



## Case Law of Greek Courts for the Vienna Convention (1980) for International Sale of Goods

by

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## 1. Introduction

The Vienna Convention of 1980 for the International Sale of Goods (hereinafter “The Vienna Convention” or “CISG”) governs the conclusion of international sales and rights and obligations of parties thereunder. Up to this date, the Convention has been ratified by 74 states<sup>1</sup> (hereinafter the “Contracting States” and each of them a “Contracting State”) and was entered into force in Greece on 1.2.1999 by virtue of the Law 2532/1997 (Off. Gazette ¶ 227/11.11.1997).

The Vienna Convention has been the object of extended analysis in international legal doctrine and has been repeatedly dealt with by international case law. Similarly, it is evident that it has been the object of many Greek studies and monographs<sup>2</sup>. However, with the conclusion of

<sup>1</sup> <http://untreaty.un.org>

<sup>2</sup> Quote in chronological order: *E. Kapnopolou/C. Witz*, The Vienna Convention on international sales of goods and recent relevant case law, *Greek Review of European Law (ΕΕΕυρΔ)* 1995, 561. *S. Vrellis*, The Convention of United Nations on Contracts for international sales of goods – Thoughts on the expedience of the accession of Greece, *Koinodikion*, 1996, 21. *M. Stathopoulos*, the convention of United Nations for the international sale of goods (to be ratified) and the Civil Code Law, Innovations on breach of contract, *Legal Podium (NoB)* 1997, 1085. *I. Karakostas*, The meaning of defect pursuant to Articles 534 seq. of the Civil Code, Article 6 of Law 2251/1994 for the protection of consumers and Articles 25 and 35 § 1 of the Vienna Convention of 1980 for the international sales of goods, *Companies and Undertakings Law (Companies and Undertakings Law (ΔΕΕ))* 1998, 1240. *Will/ Ath. Pouliades*, Statutory Limitation in the international sale of goods. Thoughts resulting from the Judgment of the Court of Appeals of Geneva dated 10.10.1997, *Judicial Review (Κριτε)* 1998, 123. *Ath. Pouliades*, The Convention of United Nations for the international sale of goods and the law of the Civil Code: The regulatory precedent for the unification of breach of contract, *Commercial Law Survey (ΕπισκεΔ)* 1998, 19. *Al. Demas*, Sphere of application of the Convention of United Nations for the international sales of goods, *Companies and Undertakings Law (ΔΕΕ)* 1998, 452. *Al. Demas*, International contracts for sales of goods: The convention of the United Nations (Vienna) 1980 - Law 2532/1997, *Legal Podium (NoB)* 1998, 432. *G. Nikolaidis*, The creation of CISG and settlements which it expresses, *Judicial Review (Κριτε)* 1999, 119. *P. Giannopoulos*, Sphere of application of the Vienna Convention of 1980, *Greek Review of European Law (ΕΕΕυρΔ)* 1999, 622. *A. Valtoudis*, The problem of concurrence of liability for real defects pursuant to the Vienna Convention (CISG) with the national non-contractual law, *Armenopoulos (Αρμ)* 1999, 327. *A. Valtoudis*, The right of the seller to “remedy any failure to perform” pursuant to the Vienna Convention, *Armenopoulos (Αρμ)* 1999, 605. *D. Tzougianos*, The transfer of risk pursuant to Articles 66-70 of the United Nations Convention for international sales of goods, *Commercial Law Review (ΕΕμπΔ)* 2000, 509. *G. Nikolaidis*, International sale of goods pursuant to the Vienna Convention, 2000. *D. Flambouras*, Exemption from the liability of non-performance of a sales contract in the Vienna Convention for international sale of goods, *Commercial Law Review (ΕΕμπΔ)* 2000, 679. *D. Flambouras/G. Petrocheilos*, The Vienna Convention for the international sale of goods as interpreted by Arbitral Tribunals, *Commercial Law Review (ΕΕμπΔ)* 2000, 1. *A. Chelidonis*, Law 2532/97 (Vienna Convention for international sale of goods) – setting the limits of the sphere of application and theory of legal transactions, *Chronicles of Private Law (ΧρΙΔ)* 2001, 879. *A. Chelidonis*, The “fundamental breach of contract” in Article 25 of the Vienna Convention, *Commercial Law Survey (ΕπισκεΔ)* 2002, 663. *D. Flambouras*, The doctrines of impossibility of performance and *clausula rebus sic stantibus* in the 1980 Convention on Contracts for the international sale of goods and the Principles of European Contract Law – A Comparative Analysis, *Pace International Law Review* 2001, 261. *D. Flambouras*, The problem of

adjudication and calculation of interest in the Vienna Convention for the international sale of goods, *Judicial Review (Κριτική)* 2000, 195. P. Kornilakis /Ath. Pouliades/A. Valtoudis, The Vienna Convention for international sale of goods, Northern Greece Law Union (*ENOBE*), 2001. G. Nikolaidis, Sphere of Application of the Vienna Convention for the international sales of goods (Law 2532/97), 2001. P. Arvanitakis, The effect of the Vienna Convention for the international sales of goods in procedural law, *Chronicles of Private Law (ΧρΙΔ)* 2001, 674. P. Kornilakis, Issues concerning the application of the Vienna Convention for the international sales of goods. Introduced regulatory framework. The right to declare the contract avoided, *Judicial Review (Κριτική)* 2002, 133. Ath. Pouliades, The main features of the regulation of damages by the Vienna Convention for international sales of goods, *Judicial Review (Κριτική)* 2002, 151. P. Kornilakis, Special Contractual Law, volume I, 2002, p. 104 seq. P. Papanikolaou/Kl. Roussou/K. Christodoulou/A. Karabatzos, The new law on the seller's liability, 2003, p. 259 seq. F. Doris/A. Chelidonis (collective work), Issues for the application of the Vienna Convention for international sales of goods (Law 2532/97), 2006. A. Georgiadis, Contractual law- Special Part, Volume I, 2004, p. 151 seq. Ath. Pouliades, Seller's liability in the system of contract breaches, 2005. B. Kiantos, Private law of international commerce, 2005, p. 873-971. D. Flambouras, Exemption and hardship: Remarks on the manner in which the Principles of European Contract Law (Articles 6:111 and 8:108) may be used to interpret or supplement CISG Article 79 in J. Felemegas (edit.), *An International Approach to the Interpretation of the UN Convention on Contracts for the international sale of goods (1980) as Uniform Sales Law* (Cambridge University Press, 2006), p. 499 seq. P. Demetriades, Sales Law in the Civil Code and the international convention for the sale of goods (CISG), *Armenopoulos (Αρμ)* 2006, 1183. D. Flambouras, Allocation and transfer of risk contained in the sale of goods, 2007. D. Flambouras, Recent case law of Greek courts for the Vienna Convention of 1980 for international sales of goods - Issues of private international law, in *Private International Law of Commerce*, 2008, p. 509. D. Flambouras, International Sales, in Ch. Pamboukis (edit.), *International Transactions Law*, Athens, Law Library, 2009, paragraphs 558-1472 (pages 275-594) (*passim*).

almost 10 years from the date CISG was entered into force in Greece and the issue of Greek court judgments which interpreted its text<sup>3</sup>, a brief presentation of certain provisions of CISG is deemed necessary, as these have been interpreted mainly by Greek Courts<sup>4</sup>. On this basis this study concentrates on the manner in which Greek courts have interpreted the CISG and sets out systematically (i.e. following CISG structure) the results from the said judicial interpretation (for a brief overview of the matters dealt with by Greek courts as appear in this study please refer to the preceding diagram).

## II. Legal nature of the CISG

CISG falls into the category of international conventions that create law and constitutes a directly enforceable international convention. Therefore, it contains no rules of private international law (conflict rules), but directly enforceable substantial rules, which supersede the

<sup>3</sup> Single-Member First Instance Court of Athens (*ΜΠρΑθ*) 8161/2009 (not published) [facts and editorial remarks by the writer in English in <<http://cisgw3.law.pace.edu/cases/090000gr.html>>]. Multi-Member First Instance Court of Athens (*ΠΠρΑθ*) 4505/2009 (not published) [facts and editorial remarks by the writer in English in <<http://cisgw3.law.pace.edu/cases/094505gr.html>>]. Multi-Member Court of First Instance of Athens (*ΜΠρΑθ*) 2282/2009 *Companies and Enterprises Law Review (ΑΕΕ)* 2009, 831 [editorial remarks by the writer in English in <<http://cisgw3.law.pace.edu/cases/092282gr.html>>]. Court of Appeals of Piraeus (*ΕφΠειρ*) 520/2008, *Companies and Undertakings Law (ΑΕΕ)* 2008, 1396 [facts and editorial remarks by the writer in English in <<http://cisgw3.law.pace.edu/cases/080000gr.html>>]. Single-Member First Instance Court of Thessalonica (*ΜΠρΘεσ*) 16319/2007, *Chronicles of Private Law (ΧρΙΔ)* 2008, 146 (with commentary of P. S. G.) [facts and editorial remarks by the writer in English in <<http://cisgw3.law.pace.edu/cases/080001gr.html>>]. Single-Member First Instance Court of Athens (*ΜΠρΑθ*) 2967/2007, *Companies and Undertakings Law (ΑΕΕ)* 2007, 957 (with commentary of F. Demetriou) [editorial remarks by the writer in English in <<http://cisgw3.law.pace.edu/cases/070000gr.html>>]. Single-Member First Instance Court of Thessalonica (*ΜΠρΘεσ*) 43945/2007, *Chronicles of Private Law (ΧρΙΔ)* 2008, 52 [facts and editorial remarks by the writer in English in <<http://cisgw3.law.pace.edu/cases/080002gr.html>>]. Court of Appeals of Athens (*ΕφΑθ*) 4861/2006, *Commercial Law Survey (ΕπισκΕΔ)* 2006, 841 [facts and editorial remarks by the writer in English in <<http://cisgw3.law.pace.edu/cases/060000gr.html>>]. Court of Appeals of Lamia (*ΕφΛαμ*) 63/2006, *Commercial Law Survey (ΕπισκΕΔ)* 2006, 1108 [facts and editorial remarks by the writer in English in <<http://cisgw3.law.pace.edu/cases/060001gr.html>>]. Court of Appeals of Thessalonica (*ΕφΘεσ*) 2923/2006, *Commercial Law Survey (ΕπισκΕΔ)* 2007, 168 [facts and editorial remarks by the writer in English in <<http://cisgw3.law.pace.edu/cases/070001gr.html>>]. Single-Member First Instance Court of Larisa (*ΜΠρΛαρ*) 165/2005, NOMOS legal database no. 380226 [facts and editorial remarks by the writer in English in <<http://cisgw3.law.pace.edu/cases/050165gr.html>>]. Multi-Member First Instance Court of Thessalonica (*ΠΠρΘεσ*) 22513/2003, *Armenopoulos (Αρμ)* 2003, 1802 [facts and editorial remarks by the writer in English in <<http://cisgw3.law.pace.edu/cases/030513gr.html>>]. Single-Member First Instance Court of Thessalonica (*ΜΠρΘεσ*) 14953/2003, NOMOS legal database no. 432741 [facts and editorial remarks by the writer in English in <<http://cisgw3.law.pace.edu/cases/030001gr.html>>]. Single-Member First Instance Court of Athens (*ΜΠρΑθ*) 1314/2000 (not published) [facts and editorial remarks by the writer in English in <<http://cisgw3.law.pace.edu/cases/000308gr.html>>].

