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The Proposed Regulation on a  
Common European Sales Law  
(CESL) as an Alternative to the  
Convention on the International Sale  
of Goods (CISG) in Transnational  
Business-to-Business Transactions?

Master thesis  
15 credits

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Master's Programme in European Business Law

2012

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# Summary

The Commission has put forth a proposal for a Regulation on a Common European Law of Sales (CESL). It is envisaged – as of now – as an optional second regime within each member state’s law, electable for transnational consumer contracts and contracts among traders, as long as one of them is a small or medium-sized enterprise. The intention is to provide contractors with a level playground of one legal order (to reduce transaction costs) and to cover (almost) all aspects, which may arise in transnational sales of goods, digital content or related services. In this regard, it is a direct competitor to the United Nations Convention on Contracts for the International Sale of Goods (CISG). This paper researches the opt-in into the CESL and analyses its provision with the exception of those covering consumer matters. They are directly compared to their counterparts in the CISG, provided that such provisions exist. The paper aims to clarify which rules are more apt for business transactions and to provide entrepreneurs with an overview what different outcomes they might expect when opting into the CESL instead of (not opting out of) the CISG. The conclusion is that the CESL in its current form does not meet the requirements of businesses, mainly for two reasons. Like the CISG, it does not cover every aspect of contract law and leaves vital matters to the applicable national law. Moreover, many of its terms and principles remain uncertain and broad, its focus on fairness and protecting “the weaker” party are unfit for businesses, especially with regard to the unpredictability of liabilities. The CESL would need either a substantial amount of adaptation by the contract parties as far as its rules are not mandatory, a considerable quantity of clarifying case law or an in-depth revision by the legislator – it therefore does not constitute an advantage to the CISG in its current form, rather the opposite.

*Für Sabrina*

# Abbreviations

Art	article
Artt	articles
B2B	Business to Business
B2C	Business to Consumers
CESL	Common European Sales Law
cf.	confer
CFR	Common Frame of Reference
CISG	Convention on Contracts for the International Sale of Goods
CJEU	Court of Justice of the European Union
DCFR	Draft Common Frame of Reference
ECB	European Central Bank
e.g.	exemplum generale
et seq.	et sequens
et seqq.	et sequentia
EU	European Union
EUR	Euro
FN	footnote(s)
i.a.	inter alia
ibid	ibidem
i.e.	id est
IP	intellectual property
MS	Member State(s) of the European Union
p.	page
pp.	pages
para	paragraph(s)
PIL	Private International Law
SIN	Standard Information Notice
SME	Small and Medium Sized Enterprises
TFEU	Treaty on the Functioning of the European Union
UK	United Kingdom

# 1 Introduction

## 1.1 Background

The proposal for a Regulation on a Common European Law of Sales<sup>1</sup> was the last step in a long row of efforts aiming at a – at least partial – unification of the civil law of the European Union’s member states. It had been preceded by a Commission’s Green Paper<sup>2</sup>, which discussed several options for the introduction of a European contract law for B2C and B2B transactions. Extensive works of various expert groups, lasting for several decades and resulting i.a. in the CFR and the DCFR, had in turn preceded this.<sup>3</sup>

The intended benefit as regards B2B contracts are a simplification for transnational transactions of SME (and possibly also for other undertakings and national contracts), by introducing an optional regime, which does away with the 27 national regimes.<sup>4</sup> Theoretically, this will save time and resources for this kind of undertakings by allowing them to gain in-depth expertise with one legal order instead of sparse knowledge of an abundance of national ones.

Furthermore, it is supposed to constitute an advantage over the CISG<sup>5</sup>, because it covers a wider range of contracts in greater depth and does not rely on national law for matters like contract validity.<sup>6</sup> Its aim is to be a “neutral” law<sup>7</sup>.

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<sup>1</sup> Proposal for a Regulation on a Common European Sales Law, 11.10.2011, Com (2011) 635 final, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2011:0635:FIN:EN:PDF>, online on 09.05.2012.

<sup>2</sup> Green Paper on policy options for progress towards a European Contract Law for consumers and businesses, 01.06.2010, Com (2010) 348 final, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2010:0348:FIN:en:PDF>, online on 09.05.2012.

<sup>3</sup> For a short overview over the development from the establishment of the Lando Commission until the Proposal cf. The Law Commission and The Scottish Law Commission, An Optional Common European Sales Law: Advantages and Problems - Advice to the UK Government, 10.11.2011, para 1.11 et seq. (Henceforth “The Report”), [http://lawcommission.justice.gov.uk/docs/Common\\_European\\_Sales\\_Law\\_Advice.pdf](http://lawcommission.justice.gov.uk/docs/Common_European_Sales_Law_Advice.pdf), online on 23.04.2012.

<sup>4</sup> Proposal for a Regulation, 11 and recital 7; The Report, para 1.5.

<sup>5</sup> United Nations Convention on Contracts for the International Sale of Goods, UNTS vol. 1489, p. 3.

<sup>6</sup> Proposal for a Regulation, p 5.

<sup>7</sup> Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of Regions on a Common European Sales Law to Facilitate Cross-Border Transactions in the Single Market, 11.10.2011, COM(2011) 636 final, <http://eur->

## 1.2 Research Problems

It is not the aim of this paper to argue either for or against the creation of such a body of law, or to assess it as a whole. It rather intends to give guidance on the main differences arising out of an opt-in into the proposed new regime and the opt-out of the standard regime on the formation of transnational contracts for most MS<sup>8</sup>, the CISG. Precondition hereto is of course the passing of the Regulation as proposed. It shall be ascertained, where the main differences in the nature of both regimes lie, where their provisions confer and where they deviate and which provisions are more apt for business transactions and ensure desirable legal effects.

This assessment will be preceded by a short analysis as to how the opt-in system works and what pitfalls might exist for traders, since any evaluation of the CESL is dependent on a valid opt-in and a possible choice of the applicable law for matters ungoverned.

## 1.3 Method and Materials

The research of this paper is carried out in the way of traditional legal research. The two regimes are compared both in general and in detail, their provisions will be analysed and assessed. Research is based on the legal texts, scholarly writing both in books and commentaries as in articles; moreover different opinions and reports on the CESL from various sources will be utilized.

## 1.4 Delimitation

Apart from the fact that no judgment on the general merits of the introduction of a CESL shall be passed (or on the problems in connection with the opt-in system), one big issue is omitted from review. Due to the non-applicability of the CISG on consumer contracts, the provisions of the CESL relating exclusively to such contracts will not be dealt with in this paper. Besides, since this paper intends to give an overview over both regimes, the coverage of certain problem areas must naturally be of lesser depth.

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lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2011:0636:FIN:en:PDF, online on 28.04.2012, p. 9.

<sup>8</sup> Exceptions: UK, Republic of Ireland, Portugal and Malta.

## 1.5 Disposition

This paper will start out with observances concerning the opt-in and opt-out into the CESL and out of the CISG respectively in Chapter 2. Chapter 3 is concerned with the general differences and ambits of both legal frameworks and intends to present their differing character. Chapters 4 to 10 compare the material provisions both of the CESL and the CISG with regard to their main differences and the consequences for B2B contracts connected therewith:

- Chapter 4 discusses the general contract principles underpinning both legal regimes.
- Chapter 5 assesses the formation of a legally binding contract.
- Chapter 6 deals with the interpretation of contractual terms and of the provisions of the substantial law itself.
- Chapter 7 covers the parties' basic rights and obligations flowing from a contract and the remedies connected therewith.
- Chapter 8 describes the issues in connection with contracts on related services.
- Chapter 9 elaborates on issues of damages and interest.
- Chapter 10 illustrates further issues such as restitution and prescription.

Each chapter is concluded with a small summary of the main findings.

Chapter 11 is to conclude the research and present the results concerning the substantive divergences between CESL and CISG.

# 2 Opt-In and Opt-Out

## 2.1 Legal Framework

### 2.1.1 The proposed Regulation

The Proposal starts out with a so-called “explanatory memorandum” reflecting on the reasons for the proposal with regard to existing regulations, the history of the project, its legal basis and so forth. The memorandum<sup>9</sup> is followed by the actual regulation, composed of 37 recitals and 16 articles. A subsequent Annex I contains the 186 material articles of the CESL and two annexes – the “model instructions on withdrawal” and “model withdrawal form”. The short “standard information notice” on the most important effects of choosing the CESL as the law governing the contract (Annex II) completes the Proposal.

After the programmatic Art 1 and Art 2 (definitions), Art 3 of the proposed Regulation allows for an opt-in into the rules of the CESL for cross border contracts (Art 4) dealing with the sale of goods or digital contracts or services respectively (Art 5). Article 6 excludes mixed-purpose contracts and consumer credits from the scope of the CESL. Art 7 restricts the application to contracts between a trader and a consumer (B2C) and to contracts between traders, one of whom is a SME.

MS are free to remove the requirements of a transnational nature of the contract and an SME partner in B2B contracts respectively according to Art 13.

Article 8 clarifies that the use of the CESL requires an agreement of the parties – there is no automatic applicability. Para 3 explains that for B2C contracts the CESL can only be chosen as a whole and not in parts – *e contrario* a partial application of the CESL on contracts otherwise regulated by a different regime is possible among traders.<sup>10</sup>

Art 11 defines the consequences of the choice of the CESL thusly:

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<sup>9</sup> However, the memorandum only deals in general terms with the CESL and does not give explanations as to the meaning of the individual articles. This has led to criticism, c.f. only report of the Austrian Chamber of Commerce of 26.03.2012, [http://portal.wko.at/wk/format\\_detail.wk?angid=1&stid=669618&dstid=16&titel=Gemeinsames%20Europ%C3%A4isches%20Kaufrecht%20\(CESL\)](http://portal.wko.at/wk/format_detail.wk?angid=1&stid=669618&dstid=16&titel=Gemeinsames%20Europ%C3%A4isches%20Kaufrecht%20(CESL)), online on 23.04.2012, p. 2.

<sup>10</sup> E.g. to complete the rules the CISG, which lack provisions on fraud, with the relevant CESL articles.

*“Where the parties have validly agreed to use the Common European Sales Law for a contract, only the Common European Sales Law shall govern the matters addressed in its rules. Provided that the contract was actually concluded, the Common European Sales Law shall also govern the compliance with and remedies for failure to comply with the pre-contractual information duties.”*

The relationship between the CESL and the CISG is touched upon by the Proposal merely in its recital 25, where it states:

*“Where the United Nations Convention on Contracts for the International Sale of Goods would otherwise apply to the contract in question, the choice of the Common European Sales Law should imply an agreement of the contractual parties to exclude that Convention.”*

Thus, when reading Art 11 in conjunction with recital 25, it is clear that from the viewpoint of the Union legislator the (explicit<sup>11</sup>) choice of the CESL is sufficient to disapply the CISG.

## **2.1.2 The CISG<sup>12</sup>**

Unlike the CESL, the CISG is constructed as a default regime<sup>13</sup> applying automatically under certain conditions unless opted-out of. It governs a contract for the sale of goods if the parties (knowingly) have places of business in two different states, which are signatory states; or if PIL rules lead to the application of the law of such a state<sup>14</sup> (Art 1).

However, according to its Art 6, the parties are free to exclude the CISG’s application to their contract – wholly or partially – and to alter its provisions. The only exception<sup>15</sup> hereto is that the parties – should they not opt-out of the CISG - are unable to derogate from Art 12, which stipulates a writing requirement should one party reside in a contracting state which has made an Art 96 declaration.

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<sup>11</sup> For B2C contracts, cf. Art 8 para 2 of the Regulation.

<sup>12</sup> In place of many: *P. Schlechtriem & I. Schwenzler*, Kommentar zum Einheitlichen UN-Kaufrecht– Das Übereinkommen der Vereinten Nationen über den Internationalen Warenkauf – CISG<sup>4</sup> (2004).

<sup>13</sup> Cf. e.g. *J. Lookofsky*, Understanding the CISG<sup>3</sup> - A Compact Guide to the 1980 United Nations Convention on Contracts for the International Sale of Goods (2008), § 1.1.

<sup>14</sup> Unless that state has declared not to be bound by Art 1 (b), for the EU this concerns the Czech Republic and Slovakia.

<sup>15</sup> Also, provisions addressed to the contracting states and not to the parties of the agreement are unalterable, cf. *P. Schlechtriem & I. Schwenzler*, Kommentar zum Einheitlichen UN-Kaufrecht, Art 6 para 9.

Yet, the mere usage of phrases like “the contract is governed by German law” does not suffice to prevent the CISG from being applicable, since according to German law the CISG is applicable.<sup>1617</sup>

## 2.2 The Legal Nature of the CESL

Whereas the 2010 Green Paper favoured a separate legal system from the national legal orders (the so-called “28<sup>th</sup> regime”), the approach under the Proposal is somewhat different. Recital 9 reads as follows:

*“This Regulation establishes a Common European Sales Law. It harmonises the contract laws of the Member States not by requiring amendments to the pre-existing national contract law, but by creating within each Member State's national law a second contract law regime for contracts within its scope. This second regime should be identical throughout the Union and exist alongside the pre-existing rules of national contract law. The Common European Sales Law should apply on a voluntary basis, upon an express agreement of the parties, to a cross-border contract.”*

The opt-in into the CESL thus does not constitute a choice of law in the sense of the Rome I Regulation<sup>18</sup>.<sup>19</sup> Rather, in contracts between two parties located in two different MS, PIL rules lead to the applicability of the law of a MS – and subsequently the parties agree on the usage of the CESL regime within the specific national law.<sup>20</sup> We thus deal not with a 28<sup>th</sup> regime, but with a second national regime.<sup>21</sup>

How this is effected exactly and what the precise legal nature of the CESL is, remains somewhat dubious.<sup>22</sup> We deal with a body of law created at Union level via regulation, which is supposed to constitute national law. This does not fit well with the traditional view of regulations being directly

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<sup>16</sup> *ibid*, Art 1 para 72.

<sup>17</sup> N. Kornet, The Common European Sales Law and the CISG – Complicating or Simplifying the Legal Environment?, Maastricht Journal of European and Comparative Law, Working Paper 2012/04, p. 7.

<sup>18</sup> Regulation (EC) No 593/2008 of the European Parliament and the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I), OJ L 177, pp. 6.

<sup>19</sup> M. Hesslink, How to opt into the Common European Sales Law? Brief Comments on the Commission's Proposal for a Regulation, European Review of Private Law, Vol. 1, pp. 195-212, 2012, 2.

<sup>20</sup> Critically (and complete with a beer-reference), K. Riesenhuber, Information über die Verwendung des Gemeinsamen Europäischen Kaufrechts – Gedanken zum Harmonisierungskonzept, <http://ssrn.com/abstract=1998144>, online on 19.04.2012, p1.

<sup>21</sup> H. Eidenmüller, N. Jansen, E.-M. Kieninger, G. Wagner & R. Zimmermann, Der Vorschlag für eine Verordnung über ein Gemeinsames Europäisches Kaufrecht - Defizite der neuesten Textstufe des europäischen Vertragsrechts, JZ 6/2012, pp. 269–289, p. 270.

<sup>22</sup> M. Hesslink, How to opt into the Common European Sales Law?, p. 6.

applicable (Art 288 TFEU) as European law and directives as “guidelines” for the national legislators. Ultimately, it will probably be a matter for national constitutions to deal with this transfer *sui generis*.<sup>23</sup>

The choice for this option is – with all likelihood – the wish of the Commission to use Art 114 TFEU as treaty basis. No new law is to be created, but the law of the MS is to be harmonized, in the “department European sales contracts”.<sup>24</sup>

## 2.3 The Choice of Law

Seen in conjunction with the fact, that the CISG constitutes the default regime for the overwhelming majority of MS, it is important for traders to be specific as to their choice between CESL and CISG. As *Hesslink* points out:

*“[T]he claim, contained in the recital of the proposed regulation, that the choice of the CESL ‘should imply’ an agreement of the contractual parties to exclude the [Vienna] Convention, seems ultra vires. What amounts to an agreement of the contractual parties to exclude the Convention cannot be determined by a European regulation, but is determined – on a case to case basis – by the Convention itself, in particular its Art 8.”*<sup>25</sup>

The mere mentioning of the CESL therefore does not automatically constitute an opt-out from the CISG.<sup>26</sup>

Of course, also an implied opt-out of the CISG is deemed possible; if the parties are to use a formulation like “this contract shall be exclusively governed by the CESL”, little problems to deduct a CISG-opt-out should arise. However, a partial opt-in into the CESL, e.g. into its provisions on contract validity might not make sufficiently clear whether the CISG shall be applicable too or not. Parties are therefore best advised to be explicit about this matter and pay heed to the possibility of overlaps or gaps due to the differing structures of CISG and CESL.<sup>27</sup> Especially for SME, it would seem wiser to remain within one regime on order to save time and money for legal advice on the difficult question, which may arise from an overlaps.

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<sup>23</sup> *Ibid*, p. 9.

<sup>24</sup> H. Eidenmüller, N. Jansen, E.-M. Kieninger, G. Wagner & R. Zimmermann, Der Vorschlag für eine Verordnung über ein Gemeinsames Europäisches Kaufrecht, p. 274.

<sup>25</sup> M. Hesslink, How to opt into the Common European Sales Law?, p. 4.

<sup>26</sup> N. Kornet, The Common European Sales Law and the CISG, p. 7.

<sup>27</sup> *ibid*, p. 8.

What should be kept in mind as well is the fact that a trader can not only impliedly opt-out of the CISG, but also the CESL may find (partial) application without explicit consent in B2B contracts. The parties' statements and conducts (Art 30 para 3 CESL) are used to determine their intention, which in turn is used to interpret the contract; even against the explicit wording of said contract (Art 58). Finally, also an inclusion via standard terms is possible (*e contrario* from Art 8 of the Regulation).<sup>28</sup>

There are no explicit provisions within the CESL as to when parties may decide to have their contract governed by it – and little is to be said against allowing and opt-in after the conclusion of the contract or even during litigation for traders.<sup>29</sup>

In the material provisions of the CESL, Art 70 is furthermore of importance: it states that not individually negotiated terms (i.e. e.g. standard terms) are only binding on the other party if they took at least reasonable efforts to make the other party aware of them. This means that even B2B “reasonable efforts” have to be made if a choice for the CESL is contained in standard terms.<sup>30</sup> For evidence reasons, this might call for the usage of a form to be signed and returned by the other party or a highlighted passage in the contract in order to be on the safe side.

## 2.4 The Role of the Relevant National Law

Even after choosing the CESL as the regime governing the contract, choice-of-law matters can still be relevant. The CESL may cover a considerably wider field of issues than the CISG, yet there are more than enough questions left for national law in case of more complicated conflicts.<sup>31</sup>

Among these are topics such as incapacity, immorality, non-discrimination and IP.<sup>32</sup> Furthermore, one has to differentiate between the contract per se and the agreement to use the CESL.<sup>33</sup> The formal requirements for the opt-in-agreement (i.a. offer, acceptance and the like) are contained within the Art 30-39 CESL, the substantial factors by the applicable national law (and with the CESL being part thereof, by the CESL as far as it covers them).

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<sup>28</sup> *ibid*, pp. 8 et seq.

<sup>29</sup> *ibid*, p. 9.

<sup>30</sup> Cf. i.a. *H.W. Micklitz & N. Reich*, The Commission Proposal for a “Regulation on a Common European Sales Law (CESL)” – Too Broad or not Broad Enough?, EUI Working Papers LAW No. 2012/04, p. 29.

<sup>31</sup> *N. Kornet*, The Common European Sales Law and the CISG, p. 12.

<sup>32</sup> Cf. The Proposal p. 6, recital 27.

<sup>33</sup> *C. Harvey & M. Schillig*, Conclusion of Contract under the Draft Common European Sales Law, [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2028885](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2028885), online on 13.04.2012, p. 2.

The contract itself is then governed by the CESL (as far as its issues are covered in the CESL, unless the parties choose only partial applicability). Thus at both levels, CESL and applicable national law interact.<sup>34</sup>

It might be advisable for parties to pay heed to possible points of dispute unregulated by the CESL and decide on a specific national law to govern these. Of course, this might counteract one of the aims of the CESL, namely to relieve smaller entrepreneurs from the time and resource consuming negotiations regarding choice of law – it is ultimately the trader’s choice how risk-averse he is.

## 2.5 The Law Applicable on the Opt-In

As mentioned above, the agreement to make the CESL applicable is not a choice of law since it does not constitute a legal order distinct from national orders, but is an integrated part of all MS legal orders. The law chosen by the parties – and, in absence of a choice, the provisions of Rome I – govern the agreement to opt-in.<sup>35</sup>

With great likelihood, Art 4 (1) a or 4 (2) will apply, so that the applicable law in that case would be that of the seller or the provider of digital content (i.e. the provider of the characteristic performance).

In case this is the law of a MS, the Art of the Proposal are applicable, namely Art 8 and 9 (setting criteria such as the SIN for B2C contracts). They also point to “the relevant provisions of the Common European Sales Law”. Therefore, as *Harvey* and *Schillig* point out convincingly, Art 30-39 of the CESL apply on the agreement; matters not covered in the CESL are to be resolved by the national law.<sup>36</sup>

## 2.6 Invalid Opt-In

If – for any reason – in a B2B contract, the opt-in was not valid, the question remains if the then concluded contract remains valid. If an opt-in failed, then the applicable national law governs the contractual agreement.<sup>37</sup> This might then include the CISG. It depends on the will of the parties – assessed under national law – to decide whether they still wished for the

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<sup>34</sup> *ibid*, p. 3.

<sup>35</sup> *ibid*, p. 4.

<sup>36</sup> *ibid*, pp. 5 et seq.

<sup>37</sup> *ibid*, p. 61.

conclusion of a contract. If this is the case, it is most probably the parties' intention to apply the rules of the CESL to the contract. This is possible to the extent that national law allows derogation from its provisions; in other words, the mandatory articles of e.g. Finnish law apply, those of the CESL are replacing its optional provisions.<sup>38</sup> That this would make contract assessment extremely difficult and hard to predict goes without saying.

If for either party the conclusion of the contract under the CESL-regime was a *conditio sine qua non* and the criteria of the national law for nullity or avoidance are fulfilled, then the contract is either void or avoidable.

## 2.7 Chapter Conclusion

### **Explicit Choice, Inadvisability of Partial Application**

When making a choice to opt into the CESL, parties should do so explicitly and (if this is desired) explicitly exclude the CISG's application. Partial opt-ins and opt-outs are possible, yet – especially in the light of the uncertainty connected with the CESL – are not advisable. In order to be on the safe side, they should make a choice of law governing the opt-in as well; otherwise, this will be decided by PIL.

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<sup>38</sup> *ibid*, p. 61.

## 3 General Differences

Previous works resulting in the DCFR and the CFR constitute the basis of the CESL. These in turn are nothing less than an academic draft of a common European Civil Code. Of this substantial, rather comprehensive work, the CESL is merely a section; namely the provisions dealing with the sale of goods and digital content, and the provision of related services. However, this is far more than the CISG covers.<sup>39</sup> The Vienna Convention deals only with the formation of the contract and the rights, obligations and remedies resulting thereof; it is much less detailed than the CESL and contains but one mandatory provision.<sup>40</sup>

### 3.1 Different Scope of Application

The CESL's scope – even though also not covering the breadth of issues which may arise in contractual relationships – is broader<sup>41</sup>. A substantial part of its articles deals with consumer issues and tries to establish a high standard of protection for them. It is those norms, which are usually mandatory and not to be altered by the parties. For B2B, a good part of the rules can be changed according to the parties, however, still the default setting tends to value “fairness” over “predictability”<sup>42</sup>, more than the CISG does.<sup>43</sup> The CESL therefore leans in general too much in the direction of the buyer, granting rights and remedies too far reaching in scope and time to satisfy many trading contracts.<sup>44</sup>

On the other hand, the application of the CESL is limited to B2B transactions with at least one SME (unless MS make use of their options to allow also the usage between larger enterprises) and may not be applied on mixed contracts. Parties might find it hard to conduct research whether their partner is an SME or not and whether this specific contract may be unfit for CESL-application.<sup>45</sup> For this reason, many a voice has been raised against this distinction.<sup>46</sup>

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<sup>39</sup> Cf. e.g. *C.Schmitthoff*, *Export Trade: The Law and Practice of International Trade*<sup>11</sup> (2007), para 32-026 et seqq.

<sup>40</sup> That contracts be concluded in writing under certain circumstances, cf. FN 15.

<sup>41</sup> The Report, para 7.15.

<sup>42</sup> *ibid*, para 7.4.

<sup>43</sup> *ibid*, para 7.16.

<sup>44</sup> *N. Kornet*, *The Common European Sales Law and the CISG*, p. 15.

<sup>45</sup> The Report, para 6.34 et seqq.

<sup>46</sup> In place of many, *H. Eidenmüller, N. Jansen, E.-M. Kieninger, G. Wagner & R. Zimmermann*, *Der Vorschlag für eine Verordnung über ein Gemeinsames Europäisches Kaufrecht*, p. 275.

The CISG is not to be applied to contracts mentioned in Art 2 CISG. This includes goods as ships and electricity, shares and money and of course contracts with consumers (unless the seller neither knew nor ought to have known that fact).<sup>47</sup> To opt into the CESL allows for a purchase of these goods based on a uniform law, not a (merely) national law.

A general advantage of the CESL would be the greater scope of issues dealt with, so that less recourse must be had to national law – making resource-intensive negotiations on a choice of law less needed. On the other hand, negotiated provisions might conflict with mandatory CESL rules or be interpreted in a “fair” way, which leads to undesirable results. Generally, the wide gaps of the CESL seem to thwart its aims to govern the whole life circle of international contracts. It seems that political and time pressure have reduced the project of a European Civil Code to what the CESL is as of now – with great implications on the operability of the remaining provisions – at least for traders.<sup>48</sup>

Apart from the point explicitly named in the Regulation as not being covered, a number of other issues is left unregulated by the CESL, i.a. contractual punishments, defects in consent caused by third parties, reasons for prescription outside the parties influence etc.<sup>49</sup>

Lastly, the UK – among the four most important economies in the EU<sup>50</sup> – has not ratified the CISG and British parties are traditionally wary of applying it,<sup>51</sup> even more so than their continental counterparts, which also do not hold the CISG in high esteem.<sup>52</sup>

The Scandinavian countries<sup>53</sup> have opted not to apply Part II of the CISG on contract formation – thus making the situation in Europe as regards the application of the CISG even more fragmented. However, the Scandinavians have now chosen to revoke their declaration and will thus apply Part II of the CISG. According legislation has been passed at least in Sweden, where

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<sup>47</sup> P. Schlechtriem & I. Schwenzer, *Kommentar zum Einheitlichen UN-Kaufrecht*, Art 2 para 7, 15.

<sup>48</sup> H. Eidenmüller, N. Jansen, E.-M. Kieninger, G. Wagner & R. Zimmermann, *Der Vorschlag für eine Verordnung über ein Gemeinsames Europäisches Kaufrecht*, p. 271.

<sup>49</sup> *ibid*, p. 272.

<sup>50</sup> After Germany, France and before Italy, cf. e.g. <http://wko.at/statistik/eu/europa-wirtschaftsleistung.pdf>, online on 19.04.2012

<sup>51</sup> Regarding the lack of political momentum for the UK to ratify the CISG, cf. S. Moss, *Why the United Kingdom has not Ratified the CISG*, *Journal of Law and Commerce*, 2005, Vol 25; Issu 1/2, pp. 483-488.

<sup>52</sup> The Report, § 7.29.

<sup>53</sup> Denmark, Sweden, Norway and Finland (though not Iceland).

it is dependent on a government declaration. When said countries apply the CISG in full is thus not clear yet.<sup>54</sup>

## 3.2 The Value of “Fairness”

Broadly speaking, the CISG is a (rough) legal frame designed exclusively for B2B transactions. Its rules are fewer than the CESL’s, sometimes more, sometimes less precise, putting considerably greater emphasis on the parties’ own duty to negotiate a comprehensive contract. Even if the UK did not ratify the CISG because it deemed it heavily influenced by continental principles like good faith, it is clear that the CESL originates from a consumer-centred approach<sup>55</sup> and values a “fair” outcome over a predictable one.<sup>56</sup>

According to Art 2 CESL in connection with recital 31, good faith and fair dealing are not only used to interpret the CESL, but also set up a duty for the parties to cooperate in such a manner. Within the CISG, there is no explicit principle of good faith for the parties, yet there has been a development over the years to derive similar obligations for the parties from the CISG principles of reasonableness and estoppel.<sup>57</sup> However, this is still less far reaching than the CESL, as the Scottish and English Law Commissions observe:

*“The important issue, therefore, is whether traders observed good commercial practice in the specific situation. The CESL allows judges discretion to intervene to ensure that good commercial practice is observed.”<sup>58</sup> [...] Under the CISG, this acts only as an interpretive principle. By contrast, under the CESL, breach of the duty gives rise to direct liability.<sup>59</sup>”*

Furthermore, Art 23 calls for the disclosure of all relevant information, which it would be contrary to good faith and fair dealing not to give to the other party. That this duty goes much farther than a mere ban of

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<sup>54</sup> K. Nilsson, Sweden ratifies part II of the United Nations Convention on Contracts for the International Sale of Goods (CISG), [http://www.legal500.com/assets/images/stories/firmdevs/delphi\\_sweden\\_ratifies.pdf](http://www.legal500.com/assets/images/stories/firmdevs/delphi_sweden_ratifies.pdf), online 14.05.2012, p. 2.

<sup>55</sup> Cf. hereto e.g. the different “factsheets” published by the Commission, stating in what ways the CESL is supposed to even exceed each national law’s consumer protection: [http://ec.europa.eu/justice/newsroom/news/20111011\\_en.htm](http://ec.europa.eu/justice/newsroom/news/20111011_en.htm), online on 08.05.2012.

<sup>56</sup> The Report, para 7.53 et seqq; critically e.g. N. Kornet, *The Common European Sales Law and the CISG*, p. 6.

<sup>57</sup> J. Lookofsky, *Understanding the CISG*<sup>3</sup>, § 2.10, with further references.

<sup>58</sup> The Report, para 7.55.

<sup>59</sup> *ibid*, para 7.59.

misrepresentations as under the CISG is self-evident; its observance is guarded by Art 2 para 2 CESL threatening with loss of rights and remedies as with liability.

Yet another point would be, e.g., Art 89, which contains a *clausula rebus sic stantibus*; imposing on the parties a duty to renegotiate the contract in the event of an exceptional change of circumstances instead of e.g. termination.

### 3.3 Uniform Interpretation by a Supreme Court?

Another advantage, at least according to the Commission<sup>60</sup>, is the fact that there will be a common Supreme Court deciding on the interpretation of the CESL, the CJEU. However, it is questionable if the parties carry all disputes through the instances before the CJEU, which is both time and cost expansive. For national judgments, a database is to be set up (Art 14 of the Proposal). This is no different from the situation with the CISG, except for the fact that parties contracting under the CISG have judgments of decades, covering a great deal of the CISG and reducing uncertainties probably way below the starting level of the CESL.<sup>61</sup>

### 3.4 Language Plurality

Whereas the CISG is authoritative only in 6 languages<sup>62</sup>, the CESL would be provided in all official languages of the EU. On the one hand, this makes it more accessible for parties wishing to use it – on the other hand, it might even complicate interpreting the meaning of the provisions.<sup>63</sup> Moreover, a mere translation from the (probably English or French) original might introduce terms alien to national legal system or misleading formulations.<sup>64</sup>

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<sup>60</sup> Communication from the Commission, p. 5.

<sup>61</sup> The Report, para 7.19 et seq; *N. Kornet*, *The Common European Sales Law and the CISG*, p. 12.

<sup>62</sup> English, French, Spanish, Russian, Arabic and Chinese.

<sup>63</sup> The Report, para. 7.22 et seqq.

<sup>64</sup> For an extensive critique of that problem regarding the German version, cf. *H. Eidenmüller, N. Jansen, E.-M. Kieninger, G. Wagner, R. Zimmermann*, *Der Vorschlag für eine Verordnung über ein Gemeinsames Europäisches Kaufrecht*, p. 272.

### 3.5 “Front-Loading” and “Back-Loading”

Taken all the above-mentioned into account, one can draw a first conclusion. Using the language of the Scottish and English Law Commissions, one can differentiate two different strategies when drawing up a contract.<sup>65</sup>

“Front-loading” is the tactics employed by rather big companies with equally big deals and resources. It consists in putting considerable efforts into the drafting of the contract, trying to pre-emptively conceive future conflicts and devise solutions thereto.

“Back-loading” on the other hand is rather the solution of smaller players with fewer means and less access to legal advice. The main elements of the deal are agreed upon whereas the rest is left to default legal rules, in the hope that nothing goes wrong and if it does, it is adequately addressed by said rules.

It is generally advisable for companies which put considerable resources into the negotiation of a deal suitable to them to have that contract governed by a law that allows for greater party autonomy and is less protective of the “weaker” party; e.g. the CISG or a national law of this character (- English or maybe Swiss law coming readily to one’s mind).

For SME which use less “developed” contracts, the CESL with its approach to strike as fair a balance as possible and its implied duties for the judge to assess the parties’ intentions, might prove an adequate choice in this regard. As the Commissions phrase it:

*“They will not wish to be caught by some harsh standard term which no-one paid any attention to at the time. [...]The parties may welcome an extension of unfair terms provision, such as that set out in the CESL.”*<sup>66</sup>

A common requirement for all contractors is the wish for a predictable outcome; a legal system shall not lead to harsh results (unless voluntarily agreed upon) or unexpected results. With its broad terms and categories, the CESL might allow a judge to find a “just” solution (i.e. one balancing the parties’ interests) but deviate from the clear agreement in an unpredictable ways.

Of course, many provisions if the CESL not directed at B2C sales are open for derogation by the parties. But, as *N. Kornet* puts it:

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<sup>65</sup> Cf. The Report, para 7.64 et seqq.

<sup>66</sup> The Report, para 7.66.

“[...] there is a clear message to restore a perceived imbalance in the equilibrium between parties.”<sup>67</sup>

Yet, if the contractors go through the difficulties of negotiating a rather comprehensive contract, it just might be more advisable to use the system with the “surer” outcome – which is as of date still the CISG.

A practical aspect regarding derogation from the default rules of the CESL is the fact, that when dealing with stronger parties, the smaller undertaking will usually be forced to accept the terms and conditions of the bigger partner. So in many transactions between to undertakings of noticeable differences in (economic) strength and bargaining power, the application of the CESL might not avail too much (except for a more “fair” interpretation) for the smaller party, so again, the CISG’s greater predictability might be preferable.

## 3.6 Chapter Conclusion

### **Scope of Application and General Nature**

The CESL covers a wider area than the CISG, but not all issues, which can arise in a transnational contract. It contains substantially more mandatory rules than the CISG and is more concerned with fairness and less with predictability. The fact that the CESL covers more unfortunately does not entail that it contains less gaps, many provisions should be either amended, clarified or call for other engagement by prudent traders.

The limitation of the CESL applicability might make it hard for parties to find out if their partner is indeed an SME or not. The CISG on the other hand has not been a major break-through either, with notably the UK not ratifying it, the Scandinavian countries partially excluding its application and a majority of businesses opting out of it.

### **Judicature and Language Plurality**

As of yet, naturally no case law for the CESL exists; arguments promising advantages over the CISG due to uniform interpretation by the CJEU have to be assessed critically. The greater number of authoritative language versions (23:6 at the moment) makes the CESL more accessible, but also more prone to disputes as to differences between the versions.

### **Contractual Freedom**

Due to the greater contractual freedom under the CISG, parties who put substantial resources into contract drafting should have it governed by that regime. Smaller parties who do not agree on much more than the *essentialia*

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<sup>67</sup> N. Kornet, *The Common European Sales Law and the CISG*, p. 16.

*negotii* could try and rely on the CESL's "fair" provisions – yet they have to deal with the insecurity that comes with that.

# 4 Introductory Provisions<sup>68</sup>

## 4.1 General Principles and Application

### 4.1.1 General Principles

#### Article 1 – Freedom of Contract

The CESL starts out with stipulating the general principle of contractual freedom, which applies to contracts concluded under it. It is subject to mandatory provisions, which may not be varied by the parties (para 1 and 2). Such provisions are with majority those concerned with B2C relations, but not exclusively so. Parties contracting into the CESL must be aware of the fact that even if they are both traders, some mandatory rules prevail for them. In a contract under des CISG (Art 6) on the other hand, only the writing requirement according to Art 12 cannot be derogated from, if one contract party is situated in a state that has made an Art 96 declaration.<sup>69</sup> Additionally, *ordre public* considerations have to be made.

Many provisions of Part I (which deals with issues like interpretation and the like) do not contain an explicit declaration of being mandatory and would thus seem – if one stuck to the black-letter text of Art 1 – open for derogation. However, it would be quite contrary to the aim of creating a commonly interpreted European law of sales, if e.g. the parties could modify Art 4 (interpretation). Moreover, within the explanatory memorandum it says:

*“Part I 'Introductory provisions' sets out the general principles of contract law which all parties need to observe in their dealings, such as good faith and fair dealing.”*<sup>70</sup>

There are provisions (like Art 9 dealing with mixed-purpose contracts) which would be rather useless if they were not of mandatory nature; with others (like Art 11 on the computation of time) one might not find the thought of derogation from them so far-fetched, at least in B2B transaction.

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<sup>68</sup> The CESL is structured in 8 Parts (I-VIII), within which there are 18 Chapters. Chapters may be subdivided into Sections. It should be noted that Chapters have consecutive numbers, so that in Part I there is Chapter 1, in Part II there are Chapters 2-5, Part III contains Chapters 6-8 and so forth. Obligations and Remedies of the parties are structured according to a buyer / seller division, obviously with an aim for easy usage by the parties. For a critique of this, cf. *H. Eidenmüller, N. Jansen, E.-M. Kieninger, G. Wagner, R. Zimmermann*, Der Vorschlag für eine Verordnung über ein Gemeinsames Europäisches Kaufrecht, p. 272.

<sup>69</sup> For the EU, this concerns Lithuania, Latvia and Hungary.

<sup>70</sup> Proposal for a Regulation, p. 13.

However, the memorandum seems to support the view, that the whole Part I is mandatory in nature, and that derogations are only possible from Part II onwards.

### **Article 2 – Good Faith and Fair Dealing**

Art 2 puts an active duty on both parties to act in accordance with good faith and fair dealing (para 1). It furthermore stipulates sanctions for breaches, by declaring that it might bar the party in breach from exercising or relying on a right, remedy or defence which that party would otherwise have, or may make the party liable for any loss thereby caused to the other party (para 2). No explicit requirement of fault is contained.

This puts far-reaching duties on the parties, which are definitely more intensive than those under the CISG, let alone Common Law. Art 7 CISG literally declares that good faith only applies as a means to interpret the provisions of the CISG, not the parties' dealings per se. However, during the existence of the CISG, principles that are more concrete have been derived from this, such as the prohibition of *venire contra factum proprium* or the estoppel principle.<sup>71</sup> These are in turn used to fill the gaps of the CISG (things covered by it but not dealt with by it). From this stems e.g. the duty of the seller, to inform the buyer that the buyer's specifications for the transport of goods are not feasible<sup>72</sup>, yet it must not be used to interpret e.g. the parties' declarations and their intentions.<sup>73</sup>

Just how far those principles will be applied in the CESL, what actions or omission trigger what kind of loss of rights or liabilities will be for the courts to establish. Naturally, this is connected with a great insecurity in the initial phase.<sup>74</sup> Generally, one may presume that from the outline of the CESL (centred on consumer protection) and the broad nature of those concepts that a willing judge could go quite far in altering the parties' relationship. Art 2 (b) of the Proposal contains even a duty for the parties, to bear the other parties interest in mind – the consequences for traders compared to the CISG could be far reaching. Entrepreneurs must be wary of this duty to see to the other part's interest – it might bar quite a considerable number of them opting for the CESL.

Art 2 CESL is the only provisions in Part I, which explicitly states that it is mandatory in nature (para 3). However, as put forth above, Art 1 will have to be teleologically reduced to apply only to articles outside of Part I. Therefore, para 3 does seem to be only a clarification.

### **Article 3 – Co-Operation**

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<sup>71</sup> P. Schlechtriem & I. Schwenzer, Kommentar zum Einheitlichen UN-Kaufrecht<sup>4</sup>, Art 7 para 48 et seqq.

<sup>72</sup> *ibid*, Art 32 para 29.

<sup>73</sup> *ibid*, Art 31 para 40.

<sup>74</sup> Report of the Austrian Chamber of Commerce, p. 4.

Without an explicit counterpart in the CISG, Art 3 puts a duty on the parties to co-operate to the extent that this can be expected for the performance of their contractual obligations. No explicit sanctions for a breach of this obligation are given; a failure to co-operate might result either in one of the sanctions for breach of contract (e.g. failure to pay the price on time) if it consists in such a breach or may fall under Art 2. Anyhow, the parties can demand said co-operation from the other in court. No case law exists to delimit the boundaries of this obligation, but duties might go quite far and put considerable strains on a party.

For the CISG, a general principle of co-operation is inferred from certain provisions, e.g. the duty to preserve goods to be returned.<sup>75</sup> If there will be a different level of co-operation required (namely, a higher level in the CESL), time will tell, but the explicitness of Art 3 CESL leads to believe so.

## 4.1.2 Application

### Article 4 – Interpretation

The CESL calls for an autonomous interpretation (para 1). Matters governed but not settled by it are to be settled in accordance with the objectives and the principles underlying it and all its provisions, without recourse to national law (para 2). Furthermore it states, that special provision take precedence over general ones (para 3).

The CISG, according to its Art 7, must also be interpreted autonomously, “regard is to be had to its international character and to the need to promote uniformity in its application” (para 1). To fill gaps, however, it allows recourse the applicable national law in case no general principles exist (para 2.) However, even though the CISG should only be interpreted one way the world over, different courts in different countries come up with different rulings. Yet, it is dubious, as explained above, whether the situation for the CESL will be in any way different, since the CJEU might not be able to cope with the additional workload and parties might not have time and resources to go through all instances.

From this requirement of autonomous interpretations arises another problem, due to the fact that – as of yet – there are very little explanatory notes completing the provisions. Even if one were allowed to use the DCFR in order to shed light on the CESL’s provisions (which is probably

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<sup>75</sup> *U. Magnus*, General Principles of UN-Sales Law, *Rebels Zeitschrift*, Volume 59 (1995) Issue 3-4 (October), 5 (11), online on <http://www.cisg.law.pace.edu/cisg/biblio/magnus.html>, 21.04.2012.

forbidden), these efforts would be thwarted by the sparseness of supporting materials for the preceding DCFR.<sup>76</sup>

In the long run, this might become less and less problematic. Even from the far less numerous provisions of the CISG, a wide range of principles has been deduced, used to give guidance in unsettled situations. Traders though should be wary of the fact that it will take time to acquire jurisprudence and reach the level of certainty as of yet contained in the CISG and the rulings based on it.

