CISG. As with any new sales law, this process will take time. In the meantime, there is a phase of transition. The existing law includes a substantial variance in interpretation of certain provisions of the CISG. During this phase, it is far easier and safer, when in a dispute over whether to choose United States or Canadian law, as appropriate, or a foreign law, for a United States attorney or a Canadian solicitor to choose a foreign governing law over the CISG, particularly if the contract is significant and local foreign counsel can advise on the peculiarities of local law. Alternatively, where United States or Canadian law is absolutely unacceptable and where the other party's counsel is not familiar with the CISG,[97] it may be tactically advantageous not to agree on any law until one is sure that the CISG is applicable, but to draft the agreement in light of the likely application of the CISG.[98] However, the practitioner should bear in mind that the CISG contains complexities that can easily lead to errors.

From the CISG cases that have been reported worldwide, what has emerged is a pattern of interpretation that favours local choice of law and forum. Additionally, as courts look to the body of case law to interpret the CISG, the bulk of these decisions, over 90%, come from civil law jurisdictions where the interpretation of the CISG may differ from a common law approach.

Fortunately, even if the CISG applies to a contract, any of its provisions can be excluded, modified, varied, or limited by the wording of the contract, or by established trade practice in the industry or between the parties. In this regard, however, care must be taken to ensure that these steps are taken in a legally enforceable manner.

II OTHER INTERNATIONAL CONTRACT RULES: UNIDROIT PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS AND THE PRINCIPLES OF EUROPEAN CONTRACT LAW

In addition to the CISG, there are myriad other international contract rules which may be incorporated into an international sales agreement. These include INCOTERMS (trade terms), the *UCP 600* (letter of credit terms), and a host of ICC model clauses and related publications that may be incorporated by reference into the agreement, along with contract forms such as those provided by industry associations. Many of these terms are discussed in this book in connection with the annotated clauses that concern them. Practitioners should also be aware of the UNIDROIT *Principles of International Commercial Contracts*, published in June 1994, and the Principles of European Sales Law (PECL). Together, these constitute a new approach to international trade law.

The UNIDROIT Principles are neither model clauses nor contract forms. They are intended to cover the whole area of contract law without being conceived in terms of specific types of transactions. The UNIDROIT Principles do not have any binding force and will be applied in practice by reason of their persuasive value only.[99]

97. Most domestic lawyers in Canada and the US remain unfamiliar with the CISG.
98. Note that this is a dangerous practice. Ensure that the parties fully appreciate the risks such action entails.
99. Michael Joachim Bonell, 'The Unidroit Principles of International Commercial Contracts: Why? What? How?', *Tulane Law Review* 69, no. 5 (1995): 1121.

As a general rule, the UNIDROIT Principles still have not yet excited lawyers as an obvious drafting tool. The theory behind them is that parties who belong to different legal systems or who speak different languages can use the UNIDROIT Principles as a guide for drafting their contract. They may even choose to rely on the UNIDROIT Principles as a comprehensive set of rules, instead of choosing one or another national law as the proper law of their contract.[100]

While the UNIDROIT Principles will be applied only if incorporated into a contract, there is a slowly growing body of decisions where they have been held to reflect 'international legal practice'. As a result, they may take on greater importance where an arbitrator or a judge is in need of a rule to fill a gap.[101] In at least one CISG case, an arbitrator has observed that the application of the UNIDROIT Principles would have led to the same result (in a particular fact situation) as the CISG.[102] However, not all cases will have the same result.

The UNIDROIT Principles are set out in 119 Articles grouped in six chapters:

Chapter 1: General Provisions
Chapter 2: Formation
Chapter 3: Validity
Chapter 4: Interpretation
Chapter 5: Content
Chapter 6: Performance

The UNIDROIT Principles have been reproduced (without comments) in Appendix II.[103]

The PECL are similar in concept to the American Restatement of the Law of Contract in that the articles drafted are supplied with comments and notes. Both are non-binding rules. While the American Restatement serves to restate United States common law and acts as an interpretive companion, the PECL's purpose is to serve as

100. *Ibid.*, 1122.
101. *See*, for example, Belarus 20 May 2003 Supreme Economic Court of the Republic of Belarus (*Holzimpex Inc. v. State Farm-Combine Sozh*), case presentation and English translation http://cisgw3.law.pace.edu/cases/030520b5.html, in which an American seller of fish flour sued for non-payment from the Belarus buyer. After determining that the CISG applied to the contract, the court held in favour of the seller and awarded interest pursuant to CISG, Art. 78, and then, to determine the interest rate, applied Art. 7.4(9) of the 1994 UNIDROIT Principles of International Commercial Contracts. Also *see*, for example, Russia 5 Jun. 1997 Arbitration proceeding 229/1996, case presentation and English translation http://cisgw3.law.pace.edu/cases/970605r1.html. In this case, a Russian arbitral tribunal, citing CISG, Art. 9(2) held that '[t]he parties are considered, unless otherwise agreed, to have impliedly made applicable to their contract or its formation a usage of which the parties knew or ought to have known and which in international trade is widely known to, and regularly observed by, parties to contracts of the type involved in the particular trade concerned'. They went on to apply the UNIDROIT Principles as an international usage, reflecting 'international legal practice'.
102. *Parties Unknown*, Austria 15 Jun. 1994 Vienna Arbitration proceeding SCH-4366 (*Rolled metal sheets* case), case presentation and English translation http://cisgw3.law.pace.edu/cases/940615a3.html.
103. The full text of the UNIDROIT Principles, with commentary, is available at www.unidroit.org/english/principles/contracts/principles2004/integralversionprinciples2004-e.pdf.

as, where a sale cuts off outstanding property interests of third parties,[41] or where the contract causes the buyer or seller any hardship.[42]

- **Exclusion of Questions of Liability Due to Death or Personal Injury:** Finally, the CISG 'does not apply to the liability of the seller for death or personal injury caused by the goods to any person'.[43]

For all these issues, the underlying governing law of the agreement will still be important. Thus, simply providing in an agreement that it is governed by the CISG is not sufficient, as a court will be required to apply conflicts of laws rules to determine which law governs those matters not covered by the CISG. It is still vital to state a gap-filling law for the agreement.

B Important Distinctions Between the CISG and Domestic Sales Law

While the CISG is frequently referenced and each term examined in the context of the annotated clauses in this book, it is useful to examine the primary differences between the CISG and both United States and Canadian sale of goods' law.

(1) Contrast with United States Law

Generally, Article 2 of the *Uniform Commercial Code* (UCC Article 2) sets out the United States' legal standards applicable to the sale of goods. Every state except Louisiana has enacted a version of UCC Article 2, so contrasting the major distinctions between UCC Article 2 and the CISG is worthwhile. However, each state's enactment of the *UCC* is slightly different, so practitioners will need to take note of any individual state's discrepancies when contrasting state law with the CISG. United States' attorneys examining the CISG for the first time may be lulled by the apparent similarities between UCC Article 2 and the CISG. Although they appear very similar, there are some significant differences between the two. Some of the key distinctions are set out below. Others may be found with reference to specific provisions of the annotated clauses:

- **Time of Acceptance:** United States common law specifies that if a contract is made by mail, the time of acceptance of an offer is the instant the acceptance

41. For example, *Usinor Industeel v. Leeco Steel Products, Inc.*, 209 E.Supp.2d 880 (N.D. Ill. 2002).
42. For example, *Nuova Fucinati S.p.A. v. Fondmetal International A.B.*, 14 Jan. 1993, Tribunale Civile di Monza (Italy), cited in Giurisprudenza Italiana, 1994, I, 146. In this CISG case, an Italian court held that a domestic court could not integrate into CISG provisions of domestic law recognizing a right of avoidance of the contract in case of hardship since hardship is not a matter expressly excluded from the scope of the Convention in Art. 4 of the CISG.
43. CISG, Art. 5. But note at least one CISG case where the exclusion was not applied; *see* Germany, 2 Jul. 1993, Appellate Court Düsseldorf, case presentation and English translation http://cisgw3.law.pace.edu/cases/930702g1.html. *See also* CISG Advisory Council Opinion No. 12, *ibid.*, footnote 33.

is mailed.[44] This is known as the 'mailbox rule'. The CISG takes the opposite position – an offer is accepted only at the moment the acceptance is received.[45]

- **Scope of Applicability:** Unlike the CISG, which only excludes certain types of goods from its scope, UCC Article 2 defines 'goods' subject to it.[46] This definition broadens the scope of UCC Article 2 by including transactions in consumer goods, unlike the CISG.[47] Additionally, for UCC Article 2 to apply to a transaction, it must have a 'reasonable relation' to the transaction if the law of a state has been expressly chosen by the parties, and it must have an 'appropriate relation' to the transaction if an applicable law has not been expressly chosen by the parties.[48] The CISG does not require any 'relation' to the transaction for it to apply if it is chosen by the parties.
- **Oral Agreements:** The CISG, like most civil jurisdictions, permits oral contracts to be enforced. It does not have an equivalent to the *Statute of Frauds*.[49] However, section 2-201 of UCC Article 2 requires all contracts for the sale of goods in excess of US dollars (USD) 500 to be in writing.[50] The CISG permits

44. *See* Restatement (2d) Contract, s. 63(a).
45. CISG, Art. 15:

> An offer becomes effective when it reaches the offeree.
>
> An offer, even if it is irrevocable, may be withdrawn if the withdrawal reaches the offeree before or at the same time as the offer.

CISG, Art. 24:

> For the purposes of this Part of the Convention, an offer, declaration of acceptance or any other indication of intention 'reaches' the addressee when it is made orally to him or delivered by any other means to him personally, to his place of business or mailing address or, if he does not have a place of business or mailing address, to his habitual residence.

46. UCC s. 2-105:

> 'Goods' means all things ... which are moveable at the time of identification to the contract for sale other than the money in which the price is to be paid.

47. CISG, Art. 2(a).
48. UCC s. 1-105(1).
49. CISG, Art. 11:

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

50. Of the many US cases that mention the CISG, several of them have involved statute of fraud claims. *See Fercus v. Palazzo*, No. 98 CIV. 7728 (NRB), 2000 US Dist. LEXIS 11086, upholding that the Statute of Frauds is no obstacle to a jury's finding of an oral contract; *Graves Import Co., Ltd. v. Chilewich Int'l Corp.*, 1994 WL 519996, (SDNY 1994), (upholding parties' ability to derogate from the terms of the CISG by requiring a writing); *GPL Treatment, Ltd. v. Lousiana Pacific Corp.*, 894 P2d 470 (Ct. App OR 1995), and *Orbisphere Corp. v. US*, 726 F.Supp. 1344 (US C.I.T. 1989), (court notes it is not bound to apply the UCC to an international dispute, but decides on other grounds that the statute of frauds was not violated). However, note that Courts

countries to opt out of the oral contracts provision. Only Argentina, Armenia, Belarus, Chile, Estonia, Hungary, Latvia, Lithuania, Paraguay, Russian Federation, and Ukraine have opted out of the oral contracts provision.[51] Thus, an oral agreement between a Canadian and a United States' company would be enforceable notwithstanding the domestic writing requirements, whereas an oral agreement between a United States and a Chilean company would not be. Similarly, Article 2-202 of UCC Article 2 prohibits the use of parol evidence to contradict the terms of a written contract (although such evidence can be used to supplement the understanding evinced by the contract with respect to the course of dealing, trade usage or course of performance), whereas Article 8 of the CISG allows consideration of 'all relevant circumstances' in interpreting a contract, which would include parol evidence.[52]

- **Formation of the Contract:** Sometimes the contract is formed by exchange of purchase orders which are accepted or confirmed through the exchange of forms containing conflicting small-print terms. Under the CISG, an acceptance that contains modifications or additions operates as a rejection of the offer, and constitutes a counter-offer, unless the modifications or additions do not materially alter the terms of the offer and are not objectionable to the offeror.[53] This leads to the 'battle of the forms'.[54] The exchange of forms usually results in no contract being formed until the seller begins performing, at which time

often work around the Statute of Frauds. *See*, for example, *International Casings Group, Inc. v. Premium Standard Farms, Inc.*, 358 F.Supp.2d 863, 56 U.C.C. Rep. Serv. 2d (West), 736 (W.D. Mo. 2005), where an exchange of seventeen emails between the parties was sufficient to satisfy the UCC 2-201(1).

51. From CISG Table of Contracting States, available at http://cisgw3.law.pace.edu/cisg/countries/cntries.html. The reader is advised to check this list for updates. CISG, Art. 96:

> A contracting state whose legislation requires contracts of sale to be concluded in or evidenced by writing may at any time make a declaration in accordance with Art. 12 than any provision of Art. 11, Art. 29, or Part II of this Convention, that allows a contract of sale or its modification or termination by agreement or any offer, acceptance, or other indication of intention to be made in any form other than in writing, does not apply where any party has his place of business in that state.

52. For example, *see* United States 28 Sept. 2007 Federal District Court (Kansas), *Guang Dong Light Headgear Factory Co. Ltd. v. ACI International, Inc.*, case presentation http://cisgw3.law.pace.edu/cases/070928u2.html, following *MCC-Marble Ceramic Centre, Inc. v. Ceramica Nuova D'Agostino, S.p.A.*, 144 F.3d 1384 (11th Cir. 1998 [Fla.]) where a US court excluded recourse to the parol evidence rule in a case involving an Italian seller of ceramic tile and a Florida buyer. But *see also Beijing Metals & Minerals Import/Export Corp. v. American Business Center, Inc.*, 993 F2d 1178 (5th Cir. 1993), (in a sale of goods situation involving a US and a Chinese company, the court applied Texas' parol evidence rule, which the court concluded applied regardless of whether the CISG applied).
53. CISG, Art. 19(2).
54. For further discussion, *see* Ch. 2, under the heading 'Statutory Requirements'.

it 'accepts' the counter-offer from the buyer.[55] UCC Article 2-207 rejects this approach by allowing an acceptance to state different or additional terms, so long as the 'acceptance' does not materially alter the terms of the initial offer.[56] If the acceptance provides additional terms, they become a part of the contract, whereas if it provides different terms, the conflicting terms from each form are struck from the terms of the contract and replaced by the default settings under the UCC.[57] However, this distinction may not be quite as great as it at first appears, since under the CISG, modifications or additions that do not materially alter the terms of the offer and are not objectionable to the offeror do not constitute a counter-offer.[58] Thus, if the offeror does not object orally without undue delay, then the contract terms becomes those of the offer, as modified by the acceptance. In other words, the small-print terms of an acceptance or order confirmation can be binding unless promptly objected to, or unless they constitute material changes to the offer, or purchase order, such as with respect to price, quality or dispute resolution.

- **Examination and Notice:** Under the CISG, the buyer must examine the goods as soon as practicable and notify the seller of any lack of conformity within a reasonable time after he or she has discovered or ought to have discovered the defect, or at the latest within two years after delivery.[59] UCC Article 2 section 2-607(3)(a) requires notice within a reasonable time after discovery of the defect but does not state an outside time limit.
- **Seller's Remedies:** If the buyer rejects the goods, both the CISG and the UCC Article 2 lead to similar results. However, unlike the CISG, UCC Article 2 does not grant a seller the right to avoid the contract where the buyer has possession of the goods. The CISG permits avoidance of the contract even after the buyer takes possession of the goods if there is a failure by the buyer to perform that

55. *See*, for example, *Empro Systems, Ltd. v. Namasco Corp.*, 382 F.Supp.2d 874 (S.D. Tex. 2005), where the Court held that terms contained on an invoice which limited warranty claims and remedies, did not form part of the contract, as the buyer received the invoice three days after the goods arrived.
56. Comment 4 to s. 2-207(2) gives the following examples of material and non-material terms: Material additions: disclaimer of implied warranties; different guarantee of quantity than trade usage; right of seller to cancel if buyer fails to pay an invoice; shortening the time to complain below what is reasonable or customary. Non-material additions: a force majeure clause; a clause setting a reasonable time for complaints; a clause giving seller reasonable credit terms; a clause limiting buyers right of rejection for defects that fall within trade tolerances. *See*, for example, *Borden Chemical, Inc. v. Jahn Foundry Corp*, 834 N.E. 2d 1227 (Mass. App. Ct. 2005), where an indemnification clause was held to be a material alteration.
57. There is some disagreement on this issue. Some commentators argue that the different term in the acceptance should drop out and that the offeror's term should prevail. However, the majority of cases have adopted the approach of striking both terms. *See* William H. Lawrence & William H. Henning, *Understanding Sales and Leases of Goods* (Matthew Bender, 1996), 31.
58. In *Filanto S.p.A. v. Chilewich Int'l Corp.*, 789 F.Supp. 1229 (SDNY 1992), the court, in applying the CISG over UCC Art. 2 in a battle of the forms situation, noted that both sets of rules considered the addition of an arbitration clause material, thereby creating a counter-offer under the CISG.
59. CISG, Art. 39(2).

constitutes a fundamental breach or if the buyer fails to remedy any breach after notice and a reasonable time to cure.[60]

- **Claims for Damages:** Although both the CISG and the UCC Article 2 allow recovery of foreseeable damages, the CISG includes damages which the party 'ought to have foreseen', as well as those which were actually foreseen.[61]

(2) Contrast with Canadian Law

Unlike the United States, Canada has no unified sales law such as that contained in the United States *UCC*. Instead, each province and territory has its own sales law, based generally upon the now outdated English *Sale of Goods Act*, 1893. However, the significant distinctions vis-à-vis the CISG are generally countrywide. Some of the key distinctions are set out below. All others may be found with reference to specific provisions of the annotated clauses:

(1) **Time of Acceptance:** Canadian law[62] specifies that if a contract is made by mail, the time of acceptance of an offer is the instant the acceptance is mailed. This is known as the 'mailbox rule'. The CISG takes the opposite position – an offer is accepted only at the moment the acceptance is received.[63]

(2) **Irrevocable Offers:** The CISG may limit a party's ability to withdraw an irrevocable offer.[64] Under Canadian law, irrevocable offers can generally be revoked if they have not yet been accepted.

