UCC, the inclusion of material variations causes the re-characterization of a purported acceptance as a counter offer. Consequently, a party who receives such an 'acceptance' is in danger of being treated as having accepted that offer, as under the common law, if he then proceeds to performance. In other words, the CISG adopts the 'last shot rule'.

VLM Food Trading International v Illinois Trading Company (2014) United States Court of Appeals 748 F 3d 780 (7th Circuit)

FACTS:

The case involved 18 contracts for the sale of potatoes between VLM, the Seller, a Canadian agricultural supplier and Illinois Trading, the Buyer, an Illinois produce reseller. Each contract was initiated when Illinois Trading sent an offer to buy potatoes to VLM specifying their quantity, price, and place of delivery. VLM would respond by e-mail, confirming the terms of the sale and would then ship the order. Finally VLM would send an invoice including a term making Illinois Trading responsible for attorney's fees if it breached the contract. Illinois Trading accepted the goods on every occasion and duly paid the price under the first nine contracts but through financial difficulties failed to pay under the next nine. VLM sued for the price and its legal costs. Illinois Trading accepted it owed the purchase price of the potatoes but disputed that it had to pay VLM's attorney's fees.[89]

HELD:

1. Applying *Zapata Hermanos Sucesores SA V Hearthside Baking Co*[90] the CISG does not mandate the recovery of legal costs, consequently VLM had to show that the costs clause was part of the contracts.
2. Since Illinois Trading's communications met the Art 14(1) requirements they were offers and VLM's emails constituted acceptances on the terms of the offers.
3. Since neither the offers nor the acceptances mentioned legal costs VLM could not recover its costs.

COMMENT:

1. The reasoning, if not the outcome, in *Zapata* is not without its critics,[91] but the doctrine of precedent in the USA meant that this decision of the US Court of Appeals (7th Circuit) was

[88] Interestingly the CISG departs from the UCC in that under the CISG apparently, objections voiced to terms suggested during pre-contractual negotiations are not sufficient to prevent non material alterations in an acceptance becoming contractual terms.

[89] In the US generally each party to litigation pays its own legal costs whatever the outcome of the case.

[90] (2002) 313 F.3d 385. US Circuit Court of Appeals, 7th Circuit. Available at: http://cisgw3.law.pace.edu/cases/021119u1.html.

[91] See for example, David B Dixon, 'Que Lastima Zapata! Bad CISG Ruling on Attorneys' Fees Still Haunts U.S. Courts' (2006-07) 38 (2) University of Miami Inter-American Law Review 405–429.

binding on the same Court in *VLM*. Consequently unless the Court decided to convene en banc[92] to overrule *Zapata* it was legally pointless for the Court to consider the commentaries on the issue of legal fees, for example the 6th CISG Advisory Council Opinion that whilst the CISG does not govern recovery of costs nevertheless it does not prevent their recovery if for example they would be recoverable under the law of the contract.[93] Judge Posner in *Zapata* had decided (correctly, if we share the view of the Advisory Council) that the CISG did not expressly cover the issue of legal costs but (incorrectly) that therefore, since the recovery of costs is a procedural not a substantive matter, the law of the forum determined the issue.

2. In the absence of binding precedent the court could have approached its task rather differently. Firstly, applying Art 7(1)—asking the question 'is there a consensus on whether the CISG governs the recovery of costs?' If the answer is 'no', recourse to Art 7(2) should then follow. There may for example be principles which might assist an interpretation of Art 74 (quantum of damages and remoteness). It would certainly be possible to conclude that if we give an autonomous meaning the word 'damages' (as we should if the CISG is to be given a uniform construction) and do not view damages solely as a remedy, separate from legal costs, then incurring legal costs in pursuit of a redress for a breach of contract is not only foreseeable but inevitable.[94] Finally, assuming the court could find no suitable principles it should apply the private international law of Illinois not immediately resort to Illinois civil litigation rules. That said it seems impossible to believe that a choice of law clause nominating Canadian law[95] would have been included in the VLM's e mail acceptance and in the absence of a choice of law clause, Illinois private international law would probably apply lead to the law of Illinois.[96]
3. It is interesting to consider how VLM could amend its practices and documentation to ensure a better outcome in the future.

Material 'additional or different terms' include those relating to 'the price, payment, quality and quantity of the goods, place and time of delivery, extent of one party's liability to the other or the settlement of disputes' (Art 19(3)). On this basis one might ask whether there are many non-material variations which could have given rise to litigation, one possibility is a clause dealing with the mechanism for giving notices and other communications under the contract or perhaps the packaging of goods.[97] That said there is clearly only a limited scope for the operation of Art 19(2).

[92] That is a court consisting of all of the judges on the circuit and not just the normal three judge panel.
[93] Available at: http://cisgw3.law.pace.edu/cisg/CISG-AC-op6.html.
[94] That said, as the CISG Advisory Council points out treating legal costs as a head of damage would create an anomaly in that a successful defendant would not be able to recover—he has no cause of action under which to claim a remedy.
[95] Canadian Provinces generally apply a broadly similar approach to costs as England and Wales.
[96] Illinois like most US states apples a variation of the 'most significant contacts' rule for determining the law of a contract and most of the pointers would probably be to Illinois.
[97] See E Alan Farnsworth 'Article 19' in Bianca-Bonell, *Commentary on the International Sales Law* (Giuffrè 1987) 175–184. Available at: http://www.cisg.law.pace.edu/cisg/biblio/farnsworth-bb19.html. Though the mode of packaging may be part of the description of the goods (see *Manbre Saccharine v Corn Products* (1919) 1 KA 198 (KB)).

Variation of Contract and Formalities in Contract Formation and Variation

Art 29(1) requires the parties to agree to any variation and subject as noted below, that agreement can be signified in any form including conduct. A problem which regularly appears in the courts is where, after a contract is concluded, a party supplies goods accompanied by an invoice setting out its standard terms of business. This can be construed as a request for a variation of the terms of the contract to reflect these terms. The question then arises, if the buyer accepts the goods, is this an agreement to the terms as proposed? We will return to this issue in the next section.

Art 29(1) does not apply where the original contract is in writing and contains a 'no oral variation clause' (Art 29(2)). Where contrary to such a clause there is a purported oral variation upon which one of the parties relies, the other party cannot insist on the pre-variation contract to the extent of the reliance (Art 29(2)). The Secretariat Commentary on Art 29(2)[98] gives an example where, contrary to a no oral variation clause, the parties agree to modify the seller's duties where delivery is to be by instalments. The seller acts on this agreement in relation to a number of instalments but the buyer insists on returning to the original terms for the final delivery. The commentary states that the buyer has no claim against the seller in respect of the completed deliveries but the seller must make the final delivery as originally agreed. This seems correct but only if returning to the original contract can be achieved without undue difficulty for the seller.

Under Art 11 there is no requirement that a contract be or be evidenced in writing nor is contract formation subject to any other requirement as to form.

Articles 11 and 29 were controversial and as a compromise Art 12 states that any disapplication of formality rules by Arts 11 and 29 or in Part II 'does not apply where any party has his place of business in a Contracting State which has made a declaration under article 96 of this Convention'.[99] Two interpretations of Art 12 have been suggested. The first is exemplified in *Zhejiang Shaoxing Yongli Textile v Microflock Textile Group*[100] where the issue was whether an oral variation of a contract had taken place. The parties were located in Florida (Buyer) and the Peoples' Republic of China (Seller), which at the time had entered an Art 96 Declaration. The Florida District Court held that such a Declaration disapplied Art 29(1) and that therefore writing was necessary to effect a variation. The contrary view is that all that Art 12 does is to leave the CISG with no provision as to form and that therefore the private international law of the forum state should be applied to determine the law of the contract, and writing would be required only if it was needed under the applicable law. This is probably now the majority view.[101] In fact even this view seems not quite correct since it short circuits the

[98] Available at: https://cisgw3.law.pace.edu/cisg/text/secomm/secomm-29.html.

[99] Currently Argentina, Armenia, Belarus, Chile, Paraguay, Russian Federation, Ukraine, and Vietnam have made Art 96 Declarations.

[100] US District Court (Southern District Florida) 19 May 2008. Available at: http://cisgw3.law.pace.edu/cases/080519u2.html.

