CHAPTER – III

OBLIGATIONS OF SELLER UNDER CONVENTION ON INTERNATIONAL SALE OF GOODS (CISG)

3.1. Summary of Seller's Obligations

In accordance with Articles 30 through 55 CISG, the seller must deliver the goods, transfer any documents referring to the goods and transfer property in the goods. The object of the delivery is the goods bought by the buyer, which the buyer may have to specify in accordance with Article 65 CISG. The seller performs its delivery obligation by making the goods available to the buyer. If the contract of sale involves carriage of the goods, the seller must hand the goods over to the first carrier for transmission to the buyer (Article 31(a) CISG). When the parties agree in the contract that the goods must be delivered to a particular place, or this place of delivery is determined by law, the seller is responsible for the delivery of the goods to that particular place (Article 31 CISG). The OLG Karlsruhe (NJW-RR 1993, 1316) interpreted an agreement of the parties to deliver "free house" (frei Haus) to require delivery at buyer's place of business. Seller must perform the required act of delivery at the time agreed upon by the parties or at the time determined by law (Article 33 CISG). In addition to early delivery (Article 52(1) CISG), the CISG allows the seller under observation of strict requirements to deliver goods after the agreed date for delivery (Article 48 CISG). In addition to delivery of the contractual goods, seller must transmit to buyer any documents relating to the goods (Article 34 CISG). The exact documents that are covered by this regulation, as well as the time, place, and form of transmission of documents, must be designated in the contract of sale, by relevant business usages and/or custom. In accordance with Article 30 CISG, seller must transfer to buyer property in the goods. Although this obligation lies at the core of sales contracts, the CISG contains no further regulations on transfer of property. Indeed, as noted above, Article 4(b) CISG states expressly that the Convention is not applicable to property-related aspects of sales contracts. As a rule, in sales involving the carriage of goods, the seller is obligated to conclude at the cost of buyer all necessary contracts for the carriage of the goods. Whenever the apparent right of the buyer to the goods is not guaranteed, seller must give the buyer notice of the
consignment specifying the goods (Article 32(1) CISG). On the other hand, the seller is not required to insure the carriage of the goods unless particular circumstances require the seller to do so (Article 32(3) CISG). Seller is required to ensure that the goods are appropriately packaged. In addition, seller must carry the costs incurred in making the goods available to the buyer at the agreed place of delivery. The CISG requires the seller to give notice to buyer of any impediment to performance (Article 79(4) CISG).

3.2. Delivery of the Goods

3.2.1. Introduction

The CISG specifies the seller’s obligations with respect to the place for delivery, arranging for the carriage of goods and their insurance, the time of delivery, and the time and place at which documents are to be handed over. These obligations are set forth in Articles 30-34.

Art. 30 of the CISG was designed as an introduction to the essential obligations of the seller. These are summarized as: delivery of goods, handing over any documents relating to them and transfer of property in the goods. The obligation of conformity is not made explicitly in this Article; however, its concept is implied by the requirement of this obligation: "as required by the contract and this convention". These obligations in Art. 30 are discussed in greater detail in the CISG as follows: Arts. 31 to 34 provide the seller's duty in delivering the goods and handing over the documents. The obligations relevant to conformity and third party claims are dealt with in Arts-35 to 44. One exception with regard to the obligation of the passing of property and transfer of title which was mentioned in Art. 30, however this is not dealt with in any detail in these articles. The CISG does not define when the property passes, or what is required in obtaining the passage of the property; since these issues are left to be governed by the jurisdiction of the applicable national law.189

The CISG places emphasis on the parties' agreements in the contract as its fundamental source for their rights and obligations; as expressed in Art. 6, which was designed specifically to address this principle. Hence the obligations of the CISG can be used only as supplementary to the parties' contract. “There is no sale without delivery and transfer of property.”

The following part of this chapter discusses the meaning of delivery, its place and time.

3.2.2. The Concept of delivery

Delivery is defined in the CISG as the transfer of possession of goods by handing them over or even by placing them at the buyer's disposal. Delivery can be defined as "the active transportation of the goods to the buyer". This definition focuses on the actual or physical delivery rather than constructive means such as delivery by document.

Unlike in ULIS, the concept of delivery was not defined in the CISG. The approach of the CISG Articles related to delivery intends to describe how the seller can perform their obligations, rather than whether or not delivery actually takes place. Therefore, delivery may involve some action by the seller, such as transferring the goods to a carrier or at the buyer's place of business. On the other hand, delivery may not need any positive action from the seller if for instance it is the buyer's duty to come and collect the goods. In this case, the duty of the seller is to place the goods at the buyer's disposal.

It can be suggested that “delivery” is a broader term which can be used to express the obligation of the seller as a party in the contract without any additional

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190 Art. 6 states: "The parties may exclude the application of this Convention or, subject to article 12, derogate from or vary the effect of any of its provisions".
192 Ibid
193 see Art. 30 CISG. See also Schlechtriem-Huber, Art. 30 no. 2; García Camacho in Campbell 256; Kromer 250.
195 ULIS defines delivery in Art. 19 (1) as the handover of conforming goods. In this definition, conformity is an additional requirement for the seller to perform their obligation of delivery.
196 Honnold J, (2009), op. cit., p. 315
pacification of how this obligation is to be performed or whether or not the seller should take positive action.

Since the CISG takes a clearly practical approach to the meaning of “delivery”, it takes into consideration the seller's performance of the duty of delivery by placing the goods as required by the contract and the CISG is enough for the purpose of fulfilling the obligation of delivery, even where the goods are defective or do not meet the condition of conformity.197 On this ground, defective delivery will be considered only under the obligation of conformity.

3.2.3. Place of delivery

The place of delivery is the place where the seller is obligated to deliver the goods. If the seller at the time of delivery delivers at the place of delivery, he fulfills his obligation. In addition to the parties' autonomy rule, Art. 31 provides three other alternative default places in identifying the place where the seller has to deliver the goods in order to fulfill their duty:

a) if the contract of sale involves carriage of the goods--in handing the goods over to the first carrier for transmission to the buyer;
b) if, in cases not within the preceding subparagraph, the contract relates to specific goods, or unidentified goods to be drawn from a specific stock or to be manufactured or produced, and at the time of the conclusion of the contract the parties knew that the goods were at, or were to be manufactured or produced at, a particular place--in placing the goods at the buyer's disposal at that place;
c) in other cases--in placing the goods at the buyer's disposal at the place where the seller had his place of business at the time of the conclusion of the contract.

Article 31, as with most performance rules in the CISG, is a default provision, and therefore this article only applies when the parties have not expressly or implicitly agreed otherwise.198

As for the place of delivery, the CISG distinguishes between four possibilities and itself provides for three of these: It distinguishes between a contract involving carriage\textsuperscript{199} and one where the seller has to place the goods at the buyer's disposal at a certain place.\textsuperscript{200}

In the CISG employing the word "place" and not "destination" is present because "destination" usually refers to the locality at which the goods ended their journey. In turn "place" is more general and could include intermediate localities. Therefore, the place of delivery should not be mistaken for the place of destination. The place of delivery and the place of destination need not be identical. The place of destination is the place where the goods are transported to; it is the final destination of a dispatch. But the place of delivery is that place where the seller has to fulfill his obligation to deliver; the place where the obligations of the seller finally end. Therefore, there is no difference between the place of destination and the address to which the goods are sent.

The place of destination is of importance for the examination of the goods\textsuperscript{201}. The place of destination may also be the result of usages and practices.

3.2.3.1. Contractual agreement

The place of delivery is usually agreed between the parties. The CISG attaches substantial weight to the parties' agreement in their contract.

The parties may resort to interpretation of the contract according to article 8; applying article 8(3)\textsuperscript{202}, the determination of the place for delivery may give important information about the parties' intent as to who shall be burdened with the public law duties mentioned above. If, for example, they have agreed on an obligation to be discharged only at the buyer's place of business so that the seller is bound to deliver the goods to that place at his own risk and expense, their intent will normally have been that the seller should provide for licenses and pay all taxes.

\textsuperscript{199} Article 31(a)
\textsuperscript{200} Article 31(b)
\textsuperscript{201} Article 38, paragraphs 2 and 3
\textsuperscript{202} Article 8 (3): ”In determining the intent of a party or the understanding a reasonable person would have had, due consideration is to be given to all relevant circumstances of the case including the negotiations, any practices which the parties have established between themselves, usages and any subsequent conduct of the parties.”
Parties quite seldom fail to agree on the place of delivery because this place
is decisive for several other topics, e.g., usually the passing of risk.

Art. 31 begins by stating: "If the seller is not bound to deliver the goods at any other
particular place …"

Essentially, this suggests that applying the terms of this article can merely
come into force when the parties have not explicitly or implicitly contracted
otherwise. Therefore Art. 31 is rarely applied, and there are numerous examples
of court decisions passed according to this article referring to the parties' autonomy.

For example, a German appellate court held that "the legal consequences of
Art. 31 CISG only come into play if the seller is not bound to deliver the goods at any
other particular place".

In practice, however, most contracts refer to the customary Place of shipment
clauses. Although these terms have become popular in practice, they are interpreted
differently from country to country.

Often parties agree on the place of delivery by referring to clauses of the
INCOTERMS. If a contract contains an explicit reference to the INCOTERMS, no
problem arises. The INCOTERMS are so complete that there is no need to
supplement them with the rules of the Convention. They have been "derogated" by the
contract.

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203 Brand R, `CISG Article 31: When substantive law Rules affect Jurisdictional results (' 2005.06) 25
JL. &Com,P.182; Enderlein F, in Sarcevic/Volken (1986) ,op.cit.,p.145; Mullis A, in Huber/Mullis
(2007) op.cit., p. 110
204 See: Lookofsky J, Understanding the CISG: A compact guide to the 1980 United Nations CISG on
International, 2008), p.70
http://cisgw3.1aw.pace. du/ca-c-s/970108gl.h tmi
207 See: Lookofsky J, (2008), op. cit., p. 70, note 22; Schlechtriem P, and Butlery P, UN Law on
International Sales
In accordance with the INCOTERMS [2010]\textsuperscript{209}, the place of delivery is determined as follows:

INCOTERMS 2010 are grouped into two classes:

\textbf{a) Terms for any Transport Mode}

- **EXW - EX WORKS** (... named place of delivery) The Seller's only responsibility is to make the goods available at the Seller's premises. The Buyer bears full costs and risks of moving the goods from there to destination.

- **FCA - FREE CARRIER** (... named place of delivery)
  The Seller delivers the goods, cleared for export, to the carrier selected by the Buyer. The Seller loads the goods if the carrier pickup is at the Seller's premises.
  From that point, the Buyer bears the costs and risks of moving the goods to destination.

- **CPT - CARRIAGE PAID TO** (... named place of destination)
  The Seller pays for moving the goods to destination. From the time the goods are transferred to the first carrier, the Buyer bears the risks of loss or damage.

- **CIP - CARRIAGE AND INSURANCE PAID TO** (... named place of destination)
  The Seller pays for moving the goods to destination. From the time the goods are transferred to the first carrier, the Buyer bears the risks of loss or damage. The Seller, however, purchases the cargo insurance.

- **DAT - DELIVERED AT TERMINAL** (... named terminal at port or place of destination)
  The Seller delivers when the goods, once unloaded from the arriving means of transport, are placed at the Buyer's disposal at a named terminal at the named port or place of destination. "Terminal" includes any place, whether covered or not, such as a quay, warehouse, container yard or road, rail or air cargo terminal. The Seller bears all risks involved in bringing the goods to and unloading them at the terminal at the named port or place of destination.

- **DAP - DELIVERED AT PLACE** (... named place of destination)

\textsuperscript{209} http://www.iccwbo.org/INCOTERMS/. New INCOTERMS (2010) effective as of 01/01/2011
The Seller delivers when the goods are placed at the Buyer's disposal on the arriving means of transport ready for unloading at the names place of destination. The Seller bears all risks involved in bringing the goods to the named place.

-DDP - DELIVERED DUTY PAID (... named place)

The Seller delivers the goods -cleared for import - to the Buyer at destination.

The Seller bears all costs and risks of moving the goods to destination, including the payment of Customs duties and taxes.

b) Maritime-Only Terms

-FAS - FREE ALONGSIDE SHIP (... named port of shipment)

The Seller delivers the goods to the origin port. From that point, the Buyer bears all costs and risks of loss or damage.

-FOB - FREE ON BOARD (... named port of shipment)

The Seller delivers the goods on board the ship and clears the goods for export. From that point, the Buyer bears all costs and risks of loss or damage.

-CFR - COST AND FREIGHT (... named port of destination)

The Seller clears the goods for export and pays the costs of moving the goods to destination. The Buyer bears all risks of loss or damage.

-CIF - COST INSURANCE AND FREIGHT (... named port of destination)

The Seller clears the goods for export and pays the costs of moving the goods to the port of destination. The Buyer bears all risks of loss or damage. The Seller, however, purchases the cargo insurance.

3.2.3.1. Delivery involving carriage of goods

All sales involve movement of goods, at the very least by the buyer’s removal of the goods he has purchased. The seller’s obligations with respect to the carriage of the goods depend upon its obligations for carriage provided in the contract. Normally, these obligations are implicated by the use of INCOTERMS or customary delivery clauses. Article 31(a), however, is applicable only to contracts that involve "carriage." This refers to transport by a "carrier" to which the seller hands the goods over for
transmission to the buyer.\textsuperscript{210} So if the goods are effectively moved by the parties' own actions, the concept of carriage and carrier in Art. 31(a) will not apply, and the seller will still be responsible for the goods whilst they are kept under their custody.\textsuperscript{211}

Delivery in this circumstance, means to hand over the goods to the carrier, which, as mentioned earlier, means to convey transfer of physical control of the goods\textsuperscript{212}. Therefore the seller is responsible for the goods if he leaves them on an unattended jetty pending arrival of the carrier.\textsuperscript{213}

Handing over the goods to the first carrier may apply even though there is an indication to contrary customary terms if the parties fail to agree on a particular place. In such a case, the seller still fulfils their obligation by handing the goods to the first carrier.\textsuperscript{214}

In the case of delivery to a forwarding agent, it is difficult to consider this as the first carrier. However, the answer depends on the position of the forwarder, and whether or not they play a role in taking responsibility over the goods as carrier. If not, then the seller will not have discharged their duty until the carrier hands them over.\textsuperscript{215}

- **Definition of the term carrier**

A carrier is the collective term used for the different means of transportation. The place of delivery where the clauses "FCA", "CPT" and "CIP" are applied is the first carrier, whereas the named port of shipment and/or destination is the place of. It is, therefore, not sufficient for the seller, in the case of FOB, to hand over the goods to the railway company as the first carrier. To what extent a forwarding agent can be considered as the carrier depends on whether he himself undertakes to transport the goods.

\textsuperscript{211} Huber/Widmer in Schlechtriem/Schwenzer(2005),op.cit.,p.348; EnderleinF , in Sarcevic/Volken, op.cit., p.147; Honnold J, (2009), op.cit.,p.311;
\textsuperscript{212} Schlechtriem P, in Galston/Smit, op.cit., pp. 6-1 1
\textsuperscript{213} Honnold J, (2009), op. cit., p. 312.
\textsuperscript{215} See: Huber/Widner in Schlechtriem/Schwenzer(205) op.c it., pp.3 47
Supplementary obligations of arrangement for shipment: As the majority of international sales of goods involve carriage, the CISG supplements the provisions of Art. 31(a) with Art. 32, which deals with various cases where there is no agreement with respect to arrangements for the carriage of goods.

Subparagraph 1 considers the seller's obligation to give notice of delivery to the buyer as follows:

“If the seller, in accordance with the contract or this CISG, hands the goods over to a carrier and if the goods are not clearly identified to the contract by markings on the goods, by shipping documents or otherwise, the seller must give the buyer notice of the consignment specifying the goods”.

In commercial practice, the seller usually gives the buyer notice of the consignment in any case and it is usually affected in the documents issued by the carrier.216

However, Art. 32(1) requires notice as an obligation of the seller to inform the buyer of the consignment specifying the goods in cases where the goods are not identified by markings on them or by the shipping document. This notice protects the buyer from the seller identifying the goods for the contract later, particularly after they have been damaged or lost, and thus passing the risk to the buyer.217

The obligation of the seller to give the buyer notice of having loaded or delivered the goods into the custody of the railway or on board the vessel is also contained in several clauses of the INCOTERMS, e.g., FOB.

Under the CISG, a buyer should not forget to ask the seller to give notice of the consignment if this is necessary to make the required arrangements for taking over the goods in view of their nature and the means of transport. The result of failing to give notice of the consignment by the seller is that the risk will not pass on to the buyers' This is considered to be a breach of contract, and the remedy depends on whether or not it is deemed fundamental.218

When the contract involves arranging for carriage of the goods, Art. 32 (2) identifies what the seller is required to do in order to fulfill their obligation as follows:

216 Lando 0, in Bianca-Bonell, (1987) op. cit. p 258.
217 Mullis A, in Iluber/Mullis (2007), op. cit., p. 117
“If the seller is bound to arrange for carriage of the goods, he must make such contracts as are necessary for carriage to the place fixed by means of transportation appropriate in the circumstances and according to the usual terms for such transportation.”

This paragraph deals with several aspects of the transport of the goods. Here again, the contract is important. The seller is not obliged to arrange carriage in all cases. Such an obligation will therefore follow from the contract or from usage. However, if the seller is bound to arrange carriage, para. 2 of Art. 32 applies. If such an agreement exists, it should also include the place of destination, "the place fixed" by the contract even if the transport itself or its cost is not their responsibility.\textsuperscript{219} It provides that the seller's conduct for these arrangements must be made according to appropriate means in accord with the circumstances such as selecting the right carrier and giving the correct instructions. Moreover, it is an obligation for the seller to arrange for appropriate vehicles and routes. The standard for these obligations must be according to the usual terms.\textsuperscript{220}

The means of transportation to be chosen by the seller have to be "appropriate in the circumstances." The circumstances which have to be taken into account include the kind and quantity of the goods, their packing as well as the distance between seller and buyer.\textsuperscript{221}

The last provision of Art.-32 is related to the seller, who is not bound to effect insurance for the goods to be delivered. Paragraph 3 states: “If the seller is not bound to effect insurance in respect of the carriage of the goods, he must, at the buyer's request, provide him with all available information necessary to enable him to affect such insurance.”

In general, the seller is not obliged to insure the goods during carriage. Such an obligation can follow from the contract or from the chosen delivery clause, e.g., INCOTERMS CIF. This obligation applies only when the buyer requests this information. However, when the buyer requests insurance information, the seller is

\textsuperscript{219} Huber/Widmer in Schlechtriem/Schwenze (2005) op. cit., p. 387.
\textsuperscript{220} Mullis A, in Huber/Mullis (2007), op. cit., pp. 120-1.
\textsuperscript{221} Fritz Enderlein, Rights and Obligations of the Seller under the UN Convention on Contracts for the International Sale of Goods. 149.
obliged to send it as soon as it is available. When failing to do so, the seller is liable to pay damages under the CISG's rules.

3.2.3.1.2. Delivery not involving carriage of goods

It is uncommon for international sale contracts to be concluded without the involvement of the carriage of goods. Paragraphs (b) and (c) of Article 31 of CISG apply to a small minority of international sales. If the contract of sale does not involve carriage of the goods, the seller's obligation to deliver consists:

“(b) if, in cases not within the preceding subparagraph, the contract relates to specific goods, or unidentified goods to be drawn from a specific stock or to be manufactured or produced, and at the time of the conclusion of the contract the parties knew that the goods were at, or were to be manufactured or produced at, a particular place--in placing the goods at the buyer's disposal at that place;

(c) in other cases--in placing the goods at the buyer's disposal at the place where the seller had his place of business at the time of the conclusion of the contract.”

These provisions are most likely to apply when the seller and buyer are relatively near each other and the buyer operates trucks that can conveniently come to (b) where the goods are or (c) to the seller’s place of business. When the contract calls for the buyer to come for the goods, the seller completes its contractual duties with respect to delivery by "placing the goods at the buyer’s disposal."

The place where the goods have to be placed at the buyer's disposal could be, for instance, a factory, a mill, a plantation, a warehouse etc. This is exactly the EXW clause of INCOTERMS.

A) Goods at a particular place

Art. 31(b) applies where the place of the goods is known to the parties at the time of concluding their contract, even if the goods are yet to be manufactured or produced, as long as both parties know that particular place. In this respect, the place of delivery is the particular place known to them; hence, the seller's duty is to place

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222 Mullis A, in Iuuber/Mullis (2007), op. cit., p. 121
the goods at the buyer's disposal at that place to enable the buyer to collect them.\textsuperscript{224} Thus, placing the goods at the buyer's disposal requires doing everything necessary to enable the buyer to take complete control of them, such as giving the buyer a delivery order; instructions to the warehousemen and giving the buyer a notice to inform him that the goods are placed at his disposal if required.\textsuperscript{225} The place of delivery in this subparagraph is the same as in the ex work clause of INCOTERMS.\textsuperscript{226}

The requirement of identifying the goods has been dealt with in the chapter on passing of risk. Art. 69 (3) provides that "the goods are considered not to be placed at the disposal of the buyer until they are clearly identified to the contract. The method of identifying the goods to the contract is dealt with in Art. 67, providing that: "by markings on the goods, by shipping documents by notice given to buyer or otherwise."