(3) **Oral Agreements:** The CISG, like most civil jurisdictions, permits oral contracts to be enforced. It does not have an equivalent to the *Statute of*

60. CISG, Art. 64.
61. CISG, Art. 74; *see Delchi Carrier S.p.A. v. Rotorex Corp.*, 71 F.3d 1024 (2nd Cir. 1995) (upholding award of foreseeable damages under the CISG).
62. This term is used generally to describe the common law throughout the Canadian provinces and territories. The province of Quebec is a civil law jurisdiction and its differences are not discussed.
63. *Supra*, footnote 45.
64. CISG, Art. 16:

> Until a contract is concluded an offer may be revoked if the revocation reaches the offeree before he has dispatched an acceptance.
>
> However, an offer cannot be revoked:
>
> (a) If it indicates, whether by stating a fixed time for acceptance or otherwise, that it is irrevocable; or
> (b) If it was reasonable for the offeree to rely on the offer as being irrevocable and the offeree has acted in reliance on the offer.
>
> Also, CISG, Art. 17:
>
> An offer, even if it is irrevocable, is terminated when a rejection reaches the offeror.

Frauds. There is no equivalent to the 'parol evidence' rule.[65] The CISG permits countries to opt out of the oral contracts provision. While most provinces and United States' states still have a writing requirement in their domestic law, only Argentina, Armenia, Belarus, Chile, Estonia, Hungary, Latvia, Lithuania, Paraguay, Russian Federation, and Ukraine have opted out of the oral contracts provision.[66] Thus, an oral agreement between a Canadian and a United States' company would be enforceable notwithstanding the domestic writing requirements, whereas an oral agreement between a Canadian and a Hungarian company would not be.

(4) **Formation of the Contract:** Sometimes the contract is formed by exchange of purchase orders which are accepted or confirmed through the exchange of forms containing conflicting small-print terms. Under the CISG, an acceptance that contains modifications operates as a rejection of the offer, and constitutes a counter-offer, unless the modifications do not materially alter the terms of the offer and are not objectionable to the offeror.[67] If the offeror does not object orally without undue delay, then the contract terms becomes those of the offer, as modified by the acceptance. In other words, the small-print terms of an acceptance or order confirmation can be binding unless promptly objected to, or unless they constitute material changes to the offer, or purchase order, with respect to price, quality or dispute resolution. This leads to the 'battle of the forms'.[68]

(5) **Examination and Notice:** Under the CISG, the buyer must examine the goods as soon as practicable and notify the seller of any lack of conformity within a reasonable time after he or she has discovered or ought to have discovered the defect, or at the latest within two years after delivery.[69] Failure to conduct this examination or make the complaint forfeits the buyer's right to reject the goods and, more significantly, the right to claim damages or a price reduction. The notice must be sufficient to specify the nature of the defects. In contrast, Canadian law does not require any such notice to be given to the seller unless the buyer chooses to reject, although some provinces have two-year limitation periods for commencing actions.

(6) **Threshold of Breach – Buyer's Remedies:** The CISG expressly preserves the buyer's right to sue for breach of contract.[70] However, the right to terminate the contract (technically speaking, to 'avoid' the contract) and reject the goods has been sharply limited. The buyer may reject the goods

65. CISG, Art. 11:

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

66. *See supra* footnote 51.
67. CISG, Art. 19(2).
68. For further discussion, *see* Ch. 2, under the heading 'Statutory Requirements'.
69. CISG, Art. 39(2).
70. CISG, Art. 45.

necessary export clearances on or before [date], Buyer may, by notice to the Seller no less than [x days] prior to the date of delivery, extend the delivery date by [x days], or terminate the Agreement without cost or penalty.

Finally, under the EXW term, the buyer has few obligations to provide any information to the seller. However, most countries permit a seller to exempt its invoice from VAT if the goods are exported. Under an EXW sale, there is no obligation for the buyer to provide proof of export to the seller. Accordingly, if this is important to the seller, the agreement should provide this obligation.[175]

Proof of Export

Buyer shall provide seller with proof of export upon request, in form reasonably satisfactory to permit seller to obtain an exemption of VAT.

B The 'F' Terms

(1) FCA (Free Carrier)

'Free Carrier' is the primary land transportation Incoterm. It means that the seller's obligation to deliver is fulfilled when it hands over the goods, cleared for export, into the charge of the carrier[176] named by the buyer at a named place or point (e.g., FCA Seller's Premises; e.g., New York, New York Port).[177] In those circumstances where the buyer does not indicate a precise point, the seller may choose within the place or range stipulated where the carrier takes the goods into its charge. When, according to commercial practice, the seller's assistance is required to make the contract with the carrier (e.g., rail or air transport), the seller may act at the buyer's risk and expense.[178] Note that when delivery is complete depends on where the goods are to be delivered. For example, if delivery is made at the seller's premises, completion occurs when the goods are loaded on the buyer's vehicle. If delivery is elsewhere, it is completed when the goods are available to be removed from the seller's vehicle, that is, not unloaded.

The FCA term may be used for any mode of transport, including multi-modal transport. If the buyer instructs the seller to deliver the cargo to a person who is not a 'carrier' (e.g., a freight forwarder), the seller fulfils its obligation to deliver the goods when they are in the custody of that person.

175. *Ibid.*
176. 'Carrier' means any person who, in a contract of carriage, undertakes to perform or to procure the performance of carriage by rail, road, sea, air, inland waterway or by a combination of such modes. *Supra, Incoterms 2010*, footnote 168, 25.
177. Note that if delivery is 'FCA Seller's premises', the shipper on the waybill will be the seller, whereas if delivery is 'FCA other place' the shipper on the waybill will be the buyer. *Supra* Malfliet, footnote 174, at 165.
178. *Supra, INCOTERMS 2010*, footnote 168, 26.

(2) FAS (Free Along Side)

'Free Along Side Ship' (FAS) means that the seller's obligation to deliver is fulfilled when the goods have been placed alongside the vessel on the quay or in lighters at the named port of shipment. Thereafter, the buyer bears all costs and risks of loss of or damage to the goods.[179] Where the goods are in containers, the seller typically hands over the goods to the carrier at a terminal and not alongside the vessel, in which case, the FCA term should be used.[180] As with FCA, the seller is required to clear the goods for export.[181]

Under an FAS contract, the placing of the goods on board the vessel is the buyer's obligation at the buyer's cost. The seller has only to place the goods near the ship's anchorage, and where the ship cannot enter a port, has to provide and pay for lighters which will take the consignment alongside the ship, unless the contract provides for delivery 'free on lighter'.

This term is often amended to deal with who pays for port rates, as this may otherwise depend on the custom of the port. These rates ordinarily are due when the goods are 'exported', that is, when the ship carrying them leaves port.[182]

Even where the Seller uses an Incoterm, the parties may choose to reallocate some of the responsibilities otherwise imposed by the trade term. Examples of this are given below:

Modified FAS Incoterm (1)

The Seller to pay freight by Seller's usual means, FAS New York, NY (INCOTERMS 2010) (but not the cost of insurance, or charges for pier handling, marshalling, lighterage and heavy lifts).

Modified FAS Incoterm (2)

The Buyer shall obtain at his own risk and expense any export licence or other official authorization and carry out all applicable customs formalities required for the export of the goods.

(3) FOB (Free on Board)

The most common of the trade terms is Free on Board (FOB). This term is also the most frequently misapplied, since it is only properly applicable to carriage by sea. Production of the appropriate documents in an FOB contract – the bill of lading[183] and the seller's invoice, entitles the seller to payment.

179. *Ibid.*, 81.
180. *Ibid.*
181. *Ibid.*, 81.
182. Clive Schmitthoff, *Schmitthoff's Export Trade, the Law and Practice of International Trade*, 11th ed. (London: Sweet & Maxwell, 2007), 16.
183. In the traditional FOB contract, the seller takes out the bill of lading in the buyer's name or, if the buyer's agent is present, receives a mate's receipt upon loading the goods which the seller gives to the buyer's agent (who takes out the bill of lading). The seller is then entitled to

FOB means that the seller's obligation to deliver is fulfilled when the goods have been delivered on board the vessel nominated by the buyer at the named port of shipment, or procures the goods already so delivered.[184] Under the current INCOTERMS, where the goods are handed over to the carrier before they are on board the vessel, such as containers, the FCA term is more appropriate to use. The buyer has to bear all costs and risks of loss of or damage to the goods from that point. The FOB term requires the seller to clear the goods for export.[185]

As a general rule, it is the obligation of the seller to obtain an export licence. However, this may be altered if the parties, either expressly or by necessary implication, agree otherwise. Conversely, an import licence is prima facie the responsibility of the buyer. If the parties have not turned their minds to the matter, then the presumption is that the buyer is to obtain the licence.

The main rights and duties of the buyer are to examine the goods, open a commercial credit in the seller's favour, and to organize the main international transport, although if it is commercial practice, or at the buyer's request, the seller may organize carriage at the risk and expense of the buyer ('FOB additional service').[186] If the buyer fails to nominate a vessel, or fails to nominate a vessel within a reasonable time to enable performance of the contract, then the seller has the right to treat this as a repudiation of the agreement.

When the seller has made shipment, it is under an obligation to promptly notify the buyer and deliver any document that the buyer needs to receive possession of the goods. Without a notice requirement, the buyer would not be able to know when to insure the goods.[187]

Generally, the buyer is not under a duty to inspect or examine the goods that the seller ships. Unless modified by trade custom or agreement, the buyer has the right to inspect the goods upon their delivery to it at the place of destination (even though place of delivery is prima facie at the ship nominated by the buyer). It is at this point that the buyer can exercise its right to reject the goods (or its rights generally under the contract for any failure of the seller to meet the terms of their agreement).[188] However, as a practical matter, in international sales payment is usually required to be made upon delivery. Thus it is critical (but often difficult) to ensure that inspection of the goods

payment. Note that unless credit terms are being given by the seller, the seller will not wish to part with the bill of lading until payment is assured.

184. *Supra*, *INCOTERMS 2010*, footnote 168, 89. Prior to INCOTERMS 2010, risk was expressed to pass to the buyer when the goods pass the ship's rail. This test was criticized as quite artificial and divisive when a mishap occurred during the loading process. In the words of Develin J. in *Pyrene Co. Ltd. v. Scindia Navigation Co. Ltd.* (1954), 2 Q.B. 402, at 419: 'Only the most enthusiastic lawyer could watch with satisfaction the spectacle of liabilities shifting uneasily as the cargo sways at the end of a derrick across a notional perpendicular projecting from the ship's rail.' *See* Paul Evans, 'FOB and CIF Contracts', *The Australian Law Journal* (November 1993): 844.
185. *Ibid.*, *INCOTERMS* 2010, 50.
186. *Supra*, Malfliet, footnote 174, 166.
187. *Sheinberg-Kellerei Gmbh v. Vineyard Wine Co.*, 281 S.E. 2d 425, 32 UCC Rep. 96 (N.C. Ct. App. 1981). *See* Louis M. Guenin, *Risk Allocation in Delivery Terms* (1992), 25 UCC L. J. 3, 49–59.
188. *Supra*, Evans, footnote 184, 850.

occurs prior to payment in FOB transactions. Obviously, once the buyer has paid for the goods, it is a much more difficult proposition to recover any monies paid.

For example, in one case,[189] the contract permitted the Hungarian buyer to inspect the goods upon their arrival in Hungary. However, the transaction was 'FOB Shanghai Port'. Payment was due upon delivery of the bill of lading. The goods were shipped, the bill of lading tendered, and payment became due. However, following arrival of the goods, it was clear to the buyer that they were defective. The inspection clause was useful only with respect to the buyer's subsequent right to commence action against the seller. The contractual inspection term was not meaningful in terms of avoiding payment for defective goods. The solution would be to require an inspection certificate or, alternatively, to arrange payment based upon a destination contract, such as 'FCA Budapest' or 'CIF Budapest'. This type of problem is not uncommon due to the fact that parties often complete the agreement (the seller's offer, the buyer's order and the seller's acceptance), the letter of credit, and the shipping documents independently, thus increasing the concomitant risks of inconsistency.

Note that a clear inspection certificate can work against the buyer if the goods arrive in defective state, as such a certificate creates a presumption in favour of the seller in the event of a dispute. The buyer will, in essence, have to argue that its own inspection certificate was defective. It is thus vital for the buyer to ensure that the company performing the inspection is reputable, and preferably has assets so as to permit easier recovery in the event the buyer needs to claim against it for negligent issuance of the inspection certificate.

Many general places of delivery have more than one port. For example, the following clause permits a buyer to choose a port within a specified boundary:

Modified FOB Incoterm

FOB East Coast (Canadian) Port

For a clause such as the above, confusion may arise. In addition to its obligation to nominate a ship, the buyer would also be required to nominate a port within a reasonable time in the circumstances. Note, however, that agreeing to such a term may result in increased costs if the buyer nominates a ship and port which are within the confines of the clause, but are unexpected (e.g., New Brunswick or Newfoundland).

(4) Modifications and Complications of the FOB Term

One of the difficulties with the FOB term (or any trade term) is when it is used without reference to the INCOTERMS definition (or any other specific reference to give a precise meaning to the term). In Canada, England and Australia, trade term definitions tend to follow the English definitions (as determined by English courts), which are closely mirrored in INCOTERMS. In the United States, the current revision to the UCC eliminates the United States definitions of shipping and delivery terms which previously broke down the term FOB into several subcategories, including 'FOB' and 'FOB

189. From the author's files.

vessel'.[190] Thus, Americans could use the 'FOB' term, among other things, as one of general delivery, for example 'FOB New York'. In this usage, the term implies that the seller is required to deliver the goods to New York, but is not required to deliver the goods on board any ship in New York (as the term would imply in a Canadian, English or Australian contract). The appropriate Incoterm usage would be 'FCA New York' or 'CPT New York'. Slightly more complicated, however, were the numerous other US modifications of the non-Incoterm expression of 'FOB' including 'FOB Seller's Warehouse' (the proper Incoterm is now EXW), 'FOB Port of Shipment' (now 'FCA (port of shipment)'), 'FOB Vessel or Airport' (now 'FCA (airport)'), FOB Port of Destination' (now 'FCA Port of Destination', 'CFR' or even 'CIF'), and 'FOB Buyer's Plant' (now 'DDP'). As each United States state adopts the UCC revision, American shippers will still be able to use these old terms. However, they will no longer be generally accepted definitions and will have to be spelled out. Until the UCC revision is adopted universally throughout the United States, United States' drafters would be wise to reference INCOTERMS 2010, or alternatively be very specific in drafting the rights and obligations of the parties with respect to any non-Incoterm trade term.

While the traditional FOB term under INCOTERMS clearly defines the obligations of the parties, the term will sometimes be encountered with modifications which, on their face, appear minor, but which may fundamentally alter the obligations of the parties. These include both stowing[191] and trimming.[192] With many general and dry

190. S. 2-319(1) of the UCC states:

> Unless otherwise agreed the term fob (which means 'free on board') at a named place, even though used only in connection with the stated price, is a delivery term under which:
>
> (a) when the term is *fob the place of shipment*, the seller must at that place ship the goods and bear the expense and risk of putting them into the possession of the carrier; or
> (b) when the term is fob *the place of destination*, the seller must at his own expense and risk transport the goods to that place and there tender delivery of them . . . ;
> (c) where under either (a) or (b) the term is also *fob vessel* . . . the seller must . . . load the goods on board.

191. Stowing means to ensure that the goods are positioned on board the ship so as to be safe during the voyage. For example:

- goods which react with other goods and must be stowed in segregation;
- goods which cannot be stowed near parts of the ship which have unacceptable attributes such as heat or dampness, which can damage the goods and imperil their safety and that of the ship;
- goods which must be properly balanced within the ship such that they remain stationary throughout the voyage;
- goods which need to be properly fastened down so that they will not roll about;
- general cargoes which need to be lashed down; or
- dry bulk cargoes which require a modification of the layout of the ship's hold.