### **Article 5 – Reasonableness**

The CESL contains a standard of reasonableness. What is reasonable depends on the nature and purpose of the contract, to the circumstances of the case and to the usages and practices of the trades or professions involved (para 1). Any reference to what can be expected of or by a person, or in a particular situation, is a reference to what can reasonably be expected (para 2).

The CISG provision dealing with reasonableness is Art 8 para 2, which does not set a reasonableness standard, but asserts that statements are to be interpreted in the way that a reasonable person would have conceived them (unless the party's true intention was known or must have had been known – para 1).

Yet, there is probably not so much of a difference between the provisions, since “the circumstances of the case” most certainly contain the will of the parties and usages and practices are also relevant when it comes to determining parties' actions. The concept of reasonableness blurs on its fringes with good faith and fair dealing which have – as said – a higher status in the CESL than in the CISG. It might lead judges to stray farther from the black letters of a contract of the mere words of a statement to “put” more reasonableness into the dealings of the parties.

### **Article 6 – No Form Required**

Art 6 states that basically agreements or communications do not need to take a special form, unless said so in other provisions. Form requirements arise mainly in articles dealing with B2C relations. The CISG on the other hand does not require writing in certain classes of agreements or such, but only if one party has its place of business within a jurisdiction demanding writing.

When choosing the CESL over the CISG, traders thus can escape the general writing requirement when dealing with Lithuanian, Latvian or

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<sup>76</sup> H. Eidenmüller, N. Jansen, E.-M. Kieninger, G. Wagner & R. Zimmermann, Der Vorschlag für eine Verordnung über ein Gemeinsames Europäisches Kaufrecht, p. 271.

Hungarian partners, yet they must be aware that within the CESL there sometime are form requirements even for B2B transactions.

### **Article 7 - Not individually negotiated contract terms**

Art 7 deals with standard terms by one or more parties of an agreement. The CISG does not contain any comparable provision. Para 1 contains the definition of such a term, which is centered about the inability of the other party to influence the content. The drafters probably had the classical B2C relationship in mind, but the provision also applies to B2B dealings with one or both parties trying to apply their standard terms.

Para 2 is a special provision which equates to a “normal” standard term the situation, where the other party has at least been able to chose one provision from a selection. Para 3 puts a duty on the party claiming that a former standard term has afterwards been negotiated individually to prove this fact, para 4 puts this duty for his own terms. Para 5 lastly holds that third party terms are considered to be introduced by the trader unless it was the consumer.

When choosing the CESL, standard terms have to be brought to the other party’s notice (Art 70), it might be disapplied if grossly unfair (Art 86), and they yield to individually negotiated terms in case of discrepancies (Art 62).

### **Article 8 – Termination**

This provision defines the termination of a contract. Heed must be had to the fact that the CESL uses two terms for bringing an end to a contractual relationship. Avoidance covers the dissolution of the contract for mistake, fraud or unfair exploitation (cf. Art 54 CESL), “termination” for (fundamental) breaches of contract (cf. Art 114 CESL). Thus, there are two regimes, one covering dissolution for invalidity, the other for non-performance.

Art 8 para 1 states that the termination of a contract puts an end to all rights and obligations, apart from those which are to operate even after termination. Due payments and damages which came into existence prior to termination remain payable; if it is for non-performance or for anticipated non-performance it entitles the terminating party also to damages in lieu of the other party’s future performance (para 2). Para 3 sets forth that restitutionary effects are governed by the rules on restitution set out in Chapter 17.

The CISG on the other hand does not differentiate between the terms avoidance and termination; Art 29 para 1 CISG states that a contract may be “terminated” by the mere agreements of the parties, whereas Art 81 CISG basically mirrors para 1 and 2 of Art 8 CESL. This is due to the fact that contract validity for fraud, mistake and unfair exploitation is explicitly excluded from the CISG in its Art 4 (a). The CISG does thus only know termination in the sense of the CESL, but uses both terms in its text.

## **Article 9 - Mixed-Purpose Contracts**

Art 6 of the Proposal forbids the application of the CESL to contracts containing other elements than the sale of goods, the provision of digital content and related services. Art 9 CESL draws up rules which provision to apply on a mixed contract containing two or all of these elements.

Para 1 sets up the general rules that the goods / digital content part of a contract is governed by the rules for a sale of goods or the provision of digital content, the service part by those for service.

Para 2 states that if the seller's / service provider's performances are divisible, the buyer / customer may only terminate the part for which there is ground for termination, not the whole contract, unless this is justified (para 3). Where the obligations of the seller and the service provider under the contract are not divisible or a part of the price cannot be apportioned, the buyer and the customer may terminate only if the non-performance is such as to justify termination of the contract as a whole (para 4).

The only comparable CISG provision is Art 3, stating that contracts for the supply of goods to be manufactured or produced are to be considered sales unless the party who orders the goods undertakes to supply a substantial part of the materials necessary for such manufacture or production (para 1). Service contracts are excluded from the CISG's scope of application (para 2).

## **Article 10 – Notice**

Art 10 defines a notice as the communication of any statement which is intended to have legal effect or to convey information for a legal purpose (para 1), and can be given by any appropriate means (para 2). It becomes effective when it reaches the addressee, unless it provides for a delayed effect (para 3). Para 4 defines when it reaches the addressee:

- (a) when it is delivered to the addressee;
- (b) when it is delivered to the addressee's place of business or, where there is no such place of business or the notice is addressed to a consumer, to the addressee's habitual residence;
- (c) in the case of a notice transmitted by electronic mail or other individual communication, when it can be accessed by the addressee; or
- (d) when it is otherwise made available to the addressee at such a place and in such a way that the addressee could be expected to obtain access to it without undue delay.

If a revocation of a notice arrives before or at the same time as the notice, the notice never becomes effective (para 5)

Para 6 allows, *e contrario*, for traders to set up own rules when and how notices become effective, providing e.g. for effectiveness only in case a notice reaches the other party personally or demanding for all notices in writing.

The CISG default regime is similar, Art 24 CISG basically mirroring Art 10 para 4 (a) and (b) CESL. Art 27 expressly states that a party using a proper method of communication can rely on the message to arrive despite problems in the transmission. Lastly, at the time of the CISG's creation, modern electronic communication was at an early stage, so it does not contain any reference to emails but e.g. to "telex" (Art 13 CISG).

#### **Article 11 - Computation of time**

Art 11 contains comprehensive rules, its para 2 fixing the beginning and ending of periods to the hour. Para 4 includes holidays (as defined in para 7) unless expressly excluded, and para 5 sets the general rules that periods do not end on a holiday but on the next working day. Para 6 sets the starting point of a period the moment the document reaches the addressee, unless the document itself states the beginning.

The CISG in its Art 20 on the other hand sets forth, that periods in documents begin with the date contained in them or on the envelope. Only for instantaneous communication does the period start at the moment it reaches the offeree. Art 20 CISG does only deal with the periods for acceptance. Holidays are included and only if the fact that the last day of the acceptance period falls on a holiday makes deliverance of the acceptance impossible, the period is extended to the next working day.

#### **Article 12 - Unilateral statements or conduct**

Art 12, which is without exact counterpart in the CISG sets out parameters to interpret unilateral actions, declaring them to be understood in the way the addressee must have understood them.

## **4.2 Chapter Conclusion**

### **Freedom of Contract**

Even though CISG and CESL both contain contractual freedom as a default rule, the CESL contains a substantial amount of mandatory provisions (which will be dealt with below). When drafting a contract under the CISG, parties can be quite sure that its provisions will be upheld unless for the special cases of Artt 12 and 28 CISG<sup>77</sup>, i.e. if they do not violate core principles of the forum. Contracts under the CESL have to be drafted with greater care to make sure that its provisions are not invalid for going against mandatory CESL articles. Furthermore, it is not entirely clear, if Part I CESL is mandatory in its entirety or partly alterable.

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<sup>77</sup> Writing requirement and specific performance.

**Good Faith and Fair Dealing**

Good faith and fair dealing, combined with an explicit duty to cooperate with the other party, have a much greater standing in the CESL. A breach of the duty to act in good faith can lead to the loss of rights and remedies and make the breaching party liable for damages, to an extent not yet clear. This makes for great insecurity, at least in the first years of its application.

**Interpretation**

Not helping is the fact, that gaps in the CESL may not be closed by national law and that its text comes with very little explanatory notes.

**Standard Terms**

Traders have to beware of the stringent rules set up for standard contract terms, which have to be pointed out to the other party, undergo a fairness control and yield to contract provisions.

# 5 Making a Contract binding

## 5.1 Pre-Contractual Information

### 5.1.1 Pre-Contractual Information to be given by a Trader dealing with a Consumer

Art 13 to 21 set up very stringent information duties for B2C contracts, declared mandatory by Art 22. They are omitted in this paper due to their consumer nature.<sup>78</sup> When taking the spirit of the CESL into account insofar as seems to value consumers over traders, one can assume that the level of protection for the latter is lesser. To some degree one might derive information *e contrario*; if it is explicitly forbidden vis-à-vis a consumer, it might be allowed among traders.

### 5.1.2 Pre-Contractual Information to be given by a Trader dealing with another Trader

#### **Article 23 - Duty to disclose information about goods and related services**

Even B2B contracts put a duty on the seller / service provider to provide the other party with all information concerning the main characteristics of the goods, digital content or related services to be supplied which the supplier has or can be expected to have and which it would be contrary to good faith and fair dealing not to disclose to the other party (para 1). Para 2 establishes criteria whether information has to be supplied (depending i.a. on the level of expertise of the buyer or the cost for the seller to provide the information).

The CISG on the other hand follows the *caveat emptor* principle; there is no duty to supply information under the CISG (except the special case of Art 32 para 3, to enable to buyer to effect insurance); misrepresentations and information duties have to be assessed under national law.<sup>79</sup>

A CESL seller thus may have almost the same duties vis-à-vis another undertaking that is conducting a purchase of a good that it is not familiar

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<sup>78</sup> For a criticism of the "overbording" information duties imposed by EU legislation, cf. e.g. The Report of the Austrian Chamber of Commerce, p. 7 (with further refernces).

<sup>79</sup> P. Schlechtriem & I. Schwenzler, Kommentar zum Einheitlichen UN-Kaufrecht<sup>4</sup>, Vor Artt 14-24, para 6b.

with than vis-à-vis a consumer! A seller must moreover try and assess the other party's knowledge and proficiency in order to establish what good faith and fair dealing require him to disclose. To be on the safe side, undertakings might chose to provide substantial information, whereas under the CISG a mere avoidance of misrepresentations would be sufficient.

Generally the provision is not mandatory, yet what room for maneuvers remain in the light of Art 2 is dubious.<sup>80</sup>

### **5.1.3 Contracts concluded by Electronic Means**

#### **Article 24 - Additional duties to provide information in distance contracts concluded by electronic means**

Of the provisions of this section, only Art 24 applies directly to contracts concluded by traders. It has no counterpart in the CISG, due to the obvious fact that in the 1980s, internet-trade was undreamt of.

In para 1, the general situation is described: a trader provides the means for concluding a contract; those means are electronic and do not involve the exclusive exchange of electronic mail or other individual communication. Meant by this are online-shops of all kinds, a prominent example would be the AMAZON online store, where goods are placed in a "basket" and then paid for by merely giving credit card or bank account information. An email containing the main elements of the contract is sent in confirmation. No individual communication takes places, unless there arise problems in the realization of the contract.

The trader must make available to the other party (be it a consumer or another trader) appropriate, effective and accessible technical means for identifying and correcting input errors before the other party makes or accepts an offer (para 2). Practically, this could be realized by putting up a mask that summarizes the whole order before the payment has to be confirmed, and gives a link to return back to the former pages to correct or abort the transaction.

Furthermore, the trader is to give information concerning i.a. the technical steps for the electronic conclusion of the contract, languages and contract terms (para 3 [a]-[e]) before the other party makes or accepts an offer.

According to para 4, the trader must make the contract terms available in alphabetical or other intelligible characters and on a durable medium by means of any support which permits reading, recording of the information contained in the text and its reproduction in tangible form. In practice, this

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<sup>80</sup> Report of the Austrian Chamber of Commerce, p. 10.

amounts to a duty to make use of standard terms.<sup>81</sup> These terms are subject to the already mentioned requirements of fairness control and have to be brought to the other party's attention.

A possible solution would be to make the contract terms downloadable in the form of a PDF-file, which is a common practice anyways and to have a link to them "pop up" during the conclusion of the contract.

Lastly, the trader must acknowledge by electronic means and without undue delay the receipt of an offer or an acceptance sent by the other party (para 5). This could be either an e-mail or a printable document provided for after the conclusion.

Traders already offering the conclusion of contracts over the internet will usually have a system that satisfies the demands of Art 24, since practical problems call for them. If transactions could not be corrected, this would lead to a considerable amount of conflict, binding resources and preventing the profitable contract conclusions. Traders basing their internet business on the CESL should of course check whether it fulfills all requirements of Art 24, yet making necessary adaptations should not prove too difficult.

#### **Article 25 - Additional requirements in distance contracts concluded by electronic means**

This article applies only to B2C contracts, yet information can be derived of it, what might still be allowed in B2B transactions, since Art 25 demands a *plus* of "protection" when compared to Art 24. E.g., since Art 25 para 3 explicitly calls obliges the trader to inform a consumer about the means of payment beforehand, this is not necessary vis-à-vis another trader.

#### **Article 26 - Burden of proof**

In relations between a trader and a consumer, the trader bears the burden of proof that it has provided the information required by this section. In B2B litigations, general rules of proof apply, putting it usually on the party that claims a certain fact.

#### **Article 27 Mandatory nature**

In relations between a trader and a consumer, the parties may not, to the detriment of the consumer, exclude the application of this Section or derogate from or vary its effects. For contracts between traders, the seller might e.g. declare Art 24 inapplicable and refer to its national laws on e-contracts or change the provision.

### **5.1.4 Duty to ensure that Information supplied**

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<sup>81</sup> *ibid.*

## **is correct**

### **Article 28 - Duty to ensure that information supplied is correct**

The information supplied by the seller before the conclusion of the contract has to be correct; at least the seller has a duty to take reasonable care to ensure that it is accurate and not misleading (para 1). If the other party reasonably relied on false information, it has certain remedies (cf. hereto Art 29 CESL) (para 2).

For B2B relations, Art 28 may be derogated from, depriving the other party of its rights. However, the principles of good faith and fair dealing set limits for all alterations of the CESL. A provision stating that the seller / provider is not responsible for even the grossest fallacies might be invalid or altered by a judge.

## **5.1.5 Remedies for Breach of Information Duties**

### **Article 29 - Remedies for breach of information duties**

Para 1 sets up a liability for any loss caused to the other party by supplying incorrect information; it does so without any reference to default. How this will interplay with the term “reasonable efforts” in Art 28 para 1 is not entirely clear. A trader dealing e.g. in special electronic parts who just trustingly forwards the parts’ producer’s information on compatibility of said parts with other equipment certainly does not make a purposeful misrepresentation if that compatibility proves to be inexistent. But has he put “reasonable efforts” into establishing their correctness? When thinking about the extensive possible liability for any loss caused by this, there seem to be great insecurities and pitfall for traders.

Para 2 deals exclusively with the rights of consumers.

Para 3 states that the right to damages according to Art 29 does not preclude any rights to avoid the contract for mistake or fraud (Art 48 et seq.). A misinformed party (any party who’s partner has not put reasonable efforts to ascertain the correctness of the information) thus can avoid the contract and claim damages.

Para 4 declares Art 29 mandatory vis-à-vis consumers. In B2B transactions, an exclusion of the application of Art 29 or at least a reduction to default or the introduction of a cap is highly advisable.

## **5.2 Conclusion of Contract**

### **Article 30 - Requirements for the conclusion of a contract**

According to para 1, a contract is concluded if the parties reach an agreement (i.e. the acceptance of an offer as defined in Art 31, cf. Art 30 para 2) which they intend to have legal effect and which has sufficient content and certainty to be given legal effect ([a]-[c]). The relevant CISG provision is Art 14 para 1 CISG, an offer has to be sufficiently definite and indicates the intention of the offeror to be bound in case of acceptance.

Art 30 Para 2 states that acceptance may be made explicitly or by other statements or conduct. Whether they wish to give it legal effect has to be determined from their statements and conduct (para 3). The CISG states in its Art 18: a statement made by or other conduct of the offeree indicating assent to an offer is an acceptance. Silence or inactivity does not in itself amount to acceptance.

Where one of the parties makes agreement on some specific matter a requirement for the conclusion of a contract, there is no contract unless agreement on that matter has been reached (para 4). There is no corresponding CISG Art.

Thus the basic necessities for the formation of a contract are the same: an agreement (i.e. an offer and its corresponding acceptance) with a minimum content and intended by the parties to have legal effect (i.e. that they be bound by it). If the criterion of “sufficient content and certainty” under the CESL will be interpreted in the same way as the “determinability” of the respective obligations under the CISG, only time will tell.

### **Article 31 – Offer**

A proposal constitutes an offer if it is intended to result in a contract if it is accepted and has sufficient content and certainty for there to be a contract (para 1). It may be made to one or more specific persons (para 2), a proposal to the public is not an offer unless the circumstances indicate otherwise (para 3).

Art 14 para 1 CISG states that a proposal is sufficiently definite if it indicates the goods and expressly or implicitly fixes or makes provision for determining the quantity and the price. Para 2 mirrors para 3 of Art 31 CESL, with the difference being that the proposer must indicate that the public proposal is an offer, not “the circumstances”. Practically however, this should not lead to different results.

### **Article 32 - Revocation of offer**

An offer may be revoked if the revocation reaches the offeree before the offeree has sent an acceptance or, in cases of acceptance by conduct, before the contract has been concluded (para 1). This corresponds with Art 16 para 1 CISG, with the exception of the provision for conclusion by conduct. However, there CISG leads to the same results, since Art 18 CISG equates a “classical” acceptance with acceptance by conduct.

Para 2 provides that a public offer may be revoked by the same means as the offer was made by, a provision without counterpart in the CISG.

An offer cannot be revoked if it is (indicated as) irrevocable, sets a fixed time for acceptance, or if it was otherwise reasonable for the offeree to rely on the offer as being irrevocable and the offeree has acted in reliance on the offer (para 3). This corresponds to Art 16 para 2 CISG.

The CESL does not contain a provision equal to Art 15 para 2, which uses the concept of “withdrawal” as distinct from “revocation”. It allows for an offer to be “withdrawn”, if the withdrawal reaches the offeree before or at the same time as the offer (whereas a revocation reaches him thereafter).

In wording, there might be no difference between a letter sent before or after the offer reaches the offeree (e.g. “consider our offer void”), yet under the CISG, a withdrawal is always possible without any consequences for the offeror<sup>82</sup>. Under the CESL – as it seems from the wording of Art 32 – even if a revocation arrives at the same time as the actual offer, it cannot be revoked if the offer says it is irrevocable or sets a period for acceptance (a reasonable reliance on it by the offeree is impossible). If this is merely a legislative glitch or intended is unclear.

Yet, parties might rely on fair dealings and good faith to argue that it has been against those principles to hold them to their word when the other party had never actually relied on it.

### **Article 33 - Rejection of offer**

When a rejection of an offer reaches the offeror, the offer lapses. This matches with Art 17 CISG.

### **Article 34 – Acceptance**

According to para 1, any form of statement or conduct by the offeree is an acceptance if it indicates assent to the offer; silence or inactivity does not in itself constitute acceptance (para 2). There is no difference to Art 18 para 1 CISG.

### **Article 35 - Time of conclusion of the contract**

The contract is concluded at the time the acceptance reaches the offeror (para 1), or notice of the concluding conduct reaches him (para 2). It equals Art 23 CISG.

Para 3 deals specifically with the commercial usage of not assenting to an order but merely acting (e.g. dispatching the goods), which can also be established between parties by their practices. This is in tie with Art 18 para 3 CISG.

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<sup>82</sup> *J. Lookofsky*, Understanding the CISG<sup>3</sup>, § 3.6.

### **Article 36 - Time limit for acceptance**

An acceptance of an offer is effective only if it reaches the offeror within any time limit stipulated in the offer by the offeror (para 1), or within a reasonable time if no limit has been fixed (para 2). Acceptance by action must take place within the same time boundaries (para 3). This is equivalent to Art 18 para 2 CISG.

### **Article 37 - Late acceptance**

A late acceptance is effective as an acceptance if without undue delay the offeror informs the offeree that the offeror is treating it as an effective acceptance (para 1); this corresponds with Art 21 para 1 CISG. Art 37 para 2 CISG deals with communications which have been obviously delayed without default by the offeree; the offeror has to inform him without undue delay that the offer has lapsed. This corresponds with Art 21 para 2 CISG.

### **Article 38 - Modified acceptance**

A reply by the offeree which states or implies additional or different contract terms which materially alter the terms of the offer is a rejection and a new offer (para 1), the CISG speaks of “additions, limitations or other modifications” in its Art 19 para 1.

Presumed to be materially altering the terms are: price, payment, quality and quantity of the goods, place and time of delivery, extent of one party's liability to the other or the settlement of disputes (para 2). They are literally the same as those of Art 19 para 3 CISG. The CISG however uses the term “are considered”, whereas the CESL speaks of “are presumed”. Theoretically minor alterations also of matters such as the price can – under the special circumstances of the case – rebut the presumption of materiality and lead to an acceptance. Without clarifying case law, this border-zone cannot be determined, even under the CISG there are deviating opinions and judgments on the matter of materially altering acceptances.<sup>83</sup>

An acceptance that gives definite assent to an offer without materially altering it make the contract perfect; its additional or differing provisions become part of the agreement (para 3).

No contract is concluded if the conditions of para 4 are fulfilled. One of them is also contained in the CISG, Art 19 para 2. It allows for the offeror to object to non-materially altering terms without undue delay, thus preventing the formation of a contract (both offer and “acceptance” thus become void<sup>84</sup>).

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<sup>83</sup> P. Schlechtriem & I. Schwenzer, *Kommentar zum Einheitlichen UN-Kaufrecht*<sup>4</sup>, Art 19 para 8 et seqq.

<sup>84</sup> *ibid*, para 18.

## Article 39 - Conflicting standard contract terms

The CESL follows the “knock-out” doctrine as regards the battle of forms. Differing standard terms do not prevent the conclusion of a contract, yet only those provisions common in substance become part of the agreement (para 1).

Yet a party can prevent this by indicating expressly (and not by standard terms) not to be bound by para 1, either in advance or without undue delay (para 2). In that case, no contract is concluded.

In this regard, the CESL provides for a more secure outcome than the CISG, which does not contain an explicit provision dealing with this matter (Art 19 CISG applies). Here, the first question is, whether a contract has been concluded at all. Courts applying the CISG have developed a rather contract preserving case law in that regard<sup>85</sup>. If a contract exists, the question arises whether “first-shot”<sup>86</sup>, “last-shot”<sup>87</sup> or “knock-out” doctrine is applied by the courts. While the “first shot” principle has not met with success, different courts have either relied on last-shot or knock out doctrine.<sup>88</sup> However, as aforementioned, the outcome is far less certain than under the CESL.<sup>89</sup>

## 5.3 Right to withdraw in distance and off-premises contracts between traders and consumers

As indicated by the title, the provisions (CESL Art 40 – 47) of this section deal with B2C transactions and therefore fall out of the scope of this paper.

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<sup>85</sup> *J. Lookofsky*, Understanding the CISG<sup>3</sup>, § 3.8, with further references.

<sup>86</sup> The party who puts forth the first set of standard terms manages to make them part of the contract.

<sup>87</sup> The party who puts forth the last set of standard terms manages to make them part of the contract.

<sup>88</sup> *J. Lookofsky*, Understanding the CISG<sup>3</sup>, § 3.8.

<sup>89</sup> For a more comprehensive overview over the battle-of-forms problem, cf. *P. Schlechtriem & I. Schwenzler*, Kommentar zum Einheitlichen UN-Kaufrecht<sup>4</sup>, Art 19; *P. Schlechtriem*, Battle of the Forms in International Contract Law - Evaluation of approaches in German law, UNIDROIT Principles, European Principles, CISG; UCC approaches under consideration, <http://cisgw3.law.pace.edu/cisg/biblio/slechtriem5.html>, online on 25.04.2012.

## 5.4 Defects in Consent

The whole chapter dealing with mistake, fraud and coercion has no counterpart within the CISG, since its Art 4 (b) explicitly excludes matters of contract validity from its scope; they are to be decided according to the applicable national law.<sup>90</sup> Depending on whether the parties gave thought to deciding on such a law besides the application of the CISG and the exact nature of said law, the usage of the CISG might be more or less advantageous than the CESL in specific circumstances. However, the broad nature of the provisions and the abundant liabilities in case of an invalid contract make this part of the CESL – devised to simplify B2B transactions – highly unpredictable and little apt for traders at first sight, especially since Art 48 para 1 (b) (ii) links the ability to avoid to a violation of the wide information duties.

Including the three validity issues in the CESL stems from the origin of the project; it was envisaged as a European civil code<sup>91</sup> or at least a comprehensive piece of legislation covering the whole of contractual relations. The problematical exclusion of many matters (such as e.g. incapacity) despite this aim, thwarting the aspired comprehensiveness has been mentioned above.

### Article 48 – Mistake

A party may avoid a contract for mistake of fact or law existing when the contract was concluded if the party, but for the mistake, would not have concluded the contract or would have done so only on fundamentally different contract terms and the other party knew or could be expected to have known this (para 1).

Precondition hereto is that the other party caused the mistake (also by failing to provide the required pre-contractual information), or that he knew or could be expected to have known of the mistake and caused the contract to be concluded in mistake by not pointing out the relevant information, provided that good faith and fair dealing would have required a party aware of the mistake to point it out; or made the same mistake. Thus, if both seller and buyer err, the latter may avoid.<sup>92</sup>

Furthermore, a party may not avoid a contract for mistake if the risk of the mistake was assumed, or in the circumstances should be borne, by that party (para 2). The exact meaning of this provision is unclear. One might think of a trader ordering special parts from another trader required for a special

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<sup>90</sup> P. Schlechtriem & I. Schwenzer, *Kommentar zum Einheitlichen UN-Kaufrecht*<sup>4</sup>, Art 4 para 15 et seqq.

<sup>91</sup> Cf. Option 7 of the Green Paper.

<sup>92</sup> For a critique on this provision, cf. The Report of the Austrian Chamber of Commerce, pp. 20 et seq.

purpose – with neither party knowing exactly whether the parts are fit for that purpose. The buyer might then declare to “assume the risk” that the parts work as desired and should then be barred from avoidance if they do not. However, para 2 does not seem to be a very practical provision.

Any inaccuracy in the expression or transmission of a statement is treated as a mistake of the person who made or sent the statement (para 3).

Generally, it can be said that these rules resemble many national rules on mistake; however, it is very likely that the duty to point out mistakes, even to other traders, goes far beyond many a MS legal order. What undertakings have to keep in mind as well is the fact, that the CESL requires them to provide – even to traders – comprehensive information on the products they are selling. It is their duty to inform the other party and by failing to do so, they risk avoidance of the contract – for a possible indefinite period of time, since according to Art 52 CESL, the period for avoidance starts when the other party becomes aware of the mistake. There is no maximum period.<sup>93</sup>

According to Art 56, mistake is the only ground for avoidance that traders may exclude or alter when dealing with another trader (Remedies for fraud, threats and unfair exploitation cannot be directly or indirectly excluded or restricted.) They are very much advised to do so or at least agree on an absolute period after which no avoidance for mistake is possible any more.

#### **Article 49 – Fraud**

A party may avoid a contract if the other party has induced the conclusion of the contract by fraudulent misrepresentation, whether by words or conduct, or fraudulent non-disclosure of any information which good faith and fair dealing, or any precontractual information duty, would have required that party to disclose (para 1).

Para 2 defines fraudulence as knowledge or belief that the representation is false, or recklessly as to whether it is true or false, and is intended to induce the recipient to make a mistake. Non-disclosure is fraudulent if it is intended to induce the person from whom the information is withheld to make a mistake.

Para 3 sets up criteria to assess when good faith and fair dealing require a party to disclose information, it mirrors Art 23 para 2. The reference to good faith and fair dealing seems to draw a dangerous connection between fraud and a failure to take the other party’s interest into account. Traders will have to beware and under certain circumstances maybe even required to put themselves into their partners place and guess what information the other undertaking needs. This probably stems from the fact that the CESL is

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<sup>93</sup> *ibid*, p. 20.

focused in B2C relationships, where it might be fairer to have a seller give greater information to a consumer.

The fact that the CESL equates or at least makes possible an equation of fraud with not taking the other party's interest into account is definitely an issue that should make traders think twice if they will run the risk of basing their contract on the CESL.

### **Article 50 – Threats**

A party may avoid a contract if the other party has induced the conclusion of the contract by the threat of wrongful, imminent and serious harm, or of a wrongful act.

### **Article 51 - Unfair exploitation**

If a party is dependent on, or had a relationship of trust with, the other party, was in economic distress or had urgent needs, was improvident, ignorant, or inexperienced; and the other party knew or could be expected to have known this and, in the light of the circumstances and purpose of the contract, exploited the first party's situation by taking an excessive benefit or unfair advantage.

The number of situations which can be summarized under Art 51 is near endless. While even among traders, national legal orders permit contract avoidance if one party grossly abuses a situation of distress of the other party, it is hard to come to terms with to connect this to situations where one party was merely "improvident".<sup>94</sup> It is not a trader's duty to think ahead for his business partners; it is clear that this provision stems from the CESL's focus on consumer contracts – however, while vis-à-vis a consumer, this might at least be arguable, in B2B relationships this clause seems quite inappropriate.

Traders should keep in mind that especially for the first years – in case the CESL should be enacted – no body of case-law exists to clarify the provision's broad terms. What is an "urgent need", what is "improvident" and what is an "unfair advantage" under the CESL? Yet again, undertakings would run hardly controllable risks to have their contracts governed by the CESL's rules on contract validity.

### **Article 52 - Notice of avoidance**

Avoidance has to be notified to the other party (para 1) (cf. hereto Art 26 CISG). Once the mistaken or "wronged" party becomes aware of the fact, that she has the possibility to avoid the contract, the period for giving that notice starts. It is six months in case of mistake, one year in case of fraud, threats or exploitation.

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<sup>94</sup> *ibid* p. 21.

The commencement of the period is tied to the awareness of the party. While this may basically a just solution, it might prove hard in practice to establish the exact point in time when a person really becomes aware of having been mistaken. Many national legal systems tie this to the conclusion of the contract, for clarity's and certainty's sake.

Moreover, there is no reference to the point in time, when the party could have been expected to become aware of the fact (even though the other party could probably rely on good faith to establish a duty of the other party to notify at that point too). Combined the wide terms in the provisions concerned with fraud, mistake and coercion, businesses face possible avoidance for a near endless period of time, since there is no ultimate period after which a contract cannot be avoided anymore.

By having the contract avoided by mere notice, this puts the party who is supposedly fraudulent or exploiting under a bad position to start with. Even though still open to judicial control, Art 52 seems an easy way out of a contract for a party dissatisfied with it for totally different reasons.<sup>95</sup>

#### **Article 53 – Confirmation**

Once a party has become aware of the existence of her right to avoid and yet confirms the contract, she loses that right.

#### **Article 54 - Effects of avoidance**

A contract which may be avoided is valid until avoided but, once avoided, is retrospectively invalid from the beginning (para 1). Unless unreasonable, a contract is only avoidable in part, if only a part of it fulfills the conditions for avoidance (para 2). Restitution is dealt with in Chapter 17 (para 3).

The avoidance has the effect of not only “destroying” certain elements of the contract (the mutual rights and obligations but with the exception of the provision meant to survive) like in termination, but annihilates it completely *ex tunc* – unless it is only applicable to parts of the contract.

As mentioned above, the CISG does not differentiate between termination and avoidance, which it regulates in its Art 81, which says: Avoidance of the contract releases both parties from their obligations under it, subject to any damages which may be due. Avoidance does not affect any provision of the contract for the settlement of disputes or any other provision of the contract governing the rights and obligations of the parties consequent upon the avoidance of the contract.

In Art 81 para 2 CISG, it is regulated that parties must give back anything received and that this must take place concurrently, if both parties owe the other.

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<sup>95</sup> *ibid*, p. 22.

The CISG thus does not contain a regime for total avoidance of the contract, but this must be decided on the basis of national law.<sup>96</sup>

#### **Article 55 - Damages for loss**

Regardless of an actual usage of the right to avoid, and even after the end of the period of prescription or after confirmation of the contract, the party who suffered a loss as a result of mistake, fraud, threats or exploitation can reclaim it from the other party. Precondition hereto is that the other party knew or must have known the circumstances.

Again, traders deal with a potential liability without any *culpa* (as e.g. under German or Austrian law) on their side. An “improvident” business partner suffers a substantial economic loss by ordering and reselling goods that are not fit for the purpose he intends them for and gets sued by his customers: the first seller – if e.g. the court finds him “guilty” of having taken unfair advantage (whatever that is) or not having informed the other party according to good faith – is then liable to pay for all damage, regardless if the other party avoided the contract or its right to do so was already beyond the period of prescription.<sup>97</sup>

#### **Article 56 - Exclusion or restriction of remedies**

Even among traders, there is no derogating of or excluding the provisions on remedies for contract liability, with the exception for those on mistake. In B2C contracts, not even that is possible.

One can only speculate on the reasons for this, yet it is clear from the communications of the Commission, that the CESL strives to become an alternative to the CISG, by providing more detailed rules on matters covered by the CISG and also supplying rules on matters not covered by it. Especially the rules on contract validity seem to be the very incorporation of the “fairness” approach of the CESL. It leads one to think, that the Commission might have been worried that an alterability of said rules would have deprived the CESL of its advantage vis-à-vis the CISG and upset its basic structure. With regard to the first point, probably quite the opposite is true.

Generally speaking, consumer and business matters with regard to validity would be deserving of a stricter separation.<sup>98</sup>

#### **Article 57 - Choice of remedy**

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<sup>96</sup> P. Schlechtriem & I. Schwenzer, Kommentar zum Einheitlichen UN-Kaufrecht<sup>4</sup>, Art 81, para 8.

<sup>97</sup> The Report of the Austrian Chamber of Commerce, pp. 22 et seq.

<sup>98</sup> *ibid.*

If a party is in a situation where she has both a right to avoid the contract or a remedy for non performance, the party may pursue both. This formulation has to be teleologically reduced. It does not make sense that a buyer should be able to avoid the contract for exploitation and on the other hand require specific performance.

## 5.5 Chapter Conclusion

### **Information Duties and Electronic Sales**

To begin with, the CESL puts pre-contractual duties on the seller / provider to supply comprehensive information about the product – a failure to do so can result in contract avoidance by the other party. The provisions are not mandatory but just how alterable they are is unsure.

The duties imposed for traders selling online are generally sensible vis-à-vis other traders and probably reflect only what traders will anyways do. Since they will usually use standard terms, they must take into account that they have to take reasonable efforts to make the other party aware of them and that they are subject to a fairness control.

The selling party is under an obligation to assure that the supplied information is correct; if she fails to do so, liabilities may ensue from that. Contractual derogation is advisable.

### **Formation of Contract**

The formation of a Contract is regulated quite similarly in the CESL and the CISG. Whether minor differences in wording (e.g. “sufficient content and certainty” as opposed to “determinability”) cause different results, case law will show.

Notable differences are, i.a., that the CESL does not know the concept of “withdrawal” (i.e. a revocation that reaches the offeree before or at the same time as the offer), which is possible under all circumstances. The scope for acceptable modifications in an acceptance is unclear, yet not certain in CISG case law either. Lastly, the CESL explicitly embraces the “Last-Shot”-doctrine regarding battle of forms, unlike the CISG which has inconsistent case law in that regard.

Parties may alter these terms.

### **Contract Validity**

Unlike the CISG, the CESL contains provisions regard mistake, fraud, threats and exploitation. Apart from the rules on mistake, the provisions are mandatory; and even those provisions regarding mistake cannot be altered beyond the (not yet really defined) Art 2. Especially undesirable for traders is the possibility to avoid the contract literally forever (periods for

notification start when the party become aware of the relevant fact), e.g. because of a mistake due to a violation of the information duties. Also, liabilities are connected therewith.

Moreover, a party might become guilty of fraud if she does not disclose information that good faith would have required her to disclose. This might be a bit far reaching among traders, as is the possibility of a party to avoid the contract for exploitation if she was “improvident” and the other party took advantage thereof.

All in all, the mostly mandatory validity rules seem quite unapt for businesses.

# 6 Assessing what is in the Contract

## 6.1 Interpretation

### **Article 58 - General rules on interpretation of contracts**

A contract is to be interpreted according to the common intention of the parties even if this differs from the normal meaning of the expressions used in it (para 1). Particular meanings, if known to or if they must have been known by the other party, prevail (para 2). In any other case, the contract is to be interpreted as a reasonable person would (para 3).

The CISG rules in Art 8 regarding the interpretation of statements are worded slightly different; yet they carry the same material content.

### **Article 59 - Relevant matters**

This Art contains guidance as to what is to be utilized in order to determine the intention of the parties. It matches generally with the provisions contained in Art 8 and 9 CISG. The main difference is, that the principles of good faith and fair dealing are applied explicitly to interpret the contract and the parties' intentions under the CESL (Art 59 [h]), whereas under the CISG it is rather a gap-filling mechanism.<sup>99</sup> As with many other provisions, its actual influence in litigation is not clear – parties may exclude it or derogate from this provision. How an alteration would interplay with Art 2, which is mandatory, is not easy to say – it certainly limits deviations to a large degree.

### **Article 60 - Reference to contract as a whole**

Expressions used in a contract are to be interpreted in the light of the contract as a whole.

### **Article 61 - Language discrepancies**

The original contract language is authoritative. However, it is questionable which language prevails, if the contract has been concluded orally e.g. between a Swedish and a Danish or Czech and Slovakian party, each communicating in their own language yet being able to understand and reach an agreement on the *essentialia negotii*.

### **Article 62 - Preference for individually negotiated contract terms**

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<sup>99</sup> P. Schlechtriem & I. Schwenzer, Kommentar zum Einheitlichen UN-Kaufrecht<sup>4</sup>, Art 8 para 30.

Individually negotiated terms automatically take preference over terms contained in standard terms. This is also the situation under the CISG.<sup>100</sup>

**Article 63 - Preference for interpretation which gives contract terms effect**

An unclear provision is to be interpreted in a contract-furthering way.

**Article 64 - Interpretation in favour of consumers**

In B2C contracts, a consumer-friendly interpretation prevails.

**Article 65 - Interpretation against supplier of a contract term**

In B2B contracts, unclear provisions in standard terms will be interpreted against the party who supplied it, as under the CISG.<sup>101</sup>

## 6.2 Contents and Effect

**Article 66 - Contract terms**

Art 66 clarifies what makes up the contract: the agreement (subject to mandatory CESL rules), usages and practices, default CESL provisions and implied contract terms. A hierarchy may be derived from this provision<sup>102</sup>: precedence take the unalterable provisions of the CESL, thereafter comes the agreement, usages and practices and lastly implied terms.

**Article 67 - Usages and practices in contracts between traders**

Usages can become part of the contract by (express) consent of the parties hereto<sup>103</sup> (para 1), practices can be established between parties – this mirrors Art 9 para 1 CISG. Moreover, the parties are bound by a usage which would be considered generally applicable by traders in the same situation as the parties (para 2). The same is true under Art 9 para 2 CISG.<sup>104</sup>

Usages and practices do not bind the parties to the extent to which they conflict with contract terms which have been individually negotiated or any mandatory rules of the CESL (para 3). That means that standard terms can be overruled by usages, to which traders have to give attention.

Also under the CISG, usages are merely used to complete the agreement, not to overrule its explicit provisions. However, under the CISG usages and

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<sup>100</sup> *ibid*, para 58.

<sup>101</sup> *ibid*, para 59 (*contra proferentem* rule).

<sup>102</sup> The Report of the Austrian Chamber of Commerce, p. 24.

<sup>103</sup> Whether this does not constitute an agreement anyway is debatable.

<sup>104</sup> Regarding the problems in connection with establishing the relevant trade usages, cf. e.g. The Report of the Austrian Chamber of Commerce, p. 25.

practices also take precedence over the CISG's provisions<sup>105</sup>, in the CESL its mandatory rules cannot be overridden.

### **Article 68 - Contract terms which may be implied**

If a matter remains ungoverned by agreement, usage and practices and default rules, a judge may imply additional terms, with respect to the nature of the contract, the circumstances and good faith / fair dealing (para 1). The parties' hypothetical intention should be the guidelines (para 2).

The CISG does not contain an explicit counterpart, yet from the Art 8, 9 and 35 the same concept is inferred.<sup>106</sup> The exact extent to which judicial contract completion is possible under the CISG remains dubious, the absolute limit is the (explicit) parties' intention.<sup>107</sup>

Again, good faith and fair dealing take a prominent position within the CESL and again, there is (as of yet) little certainty how exactly judges will complete incomplete contract terms and whether they will be tempted to give precedence to completing it "fairly" instead of sticking closer to the "spirit" established by the parties.

Para 3 states that deliberate gaps are not to be filled. In that case the default rules of the CESL apply; if the matter is not governed by it, the applicable national law must be used.

### **Article 69 - Contract terms derived from certain pre-contractual statements**

Pre-contractual statements regarding the good or service, public or private, become part of the contract unless the other party could not rely on the truthfulness or the statement did not influence the decision to conclude the contract (para 1). Para 2 includes statements by third parties, who act as advertisers to the party. Para 3 contains a farther-reaching provision for B2C contracts and para 4 states the mandatory nature of Art 69 vis-à-vis consumers.

Especially para 1 and 2 are of importance for traders: they have to keep a tight regime regarding statements about their products / services and check on the advertisement tactics of any advertisers / marketers, since they will be liable for contract breach if their product does not fulfill these statements. Outside of this scope are generally only very exaggerated slogans (e.g. "washes whiter than white") that can in no way lead another party to trust in them. It also depends whom the trader is contracting with; if his counterpart

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<sup>105</sup> P. Schlechtriem & I. Schwenzer, Kommentar zum Einheitlichen UN-Kaufrecht<sup>4</sup>, Art 9 para 12 et seqq.

<sup>106</sup> *ibid.*, Art 8 para 26.

<sup>107</sup> *ibid.*, Art 8 para 27.

himself is an expert dealer, reliance on advertisement might be harder to argue for that expert, than for a business dealing in totally different goods.