[101] As it was at the date of *Microflock*. See Franco Ferrari, 'Writing Requirements: Articles 11–13' in Franco Ferrari, Harry Flechtner, and Ronald Brand (eds), *The Draft UNCITRAL Digest and Beyond* (Sellier 2004) 213–214.

gap filling mechanisms of the CISG in Art 7 something that the US Court of Appeals recognized in *Forestal Guarani SA v Daros International Inc*.[102] Here the seller under an oral contract was located in Argentina which had made an Art 96 Declaration and the buyer was in New Jersey. The issue was the validity of the contract. The court applied Art 7 and looked for a uniform view on the meaning of Art 12 among US and foreign jurisdictions and commentators and finding none sought suitable principles under the Convention which could guide an interpretation. Not finding any relevant principles the court then concluded that since the majority view seemed to be that it was incorrect to simply apply the form rules of the Declaring State resorted to New Jersey private international law as a last resort.

Determining the Parties Intentions and Implied Terms

Intentions

The issue of the intention of the parties is key, both in relation to interpreting the Convention, for example whether a contract exists, and construing the contract. The question arises whether in discerning intention do we apply a subjective test or an objective test and to whom—the 'intending party ' (Party A or the other party (Party B)?

Article 8 answers this question in providing a drop-down pair of rules for interpreting the outward manifestations of a party's intent, whether in a statement or other conduct:

1. Art 8(1)—Apply A's subjective intent where B knew or must have known what the intent was.
2. Art 8(2)—Otherwise apply B's objective understanding, taking into account the kind of person B is.

In either case account must be given to all relevant circumstances of the case including the negotiations, any practices which the parties have established between themselves, usages and any subsequent conduct of the parties (Art 8(3)).

Two issues immediately strike a common lawyer when considering this Article. Firstly Arts 8(1) and (2) look very like the *contra proferentem* rule so that a person must be clear in communications for fear that any ambiguity will be construed against him. The second is that Art 8(1) seems to 'permit [103]substantial inquiry into the parties' subjective intent'[104] and in tandem with Art 8(3) disapplies the 'parol evidence rule.[105] These points are well illustrated in *MCC Marble v Ceramic Nuova*. Here the buyer signed a written contract recording a prior oral agreement for the sale of tiles to be delivered in a number of consignments. Printed on the back in Italian were a

[102] 613. 3d 395 3d Cir. 2010.

[103] In fact it seems to *require* such an inquiry.

[104] *MCC Marble Ceramic Center v Ceramic Nuova D'Agostino*. (1998) 144 f. 3d 1384 (11th Circuit). Birch J. Available at: https://cisgw3.law.pace.edu/cases/980629u1.html

[105] The parol evidence rule is to the effect that written contracts may not be contradicted by evidence of prior or contemporaneous inconsistent oral promises or representations.

standard set of terms including one which gave the Italian seller the right to terminate the contract in the event of the Floridian buyer's failure to pay on delivery for each consignment. After several deliveries of tiles the buyer refused to make a payment, the seller purported to terminate the contract and the buyer sued the seller in the Florida Federal Court for failure to deliver any more tiles. At first instance the court refused the buyer's application to lead evidence that the parties had no subjective intent to be bound by the printed terms, but on appeal the court held that the evidence was admissible since it fell squarely inside Art 8(1). The court also held that CISG ousted the parol evidence rule since 'Art 8(3) is a clear instruction to admit and consider parol evidence regarding the negotiations to the extent that they reveal the parties' subjective intent.'[106]

Parties can avoid Art 8(3) by including an 'entire agreement' clause in the contract by virtue of Art 6, though of course it would appear that the clause would itself have to be construed in the light of Art 8(3). This raises the question whether, had such an entire agreement clause have been included in the written terms in *MCC*, it could have affected the outcome.

Finally, we need to return to the effect of an invoice or similar document containing the seller's standard term tendered after the conclusion of a contract in particular whether an acceptance of the goods is also construed as an acceptance of the terms? The answer where this is the first or only contract the parties have made the answer as exemplified in the *Sour Cherries Case*[107] is a clear no.

But what if, as in *VLM v Illinois*,[108] there were a series of contracts on identical terms each involving tender of an invoice, how would Art 8 deal with that? Obviously in relation to the first contract the seller has failed to make his terms part of the contract but it seems likely that subjectively the seller did intend its terms to apply when making the second and subsequent contracts. Each of these contracts was initiated by the buyer's offer and it is open to inquiry what the buyer's subjective intention was in relation to incorporation of the standard terms. Clearly if it can be proved that subjectively the buyer intended to incorporate the seller's terms in the offer that ends the matter. Assuming however that no such evidence exists it is at least plausible to suggest that since the seller did not, and could not, have known what the buyer subjectively intended then what the Buyer intended becomes irrelevant. If this is correct then Art 8(2) raises the question; 'would a reasonable person in the Seller's situation believe that the Buyer's offer was intended to incorporate the standard terms? Again, it is at least plausible to suggest that he would and so the terms would be deemed to be incorporated. Finally, returning to Art 8(1), it is equally plausible to argue that in making the offer the buyer knew or ought to have known that the seller believed he would be contracting on his standard terms (however mistakenly). The issues are not simplified by the possible role Art 7(1) might have here.

---

[106] For an excellent article on *MCC* see Harry Flechtner, 'The UN Sales Convention and the Eleventh Circuit' (1999) 18 Journ L & Comm 259. See also CISG Advisory Council Opinion No 3 available at: https://www.cisg.law.pace.edu/cisg/CISG-AC-op3.html.

[107] Decision of the District Court Neubrandenburg, 3 August 2005. Available at: http://cisgw3.law.pace.edu/cases/050803g1.html.

[108] *VLM Food Trading International, v. Illinois Trading Company* (2014) United States Court of Appeals 748 F 3d 780 (7th Circuit).

Waiver and implied terms

Unsurprisingly, since presumably they would in any event constitute contractual terms, the parties are bound by any 'usage' (i.e. custom) they have agreed: more importantly they are also bound by 'any practices which they have established between themselves', which context demands means that they need not have actually been agreed (Art 9(1)). The inference to be drawn from Art 29 is that unless the practice has been agreed it cannot amount to a variation of the contract and can only act as a waiver of past rights. Whether a variation has been agreed requires application of Art 8. As an example, suppose that a seller in a contract involving periodic payments, has never insisted on the buyer paying on time: does this affect the seller's rights in respect of future late payment? The Seller might always have intended this as an act of co-operative forbearance not intending that it bind his future action while the buyer might see the practice as constituting a variation. Clearly whether there is a variation or not is a matter to be determined by reference to Art 8(2) but assuming there was no agreement to vary, then the seller can draw the practice an end by notifying the buyer that he will be sticking to 'the letter' of the contract in future.

Article 9(2) deals with the incorporation of international trade practices into the contract. Subject to agreement to the contrary such a practice is implied into a contract if it is one 'the parties ought to have been aware of and which is widely known to, and regularly observed by, parties to contracts of the type involved in the particular trade concerned'. An important example relates to the incorporation of INCOTERMS. The use of trade terms like 'FoB' (Free on Board) or 'CiF' (Cost Insurance Freight) is very common in international trade. The problem is that the terms do not necessarily have the same meaning under the domestic law of every country. To counter this the International Chamber of Commerce has promulgated a set of widely used uniform definitions. To ensure these definitions are incorporated into a contract it is important to make this clear - for example by putting 'FoB . . .INCOTERMS 2010',[109] failure to do so may result in the court using the domestic definition of the term. However in a number of decisions in the USA have held simply by using a trade term which has an Incoterm definition implies that Incoterm definition into a contract governed by the CISG by virtue of Art 9(2).[110]

Trade terms including Incoterms are discussed in Chapter 20 of the physical book.

The '*Windows and Doors*'[111] case provides a further example but one where the practice was not as formal and well documented as the incorporation of INCOTERMS. In this case the content of an oral contract for the manufacture and supply of doors and windows by an Italian seller to a German buyer was confirmed in writing by the buyer including a price discount of 14%. The size of the discount was disputed but the Saarbrucken Court of Appeals held that it was an accepted trade usage that unless he objects a trader is bound by the terms of a confirmation letter unless it intentionally misrepresented the agreement or departs so far from its terms that the other's consent cannot be reasonably assumed. Interestingly the court then went on:

[109] The inclusion of the year indicates which edition of INCOTERMS is to apply.

[110] See for example, *BP Oil International Ltd v Empresa Estatal Petroleos De Ecuador* (2003) 332 F.3d 333 (5th Cir 2003). Analysed above in relation to opting out of the CISG.