192. Trimming is the process of levelling dry bulk goods, such as grain, during or shortly after loading, so that they are evenly distributed in each hold and throughout the ship as a whole. Trimming stabilizes the ship and allows the holds to be filled efficiently. It also reduces the chance of spontaneous heating at 'hot spots' – with some cargoes, a disproportionate concentration in any one part of the hold can lead to dangerous levels of heat. *See* Barney

bulk cargoes, stowing and trimming are processes that must be completed prior to shipment. Often an FOB agreement will put the obligation for these processes upon the seller. Examples are 'FOBT' (free on board trimmed), 'FOBS' (free on board stowed) and 'FOBST' (free on board stowed trimmed).[193] The problem with using such terms is that the question of when the risk of the goods passes becomes muddied. If the risk in an FOB transaction passes when the goods are placed on board the vessel, what then is the obligation of the seller when it is in the ship's hold performing its stowing or trimming operations? Clearly, the intention of the parties would be that the risk does not pass until the seller has completed all its obligations under the agreement. However, without a specific contractual term dealing with transfer of risk, if the goods are damaged during the seller's trimming operation, a dispute will surely arise as to which party is, in law, responsible.

Finally, customary international trade usage may give a different meaning to the FOB term. For example, in the oil trade there is usage which exists requiring an FOB buyer to give the seller timely notice of loading;[194] in Sweden, the trade usage of the term 'FOB Stockholm' for wood products requires the buyer to bear the loading costs onto the ship, thus converting the FOB term into an FAS term. As a result, before any drafter uses the FOB term (or any other Incoterm), an inquiry should be made to ensure that trade usage has not modified the term.

C The 'C' Terms

All four 'C' terms require the seller to clear the goods for export. All 'C' terms provide that the seller's obligation to deliver ends when it hands the goods over to the carrier in the manner specified by the specific term, and not when the goods reach their destination.[195] The 'C' terms are also notable in that risk passes and costs are transferred at different places. While the contract will always specify a destination, it might not specify the place of shipment, which is where risk passes to the buyer. The place of shipment is important to the buyer; it should be identified in the agreement.[196]

(1) CIF (Cost, Insurance, Freight)

A Cost, Insurance, Freight (CIF) transaction is to be used only for sea and inland waterway transport.[197] It is generally considered to be the most advantageous for the buyer and is usually the most profitable for the seller. Under a CIF contract, the seller

Reynolds, 'Stowing, Trimming and Their Effects on Delivery, Risk and Property in Sales "f.o.b.s.," "f.o.b.t." and "f.o.b.s.t.,"' *Lloyd's Maritime and Commercial Law Quarterly* (February 1994): 119.

193. There are also similar examples with EXW contracts such as 'EXW Loaded', where the seller is obliged to load the goods onto the buyer's vehicle.
194. *Scandinavian Trading Co A/S v. Zodiac Petroleum SA and William Hudson Ltd. The Al Hofuf*, 1981, 1 Lloyds Rep. 81, at 84.
195. *Supra*, *INCOTERMS 2010*, footnote 168, 107.
196. *Ibid.*, 97, 107.
197. *Ibid.*, 107.

delivers the goods on board the vessel or procures the goods already so delivered.[198] The seller also must procure, at the seller's cost, marine insurance against the buyer's risk of loss or damage to the goods during the carriage. However, the required insurance is only on minimum cover, and thus the buyer should ensure that it has sufficient insurance coverage for the risk, either procured by the seller (as expressly provided in the agreement), or by the buyer at its own expense.

Under the INCOTERMS, CIF can be used only for sea and inland waterway transport. For roll-on/roll-off or container traffic or air transport, the CIP term is more appropriate to use.[199]

The chief distinction between a CIF transaction and an FOB transaction is that the documents obtained by the seller are more extensive (as they need to reflect the additional duties of the seller). The primary documents in a CIF contract include those of the FOB contract (the bill of lading[200] and the seller's invoice), together with an insurance policy.[201] Under a CIF transaction, the seller satisfies its obligations by the delivery of the documents, not by actual physical delivery of the goods, as in the case with the 'D' class of INCOTERMS. The basic logic of the CIF contract is that the moment of passing the risk lies at the time of shipment. Under a CIF contract, as the seller is obliged to deliver the documents transporting the goods to the buyer, it is usually the obligation of the buyer to obtain any import licences required in the transaction.

(2) Modifications of CIF Term

Just as with the stowing and trimming modification of the FOB term, the CIF term can also be modified in ways which may affect its fundamental meaning with regard to the transfer of the risk of loss. In particular, the international oil industry has created a modification known as the out-turn or landed weight clause. In essence, such a clause states that the buyer need only pay for the actual quantity that is received, rather than the quantity shown on the bill of lading (as is normally the case under a standard CIF contract).[202]

198. *Ibid.* In the common law, the standard definition of a 'cif' contract (as laid out in *Biddell Bros. v. E. Clemens Horst Co.* [1911] 1 KB 214; 220) imposed five obligations upon a seller:

- to ship the goods according to the contract;
- to arrange for carriage of the goods;
- to arrange insurance;
- to make out an invoice to the buyer; and
- to tender these documents to the buyer.

199. *Ibid.*, *INCOTERMS* 2010, footnote 168, 108.
200. The bill of lading must indicate carriage to the port of destination and that the goods were shipped within the shipment period provided by the contract. This must be a 'clean' bill of lading. A clean bill of lading is a bill that does not contain any qualifications to the effect that the goods were not shipped in apparent good order and condition. The bill of lading may be in the buyer's or seller's name under a cif contract. *See* Ch. 10 – Bills of Lading.
201. Note that the insurance that the seller is required to purchase is the minimum cover only, and the buyer may wish to increase this coverage. *See* Ch. 11 – Insurance, for further detail.
202. There are two main types of loss in oil transport by sea – transportation loss and marine loss. Transportation loss (also known as 'shore-to-shore' loss, or 'in-transit' loss) is the unavoidable loss which occurs due to evaporation, sludge accumulation, spillage or measurement error. It is the difference between the volume of oil purchased at the loading port (as is shown in the ship's bill of lading) and the volume of oil received at the port of discharge. Conversely, marine loss is accidental, such as loss through sinking, crime, or war.
203. James J. Lightburn & Gawie M. Nienaber, 'Out-Turn Clauses in C.I.F. Contracts in the Oil Trade', *Lloyd's Maritime and Commercial Law Quarterly* (May 1987): 177.
204. *Supra*, *INCOTERMS* 2010, footnote 168, 98.
205. *Ibid.*, 35.

When a CIF contract is modified by an out-turn clause, the time at which risk passes becomes unclear. Is it simply a price-adjustment clause, or does it change the time at which the risk passes to the buyer from the point of shipment to the port of destination?[203] Again, the re-examination of any modified trade term must begin with a determination of the effect the modification has on the fundamental aspects of the term.

Additionally, some sellers are notorious for using less than satisfactory vessels to carry the goods. Some shipping lines are well known for their use of unfit vessels. Notwithstanding that the CIF term is one of delivery, the buyer may still wish to nominate the ship or shipping line.

(3) CFR (Cost and Freight)

'Cost and Freight' (CFR) is a term similar to CIF except that the seller does not have any insurance responsibilities. It was formerly known as 'C&F'. The seller must pay the costs and freight necessary to bring the goods to the named port of destination but the risk of loss of or damage to the goods, as well as any additional costs due to events occurring after the time the goods have been delivered on board the vessel, is transferred from the seller to the buyer when the goods are on board the vessel in the port of shipment. Like CIF, the CFR term requires the seller to clear the goods for export. This term is written for sea and inland waterway transport, although it is sometimes incorrectly used in air transport. However, where the goods are handed over to the carrier before they are on board the vessel, such as goods in containers, which are typically delivered at a terminal, the CPT term is more appropriate to use.[204]

(4) CPT (Carriage Paid To)

'Carriage Paid To' means that the seller delivers the goods to the carrier of another person nominated by the seller at an agreed place and that the seller must contract for and pay the costs of carriage necessary to bring the goods to the named place of destination.[205] The risk of loss of or damage to the goods, as well as any additional costs due to events occurring after the time the goods have been delivered to the carrier, is transferred from the seller to the buyer when the goods have been delivered into the custody of the carrier. If subsequent carriers are used for the carriage to the agreed destination, the risk passes when the goods have been delivered to the first carrier. This

term may be used for any mode of transport.[206] Note that the named destination may not necessarily be the final destination of the goods.

(5) CIP (Carriage and Insurance Paid To)

'Carriage and Insurance Paid To' means that the seller has the same obligations as under CPT but with the addition that the seller has to procure insurance against the buyer's risk of loss of or damage to the goods during the carriage. The seller contracts for insurance and pays the insurance premium.[207] When only land transportation is involved, CIP should replace the incorrect use of CIF. Note, however, that as with CPT above, the named destination may not necessarily be the final destination of the goods.

D The 'D' Terms

The 'D' category INCOTERMS are the most rarely used in international trade, primarily because international traders are simply unfamiliar with the obligations which they impose. They require an additional level of sophistication for parties to be able to ascertain whether they are most appropriate or not. Most international traders choose to use the more familiar terms such as 'FOB' and 'CIF' and modify them with additional clauses, rather than use the simplified 'D' terms.

(1) DAT (Delivered at Terminal)

'Delivered at Terminal' means that the seller delivers when the goods, once unloaded from the arriving means of transport, are placed at the disposal of the buyer at a named terminal at the named port or place of destination.[208] The seller must clear the goods for export, but the buyer must clear the goods for import, pay any import duty, and carry out any import customs formalities.[209] The term 'terminal' includes any place whether covered or not, such as a quay, warehouse, container yard or road, rail or air cargo terminal.[210] Therefore, it is of vital importance that the terminal in question be defined precisely. The seller does not need to arrange any insurance for the buyer's benefit. The term may be used for any mode of transport, but if the parties intend the seller to bear the risks and costs involved in transporting and handling the goods from the terminal to another place, then the DAP or DDP terms should be used.

206. *Ibid.*
207. *Ibid.*, 43.
208. *Ibid.*, 55.
209. *Ibid.*
210. *Ibid.*

(2) DAP (Delivered at Place)

'Delivered At Place' means that the seller delivers when the goods are placed at the disposal of the buyer on the arriving means of transport ready for unloading at the named place of destination. The seller has to bear all the risks involved in bringing the goods to the named place. This term can be used only for any mode of transport.[211] The seller must clear the goods for export, but the buyer must clear the goods for import, pay any import duty, and carry out any import customs formalities.[212] If the parties intend the seller to clear the goods for import, then the DDP term should be used.

(3) DDP (Delivered Duty Paid)

'Delivered Duty Paid' represents the maximum obligation of the seller of all INCOTERMS. It means that the seller delivers the goods when the goods are placed at the disposal of the buyer, cleared for import on the arriving means of transport ready for unloading at the named place of destination.[213] The seller has to bear the risks and costs, including duties, taxes and other charges of delivering the goods thereto, cleared for importation. If the parties wish to exclude from the seller's obligations some of the costs payable upon importation of the goods (such as VAT), this should be made clear by adding words to the effect: 'Delivered DDP, VAT unpaid ([...] named port of destination).' In one case, the seller argued unsuccessfully, that it was not responsible for increased shipping charges due to the buyer's request for air freight for goods purchased under the DDP term.[214] This term should not be used if the seller is unable to obtain the import licence.[215]

211. *Ibid.*, 63.
212. *Ibid.*
213. *Ibid.*, 71.
214. *Tian Long Fashion Co., Ltd. v. Fashion Avenue Sweater Knits LLC*, No. 13 Civ. 8258 (SDNY 25 Jul. 2016). *See also SMS Demag, Inc. v. ABB Transmissione & Distribuzone, S.P.A.*, 05-civ-00466, 2008 U.S. Dist. LEXIS 25637, at *42 (W.D. Pa. 31 Mar. 2008) (holding DDP meant that the parties contemplated the seller would be responsible for shipping the goods).
215. *Ibid.*

No Payment for Nonconforming Goods

The parties hereto agree that the Buyer shall have no obligation to pay for goods that are not in conformity with this Agreement.

For the buyer, the issue of nonconformity of the goods should be more fully addressed in the provisions of the agreement (and the chapters in this book) relating to delivery, inspection and warranty.

III CURRENCY

The agreement must identify the currency of payment, that is, whether payment is in United States or Canadian dollars or, say, Mexican pesos. In an international sales transaction, one of the parties must take on the risk of devaluation of the local currency. This is particularly important on delayed delivery contracts due to the risk of exchange rate fluctuations and inflation. The parties may allocate the risk of either of these fluctuations in the agreement. In the absence of a specific requirement for payment in a specific currency, a seller who agrees to make shipment 'FCA Country of Destination' may be forced to receive payment for the goods in the local currency of that country.[231] The clause below covers both the reference and the payment of funds in United States dollars.

Currency of Payment

Unless otherwise specifically provided herein, all references to dollar amounts herein or other money amount are expressed in terms of United States Dollars. All payments to be made in connection with this agreement are to be made in United States Dollars in the United States.

In addition to payment of the purchase price, one of the parties may wish to insert a requirement that any judgment arising from any dispute under the agreement also be denominated in the same currency (*see* Chapter 18 – Dispute Resolution).

Often in order to complete the deal, it is necessary for the seller to quote its price in the currency of the buyer's country. In such case, the seller must decide whether or not to accept the exchange risk of the buyer's country. In the event that the seller is not prepared to accept this risk, the clause below provides a good example of the specificity required to draft such a provision. In particular, attention should also be made to the payment of interest.

Payment to Be Converted to United States Currency

Except as otherwise specified herein, all amounts required to be paid by the Buyer under this Agreement shall be converted to and paid in United States dollars, based upon the prevailing 'buying' foreign exchange rate for United States dollars at the (Bank of America) on the date any such payment is due, and shall be paid to the Seller or to such account or accounts at such bank or banks as the Seller may, in its sole discretion, designate from time to time. The Seller shall give the Buyer thirty day's written notice of any such change in

231. *See also* Ch .7 – Payment.

place of payment. In the event that the Buyer is late in making any payment due pursuant to this Agreement, then, in addition to any interest charges that may accrue thereon in accordance with this Agreement, the exchange rate to be applied to any such late payment shall be the Seller's most favourable 'buying' foreign exchange rate at the (Bank of America) at any time during the period commencing on the date that the payment was due and the date such payment was actually made.

Exchange rate fluctuations can also be addressed by establishing a formula based on benchmark currencies such as the British Pound, United States dollar or the European Euro or any combination of two or more currencies. Alternatively, the seller may protect itself by purchasing forward currency or 'hedging' contracts. The clause given below is an example of a 'benchmark' currency adjustment.

Exchange Fluctuations

Any amount payable hereunder that is not paid when due shall be adjusted in proportion to any change in the 'Benchmark Currency Ratio' during the period from the due date to the actual date of payment, provided that in no event shall any such change ever operate to reduce the amount payable hereunder below the amount stated to be payable on the due date.[232] The 'Benchmark Currency Ratio' shall be (*e.g.*, one United States Dollar to 1.30 Canadian Dollars).

Note that the CISG is silent on the currency of payment. However, several CISG cases have ruled that, where the contract is silent as to currency of payment, the currency of payment is the currency of the seller's place of business.[233] Another case ruled that the currency of payment was the place of the performance of the contract,[234] and a further case ruled that the currency of payment was to be determined in accordance with the law of the contract.[235]

IV EXCHANGE CONTROLS

If the purchase price is payable in the seller's currency (e.g., United States dollars), then the principal currency risk to the seller will be one of blockage of payment, not depreciation of the local currency. Since some currencies are not freely convertible,

232. J.A. Levin, 'International Sales Contracts: Certain Considerations Relevant to Inflation and Currency Fluctuations', Int'l Bus. Lawyer 9 (1981): 243.
233. *Parties Unknown*, 24 Jan. 1994, *Recht der Internationalen Wirtschaft* 2 U 7418/92 (RIW), 1994, 683, Published in German: (Kammergericht Berlin), Case No. 80, Case Law on UNCITRAL Texts (CLOUT), United Nations, case presentation and English translation http://cisgw3.law.pace.edu/cases/940124g1.html; *Parties Unknown*, 28 Jan. 2009 *Tribunal cantonal* [Higher Cantonal Court] Valais (*Fiberglass composite materials case*), case presentation and translation http://cisgw3.law.pace.edu/cases/090128s1.html; *Wacker-Polymer Systems GmbH v. Quiebra v. Glaube S.A. et al.* 17 Mar. 2003 Juzgado Comercial [Commercial Court] Buenos Aires, case presentation and translation http://cisgw3.law.pace.edu/cases/030317a1.html.
234. *Parties Unknown*, Germany 17 Sept. 1993 Appellate Court Koblenz (*Computer chip* case), case presentation and English translation http://cisgw3.law.pace.edu/cases/930917g1.html.
235. *Parties Unknown*, Switzerland 30 Jun. 1998 Canton Appellate Court Valais / Wallis (*Granite stones* case), case presentation and English translation http://cisgw3.law.pace.edu/cases/980630s1.html.

payment therefore becomes the fundamental issue in any transactions involving non-convertible currencies, such as the Nigerian *Kwacha* and the Chinese *Renminbi*. Even where the currency is convertible at the time the contract is entered into, there is always a risk that currency control restrictions may be imposed. Additionally, in some countries, it is not possible to obtain a court settlement in a foreign currency. Depending on negotiating power, it may be possible to add a provision that entitles the seller to increase the purchase price in the event of the imposition of currency control restrictions. Consideration should be given, prior to using such a clause, of the public policy issue involved.