The corresponding CISG provision is Art 35, which states that goods are only conform to contract if they are fit for their ordinary use, conform with samples, are adequately packed and conform with specifications given to the seller (unless the buyer did not rely on the seller's judgment and skill). Advertisements by the seller can be used to determine the qualities the goods or services ought to have.<sup>108</sup>

As the provision is not mandatory for traders, undertakings may include in their contract a provision declaring not to be bound by such statements and only those statements made in contract negotiations (cf. Art 72). Prior statements are then merely used for interpretation.

### **Article 70 - Duty to raise awareness of not individually negotiated contract terms**

Not individually negotiated contract terms – i.e. standard terms – have to be brought to the other party's attention before the conclusion of the contract or at least reasonable efforts must be taken in that regard (para 1). This applies also vis-à-vis a trader. Since a mere reference in the signed contract with declared as insufficient in B2C contracts (para 2), *e contrario* this should suffice in B2B transactions. The provision is mandatory (para 3). To be on the safe side, traders might still find it practical to highlight the application of standard terms, have a special confirmation form signed or include doubtful provisions in the contract itself.

The CISG does not contain explicit rules on standard terms.<sup>109</sup> The question what requirements are necessary for standard terms to become part of the contract is disputed, a minimum requirement is that the other party is aware of the fact that the user of standard terms wants them to govern the contract, they have to be provided if the other party then wishes so.<sup>110</sup>

### **Article 71 - Additional payments in contracts between a trader and a consumer**

Only relevant in B2C contracts.

### **Article 72 - Merger clauses**

If contained in a written contract, prior statements cannot become part of the contract (para 1), but merely be used for interpretation (para 2), unless in consumer contracts (para 3). This provision is one of the most trader-friendly contained in the CESL. Whether it can be altered further (as to not even include prior statements for interpretation) is a bit unclear, from the

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<sup>108</sup> *ibid.*, Art 35 para 7, Art 36 para 8.

<sup>109</sup> *ibid.*, Art 8 para 52.

<sup>110</sup> *ibid.*, para 53.

wording it seems so but it is questionable if there remains much room with regard to “fairness” considerations.

An inclusion via standard terms seems possible, because if the standard terms become part of the contract, the clause is “in a written contract”. An argument against this could be the explicit reference to a written contract; the other party should have the contract “in hand” as to speak. Since this Art is alterable among traders, parties can clarify that in case they are interested in this question.

The CISG contains no explicit provision thereon, yet an inclusion and thus a derogation from standard provisions is possible.<sup>111</sup>

### **Article 73 - Determination of price**

In case the price cannot be determined otherwise, the normal price for such transactions is regarded as agreed upon, or the reasonable price. This corresponds with Art 55 CISG.<sup>112</sup> Art 56 contains a special rule, if the price is fixed according to the weight of the goods, in case of doubt it is to be determined by the net weight.

### **Article 74 - Unilateral determination by a party**

Art 74 (which is mandatory according to para 2) forbids grossly unreasonable unilateral price fixing. Yet again, gross unreasonableness will be determined by case-law, as will be the price fixed by the judge. This bears insecurities for traders, especially since derogation is impossible.

### **Article 75 - Determination by a third party**

The CESL allows for price determination by a third party, but draws up a few rules for this matter: if the appointed third party cannot or will not determine the price, the court (including arbitral courts according to para 3) will appoint another person to do so (unless this is inconsistent with the contract – what this exactly means is a little unclear) (para 1). If that price is grossly unreasonable, the same rules as in Art 74 apply (para 2). Para 4 allows – *e contrario* - for the derogation of para 2.

### **Article 76 – Language**

Since the CESL is devised as a European tool, thought has been given as to which language is to be used for communications, if it cannot be determined otherwise. It is the language used for the conclusion of the contract. The question with oral contracts are the same as raised in Art 61,

### **Article 77 - Contracts of indeterminate duration**

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<sup>111</sup> CISG-AC Opinion no 3, Parol Evidence Rule, Plain Meaning Rule, Contractual Merger Clause and the CISG, 23.10.2004, <http://www.cisg.law.pace.edu/cisg/CISG-AC-op3.html>, online on 16.05.2012, § 4.1.

<sup>112</sup> Cf. *ibid*, Art 55 para 8.

If contracts of repeated performance do not stipulate the duration, Art 77 CESL provides for a right to terminate within a reasonable period of notice not exceeding two months (para 1). The CISG is centered on a single sale of goods; long-term contractual obligations are not covered by its provisions, only Art 73 contains rules for delivery by installments.

Art 77 is not mandatory vis-à-vis traders (para 2).

### **Article 78 - Contract terms in favour of third parties**

Parties may contractually confer a right on a third party, which has to be at least identifiable (para 1). A right can also be a reduction of liability towards one of the parties (para 2). Para 3 states that the third party and the contract party bound to perform have vis-à-vis each other the same rights and defenses as in regard to the non-performing contract party (para 3). The third party can reject the right via message prior to acceptance (para 4) and the contract parties can remove or modify it prior to giving the third party notice of the right.

## **6.3 Unfair contract terms**

### **6.3.1 General Provision**

#### **Article 79 - Effects of unfair contract terms**

Contract terms supplied by one party and in violation of the subsequent articles (“unfair”) are not binding on the other party (para 1); if the contract can be maintained without the unfair provision, the rest remains binding (para 2). The exact meaning of “terms supplied by one party” is not clear – from the black-letter text, one could infer that this only covers classical standard terms; terms which were brought into the contract as a standard term, but negotiated thereafter would not fall under this regime.<sup>113</sup>

Thus, an unfair term (i.e. a term contrary to Art 86 because it e.g. is against “good commercial practice”) if it concerns a central part of the contract may lead to full avoidance of the whole deal.

In comparison, a contract concluded under the CISG – which does not contain provisions on unfair contract terms – would in this regard be governed by the applicable national law<sup>114</sup>, which oftentimes calls for contract adaption instead of a total invalidity.<sup>115</sup>

#### **Article 80 - Exclusions from unfairness test**

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<sup>113</sup> The Report of the Austrian Chamber of Commerce, p.28,

<sup>114</sup> P. Schlechtriem & I. Schwenzer, *Kommentar zum Einheitlichen UN-Kaufrecht*<sup>4</sup>, Art 4 para 20, whether the terms become part of the contract is governed by the CISG, cf. *ibid.*

<sup>115</sup> The Report of the Austrian Chamber of Commerce, pp. 28 et seq.

Para 1 states, that provisions taken from the CESL itself are not subject to any fairness control, para 2 and 3 state that the main contract subject and the price are excluded from a fairness test as well.

#### **Article 81 – Mandatory Nature**

The fairness test cannot be excluded or altered, not even among traders.

### **6.3.2 Unfair Contract Terms in Contracts between a Trader and a Consumer**

Articles 82 to 85 are omitted since they deal with B2C contracts.

### **6.3.3 Unfair Contract Terms in Contracts between Traders**

#### **Article 86 - Meaning of “unfair” in contracts between traders**

Para 1 (in conjunction with art 80 para 2) establishes the terms that are subject to a fairness control: it is non-individually negotiated contract terms (i.e. standard terms), not relating to the good/service and the price. They are invalid, if they grossly deviate from good commercial practice, contrary to good faith and fair dealing.

Para 2 sets up guidelines as to what is deviating from good commercial practice or otherwise unfair.

Art 86 establishes a fairness control for standard terms. Any term contained in such a set of terms, e.g. shipping conditions, method of payment, insurance etc. is automatically void if it is unfair. As a worst case scenario, the contract will be avoided as a whole.

Yet again, the CESL relies on very broad concepts, the exact form and meaning whereof is yet to be given shape by case law. Of course, for a small undertaking, it could be beneficial not to be bound by a clause unfavorable to them and “forced” upon them by the bigger party with more leverage. And certainly, there are clauses so obviously unjust, that the usage of the CISG could not save them from national law’s alteration or invalidation.

Yet, for many an undertaking, it will probably not be worth the risk to include a choice of law for the CESL in their standard forms, when they cannot be sure that important parts thereof will not be declared void in case of conflict, at least before case law has cleared the scope of this fairness control.

In addition, the rules of this chapter are unalterable (Art 81), thus not even allowing for an adaption by the parties or an exclusion of fairness control.

Taking into account that bigger undertakings, when contracting, have the other parties' standard terms evaluated by legal experts beforehand and negotiate on problematic issues (mostly with trade-offs in other areas), an inevitable judicial control makes the CESL definitely less attractive to businesses.<sup>116</sup>

## 6.4 Chapter Conclusion

### **Interpretation:**

Unlike the CISG, the CESL uses the principles of good faith and fair dealing as means to interpret the contract and the ensuing duties of the parties. The implications of this factor will only be seen when the CESL is put to the test, but businesses might not feel much inclined to have their contracts governed by a "fairness" regime. The fact that interpretation rules are alterable is limited by the mandatory nature of Art 2.

### **Contents:**

A difference between CESL and CISG is that the latter gives preference to commercial usages over its default rules. The CESL's mandatory provisions cannot be derogated from by the parties' agreement, even less so by commercial practices.

The CESL contains an explicit provision allowing for contract completion by so called "implied terms" to save the contract and help its realization where parties forgot to regulate matters. The CISG also knows this concept, albeit its exact scope is debated. The CESL'S wording leads to believe that it entrusts judges and arbitrators with farther-reaching powers to alter the contract than under the CISG.

Standard terms have to be brought to the other party's notice or at least reasonable efforts to that have to be made. It seems that the CESL and the CISG generally require the same, namely, that the other party is aware of the terms and can obtain knowledge of them if she wants to.

Regarding the price, the CESL contains explicit rules to prevent "grossly unreasonable" price fixing by one party or a third party. The CISG leaves such matters to the applicable national law.

### **Unfair provisions:**

While the CISG leaves the fairness of standard terms to national law, the CESL draws up an unalterable control even for standard terms among

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<sup>116</sup> H. Eidenmüller, N. Jansen, E.-M. Kieninger, G. Wagner & R. Zimmermann, Der Vorschlag für eine Verordnung über ein Gemeinsames Europäisches Kaufrecht, pp. 279 et seq.

traders. If transparency standard have been kept, the control is not extended to the main subject of the contract and the price.

The terms used are “good commercial practice” and “good faith and fair dealing”. The concepts are broad and contain risks for traders and are not alterable. To be on the safe side, traders would have to negotiate individually on every provision they have doubts about.

# 7 Obligations and Remedies

## 7.1 General Provisions

### **Article 87 - Non-performance and fundamental non-performance**

The Art starts out by defining non-performance as any failure to perform a contract obligation, regardless of whether it is excused or not. It continued with a non-exclusive list of common issues, such as failure to deliver, non-conforming goods, late payment and a catchphrase: “any other purported performance which is not in conformity with the contract” (para 1 [f]). Thus, every deviation from the contract falls under the heading “non-performance” with the connected implications.

The CESL uses a wide concept, yet is then forced to make special provisions for special circumstances, leading to complex interplay between provisions. It does not differentiate between main duties under the contract or ancillary duties.<sup>117</sup> The CISG only speaks of a “breach of contract”, what falls under this term is defined by case law.<sup>118</sup>

Para 2 defines fundamental non-performance, as substantially depriving the other party of what that party was entitled to expect under the contract, unless at the time of conclusion of the contract the nonperforming party did not foresee and could not be expected to have foreseen that result. This is basically equal to Art 25 para 2 CISG<sup>119</sup> with the difference that the CISG calls for an actual “detriment” to be inflicted on the other party that deprives it – it might be possible that judges will come to a conclusion of fundamental breach easier under the CESL.<sup>120</sup>

Moreover, an act that makes clear that the nonperforming party will not perform in future, is also fundamental. The CISG contains special rules in Art 71 dealing with “anticipatory breach”, allowing the other party to suspend the performance of their obligations if it becomes “apparent”, that the other party will not perform. Both provisions are equally vague as to what can be counted as a definite indication that no further performance will occur. Only if becomes clear, that the other party will commit a fundamental breach of contract, avoidance becomes possible under the CISG.<sup>121</sup>

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<sup>117</sup> The Report of the Austrian Chamber of Commerce, p. 25.

<sup>118</sup> Cf. *P. Schlechtriem & I. Schwenzer*, *Kommentar zum Einheitlichen UN-Kaufrecht*<sup>4</sup>, Art 25 para 7 et seqq.

<sup>119</sup> *ibid.*, para 4 et seqq.

<sup>120</sup> *H. Eidenmüller, N. Jansen, E.-M. Kieninger, G. Wagner & R. Zimmermann*, *Der Vorschlag für eine Verordnung über ein Gemeinsames Europäisches Kaufrecht*, p. 36.

<sup>121</sup> *J. Lookofsky*, *Understanding the CISG*<sup>3</sup>, § 6.26, with further references.

The CESL connects it with farther reaching consequences, since it allows the other party to terminate the contract (and call for damages) once the other party's performance "cannot be relied on". Therefore, insecurities under the CESL in regard to termination for future / anticipated non-performance are greater.

The provision is amendable.

### **Article 88 - Excused non-performance**

The consequence of the fact that the non-performance is excused is that according to Art 106 para 4 CESL no liability for damages is incurred. *E contrario*, this means that all non-excused non-performances make the non-performer liable. As said above, parties are free to adjust the provisions; yet, such an alteration would upset the whole design of the CESL and might lead to further insecurities and inconsistencies.

A non-performance is excused if it is due to an impediment beyond that party's control and if that party could not be expected to have taken the impediment into account at the time of the conclusion of the contract, or to have avoided or overcome the impediment or its consequences (para 1). If the impediment is only temporary, it is only temporarily excused (para 2), unless it is fundamental. The impeded party must notify the other party without undue delay or be liable for damages for failing to do so (para 3).

Art 79 CISG basically puts up the same definition of excused non-performance in its para 1.<sup>122</sup> The temporary non-performance is covered in para 3, notice in para 4. Furthermore, the CISG contains a provision for third parties performing (parts of) the contract; both the actual contract party and the third party must fulfill the requirements.

Here the CESL and the CISG regimes correlate closey.

### **Article 89 - Change of circumstances**

Unlike the CISG<sup>123</sup>, the CESL contains a *clausula rebus sic stantibus*. Performance is due, unless where performance becomes excessively onerous because of an exceptional change of circumstances. Then, the parties have a duty to enter into negotiations with a view to adapting or terminating the contract (para 1).

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<sup>122</sup> Cf. P. Schlechtriem & I. Schwenzer, Kommentar zum Einheitlichen UN-Kaufrecht<sup>4</sup>, Art 79 para 10 et seqq.

<sup>123</sup> D. Flambouras, The Doctrines of Impossibility of Performance and *clausula rebus sic stantibus* in the 1980 Vienna Convention on Contracts for the International Sale of Goods and the Principles of European Contract Law: A Comparative Analysis, <http://www.cisg.law.pace.edu/cisg/biblio/flambouras1.html#iie>, online on 01.05.2012, pp. 277 et seqq.

Para 2 allows a court (or an arbitrary tribunal, cf. para 4) on a party's request to either adjust the contract or terminate it. Para 3 makes clear that changes in circumstances are only relevant if they took place after the contract's conclusion, were not taken into account by the party relying on it and that this party did not assume the risk.

The criteria for a performance to become excessively onerous will be different from case to case. Parties will be well advised to stipulate circumstances which they deem falling in that category.

Furthermore, the relationship to Art 110 para 3 is unclear, which says that performance cannot be required in case it is impossible or disproportionate.<sup>124</sup> A possible interpretation would be that Art 100 para 3 is merely a clarification, stating that performance in the original way cannot be required and that renegotiation has to take place.

Also, Art 89 does not state the consequences of a failure to enter into renegotiations. Since this would probably be against good faith, a party might become liable or lose rights.<sup>125</sup>

Parties will have to decide for themselves, if they think that a duty to renegotiate is apt for the kind of business they wish to conclude, or if they should not exclude the application of the provision or opt e.g. for a mere automatic termination.

### **Article 90 - Extended application of rules on payment and on goods or digital content not accepted**

Quite out of place, Art 90 regulates that rules on payment of the price in Chapter 12 apply on all payments and that Art 97 (rights and duties of a seller of goods not accepted) apply to other cases where a person is left in possession of goods or digital content because of a failure by another person to take them when bound to do so.

## **7.2 The Seller's Obligations**

### **7.2.1 General provisions**

#### **Article 91 - Main obligations of the seller**

The seller must hand over the goods, transfer the ownership and provide the documents. This is in conformity with Art 30 and 34 CISG (which contains more elaborate provisions on the required documentation). Moreover, the CESL contains rules to ensure the usability and the right to do so of digital

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<sup>124</sup> The Report of the Austrian Chamber of Commerce, p. 37.

<sup>125</sup> H. Eidenmüller, N. Jansen, E.-M. Kieninger, G. Wagner & R. Zimmermann, Der Vorschlag für eine Verordnung über ein Gemeinsames Europäisches Kaufrecht, p. 37.

content, a good not envisaged by the CISG. Though not explicitly written down, it seems self-understanding, that the contract takes precedence over these standard obligations.

It is already regulated here, that goods and digital content are in conformity with the contract ([c]), whereas the CISG regulates the duty to deliver and to deliver conforming goods in different provisions.<sup>126</sup>

Since the acquisition of property is not regulated, that is – as with the CISG<sup>127</sup> – a matter of national law; this is also true if the property remains reserved.

### **Article 92 - Performance by a third party**

The CISG contains no provisions on the performance of third parties except in Art 79<sup>128</sup> (see above under Art 88), the CESL states explicitly that a party remains responsible for the performance of a third party. This can be altered vis-à-vis other traders. Both under CISG and CESL, this can be modified; probably to a lesser degree under the CESL due to Art 2.

## **7.2.2 Delivery**

### **Article 93 – Place of Delivery**

The article defines the place of delivery in case it cannot be determined from the contract. Para 1 (a) deals with delivery vis-à-vis consumers. Para 1 (b) states that in B2B contracts it is the nearest collection point of the first carrier in case that carriage is agreed upon, otherwise it is at the seller's place of business. The CISG calls for delivery to the first carrier (not at his nearest collection point) (Art 31 [a]) or also at the seller's place of business (Art 31 [c]). Art 31 (b) contains special rules if the goods are taken from a specific stock or yet to be produced.

Under the CESL, if the seller has more than one place of business, the place of business is that which has the closest relationship to the obligation to deliver (para 2).

### **Article 94 - Method of delivery**

Para 1 (a) regards B2C delivery. Para 1 (b) calls for handing over the goods and all documents to the carrier so that the buyer can take the goods from him. In all other cases, it is by making the goods or content available to the buyer (or a third party, indicated by him, para 2), (para 1 [c]). Cf. herewith Artt 30 to 34 CISG.

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<sup>126</sup> The Report of the Austrian Chamber of Commerce, p. 38.

<sup>127</sup> P. Schlechtriem & I. Schwenzer, Kommentar zum Einheitlichen UN-Kaufrecht<sup>4</sup>, Art 4 para 4.

<sup>128</sup> Cf. *ibid*, Art 79 para 25 et seqq.

### **Article 95 – Time of Delivery**

If no time is specified, delivery has to take place without undue delay (para 1). Para 2 is for B2C contracts. Art 33 CISG contains the same provisions, with the addition in its para 2, that if a period is fixed or determinable, delivery has to take place within that period, except if the buyer is to choose a date.

### **Article 96 - Seller's obligations regarding carriage of the goods**

The deals with matters such as the consignment specifying the goods (para 2), appropriate means of transportation (para 1) and insurance (para 3). It mirrors Art 33 CISG.

### **Article 97 - Goods or digital content not accepted by the buyer**

If the goods or content was not accepted by the buyer, the seller has to take reasonable steps to preserve them (para 1) (matches Art 85 CISG). He may then either deposit the goods with a third party on reasonable conditions (cf. hereto Art 87 CISG) or sell them and pay the net proceeds to the buyer (para 2). The seller is entitled to be reimbursed or to retain out of the proceeds of sale any costs reasonably incurred.

Art 88 CISG allows for sale if the delay is unreasonable if notice has been given to the other party (para 1). In case the goods deteriorate quickly, the party is under a duty to sell (para 2). After deducting the reasonable costs, the rest of the proceeds must be given to the other party (para 3).

The CISG contains more elaborate and precise rules – a duty to sell foodstuff or the like under the CESL would have to be derived from general principles.

### **Article 98 - Effect on passing of risk**

States that the effect is regulated in Chapter 14.

## **7.2.3 Conformity of the Goods and Digital Content**

### **Article 99 - Conformity with the contract**

Conform goods are such as of quality, quantity and description as agreed upon in the contract, correctly packaged and complete with all additional material (para 1). It must furthermore satisfy Art 100 to 102 (e.g. they must be fit for the ordinary purpose and free of third parties' rights) unless otherwise agreed so (para 2). Para 3 and 4 deal with consumer matters.

Art 35 CISG corresponds in its para 1 with Art 99 para 1 CESL, except that it does not contain a reference to additional material. However, if the circumstances make it apparent that e.g. manuals must be included with the

good, they have to be provided.<sup>129</sup> Para 2 sets forth the criteria of fitness for ordinary purposes and such (cf. *infra*).

### **Article 100 - Criteria for conformity of the goods and digital content**

Goods must be fit for the purpose made known to the seller, unless the buyer did not or could not rely on the seller's skill and judgment (para 1 [a]). Even though this is not said explicitly, the goods must only conform to their ordinary use (para 1 [b]), if the buyer did not specify a particular use – everything else would be against the primacy of the contractual agreement.<sup>130</sup> Furthermore, conformity is foremost if goods confer to the parties' agreement according to Art 99!<sup>131</sup>

If a model or sample was shown, the goods or content must conform to that (para 1 [c]), and always they must be packed in an appropriate manner (para 1 [d]). All accessories must be supplied alongside (para 1 [e]). They must furthermore conform to any (!) pre-contractual statement of the seller and to what the buyer may expect of the good or content (para 1 [f], [g]).

The CISG mirrors in Art 35 para 2 and 3 the letters (a) to (d) of Art 100 para 1 CESL, yet it gives explicit precedence to the parties' agreement. As said above, precontractual statements seem to have greater weight under the CESL. Especially the conformity with all statements made by the seller or third parties in his services poses a certain risk for liability for traders and should be reduced by adapting said provisions.

The criterion that the goods must conform to what the buyer "can expect" is not determinable at all and is to be excluded by any prudent trader.<sup>132</sup>

### **Article 101 - Incorrect installation under a consumer sales contract**

The article is only relevant in consumer contracts.

### **Article 102 - Third party rights or claims**

The seller has to supply goods or content free of rights or not obviously unfounded claims of third parties (para 1). For intellectual property rights, para 2 states that goods must be free of such rights and claims (whereof the seller knew or could have been expected to know of) under the law of the state where the goods or digital content will be used according to the contract or, in the absence of such an agreement, under the law of the state of the buyer's place of business (para 2). This applies only to rights and

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<sup>129</sup> P. Schlechtriem & I. Schwenzer, Kommentar zum Einheitlichen UN-Kaufrecht<sup>4</sup>, Art 35 para 14.

<sup>130</sup> The Report of the Austrian Chamber of Commerce, p. 39.

<sup>131</sup> Rightly criticizing wrong impression given by the provision: H. Eidenmüller, N. Jansen, E.-M. Kieninger, G. Wagner & R. Zimmermann, Der Vorschlag für eine Verordnung über ein Gemeinsames Europäisches Kaufrecht, p. 280.

<sup>132</sup> The Report of the Austrian Chamber of Commerce, p. 40.

claims the buyer was unaware of or could not have been at the conclusion of the contract (para 3).

Para 4 and 5 deal with consumer matters.

The CISG contains conforming provisions in Art 41 et seq, with a special provision in Art 42 para 2 (b): if the claim arises because the seller abided by technical drawings or other specifications given to him by the buyer, he is not liable.<sup>133</sup> Art 43 puts a duty on the buyer to inform the seller of claims within a reasonable time after he becomes aware of it, unless the seller knows of the right or claim.

### **Article 103 - Limitation on conformity of digital content**

A later update of digital content does not make the sold version unconforming.

### **Article 104 - Buyer's knowledge of lack of conformity in a contract between traders**

In a contract between traders, the seller is not liable for any lack of conformity of the goods if, at the time of the conclusion of the contract, the buyer knew or could not have been unaware of the lack of conformity. This mirrors Art 35 para 3 CISG.

### **Article 105 - Relevant time for establishing conformity**

Conformity must exist at the passing of risk (para 1) according to Chapter 14 (Artt 143 to 146). Para 2 and 3 deal with consumer matters. Para 4 establishes that – if digital content is sold with the duty to update it – that the seller must see to conformity during the whole duration of the contract.

The CISG does not explicitly specify the point in time when conformity must exist, but contains rules under which circumstances cure is possible (Artt 37, 48 et seq., cf. *infra* at Art 109 CESL).

## **7.3 The Buyer's Remedies**

### **7.3.1 General Provisions**

#### **Article 106 - Overview of buyer's remedies**

The article sets out the buyer's remedies (with the exclusion of those based on the invalidity of the contract), first of all (specific) performance, respectively repair or replacement. He may withhold his own performance, may terminate the contract, reduce the price and claim damages.

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<sup>133</sup> Cf. *P. Schlechtriem & I. Schwenzer*, Kommentar zum Einheitlichen UN-Kaufrecht<sup>4</sup>, Art 42 para 19.

Vis-à-vis a trader, these rights are subject to cure and examination / notification (para 2). Para 3 deals with consumer matters. Excused non-performance precludes claims for performance and / or damages (para 4). If the buyer is responsible for lacks in performance, he may not claim any of the remedies (para 5). Remedies which are not incompatible may be cumulated (para 6).

Under the CISG, no court is bound to award specific performance if it would not do so to a similar contract under its national law (Art 28). Other than that, the remedies are generally conforming (cf. Art 45).<sup>134</sup>

#### **Article 107 - Limitation of remedies for digital content not supplied in exchange for a price**

This special provision reduces the rights of the “buyer” of digital content supplied without a price – he is only entitled to damages for harm that has come from the usage of the content.

#### **Article 108 - Mandatory nature**

Vis-à-vis consumers. Trading parties are free to e.g. exclude the right for specific performance and agree on mere monetary compensation.

### **7.3.2 Cure by the Seller**

#### **Article 109 – Cure by the Seller**

In case of early (faulty) performance by the seller, he is entitled to rectify the shortcoming within the time allowed for performance (para 1). Other than that, he may offer cure at his own expense (para 2), which is not precluded by notice of termination. The other party may only reject that if it is overly inconvenient, not reliable or so delayed that it amounts to fundamental non performance (para 4). The notion of “effected promptly” is quite narrow and raises questions as to its relation with para 5, which offers “a reasonable time”.<sup>135</sup>

From the usage of the word “tender”, it is not entirely clear whether a cure after the date of delivery is only possible if performance was offered but not taken, or in any case.<sup>136</sup> If the first interpretation turns out to be correct, a right to cure after accepted deficient performance may be warranted by good faith and fair dealing.

The CISG contains a different provision, Art 37. It states that in case of early delivery, the seller may establish conformity until the point that

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<sup>134</sup> *ibid.*, § 6.2.

<sup>135</sup> The Report of the Austrian Chamber of Commerce, p. 43.

<sup>136</sup> *ibid.*

delivery was due, unless this is overly cumbersome for the buyer.<sup>137</sup> Furthermore, even after the date of delivery, the seller is allowed to cure according to Art 48 CISG<sup>138</sup>, as long as it is not a(n unrectifiable) fundamental breach of contract according to Art 49.<sup>139</sup>

The CISG thus also allows for a cure, but only if it is not troublesome to the other party; there is no “right” to cure as under Art 109 para 1 CESL (even though CISG case law has sometimes put considerable burden on the other party waiting for cure).<sup>140</sup> If cure according Art 109 para 1 CESL can be evaded by the buyer because it would be so overly cumbersome on him as to be against good faith and fair dealing will be shown by case law.

In case the seller is entitled to cure, he has reasonable time for it (para 5). The buyer may withhold his performance but not use rights inconsistent with the cure (such as termination) (para 6); yet he may claim damages for delay as well as for any harm caused or not prevented by the cure. The consequence of a failure to cure are not regulated, teleological interpretation of the provision then leads to think that the original remedies are available for the buyer, and possibly additional damages if he suffered a detriment by the failed cure.

### 7.3.3 Requiring Performance

#### **Article 110 - Requiring performance of seller’s obligations**

The buyer may demand (specific) performance unless it has become impossible or unlawful or if the expense would be disproportionate. While generally amendable, Art 2 would possible hinder an exclusion of e.g. Art 110 para 3 (b).

Art 46 CISG allows demanding performance only if no inconsistent remedy has been used (e.g. avoidance) (para 1), and of course subject to Art 28.

#### **Article 111 - Consumer’s choice between repair and replacement**

Only the consumer is entitled to choose between these two – a trader has to include such a provision into the contract. If no special agreement is made, it is up to the seller to choose the means to remedy a lack.

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<sup>137</sup> Cf. *P. Schlechtriem & I. Schwenzer*, Kommentar zum Einheitlichen UN-Kaufrecht<sup>4</sup>, Art 37 para 6.

<sup>138</sup> *ibid.*, Art 48 para 3.

<sup>139</sup> *J. Lookofsky*, Understanding the CISG<sup>3</sup>, § 6.9, with further references.

<sup>140</sup> *ibid.*

Under the CISG, the buyer can opt for replacement only in case of a fundamental breach (Art 46 para 2), otherwise he is restricted to repair, unless this is unreasonable (para 3).<sup>141</sup>

#### **Article 112 – Return of replaced item**

In case of replacement, the seller may transport the item back on his own expense (para 1), the buyer does not have to compensate him for the use (para 2). This provision might lead to unjust results, if the item was used for years and years before the buyer became aware of the defect.<sup>142</sup> In case of termination, the CESL requires indemnification for usage under certain circumstances (cf. Art 174).

The CISG only contains a special provision in Art 84 dealing with the case of goods to be returned after the contract was avoided. The buyer has to return all benefits derived from the goods.

### **7.3.4 Withholding Performance of the Buyer's Obligations**

#### **Article 113 - Right to withhold performance**

If according to contract the buyer must only perform concurrently or after the seller, he has the right to without performance until then, as is self-understanding (para 1). This matches with Art 58 para 1 CISG; the payment of the price can be made a condition for the handing over of the goods. According to this CISG article, the buyer is also not bound to pay before he has inspected the goods.

Para 2 allows to withhold performance in case of a reasonably anticipated breach. The same is true under Art 71 CISG. According to para 3, holding back is only allowed to the extent justified under the circumstances. Under the CISG, there is no explicit provision as to partial withholding<sup>143</sup>, yet a notice has to be dispatched to the party in breach.

### **7.3.5 Termination**

#### **Article 114 - Termination for non-performance**

For B2B contracts, every fundamental breach allows for termination of the contract (para 1). The confirming provision is Art 49 CISG. That provision fixes a “reasonable” time span for termination; this is not matched by the

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<sup>141</sup> Cf. *P. Schlechtriem & I. Schwenzer*, Kommentar zum Einheitlichen UN-Kaufrecht<sup>4</sup>, Art 46 para 4.

<sup>142</sup> The Report of the Austrian Chamber of Commerce, p. 43.

<sup>143</sup> Cf. *P. Schlechtriem & I. Schwenzer*, Kommentar zum Einheitlichen UN-Kaufrecht<sup>4</sup>, Art 71 para 4 et seqq.

CESL with regard to absolute non-delivery (cf. Art 119 para 2 [b] CESL). Under the CESL, as long as no performance (past the agreed date of performance) has been tendered, it seems as if the buyer may terminate the contract because an absolute non-delivery is deemed fundamental. Under the CISG, it might be dubious whether the criterion of a fundamental breach is reached yet and the wish for security greater on the buyers side, forcing him to make use of an addition period.<sup>144</sup>

#### **Article 115 - Termination for delay in delivery after notice fixing additional time for performance**

In case the non-performance is not fundamental (or the trader wants to make sure not to terminate in default), he may set a *Nachfrist* of reasonable length – if it passes without performance, he may terminate (para 1). If the seller does not object to the actual period without undue delay, it is deemed reasonable (para 2). Where the notice provides for automatic termination if the seller does not perform within the period fixed by the notice, termination takes effect after that period without further notice (para 3).

Article 47 CISG also allows for the setting of an addition period during which the buyer must not take remedies for breach. As stated above, a total non-performance (i.e. the lack of any tender) seems to allow terminating the contract promptly.

#### **Article 116 - Termination for anticipated non-performance**

A buyer may terminate the contract before performance is due if the seller has declared, or it is otherwise clear, that there will be a non-performance, and if the non-performance would be such as to justify termination. The CISG (Art 72) mirrors that, with the exception that a notice has to be given (unless the seller declared not to perform) (for the CESL the requirement of a notice is contained in its Art 118).

#### **Article 117 - Scope of right to terminate**

Termination of divisible performances may only be made in regard to the parts fulfilling the conditions hereto (para 1), unless a total termination is justified (para 2 and 3). Art 51 CISG also sets partial avoidance as default rule.

#### **Article 118 - Notice of termination**

A right to terminate is exercised by notice to the seller.

#### **Article 119 - Loss of right to terminate**

The buyer has to give notice within a reasonable period of time after becoming aware or could have been expected to do so (para 1), or he loses the right. For a non-delivery, the termination right seems to have no period of expiry.

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<sup>144</sup> J. Lookofsky, Understanding the CISG<sup>3</sup>, § 6.10.

According to Article 82 of the CISG, the ability to restore the received goods in the conditions they had at delivery is a precondition to terminate (para 1). Exceptions hereof are occurrences not due to the buyer, proper examinations of the goods and normal sales thereof (para 2). Cf. furthermore *supra* at Art 114.

### 7.3.6 Price Reduction

#### **Article 120 - Right to reduce price**

If the goods are non-conforming, the buyer has the option to accept them but reduce the price (para 1), even if he has already paid (para 2). However, he may not claim damages covered by this but only those in excess of the reduction (para 3). Para 1 and 2 are mirrored by Article 50 CISG; yet this provision explicitly states that a reduction is not viable in case the seller may cure.<sup>145</sup> From there wording of Art 120 CESL, it seems as if reduction might be possible without giving the seller a chance to cure.<sup>146</sup>

### 7.3.7 Requirements of Examination and Notification in a Contract between Traders

#### **Article 121 - Examination of the goods in contracts between traders**

Goods, content and services must be examined among traders within a reasonable time and not more than 14 days from the point of their delivery or supply (para 1). The CISG in its Art 38 para 1 does not set a fixed period, but uses the wording “within as short a period as practicable under the circumstances”. Traders acquiring complex high-technology or software should – if choosing the CESL – might think about excluding the 14 days rule.

What has to be kept in mind when choosing the CISG for that reason, is that some countries like Germany and Austria have ruled, that for them a reasonable period is e.g. one month (Germany) and 14 days (Austria) respectively.<sup>147</sup>

If the contract involves carriage of the goods, examination may be deferred until after the goods have arrived at their destination (para 2, matches Art 38 para 2 CISG).

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<sup>145</sup> P. Schlechtriem & I. Schwenzer, Kommentar zum Einheitlichen UN-Kaufrecht<sup>4</sup>, Art 50 para 7.

<sup>146</sup> The Report of the Austrian Chamber of Commerce, p. 45.

<sup>147</sup> J. Lookofsky, Understanding the CISG<sup>3</sup>, § 4.9, with further references.

Should a redirection of goods *in transitu* occur, examination can be carried out at their final destination (para 3 of both Art 121 CESL and Art 38 CISG).

With regard to interest for failure to pay, Art 168 para 3 CESL sets a 30 day period for examination; the exact relationship between the provisions is unclear.<sup>148</sup> One might possibly assume that this 30 days period applies in cases where parties have derogated from or excluded the 14 days rule, setting a new maximum period which has to be deviated from expressly again. Traders might wish to clarify this contractually (especially since Art 168 is not open to derogation according to Art 171).

### **Article 122 - Requirement of notification of lack of conformity in sales contracts between traders**

The receiving trader has to give notice and specify the lack of conformity within a reasonable time after he discovers (or should have discovered) it (para 1, equals Art 39 para 1 CISG).

Para 2 establishes a maximum 2 year period after the handing over of the goods, as does Art 39 para 2 CISG. Under both CISG<sup>149</sup> and the CESL, this maximum period does not exist for third party claims and rights (para 4) – they are thus a valid ground for using all remedies of the CESL for a near indefinite period of time. Traders should pay heed to this.

Guarantees given extend that period until the end of the guarantee (para 3, Art 39 para 2 CISG). Moreover, the buyer does not have to notify the seller that not all the goods have been delivered if the buyer has reason to believe that the remaining goods will be delivered (para 5) – this probably means that in case of missing quantities, the starting point for notice is the moment when the buyer could not reasonably expect the delivery of the missing goods anymore.

If the seller knew of the lack or could have been expected to know, he cannot rely on a delay in notice (para 6, conform with Art 40 CISG).

## **7.4 The buyer's obligations**

### **7.4.1 General Provisions**

#### **Article 123 - Main obligations of the buyer**

The buyer must take the goods or content and pay the price (para 1) (mirrors Art 53 CISG), unless in cases of digital content without a price (para 2).

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<sup>148</sup> The Report of the Austrian Chamber of Commerce, pp. 45 et seq.

<sup>149</sup> P. Schlechtriem & I. Schwenzer, Kommentar zum Einheitlichen UN-Kaufrecht<sup>4</sup>, Art 43 para 4.

Furthermore, he is also obliged to take all related documents – not a duty under the CISG. Whether a failure to take such documentation really amount to a breach of the buyer’s contractual duties will have to be assessed on a case-by-case basis. Much leads to think that is usually rather a “duty” in the buyers own interest and not a breach of contract – thus like an *Obliegenheit* under German law.

## 7.4.2 Payment of the Price

### **Article 124 - Means of payment**

According to para 1, the payment method agreed upon in the contract shall prevail, if there is no such agreement, then any means used in the ordinary course of business at the place of payment taking into account the nature of the transaction may be used.

Cheques and other promises are accepted only under the precondition that they will be honoured, if that does not occur, the original obligation may be enforced (para 2).

If the seller accepts a cession, the old obligation is extinguished and only the promise of the third party remains for the seller (para 3).

The CISG is less precise in its Art 54, merely calling for the buyer to take all steps and complying with all formalities as necessary to effect the payment.

### **Art 125 – Place of Payment**

If no other place may be determined, it is the seller’s place of business (para 1) (which has the closest relationship with the obligation to pay, para 2). Art 57 of the CISG also calls for payment at the seller’s place of business, or alternatively at the place of the handing over of the goods (para 1). It also orders the seller to pay for any increase in costs due to change of his place of business after the conclusion of the contract (para 2).

### **Article 126 - Time of payment**

Payment is to be made at delivery (para 1). The seller may reject an offer to pay before payment is due if it has a legitimate interest in so doing (para 2). It goes without saying that the parties are free to alter this standard clause – as Art 58 para 1 CISG makes clear for contract governed by the Convention. The CISG is also more detailed as it states that otherwise the default point is when seller places either the goods or documents controlling their disposition at the buyer’s disposal. The seller may also arrange the handing over in a way, that the goods are only committed against payment.

Art 58 para 3 CISG allows the buyer to refrain from paying the price until he has inspected the goods – unless otherwise agreed. As mentioned above, Art 168 para 3 seems to allow a period of 30 days for payment in the CESL.

Lastly, Art 59 CISG states that the payment is to be made without the seller having to comply with any formalities.

#### **Article 127 - Payment by a third party**

The CISG does not contain any provisions on payment by third parties. According to Art 127 CESL, the buyer may entrust payment to a third party, but remains responsible for it (para 1). A third party paying with assent of the buyer or with a legitimate interest in paying cannot be refused by the seller (para 2), the payment discharges the buyer of his liability towards the seller (para 3). If the seller accepts a payment from a third party not fulfilling the above criteria, the buyer is discharged and the seller is liable to the seller for any loss caused by this action (para 4).

#### **Article 128 - Imputation of payment**

Without counterpart in the CISG, Art 128 sets up rules for the case that the buyer has several obligations to pay and makes a payment that does not cover all of them. He may decide for which obligations the payment shall count (para 1), or the seller may do so if he does not (para 2), unless it is not due or disputed (para 3). The para 4 to 6 set up further rules, which seem appropriate and just.

## **7.5 Taking Delivery**

#### **Article 129 - Taking delivery**

It is the buyers duty to take over the goods and perform all the acts which could be expected in order to enable the seller to perform the obligation to deliver. This matches Art 60 CISG.

However, this has to be read in conjunction with Art 132 para CESL, which stipulates that the buyer may refrain from accepting the goods unless the seller could not have made a reasonable substitute transaction without significant effort or expense. To this see *infra* at Art 132.

#### **Article 130 - Early delivery and delivery of wrong quantity**

The buyer must take early delivery unless he has a legitimate interest in not doing so (para 1). The same is true if the sellers delivers less than contractually agreed upon (para 2). If it is more, the buyer may take the excess or refuse it (para 3); in that case he has to pay for it as if it were agreed upon under the contract (para 4). Para 5 regulates B2C contracts, para 6 excludes the application of Art 130 with regard to digital content supplied without a price.

The main difference to the CISG regime is that there the buyer can always chose whether he wishes to take or refuse early/insufficient/excessive delivery (Art 52). Of course, a rule like Art 130 CESL may make it easier for the supplying party – however, it complicates matters if both parties

have to assess, whether the buyer really has a legitimate interest in denying early delivery or the delivery of a *minus*.

## 7.6 The Seller's Remedies

### 7.6.1 General Provisions

#### Article 131 – Overview of Seller's Remedies

The seller may, in case of a non-performance, require (specific) performance (para 1 [a]). This is in line with Art 61 para 1 (a) CISG in conjunction with Art 62 CISG.<sup>150</sup>

He furthermore may withhold his own performance (para 1 [b]). This is also possible under the CISG under the conditions of Art 71 CISG. He may terminate for fundamental breach (para 1 [c]), this matches Art 61 para 1 (a) CISG in conjunction with Art 64 CISG.

Lastly, he can claim damages and / or interest (para 1[d]), cf. hereto Art 61 para 2 CISG. For non-fundamental breach, only termination and suspension of performance are viable (para 2) (cf. Art 64 para 1 [a] *e contrario*). The seller may not rely on any remedy where he caused the non-performance (para 3).<sup>151</sup> Remedies which are not incompatible may be cumulated (para 4).

The CISG (Art 61 para 3) states explicitly, that no period of grace may be granted to the buyer by a court or arbitral tribunal when the seller resorts to a remedy for breach of contract.

### 7.6.2 Requiring Performance

#### Article 132 - Requiring performance of buyer's obligations

The seller may require that the buyer pay the price and perform his other obligations (para 1). Para two however allows the buyer to refrain from accepting the goods, if the seller can make a reasonable, not too burdensome substitute transaction.

