The pros and cons for the buyer and the seller in the application of the United Nations Convention on Contracts for the international sale of goods compared to the German law.

and

Application of the United Nations Convention for the international sale of goods in South Africa although South Africa is not a party to this Convention.

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Bibliography:

Aue, Mängelgewährleistung im UN-Kaufrecht unter besonderer Berücksichtigung stillschweigender Zusicherungen, Frankfurt/Main, 1989

Bonell, Vertragsverhandlungen und culpa in contrahendo nach dem Wiener Kaufrechtsübereinkommen von 1980, RIW 1990, 693 f.

Bucher, Wiener Kaufrecht, Der schweizerische Außenhandel unter dem UN-Übereinkommen über den internationalen Warenkauf, Bern, 1991

Büchting/Heussen, Beck´sches Rechtsanwaltshandbuch, München, 3. Auflage, 1993

v. Caemmerer/Schlechtriem, Kommentar zum Einheitlichen UN-Kaufrecht, Das Übereinkommen der Vereinten Nationen über den Internationalen Warenkauf - CISG Kommentar - , 2. Auflage, München, 1995

Czerwenda, Rechtsanwendungsprobleme im internationalen Kaufrecht, Das Kollisionsrecht bei grenzüberschreitenden Kaufverträgen und der Anwendungsbereich der internationalen Kaufrechtsübereinkommen, Berlin, 1988

Endelein/Maskow/Stargardt, Konvention der Vereinten Nationen über Verträge über den Internationalen Warenkauf, Kommentar, Berlin, 1985

Ehricke, Das Recht des Vertragschlusses im Dänischen Recht, RIW 1989, 178 f.

Esser, Die letzte Glocke zum Geleit? Kaufmänisches Bestätigungsschreiben im internationalen Handel: deutsches, französisches, österreichisches und schweizerisches Recht und Einheitliches Recht unter der Kaufrechtskonvention von 1980, ZfRV 1988, 167 f.

Garro/Zuppi, Compraventa international de mercaderias, Buenos Aires, 1990

Herber/Czerwenka, Internationales Kaufrecht, UN-Übereinkommen über Verträge über den internationalen Warenkauf, Kommentar, München, 1991

Honnold, Documentary history of the uniform law for international sales. The studies, deliberations and decisions that led to the 1980 United Nations Convention with introductions and explanations, Devender: Kluver Law and Taxation (1989), (*Honnold*, Documentary History)

Jung, Recht und Praxis des chinesischen Warenimports, Heidelberg, 1992

Karollus, UN-Kaufrecht, Wien, 1991

Koller, in: *Staub*, HGB-Großkommentar, Berlin, 4. Auflage 1985, vor § 373 HGB RN 621 f.

Kritzer, Guide to practical applications of the United Nations Convention on Contracts for the International Sale of Goods, Detailed Analysis, Defenter, March 1992

Kropholler, Internationales Privatrecht, Tübingen, 1990

Loewe, Internationales Kaufrecht, Wiener UN-Übereinkommen vom 11. April 1980, Wien 1989

Martiny, in: Münchner Kommentar zum Bürgerlichen Gesetzbuch, Band 7 (Einführungsgesetze zum Bürgerlichen Gesetzbuch), München, 2. Auflage, 1990

Mertens/Rehbinder, Internationales Kaufrecht, Frankfurt, 1975

Palandt, Bürgerliches Gesetzbuch, München, 55. Auflage, 1997

Piltz, Internationales Kaufrecht, Das UN-Kaufrecht in praxisorientierter Darstellung, München, 1993

Piltz, Internationales Kaufrecht, NJW 1989, page 615 f.

Pünder, Das Einheitliche UN-Kaufrecht - Anwendung Kraft kollisionsrechtlicher Verweisungen nach art. 1 I b UN-Kaufrecht, RIW 1990, page 869 f.

Reinhart, UN-Kaufrecht, Kommentar zum Übereinkommen der Vereinten Nationen vom 11. April 1980 über Verträge über den Internationalen Warenkauf, Heidelberg, 1991

Sarcevic/Volken, International Sale of Goods, Dubrovnik Lectures, New York, 1986

Schwenzer, Das UN-Übereinkommen zum internationalen Warenkauf, NJW 1990, 602 f.

Schlechtriem, Uniform Sale Law, The UN-Convention on Contracts for the International Sale of Goods, Wien, 1986

Schlechtriem, Einheitliches Kaufrecht und und nationales Obligationsrecht, Baden-Baden, 1987

Schubert, Der Einfluß des Einheitskaufrechts auf die Schuldreform in der Bundesrepublik Deutschland, in: *Schlechtriem*, Einheitliches Kaufrecht und nationales Obligationsrecht, Baden-Baden: Nomos 1987, page 415-436, (*Schubert*, Einfluß des Einheitskaufrechts)

Sevón, The New Scandinavian Codification on the Sale of Goods and the 1980 United Nations Convention on Contracts for the International Sale of Goods, in: *Schlechtriem*, Einheitliches Kaufrecht und nationales Obligationsrecht, Baden-Baden: Nomos 1987, page 343-357, *(Sevón*, Scandinavian Codification)

United Nations Conference on Contracts of Sale of Goods, Vianna, 10 March-11 April 1980, ***Official Records***, Documents of the Conference and Summary Records of the Plenty Meetings and of the Meetings of the Main Committees, United Nations, New York, 1981

Walter, Kaufrecht (Handbuch des Schuldrechts, Band 6), Tübingen, 1987

Witz, Der unbestimmte Kaufpreis, Ein rechtsvergleichender Beitrag zur Bedeutung des pretium certum, Frankfurt, 1989

Zweigert/Kötz, Einführung in die Rechtsvergleichung auf dem Gebiete des Privatrechts, Band II: Institutionen, Tübingen, 2. Auflage, 1984

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1) Introduction

Since the Conference on Contracts for the International Sale of Goods (CISG) in Vienna that took place from March 10th till April 11th, 1980 came into force on January 1st, 1988, a problem arose for buyers and sellers in an international contract of the sale of goods. Regarding art. 6 CISG they have the **choice** whether the provisions of the CISG or their own national law is applicable.

Unlike former attempts, the CISG is successful for international trading. More than 40 states and nearly all important trade states are contracting states to this convention at the time.

Therefore it is important for every lawyer, who advises a buyer or a seller in an international contract of the sale of goods, to know the provisions of the CISG and their pros and cons compared to their national law.

It is quite possible that the provisions of the CISG are applicable in their international contract of the sale of goods. In every contracting state to the convention the CISG is applicable. At the moment that are more than 40 states. But also the CISG can be applicable in non contracting states like South Africa. So lawyers of non contracting states must know the provisions of the CISG as well.

It is important to know, that the CISG is not applicable for all international contracts of the sale of goods - but for nearly all important ones - and that the CISG does not take place of all national provisions. So the lawyer must know the area of the application, too.

The centre of gravity of this dissertation is to find out the pros and cons for a buyer and a seller within the CISG compared to their national law. Here the German law takes the place of the different national laws. In Germany the CISG is applicable since January 1st, 1991.

It is often said that the CISG gives an advantage to the buyer. It is right, that a modern trend for a better position of the buyer is to find in the CISG[1]. But outside such characteristic it does not conclude that the CISG gives only disadvantages to the seller and that he therefore should lock the provisions out of the CISG. To examine the different opinions in practice it is more important to have a close look at the provisions themselves. Compared to the German law

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[1] *Kritzer*, Guide to practical applications of the United Nations Convention on Contracts for the Internatio-

provisions of the BGB and HGB, the provisions of the CISG **give advantages to the buyer and the seller** as well.

To be able to examine the pros and cons of the provisions of the CISG those provisions have to be examined that are different to the German law. These provisions are new and because of their self-execution they are more important than all different provisions in the different national states. The German law provisions are examined in such an intensive way, because the difference to the CISG should become clear.

Furthermore there shall be given a view on the historic development of the unity of international trading and a general idea of the outline, contents, and structure of the CISG.

2) Historic development

The CISG resulted in big effort that was not hoped-for in this extensity to find a unity of law for the international sale of goods. The development started in the nineteen-twenties and ended in the Hague Trader Rules in 1964. The result was the creation of the CISG.

a) First steps

The way to find a unity for an international trade law has a **long time history**[2]. Between the two world wars the first attempts were started under the administration of the League of Nations. They wanted to find a unity for the trading law. The famous lawyer Ernst Rabel started a first report on the possibilities to find a unity for the international trade with "the master mind behind the draft Uniform International Sales Law" on February 21st, 1929. In the same year the famous "Blue Report" was handed in to find a committee of members of the English, French, Scandinavian and German law area. This committee was built on April 29th, 1930, and started with a first draft in 1935. The development finally resulted in the Hague Conference in 1964 where the Hague Trader Rules were invented.

Outside Europe there was only one attempt to find a unity for the trade law in Latin-America. In 1953 a "Proyecto de Buenos Aires" wanted to reach unity of the trade law in the organisation of the American States[3]. But this draft did not get beyond the stadium of a project and was not applicable to any of the American States.

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nal Sale of Goods, page. 338

[2] see *Sono*, in: *Sarcevic/Volken*, International Sale of Goods, page 1 f.

[3] *Garro/Zuppi*, Compraventa international de mercaderias, page 41 f.

b) Hague Trader Rules from 1964

After World War II there were new attempts in Europe to find a unity for the international trading law. These attempts lead to the Hague Trader Rules in 1964.

Compared to the expectation, that a world-wide unity of the international trading law would be accompanied by big support, the Hague Trader Rules were **not successful**. In reality they were applicable in only nine states[4].

At first it was disappointing that preferred trading nations like France and the United States of America did not ratify the rules although they worked on the provisions of the rules. On the other hand the Hague Trader Rules were not attractive for many other states, because neither the communist states nor the developing countries were involved in the conference to the trader rules in Hague.

So the Hague Trader Rules were **applicable in only a few states**. But in this area the Hague Trader Rules became very important in the practice of the courts especially in Germany, the Benelux Countries, and Italy.

The Hague Trader Rules as well became a guide for the development of the national trading law in some states[5]. The Hague Trader Rules especially built the foundation for the "new" homogeneous trading law which was developed by the United Nations Commission for International Trade Law (UNCITRAL) and later for the CISG.

c) United Nations Convention on Contracts for the international sale of goods from 1980

After the expectations on the Hague Trader Rules did not come true, the United Nations Commission for International Trade Law) **(UNCITRAL)** decided to develop an international trade law.

They started with a request on their members to state their opinion to the Hague Trader Rules and to analyse the answers. The annual UNCITRAL-Conference in 1970 was prepared with an argumentation about the Hague Trader Rules by a working team[6]. This working team built smaller work groups which had jurisdiction over special problems.

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[4]in force in Belgium at 18.8.1972, Gambia at 5.9.1974, Israel at 18.8.1972 and 30.11.1980, Italy at 23.8.1979, The Neatherlands at 18.8.1972, San Marion at 18.8.1972, Great Britain at 18.8.1972 and Germany at 16.4.1974

[5]*Sevón*, Scandinavian Codification, page 343 f.; *Schubert*, Einfluß des Einheitskaufrechts, page 415 f.

[6]altogether there were nine working team meetings between 1970 and 1977 that were recorded in UNCI-

In 1976 the first draft for an international trade law was completed. This draft was revised on the 10th UNICITRAL-Commission in 1977[7]. The provisions for the formation of the contract, which were developed in the 9th meeting of the working team[8], were discussed by the commission at their 11th meeting in New York in 1978 and were put together with the provisions of the material trade law forming the so-called "**New York-Draft**". This "New York-Draft" was sent to the governments of the UN-memberstates. The answers of the governments were inserted into the drafts. They resulted in the foundation of the conference in Vienna in spring 1980.

62 nations took part in the **Vienna-Conference** in March and April 1980. Finally 42 States voted for the draft of the CISG. Regarding art. 99 CISG, the convention came into force "on the first day of the month following the expiration of twelve months after the date of deposit of the tenth instrument of ratification, acceptance, approval or accession". This was given on December 11th, 1986. The Convention on Contracts for the International Sale of Goods came into force on January 1st. 1988.

Since the end of 1973 Germany has been a member of UNCITRAL. It took part for the first time at the 7th meeting in 1974. At first Germany was only an observer in the working team. The CISG is applicable in Germany since January 1st, 1991.

Finally, the Convention on Contracts for the International Sale of Goods **was successful**. Now more than 40 States and all important trading nations are contracting states to the CISG.

3) Outline, contents and structure of the CISG

The CISG is structured in four parts:

- Part I (art. 1-13 CISG) regulates the **application of the CISG**. Beyond that it contains provisions for the interpretation of statements respectively other conduct of a party, consideration of usage, practices, and requirements of form.