[111] Court of Appeals (Saarbrucken) 14 February 2001. Available at: http://cisgw3.law.pace.edu/cases/010214g1.html

The recipient's silence causes the contract to be modified or supplemented in accordance with the letter of confirmation. In the event that a contract had not yet been concluded, it is formed with the content of the confirmation.

In other words, the court held that Art 9(2) provides a means of agreeing a variation to a contract by conduct, in this case silence, within the meaning of Art 29 (1).

Articles 9(1) and 9(2) can come into conflict. For example, under the contract in *Treibacher Industrie v Allegheny*[112] tantalum chloride was supplied 'on consignment'. Trade usage was to the effect that a 'consignment' contract was only concluded once the buyer actually used the goods. However, the established custom between the parties was that a contract arose when the buyer gave an order. On this basis all the seller was doing was to delay billing until consumption. The Federal Appellate Court (11th Circuit) concluded that the parties' understanding of their contract established in their custom 'trumped' the trade usage.

Rights Duties and Remedies of the Parties

Rights and duties

The rights and duties of the parties are set out in summary in Table 1 and whilst the table does show that there are some differences between the CISG and English law, nevertheless these are principally matters of detail, the essential duties appear very familiar. Put shortly the seller's duty is to deliver conforming goods and documents and pass title in the goods and the buyer has a duty to accept and pay for such a tender (Arts 30 and 53). There are however some rights, namely the buyer's duty to examine the goods and the seller's right to cure which require comment in order to provide background to the issue of remedies under the CISG some of which are not available at common law.

The buyer's duty to examine the goods

Art 38(1) requires the buyer to examine the goods 'within as short a period as is practicable in the circumstances'. No independent sanction is provided in the Convention for breach of this duty but as Tables 1, 3 and 4 show, exercise of the Buyer's remedies, other than a damages claim unconnected with a lack of conformity, is dependent on giving timely notice to the seller of the breach complained of.[113]

The seller's right to cure

One of the principles identified by commentators as underpinning the CISG is that there is an emphasis on 'making the contract work' rather than permitting a party too readily to resort to termination of contractual duties, a perceived weakness of the common law approach. The seller's right to cure non-conforming performance under Arts 37 and 48 is clearly an example supporting that principle.

---

[112] *Treibacher Industrie A.G v Allegheny Inc* (2006) 464 F.3d 1235 (11th Cir).Available at http://cisgw3.law.pace.edu/cases/060912u1.html.

[113] See Arts 39, 43, and 49.

Art 37 deals with the seller's right to cure a non-conforming tender before the contractual date for delivery so long as it 'does not cause the buyer unreasonable inconvenience or unreasonable expense.' A similar right may exist under the common law[114] but if it does has received little attention in the courts.[115] Notwithstanding it is clear that a non-conforming tender even if cured is still a breach of contract under the CISG since the Article specifically reserves the buyer's right to claim damages for it, even if cured.

Art 48 is more far-reaching in that it gives the seller the right to cure even after the date of delivery. The right is triggered by a request to accept performance which if accompanied by a timescale for performance is deemed to be accepted if the buyer fails to respond within a reasonable time (Art 48(2)). A notice to the buyer that the seller will cure within a specified timescale is deemed include such a request (Art 48(3)). Assuming the buyer permits an attempt at cure he cannot resort to remedies which are inconsistent with the attempt (Art 48(2)).

The Seller's right to cure under Art 48 is subject to 3 conditions:

1. The cure must be effected without unreasonable delay.
2. It must not cause the buyer unreasonable inconvenience or unreasonable uncertainty of recovering money already expended.
3. Assuming the seller effects a cure as above the breach must not amount to a fundamental breach of contract.

This latter condition is not reflected in its terms in Art 48 but constitutes the consensus view of the sense of the Article. The content of what is now Art 48 was the subject of controversy with the West German delegation in particular concerned that the buyer's right to terminate the contract would deprive the seller's right to cure of much of its utility.[116] We will consider the issue of the remedy of avoidance more fully shortly but for our current purposes it is sufficient to know that termination under the CISG is possible in the case of 'fundamental breach' meaning that the buyer has been substantially deprived of all benefit he was entitled to expect under the contract.

Eg **COMCORP LTD**

ComCorp's subsidiary in Paris agreed to supply a CNC Drill to Deutche Drilling in Germany for delivery on 1 March 2019. On 2 January 2019 Deutche Drilling ordered another CNC Drill for delivery on 1 April 2019. The first machine arrived on 1 March but Deutche Drilling sent ComCorp (Paris) an email stating that they were terminating the contract. ComCorp (Paris) immediately emailed back asking the reason and offering to solve any problems. Deutche Drilling explained the problem on the telephone and ComCorp (Paris) said they could easily solve it and would send an engineer the following day. Deutche Drilling insisted that the contract was at an end and told ComCorp to come and collect the machine.

[114] See *The Katchenjunga* [1990] 1 Lloyds Rep 391, 399 Lord Goff. Though see contra Vanessa Mak, 'The Seller's Right to Cure Defective Performance' [2007] LMCLQ 409.

[115] So too Art 37. From the available sources its application has caused few problems.

[116] See Peter Schlechtreim, *Uniform Sales Law - The UN-Convention on Contracts for the International Sale of Goods* (Manz 1986) 77. Available at: https://www.cisg.law.pace.edu/cisg/biblio/schlechtriem.html.

Consider the ComCorp example. *Prima facie* termination of contract relieves the buyer of all unperformed obligations under the contract, for example allowing access to the seller's workmen to repair the machine. However, the right to terminate under the CISG is not like the right at common law where purely technical breaches causing no loss to the buyer can nevertheless trigger termination. Under the CISG, the very fact that the seller can readily cure a non-conforming breach must suggest that the breach was probably not fundamental. Therefore in our example, until we know whether the seller can cure the breach or not, we cannot know whether the breach was fundamental. Consequently, a buyer faced with an offer of cure, refuses it and terminates at his peril.

Remedies

As with the rights and duties of the parties Table 1 gives an outline in summary form comparing the positions under the CISG and English Law and apart from considering the remedy of termination of contract (called by the CISG 'avoidance') there is only a need to consider three other matters, the need for notifications of breaches, specific performance, time extensions and avoidance.

Notification of Breaches of Contract

The principle that the CISG requires open communication by the parties is exemplified well by the fact that the availability of all remedies for non-conformity (with the possible exception of avoidance) is made dependent on timely and specific notification to the other party, while some remedies for other types of breach also require notice.

Table 3 outlines the notice requirements but excluding that needed in relation to avoidance which is dealt with below.

TABLE 3

Issue	Content of notification	Time limit for notification	Authority
Non-conformity breach (short delivery may be a non-conformity breach—goes to quantity)	Must specify nature of non-conformity	Reasonable time after buyer discovered or ought to have discovered breach—max 2 years. Reasonable excuse for delay applies in a damages or price reduction claim	Art 39 Art 44
Goods subject to third party rights	Must specify nature of third party right	Reasonable time after buyer discovered or ought to have discovered breach. Reasonable excuse for delay applies in a damages or price reduction claim	Art 43(1) Art 44
Substitute goods claim	Must claim remedy	With Art 39 notice or within reasonable time thereafter	Art 46(2)
Repair of goods claim	Must claim remedy	With Art 39 notice or within reasonable time thereafter	Art 46(3)

Specific performance—substitute goods and repair

Shorn of its equitable baggage, the right to insist on performance both for buyers (Art 46) and sellers (Art 62) is a primary remedy under the CISG. In the case of a buyer, claiming a right of repair (Art 46(3)) or substitute goods (Art 46(2)) would be examples of a specific remedy while claiming the price or insisting on delivery would be the corresponding rights for a seller.

The right to claim substitute goods is available to a buyer only if the non-conformity in the goods supplied amounts to a fundamental breach.[117] Such a claim cannot be maintained at the same time as are claims for avoidance and repair and presumably reduction in price.

The right to claim repair does not depend on there being a fundamental breach but is only available where it is reasonable in the circumstances.

Finally, since specific performance of sales of goods is generally not awarded under the common law, Art 28, as a compromise, provides the court with a discretion not to make such an award unless it 'would do so under its own law in respect of similar contracts of sale not governed by this Convention'.

Additional time for performance

German law has a concept called 'nachfrist' which normally gives a defaulting party the right to be granted additional time for performance by the other. This idea of an extended deadline of reasonable length, though not the German term, was partially borrowed by the CISG in Arts 47 (for the buyer) and 62 (for the seller).