\textbf{b) Goods not in a particular place}

For the purpose of covering all of the possible options for the place of delivery, the CISG deals, in Art. 31(c), with cases of delivery, in which neither the carriage of goods nor the place of goods are known during the conclusion of the contract. In such cases the place of delivery is the seller's place of business at the time of the conclusion of the contract.\textsuperscript{227}

If a party has more than one place of business, The Place of delivery is determined according to Article 10\textsuperscript{228} of the Convention.

Additionally, the habitual residence can be adopted as a reference if a party does not have a place of business.\textsuperscript{229}

\begin{footnotesize}
\textsuperscript{224} Mullis A, in Huber/Mullis (2007) op.cit. p. 116; Secretariat Commentary, OR. p.30, (16).
\textsuperscript{225} Huber/Widmer in Schlechtriem/Schwenzer (2005), op.cit., p.3 58; Secretariat Commentary, OR. p.3 0,( 16)
\textsuperscript{227} Mullis A, in Huber/Mullis (2007) op. cit., p. 116.
\textsuperscript{228} “For the purposes of this Convention:
(a) if a party has more than one place of business, the place of business is that which has the closest relationship to the contract and its performance, having regard to the circumstances known to or contemplated by the parties at any time before or at the conclusion of the contract;
(b) if a party does not have a place of business, reference is to be made to his habitual residence.”
\textsuperscript{229} See Liu C, in Felemegas J (2007), op.cit., p.3 47,359.
\end{footnotesize}
3.2.4. Time for Delivery

The time for delivery of the goods is an integral part of the delivery obligation. Under this obligation, clauses (a) and (b) of Art. 33 of CISG deal with the contractual agreement where a date or period of time is fixed by the parties and (c) is concerned with contracts where no time of delivery has been mentioned by them.

Agreement on a period of time often gives him the necessary flexibility to prepare the goods for delivery and arrange the transport.

On the other hand, if the buyer himself has to arrange the carriage of the goods, if he has, as in the FOB clause, to charter a vessel or reserve the necessary space on board a vessel, this should be taken as an indication that the buyer may choose a date of delivery within the agreed period.

3.2.4.1. Delivery at a specific time

Clause (a) of article 33 first reiterates the self-evident statement that the relevant time for delivery is primarily the date fixed by or determinable from the contract. In this subparagraph there is no negative legal issue, as the time of delivery is clear and the duty of the seller is to deliver the goods at that time. In addition, a definite time can be implicitly referred to in the contract, such as when an event takes place after the contractual time or at the request of the buyer or a third party.

The question of counting usage as a reference to identify the time of delivery is not explicitly provided in this article. If the parties, for example, agree on March as the time of delivery, the seller may deliver on the first of March as well as on the thirtieth. However, usage can be included under the meaning of "determinable from the contract" in this subparagraph as well as from the general principle of recognition of usages and practices in the CISG. Hence, the time recognized by both parties through usage or practice should be recognized as a determinable time. Finally, in the cases of an indefinite event or date of delivery, the seller's obligation to deliver might not apply under this subparagraph and the contract should be considered

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230 In this context, it must be reiterated that, as stated in UCC 1-102(4), the express reference to the possibility of agreement on a certain term by virtue of party autonomy does not exclude the possibility of varying other provisions also. Cf. Honnold, op. cit. op. cit., 5, at 245 no. 216 note 2.
231 Lando 0, in Bianca-Bonell (1987) op. cit., p. 263.
as if there is no indication as to the time of delivery in the contract. Consequently, the applicable rule for such a contract is Art. 33(c). In the case where a contract which only indicates the time of taking delivery, the seller's duty is to deliver the goods with enough time to enable the buyer to take delivery.

Art. 33(a) does not specify at which part of the day the seller has to deliver the goods. This issue has also been given no attention in the literature where the commentators' focus is on defining the correct date in different types of agreement. However, Viscasillas highlighted the problem of time for receiving documentation after business hours on the fixed date, suggesting that as long as the delivery can be proven by means which indicate the time, such as email or fax, the delivery should still be effective "because it was delivered prior to midnight". On these grounds it can be said that the CISG is not concerned with this issue, following its general approach to not engage with all details in contracts. However, within the CISG, time can be determined by reference to the common usage and practice which is, as mentioned above, before the midnight on the relevant day. In addition, several other issue need to be taken into account; namely the role of the fundamental breach, as mentioned in the above case where the court considered that a delay of two days was not fundamental.

3.2.4.2. Delivery in a specific period of time

The second paragraph of Art. 33 continues to describe the legal conditions of the contractual agreement terms of the time of delivery as follows:

(b)“if a period of time is fixed by or determinable from the contract, at any time within that period unless circumstances indicate that the buyer is to choose a date.”

The rule of paragraph (b) is similarly unambiguous: While Art. 33(a) deals with the contract involving a fixed date of delivery, the other option for determining the time of delivery in the contract can be a period of time; any day in this period can be the time for seller to deliver the goods. If a certain period of time is fixed, the seller

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is basically at liberty to choose at which date within this time span he wants to deliver, unless the buyer is to choose a date; in turn, the buyer's obligation is to be ready to take delivery during that period. However, according to this paragraph, in some cases instead of authorizing the seller to choose the time within the period, it can be indicated that the buyer is to choose the appropriate date for delivery. Such cases can be found in FOB contracts where shipment is fixed by the contract to be under the buyer's responsibility. In such a case, the buyer will determine the date of shipment when he selects the ship at the port of delivery. Similarly, in ex work contracts the buyer may have to take delivery within a stipulated period of time when the goods have been placed at his disposal at the seller's place of business.

This provision can be illustrated by a German case where the contract included that "autumn goods to be delivered July, August, and September". The German buyer refused to accept the goods because the delivery was made on 26 September claiming that the period for delivery had expired, the court applied CISG as the applicable law and awarded the Italian seller the full sales price, since delivery was made during the contractual period of time. In this case even though the buyer expected to receive one-third of the goods during each month, there was insufficient evidence in this circumstance to support the allegation. Thus, delivery during the explicitly defined period was justified by the court.

3.2.4.3. Delivery in a reasonable time

A final gap filling provision permits the seller to meet his obligation with respect to the time of delivery by delivery within a reasonable time after the conclusion of the contract. The final paragraph of Art. 33 intends to cover cases that do not fall into the above circumstances. It states that: "(c) in any other case, within a reasonable time after the conclusion of the contract".

The auxiliary rule of paragraph (c) corresponds to the respective rules of numerous domestic laws, such as UCC 2-309(1). The circumstances which play a part

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237 Ying C, Time of Delivery and Early Delivery: Comparison between provisions of the CISG (Articles 33 and 52(1)) and the counterpart revisions of the PECL (Articles 7: 102 and 7:1 03) in Felemegas J, op. cit., p.3 61.
in construing the term "reasonable time" are determined, of course, by such factors as how much time the arrangement of transportation requires; whether the seller, as the buyer must have known, has to procure or manufacture the goods himself; and so forth.

Reasonable time is the time of delivery in these cases and it begins to run after the conclusion of the contract. In order to determine "reasonable time" for performing delivery, acceptable commercial conduct and practice in relation to similar circumstances as the case should be introduced. Honnold stated that "what is 'reasonable' can appropriately be determined by ascertaining what is normal and acceptable in the relevant trade." In this respect, a reasonable time can be affected by various aspects, such as the buyer purpose of the goods, the location of the parties (whether or not they are close to one another) and the situation of the goods (whether they are to be manufactured or not). Also, observing the general principle of good faith (Art. 7(1)) is important as an element in identifying reasonable time.

In one case an Italian plaintiff sold a bulldozer to a Swiss defendant who refused to pay as a result of late delivery. The court held that since delivery was made within no more than two weeks after the seller had received the first installment, handing over the machine to the carrier could be considered in time, since no date had been fixed by the parties (Art. 33(a)), and so Art. 33(c) was applied.

In this article, the CISG does not deal with issues relating to early or late delivery. These matters are left to Arts. 47, 49 and 52.

3.2.5. Effects of delivery

When the seller delivers the goods to the buyer by either actual or constructive delivery, the seller's duty is completely fulfilled. However, the period between the conclusion of the contract and receiving the goods by the buyer may cause some uncertainty in terms of liability for the goods in case of loss or damage, and the right

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241 See Lookofsky J, in Herbots/Blanpain, op. cit., p. 87.
to gain profit before the delivery takes place. In CISG there is a main effect of the
performance of delivery; it is the passing of risk.

The following paragraphs briefly highlight the transfer of risk as a major effect,
along with the other relevant effects of delivery.

3.2.5.1. Passing of risk

The passage of risk is one of the areas in the CISG that differs from the ULIS. The
ULIS provisions on risk were predicated on risk passing when the seller has
discharged his primary obligation and validate it by undertaking the technical concept
of delivery.\(^{245}\) Article 19(1) ULIS defined delivery as:

> The handing over of goods which conform with the contract. “In consequence
> risk passed when delivery of the goods is affected in accordance with the provisions
> of the contract and the present law.”\(^{246}\)

In CISG the concept of delivery is not used in order to describe the time at
which the risk passes to the buyer. Nevertheless, there is a close relationship between
the provisions on delivery and those on passing of risk. The question of whether the
transfer of risk takes place with the seller's fulfillment of the obligation of delivery has
not been tied to the delivery rules in the CISG. However, from an examination of the
rules on passing risk, the acts which accomplish it are similar to those acts by which
delivery takes place.\(^ {247}\) The CISG undertook a new and dynamic approach to the
passing of risk that differed substantially from conventional wisdom.

- Parties' agreement on passing of risk

In the negotiation or performance of the sales contract, sometimes the parties
do expressly or implicitly refer to some incidents of the contract for the purpose of the
risk allocation. They will frequently do so by incorporating into their agreement trade
terms, such as the International Chamber of Commerce's INCOTERMS.\(^ {248}\) They may
agree to vary a standard trade term, adopt a trade term that is local, or use a trade term
in connection with the price rather than delivery. The parties may also agree to the

\(^{245}\) Nicholas in Bianca, C.M., and Bonell, M.J., eds., Commentary on the International Sales Law

\(^{246}\) Article 97(1) ULIS.


\(^{248}\) For more elaborate detail in new INCOTERMS please refer to chapter: 3.2.3.1.
allocation of risk by incorporating the standard terms or general business conditions of the seller or buyer. In accordance with article 6, the parties' agreement will govern even if it derogates from the provisions of Chapter IV that would otherwise apply.

Article 9(1) provides that parties are bound by any practices, including those allocating risk of loss or damage that they have established between themselves. The seller and buyer may also be bound by trade usages with respect to risk of loss or damage. Under article 9(1), they are bound if they agree to a usage, whether international or local. They are also bound under article 9(2) by widely-observed international usages which they know or should know unless they agree otherwise. If the parties expressly incorporate an INCOTERM into their contract, article 9(1) makes the definition of the term by the International Chamber of Commerce binding.

For the purpose of the passing of risk, Art. 67(1) provides similar rules to Art. 31(a) when a contract involves the carriage of goods. In Article 31(a), it is stated that if the contract of sale involves carriage of the goods, the seller's obligation to deliver the goods consists in handing the goods over to the first carrier for transmission to the buyer. Under Article 67(1), first sentence, if the seller is not bound to hand the goods over at a particular place, the risk passes to the buyer when the goods are handed over to the first carrier for transmission to the buyer. If, on the other hand, the seller is bound to hand the goods over to a carrier at a particular place, the risk does not pass until the goods are handed over to the carrier at that place.

It should be noted that there is no link between this rule of passing risk and the seller's responsibility for the payment of the shipping costs. The reason why this distinction is made in the provisions on passing of risk but not in the provision on delivery is that the risk for misunderstandings is considerable in the former case but almost inexistent in the latter. As it is by no means impossible to provide that the risk passes to the buyer even before the goods arrive at the place where delivery is to take place, it was thought advisable to state expressly in the Convention that this was not intended.

Similar to the obligation of identifying the goods in order for delivery to take place (Art. 32 (1)); Art. 67 (2) states that: "the risk does not pass to the buyer until the

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goods are clearly identified to the contract.” Art. 67(2) offers more detail than Art. 32(1), providing examples of how the goods can be identified: "whether by markings on the goods, by shipping documents, by notice given to the buyer or otherwise". The importance of this rule can be seen in the sale of large quantities of fungible goods to various buyers, whereby a particular buyer cannot bear the risk of damaged or lost goods without assurance that they are his goods. However, a difficult question may arise in the case of the carriage of goods which are sold in bulk to more than one buyer in a single shipment Lookofsky suggests that it is sufficient for the transfer of the risk to inform the buyer that a particular bulk contains his goods, and if the damage is partial, the various buyers ought to share the damages according to their proportions of the shipment.

Although there is no specific guide on this issue, the former suggestion would be considerably fairer for bulk sales, because the share of risk between buyers according to their proportions is the same as identifying the goods in designated goods, whereby each buyer will bear the risk of their own goods.

If the goods are sold in transit, delivery rules do not explicitly state how delivery takes place.

The CISG not only lays down the gap-filling rules which determine the point in time when the risk of loss passes from the seller to the buyer, it also sets forth a basic proposition which helps define the legal effect of the passing of risk. Article 66 provides:

“Loss of or damage to the goods after the risk has passed to the buyer does not discharge him from his obligation to pay the price, unless the loss or damage is due to an act or omission of the seller.”

However, for the transfer of risk, Art. 68 addresses the time of passing risk being the time of concluding the contract if there is no other agreement. In practice, however, it is difficult in some cases to pinpoint the time when damage during transport occurs in order to link this to the time of concluding the contract. The second sentence of Art. 68 therefore suggests some conditional solutions to avoid

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250 Lookofsky J (2008), op.cit., p.102,103.
251 Lookofsky J (2008), op.cit., p. 103.
such uncertainty: "if the circumstances so indicate, the risk is assumed by the buyer retroactively from the time the goods were handed over to the carrier who issued the documents embodying the contract of carriage."\textsuperscript{253} Although it may seem strange for the risk to pass in some cases retroactively before the conclusion of the contract, this logical dilemma can be resolved, as Ramberg pointed out: "if the sale is regarded as a sale of documents putting the subsequent buyers of the goods in the same position as the first buyer."\textsuperscript{254} Since there is no obvious better solution, this could be an acceptable explanation. The third sentence of Art. 68 restricts exceptional cases in the second sentence stating that:

“Nevertheless, if at the time of the conclusion of the contract of sale the seller knew or ought to have known that the goods had been lost or damaged and did not disclose this to the buyer, the loss or damage is at the risk of the seller.”

This last sentence is designed as Lookofsky clarified,\textsuperscript{255} to prevent the seller profiting from "a failure to disclose events which would lead to the passing of risk.” Under Article 69 the risk passes if the goods have been placed at the buyer's disposal. In addition, however, the buyer must normally also take over the goods. It is not sufficient that the seller has done all that he is expected to do in order for the risk to pass if the buyer does not take over the goods in due time. Under traditional terms risk allocation usually takes place when goods pass the ship's rail or are delivered on board.

The CISG’s basic rule is that risk passes when the seller hands over the goods to the first carrier. According to Art. 69 (1), if the buyer is not bound to take over the goods at a place other than the seller's place, the risk passes when the buyer takes the goods over at the seller's place or if the buyer fails to take over the goods at the agreed time after they have been placed at his disposal at the seller's place, provided that the buyer commits a breach of contract by failing to take delivery.\textsuperscript{256} This general rule is

\textsuperscript{255} Lookofsky J (2008), op. cit., p.103.
limited by the exception where the seller is "bound to hand them over at a particular place."

Art. 69(2) address cases whereby the buyer is bound to collect goods at a place other than the seller's place of business. It states that "the risk passes when delivery is due and the buyer is aware of the fact that the goods are placed at his disposal at that place". For the purpose of passing risk by placing the goods at the buyer's disposal, the final part of Art. 69 requires that "the goods are considered not to be placed at the disposal of the buyer until they are clearly identified to the contract."\(^{257}\)

In conclusion, it can be said that the transfer of risk in the CISG follows the seller's fulfillment of his obligation of delivery, whether or not the contract involves the carriage of the goods. The risk to the goods while in transit is significantly more difficult to identify, and is discussed separately in Art. 78. The reason for not merging the rules of delivery and those of the transfer of risk was highlighted by Honnold: "Article 31 and the other provisions in this chapter deal with the contractual obligations of the parties; problems such as allocation of risk are dealt with by provisions addressed directly to those problems."\(^{258}\)

**3.2.5.2. Seller’s responsibility for any lack of conformity**

Besides the transfer of risk, several other rules are linked to delivery. One of these rules is the time for the seller's responsibility for any lack of conformity which, according to Art. 36(1) is the time of the passing of risk, and this time, as mentioned above is the time of delivery. Article 36(1) lays down the basic rule that the goods must conform with the contract in the sense of Article 35 at the time when the risk passes to the buyer.\(^{259}\) The underlying idea is that what may occur after that time is no longer the seller's concern; the events affecting the goods are then chances of the buyer.

Article 36(1) provides that the seller is liable "in accordance with the contract and this Convention for any lack of conformity which exists at the time when the risk passes to the buyer." The principle of seller responsibility for defects existing before risk passes is reinforced by the final clause of article 36(1), which confirms the seller's

\(^{258}\) Honnold J, (2009), op. cit. p.315.
liability "even though the lack of conformity becomes apparent only after the time risk passes to the buyer." Thus it is the time that the lack of conformity comes into existence, not the time it is discovered (or should have been discovered), that is critical for the rule in article 36(1).

The other effect is that the place of delivery, as identified by the CISG, may help to provide solutions for the vexed question of which court specifically has jurisdiction, since the place of delivery is the basis for jurisdiction according to some international conventions.260

3.3. Handing over of documents

3.3.1. Introduction

Most domestic legal systems do not contain an explicit provision regulating the seller’s obligation to hand over documents, nor any explanation as to the consequences of breach. However, the principle of party autonomy certainly allows the parties to agree upon the delivery of documents in their individual circumstances.261

Documents play an important role in the sale of goods. So relations between the parties in international trade are often not close enough to justify a delivery on credit by the seller. If I may choose a simplistic classification, we have, on the one hand, documents which represent the goods and which are frequently, for the parties, the real object of the sale; they are dealing in documents, not in goods. Therefore arrangements for the use of documents to control delivery of goods can be sufficient for an exchange of goods for a price. These documentary exchanges are widely recognized in international trade practice.262 In the CISG Art. 34 was designed to deal with delivery of documents as follows: “If the seller is bound to hand over documents relating to the goods, he must hand them over at the time and place and in the form required by the contract. If the seller has handed over documents before that time, he may, up to that time, cure any lack of conformity in the documents, if the exercise of this right does not cause the buyer unreasonable in convenience or unreasonable

expense. However, the buyer retains any right to claim damages as provided for in this Convention.”

However, Art. 30 includes the obligation of handing over documents as one of the main seller's obligations, as mentioned above. The approach of the CISG to delivery suggests that the obligation of the seller to deliver the goods is independent of the obligation of the tender of documents relating to the goods.263 Thus, Art. 34 addresses the handing over obligation separately from the obligation of delivery of the goods, which is dealt with under Arts 31, 32 and 33. In this regard, the seller's duties can be confined to the tender of documents.

3.3.2. Documents to be handed over

With regard to the "handing over of documents" the CISG contains only one; very short rule (Art. 34). This clause neither provides a definition of the required documents nor lists them. It simply requires the seller to deliver the documents related to the goods. So the documents which the seller has to hand over should be provided by the contract, by the chosen clause of INCOTERMS, or by usages.

Which are those documents relating to the goods? The Secretariat Commentary264 states that: “documents” according to the meaning used in Art. 34 are documents of title and other documents provided by contract, such as certificates of origin.265 Many scholars are of the same opinion.266

Other relevant documents covered by this article are: bills of lading or other documents which by law or trade usage give the possessor of the document a right to have the goods delivered to him; notices or declarations of appropriation or shipment; certificates and policies of insurance; commercial and consular invoices; certificates of origin, quality, quantity, and weight; export and import licenses.

264 See the Secretariat's Commentary on Article 32 of the 1978 Draft of the CISG (which subsequently became Article 34), available at: <http://cisgw3.law.pace.edu/cisg/text/secomm/secomm-34.html>.
267 Mullis A in Huber/Mullis, (2007), Ibid.
As for the question of whether or not a seller is obliged to procure an export license in the case of absence of a contractual agreement can be answered with regard to the general principle of the CISG concerning international trade usage and delivery. In general, the seller is not obliged to procure customs documents for the export of goods. INCOTERMS 2010 contain detailed provisions with respect to the procurement, tender and transfer of the required documents. Thus, for example, where the parties contract on CIF INCOTERMS, the seller must hand over to the buyer, usually as a condition of obtaining payment, an insurance policy or other evidence of insurance cover, the usual transport document (e.g., a negotiable bill of lading), and an invoice.