TRAL-Yearbook I (1968-1970), page 176 f.; II (1971), page 50 f.; III (1972), page 77 f.; IV (1973), page 61 ff; V (1974), page 29 f.; VI (1975), page 49 f.; VII (1976), page 87 f.; VIII (1977), page 73 f.; IX (1978), page 61f., 83 f.; see also *Honnold*, Documentary History

[7] see to the so-called "Geneve-Draft", UNCITRAL- Yearbook VII (1976), page 89-96 and their further treat UNCITRAL-Yearbook VII (1977), page 25-65

[8] see *v. Caemmerer/Schlechtriem*, Kommentar zum Einheitlichen UN-Kaufrecht - CISG - , Vor art. 14-27, RN 2

- Part II (art. 14-24 CISG) contains the **formation of the contract**. The CISG regulates the completion of the contract and is also applicable for the general terms of business.
- Part III (art. 25-88 CISG) is the heart of the CISG and regulates the **duties of the buyer and the seller** in the contract. Furtheron, those rights are ruled here that are given to the other party in case that the buyer or seller does not perform in the correct way. The provisions for the passing of risk, avoidance of the contract, and damages which are given to both parties are summarised in separate chapters.
- Part IV (art. 89-101 CISG) contains the **final provisions** which regulate the coming into force of the CISG, the reservations of the contracting states, the relationship to other conventions, and the temporary scope of the CISG.

a) Field of application

In Germany and in all other contracting states the CISG is **automatically applicable**. No further declaration of intention of the parties is necessary to bring the CISG into application if the following **requirements** exist:

- a contract of sale or production of goods (art. 1 CISG) and no exemption in art. 2 and 3 CISG;
- either the buyer or the seller have their places of business in different contracting states (art. 1 I a CISG) or the places of business are in different states and the provisions of the private international law lead to the application of the law of a single contracting state (art. 1 I b CISG);
- the offer respectively the conclusion of the contract is given after the authoritative cut-off day (art. 100 CISG);
- and the parties did not exclude the application of the CISG (art. 6 CISG).

It is possible for the contracting states to express reservations, so that the state is not bound on part II (Formation of the contract) or part III (Sale of goods) or both (art. 92 CISG). Furthermore, a territorial limitation for a state with different systems of law (art. 93 CISG), the non-application under the same or closely related legal rules in contracting states (art. 94 CISG), and the non-application of the principle of freedom of form (art. 96) is possible.

In the daily practice the CISG covers all questions that are in the limelight, but it does not cover all law aspects, which can come up in an international contract of the sale of goods. Especially the validity of the contract as well as the effect to the property (art. 4 CISG) and the liability of the seller for death or personal injury caused by the goods (art. 5) are not covered by the scope of the CISG.

b) Formation of the contract

The CISG regulates the formation, the formal requirements, and the modification of an international contract (art. 11 f., 14 f. and 29 CISG). Regarding art. 14 f. CISG it is especially determined whether a valid offer is given in the right time. It is also mentioned which consequences will follow after a different or late acceptance. The incorporation of the general terms of business in an international contract is to evaluate under art. 14 f. CISG as well.

The control of the contents of the general terms of business and the validity of other provisions in an international contract are not covered by the CISG (art. 4 a CISG).

The most striking **deviations to the German law** of the BGB/HGB[9] are the following:

- an offer will only be valid if the price of the goods is at least sufficiently defined (art. 14 I CISG);
- an effective offer can be revoked if the revocation reaches the offeree before he has dispatched an acceptance (art. 16 CISG);
- an acceptance that contains additional or different terms which do not materially alter the terms of the offer normally brings the contract into effectiveness (art. 19 II CISG);
- as a rule, a late acceptance is unnoticed and particularly not a counter-offer (art. 18 II 2 CISG);
- the German principle of silence to a commercial letter of confirmation is not applicable (art. 18 I CISG);
- a change of the requirements of form, which was concluded between the parties, is only possible under the form which the parties had stipulated (art. 29 II CISG);

c) Rights and duties of the buyer respectively seller

In art. 25-88 CISG the rights and duties of the parties are finally summarised. The primer duties of the buyer and seller and the rights by neglect of on´s duty to the other party are described in separate chapters.

[9]BGB is the "Bürgerliches Gesetzbuch" (Book of the civil law) and HGB is the "Handelsgesetzbuch" (Book of trade law)

aa) Primer duties

Regarding art. 30, 53 CISG, the primary duties of the buyer respectively the seller are nearly the same as they are in the German law. The seller has to deliver the goods and to transfer the property of the goods. The buyer must pay the price and take over the goods.

Furthermore, the CISG regulates the duty of the seller to hand over the documents relating to the goods (art. 34 CISG). There are also provisions included that fix the arrangement for the carriage of the goods, for the notice of the consignment specifying the goods, and for the insurance referring to the carriage of the goods (art. 32 CISG). art. 54 CISG gives the buyer further obligation to take all steps before the date of payment, so that the payment can be made in conformity with the contract.

As a special **divergence to the German law** the following is to mention:

- sometimes the seller can fulfil his obligation to deliver the goods only by placing the goods at the disposal of the buyer (art. 31 b and c CISG). A hand-over is not necessary then;
- neither the seller nor the buyer are normally entitled to fulfil their obligations before the maturity date (art. 33, 52 CISG);
- regarding art. 48 CISG, the seller can possibly perform his obligation even after the date of the delivery;
- the payment of the price is to perform at the place of business of the seller (art. 57 I a CISG);
- art. 79 IV CISG explicitly standardizes the duty of one party to give notice to the other party in case of its own impediment and its effect on the ability to perform.

bb) Legal remedies

Compared to the German law, the CISG makes no difference what kind of defect in performance is given. For all possible defects in performances[10] the CISG gives all legal remedies which are mentioned in art. 45 I and 61 CISG (**standard term of performance-defects**) to the other party.

The legal remedies are always given if the debtor does not fulfil his obligation in the right way. It is not necessary that a reminder, a fixed deadline, declaration of refusal, or other measures of the creditor are given. Only in case of lack of conformity of the goods or of lack of rights in

[10] in Germany for example: Verzug, Unmöglichkeit, Unvermögen, positive Vertragsverletzung, Sachmangel, Rechtsmangel, Fehlen zugesicherter Eigenschaften ...

the goods the buyer has the obligation to examine and give notice to the seller if he does not want to lose his legal remedies.

The **legal remedies** that the CISG gives the creditor are especially:

- every party is entitled to carry on with its right of fulfilment (art. 46 and 62 CISG). The remedies of replacement respectively subsequent improvement can only be given under their further requirements in art. 46 II, III CISG.
- instead of the right of fulfilment the creditor is also entitled to declare the contract avoided (art. 49 and 64 CISG). As a rule it is necessary that a fundamental breach of contract is given. In some cases the creditor is entitled to declare the contract avoided in a fixed additional period of time (art. 49 I b and 64 I b CISG). In contrast to the German law the avoidance of the CISG does not depend on the kind of the defect in the performance, but on the weight of the defect in the performance;
- the buyer who got a delivery of goods that are not in correspondence with the contract has the right of fulfilment instead. Besides that he can declare the contract avoided. Furtheron, he has the right to reduce the price (art. 50 CISG);
- in contrast to the dogmatic German law the creditor besides all legal remedies mentioned above has the possibility to claim additional damages (art. 45 I b, II and 61 I b, II CISG);
- in every case in which the payment is not done in the right time the seller can claim interest (art. 78 CISG).

A fundamental distinction towards the German BGB/HGB is that all remedies are possible if only the objective breach of the contract is given. It is not necessarily the case that the party that does not fulfil its obligation is responsible for the breach of the contract. The CISG is following the theory of the guaranteed liability of the debtor, which is used in the Anglo-American practice of law.

The law of the defect in performance in the CISG is quite **different to the German BGB/HGB**. Especially the following differences are to be mentioned:

- the CISG does not make a difference between the different types of defects in the performance and it has a standard term of performance-defects. A liability for the party that does not fulfil its obligation is not necessary (guaranteed liability);
- regarding art. 35 CISG, a defect in the performance includes quantity, quality, and wrong delivery;
- defects in rights have to be declared to the seller in a reasonable time (art. 43 CISG);

- the buyer who does not give notice about the defect in the performance can possibly give a reasonable excuse for his failure (art. 44 CISG);
- there are certain circumstances which anable the buyer to claim a fulfilment from the seller (art. 46 II, III CISG);
- the buyer can only demand replacement if a fundamental breach of contract is given (art. 46 II CISG);
- a defect of performance, which is not a fundamental breach of contract by the seller, does not entitle the buyer to declare the contract avoided (art. 49 I CISG);
- the creditor does not lose the right of fulfilment with the expiration of an additional period of time.

4) Application of the CISG

For the application of the CISG a contract of sale of goods, an international relationship with a contracting state, and the temporary validity must be given. Furthermore, the application is possible with a positive declaration of the intention that the law of the CISG is applicable between the parties.

a) Contract of sales of goods

Regarding art. 1-3 CISG, the CISG is applicable for sales contracts and manufacturing contracts which are treated in the same way if not one of the cited exemptions is given. Other types of contracts do not fall under the application of the CISG.

Furthermore, subject to the CISG must be the delivery of goods with the exception of the objects referred to in art. 2 d-f CISG.

Contracts which are recognisably concluded for private use are not falling under the area of application of the CISG (art. 2 a CISG).

b) International relationship with contracting states

The CISG does not in all cases replace the German BGB/HGB respectively the corresponding parallel provisions in other states for all contracts of sales of goods. An application is only possible in a contract concerning border traffic. In pure national matters the national law is still in force and the CISG is not applicable there.

Furthermore, the CISG does not want to regulate all international contracts of the sale of goods without any exception. It is rather applicable in those cases which are at least **in touch with one of the contracting states** of the CISG. Outside this demarcation line the international contracts of the sale of goods are to be handled with the provisions of the private international law[11].

But the necessarily required international relationship to a contracting state is not just based on the formula, that every time a delivery from a seller located in a contracting state to a buyer in another contracting state must be given. The following must rather be distinguished in respect of the **area and the personal cases of application** of the CISG:

- the contract of the sale of goods has a character of border traffic or a character of international relationship if at the time of the formation of the contract the parties' places of business are recognisably located in different states which do not necessarily need to be contracting states (art. 1 I 1, II CISG and art. 10 CISG);
- the necessary relationship to a contracting state follows either by the fact that the states in which the seller and the buyer have their place of business are both contracting states (art. 1 I a CISG), or that the rules of the private international law lead to the application the law of a contracting state (art. 1 I b CISG). In either cases of art. 1 I CISG the reservations of the contracting states in art. 92, 93, 94 and 96 CISG are to be to considered;
- the nationality of the seller or the buyer has no importance for the application of the CISG (art. 1 III CISG).

aa) Place of business in different States

For the internationality and therefore the possibility of the application of the CISG it will do if the seller and the buyer are located in different states (art. 1 I CISG) and that this fact can be clearly recognised (art. 1 II CISG). In **contrast to the Hague Trader Rules** the following exeptions are not to take into account:

- it does not depend on the question whether a border traffic of the goods is carried out or
- whether the offer and acceptance are performed in different states or
- whether the contract is concluded in a different state than in that state in which the delivery has to be performed (art. 1 I Hague EKG).

The only important criteria for the demarcation of the area and personal application of the CISG is the place of business of the parties of the contract (art. 1 I CISG).

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[11] in Germany are the provisions of art. 27 f. EGBGB appliciable

There is no general definition of the term place of business in the CISG. That is why outside art. 10 CISG the place of business can only be found in connection with the actual circumstances of each case. For an equal application of the CISG regarding art. 7 CISG, an autonomous interpretation is preferable against the national law [12]. So for the interpretation of the **place of business** the following criteria important:

- each establishment that is equipped with legal independence is normally a place of business[13]. The place of business for a German private limited company or a Swiss joint-stock company is Germany or Switzerland. It is unimportant whether a company is legally or economically controlled by another company in a different state. A daughter company which has its own legal capacity and which acts with its own name is not just a further branch of this parent company, but a real company and party of a contract with an own place of business regarding art. 1 I CISG[14].

bb) Connection to a contracting state

Besides the international character of the contract, which is given if the parties of the contract are located in different countries, it is furthermore necessary for the application of the CISG that there is a connection to a contracting state. Despite of the reservations in art. 92, 93, 94 and 95 CISG there is a **contact to a contracting state**, which is necessary regarding art. 1 I CISG, if:

- either the states in which the seller and the buyer have their place of business are contracting states of the CISG (art. 1 I a CISG) or
- the rules of the private international law lead to the application of a contracting state (art. 1 I b CISG).

aaa) Place of business in contracting states

Regarding art. 1 I a CISG the CISG is applicable if for the concrete contract of the sale of goods the place of business of the seller and buyer are in contracting states. Further requirements are not necessary, so that for example the CISG is also applicable for a contract

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[12] here has particually *Garro/Zuppi*, Compraventa international de mercaderias, page 89 f. a different opinion

[13] *Endelein/Maskow/Stargardt*, Konvention der Vereinten Nationen über Verträge über den Internationalen Warenkauf, art. 10, RN 2

[14] *Herber/Czerwenka*, Internationales Kaufrecht, art. 1, RN 15

which is concluded in Germany between a company in the Netherlands and a German buyer containing goods that are stored in Germany.

bbb) Private international law leads to the application of the law of a contracting state

If either one or no party has its place of business in a contracting state and consequently art. 1 I a CISG is not applicable, a connection to a contracting state is given if the private international law lead to the application of the law of a contracting state (art. 1 I b CISG). The purpose of the application of art. 1 I b CISG is to extend the personal areas of application of the CISG. Both cases of application in art. 1 I CISG are fundamentally equal. But it is always necessary that the parties of the contract have their places of business in different states because if they do not, there is no international contract in the sense of the CISG.

