

The 1980 UN Convention on Contracts for the International Sale of Goods (CISG)

International Commercial Arbitration and International Sales Law

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Schedule

08.11 **CISG I**

15.11 CISG II

22.11 ...

10/11.01 Possibility to take part at the Seminar organized by
Prof. Dr. Alexander Trunk

“Alternative means of Dispute Resolution” **Registration until 15.11!**

https://www.eastlaw.uni-kiel.de/de/lehrveranstaltungen/winter18_19/seminar/seminarankuendigung-adr

Sources

CISG: <https://www.uncitral.org/pdf/english/texts/sales/cisg/V1056997-CISG-e-book.pdf>

Commentary: Kröll/Mistelis/Perales Viscasillas, UN Convention on Contracts for the International Sales of Goods (CISG) 2nd Ed. 2018
<https://beck-online.beck.de/>

Databases:

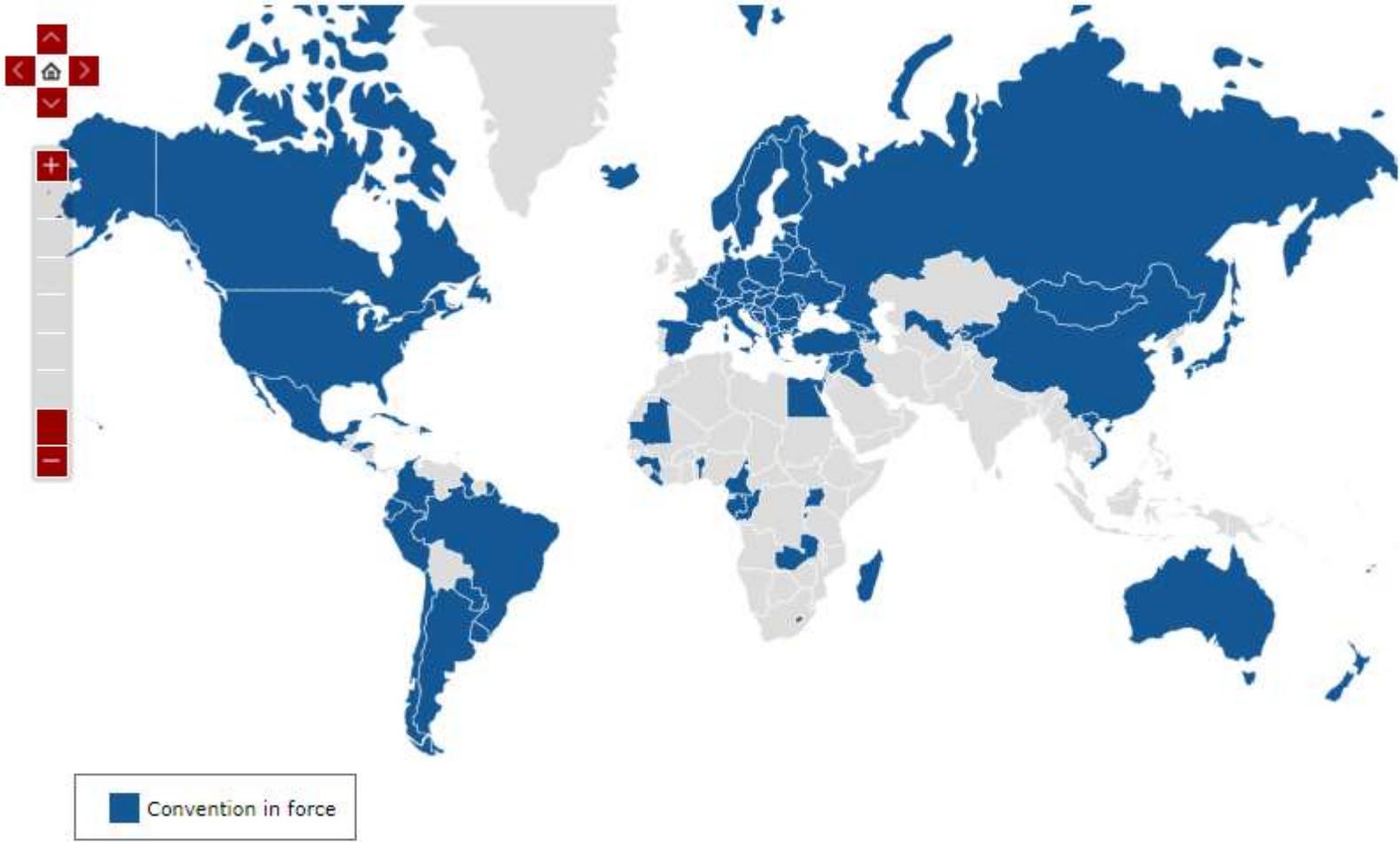
- CLOUT <http://www.uncitral.org/clout/index.jsp>
- Global Sales Law <http://www.globalsaleslaw.org/index.cfm?pageID=29>
- Albert H. Kritzer CISG database <http://www.cisg.law.pace.edu>
- CISG Online: <http://www.globalsaleslaw.org/index.cfm?pageID=28>
- CISG Advisory Council: <http://www.cisgac.com/>