Here the seller has no duty to provide the buyer with an export license and or to pay export taxes.

3.3.3. Time, place and form of handing over documents

Art. 34 CISG places an obligation on the seller to hand over the ‘documents relating to the goods’ at the time and place and in the form set out in the parties’ contract.

Unlike with the delivery of goods provision, the CISG does not lay down particular rules with regard to time, place, and form for the handing over of documents; rather, reference is made merely to the parties' agreement, requiring the seller to fulfill the agreed handing over of documents without suggesting uses for silent contracts”.

The place, time and form of handing over of the documents merely stated concerning the contractual agreement. Obligations in regard to documents are normally to be found in INCOTERMS. Where INCOTERMS are agreed upon, they will often fix these modalities.

The time at which any documents relating to the goods must be handed over is frequently made the subject of an express provision in the contract. Similarly, if the seller’s obligation to deliver consists in placing the goods at the buyer’s disposal on a
particular date, the necessary documents should be tendered in sufficient time to enable the buyer to take delivery of the goods on that date.268

Where neither the contract nor such circumstances indicate the time by which the documents must be handed over, it is required to be “as soon as possible” after the goods have been shipped.

Where there is an express provision as to the place of handing over of the documents, the seller must hand the documents over at that place. If there has been no specific agreement on a place of delivery, it may nevertheless be possible to identify one from the circumstances, for instance by reference to the contractually agreed method of payment.269 Thus, if payment is to be made by documentary credit through a bank in the seller’s country, the place of handing over is likely to be the premises of the bank.

It is submitted that as a residual rule the seller should be obliged to send the documents to the buyer at his own (the seller’s) cost and risk, irrespective of where the corresponding obligation in regard of the goods has to be performed. Although, presumptively, it is for the buyer to collect the goods and not for the seller to dispatch them it is likely to be rare that a court would hold that the buyer must collect the documents from the seller’s place of business. In the usual case, therefore, the place of delivery of the documents will be the buyer’s place of business

“However, it could be argued that there is no need for particular rules for handing over documents, because this obligation is linked to the goods themselves and the payment for them. Thus the place and time of delivery of documents can be determined from the rules of delivering the goods and payment. Therefore, if the contract does not mention these rules, their interpretation can be made by the general principles of the CISG.

268 U. Huber/Widmer, in: Schlechtriem/Schwenzer, Commentary, Art. 34 para. 2.
269 U. Huber/Widmer, in: Schlechtriem/Schwenzer, Commentary, Art. 34 para. 3.
3.3.4. Cure of Non-Conforming Documents

The handing over of non-conforming documents constitutes a breach of contract to which the normal remedies apply.\textsuperscript{270} The second and third sentences of Art. 34 provide:

“If the seller has handed over documents before that time the time agreed between the parties, he may, up to that time, cure any lack of conformity in the documents, if the exercise of this right does not cause the buyer unreasonable inconvenience or unreasonable expense. However, the buyer retains any right to claim damages as provided for in this Convention.”

This allows the seller a right to cure any lack of conformity in the documents as long as the buyer does not cause unreasonable inconvenience or expense. The cure may be executed by delivery of conforming documents.\textsuperscript{271} If the seller has handed over documents before the relevant time, he may, up to that time cure any lack of conformity in the documents, if the exercise of this right does not cause the buyer unreasonable inconvenience or unreasonable expense (Art. 34 second sentence CISG).

However, the question of the effect of the seller's right to cure defects in documents in commodities trade is somewhat controversial and may lead to various problems, but without giving a precise date, the seller may consider his delivery of defective documents as being before the final date of delivery.

3.4. Conformity of Goods

In the CISG the buyer's expectations regarding the features of goods are defined in Arts. 35 and 36 these include the parties' agreement, a series of objective standards by which performance must be judged, and the period within which these requirements apply. Other CISG provisions concerning conformity provide procedures that apply when the goods are not in conformity; the seller's right to cure (Art. 37), as well as the buyer's excuse for failing to notifying the seller (Art. 44).

\textsuperscript{270} CLOUT: “Case Law on UNCITRAL Texts,” case No. 171, Germany, 1996.
\textsuperscript{271} ICC Court of Arbitration, France, March 1998, award no. 9117, ICC International Court of Arbitration Bulletin 2000, 90.
3.4.1. Conformity required by contract

In order to determine whether the delivered goods are in conformity, a significant factor is the contractual agreement. Therefore standards of conformity are not based, in the first place, on objective elements of quantity, quality and description, but rather on the requirements of the parties in their contract. In this respect, the determination of conformity in Art. 35 begins with the expressed contractual requirement. But this provision does not contain any express rule on the allocation of the burden of proof. Neither does it regulate explicitly who has to prove the relevant standard for conformity, nor who has to prove that the goods were not conforming to the applicable standard at the relevant time.

The first part of Art. 35 makes this clear as follows: “(1) the seller must deliver goods which are of the quantity, quality and description required by the contract and which are contained or packaged in the manner required by the contract.”

This article requires the seller to deliver goods of the quantity, quality and description "required by the contract." In a case between a German seller and a Syrian buyer, for the sale of steel bars in lots, the contract permitted a weight variation of 5%, but because some of the delivery fell outside this range it was held that the seller had clearly breached their obligations under Art. 35 (1) to deliver steel bars according to the contractual requirements of quality and description. The questions of whether the contractual agreement includes the seller's descriptions of the goods in the offer, the reference to an advertisement illustrating the goods and their quality, or the descriptions made by the buyer in requesting the goods should be answered in the light of Arts 8 and 11. According to these articles these requirements are binding without need of a specific promise or being in writing, unless the seller raises objections to the buyer's request.

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273 Dr. Stefan Kroll, (2011), The Burden of Proof for the Non-Conformity of Goods under Art. 35 CISG.
274 CISG, Art. 35 (1).
276 According to Art. 11, writing is one of many ways to express a contract's terms and interpretations’
Even though the CISG includes no version of the parol evidence rules, many articles of the CISG, mainly, Arts 8 and 11, reveal that "statements and other relevant circumstances are to be considered when determining the effect of a contract and its terms. To decide what quality is required by the contract, one should consider the expectations latent in any description of the goods."\(^{278}\) In addition, the level of quality can be determined using the general rule on contract interpretation in Art. 8, which emphasizes what a reasonable person can understand from such statements.\(^{279}\)

The question of whether or not the seller performs his obligation of delivery when the goods fail to conform to the requirements of the contract is treated in the CISG as performed delivery, even if the performance is defective, as long as the goods meet the same name of the agreed product.\(^{280}\) Under ULIS Art. 33 (1) the delivery obligation is not fulfilled if the seller handed over goods that failed to conform to the requirements of the contract. The importance of the distinction between non-delivery and defective delivery, as Bianca has indicated, is to oblige the buyer to examine the goods in the case of defective performance and give immediate notice of the lack of conformity.\(^{281}\)

Delivering goods containing less than the quantity specified in the contract is considered as lack of conformity under Paragraph (1) of Art. 35. In a German case of delivering acrylic blankets, the buyer gave notification of lack of quality and claimed that five blankets were missing. The court held that lack of conformity comprises both a lack of quality and a lack of quantity; however, the buyer lost the claim of non-conformity because the buyer's notice did not specify the design to enable the seller to remedy the non-conformity (since there was more than one design in the delivery).\(^{282}\) Although the buyer's claim in this case of non-conformity was not upheld, the court clearly stated that lack of quantity is treated as non-conformity.

3.4.2. Implied Conformity Requirements

Article 35(2) prescribes the qualities and characteristics the goods must possess in order to conform to the contract, unless the parties have agreed otherwise.

\(^{278}\) Art. 35 (2)(a)(b).
\(^{280}\) Secretariat's commentary, OR p.3 2,( 2).
\(^{282}\) Germany, OLG Koblenz [OLG = Oberlandesgericht = Provincial Court of Appeal], 2 U 31/96, 19970131 (31 January 1997).
Accordingly, the criteria of that Article continues to determine requirements with regard to the quality of the goods to be applied only in the absence of an express or implied agreement. Thus, the content of the seller's obligations must be properly interpreted through the contract.

It should be noted that, if the parties have agreed otherwise, then the provisions of (a) and (b) in Art. 35(2) will not apply in the contract; e.g. given an indication of the expression caveat emptor let the buyer beware.\textsuperscript{283} There is one extremely grave challenge to uniformity here that no amount of legal construction can transcend. Even with respect to contracts governed by the Convention, domestic law will continue to regulate the substantive validity of disclaimer clauses.\textsuperscript{284} These domestic rules do not threaten the Convention's uniformity because the Convention governs neither consumer sales nor the seller's liability for personal injury.\textsuperscript{285} Additionally, usages applicable to the contract may also determine the content of the seller's obligations.\textsuperscript{286}

The criteria of conformity in the CISG are designed in a positive way, indicating four defining standards to be applied to clarify whether the seller fulfils their obligation, whereas the ULIS confines its rule to the criteria of breaching the obligation of conformity.\textsuperscript{287}

\subsection*{3.4.2.1 Fitness for general purposes}

The first criterion states that:

The goods do not conform with the contract unless they: (a) are fit for the purposes for which goods of the same description would ordinarily be used....

Under the CISG, sellers undertake, at the minimum, this obligation of Art. 35 (2) (a),\textsuperscript{288} especially when there is no indication to the seller of what the buyer intends

\textsuperscript{283} Lookofsky J in llerbots/Blanpain, op. cit, p. 91; however, there are some restrictions on such disclaimer rules; see Ibid, pp. 96-8.
\textsuperscript{284} See CISG, Art. 4(a).
\textsuperscript{285} CISG arts. 2(a), 5.
\textsuperscript{287} Bianca C, in Bianca-Bonell (1987) op. cit., p. 269.
\textsuperscript{288} See for the reason of this requirement: Ferrari F, (1/201 0) Internationales1 landesrecht,p.cit., p.4 .7.
to use the goods for. Thus this provision plays the most important role in the seller's implied obligation regarding quality.\textsuperscript{289}

In this provision, the delivered goods must be fit for the usual use required by the contract when they have the normal qualities and are free from defects normally not expected in such goods,\textsuperscript{290} irrespective of the seller fault, such as for instance, if the material used in the goods is compromised by a lack of proper features or provides abnormally deficient results.\textsuperscript{291} Under this criterion in a French case for the sale of ceramic ovenware which was insufficiently ovenproof, the French Supreme Court held that the unfitness of the sold goods for their ordinary use represented lack of conformity to the contract within the general meaning given to those terms by the provision of the CISG.\textsuperscript{292}

The standard of ordinary use is different according to the type of the goods. For instance, when it comes to perishable food products, the ordinary use is different from that of durable goods such as washing machines and automobiles. Thus the latter is not fit for ordinary use unless it remains durable for an ordinary period of time. However, no precise period can be expected, because the determination will vary depending on the nature of each type of goods.\textsuperscript{293} In one relevant case, a French appeal court held that the seller of a refrigeration unit breached its obligation. The court found that Art. 35 (2) (a) of the CISG was applicable with regard to the defects of the refrigeration unit, noting that "the unit had broken down within a short period of time after it was first operated.\textsuperscript{294} The early breakdown of the machine in this case instituted lack of conformity in the good to be used for ordinary purposes.

One controversial question here is whether the fitness of goods for ordinary use refers to the seller's place of business or to the place where the buyer is going to use or resell them. The Problem becomes even more complex when the buyer's

\textsuperscript{289} Lookofsky J (2008), op. cit., p.75.
\textsuperscript{293} Lookofsky J (2008), op. cit., p. 79.
country implements public law standards that are different from those in the seller's country.\textsuperscript{295}

In the view of some commentators, ordinary usage generally must be determined by the seller's place of business, since the seller cannot be supposed, in normal circumstances, to know about specific requirements for ordinary use of the goods in other countries.\textsuperscript{296} Enderlein and Maskow explain that "the CISG stipulates nothing with respect to qualitative prerequisites which may be mandatory in the buyer's country or in the country of destination."\textsuperscript{297} Support for this view can be seen in a popular German case of the sale of mussels containing cadmium levels which exceeded the recommendations of the buyer's national law. The court held that "high cadmium composition did not constitute lack of conformity of the mussels with contract specifications under CISG 35(2), since the mussels were still fit for eating."\textsuperscript{32} The court indicated that the standards in the importing jurisdiction would have applied if the same standards existed in the seller's jurisdiction, or if the buyer had pointed out the standards to the seller and relied on the seller's expertise.\textsuperscript{298} In this case, since there was no contractual agreement for the level of quality, the standard of conformity was judged according to ordinary use in the seller's county, regardless of the buyer's claim based on the standards of his country.

Ferrari justified this decision on the ground that "quality warranties should apply only where sellers enjoy an informational advantage." However, on the other hand, some writers would argue that reference should be made to the place where the goods are to be used, because the actual purpose of the goods in such contracts is to be fit for use in the place where they will be sold. Schlechtriem pointed out that "it has to be added, however, that 'ordinary use' will be defined by the standards of the country or region in which the buyer intends to use the goods."\textsuperscript{299} An American case between an Italian seller (claimant) and an American buyer (defendant) concerned the sale of medical equipment which did not comply with American public law used this approach. The court held that the required quality in the public law of buyer's country

\textsuperscript{295} Under "public law standards" in some countries there are specific rules to protect, for example, consumers, the environment and workers.
\textsuperscript{296} See for this opinion Bianca C, in Bianca-Bonell (1987) op. cit., p. 274.
\textsuperscript{297} Maskow/ Enderlein, (1992), op. cit., p. 144.
\textsuperscript{298} See UNCITRAL Digest Art. 35, para. 9.
\textsuperscript{299} Schlechtriem P, in Galston/Smit, op. cit., pp. 6-21.
is determinative, in that the seller in this case had reason to know the existence of that legal requirement.\textsuperscript{300}

Between these two contrary views, there is a third suggestion for determining the place of ordinary use, based on the CISG's rules for interpreting sale contracts, as Honnold pointed out:

These rules are set forth in Article 8, supplemented by the practices of the parties and trade usages Article 9. Under these rules the relevant facts are: Which party drafted the description? ... What, under Article 8(2), would be "the understanding that a reasonable person of the same kind as the other party would have had in the same circumstances"? ... Article 8(3) directs attention to all relevant circumstances in clouding "the negotiations, any practices which the parties have established between themselves, usages and any subsequent conduct of the parties.\textsuperscript{301}

Therefore, in order to use the CISG's general rules to solve the problem of contract interpretation, one should consider the circumstances of each transaction to determine whether the place of the seller or of the buyer controls the provision of Art. 35 (2) a).\textsuperscript{302} Schwenzer provided some suggestions for determining the ordinary purpose, including the existence of international usage, as to particular characteristics of the goods and standards which apply both in the buyer's and in the seller's state. However, in the case where the buyer's country only provides standards restrictions, Schwenzer in this case would support the first opinion which requires the seller to deliver the goods in conformity with the seller's state, as the seller cannot be expected to be aware of those particular requirements.\textsuperscript{303} Schlechtriem criticized this approach by stating that when the seller becomes aware of the country where the goods will be used, the seller should "not only accommodate the characteristics required for the actual use of the goods in this country, but also observe the applicable public law provisions." However in the case where the seller neither knew nor could have been aware of a particular public law in the goods destination, he added that "then it will

\textsuperscript{300} U. S. District Court (Eastern District of Louisiana), (17/5/1999), No. 99-0380, available at: http://cisgw3.law.pace.edu/cases/9905171u.html.

\textsuperscript{301} Honold J, (2009), op. cit, p..333.

\textsuperscript{302} Ferrari F, (1/2010) Internationals Handesrecht, op. cit., p. 8. The author in this regard referred to 'the rule of merchantability.

\textsuperscript{303} Schwenzerl, in Schlechtriem/Schwenze(r2005), op. c it., at.421.
usually not be demonstrable that the buyer relied, or was reasonably able to rely on 'the skill and judgment of the seller'.

### 3.4.2.2. Fitness for a particular purpose

Under certain circumstances, the Convention requires that goods be fit for the particular purpose for which the buyer acquires them. The second criterion states:

The goods do not conform with the contract unless they ... (b) are fit for any particular purpose expressly or impliedly made known to the seller at the time of the conclusion of the contract, except where the circumstances show that the buyer did not rely, or that it was unreasonable for him to rely, on the seller's skill and judgment.

This standard only applies if and when a buyer displays the intention to use the goods for a particular purpose, which is expressly or implicitly made known to the seller, unless the seller can prove that the buyer does not rely on the seller skills and judgments, for example if the seller is intermediary. However, being an expert or specialist for the supply or production of goods with the particular purpose is sufficient for reliance on the seller's judgment. In this standard the goods must be fit for the required purpose. There is no problem when the buyer expressly and clearly informs the seller of the purpose for which the goods are to be used. The difficulty arises when the seller should be aware of the buyer's particular purpose but in fact is not. The Convention's seemingly straightforward reliance requirement the buyer must actually have relied on the seller's skill and judgment and the reliance must have been reasonable also proves exceedingly difficult to interpret. Actual reliance is difficult to prove directly, and no set of presumptions can make the necessarily fine distinctions.

The provision in the Uniform Law on the International Sale of Goods (ULIS) is virtually identical. Behind all of these texts is the idea that the seller guarantees

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308 Marten A. Trotzig (1978) Express and Implied Warranties of the Uniform Commercial Code in Seed Sales: Agricultural Services Association, Inc. v. Ferry-Morse Seed Co, SOUTH DAKOTA LAW (1978) 786 (the seller should have realized, from the large quantity of seed ordered, that the buyer intended to resell).
309 See ULIS Art. 33(1)(e).
fitness for the buyer's particular purpose when that purpose becomes part of the agreement, either expressly or impliedly.

Against this background, the proper interpretation of the Convention's fitness requirement is unclear. In a court decision it was found that a seller of kin care products delivered non-conforming goods according to Art. 35 (2) (b), as the products did not preserve specified levels of vitamin A throughout their shelf life. The court found that with regard to the specified vitamin levels which the buyer intended to be contained in the products, “the special purpose ... was known by the seller with sufficient clarity.”\textsuperscript{310} However, the last part of Art. 35 (2) (b) states that the particular purpose rule does not apply in The case where the skill and judgment of the seller are not reliable for the buyer, or if it is unreasonable to rely on them concerning the qualities required for their particular use. For this reason, in the above case, the court added that "the buyer counted on the seller's expertise in terms of how the seller achieves the required vitamin A content and how the required Preservation is carried out.\textsuperscript{311}

Honnold has therefore suggested that the burden of proof on the reliance issue shifts to the seller once the buyer demonstrates that the seller was aware of the particular purpose.\textsuperscript{312} For example in the above case of purchasing mussels whose cadmium levels exceeded the standard of the buyer's national law, the court held that the seller did not breach the provision of Art. 35 (2) (b), as there was no evidence that the seller was informed of such regulations. In addition the court stated that, in the usual case, a buyer cannot reasonably rely on the seller's knowledge of the buyer's country importing public law requirements or administrative practices relating to the goods, unless the buyer has pointed out such requirements to the seller. This provision of Art. 35 (2) (b) can be in conflict with Art. 35 (1) in a case where the buyer, for example, orders goods with a particular description and the seller recognizes that such descriptions are not suitable for the buyer's special purpose. The Secretariat's

\textsuperscript{310} Finland, Helsinki CA, (30/6/1998), No.596/1215, available at: http://cisgw3.law.pace.edu/ cases dufc=5m0630iS. h tm1.
\textsuperscript{311} Ibid.
\textsuperscript{312} Honnold op. c it, no. 226.
Commentary supposes that the seller has a duty of good faith to inform the buyer in such a case.\textsuperscript{313}

\subsection*{3.4.2.3. Conformity with sample or model}

The final implied conformity requires the seller to deliver goods possessing the qualities of goods which the seller has held out to the buyer as a sample or model.\textsuperscript{314} Holding out a sample or a model is a concrete way for the seller to specify his offer. The legislative history provides no hint of the reason for the characterization of the sample or model requirement as implied. In fact, it is doubtful that the drafters focused on the potential consequences. For example, the Convention explicitly provides that implied conformity requirements may be disclaimed, while, as discussed above, nothing is said about the disclaimer of express conformity requirements.\textsuperscript{315}

When the contract indicates that goods must conform to the model or the sample, the seller is then bound to deliver goods of the same quality as in the sample, since samples are the same as using words to describe the goods.\textsuperscript{316}

In a German case, The District Court of Berlin indicated\textsuperscript{317} that the sample only has binding effect where the parties actually agreed so. The seller of the shoes never alleged such an agreement. Additionally, seller then would have had to show specifically that the sample also had the same defects as alleged by the buyer. Consequently, the goods must conform to a model only if there is an express agreement in the contract that the goods will do so. It may have been difficult for the buyer to rely only on the condition of the window blinds for a claim of lack of conformity if there had been no specific indication of the sample, since the delivered goods still fit for the standard of the same kind of products if there is no expressed or implied promise in the contract to the given sample or model.\textsuperscript{318}

The Convention rejects the modern trend in comparative law and regards representations based on a sample or model as implied rather than express conformity

\textsuperscript{313} See Secret, op. cit ariat's Commentary O .R . p.32.
\textsuperscript{314} CISG Art. 35(2) (c).
\textsuperscript{315} Compare CISG Art. 35 (2) with id. Art. 35(1).
\textsuperscript{316} See Lookofsky J (2008), op. cit., p. 82.
\textsuperscript{317} GERMANY, Landgericht Berlin (District Court Berlin) 15 September 1994, Case No. 52 S 247/94.
\textsuperscript{318} ULIS Art. 33(c) did not oblige the seller to deliver goods conforming to the standards of a sample or model if the seller had submitted it without any express or implied undertaking that the goods would conform therewith.
requirements. As a practical matter, even the Convention's requirement that the goods conform to the sample or model will more closely resemble an express than an implied conformity requirement, for it is directly based on the seller's representations. It arises only when goods are "held out ... as a sample or model," that is, in situations in which the required conformity between the goods and the sample or model might as easily be considered "required by the contract."