If the places of business are in different contracting states but because of a reservation against art. 92, 93 and 94 CISG the application of the CISG is not given, it is not possible to fall back into the second case of application of the private international law expressed in art. 1 I b CISG[15]. Regarding art. 1 I b CISG the application of the CISG by the private international law rules is only possible under the following circumstances: Without the application of art. 93 III CISG the relevant places of business both of the seller and the buyer are not in contracting states. Regarding art. 1 I b CISG the view for the circumstances for the application of the private international law must be taken from that state which private international law is relevant. But the private international law provisions neither have a standardized origin nor different starting points, so that the results can be different. It depends on the state in which the decision must be found.

In case that art. 1 I b CISG is applicable the relevant rules of the private international law can be found in the relevant conflict of law rules[16]. In Germany these relevant rules are art. 27, 28. Sometimes art. 29 EGBGB is applicable, too[17]. Special conflict of law rules for part- or prequestions or other special aspects are not applicable in connection with art. 1 I b CISG[18]. For the **application of the CISG** there can be two possibilities that are important:

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[15]other opinion is *Schlechtriem*, in: *v. Caemmerer/Schlechtriem*, Kommentar zum Einheitlichen UN-Kaufrecht - CISG - , Vor art. 14-27, RN 12; *Herber/Czerwenka*, Internationales Kaufrecht, art. 92, RN 3

[16]*Endelein/Maskow/Stargardt*, Konvention der Vereinten Nationen über Verträge über den Internationalen Warenkauf, art. 1, RN 6.2

[17]EGBGB is the "Einführungsgesetze zum Bürgerlichen Gesetzbuch", (Introduction law of the civil law book)

[18]*Karollus*, UN-Kaufrecht, page 31, 33

- either an objective reference to the legal system in which the party of the typical performance has its place of business (art. 28 II EGBGB) or
- the selection of the parties regarding art. 27 EGBGB[19].

In a contract of the sale of goods the typical performance regarding art. 28 II EGBGB is normally done by the seller[20]. As a consequence the CISG is in doubt applicable for all German exports. As far as the places of business are located in contracting states and if there is no reservation regarding art. 93 CISG, this consequence already follows out of art. 1 I a CISG. In all other cases the application of the CISG follows out of art. 1 I b CISG and 28 II EGBGB.

In other words, the CISG is not applicable for German sellers in export contracts if the parties chose a different law or the buyer is located in a different area regarding art. 93 CISG.

Besides the objective connection to art. 28 EGBGB there is also an effective possibility for the application of the CISG via art. 1 I b CISG by choosing the law of any state regarding art. 27 EGBGB. Therefore it is not necessary for the parties to know that regarding art. 6 CISG with the application of the law of one party automatically the CISG comes into application [21].

A choice of law is not only possible if it is expressed explicitly. An implied choice of law is possible as well. But general rules on the circumstances under which an implied choice of law is possible are not available. The CISG is very often applicable in connection with the declaration of a German place of jurisdiction and a German place of performance by the implied choice of the German law and therefore via art. 1 I b CISG.

But the reservation in art. 92, 93, 94 and 95 CISG must be taken into account, too. Long lasting negotiations about the reference to the conflict of law provision as fixed in art. 1 I b CISG and therefore the extension of the application of the CISG followed at the conference in Vienna. Finally a compromise was found in which all contracting states can exclude the application of art. 1 I b CISG via art. 95 CISG. This reservation was done by China, Czechoslovakia and the United States of America and is valid until now.

In the view of a state that made a reservation the CISG only comes into application if the places of business are located in different contracting states (art. 1 I a CISG). There is no obligation to apply the CISG via art. 1 I b CISG. But for the other contracting states the

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[19] *Czerwenda*, Rechtsanwendungsprobleme im internationalen Kaufrecht, pages 160 f.

[20] *Heldreich* in: *Palandt*, Bürgerliches Gesetzbuch, art. 28 II EGBGB, RN 8

[21] Sekretariatskommentar, Official Records, art. 1, RN 8; *Czerwenda*, Rechtsanwendungsprobleme im internationalen Kaufrecht, pages 161; *Pünder*, RIW 1990, page 873

consequences of the reservation regarding art. 95 CISG are controversial[22]. Apart from the special situation in Germany[23], it might be right to attach the reservation only to the view of those states that made the reservations come into force. If the private international law of a contracting state which had made no reservation regarding art. 95 CISG leads to the law of China, Czechoslovakia, or the United States of America, the CISG will be applicable via art. 1 I b CISG, also if these states made a reservation concerning art. 95 CISG. The reservation only exempts the states of the obligation to apply the CISG via art. 1 I b CISG[24].

In § 2 of the German "Vertragsgesetz"[25] it is explained that art. 1 I b CISG is also not applicable if the rules of the private international law lead to the application of a state which made a reservation regarding art. 95 CISG. In the German view the statement of the legislation is independent from the view of the international law on this statement[26].

c) Temporary validity

In Germany the CISG came into force on January 1st, 1991. But not all contracts of the sale of goods, that are falling under the CISG, are judged by the CISG without any exemption. Furthermore the temporary validity regarding art. 100 CISG is necessary.

From the German view the relevant cut-off day regarding art. 100 I or II CISG is not January 1st, 1991. It depends on the fact whether an application regarding art. 1 I a CISG or art. 1 I b CISG is given. In the case of art. 1 I a CISG the CISG must be applicable on the cut-off day in both contracting states of the seller and the buyer. In the other case regarding art. 1 I b CISG the cut-off day is the day on which the CISG comes into force in the state to which the private international law leads.

d) Situation in South Africa as a non contracting state

An application of the provisions of the CISG in South Africa as a non contracting state **is only possible regarding art. 1 I b CISG**. Therefore the private international law of this state from which the contract is to examine must lead to the application of the law of a contracting state.

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[22]see *Pünder*, RIW 1990, page 869 f.; *Martiny*, in: Münchner Kommentar zum Bürgerlichen Gesetzbuch, RN 28 f. to Anhang II to art. 28 EGBGB; and *Kritzer*, Guide to practical applications of the United Nations Convention on Contracts for the International Sale of Goods, page. 28 f.

[23]see later in the next paragraph

[24]*Czerwenda*, Rechtsanwendungsprobleme im internationalen Kaufrecht, pages 158 f.; *Karollus*, UN-Kaufrecht, page 31, 34 and *Piltz*, NJW 1989, page 618 f.

[25]Vertragsgesetz is the act which brings the Vienna Conference in Germany into force

[26]*Herber/Czerwenka*, Internationales Kaufrecht, art.1, RN 19

If therefore in a international contract between a South African party and a further party the private international law of South Africa or the other state leads to the application of the law of a contracting state, the CISG will automatically be applicable for this contract.

Because the seller normally made the typical performance[27], all import contracts of South Africa with a contracting state of the CISG made the CISG applicable via art. 1 I b CISG. The private international law of the exporting contracting states lead to its national law which includes the CISG. Normally the CISG is not applicable for all export contracts from South Africa because the private international law of South Africa, which is in this case applicable, leads to the applicability of the law of South Africa, which is not a contracting state.

5) The pros and cons for the buyer and the seller between the CISG and the German law

For the consideration between the pros and cons for the buyer and the seller in respects of the applicability of the CISG or the German law the material law that includes the formation of the contract, the duties of the buyer and the seller of the contract, and the rights by neglection of one`s duty to the other party must be examined.

a) Formation of the contract

For the formation of the contract an offer and its acceptance are necessary. There must be regulations for a different or late acceptance and requirements of form.

aa) Introduction

Besides the duties and the rights of the parties in art. 14-24 CISG the CISG also regulates the formation of the contract. regarding art. 4 CISG the normal formation of these provisions are also applicable for changes, supplentments, and cancellations of CISG-contracts or agreements about the legal consequences in cases of breach of contract[28]. The provisions for the formation of the contract are only effective in the area of application of the CISG but also for other contracts that have different contents if the business is altogether following the CISG regarding art. 3 CISG.

The CISG does not define all legal aspects of the formation of the contract. Instead of that the CISG regulates the external agreements of the contract that is given with the external

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[27] see also the Rome Convention art. 4 II and the Hague Convention art. 8 I

[28] *Rehbinder* in: *Schlechtriem*, Einheitliches Kaufrecht und und nationales Obligationsrecht, page 153 f.; *Herber/Czerwenka*, Internationales Kaufrecht, art.29, RN 3

noticeable offer and acceptance. The juristic personality and legal capacity of the parties, threats, mistakes, the entitlement of representation, and the ineffectivety in other law systems are not to take into account. They are no object of the CISG, art. 4 a CISG. The provisions of the state are applicable for these problems to which law the private international law leads. Regarding the CISG the external noticeable formation of the contract is to examine finally.

The provisions of the external noticeable formation of the contract (art. 14-24 CISG) can be found in Part II of the CISG. art. 92 CISG contains the possibility for the contracting states that part II is not applicable for them. Denmark, Finland, Norway and Sweden have used this possibility. By doing so theses states are non contracting states for the provisions on the formation of the contract . If the buyer or the seller have their place of business in one of theses states and the application of the CISG is given via art. 1 I a CISG, then art. 14 f. CISG would not be applicable anymore. The same fact would apply if under art. 1 I b CISG the private international law lead to one of these states. The provisions that are applicable under these constellation can be found in the private international law[29].

The requirements on form are not regulated in part II. They can be found in art. 11 and 29 CISG. art. 96 CISG contains the possibility that these articles are not applicable for contracting states[30]. This possibility has not yet been used by the Scandinavian states, but by Argentina, Chile, China, Russia, Ukraine, Hungary and Boleros. Therefore the provisions of form can also be found via the private international law of these states[31].

The construction of the formation of the contract and the requirements of form are regulated differently in the different law systems. Without further specification[32] there are different points of view in the continental European and the Anglo-American law-families. On the one hand there is the reception-theory and on the other hand there is the send-theory. There are also the so-called commitment of the offeree to the offer on the one hand and the free revocation of an offer on the other hand. The provisions of the CISG in art. 14 f. CISG do not follow the one way or the other. It is rather a compromise of negotiation which reflects all theories and in which all theories are tried to be co-ordinated.

Regarding art. 14 f. CISG there must be an extensive analysis of the formation of the contract, because the consequences of an invalid contract in an international business are very difficult. If

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[29]for the formation in Denmark see *Ehricke*, RIW 1989, 178 f.

[30] *Herber/Czerwenka*, Internationales Kaufrecht, art.12, RN 2

[31]see *Jung*, Recht und Praxis des chinesischen Warenimports, page 103 f.

[32]see for that *Zweigert/Kötz*, Einführung in die Rechtsvergleichung auf dem Gebiete des Privatrechts, Band II page 41 f., 53 f.

the delivery of the goods is made in the foreign state and the buyer does not want to pay the stipulate price explaining that the formation of the contract was wrong, the handling back is more expensive and difficult because of duty or currency problems than in domestic contracts. It is also easier for a buyer to argue against the claim for the payment of the seller with an invalid formation of the contract than to argue with the help of the more difficult law of guarantee.

Compared to the German law the following provisions of the CISG are not identical: art. 14 I, 16, 18 I, II, 19 II and 29 II CISG.

bb) Offer and acceptance

Regarding art 14 f. CISG the mechanisms of the formation of the contract base on traditional components, i.e. offer and corresponding acceptance. For an **effective formation** of the contract the following is necessary:

- regarding art. 15 CISG, an offer which reaches the offeree and which includes all necessary components of art. 14 CISG, is not revoked if the revocation reaches the offeree before he has despatched an acceptance, (art. 16 CISG). Rejection does not need to be given as well (art. 17 CISG);
- regarding art. 18 and 19 CISG, an explicit and corresponding acceptance that is in time and that accepted the offer material of the addressee must be given;
- in many cases it can be difficult to identify the offer and the acceptance. But because for the CISG only a material content is necessary, a contract can become effective without finding an offer or an acceptance in the correct order. In the end it will do if a material agreement with well-known contents is given and if the parties want to be bound on this agreement[33].

aaa) Effective offer

In the provisions of the CISG the following components for an **effective offer** are necessary:

- determination of the addressee (art. 14 I 1, II CISG);
- sufficient determination of the contents especially the goods, the quantity, and the price (art. 14 I 2 CISG);

[33] *Rehbinder* in: *Schlechtriem*, Einheitliches Kaufrecht und und nationales Obligationsrecht, page 166, *Bonell*, RIW 1990, 695 f. and *Bucher*, Wiener Kaufrecht, page 63 f.

- indication of the intention of the offeror to be bound in case of acceptance (art. 14 I 1 CISG);
- reaching at the offeree without irrevocation (art. 15, 24 CISG);
- no revocation (art. 16) and
- no rejection (art. 17 CISG).

If one of the mentioned components is missing, the offer will not be effective and therefore one component of the formation of the whole contract is missing. Because the provisions in art. 14 f. CISG are final components for the formation of the contract, no other national law which maybe forms the contract in an easier way is applicable[34].