If exchange controls are imposed, the buyer is usually required to use its best efforts[236] to facilitate consents, if available, for the payments to be made. In the event that the CISG is applicable, the buyer has a positive obligation to comply with any laws and regulations to enable payment to be made.[237] Where consent cannot be obtained, the seller often negotiates the option of terminating the agreement or having the payment made in the restricted currency to an account in the buyer's country.

In addition, it may be worth considering, in dealing with particular countries, inserting into the agreement a provision which requires the buyer, in the event that the purchase price is 'blocked' from leaving the buyer's country, to deposit the purchase price into an account in the buyer's country for the benefit of the seller, or to enter into a barter-type arrangement. Note that in the event that the CISG applies, the seller does not have the right to insist upon payment in the buyer's country. If the agreement is silent as to the place of payment, the place of payment is the seller's place of business or the place where the goods are handed over (or the documents delivered).[238] Obviously, these provisions are necessary only for contracts that do not utilize confirmed letters of credit.

236. Note that the phrase 'best efforts' has a specific meaning in each jurisdiction. For example, in Canada, the following principles have been set out in the case law:
    - 'reasonable commercial efforts' imposes a lower standard than 'best efforts';
    - 'reasonable commercial efforts' requires a party to pursue applications (or other initiatives) up to the point where it becomes commercially unreasonable to proceed further having regard to the costs of doing so relative to the probability of success;
    - 'reasonable commercial efforts' does not require 'all possible efforts' nor 'all efforts short of those that are doomed to certain failure'; however, 'simple doubt' that an application or initiative will succeed will not justify its abandonment;
    - a party obliged to use 'reasonable commercial efforts' cannot deliberately prevent the occurrence of the condition or 'take advantage of its own wrong';
    - 'all reasonable commercial efforts' imposes no higher standard than 'reasonable commercial efforts': 'either the efforts … [are] commercially reasonable or they [are] not'.

    See Nelson v. 535945 British Columbia Ltd., 2007 BCSC 1544.

237. CISG, Art. 54:

    > The buyer's obligation to pay the price includes taking such steps and complying with such formalities as may be required under the contract or any laws and regulations to enable payment to be made.

238. CISG, Art. 57:

Exchange Controls Imposed

If any law or regulation is imposed in the Buyer's country restricting or limiting the right of the Buyer to make payment to the Seller as provided herein, the Buyer shall immediately notify the Seller of any such restrictions or limitations and shall use its best efforts to register or qualify this Agreement under any such law or regulation in order to allow the Buyer to make full payment to the Seller as provided in this Agreement. The Buyer agrees to modify any terms or conditions of this Agreement which would not unreasonably interfere with its utilization of any rights granted under this Agreement, if such modifications are necessary in order to allow the Buyer to make full payment to the Seller. If the Agreement cannot be modified to the satisfaction of both parties so as to allow the Buyer to obtain sufficient exchange to make its required payments hereunder, then in that event, the Seller shall have the option of accepting payment in any other authorized currency acceptable to the Seller and designated by the Seller to the Buyer in writing, or the Seller may terminate this Agreement upon sixty days' notice thereof to the Buyer.

The clause below is a stronger alternative to the above clause, requiring the buyer to indemnify the seller against currency controls.

Exchange Controls Imposed; Buyer's Indemnity

If the amount of the purchase price payable by the Buyer or interest thereon receivable by the Seller is reduced, as the result of:

- **the enactment, introduction or change in or in the interpretation of, any law or regulation of any applicable jurisdiction; or**
- **a request from any central bank or other fiscal, monetary or other authority of any applicable jurisdiction (whether or not having the force of law) which imposes, modifies or deems applicable any reserve requirement or similar requirement including, without limitation, a requirement on the Seller to make any payment on or in relation to a sum received by him from the Buyer on account of tax (other than tax on the overall income of the Seller); or**
- **if any law or regulation of any applicable jurisdiction or any request from any such authority requires that the Buyer suspend or otherwise defer payment of the purchase price or interest thereon,**

the Buyer shall, in any such event, pay to the Seller on demand an amount sufficient to indemnify and hold the Seller harmless against the effects of any such requirement, including, without limitation, the effects of any increased costs or tax as aforesaid.
If the enactment of or any change in, or in the interpretation of, any applicable law makes it unlawful for the Buyer to perform its other obligations

(1) If the buyer is not bound to pay the price at any other particular place, he must pay it to the seller:
    (a) at the seller's place of business; or
    (b) if the payment is to be made against the handing over of the goods or of documents, at the place where the handing over takes place.
(2) The seller must bear any increases in the expenses incidental to payment which is caused by a change in his place of business subsequent to the conclusion of the contract.

hereunder, the Buyer, on demand by the Seller, shall prepay, without payment of any bonus or penalty of interest, an amount equal to the principal amount of the purchase price then outstanding, together with all interest accrued thereon to the date of such prepayment and all other sums payable under this Agreement, and the Buyer shall thereupon be discharged from its obligations hereunder.[239]

Finally, notwithstanding that the buyer may suffer from exchange control restrictions, it may still be willing to undertake the transaction based upon its ability to purchase 'hard' currency on the black market. Many countries impose exchange controls but do not take active steps to rein in their black market. Typical examples are China and Egypt. Obviously, a prudent seller will wish to consider whether or not there is any risk to it by virtue of what is likely a breach of the laws of the buyer's country. The clause given below, which tries to strike a compromise between the parties in such a scenario, may be illegal in many countries that have exchange controls.

Exchange Controls – Currency to be Converted or Price Modified

If the currency of the Buyer's country is a restricted currency and if the Buyer must purchase United States dollars with currency of the Buyer's country on the free market in order to pay for the goods, and the free market rate of exchange on the date of purchase is less than (*e.g.*, 1:1), then in such event, the payment due and payable to the Seller hereunder shall be reduced by an amount equal to (*e.g.*, 25%) of the difference in dollars between the aforesaid rates multiplied by the payment then due and payable.
It is further agreed that if the free market rate for the purchase of United States dollars from the currency of the Buyer's country falls and remains below (*e.g.*, eighty cents) for a period of three consecutive months, then the Buyer may request the Seller to negotiate a mutually satisfactory agreement relating to the sharing of the resulting exchange loss with respect to the remaining payment due. The Buyer shall have the continuing obligation to pay any payments due in accordance with the provisions of this Agreement until a mutually satisfactory agreement is negotiated or until this Agreement is terminated in accordance with its terms or until the Seller elects to receive the payments due in the currency of the Buyer's country in accordance with this Agreement.
If no satisfactory agreement can be reached within sixty days after the date that the Seller has received a written request from the Buyer to enter into the negotiations described in above, then either party shall have the right to terminate this Agreement by giving the other party thirty days' written notice to that effect; PROVIDED, however, that this Agreement shall not be terminated if the Seller receives such notice from the Buyer and thereafter elects within said thirty-day period to require the Buyer to pay such payments due in the currency of the Buyer's country.

V TAXES AND DUTIES

There are a variety of taxes and duties which can be included or excluded from the purchase price. Generally, unless the parties have specifically agreed otherwise, say,

239. Levin, *supra* footnotes 232.

by agreeing to the DDP (delivered, duty paid) Incoterm, the buyer is expected to pick up all the costs of importing the goods, save as may be expressed specifically by the specified Incoterm or as required by international customary trade usage. The following clause clearly states the buyer's obligation.

Duties and Taxes – In Favour of Seller (Basic)

The Buyer shall be liable for all Commodity Taxes, costs and procedures and compliance with all local laws, associated with importing all material shipped to the Buyer under this Agreement into the country of destination. 'Commodity Taxes' includes all taxes, charges, fees, levies, imposts and other assessments of any nature, including all sales, use, goods and services, harmonized sales, value added, transfer, excise and any other taxes, customs duties, or similar charges in the nature of a tax and any interest, fines and penalties imposed by any governmental authority (including federal, state, provincial, territorial, municipal and foreign governmental authorities), and whether disputed or not.

A more appropriate clause for the buyer is set out below. It requires the seller to set out the various taxes separately on the commercial invoice and avoids the open-endedness of the above clause.

Duties and Taxes – In Favour of Buyer

Unless otherwise indicated, the price provided in this Agreement excludes all Commodity Taxes, or any other excise tax, for which Buyer is responsible. Such Commodity Taxes shall be specified separately in the invoice from the Seller to the Buyer. 'Commodity Taxes' means all taxes, charges, fees, levies, imposts and other assessments of any nature, including all sales, use, goods and services, harmonized sales, value added, transfer, excise and any other taxes, customs duties, or similar charges in the nature of a tax and any interest, fines and penalties imposed by any governmental authority (including federal, state, provincial, territorial, municipal and foreign governmental authorities), and whether disputed or not.

However, the seller may have fears of additional burdens being placed upon it, primarily concerning taxation. Ordinarily, the sale of goods to an independent foreign person or company for use or for resale within that country will not result in local taxation of the seller unless it is deemed to have a 'permanent establishment' in that country, although some countries look to where title transfers (in which case, the seller will have local source income in that country).

A 'permanent establishment' is usually defined as a fixed place of business through which the business of an enterprise is carried on in whole or in part. It typically includes a branch, an office, a factory, or a workshop, and under some countries laws, includes an oil and gas well or other place of mineral extraction.

There are two partial solutions to this problem. The first is, in addition to any other steps taken, to foist the obligation for carrying any such possible tax burden upon the buyer. A clever buyer will recognize this clause and dispute it. This solution is partial in that the levying of the taxes in the buyer's country will likely occur long after the contractual relationship between the parties is over (and thus reimbursement will be more difficult). The second partial solution is to state elsewhere in the agreement

Compliance with Export Controls (2)

The Buyer acknowledges that the goods (*e.g.*, which may include technology and software) may, due to their nature or intended purpose or destination, be subject to (*e.g.*, United States, Canadian, European Union) export control laws and the laws of the country where they are to be delivered or used. Under these laws, the goods may not be sold, leased or transferred to restricted end-users, end-uses or countries. The Buyer agrees to abide by these laws.[254] The Buyer agrees that it shall not make any disposition of the goods purchased from the Seller by way of transhipment, re-export, resale, diversion or otherwise, other than in and to the country of ultimate destination specified in the Buyer's order or declared as the country of ultimate destination on the Seller's invoices, except as such laws and regulations may permit.
The Buyer shall particularly check and verify that:

- **the goods shall not be used for any purpose related to armaments, nuclear technology or weaponry or other military use;**
- **regulations of all applicable Sanctioned Party Lists of (*e.g.*, the European Union, Canada, the United States) concerning the trading with entities, persons and organizations listed therein are complied with; and**
- **there shall be no infringement of any embargo imposed by (*e.g.*, the European Union, Canada, the United States) and/ or by the United Nations in connection with the goods.**

The obligations of the Buyer to comply with all applicable export control laws and regulations shall survive any termination of, or discharge of any other obligations under, this Agreement.

II IMPORT CONTROLS: COMMERCIAL INVOICES

Import restrictions, customs, and required documentation vary greatly from country to country, and are subject to frequent changes. Generally commercial invoices, often in a prescribed form, will be required, together with certificates of varying formality relating to origin, value, local content, etc. Some countries require elaborate commercial invoices that must be completed in the foreign language and legalized before a local consular official often together with import licences, certificates of value and of origin. Typically, to import goods going directly into the commerce of most countries, including the United States, the following documents are generally required:

(1) a bill of lading, air waybill, or carrier's certificate (naming the consignee for customs purposes) as evidence of the consignee's right to make entry;
(2) a commercial invoice obtained from the seller, which shows the value and description of the merchandise;
(3) the appropriate Customs forms; and

254. Note that Canadian purchasers of US goods who intend to subsequently export them should amend this last sentence to ensure compliance with Canada's Foreign Extraterritorial Measures Act, *supra* footnote 252, as follows: The Buyer agrees to abide by all applicable laws. However, note that this may not solve a Cuba-related issue.

(4) packing lists (if appropriate) and other documents necessary to determine whether the merchandise may be admitted.

In addition to tariffs, the United States has a myriad of import controls many in the form of import quotas and tariff-rate quotas. Additionally, a number of treaties between the United States and other countries limit imports of certain types of items.

The commercial invoice domestically is the seller's bill for the goods delivered. However, in an export transaction it can set out many of the terms of the contract, such as quantity and description of the goods. It is also used as a source of information for those involved in the documentation and the actual transmission of the goods from the seller to the buyer.[255] Shipping and customs documentation are often prepared from and supported by the contents of the commercial invoice. In some countries the commercial invoice must be prepared in a prescribed form since it has also to act as a Customs' invoice. However, the design and layout of the invoice form is generally at the seller's discretion. When used in letter of credit transactions, the requirements of the commercial invoice are set out in the *UCP 600*.[256]

As in the case of the previously discussed contract documents, the important principle is completeness and clarity of information. Particular attention must be given to required statements of value and price, since many of these form the basis for application of tariffs in most countries. Thus, Commonwealth countries generally require a declaration of current price in the exporter's country as well as the selling price to the purchaser in the importing country. In a very few situations, such as some chemicals entering the United States, duty is levied upon the market value in the importing country.

255. In a CISG case, the seller's place of business was held to be its address as set out on its commercial invoice, such that the CISG applied. *See Elastar Sacifia S/ Concurso preventivo S/ Incidente de Impugnacin por Bettcher Industries Inc.*, *supra* footnote 5.
256. UCP 600, Art. 18 – Commercial Invoices:

a. A commercial invoice:
   i. must appear to have been issued by the beneficiary (except as provided in Art. 38);
   ii. must be made out in the name of the applicant (except as provided in sub-Art. 38 [g]);
   iii must be made out in the same currency as the credit; and
   iv. need not be signed.
b. A nominated bank acting on its nomination, a confirming bank, if any, or the issuing bank may accept a commercial invoice issued for an amount in excess of the amount permitted by the credit, and its decision will be binding upon all parties, provided the bank in question has not honoured or negotiated for an amount in excess of that permitted by the credit.
c. The description of the goods, services or performance in a commercial invoice must correspond with that appearing in the credit.

III GOVERNMENT DOCUMENTATION

Some trade terms carry with them an allocation of responsibility for obtaining governmental consents and licences, such as foreign exchange approvals. The agreement should specifically provide what consents are required, which party is obligated to obtain them, and should contemplate the failure to obtain them. The drafter should advise the exporter to commit itself only once the requisite consents and approvals have been obtained, even if the transaction is pursuant to a letter of credit. It is not uncommon for a transaction to be cancelled due to the inability of one of the parties to obtain the necessary government permissions. For example, under a CIF contract, the seller is under an obligation to provide an export licence, if required (and the buyer to obtain any approvals necessary to import the goods). This requirement is strictly imposed. By using this term, the seller agrees to do more than simply 'use its best endeavours or due diligence to obtain an export certificate'.[257] Rather, the seller must deliver the certificate, failing which, it is liable for breach of contract.[258] Thus, the agreement should contemplate the effect that any such inability will have, that is, the cancellation of the agreement. This issue should be contemplated prior to the expenditure of any funds by either party in preparation for fulfilment of its contractual obligations. In those countries where foreign exchange is controlled, an inquiry should be undertaken to determine what documents will be required by the buyer to permit it to remit the foreign currency. Where the seller is aware that the buyer will require, say, a Certificate of Origin in order to obtain a foreign currency remittance authorization, the seller should be in a position to supply such a Certificate, even if the buyer has neglected to request such a document in the agreement.

Neither party may be willing to commit itself to the transaction if there is a concern about the ability to obtain a government licence. The parties (or either one of them), may wish to consider a clause which permits the contract not to be fully enforceable until such permissions have been received. If such a condition is used, the drafter should ensure that the conditional period is limited to a reasonable time. An example is as follows:

257. *Pagnan SpA v. Tradax Ocean Transportation SA*, 1987, 2 Lloyd's Rep. 342, 346.
258. *Ibid.* In the *Pagnan* case, the seller contracted to supply the buyer with 35,000 tonnes of Thai tapioca pellets on FOB terms. A special condition of the contract read: 'Sellers to provide for export certificate enabling buyers to obtain import licence into EEC under tariff 07.06 with 6% import levy.' The seller was to make three shipments to the buyer on these terms. After the first shipment was completed it was discovered that the quota imposed for imports into the European Economic Community had been exceeded. As a result, the seller could not obtain the required export certificate. The buyer sued the seller for breach of the special term. The British Court of Appeal held that the seller had an absolute or strict duty to provide the export certificate and that the impossibility of obtaining this certificate was irrelevant. A strict duty arose as the seller had contracted to obtain/supply an export certificate. The seller had not agreed to 'use their best endeavours or due diligence to obtain an export certificate' but to actually supply such a certificate.