<sup>4</sup> In particular, for the issues concerning the private international law, which emerged in certain of this judgments cf. *D. Flambouras, as above*, in *Private International Law of Commerce*, 2008, p. 509 seq.

relevant provisions of national laws (art. 28 § 1 of Greek Constitution of 1975)<sup>5</sup>. Thus, in the states that have ratified CISG, the international sales of goods that fall into the sphere of application of the CISG are governed by its provisions, while all other sales are governed by the provisions of national law to which the rules of private international law of the *forum*<sup>6</sup> refer to. It must be noted that at the EU level as from 17.12.2009, the Regulation (EC) 593/2008 of the European Council and of the Council dated 17.6.2008 for applicable law on contractual obligations (Rome I) shall apply; the latter statute will substitute the Rome Convention of 1980 (ratified in Greece by law 1792/1988 (Off. Gazette A 142/1988))<sup>7</sup>. As regards countries outside the EU, the relevant Greek domestic provisions of the private international law shall continue to apply (see Greek Civil Code art. 4 to (incl.) 33).

CISG Art. 6 provides that “The parties may exclude the application of this Convention or, subject to article 12, derogate from or vary the effect of any of its provisions”. Therefore, CISG does not contain compulsory law but, on the contrary, art. 6 confirms the principle of the autonomy of the parties. Thus the contracting parties, pursuant to CISG art. 6, may agree that: (a) CISG shall not apply in whole (e.g. with the choice of the law of a state which has not ratified CISG)<sup>8</sup>; (b) CISG shall not apply in part, either with the exclusion of several parts

<sup>5</sup> Single-Member First Instance Court of Athens (*ΜΠρΑθ*) 8161/2009 (not published) [facts and editorial remarks in English in <<http://cisgw3.law.pace.edu/cases/090000gr.html>>]. Multi-Member First Instance Court of Athens (*ΙΙΠρΑθ*) 4505/2009 (not published) [facts and editorial remarks by the writer in English in <<http://cisgw3.law.pace.edu/cases/094505gr.html>>]. Court of Appeals of Lamia (*ΕφΛαμ*) 63/2006, *Commercial Law Survey (Επισκευή)* 2006, 1108 [facts and editorial remarks by the writer in English in <<http://cisgw3.law.pace.edu/cases/060001gr.html>>]. Cf. P. Kornilakis, Special contractual Law, Volume I, 2002, p. 109. M. Stathopoulos, *Legal Podium (NoB)* 1997, 1085 seq.

<sup>6</sup> P. Kornilakis, Special contractual Law, volume I, 2002, p. 109.

<sup>7</sup> Convention for Applicable Law for Contractual Obligations (Rome, June 19, 1980). For the sphere of application of the Rome Convention, cf. I. Voulgaris, The Sphere of Application of the Rome Convention of 1980 “on applicable law for contractual obligations” and the lines of applicable law it provides (the Rome Convention) in relation to the respective provisions of the Civil Code, *Legal Podium (NoB)* 1992, 1289; Ch. Pamboukis, The choice of applicable law and the rules of direct application in the Rome Convention for the applicable law for contractual obligations, *Legal Podium (NoB)* 1992, 1327.

<sup>8</sup> In order for the contracting parties to ensure the non-application of CISG to their sales agreement, they must clearly and expressly state their will; cf. Multi-Member First Instance Court of Athens (*ΙΙΠρΑθ*) 4505/2009 (not published) [facts and editorial remarks by the writer in English in <<http://cisgw3.law.pace.edu/cases/094505gr.html>>]; Judgment of the U.S. District Court Minnesota (January 31, 2007, Judgment No Civ. 04-4386 ADM/AJB) in the case *The Travelers Property Casualty Company of America and Hellmuth Obata & Kassabaum, Inc. v. Saint-Gobain Technical Fabrics Canada Limited*, 2007 WL 313591 (D.Minn.).

thereof or with the exclusion of specific articles (“opting out” clause)<sup>9</sup>; or (c) CISG shall apply in cases where normally it would not apply<sup>10</sup>.

### III. Interpretation of the CISG<sup>11</sup>

CISG Art. 7 § 1 provides that in the interpretation of the Vienna Convention “regard is to be had to its international character and to the need to promote uniformity in its application and the observance of good faith in international trade”. It is accepted by legal doctrine and has been recently judged that pursuant to CISG art. 7 § 1 the courts of the Contracting States must interpret the provisions of the CISG autonomously, i.e. independently from any national particularities of the relevant interpreter (e.g. from limitations of domestic law or from preceding court judgments); thus, the interpreter must take into account the interpretations provided by courts of other Contracting States and in parallel to recur to the preparatory discussions and the views of domestic and international legal doctrine<sup>12</sup>. This autonomous interpretation is mandatory, in order to avoid the risk of non-uniformity throughout the application of the CISG.

<sup>9</sup> Court of Appeals of Athens (*Εφαθ*) 4861/2006, *Commercial Law Survey (Επισκευή)* 2006, 841 [facts and editorial remarks by the writer in English in < <http://cisgw3.law.pace.edu/cases/060000gr.html> >]. Court of Appeals of Lamia (*ΕφΛαμ*) 63/2006, *Commercial Law Survey (Επισκευή)* 2006, 1108 [facts and editorial remarks by the writer in English in < <http://cisgw3.law.pace.edu/cases/060001gr.html> >]. Multi-Member First Instance Court of Athens (*ΙΙΙΙρΑθ*) 4505/2009 (not published) [facts and editorial remarks by the writer in English in < <http://cisgw3.law.pace.edu/cases/094505gr.html> >].

<sup>10</sup> Multi-Member First Instance Court of Athens (*ΙΙΙΙρΑθ*) 4505/2009 (not published) [facts and editorial remarks by the writer in English in < <http://cisgw3.law.pace.edu/cases/094505gr.html> >]. Cf. *D. Flambouras /G. Petrocheilos, Commercial Law Review (ΕΕμπΔ)* 2000, 13 with further references. .

<sup>11</sup> For the said issue, c.f. analytically *D. Flambouras*, The international sale, in *Ch. Pamboukis* (edit.), *International Transactions Law* par. 685-694.

<sup>12</sup> See also Multi-Member First Instance Court of Athens (*ΙΙΙΙρΑθ*) 4505/2009 (not published) [facts and editorial remarks by the writer in English in < <http://cisgw3.law.pace.edu/cases/094505gr.html> >]. Cf. *A. Georgiadis*, *Special contractual Law*, Volume I, Special part, p. 155. *P. Papanikolaou/A. Karabatzos*, The new law on the seller’s liability, 2003, p. 267-268 where reservations are expressed in relation to the practicability of “non-national” interpretation.

## IV. Sphere of application of the CISG<sup>13</sup>

### 1. Territorial and temporal sphere of application

CISG art. 1 § 1 provides that:

“This Convention (the CISG) applies to contracts of sale of goods between parties whose places of business are in different States”

- (a) when these States are Contracting States or
- (β) when the rules of private international law lead to the application of the law of a Contracting State."

Furthermore, CISG art. 99 § 2 regulates the issue of when does the CISG enters into force in a State (whenever this becomes a Contracting State for the purposes of art. 1 § 1 CISG). In addition, pursuant to CISG art. 100 § 2, in order for a sales contract to fall into the sphere of application of CISG it must had been concluded after the date when the CISG enters into force in the Contracting States (if CISG art. 1 § 1(a) applies) or in the Contracting State (if CISG art. 1 § 1(b) applies)<sup>14</sup>.

In order for CISG art. 1 § 1(a) to apply, it is adequate if parties have their place of business in different Contracting States; the existence or absence of cross-border transport of goods has no effect<sup>15</sup>.

Until this day, Greek courts have successfully applied CISG art. 1 § 1(a) and § 1(b), but also CISG art. 99 and art. 100.

In particular, in eight cases<sup>16</sup> CISG applied by virtue of art. 1 § 1(a) thereof, since not only the seller but also the buyer had their place of business, upon conclusion of the contract, in Contracting States.

<sup>13</sup> For this issue cf. analytically G. Nikolaidis, Sphere of application of the Vienna Convention for international sales of goods (Law 2532/97), 2001, p. 1 seq.

<sup>14</sup> For CISG art. 99 and 100 and in general the temporal scope of application of the CISG cf. G. Nikolaidis, The international sale of goods pursuant to the Vienna Convention, 2000, p. 49-50; cf also Multi-Member First Instance Court of Athens (*ΠΠρΑθ*) 4505/2009 (not published) [facts and editorial remarks by the writer in English in <<http://cisgw3.law.pace.edu/cases/094505gr.html>>].

<sup>15</sup> P. Schlechtriem, in P. Schlechtriem/I. Schwenzer, Commentary on the UN Convention on the international sale of goods, 2005 2<sup>nd</sup> ed., p. 24. It should be noted that the meaning for the place of business is provided in CISG art. 10. See also Multi-Member First Instance Court of Athens (*ΠΠρΑθ*) 4505/2009 (not published) [facts and editorial remarks by the writer in English in <<http://cisgw3.law.pace.edu/cases/094505gr.html>>].

Furthermore, in four cases<sup>17</sup> CISG applied by virtue of art. 1 § 1(b) thereof, since the private international law rules of Greece referred to the law of a Contracting State. In particular, it can be concluded from the text of these three judgments that the contracting parties had not selected an applicable law for the sales contract and that the court, in order to determine the applicable law, referred to the conflict rules contained in the Rome Convention of 1980, ratified in Greece by law 1792/1988 (Gov. Gazette A 142/1988)<sup>18</sup>. Since the contracting parties had not selected an applicable law to govern their sales contract (art. 3 of Law 1792/1988), it was adjudicated that the sales contract was governed by the law with which is more closely connected (art. 4 § 1 of Law 1792/1988); in order for the court to find the law which is more closely connected to the contract, it applied the presumption of the characteristic obligation provided by art. 4 § 2 of Law 1792/1988. It is accepted that in the sales contract the characteristic obligation must be fulfilled by the seller (i.e. the delivery of the goods against payment of its price) and therefore, in the absence of an agreement to the contrary, the law of the seller's country is the applicable one<sup>19</sup>.

<sup>16</sup> Single-Member First Instance Court of Athens (*ΜΠρΑθ*) 8161/2009 (not published) [facts and editorial remarks by the writer in English in <<http://cisgw3.law.pace.edu/cases/090000gr.html>>]. Multi-Member First Instance Court of Athens (*ΠΠρΑθ*) 4505/2009 (not published) [facts and editorial remarks by the writer in English in <<http://cisgw3.law.pace.edu/cases/094505gr.html>>]: this last judgement also analysed the application of the CISG by virtue of art. 1 § 1(b). Single-Member First Instance Court of Thessalonica (*ΜΠρΘεσ*) 16319/2007, *Chronicles of Private Law (ΧρΙΑ)* 2008, 146 (with commentary of P. S. G.) [facts and editorial remarks by the writer in English in <<http://cisgw3.law.pace.edu/cases/080001gr.html>>]. Court of Appeals of Athens (*ΕφΑθ*) 4861/2006, *Commercial Law Survey (ΕπισκεΔ)* 2006, 841 [facts and editorial remarks by the writer in English in <<http://cisgw3.law.pace.edu/cases/060000gr.html>>]. Court of Appeals of Lamia (*ΕφΛαμ*) 63/2006, *Commercial Law Survey (ΕπισκεΔ)* 2006, 1108. Court of Appeals of Thessalonica (*ΕφΘεσ*) 2923/2006, *Commercial Law Survey (ΕπισκεΔ)* 2007, 168 [facts and editorial remarks by the writer in English in <<http://cisgw3.law.pace.edu/cases/070001gr.html>>]. Single-Member First Instance Court of Thessalonica (*ΜΠρΘεσ*) 43945/2007, *Chronicles of Private Law (ΧρΙΑ)* 2008, 52 [facts and editorial remarks by the writer in English in <<http://cisgw3.law.pace.edu/cases/080002gr.html>>]. Single-Member First Instance Court of Larisa (*ΜΠρΛαρ*) 165/2005, NOMOS legal database no. 380226 [facts and editorial remarks by the writer in English in <<http://cisgw3.law.pace.edu/cases/050165gr.html>>].