Compared to the **German provisions** of the formation of the contract there are two different demands in an effective offer:

- the sufficiently definition of the price (art. 14 I CISG) and
- the revocation in art. 16 CISG.

aaaa) Definition of the price (art. 14 CISG)

Regarding art. 14 CISG it is necessary for an effective offer and also for an effective formation of the contract, that the price is sufficiently defined. But on the other hand art. 55 CISG regulates the price if a determination of the price is not possible. This open discrepancy between the two provisions was recognised at the conference in Vienna but all attempts to harmonise the different views were not successful[35]. Background for the keeping of a sufficient definition of the price in art. 14 CISG is that in a lot of the Roman law systems there is only a valid formation of the contract if some indications for the fixing of a price in the contract can be found[36].

In the historic development of the CISG the basic decision for the "pretium certum" can be found in art. 14 CISG[37]. It says that under remittal of art. 55 CISG it is not possible to leave a sufficient definition of the price as stated in art. 14 CISG and so to make the negotiations between the parties successful via art. 55 CISG [38].

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[34] not so clear *Garro/Zuppi*, Compraventa international de mercaderias, page 106

[35] *Witz*, Der unbestimmte Kaufpreis, page 223 f.

[36] see for example for the frence law *Witz*, Der unbestimmte Kaufpreis, page 26 f.

[37] *Witz*, Der unbestimmte Kaufpreis, page 223 f. and *Rehbinder* in: *Schlechtriem*, Einheitliches Kaufrecht und und nationales Obligationsrecht, page 157

[38] *Herber/Czerwenka*, Internationales Kaufrecht, art. 14, RN 6 and art. 55, RN 4; *Witz*, Der unbestimmte Kaufpreis, page 225f; other opinion *Loewe*, Internationales Kaufrecht, page 76 f.; *Kritzer*, Guide to practical

But under certain circumstances, especially if the goods are already sold by a fixed price or by the use of lists for the price or for the price in former contracts, it is possible that the parties have fixed a silent, sufficient definition of the price without special negotiations[39]. In practice this is an interpretation of statements or other conducts regarding art. 8 CISG. -its use and practice between the parties concerning art. 9 CISG is often a sufficient definition of the price.

The acceptance of a silent definition or a settlement for a sufficient definition of the price must not be existing just in fiction[40]. There must be some intention that the parties have actively defined the price.

The German interpretation ruled in § 316 BGB is not applicable in the CISG[41]. The seller, in doubt of the price, can fix the price here, and an effective offer is given if no points for a sufficient definition in the statements or other conducts of the parties are to find.

On the one hand the formation of the contract is more convenient for the buyer under the CISG than under the German law, because the seller is not entitled to fix the price if there is a doubt about it. The seller in an international business has a bigger obligation to fix the price for the goods.

But on the other hand the formation of the contract becomes more difficult than under the German law. In an international contract the consequence of an invalid contract is more difficult than in a national business. The handling back, for example, is more expensive and difficult because of duty- or currency problems. Normally these problems hit the seller but also problems for the buyer can arise. If the contract is invalid the buyer has no right to get the goods for his own. But normally he expects to get the goods at a fixed date and he needs these goods at this point of time. If the contract is invalid he must get the goods from a different seller and often the delivery is not possible to the date when the goods are needed. The risk of a later delivery can be much higher than the risk that the seller fixes the price. He normally wants to get the price which is to be paid for the goods in international business and which the buyer must also pay for different sellers.

So there is no real advantage for the seller or the buyer in the CISG or in the German law.

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applications of the United Nations Convention on Contracts for the International Sale of Goods, page. 160; Karollus, UN-Kaufrecht, page 62 and *Bucher*, Wiener Kaufrecht, page 71 f.

[39] *Endelein/Maskow/Stargardt*, Konvention der Vereinten Nationen über Verträge über den Internationalen Warenkauf, art. 55, RN 3; *Schlechtriem*, Uniform Sale Law, page 52 f.

[40] *Rehbinder* in: *Schlechtriem*, Einheitliches Kaufrecht und und nationales Obligationsrecht, page 158

[41] it was also not appliciable in the Hague Mercator Rules, BGH 1990, 2059 f.

bbbb) Revocation, art. 16 CISG

Regarding art. 16 CISG it is possible to revoke an offer if the revocation reaches the offeree before he has dispatched an acceptance. Every conduct of the offeree that makes clear that he does not want to be bound any further to his offer can be seen as a revocation.

Since the decision of the CISG for a free revocation of the offer, it is not any longer allowed for a party of the contract to fall back to the national law provisions in order to get a compensation claim for the revocation of the offer and the neutralisation of the contract[42]. Therefore the offeree must make sure to form the contract with a fast acceptance or he must arrange that the offer cannot be revoked in a fixed period of time.

A revocation is only possible if the revocation reaches the offeree before he dispatched an acceptance (art. 16 I CISG). It is not necessary here that the acceptance reaches the offeror. This rule contains an uncertainty for the offeror in the revocation, because he does not know if his offer was accepted by the offeree. This provision is a compromise between the free revocation of the offer on the one hand and a prohibition of the revocation on the other[43].

But it is not possible to revoke the offer in all cases. Regarding art. 16 II a and b CISG, there can be no revocation if the offer is irrevocable. A typical indication of an irrevocability can be a fixed period of time in which the offer must be accepted. But in the Anglo-American law-system there is the opinion that after a fixed period of acceptance there also arises the right to revoke the offer[44]. Therefore it can not be said that in a fixed period of acceptance a revocation is not possible[45].

Under the German provision in § 130 I BGB, a revocation is only possible until the offer reaches the offeree. Therefore the offeror is bound to his offer until an acceptance can not be seen as an acceptance because the time between the offer and the acceptance is not reasonable (§ 147 BGB).

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[42] *Koller*, in: *Staub*, HGB-Großkommentar, vor § 373 HGB, RN 643 and *Schlechtriem*, in: *v. Caemmerer/-Schlechtriem*, Kommentar zum Einheitlichen UN-Kaufrecht - CISG - , art. 16, RN 13

[43] Sekretariatskommentar, Official Records to art. 14, RN 5

[44] *Kritzer*, Guide to practical applications of the United Nations Convention on Contracts for the International Sale of Goods, page. 165 f.

[45] other opinion is *Reinhart*, UN-Kaufrecht, art. 16, RN 8; *Garro/Zuppi*, Compraventa international de mercaderias, page 126

Under the German law the offeror has less possibilities to make his offer ineffective, because he is bound to this offer. A better opportunity is granted to the seller in the CISG than under the German law. These provision of the CISG has the effect that the formation of the contract becomes quicker, because the offeree cannot be sure that the offer is effective for a specific time. The seller always has the possibility to revoke the offer and he must not pay for a compensation claim. This is a clear advantage for the seller in the CISG compared to the German law.

bbb) Acceptance in time

With acceptance of the addressee the contract becomes **valid in the correct time**. As a requirement the following is necessary:

- a statement or other conduct of the offeree that indicates an acceptance (art. 18 I 1 CISG);
- silence or inactivity is not an acceptance (art. 18 I 2 CISG);
- a reaching of the indication of assent at the offeror (art. 18 II 1 CISG respectively a concluding acceptance (art. 18 III CISG);
- the acceptance of the offer must be given in a reasonable time (art. 18 II 2 and 3 CISG);

An effective acceptance of the effective offer brings the contract into validity (art. 23) and fixes the place and time of the conclusion of the contract. Considering the different places and times of the contract it depends whether the acceptance must reach the addressee or an enforcement will do for the formation of the contract (art. 18 II1 CISG respectively art. 18 III CISG).

Compared to the German law there is no basis in art. 18 I CISG for applying the German concept of silence to a commercial letter of confirmation in the CISG. art. 18 CISG regulates the behaviour that brings the bid of the contract into validity. But for the concept of silence to a commercial letter of confirmation that is different to a confirmation of an order, the confirmation of the contract must be made in the minds of the parties.[46].

A commercial letter of confirmation is a written confirmation of an orally formulated contract that is different from the oral formation of the contract leaving out murmur and dishonesty.

Under the application of the German law it becomes clear that in this concept the commercial letter of application which is different to the concept of the oral contract, forms the contract with the contents of the different commercial letters of confirmation.[47]. In other law systems

[46] *Walter*, Kaufrecht, page 341 f., 343

[47] *Walter*, Kaufrecht, page 348

the importance of silence to a commercial letter of confirmation is ruled in a much more restrictive way.[48].

But the concept of silence to a commercial letter of confirmation can also come into force under the CISG. Because there is no positive provision in the CISG an application is only possible with agreements of the parties regarding art. 6 CISG or with the use of art. 9 CISG.[49]. The burden of proof lies on the party that wants to bring the concept of silence to a commercial letter of confirmation into application.

The renouncement of the concept of silence to a commercial letter of confirmation is an advantage for the legal stability of an international business which means an advantage for the seller and the buyer.

cc) Different and late acceptance

For the effectiveness of the contract an identical acceptance in a reasonable time is necessary. A late acceptance normally brings the contract into non effectiveness. The following must be differentiated here:

- a **different acceptance** which contains additional or different terms in material matters is a rejection of the offer and constitutes a counter-offer (art. 18 I CISG);
- an acceptance which contains additional or different terms which do not relate to material matters, constitutes an acceptance unless the offeror, without any delay, dispatches a notice to that effort (art. 18 II CISG;
- a **late acceptance** that was sent under those circumstances that if its transmission had been normal, it would have reached the offeror in due time, is effective as acceptance unless, without delay, the offeror orally informed the offeree that he considers his offer as having and has lapsed dispatches as a notice to that effect (art. 21 II CISG);
- a late acceptance because of different reasons than mentioned in art. 21 I CISG is nevertheless effective as an acceptance if without delay the offeror orally informs the offeree of despatches, art. 21 II CISG.

aaa) Different acceptance

For an acceptance of an offer it is not necessary to answer with a "yes". The repetition of the offer word by word is not necessary either. It is more important that the legal contents of the

[48] see for example *Esser*, ZfRV 1988, 167 f.

[49] *Herber/Czerwenka*, Internationales Kaufrecht, art.14, RN 18

offer are accepted unchanged[50]. Mistakes in writing or transmission, language divergences, or a wrong expression are not important if it comes clear that the sense of the offer remains unchanged[51].

If the explanations of the offeree should be seen as an acceptance, but they include additional or different terms, it cannot be seen in all cases as a formation of the contract or as a refusal of the offer. Regarding art. 19 II CISG it depends on the question whether the modifications in the acceptance change the material of the offer.

In article 19 III CISG there are some terms mentioned that are considered as a material modification. But not all modifications of the terms that are mentioned in art. 19 III CISG are a compelling evidence for a material modification[52]. In the history of article 19 CISG art. 19 III CISG is a rule for the interpretation. But with other agreements regarding art. 6 CISG or usage or practice concerning art. 9 CISG this modification can get a different meaning and they are not any further contracting material[53].

But normally every modification in price, payment, quality, and quantity of the goods, place, and time of the delivery, extent of one party's liability to the other, or settlement of disputes are considered materially. The mentioned list in art. 19 III CISG is not closing[54], so unmentioned modifications can be contracting material also. But in this case it is necessary to find circumstances that allow such a qualification [55]. In the end it is important whether with the modification there is a change in content

An acceptance of material modifications does not bring the contract into validity but if there are no material modifications this does not stand against the formation of the contract, either. It does not make any difference if there is no material modification, because a modification is not mentioned in art. 19 III CISG and no circumstances for material modifications are applicable. Or there are one or more modifications that are mentioned in art. 19 III CISG, but

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[50]Sekretariatskommentar, Official Records to art. 17, RN 3

[51]*Schlechtriem*, in: *v. Caemmerer/Schlechtriem*, Kommentar zum Einheitlichen UN-Kaufrecht - CISG - , art. 19, RN 6

[52]but with a different opinion *Reinhart*, UN-Kaufrecht, art. 19, RN 6 and not so strong *Herber/Czerwenka*, Internationales Kaufrecht, art.19, RN 11,12

[53]*Schlechtriem*, in: *v. Caemmerer/Schlechtriem*, Kommentar zum Einheitlichen UN-Kaufrecht - CISG - , art. 19, RN 8; *Garro/Zuppi*, Compraventa international de mercaderias, page 124 and *Rehbinder* in: *Schlechtriem*, Einheitliches Kaufrecht und und nationales Obligationsrecht, page 165

[54]Sekretariatskommentar, Official Records to art. 17, RN 11-14

[55]*Schlechtriem*, in: *v. Caemmerer/Schlechtriem*, Kommentar zum Einheitlichen UN-Kaufrecht - CISG - , art. 19, RN 9

there are different circumstances that stand against the applicability of art. 19 III CISG so the interpretation rule is not applicable.

Concerning the contents, the contract follows the acceptance of the not existing material modifications (art. 19 II 2 CISG). The offeror can fight against this consequence if he, without undue delay, orally objects the discrepancy of dispatches a notice to this effect (art. 19 II 1 CISG).

Compared to the German law, in § 150 II BGB there is a different provision. Regarding § 150 II BGB all modifications in the acceptance are counter-offers. There is no distinction between material or other modifications. A formation of the contract is not possible with a modification. Under the CISG it is easier to bring the contract into effectiveness because the formation of the contract becomes invalid only with a material modification.