Schwenzer, pursuant to the wording of Art. 35 (2) (c) "held out", suggested that if the sample or model is provided without obligation they are not binding. In one court decision it was pointed out that the seller's obligation of conformity to the sample applies only if there is an expressed agreement in the contract of the parties thereupon. Analyzing this discussion one may suggest that Art. 8 should be conceded in this circumstances as discussed above.

Ultimately, when there is reference to a sample or a model, the application of Art. 35 (a) and (b) is excluded, as the need for these criteria is only to determine the parties' intentions and purposes of the contract, hence, sample and model are more precise in expressing what the parties want in their agreement. The seller must clearly express his intention, if a model is presented only to point out 'some' quality of the goods or to give an approximate description of the goods offered to the buyer.

3.4.2.4. Packaging and containing

In Art. 35 (2), the CISG inserts the duty of packaging and containing the goods in the concept of conformity as follows:

“(d) are contained or packaged in the manner usual for such goods or, where there is no such manner, in a manner adequate to preserve and protect the goods.”

This provision points out that the delivery obligation includes the duties to do what is ordinarily required in order to allow the buyer to receive the goods in

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319 See British Sale of Goods Act, 1979, sec. 15; UCC § 2-313 (l)(c); BGB § 494.
320 See CISG Art. 35 (2) (c).
321 The CISG expressly contemplates only the situation in which the seller holds out the sample or model to the buyer. When the buyer produces the model, the seller's assent may create an express conformity requirement.
323 For support of this view see: Bianca C, in Bianca-Bonell, (1987) op. cit., p. 276.
satisfactory condition. In INCOTERMS the seller is usually responsible for providing the packaging at his own expense, which is required for the transportation of the goods; to the extent that circumstances relating to transport are made known to the seller before the contract of sale is concluded. The CISG clearly implies also that the goods have to be properly packaged so as to allow the buyer to load and carry them away, even if the goods are to be handed over at the seller's place of business. In the CISG packaging the goods is articulated as part of conformity, and thus the wide range of remedies of non-conformity are also available for the buyer when the seller has not packed the goods properly.

In determining the manner in which the goods must be contained or packaged, the usual manner of similar goods must be taken into consideration, for example the manner conforming with the standards normally observed in the practice of the seller's professional branch. The 'usualness' of determining how the goods have to be contained or packaged is the manner conforming with usage normally used for such goods in the seller profession, and if it is differently contained or packaged from place to place, then reference must be made to the international trade's usual manner, and then to the usual manner in the seller place of business.

3.4.3. Limitation on the liability of the seller for nonconformity

The last paragraph of Art. 35 states clearly that: “(3) The seller is not liable under sub-paragraphs (a) to (d) of the preceding paragraph for any lack of conformity of the goods if at the time of the conclusion of the contract the buyer knew or could not have been unaware of such lack of conformity.”

According to This provision, the seller is not liable for lack of conformities which are apparent, as long as the buyer knows or ought to know the kind of goods the seller will deliver. This knowledge is meant to have agreed to the seller's proposal as determined by the effective state of the goods. The additional rule where one "could not have been unaware" is to lighten the burden of proving that those facts that

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were before the eyes must have reached the mind, whereas the facts one "knew or ought to have known" may impose a duty of investigation or inquiry.\textsuperscript{330}

Art. 35 (3) is applicable to the sale of specific goods, where the buyer can inspects and then agrees to purchase.\textsuperscript{331}

In the Swiss case of the sale of a second-hand bulldozer (cited above), the court found that the buyer's claim for damages for non-conformity was illegitimate, since the buyer had tested the Bulldozer at the seller's premises before the contract was concluded. The presumption is that a person who buys goods in spite of obvious defects intended to accept the seller's offer as stated by Art. 35(3). In the present case the buyer has no excuse, as the seller had expressly informed him about the current state of the second-hand bulldozer which the buyer had even tested prior to purchasing it.

3.4.4. Duration of seller liability for conformity

As we have already seen in Art. 35, the lack of conformity comprises quality, just as well as quantity and description. But what time is decisive for determining whether conformity exists or not? The question is answered in Art. 36. Paragraph (1) provides a general reference to this time period, and paragraph (2) deals with cases that do not fall into that general rule. Art. 36(1) states that:

"The seller is liable in accordance with the contract and this Convention for any lack of conformity which exists at the time when the risk passes to the buyer, even though the lack of conformity becomes apparent only after that time."

The determination of whether the goods conform to the contract is made at the time of the passing of risk.\textsuperscript{332} The Convention deals with the transfer of risk in Articles 66 to 70.\textsuperscript{333} Thus, the seller complied with the contract if the goods conform to the contract when the risk passes to the buyer.

Passing of risk in the CISG normally takes place at the point in time when the goods are delivered by the seller.\textsuperscript{334} In many cases, the risk passes to the buyer upon

\textsuperscript{330} Honnold J, (2009), op. cit., p. 339.
\textsuperscript{331} Ibid.
\textsuperscript{333} See Chapter, III, section: 3.2.5.1.
\textsuperscript{334} Rules regarding the passing of risk are set forth in Articles 66-70.
the handing over of the goods to the first carrier as stated in Art. 31 (a) which is considered as the seller's primary obligation under CISG contracts and, therefore, this is the appropriate event to determine conformity.335

Although the risk passes to the buyer when the seller hands the goods over to a carrier for transmission to the buyer, in most cases it is difficult for both the carrier and the buyer to inspect goods at that very moment. In practice the normal time to detect defects is after examining the goods or actually using them. Therefore, the second part of Art. 36 (l) makes it clear that any nonconformity which becomes apparent only after the risk has passed to the buyer is still under the seller's liability,336 provided that the cause of the defect already existed at the time when the risk passed.337 The virtue of this provision, as Honnold indicated, is that it "would protect the buyer when a latent defect appears at a later date, including a failure to comply with the requirement of Article 35(2) (a) that the goods be 'fit for the purposes for which goods of the same description would ordinarily be used'.338

A controversial question is whether or not the seller should be responsible for the duration of quality for a certain period of time.339 The answer is given in Art. 36 (2) as follows:

The seller is also liable for any lack of conformity which occurs after the time indicated in the preceding paragraph and which is due to a breach of any of his obligations, including a breach of any guarantee that for a period of time the goods will remain fit for their ordinary purpose or for some particular purpose or will retain specified qualities or characteristics.

Unlike the provision of paragraph (1), paragraph (2) of Art. 36 does not require the buyer to prove that there was non-conformity when risk passed.340 This provision includes both

Expressed and implied warranty.341 In the case of an expressed warranty, the seller remains liable for the quality of the goods for the specified period of warranty.

335 Lookofsky J (2008), op. c it., p.9 9. Under the FOB clause, t he risk passes when the goods have effectively passed on board the ship.
337 Schwenzer I , in Schlechtriem/Schwenzer (2005), op. c it., p.435.
However, without having an express guarantee, the seller is still liable for an implied warranty beyond the time the goods have been accepted. This concerns the durability and suitability for ordinary purposes which may follow from the nature of the goods or from usage. As already discussed in Art. 35, where the goods must be fit for ordinary use including the requirement to remain fit for a reasonable time (implied guarantee), so the provision of Art. 36(2) emphasize the seller's obligation for this `implied' period of warranty.

The time for determining the period of durability is stated only in the CISG as "a period of time", thus in the event of the absence of express warranty, a court must consider what a reasonable person would have agreed in similar circumstances in the light of the general approach of the CISG of using objective judgment.

The claims on guarantee arise the question of burden of proof again which is a really critical issue. It might be disputed whether the seller must prove that the goods fully complied with the contract at the time the risk passed to the buyer or if the buyer must show that the goods were already non-conforming. It should be note that even without a specified guarantee the buyer may expect the goods to endure for a normal time.

3.4.5. Seller's right to cure prior to date for delivery

A seller who delivers non-conforming goods becomes legally responsible for breach of contract pursuant to the CISG provisions dealing with the buyer's remedies. However, Art. 37 provides an important right for the seller to cure the breach. It provides:

“If the seller has delivered goods before the date for delivery, he may, up to that date, deliver any missing part or make up any deficiency in the quantity of the goods delivered, or deliver goods in replacement of any nonconforming goods delivered or remedy any lack of conformity in the goods delivered, provided that the exercise of this right does not cause the buyer unreasonable inconvenience or

343 Lookofsky J (2008), op. cit., p. 84.
344 See: Schwenzer I, in Schlechtriem/Schwenzer (2005), op. cit., p.4 38; and Art.-8 (2) for the general principle of referring to a "reasonable person"; Schlechtriem P, (1986), op. cit., p.6 8.
unreasonable expense. However, the buyer retains any right to claim damages as provided for in this Convention.”

Although the second sentence of Art. 37 is under the seller obligations section specifies that the buyer retains any right to damages provided by the CISG it may be more than inconvenient to sue the seller for damages as the burden of proof is on his side as a result of the generally accepted rule. It means that he has to bring evidence for the fact that real expenses arises due to the seller’s conduct.

When the seller wants to cure the defects under this article, it must take place before the date of delivery which was fixed by the contract, provided that the buyer accepts the early delivery; or before the end of a period for delivery, when it is up to the seller to deliver the goods at any time within that period of delivery. The seller's right to cure any non-conformity is limited to the period between the actual delivery and the fixed date or up to the end of the period. Thus, under this article, the seller does not have a right to cure any lack of conformity once the contract date for delivery has expired. At the same time the buyer cannot exercise any remedies for nonconformity until the fixed time has passed, or when it has become clear that the seller will not cure the lack of conformity (Art. 72).

Moreover, the right of the seller to cure cannot be applied unless it does not cause unreasonable inconvenience or expense to the buyer. For instance, in a FOB clause, if the buyer has chosen a date for the ship to take delivery at the port at that date, it may be difficult for him to provide another ship at a later date for missing goods.

The important question in this regard concerns measuring the reasonableness of inconvenience and expense. Inconvenience can be decided in the light of each case, as each case is unique according to individual circumstances. However, although the CISG uses the notion of ‘unreasonable ‘in both inconvenience and expense, inconvenience and expense are not the same, since even with reasonable expenses the buyer is entitled to recover all the expenses he might have borne.

345 Art. 52 (1).
346 Art. 33(b); see Maskow/Enderlein (1992) op. cit., p. 152.
347 This rule is subject to the discussion of Art. 48.
Although the CISG does not require the seller to notify the buyer of his intention to cure the lack of non-conformity, this would be considered as unreasonable inconvenience, and therefore it would be necessary for the buyer to be informed in advance in order for the seller to protect their right of practicing the cure.\textsuperscript{350}

In contrary, according to Arts 38 and 39, the buyer stays responsible for examining the goods and to notify the seller of any defects. This duty takes place shortly after receiving the goods, even if the date of delivery in the contract has not transpired.\textsuperscript{351} If the buyer refuses to allow the seller to cure the non-conformity, the buyer loses the right to claim a defect.\textsuperscript{352}

3.4.6. Exceptions to the requirement of the buyer's notice

3.4.6.1. Seller's knowledge of defect

Under Art. 39 (1), buyers who fail to give timely notice will lose the right to rely on the lack of conformity against the seller. Arts 40 and 44 provide an exception to the buyer's obligation to give notice to retain the right to claim non-conformity. Art. 40 states that:

“The seller is not entitled to rely on the provisions of articles 38 and 39 if the lack of conformity relates to facts of which he knew or could not have been unaware and which he did not disclose to the buyer.”

According to this article the seller cannot rely on the protection of the buyer's notice to escape liability for a lack of conformity if he knew or could not have been unaware of it,\textsuperscript{353} since there is no reasonable basis for the seller to require the buyer to notify them of such facts.\textsuperscript{354} In order to require the buyer to examine the goods and to give notice within reasonable time, the seller has to disclose to the buyer any defects which may affect the CISG principle of good faith as a result of the seller's deceit.\textsuperscript{355} In addition, the provision also concerns the case of the gross

\textsuperscript{350} Maskow/Enderlein (1992) op. cit., p. 153.
\textsuperscript{351} Enderlein F, in Sarcevic/Volken (1986), op. cit., p. 164.
\textsuperscript{353} Domestic rules governing fraud may apply in such a case; see Honmold J, (2009), op. cit., p.37.
\textsuperscript{354} Lookofsky J, in Iierbots/Blanpain,(2000) op. cit., p.109.
\textsuperscript{355} Art. 7 (1); see Lookofsky J, in Iierbots/Blanpain,(2000) op. cit., p.10.
negligence of the seller.\textsuperscript{356} This obligation to disclose includes defects which may only occur after the goods have left the seller's place.\textsuperscript{357}

The seller's knowledge of non-conformity covers the case when the seller "could not have been unaware". The meaning of this phrase has been subject to disagreement between commentators and tribunals.\textsuperscript{358} It was described as "being a little bit less than cunning and a little bit more than gross negligence",\textsuperscript{359} which means in fact that it must involve an obvious lack of conformity.\textsuperscript{360}

Another view defined it as the same as gross negligence.\textsuperscript{361} Enderlein criticizes these views as representing efforts to protect the seller following domestic law: "The wording of the CISG itself would, in our view, include simple negligence, which could also be described as a violation of customary care in trade."\textsuperscript{362} This view seems more appropriate to serve the purpose of Art. 40 since its aim is to balance between the seller's and buyer's duties regarding the awareness of the defects.

3.4.6.2. Excuse for failure to give notice

The last article concerning the conformity of the goods deals with a special circumstance under which the buyer is not deprived of his remedies, even if he failed to give the required notice of the defect within a reasonable time. Therefore, the drastic consequences of the general rule are being made smoother and even more flexible. Further exception has been given to the buyer under Art. 44,\textsuperscript{363} granting a limited "excuse" for failing to notify, providing that:

"Notwithstanding the provisions of paragraph (1) of article 39 and paragraph (1) of article 43, the buyer may reduce the price in accordance with article 50 or claim damages, except for loss of profit, if he has a reasonable excuse for his failure to give the required notice." This provision of Art. 44 was not included in the 1978 draft CISG which was submitted to the Diplomatic Conference, and also cannot be found in

\textsuperscript{356} Schwenzer I, in Schlechtriem/Schwenzer(2005), op. cit., p.479
\textsuperscript{357} Ibid, p.480.
\textsuperscript{358} AndersenC, (2005) 9 V.J. I. C.L. A, p.27.
\textsuperscript{359} Maskow/Enderlein (1992) op. cit., p.163.
\textsuperscript{360} Schwenzer I, in Schlechtriem/Schwenzer(2005), op. cit., p.478.
\textsuperscript{361} Schlechtriem P, (1986), op. cit., p.70.
\textsuperscript{362} Maskow/Enderlein (1992) op. cit., p.164.
any national law. The addition of this provision was to balance the consideration of the seller's right to be given prompt notice under Art. 39(1) and the right of the buyer who fails to give timely notice. Furthermore the requirement of examining the goods and giving notice may not exist in domestic law and practice.

Art. 44 only applies when the buyer has a reasonable excuse or failure to give the required notice under Art. 39 (1), in order to minimize some of the harsh consequences that provision.

However, the effect of Art. 44 is limited to within the two-year cut-off period (Art. 39(2)); the buyer loses all of his rights if notice was given after more than two years. In addition, the application of Art. 44 is limited to providing the buyer only with certain remedies, namely:

“a) reduction in price as provided in Art. 50;

b) recovery of damages, except for loss of profit, which the buyer would have achieved if the goods had conformed to the contract.

These are the only available remedies for the buyer. Accordingly, buyers who fail to give notice within a "reasonable time" (Art. 39(1)) still face serious consequences, as they may not longer:

a) require delivery of substitute goods (Art. 46);

b) avoid the contract (Arts. 49 and 73);

c) require the seller to repair non-conforming goods; or

d) rely on non-conformity as a basis for delaying the passage of the risk of loss (Art. 70).

A difficult question arising from Art. 44 is to what extent the "reasonable excuse" can be used to relax the rule of Art. 39 (1). This article, which determines the buyer’s obligation to examine the goods delivered, incorporates a flexible provision in

368 Sono K, in Bianca-Bonell, op. cit., p.327.
369 Enderlein F., in Sarcevic/Volken, (1986)op.cit., p.187
order to accommodate the individual circumstances of each business transactions. It has been argued that Art. 44 will rarely be applied, since a buyer who discovers or ought to have discovered the non-conformity can hardly be excused for not giving proper notice.\textsuperscript{371} In practice, there have been many cases where the buyers' excuses were rejected.

Some legal writers include in "reasonable excuse" cases where the notice given did not specify the nature of the non-conformity, as Art. 39 (1) requires, because of the difficulty of making such a specification.\textsuperscript{372} Enderlein criticized this view, pointing out that: "I don't believe that the buyer would lose his rights under Para.I of Art. 39 so quickly."\textsuperscript{373}

Ferrari rightly proposes a practical method for how the provision of reasonable excuse can be applied: regard will be had to the need to reach equitable results,\textsuperscript{186a} a goal which can be reached by, among other means, resorting to more individualized considerations than would otherwise be relevant under Article 39(1).\textsuperscript{374}

Canellas explained, in more detail, this approach to applying Art. 44 in relation to the application of Arts-38 and 39, pointing out that: "Article 44 is useful when the circumstances of delay of notice are not objective, but subjective".\textsuperscript{375} In this regard Article, 44 can be understood as an excuse for subjective matters only, such as the personal circumstances of the buyer. In any event, as Camellias pointed out: "the more time for notice that has passed the less probability of convincing the judge to apply the reasonable excuse of Article 44."\textsuperscript{376} Even if this differentiation between subjective and objective excuses may be an acceptable solution at the theoretical level, it does not necessarily represent the actual meaning intended by the drafters of the CISG. Therefore, it can be said that, in order to determine the meaning of reasonable excuse, it is fundamentally necessary to include any acceptable excuse that cannot be accepted as timely, as the addition of this article was meant to mitigate the harsh consequences of Art. 39 (1).\textsuperscript{377}

\textsuperscript{371} Ibid, p. 382.
\textsuperscript{372} EnderleinF, in SarcevicNolken, op. cit., p. 187.
\textsuperscript{373} Ibid, p.187.
\textsuperscript{376} Ibid, p.268.
3.5. Third Party Rights to the Goods

3.5.1. Third party rights in general

The CISG regulates only the relations between the seller and the buyer, not those between the buyer and the third party. In addition to the seller's obligation in Art. 30 to deliver the property of the goods, the seller must also deliver goods without there being any right or claim from third parties. Art. 41 provides that:

“The seller must deliver goods which are free from any right or claim of a third party, unless the buyer agreed to take the goods subject to that right or claim.”

However, if such right or claim is based on industrial property or other intellectual property, the seller's obligation is governed by article 42. The scope of this article is limited to protecting the buyer's rights, in transferring the ownership of the goods, against the seller. Therefore, the right of the buyer as a bona fide purchaser against the third party and the nature of the property, which has been transferred, are not governed by the CISG. 378 Thus, issues related to the transfer of the title in goods and their acquisition in good faith or free from hindrances are not dealt with by the CISG. Such instances are governed by domestic law, pursuant to the private international law of the jurisdiction. 379 Therefore, the applicable law must be checked to determine whether or not the seller has fulfilled the obligations of Art. 41. In addition, if the third party right or claim is based on industrial or other intellectual properties, the relevant article is Art. 42.

3.5.1.1. Third party rights

Art. 41 provides protection of the buyer's right to transfer the ownership of the goods when the seller is not able to do so for any reason, such as selling goods which they do not own, or when the goods sold are encumbered by a third party right. Thus, the third party right must have an impact on the buyer. 380 This right plays a noteworthy role, particularly if the domestic law does not provide sufficient rules of acquisition of title for bona fide purchasers. The third party right can be a right in personam 381 or in

379 Schwenzer, in Schlechtriem/Schwenzr (2005), op. cit.
381 "directed toward a particular person.”
Thus, the right includes cases where the possession of the goods, or their use or disposal, are restricted by the third party, e.g. in renting or leasing if the third party was given possession of the goods under certain contracts.