<sup>17</sup> Multi-Member Court of First Instance of Athens (*ΜΠρΑθ*) 2282/2009 *Companies and Enterprises Law Review (ΔΕΕ)* 2009, 831 [editorial remarks by the writer in English in <<http://cisgw3.law.pace.edu/cases/092282gr.html>>]. Multi-Member First Instance Court of Thessalonica (*ΠΠρΘεσ*) 22513/2003, *Armenopoulos (Αρμ)* 2003, 1802 [facts and editorial remarks by the writer in English in <<http://cisgw3.law.pace.edu/cases/030513gr.html>>]. Single-Member First Instance Court of Thessalonica (*ΜΠρΘεσ*) 14952/2003, NOMOS legal database no. 432741. *ΜΠρΑθ* 1314/2000 (not published) [facts and editorial remarks by the writer in English in <<http://cisgw3.law.pace.edu/cases/000308gr.html>>]. It should be noted that in these cases CISG could not apply by virtue of art. 1 § 1(a), since CISG had not entered into force in Greece when the sales contract under judgment were concluded (CISG art. 99 § 2 and art. 100).

<sup>18</sup> In connection with the Rome Convention 1980 cf. bibliography cited above at footnote nr. 7. It is reminded that at an EU level, Regulation (EC) 593/2008 (Rome I) shall apply from 17.12.2009 and will replace the Rome Convention 1980 (see above par. II).

<sup>19</sup> Z. Papsiopoulos-Pasias, Applicable law in the contract, in case of non-agreement between the parties, pursuant to the EC Convention of 1980 for applicable law for contractual obligations, *Legal Podium (NoB)* 1992, 1346 seq. M. Giuliano/P. Lagarde, Report on the Convention on the law applicable to contractual obligations, Journal officiel no

## 2. Objective and subjective sphere of application – purchase of goods for personal, family or household use

CISG art. 1 § 3 provides that “Neither the nationality of the parties nor the civil or commercial character of the parties or of the contract is to be taken into consideration in determining the application of this Convention”.

Furthermore, CISG art. 2 provides that “This Convention [CISG] does not apply to sales: (a) of goods purchased for personal, family or household use, unless the seller, at any time before or at the conclusion of the contract, neither knew nor ought to have known that the goods were bought for any such use; (b) by auction; (c) on execution or otherwise by authority of law; (d) of stocks, shares, investment securities, negotiable instruments or money; (e) of ships, vessels, hovercraft or aircraft; (f) of electricity”.

Consequently, CISG makes clear that it applies to private law sale contracts for goods intended for professional, civil or commercial purposes (CISG art. 1 § 3), but not for consumers’ purposes<sup>20</sup>.

For the purposes of CISG art. 2(a), the intention for personal, family or household use may derive from various factors such as the nature of the goods; accordingly the purchase of goods used for entertainment-recreation<sup>21</sup> or purchase of low-price goods may indicate towards personal use. On the contrary, the purchase of large quantities of same goods or the professional capacity

C282 du 31.10.1980 p. 0001-0050 (Article 4 § 3). Pursuant to art. 3 § 1 of the Regulation (EC) 593/2008 (Rome I) "A contract shall be governed by the law chosen by the parties". Furthermore, art. 4 § 1(a) of the same Regulation, provides the following: "To the extent that the law applicable to the contract has not been chosen in accordance with Article 3 [...], the law governing the contract shall be determined as follows: (a) a contract for the sale of goods shall be governed by the law of the country where the seller has his habitual residence". Therefore, for the purposes of CISG art. 1 § 1(b), in the absence of selection by the parties of applicable law for the sales contract, Greek courts, by virtue of Regulation (EC) 593/2008 (Rome I), shall adopt a solution similar to the one adopted in accordance with Law 1792/1988 (Rome Convention of 1980) that is the law of the country where the seller has his place of business.

<sup>20</sup> Similarly cf. Single-Member First Instance Court of Thessalonica (*ΜΠρΘεσ*) 16319/2007 *Chronicles of Private Law (ΧρΙΔ)* 2008, 147 [facts and editorial remarks by the writer in English in <<http://cisgw3.law.pace.edu/cases/080001gr.html>>].

<sup>21</sup> It has been judged that, in accordance with CISG art. 2(e) and 2(a), the CISG did not apply to a contract that concerned the sale (and purchase) of a private leisure boat; cf. Court of Appeals of Piraeus (*ΕφΠειρ*) 520/2008, *Companies and Undertakings Law (ΔΕΕ)* 2008, 1396, 1397 [facts and editorial remarks by the writer in English in <<http://cisgw3.law.pace.edu/cases/080000gr.html>>].

of the buyer (e.g. a professional photographer buys a camera) etc., does not support the view that the purchased goods were intended for personal, family or household use<sup>22</sup>.

However, CISG shall apply, if the seller, at any time prior or after the conclusion of the sales contract, neither knew nor ought to have known that the goods were bought for personal, family or household use (CISG art. 2 (a)).

### 3. Issues governed by the CISG

If pursuant to the above, a sales contract falls into the sphere of application of CISG, art. 4 provides that the CISG “governs only the formation of the contract of sale and the rights and obligations of the seller and the buyer arising from such a contract [...]”<sup>23</sup>.

Furthermore, CISG governs the form (see CISG art. 11) as well as the amendment or termination of a sales contract (see CISG art. 29).

As regards questions falling into the sphere of application of the Vienna Convention, CISG art. 7 § 2 provides that “Questions concerning matters governed by this Convention which are not expressly settled in it are to be settled in conformity with the general principles on which it is based or, in the absence of such principles, in conformity with the law applicable by virtue of the rules of private international law”.

Therefore, if CISG does not include a special provision for questions falling into its sphere of application (*internal gaps*), these gaps must be filled by the system-methodology of CISG, i.e. based on the general principles on which CISG is based and not with recourse to the applicable law to which the private international law rules of the *forum* refer.

The general principles on which CISG is based include<sup>24</sup>, *inter alia*, the principle of the informal nature of the parties declarations, the principle of autonomy of the parties, the

<sup>22</sup> P. Schlechtriem, in P. Schlechtriem/I. Schwenzer, Commentary on the UN Convention on the international sale of goods, 2005 2<sup>nd</sup> ed., p. 44-45. For the exception of CISG art. 2 (a) as well as for the question of the applicability of the CISG to contracts of sale of goods to consumers within the meaning of art. 1 § 4 of Law 2251/1994 on consumer protection, see D. Flambouras, The international Sale, in Ch. Pamboukis (edit.) International Transactions law, par. 603-617.

<sup>23</sup> See also Multi-Member First Instance Court of Athens (*IIIπρΑΘ*) 4505/2009 (not published) [facts and editorial remarks by the writer in English in <<http://cisgw3.law.pace.edu/cases/094505gr.html>>].

<sup>24</sup> For the general principles of CISG cf. P. Kornilakis, Special contractual Law, volume I, 2002, p. 117-118; G. Nikolaidis, International sale of goods pursuant to the Vienna Convention, 2000, p. 66-67; D. Flambouras, The international sale, in Ch. Pamboukis (edit.), International Transactions Law, par. 701-728; P. Schlechtriem, in P. Schlechtriem/I. Schwenzer, Commentary on the UN Convention on the international sale of goods, 2005 2<sup>nd</sup> ed., p. 92 seq. with extensive references to German legal doctrine and case law.

principle of uniform regulation for the questions concerning the international sale of goods<sup>25</sup>, the principle of good faith<sup>26</sup>, the principle of non-contradictory behavior (*venire contra factum proprium*), the principle of *favor contractus* to the extent possible etc.

If there is no general principle that could apply to an issue for which an internal gap exists in the CISG, then, pursuant to CISG art. 7 § 2 one must apply the national law to which the private international law rules of the *forum*<sup>27</sup> refer.

#### 4. Issues not governed by the CISG

CISG art. 4 provides that “[...], In particular, except as otherwise expressly provided in this Convention, it is not concerned with: (a) The validity of the contract or of any of its provisions or of any usage; (b) The effect which the contract may have on the property in the goods sold”<sup>28</sup>.

The use of the phrase *in particular*, shows that reference made in CISG art. 4 is indicative<sup>29</sup>. Therefore, apart from the questions referred to in CISG art. 4, other questions are also beyond the sphere of application of the CISG which are not governed by a specific provision of CISG, neither can they be dealt with reference to the general principles on which the CISG is based. These questions are characterized as *external gaps*<sup>30</sup> and, pursuant to CISG art. 7 § 2, they are resolved by the rules of national law to which the private international law of the *forum* refers<sup>31</sup>.

<sup>25</sup> Similarly Single-Member First Instance Court of Larisa (*ΜΙΠΛαρ*) 165/2005, NOMOS legal database 380226 [facts and editorial remarks by the writer in English <<http://cisgw3.law.pace.edu/cases/050165gr.html>>]. Single-Member First Instance Court of Athens (*ΜΙΠΑθ*) 1314/2000 (not published) [facts and editorial remarks by the writer in English in <<http://cisgw3.law.pace.edu/cases/000308gr.html>>]: in the latter judgment the court determined the default interest rate based on general principles on which CISG is based, without applying the relevant rules of the domestic applicable law. See below section. IX, supra 125.

<sup>26</sup> See above footnote nr. 25.

<sup>27</sup> However, reference to the applicable domestic law must constitute the “ultimate solution”: cf. *D. Flambouras/G. Petrocheilos, Commercial Law Review (ΕΕμπΔ)* 2000, 17 with further references.

<sup>28</sup> It should be noted that CISG does not apply to the seller’s liability for death or injuries caused to any person from the goods (see CISG art. 5) and below par. VII.2.5.

<sup>29</sup> Multi-Member First Instance Court of Athens (*ΜΙΠΑθ*) 4505/2009 (not published) [facts and editorial remarks by the writer in English in <<http://cisgw3.law.pace.edu/cases/094505gr.html>>].

<sup>30</sup> Similarly Multi-Member First Instance Court of Athens (*ΜΙΠΑθ*) 4505/2009 (not published) [facts and editorial remarks by the writer in English in <<http://cisgw3.law.pace.edu/cases/094505gr.html>>]. Single-Member First Instance Court of Thessalonica (*ΜΙΠΘεσ*) 43945/2007, *Chronicles of Private Law (ΧρΙΔ)* 2008, 52, 54 [facts and editorial remarks by the writer in English in <<http://cisgw3.law.pace.edu/cases/080002gr.html>>].

<sup>31</sup> Multi-Member First Instance Court of Athens (*ΜΙΠΑθ*) 4505/2009 (not published) [facts and editorial remarks by the writer in English in <<http://cisgw3.law.pace.edu/cases/094505gr.html>>].

It has been judged that set-off<sup>32</sup>, statutory limitation<sup>33</sup> and the place where the contract is concluded<sup>34</sup> are matters outside the sphere of application of the CISG and therefore they are governed by the rules of the national law to which the private international law of the *forum* refers<sup>35</sup>.

## 5. Problematic areas: precontractual liability, tort, unjust enrichment

It has been judged that precontractual liability is not governed by the CISG, unless the CISG specifically provides for a matter related to the time prior to the conclusion of the contract (e.g. CISG art. 16 § 2); accordingly remedies for precontractual liability which are based on domestic

<sup>32</sup> Multi-Member First Instance Court of Athens (*IIIπAθ*) 4505/2009 (not published) [facts and editorial remarks by the writer in English in <<http://cisgw3.law.pace.edu/cases/094505gr.html>>]. Single-Member First Instance Court of Thessalonica (*MIIπΘεσ*) 43945/2007, *Chronicles of Private Law (XpIA)* 2008, 52, 54 [facts and editorial remarks by the writer in English in <<http://cisgw3.law.pace.edu/cases/080002gr.html>>]: in this judgment the court characterised as a question for which an external gap exists (CISG art. 7 § 2) the conditions for the set-off of the claims of the parties which are based in the sales contract; consequently, the court examined the legality of the objection of set-off raised in accordance with art. 440 and 441 of the Greek Civil Code (since the Greek law was the applicable one in the contract of sale under examination).

