

Uniform Private Law I CISG

Scope of Application

- **United Nations Convention on Contracts for the International Sale of Goods ('CISG')**
 - UNCITRAL: United Nations Commission on International Trade Law (headquarters: Vienna & New York)
- **Replacement of national laws entirely**
 - if the seller and the buyer are located in different states and
 - the buyer is not a consumer (Art. 1 and 2(a) CISG)
 - no stipulation of the CISG rules by the parties necessary
 - for non-application clear statement in contract (Art 6 CISG)
- not applicable to **service contracts, contracts to manufacture goods** (Art 3 CISG)

Scope of Application

CISG applies to

- the **formation of the sales contract** (Artt 14 to 24),
- the duties of the parties under the sales contract (Artt 30 to 37, 53 to 60),
- the passing of the risk (Gefahrtragung: Artt 66 to 70),
- the duty of the buyer to examine the goods and to give notice to the seller of any lack of conformity within a reasonable time (Artt 38 to 44) and, last but not least,
- all legal consequences that are triggered by a breach of contract (Artt 45 to 52, 61 to 65).

Scope of Application

CISG does **not apply** to:

- questions of validity of the contract
 - capacity of the parties
 - representation or agency,
 - violation of mandatory law or of *bonos mores*
 - mistake (other than characteristics of the goods)
- passing of property (Art 4 CISG)

Rules for Breach of Contract

Starting Point, Art 25 CISG ‘fundamental breach of contract’

- breach 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’
- cause a **serious detriment** to the affected party
- so severe that the party cannot expect any longer to get the essentials of the performance he/she contracted for
- construed **rather narrowly** by the courts

Examples:

- goods completely **worthless** and cannot be resold by the buyer
- goods are unusable **only** for the buyer, but could be used by other people, the buyer is required to **sell the goods** and demand a **price reduction** and/or **damages** from the seller

Fundamental Breach of Contract

in case of a fundamental breach of contract (Art 25 CISG) by the seller the buyer has the following remedies/rights:

- the right to demand delivery (Art 46 (1) CISG)
- the right to demand the delivery of substitute goods (Art 46 (2) CISG)
- the right to demand repair of the goods (Art 46 (3) CISG)
- right to demand price reduction (Art 50 CISG)
- the right to declare the contract void (Art 49 CISG)
- the right to claim damages (Artt 74 et seq CISG)
- the right to claim restitution of the purchase price (Artt 81 et seq CISG)

buyer can **choose** any of these remedies – **Condition: not twice, not contradictory**

- demand price reduction (Art 50) and damages for the lower value of the goods (Art 74)
- specific performance (Erfüllung) and avoid the contract at the same time

Non-fundamental Breach of Contract

all the remedies except for two:

- the delivery of substitute goods, Art 46 (2) CISG
- avoidance of the contract, Art 49 CISG.

Reason:

- only two remedies that cause a re-transport of the goods back to the seller
- transport is expensive

Priority of repair

If the defective goods can be **repaired** and the repair does not create an **unreasonable burden** or delay for the buyer, the buyer - **in case of a non-fundamental breach by the seller** - has to give the seller the opportunity to repair the goods within a **reasonable time** (Art 48 (1) CISG)

- price reduction,
- restitution or damages if the seller does not repair the goods within that reasonable period of time
- damages that were caused to him/her by the delay

Examination of Goods

remedies only if

- buyer has **examined** the goods according to Art 38 CISG ‘within as short a period as is practicable in the circumstances’ and
- has given **notice** of their lack of conformity to the seller according to Art 39 CISG ‘**within a reasonable time** after he has discovered it or ought to have discovered it’

exception: Art 44 CISG, the buyer retains his right to price reduction and to claim damages, if he has a **reasonable excuse** for his failure to give notice.

regular length: about one to two weeks for examination and two weeks for notice, ie three to **four weeks as a maximum total period**

Damages for Breach of Contract, Artt 74 ff

no-fault liability

- all foreseeable damage suffered by the other party as a consequence of the breach (Art 74 CISG)

exception force majeure, Art 79

- no liability if the breach was ‘*due to an impediment beyond his control and he could not reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract or overcome it or its consequences*’
 - war
 - riot
 - natural catastrophes
 - an import or export ban

Damages for Breach of Contract, Artt 74 ff

legal requirements of a claim of damages

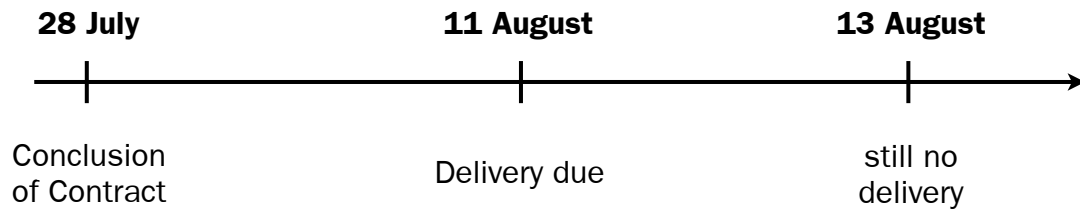
- the occurrence of a damage to the claimant
- the breach of a contractual duty by the defendant
- the causation of the damage by the breach of that particular duty
- the foreseeability of the damage for the defendant

In July 2005, an Austrian firm A that produces a special type of computer chips that are combined with other hardware concludes a contract of sale with a Portuguese manufacturer M, who needs the seller's products for his high tech machinery. The contract provides that A will deliver 10.000 units of XY (name of the goods) within 14 days after the conclusion of the contract, and that the price of 80.000,- EUR is due one month after the delivery of the goods.