Agreement Conditional Pending Export Permissions

Seller shall use its best efforts[259] to obtain all necessary permits, licences or permissions to export the goods. The Buyer shall use its best efforts to obtain all necessary permits, licences or permissions necessary to import the goods. This Agreement is not fully executed and enforceable until all such permissions have been received. In the event that either party determines that it cannot reasonably obtain any such permissions, it shall notify the other party on or before (date), of its inability to obtain such necessary permissions, and this Agreement shall be declared null and void. Provided, however, that if such notice is not given, this Agreement shall be a binding legal agreement between the parties, notwithstanding the inability of such party to obtain the necessary permissions.

In some circumstances, the seller will be able to arrange that it only applies for the export permits on behalf of the buyer, and without any liability. The following clause apportions the risk fairly evenly, in that the neither party is penalized in the event that an export permit is unavailable.

Seller to Apply for Export Permit on Buyer's Behalf

The Seller shall, without any assumption of liability therefore, apply for an export permit on behalf of the Buyer where a permit is required by law. In the event that an export permit is denied or revoked, the Buyer shall have the right to elect to terminate this Agreement. The Buyer shall be responsible for obtaining any import permit, exchange permit or other governmental authorization required by the law of the country of importation.

Alternatively, the seller may be able to transfer some of the risk of not obtaining an export permit to the buyer, and charge the buyer termination charges in the event that the permit is not available. This type of provision is appropriate where the seller is concerned that an export permit might not be granted because of the nature of the goods or the nature of the buyer. The clause below adds this extra provision by, in effect, causing the buyer to indemnify the seller for its trouble.

Termination Charges if No Export Permission

The Seller shall, without any assumption of liability therefore, apply for an export permit on behalf of the Buyer where a permit is required by law. In the event that an export permit is denied or revoked, the Buyer shall have the right to elect to terminate this Agreement, subject to the payment to the Seller of termination charges determined in accordance with the Termination Charges provisions of this Agreement. The Buyer shall be responsible for obtaining any import permit, exchange permit or other governmental authorization required by the law of the country of importation.

Where the seller is required by the buyer to prepare documentation for export, the agreement should state the precise obligations of the seller. Where the seller intends to assist the buyer with preparation of any specific documents for importation, it may

259. *See* discussion on 'best efforts' at *supra* footnote 236.

wish to clearly indicate that it is not paying any costs associated with obtaining such documents. The clause below is an example of the seller agreeing to pay the cost of all export documentation.

Preparation of Export Documentation – Fees and Expenses

The Seller shall prepare, at its cost, all necessary export documentation (which shall include all of the several papers and documents required by the (Canadian) Government or any office or agency thereof and all of the papers and documents of a non-official or private nature which are customarily used for the export of merchandise of (Canadian) origin to foreign countries such as, but not limited to:

(i) bills of lading;
(ii) memoranda of shipment or shipping invoices;
(iii) packing lists;
(iv) insurance certificate;
(v) Commonwealth preference certificate;
(vi) certificate of origin;
(vii) (Canadian) customs export entry;
(viii) consular visas;
(ix) legalization by chambers of commerce or similar entities; and
(x) notices of date of departure of the shipments.

Where the buyer wishes to have the shipment made by a party other than the seller, a clause which covers the seller's fees and reduces the seller's liability is required. Note, however, that the seller cannot absolve itself from liability for illegal export merely by inserting such a clause. An example is as follows:

Export Services to Be Provided by Buyer

In the event the Buyer wishes to arrange for export shipment to be made by a party other than the Seller, the Buyer shall so inform the Seller within (e.g., forty-five days) of the Effective Date of this Agreement. In the absence of such instructions, the Seller shall, on behalf of the Buyer, arrange for export shipment to the Buyer's country and for marine warehouse-to-warehouse insurance (including war risk insurance, if available). The Buyer shall pay the Seller for all applicable fees and expenses including, but not limited to, those covering preparation of consular documents, consular fees, ocean freight, storage, demurrage, insurance and the Seller's then current fee for such services. Notwithstanding any extension of credit to the Buyer, payment of all such charges by the Seller shall be promptly reimbursed by the Buyer in (United States) Dollars upon submission of the Seller's invoices. In performing any such services, the Seller shall comply with any reasonable instructions of the Buyer or, in the absence thereof, shall act according to its best judgment. In so acting on Buyer's behalf, neither Seller nor its agents shall be liable for negligence or any special, consequential, incidental, indirect or exemplary damages to Buyer resulting therefrom.

Likewise, where the buyer requests the seller to assist it with the preparation of documentation necessary for the importation of the goods, the seller will do so provided that it is compensated and that it has no liability for any errors it may make.

All Fees and Expenses Relating to Import for Buyer's Account

All fees and expenses, including, but not limited to, those covering preparation of documents to permit the Buyer to import the goods into (country of destination), shall be payable by the Buyer upon submission of invoices from the Seller therefore. Unless otherwise instructed by the Buyer, Seller will prepare consular documents according to its best judgment but without liability for fines or other charges due to error or incorrect declarations.

Some goods are manufactured specifically for export, for example, electrical goods that do not meet United States standards, but do meet standards in other countries. Where the seller is selling goods specifically for export only, it is necessary to set up a control mechanism to ensure that the goods actually are imported into the buyer's intended country. The following clause imposes an obligation upon the buyer to furnish a landing certificate in the country of importation.

Goods to Be Sold for Export Only

The Buyer covenants that the goods are being purchased for export and shall be exported to a foreign destination for use outside (*e.g.*, the United States), and agrees to furnish, if requested by Seller, a landing certificate duly signed by the customs authorities at the foreign point of destination, certifying that the goods have been landed and entered at that port.

With some high risk goods, the Seller may have an interest in securing additional documentation, and in having the ability to conduct an export control verification. The clauses below provide that right, although the Buyer should note that such clauses may provide the opportunity for the seller to obtain otherwise confidential sales information.

Goods to Be Used for Civil Applications Only

The Buyer agrees and acknowledges that the goods shall be used solely for civil applications, and will execute all documents reasonably required therefore by the Seller.

Verification

In the event that the Seller is required to conduct (or enable authorities to conduct) any verification of compliance with export controls, the Buyer shall, upon written request of the Seller, promptly provide Seller with all information pertaining to goods, the particular destination and the particular intended use of the goods.

Finally, in the event that the buyer is in breach of any export control laws, the below is a specific indemnification clause in favour of the seller.

Indemnification

The Buyer shall indemnify and hold harmless the Seller from and against any claim, proceeding, action, fine, loss, cost and damages arising out of or relating to any non-compliance with export control regulations by the Buyer, and the Buyer shall compensate the Seller for all losses and expenses resulting thereof.

IV CERTIFICATE OF ORIGIN

The international sale of goods agreement should usually indicate the origin of the goods, since goods imported from certain countries can receive preferential customs treatment. As a result of the Canada-United States FTA and subsequently the NAFTA, the Canadian, Mexican, or US content of some exports must be specified in order to qualify for preferential treatment. Often, the contract requires that the exporter provide a Certificate of Origin. A Certificate of Origin discloses the nationality of the goods, that is, the country in which they were manufactured or otherwise produced. When goods are assembled in one country with parts originating from another country, it is sometimes necessary to specify that the goods were assembled with parts from that country. Certificates of Origin play an important role particularly in a North American transaction, although they may be just as important in other countries. In addition to customs requirements, they may be necessary to meet quota requirements imposed by the importing country, requirements for a letter of credit, or other official needs.

In North America, the primary purpose of the Certificate of Origin is to determine whether the goods are of 'North American Origin' (for NAFTA purposes) or whether the 'most favoured nation' preferential customs tax and duties are applicable. At a minimum, the agreement should provide a cut-off date, after which the Certificate of Origin is considered stale-dated. Amongst international traders, it is common practice for the buyer to bear the costs of issuance of the Certificate of Origin.[260] The buyer should consider inserting a provision that requires the seller to cover this expense.

> **Certificate of Origin – Seller to Provide**
>
> **The Seller shall provide the Buyer with a Certificate of Origin respecting the goods, dated no earlier than (*e.g.*, ten days) prior to delivery, at the Seller's expense.**

Because of the importance of the Certificate of Origin to a NAFTA-related transaction, it may not be sufficient for an exporter merely to agree to provide such a Certificate as above. A United States importer, for example, will likely insist upon an indemnity from the exporter, to the extent that the Certificate of Origin is false. For example, the exported products may be intended for incorporation into a new product. The buyer may be reliant upon purchasing goods of a minimum Canadian content, say 50%, so as to permit the finished goods to meet the minimum NAFTA-origin requirements to qualify for preferential duty treatment. If the Certificate of Origin is false, the consequences may have far greater effect than simply affecting the duty on the exported goods. It may further affect the duty imposed upon the buyer's finished goods, which will have a far greater value. For this reason, the buyer should obtain an indemnity

260. Under both Canadian and United States law, it is unclear, for example, if a Canadian seller agrees to an international sale under an FOB term, whether the seller or, say, the United States buyer, must bear the expenses of obtaining a Certificate of Origin.

from the seller, which should cover all the costs incurred due to the subsequent reclassification of the goods.[261] An example of a Certificate of Origin indemnity clause is below.

> **Certificate of Origin – Seller to Indemnify Buyer**
>
> **The Seller agrees to indemnify and hold the Buyer harmless against any liability, damage or expense (including costs and legal fees and expenses) by reason, or arising out of or relating to any incorrect statement contained in the Certificate of Origin, including any additional duties and costs incurred by the Buyer as a result of such incorrect statement.**

The counsel for the seller should ensure that the seller understands the ramifications of providing such an indemnity as above, particularly where the seller is itself relying on Certificates of Origin from other suppliers for components to the goods.

A reclassification of the origin of the goods is not something that takes place overnight. There is a fairly long investigation process that is first undertaken prior to making such a determination. It is not sufficient that the seller simply indemnify the buyer. The agreement can provide that the seller has a positive obligation to advise the buyer of any changes that may affect the Certificate of Origin, and to advise if the seller is under any investigation pertaining to the Certificate of Origin. This clause should also impose upon the exporter a contractual undertaking to cooperate with any investigation to the best of its ability. The clause below sets forth an example of this kind of obligation.

> **Certificate of Origin – Modifications and Investigations**
>
> **In the event that the Seller becomes aware of:**
>
> - **any modifications which may be required to be made to the Certificate of Origin, which may differ from any prior representations made to the Buyer; or**
> - **any investigation by any representative of any government agency, that may affect the veracity of the Certificate of Origin, the Seller shall forthwith be under an obligation to immediately so notify and provide details to the Buyer, and in the case of an investigation, the Seller shall be under an obligation to fully cooperate with investigators to ensure that the investigation is promptly completed.**

261. Note that the standard form of Certificate of Origin with respect to NAFTA goods contains the following statements:

> I certify that:
>
> a. the information on this document is true and accurate and I assume the responsibility for proving such representations. I understand that I am liable for any false statements or material omissions made on or in connection with this document;
> b. I agree to maintain, and present upon request, documentation necessary to support this Certificate and to inform, in writing, all persons to whom the Certificate was given of any changes that would affect the accuracy or validity of this Certificate.

Note that some countries may require Certificates of Origin to be issued by someone other than the producer of the goods, such as a Chamber of Commerce. This can cause difficulties in the United States and Canada where it is not customary for Chambers of Commerce to do this.

V CERTIFICATES OF QUALITY

Many buyers will require Certificates of Quality relating to the goods, to confirm representations of quality by the seller, and to permit importation or resale of the goods in the buyer's country. These certificates can relate to the 'newness', the 'health safety', or the general quality of the goods, or can confirm that the goods match a trade association's standard sample.[262] However, quality certificates vary and must be specific.[263] Many countries will accept quality certificates only if they are issued by specific regulatory bodies, if they are issued within a specific period of time, and if the goods are rated in accordance with their required tolerances.[264]

Certificates of Quality may be issued in two forms. A Certificate in *rem* is addressed to the world; a Certificate in *personam* is addressed only to the parties to the contract. Which form of Certificate will be required depends upon the intentions of the parties.[265] A Certificate of Quality may be issued by a government agency, such as Health & Welfare Canada, or by an inspection agency, such as Société Généreléde Surveillance SA (known worldwide as 'SGS') (Switzerland), Lloyd's (England) and Bureau Veritas (France), all of which have offices in Canada. Certificates of Quality in *personam* often state that they shall be 'final, as to quality'.[266] In this case, the Certificate is binding on both buyer and seller even though the Certificate may be incorrect (although, it ceases to be binding if revoked by the certifier or set aside by a court or arbitral tribunal).[267] The following clause places the obligation for obtaining such a Certificate upon the seller.

262. Schmitthoff, *supra* footnote 182, 88.
263. In *Michael Doyle & Assoc. v. Bank of Montreal* (1984) 11 DLR (4th) 496, 198[illegible] W.W.R. 193, 55 B.C.L.R. 196 (Ont. C.A.), the seller sold frozen herring fillets to a Dutch buyer in four shipments. The payment was secured by a letter of credit drawn on the Dutch buyer's bank, and advised by the defendant Canadian bank. The seller delivered the required documents to the Canadian bank, which, after inspecting the documents, accepted a draft in favour of the seller payable, forty-five days after shipment. After acceptance of the third draft, the first of the four shipments arrived in Holland, where the buyer rejected it as unfit. On the buyer's request, its Dutch bank rejected the documents, on the ground that the required Canadian government health certificate was defective. The Letter of Credit called for 'Health Certificate Issued by Canadian Department of Fisheries Inspection'. The tendered document was correct in all respects save and except that it was not headed 'Health Certificate of Inspection'. By the time the seller arranged to have a proper certificate issued, the Letter of Credit had expired. When the defendant bank tried to avoid liability on the draft, the Court held that the bank assumed liability by its acceptance of the buyer's drafts. The defendant bank would have been entitled to reject the documents and avoid liability.
264. *See* the discussion on the need for a good inspection company in Ch. 4 – Trade Terms under the heading 'FOB (Free on Board)'.
265. Schmitthoff, *supra* footnote 182, 88.
266. *Ibid.*
267. *Ibid.*

Certificate of Quality – Seller to Provide

The Seller shall provide the Buyer with a Quality Certificate respecting the goods, issued to the Seller and Buyer, dated no earlier than (*e.g.*, ten) days prior to delivery, and issued by the (*e.g.*, Seller's Ministry of Health), such Certificate indicating that the goods are (*e.g.*, disease-free).

Note that if traceability of the goods is critical to the buyer (as is required with food products), additional consideration should be given to the Certificates of Origin, Certificates of Quality, and to the warranties made.

VI PACKING, MARKING, AND LABELLING

Packaging, marking, and labelling costs do not instantly come to mind when drafting an international sales agreement. However, they can often prove burdensome to the party who is unwittingly responsible for them. The INCOTERMS clearly provide for which party is responsible for packing of the goods. For example, when goods are sold on FOB or CIF terms, the price quotation includes export packing charges unless the agreement specifically states that an extra charge will be made. However, the requirement for such packing is simply limited to 'customary packing of the goods, unless it is the custom of the trade to dispatch the goods unpacked'. The CISG provides a similar nebulous requirement for the goods to be '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'.[268]

These unclear provisions can result in one party picking up a needless or unexpected expense. Air carriers, for example, impose special packaging requirements. Shipments by sea have packaging requirements and shipping rates that vary depending upon whether the goods are shipped 'below deck' or 'above deck'. If a seller undertakes to ship goods to the country of final destination, it should be aware that some countries assess customs duties on the gross weight of the goods. If packaging weight can be maintained at the lowest weight-to-safety ratio possible, the buyer can economize on customs duties. Thus, the parties should tailor the agreement to the particularities of their transaction. The following clause is an example of a fairly detailed packing clause.

Packing Requirements – In Favour of Buyer

The Seller shall have the goods properly packed and shall take measures to protect the goods from moisture, rain, dust, corrosion and shock, etc., according to their different shapes and special features so as to withstand handling, loading and unloading, as well as long-distance sea and inland transportation, to ensure the goods' safe arrival at the destination without any damage or corrosion.

All goods shall be packaged in standard cardboard boxes, sealed on all edges with packing tape, loaded on standard shipping pallets, twenty-four boxes per pallet, and placed inside sealed shipping containers, twelve pallets per container.

268. CISG, Art. 35.

The following documents shall be enclosed in each package of the goods:

Detailed packing list in two copies; and
Operating manual for relevant equipment in one copy.