<sup>33</sup> See Multi-Member First Instance Court of Athens (*IIIπAθ*) 4505/2009 (not published) [facts and editorial remarks by the writer in English in <<http://cisgw3.law.pace.edu/cases/094505gr.html>>]; and Single-Member First Instance Court of Larisa (*MIIπAap*) 165/2005, NOMOS legal database no. 380226 [facts and editorial remarks by the writer in English <<http://cisgw3.law.pace.edu/cases/050165gr.html>>]. In particular both courts judged that the statutory limitation of the claims of the seller and the buyer are not regulated by the CISG, since there is no special provision neither can a general principle be concluded which governs this question (CISG art. 7 § 2). Consequently, the question of the statutory limitation of the seller's and the buyer's claims is governed by the national law to which the private international law of the *forum* refers. Furthermore, the courts accepted in terms of interpretation that, in view of the two-year limitation period provided by CISG art. 39 § 2 (see below par. VII.2.3), the (six months) statutory limitation provided for by art. 554 of the Greek Civil Code for the buyer's remedies for real defects or absence of agreed qualities, should begin, not from the date the buyer acquired the goods, but from the date notice was served by the buyer to the seller in relation to the lack of conformity of the goods; however, after the amendment of art. 554 of the Greek Civil Code by Law 3043/2002 (which implemented in Greece Directive 1999/44/EC of the European Parliament and of the Council of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees [OJ No. L 171, 7.7.99 p. 12]), the statutory limitation for lack of conformity (real defects/absence of agreed qualities) is set to two years and it coincides with the two-year time limit set out by CISG art. 39 § 2.

<sup>34</sup> Single-Member First Instance Court of Thessalonica (*MIIπΘεσ*) 16319/2007, *Chronicles of Private Law (XpIA)* 2008, 147, 148 [facts and editorial remarks by the writer in English in <<http://cisgw3.law.pace.edu/cases/080001gr.html>>]. P. Arvanitakis, *Chronicles of Private Law (XpIA)* 2001, 674-675.

<sup>35</sup> Also cf. Single-Member First Instance Court of Thessalonica (*MIIπΘεσ*) 43945/2007 *Chronicles of Private Law (XpIA)* 2008, 52, 54 [facts and editorial remarks by the writer in English in <<http://cisgw3.law.pace.edu/cases/080002gr.html>>]: in this judgment the court ruled that the question of the determination of the interest rate constitutes an external gap not governed by CISG and therefore it is governed by the national law to which the private international law of the *forum* refers. See, however, controversy Greek case law below in section IX footnote 125.

provisions (to which the private international rules of the *forum refer*) may apply in parallel to the provisions of the CISG (i.e. the CISG does not exclude domestic provisions providing for remedies for precontractual liability)<sup>36</sup>.

Furthermore it has been judged that when liability may be based either in tort (*adikopraxia*, art. 914 seq. of the Greek Civil Code) or the provisions of the CISG, the party that suffered physical damage can claim compensation only under the CISG provisions, since otherwise there is a risk for non-uniform application in matters falling within the sphere of application of the CISG<sup>37</sup>.

Finally it has been judged that when the CISG provisions apply concurrently with the domestic provisions on unjust enrichment, the domestic provisions do not apply since unjust enrichment claims is a matter governed by the CISG and in particular the general principles on which CISG is based (CISG art. 7 § 2); in particular: (i) in CISG art. 84 § 2a general principle is based pursuant to which any received enrichment should be returned in the event of a subsequent overturing of the contract of sale; and (ii) in CISG art. 81 § 2(a) a general principle is based

<sup>36</sup> Multi-Member First Instance Court of Athens (*IIIΠρΑθ*) 4505/2009 (not published) [facts and editorial remarks by the writer in English in <<http://cisgw3.law.pace.edu/cases/094505gr.html>>]: this judgment further ruled that art. 197-198 of the Greek Civil Code providing for remedies in the event of precontractual liability could apply even in a contract of sale governed by the CISG. Cf. *D. Flambouras*, The international Sale, in *Ch. Pamboukis* (edit.) International Transactions law, par. 676; *A. Valtoudis*, in *Northern Greece Law Union (ENOBE)*, The Vienna Convention for international sales of goods, 2001, p. 50. However, a Greek writer (*G. Nikolaidis*, The importance of good faith and the precontractual liability under the CISG, *Chronicles of Private Law (ΧρΙΔ)* 2002, 891 seq.) has supported the opposite opinion; in particular he submits that precontractual liability is within the scope of CISG and is a matter governed by a general principle on which CISG is based by virtue of art. 7 § 2: in particular precontractual liability may be based on the general principle that the seller and the buyer must act in good faith during the precontractual stage; if the opinion of the said writer is followed, then domestic provisions on precontractual liability cannot apply to a contract of sale governed by the CISG and any matters in connection with precontractual liability will be resolved with reference to the general principles of the CISG.

<sup>37</sup> Multi-Member First Instance Court of Athens (*IIIΠρΑθ*) 4505/2009 (not published) [facts and editorial remarks by the writer in English in <<http://cisgw3.law.pace.edu/cases/094505gr.html>>]; accordingly, under the said judgement, with respect to physical damage, tort provisions cannot apply concurrently with the provisions of the CISG and the latter provisions exclude the former. Cf. *D. Flambouras*, The international Sale, in *Ch. Pamboukis* (edit.) International Transactions law, par. 683; *A. Valtoudis*, *Armenopoulos (Αρμ)* 1999, 348 seq.; *P. Kornilakis*, Special contractual Law, volume I, 2002, p. 117-118; *G. Nikolaidis*, The international sale of goods under the CISG, 2000, p. 64. The opposite is supported by *F. Ferrari*, The Interaction between the UN Convention on Contracts for the International Sale of Goods and Domestic Remedies, *RabelsZ* 2007, 52, 73-76; not clearly cf. *P. Schlechtriem*, in *P. Schlechtriem/I. Schwenzer*, Commentary on the UN Convention on the international sale of goods, 2005 2<sup>nd</sup> ed., p. 75 ["Liability based on domestic concepts of ... tort or delict (in particular product liability) may be applied concurrently with the provisions of the CISG. The guiding principle must be that those remedies may not be applied concurrently with those of the CISG in so far as they relate to the seller's actual (typical or atypical) obligations, in particular as regards the quality of the goods sold and their freedom from legal defects"].

pursuant to which following avoidance of a contract, there is an *ex lege* obligation to return anything acquired due to the performance of the contract<sup>38</sup>.

## V. The meaning of trade usages

CISG art. 9 § 1 provides that “The parties are bound by any usage to which they have agreed and by any practices which they have established between themselves” while art. 9 § 2 CISG provides that “The parties are considered, unless otherwise agreed, to have impliedly made applicable to their contract or its formation a usage of which the parties knew or ought to have known and which in international trade is widely known to, and regularly observed by, parties to contracts of the type involved in the particular trade concerned”.

Therefore, CISG art. 9 § 1 covers the trade usages that the parties have selected. Thus, if the parties in the sales agreement make reference to terms of the international trade such as CIF, FOB, Ex Ship, Ex Quay<sup>39</sup> etc., their rights and obligations shall be interpreted, to the extent that there is deviation from the CISG, based on the content of the said international trade term and not based on the provisions of the CISG<sup>40</sup>.

However, a question is raised in connection with the extent to which, in case the parties make reference to a term of the international trade, INCOTERMS<sup>41</sup> may apply in the sales contract as trade customs by virtue of CISG art. 9 § 2, even if the parties have not made express

<sup>38</sup> Multi-Member First Instance Court of Athens (*IIIρΑθ*) 4505/2009 (not published) [facts and editorial remarks by the writer in English in <<http://cisgw3.law.pace.edu/cases/094505gr.html>>]. Cf. G. Nikolaidis, The international sale of goods under the CISG, 2000, p. 136; D. Flambouras, The international Sale, in Ch. Pamboukis (edit.) International Transactions law, par. 684. However, this matter is contradictory: see analytically H. D. Gabriel, The Buyer’s Performance Under the CISG: Articles 53-60 Trends in the Decisions, Journal of Law and Commerce 25 (2005-06), 273, p. 278-279 with further reference to two non-Greek judgements which have ruled that following overturning of the contract of sale after the exercise of avoidance, restitution claims should be governed by the domestic rules of the law that governs the contract of sale and to which the private international rules of the forum refer: Judgement of the Supreme Court (*Oberster Gerichtshof*) of Austria of 10.3.1998, *Österreich Zeitschrift für Rechtsvergleichung*, 1998, 161; Judgement of the Court of Appeal (*Cour d’appel*) of Paris (France) of 14.1.1998, Case Law on UNICTRAL Texts (CLOUT) ap. 312.

<sup>39</sup> For the interpretation of these clauses, see below footnote 41.

<sup>40</sup> Judgment of the Arbitral Tribunal of the International Chamber of Commerce of Paris (ICC) No 6653/1993, JDI 119 (1993), 1040 with notes by Arnaldez.

<sup>41</sup> These are the International Commercial Terms (INCOTERMS) of the International Chamber of Commerce, ICC which interpret the main terms of international commerce (e.g. CIF, FOB, FAS and others); the last update of INCOTERMS took place in 2000. For the terms of the international trade and INCOTERMS see analytically in D. Flambouras, The international sale, in Ch. Pamboukis (edit.), International Transactions Law par. 1415-1472; by the same, The rules of International Chamber of Commerce for the International Commercial Sale (INCOTERMS 2000), *Companies and Undertakings Law (AEE)* 2000, 260 seq.

reference to them (i.e. INCOTERMS). In connection with this question, it has been judged<sup>42</sup> that INCOTERMS constitute interpretative criteria at the level of business customs for the purposes of articles 173 and 200 of the Greek Civil Code<sup>43</sup> and that they apply to a sales contract that fall into the sphere of application of the CISG, only if the parties have expressly referred thereto (i.e., it can not be deemed that, pursuant to CISG art. 9 § 2, the parties have impliedly incorporated/applied INCOTERMS in the sales contract).

Nevertheless, it must be accepted that INCOTERMS may be taken into account as “usages” according to the objective interpretation of the representations of the parties under CISG art. 8 § 2 and § 3<sup>44</sup>.

## VI. Conclusion of the contract of sale<sup>45</sup>

In its second part, (CISG art. 14-24) regulates the conclusion of a sales contract<sup>46</sup>.

In particular, pursuant to CISG art. 23 “A contract is concluded at the moment when an acceptance of an offer becomes effective in accordance with the provisions of this Convention”. CISG art. 18 § 2(a) provides that “An acceptance of an offer becomes effective at the moment the indication of assent reaches the offeror” [meaning the recipient of the proposal]”.

It has been judged<sup>47</sup> that CISG adopts the theory of receipt and therefore the contract is concluded as soon as the offeror receives the recipient's acceptance.

<sup>42</sup> Single-Member First Instance Court of Thessalonica (*ΜΠρΘεσ*) 16319/2007, *Chronicles of Private Law (ΧρΙΑ)* 2008, 147 [facts and editorial remarks by the writer in English in <<http://cisgw3.law.pace.edu/cases/080001gr.html>>]. Similarly *D. Flambouras*, Allocation and transfer of risk in the sale of goods, 2007, p. 478. *On the contrary, cf. Ch. Pamboukis*, The Concept and Function of Usages in the United Nations Convention on the international sale of goods, *Journal of Law and Commerce* 25 (2005-06), 107, p. 129. Judgment of the United States District Court, Southern District, Texas Houston Division dated 7.2.2006 (*China North Chemical Industries Corporation v. Beston Chemical Corporation*) (published in <http://cisgw3.law.pace.edu/cases/060207u1.html>).