The security interests to the creditors of the seller are also considerable in practice, as in many cases the seller operates under the condition to pay the full price to the supplier in order to pass the title of the goods. A defect in the title can occur if the delivered goods are pledged to a third party.

If the right of the third party hinders the delivery from taking place, then the relevant article is Art. 31. The defect in title is only applicable when the delivery has already taken place. In a case between an Austrian buyer (claimant) and a German seller (defendant) for the sale of propane, the seller was not able to deliver the goods because the seller's own supplier made the delivery subject to an export limitation. The court found that, as a consequence of the provision of Art. 31, the buyer was entitled to expect the goods to be put at their unrestricted disposal.

Additionally, the court did not accept the seller's defence that the supplier had prohibited exportation to Benelux countries, holding that the seller had breached its obligation under Art. 41 to deliver goods free from any right or claim of a third party.

This decision was referred to as an application of Art. 41, since the court rejected the seller's reliance on its supplier's restriction. However, this case shows that in practice the buyer was not affected directly by the third party right or claim, because the delivery itself was not performed. Therefore, it can be observed that the main issue in this case is no delivery, and it should consequently be associated with Art. 31.

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382 referring to a lawsuit or other legal action directed toward property, rather than toward a particular person. Thus, if title to property is the issue, the action is "in rem"; See Mullis A, in Huber/Mullis (2007) op. cit., p.170.
384 Ibid.
386 Schwengerl, in Schlechtriem/Schwenzer (2005), op. cit., p .484.
387 Austria 6 February 1996 Supreme Court, case No.10 Ob 518/95
3.5.1.2. Third party claim

The CISG defines as a breach of contract if the delivered goods are not free from any right or claim of a third party, unless the buyer agreed to take such goods. The obligations in Art. 41 include the claim of a third party to protect a buyer who should not be expected to be hindered in the use of the goods or to deal with the third party, particularly as the claim is controlled by domestic law which is normally the seller's state law. Honnold explained that the seller has to be responsible for such a claim, in order to "protect the normal expectation of a buyer that he is not purchasing a lawsuit".

The important question is whether the seller will still be liable for an unfounded claim, since under Art. 41 the claim gives rise to a seller's responsibility. Some commentators consider that sellers should not be liable for claims below a certain level of seriousness; however, it is not always possible to decide how frivolous a claim is. Even if it is possible for the buyer to assess the claim, it is still the seller's responsibility to engage in defeating it; therefore, some writers argued that in practice the seller has to deal with the claim. If it is frivolous, then it will be easy for the seller to tackle the claim without delay; and consequently the buyer's right will not be affected so as to amount to a fundamental breach. Simultaneously, the seller has to compensate the buyer for any cost resulting from that claim. It can be speculated that, in order to implement Art. 41 to protect the buyer's rights as a bona fide purchaser the seller must bear the third party's claim regardless of the basis of such a claim, rather than leaving the claim to be assessed by the buyer. However, it is important to note that if the third party's claim is a result of a conspiracy between the third party and the buyer, the seller cannot be liable for the claim or any damages arising.

Although the wording of Art. 41 deals with the rights of the third party and claims, it also covers the seller's own rights, such as the security interests for the payment of the price of goods if the seller reserved them in breach of contract.

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390 See: Secretariat Commentary, O. R. p.3 6,(3).
3.5.1.3. Time for the existence of the right or claim

As far as the decisive time is concerned, the goods must be free from third party rights or claims at the time of delivery.\textsuperscript{396} However, if the seller is required to deliver the goods "ex-work or at the board", and then the goods, at some point in transit, are seized in the seller's state by creditors, the seller will still be responsible for the third party right and his liability cannot be limited to that early time of delivery if the origin and the cause of such a claim developed before the time of delivery.\textsuperscript{397}

3.5.1.4. Exclusion of the seller's liability

In order to exempt the seller from title defects, it is insufficient for the buyer to be aware of the third party's right. The buyer also must agree to accept the goods encumbered with such a right or claim, whether explicitly or implicitly.\textsuperscript{398} For instance, it is not enough to take into consideration the buyer's knowledge of a lien or other security over the goods owned by the carrier or warehouses or that the seller is indebted to a third party. However, according to some commentators definite knowledge of the buyer of the rights or claims is sufficient to meet the requirements of Art. 41 if they accept the goods without reservation of their right against that third party.\textsuperscript{399} In considering this opinion, one should note that the provision of Art. 41 requires the buyer's agreement. Therefore, the buyer's explicit or implicit consent to take the goods subject to the third party right is necessary. This can be proved by recognizing the difference between the wordings of Art. 41, "unless the buyer agreed to take the goods subject to that right or claim", and the wording of Art. 35 "the buyer knew or could not have been unaware of such lack of conformity.” It is clear from the language of these provisions that Art. 41 requires more than mere knowledge of it. This difference is not surprising, since the removal of nonconformity is much more unexpected than the removal of third party rights which is usually resolved soon after delivery. In any case, the rule of Art. 8 should play an important role in defining whether or not the buyer has agreed to have the goods subject to the third party's right. It is important to mention that, unlike in Art. 42, whether or not the seller knew about

\textsuperscript{396} Maskow/Enderlein (1992) op. cit., p. 165.
\textsuperscript{397} Schwenzer I, in Schlechtriem/Schwenzer(2005), op. cit., p.488
\textsuperscript{399} Enderlein F, in Sarcevic/Volken (1986), op. cit., p.179.
the defect in title at the time of concluding the contract does not affect their liability in Art. 41.400

3.5.1.5. Buyer's remedies

No special remedies are given for defects in title, so reference should be made to the remedies available in the convention following from Arts 45 to 52.401 The buyer is also entitled to claim damages for any expenses or loss caused by the defect in title. A third party who has sold goods to the seller under the condition that the title to the goods shall pass only on full payment of price and who has not been fully paid, may demand the return of the goods under the most legal systems. In this case the buyer has to hand over the goods (Art. 74), such as the cost of defending the third party's claim.402 However, the right to avoid the contract cannot be applicable unless the defect in title amounts to a fundamental breach (Art. 25), such as in cases where the third party prevents the buyer from using the goods.403

3.5.2. Third party claims based on intellectual property

Whereas Art. 41, as discussed above, deals with the general obligation to deliver goods free from third party rights in title, restricted obligations on the seller for third party rights or claims based on industrial or intellectual property constitutes the subject-matter of Article 42. It provides:

“(1) The seller must deliver goods which are free from any right or claim of a third party based on industrial property or other intellectual property, of which at the time of the conclusion of the contract the seller knew or could not have been unaware, provided that the right or claim is based on industrial property or other intellectual property:

“(a) under the law of the State where the goods will be resold or otherwise used, if it was contemplated by the parties at the time of the conclusion of the contract that the goods would be resold or otherwise used in that State; or

401 Schwenzer I, in Schlechtriem/Schwenzer (2005), op. cit., p.491
403 Schwenzer I, in Schlechtriem/Schwenzer (2005), op. cit., p.491
(b) in any other case, under the law of the State where the buyer has his place of Business

(2) The obligation of the seller under the preceding paragraph does not extend to cases where:

(a) at the time of the conclusion of the contract the buyer knew or could not have been unaware of the right or claim; or

(b) the right or claim results from the seller's compliance with technical drawings, designs, formulae or other such specifications furnished by the buyer.”

3.5.2.1. Application of the right

The concept of industrial or intellectual property should be understood in a general sense according to the international standard especially as far as intellectual property is concerned,\textsuperscript{404} to include all rights that owe their existence to the activity of a human mind "resulting from intellectual activity in the industrial, scientific, literary, or artistic fields.” This includes any rights relating to copyrights, patents, trademarks, industrial design, trade secrets and commercial names.

When a third party right exists, the seller will be in breach of its obligation even without any claim by the third party. This obligation applies even for the mere contention of such a right or claim, since in practice the third party may expect a similar trademark to be a protected mark of their own, which requires the involvement of the seller (not the buyer) in defeating the claim. Nevertheless, if the claim is unfounded, it is unlikely that the seller will be aware of it, which may release them from liability under Art. 42(l).\textsuperscript{405} The rights of the third party are not covered by Art. 42, since the CISG aims only to govern the relationship between buyer and seller. In order to determine whether or not the third party can assert its right in relation to the goods against the buyer, reference has to be made to the applicable domestic law.\textsuperscript{406}

\textsuperscript{405} Schwenzer I, in Schlechtriem/Schwenzer (2005), op. cit., p.498.
\textsuperscript{406} Schwenzer I, in Schlechtriem/Schwenzer (2005), op. cit., p.495.
3.5.2.2. Limitation of the seller's liability

3.5.2.2.1. Seller’s knowledge

Whereas Art. 41 does not differentiate between the seller knowing of the defect in title or not, in Art. 42 (1) the awareness of the seller at the time of the conclusion of the contract about industrial or intellectual rights in the state where the goods are going to be resold or used is required.

Art. 42 (1) determines this requirement of knowledge as that "the seller knew or could not have been unaware of." This article comprises several restrictions regarding the seller’s liability. The buyer's knowledge of third party rights also frees the seller from his liability. While under the general rule of Article 41 the buyer must expressly or at least impliedly agree to goods subject to third party rights, the seller is only liable if he knew or could not have been unaware of these rights at the time the contract was concluded. He must inform himself about the possible industrial or other intellectual property rights.

Commentators are in disagreement as to whether or not the meaning of the phrase "could not have been unaware" in Art. 42 include an affirmative duty. According to one view, the seller has to conduct an investigation to the registration of such intellectual rights in the state where the goods will be resold or used whenever the registry was made public, since the seller is in a better position to know about the product and the possible foreseeable infringements. Only if he does so and no relevant rights are revealed can the seller begin to assert that he was unaware of that right.

This viewpoint was supported by secretariat's commentary, stating that: "the seller `could not have been unaware' of the third-party claim if that claims was based on a patent application or grant which has been published in the country in question". An opposing view considers this to constitute an additional heavy obligation on the seller without being required by the wording of Art. 42 (1).

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410 Secretariat's Commentary, O.R. p.37, (5) (6).
of the article should apply only when the seller was guilty of "maliciously keeping silence with regard to third party rights".412

Assessing the two views, Mullis413 suggested that the seller should be required to be aware of obvious aspects of easily accessible information in relation to intellectual rights and not to be grossly negligent. Thus the seller cannot be liable for the registration of third party rights unless the buyer can prove that there is gross negligence". In order to evaluate this argument, it can be suggested that the first view seems to be a more appropriate interpretation of Art. 42. The seller may otherwise, in most cases, escape from liability by claiming that they were unaware of the unexpected third party right at the conclusion of the contract. Therefore it is important to require the seller to conduct an investigation into intellectual rights giving Art. 42 sufficient power to ensure that the seller acts accordingly.

Moreover, as stated above, the seller is in a better position to investigate details of the components of goods and possible violations of rights. Finally it is not reasonable to equate the duties of the seller and buyer in this respect since the seller's general obligation in the sale of goods contract is to sell goods fit for general and particular known purposes (Art. 35 (2)). At the same time the buyer's duty to examine the goods cannot expand to the extent to share the seller their fault of not selling sound goods.

3.5.2.2.2. Relevant Time:

The seller will not be liable for any rights of third parties that may occur between the time of concluding the contract and the time of delivery, as long as they were not aware of the right at the time of concluding the contract. Art. 42 (1) expressly specifying the timing of the seller's liability as being that "at the time of the conclusion of the contract the seller knew or could not have been unaware" of the relevant information. This article applies to industrial and other intellectual property rights. Regarding the decisive time this article diverges from the general rule. The seller’s liability is restricted to his knowledge at the time of the conclusion of the contract. Till the date of delivery, third parties could acquire rights that could not have taken into consideration. This risk falls evidently on the buyer. “In contrast to this

413 Mullis A, in Inüber/Mullis (2007) op. cit., p. 176.
interpretation of Art. 42, Shinn argued that, in order to implement Art. 42, the seller's liability has to extend to include claims which have arisen after delivery, regardless of whether or not the seller knew of the claim at the conclusion of the contract. Shinn pointed out that: the alternative would make the entire article meaningless except when the goods are imported before the sales contract is made.

3.5.2.2.3. Territorial restrictions:

As further limitation of seller’s liability the CISG provides that freedom from rights and claims has to be assured only in one country.

Intellectual property rights may be protected in one legal system, but not in another, depending upon whether the person claiming protection has complied with national requirements for registration. Art. 42 limits the relevance of laws of intellectual or industrial property rights to only one country. According to the wording of Art. 42 (1) (a), it is extraordinarily difficult for the seller to obtain information about the probable existence of these rights and what relevant regulations are in different countries. 414 Art. 42 (1) (a, b) determines one of two places where the seller is liable under its law of intellectual property: the first place is where the goods are going to be resold or otherwise used, and if there is insufficient evidence of any place to be considered, the reference then must be made, as alternative, to the state of the buyer's place of business. This liability is to protect the buyer against their own customers, 415 and it is not required for the place to be expressly agreed upon as long as it was contemplated by the parties at the time of concluding the contract.

3.5.2.2.4. Knowledge of the buyer

The buyer's knowledge of third party rights also frees the seller from his liability. While under the general rule of Article 41 the buyer must expressly or at least impliedly agree to goods subject to third party rights, in contrary to that, concerning to intellectual property rights, it is sufficient that the buyer knew of the third party right or even that he should have known it. According to Art. 42 (2) (a) the buyer may bear the risk of the third party's intellectual rights if, at the conclusion of the contract, they knew or could not have been unaware of that right. 416 This provision

arises a crucial question whether the buyer is obliged to conduct research regarding the intellectual property rights in his country or the country of destination? As the buyer may also know the concerning legal provisions on the ground of the above mentioned generally accepted principle, the seller may refer to the buyer’s failure to inform himself about the current legal situation as well.

The buyer's liability for intellectual rights in Art. 42 (2) (a) is more similar to the rights under Art. 35 (3) concerning the lack of conformity of goods than those concerning the general liability for defects in title under Art. 41. In Arts 35 (3) and 42 (2) (a) there is no need to have the consent of the buyer as long as they are aware of the defects or rights whereas in Art. 41 the consent of the buyer to take the goods subject to the title's defect is required.

3.5.2.2.5. Technical requirements provided by the buyer:

If the buyer provides the seller with technical requirements that infringe third party rights, then it is presumed that the buyer is aware of the situation of intellectual property rights in their country. According to Art. 42 (2) (b), the buyer is liable for third party rights even if they are completely ignorant of the existence of others' rights. However, providing general information and specific requirements should be clearly differentiated. As chwenzer rightly highlighted, "general information provided and wishes expressed by the buyer, which leave the seller room to exercise discretion ... can not release the seller from his liability." So, the buyer will only be responsible as stated in Art. 42 (2) (b) if they are precise about their request which infringe others' intellectual right.

At the same time, even when the buyer's technical requirements infringe intellectual property rights, the seller must notify him of third party rights which they are aware of. This is required by the general rules of good faith, although in this case the seller is not obliged to carry out any research.

417 Ibid.
418 This is similar to the case under Art. 35(2)(c), whereby the seller is obliged to deliver the goods according to the sample or model provided. See Maley K (2009), 121. T. B. L. R, op. cit., p. 92.
420 Schwenzer I, in Schlechtriem/Schwenzer(2005), op. cit., p.503.
The first paragraph of Art. 43 states that: “(1) The buyer loses the right to rely on the provisions of article 41 or article 42 if he does not give notice to the seller specifying the nature of the right or claim of the third party within a reasonable time after he has become aware or ought to have become aware of the right or claim.”

There is, however, a remarkable difference in the specific time-limits compared with Article 39 on the examination and notifying. Art. 39 specifies a maximum period of two years for giving notice, here there is no time-limit for asserting a claim. The buyer does not lose his rights upon the seller’s infringement, even if the buyer fails to give the required notice. The CISG provides for a defence for the buyer’s failure in a way which is comparable to Article 40 for the fraudulent seller. Losing these rights may prevent him from practicing the available remedies: to claim damages (Art. 45 (1) (b)); to request performance (Art. 46); to give an additional period for the seller to perform their obligation (Art. 47); and to declare the contract voided (Art. 49). In order for the buyer's notice to be accepted he has to specify the nature of the right or claim so that the seller can refute it. The buyer should, for the purpose of Art. 43 identify the steps already undertaken by the third party. If no such claim has been made, and the buyer seeks remedies relying on the existence of the third party's right's, the buyer should be expected to provide the seller with a detailed definition of the alleged right, such as the registration number of the third party.

3.6. Remedies for Breach of Contract by the Seller

3.6.1 Remedies in general

Understanding the rules on remedies and uniform application of them are considered as the backbone of unifying the law of sale internationally. The remedial system of the CISG provides a separates action on remedies for each party set forth after the obligations of the other party and then it followed by the common provisions for both parties. This study attempts to explore the section which

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424 Bridge MG, (2007), 37 II. K.L. J, op.cit. p. 3 4. This author considers the area of remedies to include the most important differences between the CISG and the English Sale of Goods Act.
425 The seller's remedies are set out in Arts. 61-65. Art. 61 sums up the seller's remedies in the same way as Art. 45. for the buyer's remedies. The common provisions for both parties are drawn in Arts. 71.88.
specifically looks at buyer remedies to provide a clear understanding of their approach. For the seller's breach of contract obligations, Art. 45 summarize all the buyer's remedies and the links between them:

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

(a) exercise the rights provided in articles 46 to 52;
(b) claim damages as provided in articles 74 to 77.

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

(3) No period of grace may be granted to the seller by a court or arbitration tribunal when the buyer resorts to a remedy for breach of contract.

As the discussion of Article 45(1) of the Convention in the UNCITRAL Digest of Case Law on the CISG indicates, this provision is as much informational as substantive. It is designed as an overview or guide to the remedies available to a buyer for breach by the seller. For example, Article 45(1)(a) merely catalogues the performance-oriented remedies (as opposed to damages) available to an aggrieved buyer, and Article 45(1)(b) provides guidance through the damage measures available when the seller breaches.

As the UNCITRAL Digest points out, tribunals apparently have had little difficulty with the substantive aspects of Article 45(1). Several decisions rendered after the Digest was assembled have confirmed what a large number of decisions cited in the Digest had already recognized: that a buyer's right to claim damages for a seller's breach is grounded in Article 45(1)(b). Recent decisions have cited Article 45(1)(b) as the foundation for a buyer's claim to damages for, in particular, a seller's late delivery, and delivery of non-conforming goods.

426 Compare this approach with the ULIS structure of remedies, whereby each breach was followed by its remedy; see Schlechtriem P, in Schlechtriem/Schwenzer (2005) op.cit. Pp. 3 -4.
428 Ibid.
430 Oberlandesgericht Düsseldorf, Germany, 28 May 2004, English translation
The main remedies under the CISG can be divided into three basic types: specific performance, which includes repair and the delivery of substitutes in cases of non-conformity (Art. 46); avoidance of the contract (Art. 49); and reduction in price (Art. 50). The other provisions referred to in the buyer's remedies section are merely supplementary rules. Art. 47 deals with an additional period of time for performance and Art. 48 governs the right of the seller to cure defects. Partial breaches are dealt with in Art. 51; early delivery in Art. 52(l) and the delivery of extra quantities in Art. 52(2).

In addition, claiming damages is a supplementary remedy for both buyer and seller. Art. 45(1)(b) forms the basis of the right of the buyer to claim damages and according to its language, the buyer may claim damages even if the seller is not at fault for failing to perform his obligations. The calculation of damages, and their limitations, and mitigation are then dealt with in Arts. 74-77.

Under Para 45(2) it is expressly indicated that an aggrieved buyer's right to damages is cumulative with its other remedies. Although the UNCITRAL Digest does not cite any cases that have applied Article 45(2), it does note that, where a buyer has availed itself of other remedies, the amount of damages the buyer may recover "depends on which other remedy has been resorted to by the buyer.”

The aim of Para 45(3) is to exclude the influence of various domestic national laws. When a buyer "resorts to a remedy for breach of contract," Article 45(3) forbids a court or arbitral tribunal to grant the seller a "period of grace." Once again, the Digest does not cite any cases applying Article 45(3). Although it does not cite Article 45(3), a very recent case may in fact illustrate the application of this rule it is consistent with the rule. In the decision, the court held that, under Article 45(1)(b), a buyer was entitled to damages for the seller's late delivery without requiring the buyer

Available at: <http://cisgw3.law.pace.edu/cases/040528g1.html>.


Art. 45 (1)(b) gives the grounds for the damage remedy and the rules of damages in the CISG merely specify how the damage should be implemented without granting the aggrieved buyer this remedy. See: Flechtner H. Buyers' Remedies in General and Buyers' Performance Oriented Remedies(2005-06), 25 J.L. &Com, 339 p.340.

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to have given the seller a "reminder" (referring, presumably, to a reminder that delivery was past due).  