This may constitute an easy way out of the contract for a buyer, e.g. in a case where commodities were bought and a subsequent drop in prices makes the maintenance of the contract undesirable to the buyer. What the buyer is left with in the case that he can effect a substitute transaction is not

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<sup>150</sup> Yet subject to Art 28 CISG.

<sup>151</sup> The CISG does not contain such a provision, to avoid undue effects principles like estoppel have to be utilized.

elaborated on in the CESL. It will certainly be the termination of the contract and possibly damages, unless the non-acceptance of the goods is excusable.<sup>152</sup>

Another consequence is that the buyer then does not have to pay the purchase price. It is not justified that a buyer can get out of a contract just because the seller is able to rectify this behavior by making a substitute transaction. Moreover, it might not be easy to assess when such a transaction is without “significant effort or expense”.

Also, the seller would be under the duty to prove a non-performance (failure of the non-payment of the price and the non-acceptance of the goods) and the fact that the buyer is not inclined to accept them in the future. Added to this is that he has to take care of the goods during the period of non-acceptance (Art 97 CESL). How the option to deposit the goods with a third party interacts with the duty to arrange for a substitute transaction is unclear.<sup>153</sup> Lastly, that any proceeds of such a sale to a third party should go to the buyer is unacceptable.

Sellers would do well to exclude or amend Art 132 para 2.

### **7.6.3 Right to withhold Performance**

#### **Article 133 - Right to withhold performance**

Para 1 sets out that if the contract calls for simultaneous performance of the obligations, the seller may withhold performance until the buyer performs. If the seller is to perform first and has good reason to believe that the buyer will not do so, he may withhold for the time of the belief or until the buyer gives adequate security (para 2). Withholding is only viable in as far as it is justified (para 3).

The CISG in Art 71 para 1 sets a higher hurdle, the non-performance must be “apparent”, either from conduct or a serious deficiency. If furthermore contains a special provision to prevent the handing over of goods which have already been dispatched (para 2). Parties have to give notice of their intention to withhold and must continue their performance if security is given (para 3).

### **7.6.4 Termination**

#### **Article 134 - Termination for fundamental non-performance**

If the breach or non-performance is fundamental, the seller may terminate. The CISG mirrors that in Art 64 para 1 (a) and adds, that after a set

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<sup>152</sup> The Report of the Austrian Chamber of Commerce, p. 47.

<sup>153</sup> *ibid.*

*Nachfrist*, if the buyer does not pay the price, accept the goods or declares he will not do so, termination is allowed for (para 1 [b]). The CISG furthermore does not allow termination / avoidance if the buyer has already paid the price unless certain conditions are met. The CISG is thus more restrictive and protects a contract where the price has already been paid.

For the additional period under the CESL see *infra* Art 135.

#### **Article 135 - Termination for delay after notice fixing additional time for performance**

If the delay is not fundamentally breaching the contract, the seller may set an additional period of reasonable length as an ultimatum (para 1) (equals Art 63 para 1 CISG). Any period is deemed reasonable, if the buyer does not object to it without undue delay (para 2). According to para 3, the termination takes effect at the end of the *Nachfrist* if the notice thereupon says so. Para 4 declares the provision mandatory vis-à-vis consumers.

#### **Article 136 - Termination for anticipated non-performance**

A seller may terminate the contract before performance is due if the buyer has declared, or it is otherwise clear, that there will be a non-performance, and if the non-performance would be fundamental. This equals Art 72 para 1 CISG, which adds, that the terminating party should give notice if possible (para 2), unless the termination is due to a declaration of the other party (para 3).

#### **Article 137 - Scope of right to terminate**

The article specifies that if the buyer's obligations are divisible, termination may only be used on those parts that were not performed, unless the contract as a whole is thus fundamentally flawed. For indivisible obligations, termination is only allowed if the non-performance is justified to the contract as a whole.

#### **Article 138 - Notice of termination**

A right to terminate the contract under this Section is exercised by notice to the buyer.

#### **Article 139 - Loss of right to terminate**

Non-performance and termination based thereon must be notified to the buyer within a reasonable time, or the seller loses the right hereto. The same is true with regard to termination for anticipatory breach under Art 136. Non-payment of price or other fundamental breaches do not need a notification within a reasonable time.

## **7.7 Passing of Risk**

### **7.7.1 General Provisions**

#### **Article 140 - Effect of passing of risk**

Loss of, or damage to, the goods or the digital content after the risk has passed to the buyer does not discharge the buyer from the obligation to pay the price, unless the loss or damage is due to an act or omission of the seller. The same formulation is used in Art 66 CISG. An act or omission, even though without fault on the seller will lead to him bearing the risk. The chapter is open to alteration by the parties in B2B contracts, e.g. to install the requirement of default.

**Article 141 - Identification of goods or digital content to contract**

No risk can pass until the goods are identified, cf. Art 67 para 2 CISG.

## **7.7.2 Passing of Risk in Consumer Sale Contracts**

Art 142 deals with consumer matters.

## **7.7.3 Passing of Risk in Contracts between Traders**

**Article 143 - Time when risk passes**

The article sets up the default rule, the risk passes when the buyer takes the delivery of the good or the documents representing them (para 1), it is subject to the subsequent articles (para 2). The CISG has a conforming provision in Art 69 para 1.

**Article 144 - Goods placed at buyer's disposal**

To put the goods at the buyer's disposal so he becomes aware of it also lets the risk pass at the time the goods should have been taken over, if they are not put at the disposal at the seller's place of business, the buyer must know the other place. The risk does not pass if the buyer was entitled to withhold their taking. Cf. with Art 69 para 1 CISG.

**Article 145 - Carriage of the goods**

If the sale includes the carriage of goods, the risk passes over to the buyer at the handing over of the goods to the first carrier (para 2). The default rule of the CISG is the same (Art 67 para 1 CISG). If a specific place is agreed upon, the risk only passes if the goods are handed over at that place. The fact that the seller is authorised to retain documents controlling the disposition of the goods does not affect the passing of the risk (para 4), also mirrored by the CISG.

**Article 146 - Goods sold in transit**

The risk passes at the handing over to the first carrier, unless the circumstances otherwise (para 2). The CISG's default rule is the same (Art 68 CISG), yet a passing of the risk is assumed by the buyer from the time

the goods were handed over to the carrier who issued the documents embodying the contract of carriage, if circumstances indicate so.

If the seller knew or could have been expected to know that the goods are damaged or lost, he bears the risk; this is a shared provision of CISG and CESL.

## 7.8 Chapter Conclusion

### **Non-Performance**

The CESL, as the CISG, uses only one concept for shortcomings in the performance of the contract, the so called non-performance (“breach of contract” under the CISG). As a qualification, both regimes speak of “fundamental” non-performance / breach; possibly, the threshold for a non-performance to be fundamental might be lower under the CESL, as might be the threshold for terminating a contract for anticipatory breach.

Non-performance might be excused under certain circumstances and then only entitle to remedies other than damages.

### **Change of Circumstances**

The CESL contains a *clausula rebus sic stantibus* and calls for re-negotiations in case of substantial changes. Some insecurity is connected with this provision.

### **Goods not accepted by the Buyer**

The CISG contains more detailed provisions regarding the duties and remedies of a seller “stuck” with unaccepted goods. Under the CESL, good faith and fair dealing would have to be used to argue e.g. for an emergency sale of short lived goods.

### **Conformity of Goods**

The CESL establishes a more stringent liability for pre-contractual statements by the seller and third parties in his service than the CISG. It further establishes a criterion that the goods must conform to what the buyer “can expect”, which should be excluded due to its vagueness.

### **Specific Performance**

In jurisdictions that do not award specific performance in national litigations, the court is not bound to award specific performance under the CISG.

### **Cure by the Seller**

The CISG allows for cure only if it is not overly cumbersome for the buyer, whereas under the CESL, the seller may always cure if he performed early.

### **Repair and Replacement**

The seller can choose the remedy under the CESL; under the CISG, replacement is only due in case of a fundamental breach, unless repair is unreasonable.

#### **Termination for Failure to deliver**

It seems that a contract can be terminated quite easily under the CESL in case the seller fails to deliver on time, because it will be deemed at fundamental non-performance.

#### **Loss of the Right to Terminate**

Under the CISG, goods have to be given back in the state received (with some exceptions), otherwise, termination is impossible.

#### **Reduction of Price**

Seemingly, the CESL allows avoiding cure by the seller via price reduction and acceptance of the goods.

#### **Examination**

Examination has to take place within 14 days according to the CESL; the CISG fixes a “reasonable” time span, which – by case law – has been fixed differently in various countries.

#### **Early and / or Incomplete Delivery**

The CESL states that the buyer must accept early or incomplete deliveries, unless he has a valid reason not to. The CISG allows for choice of the buyer

#### **Substitute Transactions**

The CESL allows the buyer to refuse acceptance of the goods if the seller can – without too great a trouble – effect a substitute transaction. He is left with the right to terminate the contract and possible damages.

#### **Withholding of Performance**

It seems that the CISG sets a higher threshold for allowing a party to withhold its performance.

*Summa summarum*, the provisions of CESL and CISG are providing for similar solutions, yet in some important details, they differ. The CESL is generally more detailed, but for reasons stated not necessarily more “secure”. The Chapter is open for party derogation which is highly advisable with regard to certain provisions.

# 8 Obligations and remedies of the parties to a related service contract

The CISG does not deal with the provision of services (Art 3 para 2). Under the CISG, if two (or more) contracts exist, with one being on the sale of goods and the other on the provision of services, the latter is governed by the applicable national law, the former by the CISG. In case they are contained in one contract, the preponderant part governs the fate of the contract.<sup>154</sup>

The whole Chapter is not mandatory except certain provisions with regard to consumers. Its 21 articles, in connection with Chapter 9, provide a frame for related service contracts – yet, traders evidently would be wise to flesh out the provisions.

## 8.1 Obligations and Remedies of the Parties

### 8.1.1 Application of certain General Rules on Sales Contracts

#### **Article 147 - Application of certain general rules on sales contracts**

The general provisions on (fundamental) non-performance of Chapter 9 are applicable on sales contracts as well (para 1), if a contract for goods or digital contract is terminated, related service contracts are also terminated.

### 8.1.2 Obligations of the Service Provider

#### **Article 148 - Obligation to achieve result and obligation of care and skill**

The provider must achieve the result agreed upon in the contract (para 1), this is comparable to the delivery of goods of the agreed quality and quantity at the agreed point in time. If a specific result cannot be determined, the provider must perform the related service with the care and skill which a reasonable service provider would exercise and in conformity with any statutory or other binding legal rules which are applicable to the related service (para 2).

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<sup>154</sup> P. Schlechtriem & I. Schwenzer, Kommentar zum Einheitlichen UN-Kaufrecht<sup>4</sup>, Art 3 para 12 et seq.

Para 3 sets criteria for assessing the conformity with para 2, such as risk, time and damages connected with the service. Para 4 and 5 deal with consumer matters.

#### **Article 149 - Obligation to prevent damage**

The provider who also delivers goods or content must take care not to damage them during the provision of the service.

#### **Article 150 - Performance by a third party**

Performance by a third party is possible, unless personal performance is required (para 1), yet he remains liable for the third party's performance. Para 3 declares para 2 mandatory vis-à-vis consumers.

#### **Article 151 - Obligation to provide invoice**

The Art sets a duty to provide and intelligible invoice for services, to traders and consumers alike.

#### **Article 152 - Obligation to warn of unexpected or uneconomic cost**

If the costs for the service will exceed the indicated costs or the value of the goods, the provider must seek consent of the receiver to perform further. If he fails to do so, he is not entitled to the price. There is no clause defining a threshold, so the agreed price thus becomes an absolute cap, with even minor excesses triggering Art 152. This should be amended by parties, if they do not want to rely on "equity" considerations.

Traders should furthermore include rules what happens if no consent is given or the other party does not react at all.<sup>155</sup>

### **8.1.3 Obligations of the Customer**

#### **Article 153 - Payment of the price**

The customer must pay the price; it is due when the service is completed. Self-evidently, parties can agree to payment beforehand or different installments.

#### **Article 154 - Provision of access**

If necessary, access to premises has to be given at reasonable hours to the provider. A failure to do so – even an involuntary – might constitute a non-performance of the provider and thus make him bear the risk. Traders should be wary of this and adapt the provision accordingly.<sup>156</sup>

#### **Article 155 - Remedies of the customer**

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<sup>155</sup> The Report of the Austrian Chamber of Commerce, p. 52.

<sup>156</sup> *ibid.*, pp. 52 et seq.

The remedies are the same as those of the buyer under a “normal” contract, except for the fact that the provider has a right to make a try and cure the insufficient service before any remedy is taken.

Para 3 and 4 deal with consumer matters, para 5 declares that Chapter 11 is applicable *mutatis mutandis* and that Art 156 is applicable as a *lex specialis* instead of Art 122.

#### **Article 156 - Requirement of notification of lack of conformity in related service contracts between traders**

Traders have to give notice of a lack of conformity within a reasonable time after either the completion of the service or he detected or could be expected to detect the insufficiency (para 1). Traders should be mindful of the fact that there is no fixed time period as with contracts on goods (14 days)<sup>157</sup> and no absolute prescription period.

If the provider was aware or should have been aware of a deficiency, he cannot rely on the period (para 2).

#### **Article 157 - Remedies of the service provider**

The provider’s remedies are the same as a seller’s; the respective provisions apply *mutatis mutandis*. Art 132 para 2, which allows the buyer to refuse goods if the seller can effect a substitute transaction is replaced by Art 158 for service contracts.

#### **Article 158 - Customer’s right to decline performance**

The article starts out with the right of the customer to notify the provider at any time that the service or its further performance is no longer required (para 1). If there is no ground for termination, he remains liable to pay the price minus that what the provider saved by not having to perform (para 2). Para 3 declares the article mandatory vis-à-vis consumers.

Even though without counterpart in the CISG, this provision is deserving of a little comment. The right to terminate any service contract by mere notice has great influence on both long and short term service contracts. For short term service contracts, such as the manufacturing of a good then to be delivered (the classical *Werkvertrag*), this provides an easy way out of the contract and might deprive the other party of substantial profits to be gained from the contract. When the customer avoids early (because he has e.g. found a cheaper alternative), the provider’s compensation is cut almost to nil, he has spend time and resources negotiating a contract and can now go on and look for the next customer. For long term contracts, this provides for a right to terminate without termination period and date.<sup>158</sup> For those

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<sup>157</sup> Cf. thereupon *ibid*, p. 53.

<sup>158</sup> *ibid*, p.53.

reasons, Art 158 is probably lacking the required degree of certainty in commercial transactions.

## 8.2 Chapter Conclusion

### **Scope**

The CISG does not cover service contracts; contracts containing a minor “service element” are governed by it, but there are not provisions regulating it. If the service element is preponderant, the whole contract falls out of the CISG. The CESL contains 21 articles regulating services materially and applies the rules on non-performance *mutatis mutandis* on them. It therefore provides a frame, which governs core aspects, but is in need of further, supporting party provisions.

### **Warning Obligation**

The provisions establishing a duty to inform of costs exceeding the originally planned costs least they be forfeit should be adapted in order to clarify that minor excesses do not lead to forfeiture of the whole price.

### **Decline of Performance**

The fact that the receiving party may always inform the provider that the services are no longer required is not in line with usual practices; it might be in the interest of traders to derogate from this provision.

# 9 Damage and Interest

## 9.1 Damages

### Article 159 - Right to damages

A creditor is entitled to damages<sup>159</sup> for loss<sup>160</sup> caused (!) by the non-performance of an obligation by the debtor, unless the non-performance is excused (para 1). The loss for which damages are recoverable includes future loss which the debtor could expect to occur.

The CISG in its Art 74 states, that both normal loss and loss of profit is only recoverable, if the party in breach foresaw or could foresee it under the circumstances. Personal injury is excluded according to Art 5.<sup>161</sup> From the wording of Art 159 CESL, it seems on the other hand as if there was no adequacy test at all for damages *per se* – any damage not related to loss of profit but caused by a non-performance falls upon the party in breach. Yet then Art 161 hand states that a debtor is only liable for a loss he foresaw or could be expected to foresee. It seems as if Art 161 set up an additional criterion.

As mentioned above, the criteria when a non-performance is excused (according to Art 88 and therefore does not incur liability) are quite vague. The field of liabilities is probably a wide one and at least at the moment not very predictable.<sup>162</sup>

Moreover, the seller is liable for any non-conformity at the passing of risk and under a duty to examine the goods on conformity (Art 91 [c]) before they sell them. Traders should be well aware before taking this provision unaltered into their contracts.<sup>163</sup> Especially where a trader sells goods not produced by him, he is probably still liable for any damages they cause. If “impediments” can excuse it according to Art 88 CESL is (at best) dubious<sup>164</sup>, and this for up to 30 years with regard to personal injury.<sup>165</sup>

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<sup>159</sup> The definition of “damages” is to be found in Art 2 (g) of the proposed Regulation.

<sup>160</sup> What exactly constitutes a loss is not defined in the CESL itself, but in Art 2 (c) of the proposed Regulation. With regard to the unclear relationship between Art 2 (c) and (g) cf. *Ibid*; H. Eidenmüller, N. Jansen, E.-M. Kieninger, G. Wagner & R. Zimmermann, Der Vorschlag für eine Verordnung über ein Gemeinsames Europäisches Kaufrecht, p. 282.

<sup>161</sup> P. Schlechtriem & I. Schwenzler, Kommentar zum Einheitlichen UN-Kaufrecht<sup>4</sup>, Art 74 para 10.

<sup>162</sup>The Report of the Austrian Chamber of Commerce, p. 54.

<sup>163</sup> *ibid*, p. 56.

<sup>164</sup> *Ibid*; H. Eidenmüller, N. Jansen, E.-M. Kieninger, G. Wagner & R. Zimmermann, Der Vorschlag für eine Verordnung über ein Gemeinsames Europäisches Kaufrecht, p. 282; E.-M. Kieninger in H. Schulte-Nölke, F. Zoll, N. Jansen & R. Schulze, Der Entwurf für ein Optionales Europäisches Kaufrecht (2012), p. 211 FN 28.

### **Article 160 - General measure of damages**

The aim of damages is to put the aggrieved party in the situation it would have been if the contract had been performed adequately. Such damages cover loss which the creditor has suffered and gain of which the creditor has been deprived.

### **Article 161 - Foreseeability of loss**

Loss must be foreseen or at least foreseeable for the debtor (and seems to be setting up an additional condition with regard to Art 159). On the other hand, Art 159 puts forth the rule, that loss of profit must be expected to occur (whereas for other damages “cause” is sufficient.) A possible explanation hereto is that “normal” damages must “only” be foreseeable, whereas such regarding lost profits demand a higher level of certainty, i.e. the “expectancy” of their occurrence.

### **Article 162 - Loss attributable to creditor**

Unlike the CISG, the CESL contains an express provision stating that the debtor is not liable for damages inflicted by the creditor himself.

### **Article 163 - Reduction of loss**

Art 163 sets up a duty to mitigate losses, similar to Art 77 CISG. The CESL moreover states expressly, that the debtor may recover reasonable costs connected with the mitigation. For the CISG, this is impliedly the case law.<sup>166</sup>

### **Article 164 - Substitute transaction**

In case the creditor is able to make a substitute transaction, he may recover any additional costs in relation to the terminated contract, apart from other damages he is entitled to. This mirrors Art 75 CISG.

### **Article 165 - Current price**

If no substitute transaction is made but there is a current price for the transaction, the creditor may recover the difference between the contract price and the price current at the time of termination as well as damages for any further loss. The CISG states the same in Art 76 para 1 and additionally that the party claiming damages has avoided the contract after taking over the goods, the current price at the time of such taking over shall be applied instead of the current price at the time of avoidance. Its para 2 makes further provisions on the location of which the prevailing price is to be taken.

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<sup>165</sup> The Report of the Austrian Chamber of Commerce, pp. 57 et seqq., cf. also with regard to the problems that would arise for the regime of the Council Directive 85/374/EEC of 25 July 1985 on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products, OJ L 210, 07/08/1985, p. 29.

<sup>166</sup> P. Schlechtriem & I. Schwenzer, *Kommentar zum Einheitlichen UN-Kaufrecht*<sup>4</sup>, Art 77 para 11.

## 9.2 Interest on late Payments: General Provisions

### Article 166 - Interest on late payments

Where a party is late with the payment of a sum, the other party is entitled to interest, without giving notice (para 1). The exact rate is set down in para 2, according to the ECB's rates for countries within the monetary union, and the rates of the national banks in countries outside (according to the creditor's habitual residence) plus two percentage points. This rate is the default rate, Art 168 sets own rates for late payment of price in B2B contracts.

Lastly, the creditor may recover damages for any further loss (para 3). What this actually means seems a little obscure – a possible interpretation would be that if a late payment causes damages to the creditor (e.g. because he cannot pay in time and is in turn liable to pay interest), that he may recover those besides the interest for the payment itself.

The CISG “regulates” interest in Art 78, merely stating that a party is entitled to it if the other party is late with payment. Furthermore, Art 84 para 1 states that with regard to reimbursement of the purchase price, the interest has to be paid from the time the price was paid. The interest is to be paid for all payments<sup>167</sup>, whether or not also for damages is dubious.<sup>168</sup> The interest rate is either to be devised according to the applicable national law, or on the basis of CISG interpretation.<sup>169</sup>

Thus, even if the CESL itself does not deal with all matters which can arise with regard to interest (such as e.g. compound interest), its rules are considerably more detailed than the default rules of the CISG. Parties not willing or unable to find a contractual agreement might be served better by the CESL's rules in terms of security. Traders will have to bear in mind, that according to Art 170 para 2 in connection with Art 171, even among traders there is a “minimum” fairness standard (that of Art 168) which they cannot derogate from. More to this *infra* at Art 171.

### Article 167 - Interest when the debtor is a consumer

Deals with consumer related interest questions.

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<sup>167</sup> P. Schlechtriem & I. Schwenzer, Kommentar zum Einheitlichen UN-Kaufrecht<sup>4</sup>, Art 78 para 5.

<sup>168</sup> *ibid.*, para 6.

<sup>169</sup> *ibid.*, para 27.

## 9.3 Late Payments by Traders

### **Article 168 - Rate of interest and accrual**

The article deals with the interest rate for the late payment of the purchase price among traders (para 1). Para 2 sets up rules for the beginning of the interest payment (either the day after contractual payment point in time; if no such point exists 30 days after the receiving of the invoice, in case the receiving time is unclear 30 days after the date on the invoice). The maximum period is 60 days unless parties expressly agree otherwise and Art 170 is not violated (para 4).

Para 3 sets up a special regime for cases where the conformity has to be ascertained; the 30 day period begins to run at the end of the examination, which in turn can take a maximum of 30 days. The parties may derogate hereof, provided that the agreement is not unfair according to Art 170.

Para 5 sets up the rates identical to Art 166, yet adds eight percentage points instead of two. If the late payment is excused, the normal rate of Art 166 applies.<sup>170</sup>

The creditor may also recover damages for any further loss (para 6).

### **Article 169 - Compensation for recovery costs**

Para 1 fixes a minimum compensation for costs in connection with the recovery for late payment, it is EUR 40 or the equivalent value in the currency of the contract price; the creditor is entitled to also to all costs exceeding this (para 2).

### **Article 170 - Unfair contract terms relating to interest for late payment**

Art 170 sets up a standard for terms relating to interest for late payment. Unfair terms are not binding (and probably replaced by the CESL's standard rules). A term is unfair if it grossly deviates from good commercial practice, contrary to good faith and fair dealing, taking into account all circumstances of the case, including the nature of the goods, digital content or related service (para 1).

A time or period for payment or a rate of interest less favorable than those set out in Art 168 or a lower sum than EUR 40 are "presumed" to be unfair (para 2). One might ask now whether the presumption can be rebutted. The English version uses the term "presumed", the French version has the literal translation "est présumée" as does e.g. the Swedish version with "presumeras". The German version deviates, using the word "gilt", which can be translated as "counts for" "holds for" etc., implying an almost non-

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<sup>170</sup> H. Eidenmüller, N. Jansen, E.-M. Kieninger, G. Wagner & R. Zimmermann, Der Vorschlag für eine Verordnung über ein Gemeinsames Europäisches Kaufrecht, p. 284.

rebuttable fact. Yet, in the light of the Spanish and the Italian versions, both supporting the English one, it is likely to give preference to that.

Further, a contract term excluding interest for late payment or compensation for recovery costs is always unfair (para 3).

Art 168 to 170 have to be read in conjunction with Art 171, who declares them mandatory. See below.

### **Article 171 - Mandatory nature**

According to this article, the rules of Art 168 to 170 are mandatory and may not be derogated from. What does this mean, especially with regard to the (un)fairness standard of Art 170? One could easily argue, that Art 171 deprives Art 170 of its scope of application, because if the whole section is unalterable, there is no need for a fairness control since there can be no deviations.<sup>171</sup> However, it can also be interpreted in the way that, since Art 170 implies that alterations are possible, the whole section allows for adaptations within the boundaries of unfairness.

This means that terms more favorable to the creditor than those of Art 168 et seq. can be agreed upon, such less favorable too, yet they have the presumption of unfairness against them. Absolutely impossible is the total exclusion of interest or compensation, according to Art 170 in connection with Art 171.

## **9.4 Chapter Conclusion**

### **Damages**

The provisions on damages are a bit more comprehensive in the CESL than in the CISG. Traders should be wary of their duty to ensure the functionality of the products they sell (especially if they just sell them on), since they are liable for any injury up to 30 years without default under the CESL (if an “excuse” under Art 88 is possible is doubtful). The CISG does not cover product liability matters.

The relationship between the general foreseeability criterion for damages *per se* and the requirement of “expectancy” for future loss is unclear.

### **Interest**

By far more thorough than the CISG, the CESL sets up an interest regime which still leaves enough ungoverned for prudent parties. Interest is also due for damages, a point dubious under the CISG. The interest rate contains

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<sup>171</sup> H. Eidenmüller, N. Jansen, E.-M. Kieninger, G. Wagner & R. Zimmermann, Der Vorschlag für eine Verordnung über ein Gemeinsames Europäisches Kaufrecht, p. 284.

a standard rate for payments general and a higher rate for late payment of the price (unless the delay is excused).

The Chapter sets up a fairness standard for interest matters, if they are unfair (grossly deviating from good commercial practice, contrary to good faith and fair dealing, taking into account all circumstances of the case, including the nature of the goods, digital content or related service) they are not binding. Terms more favorable for the creditor than the standard regime may agreed upon, less favorable ones too, yet they have the presumption of unfairness against them. Absolutely impossible is the total exclusion of interest or compensation.

# 10 Restitution and Prescription

## 10.1 Restitution

### **Article 172 - Restitution on avoidance or termination**

Where a contract is avoided or terminated by either party, each party is obliged to return what that party has received from the other party (para 1), plus any natural or legal fruits (para 2). In case the performance is made in installments or parts and a part of the one party's performance has been rewarded with the counter-performance, restitution of this part is not necessary, unless the nature of the contract is such that part performance is of no value to one of the parties (para 3). From the wording, para 3 seems only to apply to terminated contracts, not to avoided ones.<sup>172</sup>

The CISG in Art 81 para 2 also calls for restitution, if need be concurrently, in case of avoidance (which means termination). Restitution is generally to be made *in natura*<sup>173</sup>, the terminating party must return the goods unchanged except for certain exceptions (Art 82). Place and costs are not regulated in the CISG, for the first, the residence of the buyer has been put forth.<sup>174</sup> The costs are to be borne by the party in breach, unless the termination is not connected with any damages.<sup>175</sup> Unlike the CISG<sup>176</sup>, the CESL regulates that fruits have to be returned with the goods.

The CESL does not contain rules on place or who bears the costs either – the parties must reach an agreement or trust in the court's ability to find an appropriate solution with the application of the principles of good faith and fair dealing.

### **Article 173 - Payment for monetary value**

If the goods cannot be returned (or they were digital content), their monetary value has to be paid back. The same is true if unreasonable effort or expense were connected with it for the recipient, unless this would harm the other party's proprietary interests (para 1). One might interpret this as referring to sales with a clause reserving the property of the goods or cases where the property right has not passed.<sup>177</sup> As mentioned above, the CISG generally allows termination only if (unaltered) restitution is possible.

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<sup>172</sup> The Report of the Austrian Chamber of Commerce, p. 60.

<sup>173</sup> P. Schlechtriem & I. Schwenzer, Kommentar zum Einheitlichen UN-Kaufrecht<sup>4</sup>, Art 81 para 12.

<sup>174</sup> *ibid.*, para 18.

<sup>175</sup> *ibid.*, para 19a.

<sup>176</sup> *ibid.*, para 12.

<sup>177</sup> The Report of the Austrian Chamber of Commerce, p. 61.

The monetary value of goods is the value that they would have had at the date when payment of the monetary value is to be made if they had been kept by the recipient without destruction or damage until that date (para 2). Considerations as to whether the damage was in any way caused by the party keeping the goods are not contained in the provision – a possible amendment would be to reduce the value to allow for uncaused deterioration.<sup>178</sup>

It is not clarified how to calculate the actual value. In case the goods have been handed over shortly before and did not change (much) during that time, the purchase price might be a good value. The provision does not deal with the loss of value over time – especially problematic since contracts under the CESL can be terminated after long periods. Also, the question arises whether any damage suffices to make restitution *in natura* impossible<sup>179</sup> – interpreting the provision according to good faith would probably lead to a differentiating approach.

Parties should include clarifications in their contract if they are faced with restitutions oftentimes.

Where a related service contract is avoided or terminated by the customer after the related service has been performed or partly performed, the monetary value of what was received is the amount the customer saved by receiving the related service (para 3), in a case of digital content the monetary value of what was received is the amount the consumer (no mentioning of the trader – a possible glitch?<sup>180</sup>) saved by making use of the digital content (para 4). In practice, it might prove very difficult to actually calculate what a party thus saved and if the usage was little, this might lead to unjust results.<sup>181</sup>

If a recipient has received a substitute in money or kind for the good, the other party may either claim that or monetary value of that substitute if the recipient was aware of the ground for termination. If he was not, he may choose which to hand over to the other party (para 5). This is problematic if the recipient passed the goods on for a substitute of low value (malevolently or not), since the other party is in any way only entitled to the substitute or its (!) monetary value, not that of the original goods.<sup>182</sup>

In the case of digital content which is not supplied in exchange for the payment of a price, no restitution will be made (para 6).

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<sup>178</sup> H. Eidenmüller, N. Jansen, E.-M. Kieninger, G. Wagner & R. Zimmermann, Der Vorschlag für eine Verordnung über ein Gemeinsames Europäisches Kaufrecht, p. 278.

<sup>179</sup> *ibid.*

<sup>180</sup> *ibid.*

<sup>181</sup> *ibid.*

<sup>182</sup> *ibid.*, p. 62.

### **Article 174 - Payment for use and interest on money received**

A recipient of goods has to pay a fee for the usage, if he caused the termination, was aware of its ground or if it would be “inequitable” if he were allowed free usage (para 1). A recipient of payment must upon return pay interest according to Art 166 if he caused the termination or the other party must pay for the use. Para 3 states that these are the only circumstances under which such payments have to be made.

Again, the provision contains no help as how to calculate the value. Combined with the long periods and the difficulties connected with showing when a party knew of something, the provision’s application’s outcome in practice is probably hard to estimate without clarifying case-law. For simplicity’s sake, parties might opt for a fixed usage / interest rate regardless of either party’s knowledge.<sup>183</sup>

### **Article 175 - Compensation for expenditure**

An “honest” recipient incurring expenditures beneficial to the other party may reclaim them (para 1). A “malevolent” recipient may only reclaim those necessary to protect the goods or the digital content from being lost or diminished in value, provided that the recipient had no opportunity to ask the other party for advice (para 2).

### **Article 176 - Equitable modification**

Any provision relating to restitution may be modified according to equity considerations. Needless to say, this provision reduces legal certainty even more and is probably to be eliminated from any B2B contract.

### **Article 177 - Mandatory nature**

Stating the mandatory nature for B2C contracts.

## **10.2 Prescription**

The CISG does not deal with periods of prescription. They are regulated by the UN Convention on the Limitation Period in the International Sale of Goods<sup>184</sup>. It is drafted in a way to be applicable when the CISG is applicable<sup>185</sup>, yet as of now, only a handful of MS have signed (and ratified) this convention.<sup>186</sup> Its provisions will therefore not be dealt with here.

### **Article 178 - Rights subject to prescription**

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<sup>183</sup> *ibid*, p. 64.

<sup>184</sup> United Nations Convention on the Limitation Period in the International Sale of Goods, UNTS vol. 1511, p. 3

<sup>185</sup> <sup>185</sup> P. Schlechtriem & I. Schwenzer, Kommentar zum Einheitlichen UN-Kaufrecht<sup>4</sup>, VerjÜbk para 2.

<sup>186</sup> Belgium, Czech Republic, Hungary, Poland, Romania, Slovenia and Slovakia, [http://www.uncitral.org/uncitral/en/uncitral\\_texts/sale\\_goods/1974Convention\\_status.html](http://www.uncitral.org/uncitral/en/uncitral_texts/sale_goods/1974Convention_status.html), online on 15.05.2012.

Rights to enforce performance and ancillary rights thereto are subject to prescription. What rights thus fall under the regime is not entirely clear, it is questionable if the parties remedies<sup>187</sup> according to Chapters 11 and 13 are included.<sup>188</sup> Parties deciding on the usage of the CESL would be wise to clarify this, until a sufficient body of case law is developed in this regard.

#### **Article 179 - Periods of prescription**

The short period of prescription is two years, the long period is ten years or, in the case of a right to damages for personal injuries, thirty years. Regard should be had by traders that they may thus be liable for 30 years without any default on his side for the selling of a faulty product that causes injuries – use should be made of the possibility to amend the provision within the boundaries of Art 186.<sup>189</sup>

#### **Article 180 – Commencement**

The short period begins to run with the awareness of the party or the point in time when she could have been aware (para 1). That this might be hard to prove is self evident.<sup>190</sup> The long period begins the time when the debtor has to perform or, in the case of a right to damages, from the time of the act which gives rise to the right (para 2), thus creating an absolute period.

Repeated infringements of a continuous obligation are regarded as giving rise to separate rights (para 3).

Traders have to bear in mind that they are faced with the obligation to notify the other party within two years after the goods were handed over (Art 122 para 2).

#### **Article 181 - Suspension in case of judicial and other proceedings**

The running of both periods of prescription is suspended from the time when judicial proceedings to assert the right are begun (para 1), until a final decision has been made, or until the case has been otherwise disposed of (para 2). Furthermore, where the proceedings end within the last six months of the prescription period without a decision on the merits, the period of prescription does not expire before six months have passed after the time when the proceedings ended.

Proceedings are not only that before a court proper, but also arbitrary courts and all other proceedings initiated with the aim of obtaining a decision relating to the right or to avoid insolvency (para 3).

Meditation is also included and defined in para 4.

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<sup>187</sup> Such as withholding performance, price reduction etc.

<sup>188</sup> The Report of the Austrian Chamber of Commerce, p. 65.

<sup>189</sup> *ibid.*

<sup>190</sup> *ibid.*, p. 66.

### **Article 182 - Postponement of expiry in the case of negotiations**

If parties enter into negotiations, prescription does not end before one year after the last communication or their explicit termination. Undertakings should be wary of this, because in order to free themselves of claims pending at the end of their prescription period, they must refrain from negotiations, and to be sure from almost all communication. Parties might find it more practical to exclude this provision or change it to have only suspensory effect during the time of negotiations.

### **Article 183 Postponement of expiry in case of incapacity**

If a party becomes incapable, the prescription period does not end until one year after the end of incapacity or the appointment of a representative. A shortening to “a reasonable time” or another, shorter period would be wise.<sup>191</sup>

### **Article 184 - Renewal by acknowledgement**

If the debtor acknowledges the right vis-à-vis the creditor, by part payment, payment of interest, giving of security, set-off or in any other manner, a new short period of prescription begins to run. Whether this requires any subjective will of the party to acknowledge the debt is unclear.<sup>192</sup> Judging from the black letter text, it seems as if only the objective fact that such an action was committed by the debtor is sufficient. Yet one must bear in mind, good faith and fair dealing, if the other party could not trust the action, acknowledgment might be doubtful.

### **Article 185 - Effects of prescription**

After the end of the period, the debtor cannot be forced to perform anymore and the creditor loses all rights except for withholding his own performance. Performances carried out after the end of prescription cannot be reclaimed merely because of that, they become *Naturalobligationen*, payable yet not claimable.<sup>193</sup>

Ancillary rights as those to interest expire no later than the principal right (para 3).

### **Article 186 - Agreements concerning prescription**

The rules concerning prescription are – to a degree - amendable (para 1). Periods of prescription may be shortened or lengthened. The short period can be set between one and ten years, the long period between one and thirty years (para 2 and 3). The article itself is mandatory (para 4). Para 5 sets up rules for consumers. Apart thereof, alteration within the boundaries of the CESL is possible.

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<sup>191</sup> The Report of the Austrian Chamber of Commerce, p. 67.

<sup>192</sup> *ibid.*

<sup>193</sup> *ibid.*, p. 68.

## 10.3 Chapter Conclusion

### **Restitution**

Restitution under the CESL also encompasses natural and legal fruits; unlike the CISG. Furthermore, restitution of a changed or deteriorated good is also possible, more exactly, of its monetary value. How this value is to be calculated though is not fixed in the CESL. There is a number of issues and ambiguities connected with the monetary value of services and digital content, as with substitutes received for the goods.

The provisions are not mandatory among traders, adaption, clarification and completion might be called for.

### **Prescription**

The CISG does not deal with this issue; this is left to another convention, which has not yet gained the influence of the CISG and is not covered in this paper.

The scope of the rights subject to prescription is unclear, furthermore, the period begins with the awareness of the concerned party of the relevant circumstances, a fact hard to establish. Parties should furthermore be wary how negotiations on contract dispute affect the expiry period. The rights subject to prescription are not extinct, but merely unenforceable in the sense of an *obligatio naturalis*.

This chapter also calls for a proper revision by the parties and possible derogations from the standard regime.

# 11 Conclusion

As we have seen, the problems in connection with the CESL can be summarized in two words: gaps and uncertainty. Even though the CESL claims, unlike the CISG, to encompass all matters connected with transnational sales, it leaves an abundance of issues uncovered. Due to the complicated interplay between CESL and national law in the first place, it is inadvisable to perform a partial opt-in; an explicit choice for the CESL as a whole and an explicit exclusion of the CISG help to reduce legal uncertainties.

The CESL values fairness and an equitable outcome over certainty, not only in B2C transaction but also in B2B contracts. Good faith and fair dealing are cornerstones in the application and interpretation of the Proposal. Its provisions, even though usually greater in number and depth than the CISG's do not necessarily ensure a higher degree of certainty, especially since they are to be interpreted autonomously. The lack of commentary accompanying the CESL (at least at the moment) does not make this task easier.

Should the CESL be adopted in its current form, it is to hope that the MS make use of the options to extend its application to B2B contracts without a SME, since it might be quite difficult for contract partners to ascertain whether the other fulfils this requirement.

When comparing CISG and CESL it comes to one's attention, that the latter puts greater restrictions on the freedom of contract. Not only in B2C matters but also in provisions concerning trader deals, the CESL contains mandatory rules, some of which are inapt for governing business transactions. Generally, it must be said that the CESL is probably unfit for many traders as a default regime, its provisions require tuning and adaptation by the parties. The CISG with its greater contractual freedom and higher legal certainty (by decades of case law) seems as of yet the better choice. If one has to put substantial efforts into contract drafting anyways, it is better to have that contract governed by a regime that does not override it with mandatory provisions.

Critical provisions can be found all over the CESL, e.g.: Standard terms have to be pointed out to the other party and must undergo a fairness test. Traders have to observe extensive information duties, a failure to supply (correct) information allows for avoidance and damages by the other party. Avoidance for mistake, fraud etc. allow for the annihilation of the contract for long periods; in connection with broad information duties, this is something traders must be wary of. Goods sold under the CESL are conform only if they conform to what the buyer "can expect"; early or incomplete deliveries must be excepted unless the buyer has a good reason not to. On the other hand, the buyer may refuse acceptance if the seller can make a

substitute transaction. Product liability for personal injury can “haunt” the seller for up to 30 years.

The CISG is not a pure success story; some MS have not adopted it, others apply it only partially. Yet, if the CESL will become an instrument to put an end to legal fragmentation is not certain. It may with time, through case law, legal amendment and the creation of standard terms by industries and other groups become a valuable tool. Precondition hereto is the development of a “critical mass”. Whether this will take place in spite of the CESL’s deficiencies is questionable, since traders – at this stage – must generally be advised against an opt-in into the CESL.

# Supplement – Comparative Table of CESL and CISG

This table undertakes to give an overview over corresponding and / or related provisions of the CESL and the CISG; it follows the articles of the first and links to them provisions of the latter where possible. Due to the different scope, structure and formulation of the two regimes, many CESL provisions do not have an (exact) match in the CISG, others have several. It is to be read in conjunction with the explanations of the paper.