This provision is an advantage for the legal stability of an international business becomes smaller if the formation of the contract has not such extreme requirements. The offeror has the possibility to act against the modifications to regulate the easier formation (art. 19 II CISG).

bbb) Late acceptance

The offer or counter-offer becomes invalid if the acceptance is not done in a reasonable time. For this time normally the date of the reaching of the acceptance to the offeror is important. Only in the case of art.18 II CISG the acceptance can not become effective regarding art. 18 II 2 CISG. Especially in the CISG a provision is missing which rules that a late acceptance is a counter-offer like in German law (§150 I and II BGB).

But not all late acceptance become invalid. Regarding art. 21 CISG, it depends on the fact whether the acceptance as a normal transmission reaches the offeror in due time or in other cases of later acceptance[56]. A requirement for art. 21 CISG is that the declaration is an acceptance and not a refusal of the offer are a counter-offer. In these cases there is no difference to the German law.

dd) Requirements of form

The CISG does not want to regulate the requirements of form. The parties are free to choose the form of their contracts.

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[56]see for this *Piltz*, Internationales Kaufrecht, Das UN-Kaufrecht in praxisorientierter Darstellung, München 1993, § 3 Vertragschluß und Form, RN 103-112

The form-provisions in art. 11 and 29 CISG are also applicable for contracting states that made a reservation regarding art. 92 CISG. Concerning art. 12 CISG the application of art. 11 and 29 CISG are not possible if a party of the contract has its place of business in a contracting state that has used the reservation regarding art. 96 CISG. At the moment these states are Argentina, Chile, China, Russia, Ukraine, Hungary and Boleros.

Regarding art. 29 II CISG the parties have the possibility to agree, besides the free choice of form, on any modification or termination in a special form. If no other agreements are made and there is no different use or practice, all requirements of this form must be given.

If a written contract says, that every modification must be done in written form (art. 29 II 1 CISG), an oral modification of the contents of the contract is not possible. This counts if of both parties do not want to be bound to the oral modification[57]. The CISG allows the parties to terminate their agreement on behalf of the form but this termination must be in the required form[58].

In the German law it is possible to make an effective oral modification of the contents of the contract if the parties want to be bound to the oral modification. But with a contract in an international business it is a special case, so the modifications or terminations must be formulated clearly if the parties want the written form. This is a protection and an advantage for the buyer and the seller because the development of the contract can follow in an easier way and the doubts inside the contract become smaller.

b) Duties of the buyer and the seller of the contract

Besides the provision of the formation of the contract the most important provisions in the CISG are the provisions of the duties and the rights of the parties. The provisions are summarised in Part III of the CISG (art. 25-88 CISG, Sale of Goods) and contain the final programme of the duties of the buyer and seller.

The provisions of the duties of the buyer and the seller only get into effectiveness in the area of application. Regarding art. 92 I CISG it is possible to cut Part III out of the CISG. But this reservation is not accepted by one of the contracting states.

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[57] *Koller*, in: *Staub*, HGB-Großkommentar, vor § 373 HGB, RN 659

[58] *Herber/Czerwenka*, Internationales Kaufrecht, art.29, RN 6

Compared to the German law, there are the following provisions of the CISG which are not identical: art. 31, 33, 48, 57 I a, and 79 IV CISG.

aa) Duties of the seller

The basic **duties of the seller** are summarised in art. 30 CISG and they are specified in art. 31 f. CISG. Regarding these provisions, the seller:

- must deliver the goods to the right place at the right time (art. 31 and 33 CISG);
- is bound to hand over the documents relating to the goods at the time, the place, and the form required by the contract (art. 34 CISG);
- must transfer the property in the goods (art. 30 CISG) and
- must fulfil all other duties that are agreed on in the contract or come in force by law (art. 34 CISG).

aaa) Delivery of the goods

In contrast to art. 19 of the Hague Trader Rules (EKG) no definition of delivery is applicable in the CISG. The delivery by the seller can therefore extend over the hole spectrum between a disposal for the buyer on the one hand and transfer by hand, that means delivery in the way that the other person can control fictive the goods, on the other hand.

The CISG regulates the delivery in different ways. In art. 31 a CISG it is regulated that the seller in a contract of sale that involves carriage of the goods must also hand over the goods. In other cases regarding art. 31 b and c CISG it will do if the seller places the goods at the buyer's disposal.

Under the CISG the seller does not have the duty to fulfil the delivery as a "whole" although the goods are transferred in an international contract. Regarding art. 31 b and c CISG - but excepted art. 31 a CISG - it is clear that the goods must be carried to the place of the seller by the buyer. Within this background a contract of sale involves carriage in art. 31 a CISG. The seller has the obligation to regulate the delivery of the goods to the buyer but he is not responsible for the transport. This interpretation is supported by art. 32 II CISG in which the seller has to work out the contracts for the delivery in a carriage-contract[59].

Regarding art. 31 a CISG the seller fulfils his obligation of the delivery in a carriage-contract with the handover and the formation of the necessary contracts for the carriage. The seller not

[59]Sekretariatskommentar, Official Records to art. 29, RN 5,7 and art. 79, RN 2

liable for mistakes or wrong performances of the carrier[60]. If more than one carrier is involved, the handover to the first carrier will do (art 31 a CISG). But when the seller gives the goods to a forwarding agent, who organises the delivery, the liability is still at the seller until the forwarding agent has handed over the goods to the first carrier[61].

If no carriage-contract exists, the seller fulfils his obligation of delivery by placing the goods at the buyer's disposal (art. 31 b and c CISG). A handover, i.e. the buyer or an authorised person gets the custody, is not necessary. The loading of the goods is in doubt the obligation of the buyer[62]. The seller has to fulfil his obligation of delivery if he has finished all work, so that in the end the buyer can get the possession of the goods[63] and can make use of them. If the seller makes the delivery of the goods dependent on further obligations, there will be no placement of the goods on the buyers disposal[64].

In lots of cases there is only the possibility for the buyer to take the possession of the goods if the goods are sorted out and marked[65]. A special outsourcing is not necessary, if, like in filling components the declaration of the possession after the passing over is not a problem[66]. In some circumstances it might be necessary that there is a notice to the buyer for the placing of the goods to his disposal. But the notice is not necessary if a date for the delivery was agreed on or if the buyer knows that the goods are ready for delivery[67].

Compared to the German law, the case of the placing of the goods to the buyers disposal will not do for a delivery under German law. Regarding § 433 I BGB, the seller must hand over the goods in all cases. Because of that in the German law the obligation of the seller is bigger. This can be an advantage for the buyer because with a direct handover problems with the goods are easier to find and to handle. On the other hand there is also an advantage for the seller, because

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[60] *Huber*, in: *v. Caemmerer/Schlechtriem*, Kommentar zum Einheitlichen UN-Kaufrecht - CISG - , art. 19, RN 7 and 47 a

[61] *Huber*, in: *v. Caemmerer/Schlechtriem*, Kommentar zum Einheitlichen UN-Kaufrecht - CISG - , art. 31, RN 38

[62] *Huber*, in: *v. Caemmerer/Schlechtriem*, Kommentar zum Einheitlichen UN-Kaufrecht - CISG - , art. 31, RN 55

[63] Sekretariatskommentar, Official Records to art. 29, RN 16

[64] *Huber*, in: *v. Caemmerer/Schlechtriem*, Kommentar zum Einheitlichen UN-Kaufrecht - CISG - , art. 31, RN 70

[65] *Schlechtriem*, Uniform Sale Law, The UN-Convention on Contracts for the International Sale of goods, Wien, 1986, page 65

[66] *Huber*, in: *v. Caemmerer/Schlechtriem*, Kommentar zum Einheitlichen UN-Kaufrecht - CISG - , art. 31, RN 53

[67] *Huber*, in: *v. Caemmerer/Schlechtriem*, Kommentar zum Einheitlichen UN-Kaufrecht - CISG - , art. 31, RN 54

he has an obligation to fulfil which is smaller. Altogether there is an advantage for the seller, because his obligation is smaller and he can fulfil his duties easier.

bbb) Delivery to the right time

The seller must deliver the goods to the right place and in the right time. Hereby the placing of the goods to the buyer's disposal or the handover in the right time is necessary[68]. The time when the goods arrive in a place different to the place of delivery (handover or placing of the goods to the buyers disposal) is not important for the time. Regarding art. 45 CISG, a longer delivery automatically gives the rights to the buyer without a warning or other formalities[69].

The buyer has an interest in the delivery on the correct point of time. Without further agreements, uses, or practices the correct time is specified in art. 33 CISG. For the seller a delivery before the right time can be possible (art. 52 I CISG). There is also the especially important possibility that the seller fulfils his obligation for delivery with a delivering later than the correct time (art. 48 CISG).

aaaa) Delivery before the agreed point of time

Without agreement of the buyer or without the use or practice the seller is not entitled to **deliver before the agreed time**. A delivery before the agreed time is a breach of contract[70] and opens the rights for the buyer regarding art. 45 f. CISG. The buyer has the choice whatever he takes the delivered goods (art. 52 I CISG). If the buyer does not want the goods, the seller must deliver again at the agreed time[71]. With the acceptance of the delivery before the agreed time without notifying a defect the buyer does not remunerate his legal remedies[72]. But with the obligation to minimise the damage concerning art. 77 CISG the buyer can have the obligation to take the goods before the agreed time to minimise further damage.

If the goods are delivered before the agreed point of time, the seller is, according to art. 37 CSIG, entitled to remove violation of the contract until the agreed point of time. The kind and dimension of the violation of the contract is not of importance concerning the right regarding

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[68] Sekretariatskommentar, Official Records to art. 31, RN 2

[69] *Huber*, in: *v. Caemmerer/Schlechtriem*, Kommentar zum Einheitlichen UN-Kaufrecht - CISG - , art. 33, RN 4

[70] *Herber/Czerwenka*, Internationales Kaufrecht, art.52, RN 3

[71] Sekretariatskommentar, Official Records to art. 48, RN 5

[72] *Huber*, in: *v. Caemmerer/Schlechtriem*, Kommentar zum Einheitlichen UN-Kaufrecht - CISG - , art. 52, RN 3; perhaps other opinion *Endelein/Maskow/Stargardt*, Konvention der Vereinten Nationen über Verträge über den Internationalen Warenkauf, art. 52, RN 2

art. 37 CISG[73]. Through this norm the seller can fight against the rights of the buyer regarding art. 45 f. CISG. The buyer still has the right to claim damages regarding art. 37 II CISG though.

In comparison to the German law a delivery of the goods before the agreed time is in all cases allowed. Regarding § 271 II BGB the buyer is not entitled to claim delivery before the point of time that the parties have agreed on. The seller has the right to deliver prior to this point of time. This regulation contains clear **advantage** in the CISG for the **buyer**, because he is entitled to claim damages in the case that a delivery of goods occurs before the agreed point of time. The buyer does not have such a right under the German law.

bbbb) Delivery after the agreed point of time

When the times agreed on are crossing, the buyer normally gets his legal remedies regarding art 45 f. CISG without further requirements. The seller does not have the possibility - as it is the case in some other law systems - to get a period of grace by a court decision (art. 45 III CISG). In front of this background the necessity evolves for the seller that he is entitled regarding art. 48 I CISG to repair the breach of contract after the agreed time (**right for a second offer**) to therefore minimise the claim for damages of the buyer.

The right for a second offer is also given if the seller has not delivered goods until the point of time which the parties agreed on. If only parts of the goods are delivered or some parts have a lack of conformity then his right for a second offer is also applicable, art. 51 I CISG[74]. According to this norm a delivery in parts is applicable for the seller.

The possibility of the second offer concerning art. 48 CISG is an **advantage for the seller**. A consent with the buyer is not necessary. In case that the buyer makes a second offer, he loses his legal remedy mentioned in art. 45 f. CISG[75]. The seller does not have the opportunity to make a second offer in all constellations. Regarding art. 48 I CISG the following requirements must be given:

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[73] *Huber*, in: *v. Caemmerer/Schlechtriem*, Kommentar zum Einheitlichen UN-Kaufrecht - CISG - , art. 48, RN 14

[74] *Huber*, in: *v. Caemmerer/Schlechtriem*, Kommentar zum Einheitlichen UN-Kaufrecht - CISG - , art. 51, RN 2

[75] *Huber*, in: *v. Caemmerer/Schlechtriem*, Kommentar zum Einheitlichen UN-Kaufrecht - CISG - , art. 48, RN 25

The right for a second offer is not given if the buyer has the right to declare the contract avoided regarding art. 49 CISG[76]. The right to avoid the contract is given in case of a fundamental breach of the contract. But during the time when the buyer does not give a notice for the delivery with a lack of conformity regarding art. 39 I respectivly 43 I CISG the seller is still entitled to make a second offer also if the buyer can avoid the contract. This is not the case if the seller knows or must have known about the lack of conformity, art. 40 and 43 II CISG.

A further requirement for the second offer is that the later performance can take place without unreasonable delay and unreasonable inconvenience or uncertainty of reimbursement on behalf of the buyer, art. 48 I CISG[77].