<sup>43</sup> Art. 173 of the Greek Civil Code provides that "When a declaration of will is interpreted, the real will is sought with no emphasis on words". Art. 200 of the Greek Civil Code provides that "The contracts are interpreted as required by good faith, having taken into consideration the business customs".

<sup>44</sup> See *D. Flambouras*, Allocation and transfer of risk in the sale of goods, 2007, p. 565-566.

<sup>45</sup> For the conclusion of the sale contract under the CISG cf. *P. Kornilakis*, Special contractual Law, Volume I, 2002, p. 119-123.

<sup>46</sup> It should be noted that the Contracting States may state that the second part of the CISG shall not apply (CISG art. 92 § 1) therefore, as to the Contracting State which made this declaration, the questions related to the conclusion of the sale shall be regulated by the rules of the national law to which the private international law of the *forum* refers (CISG art. 92 § 2).

## VII. Seller's Obligations

### 1. Seller's obligation for delivery of goods and transfer of ownership<sup>48</sup>

#### 1.1. General

The main contractual obligations of the seller are: (a) to deliver the goods; (b) to transfer the ownership of the goods; and (c) to hand over the documents that relate with the goods to the buyer (see CISG art. 30)<sup>49</sup>.

The obligation for the delivery of the goods and the handing over of the documents is performed at a specific place (see CISG art. 31, 34) and at a certain date (see CISG art. 33<sup>50</sup> and art. 34).

#### 1.2. Place for delivery of the goods

In relation to the place of delivery, it must be noted that the seller is, at first, obliged to deliver the goods at the place agreed upon and in the manner agreed between the parties (see CISG art. 6, 31); such agreement may be express, but it can also be concluded following interpretation of the contract (see CISG art. 8) or following the application in the contract of a practice or an existing trade usage which is deemed to bind the parties (see CISG art. 9)<sup>51</sup>.

If the place where (and the manner according to which) the seller is obliged to perform his obligation for the delivery of the goods cannot be determined as above, then CISG art. 31 applies, and the following apply:

<sup>47</sup> Single-Member First Instance Court of Thessalonica (*ΜΠρΘεσ*) 16319/2007, *Chronicles of Private Law (ΧρΙΑ)* 2008, 147 [facts and editorial remarks by the writer in English in <<http://cisgw3.law.pace.edu/cases/080001gr.html>>]. Accordingly, the time of the conclusion of the contract is regulated in a manner corresponding to that provided for by art. 197 of the Greek Civil Code: See P. Arvanitakis, *Chronicles of Private Law (ΧρΙΑ)* 2001, 675.

<sup>48</sup> For these obligations, cf. analytically D. Flambouras, The international sale, in Ch. Pamboukis (edit.), *International Transactions Law*, par. 840-863.

<sup>49</sup> See also Multi-Member First Instance Court of Athens (*ΜΜΠρΑθ*) 4505/2009 (not published) [facts and editorial remarks by the writer in English in <<http://cisgw3.law.pace.edu/cases/094505gr.html>>].

<sup>50</sup> In the event of absence of an agreement to the contrary (CISG art. 6 and 8), the period provided by law for the performance of the seller's obligation is the lapse of a reasonable period of time from the conclusion of the contract (CISG art. 33(c)).

<sup>51</sup> Consequently, when the parties conclude a sales contract with a CIF, CFR, FCA, FAS or FOB term, it is deemed that, as to the place where the seller is obliged to deliver the goods to a carrier, they have deviated from CISG art. 31(a); cf. D. Flambouras, The allocation and transfer of risk in the sale of goods, p. 573-590.

- (a) If the contract of sale involves carriage of the goods, the seller performs his obligation to deliver the goods by handing the goods over to the first carrier for transmission to the buyer (*obligation performed by dispatch "pempsimο hreos"*) (par. (a))<sup>52</sup>.
- (b) If the case referred to in (a) above does not apply, then to the extent that:
- (1) the sales contract relates to specific goods, or unidentified goods to be drawn from a specific stock or to be manufactured or produced; and
  - (2) at the time of the conclusion of the contract the parties knew that the goods were at, or were to be manufactured or produced at, a particular place,
- the seller is obliged to have the goods at the buyer's disposal at that place (*obligation performed by delivery "komisimo hreos"*) (par. (b))<sup>53</sup>.
- (c) If none of the above (par. (a) or (b)) applies, then the seller is obliged to have the goods at the buyer's disposal, at the place where (the seller) has his place of business (*obligation performed by receipt "arsimo hreos"*) (par. (c)).

It is concluded from the above, that unless otherwise agreed (CISG art. 6), the place for the performance of the seller's obligation is where the seller has his place of business at the time the contract was concluded<sup>54</sup>.

The practical importance of the determination of the place where the seller is obliged to perform his obligation for the delivery of goods is also connected to the establishment, by the Greek courts, of international jurisdiction, pursuant to art. 5 § 1 item (a) and (b) of the Regulation (EC) 44/2001 of the European Council dated 22 December, 2000 for international jurisdiction, acknowledgment and enforcement of judgments in civil and commercial cases.

<sup>52</sup> In this case, "delivery" has the meaning of the movement of the goods from the seller's possession to the carrier's possession, aiming at their further transmission to the buyer: cf. Judgment of the Court of Appeals (Oberlandesgericht) of Oldenburg (Germany) dated 20.12.2007 [8 U 138/07] (published in <http://cisgw3.law.pace.edu/cases/071220g1.html>).

<sup>53</sup> Then, the buyer is obliged to appear and receive the goods in the place described in CISG art. 31(b). In addition, the obligation for receipt by the buyer is performed in accordance with CISG art. 60 (see below footnote 114). It must be noted that for the purposes of CISG art. 31(b) and (c), it is deemed that the seller has "placed the goods at the buyer's disposal", when he has proceeded with any preparative action necessary in order for the buyer to be able to receive the goods, without being necessary to perform any other action: cf. *U. Huber/C. Widmer*, in *P. Schlechtriem/I. Schwenzer*, Commentary on the UN Convention on the international sale of goods, 2005 2<sup>nd</sup> ed., p. 357, 359.

<sup>54</sup> Similarly cf. Single-Member First Instance Court of Thessalonica (*ΜΠρΘεσ*) 43945/2007 *Chronicles of Private Law (ΧρΙΔ)* 2008, 52, 53 [facts and editorial remarks by the writer in English in <http://cisgw3.law.pace.edu/cases/080002gr.html>]; Single-Member First Instance Court of Thessalonica (*ΜΠρΘεσ*) 16319/2007 *Chronicles of Private Law (ΧρΙΔ)* 2008, 148-149 (with commentary of P.S.G.) [facts and editorial remarks by the writer in English in <http://cisgw3.law.pace.edu/cases/080001gr.html>]: in the latter judgment it is further mentioned that CISG art. 31 supersedes art. 320-322 of the Greek Civil Code (art. 302-322 of the Greek Civil Code provide for the place of performance of contractual obligations in the event of absence of contractual agreement on this issue). For a short analysis of CISG art. 31 see Multi-Member Court of First Instance of Athens (*ΜΙΠΑθ*) 2282/2009 *Companies and Enterprises Law Review (ΑΕΕ)* 2009, 831 [editorial remarks by the writer in English in <http://cisgw3.law.pace.edu/cases/092282gr.html>].

Pursuant to these provisions, and with Greece being the *forum*, as to the disputes arising from a contract, a person residing in an EU member-state may be sued in another EU member-state before the court of the place where the obligation in question was or must be performed; in particular in connection with the sale of goods, the place of performance of the obligation in question is the place where the delivery of goods was performed or should have been performed<sup>55</sup>. In view of the above, it has been judged<sup>56</sup> that, if the place where the seller is obliged to deliver the goods is in Greece, an action concerning a dispute under the contract governed by the CISG, may be filed before the competent Greek courts.

### 1.3. Remedies of the buyer in case the seller is in breach of his main obligations – fundamental breach

If the seller does not perform his main obligations as those were described above (delivery of goods, transfer of ownership, handing over of documents), the buyer has the following remedies<sup>57</sup>:

- (i) to require performance by the seller of his obligations, unless the buyer has resorted to a remedy which is inconsistent with this requirement (see CISG art. 45 § 1, art. 46 § 1) (*specific performance*); or
- (ii) if the non-performance by the seller constitutes a fundamental breach (CISG, art. 25), he may avoid the contract; furthermore, and in particular in case of

<sup>55</sup> Cf. P. Arvanitakis, *Chronicles of Private Law (ΧρΙΑ)* 2001, 676.

<sup>56</sup> Multi-Member Court of First Instance of Athens (*ΜΙΠΑΘ*) 2282/2009 *Companies and Enterprises Law Review (ΔΕΕ)* 2009, 831 [editorial remarks by the writer in English in <<http://cisgw3.law.pace.edu/cases/10gr.html>>]. Single-Member First Instance Court of Thessalonica (*ΜΙΠΘΕΣ*) 43945/2007 *Chronicles of Private Law (ΧρΙΑ)* 2008, 52 [facts and editorial remarks by the writer in English in <<http://cisgw3.law.pace.edu/cases/080002gr.html>>]: in this judgment. In these two cases the courts established international jurisdiction pursuant to art. 5 § 1 point (a) and (b) of Regulation EC/44/2001 since, in the absence of a contractual agreement to the contrary, the seller, pursuant to CISG art. 31(c), was obliged to perform his obligation to deliver the goods sold at the place where he had his place of business (i.e. Greece). Single-Member First Instance Court of Thessalonica (*ΜΙΠΘΕΣ*) 16319/2007 *Chronicles of Private Law (ΧρΙΑ)* 2008, 147 (with informative note of P. S. G.) [facts and editorial remarks by the writer in English in <<http://cisgw3.law.pace.edu/cases/080001gr.html>>]: in this judgment the court accepted an objection raised on lack of international jurisdiction since, in the absence of a contractual provision to the contrary, the seller, pursuant to CISG art. 31(c), was obliged to perform his obligation to deliver the goods sold at the place he had his place of business (i.e. in Italy); therefore, art. 5 § 1 point (a) and (b) of Regulation EC/44/2001 did not grant international jurisdiction to Greek but to the Italian courts.

<sup>57</sup> For the remedies of the buyer cf. analytically in D. Flambouras, *The international sale*, in Ch. Pamboukis (edit.), *International Transactions Law*, par. 914-924, 1030, 1058 seq. See also Multi-Member First Instance Court of Athens (*ΜΙΠΑΘ*) 4505/2009 (not published) [facts and editorial remarks by the writer in English in <<http://cisgw3.law.pace.edu/cases/094505gr.html>>] and Multi-Member Court of First Instance of Athens (*ΜΙΠΑΘ*) 2282/2009 *Companies and Enterprises Law Review (ΔΕΕ)* 2009, 831 [editorial remarks by the writer in English in <<http://cisgw3.law.pace.edu/cases/092282gr.html>>].

- non-delivery, [the buyer] may avoid the contract, if the seller does not deliver the goods within the additional period set by the buyer (see CISG 45 § 1(a), 47 and art. 49) (*avoidance*); and
- (iii) to claim damages; the buyer is not deprived of the right to claim damages if he has made use of other remedies (see CISG art. 45 § 1(b), 45 §2 and art. 74-77) (*damages*).

For the establishment of the seller's liability for breach of his main obligations, it is not important whether there is or there is no fault, i.e. the seller's liability is objective and it is only associated with the (objective) fact of the contractual breach<sup>58</sup>.

As it can be concluded from the above, the classification of a contractual breach as fundamental is of high importance, since, among other things, it entitles the buyer to avoid the contract.

CISG provides the meaning of the fundamental breach in art. 25 which provides that "A breach of contract committed by one of the parties is fundamental if it results in such detriment to the other party as substantially to deprive him of what he is entitled to expect under the contract, unless the party in breach did not foresee and a reasonable person of the same kind in the same circumstances would not have foreseen such a result"<sup>59</sup>.