<u>CESL</u>	<u>CISG</u>
<p><b>Part I – Introductory Provisions</b></p> <p><b>Chapter 1 – General Principles and Application</b></p> <p><b>Section 1</b> <i>General Principles</i></p>	
<p><b>Article 1 - Freedom of contract</b></p> <p>1. Parties are free to conclude a contract and to determine its contents, subject to any applicable mandatory rules.</p> <p>2. Parties may exclude the application of any of the provisions of the Common European Sales Law, or derogate from or vary their effects, unless otherwise stated in those provisions.</p>	<p><b>Article 6</b></p> <p>The parties may exclude the application of this Convention or, subject to article 12, derogate from or vary the effect of any of its provisions.</p>
<p><b>Article 2 - Good faith and fair dealing</b></p> <p>1. Each party has a duty to act in accordance with good faith and fair dealing.</p> <p>2. Breach of this duty may preclude the party in breach from exercising or relying on a right, remedy or defence which that party would otherwise have, or may make the party liable for any loss thereby caused to the other</p>	<p><b>Article 7</b></p> <p>(1) In the interpretation of this Convention, regard is to be had to its international character and to the need to promote uniformity in its application and the observance of good faith in international trade.</p> <p>(2) Questions concerning matters governed by this Convention which are not expressly settled in it are to be settled in conformity with the</p>

<p>party.</p> <p>3. The parties may not exclude the application of this Article or derogate from or vary its effects.</p>	<p>general principles on which it is based or, in the absence of such principles, in Conformity with the law applicable by virtue of the rules of private international law.</p>
<p><b>Article 3 - Co-operation</b></p> <p>The parties are obliged to co-operate with each other to the extent that this can be expected for the performance of their contractual obligations.</p>	
<p><b>Section 2</b> <i>Application</i></p>	
<p><b>Article 4 – Interpretation</b></p> <p>1. The Common European Sales Law is to be interpreted autonomously and in accordance with its objectives and the principles underlying it.</p> <p>2. Issues within the scope of the Common European Sales Law but not expressly settled by it are to be settled in accordance with the objectives and the principles underlying it and all its provisions, without recourse to the national law that would be applicable in the absence of an agreement to use the Common European Sales Law or to any other law.</p> <p>3. Where there is a general rule and a special rule applying to a particular situation within the scope of the general rule, the special rule prevails in any case of conflict.</p>	<p><b>Article 7</b></p> <p>(1) In the interpretation of this Convention, regard is to be had to its international character and to the need to promote uniformity in its application and the observance of good faith in international trade.</p> <p>(2) Questions concerning matters governed by this Convention which are not expressly settled in it are to be settled in conformity with the general principles on which it is based or, in the absence of such principles, in Conformity with the law applicable by virtue of the rules of private international law.</p>
<p><b>Article 5 – Reasonableness</b></p> <p>1. Reasonableness is to be objectively ascertained, having regard to the nature and purpose of the contract, to the circumstances of the case and to the usages and practices of the trades or professions involved.</p>	<p><b>Article 8</b></p> <p>(1) For the purposes of this Convention statements made by and other conduct of a party are to be interpreted according to his intent where the other party knew or could not have been unaware</p>

<p>2. Any reference to what can be expected of or by a person, or in a particular situation, is a reference to what can reasonably be expected.</p>	<p>what that intent was.</p> <p>(2) If the preceding paragraph is not applicable, statements made by and other conduct of a party are to be interpreted according to the understanding that a reasonable person of the same kind as the other party would have had in the same circumstances.</p>
<p><b>Article 6 - No form required</b></p> <p>Unless otherwise stated in the Common European Sales Law, a contract, statement or any other act which is governed by it need not be made in or evidenced by a particular form.</p>	<p><b>Article 11</b></p> <p>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.</p> <p><b>Article 96</b></p> <p>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 article 12 that any provision of article 11, article 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.</p>
<p><b>Article 7 - Not individually negotiated contract terms</b></p> <p>1. A contract term is not individually negotiated if it has been supplied by one party and the other party has not been able to influence its content.</p> <p>2. Where one party supplies a selection of contract terms to the other party, a term will not be regarded as individually negotiated</p>	

<p>merely because the other party chooses that term from that selection.</p> <p>3. A party who claims that a contract term supplied as part of standard contract terms has since been individually negotiated bears the burden of proving that it has been.</p> <p>4. In a contract between a trader and a consumer, the trader bears the burden of proving that a contract term supplied by the trader has been individually negotiated.</p> <p>5. In a contract between a trader and a consumer, contract terms drafted by a third party are considered to have been supplied by the trader, unless the consumer introduced them to the contract</p>	
<p><b>Article 8 - Termination of a contract</b></p> <p>1. To ‘terminate a contract’ means to bring to an end the rights and obligations of the parties under the contract with the exception of those arising under any contract term providing for the settlement of disputes or any other contract term which is to operate even after termination.</p> <p>2. Payments due and damages for any non-performance before the time of termination remain payable. Where the termination is for non-performance or for anticipated non-performance, the terminating party is also entitled to damages in lieu of the other party’s future performance.</p> <p>3. The effects of termination on the repayment of the price and the return of the goods or the digital content, and other restitutionary effects, are governed by the rules on restitution</p>	<p><b>Article 29</b></p> <p>(1) A contract may be modified or terminated by the mere agreement of the parties.</p> <p>(2) A contract in writing which contains a provision requiring any modification or termination by agreement to be in writing may not be otherwise modified or terminated by agreement. However, a party may be precluded by his conduct from asserting such a provision to the extent that the other party has relied on that conduct.</p> <p><b>Article 81</b></p> <p>(1) Avoidance of the contract releases both parties from their obligations under it, subject to any damages which may be due. Avoidance does not affect any provision of the contract for the settlement of disputes or any other</p>

<p>set out in Chapter 17.</p>	<p>provision of the contract governing the rights and obligations of the parties consequent upon the avoidance of the contract.</p> <p>(2) A party who has performed the contract either wholly or in part may claim restitution from the other party of whatever the first party has supplied or paid under the contract. If both parties are bound to make restitution, they must do so concurrently.</p> <p><b>Article 4</b></p> <p>This Convention governs only the formation of the contract of sale and the rights and obligations of the seller and the buyer arising from such a contract.</p> <p>In particular, except as otherwise expressly provided in this Convention, it is not concerned with:</p> <ul style="list-style-type: none"> <li>(a) the validity of the contract or of any of its provisions or of any usage;</li> <li>(b) the effect which the contract may have on the property in the goods sold.</li> </ul>
<p><b>Article 9 - Mixed-purpose contracts</b></p> <p>1. Where a contract provides both for the sale of goods or the supply of digital content and for the provision of a related service, the rules of Part IV apply to the obligations and remedies of the parties as seller and buyer of goods or digital content and the rules of Part V apply to the obligations and remedies of the parties as service provider and customer.</p> <p>2. Where, in a contract falling under paragraph 1, the obligations of the</p>	<p><b>Article 3</b></p> <p>(1) Contracts for the supply of goods to be manufactured or produced are to be considered sales unless the party who orders the goods undertakes to supply a substantial part of the materials necessary for such manufacture or production.</p> <p>(2) This Convention does not apply to contracts in which the preponderant part of the obligations of the party who furnishes the goods consists in the supply of</p>

<p>seller and the service provider under the contract are to be performed in separate parts or are otherwise divisible, then if there is a ground for termination for non-performance of a part to which a part of the price can be apportioned, the buyer and customer may terminate only in relation to that part.</p> <p>3. Paragraph 2 does not apply where the buyer and customer cannot be expected to accept performance of the other parts or the non-performance is such as to justify termination of the contract as a whole.</p> <p>4. Where the obligations of the seller and the service provider under the contract are not divisible or a part of the price cannot be apportioned, the buyer and the customer may terminate only if the non-performance is such as to justify termination of the contract as a whole.</p>	<p>labour or other services.</p>
<p><b>Article 10 – Notice</b></p> <p>1. This Article applies in relation to the giving of notice for any purpose under the rules of the Common European Sales Law and the contract. ‘Notice’ includes the communication of any statement which is intended to have legal effect or to convey information for a legal purpose.</p> <p>2. A notice may be given by any means appropriate to the circumstances.</p> <p>3. A notice becomes effective when it reaches the addressee, unless it provides for a delayed effect.</p> <p>4. A notice reaches the addressee:</p> <p style="padding-left: 40px;">(a) when it is delivered to the addressee;</p>	<p><b>Article 24</b></p> <p>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.</p> <p><b>Article 27</b></p> <p>Unless otherwise expressly provided in this Part of the Convention, if any notice, request or other communication is given or made by a party in accordance with this Part and by means appropriate in the circumstances, a delay or</p>

<p>(b) when it is delivered to the addressee's place of business or, where there is no such place of business or the notice is addressed to a consumer, to the addressee's habitual residence;</p> <p>(c) in the case of a notice transmitted by electronic mail or other individual communication, when it can be accessed by the addressee; or</p> <p>(d) when it is otherwise made available to the addressee at such a place and in such a way that the addressee could be expected to obtain access to it without undue delay.</p> <p>The notice has reached the addressee after one of the requirements in point (a), (b), (c) or (d) is fulfilled, whichever is the earliest.</p> <p>5. A notice has no effect if a revocation of it reaches the addressee before or at the same time as the notice.</p> <p>6. In relations between a trader and a consumer the parties may not, to the detriment of the consumer, exclude the application of paragraphs 3 and 4 or derogate from or vary its effects.</p>	<p>error in the transmission of the communication or its failure to arrive does not deprive that party of the right to rely on the communication.</p> <p><b>Article 13</b> For the purposes of this Convention "writing" includes telegram and telex.</p>
<p><b>Article 11 - Computation of time</b></p> <p>1. The provisions of this Article apply in relation to the computation of time for any purpose under the Common European Sales Law.</p> <p>2. Subject to paragraphs 3 to 7:</p> <p>(a) a period expressed in days starts at the beginning of the first hour of the first day and ends with the expiry of the last</p>	<p><b>Article 20</b></p> <p>(1) A period of time for acceptance fixed by the offeror in a telegram or a letter begins to run from the moment the telegram is handed in for dispatch or from the date shown on the letter or, if no such date is shown, from the date shown on the envelope. A period of time for acceptance fixed by the offeror by telephone, telex or other means of instantaneous communication,</p>

<p>hour of the last day of the period</p> <p>(b) a period expressed in weeks, months or years starts at the beginning of the first hour of the first day of the period, and ends with the expiry of the last hour of whichever day in the last week, month or year is the same day of the week, or falls on the same date, as the day from which the period runs; with the qualification that if, in a period expressed in months or in years, the day on which the period should expire does not occur in the last month, it ends with the expiry of the last hour of the last day of that month.</p> <p>3. Where a period expressed in days, weeks, months or years is to be calculated from a specified event, action or time the day during which the event occurs, the action takes place or the specified time arrives does not fall within the period in question.</p> <p>4. The periods concerned include Saturdays, Sundays and public holidays, save where these are expressly excepted or where the periods are expressed in working days.</p> <p>5. Where the last day of a period is a Saturday, Sunday or public holiday at the place where a prescribed act is to be done, the period ends with the expiry of the last hour of the following working day. This provision does not apply to periods calculated retroactively from a given date or event.</p> <p>6. Where a person sends another person a document which sets a</p>	<p>begins to run from the moment that the offer reaches the offeree.</p> <p>(2) Official holidays or non-business days occurring during the period for acceptance are included in calculating the period. However, if a notice of acceptance cannot be delivered at the address of the offeror on the last day of the period because that day falls on an official holiday or a non-business day at the place of business of the offeror, the period is extended until the first business day which follows.</p>
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<p>period of time within which the addressee has to reply or take other action but does not state when the period is to begin, then, in the absence of indications to the contrary, the period is calculated from the moment the document reaches the addressee.</p> <p>7. For the purposes of this Article:</p> <p>(a) “public holiday” with reference to a Member State, or part of a Member State, of the European Union means any day designated as such for that Member State or part in a list published in the Official Journal of the European Union; and</p> <p>(b) “working days” means all days other than Saturdays, Sundays and public holidays.</p>	
<p><b>Article 12 - Unilateral statements or conduct</b></p> <p>1. A unilateral statement indicating intention is to be interpreted in the way in which the person to whom it is addressed could be expected to understand it.</p> <p>2. Where the person making the statement intended an expression used in it to have a particular meaning and the other party was aware, or could be expected to have been aware, of that intention, the expression is to be interpreted in the way intended by the person making the statement.</p> <p>3. Articles 59 to 65 apply with appropriate adaptations to the interpretation of unilateral statements indicating intention.</p> <p>4. The rules on defects in consent in Chapter 5 apply with appropriate</p>	

<p>adaptations to unilateral statements indicating intention.</p> <p>5. Any reference to a statement referred to in this Article includes a reference to conduct which can be regarded as the equivalent of a statement.</p>	
<p style="text-align: center;"><b>Part II – Making a binding Contract</b></p> <p style="text-align: center;"><b>Chapter 2 – Pre-Contractual Information</b></p> <p style="text-align: center;"><b>Section 1 Pre-Contractual Information to be given by a Trader dealing with a Consumer</b></p>	
<p><b>Article 13 - Duty to provide information when concluding a distance or off-premises contract</b></p> <p>1. A trader concluding a distance contract or off-premises contract has a duty to provide the following information to the consumer, in a clear and comprehensible manner before the contract is concluded or the consumer is bound by any offer:</p> <ul style="list-style-type: none"> <li>(a) the main characteristics of the goods, digital content or related services to be supplied, to an extent appropriate to the medium of communication and to the goods, digital content or related services;</li> <li>(b) the total price and additional charges and costs, in accordance with Article 14;</li> <li>(c) the identity and address of the trader, in accordance with Article 15;</li> <li>(d) the contract terms, in accordance with Article 16;</li> <li>(e) the rights of withdrawal, in accordance with Article 17;</li> <li>(f) where applicable, the existence and the conditions</li> </ul>	<p><i>No corresponding CISG provisions due to the exclusion of consumer sales from its scope in Article 2 (a).</i></p>

<p>of the trader's after-sale customer assistance, after-sale services, commercial guarantees and complaints handling policy; (g) where applicable, the possibility of having recourse to an Alternative Dispute Resolution mechanism to which the trader is subject and the methods for having access to it;</p> <p>(g) where applicable, the functionality, including applicable technical protection measures, of digital content; and</p> <p>(h) where applicable, any relevant interoperability of digital content with hardware and software which the trader is aware of or can be expected to have been aware of.</p> <p>2. The information provided, except for the addresses required by point (c) of paragraph 1, forms an integral part of the contract and shall not be altered unless the parties expressly agree otherwise.</p> <p>3. For a distance contract, the information required by this Article must:</p> <ul style="list-style-type: none"> <li>(a) be given or made available to the consumer in a way that is appropriate to the means of distance communication used;</li> <li>(b) be in plain and intelligible language; and</li> <li>(c) insofar as it is provided on a durable medium, be legible.</li> </ul> <p>4. For an off-premises contract, the information required by this Article must:</p>	
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<p>(a) be given on paper or, if the consumer agrees, on another durable medium; and</p> <p>(b) be legible and in plain, intelligible language.</p> <p>5. This Article does not apply where the contract is:</p> <p>(a) for the supply of foodstuffs, beverages or other goods which are intended for current consumption in the household, and which are physically supplied by a trader on frequent and regular rounds to the consumer's home, residence or workplace; (b) concluded by means of an automatic vending machine or automated commercial premises;</p> <p>(b) an off-premises contract if the price or, where multiple contracts were concluded at the same time, the total price of the contracts does not exceed EUR 50 or the equivalent sum in the currency agreed for the contract price.</p>	
<p><b>Article 14 - Information about price and additional charges and costs</b></p> <p>1. The information to be provided under point (b) of Article 13 (1) must include:</p> <p>(a) the total price of the goods, digital content or related services, inclusive of taxes, or where the nature of the goods, digital content or related services is such that the price cannot reasonably be calculated in advance, the manner in which the price is to be calculated; and</p>	

<p>(b) where applicable, any additional freight, delivery or postal charges and any other costs or, where these cannot reasonably be calculated in advance, the fact that such additional charges and costs may be payable.</p> <p>2. In the case of a contract of indeterminate duration or a contract containing a subscription, the total price must include the total price per billing period. Where such contracts are charged at a fixed rate, the total price must include the total monthly price. Where the total price cannot be reasonably calculated in advance, the manner in which the price is to be calculated must be provided.</p> <p>3. Where applicable, the trader must inform the consumer of the cost of using the means of distance communication for the conclusion of the contract where that cost is calculated other than at the basic rate.</p>	
<p><b>Article 15 - Information about the identity and address of the trader</b></p> <p>The information to be provided under point (c) of Article 13 (1) must include:</p> <ul style="list-style-type: none"> <li>(a) the identity of the trader, such as its trading name;</li> <li>(b) the geographical address at which the trader is established;</li> <li>(c) the telephone number, fax number and e-mail address of the trader, where available, to enable the consumer to contact the trader quickly and communicate with the trader efficiently;</li> <li>(d) where applicable, the identity and geographical address of</li> </ul>	

<p>any other trader on whose behalf the trader is acting; and</p> <p>(e) where different from the address given pursuant to points (b) and (d) of this Article, the geographical address of the trader, and where applicable that of the trader on whose behalf it is acting, where the consumer can address any complaints.</p>	
<p><b>Article 16 - Information about the contract terms</b></p> <p>The information to be provided under point (d) of Article 13 (1) must include:</p> <ul style="list-style-type: none"> <li>(a) the arrangements for payment, delivery of the goods, supply of the digital content or performance of the related services and the time by which the trader undertakes to deliver the goods, to supply the digital content or to perform the related services;</li> <li>(b) where applicable, the duration of the contract, the minimum duration of the consumer's obligations or, if the contract is of indeterminate duration or is to be extended automatically, the conditions for terminating the contract; and</li> <li>(c) where applicable, the existence and conditions for deposits or other financial guarantees to be paid or provided by the consumer at the request of the trader;</li> <li>(d) where applicable, the existence of relevant codes of conduct and how copies of them can be obtained.</li> </ul>	
<p><b>Article 17 - Information about</b></p>	

**rights of withdrawal when concluding a distance or off-premises contract**

1. Where the consumer has a right of withdrawal under Chapter 4, the information to be provided under point (e) of Article 13 (1) must include the conditions, time limit and procedures for exercising that right in accordance with Appendix 1, as well as the model withdrawal form set out in Appendix 2.

2. Where applicable, the information to be provided under point (e) of Article 13(1) must include the fact that the consumer will have to bear the cost of returning the goods in case of withdrawal and, for distance contracts, that the consumer will have to bear the cost of returning the goods in the event of withdrawal if the goods by their nature cannot be normally returned by post.

3. Where the consumer can exercise the right of withdrawal after having made a request for the provision of related services to begin during the withdrawal period, the information to be provided under point (e) of Article 13(1) must include the fact that the consumer would be liable to pay the trader the amount referred to in Article 45 (5).

4. The duty to provide the information required by paragraphs 1, 2 and 3 may be fulfilled by supplying the Model instructions on withdrawal set out in Appendix 1 to the consumer. The trader will be deemed to have fulfilled these information requirements if he has supplied these instructions to the consumer correctly filled in.

5. Where a right of withdrawal is not

<p>provided for in accordance with points (c) to (i) of Article 40 (2) and paragraph 3 of that Article, the information to be provided under point (e) of Article 13 (1) must include a statement that the consumer will not benefit from a right of withdrawal or, where applicable, the circumstances under which the consumer loses the right of withdrawal.</p>	
<p><b>Article 18 - Off-premises contracts: additional information requirements and confirmation</b></p> <p>1. The trader must provide the consumer with a copy of the signed contract or the confirmation of the contract, including where applicable, the confirmation of the consumer's consent and acknowledgment as provided for in point (d) of Article 40(3) on paper or, if the consumer agrees, on a different durable medium.</p> <p>2. Where the consumer wants the provision of related services to begin during the withdrawal period provided for in Article 42(2), the trader must require that the consumer makes such an express request on a durable medium.</p>	
<p><b>Article 19 - Distance contracts: additional information and other requirements</b></p> <p>1. When a trader makes a telephone call to a consumer, with a view to concluding a distance contract, the trader must, at the beginning of the conversation with the consumer, disclose its identity and, where applicable, the identity of the person on whose behalf it is making the call and the commercial purpose of the call.</p>	

2. If the distance contract is concluded through a means of distance communication which allows limited space or time to display the information, the trader must provide at least the information referred to in paragraph 3 of this Article on that particular means prior to the conclusion of such a contract. The other information referred to in Article 13 shall be provided by the trader to the consumer in an appropriate way in accordance with Article 13(3)

3. The information required under paragraph 2 is:

- (a) the main characteristics of the goods, digital content or related services, as required by point (a) of Article 13 (1);
- (b) the identity of the trader, as required by point (a) of Article 15;
- (c) the total price, including all items referred to in point (b) of Article 13 (1) and Article 14(1) and (2);
- (d) the right of withdrawal; and
- (e) where relevant, the duration of the contract, and if the contract is for an indefinite period, the requirements for terminating the contract, referred to in point (b) of Article 16.

4. A distance contract concluded by telephone is valid only if the consumer has signed the offer or has sent his written consent indicating the agreement to conclude a contract. The trader must provide the consumer with a confirmation of that agreement on a durable medium.

5. The trader must give the consumer

<p>a confirmation of the contract concluded, including where applicable, of the consent and acknowledgement of the consumer referred to in point (d) of Article 40(3), and all the information referred to in Article 13 on a durable medium. The trader must give that information in reasonable time after the conclusion of the distance contract, and at the latest at the time of the delivery of the goods or before the supply of digital content or the provision of the related service begins, unless the information has already been given to the consumer prior to the conclusion of the distance contract on a durable medium.</p> <p>6. Where the consumer wants the provision of related services to begin during the withdrawal period provided for in Article 42(2), the trader must require that the consumer makes an express request to that effect on a durable medium.</p>	
<p><b>Article 20 - Duty to provide information when concluding contracts other than distance and off-premises contracts</b></p> <p>1. In contracts other than distance and off-premises contracts, a trader has a duty to provide the following information to the consumer, in a clear and comprehensible manner before the contract is concluded or the consumer is bound by any offer, if that information is not already apparent from the context:</p> <p>(a) the main characteristics of the goods, digital content or related services to be supplied, to an extent appropriate to the medium of communication and to the goods, digital content or</p>	

<p>related services;</p> <p>(b) the total price and additional charges and costs, in accordance with Article 14(1);</p> <p>(c) the identity of the trader, such as the trader's trading name, the geographical address at which it is established and its telephone number;</p> <p>(d) the contract terms in accordance with points (a) and (b) of Article 16;</p> <p>(e) where applicable, the existence and the conditions of the trader's after-sale services, commercial guarantees and complaints handling policy;</p> <p>(f) where applicable, the functionality, including applicable technical protection measures of digital content; and</p> <p>(g) where applicable, any relevant interoperability of digital content with hardware and software which the trader is aware of or can be expected to have been aware of.</p> <p>2. This Article does not apply where the contract involves a day-to-day transaction and is performed immediately at the time of its conclusion.</p>	
<p><b>Article 21 - Burden of proof</b></p> <p>The trader bears the burden of proof that it has provided the information required by this Section.</p>	
<p><b>Article 22 - Mandatory nature</b></p> <p>The parties may not, to the detriment of the consumer, exclude the application of this Section or derogate from or vary its effects.</p>	

**Section 2**  
*Pre-Contractual Information to be given by a Trader dealing with another Trader*

**Article 23 - Duty to disclose information about goods and related services**

1. Before the conclusion of a contract for the sale of goods, supply of digital content or provision of related services by a trader to another trader, the supplier has a duty to disclose by any appropriate means to the other trader any information concerning the main characteristics of the goods, digital content or related services to be supplied which the supplier has or can be expected to have and which it would be contrary to good faith and fair dealing not to disclose to the other party.

2. In determining whether paragraph 1 requires the supplier to disclose any information, regard is to be had to all the circumstances, including:

- (a) whether the supplier had special expertise;
- (b) the cost to the supplier of acquiring the relevant information;
- (c) the ease with which the other trader could have acquired the information by other means;
- (d) the nature of the information;
- (e) the likely importance of the information to the other trader; and
- (f) good commercial practice in the situation concerned.

**Article 32**

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

(2) If the seller is bound to arrange for carriage of the goods, he must make such contracts as are necessary for carriage to the place fixed by means of transportation appropriate in the circumstances and according to the usual terms for such transportation.

(3) If the seller is not bound to effect insurance in respect of the carriage of the goods, he must, at the buyer's request, provide him with all available information necessary to enable him to effect such insurance.

**Section 3**  
*Contracts concluded by Electronic Means*

**Article 24 - Additional duties to provide information in distance**

**contracts concluded by electronic means**

1. This Article applies where a trader provides the means for concluding a contract and where those means are electronic and do not involve the exclusive exchange of electronic mail or other individual communication.

2. The trader must make available to the other party appropriate, effective and accessible technical means for identifying and correcting input errors before the other party makes or accepts an offer.

3. The trader must provide information about the following matters before the other party makes or accepts an offer:

- (a) the technical steps to be taken in order to conclude the contract;
- (b) whether or not a contract document will be filed by the trader and whether it will be accessible;
- (c) the technical means for identifying and correcting input errors before the other party makes or accepts an offer;
- (d) the languages offered for the conclusion of the contract;
- (e) the contract terms.

4. The trader must ensure that the contract terms referred to in point (e) of paragraph 3 are made available in alphabetical or other intelligible characters and on a durable medium by means of any support which permits reading, recording of the information contained in the text and its reproduction in tangible form.

5. The trader must acknowledge by

<p>electronic means and without undue delay the receipt of an offer or an acceptance sent by the other party.</p>	
<p><b>Article 25 - Additional requirements in distance contracts concluded by electronic means</b></p> <p>1. Where a distance contract which is concluded by electronic means would oblige the consumer to make a payment, the trader must make the consumer aware in a clear and prominent manner, and immediately before the consumer places the order, of the information required by point (a) of Article 13 (1), Article 14(1) and (2), and point (b) of Article 16.</p> <p>2. The trader must ensure that the consumer, when placing the order, explicitly acknowledges that the order implies an obligation to pay. Where placing an order entails activating a button or a similar function, the button or similar function must be labelled in an easily legible manner only with the words "order with obligation to pay" or similar unambiguous wording indicating that placing the order entails an obligation to make a payment to the trader. Where the trader has not complied with this paragraph, the consumer is not bound by the contract or order.</p> <p>3. The trader must indicate clearly and legibly on its trading website at the latest at the beginning of the ordering process whether any delivery restrictions apply and what means of payment are accepted.</p>	
<p><b>Article 26 - Burden of proof</b></p> <p>In relations between a trader and a consumer, the trader bears the burden of proof that it has provided the information required by this Section.</p>	

<p><b>Article 27 Mandatory nature</b></p> <p>In relations between a trader and a consumer, the parties may not, to the detriment of the consumer, exclude the application of this Section or derogate from or vary its effects.</p>	
<p><b>Section 4</b> <b>Duty to ensure that Information supplied is correct</b></p>	
<p><b>Article 28 - Duty to ensure that information supplied is correct</b></p> <p>1. A party who supplies information before or at the time a contract is concluded, whether in order to comply with the duties imposed by this Chapter or otherwise, has a duty to take reasonable care to ensure that the information supplied is correct and is not misleading.</p> <p>2. A party to whom incorrect or misleading information has been supplied in breach of the duty referred to in paragraph 1, and who reasonably relies on that information in concluding a contract with the party who supplied it, has the remedies set out in Article 29.</p> <p>3. In relations between a trader and a consumer the parties may not, to the detriment of the consumer, exclude the application of this Article or derogate from or vary its effects.</p>	
<p><b>Section 5</b> <b><i>Remedies for Breach of Information Duties</i></b></p>	
<p><b>Article 29 - Remedies for breach of information duties</b></p> <p>1. A party which has failed to comply</p>	

<p>with any duty imposed by this Chapter is liable for any loss caused to the other party by such failure.</p> <p>2. Where the trader has not complied with the information requirements relating to additional charges or other costs as referred to in Article 14 or on the costs of returning the goods as referred to in Article 17(2) the consumer is not liable to pay the additional charges and other costs.</p> <p>3. The remedies provided under this Article are without prejudice to any remedy which may be available under Article 42 (2), Article 48 or Article 49.</p> <p>4. In relations between a trader and a consumer the parties may not, to the detriment of the consumer, exclude the application of this Article or derogate from or vary its effects.</p>	
<p><b>Chapter 3 – Conclusion of Contract</b></p>	
<p><b>Article 30 - Requirements for the conclusion of a contract</b></p> <p>1. A contract is concluded if:</p> <ul style="list-style-type: none"> <li>(a) the parties reach an agreement;</li> <li>(b) they intend the agreement to have legal effect; and</li> <li>(c) the agreement, supplemented if necessary by rules of the Common European Sales Law, has sufficient content and certainty to be given legal effect.</li> </ul> <p>2. Agreement is reached by acceptance of an offer. Acceptance may be made explicitly or by other statements or conduct.</p>	<p><b>Article 23</b></p> <p>A contract is concluded at the moment when an acceptance of an offer becomes effective in accordance with the provisions of this Convention.</p> <p><b>Article 14</b></p> <p>(1) A proposal for concluding a contract addressed to one or more specific persons constitutes an offer if it is sufficiently definite and indicates the intention of the offeror to be bound in case of acceptance. A proposal is sufficiently definite if it indicates the goods and expressly or implicitly fixes or makes provision for determining the quantity and the price.</p>

<p>3. Whether the parties intend the agreement to have legal effect is to be determined from their statements and conduct.</p> <p>4. Where one of the parties makes agreement on some specific matter a requirement for the conclusion of a contract, there is no contract unless agreement on that matter has been reached.</p>	<p>(2) A proposal other than one addressed to one or more specific persons is to be considered merely as an invitation to make offers, unless the contrary is clearly indicated by the person making the proposal.</p> <p><b>Article 18</b></p> <p>(1) A statement made by or other conduct of the offeree indicating assent to an offer is an acceptance. Silence or inactivity does not in itself amount to acceptance.</p> <p>(2) An acceptance of an offer becomes effective at the moment the indication of assent reaches the offeror. An acceptance is not effective if the indication of assent does not reach the offeror within the time he has fixed or, if no time is fixed, within a reasonable time, due account being taken of the circumstances of the transaction, including the rapidity of the means of communication employed by the offeror. An oral offer must be accepted immediately unless the circumstances indicate otherwise.</p> <p>(3) However, if, by virtue of the offer or as a result of practices which the parties have established between themselves or of usage, the offeree may indicate assent by performing an act, such as one relating to the dispatch of the goods or payment of the price, without notice to the offeror, the acceptance is effective at the moment the act is performed, provided that the act is performed within the period of time laid down in the preceding paragraph.</p>
<p><b>Article 31 – Offer</b></p>	<p><b>Article 14</b></p>

<p>1. A proposal is an offer if:</p> <ul style="list-style-type: none"> <li>(a) it is intended to result in a contract if it is accepted; and</li> <li>(b) it has sufficient content and certainty for there to be a contract.</li> </ul> <p>2. An offer may be made to one or more specific persons.</p> <p>3. A proposal made to the public is not an offer, unless the circumstances indicate otherwise.</p>	<p>(1) A proposal for concluding a contract addressed to one or more specific persons constitutes an offer if it is sufficiently definite and indicates the intention of the offeror to be bound in case of acceptance. A proposal is sufficiently definite if it indicates the goods and expressly or implicitly fixes or makes provision for determining the quantity and the price.</p> <p>(2) A proposal other than one addressed to one or more specific persons is to be considered merely as an invitation to make offers, unless the contrary is clearly indicated by the person making the proposal.</p> <p><b>Article 15</b></p> <p>(1) An offer becomes effective when it reaches the offeree.</p> <p>(2) 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.</p>
<p><b>Article 32 - Revocation of offer</b></p> <p>1. An offer may be revoked if the revocation reaches the offeree before the offeree has sent an acceptance or, in cases of acceptance by conduct, before the contract has been concluded.</p> <p>2. Where a proposal made to the public is an offer, it can be revoked by the same means as were used to make the offer.</p> <p>3. A revocation of an offer is ineffective if:</p> <ul style="list-style-type: none"> <li>(a) the offer indicates that it is</li> </ul>	<p><b>Article 16</b></p> <p>(1) Until a contract is concluded an offer may be revoked if the revocation reaches the offeree before he has dispatched an acceptance.</p> <p>(2) However, an offer cannot be revoked:</p> <ul style="list-style-type: none"> <li>(a) if it indicates, whether by stating a fixed time for acceptance or otherwise, that it is irrevocable; or</li> <li>(b) if it was reasonable for the offeree to rely on the offer as being irrevocable and the</li> </ul>

<p>irrevocable;</p> <p>(b) the offer states a fixed time period for its acceptance; or</p> <p>(c) it was otherwise reasonable for the offeree to rely on the offer as being irrevocable and the offeree has acted in reliance on the offer.</p>	<p>offeree has acted in reliance on the offer.</p> <p><b>Article 17</b></p> <p>An offer, even if it is irrevocable, is terminated when a rejection reaches the offeror.</p> <p><b>Article 22</b></p> <p>An acceptance may be withdrawn if the withdrawal reaches the offeror before or at the same time as the acceptance would have become effective.</p>
<p><b>Article 33 - Rejection of offer</b></p> <p>When a rejection of an offer reaches the offeror, the offer lapses.</p>	<p><b>Article 17</b></p> <p>An offer, even if it is irrevocable, is terminated when a rejection reaches the offeror.</p>
<p><b>Article 34 – Acceptance</b></p> <p>1. Any form of statement or conduct by the offeree is an acceptance if it indicates assent to the offer.</p> <p>2. Silence or inactivity does not in itself constitute acceptance.</p>	<p><b>Article 18</b></p> <p>(1) A statement made by or other conduct of the offeree indicating assent to an offer is an acceptance. Silence or inactivity does not in itself amount to acceptance.</p> <p>(2) An acceptance of an offer becomes effective at the moment the indication of assent reaches the offeror. An acceptance is not effective if the indication of assent does not reach the offeror within the time he has fixed or, if no time is fixed, within a reasonable time, due account being taken of the circumstances of the transaction, including the rapidity of the means of communication employed by the offeror. An oral offer must be accepted immediately unless the circumstances indicate otherwise.</p> <p>(3) However, if, by virtue of the offer or as a result of practices</p>

	<p>which the parties have established between themselves or of usage, the offeree may indicate assent by performing an act, such as one relating to the dispatch of the goods or payment of the price, without notice to the offeror, the acceptance is effective at the moment the act is performed, provided that the act is performed within the period of time laid down in the preceding paragraph.</p>
<p><b>Article 35 - Time of conclusion of the contract</b></p> <p>1. Where an acceptance is sent by the offeree the contract is concluded when the acceptance reaches the offeror.</p> <p>2. Where an offer is accepted by conduct, the contract is concluded when notice of the conduct reaches the offeror.</p> <p>3. Notwithstanding paragraph 2, where by virtue of the offer, of practices which the parties have established between themselves, or of a usage, the offeree may accept the offer by conduct without notice to the offeror, the contract is concluded when the offeree begins to act.</p>	<p><b>Article 23</b></p> <p>A contract is concluded at the moment when an acceptance of an offer becomes effective in accordance with the provisions of this Convention.</p>
<p><b>Article 36 - Time limit for acceptance</b></p> <p>1. An acceptance of an offer is effective only if it reaches the offeror within any time limit stipulated in the offer by the offeror.</p> <p>2. Where no time limit has been fixed by the offeror the acceptance is effective only if it reaches the offeror within a reasonable time after the offer was made.</p>	<p><b>Article 18</b></p> <p>(1) A statement made by or other conduct of the offeree indicating assent to an offer is an acceptance. Silence or inactivity does not in itself amount to acceptance.</p> <p>(2) An acceptance of an offer becomes effective at the moment the indication of assent reaches the offeror. An acceptance is not effective if the indication of assent does not reach the offeror within</p>

<p>3. Where an offer may be accepted by doing an act without notice to the offeror, the acceptance is effective only if the act is done within the time for acceptance fixed by the offeror or, if no such time is fixed, within a reasonable time.</p>	<p>the time he has fixed or, if no time is fixed, within a reasonable time, due account being taken of the circumstances of the transaction, including the rapidity of the means of communication employed by the offeror. An oral offer must be accepted immediately unless the circumstances indicate otherwise.</p> <p>(3) However, if, by virtue of the offer or as a result of practices which the parties have established between themselves or of usage, the offeree may indicate assent by performing an act, such as one relating to the dispatch of the goods or payment of the price, without notice to the offeror, the acceptance is effective at the moment the act is performed, provided that the act is performed within the period of time laid down in the preceding paragraph.</p>
<p><b>Article 37 - Late acceptance</b></p> <p>1. A late acceptance is effective as an acceptance if without undue delay the offeror informs the offeree that the offeror is treating it as an effective acceptance.</p> <p>2. Where a letter or other communication containing a late acceptance shows that it has been sent in such circumstances that if its transmission had been normal it would have reached the offeror in due time, the late acceptance is effective as an acceptance unless, without undue delay, the offeror informs the offeree that the offer has lapsed.</p>	<p><b>Article 21</b></p> <p>(1) A late acceptance is nevertheless effective as an acceptance if without delay the offeror orally so informs the offeree or dispatches a notice to that effect.</p> <p>(2) If a letter or other writing containing a late acceptance shows that it has been sent in such circumstances that if its transmission had been normal it would have reached the offeror in due time, the late acceptance is effective as an acceptance unless, without delay, the offeror orally informs the offeree that he considers his offer as having lapsed or dispatches a notice to that effect.</p>
<p><b>Article 38 - Modified acceptance</b></p> <p>1. A reply by the offeree which states</p>	<p><b>Article 19</b></p> <p>(1) A reply to an offer which</p>

<p>or implies additional or different contract terms which materially alter the terms of the offer is a rejection and a new offer.</p> <p>2. Additional or different contract terms relating, among other things, to the price, payment, quality and quantity of the goods, place and time of delivery, extent of one party's liability to the other or the settlement of disputes are presumed to alter the terms of the offer materially.</p> <p>3. A reply which gives a definite assent to an offer is an acceptance even if it states or implies additional or different contract terms, provided that these do not materially alter the terms of the offer. The additional or different terms then become part of the contract.</p> <p>4. A reply which states or implies additional or different contract terms is always a rejection of the offer if:</p> <ul style="list-style-type: none"> <li>(a) the offer expressly limits acceptance to the terms of the offer;</li> <li>(b) the offeror objects to the additional or different terms without undue delay; or</li> <li>(c) the offeree makes the acceptance conditional upon the offeror's assent to the additional or different terms, and the assent does not reach the offeree within a reasonable time.</li> </ul>	<p>purports to be an acceptance but contains additions, limitations or other modifications is a rejection of the offer and constitutes a counter-offer.</p> <p>(2) However, a reply to an offer which purports to be an acceptance but contains additional or different terms which do not materially alter the terms of the offer constitutes an acceptance, unless the offeror, without undue delay, objects orally to the discrepancy or dispatches a notice to that effect. If he does not so object, the terms of the contract are the terms of the offer with the modifications contained in the acceptance.</p> <p>(3) Additional or different terms relating, among other things, to the price, payment, quality and quantity of the goods, place and time of delivery, extent of one party's liability to the other or the settlement of disputes are considered to alter the terms of the offer materially.</p>
<p><b>Article 39 - Conflicting standard contract terms</b></p> <p>1. Where the parties have reached agreement except that the offer and acceptance refer to conflicting standard contract terms, a contract is nonetheless concluded. The standard</p>	

<p>contract terms are part of the contract to the extent that they are common in substance.</p> <p>2. Notwithstanding paragraph 1, no contract is concluded if one party:</p> <ul style="list-style-type: none"> <li>(a) has indicated in advance, explicitly, and not by way of standard contract terms, an intention not to be bound by a contract on the basis of paragraph 1; or</li> <li>(b) without undue delay, informs the other party of such an intention.</li> </ul>	
<p><b>Chapter 4 - Right to withdraw in distance and off-premises contracts between traders and consumers</b></p>	
<p><b>Article 40 - Right to withdraw</b></p> <p>1. During the period provided for in Article 42, the consumer has a right to withdraw from the contract without giving any reason, and at no cost to the consumer except as provided in Article 45, from:</p> <ul style="list-style-type: none"> <li>(a) a distance contract;</li> <li>(b) an off-premises contract, provided that the price or, where multiple contracts were concluded at the same time, the total price of the contracts exceeds EUR 50 or the equivalent sum in the currency agreed for the contract price at the time of the conclusion of the contract.</li> </ul> <p>2. Paragraph 1 does not apply to:</p> <ul style="list-style-type: none"> <li>(a) a contract concluded by means of an automatic vending machine or automated commercial premises;</li> <li>(b) a contract for the supply of foodstuffs, beverages or other</li> </ul>	<p><i>No corresponding CISG provisions due to the exclusion of consumer sales from its scope in Article 2 (a).</i></p>

<p>goods which are intended for current consumption in the household and which are physically supplied by the trader on frequent and regular rounds to the consumer's home, residence or workplace;</p> <p>(c) a contract for the supply of goods or related services for which the price depends on fluctuations in the financial market which cannot be controlled by the trader and which may occur within the withdrawal period;</p> <p>(d) a contract for the supply of goods or digital content which are made to the consumer's specifications, or are clearly personalised;</p> <p>(e) a contract for the supply of goods which are liable to deteriorate or expire rapidly;</p> <p>(f) a contract for the supply of alcoholic beverages, the price of which has been agreed upon at the time of the conclusion of the sales contract, the delivery of which can only take place after 30 days from the time of conclusion of the contract and the actual value of which is dependent on fluctuations in the market which cannot be controlled by the trader;</p> <p>(g) a contract for the sale of a newspaper, periodical or magazine with the exception of subscription contracts for the supply of such publications;</p> <p>(h) a contract concluded at a public auction; and</p> <p>(i) a contract for catering or services related to leisure activities which provides for a specific date or period of performance.</p>	
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3. Paragraph 1 does not apply in the following situations:

- (a) where the goods supplied were sealed, have been unsealed by the consumer and are not then suitable for return due to health protection or hygiene reasons;
- (b) where the goods supplied have, according to their nature, been inseparably mixed with other items after delivery;
- (c) where the goods supplied were sealed audio or video recordings or computer software and have been unsealed after delivery;
- (d) where the supply of digital content which is not supplied on a tangible medium has begun with the consumer's prior express consent and with the acknowledgement by the consumer of losing the right to withdraw;
- (e) the consumer has specifically requested a visit from the trader for the purpose of carrying out urgent repairs or maintenance. Where on the occasion of such a visit the trader provides related services in addition to those specifically requested by the consumer or goods other than replacement parts necessarily used in performing the maintenance or in making the repairs, the right of withdrawal applies to those additional related services or goods.