Eg **COMCORP LTD**

Returning to ComCorp (Paris) and Deutche Drilling. When the second drill arrived on 1 April 2019 it too did not work. Deutche Drilling gave ComCorp three days in order to sort the problem out. ComCorp (Paris) said that its engineer was not available until 6 April 2019. Deutche Drilling claims that it can avoid the contract even if the repair is easily accomplished. Is Deutche Drilling correct?

Unlike with a German 'nachfrist', under the CISG there is no duty to grant an extension but if one is granted, on its expiry (or if the other party has given notice that it will not perform or will not perform by the expiry date) the party granting it may terminate the contract, in the case of a buyer by virtue of Art 49(1)(b) and a Seller by virtue of Art 64(1)(b) whatever the severity of the breach. It should however be noted that Art 49(1)(b) only applies in its terms if the breach concerned is late delivery. That said German courts have applied the German domestic understanding of time extensions by treating the grant of an extension as duty but also applying the right to avoid under Art 49(1)(b) to cases of non-conformity as well as late delivery.[118] This discrepancy in

[117] In which see more below.

[118] Goode et al see this as an example of familiarity with a legal concept proving a 'faux ami' to interpreters who need to give CISG concepts an autonomous interpretation. See Roy Goode, Herbert Kronk, and Ewan McKendrick, *Transnational Commercial Law* (2nd edn, OUP 2015) 230. See also Maryellen DiPalma, 'Nachfrist under National Law, the CISG, and the UNIDROIT and European Principles: A Comparison'(1999) 5(1) International Contract Adviser, 28–38. Available at: https://www.cisg.law.pace.edu/cisg/biblio/DiPalma.html.

interpretation as with all such discrepancies opens up the possibility of 'forum shopping' even under the CISG where in the case of a dispute, parties seek the jurisdiction most favourable to their arguments.

Avoidance of contract: procedure

Avoidance of a contract meaning, that both side's unperformed contractual obligations are terminated is often called 'termination' or 'cancellation' but whatever term is used the key point is that this is not a case where the contract is treated as if it had never existed (i.e. it has been rescinded) simply one where from now on neither side can insist on performance and are left to their respective remedies.

As noted above, avoidance is available to a buyer only on the expiry of an extension period (and then only in respect of non-delivery) or in the case of a 'fundamental breach'. In the case of a seller, apart from a fundamental breach, avoidance is possible only if the buyer fails to take delivery or pay the price after any reasonable time extension for performance the seller may have given him (Art 64(1)(b)).

The injured party must trigger his right to avoid by giving declaring it so in a notice of termination to the other party (Art 26). This notice can take any form but must be unambiguous.[119] The *'Jewellery Case'*[120] provides an odd example. Here the German seller sold jewellery to an Austrian buyer, cash in advance. The contract stated 'German law applies'. The buyer did not pay and the seller, in writing, gave an additional period of time for payment after which he would refuse to accept any payment and claim damages or declare the contract avoided. The buyers still refused to pay claiming the contract was cash on delivery. The seller sued. The Austrian Supreme Court held that notwithstanding the choice of law clause, the CISG applied since it is part of German law. It also held that whilst not having to be in any form, a declaration under Article 64 must be unambiguous but even if the wording of the seller's letter may have left doubt, the subsequent legal action contained an unambiguous notification of avoidance.

There is some debate whether by virtue of Art 39(1), the buyer must give a notice of non-conformity 'specifying the nature of the lack of conformity' within a reasonable time or lose his remedies, requires that an Art 26 notice of termination based on non-conformity must also be specific. Clearly, since Art 39(1) applies to remedies generally, while Art 26, which has no reference to the need for specific content, applies particularly to avoidance, it may seem that the particular case should prevail over the general. Likewise, such a difference in content can be justified since the two notices have different functions. A notice of non-conformity needs to alert the seller to details of the alleged breach in order that he can consider whether he can offer to cure and keep the contract alive while a notice of avoidance brings the contract to an end so that in theory any offer of cure is too late.[121] On the other hand this reasoning assumes

---

[119] Art 26 does not state this expressly but since avoidance is not favoured in the CISG along with the principle of clear communication, clarity would seem to be essential. See for example Supreme Court of Austria 28 April 2000. Available at: http://cisgw3.law.pace.edu/cases/000428a3.html.

[120] Supreme Court of Austria (Oberster Gerichtshof) 28 April 2000. Available at: http://cisgw3.law.pace.edu/cases/000428a3.html. See to like effect *Roder Zelt- und Hallenkonstruktionen GmbH v Rosedown Park Pty Ltd* (1995) 57 FCR 216. Federal Court of Australia. - Seller/creditor's claim in buyer's insolvency for return of goods unequivocally signalled the seller was avoiding the contract. Available at: http://www.uncitral.org/docs/clout/AUS/AUS_280495_FTAdelaide.pdf.

[121] See Clayton P Gillette and Steven D Walt in *The UN Convention on Contracts for the International Sale of Goods* (2nd edn, Cambridge University Press 2016) 199.

TABLE 4 Time Limits For Declarations Of Avoidance

By Buyers		**Authority**
Late delivery	Reasonable time after becoming aware of delivery having been made.	Art49(2)(a)
Other breaches	Reasonable time after he knew or ought to have known of the breach; or Reasonable time after expiry of any extension given under Art 47.	Art49(2)(b)(i) Art49(2)(b)(ii)
By Sellers		
	None if the buyer has not paid. [122]	
Late performance	Before becoming aware of rendering of performance.	Art 64(2)(a)
Other breaches	Reasonable time after he knew or ought to have known of the breach; or Reasonable time after expiry of any extension given under Art 47.	Art64(2)(b)(i) Art64(2)(b)(ii)

that the buyer was correct in assessing the breach as fundamental so that making the Art 26 notice conform to the Art 39(1) specification at least keeps the possibility of salvaging the contract alive. After all, unlike in our first ComCorp (Paris) example, the seller might be able to change the buyer's mind. In any event failing to give an Art 26 notice which meets the Art 39 standard is poor practice. A party cannot always be confident that he has the right to avoid for non-conformity and may have to rely on a money-based claim in either damages or price reduction both of which require a timely notice under Art 39 and even if he is confident he can avoid, in many instances he will require further monetary compensation for the other party's non-performance.

A party will lose the right to avoid unless making a declaration of avoidance within the lime limits established in Arts 49 (buyer) and 64 (seller). Table 4 indicates the time limits applicable to making effective declarations of avoidance.

Avoidance for fundamental breach

What amounts to a fundamental breach is set out in Art 25 as follows:

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

The Article has given rise to a significant volume of litigation since there is no further elucidation in the Convention of any of its rather general terms,[123] but whilst there will always be cases to the contrary it is possible to propose some general propositions.

[122] See for example the *Jewellery Case* where the effective declaration was made in the Statement of Claim served eight months after the termination of the last time extension.

[123] See generally Franco Ferrari 'Fundamental Breach of Contract under the UN Sales Convention - 25 years of Article 25' (2006) J L and Comm 489.

Firstly courts do not favour avoidance. This accords with the general principle that the parties should co-operate to make the contract work, however imperfectly, rather than to abandon it.

Secondly though less confidently, the supply of non-conforming goods to a trader in those goods will not normally amount to a fundamental breach if there is a re-sale market for them. Thus in the *Cobalt Sulfate Case*[124] the German Federal Supreme Court held that the supply of goods from South Africa did not comprise a fundamental breach where the contract required the UK to be the place of origin. The fact that the buyer could not re-sell the goods to his normal customers in India because at the time South African goods were embargoed was insufficient since there was a re-sale market in other countries.

Thirdly the previous proposition may be a particular instance of a more general one, namely that a breach is not fundamental if the buyer can be expected to put the goods to another reasonable use,[125] which would also apply to a case of supply of non-conforming goods to an end-user.

Fourthly avoidance may only be appropriate if there is a lack of any suitable alternative remedy.

Support for these propositions can be found in a decision of the Swiss Supreme Court—the *Packaging Machine Case*.[126]

Decision of the Supreme Court of Switzerland 18 May 2009

FACTS: The Swiss seller sold a packaging machine to the Spanish buyer and agreed to install it in the buyer's factory. Immediately after initial installation the buyer complained about the machine's lack of performance. For over a year the seller repeatedly tried to increase the machine's hourly capacity but on 6 December 2002 it notified the buyer that the desired performance could not be achieved but suggested ways in which the speed could be increased. On 10 December 2002 the buyer notified the seller of the extent of its losses to date because of the under-performance and demanded the seller set a definite date by which it would finish installation. On 14 February 2003 the seller stated that at best the performance would be 40% below the contractual specification. The buyer declared the contract avoided on 23 March 2003. The questions arose whether the notice of avoidance was out of time and whether the breach was fundamental.