It is accepted that in order to characterise a breach as fundamental, certain factors are taken into consideration such as the seriousness of the breached obligation for the specific promisor and the object of the contract; these factors are examined with reference to the contract (see CISG art. 6) or following interpretation of the parties' statements (see CISG art. 8)<sup>60</sup>. In addition the following factors are taken into consideration: the unwillingness or inability of the

<sup>58</sup> P. Papanikolaou/A. Karabatzos, The new law on the seller's liability, 2003, p. 278-279. M. Stathopoulos, *Legal Podium (NoB)* 1997, 1096-1097. Similarly Court of Appeals of Lamia (*Εφαλμ*) 63/2006, *Commercial Law Survey (Επισκευή)* 2006, 1108 [facts and editorial remarks by the writer in English in <<http://cisgw3.law.pace.edu/cases/060001gr.html>>]. Multi-Member First Instance Court of Athens (*ΠΠρΑθ*) 4505/2009 (not published) [facts and editorial remarks by the writer in English in <<http://cisgw3.law.pace.edu/cases/094505gr.html>>]: these two judgments further accepted that the only legal possibilities for the exemption of the breaching party from his liabilities are provided for: (a) under the conditions of art. 79 CISG (only for liability for compensation); and (b) under CISG art. 25 sub-section b for any type of liability in the event that the breaching party did not foresee and a reasonable person of the same kind in the same circumstances would not had foreseen that the breach resulted in such detriment to the other party as substantially to deprive him of what he is entitled to expect under the contract.

<sup>59</sup> For the concept of fundamental breach cf. analytically in D. Flambouras, The international sale, in Ch. Pamboukis (edit.), *International Transactions Law*, par. 1033-1057; A. Chelidonis, *Commercial Law Survey (Επισκευή)* 2002, 663 seq.; L. Graffi, Case Law on the Concept of "Fundamental Breach" in the Vienna Sales Convention, *Revue de droit affaires internationales/International Business Law Journal* (2003) No. 3, 338-349; R. Koch, The Concept of Fundamental Breach of Contract under the United Nations Convention on Contracts for the international sale of goods (CISG), *Review of the Convention on Contracts for the international sale of goods (CISG)*, 1998, 177 seq. See also below par. VII.2.6.

<sup>60</sup> P. Kornilakis, *Special contractual Law*, Volume I, 2002, p. 147.

breaching party to remedy-restore the breach committed by him (i.e. when the circumstances of the specific breach of contract reasonably lead the non-breaching party to conclude that he can not rely on a future performance by the breaching party)<sup>61</sup>, the inability to satisfy the promisee with the payment of damages<sup>62</sup> or with reduction of the price<sup>63</sup> etc.

#### 1.4. Damages – exemption from liability for damages – avoidance and damages – avoidance in the anticipatory breach of contract

CISG art. 79 § 1 sets out the conditions under which the obligor in breach may be exempted from his liability for damages by providing that “A party is not liable for a failure to perform any of his obligations if he proves that the failure was due to an impediment beyond his control and that he could not reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract or to have avoided or overcome it or its consequences”.

Therefore, in order to be exempted from his liability for damages for the non-performance of his obligation, pursuant to CISG art. 79 § 1, the promisor in breach must prove that: (a) failure to perform the obligation was due to an impediment beyond his control (e.g. natural causes, an event related to the political life of a place, prohibition-restrictions in imports-exports etc.); (b) he could not reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract; and (c) there was causative relation (nexus) between the impediment and the failure to perform the contractual obligation<sup>64</sup>.

<sup>61</sup> R. Koch, The Concept of Fundamental Breach of Contract under the United Nations Convention on Contracts for the international sale of goods (CISG), *Review of the Convention on Contracts for the international sale of goods (CISG)*, 1998,177, p. 257. P. Huber, CISG - The Structure of Remedies, *Rebels Z*, 71 (2007), 13, p. 26. P. Schlechtriem, in P. Schlechtriem/I. Schwenzer, *Commentary on the UN Convention on the international sale of goods*, 2005 2<sup>nd</sup> ed., p. 295.

<sup>62</sup> P. Kornilakis, *Special contractual Law*, Volume I, 2002, p. 147.

<sup>63</sup> Judgment of the Court of First Instance (*Tribunale*) of Forli (Italy) dated 11.12.2008 (published in <http://cisgw3.law.pace.edu/cases/081211i3.html>).

<sup>64</sup> Analytically for the conditions concerning or the application of CISG 79 § 1 cf. D. Flambouras, *Commercial Law Review (ΕΕμπΔ)* 2000, 679 seq.

It should be noted that CISG art. 79 § 1 releases the promisor only from his liability for damages<sup>65</sup>.

The above issue (together with other interesting issues) was dealt by a Greek court judgment within the context of a seller's liability for damages for failure to deliver the goods<sup>66</sup>.

The actual events of the case had as follows: between a Greek company (buyer) and a Bulgarian company (seller) a contract was concluded for the sale of 3,000 tones of sunflower seed which would be produced in Bulgaria. It was agreed that delivery would be performed at the end of September-beginning of October of 2001. The seller, via a facsimile transmission (19/9/2001) refused to perform the contract by the delivery of the agreed quantity, invoking changes on the market and certain other impediments. The buyer repeatedly notified the seller requesting the delivery of the agreed quantity of sunflower seed, but the seller continued to refuse. In view of this situation, the buyer, in order to cover the needs of its oil-industry, proceeded to a cover contract and purchased a quantity of sunflower seed from another supplier at a higher price than the one agreed upon between it and the seller. The relevant court action included a claim of the buyer for damages that corresponded to the difference between the price it had initially agreed with the buyer and the higher price it paid to a third supplier under a substitute (cover) transaction.

The seller, in order to be exempted from the above liability for damages, pleaded before the court that its failure to deliver the quantity of sunflower seed sold to the buyer was due:

- (a) to prolonged dryness, which resulted to the destruction of a large quantity of the current harvest of sunflower seed in Bulgaria and consequently reduction of production and offer of the said product; and

<sup>65</sup> This conclusion derives from the letter/text of CISG art. 79 § 5 which provides that "Nothing in this article prevents either party from exercising any right other than to claim damages under this Convention". However, and in particular as regards a claim for specific performance of obligations (CISG art. 46 for the buyer, art. 62 for the seller), it is claimed that, if the impediment obstructing the performance reaches the point of failure which supersedes the promisor's highest limit of sacrifice, the promisee must be deprived, apart from the remedy of damages, also from the remedy of specific performance and to maintain, in a teleological interpretation of CISG art. 79 § 5, only all other legal remedies: cf. *M. Stathopoulos, Legal Podium (NoB) 1997, 1092*.

<sup>66</sup> Cf. Court of Appeals of Lamia (*Εφαλαμ*) 63/2006, *Commercial Law Survey (Επισκευή)* 2006, 1108 [facts and editorial remarks by the writer in English in <<http://cisgw3.law.pace.edu/cases/060001gr.html>>]. Furthermore, it is worth noting that in this judgment it is stated that CISG adopts one unified form of non-performance, establishing a unified and general aspect of liability which covers all cases of breach under the Greek Civil Code, as well as that the liability for contractual breaches under the CISG is generated regardless of the fault of the person in breach; same was accepted by the Multi-Member First Instance Court of Athens (*ΠΠΡΑΘ*) 4505/2009 (not published) [facts and editorial remarks by the writer in English in <<http://cisgw3.law.pace.edu/cases/094505gr.html>>] and the One-Member First Instance Court of Athens (*ΜΠΡΑΘ*) 8161/2009 (not published) [facts and editorial remarks by the writer in English in <<http://cisgw3.law.pace.edu/cases/090000gr.html>>] (cf. *M. Stathopoulos, Legal Podium (NoB) 1997, 1096-1097*).

- (b) the lowering of the level of the river Danube; thus the seller was unable to load the goods on a ship in a river port which was located in its premises and furthermore it was obliged to use a port located in the Black Sea; however, the necessity to load the goods in a sea port entailed increased transportation costs for the seller to the said port, a fact that rendered the initially agreed price highly inexpedient for the seller.

Accordingly, the seller claimed that the above were impediments beyond his control which it did not take into account during the conclusion of the contract neither it could avoid them and overcome their effect; therefore, pursuant to CISG art. 79 § 1, it was exempted from the liability to pay damages (CISG art. 45 § 1 (b), and art. 74-77).

The court rejected the arguments of the seller since: (a) it was proved that the seller was aware that the production and offer of sunflower seed would be limited for the specific year due to dryness; and (b) the lowering of the level of the river Danube was an impediment within the control of the seller which should have been taken into account and avoid it, since the same event had occurred several years ago and, in view of this previous experience, the seller should have alternatively proposed an increased price for the case, where due to the lowering of the level of the river Danube, the need for the transport of the goods from a port of the Black Sea would emerge (instead of the closest river port); otherwise, it should not have proceeded with the execution of the sale contract.

The court additionally supported its judgment for the non-exemption of the seller from its liability for failure to deliver, by accepting that CISG art. 79 does not entitle the promisor to be released from his contractual obligations due to change of the economic background on which the parties relied for the conclusion of the contract, since, in this case, the commencement of transportation by ship could be performed by a sea port (instead by a river port), although this would entail higher costs for the seller<sup>67</sup>.

<sup>67</sup> Based on this interpretation, it is clear that the CISG does not release the promisor from his liability in case of change of the economic background on which the parties relied on, upon conclusion of the contract, neither does it grant him the right to renegotiate the terms of the contract in case of change of the actual facts or in case of economic inability. Similarly cf. *D. Flambouras, Commercial Law Review (ΕΕμπΔ)* 2000, 701-702; *D. Flambouras, The Doctrines of Impossibility of Performance and Clausula rebus sic stantibus in the 1980 Convention on Contracts for the international sale of goods and the Principles of European Contract Law - A Comparative Analysis, Pace International Law Review* (13) 2001, 289-293. It is however supported that, when actual facts are radically altered, the judge must be ready to acknowledge the existence of a “highest limit of sacrifice”, beyond which, in view of substantial financial difficulties, the promisor should not be expected to perform his obligation (e.g. general disturbance of market economy in times of war, downfall of the market value of the currency etc.). According to the same view this effect may result from the interpretation of CISG art. 79 in order to ensure that good faith is observed in international commerce (CISG art. 7 § 1) or following interpretation of the sale contract on the basis of the criteria set out in CISG art. 8 which shall suggest the existence of direct contractual will and agreement between the parties to allocate the relevant risks and to be able to renegotiate in case of alteration of the background on which the parties relied at the time of conclusion of the contract. Cf. *A. Valtoudis, in Northern Greece Law Union (ENOBE), The Vienna Convention for international sale of goods, 2001, 47, p. 55 seq. P.*

Furthermore, the court accepted that the buyer observed his obligation under CISG art. 77<sup>68</sup>; in particular, in order to reduce its loss from the failure of delivery of the agreed quantity of sunflower seed, the buyer acted promptly and adopted reasonable measures by concluding in due time a substitute (cover) contract, i.e. it purchased the quantity of sunflower seed which was required for the needs of its oil-industry business from another supplier<sup>69</sup>.

As mentioned above, the buyer requested as damages for the seller's failure of delivery of the agreed quantity of sunflower seed, the difference between the price agreed upon in the sale contract and the price set out in the substitute purchase contract concluded with the third supplier. However, despite the fact that according to the above the buyer had concluded a substitute transaction (substitute purchase) for the acquisition by another supplier of the

*Kornilakis, Special contractual Law, Volume I, 2002, p. 142.* It is worth noting that, in cases where the route agreed upon for the transportation of sold goods has been rendered impossible to be used due to unexpected reasons (... "an impediment beyond the control"), in general it is accepted that the use of an alternative route of transportation by the promisor (even if it entails higher costs) constitutes a measure which is reasonably expected to be adopted by the promisor in order to overcome the impediment and its consequences. Cf. *P. Kornilakis, Special contractual Law, Volume I, 2002, p. 143. D. Flambouras, Commercial Law Review (ΕΕμπΔ) 2000, 692-693* where reference is made to older English judgments that concerned the closing of the Suez Canal due to the war between Arabs and Israel and according to which, the sea carrier was obliged to overcome this impediment, by navigating in Africa.