4. Where the consumer has made an offer which, if accepted, would lead to the conclusion of a contract from

<p>which there would be a right to withdraw under this Chapter, the consumer may withdraw the offer even if it would otherwise be irrevocable.</p>	
<p><b>Article 41 - Exercise of right to withdraw</b></p> <p>1. The consumer may exercise the right to withdraw at any time before the end of the period of withdrawal provided for in Article 42.</p> <p>2. The consumer exercises the right to withdraw by notice to the trader. For this purpose, the consumer may use either the Model withdrawal form set out in Appendix 2 or any other unequivocal statement setting out the decision to withdraw.</p> <p>3. Where the trader gives the consumer the option to withdraw electronically on its trading website, and the consumer does so, the trader has a duty to communicate to the consumer an acknowledgement of receipt of such a withdrawal on a durable medium without delay. The trader is liable for any loss caused to the other party by a breach of this duty.</p> <p>4. A communication of withdrawal is timely if sent before the end of the withdrawal period.</p> <p>5. The consumer bears the burden of proof that the right of withdrawal has been exercised in accordance with this Article.</p>	
<p><b>Article 42 - Withdrawal period</b></p> <p>1. The withdrawal period expires after fourteen days from:</p> <p>(a) the day on which the</p>	

<p>consumer has taken delivery of the goods in the case of a sales contract, including a sales contract under which the seller also agrees to provide related services;</p> <p>(b) the day on which the consumer has taken delivery of the last item in the case of a contract for the sale of multiple goods ordered by the consumer in one order and delivered separately, including a contract under which the seller also agrees to provide related services;</p> <p>(c) the day on which the consumer has taken delivery of the last lot or piece in the case of a contract where the goods consist of multiple lots or pieces, including a contract under which the seller also agrees to provide related services;</p> <p>(d) the day on which the consumer has taken delivery of the first item where the contract is for regular delivery of goods during a defined period of time, including a contract under which the seller also agrees to provide related services;</p> <p>(e) the day of the conclusion of the contract in the case of a contract for related services concluded after the goods have been delivered;</p> <p>(f) the day when the consumer has taken delivery of the tangible medium in accordance with point (a) in the case of a contract for the supply of digital content where the digital content is supplied on a tangible medium;</p> <p>(g) the day of the conclusion of</p>	
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<p>the contract in the case of a contract where the digital content is not supplied on a tangible medium.</p> <p>2. Where the trader has not provided the consumer with the information referred to in Article 17 (1), the withdrawal period expires:</p> <ul style="list-style-type: none"> <li>(a) after one year from the end of the initial withdrawal period, as determined in accordance with paragraph 1; or</li> <li>(b) where the trader provides the consumer with the information required within one year from the end of the withdrawal period as determined in accordance with paragraph 1, after fourteen days from the day the consumer receives the information.</li> </ul>	
<p><b>Article 43 - Effects of withdrawal</b></p> <p>Withdrawal terminates the obligations of both parties under the contract:</p> <ul style="list-style-type: none"> <li>(a) to perform the contract; or</li> <li>(b) to conclude the contract in cases where an offer was made by the consumer.</li> </ul>	
<p><b>Article 44 - Obligations of the trader in the event of withdrawal</b></p> <p>1. The trader must reimburse all payments received from the consumer, including, where applicable, the costs of delivery without undue delay and in any event not later than fourteen days from the day on which the trader is informed of the consumer's decision to withdraw from the contract in accordance with Article 41. The trader must carry out such</p>	

<p>reimbursement using the same means of payment as the consumer used for the initial transaction, unless the consumer has expressly agreed otherwise and provided that the consumer does not incur any fees as a result of such reimbursement.</p> <p>2. Notwithstanding paragraph 1, the trader is not required to reimburse the supplementary costs, if the consumer has expressly opted for a type of delivery other than the least expensive type of standard delivery offered by the trader.</p> <p>3. In the case of a contract for the sale of goods, the trader may withhold the reimbursement until it has received the goods back, or the consumer has supplied evidence of having sent back the goods, whichever is earlier, unless the trader has offered to collect the goods.</p> <p>4. In the case of an off-premises contract where the goods have been delivered to the consumer's home at the time of the conclusion of the contract, the trader must collect the goods at its own cost if the goods by their nature cannot be normally returned by post.</p>	
<p><b>Article 45 - Obligations of the consumer in the event of withdrawal</b></p> <p>1. The consumer must send back the goods or hand them over to the trader or to a person authorised by the trader without undue delay and in any event not later than fourteen days from the day on which the consumer communicates the decision to withdraw from the contract to the trader in accordance with Article 41, unless the trader has offered to collect the goods. This deadline is met if the</p>	

<p>consumer sends back the goods before the period of fourteen days has expired.</p> <p>2. The consumer must bear the direct costs of returning the goods, unless the trader has agreed to bear those costs or the trader failed to inform the consumer that the consumer has to bear them.</p> <p>3. The consumer is liable for any diminished value of the goods only where that results from handling of the goods in any way other than what is necessary to establish the nature, characteristics and functioning of the goods. The consumer is not liable for diminished value where the trader has not provided all the information about the right to withdraw in accordance with Article 17 (1).</p> <p>4. Without prejudice to paragraph 3, the consumer is not liable to pay any compensation for the use of the goods during the withdrawal period.</p> <p>5. Where the consumer exercises the right of withdrawal after having made an express request for the provision of related services to begin during the withdrawal period, the consumer must pay to the trader an amount which is in proportion to what has been provided before the consumer exercised the right of withdrawal, in comparison with the full coverage of the contract. The proportionate amount to be paid by the consumer to the trader must be calculated on the basis of the total price agreed in the contract. Where the total price is excessive, the proportionate amount must be calculated on the basis of the market value of what has been provided.</p> <p>6. The consumer is not liable for the</p>	
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<p>cost for:</p> <ul style="list-style-type: none"> <li>(a) the provision of related services, in full or in part, during the withdrawal period, where: <ul style="list-style-type: none"> <li>(i) the trader has failed to provide information in accordance with Article 17(1) and (3); or</li> <li>(ii) the consumer has not expressly requested performance to begin during the withdrawal period in accordance with Article 18(2) and Article 19(6);</li> </ul> </li> <li>(b) for the supply, in full or in part, of digital content which is not supplied on a tangible medium where: <ul style="list-style-type: none"> <li>(i) the consumer has not given prior express consent for the supply of digital content to begin before the end of the period of withdrawal referred to in Article 42(1);</li> <li>(ii) the consumer has not acknowledged losing the right of withdrawal when giving the consent; or</li> <li>(iii) the trader has failed to provide the confirmation in accordance with Article 18(1) and Article 19(5).</li> </ul> </li> </ul> <p>7. Except as provided for in this Article, the consumer does not incur any liability through the exercise of the right of withdrawal.</p>	
<p><b>Article 46 - Ancillary contracts</b></p> <p>1. Where a consumer exercises the right of withdrawal from a distance or an off premises contract in accordance with Articles 41 to 45, any ancillary contracts are automatically terminated at no cost to the consumer except as provided in</p>	

<p>paragraphs 2 and 3. For the purpose of this Article an ancillary contract means a contract by which a consumer acquires goods, digital content or related services in connexion to a distance contract or an off-premises contract and these goods, digital content or related services are provided by the trader or a third party on the basis of an arrangement between that third party and the trader.</p> <p>2. The provisions of Articles 43, 44 and 45 apply accordingly to ancillary contracts to the extent that those contracts are governed by the Common European Sales Law.</p> <p>3. For ancillary contracts which are not governed by the Common European Sales Law the applicable law governs the obligations of the parties in the event of withdrawal.</p>	
<p><b>Article 47 - Mandatory nature</b></p> <p>The parties may not, to the detriment of the consumer, exclude the application of this Chapter or derogate from or vary its effects.</p>	
<p><b>Chapter 5- Defects in consent</b></p>	
<p><b>Article 48 – Mistake</b></p> <p>1. A party may avoid a contract for mistake of fact or law existing when the contract was concluded if:</p> <p style="padding-left: 40px;">(a) the party, but for the mistake, would not have concluded the contract or would have done so only on fundamentally different contract terms and the other party knew or could be expected to have known this; and</p> <p style="padding-left: 40px;">(b) the other party:</p>	<p><i>No corresponding CISG provisions due to the exclusion of contract validity from its scope in Article 4 (b).</i></p>

<p>(i) caused the mistake;  (ii) caused the contract to be concluded in mistake by failing to comply with any pre-contractual information duty under Chapter 2, Sections 1 to 4;  (iii) knew or could be expected to have known of the mistake and caused the contract to be concluded in mistake by not pointing out the relevant information, provided that good faith and fair dealing would have required a party aware of the mistake to point it out; or  (iv) made the same mistake.</p> <p>2. A party may not avoid a contract for mistake if the risk of the mistake was assumed, or in the circumstances should be borne, by that party.</p> <p>3. An inaccuracy in the expression or transmission of a statement is treated as a mistake of the person who made or sent the statement.</p>	
<p><b>Article 49 – Fraud</b></p> <p>1. A party may avoid a contract if the other party has induced the conclusion of the contract by fraudulent misrepresentation, whether by words or conduct, or fraudulent non-disclosure of any information which good faith and fair dealing, or any precontractual information duty, required that party to disclose.</p> <p>2. Misrepresentation is fraudulent if it is made with knowledge or belief that the representation is false, or recklessly as to whether it is true or false, and is intended to induce the recipient to make a mistake. Non-disclosure is fraudulent if it is intended to induce the person from</p>	

<p>whom the information is withheld to make a mistake.</p> <p>3. In determining whether good faith and fair dealing require a party to disclose particular information, regard should be had to all the circumstances, including:</p> <ul style="list-style-type: none"> <li>(a) whether the party had special expertise;</li> <li>(b) the cost to the party of acquiring the relevant information;</li> <li>(c) the ease with which the other party could have acquired the information by other means;</li> <li>(d) the nature of the information;</li> <li>(e) the apparent importance of the information to the other party; and</li> <li>(f) in contracts between traders good commercial practice in the situation concerned</li> </ul>	
<p><b>Article 50 – Threats</b></p> <p>A party may avoid a contract if the other party has induced the conclusion of the contract by the threat of wrongful, imminent and serious harm, or of a wrongful act.</p>	
<p><b>Article 51 - Unfair exploitation</b></p> <p>A party may avoid a contract if, at the time of the conclusion of the contract:</p> <ul style="list-style-type: none"> <li>(a) that party was dependent on, or had a relationship of trust with, the other party, was in economic distress or had urgent needs, was improvident, ignorant, or inexperienced; and</li> <li>(b) the other party knew or could be expected to have known this and, in the light of the circumstances and purpose of</li> </ul>	

<p>the contract, exploited the first party's situation by taking an excessive benefit or unfair advantage.</p>	
<p><b>Article 52 - Notice of avoidance</b></p> <p>1. Avoidance is effected by notice to the other party.</p> <p>2. A notice of avoidance is effective only if it is given within the following period after the avoiding party becomes aware of the relevant circumstances or becomes capable of acting freely:</p> <ul style="list-style-type: none"> <li>(a) six months in case of mistake; and</li> <li>(b) one year in case of fraud, threats and unfair exploitation.</li> </ul>	<p><b>Article 26</b></p> <p>A declaration of avoidance of the contract is effective only if made by notice to the other party.</p>
<p><b>Article 53 – Confirmation</b></p> <p>Where the party who has the right to avoid a contract under this Chapter confirms it, expressly or impliedly, after becoming aware of the relevant circumstances, or becoming capable of acting freely, that party may no longer avoid the contract.</p>	
<p><b>Article 54 - Effects of avoidance</b></p> <p>1. A contract which may be avoided is valid until avoided but, once avoided, is retrospectively invalid from the beginning.</p> <p>2. Where a ground of avoidance affects only certain contract terms, the effect of avoidance is limited to those terms unless it is unreasonable to uphold the remainder of the contract.</p> <p>3. The question whether either party has a right to the return of whatever has been transferred or supplied under a contract which has been avoided, or</p>	<p><b>Article 81</b></p> <p>(1) Avoidance of the contract releases both parties from their obligations under it, subject to any damages which may be due. Avoidance does not affect any provision of the contract for the settlement of disputes or any other provision of the contract governing the rights and obligations of the parties consequent upon the avoidance of the contract.</p> <p>(2) A party who has performed the contract either wholly or in part may claim restitution from the</p>

<p>to a monetary equivalent, is regulated by the rules on restitution in Chapter 17.</p>	<p>other party of whatever the first party has supplied or paid under the contract. If both parties are bound to make restitution, They must do so concurrently.</p>
<p><b>Article 55 - Damages for loss</b></p> <p>A party who has the right to avoid a contract under this Chapter or who had such a right before it was lost by the effect of time limits or confirmation is entitled, whether or not the contract is avoided, to damages from the other party for loss suffered as a result of the mistake, fraud, threats or unfair exploitation, provided that the other party knew or could be expected to have known of the relevant circumstances.</p>	
<p><b>Article 56 - Exclusion or restriction of remedies</b></p> <p>1. Remedies for fraud, threats and unfair exploitation cannot be directly or indirectly excluded or restricted.</p> <p>2. In relations between a trader and a consumer the parties may not, to the detriment of the consumer, directly or indirectly exclude or restrict remedies for mistake.</p>	
<p><b>Article 57 - Choice of remedy</b></p> <p>A party who is entitled to a remedy under this Chapter in circumstances which afford that party a remedy for non-performance may pursue either of those remedies.</p>	
<p><b>Part III - Assessing what is in the contract</b> <b>Chapter 6 – Interpretation</b></p>	
<p><b>Article 58 - General rules on interpretation of contracts</b></p>	<p><b>Article 8</b></p> <p>(1) For the purposes of this</p>

<p>1. A contract is to be interpreted according to the common intention of the parties even if this differs from the normal meaning of the expressions used in it.</p> <p>2. Where one party intended an expression used in the contract to have a particular meaning, and at the time of the conclusion of the contract the other party was aware, or could be expected to have been aware, of that intention, the expression is to be interpreted in the way intended by the first party.</p> <p>3. Unless otherwise provided in paragraphs 1 and 2, the contract is to be interpreted according to the meaning which a reasonable person would give to it.</p>	<p>Convention statements made by and other conduct of a party are to be interpreted according to his intent where the other party knew or could not have been unaware what that intent was.</p> <p>(2) If the preceding paragraph is not applicable, statements made by and other conduct of a party are to be interpreted according to the understanding that a reasonable person of the same kind as the other party would have had in the same circumstances.</p> <p>(3) In determining the intent of a party or the understanding a reasonable person would have had, due consideration is to be given to all relevant circumstances of the case including the negotiations, any practices which the parties have established between themselves, usages and any subsequent conduct of the parties.</p>
<p><b>Article 59 - Relevant matters</b></p> <p>In interpreting a contract, regard may be had, in particular, to:</p> <ul style="list-style-type: none"> <li>(a) the circumstances in which it was concluded, including the preliminary negotiations;</li> <li>(b) the conduct of the parties, even subsequent to the conclusion of the contract;</li> <li>(c) the interpretation which has already been given by the parties to expressions which are identical to or similar to those used in the contract;</li> <li>(d) usages which would be considered generally applicable by parties in the same situation;</li> <li>(e) practices which the parties have established between</li> </ul>	<p><b>Article 9</b></p> <p>(1) The parties are bound by any usage to which they have agreed and by any practices which they have established between themselves.</p> <p>(2) The 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.</p>

<p>themselves;</p> <p>(f) the meaning commonly given to expressions in the branch of activity concerned;</p> <p>(g) the nature and purpose of the contract; and</p> <p>(h) good faith and fair dealing.</p>	
<p><b>Article 60 - Reference to contract as a whole</b></p> <p>Expressions used in a contract are to be interpreted in the light of the contract as a whole.</p>	
<p><b>Article 61 - Language discrepancies</b></p> <p>Where a contract document is in two or more language versions none of which is stated to be authoritative and where there is a discrepancy between the versions, the version in which the contract was originally drawn up is to be treated as the authoritative one.</p>	
<p><b>Article 62 - Preference for individually negotiated contract terms</b></p> <p>To the extent that there is an inconsistency, contract terms which have been individually negotiated prevail over those which have not been individually negotiated within the meaning of Article 7.</p>	
<p><b>Article 63 - Preference for interpretation which gives contract terms effect</b></p> <p>An interpretation which renders the contract terms effective prevails over one which does not.</p>	
<p><b>Article 64 - Interpretation in favour of consumers</b></p> <p>1. Where there is doubt about the</p>	

<p>meaning of a contract term in a contract between a trader and a consumer, the interpretation most favourable to the consumer shall prevail unless the term was supplied by the consumer.</p> <p>2. The parties may not, to the detriment of the consumer, exclude the application of this Article or derogate from or vary its effects.</p>	
<p><b>Article 65 - Interpretation against supplier of a contract term</b></p> <p>Where, in a contract which does not fall under Article 64, there is doubt about the meaning of a contract term which has not been individually negotiated within the meaning of Article 7, an interpretation of the term against the party who supplied it shall prevail.</p>	
<p><b>Chapter 7 - Contents and effects</b></p>	
<p><b>Article 66 - Contract terms</b></p> <p>The terms of the contract are derived from:</p> <ul style="list-style-type: none"> <li>(a) the agreement of the parties, subject to any mandatory rules of the Common European Sales Law;</li> <li>(b) any usage or practice by which parties are bound by virtue of Article 67;</li> <li>(c) any rule of the Common European Sales Law which applies in the absence of an agreement of the parties to the contrary; and</li> <li>(d) any contract term implied by virtue of Article 68.</li> </ul>	
<p><b>Article 67 - Usages and practices in contracts between traders</b></p>	<p><b>Article 9</b></p>

<p>1. In a contract between traders, the parties are bound by any usage which they have agreed should be applicable and by any practice they have established between themselves.</p> <p>2. The parties are bound by a usage which would be considered generally applicable by traders in the same situation as the parties.</p> <p>3. Usages and practices do not bind the parties to the extent to which they conflict with contract terms which have been individually negotiated or any mandatory rules of the Common European Sales Law.</p>	<p>(1) The parties are bound by any usage to which they have agreed and by any practices which they have established between themselves.</p> <p>(2) The 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.</p>
<p><b>Article 68 - Contract terms which may be implied</b></p> <p>1. Where it is necessary to provide for a matter which is not explicitly regulated by the agreement of the parties, any usage or practice or any rule of the Common European Sales Law, an additional contract term may be implied, having regard in particular to:</p> <ul style="list-style-type: none"> <li>(a) the nature and purpose of the contract;</li> <li>(b) the circumstances in which the contract was concluded; and</li> <li>(c) good faith and fair dealing.</li> </ul> <p>2. Any contract term implied under paragraph 1 is, as far as possible, to be such as to give effect to what the parties would probably have agreed, had they provided for the matter.</p> <p>3. Paragraph 1 does not apply if the parties have deliberately left a matter unregulated, accepting that one or other party would bear the risk.</p>	
<p><b>Article 69 - Contract terms derived</b></p>	<p><b>Article 35</b></p>

<p><b>from certain pre-contractual statements</b></p> <p>1. Where the trader makes a statement before the contract is concluded, either to the other party or publicly, about the characteristics of what is to be supplied by that trader under the contract, the statement is incorporated as a term of the contract unless:</p> <ul style="list-style-type: none"> <li>(a) the other party was aware, or could be expected to have been aware when the contract was concluded that the statement was incorrect or could not otherwise be relied on as such a term; or</li> <li>(b) the other party's decision to conclude the contract could not have been influenced by the statement.</li> </ul> <p>2. For the purposes of paragraph 1, a statement made by a person engaged in advertising or marketing for the trader is regarded as being made by the trader.</p> <p>3. Where the other party is a consumer then, for the purposes of paragraph 1, a public statement made by or on behalf of a producer or other person in earlier links of the chain of transactions leading to the contract is regarded as being made by the trader unless the trader, at the time of conclusion of the contract, did not know and could not be expected to have known of it.</p> <p>4. In relations between a trader and a consumer the parties may not, to the detriment of the consumer, exclude the application of this Article or derogate from or vary its effects.</p>	<p>(1) The seller must deliver goods which are of the quantity, quality and description required by the contract and which are contained or packaged in the manner required by the contract.</p> <p>(2) Except where the parties have agreed otherwise, the goods do not conform with the contract unless they:</p> <ul style="list-style-type: none"> <li>(a) are fit for the purposes for which goods of the same description would ordinarily be used;</li> <li>(b) are fit for any particular purpose expressly or impliedly made known to the seller at the time of the conclusion of the contract, except where the circumstances show that the buyer did not rely, or that it was unreasonable for him to rely, on the seller's skill and judgement;</li> <li>(c) possess the qualities of goods which the seller has held out to the buyer as a sample or model;</li> <li>(d) are contained or packaged in the manner usual for such goods or, where there is no such manner, in a manner adequate to preserve and protect the goods.</li> </ul> <p>(3) The seller is not liable under subparagraphs (a) to (d) of the preceding paragraph for any lack of conformity of the goods if, at the time of the conclusion of the contract, the buyer knew or could not have been unaware of such lack of conformity.</p>
<p><b>Article 70 - Duty to raise awareness</b></p>	

<p><b>of not individually negotiated contract terms</b></p> <p>1. Contract terms supplied by one party and not individually negotiated within the meaning of Article 7 may be invoked against the other party only if the other party was aware of them, or if the party supplying them took reasonable steps to draw the other party's attention to them, before or when the contract was concluded.</p> <p>2. For the purposes of this Article, in relations between a trader and a consumer contract terms are not sufficiently brought to the consumer's attention by a mere reference to them in a contract document, even if the consumer signs the document.</p> <p>3. The parties may not exclude the application of this Article or derogate from or vary its effects.</p>	
<p><b>Article 71 - Additional payments in contracts between a trader and a consumer</b></p> <p>1. In a contract between a trader and a consumer, a contract term which obliges the consumer to make any payment in addition to the remuneration stated for the trader's main contractual obligation, in particular where it has been incorporated by the use of default options which the consumer is required to reject in order to avoid the additional payment, is not binding on the consumer unless, before the consumer is bound by the contract, the consumer has expressly consented to the additional payment. If the consumer has made the additional payment, the consumer may recover it.</p> <p>2. The parties may not, to the</p>	

<p>detriment of the consumer, exclude the application of this Article or derogate from or vary its effects.</p>	
<p><b>Article 72 - Merger clauses</b></p> <p>1. Where a contract in writing includes a term stating that the document contains all contract terms (a merger clause), any prior statements, undertakings or agreements which are not contained in the document do not form part of the contract.</p> <p>2. Unless the contract otherwise provides, a merger clause does not prevent the parties' prior statements from being used to interpret the contract.</p> <p>3. In a contract between a trader and a consumer, the consumer is not bound by a merger clause.</p> <p>4. The parties may not, to the detriment of the consumer, exclude the application of this Article or derogate from or vary its effects.</p>	
<p><b>Article 73 - Determination of price</b></p> <p>Where the amount of the price payable under a contract cannot be otherwise determined, the price payable is, in the absence of any indication to the contrary, the price normally charged in comparable circumstances at the time of the conclusion of the contract or, if no such price is available, a reasonable price.</p>	<p><b>Article 55</b></p> <p>Where a contract has been validly concluded but does not expressly or implicitly fix or make provision for determining the price, the parties are considered, in the absence of any indication to the contrary, to have impliedly made reference to the price generally charged at the time of the conclusion of the contract for such goods sold under comparable circumstances in the trade concerned.</p> <p><b>Article 56</b></p> <p>If the price is fixed according to the</p>

	weight of the goods, in case of doubt it is to be determined by the net weight.
<p><b>Article 74 - Unilateral determination by a party</b></p> <p>1. Where the price or any other contract term is to be determined by one party and that party's determination is grossly unreasonable then the price normally charged or term normally used in comparable circumstances at the time of the conclusion of the contract or, if no such price or term is available, a reasonable price or a reasonable term is substituted.</p> <p>2. The parties may not exclude the application of this Article or derogate from or vary its effects.</p>	
<p><b>Article 75 - Determination by a third party</b></p> <p>1. Where a third party is to determine the price or any other contract term and cannot or will not do so, a court may, unless this is inconsistent with the contract terms, appoint another person to determine it.</p> <p>2. Where a price or other contract term determined by a third party is grossly unreasonable, the price normally charged or term normally used in comparable circumstances at the time of the conclusion of the contract or, if no such price is available, a reasonable price, or a reasonable term is substituted.</p> <p>3. For the purpose of paragraph 1 a 'court' includes an arbitral tribunal.</p> <p>4. In relations between a trader and a consumer the parties may not to the detriment of the consumer exclude the application of paragraph 2 or</p>	

<p>derogate from or vary its effects.</p>	
<p><b>Article 76 – Language</b></p> <p>Where the language to be used for communications relating to the contract or the rights or obligations arising from it cannot be otherwise determined, the language to be used is that used for the conclusion of the contract.</p>	
<p><b>Article 77 - Contracts of indeterminate duration</b></p> <p>1. Where, in a case involving continuous or repeated performance of a contractual obligation, the contract terms do not stipulate when the contractual relationship is to end or provide for it to be terminated upon giving notice to that effect, it may be terminated by either party by giving a reasonable period of notice not exceeding two months.</p> <p>2. In relations between a trader and a consumer the parties may not, to the detriment of the consumer, exclude the application of this Article or derogate from or vary its effects.</p>	<p><b>Article 73</b></p> <p>(1) In the case of a contract for delivery of goods by instalments, if the failure of one party to perform any of his obligations in respect of any instalment constitutes a fundamental breach of contract with respect to that instalment, the other party may declare the contract avoided with respect to that instalment.</p> <p>(2) If one party's failure to perform any of his obligations in respect of any instalment gives the other party good grounds to conclude that a fundamental breach of contract will occur with respect to future instalments, he may declare the contract avoided for the future, provided that he does so within a reasonable time.</p>
<p><b>Article 78 - Contract terms in favour of third parties</b></p> <p>1. The contracting parties may, by the contract, confer a right on a third party. The third party need not be in existence or identified at the time the contract is concluded but needs to be identifiable.</p> <p>2. The nature and content of the third party's right are determined by the contract. The right may take the form of an exclusion or limitation of the</p>	

<p>third party's liability to one of the contracting parties.</p> <p>3. When one of the contracting parties is bound to render a performance to the third party under the contract, then:</p> <p>(a) the third party has the same rights to performance and remedies for nonperformance as if the contracting party was bound to render the performance under a contract with the third party; and</p> <p>(b) the contracting party who is bound may assert against the third party all defences which the contracting party could assert against the other party to the contract.</p> <p>4. The third party may reject a right conferred upon them by notice to either of the contracting parties, if that is done before it has been expressly or impliedly accepted. On such rejection, the right is treated as never having accrued to the third party.</p> <p>5. The contracting parties may remove or modify the contract term conferring the right if this is done before either of them has given the third party notice that the right has been conferred.</p>	
<p><b>Chapter 8 Unfair contract terms</b>  <b>Section 1 General Provision</b></p>	
<p><b>Article 79 - Effects of unfair contract terms</b></p> <p>1. A contract term which is supplied by one party and which is unfair under Sections 2 and 3 of this Chapter is not binding on the other party.</p>	

<p>2. Where the contract can be maintained without the unfair contract term, the other contract terms remain binding.</p>	
<p><b>Article 80 - Exclusions from unfairness test</b></p> <p>1. Sections 2 and 3 do not apply to contract terms which reflect rules of the Common European Sales Law which would apply if the terms did not regulate the matter.</p> <p>2. Section 2 does not apply to the definition of the main subject matter of the contract, or to the appropriateness of the price to be paid in so far as the trader has complied with the duty of transparency set out in Article 82.</p> <p>3. Section 3 does not apply to the definition of the main subject matter of the contract or to the appropriateness of the price to be paid.</p>	
<p><b>Article 81 - Mandatory nature</b></p> <p>The parties may not exclude the application of this Chapter or derogate from or vary its effects.</p>	
<p><b>Section 2 - Unfair Contract Terms in Contracts between a Trader and a Consumer</b></p>	
<p><b>Article 82 - Duty of transparency in contract terms not individually negotiated</b></p> <p>Where a trader supplies contract terms which have not been individually negotiated with the consumer within the meaning of Article 7, it has a duty to ensure that they are drafted and communicated in</p>	<p><i>No corresponding CISG provisions due to the exclusion of consumer sales from its scope in Article 2 (a).</i></p>

<p>plain, intelligible language.</p>	
<p><b>Article 83 - Meaning of "unfair" in contracts between a trader and a consumer</b></p> <p>1. In a contract between a trader and a consumer, a contract term supplied by the trader which has not been individually negotiated within the meaning of Article 7 is unfair for the purposes of this Section if it causes a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer, contrary to good faith and fair dealing.</p> <p>2. When assessing the unfairness of a contract term for the purposes of this Section, regard is to be had to:</p> <ul style="list-style-type: none"> <li>(a) whether the trader complied with the duty of transparency set out in Article 82;</li> <li>(b) the nature of what is to be provided under the contract;</li> <li>(c) the circumstances prevailing during the conclusion of the contract;</li> <li>(d) to the other contract terms; and</li> <li>(e) to the terms of any other contract on which the contract depends.</li> </ul>	
<p><b>Article 84 - Contract terms which are always unfair</b></p> <p>A contract term is always unfair for the purposes of this Section if its object or effect is to:</p> <ul style="list-style-type: none"> <li>(a) exclude or limit the liability of the trader for death or personal injury caused to the consumer through an act or omission of the trader or of</li> </ul>	<p><b>Article 5</b></p> <p>This Convention does not apply to the liability of the seller for death or personal injury caused by the goods to any person.</p>

<p>someone acting on behalf of the trader;</p> <p>(b) exclude or limit the liability of the trader for any loss or damage to the consumer caused deliberately or as a result of gross negligence;</p> <p>(c) limit the trader's obligation to be bound by commitments undertaken by its authorised agents or make its commitments subject to compliance with a particular condition the fulfilment of which depends exclusively on the trader;</p> <p>(d) exclude or hinder the consumer's right to take legal action or exercise any other legal remedy, particularly by requiring the consumer to take disputes exclusively to an arbitration system not foreseen generally in legal provisions that apply to contracts between a trader and a consumer;</p> <p>(e) confer exclusive jurisdiction for all disputes arising under the contract to a court for the place where the trader is domiciled unless the chosen court is also the court for the place where the consumer is domiciled;</p> <p>(f) give the trader the exclusive right to determine whether the goods, digital content or related services supplied are in conformity with the contract or gives the trader the exclusive right to interpret any contract term;</p> <p>(g) provide that the consumer is bound by the contract when the trader is not;</p> <p>(h) require the consumer to use a more formal method for terminating the contract</p>	
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<p>within the meaning of Article 8 than was used for conclusion of the contract;</p> <ul style="list-style-type: none"> <li>(i) grant the trader a shorter notice period to terminate the contract than the one required of the consumer;</li> <li>(j) oblige the consumer to pay for goods, digital content or related services not actually delivered, supplied or rendered;</li> <li>(k) determine that non-individually negotiated contract terms within the meaning of Article 7 prevail or have preference over contract terms which have been individually negotiated.</li> </ul>	
<p><b>Article 85 - Contract terms which are presumed to be unfair</b></p> <p>A contract term is presumed to be unfair for the purposes of this Section if its object or effect is to:</p> <ul style="list-style-type: none"> <li>(a) restrict the evidence available to the consumer or impose on the consumer a burden of proof which should legally lie with the trader;</li> <li>(b) inappropriately exclude or limit the remedies available to the consumer against the trader or a third party for non-performance by the trader of obligations under the contract;</li> <li>(c) inappropriately exclude or limit the right to set-off claims that the consumer may have against the trader against what the consumer may owe to the trader;</li> <li>(d) permit a trader to keep money paid by the consumer if the latter decides not to conclude the contract, or perform</li> </ul>	

<p>obligations under it, without providing for the consumer to receive compensation of an equivalent amount from the trader in the reverse situation;</p> <p>(e) require a consumer who fails to perform obligations under the contract to pay a disproportionately high amount by way of damages or a stipulated payment for nonperformance;</p> <p>(f) entitle a trader to withdraw from or terminate the contract within the meaning of Article 8 on a discretionary basis without giving the same right to the consumer, or entitle a trader to keep money paid for related services not yet supplied in the case where the trader withdraws from or terminates the contract;</p> <p>(g) enable a trader to terminate a contract of indeterminate duration without reasonable notice, except where there are serious grounds for doing so;</p> <p>(h) automatically extend a contract of fixed duration unless the consumer indicates otherwise, in cases where contract terms provide for an unreasonably early deadline for giving notice;</p> <p>(i) enable a trader to alter contract terms unilaterally without a valid reason which is specified in the contract; this does not affect contract terms under which a trader reserves the right to alter unilaterally the terms of a contract of indeterminate duration, provided that the trader is required to inform the consumer with reasonable notice, and that the consumer is free to terminate the</p>	
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<p>contract at no cost to the consumer;</p> <p>(j) enable a trader to alter unilaterally without a valid reason any characteristics of the goods, digital content or related services to be provided or any other features of performance;</p> <p>(k) provide that the price of goods, digital content or related services is to be determined at the time of delivery or supply, or allow a trader to increase the price without giving the consumer the right to withdraw if the increased price is too high in relation to the price agreed at the conclusion of the contract; this does not affect priceindexation clauses, where lawful, provided that the method by which prices vary is explicitly described;</p> <p>(l) oblige a consumer to perform all their obligations under the contract where the trader fails to perform its own;</p> <p>(m) allow a trader to transfer its rights and obligations under the contract without the consumer's consent, unless it is to a subsidiary controlled by the trader, or as a result of a merger or a similar lawful company transaction, and such transfer is not likely to negatively affect any right of the consumer;</p> <p>(n) allow a trader, where what has been ordered is unavailable, to supply an equivalent without having expressly informed the consumer of this possibility and of the fact that the trader must bear the cost of returning what the consumer</p>	
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<p>has received under the contract if the consumer exercises a right to reject performance;</p> <ul style="list-style-type: none"> <li>(o) allow a trader to reserve an unreasonably long or inadequately specified period to accept or refuse an offer;</li> <li>(p) allow a trader to reserve an unreasonably long or inadequately specified period to perform the obligations under the contract;</li> <li>(q) inappropriately exclude or limit the remedies available to the consumer against the trader or the defences available to the consumer against claims by the trader;</li> <li>(r) subject performance of obligations under the contract by the trader, or subject other beneficial effects of the contract for the consumer, to particular formalities that are not legally required and are unreasonable;</li> <li>(s) require from the consumer excessive advance payments or excessive guarantees of performance of obligations;</li> <li>(t) unjustifiably prevent the consumer from obtaining supplies or repairs from third party sources;</li> <li>(u) unjustifiably bundle the contract with another one with the trader, a subsidiary of the trader, or a third party, in a way that cannot be expected by the consumer;</li> <li>(v) impose an excessive burden on the consumer in order to terminate a contract of indeterminate duration;</li> <li>(w) make the initial contract period, or any renewal period, of a contract for the protracted provision of goods,</li> </ul>	
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<p>digital content or related services longer than one year, unless the consumer may terminate the contract at any time with a termination period of no more than 30 days.</p>	
<p><b>Section 3 – Unfair Contract Terms in Contracts between Traders</b></p>	
<p><b>Article 86 - Meaning of “unfair” in contracts between traders</b></p> <p>1. In a contract between traders, a contract term is unfair for the purposes of this Section only if:</p> <ul style="list-style-type: none"> <li>(a) it forms part of not individually negotiated terms within the meaning of Article 7; and</li> <li>(b) it is of such a nature that its use grossly deviates from good commercial practice, contrary to good faith and fair dealing.</li> </ul> <p>2. When assessing the unfairness of a contract term for the purposes of this Section, regard is to be had to:</p> <ul style="list-style-type: none"> <li>(a) the nature of what is to be provided under the contract;</li> <li>(b) the circumstances prevailing during the conclusion of the contract;</li> <li>(c) the other contract terms; and</li> <li>(d) the terms of any other contract on which the contract depends.</li> </ul>	<p><b>Article 7</b></p> <p>(1) In the interpretation of this Convention, regard is to be had to its international character and to the need to promote uniformity in its application and the observance of good faith in international trade.</p> <p>(2) Questions concerning matters governed by this Convention which are not expressly settled in it are to be settled in conformity with the general principles on which it is based or, in the absence of such principles, in conformity with the law applicable by virtue of the rules of private international law.</p>
<p><b>Part IV - Obligations and remedies of the parties to a sales contract or a contract for the supply of digital content</b></p> <p><b>Chapter 9 General provisions</b></p>	

**Article 87 - Non-performance and fundamental non-performance**

1. Non-performance of an obligation is any failure to perform that obligation, whether or not the failure is excused, and includes:

- (a) non-delivery or delayed delivery of the goods;
- (b) non-supply or delayed supply of the digital content;
- (c) delivery of goods which are not in conformity with the contract;
- (d) supply of digital content which is not in conformity with the contract;
- (e) non-payment or late payment of the price; and
- (f) any other purported performance which is not in conformity with the contract.

2. Non-performance of an obligation by one party is fundamental if:

- (a) it substantially deprives the other party of what that party was entitled to expect under the contract, unless at the time of conclusion of the contract the nonperforming party did not foresee and could not be expected to have foreseen that result; or
- (b) it is of such a nature as to make it clear that the non-performing party's future performance cannot be relied on.

**Article 25**

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

**Article 71**

(1) A party may suspend the performance of his obligations if, after the conclusion of the contract, it becomes apparent that the other party will not perform a substantial part of his obligations as a result of:

- (a) a serious deficiency in his ability to perform or in his creditworthiness; or
- (b) his conduct in preparing to perform or in performing the contract.

(2) If the seller has already dispatched the goods before the grounds described in the preceding paragraph become evident, he may prevent the handing over of the goods to the buyer even though the buyer holds a document which entitles him to obtain them. The present paragraph relates only to the rights in the goods as between the buyer and the seller.

(3) A party suspending performance, whether before or after dispatch of the goods, must immediately give notice of the suspension to the other party and must continue with performance if the other party provides adequate assurance of his performance.

<p><b>Article 88 - Excused non-performance</b></p> <p>1. A party's non-performance of an obligation is excused if it is due to an impediment beyond that party's control and if that party could not be expected to have taken the impediment into account at the time of the conclusion of the contract, or to have avoided or overcome the impediment or its consequences.</p> <p>2. Where the impediment is only temporary the non-performance is excused for the period during which the impediment exists. However, if the delay amounts to a fundamental non-performance, the other party may treat it as such.</p> <p>3. The party who is unable to perform has a duty to ensure that notice of the impediment and of its effect on the ability to perform reaches the other party without undue delay after the first party becomes, or could be expected to have become, aware of these circumstances. The other party is entitled to damages for any loss resulting from the breach of this duty.</p>	<p><b>Article 79</b></p> <p>(1) A party is not liable for a failure to perform any of his obligations if he proves that the failure was due to an impediment beyond his control and that he could not reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract or to have avoided or overcome it, or its consequences.</p> <p>(2) If the party's failure is due to the failure by a third person whom he has engaged to perform the whole or a part of the contract, that party is exempt from liability only if:</p> <ul style="list-style-type: none"> <li>(a) he is exempt under the preceding paragraph; and</li> <li>(b) the person whom he has so engaged would be so exempt if the provisions of that paragraph were applied to him.</li> </ul> <p>(3) The exemption provided by this article has effect for the period during which the impediment exists.</p> <p>(4) The party who fails to perform must give notice to the other party of the impediment and its effect on his ability to perform. If the notice is not received by the other party within a reasonable time after the party who fails to perform knew or ought to have known of the impediment, he is liable for damages resulting from such non-receipt.</p> <p>(5) Nothing in this article prevents either party from exercising any right other than to claim damages under this Convention.</p>
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**Article 89 - Change of circumstances**

1. A party must perform its obligations even if performance has become more onerous, whether because the cost of performance has increased or because the value of what is to be received in return has diminished. Where performance becomes excessively onerous because of an exceptional change of circumstances, the parties have a duty to enter into negotiations with a view to adapting or terminating the contract.

2. If the parties fail to reach an agreement within a reasonable time, then, upon request by either party a court may:

- (a) adapt the contract in order to bring it into accordance with what the parties would reasonably have agreed at the time of contracting if they had taken the change of circumstances into account; or
- (b) terminate the contract within the meaning of Article 8 at a date and on terms to be determined by the court.