Legal Nature of CISG

1. a substantive law treaty
2. displacing the domestic regime otherwise applicable
3. influenced other legislative initiatives, including UNIDROIT Principles for International Commercial Contracts (PICC), the Principles of European Contract Law (PECL)
4. Advantages:
 - No need to negotiate/establish applicable law, make research on foreign law
 - Less dependent on bargaining power

Status map

United Nations Convention on Contracts for the International Sale of Goods (Vienna, 1980)



JS map by amCharts

See also: [Status table](#)

08.11.2018

Disclaimer: The boundaries and names shown and the designations used on this map do not imply official endorsement or acceptance by the United Nations. This map is provided solely as a visual aid; due to technical limitations it may not reflect accurately the territorial application of the

History of CISG



Ernst Rabel
(1874 – 1955)
a member of the
UNIDROIT

UNIDROIT - International Institute for the Unification of Private Law

Hague Conventions of 1964, entered into force in 1972:

1. Uniform Law on the International Sale of Goods (ULIS)
2. Uniform Law on the Formation of Contracts for the Int'l Sale of Goods (ULF)

UNCITRAL - The United Nations Commission on International Trade Law

CISG of 1980, entered into force in 1988

Structure of the CISG

Part I: Sphere of Application and General Provisions (Art. 1–13)

Part II: Formation of the Contract (Art. 14–24)

Part III: Sale of Goods (Art. 25–88):

general provisions – obligations of seller, remedies for breach of contract – obligations of buyer, remedies for breach of contract – passing of risk – provisions common to seller and buyer (e.g. damages)

Part IV: Public International Law provisions (Art. 89–101).

Application of the CISG (in courts)

1. party autonomy (choice of law of a Contracting State)
2. direct choice of rules of the Convention by the contracting parties
3. there is a sale of goods and the seller and buyer have their places of business in different Contracting States
4. the applicable PIL points to the application of the law of a Contracting State (only one or neither party has its relevant place of business in a Contracting State) AND
5. the contracting parties have not excluded application of CISG

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“Sale”

Contracts of sale - reciprocal contracts directed at the exchange of goods against the price

Explicitly included:

- carriage of the goods
- sales by sample or model or under specifications made by buyer,
- delivery of goods by instalments
- framework contracts, provided the framework contains the main rights and duties without having to refer to them in the main contract

“Sale” - mixed contracts

1. sales+production (goods to be manufactured)

the buyer provides a non-substantial portion of the materials necessary

- economic value (price of the contribution)
- essential (the importance of the contribution for the end-product)
- quantity/amount (volume of the contribution)

2. sales+service

service is a non-preponderant portion of the obligation

- the weight the parties placed upon obligations
- economic value

“Sale” – not regulated by CISG:

1. the objective of the sales contract:

sale of goods bought for personal, family or household use

2. non-contractual basis of the sales transaction:

sale by auction or on execution or by authority of law

3. non-sales character:

– barter

– distribution agreements

– franchising agreements

– financing agreements

“Goods”

Movable, tangible

Exemptions based on:

1. the intended use: personal, family or household use **at the time of the conclusion of the contract** unless the seller neither knew nor ought to have known that
2. nature of the goods:
 - stocks, shares, investment securities, negotiable instruments or money
 - (whole) ships, vessels, hovercraft or aircraft
 - electricity etc.