The Seller shall not be entitled to any additional charges for packing other than as specifically provided for in this Agreement.

Shipping pallets shall not weigh more than (x) kilograms (unloaded).

An example of a seller's clause that contains a less onerous obligation upon the seller is as follows:

Packing Requirements – In Favour of Seller

The Seller shall be responsible for packing and packaging necessary to withstand normal transportation hazards.

The following clauses are examples of marking provisions:

Marking Requirements

The Seller shall mark the following clearly visible on each package of the goods with indelible paint in conspicuous English printed words:

(a) Contract Number
(b) Destination
(c) Consignee Code
(d) Case Number
(e) Gross weight (Kilograms)
(f) Shipping Mark

Should the goods weigh two or more metric tons, weight and hoisting position shall be marked in English and with international trade practice marks and illustrative marks on the two sides of each case so as to facilitate loading, unloading and handling.

In accordance with the characteristics and different requirements in loading, unloading and shipping different goods, the package shall be conspicuously marked with 'Handle with Care', 'Right Side Up', 'Keep Dry', etc., in English and with appropriate international trade practice marks and illustrative marks.

On goods without packing, the above-mentioned requirements shall be indicated on those goods by using metal labels.

The loose accessories in package or bundle shall be labelled by the Seller indicating Contract Number and name of primary machine.

Some goods require specific labelling so that they may be sold in the country import. In some countries, the labelling is required to be in the official language of that country. Failure to require this labelling will put the buyer to an additional expense, and may impede importation. The following clause is an example of a requirement for consumer goods labelling, rather than labelling for shipping.

Labelling Requirements

The goods shall be labelled with the following standard label, 3.5 centimetres by 1 centimetre, printed with set type and stating the following:

'Made in Hong Kong/Fabrique a Hong Kong
100 % Cotton/Coton
RN# [ ] CA# [ ]'.

Despite the CISG provision relating to packaging of the goods, mere faulty packaging under the CISG will not permit the buyer to terminate the agreement unless the faulty packaging is a fundamental breach of the contract. In the previously referenced German mussel case,[269] it was held that even if the buyer had established faulty packaging of the goods, the contract could not be avoided. The court held that in order to justify avoidance of the contract in those circumstances, faulty packaging must be a fundamental breach of contract; and such a breach must be easily detectable to enable the buyer to declare avoidance of the contract within a reasonable time after receiving delivery. To deal with such a possibility, the buyer may wish to insert a provision declaring that any non-conformity due to packing, marking or labelling of the goods is a fundamental breach permitting the buyer to avoid the contract.

Exclusion of CISG Re: Packing, Marking and Labelling

Notwithstanding the provisions of the United Nations Convention on Contracts for the International Sale of Goods, the parties agree that the failure by the Seller to properly package, mark and label the goods shall be a fundamental breach of this agreement.

In addition to marking and labelling concerns that the buyer may have, if the goods have a potential hazardous use, or are destined for consumer consumption, the seller may have a legitimate concern that the goods are properly marked with the appropriate warnings to avoid product liability exposure in the country of import. While the clause below may offload the primary liability for product liability claims to the buyer, the seller should investigate and satisfy itself that it has limited its liability for such claims, through liability insurance, and/or its own investigations as to the potential for such claims.

Buyer Responsible for Marking Warnings

Buyer agrees to assume all responsibility for marking the goods as required by all laws in the country of import or intended use of the goods, and shall indemnify and hold harmless the Seller from any claims relating to their use or resale by Buyer without proper marking or labelling.

269. *Supra* footnote 159.

II POST-DELIVERY INSPECTIONS

There are two primary types of post-delivery inspections. The first is an inspection to permit payment in those very few letter of credit transactions that permit inspection following delivery, but before payment. The other is to permit the buyer to reject the goods and avoid payment, or, if payment has been made, to obtain a refund or trigger the warranty obligations. In the event that an inspection provision is not included in the contract, the buyer generally, unless trade custom is to the contrary or the agreement otherwise provides, has the right to inspect the goods upon their delivery to it at the place of destination[408] (and reject the goods if nonconforming). Note, however, that the location of the place of destination may depend on the trade term used in the agreement. Often, the seller will assume erroneously that the buyer's payment signifies acceptance of the goods. The clause below makes clear that this is not the case.

Payment Prior to Final Inspection

Payment by the Buyer prior to final inspection and acceptance shall not constitute acceptance.

The main issue, however, is how quickly the buyer must undertake the inspection to be able to reject the goods. For the seller this is important for two reasons: the first is that it wishes to obtain payment and move on to new business without having the existence of a potential lingering dispute with the buyer. The second is that while liability may be limited, there are still mandatory time limits within the Warsaw Convention,[409] the Hague Rules[410] and even state or provincial carriage by truck rules,[411] which must be observed in order to preserve a right of legal action against carriers. A typical post-delivery clause sets a limited time period for notification to the seller of discrepancies in the quantity or quality of the goods.

Post-delivery Inspection

Buyer shall, not later than (*e.g.*, five) days following receipt of any of the goods, notify the Seller in writing of any lack of conformity of the goods ordered. If the Buyer shall fail to provide such notice to the Seller within this prescribed period, the goods shall be conclusively deemed to have been received by the Buyer without defects.

408. *Boks & Co. Ltd. v. J.H. Rayner & Co. Ltd.* (1921) 37 TLR 800. Evans, *supra* footnote 184, 850.
409. If the goods are damaged or delayed by the carrier, the Convention provides for two notice periods. Where goods are lost or damaged, the consignee must complain to the carrier, in writing, not later than fourteen days from receipt of the cargo. In the case of delay, such complaint must be made within twenty-one days from the date on which the cargo is eventually placed at the consignee's disposal.
410. If the goods are damaged by the carrier, the Hague Rules set out two important notice periods. If the damage is apparent, the consignee must notify the carrier in writing when it removes the goods from the carrier. If the damage is not apparent, the consignee must notify the carrier within three days after removal. Otherwise, the removal of the goods is taken as evidence of good delivery by the carrier of the goods described in the bill of lading. The Hague Rules fix a one-year limitation period for bringing any legal action against the carrier.
411. For example, the Ontario Truck Transportation Act: Notice of any claim must be given to a carrier within sixty days of the date of delivery of the goods, or in the case of failure to make delivery, within nine months of the date of shipment. The carrier is not liable unless timely notice was given. Legal action must commence within nine months. R.S.O. 1990, c. T-22.

Note that drafters are often confused by the interplay between the right to reject the goods following inspection (which is usually limited to a short period), and the seller's warranty obligation to the buyer for the goods. The seller may wish to clarify this misunderstanding by avoiding the use of language that indicates that the buyer has any remedy other than reliance upon the warranty in the case of inadequate quality of the goods.

Post-delivery Inspection – Warranty Obligations

The Buyer shall, not later than five days following receipt of any of the goods, notify the Seller of any discrepancies in the packing list of the goods ordered. If the Buyer shall fail to provide such notice to the Seller within this prescribed period, the goods shall be conclusively deemed to have been received by the Buyer without defect in quantity. Any defect in quality shall be dealt with in accordance with the warranty clause contained in this Agreement.

The Buyer shall have no remedy for lack of conformity of the goods if the Buyer fails to notify the Seller thereof within (*e.g.*, three months) following receipt of any of the goods.

In cases of more complex equipment, the seller may wish to be present when the post-delivery inspection takes place. The following clauses are examples of the issues which the seller and buyer may wish to address in such an inspection:

Inspection upon Delivery

The open-package inspection and testing for all equipment supplied by the Seller shall be performed upon delivery to the Buyer at the Buyer's premises by the Seller's personnel. The Buyer shall inform the Seller of the suitable date of inspection one month before the date and shall also render reasonable assistance to the Seller's inspectors.

Record of Inspection

Should any shortage, defect, damage or other circumstance not in conformity with this Agreement be found with the delivered equipment during open-package inspection by the representatives of both parties, a detailed record shall be made and signed by them. This record shall be taken as effective evidence for the Buyer to claim replacement, repair or supplement from the Seller, in the event the Seller is responsible for such shortage, defect, damage or other circumstance.

Failure by Seller to Attend Open-Package Inspection

If through no fault of the Buyer, the Seller's representatives cannot join the open-package inspection, the Buyer shall have the right to open packages and conduct the inspection independently.

If the CISG applies to the agreement, the notice provisions should be modified by the seller to avoid the unsatisfactory provisions of the CISG in the event that there is no contractual warranty provision. There are two notice periods provided for in the CISG. Pursuant to Article 38, the buyer must 'examine the goods, or cause them to be

examined, within as short a period as is practicable in the circumstances', although if the contract involves transportation of the goods, the examination may be deferred until after the goods have arrived at their destination. If the goods are redirected and the seller knew that such was the buyer's intention, the examination can be deferred until the goods have arrived at their destination.[412] The second notice period arises pursuant to Article 39(1).[413] The buyer must then give notice to the seller within a reasonable time after he has discovered the defect or ought to have discovered it. There have been many CISG cases that have grappled with the definition of 'reasonable'. In summary, this period depends on the nature of the goods, the type of defect, the trade usages, and the related circumstances.[414] For example, in one case (textiles),[415] it was

412. CISG, Art. 38:

> (1) The buyer must examine the goods, or cause them to be examined, within as short a period as is practicable in the circumstances.
> (2) If the contract involves carriage of the goods, examination may be deferred until after the goods have arrived at their destination.
> (3) If the goods are redirected in transit or re-dispatched by the buyer without a reasonable opportunity for examination by him and at the time of the conclusion of the contract the seller knew or ought to have known of the possibility of such redirection or re-dispatch, examination may be deferred until after the goods have arrived at the new destination.

413. CISG, Art. 39(1):

> The buyer loses the right to rely on a lack of conformity of the goods if he does not give notice to the seller specifying the nature of the lack of conformity within a reasonable time after he has discovered it or ought to have discovered it.

414. *See* CISG Advisory Council Opinion No. 2: *Examination of the Goods and Notice of Non-Conformity* Arts 38 and 39, available at http://cisgw3.law.pace.edu/cisg/CISG-AC-op2.html, which contains a chart of numerous cases, the goods involved, the length of notice provided, and whether the notice was sufficient or not.

415. *Parties Unknown*, Oberlandesgericht Dusseldorf, 6 U 32/93, 10 Feb. 1994, published in German: *Recht der Internationalen Wirtschaft* (RIW) 1995, 53; Case No. 81, Case Law on UNCITRAL Texts (CLOUT), United Nations. A German buyer of textiles was unable to rely on CISG, Art. 39(1) because the objection of lack of conformity of the goods was raised two months after delivery. The German buyer could have easily discovered the defects and raised the objection within a few days after delivery, if it had conducted a random search. In *La San Giuseppe v. Forti Moulding Ltd.*, 1999, O.J. No. 3352, Court File No. 98-CV-142493CM (ON S.C.), the objection to lack of conformity was only raised years later when the buyer filed its claim, which was too late. But note an unpublished Austrian Court of Appeal case (*Parties Unknown*, Innsbruck; 4 R 161/94 1 Jul. 1994); Case No. 107, Case Law on UNCITRAL Texts (CLOUT), United Nations, case presentation and English translation http://cisgw3.law.pace.edu/cases/940701a3.html, where a two-month period was held to be reasonable. An Austrian buyer of flowers refused to pay the Danish seller for some of them, claiming that the seller had breached a guarantee or committed a fundamental breach since the flowers did not bloom through the entire summer. The buyer was unable to prove that the seller had made the guarantee. The court also held that even if the buyer had been able to establish lack of conformity of the goods, it would have lost its right to avoid the contract, since it had failed to give the seller notice within a reasonable period of time after discovery of the defect (CISG, Art. 39(1)). The court held that two months after delivery of the goods was a reasonable period of time within which the buyer should have, and in fact had, discovered the lack of conformity of the goods.

clear that two months was too long to reject; in another case (cucumbers),[416] a seven-day period was too long, in a third, two weeks was said to be appropriate for non-perishable goods.[417]

In addition to timeliness, the notice must specify the nature of the nonconformity. For example, merely stating non-conformity on the basis of 'poor workmanship and improper fitting' of the goods (in one case, shoes), is insufficient,[418] nor is merely reporting that a customer has complained about the quality.[419] In agreements that are subject to the CISG, the seller may wish to specifically exclude the application Article 39(1). In doing so, the seller should take care to ensure that the period given for notice is nevertheless reasonable if the CISG applies. In several CISG cases, the contractual limitation on inspection has not been enforced where found to be unreasonable.

416. In *Parties Unknown*, *Oberlandesgericht Dusseldorf*, 17 U 82/93, 8 Jan. 1993, excerpts published in German: *Praxis des Internationalen Privat- und Verfahrensrechts* (IPRax) 1993, 412 Summary published in Italian: *Diritto del commercio internationale* July-September 1993, 651; Case No. 48, Case Law on UNCITRAL Texts (CLOUT), United Nations. The German buyer of fresh cucumbers could not rely on CISG, Art. 39(1) since it gave notice of the nonconformity only when the goods arrived in Germany, seven days after the buyer had the opportunity to examine them at the place of delivery in Turkey.

417. *Parties Unknown*, Switzerland 19 Dec. 2006 Appellate Court Zug (*Stove* case), case presentation and English translation http://cisgw3.law.pace.edu/cases/061219s1.html. 'As a basic rule for durable goods which are not perishable and which are not affected by major fluctuations in price – subject to adjustment in either direction – a period for examination of two weeks but at least one week or five working days seems appropriate.' But *see also* Germany 19 Oct. 2006 Appellate Court Koblenz (*T-Shirts* case), case presentation and English translation http://cisgw3.law.pace.edu/cases/061019g2.html: 'In general, however, an average of about one month after the goods have or ought to have been discovered the defect ought to be regarded as reasonable'.

418. *Parties Unknown, Landgericht Munchen I*; 17 HKO 3726/893 July 1989; Published in German: *Praxis des Internationalen Privat- und Verfahrensrechts* (IPRax) 1990, 316; Case No. 3, Case Law on UNCITRAL Texts (CLOUT), United Nations. The German buyer notified the seller within eight days of delivery of 'poor workmanship and improper fitting' of the goods. The court held that the buyer has lost the right to rely on non-conformity of the goods since the notifications, even if sent as alleged, did not specify precisely the defect in the goods. *See also Fallini Stefano& Co. S.N.C. (Italy) v. Fordic B.V.* (Netherlands): Rechtbank Roermond; 900336 19 Dec. 1991, excerpts published in Dutch: Nederlands Internationaal Privaatrecht (NIPR) 1992, 394 Reported on in English: 1995, UNILEX, D.91-14 (Transnational Juris Publications, Inc.); Case No. 98, Case Law on UNCITRAL Texts (CLOUT), United Nations, case abstract http://cisgw3.law.pace.edu/cases/911219n1.html. A delivery of rotten Italian cheese was rejected by a Dutch buyer. The court held that the reasonableness or the time of giving notice depends on the nature of the goods. Although the buyer notified the seller of the non-conformity of the cheese shortly after delivery (which was a reasonable time since cheese is a perishable item), it did not notify the seller of the nature of the defect – that it was frozen in an infested state. The court held that the fact that the cheese was frozen and not described in the contract was not sufficient reason for not examining it and discovering the infestation. The buyer had to prove that the seller knew or could not have been unaware that the cheese was infested at the time it was frozen in order to prevent the seller from relying on CISG, Arts 38 and 39 (CISG, Art. 40).

419. Germany 23 Jan. 2004 Appellate Court Düsseldorf (*Stainless Steel Plate* case), case presentation and English translation http://cisgw3.law.pace.edu/cases/040123g1.html (Dutch buyer of German seller's steel plates).

Inspection upon Delivery – Limited Notice Period

In the event that the Buyer does not give notice specifying the nature of the lack of conformity, if any, to the Seller within five days following delivery of the goods by the Seller, the parties agree that the Buyer loses the right to rely on a lack of conformity of the goods, notwithstanding the *United Nations Convention on Contracts for the International Sale of Goods*, if applicable.

Note also the application of CISG Article 44[420] which acts as a back-up to a buyer who fails to give notice but who has a good excuse. If the buyer qualifies under CISG Article 44, while it cannot reject the goods, it can reduce the price in accordance with CISG Article 50 or claim damages. Accordingly, the seller should consider excluding the application of CISG Article 44, if it chooses not to use the clause below.

Inspection upon Delivery – Limited Notice Period, No Right to Price Reduction

In the event that the Buyer does not give notice specifying the nature of the lack of conformity, if any, to the Seller within five days following delivery of the goods by the Seller, the parties agree that the Buyer loses the right to rely on a lack of conformity of the goods and shall not be entitled to any reduction of the price or other damages, notwithstanding the *United Nations Convention on Contracts for the International Sale of Goods*, if applicable.

When representing the buyer, consideration needs to be given to the buyer's rights upon rejection. The clause below gives the buyer the right to hold the rejected goods at the seller's expense and risk of loss and trigger a claim for damages. It also prevents the seller from replacing the goods without the buyer's consent.