3. Paragraphs 1 and 2 apply only if:

- (a) the change of circumstances occurred after the time when the contract was concluded;
- (b) the party relying on the change of circumstances did not at that time take into account, and could not be expected to have taken into account, the possibility or scale of that change of circumstances; and
- (c) the aggrieved party did not assume, and cannot

<p>reasonably be regarded as having assumed, the risk of that change of circumstances.</p> <p>4. For the purpose of paragraphs 2 and 3 a 'court' includes an arbitral tribunal.</p>	
<p><b>Article 90 - Extended application of rules on payment and on goods or digital content not accepted</b></p> <p>1. Unless otherwise provided, the rules on payment of the price by the buyer in Chapter 12 apply with appropriate adaptations to other payments.</p> <p>2. Article 97 applies with appropriate adaptations to other cases where a person is left in possession of goods or digital content because of a failure by another person to take them when bound to do so.</p>	
<p><b>Chapter 10 The seller's obligations</b>  <b>Section 1 General Provisions</b></p>	
<p><b>Article 91 - Main obligations of the seller</b></p> <p>The seller of goods or the supplier of digital content (in this part referred to as 'the seller') must:</p> <ul style="list-style-type: none"> <li>(a) deliver the goods or supply the digital content;</li> <li>(b) transfer the ownership of the goods, including the tangible medium on which the digital content is supplied;</li> <li>(c) ensure that the goods or the digital content are in conformity with the contract;</li> <li>(d) ensure that the buyer has the right to use the digital content in accordance with the</li> </ul>	<p><b>Article 30</b></p> <p>The seller must deliver the goods, hand over any documents relating to them and transfer the property in the goods, as required by the contract and this Convention.</p> <p><b>Article 34</b></p> <p>If the seller is bound to hand over documents relating to the goods, he must hand them over at the time and place and in the form required by the contract. If the seller has handed over documents before that time, he may, up to that time, cure any lack of conformity in the documents, if the exercise of this right does not cause the buyer</p>

<p>contract; and</p> <p>(e) deliver such documents representing or relating to the goods or documents relating to the digital content as may be required by the contract.</p>	<p>unreasonable inconvenience or unreasonable expense. However, the buyer retains any right to claim damages as provided for in this Convention.</p>
<p><b>Article 92 - Performance by a third party</b></p> <p>1. A seller may entrust performance to another person, unless personal performance by the seller is required by the contract terms.</p> <p>2. A seller who entrusts performance to another person remains responsible for performance.</p> <p>3. In relations between a trader and a consumer the parties may not, to the detriment of the consumer, exclude the application of paragraph (2) or derogate from or vary its effects.</p>	<p><b>Article 79</b></p> <p>(1) A party is not liable for a failure to perform any of his obligations if he proves that the failure was due to an impediment beyond his control and that he could not reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract or to have avoided or overcome it, or its consequences.</p> <p>(2) If the party's failure is due to the failure by a third person whom he has engaged to perform the whole or a part of the contract, that party is exempt from liability only if:</p> <ul style="list-style-type: none"> <li>(a) he is exempt under the preceding paragraph; and</li> <li>(b) the person whom he has so engaged would be so exempt if the provisions of that paragraph were applied to him.</li> </ul> <p>(3) The exemption provided by this article has effect for the period during which the impediment exists.</p> <p>(4) The party who fails to perform must give notice to the other party of the impediment and its effect on his ability to perform. If the notice is not received by the other party within a reasonable time after the party who fails to perform knew or ought to have known of the impediment, he is liable for</p>

	<p>damages resulting from such non-receipt.</p> <p>(5) Nothing in this article prevents either party from exercising any right other than to claim damages under this Convention.</p>
<p><b>Section 2 – Delivery</b></p>	
<p><b>Article 93 - Place of delivery</b></p> <p>1. Where the place of delivery cannot be otherwise determined, it is:</p> <ul style="list-style-type: none"> <li>(a) in the case of a consumer sales contract or a contract for the supply of digital content which is a distance or off-premises contract, or in which the seller has undertaken to arrange carriage to the buyer, the consumer’s place of residence at the time of the conclusion of the contract;</li> <li>(b) in any other case, <ul style="list-style-type: none"> <li>(i) where the contract of sale involves carriage of the goods by a carrier or series of carriers, the nearest collection point of the first carrier;</li> <li>(ii) where the contract does not involve carriage, the seller’s place of business at the time of conclusion of the contract.</li> </ul> </li> </ul> <p>2. If the seller has more than one place of business, the place of business for the purposes of point (b) of paragraph 1 is that which has the closest relationship to the obligation to deliver.</p>	<p><b>Article 31</b></p> <p>If the seller is not bound to deliver the goods at any other particular place, his obligation to deliver consists:</p> <ul style="list-style-type: none"> <li>(a) if the contract of sale involves carriage of the goods—in handing the goods over to the first carrier for transmission to the buyer;</li> <li>(b) if, in cases not within the preceding subparagraph, the contract relates to specific goods, or unidentified goods to be drawn from a specific stock or to be manufactured or produced, and at the time of the conclusion of the contract the parties knew that the goods were at, or were to be manufactured or produced at, a particular place—in placing the goods at the buyer’s disposal at that place;</li> <li>(c) in other cases—in placing the goods at the buyer’s disposal at the place where the seller had his place of business at the time of the conclusion of the contract.</li> </ul>
<p><b>Article 94 - Method of delivery</b></p> <p>1. Unless agreed otherwise, the seller fulfils the obligation to deliver:</p>	

<p>(a) in the case of a consumer sales contract or a contract for the supply of digital content which is a distance or off-premises contract or in which the seller has undertaken to arrange carriage to the buyer, by transferring the physical possession or control of the goods or the digital content to the consumer;</p> <p>(b) in other cases in which the contract involves carriage of the goods by a carrier, by handing over the goods to the first carrier for transmission to the buyer and by handing over to the buyer any document necessary to enable the buyer to take over the goods from the carrier holding the goods; or</p> <p>(c) in cases that do not fall within points (a) or (b), by making the goods or the digital content, or where it is agreed that the seller need only deliver documents representing the goods, the documents, available to the buyer.</p> <p>2. In points (a) and (c) of paragraph 1, any reference to the consumer or the buyer includes a third party, not being the carrier, indicated by the consumer or the buyer in accordance with the contract.</p>	
<p><b>Article 95 - Time of delivery</b></p> <p>1. Where the time of delivery cannot be otherwise determined, the goods or the digital content must be delivered without undue delay after the conclusion of the contract.</p> <p>2. In contracts between a trader and a consumer, unless agreed otherwise by</p>	<p><b>Article 33</b></p> <p>The seller must deliver the goods:</p> <p>(a) if a date is fixed by or determinable from the contract, on that date;</p> <p>(b) if a period of time is fixed by or determinable from the contract, at any time within</p>

<p>the parties, the trader must deliver the goods or the digital content not later than 30 days from the conclusion of the contract.</p>	<p>that period unless circumstances indicate that the buyer is to choose a date; or (c) in any other case, within a reasonable time after the conclusion of the contract.</p>
<p><b>Article 96 - Seller's obligations regarding carriage of the goods</b></p> <p>1. Where the contract requires the seller to arrange for carriage of the goods, the seller must conclude such contracts as are necessary for carriage to the place fixed by means of transportation appropriate in the circumstances and according to the usual terms for such transportation.</p> <p>2. Where the seller, in accordance with the contract, hands over the goods to a carrier and if the goods are not clearly identified as the goods to be supplied under the contract by markings on the goods, by shipping documents or otherwise, the seller must give the buyer notice of the consignment specifying the goods.</p> <p>3. Where the contract does not require the seller to effect insurance in respect of the carriage of the goods, the seller must, at the buyer's request, provide the buyer with all available information necessary to enable the buyer to effect such insurance.</p>	<p><b>Article 32</b></p> <p>(1) If the seller, in accordance with the contract or this Convention, hands the goods over to a carrier and if the goods are not clearly identified to the contract by markings on the goods, by shipping documents or otherwise, the seller must give the buyer notice of the consignment specifying the goods.</p> <p>(2) If the seller is bound to arrange for carriage of the goods, he must make such contracts as are necessary for carriage to the place fixed by means of transportation appropriate in the circumstances and according to the usual terms for such transportation.</p> <p>(3) If the seller is not bound to effect insurance in respect of the carriage of the goods, he must, at the buyer's request, provide him with all available information necessary to enable him to effect such insurance.</p>
<p><b>Article 97 - Goods or digital content not accepted by the buyer</b></p> <p>1. A seller who is left in possession of the goods or the digital content because the buyer, when bound to do so, has failed to take delivery must take reasonable steps to protect and preserve them.</p>	<p><b>Article 85</b></p> <p>If the buyer is in delay in taking delivery of the goods or, where payment of the price and delivery of the goods are to be made concurrently, if he fails to pay the price, and the seller is either in possession of the goods or otherwise able to control their</p>

<p>2. The seller is discharged from the obligation to deliver if the seller:</p> <ul style="list-style-type: none"> <li>(a) deposits the goods or the digital content on reasonable terms with a third party to be held to the order of the buyer, and notifies the buyer of this; or</li> <li>(b) sells the goods or the digital content on reasonable terms after notice to the buyer, and pays the net proceeds to the buyer</li> </ul> <p>3. The seller is entitled to be reimbursed or to retain out of the proceeds of sale any costs reasonably incurred.</p>	<p>disposition, the seller must take such steps as are reasonable in the circumstances to preserve them. He is entitled to retain them until he has been reimbursed his reasonable expenses by the buyer.</p> <p><b>Article 87</b></p> <p>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.</p> <p><b>Article 88</b></p> <p>(1) A party who is bound to preserve the goods in accordance with article 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.</p> <p>(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 article 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.</p> <p>(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.</p>
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<p><b>Article 98 - Effect on passing of risk</b></p> <p>The effect of delivery on the passing of risk is regulated by Chapter 14.</p>	
<p><b>Section 3 Conformity of the Goods and Digital Content</b></p>	
<p><b>Article 99 - Conformity with the contract</b></p> <p>1. In order to conform with the contract, the goods or digital content must:</p> <ul style="list-style-type: none"> <li>(a) be of the quantity, quality and description required by the contract;</li> <li>(b) be contained or packaged in the manner required by the contract; and</li> <li>(c) be supplied along with any accessories, installation instructions or other instructions required by the contract.</li> </ul> <p>2. In order to conform with the contract the goods or digital content must also meet the requirements of Articles 100, 101 and 102, save to the extent that the parties have agreed otherwise.</p> <p>3. In a consumer sales contract, any agreement derogating from the requirements of Articles 100, 102 and 103 to the detriment of the consumer is valid only if, at the time of the conclusion of the contract, the consumer knew of the specific condition of the goods or the digital content and accepted the goods or the digital content as being in conformity with the contract when concluding it.</p> <p>4. In a consumer sales contract, the parties may not, to the detriment of</p>	<p><b>Article 35</b></p> <p>(1) The seller must deliver goods which are of the quantity, quality and description required by the contract and which are contained or packaged in the manner required by the contract.</p> <p>(2) Except where the parties have agreed otherwise, the goods do not conform with the contract unless they:</p> <ul style="list-style-type: none"> <li>(e) are fit for the purposes for which goods of the same description would ordinarily be used;</li> <li>(f) are fit for any particular purpose expressly or impliedly made known to the seller at the time of the conclusion of the contract, except where the circumstances show that the buyer did not rely, or that it was unreasonable for him to rely, on the seller's skill and judgement;</li> <li>(g) possess the qualities of goods which the seller has held out to the buyer as a sample or model;</li> <li>(h) are contained or packaged in the manner usual for such goods or, where there is no such manner, in a manner adequate to preserve and protect the goods.</li> </ul>

<p>the consumer, exclude the application of paragraph 3 or derogate from or vary its effects.</p>	<p>(3) The seller is not liable under subparagraphs (a) to (d) of the preceding paragraph for any lack of conformity of the goods if, at the time of the conclusion of the contract, the buyer knew or could not have been unaware of such lack of conformity.</p> <p><b>Article 36</b></p> <p>(1) The seller is liable in accordance with the contract and this Convention for any lack of conformity which exists at the time when the risk passes to the buyer, even though the lack of conformity becomes apparent only after that time.</p> <p>(2) The seller is also liable for any lack of conformity which occurs after the time indicated in the preceding paragraph and which is due to a breach of any of his obligations, including a breach of any guarantee that for a period of time the goods will remain fit for their ordinary purpose or for some particular purpose or will retain specified qualities or characteristics.</p>
<p><b>Article 100 - Criteria for conformity of the goods and digital content</b></p> <p>The goods or digital content must:</p> <p>(a) be fit for any particular purpose made known to the seller at the time of the conclusion of the contract, except where the circumstances show that the buyer did not rely, or that it was unreasonable for the buyer to rely, on the seller's skill and judgement;</p>	<p><b>Article 35</b></p> <p>(1) The seller must deliver goods which are of the quantity, quality and description required by the contract and which are contained or packaged in the manner required by the contract.</p> <p>(2) Except where the parties have agreed otherwise, the goods do not conform with the contract unless they:</p> <p>(a) are fit for the purposes for which goods of the same</p>

<ul style="list-style-type: none"> <li>(b) be fit for the purposes for which goods or digital content of the same description would ordinarily be used;</li> <li>(c) possess the qualities of goods or digital content which the seller held out to the buyer as a sample or model;</li> <li>(d) 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;</li> <li>(e) be supplied along with such accessories, installation instructions or other instructions as the buyer may expect to receive;</li> <li>(f) possess the qualities and performance capabilities indicated in any pre-contractual statement which forms part of the contract terms by virtue of Article 69; and</li> <li>(g) possess such qualities and performance capabilities as the buyer may expect. When determining what the consumer may expect of the digital content regard is to be had to whether or not the digital content was supplied in exchange for the payment of a price.</li> </ul>	<p>description would ordinarily be used;</p> <ul style="list-style-type: none"> <li>(b) are fit for any particular purpose expressly or impliedly made known to the seller at the time of the conclusion of the contract, except where the circumstances show that the buyer did not rely, or that it was unreasonable for him to rely, on the seller's skill and judgement;</li> <li>(c) possess the qualities of goods which the seller has held out to the buyer as a sample or model;</li> <li>(d) are contained or packaged in the manner usual for such goods or, where there is no such manner, in a manner adequate to preserve and protect the goods.</li> </ul> <p>(3) The seller is not liable under subparagraphs (a) to (d) of the preceding paragraph for any lack of conformity of the goods if, at the time of the conclusion of the contract, the buyer knew or could not have been unaware of such lack of conformity.</p>
<p><b>Article 101 - Incorrect installation under a consumer sales contract</b></p> <p>1. Where goods or digital content supplied under a consumer sales contract are incorrectly installed, any lack of conformity resulting from the incorrect installation is regarded as lack of conformity of the goods or the digital content if:</p> <ul style="list-style-type: none"> <li>(a) the goods or the digital</li> </ul>	

<p>content were installed by the seller or under the seller's responsibility; or</p> <p>(b) the goods or the digital content were intended to be installed by the consumer and the incorrect installation was due to a shortcoming in the installation instructions.</p> <p>2. The parties may not, to the detriment of the consumer, exclude the application of this Article or derogate from or vary its effects.</p>	
<p><b>Article 102 - Third party rights or claims</b></p> <p>1. The goods must be free from and the digital content must be cleared of any right or not obviously unfounded claim of a third party.</p> <p>2. As regards rights or claims based on intellectual property, subject to paragraphs 3 and 4, the goods must be free from and the digital content must be cleared of any right or not obviously unfounded claim of a third party:</p> <p>(a) under the law of the state where the goods or digital content will be used according to the contract or, in the absence of such an agreement, under the law of the state of the buyer's place of business or in contracts between a trader and a consumer the consumer's place of residence indicated by the consumer at the time of the conclusion of the contract; and</p> <p>(b) which the seller knew of or could be expected to have known of at the time of the conclusion of the contract.</p>	<p><b>Article 41</b></p> <p>The seller must deliver goods which are free from any right or claim of a third party, unless the buyer agreed to take the goods subject to that right or claim. However, if such right or claim is based on industrial property or other intellectual property, the seller's obligation is governed by article 42.</p> <p><b>Article 42</b></p> <p>(1) The seller must deliver goods which are free from any right or claim of a third party based on industrial property or other intellectual property, of which at the time of the conclusion of the contract the seller knew or could not have been unaware, provided that the right or claim is based on industrial property or other intellectual property:</p> <p>(a) under the law of the State where the goods will be resold or otherwise used, if it was contemplated by the parties at the time of the conclusion of the contract that the goods would be</p>

<p>3. In contracts between businesses, paragraph 2 does not apply where the buyer knew or could be expected to have known of the rights or claims based on intellectual property at the time of the conclusion of the contract.</p> <p>4. In contracts between a trader and a consumer, paragraph 2 does not apply where the consumer knew of the rights or claims based on intellectual property at the time of the conclusion of the contract.</p> <p>5. In contracts between a trader and a consumer, the parties may not, to the detriment of the consumer, exclude the application of this Article or derogate from or vary its effects.</p>	<p>resold or otherwise used in that State; or</p> <p>(b) in any other case, under the law of the State where the buyer has his place of business.</p> <p>(2) The obligation of the seller under the preceding paragraph does not extend to cases where:</p> <p>(a) at the time of the conclusion of the contract the buyer knew or could not have been unaware of the right or claim; or</p> <p>(b) the right or claim results from the seller's compliance with technical drawings, designs, formulae or other such specifications furnished by the buyer.</p> <p><b>Article 43</b></p> <p>(1) The buyer loses the right to rely on the provisions of article 41 or article 42 if he does not give notice to the seller specifying the nature of the right or claim of the third party within a reasonable time after he has become aware or ought to have become aware of the right or claim.</p> <p>(2) The seller is not entitled to rely on the provisions of the preceding paragraph if he knew of the right or claim of the third party and the nature of it.</p>
<p><b>Article 103 - Limitation on conformity of digital content</b></p> <p>Digital content is not considered as not conforming to the contract for the sole reason that updated digital content has become available after the conclusion of the contract.</p>	

**Article 104 - Buyer's knowledge of lack of conformity in a contract between traders**

In a contract between traders, the seller is not liable for any lack of conformity of the goods if, at the time of the conclusion of the contract, the buyer knew or could not have been unaware of the lack of conformity.

**Article 35**

(1) The seller must deliver goods which are of the quantity, quality and description required by the contract and which are contained or packaged in the manner required by the contract.

(2) Except where the parties have agreed otherwise, the goods do not conform with the contract unless they:

- (a) are fit for the purposes for which goods of the same description would ordinarily be used;
- (b) are fit for any particular purpose expressly or impliedly made known to the seller at the time of the conclusion of the contract, except where the circumstances show that the buyer did not rely, or that it was unreasonable for him to rely, on the seller's skill and judgement;
- (c) possess the qualities of goods which the seller has held out to the buyer as a sample or model;
- (d) are contained or packaged in the manner usual for such goods or, where there is no such manner, in a manner adequate to preserve and protect the goods.

(3) The seller is not liable under subparagraphs (a) to (d) of the preceding paragraph for any lack of conformity of the goods if, at the time of the conclusion of the contract, the buyer knew or could not have been unaware of such lack of conformity.

<p><b>Article 105 - Relevant time for establishing conformity</b></p> <p>1. The seller is liable for any lack of conformity which exists at the time when the risk passes to the buyer under Chapter 14.</p> <p>2. In a consumer sales contract, any lack of conformity which becomes apparent within six months of the time when risk passes to the buyer is presumed to have existed at that time unless this is incompatible with the nature of the goods or digital content or with the nature of the lack of conformity.</p> <p>3. In a case governed by point (a) of Article 101(1) any reference in paragraphs 1 or 2 of this Article to the time when risk passes to the buyer is to be read as a reference to the time when the installation is complete. In a case governed by point (b) of Article 101(1) it is to be read as a reference to the time when the consumer had reasonable time for the installation.</p> <p>4. Where the digital content must be subsequently updated by the trader, the trader must ensure that the digital content remains in conformity with the contract throughout the duration of the contract.</p> <p>5. In a contract between a trader and a consumer, the parties may not, to the detriment of a consumer, exclude the application of this Article or derogate from or vary its effect.</p>	<p><b>Article 37</b></p> <p>If the seller has delivered goods before the date for delivery, he may, up to that date, deliver any missing part or make up any deficiency in the quantity of the goods delivered, or deliver goods in replacement of any non-conforming goods delivered or remedy any lack of conformity in the goods delivered, provided that the exercise of this right does not cause the buyer unreasonable inconvenience or unreasonable expense. However, the buyer retains any right to claim damages as provided for in this Convention.</p>
<p><b>Chapter 11 The buyer's remedies</b>  <b>Section 1 General Provisions</b></p>	
<p><b>Article 106 - Overview of buyer's remedies</b></p>	<p><b>Article 28</b></p> <p>If, in accordance with the</p>

<p>1. In the case of non-performance of an obligation by the seller, the buyer may do any of the following:</p> <ul style="list-style-type: none"> <li>(a) require performance, which includes specific performance, repair or replacement of the goods or digital content, under Section 3 of this Chapter;</li> <li>(b) withhold the buyer's own performance under Section 4 of this Chapter;</li> <li>(c) terminate the contract under Section 5 of this Chapter and claim the return of any price already paid, under Chapter 17;</li> <li>(d) reduce the price under Section 6 of this Chapter; and</li> <li>(e) claim damages under Chapter 16.</li> </ul> <p>2. If the buyer is a trader:</p> <ul style="list-style-type: none"> <li>(a) the buyer's rights to exercise any remedy except withholding of performance are subject to cure by the seller as set out in Section 2 of this Chapter; and</li> <li>(b) the buyer's rights to rely on lack of conformity are subject to the requirements of examination and notification set out in Section 7 of this Chapter.</li> </ul> <p>3. If the buyer is a consumer:</p> <ul style="list-style-type: none"> <li>(a) the buyer's rights are not subject to cure by the seller; and</li> <li>(b) the requirements of examination and notification set out in Section 7 of this Chapter do not apply.</li> </ul>	<p>provisions of this Convention, one party is entitled to require performance of any obligation by the other party, a court is not bound to enter a judgement for specific performance unless the court would do so under its own law in respect of similar contracts of sale not governed by this Convention.</p> <p><b>Article 44</b></p> <p>Notwithstanding the provisions of paragraph (1) of article 39 and paragraph (1) of article 43, the buyer may reduce the price in accordance with article 50 or claim damages, except for loss of profit, if he has a reasonable excuse for his failure to give the required notice.</p> <p><b>Article 45</b></p> <p>(1) If the seller fails to perform any of his obligations under the contract or this Convention, the buyer may:</p> <ul style="list-style-type: none"> <li>(a) exercise the rights provided in articles 46 to 52;</li> <li>(b) claim damages as provided in articles 74 to 77.</li> </ul> <p>(2) The buyer is not deprived of any right he may have to claim damages by exercising his right to other remedies.</p> <p>(3) No period of grace may be granted to the seller by a court or arbitral tribunal when the buyer resorts to a remedy for breach of contract.</p>
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<p>4. If the seller's non-performance is excused, the buyer may resort to any of the remedies referred to in paragraph 1 except requiring performance and damages.</p> <p>5. The buyer may not resort to any of the remedies referred to in paragraph 1 to the extent that the buyer caused the seller's non-performance.</p> <p>6. Remedies which are not incompatible may be cumulated.</p>	
<p><b>Article 107 - Limitation of remedies for digital content not supplied in exchange for a price</b></p> <p>Where digital content is not supplied in exchange for the payment of a price, the buyer may not resort to the remedies referred to in points (a) to (d) of Article 106(1) . The buyer may only claim damages under point (e) of Article 106 (1) for loss or damage caused to the buyer's property, including hardware, software and data, by the lack of conformity of the supplied digital content, except for any gain of which the buyer has been deprived by that damage.</p>	
<p><b>Article 108 - Mandatory nature</b></p> <p>In a contract between a trader and a consumer, the parties may not, to the detriment of the consumer, exclude the application of this Chapter, or derogate from or vary its effect before the lack of conformity is brought to the trader's attention by the consumer.</p>	
<p><b>Section 2 Cure by the Seller</b></p>	
<p><b>Article 109 - Cure by the seller</b></p> <p>1. A seller who has tendered performance early and who has been</p>	<p><b>Article 37</b></p> <p>If the seller has delivered goods before the date for delivery, he</p>

<p>notified that the performance is not in conformity with the contract may make a new and conforming tender if that can be done within the time allowed for performance.</p> <p>2. In cases not covered by paragraph 1 a seller who has tendered a performance which is not in conformity with the contract may, without undue delay on being notified of the lack of conformity, offer to cure it at its own expense.</p> <p>3. An offer to cure is not precluded by notice of termination.</p> <p>4. The buyer may refuse an offer to cure only if:</p> <ul style="list-style-type: none"> <li>(a) cure cannot be effected promptly and without significant inconvenience to the buyer;</li> <li>(b) the buyer has reason to believe that the seller's future performance cannot be relied on; or</li> <li>(c) delay in performance would amount to a fundamental non-performance.</li> </ul> <p>5. The seller has a reasonable period of time to effect cure.</p> <p>6. The buyer may withhold performance pending cure, but the rights of the buyer which are inconsistent with allowing the seller a period of time to effect cure are suspended until that period has expired.</p> <p>7. Notwithstanding cure, the buyer retains the right to claim damages for delay as well as for any harm caused or not prevented by the cure.</p>	<p>may, up to that date, deliver any missing part or make up any deficiency in the quantity of the goods delivered, or deliver goods in replacement of any non-conforming goods delivered or remedy any lack of conformity in the goods delivered, provided that the exercise of this right does not cause the buyer unreasonable inconvenience or unreasonable expense. However, the buyer retains any right to claim damages as provided for in this Convention.</p> <p><b>Article 48</b></p> <p>(1) Subject to article 49, the seller may, even after the date for delivery, remedy at his own expense any failure to perform his obligations, if he can do so without unreasonable delay and without causing the buyer unreasonable inconvenience or uncertainty of reimbursement by the seller of expenses advanced by the buyer. However, the buyer retains any right to claim damages as provided for in this Convention.</p> <p>(2) If the seller requests the buyer to make known whether he will accept performance and the buyer does not comply with the request within a reasonable time, the seller may perform within the time indicated in his request. The buyer may not, during that period of time, resort to any remedy which is inconsistent with performance by the seller.</p> <p>(3) A notice by the seller that he will perform within a specified period of time is assumed to include a request, under the preceding paragraph, that the buyer make known his decision.</p>
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	(4) A request or notice by the seller under paragraph (2) or (3) of this article is not effective unless received by the buyer.
<b>Section 3 Requiring Performance</b>	
<p><b>Article 110 - Requiring performance of seller's obligations</b></p> <p>1. The buyer is entitled to require performance of the seller's obligations.</p> <p>2. The performance which may be required includes the remedying free of charge of a performance which is not in conformity with the contract.</p> <p>3. Performance cannot be required where:</p> <ul style="list-style-type: none"> <li>(a) performance would be impossible or has become unlawful; or</li> <li>(b) the burden or expense of performance would be disproportionate to the benefit that the buyer would obtain.</li> </ul>	<p><b>Article 46</b></p> <p>(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.</p> <p>(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 article 39 or within a reasonable time thereafter.</p> <p>(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 article 39 or within a reasonable time thereafter.</p>
<p><b>Article 111 - Consumer's choice between repair and replacement</b></p> <p>1. Where, in a consumer sales contract, the trader is required to remedy a lack of conformity pursuant to Article 110(2) the consumer may choose between repair and replacement unless the option chosen would be unlawful or impossible or,</p>	

<p>compared to the other option available, would impose costs on the seller that would be disproportionate taking into account:</p> <ul style="list-style-type: none"> <li>(a) the value the goods would have if there were no lack of conformity;</li> <li>(b) the significance of the lack of conformity; and</li> <li>(c) whether the alternative remedy could be completed without significant inconvenience to the consumer.</li> </ul> <p>2. If the consumer has required the remedying of the lack of conformity by repair or replacement pursuant to paragraph 1, the consumer may resort to other remedies only if the trader has not completed repair or replacement within a reasonable time, not exceeding 30 days. However, the consumer may withhold performance during that time.</p>	
<p><b>Article 112 - Return of replaced item</b></p> <p>1. Where the seller has remedied the lack of conformity by replacement, the seller has a right and an obligation to take back the replaced item at the seller's expense.</p> <p>2. The buyer is not liable to pay for any use made of the replaced item in the period prior to the replacement.</p>	<p><b>Article 84</b></p> <p>(1) If the seller is bound to refund the price, he must also pay interest on it, from the date on which the price was paid.</p> <p>(2) The buyer must account to the seller for all benefits which he has derived from the goods or part of them:</p> <ul style="list-style-type: none"> <li>(a) if he must make restitution of the goods or part of them; or</li> </ul> <p>if it is impossible for him to make restitution of all or part of the goods or to make restitution of all or part of the goods substantially in the condition in which he received them, but he has nevertheless declared the contract avoided or</p>

	required the seller to deliver substitute goods.
<b>Section 4 Withholding Performance of Buyer's Obligations</b>	
<p><b>Article 113 - Right to withhold performance</b></p> <p>1. A buyer who is to perform at the same time as, or after, the seller performs has a right to withhold performance until the seller has tendered performance or has performed.</p> <p>2. A buyer who is to perform before the seller performs and who reasonably believes that there will be non-performance by the seller when the seller's performance becomes due may withhold performance for as long as the reasonable belief continues.</p> <p>3. The performance which may be withheld under this Article is the whole or part of the performance to the extent justified by the non-performance. Where the seller's obligations are to be performed in separate parts or are otherwise divisible, the buyer may withhold performance only in relation to that part which has not been performed, unless the seller's non-performance is such as to justify withholding the buyer's performance as a whole.</p>	<p><b>Article 58</b></p> <p>(1) If the buyer is not bound to pay the price at any other specific time, he must pay it when the seller places either the goods or documents controlling their disposition at the buyer's disposal in accordance with the contract and this Convention. The seller may make such payment a condition for handing over the goods or documents.</p> <p>(2) If the contract involves carriage of the goods, the seller may dispatch the goods on terms whereby the goods, or documents controlling their disposition, will not be handed over to the buyer except against payment of the price.</p> <p>(3) The buyer is not bound to pay the price until he has had an opportunity to examine the goods, unless the procedures for delivery or payment agreed upon by the parties are inconsistent with his having such an opportunity.</p> <p><b>Article 71</b></p> <p>(1) A party may suspend the performance of his obligations if, after the conclusion of the contract, it becomes apparent that the other party will not perform a substantial part of his obligations as a result of:</p> <ul style="list-style-type: none"> <li>(a) a serious deficiency in his ability to perform or in his creditworthiness; or</li> <li>(b) his conduct in preparing to perform or in performing</li> </ul>

	<p>the contract.</p> <p>(2) If the seller has already dispatched the goods before the grounds described in the preceding paragraph become evident, he may prevent the handing over of the goods to the buyer even though the buyer holds a document which entitles him to obtain them. The present paragraph relates only to the rights in the goods as between the buyer and the seller.</p> <p>(3) A party suspending performance, whether before or after dispatch of the goods, must immediately give notice of the suspension to the other party and must continue with performance if the other party provides adequate assurance of his performance.</p>
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**Section 5 Termination**

<p><b>Article 114 - Termination for non-performance</b></p> <p>1. A buyer may terminate the contract within the meaning of Article 8 if the seller's non-performance under the contract is fundamental within the meaning of Article 87 (2).</p> <p>2. In a consumer sales contract and a contract for the supply of digital content between a trader and a consumer, where there is a non-performance because the goods do not conform to the contract, the consumer may terminate the contract unless the lack of conformity is insignificant.</p>	<p><b>Article 49</b></p> <p>(1) The buyer may declare the contract avoided:</p> <ul style="list-style-type: none"> <li>(a) if the failure by the seller to perform any of his obligations under the contract or this Convention amounts to a fundamental breach of contract; or</li> <li>(b) in case of non-delivery, if the seller does not deliver the goods within the additional period of time fixed by the buyer in accordance with paragraph (1) of article 47 or declares that he will not deliver within the period so fixed.</li> </ul> <p>(2) However, in cases where the seller has delivered the goods, the</p>
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	<p>buyer loses the right to declare the contract avoided unless he does so:</p> <ul style="list-style-type: none"> <li>(a) in respect of late delivery, within a reasonable time after he has become aware that delivery has been made;</li> <li>(b) in respect of any breach other than late delivery, within a reasonable time: <ul style="list-style-type: none"> <li>(i) after he knew or ought to have known of the breach;</li> <li>(ii) after the expiration of any additional period of time fixed by the buyer in accordance with paragraph (1) of article 47, or after the seller has declared that he will not perform his obligations within such an additional period; or</li> <li>(iii) after the expiration of any additional period of time indicated by the seller in accordance with paragraph (2) of article 48, or after the buyer has declared that he will not accept performance.</li> </ul> </li> </ul>
<p><b>Article 115 - Termination for delay in delivery after notice fixing additional time for performance</b></p> <p>1. A buyer may terminate the contract in a case of delay in delivery which is not in itself fundamental if the buyer gives notice fixing an additional period of time of reasonable length for performance and the seller does not perform within that period.</p> <p>2. The additional period referred to in paragraph 1 is taken to be of reasonable length if the seller does not object to it without undue delay.</p>	<p><b>Article 47</b></p> <p>(1) The buyer may fix an additional period of time of reasonable length for performance by the seller of his obligations.</p> <p>(2) Unless the buyer has received notice from the seller that he will not perform within the period so fixed, the buyer may not, during that period, resort to any remedy for breach of contract. However, the buyer is not deprived thereby of any right he may have to claim damages for delay in performance.</p>

<p>3. Where the notice provides for automatic termination if the seller does not perform within the period fixed by the notice, termination takes effect after that period without further notice.</p>	<p><b>Article 48</b></p> <p>(1) Subject to article 49, the seller may, even after the date for delivery, remedy at his own expense any failure to perform his obligations, if he can do so without unreasonable delay and without causing the buyer unreasonable inconvenience or uncertainty of reimbursement by the seller of expenses advanced by the buyer. However, the buyer retains any right to claim damages as provided for in this Convention.</p> <p>(2) If the seller requests the buyer to make known whether he will accept performance and the buyer does not comply with the request within a reasonable time, the seller may perform within the time indicated in his request. The buyer may not, during that period of time, resort to any remedy which is inconsistent with performance by the seller.</p> <p>(3) A notice by the seller that he will perform within a specified period of time is assumed to include a request, under the preceding paragraph, that the buyer make known his decision.</p> <p>(4) A request or notice by the seller under paragraph (2) or (3) of this article is not effective unless received by the buyer.</p>
<p><b>Article 116 - Termination for anticipated non-performance</b></p> <p>A buyer may terminate the contract before performance is due if the seller has declared, or it is otherwise clear, that there will be a non-performance, and if the non-performance would be such as to justify termination.</p>	<p><b>Article 72</b></p> <p>(1) If prior to the date for performance of the contract it is clear that one of the parties will commit a fundamental breach of contract, the other party may declare the contract avoided.</p> <p>(2) If time allows, the party</p>

	<p>intending to declare the contract avoided must give reasonable notice to the other party in order to permit him to provide adequate assurance of his performance.</p> <p>(3) The requirements of the preceding paragraph do not apply if the other party has declared that he will not perform his obligations.</p>
<p><b>Article 117 - Scope of right to terminate</b></p> <p>1. Where the seller's obligations under the contract are to be performed in separate parts or are otherwise divisible, then if there is a ground for termination under this Section of a part to which a part of the price can be apportioned, the buyer may terminate only in relation to that part.</p> <p>2. Paragraph 1 does not apply if the buyer cannot be expected to accept performance of the other parts or the non-performance is such as to justify termination of the contract as a whole.</p> <p>3. Where the seller's obligations under the contract are not divisible or a part of the price cannot be apportioned, the buyer may terminate only if the non-performance is such as to justify termination of the contract as a whole.</p>	<p><b>Article 51</b></p> <p>(1) If the seller delivers only a part of the goods or if only a part of the goods delivered is in conformity with the contract, articles 46 to 50 apply in respect of the part which is missing or which does not conform.</p> <p>(2) The buyer may declare the contract avoided in its entirety only if the failure to make delivery completely or in conformity with the contract amounts to a fundamental breach of the contract.</p>
<p><b>Article 118 - Notice of termination</b></p> <p>A right to terminate under this Section is exercised by notice to the seller.</p>	
<p><b>Article 119 - Loss of right to terminate</b></p> <p>1. The buyer loses the right to terminate under this Section if notice of termination is not given within a</p>	<p><b>Article 82</b></p> <p>(1) The buyer loses the right to declare the contract avoided or to require the seller to deliver substitute goods if it is impossible</p>

<p>reasonable time from when the right arose or the buyer became, or could be expected to have become, aware of the non-performance, whichever is later.</p> <p>2. Paragraph 1 does not apply:</p> <ul style="list-style-type: none"> <li>(a) where the buyer is a consumer; or</li> <li>(b) where no performance at all has been tendered.</li> </ul>	<p>for him to make restitution of the goods substantially in the condition in which he received them.</p> <p>(2) The preceding paragraph does not apply:</p> <ul style="list-style-type: none"> <li>(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;</li> <li>(b) if the goods or part of the goods have perished or deteriorated as a result of the examination provided for in article 38; or</li> <li>(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 of normal use before he discovered or ought to have discovered the lack of conformity.</li> </ul> <p><b>Article 83</b></p> <p>A buyer who has lost the right to declare the contract avoided or to require the seller to deliver substitute goods in accordance with article 82 retains all other remedies under the contract and this Convention.</p>
<p><b>Section 6 Price Reduction</b></p>	
<p><b>Article 120 - Right to reduce price</b></p> <p>1. A buyer who accepts a performance not conforming to the contract may reduce the price. The reduction is to be proportionate to the decrease in the value of what was</p>	<p><b>Article 50</b></p> <p>If the goods do not conform with the contract and whether or not the price has already been paid, the buyer may reduce the price in the same proportion as the value that</p>

<p>received in performance at the time performance was made compared to the value of what would have been received by a conforming performance.</p> <p>2. A buyer who is entitled to reduce the price under paragraph 1 and who has already paid a sum exceeding the reduced price may recover the excess from the seller.</p> <p>3. A buyer who reduces the price cannot also recover damages for the loss thereby compensated but remains entitled to damages for any further loss suffered.</p>	<p>the goods actually delivered had at the time of the delivery bears to the value that conforming goods would have had at that time. However, if the seller remedies any failure to perform his obligations in accordance with article 37 or article 48 or if the buyer refuses to accept performance by the seller in accordance with those articles, the buyer may not reduce the price.</p>
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**Section 7 Requirements of Examination and Notification in a Contract between Traders**

<p><b>Article 121 - Examination of the goods in contracts between traders</b></p> <p>1. In a contract between traders the buyer is expected to examine the goods, or cause them to be examined, within as short a period as is reasonable not exceeding 14 days from the date of delivery of the goods, supply of digital content or provision of related services.</p> <p>2. If the contract involves carriage of the goods, examination may be deferred until after the goods have arrived at their destination.</p> <p>3. If the goods are redirected in transit, or redispached by the buyer before the buyer has had a reasonable opportunity to examine them, and at the time of the conclusion of the contract the seller knew or could be expected to have known of the possibility of such redirection or redispach, examination may be deferred until after the goods have</p>	<p><b>Article 38</b></p> <p>(1) The buyer must examine the goods, or cause them to be examined, within as short a period as is practicable in the circumstances.</p> <p>(2) If the contract involves carriage of the goods, examination may be deferred until after the goods have arrived at their destination.</p> <p>(3) If the goods are redirected in transit or redispached 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 redispach, examination may be deferred until after the goods have arrived at the new destination.</p>
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<p>arrived at the new destination.</p>	
<p><b>Article 122 - Requirement of notification of lack of conformity in sales contracts between traders</b></p> <p>1. In a contract between traders the buyer may not rely on a lack of conformity if the buyer does not give notice to the seller within a reasonable time specifying the nature of the lack of conformity. The time starts to run when the goods are supplied or when the buyer discovers or could be expected to discover the lack of conformity, whichever is later.</p> <p>2. The buyer loses the right to rely on a lack of conformity if the buyer does not give the seller notice of the lack of conformity within two years from the time at which the goods were actually handed over to the buyer in accordance with the contract.</p> <p>3. Where the parties have agreed that the goods must remain fit for a particular purpose or for their ordinary purpose during a fixed period of time, the period for giving notice under paragraph 2 does not expire before the end of the agreed period.</p> <p>4. Paragraph 2 does not apply in respect of the third party claims or rights referred to in Article 102.</p> <p>5. The buyer does not have to notify the seller that not all the goods have been delivered if the buyer has reason to believe that the remaining goods will be delivered.</p> <p>6. The seller is not entitled to rely on this Article if the lack of conformity relates to facts of which the seller knew or could be expected to have known and which the seller did not</p>	<p><b>Article 39</b></p> <p>(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.</p> <p>(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.</p> <p><b>Article 40</b></p> <p>The seller is not entitled to rely on the provisions of articles 38 and 39 if the lack of conformity relates to facts of which he knew or could not have been unaware and which he did not disclose to the buyer.</p>

disclose to the buyer.	
<b>Chapter 12 The buyer's obligations</b> <b>Section 1 General Provisions</b>	
<p><b>Article 123 - Main obligations of the buyer</b></p> <p>1. The buyer must:</p> <ul style="list-style-type: none"> <li>(a) pay the price;</li> <li>(b) take delivery of the goods or the digital content; and</li> <li>(c) take over documents representing or relating to the goods or documents relating to digital content as may be required by the contract.</li> </ul> <p>2. Point (a) of paragraph 1 does not apply to contracts for the supply of digital content where the digital content is not supplied in exchange for the payment of a price.</p>	<p><b>Article 53</b></p> <p>The buyer must pay the price for the goods and take delivery of them as required by the contract and this Convention.</p>
<b>Section 2 Payment of the Price</b>	
<p><b>Article 124 - Means of payment</b></p> <p>1. Payment shall be made by the means of payment indicated by the contract terms or, if there is no such indication, by any means used in the ordinary course of business at the place of payment taking into account the nature of the transaction.</p> <p>2. A seller who accepts a cheque or other order to pay or a promise to pay is presumed to do so only on condition that it will be honoured. The seller may enforce the original obligation to pay if the order or promise is not honoured.</p> <p>3. The buyer's original obligation is extinguished if the seller accepts a</p>	<p><b>Article 54</b></p> <p>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.</p>

<p>promise to pay from a third party with whom the seller has a pre-existing arrangement to accept the third party's promise as a means of payment.</p> <p>4. In a contract between a trader and a consumer, the consumer is not liable, in respect of the use of a given means of payment, for fees that exceed the cost borne by the trader for the use of such means.</p>	
<p><b>Article 125 - Place of payment</b></p> <p>1. Where the place of payment cannot otherwise be determined it is the seller's place of business at the time of conclusion of the contract.</p> <p>2. If the seller has more than one place of business, the place of payment is the place of business of the seller which has the closest relationship to the obligation to pay.</p>	<p><b>Article 57</b></p> <p>(1) If the buyer is not bound to pay the price at any other particular place, he must pay it to the seller:</p> <ul style="list-style-type: none"> <li>(a) at the seller's place of business; or</li> <li>(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.</li> </ul> <p>(2) The seller must bear any increase in the expenses incidental to payment which is caused by a change in his place of business subsequent to the conclusion of the contract.</p>
<p><b>Article 126 - Time of payment</b></p> <p>1. Payment of the price is due at the moment of delivery.</p> <p>2. The seller may reject an offer to pay before payment is due if it has a legitimate interest in so doing.</p>	<p><b>Article 58</b></p> <p>(1) If the buyer is not bound to pay the price at any other specific time, he must pay it when the seller places either the goods or documents controlling their disposition at the buyer's disposal in accordance with the contract and this Convention. The seller may make such payment a condition for handing over the goods or documents.</p> <p>(2) If the contract involves carriage</p>

	<p>of the goods, the seller may dispatch the goods on terms whereby the goods, or documents controlling their disposition, will not be handed over to the buyer except against payment of the price.</p> <p>(3) The buyer is not bound to pay the price until he has had an opportunity to examine the goods, unless the procedures for delivery or payment agreed upon by the parties are inconsistent with his having such an opportunity.</p> <p><b>Article 59</b></p> <p>The buyer must pay the price on the date fixed by or determinable from the contract and this Convention without the need for any request or compliance with any formality on the part of the seller.</p>
<p><b>Article 127 - Payment by a third party</b></p> <p>1. A buyer may entrust payment to another person. A buyer who entrusts payment to another person remains responsible for payment.</p> <p>2. The seller cannot refuse payment by a third party if:</p> <ul style="list-style-type: none"> <li>(a) the third party acts with the assent of the buyer; or</li> <li>(b) the third party has a legitimate interest in paying and the buyer has failed to pay or it is clear that the buyer will not pay at the time that payment is due.</li> </ul> <p>3. Payment by a third party in accordance with paragraphs 1 or 2 discharges the buyer from liability to the seller.</p>	

<p>4. Where the seller accepts payment by a third party in circumstances not covered by paragraphs 1 or 2 the buyer is discharged from liability to the seller but the seller is liable to the buyer for any loss caused by that acceptance.</p>	
<p><b>Article 128 - Imputation of payment</b></p> <p>1. Where a buyer has to make several payments to the seller and the payment made does not suffice to cover all of them, the buyer may at the time of payment notify the seller of the obligation to which the payment is to be imputed.</p> <p>2. If the buyer does not make a notification under paragraph 1 the seller may, by notifying the buyer within a reasonable time, impute the performance to one of the obligations.</p> <p>3. An imputation under paragraph 2 is not effective if it is to an obligation which is not yet due or is disputed.</p> <p>4. In the absence of an effective imputation by either party, the payment is imputed to that obligation which satisfies one of the following criteria in the sequence indicated:</p> <ul style="list-style-type: none"> <li>(a) the obligation which is due or is the first to fall due;</li> <li>(b) the obligation for which the seller has no or the least security;</li> <li>(c) the obligation which is the most burdensome for the buyer;</li> <li>(d) the obligation which arose first.</li> <li>(e)</li> </ul> <p>If none of those criteria applies, the payment is imputed proportionately to all the obligations.</p>	