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“International parties related to more than one CS”

Place of business - the place from which a business activity is de facto carried out (certain duration, stability, autonomy)

- when several, the one with the closest relationship to the contract and its performance
- when no place of business, habitual residence

In different States - at the time of contract conclusion

Parties – not agents

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Positive limits to application of CISG

- formation of the contract of sale
- rights and obligations of the seller and the buyer arising from such a contract (not the rights of 3rd parties, unjustified enrichment and tort claims)

But also:

- interpretation of the parties' statements and conduct (Art. 8),
- relevance of the parties' practices and usages (Art. 9),
- form (Art. 11),
- modifications and termination of contracts (Art. 29)
- interpretation of the CISG and gap-filling
- burden and standard of proof

Negative limits to application of CISG (external gaps)

A non-exhaustive list.

Mentioned:

1. validity of the contract or of any of its provisions or of any usage
2. the effect which the contract may have on the property in the goods sold
3. liability for death or personal injury caused by the goods or by other means

Negative limits to application of CISG

Non-mentioned but excluded:

1. limitation period for claims
 2. substantive or formal validity of dispute resolution clauses
 3. set-off
 4. recovery of attorneys' fees
 5. interest rates? seniority, currency, manner of payment
 6. assignment of claims, contracts
 7. punitive damages
- etc.

Interpretation of CISG

Principles:

- international character, uniformity in its application,
- good faith in international trade

Function:

1. determination of gaps
2. filling of internal gaps by means of:
 - analogical application of specific provisions of the CISG
 - general principles on which the CISG is based
 - other external principles and
 - the applicable domestic law.

General principles on which CISG is based

1. Party autonomy

the right to opt in, opt out, derogate or modify provisions of CISG

Opt out: by choice of law, contractually, by express agreement

2. Freedom of form

3. Upholding the contract (favor contractus)

4. Full compensation of damages

Interpretation of statements (& contracts)

A subjective test: **when the other party knew, or should have known the intention**

An objective test: **understanding of a reasonable person of the same kind in the same circumstances**

“Contra proferentem” rule

Relevant circumstances: a non-exhaustive list:

- prior negotiations between the parties,
- practices that have been established between them,
- usages or
- any conduct subsequent to the contract.