[124] German Federal Supreme Court 3 April 1996. Available at: https://cisgw3.law.pace.edu/cases/960403g1.html.

[125] Though see the *Italian Chaptalised Wine Case*, French Supreme Court, 23 January 1996. Available at: http://cisgw3.law.pace.edu/cases/960123f1.html. The abstract is unclear whether the wine was unfit for human consumption (in which case the case is unexceptionable) or just of inferior quality. See also *Delchi Carrier SpA v Rotorex Corp* (1995) 71 F.3d 1024, where the US Court of Appeals for the Second Circuit did not adversely comment on the reasoning at first instance that a supply of non-conforming goods was a fundamental breach because they were of lower value than goods of the correct specification!

[126] Decision of the Supreme Court of Switzerland 18 May 2009. Available at: http://cisgw3.law.pace.edu/cases/090518s1.html

HELD:

1. What constitutes a 'reasonable time' under Art 49 (2)(b) depends on:
   i. All circumstances of the case including the nature of the goods and the non- conformity and the seller's conduct after receiving notice of the alleged breach.
   ii. The purpose of the Article.
2. A buyer becomes aware of a breach only once he 'has fully appreciated the existence, extent and scope of [its]consequences' so that time began to run only on 14 February 2003 when it first became clear that the breach was fundamental. Except in exceptional cases 'a period of one to two months will be necessary and reasonable for the buyer to sufficiently examine the situation' so that the notice of avoidance was given within a reasonable time.
3. 'Fundamental breach' should be interpreted narrowly so that if in doubt a court should assume a breach is not fundamental because the CISG generally seeks to uphold the performance of contracts so avoidance should be an exceptional remedy with the primary remedy being monetary. Breaches of contract should primarily be compensated by virtue of a reduction of the purchase price with avoidance as a last resort.
4. Whether a party has been substantially deprived of what he is entitled to expect under a contract requires an objective test and normally only very severe cases of non-conformity would suffice so that the goods were practically useless or, where the buyer is a trader in the goods, they are not capable of being re-sold. In this case the underperformance was so substantial that the breach was fundamental and the buyer was entitled to avoid the contract.

COMMENT:

1. The reasoning of the court is generally impeccable. That said it referred only to Swiss cases, though there was reference also to a number of commentators.
2. Clearly the machine was not *prima facie* 'practically useless' but the court pointed out that with a 40% shortfall in production the packer was only marginally better than the buyer's previous machine. By inference therefore the machine was practically useless for the purpose the both parties knew the machine was intended.
3. The court also pointed out that a reduction in price would not be appropriate, since the loss of profit to the buyer over the lifetime of the machine through the performance shortfall exceeded its value. This reasoning would apply with equal force to the remedy of damages which would also include a claim for loss of profit.

Clearly fundamental breach is very a different concept under the CISG to such a breach under the common law with its insistence on the 'perfect tender' rule though some US decisions do have some residual elements of domestic law about them.[127] However the tendency among European judges to severely curtail the scope of avoidance as a remedy does not do full justice to Art 25 which for example requires a detriment which causes substantial deprivation of justifiable expectation. 'Substantial' does not mean 'almost total' which is the import of the third proposition above and of the decision in the *Packaging Machine* and similar cases.

[127] See for example *Delchi Carrier SpA v Rotorex Corp* (1995) 71 F.3d 1024. It is not just in US cases. See *The Paprika Case*, Landgericht Elwangen 21 August 1995. Available at: http://cisgw3.law.pace.edu/cases/950821g2.html, discussed later.

It should be noted that the scope of fundamental breach is further confined by the requirement that a breach is not fundamental if the severity of the detriment was neither reasonably foreseeable nor actually foreseen by the breaching party. Bearing in mind that with fundamental breaches there may be no appropriate alternative remedy, to avoidance the need for forseeability may deprive a buyer of full recompense for a catastrophic outcome of a breach of contract.

Whilst there is some difficulty with interpreting the meaning of Art 25 it is always open to the parties to contract out of it and of the notice requirements if they so wish by virtue of Art 6.

Avoidance is contingent on restitution

By virtue of Art 82(1) a buyer seeking to avoid or to claim substitute goods must be able to make restoration to the seller of goods in 'substantially in the condition in which he received them'. However, this duty does not apply if the buyer is unable to make restoration where the inability is:

1. not due to his act or omission; or
2. caused by an Art 38 examination; or
3. because the goods had been dealt with in the normal course of business before he discovered or ought to have discovered the lack of conformity (Art 82(2)).

The *'Paprika Case'*[128] provides an interesting example of the operation of the Article. Here the seller in Spain agreed to sell 80 tonnes of paprika to the buyer which was a spice distributer in Germany. The first consignment of 12 tonnes were delivered, paid for and then on-sold by the buyer. The buyer tested a sample from the second consignment and discovered that because there was an inclusion, German Food Safety Laws made it illegal to sell the goods in Germany. The buyer immediately sought and the seller agreed to supply, substitute goods for delivery about five weeks later. The seller failed to deliver and informed the Buyer that it would not be able to supply any goods which conformed to the specification. The Buyer claimed to avoid the contract both in relation to the nine tonnes already delivered and the 59-tonne balance.[129] In relation to the nine tonnes, the Court decided that five weeks was a reasonable time extension, and the buyer could avoid the contract, clearly falling within Art 49(1)(b). The court then held that he had the right to avoid the contract in its entirety even though he could not return the 12 tonnes in the original consignment since they had been disposed of in the ordinary course of business. Interestingly the fact that the breach was fundamental was almost taken for granted. On this point the *Paprika case* contradicts the second proposition for assessing whether a breach is fundamental or not.

Finally making restitution to the seller requires a buyer to account for all benefits derived from the goods (Art 84(2)) so in the *Paprika Case* that would require the seller to account for price it received on the sale of the 12 tonnes. Similarly, if a seller avoids a contract not only must he return the purchase price he must also add interest reflecting the 'time value' of money.

---

[128] Landgericht Elwangen 21 August 1995. Available at: http://cisgw3.law.pace.edu/cases/950821g2.html.

[129] This part of the case was pursued on the basis of Art 72(1) which provides the right to avoid a contract for anticipatory fundamental breach.

Conclusion

- The UN Convention on the International Sale of Goods is a uniform sales law forming part of the law of contract in those states which have ratified it.
- It does not apply to consumer sales and can be excluded by the parties to a contract to which it would otherwise apply.
- In order to preserve international character and its utility in assisting international trade the CISG requires courts to give its terms an autonomous interpretation.
- There are no formalities required for the formation of a contract under the CISG which is effected by offer and acceptance.
- Like many provisions in the Convention the CISG's solution to the 'battle of the forms' marks a compromise between competing national alternatives. It adopts an amalgamation of the 'first shot wins' and re-characterizing acceptances as counter offers.
- Whilst the rights and duties of parties under the CISG are unsurprising to a common lawyer, though there is a well-developed concept of the right to cure, CISG remedies contain some fresh features including the right of a buyer to claim repair and substitute goods.
- The CISG's restricts the right to avoid a contract to situations where either a party has failed to cure a breach or where the breach was 'fundamental'. To be fundamental, a breach must impose a foreseeable substantial deprivation of justifiable expectation on the innocent party.

TABLE 1 CISG: Summary and comparison of substantive provisions table[130]

It is important to refer to the primary materials while using this table which for the sake of brevity can only give broad indications of the content both of the Convention and English law. In particular it should be noted that even slight differences in wording between, for example, the Convention and the Sale of Goods Act 1979 can have profound effects, while texts with substantial differences in terminology can have the same meaning. Note also that the Convention requires an interpretation freed from domestic legal concepts in order to give effect to its international character.[131]

CISG Article	English Sale of Goods Act equivalent
Incorporation/implication of terms	**Incorporation/implication of terms**
Article 9	*McCutcheon v MacBrayne*[132] is to like effect.
(1) Agreed usages and established practices between the parties are incorporated into the contract.	
(2) Widely known and regularly observed international trade practices applicable to contracts of the type involved, which the parties knew or ought to have known are incorporated into the contract.	English courts will imply customary terms into a contract where the custom is certain reasonable and notorious.[133]

[130] The table does not deal with Arts 1—3 (Application of the Convention), Arts 4 & 5 (specific issues not covered by the Convention), Art 6 (Parties right to modify or exclude the Convention), Arts 7 & 8 (Interpretation of the contract), Art 10, or Art 24 (Interpretation of the Convention). These are dealt with in detail in the text.