In the contrast to the German law the right for a second offer is a big **advantage for the seller** in the CISG. The German law has no provision whereas the seller is entitled to repair the bad performance in a sales contract after the agreed time for the delivery. Regarding § 266 BGB a delivery of parts of the goods is also not allowed. Under the CISG a delivery in parts is possible because of the second offer regarding art. 48 CISG. This is an advantage for the seller in the CISG.

bb) Duties of the buyer

The basic duties of the buyer have been summarised in art. 53 CISG. art. 54 f. CISG represents a "lex specialis" in comparison to this rule. Regarding these provision the buyers are committed to the following duties:

A buyer must **pay the price** for the goods at the right place at the right time, art. 55-59 CISG. He must take the goods, art. 60 CISG and must fulfil all other duties that the parties have agreed upon in the contract or are enforced by law, art. 54 CISG.

aaa) Payment of the price

The duty of the buyer to pay the price is typical and characteristic for a sales contract. If no duty for payment of the price exists, a sales contract is not given in the sense of the CISG.

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[76] *Huber*, in: *v. Caemmerer/Schlechtriem*, Kommentar zum Einheitlichen UN-Kaufrecht - CISG - , art. 48, RN 20

[77] see for this closer *Huber*, in: *v. Caemmerer/Schlechtriem*, Kommentar zum Einheitlichen UN-Kaufrecht - CISG - , art. 48, RN 21 and 22

Without other possibilities regarding art. 6 or 9 CISG the payment of the price includes the following aspects: The payment of the price must be given in the currency that the parties have agreed upon. Subject to the payment is the agreed price, art. 55, 56 CISG. The payment of the buyer is to be made at the agreed place, art. 57 CISG and time, art. 58, 59 CISG.

In this matter the place of payment regarding **art. 57 I a CISG differs in comparison to the German law**.

art. 57 CISG regulates at which place the buyer must give the agreed price to the seller. If the buyer pays the price at different place, he violates his duty of payment: The seller has the legal remedies regarding art. 61 f. CISG at hand. The place of payment is important for the expenses and risks for the payment and the **place of jurisdiction** for a lawsuit on the payment. In everydayness business an agreement on the place of payment is typical[78]. But the INCOTERMS do not regulate the place of payment in B 1.

art. 57 CISG makes a difference for **two cases**: If the payment is to made against the handing-over of the goods or documents, the payment has to be made at the place where the handing over takes place, art. 57 I b CISG. For all other payments the seller's place of business is the place of the payment, art. 57 I a CISG.

If a payment correlating with a handover is not given, the buyer must pay at the seller's place of business, art. 57 I a CISG. For this case the payment of the price is regulated as a debt payable to the creditor[79]. But without notification of the place of business the buyer is entitled to pay the price to an account of the seller at the bank which the seller had mentioned. It is not necessary that this bank has it's seat at the place of business of the seller. But if the seller has several accounts, the buyer must choose the bank in the country of the seller[80].

The place of payment has an important meaning in international business affairs. In this matter, the problems deriving from the existence of different currencies are the most important ones. If the payment of the buyer is to perform in his national currency, the seller has the obligation to arrange the transfer. If the payment shall be performed at the place of business of the seller, the buyer has the obligation to present the payment in the agreed currency to the seller at the right time. The risk for the loss or delay of the money is taken by the buyer[81].

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[78] see to importand agreements on the place *Herber/Czerwenka*, Internationales Kaufrecht, art.57, RN 8

[79] *Reinhart*, UN-Kaufrecht, art. 57, RN 4

[80] *Endelein/Maskow/Stargardt*, Konvention der Vereinten Nationen über Verträge über den Internationalen Warenkauf, art. 57, RN 6

[81] *Hager*, in: *v. Caemmerer/Schlechtriem*, Kommentar zum Einheitlichen UN-Kaufrecht - CISG - , art. 57, RN 4

The place of payment entitles a German exporters regarding § 29 I ZPO[82] respectivly art. 5 Nr. 1 EuGVÜ[83] to have at their place of business the place of jurisdiction[84]. Those who argue against the correlation of the place of payment and the place of jurisdiction do not interpret art. 57 I a CISG correctly[85]. The primary duty of art. 57 CISG is not to find a place of jurisdiction. But the starting point is § 29 I ZPO respectivly art. 5 Nr. 1 EuGVÜ. These provisions see the place of jurisdiction at the place where the material law of the party which does not fulfil its obligation ends.

For the payment it is the place of business of the seller. If the risk-delimitation in the place of the payment does not have to change, it is not clear why to forbid the place of jurisdiction at the place of the payment[86].

In the German law the place of payment is different to art. 57 I a CISG. Regarding § 269 I BGB the payment is to be performed at the debtor's place if no other agreements have been made. The duty is regulated as a debt collectible by the creditor.

Therefore art. 57 I a CISG holds an **advantage for the seller** because the buyer has to make the payment at his own risk (currency, loss and delay of problems) at the place of the seller. The place of jurisdiction also changes regarding § 29 I ZPO respectivly art. 5 Nr. 1 EuGVÜ to the place of the seller. This is also an advantage for the seller.

bbb) Other duties for the buyer and the seller

A further duty for the buyer in connection with the payment is mentioned in art. 54 CISG. But the duty in art. 79 IV CISG is more important, because this duty is not mentioned in the German law. Regarding art. 79 IV CISG the buyer and the seller have the obligation if they fail to perform to give a notice to the other party of their impediment and its effect on their ability to perform.

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[82]ZPO is the "Zivilprozeßordnung" (civil code of procedure)

[83]EuGVÜ is the "Übereinkommen der Eüropaischen Gemeinschaften über die gerichtliche Zuständigkeit und die Vollstreckung gerichtlicher Entscheidungen in Zivil- und Handelssachen" form 27.9.1968

[84]*Reinhart*, UN-Kaufrecht, art. 57, RN 4 and *Herber/Czerwenka*, Internationales Kaufrecht, art.57, RN 12 and 13

[85]see *Piltz*, Internationales Kaufrecht, Das UN-Kaufrecht in praxisorientierter Darstellung, § 4 II Pflichten des Käufers, page 141, RN 142

[86]*Bucher*, Wiener Kaufrecht, page 34

This obligation is an **advantage for both**, the buyer and the seller, because it is easier for the other party to handle the problems if he know them prior. According to art. 79 IV CISG the party who fails to perform is subject to the obligation to make a notice earlier than under the German law in which no provision is given.

c) Rights by neglection of ones duty to the other party

From the view of a lawyer the examination of the circumstances and the possible remedies for a breach of contract is the most important work. Part III the CISG (Sale of goods, art. 25-88 CISG) regulates the consequences of a lack of performance for the buyer and seller besides the primary duties of the parties.

The German law about the lack of performance is fundamentally different to the CISG. Compared with the German law the following provisions of the CISG are not identical with the German law: art. 26, 35, 43, 44, 45 I b, II, 46 II, III, 49 I, and 61 I b, II CISG.

aa) Rights of the buyer

The possibility of remedies which the CISG holds in store for the buyer, in case that the seller does not fulfil his **obligations** to perform[87], are summarised in art. 45 CISG and concretised in the following provisions.

- With a lack of performance of the seller, the buyer has the right to require performance, Art 46, I CISG. If the goods are delivered the buyer has the opportunity to substitute of goods respectivly to repair the lack of conformity, art. 46 II, III CISG.
- He can declare the contract avoided, art. 49 CISG. For this remedy it is normally necessary that a fundamental breach of contract is given or that the seller does not deliver in an additional period of time regarding art. 47 CISG.
- In the case of delivery of goods in violation of the contract he can reduce the price, art. 50 CISG. He is entitled to claim damages instead of other remedies or additional to the other remedies, art. 45 I b, II CISG.
- Furthermore the buyer can retender his performance if he has a right of fulfilment and the requirements of a right of retention is given, art. 71 CISG.

The remedies in art. 45 f. CISG are given if the seller does not fulfil his obligation of the contract. It is not necessary that the buyer reminds the seller or makes treatment remarks.

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[87] *Huber*, in: *v. Caemmerer/Schlechtriem*, Kommentar zum Einheitlichen UN-Kaufrecht - CISG - , art. 45, RN 10

Some remedies are only possible in a fixed period of time, but for the emergence it is not necessary that the buyer acts in a special way.

Only with the delivery of goods, with a lack of conformity, or with a defect in rights the CISG requires from the buyer a "fast" act to hold his rights for the defect in the performance. The buyer has the obligation to examine the goods within a period as short as it is practical, art. 38 CISG and must give notice to the seller specifying the nature of the lack of conformity within a reasonable time after he has discovered it, art. 39 and 43 CISG.

If the buyer does not give a notice, it is possible that he loses his rights for the goods with a lack in conformity. But requirement for this obligations of the buyer is that the seller has delivered.

aaa) Delivery of goods with a lack of conformity

The buyer also has a remedy if the seller delivers goods with a lack of conformity. But in contrast to the other remedies the buyer has further obligations to get his remedy in this case.

At the point of time when the risk passes to the buyer, art. 36 CISG, the delivered goods must have a lack of conformity regarding art. 35 CISG. If the buyer knows or could not have been unaware of such a lack of conformity, he is not entitled to claim a right out of the lack of conformity. The buyer must examine the goods within as short a period of time as is practical in the circumstances, art. 38 CISG and must give a notice to the seller specifying the nature of the lack of conformity in a reasonable time after he has discovered it but at the latest within a period of two years from the day on which the goods were actually handed over to the buyer, art. 39 CISG. The proper notice leaves the buyer all his remedies for the lack of conformity until the statute of limitation. But with an unproper notice the buyer loses the remedies for the lack of conformity, art. 39 CISG. This loss is not given if the seller knows or could not have been unaware of the lack of conformity and he did not disclose this to the buyer, art. 40 CISG or the buyer has a reasonable excuse for his failure to give the required notice, art. 44 CISG.

aaaa) Lack of conformity, art. 35 CISG

For the CISG it is important that the seller has delivered goods in the required manner, art. 35 I CISG. Divergence of quality and quantity are a lack of conformity like the delivery of completely different goods[88]. The difference in the **German law** between a misperformance (peius) on the one hand and an approval respectivly a non approval of a mistaken delivery

[88] *Schlechtriem*, Uniform Sale Law, page 66 f.

(aliud) on the other hand is of no importance in the CISG. The concept for the lack in the sense of the § 459 BGB is not applicable for the CISG[89].

In the CISG no difference is made between the different lacks which can occur as it is made in German law. All lacks which could possibly occur are summoned under the generic term "lacks of conformance" regarding art. 35 I CISG[90].
In this case a change of the agreed conformity of the goods also gives a lack of conformity if the intended purpose and the functionalism of the goods do not have a negative effect on the goods.

The norm is different to the **German law** thus far that it is not necessary that a "real" lack of conformity is given for the remedies; the requirements are fulfilled when the goods do not meet the agreed standard. This concept does not make it necessary to create a differentiation in between an aliud and peius as it has been done in the German civil- and trade law. In addition the rule provides negotiating parties with a better orientation in the difficult time of the formation of a contract[91].

This is an **advantage for the buyer** in comparison to the German law. For the buyer it is not important which kind of lack of conformity is given. He has all possible remedies for any lack of conformity.

bbbb) Examination of the goods, art. 38 CISG and notice, art. 39 CISG

To **hold the claim for a lack of conformity** of the goods it is necessary that the buyer gives notice within a reasonable time but at latest within two years notice to the seller, art. 39 CISG.

This notice must be given for all lacks of conformity regarding art. 35 CISG. In comparison to the German law this rule is different thus far as the buyer regardless of art. 52 II CISG must also give notice concerning changes of quantity and wrong delivery to the seller. The time for the notice in art. 39 CISG starts with the discovery of the lack of conformity respectivly the time when it ought to have discovered it.

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[89] *Hyland*, in: *Schlechtriem*, Einheitliches Kaufrecht und und nationales Obligationsrecht, page 305 f.

[90] *Aue*, Mängelgewährleistung im UN-Kaufrecht, page 70 f., *Schwenzer*, NJW 1990, 605, *Herber/Czerwenka*, Internationales Kaufrecht, Anm. 2 to art.35; but other opinion *Loewe*, Internationales Kaufrecht, page 51, 59

[91] *Piltz*, Internationales Kaufrecht, Das UN-Kaufrecht in praxisorientierter Darstellung, § 5 I Rechte des Käufers bei Pflichtverletzung des Verkäufers, page 185, RN 27

Because of these different starting points it is important for the buyer to examine the goods as fast as possible. A late examination has the consequence that the buyer knows the lack of conformity too late and therefore can't give a notice within a reasonable period of time. But the violation of the obligation to examine by itself does not give the right of remedies against the buyer[92].

The buyer has the obligation to examine the delivered goods in a short period of time, art. 38 I CISG.

To determine the point of time the circumstances and the kind of goods are of importance[93]. The short period of time as the first possibility starts with the delivery. In the case of the seller delivering earlier than agreed, the time for the examination for the buyer is longer because the short time does not start before the agreed date of delivery[94]. In contracts that involves carriage the buyer is often not able to examine the goods. In this case the CISG concerning art. 38 II CISG gives buyers the possibility to examine after the goods have arrived at their destination[95]. Furtherly the buyer is entitle to examine the goods also later at a new destination in the case that the seller at the time of the conclusion of the contract know or ought to have known of a possibility of redirection or redispatch regarding art. 38 III CISG.