No parol evidence rule! Implied terms

Usages

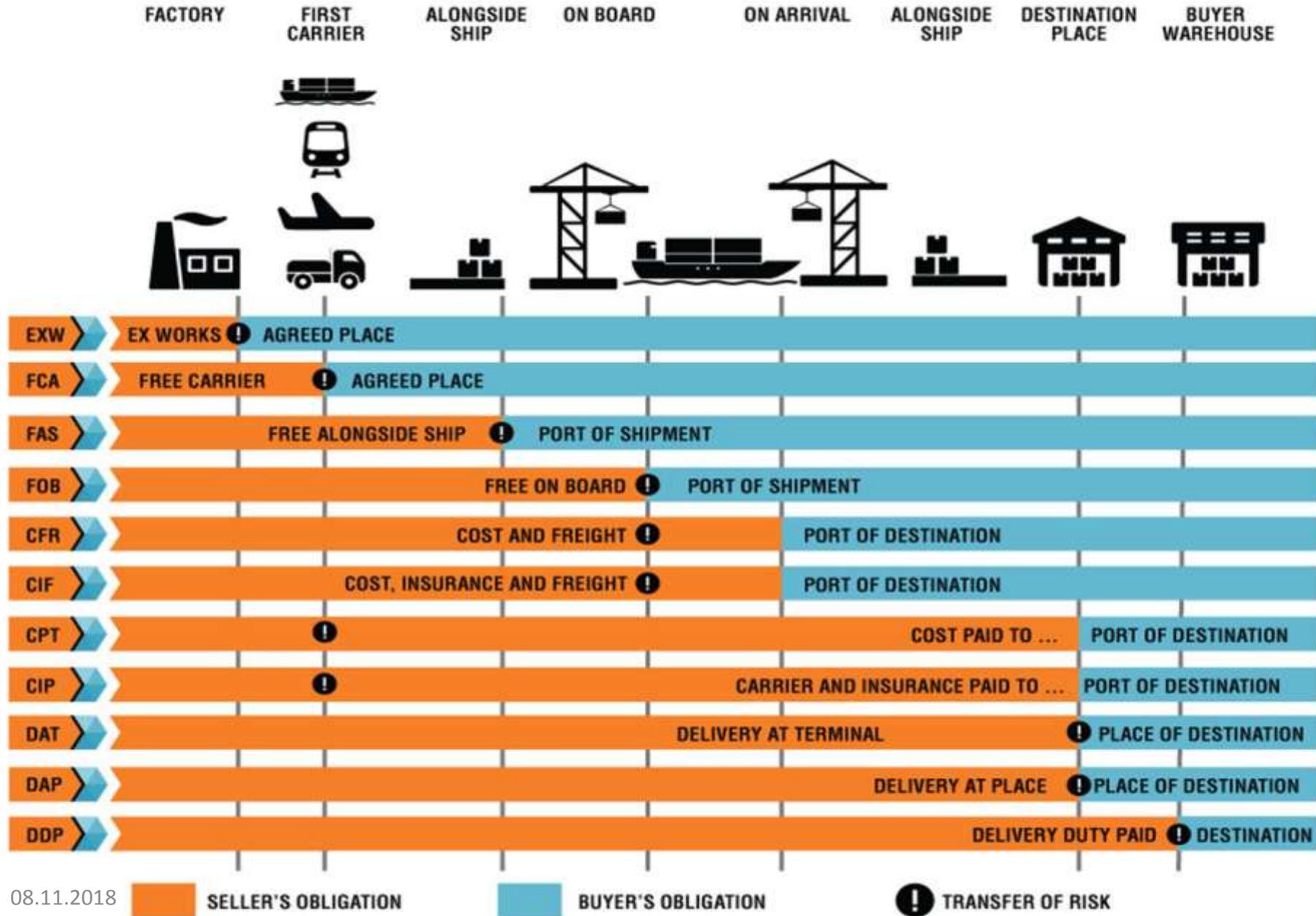
Types:

1. practices - at least 3-4 previous dealings
2. (expressly or impliedly) agreed usages, e.g. INCOTERMS
3. international usages of trade

Hierarchy of rules:

1. Art. 12, 96
2. agreement of the parties (Arts 6 and 9(1): practices and agreed usages)
3. usages of trade of Art. 9(2),
4. other rules of CISG

INCOTERMS® 2010



Is CISG applicable?

A party A with place of business in Morocco (a Buyer) orders some aircraft engines from party B which has its place of business in China (a Seller).

- I. The German law governs their contract.
- II. The rules of German Civil Code apply to this contract.
- III. The contract has a provision that the Moroccan law applies to it.
- IV. The Parties have not agreed on the law applicable to the contract but envisaged a choice of forum in favor of Chinese courts. PIL rules of China point towards the law of the Seller to govern such contracts.
- V. The Parties have not agreed on the law applicable to the contract but envisaged a choice of forum in favor of English courts. PIL rules in the UK point towards the law of Seller

*Morocco and the UK are not CS to CISG. China made a reservation under art. 95 CISG

Contract formation - Offer

1. is addressed to one or more specific persons
2. indicates an intent to be bound
3. sufficiently definite
 - Goods
 - Quantity
 - Price. See Art. 55
4. reaches the offeree Art. 24

Incorporation of standard terms:

- part of the offer
- offeree (or a reasonable person) knew or could not have been unaware about offeror's intent