As stated above, the CISG system of remedies covers all failures, and thereby each remedy can serve every breach of the obligations even if the failures differ in nature from one another. However, in order to be practically applied, some remedies require more criteria to be satisfied than others.

3.6.2 Specific performance

3.6.2.1 Nature of the remedy

When a breach of contract occurs, the buyer's primary concern may not be to receive monetary compensation for the loss of his bargain, but instead to receive actual performance of the breaching party's obligations. This is particularly true when the contract of sale concerns unique and otherwise identified or specific items. But even in cases where the goods are not especially unique or otherwise identified it might be easier and less expensive to require performance of obligations of the breaching party instead of obtaining damages and obtaining the subject matter from somewhere else.

In the event of breach of the contract by the seller, the CISG entitles the buyer to require the seller to perform or to complete the performance of any of his obligations undertaken under the contract. Consequently, damages are seen as a secondary remedy. Specific performance can, furthermore, be regarded as enforcement of the contract in the sense of putting the aggrieved party into the same position as he would have had the contract been performed. Article 46 lays down the general rule that the buyer may “require performance” by the seller. The intention

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437 In the seller's remedies, Art. 62 provides a parallel rule to specific performance, as the seller may “require the buyer to pay the price.”
of Article 46 can be seen in the fact that the seller should not have a right to buy himself out of the contract.440

It is readily available as a primary remedy for breach of contract to force the party in breach to fulfill its obligations, to deliver the goods as agreed or to repair defective delivery. This seems to be the natural remedy as long as it performance is possible.441

The approach adopted by the CISG to this remedy is similar to that followed by many civil law systems.442 In common law, this remedy is regarded as an exceptional remedy to be implemented at the court's discretion when alternative remedies are inadequate, whereas claiming for damages is the immediate remedy.443

This remedy provides a right for the buyer in the event of breach of contract to bring a court case against the seller to order such performance to be enforced by the means available to it under the court's law.444 Subject to Art. 28, the court has no discretionary power to refuse his request.445 Art. 28 seeks to preserve domestic law as regards the availability of specific performance by providing that “A court is not bound to order specific performance under the Convention unless it would do so under its own law”. This clear distinction between CISG rules and domestic rules as regards specific performance will be examined separately.

Regarding late delivery, it is sometimes difficult to decide whether or not the buyer, by demanding late performance, wants to practice Art. 46(1) for specific performance or whether he voluntarily offers the seller a modified contract according to Art. 29. In this case, reference should be made to the interpretation of the buyer's demand.446 If the buyer's intention is not clear, the declaration ought to be interpreted

441 Lookofsky J, (2008), op. cit., p.108
443 DiMattco L et al., op cit., p. 133; for more detail about English law see Treitel G, hr Law of Contracts (12" ed).
444 Secretariat's Commentary, O .R., p.38,( 8).
445 Walt S, (1991) For Specific Performance Under the United Nations Sale Convention 26 T. Int'l L. J. p.214; Lookofsky J (2008), op. cit., pp. 110-1, the latter author mentioned that for the demand of this remedy in practice, it is not likely that the buyer will seek to compel the non-performing seller, because most commercial buyers have little time to wait for additional time to deliver, and thus after the expiry of this period they are likely to avoid the contract.
446 If it is modification of contract, no damages can accrue to the buyer. See Secretariat's Commentary, O.R. 38, (5)(6); Will M, in Bianca-Bonell, op. cit. p. 340.
as requiring performance under Art. 46, since non-delivery is a breach in itself and the buyer's demand for performance is one of its remedies.

3.6.2.2. Requirements for substitute goods and repair

The CISG establishes for the buyer a clear right to require the seller to perform as originally agreed. In the Official Commentaries to the provision provided in Article 46 it is mentioned that “the buyer's principal concern is often that the seller perform the contract as he originally promised. Legal actions for damages cost money and may take a considerable period of time. Moreover, if the buyer needs the goods in the quantities and with the qualities ordered, he may not be able to make substitute purchases in the time necessary.”

3.6.2.2. 1. Right to Require the Seller to Perform; Article 46(1)

The buyer's general right to demand the seller to perform his obligations under the contract derives from the first paragraph of Article 46: “The buyer may require performance by the seller of his obligations unless the buyer has resorted to a remedy which is inconsistent with this requirement”. Such paragraph's purpose can be understood as seeing to it that the obligations of the seller are performed as laid down in the contract and the CISG. Therefore, it also expresses the maxim of the pacta sunt servanda-principle.447

The buyer's right to require performance under Article 46(1) is at hand in situations where the seller has totally failed to perform, i.e. non-delivery.448 It is thus distinguished from the buyer's right to require delivery of substitute goods or right to demand repair. What is a total failure to perform? It is clear that if the seller refuses to deliver the goods, he is in breach, as addressed by Article 46(1). But if the seller delivers goods that are totally different from what has been agreed upon, i.e. apples instead of pineapples, the answer is a bit more complicated. Should the matter be then considered as a non-delivery? The problem lies in the right to avoid. Will states that “If the answer were positive the buyer might find it difficult to avoid the contract. For the mere delay in performance caused by the delivery of apples instead of pineapples does not necessarily amount to a fundamental breach.” Therefore, Will concludes that the delivery of goods other than those agreed upon between the parties, should not be

447 Bianca and Bonell, p. 335.
448 Bernstein and Lookofsky, p. 84.
regarded as non-delivery, but as non-conformity of goods, covered by paragraph (2) of Article 46.\textsuperscript{449} The buyer may not speculate with his remedies for a failure in performance. The seller must rely on the buyer's actions. Consequently, if the buyer has only required a price reduction or otherwise claimed for damages and the seller has accepted such requirements, the buyer may lose his right to subsequently require the seller to perform his obligations. On the other hand the buyer may, in addition to a requirement of specific performance, claim for damages or a reduction of price by the seller; provided that the buyer makes it clear to the seller those requirements are made simultaneously. Moreover, it is expressly mentioned in the commentaries to Article 46(1) that: “Subject to the rule in paragraph (2) relating to the delivery of substitute goods, this article does not allow the seller to refuse to perform on the grounds that the non-conformity was not substantional or that performance of the contract would cost the seller more than it would benefit the buyer.

\textbf{3.6.2.2.2. Delivery of Substitute Goods: Article 46(2)}

According to paragraph (2) of Article 46, the buyer can require delivery of substitute goods, if the seller delivers goods that do not conform with the contract and the non-conformity constitutes a fundamental breach. The said paragraph governs therefore the scope of specific performance when the seller has delivered goods but they do not conform to the contract made between the parties.\textsuperscript{450} By delivery of substitute goods is meant that defective goods have been delivered and due to the defectiveness a second delivery is made to replace the first delivery.

The situation where buyer rejects defective goods before delivery and demands a new conforming delivery is governed, as a matter of fact, by Article 46(1) and not by Article 46(2).\textsuperscript{451} Such a situation shall, consequently, be evaluated under Article 46(1). The buyer's right to demand re-delivery of substitute goods reflects furthers the CISG's aim to respect the pacta sunt servanda principle.\textsuperscript{452}

\textsuperscript{449} Bianca and Bonell, p.336.
\textsuperscript{450} Honnold (1987), p. 301.
\textsuperscript{451} Schlechtriem (1998), p. 383
\textsuperscript{452} Bianca and Bonell, p. 336.
In short, the buyer's right to require performance under Art. 46(1) is at hand in cases of non-delivery. "If he has delivered, but the goods do not conform with the contract, paras. 2 and 3 provide remedies for specific claims for performance."\(^{453}\)

Since the shipping of a second delivery of goods and disposing of the non-conforming goods already delivered may cost the seller considerably more than the buyer's loss from having nonconforming goods, the application of the substitute remedy is restricted to cases where "the lack of conformity constitutes a fundamental breach" as in Art. 46 (2). The buyer has to have suffered a detriment which substantially deprived him of what he was entitled to expect under the contract. If the breach cannot be proved to be fundamental, then the buyer may be entitled to the remedy of repair.\(^{454}\)

When applying Article 46(2), as regards conformity of goods, it is important to separate generic and specific goods. If the contract made between the parties consists of generic goods, it follows directly from Article 46(1) that the buyer is entitled to require the seller to perform as agreed in case of non-conformity, and accordingly require re-delivery of substitute goods under Article 46(2). Therefore, the precondition of an absence of resorting to an inconsistent remedy must also exist.\(^{455}\) Consequently, the buyer would only have a right to require repair under paragraph (3) of Article 46 or claim damages. If the buyer requires the seller to deliver substitute goods, he must be prepared to return the non-conforming goods back to the seller.\(^{456}\) The rule derives consequently from the commentaries and from Article 82(1) which provides that: “The buyer loses the right to declare the contract avoided or to require the seller to deliver substitute goods if it is impossible for him to make restitution of the goods substantionally in the condition in which he received them.” Such obligation arises immediately when the buyer claims delivery of substitute goods.\(^{457}\)

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3.6.2.2.3. Right to require repair Article 46(3)

The third aspect of the buyer's right to specific performance under the CISG is his right to require repair under Article 46(3) of delivered goods, which are defective. Like the buyer's right to redelivery of substitute goods the right to demand repair is subject to Article 35, defining non-conformity of goods. Furthermore, a claim for repair could be unreasonable if the seller is a dealer who does not have the means for repair, or if the repair can be achieved by the buyer at the least cost. In general, it is unreasonable for the seller to be obliged to repair if there is no reasonable relationship between the cost of this and the advantage that the buyer may gain from such a repair. When determining non-conformity of goods pursuant to Article 35, and as regards any third-party rights to the delivered goods, it is of importance to decide whether the breach occurred is fundamental. If the breach is one of a fundamental nature, the buyer has naturally a right to avoid the contract or to require delivery of substitute goods. If, however, the requirements of a fundamental breach are not met, the buyer would nevertheless have a right to require repair.

3.6.2.3 Limitations

In spite of the general meaning of Art. 46, the buyer's right to performance is subject to some significant limitations. One of the two main limitations is provided in Art. 46 and the other in Art. 28 Alongside these articles there are other general limitations to performance remedy. The first major limitation is expressed by Art. 46 itself it instructs the buyer to not "resort to a remedy which is inconsistent with this requirement". Even though Art. 46 (1) does not specify which remedies are inconsistent with the remedy of specific performance, exercising the right of declaring the contract avoidance or reduction in price would certainly be inconsistent with this remedy.

The question of whether or not a claim for damages should be judged to be inconsistent can be answered by drawing a distinction between the case of a claim for

460 Lookofsksy J, (2008), op.c it., p110; Muller-Chen in Schlechtriem/Schwenzer (2005), op.cit., p.537. It should be noted that the mere rejection of the goods for their defects does not prevent the buyer from resorting to the performance remedy as Art. 46 (2) entitles the buyer to return the goods in the case of fundamental breach and demand substitute goods.
461 Secretariat Commentary, OR. p. 38, (5)(6); Honnold J, (2009),op, cit., p.. 411.
late delivery and that of failure to perform. If the buyer claims damages for late delivery, he would not be pursuing a remedy inconsistent with the requirement of performance. However, a claim for damages for failure to perform would be inconsistent with requiring performance, since such a claim can only be brought if the contract is avoided because the damages would be based on proportionality to the market price. Although this restriction is provided under Art. 46 Para (1), (2) and (3) should also be subject to the same limitation.

The second important limitation derives from Art. 28, which states that: "a court is not bound to enter a judgment for specific performance unless the court would do so under its own law in respect of similar contracts of sale not governed by this Convention." The language of Article 28 is not entirely clear. Therefore, an examination of this provision must start with examination of terms that are ambiguous. Phrases like "its own law," "similar contract of sale not governed by this Convention, " and "specific performance," are terms that have different connotations depending on whether they are read by a common law or a civil law jurist. According to this interpretation a judgment of specific performance thus includes a claim for the purchase price under Article 28 and a claim by the buyer for the performance by the seller of all his obligations.

The phrase "its own law" raises the question of whether the law is the substantive law of the forum or its entire law, including rules of conflicts of law. Examination of the purpose of the article makes it evident that what is meant is the substantive law of the forum. The purpose of Article 28 is to permit a court to preserve its own domestic law on specific performance and not force it to order specific performance when it is not available under that legal system.

Interpreting "its own law" to refer only to the domestic law of the forum also accords with the rationale of Article 28. The debate behind Article 28 centered on the

463 Muller-Chen in Schlechtriem/Schwenzer (2005), op.cit., p.537.
464 Maskow/Enderlein,op.cit., p. 178.
468 See Ibid. at 219.
need to protect those systems which did not have a mechanism to enforce orders of specific performance and secondly to allow those legal systems that regard specific performance as an exceptional remedy to continue to do so. However, interpreting the phrase "its own law" to include the rules of a given court could cause the applicable law to be that of a foreign country and, possibly, one that freely grants specific performance. This will eliminate the ability of the court to preserve its own national laws that do not grant specific performance. In so doing, the purpose of Article 28 will not be attained.

The other purpose of Article 28 is to avoid the problem that may arise when specific performance is claimed in a country whose own national laws have no mechanisms for enforcing specific performance. Therefore, by interpreting the term "its own law" as referring to the substantive law of the forum, the purpose of Article 28 is achieved.

The meaning of the phrase "similar contracts" embraces all sale contracts that are outside the scope of the CISG. This includes domestic contracts of sale and contracts between parties whose places of business are in the same country or contracts for the sale of goods between parties in non-Contracting States.

The full meaning of the term "specific performance" can only be revealed by comparing its meaning within the context of the civil law and common law systems. In addition to these two express limitations, other some general limitations in the CISC which should also be considered are the obligation of mitigating the damage (Art. 77) and the duty to preserve the goods or dispose of them (Arts. 85, 86, 88(2)). These may prove to be significant in limiting the buyer's right to require specific performances.


See Walt, (1991) op, cit,. P. 220.

Schlechtriem, op, cit. P. 205.

Walt, (1991) op, cit., P. 221.


Most of these limitations are, generally speaking, similar to many national laws with some difference in the degree of the limitations. See Huber P (2007) 71 R. Z. A. I. P op, cit., p. 15.

There is no provision under the CISG which defines how the court should employ the specific performance remedy to order the seller to perform what was agreed upon by the contract. In fact, it was deliberately intended to leave such matters to the procedure of the applicable law. 476

3.6.2.4 Additional period

3.6.2.4.1 Buyer's additional period for performance

In cases where the seller delays delivery, Art. 47 offers the buyer provision for fixing an additional final period for delivery as follows:

(1) The buyer may fix an additional period of time of reasonable length for performance by the seller of his obligations.

(2) Unless the buyer has received notice from the seller that he will not perform within the period so fixed, the buyer may not, during that period, resort to any remedy for breach of contract. However, the buyer is not deprived thereby of any right he may have to claim damages for delay in performance.

The purpose of the provision is to remove a double uncertainty. First, it removes the uncertainty about whether and when the seller will deliver. If the buyer could not fix a time limit, his right to claim performance and the seller's right to deliver would remain open-ended indefinitely. Second, the provision removes the uncertainty about whether non-delivery amounts to a fundamental breach. Without this certainty, it would be entirely at the buyer's own risk if he, victim of non-delivery, declared the contract avoided under Article 49(1) (a). Fear that his evaluation of a difficult situation might not be shared would make a cautious buyer hesitate to avoid the contract. The other requirement under Art. 47 is that the additional period should be of reasonable length with respect to the buyer's discretion: "the innocent party who faces breach by the seller. When the buyer chooses performance under the additional period rule of Article 47 he has to observe two conditions. He must fix an additional period of time, and that period must be of reasonable length.

Moreover, an additional period can be used to demonstrate the buyer's interest in performance, since resort to declaring the contract avoided is not always the best

solution for the buyer. Setting an additional period of time is optional for the buyer, and is not a precondition for avoiding the contract if a fundamental breach already exists. The buyer may also still require performance even when the additional period has expired.\textsuperscript{478}

For the purpose of Art. 47, it is required that the additional period is specified, and it is unacceptable for the buyer to ask for goods to be delivered as soon as possible.\textsuperscript{479}

Once the additional period of time has lapsed and the seller still has not delivered, the buyer may proceed to declare the contract avoided according to Article 49(1) (b). The same applies even before the deadline expires, as soon as the seller declares that he will not perform within the additional period fixed (Article 47(2)). In either situation, any other remedy is of course available.

In all other cases of non-fulfillment of the seller's obligations, Article 49(1)(a) provides that the buyer can resort to avoidance only if the breach is a fundamental one. Without a fundamental breach there is no other way leading to avoidance. Fixing an additional period would be of no avail whatsoever. It is, however, possible that in cases of repair, for example, persistent refusal of the seller to respect additional time limits may finally open the way to avoidance under Article 49(1) (a); but never under Article 49(1)(b).

The seller also has to be informed of the new specific period.\textsuperscript{480} Once the additional period has been fixed by the buyer, according to Para 47(2), he is not allowed to exercise any of his other remedies during this new period unless the seller declares that the delivery of the goods will not be performed within that period then.\textsuperscript{481} Fixing an additional period of time entails two main consequences for the buyer. After the period expires he may avoid the contract under Article 49(1) (b); and

\textsuperscript{477} Enderlein F, in Sarcevic/Volken (1986), op. cit., p. 194.
\textsuperscript{478} Ibid, p.193.
\textsuperscript{479} Secretaria Commentary, O.R. p.3 9,( 7) ; Enderlein F , in Sarcevic/Volken, (1986) op. cit., p. 194; Honnold J, (2009), op. cit., p. 420, went further by requiring a warning to be given that a deadline has been fixed. Since the reason for the specific additional period is to make the time of delivery of the essence it seems that the seller has no excuse to ignore the day of delivery as long as it has been identified by the parties for a second time.
\textsuperscript{481} Honnold J, (2009), op.cit., p.422; Secretariat's Commentary, OR p.39,( 9); Muller-Chen in Schlechtriem/Schwenzer (2005), op.cit. p.559-60; DiMatteo L et at., op cit., p. 134.
before it expires he cannot turn to other remedies, except perhaps the right to claim for damages for delay.

In any case, whether or not the seller performs during the additional period, the buyer's right to damages is granted by Art. 47 (2) for late performance, including any damages occurring during the additional period. The significance of this provision is to put an end to any argument that the buyer's agreement to the new period may include waiving his right to claim damages.482

3.6.2.4.2. Seller’s additional period for cure

As mentioned earlier, the seller is provided with certain rights in Art. 37 to cure any defective performance up to the date for delivery. However, a more limited possibility for the seller to cure defects after the date of delivery is provided, in similar rules to those of Art. 37, under Art. 48 which states that:

(1) Subject to article 49, the seller may, even after the date for delivery, remedy at his own expense any failure to perform his obligations, if he can do so without unreasonable delay and without causing the buyer unreasonable inconvenience or uncertainty of reimbursement by the seller of expenses advanced by the buyer. However, the buyer retains any right to claim damages as provided for in this Convention.

Art. 48 contains the right to the seller to cure any type of failure,483 available not before the date of delivery484 but thereafter. «Cure» in this context means that the seller may perform any of the acts mentioned in Art. 37 and that, in addition, he may deliver when delivery is overdue. Conditions, exercise and effects of that right upon both parties are set out in detail.

The condition of non-avoidance raises the fundamental issue of whether avoidance or cure should prevail. This question cannot be answered with certainty, since the words «subject to Article 49» are no clearer than the former «unless» clause

483 Since the delay of delivery cannot be recalled when the time has elapsed for the purpose of cure, Honnold Suggested that if the delay does not fall under Art. 49(1) there is no need for ‘cure’ and the damage is the only right remedy: Honnold J, (2009), op. cit., p. 425.
484 see Article 37, CISG.
which they replaced. The relationship between Article 48 and 49 remains unsettled. Here the interests of buyers and sellers clash so strongly that it seems almost impossible to find a proper balance. In fact, the issue has long been one of the most controversial in international sales law.

According to Art. 49 the buyer can declare the contract avoided in two cases: (a) of a fundamental breach has occurred and (b) after the expiry of any additional period of time for performance provided by Art. 47. However, in the case of a fundamental breach, the relationship between the buyer's right to avoid the contract and the right of the seller to cure is unclear.

According to one view, the right of the buyer to avoid the contract pursuant to Art. 49 should be given priority, so that once the buyer resorts to avoiding the contract, the seller cannot cure his failure to perform. Thus, the seller may cure his breach only as long as the contract is not declared avoided by the buyer.

This view provides an interesting interpretation regarding the conduct of the seller, if a quick cure can be an element in preventing the existence of fundamental breach. In a case between a Swiss buyer and Italian seller, the court held that, because the buyer refused the cure offered by the seller, the buyer was not entitled to avoid the contract.