[131] Art 7(1).

[132] [1964] 1 WLR 430 (HL).

[133] See *Cunliffe-Owen v Teather & Greenwood* [1967] WLR 1421 (QB) [1438–1439] Ungoed Thomas J.

CISG Article	English Sale of Goods Act equivalent
Formalities Articles 11, 12, and 13. No formalities required for formation of contract subject to Article 12. Modification or termination of contract by the agreement of the parties except writing is needed in the case of written contracts requiring written modification or termination by agreement subject to estoppel (Art 29).	**Formalities** English law does not require formalities for the formation of contracts for the sale of goods - SoGA, s 4. The Supreme Court has recently confirmed the effectiveness (subject to estoppel) of 'no oral variation' clauses in written contracts under English Law in *Rock Advertising Limited v MWB Business Exchange Centres Limited* [2018] UKSC 24.
Formation of Contract Contracts are formed by acceptance of an offer (Art 23).	**Formation of Contract** English law uses these concepts. Generally the effect of the CISG is apparently identical to English Law but some differences are noted below:
Offers An offer must indicate an intention to form legal relations, be addressed to one or more specific persons and indicate (expressly or by implication) the goods, their quantity, and price or a pricing mechanism. (Art 14(1) An offer to non-specific persons is an invitation to treat (Art 14(2)).	**Offers** English law does not require a price or pricing mechanism to be agreed (see s 8 SoGA).
Offers may be withdrawn if the revocation reaches the offeree: (1) if the offer is irrevocable, before or at the same time as the offer. (2) otherwise, before despatch of the acceptance (Arts 15 & 16). All offers terminate when a rejection reaches the offeror (Art 17).	Unless an offer amounts to an 'option' all offers are revocable until a contract is concluded. See *Byrne v Van Tienhoven.*[134]
Acceptances An acceptance is an offeree's statement or conduct (not silence) showing assent to an offer (Art 18(1)). Acceptance is only effective when and if: (1) it reaches the offeror: (a) within the time fixed or if none (b) within a reasonable time or (c) immediately in the case of an oral offer. Art 18(2). Or (2) the offeree, within any time limit, performs an act showing assent by virtue of the offer or through practices established by the parties, e.g. payment of price or despatch of goods. (Art 18(3).	**Acceptances** English law requires communication of acceptance except in the case where the 'postal rule' applies.
A purported acceptance failing to correspond with the terms of the offer is a counter offer save in the case of uncontested non-material additions or modifications when the contract is on the terms contained in the acceptance. Qualifications relating to price, payment, quality and quantity of the goods, place and time of delivery, liability, or the settlement of disputes are material (Art 19). The offeror can waive a late acceptance if without delay he so informs the offeree or dispatches a notice to that effect (Art 21(1)). A late acceptance is effective if it shows that under normal circumstances it would have arrived in time unless the offeror without delay orally informs the offeree that the offer has lapsed or dispatches a notice to that effect (Art 21(2)). An acceptance is withdrawn if the withdrawal reaches the offeror before or at the same time as the acceptance would have become effective.	In *Butler Machine Tool Co v Ex-Cell-O*[135] the majority (Lawton and Bridge LJJ) affirmed the traditional view that a 'mirror image' acceptance to offer correspondence was required for a contract to arise. Lord Denning looked for correspondence only on all material points. The 'Battle of the Forms' continues!

[134] *Byrne v Van Tienhoven* (1880)5 CPD 344 (Common Pleas).

[135] [1979] 1 WLR 401 (CA).

CISG Article	English Sale of Goods Act equivalent
Obligations of the seller	**Obligations of the seller**
The seller must deliver the goods, hand over any documents relating to them and transfer the property in the goods, as required by the contract and this Convention (Art 30).	s 27 SoGA—It is the duty of the seller to deliver the goods . . . in accordance with the terms of the contract of sale. English common law has the 'perfect tender rule' so that where the contract requires tender of documents then this too is an obligation of the seller. s 2 SoGA defines a sale of goods as one where 'the Seller transfers or agrees to transfer the property in goods. . .' hence a duty to transfer property.
Delivery	**Delivery**
Delivery of the goods is at the place agreed by the parties but if none:	s 29 SoGA is to like effect.
1. If the contract of sale involves carriage of the goods—in handing the goods over to the first carrier for transmission to the Buyer. But if not;	s 32 is to like effect.
2. If at the conclusion of the contract the parties knew the goods were at or were to be manufactured at a particular place—that place.	s 29— delivery is to be at the location of specific goods. (No mention of non specific manufactured good.s)
Otherwise;	
3. At the seller's place of business (Art 31).	s29 is to like effect.
The date for delivery is as agreed by the parties but if not agreed then within a reasonable time after the conclusion of the contract (Art 33).	In the absence of agreement the common law implies a duty of reasonableness.
A non-conforming tender may be cured if effected before the contractual date for delivery (Art 37).	Whether there is a right to cure a non-conforming tender within any agreed delivery period is disputed though see *Borrowman, Phillips & Co v Free & Hollis*).[136]
If the seller has a duty to tender documents relating to the goods, he must do so in conformity with the contract. A non-conforming tender may be cured if effected before the final date for delivery (Art 34).	The common law perfect tender rule produces the same result.
The buyer may refuse delivery before the contractual date (Art 52)(1).	Since delivery must be 'in accordance with the contract' (s 27 SoGA) the buyer can have no duty to accept early (or late) delivery. Time is normally of the essence in commercial contracts *Bunge Corpn v Tradax*[137] so typically *late* delivery will permit avoidance of contract.[138] Query though early delivery.
The buyer may refuse any quantity of goods delivered over the contractual amount, but must pay for any excess he accepts at the contract rate (Art 52(2)). Short delivery is deal with below under 'Remedies for Seller's Breach'.	s 30 SoGA deals with both over and under (short) delivery—allowing for partial or total rejection subject to s 30(2)(A).
Arrangements for carriage	**Arrangements for carriage**
If under the contract the seller is to hand the goods to a carrier he must identify the goods to the contract by giving notice to the seller, by marking the goods or through shipping documents (Art 32(1)). Failure to comply results in risk remaining with the Seller (Art 67(2)).	s 32 SoGA does not deal with this issue but in the absence of an express contractual duty to enable the buyer to identify the contract goods one would need to be implied in order to give business efficacy to the contract.
If under the contract the seller must arrange carriage to the buyer the arrangements must be appropriate in the circumstances and according to the usual terms for such transportation (Art 32(2)).	s 32(2) SoGA is to like effect but also provides that breach of this duty gives the buyer an option not to treat delivery to carrier as delivery under the contract.
Unless the seller has a duty to insure the goods in transit to the buyer he must on request provide the buyer with the necessary information to enable the buyer to insure the goods (Art 32(3)).	s 32(3) SoGA has the same effect but only in relation to carriage by sea.

[136] (1878) 4QBD 500 (CA). [137] [1981] 2 All ER 513 (HL) (541-542) Lord Wilberforce.
[138] *Hartley v Hymans* [1920] 3KB 475 (KB).