In comparison to the German law an **advantage for the buyer** is given in the CISG. In § 377 I HGB the buyer must examine the goods without delay. In this case the examination must be given earlier than under the CISG where the buyer has a short time.

The buyer must give notice to the seller specifying the nature of the lack of conformity within a reasonable time, art. 39 I CISG. The reasonable time is longer than the short time for the examination.

In the German parallel provision of § 377 I HGB the notice has to be given - as is the examination in the German law - without delay. The reasonable time is therefore longer than the time without delay in the German law[96]. This also is an advantage for the buyer compared with the German law. For a notice the buyer has a longer period of time, which does not make the risk to lose rights because of a lack of conformity under German codification.

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[92] *Herber/Czerwenka*, Internationales Kaufrecht, art.38, RN 2

[93] *Reinhart*, UN-Kaufrecht, art. 38, RN 2

[94] *Herber/Czerwenka*, Internationales Kaufrecht, art.38, RN 8

[95] to have a closer look see *Stumpf*, in: *v. Caemmerer/Schlechtriem*, Kommentar zum Einheitlichen UN-Kaufrecht - CISG - , art. 38, RN 7

[96] *Huber*, in: *v. Caemmerer/Schlechtriem*, Kommentar zum Einheitlichen UN-Kaufrecht - CISG - , art. 44, RN 9

cccc) Loss of remedies, art. 40 CISG

But the seller is not entitled to rely on the provisions of articles 38 and 39 CISG if the lack of conformity relates to facts which he knows or could not have been unaware and which he did not disclose to the buyer, art. 40 CISG. In this case the action of the seller unto the point of delivery of the goods is important[97]. In the case of different ways of delivery the seller must give a notice to the buyer about the lack of conformity after the passing of risk if he doesn't want the application of art. 40 CISG that gives an advantage to the buyer. art. 40 CISG will help the buyer if entirely different goods instead of the agreed are being delivered. But the application of art. 40 CISG is not only given in cases as clear as the mentioned above[98]. If the requirements of art. 40 are given, the seller cannot claim that the buyer has not examined the goods in a short time and does not give a notice within a reasonable time. art. 40 CISG furtherly gives the buyer the right to cut the two years time for the notice regarding art. 39 II CISG.

Regarding the German law the buyer has a greater possibility to bring art. 40 CISG into application under the CISG. In § 377 V HGB the seller is not only entitled to rely on § 377 HGB if he acts malevolent. It is necessary that the buyer examines and gives notice to the seller in more cases to hold his remedies as it would be the case under German law. Therefore the CISG gives an **advantage to the buyer**.

dddd) Conservation of remedies, art. 44 CISG

Furthermore it is possible for the buyer to excuse for his failure to give the required notice, art. 44 CISG. In contrary to art. 40 CISG the buyer is only excused in the case of art. 39 I and 43 CISG[99]. Through art. 44 CISG it is not possible for the buyer to get an extension of the two year period in art. 39 II CISG. The lack of a correct examination regarding art. 38 CISG cannot be subsumed under art. 44 CISG.

It is a fact that the examination is necessary for the notice, but a wrong notice because of a wrong examination does not enforce the application of art. 44 CISG[100].

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[97] *Reinhart*, UN-Kaufrecht, art. 40, RN 2

[98] see for this some examples for the same Hague Mercator Rule (EKG): OLG Hamm, IPrax 1983, 231 f. and BGH, DB 1989, 2268

[99] *Kritzer*, Guide to practical applications of the United Nations Convention on Contracts for the International Sale of Goods, page. 309

[100] *Huber*, in: *v. Caemmerer/Schlechtriem*, Kommentar zum Einheitlichen UN-Kaufrecht - CISG - , art. 44, RN 2 and 3

A requirement for the application of art. 44 CISG is that a reasonable excuse for the failure to give the required notice is given. With this provision an **advantage for an** inexplicable and bad organised **buyer** is given to avoid a harsh and unreasonable outcome[101]. The measurement to prevent the seller from unjust harshness resulting out of the breach of contract, is the damage the buyer gets and the weight of the failure to give the required notice[102].

The excuse regarding art. 44 CISG is not given in all cases. art. 44 CISG does not describe an excuse for the obligation to give notice regarding art. 39 CISG. The buyer must give notice within a reasonable period of time after the reasonable excuse ceased to exist[103].
If the buyer does not give this notice, he loses all remedies he has if the seller is not entitled to rely on art. 38 and 39 CISG regarding art. 40 CISG.

In the contrary to art. 40 CISG the excuse of art. 44 CISG does not give the buyer all remedies. This derives from the fact that the obligation to examine and to give notice is a protection for the seller. It is not possible that the seller loses all remedies when a reasonable excuse is given. The buyer is only entitled to reduce the price in accordance to art. 50 CISG or claim damages regarding art. 74 f. CISG. Different to the normal system of the CISG[104] the claim of damages is in this case not additional to the reduction of the price. It is only alternative. Also it is not possible for the buyer to claim lost profits.

This provision of the CISG has **no parallel in the German law**. According to it a reasonable excuse of the buyer is not possible. Under German codification in the contrary he can lose his remedies easier than under the CISG. This provides the buyer with a great advantage.

bbb) Fulfilment including substitute goods and repair

As a remedy for all kinds of lack of conformity the rule stated in art. 46 CISG provides the buyer with the possibility to claim fulfilment for the duties of the seller. The conception in the CISG concerning the primary duty the seller is obliged to fulfil regarding art. 30 f. CISG and on the other side the remedy of fulfilment in art. 46 CISG is different in German law[105]. The

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[101] *Huber*, in: *v. Caemmerer/Schlechtriem*, Kommentar zum Einheitlichen UN-Kaufrecht - CISG - , art. 44, RN 2 and 13

[102] *Huber*, in: *v. Caemmerer/Schlechtriem*, Kommentar zum Einheitlichen UN-Kaufrecht - CISG - , art. 44, RN 15 f.

[103] *Herber/Czerwenka*, Internationales Kaufrecht, art.44, RN 3

[104] see for example in art. 45 II CISG

[105] *Huber*, in: *v. Caemmerer/Schlechtriem*, Kommentar zum Einheitlichen UN-Kaufrecht - CISG - , art. 46, RN 5

secondary claim for fulfilment in art. 46 CISG is not identical with the primary immediate right of delivery in art. 30 f. CISG. If the seller doesn't fulfil his obligation regarding art. 30 f. CISG and the buyer require further fulfilment, the basic rule for a claim is art. 46 CISG.

In the following a **secondary claim of fulfilment** regarding art. 46 CISG will be the subject of examination:

- The buyer is not entitled to claim fulfilment if this claim has resorted to a remedy which is inconsistent with this requirement, art. 46 I CISG, or the buyer doesn't contradict the right for a second offer in art. 48 II-IV CISG.
- The buyer has the right to claim fulfilment for all kinds of lack of conformity, art. 46 I CISG. But if the seller has delivered the goods and the goods have a lack of conformity, the right of the buyer changes into a right to substitute goods and repairs regarding art. 46 II and III CISG.
- The implementation of the claim for fulfilment starts with a notice from the buyer, art. 46 I CISG in which the buyer may fix an additional period of time of reasonable length for performance, art. 47 I CISG and which is possible till the statute of limitations. But for the right to substitute goods and repair it is necessary that the buyer makes his claim in a reasonable period of time after the notice, art. 46 II and III CISG.
- Besides the right of fulfilment it is possible for the buyer to claim additional damage, art. 45 I b, II CISG. If the seller does not fulfil and if no additional period of time is standing against, a change to other remedies is possible, art. 47 II CISG.

Compared to the German law a possibility for a secondary claim of fulfilment is not given. It is only the primary claim regarding §§ 433, 459 BGB as it is possible in art. 30 CISG. The buyer has the choice regarding § 326 BGB if he wants this primary fulfilment or instead of this to claim damages or an abandonment of priority after the fixed additional period of time is over and he makes clear that he doesn't want the fulfilment after this time. But after this time a claim of fulfilment is not possible for the buyer.

Therefore art. 46 CISG provides an **advantage to the buyer** compared to the German law. He has more possibilities to claim a fulfilment and he can claim additional damages. To claim damages under the German law is in this case only possible instead of the claim of fulfilment.

ccc) Avoidance of the contract

While a fundamental breach of contract is not necessary for the claim of fulfilment regarding art. 46 CISG (but not so in art. 46 II CISG) the buyer can only avoid the contract if a

fundamental breach of contract is given, art. 49 CISG. It is not possible for the buyer to avoid the contract with ordinary or small violations of the contract. Because of the avoidance the seller must find another person for his goods. In most international cases there are problems with the redelivery and duty or currency problems. Therefore the contract should be in effect as long as possible and the buyer should only compensate the breach of contract. The avoidance should be an **ultima ratio**[106].

For an **avoidance** regarding art. 49 CISG the following shall be examined:

- If the buyer is claiming fulfilment regarding art. 46 CISG within an additional period of time regarding art. 47 CISG or the second offer regarding art. 48 II-IV CISG accepted, is the avoidance in this period of time not possible.
- Further the buyer can only claim avoidance if a fundamental breach of contract is given, art. 49 I CISG.
- For a claim of avoidance a notice of the buyer is necessary, art. 26 CISG and the claim must be given within in a reasonable period of time, art. 49 II CISG. If the seller has not delivered the goods, a reasonable time is not necessary. The avoidance follows art. 81 f. CISG.
- Next to the avoidance it is possible for the buyer to claim additional damage, art. 45 I b, II CISG. Other remedies next to an effective avoidance are not possible.
- If the buyer gives the notice that he avoids the contract without all requirements for the avoidance, the buyer himself commits a breach of contract. Such a breach of contract on the other side gives remedies to the seller, so that the buyer instead of an early avoidance perhaps has to look to other remedies which are not as harsh.

Compared to the German law the avoidance in the CISG is not as easy as it is under the German law. Regarding § 462 BGB a fundamental breach of contract is not necessary, a "normal" breach of contract is enough. But with this the problems in an international contract for the avoidance are not solved. Here the stronger requirements give an **advantage to the seller**, because the avoidance is not as easy and the problems with the handing back are not given quickly enough.

But in relation the CISG gives an **advantage to the buyer** compared with the German law. Regarding the avoidance of § 465 BGB an agreement between the seller and the buyer is necessary. This is not the case in the CISG. Regarding art. 26 CISG the avoidance becomes

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[106] *Huber*, in: *v. Caemmerer/Schlechtriem*, Kommentar zum Einheitlichen UN-Kaufrecht - CISG - , art. 49, RN 2 and 4

effective only by notice to the other party. This makes the avoidance easier for the buyer compared with the German law.

But **altogether** the regulation of the CISG gives an **advantage for the seller**, because the effectiveness of the avoidance is only a problem of time in the German law. The buyer has a claim that the seller agrees to the avoidance and he is able to get this agreement through a judgement. The fact that the avoidance is not possible in an "ordinary" breach of contract provides the seller with a great advantage.

bb) Rights of the seller

In art. 61 CISG the remedies of the seller are summarised which are given to him when the buyer does not fulfil his duties. art. 61 CISG makes no difference between main and low duties and is applicable for all kinds and weights of a breach of contract[107]. Especially in the case of a late or no payment or a late or no take-over of the goods by the buyer art. 61 CISG gives remedies to the seller. Further is the seller entitled to claim the mentioned remedies in art. 61 CISG if the buyer makes an non effective avoidance of the contract or in other cases where he hurts the requirements of his remedies.

In the case of a **neglect of a duty of the buyer** the seller is entitled to the following remedies:

- The seller can furtherly claim the fulfilment of the contract, art. 62 CISG.
- He can declare the contract avoided, art. 64 CISG. For this remedy it is necessary that a fundamental breach of contract is given or that the buyer does not pay the agreed price or is taking the goods after the seller have give an additional time regarding art. 63 CISG.
- He can claim interest regarding art. 78 CISG.
- Next or additional to the other remedies he can claim damages, art. 61 I b, II CISG.
- Furthermore the seller is entitled to the right of retention if he has a right of fulfilment and all requirements of the right of retention are given, art. 71 CISG.

aaa) Fulfilment

The secondary claim of the seller of fulfilment regarding art. 62 CISG is - like the claim of the buyer for fulfilment regarding art. 46 CISG - not identical with the primer claim for the

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[107] *Hager*, in: *v. Caemmerer/Schlechtriem*, Kommentar zum Einheitlichen UN-Kaufrecht - CISG - , art. 53, RN 4

payment and the take-over of the goods regarding art. 53 CISG. If the buyer doesn't fulfil his obligation regarding art. 53 f. CISG, the foundation for this claim is art. 62 CISG[108].