In evaluating these opinions, one may consider that granting the right of the seller in all cases may discourage him from delivering conforming goods, relying on the second chance to cure the defects or the buyer examination; that has paid to receive sound goods. Moreover, in international sales goods are likely to be subject to

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485 In the 1978 Draft' of the Art. 44 (which became Art. 48 in the CISG) began with the wording "unless the buyer has declared the contract avoided in accordance with Article 45" (later 49). In this regard the clause "unless" in the 1987 draft is very clear in giving the buyer the right to avoid the contract without affording the seller the right to cure. However, the new clause "subject to" is arguably unclear. Lookofsky J, (2008), op. cit., p. 121; Honnold J, (2009), op. cit., p. 426-7.
487 The buyer under Art. 47 may use the time of extension to limit the seller's right to cure after the expiry of the extension period. DiMatteo Let al., op cit., p. 134.
490 Honnold J, (2009), op.cit., 427. During the preparatory Diplomatic Convergence there was widespread agreement that deciding whether the breach is fundamental or not should be considered in the light of the seller's offer to cure and the right of the buyer in Art. 49 (1) (avoidance) should not prevent the seller's right to cure.
fluctuating prices, particularly in the international commodities trade. Therefore, one may suggest that, in order for the cure to comply with Art. 49 and to ensure that the cure does not cause the buyer any inconvenience, the right of the seller should be an exception which requires the seller to prove that the cure will be made without infringing the buyer's rights. If it is unclear whether or not the cure may cause inconvenience to the buyer, then buyer's right of avoidance should be given priority.

The second prominent example is unreasonable delay. The seller must be able to cure without unreasonable delay. There are three kinds of delay caused by curing: a delay which constitutes a fundamental breach of contract and is dealt with by Article 49(1)(a); a delay which does not amount to a fundamental breach but still appears unreasonable; and finally a delay which is not unreasonable. Only the last opens the way for the right to cure. Again, unreasonableness depends on the circumstances of each case, including the nature of the goods and their intended use. For example, in a case between an Italian seller of chemicals and a German buyer, the seller's non-conformity caused the buyer's customer disruption in productions. Thirdly, the cure has to be within a reasonable time. It has been proposed that this time should begin from the time when the buyer discovers the defect. If the length time to cure the defect is delayed to a degree amounting to a fundamental breach, as seen from the buyer's point of view, the seller's right to perform can be rejected. Finally, the seller has to bear all expense for curing the defects.

The last part of Para (1) of Art. 48 stresses the buyer's right to claim damages. Commentators differ in how to implement this remedy. According to one view the right of the buyer is limited to the original breach which can no longer be cured by the seller's subsequent performance, which includes delay, inspection, cover for reshipment and so on, that because the right to claim damage" lapses insofar as the seller has remedied the damages by subsequence performance". Also the buyer cannot cure the defect himself and ask for damage before first seeking the seller's

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494 Secretariat's Commentary, O.R. p.40, (12). Reasonable time here is the same as the reasonable time for examining the goods and giving notice by the buyer.
495 Secretariat's Commentary, O.R. p.40, (12); Lookofsky J, in Herbots/Blanpain (2000) op.cit., p.122. "Muller-Chen in Schlechtriem/Schwenzer (2005), op.cit., p.570; in the Secretariat's Commentary it was stated that "the original damage will, of course, be modified by the cure" O.R., p. 40, (9).
willingness to remedy. This view has been criticized as being in violation of the principle of good faith (Art. 7 (1)).

Pares (2-4) of Art. 48 discuss the legal effects of the communication between the parties regarding to the seller's request to cure the defects. They read as follows:

(2) If the seller requests the buyer to make known whether he will accept performance and the buyer does not comply with the request within a reasonable time, the Seller may perform within the time indicated in his request. The buyer may not, during that period of time, resort to any remedy which is inconsistent with performance by the seller.

(3) A notice by the seller that he will perform within a specified period of time is assumed to include a request, under the preceding paragraph, that the buyer make known his decision.

(4) A request or notice by the seller under paragraph (2) or (3) of this article is not effective unless received by the buyer.

The seller's request to the buyer as to whether or not he will accept the cure must specify the period needed in order to rely on that notice. Once the proper request, which clearly expresses the seller's intention of performance (Art. 48(3)), has been received, the buyer is under an obligation to inform the seller of his response. However, if he does not respond, Para (2) considers silence as implied acceptance. Consequently, the buyer cannot, during the period requested, exercise any remedies inconsistent with performance. Thus, the only available right would be to damages.

In order for the seller's notice to have legal effect, it must have been received by the buyer. This rule, however, is not subject to Art. 27, where it is enough for the notice to be sent by an appropriate means in the circumstances. Thus, the seller incurs the risk of loss or error in the communication of notice.

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497 Muller-Chen in Schlechtriem/Schwenzer, (2005), op. cit., p. 570.
500 DiMatteo L et al., op cit., p.134.
502 Huber P in Huber/Mullis (2007), op. cit., p. 221.
The above discussions of Arts 46-48 aim to protect the parties' agreements by keeping the contract alive through either the remedy of specific performance or the rules for an additional period offered by the buyer or the seller. These provisions take into account the economic effects and the principles of equity and good faith. In this respect the buyer is entitled to demand the fulfillment of the agreement. At the same time the buyer cannot request substitute goods unless the defect is fundamental; however, the repair of defect is granted even if the defect is not fundamental because substitution in international trade can be more costly. The buyer's additional period plays an important role in increasing the certainty in contracts, helping to avoid conflicts and misunderstandings regarding the time of delivery. The same can be said regarding the requirement of timely notice in Arts. 46 (2, 3) and 48 (2-4) providing the seller with a certain right to cure in Art. 48 may prevent the occurrence of fundamental breaches and encourages cooperation and accommodation between the parties in order to fulfill their duties. This approach promotes good faith and friendly relations between parties where this is reasonable without detriment to the buyer.

3.6.3. Buyer's right to avoid the contract

Although the injured buyer is entitled to resort to the avoidance remedy of the contract under the CISG, this right cannot be used for all breaches and it does not automatically apply. The main characteristic of the remedies in the CISG are to protect the contract by keeping it alive as far as is possible. Even in cases where the conditions are met, avoidance can take place only through a particular process. Furthermore, the buyer is not required to avoid the contract, and may insist on retaining his right to demand performance according to Art. 46.

It is assumed that avoidance is a harsh remedy and an expensive waste, particularly in international trade, and therefore restrictions on practicing this right may be necessary to prevent parties from resorting to immediate cancellation for any

503 Unlike in some domestic contract law, such as English and American law, whereby the injured party is entitled to avoid for any breach; Lookofsky J, in Herbots/Eilanpain, op.cit., p. 123.
504 Maskow/Enderlein, op.cit., p. 190-1; Lookofsky J, (2008), op.cit., p. 115; According to Art. 81, by avoiding the contract parties terminate the performance of their obligations except for those designed to take effects on avoidance, such as the dispute resolution rules or for damages.
505 Huber P in Huber/Mullis (2007) op.cit., p.1 81; Muller-Chen in Schlechtriem/Schwenzer (2005), op.cit., p.527.
breach. That situation would generate uncertainty in international commercial relations.506

3.6.3.1. Preconditions for avoidance

Under the CISG there are two grounds whereby the buyer is entitled to avoid the contract.507 One of these is based on the CISG concept of fundamental breach, and the other identifies the time of avoidance in the case of non-delivery:

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

3.6.3.1.1. Avoidance for fundamental breach

Fundamental breach is a milestone concept of the CISG, since it is the necessary precondition for avoiding the contract under articles 49(1)(a) and 64(1)(a)).

The concept of fundamental breach is not affected by the degree of importance of obligations, and there is no distinction between obligations derived from the CISG, from the contract, or from customary usage.508 Unfortunately, art. 25 CISG does not provide guidelines for a distinction between fundamental and non fundamental breach; Under the CISG a breach of contract is considered fundamental if the breach falls within the provision of Art. 25, which states that: “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 structure of art. 25 is extremely complex. The first part of art. 25 qualifies fundamental breach as the detriment caused by one party to the other party, which

507 Avoidance may comprise national concepts of rescission as well as termination; Endericin F, in Sarcevic/Volken, op. cit., p. 196.
508Enderlein F, in Sarcevic/Volken (1986) op.cit., p. 188.
substantially deprives him of what he is entitled to expect under the contract. The second part of art. 25 is conditional, and allows the party in breach to prevent avoidance provided that he proves that he did not foresee and a reasonable person of the same kind in the same circumstances would not have foreseen such a result. In order to decide whether or not a breach is fundamental, Art. 25 forms three criteria. Firstly, the breach must be of detriment to the other party, the assessment of which includes both subjective and objective measures. For the former, the buyer must suffer an actual detriment without referring to a person in the same circumstances. The objective elements are that the actual detriment has to be a result of the seller's breach obligations, and such a detriment is based only on the buyer's expectation.

The second element of fundamental breach is the substantial deprivation of what the aggrieved party is entitled to expect under the contract. Thus, the detriment has to contain of a degree of seriousness the result of which will deprive the other party of what he was expected by the contract. In other words, if the seriousness of the breach does not relate to what the buyer expects, then there is no fundamental breach. The same consequence ensues if the buyer was deprived of what they expected, but this does not reach substantial level.

Finally, when these two conditions are met the breach is considered fundamental 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.

Given the complexity of the theoretical structure of art. 25 and given that the Convention does not provide the interpreter with specific interpretive guidelines, it may be useful to take a look at the case law on fundamental breach. As correctly pointed out by a scholar, any abstract definition of fundamental breach must expect criticism. This statement cannot surprise given the various standards for determining fundamental breach in case law. Since the outcome of these decisions largely depends on the circumstances of each case, it would be of little use to simply

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list all the decisions. Nevertheless, some types of controversies are likely to occur more often than others. Thus, an attempt has been made to classify the most typical controversies into broad categories, which are the expression of court practice trends.

Court decisions show, for example, that it is a fundamental breach to deliver a second hand machine which falls far short of "the digital pictures, as `good-as-new". Similar judgments followed when a seller delivered machinery for recycling plastic bags that was not fit for the particular purpose, and when pressure cookers were sold which were dangerous to use and had been withdrawn from the market.

As previously discussed concerning Art. 48, the effect of the seller's offer to cure a fundamental defect without causing the buyer unreasonable delay or inconvenience, results in the breach being not yet fundamental; therefore the buyer may not yet avoid the contract.

The construction most favorable to Buyer would be to let him avoid the contract immediately under Article 49(1)(a) without paying the slightest attention to Seller's ability and willingness to replace or repair the machine, even if that ability and willingness have been expressly confirmed, as under Article 49(3). The seller's right to cure would thus cease to exist at the very moment the buyer declared the contract avoided. By deciding the fate of the contract the buyer equally determines the seller's right to cure. Such a solution can hardly be tenable. It would put the seller at the buyer's mercy and allow the buyer to speculate without observing his duty to mitigate losses (Article 77).

However in an Italian caste he Court of Appeals held that the contract was governed by CISG and decided that since the seller had failed to deliver the goods at the date fixed by the contract as required by Art. 33 of the CISG, the buyer was entitled to declare the contract avoided on the grounds of Arts 45(1) and 49(1) CISG. In this case, failure of delivery in the fixed time of delivery was considered a fundamental breach for the buyer when he contracted with the seller.

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514 Switzerland: Tribunal Cantonal Valais (CA), (21/2/2005), No.C104162.
515 Italy: District Court Busto Arsizio, (13/12/2001).
3.6.3.1.2 Avoidance for non-compliance with additional period for performance

Once the seller, for example, delays performing his obligations after the contractual time, it may be uncertain whether or not the seller's delay amounts to a fundamental breach, as the CISG does not automatically regard time to be of the essence.\footnote{Lookofsky J, (2008), op.cit., p. 118; Honnold J, (2009), op.cit., p. 437.} Therefore, as discussed in relation to Art. 47(1), the buyer can avoid such ambiguity by using an additional period of performance (a so-called Nachfrist).

The "Nachfrist"-mechanism is the centre-piece of the new German sales law (see BGB §437 No. 2, §323). The buyer may only terminate the contract after an adequate additional period of time has been fixed and has expired. There are, of course, exceptions to this rule, for instance if it appears from the contract that timely and conforming delivery was of prime importance for the buyer\footnote{§323(2) BGB.} or if cure by the seller would be inadequate or impossible.\footnote{§323(5) BGB.} The basic rule, however, is that the buyer has to give the seller a 'second chance' by fixing the additional period of time. This entitles the buyer to avoid the contract without the need to prove that the delay constitutes a fundamental breach, if the seller has not delivered the goods by the end of the additional period of performance given to him by the buyer, or if the seller declares that he will not so perform.\footnote{Honnod J, (2009), op.cit., p.437; Yovel J, op.cit., p.406.}

Whereas Art. 47 appears to cover any obligations under the Convention and the contract, Art. 49(1)(b) only refers to cases where the seller has failed to deliver the goods.\footnote{Honnod J, (2009), op.cit., p. 418-9; Lookofsky J, (2008), op.cit., p. 123; UNCITRAL digest Art. 74 paras. 1, 3. Extension of the application of Art. 47, for the procedure of the purpose of avoidance, to include cases where the seller fails to deliver conforming goods, was rejected at the Diplomatic Conference. UNCITRAL grounds for this rejection were that "the notice-avoidance procedure could be abused to convert a trivial breach into it ground for avoidance"; Honnold J, (2009), op.cit., p.419; Honnold J, Documentary History, op.cit., pp.147.8,1S S,3 39.} Accordingly, the buyer cannot resort to the "additional period rule" to avoid the contract if the seller has delivered non-conforming goods.\footnote{Honnod J, (2009), op.cit., p. 439; Maskow/Enderlein (1992) op.cit., p.193.T his rule of "Nachfrist" under German law applies to non-delivery and delivery of non-conforming goods.} In addition, commentators have indicated that partial delivery cannot allow the application of Art. 49(1) (b), since partial performance is not nonperformance.\footnote{Muller-Chen in SchlechtriEm/Schwenzer, (2005), op.cit., p.5 81; Yovel J, op.cit., p.407.} Having said that, if the seller's breach in these cases for non-conformity, or part delivery amounts in itself to
the level of a fundamental breach, the aggrieved buyer is not deprived of the right to avoid the contract. Finally, the buyer can only cancel the contract in accordance with Art. 49(1)(b) if the seller fails to effect delivery of the goods within the additional period of time for performance fixed by the buyer. If the buyer realizes during the additional period that even the prerequisites of Art. 49(1)(a) would have been fulfilled it is now impossible to avoid the contract before the additional period has expired; he is bound by his or her own decision to fix an additional period of time for performance: Art. 47(2).

3.6.3.2. Procedures of Avoidance

When the buyer is entitled to avoid the contract for fundamental breach of any obligation or for non-performance after the expiration of the additional period, the CISG requires the buyer to practice this right by following a particular procedure. Art. 26 and Art. 49(2) provide rules for the declaration of this right and the time limit for avoidance.

3.6.3.2.1. Notice of avoidance

The first step in avoiding any contract relates to the proper identification of the relevant grounds for avoidance under the Convention. After such identification, a party choosing the avoidance route must issue a declaration of avoidance by providing proper notice to the other party to the contract. Declarations of avoidance are governed by Article 26, which simply provides that "[a] declaration of avoidance of the contract is effective only if made by notice to the other party. However this declaration would be unclear in the case of rejection after delivery of the goods, because this rejection can be understood as a demand to repair or deliver substitute goods.

Importantly, the mere use of the word "avoidance" in a declaration does not achieve the requisite level of decisiveness. For example, in a case relating to a

contract for the sale of coal, a seller who did not receive the purchase price communicated to the buyer that he would avoid the contract if payment were not received.\(^{529}\) The court held that the threat of avoidance did not constitute a valid notice of avoidance because the condition regarding the receipt of the purchase price indicated that the seller did not consider the contract avoided.\(^{530}\) As a practical rule, therefore, parties should bear in mind that notices of avoidance under Article 26 must meet a high standard of clarity in order to be effective.

There is no duty for the buyer to give the defaulting seller prior notice of the proposed avoidance or to give him an opportunity to provide an assurance of performance.\(^{531}\) In addition, according to Art. 45(3), there is no requirement for the purpose of avoidance to resort to a court's judgment,\(^{532}\) and a court or arbitration tribunal cannot give a period of grace to the defaulting seller.\(^{533}\)

### 3.6.3.2.2. Time limits for avoidance

As a general rule, there is no provision in the Convention that precisely defines the time for the buyer to declare the contract avoided. Under article 49(1)(a), when there is a fundamental breach of any obligation, not only the obligation to deliver, the buyer can avoid the contract immediately\(^{534}\) without referring the matter to the court or arbitral tribunal.\(^{535}\) However, if the goods have already been delivered, Para (2) of Art. 49 provides some timely restrictions as follows:

“(2) However, in cases where the seller has delivered the goods, the buyer loses the right to declare the contract avoided unless he does so:

(a) in respect of late delivery, within a reasonable time after he has become aware that delivery has been made;

(b) in respect of any breach other than late delivery, within a reasonable time:

(i) after he knew or ought to have known of the breach;

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\(^{530}\) Ibid

\(^{531}\) This is subject to the anticipatory avoidance Art. 72(2), whereby the party who intended to declare the contract avoided is required to give reasonable notice to the other party in order to permit him to provide adequate Assurance of his performance.


\(^{534}\) See Enderlein & Maskow, op, cit., at 192.

\(^{535}\) CISG Art. 45(3).
(ii) after the expiration of any additional period of time fixed by the buyer in accordance with paragraph (1) of article 47, or after the seller has declared that he will not perform his obligations within such an additional period or;

(iii) after the expiration of any additional period of time indicated by the seller in accordance with paragraph (2) of article 48, or after the buyer has declared that he will not accept performance.”

The buyer may lose his right to avoid the contract when such a reasonable time has expired, and there are two different cases for when this time begins: If the seller delivers the goods after the expiration of the contractual time of delivery, the reasonable time runs from the moment when the buyer becomes aware that delivery has been made (Art. 49(2)(a)). This may be at the time of receiving a notice of dispatch or transport documents. However, this does not prevent the buyer from using his right to avoid more promptly so long as the delay constitutes a fundamental breach even before delivery.

In the case of any breach other than late delivery, the time runs either from the moment when the buyer knew or ought to have known of the breach. However, if the buyer has given notice under Art. 47(1) requiring the seller to perform within a reasonable period of time, it is from the expiration of that period or from the seller's declaration that he will not perform his obligation within that time. If the seller intends to investigate or remedy the defect, the reasonable time will not commence until the inquiry ends or by the failure to repair.

One question that needs to be asked, however, is whether or not the buyer can (within the reasonable time of Art. 49(2)(b)(i) after the expiration of the additional period of time fixed by the buyer in accordance with paragraph (1) of article 47, or after the seller has declared that he will not perform his obligations within such an additional period or;
period) extend the period instead of declaring avoidance of the contract. According to one view, the buyer can extend the additional period several times, which will thereby extend his right to avoid the contract after the expiration of the new period. 541

When the buyer has set a Nachfrist in the case of non-delivery, according to article 49(1)(b), he has to wait until the fixed period inefficiently expires and cannot declare the contract avoided before that moment, because it is not possible to require performance and at the same time to avoid the contract. 542 Only when the seller has declared that he will not perform within the additional period of time does the buyer not have to wait until the expiration of the Nachfrist period. Such a seller's declaration ends uncertainty on the buyer's part about whether the seller will perform or not within the additional period of time. However, when the buyer anticipates a fundamental breach of contract will be committed by the seller prior to the date performance is due; the buyer may avoid the contract at any time before the period for the performance expires because article 72 prescribes no time limit for such a declaration. 543 Nonetheless, the two cases can be distinguished in order to define the time for exercising the right to avoidance under this article:

a) the buyer may avoid immediately if he is absolutely certain about the fundamental character of the impending breach of the contract, or when the time does not allow the buyer, according to the wording of article 72(2), to send a reasonable notice to the seller permitting him to provide adequate assurance of his performance, or the seller declares that he will not perform his obligations; 544

b) the buyer may exercise his right after the ineffective lapse of the sufficient time necessary for the seller to provide adequate assurance of the performance when the buyer has sent a reasonable notice requiring such an assurance. 545

the seller is no longer obliged to remedy the defect" "he (the buyer must state the fixing of the second additional period of time within a reasonable period after the first additional period of the time has expired": Muller-Chen in Schlechtriem/Schwenzer,(2005), op.cit., p.591-2. 546 Will M, in Bianca-Bonell, op.cit., p.365; Muller-Chen in Schlechtriem/Schwenzer,(2005), op.cit., p.583-4.; Maskow/Enderlein (1992) op. cit., p. 194, stated that: “Instead of declaring the contract avoided upon the expiration of the first Nachfrist, the buyer could set a second Nachfrist without losing the right to avoidance.” 547 See Enderlein & Maskow, 0p, cit., at 192.
548 See CISG art. 72(3).
549 See Enderlein & Maskow, op, cit, P. 292.
In analyzing these different views it is vital to identify exactly the issue in dispute is. It seems that the focus of the second view is on the case where the buyer "fails to avoid". However, considering the first view one may note that its approach is merely to offer the buyer the right to choose (during the period of reasonable time under Art. 49 (2)(b)(ii)) between avoidance and the option of continuing the contract by providing an additional period. However, if the buyer "fails" to declare his choice within the time required by Art. 49 (2), the first opinion shares with the second view the rejection of the buyer's right to avoid the contract. In this regard, it can be said that the first view does not violate the rules of Art. 49 (2).