CISG Article	English Sale of Goods Act equivalent
Conformity of and title to the contract goods	**Conformity of and title to the contract goods**
The seller must deliver goods which are of the quantity, quality ,and description required by the contract and which are contained or packaged in the manner required by the contract (Art 35(1)). Subject to contrary agreement, goods do not conform unless: 1 Fit for the goods' ordinary purposes. 2. Fit for any particular purpose made known to the seller if the buyer reasonably relied on the at the deller's skill and judgement; 3. Conform to sample. 4. Contained or packaged usual manner if any or, otherwise adequately packaged. Art 35(2). The Art 35 duties also apply at the point when risk passes whether the lack of conformity is apparent or not (Art 36). Subject to agreement to the contrary, at delivery, the goods must be free of third party rights excluding intellectual property rights. (Art 41). The goods must also be free of certain third party intellectual property rights of which the Seller could not have been unaware at the point of contract (Art 42).	SoGA deals with these issues by way of the terms implied by ss 12–15. Differences are noted below: Packaging may be part of the s 13 description of the goods and so there conformity would be a condition of the contract. s 14 SoGA is more elaborate and in particular specifically applies an objective test in determining 'satisfactory quality' but generally appears to be of like effect. s 15 SoGA is more detailed but seems to like effect. SoGA does not expressly deal with packaging but durability is an express aspect of quality by virtue of s 14(2B)(e) which implies a need for appropriate packaging. The s 14 duties apply in respect of the 'goods supplied under the contract'. This includes all goods (including, e.g. packaging or inclusions) whether contract goods or not. The s 12 SoGA covenant for title is absolute with no intellectual property carve out.
Restrictions on buyer's remedies	**Restrictions on buyer's remedies**
The buyer has a duty to examine the goods as soon as practicable after delivery (Art 38). Buyer can only claim damages or reduction in price for a lack of conformity unless he notifies the seller of the nature of the non-conformity within: 1. A reasonable time after he discovered it or ought to have discovered it (Arts 39(1) and 44) and 2. In any event, two years after physical delivery (Art 39(2)). Unless the seller knew of the breach, buyer can only claim damages or reduction in price for breach of the covenant for title unless he notifies the seller of the breach within a reasonable time after he discovered it or ought to have discovered it (Arts 41–44).	There is no duty of examination as such but the buyer loses the right to *avoid* the contract for non-conformity if he accepts the goods which he will do if 'after the lapse of a reasonable time he retains the goods without intimating to the Seller that he has rejected them' (s 35(4) SoGA). The limitation period for all simple contractual claims is six years.
Remedies for seller's breach	**Remedies for seller's breach**
Generally Damages may be claimed in addition to any other remedy (Art 45). Specific performance is available unless the inconsistent with other remedies obtained. With partial non-delivery or non-conformity the Buyer is entitled to remedy in relation to the missing or non-conforming goods (Art 51(1)). However he may avoid the contract only if the breach in relation to the goods as a whole is fundamental (see later). (Art 51(2)).	**Generally** Except in exceptional circumstances specific performance is not available for breach of a sale of goods. English law allows for partial rejection (s 35(A) SoGA).

CISG Article	English Sale of Goods Act equivalent
Cure The buyer may give the seller an additional period of time to perform his obligations during which time the buyer's right to other remedies is suspended unless notified that the seller will not perform during the period (Art 47). After delivery the seller may notify the buyer that he is prepared to remedy a breach within a specified time if: 1.After cure it would not amount to a fundamental breach (see below); and 2.Remedy can be effected without unreasonable delay or inconvenience to the buyer (Art 48). The buyer may within a reasonable time refuse performance otherwise the seller may perform within the specified time indicated in his request. During this time the buyer's right to other incompatible remedies is suspended (Art 48(2)). The buyer retains any right to claim damages (Art 48(1)).	**Cure** In a bilateral contract (subject to the Contract (Rights of Third Parties) Act 1999) the parties can always vary the terms. For the duration of the additional time for performance will typically operate as a waiver of the buyer's rights.[139]
Repair Buyer may claim reasonable repair of non-conforming goods if the claim accompanies or is given within a reasonable time of the Art 39 notification specifying the breach (Art 46(3)).	**Repair** There is no right to claim repair under SoGA 1979 but see Consumer Rights Act, s 23.
Substitute Goods Conforming goods may be claimed in substitution for non-conforming goods but only if the breach is fundamental and the claim accompanies or is given within a reasonable time of the Art 39 notification specifying the breach (Art 43(2)). Buyer loses the right to substitute goods if it is impossible to return the contract goods in substantially the condition he received them (Art 82(2)). A breach is fundamental if it results in such detriment to the other party as substantially to deprive him of what he is entitled to expect under the contract, unless the party in breach did not foresee and a reasonable person of the same kind in the same circumstances would not have foreseen such a result (Art 25).	**Substitute Goods** There is no right to claim substitute goods under SoGA 1979 but see Consumer Rights Act, s 23.
Avoidance Avoidance releases the parties from further performance, subject to damages claims and dispute resolution provisions (Art 81). Buyer may avoid the contract for a fundamental breach (Art 49(1)(a)) or where if the buyer gives a reasonable extension of time the seller fails to deliver within that time (Art 49(1)).	**Avoidance** At common law avoidance of contract (better called 'termination' or 'cancellation') also releases the parties from further performance but subject to accrued rights and remedies. Avoidance is possible for breach of a condition of the contract. Subject to s 15(A) SoGA the innocent party need have suffered no loss. Also for breach of some innominate terms where the test whether avoidance is allowed is terminologically very similar to the definition of 'Fundamental Breach' under the CISG. There is no element of forseeability involved.

[139] Eg. *Hartley v Hymans* [1920] 3KB 475 (KB).

CISG Article	English Sale of Goods Act equivalent
The buyer loses the right of avoidance unless he notifies the seller of the breach: 1. In the case of late delivery, within a reasonable time after he has become aware that delivery has been made; 2. In the case of other fundamental breaches, within a reasonable time after: (i) he knew/ought to have known of the breach; (ii) the termination of any suspension of the buyer's rights under Art 47(1); (iii) the expiration of any suspension of the buyer's rights under Art 48(2); or (iv) after he has declared he will not accept performance.	The right to avoid is lost if the goods are accepted. See s 35 SoGA for what amounts to acceptance. CISG has no equivalent provisions concerning acts by the buyer which amount to acceptance but Art 82(1) would cover the most obvious example—incompatible user by the buyer of the goods.
If it is impossible to return the goods in substantially the condition he received them buyer loses the right to avoid (Art 82(2)(1)) unless the impossibility of return is: 1. not his fault (Art 82(2)(2)(a)); 2. Caused by the Art 38 examination (Art 82(2)(2)(b)). 3. Because the goods have been dealt with in the normal course of business before the Buyer discovered or ought to have discovered the non-conformity. (Art 82(2)(2)(c)).	The common law has no similar rule. Title to goods which has passed to the buyer reverts to the seller[140] but there is no *'restitutio in integrum'* pre-condition to termination of contract—unlike with the equitable remedy of recission.
If the contract is avoided: 1.The buyer is entitled to recover the price plus interest or other consideration he has paid (if any) if he concurrently makes restitution to the seller (Art 84(1)&(2)) 2. If the buyer has avoided the contract or claimed substitute goods he must account to the seller for all benefits he has received from the original goods.	In English law a buyer is entitled to recover the price in an action for money had and received but only if there is total failure of consideration (see *Rowland v Divall*).[141]
Reduction in Price Before or after payment, the buyer may reduce the price of non-conforming goods to their market value at the date of delivery but not if: 1. the seller has cured the breach; or 2. the buyer has refused an offer of cure.	**Reduction in Price** There is no right to claim a reduction in price under SoGA 1979 as such—though s 53 can have the same effect. See also Consumer Rights Act, s 24.
Damages Damages for breach are available for reasonably foreseeable loss including loss of profit (Art 74). If the buyer avoids the contract and acting reasonably, buys substitute goods he may claim any extra cost over the contract price plus any further Art 74 damages (Art75). If the buyer avoids the contract but does not buy substitute goods he may claim any shortfall in value between the contract price and the market price of the goods plus any further Art 74 damages (Art 76). A claimant must take reasonable steps to mitigate any loss—damages will be reduced to the amount had there been appropriate mitigation (Art 77).	**Damages** A good deal of work has gone into working out how to calculate damages in contract under the so-called Rule in *Hadley v Baxendale*[142] which is not reflected in the provisions of ss 51 & 53 SoGA. However the principles appear broadly similar between CISG and *Hadley* except that damages under Art 75 appear not to be governed by the requirement for forseeabilty.

[140] *Kwei Tek Choa v British Traders & Shippers* [1954] 2 QB 459,487 (QB).
[141] [1923] 2 KB 500 (CA).
[142] 9 Exch. 341 (1854). (Court of Exchequer).