Buyer's Rights upon Rejection

The Buyer may at its option hold rejected goods for the Seller's inspection or instruction and at the Seller's risk, or return them to the Seller at the Seller's expense when authorized by the Seller, and the Seller shall promptly reimburse the Buyer for any and all damages, including incidental or consequential damages, sustained by the Buyer as a result of the Seller's breach of warranty. No replacement of rejected goods may be made by the Seller without written authorization from the Buyer.[421]

In some circumstances, the buyer may require more than simply an inspection of the goods. For example, where the buyer is providing materials for the fabrication of the goods, or is paying for the goods on the basis of time and materials costs. In these circumstances, the buyer should require the right to audit the records of the seller, as they relate to the goods. The following clause permits this.

420. CISG, Art. 44:

> Notwithstanding the provisions of para. (1) of Art. 39 and para. (1) of Art. 43, the buyer may reduce the price in accordance with Art. 50 or claim damages, except for loss of profit, if he has a reasonable excuse for his failure to give the required notice.

421. Lansner, *supra* footnote 141.

Right to Audit

The Buyer shall have the right, but not the obligation, to have the records of the Seller, to the extent such records relate to this Agreement, examined by an independent third party for the purpose of determining compliance with this Agreement. Such third party will be mutually acceptable to the parties. Any such examination shall be subject to the obligation of the Buyer to give reasonable notice of same to the Seller and the records may be examined only during normal business hours, on the premises of the Seller.

warranty clause for a seller in Wisconsin may not be useful if the contract is governed by, say, Mississippi law, where a party may not negate the warranty of merchantability or the warranty of fitness for purpose.

Additionally, liability for damages should be dealt with specifically. When reviewing the terms of the warranty, consideration should be given to product liability insurance. For jurisdictions such as the United States, where product liability judgments can occasionally be remarkably high, there is usually a need for significant insurance coverage. While tort claims do not require privity of contract, some countries have specific legislation that prohibits contractually limiting terms.[423]

Various jurisdictions provide different interpretations of 'fitness for purpose' warranties. The actual warranty should be clearly delineated. A proper warranty clause should contain the following:

- a complete statement as to what is warranted and what is excluded from warranty;
- the length of time the warranty is in effect;
- the type of notice required to file a valid warranty claim; and
- the agreed upon remedies for a valid warranty claim.

I DEFINITION OF WHAT IS WARRANTED

The sellers of goods would much prefer to avoid giving any warranty at all, known as an 'as is, where is' sale. Unfortunately, except in exceptional circumstances, it is difficult for a seller to obtain the best price for its goods when selling on this basis (although, for some goods, such as some types of software, this may be commercially acceptable). Additionally, the law governing the transaction may proscribe the seller's ability to limit the scope of the warranty to be offered.[424] The following clause is an 'as is, where is' provision (note the warranty negation language found in the second sentence is detailed further in this chapter, and is included for reference).

No Warranty – 'As Is, Where Is'

The Buyer acknowledges that the goods are being sold on an 'as is, where is' basis. The Seller expressly disclaims all warranties, either express or implied, including implied warranties of merchantability or fitness for a particular purpose.[425]

423. For example, in the UK, the Unfair Contract Terms Act 1977 renders clauses which seek to disclaim liability caused by negligence void if the negligence causes death or personal injury.
424. For example, in one case, the buyer purchased a luxury yacht from the seller on an 'as is, where is' basis with no survey or sea trial, but with a personal warranty from the seller as to the yacht's condition. Within an hour of taking delivery, there was a catastrophic engine failure. The court stated that the 'as is, where is' phrase 'clearly signified that the buyer would acquire the yacht in whatever condition the boat was at the time of purchase with no right to complain subsequently if the boat should turn out to have any defect'. *See Michael Hirtenstein & Others v. Hill Dickinson LLP* [2014] EWHC 2711 (Comm.).
425. In another ship case, a court held that even if the words 'as is where is' had been included, they would not necessarily have excluded statutorily implied terms. *See Dalmare SpA v. Union*

More typically, a seller will offer a basic warranty that the goods will be free from defects in material, workmanship, and title, such as is found in the following clause:

Warranty – Basic

The Seller warrants to the Buyer that the goods sold by the Seller will be free from defects in material, workmanship and title.

There are plenty of other examples of basic warranties that may be legitimately requested by the buyer, the limitations being only the business dealings of the parties. The following are some examples:

Warranty – Merchantable Quality

The Seller warrants that the goods will be of merchantable quality.

Warranty – First-Class Workmanship and Materials

The Seller warrants that the goods shall be of the first class workmanship and material throughout, and free from defects.

Warranty – Normal Industry Tolerances

The Seller warrants that the goods shall meet specifications supplied by the Seller to the Buyer or as set forth on the face thereof, in either case within normal industry tolerances.

Warranty – Conformity with Specifications

The Seller warrants that the goods shall conform in every respect to the applicable drawings, specifications and samples provided by the Buyer to the Seller. No deviations from such specifications shall be made by the Seller unless previously authorized in writing by the Buyer.

Warranty – Intended Use by Buyer

The Seller has been informed by the Buyer, and/or will use its expertise to determine, the particular purpose(s) for which the goods are required and understands that the Buyer is relying on the Seller's skill and judgment to furnish suitable goods. The Seller warrants that the goods will be fit for such particular purpose(s), including but not limited to, as applicable, use for ....

Warranty Manufacturing in Accordance with Standards

The Seller shall carry out the manufacturing and/or procurement of the goods, selection of material, inspection and testing for the goods supplied by the Seller, in accordance with the existing standards and codes of (*e.g.*, Germany) and of the Seller.

Warranty – Technical Level and Quality Up-to-Date

The Seller warrants that the technical level of the goods shall be the most up-to-date and the goods of best quality, completely new and reliable.

Maritime Limited and Valor Shipping Limited [2012] EQHC 3537. As a consequence, may be wise to include warranty negation language in addition to the 'as is where is' language.

Warranty – Normal and Safe Operation

The Seller warrants that the goods shall maintain normal and safe operation according to the regulations prevailing in (*e.g.*, the United States) and/or (the Buyer's country).

Warranty – Technical Documentation Correct

The Seller warrants that the technical documentation supplied by the Seller in conjunction with the goods shall be complete, clear and correct in order to meet the requirements of the installation, operation and maintenance of the goods.

Warranty – Packing and Labelling

The Seller warrants that the goods are adequately contained, packaged and labelled in accordance with the specifications contained in this Agreement, or if none be stated, then in such manner as reasonably may be required for identification of the goods, source, and relevant production information or as may be needed to facilitate a recall as otherwise provided herein and to assure the protection of the goods from damage or destruction.

Warranty – Certifications

The Seller warrants that the goods will bear any required international, national, state or local certifications and labels that may be required for the Buyer to lawfully use or resell the goods.

Warranty – Compliance with Manufacturing, Packing and Shipping Laws

The Seller warrants that any goods sold shall comply with federal and provincial laws and regulations applicable to the manufacture, packing and shipment of such goods as of the date of this Agreement, and shall comply with any amendments thereto which may have come into effect prior to the time such goods are shipped, provided that the price and, if necessary, delivery shall be equitably adjusted to compensate the Seller for having to comply with such amendments.

Warranty – Conformity with Laws

The Seller warrants that the goods have been or will be manufactured, processed, fabricated and/or produced and may be shipped, sold and used in a customary manner without violation of any law, ordinance, rule or regulation of any governmental or administrative body, including, but not limited to (*e.g.*, the Fair Labor Standards Act, the Federal Consumer Product Safety Act, the Federal Hazardous Substances Act, the Equal Employment Opportunity Act), any relevant export and import laws, any laws concerning safety for children of all ages, and/or any rule or regulation promulgated pursuant thereto.

Warranty – Safety Responsibility

The Seller warrants that the goods are safe when used for their intended or reasonably foreseeable purposes and in accordance with the Seller's reasonable instructions, and the Seller assumes entire responsibility for the safety of all goods when so used.

Warranty – Title

The Seller warrants that it has the right to transfer good and merchantable title to the goods; that the goods on delivery will be free from all security interests

and other liens and encumbrances; and that the Buyer will have peaceful possession and quiet enjoyment of the goods.

The seller's warranty for non-infringement of third parties' intellectual property is one that requires some additional thought. The standard warranty, which follows below, has the seller warranting that the goods do not infringe. At the very least, a territorial restriction is required to ensure that a worldwide warranty is not given.

Warranty – Non-Infringement

The Seller warrants that the use of the goods does not infringe upon the patents, copyrights, trade secrets or other intellectual property rights of others (*e.g.*, in the United States).

The above warranty is actually quite a strict warranty, as it is often not something that a seller can honestly guarantee. A more accurate warranty would be that the seller is not aware of any infringement. The agreement can provide the same remedies for infringement whether or not the warranty is strict or to the best of the seller's knowledge.[426]

Warranty – Non-Infringement (Best of Knowledge)

The Seller warrants that, to the best of its actual knowledge, the use of the goods does not infringe upon the patents, copyrights, trade secrets or other intellectual property rights of others (*e.g.*, in the United States).

There are many other examples of specific warranties in other chapters of this book.

II DEFINITION OF WHAT IS NOT WARRANTED

In addition to the broad warranty negation language, the drafter may wish to consider limiting the warranty by excluding those specific matters, if any, which are not to be so warranted. The clause below is an example:

Warranty Applies to Workmanship and Materials Only

It is understood that the foregoing warranty of the Seller applies to workmanship and materials only.

The seller may also wish to specifically address the issue of goods manufactured by others but sold by the seller. If the agreement is silent on this point, the seller will be liable for the warranty of all such goods sold by it, whether or not it has manufactured them (the seller in turn relying on the warranties it may have received from other manufacturers). For the buyer, when confronted with this warranty provision, inquiries should be made to ascertain the nature of the third-party goods, and the value, if any, on the warranty being offered by such third parties. The buyer may not be willing to accept this risk, and accordingly will wish to delete this clause. Further, for many products, traceability requirements are mandatory, requiring suppliers to verify throughout their own supply chain, that, for example, their goods are fully organic.

426. For further discussion on this subject, *see* Ch .16 – Intellectual Property.

No Warranty Re: Third-Party Suppliers

In respect of any goods supplied hereunder that are manufactured by others, the Seller gives no warranty whatsoever, and the warranty given by such manufacturers, if any, shall apply.

In those circumstances where the seller is provided a design or specifications from the buyer, it will wish, if possible, to include a limitation on the warranty relating to the design. The buyer will wish to ensure that this provision does not slip by if in fact the buyer is relying on the seller's skill and expertise in analyzing and manufacturing the goods to the specifications.

No Warranty Re: Buyer's Specifications and Designs

Claims arising from or due to specifications, drawings and designs supplied by the Buyer shall be the sole responsibility and expense of the Buyer, and the Buyer shall hold harmless and reimburse the Seller for any loss, cost or damage, action or cause of action arising out of and by virtue of such a claim.

The buyer may choose to counter this exclusion with a clause that transfers the risk to the seller, as follows:

Specifications Not a Warranty

The specifications provided by the Buyer will not constitute a warranty, express or implied, by the Buyer against any claims whatsoever; and the Buyer shall not be responsible to the Seller in any way, as indemnitor or otherwise, for or on account of any such claims or liability. The parties agree that it is the Seller's obligation to ensure that any goods it manufactures pursuant to specifications provided by the Buyer are non-infringing, safe, and otherwise meet all requirements imposed by law or by this Agreement.

The seller may also wish to limit its warranty by requiring proper handling, installation and operation of the goods. The following two clauses provide examples of such a limitation.

Warranty Conditional upon Proper Storage and Installation

The obligations set forth in this clause are conditional upon proper storage, installation (except where installation is supervised by or performed by the Seller), use, maintenance and compliance with any applicable recommendations of the Seller.

No Warranty for Damage Due to Shipping or Handling

This warranty applies only to defects in parts and workmanship and not to damage incurred in shipping or handling, or damage due to causes beyond the control of the Seller such as lightning, fire, flood, wind, earthquake, excessive voltage, mechanical shock, water damage, or damage arising out of abuse, alteration or improper application of the goods.

For certain goods, the seller should ensure that the warranty is not a warranty of the goods generally, but is a warranty for the purposes of the original buyer only.

Warranty for Original Buyer Only

This warranty shall apply to the original purchaser of the goods only.

However, if the buyer intends to purchase the goods for resale, the above clause is unacceptable and should be replaced with the clause below:

Warranty Fully Transferable

The Seller hereby agrees that all its warranties under this Agreement are transferable to any succeeding owner of the goods.

In some agreements for the sale of complex products, many goods may be included in the agreement. For example, where a tractor is sold, the brake pads may not be subject to the same warranty as the tractor itself. Without addressing the individual components of the product, a seller may find itself unintentionally warranting parts which cannot realistically last the entire warranty period. The clause below highlights this issue:

No Warranty for Goods Normally Consumed in Operation

The above warranty does not apply to goods normally consumed in operation or which have a normal life inherently shorter than the said (*e.g.*, twelve) months. With respect to such goods, the regular existing warranty, if any, of the Seller, applicable to the goods involved, shall apply.

If the goods have been designed or built in accordance with instructions from the buyer, the seller will wish to add the following clause to ensure that its liability is limited in such case. This broad exclusionary clause often slips by when the buyer's counsel is unfamiliar with intellectual property issues. Often, a small buyer will engage a large manufacturer to produce goods according to the buyer's own specifications, without considering the patent infringement issue – the buyer often being lulled into a false sense of confidence that the seller is, with its team of patent counsel and engineers, more aware of the patent issues. Clearly, this risk needs to be apportioned between the parties through negotiation rather than entrapment. In addition, often the seller's goods will be only one of many components to the buyer's product. In such case, the seller may find that when the buyer receives a notification from a third party that its product infringes, it will notify all of its suppliers and ask each to indemnify it for its costs. The clause below provides a carve-out for a seller to ensure that it does not get caught up in such an indemnity unless its own unmodified goods are clearly the direct cause of the infringement. It is also limited to court awards only (and a savvy buyer will object to this significant limitation).

Excluded Conditions

The Seller warrants that, to the best of its actual knowledge, the use of the goods does not per se infringe upon the patents, copyrights, trade secrets or other intellectual property rights of others (*e.g.*, in the United States). This warranty does not extend to Excluded Conditions (defined below), the responsibility for which shall be borne by the Buyer or third parties to whom the Buyer is contracted. The parties acknowledge that the goods will comprise one component of a product being designed, operated or constructed either by the

Buyer directly and/or by a third party on behalf of the Buyer (Buyer's Improvement). On the specific terms set out below in this paragraph, the Seller will accept responsibility for its own unmodified products, but not for:

(i) the products or components of others ('Third-Party Products'); or,
(ii) any combinations of Third-Party Products with the goods, if such combination causes the infringement; or,
(iii) any infringement caused by modifications or customizations to the goods demanded or required by the Buyer; or,
(iv) the Buyer's Improvement as a whole (collectively referred to as 'Excluded Conditions').

The Seller shall indemnify the Buyer from and against any court awards against the Buyer as a result of a finding that the use of the goods per se infringes any copyright, patent, trade secret or other intellectual property right, provided that the Buyer notifies the Seller of any such claim promptly in writing and allows the Seller to control the proceedings; this indemnification does not extend or apply to Excluded Conditions.

III HOW LONG IS THE WARRANTY IN EFFECT

No warranty should last forever. The seller will wish to ensure that the warranty period is capped at a reasonable period of time. Ordinarily, the warranty should commence upon delivery of the product to the buyer. The seller may even wish to commence the warranty period from the date the goods are ready for delivery to the buyer, in case the buyer delays accepting delivery or the seller is legally permitted to withhold delivery (e.g., if the buyer is unable to pay). A basic warranty period clause is below:

Warranty Period – Basic

The warranty period for goods supplied by the Seller shall be (*e.g.*, twelve months) after the date of delivery (or readiness for delivery) of the goods to the Buyer.

In some instances, where the buyer intends to sell the goods for ultimate consumer use, the seller may agree that the warranty commences upon the sale of the goods to the consumer. Caution must be exercised when agreeing to this term, to ensure that a maximum cut-off date is given. Otherwise, the goods can theoretically remain unsold for a very long period, and still be subject to the warranty when finally sold. The clause below is an example of a warranty given in light of goods destined for consumers.

Warranty Period for Ultimate Consumer Sale

The warranty period for the goods supplied by the Seller shall be earlier of (*e.g.*, eighteen months) from the date of delivery of the goods to the Buyer, and (*e.g.*, twelve months) from the date of each sale by the Buyer to a consumer purchaser.

Where the buyer is purchasing goods that require installation, the buyer should amend the warranty clause to ensure that the warranty period does not commence until the

goods have been accepted following installation. The clause below contemplates the issuance of an acceptance certificate for the purposes of determining the commencement of the warranty period.