<sup>68</sup> CISG art. 77 provides that "A party who relies on a breach of contract must take such measures as are reasonable in the circumstances to mitigate the loss, including loss of profit, resulting from the breach (section a). If he fails to take such measures, the party in breach may claim a reduction in the damages in the amount by which the loss should have been mitigated [section (b)]". See also Multi-Member First Instance Court of Athens (*ΠΠΡΑΘ*) 4505/2009 (not published) [facts and editorial remarks by the writer in English in <<http://cisgw3.law.pace.edu/cases/094505gr.html>>] and below par. VII.2.5.

<sup>69</sup> In the judgement of the Court of Appeals of Lamia (*ΕφΛαμ*) 63/2006 [*ΕπισκεΔ*] 2006, 1108; facts and editorial remarks by the writer in English in <<http://cisgw3.law.pace.edu/cases/060001gr.html>>] it was apparently accepted that the buyer who was entitled to damages due to contractual breach by the seller, is obliged, pursuant to CISG art. 77 (a), to conclude in due time a purchase agreement with another supplier for the immediate cover. Cf. *A. Chelidonis, Transition from the claim of specific performance to damages – A suggestion for the improvement of the Civil Code, in F. Doris/A. Chelidonis, Issues of application of the Vienna Convention for international sales of goods (Law 2532/97), 2005, 109. p. 136;* this writer supports the view that "the provision for the abstract calculation made in CISG art. 77 rather offers an argument in favor of the exclusion of the thought for accepting an obligation of the creditor to proceed with the immediate cover by another supplier".

quantity not delivered, the court did not calculate the damages in accordance with CISG art. 75<sup>70</sup>. On the contrary, having applied the general provision of CISG art. 74<sup>71</sup>, the court:

- (i) on one hand refused to adjudicate the total amount of the damages claimed, i.e. the amount by which: (1) the price in the substitute purchase (US\$323.50 per metric tone), exceeded, (2) the price initially agreed upon (US\$230 per metric tone), i.e. US\$93.50 per metric tone, considering that the amount of the damages claimed exceeded the loss which the breaching party (the seller) foreseen or ought to have foreseen as possible in view of the facts and conditions which it was aware or should have been aware of; and
- (ii) on the other, it proceeded with, a rather innovative, abstract calculation of the loss and on the basis of this calculation granted as damages to the buyer the amount by which:
  - (1) the price which, someone should pay as an average in order to purchase sunflower seed by various suppliers in September 2001 (US\$280 per metric tone) exceeded,
  - (2) the price initially agreed upon (US\$230 per metric tone), i.e. US\$50 per metric tone,
 since, the court judged that this was the amount which the seller could have foreseen as a possible consequence of his breach at the time the contract was concluded (i.e. the additional average price, which the buyer should pay in order to purchase sunflower seed from other suppliers).

From the text of the judgment it cannot be safely concluded whether the buyer avoided the contract and claimed damages or whether it claimed damages without having previously avoided the contract. However, by reason of the fact that the court did not calculate the

<sup>70</sup> CISG art. 75 provides that “If the contract is declared avoided and if, in a reasonable manner and within a reasonable time after avoidance, the buyer has bought goods in replacement or the seller has resold the goods, the party claiming damages may recover the difference between the contract price and the price in the substitute transaction as well as any further damages recoverable under article 74”. That is, in order for the party that suffered damage to make use of CISG art. 75 which provides for specific calculation of damages, it is necessary that (the suffering party) has previously declared the contract avoided. Furthermore, in order for art. 75 to apply, the substitute purchase contract must have been indeed concluded and must cover the interest that the obligee would acquire under the sale agreement which he avoided (i.e. via the substitute transaction the obligee usually receives what he did not receive from the sale contract due to the breach; furthermore, the substitute transaction must have been concluded in a reasonable manner: that is, upon conclusion of the substitute transaction, the obligee must have acted as a careful and prudent businessman and must have observed the relevant practice of the trade concerned. For these questions analytically cf. *H. Stoll/G. Gruber*, in *P. Schlechtriem/I. Schwenzer*, *Commentary on the UN Convention on the international sale of goods*, 2005 2<sup>nd</sup> ed., p. 774-776; *D. Flambouras*, *The international sale*, in *Ch. Pamboukis* (edit.), *International Transactions Law*, , par. 1130-1139.

<sup>71</sup> CISG art. 74 provides that “Damages for breach of contract by one party consist of a sum equal to the loss, including loss of profit, suffered by the other party as a consequence of the breach. Such damages may not exceed the loss which the party in breach foresaw or ought to have foreseen at the time of the conclusion of the contract, in the light of the facts and matters of which he then knew or ought to have known, as a possible consequence of the breach of contract”.

amount of damages in accordance with CISG art. 75 (which presupposes avoidance of the contract (see above footnote nr. 70)), but in accordance with CISG art. 74 (which is of general application and governs any claim for damages under the CISG regardless of previous avoidance), it can be concluded that the court either accepted that the buyer claimed damages without having previously declare the contract avoided<sup>72</sup> or it did not examine at all the question of previous avoidance.

According to the view of the writer the above solution is correct judging from its outcome, but from a methodological point of view it can not be characterized as complete.

More specifically, it would be preferable if the court had examined whether the buyer had avoided the contract and also claimed damages (see CISG art. 45 § 1(a), 45 § 2 ) or whether the buyer claimed damages without having previously avoided the contract (see CISG art. 45 § 1(b)). In particular, the court should have examined whether the buyer avoided the contract in accordance with CISG art. 72 § 1 which provides that “If prior to the date for performance of the contract it is clear that one of the parties will commit a fundamental breach of contract, the other party may declare the contract avoided”. Under the facts CISG art. 72 § 1 appears to apply, since it become clear prior to the expiration of the dead-line (end of September-beginning of October 2001) (via a facsimile sent by the seller on 19/9/2001), that the seller would perform a fundamental breach of contract (definite denial to deliver the goods sold). Indeed, due to the above declaration of the seller that it would not perform its obligation, the buyer, in accordance with CISG art. 72 § 3, was not required to proceed with a notice to the seller of its intention to avoid the contract in compliance with CISG art. 72 § 2. This conclusion is further enhanced by the fact that, in view of the definite denial “before expiration” of the seller to perform its obligation and the ineffective notices of the buyer, the latter proceeded with a substitute contract for the purchase of the necessary for its oil-industry quantity of sunflower seed by another supplier, a behavior from which it can be concluded that the buyer believed that it was no longer bound by the contract.

If the court had according to the above accepted that the buyer avoided the contract of sale, then it could further accept that in view of the existence of the substitute purchase contract, the buyer could at first claim as damages the difference between the price agreed upon in the contract and the price of the substitute purchase contract pursuant to CISG art. 75 (specific calculation for the amount of damages)<sup>73</sup>; however, even in this case, damages claimed by the buyer (which would be specifically calculated in accordance with CISG art. 75 ) could, in the end, be reduced by the court by virtue of CISG art. 77(b)<sup>74</sup>: in particular, damages claimed

<sup>72</sup> It is accepted in terms of interpretation that damages can be separately claimed, without previous avoidance: cf. P. Schlechtriem, Damages, avoidance of the contract and performance interest under the CISG, § 1(a) and (b) (electronically published in <http://www.cisg.law.pace.edu/cisg/biblio/slechtriem21.html>).

<sup>73</sup> For CISG art. 75 see footnote 70.

<sup>74</sup>For CISG art. 77 see footnote 68 and below par. VII.2.5.

could be reduced since it is clear that the buyer's loss could easily be mitigated via the purchase (by the buyer) of sunflower seed from another supplier at a lower price, an action with which the buyer did not proceed (since it purchased the necessary for its oil-industry quantity of sunflower seed by a specific supplier against a higher price).

## 2. Seller's obligation for delivery of goods conforming with the contract

### 2.1. Applicable provisions

The seller must deliver goods which are of the quantity, quality and description required by the contract and which are contained or packaged in the manner required by the contract (see CISG art. 35 § 1)<sup>75</sup>.

Pursuant to CISG art. 35 § 2, and subject to any agreement to the contrary, the goods do not conform with the contract unless they: (a) are fit for the purposes for which goods of the same description would ordinarily be used (*objective criterion*); (b) are fit for any particular purpose expressly or impliedly made known to the seller at the time of the conclusion of the contract, except where the circumstances show that the buyer did not rely, or that it was unreasonable for him to rely, on the seller's skill and judgment (*subjective criterion*); (c) possess the qualities of goods which the seller has held out to the buyer as a sample or model (*subjective criterion*); (d) are contained or packaged in the manner usual for such goods or, where there is no such manner, in a manner adequate to preserve and protect the goods (*objective criterion*)<sup>76</sup>.

In relation to the above it has been judged<sup>77</sup> that this obligation of the seller to deliver the goods described in the contract exists not only for the sale of generic goods but also for the sale

<sup>75</sup> It should also be noted that subject to the opposite consent of the buyer, the seller is obliged to deliver the goods free of any right or claims of third parties (CISG art. 41 § 1(a)); if he is in breach of this obligation, then the buyer shall be entitled to the remedies referred to in CISG art. 45 seq., provided that he has observed the duties provided for by the CISG, i.e. he has notified the right or claim of the third party to the seller within a "reasonable period of time" (CISG art. 43 § 1).

<sup>76</sup> Multi-Member Court of First Instance of Athens (*ΜΠρΑθ*) 2282/2009 *Companies and Enterprises Law Review (ΔΕΕ)* 2009, 831 [editorial remarks by the writer in English in <<http://cisgw3.law.pace.edu/cases/092282gr.html>>]. See also Multi-Member First Instance Court of Athens (*ΜΠρΑθ*) 4505/2009 (not published) [facts and editorial remarks by the writer in English in <<http://cisgw3.law.pace.edu/cases/094505gr.html>>]: this judgement further states that under the contract of sale the parties may agree on specific qualities the absence of which would otherwise not had been considered as non-conformity.

<sup>77</sup> Multi-Member First Instance Court of Athens (*ΜΠρΑθ*) 4505/2009 (not published) [facts and editorial remarks by the writer in English in <<http://cisgw3.law.pace.edu/cases/094505gr.html>>]. Multi-Member First Instance Court of Thessalonica (*ΜΠρΘΕσ*) 22513/2003, *Armenopoulos (Αρμ)* 2003, 1802 [facts and editorial remarks by the writer in English in <<http://cisgw3.law.pace.edu/cases/030513gr.html>>].

of goods in kind. It has further been judged<sup>78</sup> that the seller, under the CISG, has a primary contractual obligation: (a) to deliver the goods free of defects actual or legal and equipped with the reasonably expected (and not compulsory “agreed”) features; (b) to deliver the quantity agreed upon and (c) not to deliver any other goods than the ones agreed upon.

Finally it has been judged that, under CISG art. 6, the parties may agree as to when the goods conform to the requirements of the contract of sale; the content of such contractual agreement may be determined following interpretation of the contract and the parties' declarations under CISG art. 8; if no such contractual agreement exists, then the conformity is to be determined with reference to the contractually agreed usages or practices established between the parties (CISG art. 9 § 1) or, otherwise, from the international trade usages which the parties knew or ought to have known and which the parties are considered to have impliedly made applicable to their contract (CISG art. 9 § 2). If nothing of the above is applicable, then the conformity of the goods to the contract is to be determined with reference to the criteria set out in CISG art. 35 § 2<sup>79</sup>.