CISG Article	English Sale of Goods Act equivalent
Obligations of the buyer	**Obligations of the buyer**
The buyer must pay the price (without demand) and take delivery of in accordance with the contract and Convention (Art 53).	s 27 SoGA is to like effect
Payment of price - amount If not agreed, the price is rebuttably presumed to be the market price at the point of contract for a similar contract (Art 55).	**Payment of price - amount** A reasonable price must be paid under a contract for the sale of goods in which there is no provision as to price s 8(2) SoGA - but see *May and Butcher v The King*[143] where s 8 SoGA did not apply where the price was 'to be agreed'.
Payment of price - place and time If not otherwise agreed the price is to be paid at the place of handing over the goods/documents or at the seller's place of business (Art 57(1). If not otherwise agreed the buyer must pay when the seller places either the goods or documents controlling their disposition at the buyer's disposal in accordance with the contract and Convention (Art 58(1)). Unless the agreed delivery process makes it inconsistent, the Buyer may examine the goods before making payment (Art 58(3)).	**Payment of price - place and time** s 28 SoGA makes payment and delivery concurrent obligations so the place and time of payment (absent contrary agreement) is the place and time of delivery, which absent any agreement as to that is the seller's place of business (s 29(2) SoGA). There is no equivalent right in English Law though under s 35 SoGA there is a right of examination on delivery so that if payment is against delivery or later the effect is the same.
Taking delivery The buyer must do all reasonable acts to enable the seller to deliver and take over the goods (Art 60).	**Taking delivery** s 61(1) SoGA defines delivery as the '. . .voluntary transfer of possession. . .'—so this part of the CISG seems to correspond with English law. There is no express reference to the buyer's duty to co-operate to effect possession but such co-operation is a necessary implication of the contractual duties.
Remedies for buyer's breach	**Remedies for buyer's breach**
Generally The seller may have to claim damages in addition to exercising other remedies (Art 61(2)).	**Generally** Damages is always available for breach of contract in addition to other remedies—though there are very few of them.
Specific performance Unless he has pursued an inconsistent remedy the seller may require the buyer to pay the price, take delivery or perform his other obligations (Art 62).	**Specific performance** See comments above on specific performance. However the seller's primary remedy—suing for price under s 40 SoGA (assuming property in the goods has passed) has the same effect as specific performance of the payment obligation.
Cure The seller may give the buyer an additional period of time to perform his obligations during which time the seller's right to other remedies is suspended unless notified that the buyer will not perform during the period (Art 63).	**Cure** In the absence of agreement to the contrary time is not of the essence in relation to payment—S10(1) SoGA and *Bunge Corporation v Tradax*[144] until the seller serves notice that he regards it as so.
Avoidance The seller may avoid the contract 1. For a fundamental breach (Art 64(1)(a)); or 2. If the buyer has failed to pay and/or take delivery after any additional time given under Art 63 or declares he will not perform (Art 64(1)(b).	**Avoidance** See above under Remedies for seller's breach.

[143] *May and Butcher v The King* [1034] 2KB 17n (HL) and *Hilas & Co v Arcos* 147 LT 503 (HL).

[144] [1981] 2 All ER 513 (HL).

CISG Article	English Sale of Goods Act equivalent
The right to avoid is lost once the buyer has paid the price unless: 1. When he avoided the contract, the seller was unaware that a late performance breach had been remedied (Art 64(2)(a)); or 2. He avoided the contract within a reasonable time of when he knew or ought to have known of non- performance breach (Art 64(2(b)(i)); or 3. He avoided the contract within a reasonable time of the expiration of any additional time given under Art 63 or the buyer's declaration he will not perform (Art 64(1)(b)(ii)). If the seller avoids the contract the buyer must account to him for all benefits the buyer has received from the goods (Art 84(2)).	
Damages Damages for breach are available for reasonably foreseeable loss including loss of profit (Art 74). If the seller avoids the contract and acting reasonably, sells the contract goods he may claim any shortfall between the contract price and the price received plus any further Art 74 damages (Art 75). If the seller avoids the contract but does not sell the contract goods he may claim any shortfall between the contract price and the market price of the goods plus any further Art 74 damages.	**Damages** See above under Remedies for seller's breach.
Passing of risk The buyer must pay the full contract price notwithstanding loss or damage to goods occurring after risk has passed unless loss/damage caused by the seller (Art 66). Risk in goods clearly identified to the contract passes: 1. At the contractual place for handing over the goods or if none; 2. When the goods are handed over to the first carrier for transmission to the buyer in accordance with the contract of sale. Retention by the seller of documents controlling the disposition of the goods in accordance with the contract does not affect passage of risk (Arts 67(1) & (2)). 3. For goods sold in transit: (i) At the point of contract; or (ii) When the goods were handed to the carrier if the circumstances so indicate but risk remains with Seller unless he discloses any loss or damage of which he knows/ought to have known (Art 68). (4) In all other cases risk passes when the buyer takes over or ought to take over the goods The effect of a fundamental breach by seller is that risk does not pass (Art 70).	**Passing of risk** s 20 SoGA seems to like effect except that it adds that risk passes to the buyer if delivery is delayed through the buyer's fault (s 20(2)). *Prima facie* risk passes with property whether the goods have been delivered or not (s 20(1) SOGA). In English law the passage of risk of damage/loss of goods sold in transit is unaffected by a failure by the seller to disclose at the point of sale, damage/loss which to his knowledge had already occurred. In English law as with the CISG, the Buyer may still terminate the contract for breach of a condition even though the goods have been damaged after risk has passed. However literally read Art 70 seems to apply even if there is no avoidance or claim for substitute goods.

CISG Article	English Sale of Goods Act equivalent
Anticipatory breach/instalment sales	**Anticipatory breach/instalment sales**
Either party may notify a suspension of his if the other party clearly will not perform a substantial part of his obligations. Suspension lifted on receipt of adequate assurances of performance Art 71(1) & (3).	In English law repudiatory breaches, i.e. breaches which show that the party is disabled from performance or no longer intends to perform the contract in some essential respect, give rise to an immediate cause of action and a right to terminate (not just suspend) the innocent party's contractual duties (*Bentsen v Taylor*).[145]
If the goods are in transit when the seller discovers the anticipated breach he may prevent the goods being handed over to the buyer even if the buyer has documents controlling delivery (Art 72(2)).	Under ss 44–46 SoGA an unpaid seller has the right of stoppage in transit but only in the case of the buyer's insolvency.
Innocent party may avoid the contract if anticipated breach is fundamental (Art 72(1)). If possible, innocent party must warn of intent to avoid so other party can give adequate assurance of his performance (Arts 72(1) & (2)).	Notice of termination must be given but there is no legal duty to warn.
A fundamental breach with one instalment in a series of instalments permits avoidance in relation to that instalment (Art 73(1)) and to future instalments if effected within a reasonable time if there are good grounds to believe there will be future fundamental breaches (Art 73(2)).	s 31 SoGA leaves open the issue whether a contract by instalments is severable so that for example, acceptance/rejection of one instalment affects rights in relation to future instalments.
Frustration	**Frustration**
A party is not liable in damages during the period of an impediment beyond his control, for a breach due to that impediment, which it would be unreasonable to expect him to have taken into account or to have avoided or overcome (Arts 79(1),(3) & (5)).	In English law the doctrine of frustration discharges the contract completely not just during the period of the frustrating event nor merely in relation to damages claims though normally it operates as a defence to damages claims for non-delivery.
	Note also that the frustrating event must render performance radically different from what was contemplated by both parties not merely the party in breach. ss 6 & 7 SoGA contain specific cases of frustration/impossibility. They stipulate that the contract is avoided if unknown to the seller the goods have perished before the contract was made or before risk has passed if the loss was neither party's fault.
The party in breach must give notice of the nature and effect of the impediment within a reasonable time after he knew of the impediment, and is liable in damages for loss caused by non-receipt. (Art79(4).	There is no requirement to give notice to the other party.
Preservation of non-delivered goods	**Preservation of non-delivered goods**
If the buyer is in default and seller cannot/will not deliver the goods, he must still take reasonable steps to preserve them (at the buyer's expense) (Art 85).	The assumption in s 37 SoGA appears to be that the seller does have a duty of preservation and expressly makes the costs of preservation for theb account.
If he intends to reject the goods, a buyer must (at the seller's expense) take reasonable steps to preserve those he has received or which are in transit at his disposal (Art 86 (1) &(2)).	There is no such assumption in s 36SoGA. See *Arcos v Ronaason*[146] for a 'stand-off' where rejected goods are in the possession of the buyer.
In either case preservation may be by deposit in a third party's warehouse (Art 87) or if there is unreasonable delay in collection or reimbursing the costs of storage, the goods may be sold, (Art 88 (1)& (2)) and the costs of storage reimbursed from the sale proceeds with an account for the balance (Art 88(3)).	

[145] [1893] 2 QB 274 (QB) see also *Fercometal SARL v Meditrerranean Shipping Co SA (The Simona)* [1989] AC 788, 799–801(HL).

[146] [1933] AC 470 (HL).