Warranty Period Commencing Following Installation

The warranty period of the goods shall be twelve months after the date of acceptance by the Buyer of the goods following installation. The warranty period shall not be longer than eighteen months after the delivery of the goods if the installation or acceptance of the goods is delayed due to the fault of the Buyer. The Buyer shall issue an acceptance certificate to the Seller for determining the expiration of the warranty period, in two copies.

Often the purchased goods will form a part of a larger undertaking, say, for example, a machine that will be installed in a newly built factory. The goods may be installed long before the factory is operational. The buyer will not want the warranty period to commence until the goods are actually put in use. However, the seller must ensure that the warranty period has a fixed outside start date.

Warranty Period Commencing Following Date on Which Goods First Put into Use

The period during which the Buyer may assert any claim pursuant to applicable warranties shall commence on the earlier of the date on which the goods are first put into use and shall expire (*e.g.*, twenty-four months) from the date of delivery.

From the buyer's perspective, once goods have been discovered to be defective, the warranty clock should cease to run until the defect has been corrected. For the seller, this means that the warranty period could in effect be much longer than, say, the one-year period it initially contemplated.

Warranty Period Prolonged During Period of Nonconformity

During any period of nonconformity of the goods within the warranty period, for which defective goods must be replaced or repaired by the Seller, the warranty period shall be prolonged by the period of time commencing from the date of notice of such nonconformity to the Seller, and ending with the date of delivery by the Seller to the Buyer of replaced or repaired goods.

The CISG will impute a warranty if it is not excluded or modified, and will impose liability for loss of profits or other consequential damages for defective goods unless the agreement specifically negates this. CISG Article 39(2) provides what is essentially a two-year warranty to the buyer from the date the goods are actually given to the buyer.[427] The easiest method of excluding the application of this provision from a CISG-governed agreement is the following clause:

427. CISG, Art. 39:

> (2) In any event, the buyer loses the right to rely on a lack of conformity of the goods if he does not give the seller notice thereof at the latest within a period of two years from the date on which the goods were actually handed over to the buyer, unless this time-limit is inconsistent with a contractual period of guarantee.

Limitation Period for Nonconforming Goods

Unless otherwise agreed in writing, no legal action for lack of conformity can be taken or asserted by the Buyer after (*e.g.*, 150 days) from the date of delivery of the goods. The Buyer expressly agreed that after the expiry of such time, it waives all right to claim nonconformity of the goods, or to assert a counter-claim thereon, in defence to any action taken by the Seller against the Buyer for non-performance of this Agreement.

Some warranties should not expire with time. The buyer must consider which warranties can expire with time, and which warranties should never expire. For example, a warranty regarding title to the goods should not expire.

Survival of Warranties

All warranties, expressed and/or implied, shall survive inspection, delivery, acceptance and payment, and the expiration or earlier termination of this Agreement.

IV TYPE OF NOTICE REQUIRED TO FILE A VALID WARRANTY CLAIM

In order to make a valid warranty claim, the buyer should be required to notify the seller promptly of any defect. There are many reasons for this prompt notice – one being that the seller can have the earliest opportunity to investigate, stop production if need be, and prepare itself for complying with its warranty obligations. A basic notice clause follows:

Notice of Defect to Be Given to Seller

The obligations set forth in this clause are conditional upon the Buyer promptly notifying the Seller of any defect and, if required, promptly making the goods available for correction. The Seller shall be given reasonable opportunity to investigate all claims and no goods shall be returned to the Seller until after inspection and approval by the Seller and receipt by the Buyer of written shipping instructions from the Seller.

The seller may wish to include details of the mechanism for processing any warranty claims. Most manufacturers have systems of issuing return authorization numbers so that returned goods can be located within their warehouses.[428]

Seller to Give Return Merchandise Authorization

Upon receiving notice of any warranty claim, the Seller shall provide the Buyer with a return merchandise authorization number and shipping instructions to the Buyer. Goods will not be accepted for return by the Seller from the Buyer without such number and instructions.

428. Note that under some state consumer laws, such as those in California, a manufacturer has to pay all reasonable shipping costs to transport goods from the buyer to its service and repair facility if the buyer cannot return them for size and weight, method of attachment, method of installation, or because of nature of the nonconformity. In addition, the manufacturer always has to pay reasonable shipping costs back to the buyer from the service and repair facility after service and repair.

If the CISG applies, Article 39(1) requires the buyer to inform the seller of nonconformity by giving notice to the seller specifying the nature of the lack of conformity, within a 'reasonable time' after he has discovered it or ought to have discovered it. The following clause (also found in Chapter 12 – Inspections) is the seller's solution for avoiding the undefined aspect of the phrase 'reasonable time'.[429]

Inspection upon Delivery – Limited Notice Period, No Right to Price Reduction

In the event that the Buyer does not give notice specifying the nature of the lack of conformity, if any, to the Seller within five (5) days following delivery of the goods by the Seller, the parties agree that the Buyer loses the right to rely on a lack of conformity of the goods and shall not be entitled to any reduction of the price or other damages, notwithstanding the *United Nations Convention on Contracts for the International Sale of Goods*, if applicable.

Notwithstanding the above clause, the seller should be aware that such exclusionary language still may not be sufficient to avoid further obligations. In one CISG case, an Austrian court held that even though a sales contract with a German buyer contained a provision derogating from Articles 38 and 39 of the CISG, the actions of the seller were sufficient to estop the seller from being able to rely on the defence of failure to give timely notice.[430]

429. In a recent English case, the notice clause required the buyer to notify the seller of a claim 'as soon a reasonably practicable and in any event within 20 Business Days after becoming aware of the matter'. The Court of Appeal held that this language was ambiguous as it could have three meanings, either that the buyer:

    (a) was aware of the facts giving rise to the Claim (even if unaware that those facts did give rise to a claim); or
    (b) was aware that there might be a claim under the warranties; or,
    (c) was aware of the Claim, in the sense of an awareness that there was a proper basis for the Claim.

    The Court adopted the narrowest interpretation (in part, using the rule of *contra preferentum*), namely (c) above. *Nobahar-Cookson & Ors v. The Hut Group Ltd*, Court of Appeal – Civil Division, March 22, 2016, [2016] EWCA Civ 128.

430. *See* unpublished case of the *Internationales Schiedsgericht der Bundeskammer der gewerblichen Wirtschaft – Parties Unknown*, 15 Jun. 1994, Wien; SCH-4318, reported on in English: 1995, UNILEX, D.94-11 (Transnational Juris Publications, Inc.); Case No. 94, Case Law on UNCITRAL Texts (CLOUT), United Nations, case presentation and English translation http://cisgw3.law.pace.edu/cases/940615a4.html. The parties had included in their agreement for the sale of rolled steel a specific derogation of CISG, Arts 38 and 39. The contract provided instead that the German buyer had to notify the Austrian seller of any nonconformity immediately after delivery of the goods (or at the latest within two months of delivery). The goods were to be delivered in instalments 'FOB Rostock', packaged for export. Upon receipt of the first two deliveries, the buyer sold the goods to a Belgian company which shipped them to a Portuguese manufacturer. The manufacturer found that the goods were defective and refused to accept the balance. The German buyer's notice of nonconformity (along with an expert's report) was sent six months after delivery. In applying the CISG, the arbitrator found that although the buyer had not complied with the requirements of the agreement with respect to notice of nonconformity, the seller was estopped from raising that defence, since the seller had behaved in such a way that the buyer was led to believe that the seller would not raise the defence (e.g., after receiving the notice the seller had continued to ask the buyer to provide information on the status of the complaints and had pursued negotiations with a view to reach a settlement). The arbitrator held that, while estoppel was not expressly settled by CISG, it formed a general principle underlying CISG.

V IDENTIFICATION OF THE AGREED UPON REMEDIES FOR A VALID WARRANTY CLAIM

When defective goods are delivered to the buyer, or when the goods subsequently are discovered to be defective, the buyer will be anxious to have a number of remedies, including the right to reject the goods and not to pay for them, the right to require the seller to deliver conforming goods immediately, and the right to sue the seller for damages arising out of the failure of the seller to deliver as required by the agreement. When looking at damages, the buyer wishes to obtain damages for its reliance, loss of profit, and consequential damages. The seller, however, is anxious to avoid all of these remedies, save for the right to replace or repair the goods, preferably without incurring any transportation costs. A typical seller's minimum obligation is as follows:

Limitation of Seller's Warranty Obligation

The Seller's obligations under said warranty shall be limited to repairing[431] or replacing any nonconforming goods (at the Seller's option) EXW Seller's plant, (*e.g.*, New York, New York, USA).

The following clause is a modification of the above provision, which may be slightly more palatable to the buyer. In this clause, the seller agrees to a time limit for such repair or replacement. Note, however, that the seller is permitted to issue a credit note for the value of the goods. The buyer should insist upon cash payment. In situations where much of the merchandise turns out to be defective, the buyer does not want to be forced to take a credit note, in effect, agreeing to buy more merchandise from the seller.

Seller to Repair or Replace within Period of Time

Upon return of the goods, the Seller shall, at the Seller's option, either replace or repair the goods. The Seller shall replace or attempt to repair and return any such goods within (*e.g.*, three weeks) of receipt from the Buyer, or shall issue the Buyer a credit note for the value of the rejected goods. Subject to any such credit note having been issued, nothing contained herein shall relieve the Buyer from any payment obligations.

Depending upon the nature of the goods, the seller may wish to give itself an additional option – the right to grant a reasonable allowance to the buyer on account of the nonconformity. This option may be advantageous to the seller where it would be inconvenient for it to either repair or replace the goods. The following clause includes this option:

Seller to Repair, Replace, or Grant Allowance

The Seller's obligations under said warranty shall be limited to repairing or replacing the goods (at the Seller's option), EXW Seller's plant, (*e.g.*, New York, New York, USA), or, at the Seller's option, granting a reasonable allowance on account of the nonconformity.

431. The buyer may wish to require the seller to provide technical support for the goods as well. If so, the nature of the technical support e.g., telephone support from 9 am-5 pm EST, should be stated.

The converse clause for the buyer would be a contractual right to return the goods for a refund if they are not acceptable, or alternatively, at the buyer's discretion, to choose to accept repaired or replacement goods. Note that if the CISG is applicable, the buyer would be required to return the goods to rely on such a provision.[432]

Buyer's Right to Reject and Receive Full Refund

The Buyer shall have the right to reject any goods which are defective in accordance with this Agreement, for, at the Buyer's sole option, full refund (upon return of the goods) or repair or replacement[433] by the Seller within three weeks of notice to the Seller.[434] The Seller shall pay all costs associated with the delivery of the goods from the Buyer to the Seller and any return to the Buyer.

Where the buyer is able to secure a right to a refund of its monies, it may wish to specify that it is entitled to interest on such monies. If the CISG is applicable, the seller will have an obligation to pay interest on the purchase price. The buyer will have a corresponding obligation to account for the benefit it obtained during the period it had

432. CISG, Art. 82:

> (1) 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 substantially in the condition in which he received them.

433. Note CISG, Art. 46:

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

434. Note that under the CISG, the buyer loses the right to avoid the contract if it cannot return the goods substantially in the condition in which he received them. *See* CISG, Art. 82:

> (1) 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 substantially in the condition in which he received them.
> (2) The preceding paragraph does not apply:
> (a) if the impossibility of making restitution of the goods or of making restitution of the goods substantially in the condition in which the buyer received them is not due to his act or omission;
> (b) if the goods or part of the goods have perished or deteriorated as a result of the examination provided for in Art. 38; or
> (c) if the goods or part of the goods have been sold in the normal course of business or have been consumed or transformed by the buyer in the course normal use before he discovered or ought to have discovered the lack of conformity.

the goods.[435] Note, however, that the buyer may wish to specifically state the date from when interest accrues. Although CISG Article 84 provides that interest is due from the date on which the price was paid, at least one CISG case has ignored this provision and applied interest from the date of notice of avoidance only.[436]

Interest to Be Paid on Refund

In the event the Seller is required to refund the Buyer's purchase price in accordance with this Agreement, such refund shall include interest at the rate of (*e.g.*, 10% per year) from the date the purchase price was received by the Seller from the Buyer.

If the buyer has the right to reject and return the goods, the agreement should contemplate the buyer's obligation to preserve the goods for return to the seller. Under the CISG, the buyer is entitled to its expenses for preserving the goods, and is entitled to retain them until it has been reimbursed.[437] Note also that in the event that the buyer (or the seller) is required to preserve the goods, the CISG permits it to deliver the goods to a warehouse,[438] and if the other party does not take possession quickly, the goods

435. CISG, Art. 84.

436. *See Foliopack Ag v. Daniplast S.p.A.*, Italy 24 Nov. 1989 Court of First Instance Parma, case presentation and English translation http://cisgw3.law.pace.edu/cases/891124i3.html. A Swiss buyer ordered goods from an Italian seller to be delivered within the following ten to fifteen days. The seller waited almost two months before asking the buyer to confirm its order and stating the purchase price. Dispatch of the goods was promised within one week. After waiting a further two months, the buyer cancelled the order and requested a refund, at which point, the seller, realizing the effect of its delay, dispatched the goods. The delivery, which was partial, was not accepted by the buyer, who claimed avoidance of the contract for breach by the seller. The buyer was successful in obtaining a refund together with interest. However, the court held that interest was payable from the date of avoidance of the contract, contrary to CISG, Art. 84(1).

437. CISG, Art. 86:

> (1) If the buyer has received the goods and intends to exercise any right under the contract or this Convention to reject them, he must take such steps to preserve them as are reasonable in the circumstances. He is entitled to retain them until he has been reimbursed his reasonable expenses by the seller.
> (2) If goods dispatched to the buyer have been placed at his disposal at their destination and he exercises the right to reject them, he must take possession of them on behalf of the seller, provided that this can be done without payment of the price and without unreasonable inconvenience or unreasonable expense. This provision does not apply if the seller or a person authorized to take charge of the goods on his behalf is present at the destination. If the buyer takes possession of the goods under this paragraph, his rights and obligations are governed by the preceding paragraph.

438. CISG, Art. 87:

> A party who is bound to take steps to preserve the goods may deposit them in a warehouse of a third person at the expense of the other party provided that the expense incurred is not unreasonable.
>
> For example, in one CISG case, a Swiss buyer requested a temporary order requiring a German seller to place in a warehouse a key piece of equipment to operate goods delivered but not yet paid for. The seller argued that pursuant to CISG, Art. 87, the buyer should pay the costs of such warehousing. Although the Swiss court held that the CISG was indeed applicable, it held that as its order was in accordance with

may be sold.[439] It would be unwise to rely on this provision, however, without specifying this right in the agreement. The following clause imposes an obligation to preserve the rejected goods upon the buyer, but permits the buyer to be paid for its trouble.

Buyer to Preserve Rejected Goods for Seller's Account

In the event that the Buyer is lawfully entitled to reject any goods which are defective in accordance with this Agreement, the Buyer shall have the obligation of preserving the goods for the Seller's account, and shall be entitled to receive its reasonable expenses for so doing, from the Seller, prior to delivering the goods to the Seller (which obligation shall be EXW Buyer's plant).

As a compromise, the seller may agree to modify the rejection clause to prohibit the buyer from rejecting goods which it already has previously accepted. In essence, this estops the buyer from raising nonconformance with earlier shipments, as set out in the clause below:

Right to Reject Goods Limited if Previous Shipments Accepted

The Buyer shall have the right to reject any goods which are defective in accordance with this Agreement, provided however, that the goods are materially different or defective from goods previously supplied by the Seller and accepted and paid for by the Buyer. If the goods are not materially different or defective from goods previously supplied by the Seller and accepted and paid for by the Buyer, the Seller's obligations under said warranty shall be limited to repairing or replacing (at Seller's option) EXW Seller's plant, (*e.g.*, New York, New York, USA).

cantonal rules of procedure, it was not bound by CISG on the matter of the expenses of the deposit, since that was a procedural matter and the Convention applied only to substantive law matters. *See* unpublished Cantonal Court of Vaud, *Parties Unknown*, 17 May 1994, 01 93 1308 (Switzerland), Original in French, summarized in German: *Schweizerische Zeitschrift f'r internationales und europäisches Recht* 2/1995; CLOUT Case No. 96, case presentation and English translation http://cisgw3.law.pace.edu/cases/940517s1.html.

439. CISG, Art. 88:

> (1) A party who is bound to preserve the goods in accordance with Art. 85 or 86 may sell them by any appropriate means if there has been an unreasonable delay by the other party in taking possession of the goods or in taking them back or in paying the price or the cost of preservation, provided that reasonable notice of the intention to sell has been given to the other party.
> (2) If the goods are subject to rapid deterioration or their preservation would involve unreasonable expense, a party who is bound to preserve the goods in accordance with Art. 85 or 86 must take reasonable measures to sell them. To the extent possible he must give notice to the other party of his intention to sell.
> (3) A party selling the goods has the right to retain out of the proceeds of sale an amount equal to the reasonable expenses of preserving the goods and of selling them. He must account to the other party for the balance.