For a **secondary claim of fulfilment** regarding art. 62 CISG the following has to be examined:

- The seller is not entitled to claim fulfilment if this claim has resorted to a remedy which is inconsistent with this requirement, art. 62 CISG.
- The seller has the right to claim fulfilment for all kinds of lack of conformity, art. 62 CISG.
- The implementation of the claim of fulfilment starts with a notice from the seller, art. 62 CISG in which the seller may fix an additional period of time of reasonable length for performance, art. 63 CISG and which is possible till the statute of limitations. But regarding national law a claim for fulfilment can sometimes not be given, art. 28 CISG.
- Next to the right of fulfilment it is possible for the buyer to claim interest, art. 78 CISG and to claim additional damage, art. 61 I b, II CISG. If the seller does not fulfil and if no additional period of time is standing against it, a change to other remedies is possible, art. 63 II CISG.

Compared to the German law the same advantage for the seller is given as it is for the buyer. A possibility for a secondary claim for fulfilment is not given in the German law. Only the primary claim regarding §§ 433, 459 BGB like in art. 53 CISG is possible. The seller has the choice regarding § 326 BGB if he wants this primary fulfilment or instead of this to claim damages or a abandonment of priority after the additional period of time is over and he makes clear that he does not want a fulfilment after this time. But afterwards a claim of fulfilment is not possible for the buyer.

Therefore art. 62 CISG provides the **seller** with an **advantage** compared to the German law. He has more possibilities to claim a fulfilment and he can claim additional damages. To claim damages under the German law is in this case possible only instead of the claim of fulfilment.

bbb) Avoidance of the contract

While a fundamental breach of contract is not necessary for the claim of fulfilment regarding art. 62 CISG the seller can only avoid the contract if a fundamental breach of contract is given, art. 64 CISG. It is not possible for the seller to avoid the contract with normal or small violations of the contract. The avoidance should only be seen as an ultima ratio.

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[108] *Herber/Czerwenka*, Internationales Kaufrecht, art.62, RN 3

For an **avoidance** regarding art. 64 CISG the following has to be examined:

- If the seller makes his performance too late he can lose his right to declare the avoidance, art. 64 II a CISG. Furthermore his right to declare the contract as being avoided exists during the period of time when the seller claims fulfilment and is not possible at a later point of time regarding art. 63 II CISG.
- Furtherly the seller can only claim avoidance if the buyer in the additional period of time does not pay the price or take-over the goods or a fundamental breach of contract is given, art. 64 I CISG. This remedy is possible before the date of performance, art. 72 CISG and applicable to further deliveries in a multiple delivery contract, art. 73 II CISG.
- For a claim of avoidance a notice of the buyer is necessary, art. 26 CISG and the claim must be given within a reasonable period of time, art. 64 II CISG. If the buyer has not paid the price, a reasonable time is not necessary. The avoidance follows art. 81f. CISG.
- Next to the avoidance it is possible for the seller to claim additional damages, art. 61 I b, II CISG. Other remedies next to the effective avoidance are not possible.
- If the seller give the notice that he avoids the contract without all requirements for the avoidance, the seller himself makes a breach of contract. This breach of contract gives remedies to the buyer, too. Therefore in the case of doubt the seller should find within an additional period of time habits for his right to declare avoidance.

Compared to the German law the same advantage for the seller is given as it is for the buyer. The avoidance in the CISG is not as simple as under German law. Regarding § 462 BGB a fundamental breach of contract is not necessary, a "normal" breach of contract is enough. Here the stronger requirements give an **advantage to the buyer** because the avoidance is not as simple and the problems with the handing back are not as quickly given.

But in relation the CISG gives an **advantage to the seller** compared to the German law. Regarding § 465 BGB an agreement between the contracting parties is necessary for the avoidance. This agreement is not necessary in the CISG. Regarding art. 26 CISG the avoidance becomes effective only by notice to the other party. This makes the avoidance easier for the buyer compared with the German law.

But **altogether** the regulation of the CISG gives an **advantage to the buyer**, because the effectiveness of the avoidance is only a problem of time in the German law. The seller has a claim that the buyer agrees to the avoidance and he can get this agreement through court judgement. That the avoidance in a "normal" breach of contract is not possible, gives a big advantage to the buyer.

cc) Damages

For all kinds of breach of contract the CISG gives a liability which is not based upon fault. A guarantee liability is given. Legal provisions for a claim of damage are especially, art. 45 I b and Art 61 I b CISG. Furthermore art. 37 2, 47 II 2, 48 I 2 and 63 II 2 CISG regulates claims for damage and makes clear that a late performance is not effecting the claim of damage. Rather every violation of contract gives the right to claim damage without a further reason. A cause or different requirements are not necessary[109].

Compared with the German law the CISG gives an **advantage to both**, the buyer and the seller. Under the German law a cause is necessary for a claim of damage and further the claim of damage is not in all cases additional to other cases. This makes the CISG more flexible because a claim of damage is always possible.

6) Summary

Summing up it is not easy to say, if the CISG is globally giving an over all-advantage to the buyer in comparison with the codification of the German civil- and trade law. A modern trend towards a stronger position of the buyer can be found in the rules of the CISG[110]. But on the contrary provisions can be found which give a advantages to the buyer and these provisions in itself are important. Furthermore provisions can be found in the CISG that give an advantage to both parties, the buyer and the seller which cannot be found in German law.

a) Advantages for the seller

Compared to the German law **art. 16 I, 31 b and c, 48, 57 I a, 62 CISG** gives an advantage to the seller.

The seller can revoke his offer until the buyer has accepted his offer, art. 16 I CISG. Under the German provision § 130 I BGB a revocation is only possible until the offer reaches the offeree. The seller has more opportunities to revoke the offer and must not pay for a compensation claim.

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[109] *Stoll*, in: *v. Caemmerer/Schlechtriem*, Kommentar zum Einheitlichen UN-Kaufrecht - CISG - , art. 74, RN 6 and 29

[110] *Kritzer*, Guide to practical applications of the United Nations Convention on Contracts for the International Sale of Goods, page. 338

A better possibility to fulfil his performance is given for the seller, because it is not necessary in all cases to hand over the goods, art. 31 b and c CISG. Regarding the German rule of § 433 I BGB the seller must hand over the goods in all cases. The seller's obligation is a lesser one and it is easier for him to fulfil.

The seller has the opportunity for a second offer concerning art. 48 CISG. The German law has no provision where the seller is entitled to repair the bad performance of a sales contract after the agreed time for the delivery. Due to this rule the seller can inactivate the legal remedies of the buyer regarding art. 45 f. CISG. Furtherly a second offer is possible through a partial delivery. Regarding the German § 266 BGB a delivery of only a part of the goods is not allowed.

The payment has to be performed at the place of business of the seller, art. 57 I a CISG. According to this rule the payment risks (currency, loss and delay) are risks on behalf of the buyer and in most cases the place of jurisdiction for a payment claim is at the seller's place. Regarding the German § 269 I BGB the payment is, if no other agreements have been made, to be performed at the place of the debtor and therefore at the place of business of the buyer. With it all advantages of the seller turn over to the buyer.

Further the buyer has more possibilities to claim the fulfilment and he can claim additional damages, art. 62 CISG. A possibility for a secondary claim for fulfilment is not given in the German law. Only the primary claim regarding §§ 433, 459 BGB as in art. 53 CISG is possible. For such a case the claim of damages under the German law is only possible instead of the claim of fulfilment, § 326 BGB.

b) Advantages for the buyer

Compared to the German law **art. 35 I, 38 I , 39 I, 40, 44, 46, 52 CISG** give an advantage to the buyer.

The delivery of the goods is normally not allowed prior to the agreed point of time. But the buyer has the choice if he wants to take the goods and then perhaps to claim damages, art. 52 CISG. Regarding the German norm of § 271 II BGB the seller has the right to deliver before the agreed point of time. Due to this rule the buyer must be more flexible in the take-over of the delivery. A delivery is possible at any point of time.

For the remedies of the buyer no difference between the lacks of conformance are important regarding art. 35 I CISG. Different to the German law it is not necessary that a special lack of

conformity is given; it is enough that the goods do not fulfil the requirements of the law or those agreed upon. He has all possible remedies for all lacks of conformity. In addition, no fault is necessary. The seller is subject to a guaranteed liability.

Regarding art. 38 I CISG the buyer has to examine the goods in a short period of time. In the German § 377 I HGB the buyer must examine the goods without delay. Here the examination must be given earlier than under the CISG in which the buyer has a short time. Therefore the loss of remedies is not given as quickly as it would be the case in German law.

Also the notice for a lack of conformity regarding art. 39 I CISG must be given in a short period of time. In the German parallel provision of § 377 I HGB the notice must be given - as it also is the case for the examination in the German law - without delay. The reasonable time is therefore longer than the time without delay in the German law. The buyer has a longer period of time to make a notice. In consequence the risk to lose rights because of a lack of conformity is not as high it would be the case under the German law.

An application of art. 38 and 39 CISG on behalf of the seller is not possible if the lack of conformity relates to facts of which he knows or could not have been unaware of and which he did not disclose to the buyer, art. 40 CISG. In the German § 377 V HGB the seller is not entitled to rely on § 377 HGB if he acts malevolent. So the buyer must examine and give notice to the seller in more circumstances as it is the case under the German law than under the CISG if he desires to keep his remedies.

The buyer has a reasonable excuse for this failure to give the required notice, art. 44 CISG. With this provision an advantage for an inexplicable and poorly organised buyer is given to avoid a hard and unreasonable success. This provision has no parallel provision in the German law. In application of this rule a reasonable excuse of the buyer is not possible. He can lose his remedies easier under German law than under the CISG.

Furthermore the buyer has more possibilities to claim a fulfilment and he can claim additional damages, art. 46 CISG. If one desires to claim damages under those circumstances under German law it can only been done instead of the claim of fulfilment, § 326 BGB.

c) Advantage for both parties of a contract

Compared to the German law art. **19 II a, 29 II, 45 I b, 49 I, 61 I b, 64 I, 79 IV CISG** gives an advantage to both parties of a contract.

Regarding art. 19 II a CISG additional or different terms in an acceptance, that modificate the acceptance not material is an effective offer and not only a counter-offer.
Regarding the German § 150 II BGB all modification in the acceptance have to be seen as counter-offers. A formation of the contract is not possible with a modification.

Under the CISG it is easier to format the contract, because the formation of the contract should not become invalid in "only" not material modification.

A modification of the contract is not simple to achieve regarding the form provision in art. 29 II CISG not. Under German law the contracting parties have the right to make an oral modification of the contents of the contract if they want to be bound to that oral modification. Regarding art. 29 II CISG this is not possible Therefore it is more simple to follow the development of a contract. In addition he concept of silence in response to a commercial letter of confirmation is not applicable in the CISG. As a consequence a better legal security for an international business trade is given.

A party that fails to perform must give a notice to the other party of the impediment and its effect on his ability to perform, art. 79 IV CISG. This duty is not mentioned in the German law. Therefore it is easier to handle possible problems in the CISG because the parties get to know about them earlier.

To declare the contract avoided is not possible in most constellations under the application of the CISG without a fundamental breach of contract, art. 49 I and 64 I CISG. The avoidance in the CISG is not as easy as it is the case under German law. Regarding § 462 BGB a fundamental breach of contract is not necessary; an "ordinary" breach of contract is enough. The contract is in effect for a longer period of time and the problems related to the handing back are not given in an international contract.

To claim damages in addition to other remedies is always possible under the application of the CISG, art. 45 I b and Art 61 I b CISG. An additional cause or other requirements are not necessary. When German law is being applicated it is necessary to present a different claim of damage and furtherly the claim of damage is not in all cases additional to other remedies. Due to the fact that the claim of damage is always possible, the application of the CISG appears to be more flexible.

d) Outcome

The CISG is of better use to solve the problems which occur in international sales contracts for the buyer and the seller in comparison to the German civil- and trade law. It gives **advantages for both**, the seller and the buyer. It provides a better instrumentarium to handle problems related to a contract, especially the those related to a lack of conformity.

In an international contract it is necessary that the foundation of the contract becomes easier and the avoidance more difficult. In an international contract high risks are given for a seller who has delivered goods over a large distance into another country. The problems with the handing back if no contract is given or the contract is avoided are big for the seller because of the high redelivery expenses and the duty as well as currency problems. To solve such kinds of problems the foundation of the contract is regarding art. 19 II CISG easier because an acceptance with not material modification is an effective acceptation and the declaration of avoidance regarding art. 49 I, 64 I CISG is more difficult because a fundamental breach of contract is necessary in most cases.

In addition it is made easier to follow the development of a contract regarding the form provision of art. 29 II CISG and a commercial letter of confirmation is not applicable in the CISG. This makes the contract more transparent for both parties because only the contract itself and the changes which have been made in the laid own form are important.

Under the CISG it is easier to get remedies because all remedies are given for all lack of conformity and no fault is necessary, art. 45 I and 61 I CISG. It is a guarantee liability and no conclusion as in the German law is necessary for remedies. Furthermore it is not possible for the buyer to lose his remedies as early, art. 38, 39 CISG. When the possibility of loss of remedies is given, the consequences are not as harsh regarding art. 44 CISG. On the other hand the seller has the possibility for an second offer regarding art. 48 CISG. Due to this rule he has the possibility to act against the possible remedies of the buyer. This brings the remedies to an equal point.

To sum up it is to say that an application of the CISG is more suitable to solve the problems of modern international sales business. The CISG is more transparent and easier to handle than the German rules. Because of this reason, some attempts have been made in Germany to change the existing law given to bring it into line with the CISG.