Price

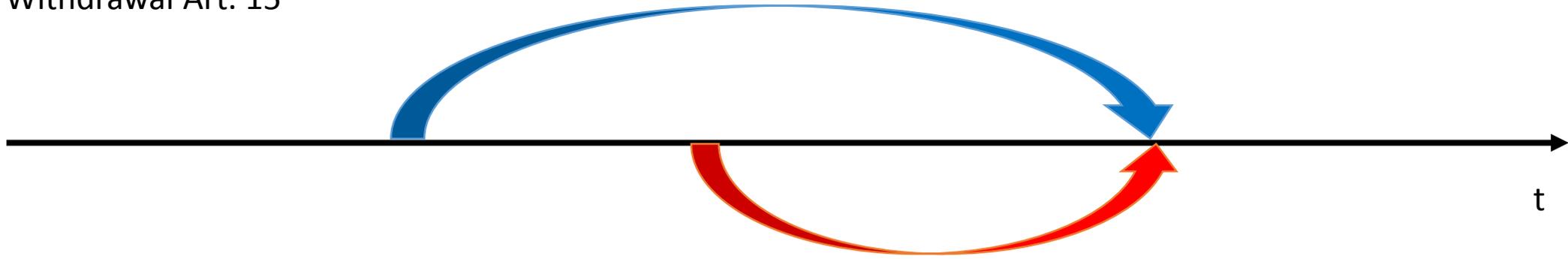
Section 4 PURCHASE PRICE

1. The purchase price is calculated on a cost-plus basis according to the following formula

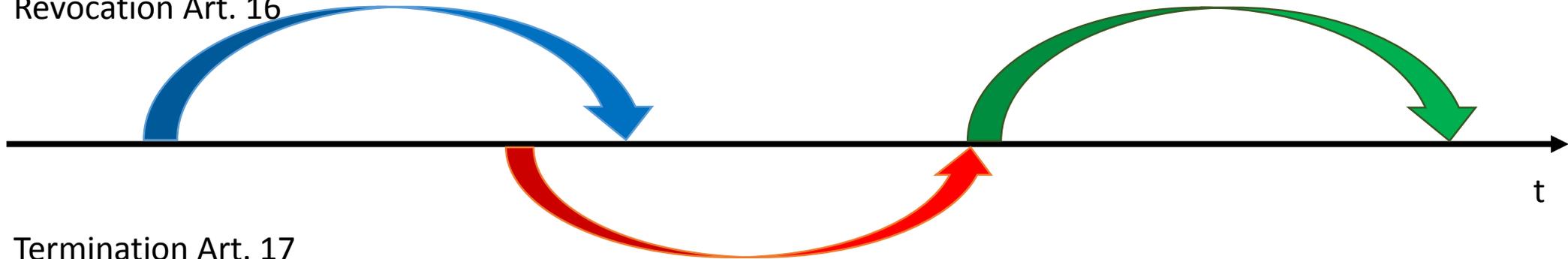
- Production Costs per blade \leq 9,500 US\$: 9,975 US\$
- Production Costs per blade: 9,500 – 10,500 US\$: Costs + 475 US\$ (5% of 9,500)
- Production Costs per blade: 10,501 – 11,500 US\$: Costs + 420 US\$ (4% of 10,500)
- Production Costs per blade: 11,501 – 12,000 US\$: Costs + 345 US\$ (3% of 11,500)
- Production Costs per blade: 12,001 – 12,500 US\$: Costs + 240 US\$ (2% of 12,000)
- Production Costs per blade: 12,501 – 13,000 US\$: Costs + 125 US\$ (1% of 12,500)
- Production Costs per blade \geq 13,125 US\$: 13,125 US\$

The minimum price per fan blade irrespective of production costs is US\$ 9,975 while the maximum price to be charged per fan blade is US\$ 13,125.

Withdrawal Art. 15



Revocation Art. 16



Termination Art. 17



Blue – an Offer, Red – a Withdrawal, Revocation or Rejection, Green - Acceptance

Contract formation - Acceptance

1. By express declaration
2. By conduct
3. By silence and inactivity when additional circumstances exist

Materially altering provisions Art. 19(3):

price, payment, quality and quantity of the goods, place and time of delivery, extent of one party's liability to the other or the settlement of disputes

Battle of forms

Rights and obligations of the parties

Obligations of the seller

(Art.30 + 31-36)

- to deliver the goods (mode, place, time) (Art.31-33)
- hand over any documents (Art.34)
- transfer the property in the goods (Art.4(b))

Obligations of the buyer

(Art.53 + 54-60)