Considering the foregoing discussion one may suggest that a distinction should be drawn between, on the one hand, the legal right which the CISG offers for the parties and, on the other, individual exceptional cases which require exceptional rules. Therefore, providing the injured buyer with the right to extend the additional period of performance would benefit both parties and the seller who does not want the buyer to continue with another new period may, according to Art. 49 (2)(b)(ii): "declares that he will not perform his obligation within such an additional period." In this context, an extra additional period cannot survive by unilateral enforcement, and therefore the first opinion would be more appropriate.

Article 7 is another general provision of the Convention that attracts interest when considering the remedy of avoidance. This article contains guidance on how the provisions of the Convention should be interpreted. The main rule of its provision is included in article 7(1). The provision indicates that in the interpretation of the Convention attention should be drawn to its international character, to the need to promote uniformity in its application and the observance of good faith in international trade.

All cases of non-performance, other than the late delivery of the goods provided that a fundamental breach of the contract occurs, are regulated under article 49(2)(b). It embraces delivery of non-conforming goods as well as delivery of goods not free from claims of a third party. The general rule is that the buyer has to exercise his right within a reasonable time. In sum, the examination of the avoidance remedy

546 For example if the length of the period may affect the goods, according to the rule of mitigation (Art. 77), the damage should apply in this regard, or the rule of good faith if it is clear that the buyer intends to make the seller suffer.
under the CISG shows that fundamental breach and the expiration of the additional period are the only tunnel for the buyer to avoid the contract. The criteria of fundamental breach focus on the result of depriving the buyer of his expectations under the contract. An account for requiring fundamental breach is given to the fact that delivery of the goods between countries should restrict the return of the goods back to their point of origin. In this context, the CISG applies this rule for requiring substitute goods and the rejection of whole contract if it is partly defected.  

### 3.6.4. Reduction in price

Besides the specific performance remedy and the remedy of avoidance, the buyer is entitled under the CISG to the remedy of a reduction in price as a remedy for contractual breach. The CISG provides for the rules that govern the principle of price reduction. It is found in most continental European legal systems. Since the CISG was designed through compromises that included both common law and civil law systems, it incorporates elements from both systems. But while reduction of price is unknown in the common law systems, which only acknowledge the right to damages.  

It is a traditional civil law remedy that derives from actio quanti minoris in Roman law. The Roman law remedy of actio quanti minoris allowed a buyer to sustain an action against the seller to reduce the purchase price payable when the seller delivered defective goods. This Roman law remedy, which provides monetary relief to buyers who have received non-conforming goods, is reflected in contemporary civil law codes. The CISG includes a relatively traditional civil law remedy of reduction of price. The amount of the price reduction under CISG includes a relatively

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547 As discussed above, the buyer may avoid the contract even for non-fundamental breach if the buyer discovers the defect before the delivery of the goods.


550 As originally framed in Roman law, actio quanti minoris allowed a buyer to sustain an action against the seller to reduce the purchase price payable when a latent or hidden defect existed in the goods and caused the goods to be less valuable. Peter A. Piliounis, The Remedies of Specific Performance, Price Reduction and Additional Time (Nachfrist) Under the CISG: Are These Worthwhile Changes or Additions to English Sales Law?, 12 Pace Int’l L. Rev. 1, 36 (2000), p. 29.

551 Article 1644 of the French Civil Code: “buyer can recover a part of the purchase price or rescind the contract and recover the total purchase price if the goods contain hidden defects”; German civil code (BGB) §§ 459, 462, 472: “reduction "in the proportion which at the time of the sale, the value of the thing in a condition free from defect would have born to the actual value".
traditional civil law remedy which is based on a principle unknown to the common law. The provision for this remedy can be found in Article 50, which reads:

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

The CISG Article 50 remedy of the reduction of the price is quite unique in many respects.552 Perhaps, the most significant feature of Article 50 is the manner in which it operates.553 Article 50 gives the buyer the ability to unilaterally declare a price reduction, even before it has paid.554 Unlike a price reduction claim, a buyer’s damage claim relies on the seller or the tribunal’s decision to liquidate its claim.555 An Article 50 price reduction is also advantageous for the buyer because it is not subject to the same limitations as damages. While a seller may escape liability from having to pay damages if he can successfully assert a foresee ability or force majeure defense, these exemptions are specifically not applicable to Article 50.556 Article 50 may even provide further insulation to a buyer if the view is accepted that Article 50 is not subject to Article 77, which imposes a duty on the buyer to mitigate her losses.557 Also, unlike the buyer’s other remedies of Article 46 specific performance and Article 49 avoidance, Article 50 may not be subject to a "reasonable time" requirement.558

554 Ibid, at 376.
556 Ibid, at, 265-266.
557 Honnold, op, cit, at, 420-421.
3.6.4.1. Application of the remedy

The price reduction remedy applies only when the buyer accepts the contract and intended to keep the non-conforming goods, and it is only available if the goods do not conform with the contract. When CISG Article 50 is read in light of CISG Article 35(1), it does not seem too far-fetched to allow a reduction of the price for a quantity deficiency. The question of whether the goods conform with the contract can be determined in reference to Article 35, namely: whether the goods are of the quality, quantity and description or are not packaged in the method description required by the contract. However, a reduction in price is not applicable if the breach is related to the obligations of delivery (Arts. 31-34) and also does not apply given the existence of third party claims (Art. 42, 43).

It should be noted that Art. 50 gives the buyer the right to reduce the price regardless of whether or not the seller is responsible for the defect or if he can be exempted from the damage remedy under Art. 79 (impediment), or even whether or not the buyer has paid the price. For example, where the seller can claim exemption under Article 79, and therefore the buyer will not be able to claim damages, the latter may resort to the Article 50 price reduction remedy. In addition, where the buyer has difficulties in proving his loss, he may avoid these difficulties simply by choosing to reduce the price. The more contentious application of Article 50 in lieu of damages is in conjunction with Article 79. Article 79 sets forth various measures whereby a party (in this case, the seller) is not liable for a failure to perform if that party can show that the failure was due to an impediment beyond its control (ie. force majeure). Article 79(5) makes it clear that this exemption only applies to claims for damages and that it does not prevent either party from exercising any other remedy under the Convention. As Article 50 is separate from any claim for damages, the buyer can still claim a price reduction for defects under those circumstances.

559 Honnold J, (2009), op. cit., p.447; Lookofsky J, (2008), op. cit., p.126. When the buyer requires performance under Art. 46, or declares the contract avoided under Art. 49, he is not entitled to the reduction remedy.
562 DiMatteo L et al., op cit., p. 138. The UNCITRAL Working Group pointed out that the price is often paid in advance or by letter of credit; that is why they believed that the buyer should have this right in all cases. See: Honnold J, Documentary History, op. cit., p. 106.
563 Honnold, op.cit., at 311-312; Schlechtriem, op.cit., at 438.
The reduction in price is a unilateral remedy without the need to bring an action for it to have its effect. However, the buyer cannot change his declaration of reduction in price to other remedies if the seller changes his position after relying on the buyer's declaration. In the case of disputes over the value of delivered and conforming goods, the burden of proof is on the buyer.

In addition to the remedies under Arts 46-52, Art. 45 (1) (a) and (b) offers the aggrieved buyer the remedy of damages under Art. 74. Article 50 is especially unique since it is not designed to protect a buyer’s expectation, reliance, or restitution interests, and it may at times violate expectation principles. While Article 74 damages put the buyer in the position he would have been in had the seller properly performed the contract, Article 50 departs from the expectation damage calculation method. Unlike expectation damages, which are designed to preserve the benefit of the bargain for the aggrieved party, price reduction attempts to preserve the proportion of the bargain. Thus the buyer may combine the two remedies of a reduction in price and damages (such as the cost of an expert's report), provided that he does not receive double compensation for the same loss, or in the case of impediments where the seller is exempted from the remedy of damages as mentioned above.

The buyer is not entitled to reduce the price if the seller has offered the buyer a cure for the nonconformity according to Arts 37 and 48. Under Art. 50 the latter rules take express priority over the right of reduction in price. This restriction highlights the importance of the buyer's duty to mitigate damages according to Art. 77.

566 Muller-Chen in Schlechtriem/Schwenzer (2005), op.cit., p.604.
567 Flechtner, op.cit, p. 171.
570 See chap.5 fn: 163; Muller-Chen in Schlechtriem/Schwenzer, (2005), op.cit., p.605.
571 DiMatteo L et al., op cit., p. 139.
3.6.4.2. Calculating the Reduction in Price.

The method of calculation of the price reduction is easier in questions of defects in quantity rather than defects in quality. When determining the "proportion as the value that the goods actually delivered had … to the value that conforming goods would have had", proportions of quantity can be easily calculated. According to CISG Art. 50, the reduction in price is determined by a proportional calculation. The reduced sales price is supposed to bear to the contractual purchase price the same proportion as the value that the goods actually delivered had at the time of the delivery bears to the value that conforming goods would have had at that time. This is the mandatory method of calculation and it is therefore inadmissible to instead simply use the estimated value of the delivered goods as the reduced purchase price, or to determine the reduced purchase price by subtracting the cost of repair from the contractually agreed price.\(^{573}\) Article 50 puts an aggrieved buyer in the position he would have been in had he purchased the goods actually delivered rather than the ones promised - assuming he would have made the same relative bargain for the delivered goods. For example, if at the time of delivery the conforming goods were worth £100 and the non-conforming goods worth £80, the proportion of the reduction in price will be one-fifth of their original price.

Price reduction can be obtained by the buyer under the CISG in conjunction with damages.\(^{574}\) In most circumstances before a court, seeking damages alone would give the buyer the largest recovery, since damages are calculated on the basis of the loss suffered by the buyer.\(^{575}\) Price reduction alone is calculated without reference to the loss suffered by the buyer, and so therefore would not include common costs incurred by the buyer, such as costs of mitigation, lost profit and so on.

As expressly indicated in the text of CISG Art. 50, the defining moment for determining the price is the time of delivery of the goods,\(^{576}\) which will be established on the basis of the contract and CISG Art. 33. The substance of the UNCITRAL Draft

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\(^{573}\) See Judgment by Handelsgericht Commercial Court Zürich, Switzerland 10 February 1999; No. HG 970238.1. English translation by Ruth M. Janal; available at: <http://www.cisg.law.pace.edu/cases/990210s1.html>.

\(^{574}\) CISG, Arts. 45(1)(b) and 45(2).

\(^{575}\) CISG, Art.74.

\(^{576}\) See Jarno Vanto (2003) "Remarks on the manner in which the Principles of European Contract Law may be used to interpret or supplement Article 50 of the CISG"; September 2003.
Convention was materially changed at the CISG as to the moment for calculating values. Instead of the time of conclusion of the contract, as in Art. 46 of ULIS, now the time of delivery is relevant. In any event, the CISG makes it clear: "The decisive time for the calculation of the price difference between proper goods and non-conforming ones is not, as in some national legal systems, the time of the conclusion of the contract but the time of the delivery of the goods." 577 In contrast with the express reference of the time, the CISG does not stipulate at which place or market the prices have to be compared. 578 A problem first raised but not decided at the CISG was left to the risk of the buyers who wish to reduce the price. The problem lies in determining from where to take the figures for comparing the value of the goods contracted and of those delivered. 579

In any event, the CISG leaves open where the value of the conforming and/or non-conforming goods will be assessed. 580 Nevertheless, "in view of the close relationship between date and place of delivery, this place should be decisive. It is not excluded, however, that buyers may consider the place of destination." 581 Regardless of the vagueness regarding the reference place, what is certain is that the amount of price reduction has to be calculated in a proportionate way. The contract price has to be reduced in proportion of the value of the delivered goods to the value conforming goods would have. 582

3.6.5. Specific cases

3.6.5.1. Partial Avoidance

The approach of the CISG to avoidance remedy of upholding the contract arises out of the concern regarding the possibility of dividing the delivered goods into parts in order to limit the avoidance remedy to defective parts and to keep the contract alive for the other conforming parts. Art. 51 addresses this issue, providing that:

578 Ibid.
(1) If the seller delivers only a part of the goods or if only a part of the goods delivered is in conformity with the contract, articles 46 to 50 apply in respect of the part which is missing or which does not conform.

(2) The buyer may declare the contract avoided in its entirety only if the failure to make delivery completely or in conformity with the contract amounts to a fundamental breach of the contract. The application of these provisions is designed to cover cases where goods can be delivered in parts. The first rule under Art. 51 is concerned with the remedy of the buyer regarding nonconforming parts; the following paragraphs deal with both cases:

It offers the buyer the full right to practice the remedial system in Arts 46-50 with respect only to the non-conforming part, "as if it were the subject of a separate contract". Regarding Art. 49, for example, the availability of avoidance is with respect to that part exhibiting non-conformity with the contract.

Secondly, in order for the buyer to avoid the entire contract, the consequence of the nonconforming part of the contract (missing or defective goods) must cause a fundamental breach on the other, conforming, part of the contract, and therefore on the entire contract. Thus when the division of the contract, pursuant to Art. 25, deprives the buyer of what he has expected under the contract, then the buyer is entitled to avoid the contract.

As a result, in case of partial non-delivery of the goods, reduction of price under Art. 46 and partial avoidance of contract under Art. 47 would lead to the same measure of monetary relief for the buyer. This is confirmed by the Secretariat Commentary on Art. 46 of the 1978 Draft [draft counterpart of CISG article 50]: "The remedy of reduction of the price also leads to results which are similar to those which would result from a partial avoidance of the contract under article 47 [draft

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583 Art. 51 does not apply to cases where a single item is composed of various components and one of the components is missing or defective. See Muller-Chen in Schlechtriem/Schwenzer (2005), op.cit., p.607.

584 Provided that the conditions to satisfy each remedy are available and requirements for these remedies have been dealt with under the discussion of each. For instance, as the defect is related to non-conformity the buyer has to give the seller notice of the defect within a reasonable time; Art. 39(1).


587 Muller-Chen in Schlechtriem/Schwenzer (2005), op.cit., p.611.

588 Secretariat Commentary on 1978 Draft Art. 46 is only of limited relevance to CISG Art. 50. (See the match-up, available online at <http://www.cisg.law.pace.edu/cisg/text/matchup/matchup-d-50.html>.)
counterpart of CISG article 51]. The most important difference between Arts. 50 and 51 in this regard is that if the contract has been partially avoided under Art. 51, the seller loses his right to remedy the non-conformity whereas reduction of price under Art. 50 does not terminate the seller's right to remedy the non-conformity.

The question of whether or not the buyer, in partial non-conformity, can avoid the contract on the grounds of the expiration of the additional period as in Art. 49 (1)(b), is answered by the statement of Art. 51 (2): "only if the failure ... amounts to a fundamental breach." In this regard, the buyer cannot provide the seller with an additional time to perform his obligations, and then avoid the entire contract due the seller's failure to perform within that period. Some commentators consider that it “appears flawed,” to prevent the buyer from resorting to the additional period procedure in order to establish grounds for avoiding the entire contract in the above case (non-delivery of part of the goods). This is due to the fact that the purpose of the additional period rule is to relieve the buyer of a long wait for the seller to perform. Furthermore, in partial delivery, the seller may deliver insignificant portions of the goods in order to deprive the buyer of the chance to avoid the entire contract by setting an additional period.

However the analysis of Art. 51 (1)(2) reveals that the buyer experiences little difficulty under Art. 51(2). Essentially, a buyer who has not suffered a fundamental breach in the contract as a whole resulting from the missing part can keep the conforming goods, since they can be used or resold separately from the missing parts. For the missing part the buyer can apply the additional period, and avoid that particular part if the seller fails to perform by the set time. For example, if the seller delivers only one car of the one-hundred agreed by the contract, if there is no fundamental breach for the buyer having only one car, he is entitled to apply the additional period procedure for the other 99 cars and avoid them once that period expires. In addition, the right of the buyer to avoid the contract when the seller has already delivered part of the goods should not be treated the same as when the seller

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591 Ibid. editor's comment.
592 For the avoidance remedy, as discussed above, Art. 49(1) provides two grounds for avoidance; fundamental breach and the expiry of the additional period if the seller fails to perform.
does not deliver at all, since the seller's effort to deliver part of the goods restricts the buyer's right to avoid the delivered part.

3.6.5.2. Early Delivery

Although late delivery is the normal form of a seller's breach of time limits, early delivery is equally a breach of contract. In this regard Art. 52(1) of the CISG states that:

(1) If the seller delivers the goods before the date fixed, the buyer may take delivery or refuse to take delivery.

Article 52 deals with two situations in which the buyer may take or refuse delivery at his choice: early delivery (paragraph (1)) and delivery of excess quantity (paragraph (2)). These two cases do not have great practical importance. The rule in Article 52(2) is well-known in national and international commercial law and trade practice. More extensive rights of the buyer, as can be found in the United Kingdom Sales of Goods Act (rejection of the whole delivery), were not included in Article 47 of ULIS nor in the UNCITRAL Draft Convention proposal; the latter was adopted without change.

Early delivery means that the goods were delivered before the date fixed. But what is the «date fixed»? This can imply a certain day of the year or a given period of time. If not expressly fixed, it must be determined according to Article 33 (as to «delivery» see Articles 31 et seq.). The main principle of Art. 52 (1) is that, unless there is an agreement or usage, the seller is not entitled to deliver the goods before the contractual time. If the buyer accepts the early delivery, he is entitled to any damages arising, and he does not have to examine the goods and pay the price before the original delivery time. According to Art. 52 (1), the buyer is not required to demonstrate the existence of inconvenience or a fundamental breach in practicing this right. However, an unreasonable refusal may be inconsistent with good faith in

597 It was suggested that the buyer should express reservation of any of his rights, since his acceptance can be seen as an amendment of the contract. See Muller-Chen in Schlechtriem/Schwenzer, (2005), op.cit., p.614.
598 Ibid.
international trade (as in Art. 7(1)). In the secretariat's commentary it was stated that: "It does not depend on whether early delivery causes the buyer extra expense or inconvenience". However, a footnote added that the buyer must have a reasonable commercial need to refuse. Muller-Chen pointed out that the right of rejection "may not be exercised veraciously." He added that "the buyer does not need to give any reasons for the rejection."  

The good faith principle could also be the basis for the buyer's rejection. The seller's premature delivery can be inconsistent with the principle of good faith which requires the parties to fulfill their obligations according to their agreement. Moreover it can be argued that the observation of good faith is limited to the interpretation of the contract.  

3.6.5.3. Excess quantity

It is a breach of contract if the seller delivers a quantity larger than that in the contract agreement (Art. 35 (1)). Art. 52(2) provides the buyer with the right to accept all the delivery, part of it, or just the contractual quantity, as follows:

(2) If the seller delivers a quantity of goods greater than that provided for in the contract, the buyer may take delivery or refuse to take delivery of the excess quantity. If the buyer takes delivery of all or part of the excess quantity, he must pay for it at the contract rate.

If the seller delivers a quantity of goods greater than stipulated, the buyer is entitled to reject the excess. If the buyer takes delivery of all or part of the excess quantity, he must, however, pay for it at the contract rate. Furthermore the buyer must give notice of the wrong quantity since any incorrect quantity is a non-conformity to which the notice requirement of article 39 applies. After a rightful refusal to take the excess quantity, the buyer must preserve the excess quantity of goods pursuant to article 86. But if the buyer takes all or part of the excess quantity, it is obliged to pay the contract price for the excess part as well. If the buyer cannot
reject the excess quantity, the buyer can avoid the entire contract if the delivery of the excess quantity amounts to a fundamental breach of contract.\footnote{See Official Records of the United Nations Conference on Contracts for the International Sale of Goods, Vienna, 10 March-11 April 1980 (United Nations publication, Sales No. E.81.IV.3), 44, para. 9.} Therefore, if the buyer has to take delivery of the excess quantity of goods, the buyer must pay for it but can claim compensation for any damages he thereby suffered.\footnote{Ibid.}

Accepting the excess quantity represents the agreement of the buyer to modify and amend the contract, and so “the breach of the contract is cured with retroactive effect”\footnote{Ibid, p. 617.} and the price paid for the excess goods should be "at the contract rate."\footnote{See: Honnold J, (2009), op. cit., p. 460-1.} In some cases, the buyer cannot accept and pay for the contractual quantity, for example if the seller tenders a bill of lading made out for 180 laptops whereas the contract quantity was 150 laptops. The buyer in this case cannot practice Art. 52, since the bill of lading cannot be divided. In this regard, the option is to accept the whole quantity or to reject it in whole.

In cases involving a partially non-conforming or insufficient delivery, furthermore, Article 51(2) permits the buyer to avoid the entire contract "only" if the failure constitutes a fundamental breach of contract. Thus if the seller fails to deliver an immaterial portion of the goods, the buyer cannot use the Nachfrist procedure to create grounds for avoiding the contract in its entirety.\footnote{Honnold, J, op, cit, P. 330.}