<p>5. The payment may be imputed under paragraph 2, 3 or 4 to an obligation which is unenforceable as a result of prescription only if there is no other obligation to which the payment could be imputed in accordance with those paragraphs.</p> <p>6. In relation to any one obligation a payment by the buyer is to be imputed, first, to expenses, secondly, to interest, and thirdly, to principal, unless the seller makes a different imputation.</p>	
<p><b>Section 3 Taking Delivery</b></p>	
<p><b>Article 129 - Taking delivery</b></p> <p>The buyer fulfils the obligation to take delivery by:</p> <ul style="list-style-type: none"> <li>(a) doing all the acts which could be expected in order to enable the seller to perform the obligation to deliver; and</li> <li>(b) taking over the goods, or the documents representing the goods or digital content, as required by the contract.</li> </ul>	<p><b>Article 60</b></p> <p>The buyer's obligation to take delivery consists:</p> <ul style="list-style-type: none"> <li>(a) in doing all the acts which could reasonably be expected of him in order to enable the seller to make delivery; and</li> <li>(b) in taking over the goods.</li> </ul>
<p><b>Article 130 - Early delivery and delivery of wrong quantity</b></p> <p>1. If the seller delivers the goods or supplies the digital content before the time fixed, the buyer must take delivery unless the buyer has a legitimate interest in refusing to do so.</p> <p>2. If the seller delivers a quantity of goods or digital content less than that provided for in the contract the buyer must take delivery unless the buyer has a legitimate interest in refusing to do so.</p>	<p><b>Article 52</b></p> <p>(1) If the seller delivers the goods before the date fixed, the buyer may take delivery or refuse to take delivery.</p> <p>(2) If the seller delivers a quantity of goods greater than that provided for in the contract, the buyer may take delivery or refuse to take delivery of the excess quantity. If the buyer takes delivery of all or part of the excess quantity, he must pay for it at the contract rate.</p>

<p>3. If the seller delivers a quantity of goods or digital content greater than that provided for by the contract, the buyer may retain or refuse the excess quantity.</p> <p>4. If the buyer retains the excess quantity it is treated as having been supplied under the contract and must be paid for at the contractual rate.</p> <p>5. In a consumer sales contract paragraph 4 does not apply if the buyer reasonably believes that the seller has delivered the excess quantity intentionally and without error, knowing that it had not been ordered.</p> <p>6. This Article does not apply to contracts for the supply of digital content where the digital content is not supplied in exchange for the payment of a price.</p>	
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**Chapter 13 The seller's remedies**  
**Section 1 General Provisions**

<p><b>Article 131 - Overview of seller's remedies</b></p> <p>1. In the case of a non-performance of an obligation by the buyer, the seller may do any of the following:</p> <ul style="list-style-type: none"> <li>(a) require performance under Section 2 of this Chapter;</li> <li>(b) withhold the seller's own performance under Section 3 of this Chapter;</li> <li>(c) terminate the contract under Section 4 of this Chapter; and</li> <li>(d) claim interest on the price or damages under Chapter 16.</li> </ul> <p>2. If the buyer's non-performance is excused, the seller may resort to any</p>	<p><b>Article 61</b></p> <p>(1) If the buyer fails to perform any of his obligations under the contract or this Convention, the seller may:</p> <ul style="list-style-type: none"> <li>(a) exercise the rights provided in articles 62 to 65;</li> <li>(b) claim damages as provided in articles 74 to 77.</li> </ul> <p>(2) The seller is not deprived of any right he may have to claim damages by exercising his right to other remedies.</p> <p>(3) No period of grace may be granted to the buyer by a court or arbitral tribunal when the seller</p>
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<p>of the remedies referred to in paragraph 1 except requiring performance and damages.</p> <p>3. The seller may not resort to any of the remedies referred to in paragraph 1 to the extent that the seller caused the buyer's non-performance.</p> <p>4. Remedies which are not incompatible may be cumulated.</p>	<p>resorts to a remedy for breach of contract.</p> <p><b>Article 62</b></p> <p>The seller may require the buyer to pay the price, take delivery or perform his other obligations, unless the seller has resorted to a remedy which is inconsistent with this requirement.</p>
<p><b>Section 2 – Requiring Performance</b></p>	
<p><b>Article 132 - Requiring performance of buyer's obligations</b></p> <p>1. The seller is entitled to recover payment of the price when it is due, and to require performance of any other obligation undertaken by the buyer.</p> <p>2. Where the buyer has not yet taken over the goods or the digital content and it is clear that the buyer will be unwilling to receive performance, the seller may nonetheless require the buyer to take delivery, and may recover the price, unless the seller could have made a reasonable substitute transaction without significant effort or expense.</p>	
<p><b>Section 3 Withholding Performance of Seller's Obligations</b></p>	
<p><b>Article 133 - Right to withhold performance</b></p> <p>1. A seller who is to perform at the same time as, or after, the buyer performs has a right to withhold performance until the buyer has tendered performance or has performed.</p> <p>2. A seller who is to perform before</p>	<p><b>Article 71</b></p> <p>(1) A party may suspend the performance of his obligations if, after the conclusion of the contract, it becomes apparent that the other party will not perform a substantial part of his obligations as a result of:</p> <p style="padding-left: 40px;">(a) a serious deficiency in his ability to perform or in his</p>

<p>the buyer performs and who reasonably believes that there will be non-performance by the buyer when the buyer's performance becomes due may withhold performance for as long as the reasonable belief continues. However, the right to withhold performance is lost if the buyer gives an adequate assurance of due performance or provides adequate security.</p> <p>3. The performance which may be withheld under this Article is the whole or part of the performance to the extent justified by the non-performance. Where the buyer's obligations are to be performed in separate parts or are otherwise divisible, the seller may withhold performance only in relation to that part which has not been performed, unless the buyer's non-performance is such as to justify withholding the seller's performance as a whole.</p>	<p>creditworthiness;  (b) or his conduct in preparing to perform or in performing the contract.</p> <p>(2) If the seller has already dispatched the goods before the grounds described in the preceding paragraph become evident, he may prevent the handing over of the goods to the buyer even though the buyer holds a document which entitles him to obtain them. The present paragraph relates only to the rights in the goods as between the buyer and the seller.</p> <p>(3) A party suspending performance, whether before or after dispatch of the goods, must immediately give notice of the suspension to the other party and must continue with performance if the other party provides adequate assurance of his performance.</p>
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**Section 4 Termination**

<p><b>Article 134 - Termination for fundamental non-performance</b></p> <p>A seller may terminate the contract within the meaning of Article 8 if the buyer's nonperformance under the contract is fundamental within the meaning of Article 87 (2).</p>	<p><b>Article 64</b></p> <p>(1) The seller may declare the contract avoided:</p> <ul style="list-style-type: none"> <li>(a) if the failure by the buyer to perform any of his obligations under the contract or this Convention amounts to a fundamental breach of contract; or</li> <li>(b) if the buyer does not, within the additional period of time fixed by the seller in accordance with paragraph (1) of article 63, perform his obligation to pay the price or take delivery of the goods, or if he declares that he will not do so within the</li> </ul>
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	<p>period so fixed.</p> <p>(2) However, in cases where the buyer has paid the price, the seller loses the right to declare the contract avoided unless he does so:</p> <ul style="list-style-type: none"> <li>(a) in respect of late performance by the buyer, before the seller has become aware that performance has been rendered; or</li> <li>(b) in respect of any breach other than late performance by the buyer, within a reasonable time: <ul style="list-style-type: none"> <li>(i) after the seller knew or ought to have known of the breach; or</li> <li>(ii) after the expiration of any additional period of time fixed by the seller in accordance with paragraph (1) of article 63, or after the buyer has declared that he will not perform his obligations within such an additional period.</li> </ul> </li> </ul>
<p><b>Article 135 - Termination for delay after notice fixing additional time for performance</b></p> <p>1. A seller may terminate in a case of delay in performance which is not in itself fundamental if the seller gives a notice fixing an additional period of time of reasonable length for performance and the buyer does not perform within that period.</p> <p>2. The period is taken to be of reasonable length if the buyer does not object to it without undue delay. In relations between a trader and a consumer, the additional time for performance must not end before the 30 day period referred to Article</p>	<p><b>Article 63</b></p> <p>(1) The seller may fix an additional period of time of reasonable length for performance by the buyer of his obligations.</p> <p>(2) Unless the seller has received notice from the buyer that he will not perform within the period so fixed, the seller may not, during that period, resort to any remedy for breach of contract. However, the seller is not deprived thereby of any right he may have to claim damages for delay in performance.</p>

<p>167(2).</p> <p>3. Where the notice provides for automatic termination if the buyer does not perform within the period fixed by the notice, termination takes effect after that period without further notice.</p> <p>4. In a consumer sales contract, the parties may not, to the detriment of the consumer, exclude the application of this Article or derogate from or vary its effects.</p>	
<p><b>Article 136 - Termination for anticipated non-performance</b></p> <p>A seller may terminate the contract before performance is due if the buyer has declared, or it is otherwise clear, that there will be a non-performance, and if the non-performance would be fundamental.</p>	<p><b>Article 72</b></p> <p>(1) If prior to the date for performance of the contract it is clear that one of the parties will commit a fundamental breach of contract, the other party may declare the contract avoided.</p> <p>(2) If time allows, the party intending to declare the contract avoided must give reasonable notice to the other party in order to permit him to provide adequate assurance of his performance.</p> <p>(3) The requirements of the preceding paragraph do not apply if the other party has declared that he will not perform his obligations.</p>
<p><b>Article 137 - Scope of right to terminate</b></p> <p>1. Where the buyer's obligations under the contract are to be performed in separate parts or are otherwise divisible, then if there is a ground for termination under this Section of a part which corresponds to a divisible part of the seller's obligations, the seller may terminate only in relation to that part.</p>	

<p>2. Paragraph 1 does not apply if the non-performance is fundamental in relation to the contract as a whole.</p> <p>3. Where the buyer's obligations under the contract are not to be performed in separate parts, the seller may terminate only if the non-performance is fundamental in relation to the contract as a whole.</p>	
<p><b>Article 138 - Notice of termination</b></p> <p>A right to terminate the contract under this Section is exercised by notice to the buyer.</p>	
<p><b>Article 139 - Loss of right to terminate</b></p> <p>1. Where performance has been tendered late or a tendered performance otherwise does not conform to the contract the seller loses the right to terminate under this Section unless notice of termination is given within a reasonable time from when the seller has become, or could be expected to have become, aware of the tender or the lack of conformity.</p> <p>2. A seller loses a right to terminate by notice under Articles 136 unless the seller gives notice of termination within a reasonable time after the right has arisen.</p> <p>3. Where the buyer has not paid the price or has not performed in some other way which is fundamental, the seller retains the right to terminate.</p>	
<p><b>Chapter 14 Passing of risk</b> <b>Section 1 General Provisions</b></p>	
<p><b>Article 140 - Effect of passing of risk</b></p>	<p><b>Article 66</b> Loss of or damage to the goods</p>

<p>Loss of, or damage to, the goods or the digital content after the risk has passed to the buyer does not discharge the buyer from the obligation to pay the price, unless the loss or damage is due to an act or omission of the seller.</p>	<p>after the risk has passed to the buyer does not discharge him from his obligation to pay the price, unless the loss or damage is due to an act or omission of the seller.</p>
<p><b>Article 141 Identification of goods or digital content to contract</b></p> <p>The risk does not pass to the buyer until the goods or the digital content are clearly identified as the goods or digital content to be supplied under the contract, whether by the initial agreement, by notice given to the buyer or otherwise.</p>	<p><b>Article 67</b></p> <p>(1) If the contract of sale involves carriage of the goods and the seller is not bound to hand them over at a particular place, the risk passes to the buyer when the goods are handed over to the first carrier for transmission to the buyer in accordance with the contract of sale. If the seller is bound to hand the goods over to a carrier at a particular place, the risk does not pass to the buyer until the goods are handed over to the carrier at that place. The fact that the seller is authorized to retain documents controlling the disposition of the goods does not affect the passage of the risk.</p> <p>(2) Nevertheless, the risk does not pass to the buyer until the goods are clearly identified to the contract, whether by markings on the goods, by shipping documents, by notice given to the buyer or otherwise.</p>
<p><b>Section 2 Passing of Risk in Consumer Sale Contracts</b></p>	
<p><b>Article 142 - Passing of risk in a consumer sales contract</b></p> <p>1. In a consumer sales contract, the risk passes at the time when the consumer or a third party designated by the consumer, not being the carrier, has acquired the physical possession of the goods or the tangible medium on which the digital</p>	

<p>content is supplied.</p> <p>2. In a contract for the supply of digital content not supplied on a tangible medium, the risk passes at the time when the consumer or a third party designated by the consumer for this purpose has obtained the control of the digital content.</p> <p>3. Except where the contract is a distance or off-premises contract, paragraphs 1 and 2 do not apply where the consumer fails to perform the obligation to take over the goods or the digital content and the non-performance is not excused under Article 88. In this case, the risk passes at the time when the consumer, or the third party designated by the consumer, would have acquired the physical possession of the goods or obtained the control of the digital content if the obligation to take them over had been performed.</p> <p>4. Where the consumer arranges the carriage of the goods or the digital content supplied on a tangible medium and that choice was not offered by the trader, the risk passes when the goods or the digital content supplied on a tangible medium are handed over to the carrier, without prejudice to the rights of the consumer against the carrier.</p> <p>5. The parties may not, to the detriment of the consumer, exclude the application of this Article or derogate from or vary its effects.</p>	
<b>Section 3 Passing of Risk in Contracts between Traders</b>	
<b>Article 143 - Time when risk passes</b>	<b>Article 69</b>
1. In a contract between traders the	(1) In cases not within articles 67

<p>risk passes when the buyer takes delivery of the goods or digital content or the documents representing the goods.</p> <p>2. Paragraph 1 is subject to Articles 144, 145 and 146.</p>	<p>and 68, the risk passes to the buyer when he takes over the goods or, if he does not do so in due time, from the time when the goods are placed at his disposal and he commits a breach of contract by failing to take delivery.</p> <p>(2) However, if the buyer is bound to take over the goods at a place other than a place of business of the seller, the risk passes when delivery is due and the buyer is aware of the fact that the goods are placed at his disposal at that place.</p> <p>(3) If the contract relates to goods not then identified, the goods are considered not to be placed at the disposal of the buyer until they are clearly identified to the contract.</p>
<p><b>Article 144 - Goods placed at buyer's disposal</b></p> <p>1. If the goods or the digital content are placed at the buyer's disposal and the buyer is aware of this, the risk passes to the buyer at the time when the goods or digital content should have been taken over, unless the buyer was entitled to withhold taking of delivery pursuant to Article 113.</p> <p>2. If the goods or the digital content are placed at the buyer's disposal at a place other than a place of business of the seller, the risk passes when delivery is due and the buyer is aware of the fact that the goods or digital content are placed at the buyer's disposal at that place.</p>	
<p><b>Article 145 - Carriage of the goods</b></p> <p>1. This Article applies to a contract of sale which involves carriage of goods.</p> <p>2. If the seller is not bound to hand</p>	<p><b>Article 67</b></p> <p>(1) If the contract of sale involves carriage of the goods and the seller is not bound to hand them over at a particular place, the risk passes to</p>

<p>over the goods at a particular place, the risk passes to the buyer when the goods are handed over to the first carrier for transmission to the buyer in accordance with the contract.</p> <p>3. If the seller is bound to hand over the goods to a carrier at a particular place, the risk does not pass to the buyer until the goods are handed over to the carrier at that place.</p> <p>4. The fact that the seller is authorised to retain documents controlling the disposition of the goods does not affect the passing of the risk.</p>	<p>the buyer when the goods are handed over to the first carrier for transmission to the buyer in accordance with the contract of sale. If the seller is bound to hand the goods over to a carrier at a particular place, the risk does not pass to the buyer until the goods are handed over to the carrier at that place. The fact that the seller is authorized to retain documents controlling the disposition of the goods does not affect the passage of the risk.</p> <p>(2) Nevertheless, the risk does not pass to the buyer until the goods are clearly identified to the contract, whether by markings on the goods, by shipping documents, by notice given to the buyer or otherwise.</p>
<p><b>Article 146 - Goods sold in transit</b></p> <p>1. This Article applies to a contract of sale which involves goods sold in transit.</p> <p>2. The risk passes to the buyer as from the time the goods were handed over to the first carrier. However, if the circumstances so indicate, the risk passes to the buyer when the contract is concluded.</p> <p>3. If at the time of the conclusion of the contract the seller knew or could be expected to have known that the goods had been lost or damaged and did not disclose this to the buyer, the loss or damage is at the risk of the seller.</p>	<p><b>Article 68</b></p> <p>The risk in respect of goods sold in transit passes to the buyer from the time of the conclusion of the contract. However, if the circumstances so indicate, the risk is assumed by the buyer from the time the goods were handed over to the carrier who issued the documents embodying the contract of carriage. Nevertheless, if at the time of the conclusion of the contract of sale the seller knew or ought to have known that the goods had been lost or damaged and did not disclose this to the buyer, the loss or damage is at the risk of the seller.</p> <p><b>Article 69</b></p> <p>(1) In cases not within articles 67 and 68, the risk passes to the buyer when he takes over the goods or, if he does not do so in due time, from the time when the goods are placed</p>

	<p>at his disposal and he commits a breach of contract by failing to take delivery.</p> <p>(2) However, if the buyer is bound to take over the goods at a place other than a place of business of the seller, the risk passes when delivery is due and the buyer is aware of the fact that the goods are placed at his disposal at that place.</p> <p>(3) If the contract relates to goods not then identified, the goods are considered not to be placed at the disposal of the buyer until they are clearly identified to the contract.</p> <p><b>Article 70</b></p> <p>If the seller has committed a fundamental breach of contract, articles 67, 68 and 69 do not impair the remedies available to the buyer on account of the breach.</p>
<p style="text-align: center;"><b>Part V Obligations and remedies of the parties to a related service contract</b></p> <p style="text-align: center;"><b>Chapter 15 Obligations and remedies of the parties</b></p> <p style="text-align: center;"><b>Section 1 Application of certain General Rules on Sales Contracts</b></p>	
<p><b>Article 147 - Application of certain general rules on sales contracts</b></p> <p>1. The rules in Chapter 9 apply for the purposes of this Part.</p> <p>2. Where a sales contract or a contract for the supply of digital content is terminated any related service contract is also terminated.</p>	<p><i>No conforming CISG provisions (Art 3 para 2).</i></p>
<p style="text-align: center;"><b>Section 2 Obligations of the Service Provider</b></p>	
<p><b>Article 148 - Obligation to achieve result and obligation of care and</b></p>	

**skill**

1. The service provider must achieve any specific result required by the contract.

2. In the absence of any express or implied contractual obligation to achieve a specific result, the service provider must perform the related service with the care and skill which a reasonable service provider would exercise and in conformity with any statutory or other binding legal rules which are applicable to the related service.

3. In determining the reasonable care and skill required of the service provider, regard is to be had, among other things, to:

- (a) the nature, the magnitude, the frequency and the foreseeability of the risks involved in the performance of the related service for the customer;
- (b) if damage has occurred, the costs of any precautions which would have prevented that damage or similar damage from occurring; and
- (c) the time available for the performance of the related service.

4. Where in a contract between a trader and a consumer the related service includes installation of the goods, the installation must be such that the installed goods conform to the contract as required by Article 101.

5. In relations between a trader and a consumer the parties may not, to the detriment of the consumer, exclude the application of paragraph 2 or

<p>derogate from or vary its effects.</p>	
<p><b>Article 149 - Obligation to prevent damage</b></p> <p>The service provider must take reasonable precautions in order to prevent any damage to the goods or the digital content, or physical injury or any other loss or damage in the course of or as a consequence of the performance of the related service.</p>	
<p><b>Article 150 - Performance by a third party</b></p> <ol style="list-style-type: none"> <li>1. A service provider may entrust performance to another person, unless personal performance by the service provider is required.</li> <li>2. A service provider who entrusts performance to another person remains responsible for performance.</li> <li>3. In relations between a trader and a consumer the parties may not, to the detriment of the consumer, exclude the application of paragraph 2 or derogate from or vary its effects.</li> </ol>	
<p><b>Article 151 - Obligation to provide invoice</b></p> <p>Where a separate price is payable for the related service, and the price is not a lump sum agreed at the time of conclusion of the contract, the service provider must provide the customer with an invoice which explains, in a clear and intelligible way, how the price was calculated.</p>	
<p><b>Article 152 - Obligation to warn of unexpected or uneconomic cost</b></p> <ol style="list-style-type: none"> <li>1. The service provider must warn the customer and seek the consent of the customer to proceed if:</li> </ol>	

<p>(a) the cost of the related service would be greater than already indicated by the service provider to the customer; or</p> <p>(b) the related service would cost more than the value of the goods or the digital content after the related service has been provided, so far as this is known to the service provider.</p> <p>2. A service provider who fails to obtain the consent of the customer in accordance with paragraph 1 is not entitled to a price exceeding the cost already indicated or, as the case may be, the value of the goods or digital content after the related service has been provided.</p>	
<p><b>Section 3 Obligations of the Customer</b></p>	
<p><b>Article 153 - Payment of the price</b></p> <p>1. The customer must pay any price that is payable for the related service in accordance with the contract.</p> <p>2. The price is payable when the related service is completed and the object of the related service is made available to the customer.</p>	
<p><b>Article 154 - Provision of access</b></p> <p>Where it is necessary for the service provider to obtain access to the customer's premises in order to perform the related service the customer must provide such access at reasonable hours.</p>	
<p><b>Section 4 Remedies</b></p>	
<p><b>Article 155 - Remedies of the customer</b></p>	

1. In the case of non-performance of an obligation by the service provider, the customer has, with the adaptations set out in this Article, the same remedies as are provided for the buyer in Chapter 11, namely:

- (a) to require specific performance;
- (b) to withhold the customer's own performance;
- (c) to terminate the contract;
- (d) to reduce the price; and
- (e) to claim damages.

2. Without prejudice to paragraph 3, the customer's remedies are subject to a right of the service provider to cure whether or not the customer is a consumer.

3. In the case of incorrect installation under a consumer sales contract as referred to in Article 101 the consumer's remedies are not subject to a right of the service provider to cure.

4. The customer, if a consumer, has the right to terminate the contract for any lack of conformity in the related service provided unless the lack of conformity is insignificant.

5. Chapter 11 applies with the necessary adaptations, in particular:

- (a) in relation to the right of the service provider to cure, in contracts between a trader and a consumer, the reasonable period under Article 109 (5) must not exceed 30 days;
- (b) in relation to the remedying of a non-conforming performance Articles 111 and 112 do not apply; and
- (c) Article 156 applies instead of

Article 122.	
<p><b>Article 156 - Requirement of notification of lack of conformity in related service contracts between traders</b></p> <p>1. In a related service contract between traders, the customer may rely on a lack of conformity only if the customer gives notice to the service provider within a reasonable time specifying the nature of the lack of conformity. The time starts to run when the related service is completed or when the customer discovers or could be expected to discover the lack of conformity, whichever is later.</p> <p>2. The service provider is not entitled to rely on this Article if the lack of conformity relates to facts of which the service provider knew or could be expected to have known and which the service provider did not disclose to the customer.</p>	
<p><b>Article 157 - Remedies of the service provider</b></p> <p>1. In the case of a non-performance by the customer, the service provider has, with the adaptations set out in paragraph 2, the same remedies as are provided for the seller in Chapter 13, namely:</p> <ul style="list-style-type: none"> <li>(a) to require performance;</li> <li>(b) to withhold the service provider's own performance;</li> <li>(c) to terminate the contract; and</li> <li>(d) to claim interest on the price or damages.</li> </ul> <p>2. Chapter 13 applies with the necessary adaptations. In particular Article 158 applies instead of Article 132 (2).</p>	

<p><b>Article 158 - Customer's right to decline performance</b></p> <p>1. The customer may at any time give notice to the service provider that performance, or further performance of the related service is no longer required.</p> <p>2. Where notice is given under paragraph 1:</p> <ul style="list-style-type: none"> <li>(a) the service provider no longer has the right or obligation to provide the related service; and</li> <li>(b) the customer, if there is no ground for termination under any other provision, remains liable to pay the price less the expenses that the service provider has saved or could be expected to have saved by not having to complete performance.</li> </ul> <p>3. In relations between a trader and a consumer the parties may not, to the detriment of the consumer, exclude the application of this Article or derogate from or vary its effects.</p>	
<p><b>Part VI Damages and interest</b></p> <p><b>Chapter 16 Damages and interest</b></p> <p><b>Section 1 Damages</b></p>	
<p><b>Article 159 - Right to damages</b></p> <p>1. A creditor is entitled to damages for loss caused by the non-performance of an obligation by the debtor, unless the non-performance is excused.</p> <p>2. The loss for which damages are recoverable includes future loss</p>	<p><b>Article 74</b></p> <p>Damages for breach of contract by one party consist of a sum equal to the loss, including loss of profit, suffered by the other party as a consequence of the breach. Such damages may not exceed the loss which the party in breach foresaw or ought to have foreseen at the</p>

<p>which the debtor could expect to occur.</p>	<p>time of the conclusion of the contract, in the light of the facts and matters of which he then knew or ought to have known, as a possible consequence of the breach of contract.</p>
<p><b>Article 160 - General measure of damages</b></p> <p>The general measure of damages for loss caused by non-performance of an obligation is such sum as will put the creditor into the position in which the creditor would have been if the obligation had been duly performed, or, where that is not possible, as nearly as possible into that position. Such damages cover loss which the creditor has suffered and gain of which the creditor has been deprived.</p>	
<p><b>Article 161 - Foreseeability of loss</b></p> <p>The debtor is liable only for loss which the debtor foresaw or could be expected to have foreseen at the time when the contract was concluded as a result of the non-performance.</p>	
<p><b>Article 162 - Loss attributable to creditor</b></p> <p>The debtor is not liable for loss suffered by the creditor to the extent that the creditor contributed to the non-performance or its effects.</p>	
<p><b>Article 163 - Reduction of loss</b></p> <ol style="list-style-type: none"> <li>1. The debtor is not liable for loss suffered by the creditor to the extent that the creditor could have reduced the loss by taking reasonable steps.</li> <li>2. The creditor is entitled to recover any expenses reasonably incurred in attempting to reduce the loss.</li> </ol>	<p><b>Article 77</b></p> <p>A party who relies on a breach of contract must take such measures as are reasonable in the circumstances to mitigate the loss, including loss of profit, resulting from the breach. If he fails to take such measures, the party in breach may claim a reduction in the damages in the amount by which the loss should have been</p>

	mitigated.
<p><b>Article 164 - Substitute transaction</b></p> <p>A creditor who has terminated a contract in whole or in part and has made a substitute transaction within a reasonable time and in a reasonable manner may, in so far as it is entitled to damages, recover the difference between the value of what would have been payable under the terminated contract and the value of what is payable under the substitute transaction, as well as damages for any further loss.</p>	<p><b>Article 75</b></p> <p>If the contract is avoided and if, in a reasonable manner and within a reasonable time after avoidance, the buyer has bought goods in replacement or the seller has resold the goods, the party claiming damages may recover the difference between the contract price and the price in the substitute transaction as well as any further damages recoverable under article 74.</p>
<p><b>Article 165 - Current price</b></p> <p>Where the creditor has terminated the contract and has not made a substitute transaction but there is a current price for the performance, the creditor may, in so far as entitled to damages, recover the difference between the contract price and the price current at the time of termination as well as damages for any further loss.</p>	<p><b>Article 76</b></p> <p>(1) If the contract is avoided and there is a current price for the goods, the party claiming damages may, if he has not made a purchase or resale under article 75, recover the difference between the price fixed by the contract and the current price at the time of avoidance as well as any further damages recoverable under article 74. If, however, the party claiming damages has avoided the contract after taking over the goods, the current price at the time of such taking over shall be applied instead of the current price at the time of avoidance.</p> <p>(2) For the purposes of the preceding paragraph, the current price is the price prevailing at the place where delivery of the goods should have been made or, if there is no current price at that place, the price at such other place as serves as a reasonable substitute, making due allowance for differences in the cost of transporting the goods.</p>
<p><b>Section 2: Interest on late Payments: General Provisions</b></p>	

<p><b>Article 166 - Interest on late payments</b></p> <p>1. Where payment of a sum of money is delayed, the creditor is entitled, without the need to give notice, to interest on that sum from the time when payment is due to the time of payment at the rate specified in paragraph 2.</p> <p>2. The interest rate for delayed payment is:</p> <ul style="list-style-type: none"> <li>(a) where the creditor's habitual residence is in a Member State whose currency is the euro or in a third country, the rate applied by the European Central Bank to its most recent main refinancing operation carried out before the first calendar day of the half-year in question, or the marginal interest rate resulting from variable-rate tender procedures for the most recent main refinancing operations of the European Central Bank, plus two percentage points;</li> <li>(b) where the creditor's habitual residence is in a Member State whose currency is not the euro, the equivalent rate set by the national central bank of that Member State, plus two percentage points.</li> </ul> <p>3. The creditor may recover damages for any further loss.</p>	<p><b>Article 78</b></p> <p>If a party fails to pay the price or any other sum that is in arrears, the other party is entitled to interest on it, without prejudice to any claim for damages recoverable under article 74.</p> <p><b>Article 84</b></p> <p>(1) If the seller is bound to refund the price, he must also pay interest on it, from the date on which the price was paid.</p> <p>(2) The buyer must account to the seller for all benefits which he has derived from the goods or part of them:</p> <ul style="list-style-type: none"> <li>(b) if he must make restitution of the goods or part of them; or</li> <li>(c) if it is impossible for him to make restitution of all or part of the goods or to make restitution of all or part of the goods substantially in the condition in which he received them, but he has nevertheless declared the contract avoided or required the seller to deliver substitute goods.</li> </ul>
<p><b>Article 167 - Interest when the debtor is a consumer</b></p> <p>1. When the debtor is a consumer, interest for delay in payment is due at the rate provided in Article 166 only when non-performance is not excused.</p>	

<p>2. Interest does not start to run until 30 days after the creditor has given notice to the debtor specifying the obligation to pay interest and its rate. Notice may be given before the date when payment is due.</p> <p>3. A term of the contract which fixes a rate of interest higher than that provided in Article 166, or accrual earlier than the time specified in paragraph 2 of this Article is not binding to the extent that this would be unfair according to Article 83.</p> <p>4. Interest for delay in payment cannot be added to capital in order to produce interest. 5. The parties may not, to the detriment of the consumer, exclude the application of this Article or derogate from or vary its effects.</p>	
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**Section 3 Late Payments by Traders**

<p><b>Article 168 - Rate of interest and accrual</b></p> <p>1. Where a trader delays the payment of a price due under a contract for the delivery of goods, supply of digital content or provision of related services without being excused by virtue of Article 88, interest is due at the rate specified in paragraph 5 of this Article.</p> <p>2. Interest at the rate specified in paragraph 5 starts to run on the day which follows the date or the end of the period for payment provided in the contract. If there is no such date or period, interest at that rate starts to run:</p> <p style="padding-left: 40px;">(a) 30 days after the date when the debtor receives the invoice or an equivalent request for</p>	
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<p>payment; or</p> <p>(b) 30 days after the date of receipt of the goods, digital content or related services, if the date provided for in point (a) is earlier or uncertain, or if it is uncertain whether the debtor has received an invoice or equivalent request for payment.</p> <p>3. Where conformity of goods, digital content or related services to the contract is to be ascertained by way of acceptance or examination, the 30 day period provided for in point (b) of paragraph 2 begins on the date of the acceptance or the date the examination procedure is finalised. The maximum duration of the examination procedure cannot exceed 30 days from the date of delivery of the goods, supply of digital content or provision of related services, unless the parties expressly agree otherwise and that agreement is not unfair according to Article 170.</p> <p>4. The period for payment determined under paragraph 2 cannot exceed 60 days, unless the parties expressly agree otherwise and that agreement is not unfair according to Article 170.</p> <p>5. The interest rate for delayed payment is:</p> <p>(a) where the creditor's habitual residence is in a Member State whose currency is the euro or in a third country, the interest rate applied by the European Central Bank to its most recent main refinancing operation carried out before the first calendar day of the half-year in question, or the marginal interest rate resulting from variable-rate tender</p>	
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<p>procedures for the most recent main refinancing operations of the European Central Bank, plus eight percentage points;</p> <p>(b) where the creditor's habitual residence is in a Member State whose currency is not the euro, the equivalent rate set by the national central bank of that Member State, plus eight percentage points.</p> <p>6. The creditor may recover damages for any further loss.</p>	
<p><b>Article 169 - Compensation for recovery costs</b></p> <p>1. Where interest is payable in accordance with Article 168, the creditor is entitled to obtain from the debtor, as a minimum, a fixed sum of EUR 40 or the equivalent sum in the currency agreed for the contract price as compensation for the creditor's recovery costs.</p> <p>2. The creditor is entitled to obtain from the debtor reasonable compensation for any recovery costs exceeding the fixed sum referred to in paragraph 1 and incurred due to the debtor's late payment.</p>	
<p><b>Article 170 - Unfair contract terms relating to interest for late payment</b></p> <p>1. A contract term relating to the date or the period for payment, the rate of interest for late payment or the compensation for recovery costs is not binding to the extent that the term is unfair. A term is unfair if it grossly deviates from good commercial practice, contrary to good faith and fair dealing, taking into account all circumstances of the case, including the nature of the goods, digital content or related</p>	

<p>service.</p> <p>2. For the purpose of paragraph 1, a contract term providing for a time or period for payment or a rate of interest less favourable to the creditor than the time, period or rate specified in Articles 167 or 168, or a term providing for an amount of compensation for recovery costs lower than the amount specified in Article 169 is presumed to be unfair.</p> <p>3. For the purpose of paragraph 1, a contract term excluding interest for late payment or compensation for recovery costs is always unfair.</p>	
<p><b>Article 171 - Mandatory nature</b></p> <p>The parties may not exclude the application of this Section or derogate from or vary its effects.</p>	
<p><b>Part VII Restitution</b> <b>Chapter 17 Restitution</b></p>	
<p><b>Article 172 - Restitution on avoidance or termination</b></p> <p>1. Where a contract is avoided or terminated by either party, each party is obliged to return what that party (“the recipient”) has received from the other party.</p> <p>2. The obligation to return what was received includes any natural and legal fruits derived from what was received.</p> <p>3. On the termination of a contract for performance in instalments or parts, the return of what was received is not required in relation to any instalment or part where the obligations on both sides have been fully performed, or where the price for what has been</p>	<p><b>Article 81</b></p> <p>(1) Avoidance of the contract releases both parties from their obligations under it, subject to any damages which may be due. Avoidance does not affect any provision of the contract for the settlement of disputes or any other provision of the contract governing the rights and obligations of the parties consequent upon the avoidance of the contract.</p> <p>(2) A party who has performed the contract either wholly or in part may claim restitution from the other party of whatever the first party has supplied or paid under the contract. If both parties are bound to make restitution, they must do so</p>

<p>done remains payable under Article 8 (2), unless the nature of the contract is such that part performance is of no value to one of the parties.</p>	<p>concurrently.</p>
<p><b>Article 173 - Payment for monetary value</b></p> <p>1. Where what was received, including fruits where relevant, cannot be returned, or, in a case of digital content whether or not it was supplied on a tangible medium, the recipient must pay its monetary value. Where the return is possible but would cause unreasonable effort or expense, the recipient may choose to pay the monetary value, provided that this would not harm the other party's proprietary interests.</p> <p>2. The monetary value of goods is the value that they would have had at the date when payment of the monetary value is to be made if they had been kept by the recipient without destruction or damage until that date.</p> <p>3. Where a related service contract is avoided or terminated by the customer after the related service has been performed or partly performed, the monetary value of what was received is the amount the customer saved by receiving the related service.</p> <p>4. In a case of digital content the monetary value of what was received is the amount the consumer saved by making use of the digital content.</p> <p>5. Where the recipient has obtained a substitute in money or in kind in exchange for goods or digital content when the recipient knew or could be expected to have known of the ground for avoidance or termination, the other party may choose to claim the substitute or the monetary value of</p>	

<p>the substitute. A recipient who has obtained a substitute in money or kind in exchange for goods or digital content when the recipient did not know and could not be expected to have known of the ground for avoidance or termination may choose to return the monetary value of the substitute or the substitute.</p> <p>6. In the case of digital content which is not supplied in exchange for the payment of a price, no restitution will be made.</p>	
<p><b>Article 174 - Payment for use and interest on money received</b></p> <p>1. A recipient who has made use of goods must pay the other party the monetary value of that use for any period where:</p> <ul style="list-style-type: none"> <li>(a) the recipient caused the ground for avoidance or termination;</li> <li>(b) the recipient, prior to the start of that period, was aware of the ground for avoidance or termination; or</li> <li>(c) having regard to the nature of the goods, the nature and amount of the use and the availability of remedies other than termination, it would be inequitable to allow the recipient the free use of the goods for that period.</li> </ul> <p>2. A recipient who is obliged to return money must pay interest, at the rate stipulated in Article 166, where :</p> <ul style="list-style-type: none"> <li>(a) the other party is obliged to pay for use; or</li> <li>(b) the recipient gave cause for the contract to be avoided because of fraud, threats and</li> </ul>	

<p>unfair exploitation.</p> <p>3. For the purposes of this Chapter, a recipient is not obliged to pay for use of goods received or interest on money received in any circumstances other than those set out in paragraphs 1 and 2.</p>	
<p><b>Article 175 - Compensation for expenditure</b></p> <p>1. Where a recipient has incurred expenditure on goods or digital content, the recipient is entitled to compensation to the extent that the expenditure benefited the other party provided that the expenditure was made when the recipient did not know and could not be expected to know of the ground for avoidance or termination.</p> <p>2. A recipient who knew or could be expected to know of the ground for avoidance or termination is entitled to compensation only for expenditure that was necessary to protect the goods or the digital content from being lost or diminished in value, provided that the recipient had no opportunity to ask the other party for advice.</p>	
<p><b>Article 176 - Equitable modification</b></p> <p>Any obligation to return or to pay under this Chapter may be modified to the extent that its performance would be grossly inequitable, taking into account in particular whether the party did not cause, or lacked knowledge of, the ground for avoidance or termination.</p>	
<p><b>Article 177 - Mandatory nature</b></p> <p>In relations between a trader and a consumer the parties may not, to the</p>	

<p>detriment of the consumer, exclude the application of this Chapter or derogate from or vary its effects.</p>	
<p><b>Part VIII Prescription</b></p> <p><b>Chapter 18 Prescription</b></p> <p><b>Section 1 General Provisions</b></p>	
<p><b>Article 178 - Rights subject to prescription</b></p> <p>A right to enforce performance of an obligation, and any right ancillary to such a right, is subject to prescription by the expiry of a period of time in accordance with this Chapter.</p>	<p><i>Not covered by the CISG, but by the Convention on the Limitation Period in the International Sale of Goods.</i></p>
<p><b>Section 2 Periods of Prescription and their Commencement</b></p>	
<p><b>Article 179 - Periods of prescription</b></p> <p>1. The short period of prescription is two years.</p> <p>2. The long period of prescription is ten years or, in the case of a right to damages for personal injuries, thirty years.</p>	
<p><b>Article 180 – Commencement</b></p> <p>1. The short period of prescription begins to run from the time when the creditor has become, or could be expected to have become, aware of the facts as a result of which the right can be exercised.</p> <p>2. The long period of prescription begins to run from the time when the debtor has to perform or, in the case of a right to damages, from the time of the act which gives rise to the right.</p>	

<p>3. Where the debtor is under a continuing obligation to do or refrain from doing something, the creditor is regarded as having a separate right in relation to each nonperformance of the obligation.</p>	
<p><b>Section 3 Extension of Periods of Prescription</b></p>	
<p><b>Article 181 - Suspension in case of judicial and other proceedings</b></p> <p>1. The running of both periods of prescription is suspended from the time when judicial proceedings to assert the right are begun.</p> <p>2. Suspension lasts until a final decision has been made, or until the case has been otherwise disposed of. Where the proceedings end within the last six months of the prescription period without a decision on the merits, the period of prescription does not expire before six months have passed after the time when the proceedings ended.</p> <p>3. Paragraphs 1 and 2 apply, with appropriate adaptations, to arbitration proceedings, to mediation proceedings, to proceedings whereby an issue between two parties is referred to a third party for a binding decision and to all other proceedings initiated with the aim of obtaining a decision relating to the right or to avoid insolvency.</p> <p>4. Mediation means a structured process, however named or referred to, whereby two or more parties to a dispute attempt by themselves, on a voluntary basis, to reach an agreement on the settlement of their dispute with the assistance of a mediator. This process may be</p>	

<p>initiated by the parties or suggested or ordered by a court or prescribed by the national law. Mediation ends by an agreement of the parties or by declaration of the mediator or one of the parties.</p>	
<p><b>Article 182 - Postponement of expiry in the case of negotiations</b></p> <p>If the parties negotiate about the right, or about circumstances from which a claim relating to the right might arise, neither period of prescription expires before one year has passed since the last communication made in the negotiations or since one of the parties communicated to the other that it does not wish to pursue the negotiations.</p>	
<p><b>Article 183 Postponement of expiry in case of incapacity</b></p> <p>If a person subject to an incapacity is without a representative, neither period of prescription of a right held by that person expires before one year has passed since either the incapacity has ended or a representative has been appointed.</p>	
<p><b>Section 4 Renewal of Periods of Prescription</b></p>	
<p><b>Article 184 - Renewal by acknowledgement</b></p> <p>If the debtor acknowledges the right vis-à-vis the creditor, by part payment, payment of interest, giving of security, set-off or in any other manner, a new short period of prescription begins to run.</p>	
<p><b>Section 5 Effects on Prescription</b></p>	

<p><b>Article 185 - Effects of prescription</b></p> <p>1. After expiry of the relevant period of prescription the debtor is entitled to refuse performance of the obligation in question and the creditor loses all remedies for nonperformance except withholding performance.</p> <p>2. Whatever has been paid or transferred by the debtor in performance of the obligation in question may not be reclaimed merely because the period of prescription had expired at the moment that the performance was carried out.</p> <p>3. The period of prescription for a right to payment of interest, and other rights of an ancillary nature, expires not later than the period for the principal right.</p>	
<p><b>Section 6 Modification by Agreement</b></p>	
<p><b>Article 186 - Agreements concerning prescription</b></p> <p>1. The rules of this Chapter may be modified by agreement between the parties, in particular by either shortening or lengthening the periods of prescription.</p> <p>2. The short period of prescription may not be reduced to less than one year or extended to more than ten years.</p> <p>3. The long period of prescription may not be reduced to less than one year or extended to more than thirty years.</p> <p>4. The parties may not exclude the application of this Article or derogate from or vary its effects.</p>	

5. In a contract between a trader and a consumer this Article may not be applied to the detriment of the consumer.	
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