- to pay the price for the goods
- take delivery of them
- to examine the goods and give a notice of their non-conformity

Conformity of the goods

BEFORE CISG: ULIS: “no difference in quantity, lack of part of the goods, or absence of any quality or characteristic shall be taken into consideration where it is not material”

Conformity = quality + quantity + description + packaging

Non-conformity of the goods: factual or legal (3rd party rights)

Requirements set by:

- The contract
- Fitness for specific purpose
- Fitness for ordinary purpose (e.g. ability to resell)
- Conformity to a sample or a model

Conformity of the goods

Mussels case:

the buyer bought mussels which contained cadmium levels exceeding the recommendations of the health regulations in the buyer's country. The buyer filed a claim for breach of contract due to non-conformity of the goods.

Court:

a foreign seller can simply not be required to know the not easily determinable public law provisions and/or administrative practices of the country to which he exports, and ... the purchaser, therefore, cannot rationally rely upon such knowledge of the seller, but rather, the buyer can be expected to have such expert knowledge of the conditions in his own country or in the place of destination, as determined by him, and, therefore, he can be expected to inform the seller accordingly.

Conformity of the goods

Frozen Pork case: a German buyer bought from a Belgian seller pork, which was to be delivered to the buyer's customer in Bosnia-Herzegovina. Upon delivery, a suspicion that Belgian pork may be contaminated with dioxin arose. In Belgium and Germany Belgian pork was not marketable without a health clearance certificate. Bosnia-Herzegovina also prohibited resale of Belgian pork. Buyer sought a health certificate from the Belgian seller but did not obtain it. The buyer refused to pay, the seller filed a claim for payment.

Court:

in the case of food stuff intended for human consumption, the resaleability includes that the goods are at least not harmful to health. Insofar as this is governed by provisions of public law, the law of the seller's state is applicable on principle. ... *the mere suspicion that the goods may be harmful to health represents a lack of conformity of the goods and therefore a breach of contract at any rate,* if the suspicion has resulted in measures of public law precluding the tradability of the goods.

Obligation of the buyer to examine the goods

“within as short a period as is practicable in the circumstances” – but no sanction

Art. 39 (1) CISG: buyer forfeits his legal claim, if it has not notified the seller

“within a reasonable time after he has discovered it or ought to have discovered it”

UNLESS:

1. the lack of conformity relates to the facts of
 - which the seller knew or could not have been unaware and
 - which he did not disclose to the buyer
2. the buyer can provide a reasonable excuse Art. 44

Cut-off period 2 years

Fundamental breach

Conditions:

- there is a detriment, that substantially deprives the other party of what he is entitled to expect under the contract
- foreseeability (but not for a particularly important term) *at the time of the conclusion of the contract*

A prerequisite for:

- avoidance or
- a right to request a substitute for non-conforming goods

Fundamental breach

- A definite non-delivery (but usually not if there is a breach with regard to one installment)
- Anticipatory breach: non-performance of “a substantial part of obligations” or in total (Art. 71-72)

There is no fundamental breach:

- where the buyer, without unreasonable inconvenience can use the goods or resell them even at a discount
- the non-conformity can be remedied without unreasonable inconvenience to the buyer or delay inconsistent with the weight accorded to the time of performance

Remedies

Available to the seller:

- Right to payment and specific performance Art.62, 28
- Right to avoid the contract Art.63(1)
- Right to damages Art.61(1)(b)
- Right to interest Art.78
- Right to suspend performance Art.71(1)

Available to the buyer:

- Right to specific performance Art.46
- Right to avoid the contract Art.49
- Right to damages Art.45(1)(b)
- Right to interest Art.78
- Right to suspend performance Art.71(1)
- Right to repair Art.46(3)
- Right to replacement of goods Art.46(2)
- Right to reduce the price Art.50

Exemptions

Failure to perform was due to impediment

1. beyond control
2. could not have been taken into account
3. could not have been avoided or overcome

Consequences:

- a non-performing party has a duty to notify,
- the aggrieved party cannot resort to damages: only withholding performance, termination and interest on money due.

Non-performance caused by the creditor itself: no remedy (Art.80)