16 days after the conclusion of the contract, M realizes that A's goods have not yet been delivered. M needs A's products to prepare the opening of a new section of his plant. Every day the opening of the plant section is delayed, M suffers damages of 2.000,- EUR due to additional expenses and of 10.000,- EUR by loss of profits.

What are M's options?

Timeline



Step 1: Competent Court

- **Brussels Ia Regulation**
 - Article 4 para 1 Brussels Ia Regulation (General provision)
 - Article 7 para 1 lit b Brussels Ia Regulation (Special jurisdiction)
- Both Austrian and Portuguese courts are competent. M's options are to sue either in Austria or in Portugal.

Step 2: Applicable Law

- **Rome I Regulation**
 - **Article 3 Rome I** – parties have not determined the applicable law in their contract
- **Article 4 para 1 lit. a Rome I Regulation**

Applicable law in the absence of choice

1. To the extent that the law applicable to the contract has not been chosen ..., the law governing the contract shall be determined as follows:
(a) a contract for the sale of goods shall be governed by the law of the country where the seller has his habitual residence;

- **Austrian law is applicable.**

Step 3: Substantive Law

- **International Convention?**
- Note: Portugal is not a Signatory State to the Convention
- Sphere of application
 - Article 1 CISG
 - (1) This Convention applies to contracts of sale of goods between parties whose places of business are in different States:
 - (a) when the States are Contracting States; or
 - (b) when the rules of **private international law** lead to the application of the law of a Contracting State.
- CISG applies to the contract between the firm A and the firm M.

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Step 3: Substantive Law

- **Facts:** Delay of the delivery of goods (2 days). M's opening of the new plant section is delayed.
 - damages € 2.000 EUR/day
 - loss of profits € 10.000 EUR/day
- Article 33, 46 para 1 CISG and Article 74 CISG:
- M has the right to demand delivery (performance by the seller) and to claim damages for breach of contract (by delay in delivery) in the amount of 24.000 EUR in total (damnum emergens + lucrum cessans)

A finally delivers the goods. M's employees immediately unpack them and start to install them into the machinery. After one week of testing, the employees report to M that the machinery cannot be set to work due to an unexplainable defect in the hardware delivered by A. After a day of discussion with the computer experts of his company M informs A of the alleged defects of the goods by fax, exactly ten days after the delivery of the goods. The next day, A sends the following statement by fax: 'The products were free of any defects when sent to you. Your machinery is defective and is therefore not compatible with our products. In any case, the discussion about the defects of XY is obsolete as you have not rendered timely notice of the defects. Ten days exceeds the statutory time period within which you were required to give us notice of any defects regarding our products. Hoping that you will soon be able to get your machinery started, Yours sincerely, A.'

After receiving the statement, M approaches a lawyer and a computer expert to further investigate the case. They establish that the XYs do not have a certain quality that was part of the product description in the sales contract. The XYs therefore cannot be used in combination with M's machinery. A repair of the XYs is possible, but it would be very expensive, amounting to 40% of the contract price. The 10.000 XYs are, however, not entirely worthless. They could be resold with relative ease to other manufacturers who do not need the special quality the XYs lack.

What remedies does M have?

Step 3: Substantive Law

- Facts: Unexplainable defects in the hardware; M's experts determined: the XY's (products) do not have a certain quality that was part of the product description in the sales contract. The products are not compatible with M's machinery.
- Article 25 CISG?
- vague definition
- The facts of this particular case can **not** be considered as a **fundamental breach**, according to recent court decisions.

Step 3: Substantive Law

- In the case of **non-fundamental breach** of contract by the seller the buyer has following remedies:
 - the right to demand delivery (Art 46 (1) CISG)
 - the right to demand repair of the goods (Art 46 (3) CISG)
 - the right to demand price reduction (Art 50 CISG)
 - the right to claim damages (Art 74 et seq CISG)
 - the right to claim restitution of the price already paid as a consequence of price reduction (Art 50 CISG) or avoidance (Art 49 CISG)

Step 3: Substantive Law

- A's objection:(...) you have not given us a timely notice of the defects. 10 days definitely exceed the statutory time period within which you have to give us notice of any defects regarding our products.
- Article 39 para 1 CISG
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.
- practice guideline: approx 1 month