## 2.2. Seller’s liability for non-conformity of the goods with the contract and remedies of the buyer

Pursuant to CISG art. 36 § 1 the seller is liable in accordance with the contract and CISG art. 35 § 1 for any lack of conformity which exists at the time when the risk passes to the buyer<sup>80</sup>, even though the lack of conformity becomes apparent only after that time”<sup>81</sup>. If the goods do

<sup>78</sup> Multi-Member First Instance Court of Athens (*IIIΠρΑθ*) 4505/2009 (not published) [facts and editorial remarks by the writer in English in <<http://cisgw3.law.pace.edu/cases/094505gr.html>>]. Multi-Member First Instance Court of Thessalonica (*IIIΠρΘΕσ*) 22513/2003, *Armenopoulos (Αρμ)* 2003, 1802 [facts and editorial remarks by the writer in English in <http://cisgw3.law.pace.edu/cases/030513gr.html>]. Single-Member First Instance Court of Thessalonica (*MIΠρΘΕσ*) 14953/2003 NOMOS legal database no. 432741 [facts and editorial remarks by the writer in English in <<http://cisgw3.law.pace.edu/cases/030001gr.html>>]. Also, cf. P. Kornilakis, *Special contractual Law*, Volume I, 2002, p. 124-125. M. Stathopoulos, *Legal Podium (NoB)* 1997, 1090. S. Ferreri, Remarks Concerning the Implementation of the CISG by the Courts (the Seller’s Performance and Article 35), *Journal of Law and Commerce* 25 (2005-06), 223, p. 232.

<sup>79</sup> Multi-Member First Instance Court of Athens (*IIIΠρΑθ*) 4505/2009 (not published) [facts and editorial remarks by the writer in English in <<http://cisgw3.law.pace.edu/cases/094505gr.html>>].

<sup>80</sup> The transfer of risk takes place in accordance with CISG art. 67-69. For the matter of the transfer of risk under the CISG, cf. analytically D. *Flambouras*, Allocation and transfer of risk in the sale of goods, p. 94-122, 196-224, 262-265, 318-345, 408-412, 444-452, 508-510, 515, 527-529, 555, 562.

<sup>81</sup> In view of this fact, it has been judged that the seller shall be liable for hidden defects resulting from the use of the goods by the buyer or by third parties to whom the buyer sold the goods; cf. Judgment of the First Instance Court of Zilina (Slovakian Republic) dated 25.10.2007 [15 Cb/10/2004] (published in <http://cisgw3.law.pace.edu/cases/071025k1.html>).

not conform to the sale contract (see CISG art. 35), the buyer is entitled to the following remedies<sup>82</sup>:

- (i) if the lack of conformity constitutes a fundamental breach (see CISG art. 25), to claim the replacement of the non-conforming goods with substitute goods (see CISG art. 45 § 1(a) and 46 § 2 ) (*specific performance - replacement*); or
- (ii) if the lack of conformity does not constitute a fundamental breach, to request the seller to remedy the lack of conformity by repair, unless this is unreasonable having regard to the circumstances (see CISG art. 45 § 1(a) and 46 § 3) (*specific performance - repair*)<sup>83</sup>; or
- (iii) if the lack of conformity does not constitute a fundamental breach, to request the reduction of the price regardless of whether the price has already been paid or not (see CISG art. 50) (*reduction of price*); or
- (iv) if the lack of conformity constitutes a fundamental breach (see CISG art. 25), [the buyer] may declare the contract avoided (see CISG art. 49 § 1(a) ); and
- (v) claim damages; the buyer is not deprived of any right he may have to claim damages by exercising other remedies he might have (see CISG 45 § 1 (b), 45 § 2, 74-77) (*damages*).

The seller's liability for non-conformity is not connected to existence or not of a fault, i.e. the seller's liability is objective and relates only to the (objective) fact of the contractual breach<sup>84</sup>.

<sup>82</sup> For the buyer's remedies in case of lack of conformity cf. analytically in *D. Flambouras*, The international sale, in *Ch. Pamboukis* (edit.), *International Transactions Law*, par. 918-921, 1030, 1058 seq. In addition, the following court judgments concerned the exercise of the buyer's remedies in case of lack of conformity: Single-Member First Instance Court of Athens (*ΜΠΡΑΘ*) 8161/2009 (not published). Multi-Member First Instance Court of Athens (*ΜΠΡΑΘ*) 4505/2009 (not published) [facts and editorial remarks by the writer in English in <<http://cisgw3.law.pace.edu/cases/094505gr.html>>]. Single-Member First Instance Court of Athens (*ΜΠΡΑΘ*) 165/2005, NOMOS legal database no. 380626 [facts and editorial remarks by the writer in English <<http://cisgw3.law.pace.edu/cases/050165gr.html>>]. Single-Member First Instance Court of Thessalonica (*ΜΠΡΘΕΘ*) 14953/2003, NOMOS legal database no. 432741 [facts and editorial remarks by the writer in English in <<http://cisgw3.law.pace.edu/cases/030001gr.html>>]. Single-Member First Instance Court of Thessalonica (*ΜΠΡΘΕΘ*) 22513/2003, *Armenopoulos (Αρμ)* 2003, 1802 [facts and editorial remarks by the writer in English in <http://cisgw3.law.pace.edu/cases/030513gr.html>].

<sup>83</sup> It has been judged that if the buyer claims repair of the non-conforming goods, then the seller shall bear the relevant costs for such repair, while if the buyer attempts to repair the goods, he is entitled to damages for all relevant costs; cf. Single-Member First Instance Court of Thessalonica (*ΜΠΡΘΕΘ*) 22513/2003, *Armenopoulos (Αρμ)* 2003, 1802 [facts and editorial remarks by the writer in English in <http://cisgw3.law.pace.edu/cases/030513gr.html>].

<sup>84</sup> See above footnote 58.

### 2.3. Duties of the buyer to examine the goods and provide notice of lack of conformity<sup>85</sup>

The legal remedies of the buyer for lack of conformity of goods with the contract (see CISG art. 35) (see above par. IV.2.2) may be exercised, only if the buyer has previously complied with the duties referred to in CISG art. 38 § 1 and 39 § 1<sup>86</sup>.

In particular, CISG art. 38 § 1 provides that “The buyer must examine the goods, or cause them to be examined, within as short a period as is practicable in the circumstances”. Furthermore, CISG art. 39 § 1 provides that “The buyer loses the right to rely on a lack of conformity of the goods if he does not give notice to the seller specifying the nature of the lack of conformity within a reasonable time after he has discovered it or ought to have discovered it”. Finally, CISG art. 39 § 2 provides that “In any event, the buyer loses the right to rely on a lack of conformity of the goods if he does not give the seller notice thereof at the latest within a period of two years from the date on which the goods were actually handed over to the buyer, unless this time-limit is inconsistent with a contractual period of guarantee”.

Therefore, if the buyer does not examine the goods within the shortest reasonable period and does not notify to the seller the lack of conformity within a reasonable period of time from the moment he discovered such lack of conformity or should have discovered it and (in any case within two years from the time the goods were actually delivered to him), he loses the above (under section IV.2.2) legal remedies for lack of conformity<sup>87</sup>.

The examination of goods must be effected “within as short a period as is practicable in the circumstances” (see CISG art. 38 § 1), i.e., as a general rule, immediately after the delivery of goods to the buyer<sup>88</sup>.

<sup>85</sup> For an analysis of the obligations of the buyer under art. 38 and 39 CISG analytically cf. in *D. Flambouras*, The international sale, in *Ch. Pamboukis* (edit.), *International Transactions Law*, par. 967-1024.

<sup>86</sup> See also Single-Member First Instance Court of Athens (*ΜΠρΑθ*) 8161/2009 (not published) [facts and editorial remarks by the writer in English in <<http://cisgw3.law.pace.edu/cases/090000gr.html>>]. Multi-Member First Instance Court of Athens (*ΜΜΠρΑθ*) 4505/2009 (not published) [facts and editorial remarks by the writer in English in <<http://cisgw3.law.pace.edu/cases/094505gr.html>>].

<sup>87</sup> However, CISG art. 40 provides that “The seller may invoke the provisions of Articles 38 and 39, if the lack of conformity in relation to events that he was aware or could not ignore and which he did not make known to the buyer”.

<sup>88</sup> But if the seller delivered the goods prior to the agreed delivery time, the period for the examination does not commence prior to the agreed delivery time: cf. *P. Kornilakis*, *Special contractual Law*, Volume I, 2002, p. 127.

It has been judged<sup>89</sup> that the reasonableness of a notice period for the purposes of CISG art. 39 § 1 is based on the particular circumstances of each examined case and mainly on the nature of the goods (e.g. in consumables the reasonable period corresponds to a few days or sometimes even a few hours), the fraudulent character of the counter-contractual behavior (which normally extends the time limits), but also the nature of the remedy that the buyer is going to exercise (therefore when the buyer intends to declare the contract avoided (see CISG art. 49 § 1(a)) or to request the replacement of the goods (see CISG art. 46 § 2), the notice for the lack of conformity must be served in a short time; it is possible however that the same does not apply when the buyer intends to keep the goods and claim damages (see CISG art. 45 § 1(b)) or reduction of price (see CISG art. 50).

Furthermore, it has been judged<sup>90</sup> that the notice for the lack of conformity must be served at a short period upon the seller when the goods sold are seasonal goods or when the lack of conformity can be easily determined/discovered (e.g. with a simple examination via human senses [vision, smell, taste]). In addition, it has been judged<sup>91</sup> that an important factor in order to examine the reasonableness of the notice period may be the fact that the lack of conformity could be revealed only by the use of the goods, whence the period of notice is extended.

However, even if the buyer does not notify the seller within a reasonable period of time the lack of conformity (see CISG art. 39 § 1), the buyer maintains the right to claim damages, if he has a reasonable excuse for his failure to give the required notice; nevertheless in this case damages shall include only positive damages (and not loss of profit) (see CISG art. 44)<sup>92</sup>.

<sup>89</sup> Single-Member First Instance Court of Thessalonica (*ΜΠρΘεσ*) 14953/2003, Nomos legal database no. 432741 [facts and editorial remarks by the writer in English in <<http://cisgw3.law.pace.edu/cases/030001gr.html>>]. See also Single-Member First Instance Court of Athens (*ΜΠρΑθ*) 8161/2009 (not published) [facts and editorial remarks by the writer in English in <<http://cisgw3.law.pace.edu/cases/090000gr.html>>] and Multi-Member First Instance Court of Athens (*ΜΜΠρΑθ*) 4505/2009 (not published) [facts and editorial remarks by the writer in English in <<http://cisgw3.law.pace.edu/cases/094505gr.html>>]: in the latter two judgments the court considered as reasonable a period of one month. Cf. Also *A. Valtoudis, Armenopoulos (Αρμ)* 1999, 337-338. It should be noted that recent judgments of German and French courts tend to converge that “reasonable time” for the purposes of CISG art. 39 § 1 may be a period of one (1) month. Cf. analytically *C. Baasch Andersen*, Reasonable Time in CISG art. 39(1)- Is article 39(1) indeed a Uniform Provision? Review of the Convention on Contracts for the international sale of goods (CISG), 1998, 63, p. 161. *I. Schwenzer*, in *P. Schlechtriem/I. Schwenzer*, Commentary on the UN Convention on the international sale of goods, 2005 2<sup>nd</sup> ed., p. 468-469.

<sup>90</sup> Judgment of the Court of Appeals (*Audiencia Provincial*) of Pontevedra (Spain) (seccion 1, Recurso No. 681/2007) dated 19.12.2007 (published in <http://cisgw3.law.pace.edu/cases/071219s4.html>).

<sup>91</sup> As when the goods sold are clothes and their defect may only be discovered once they are worn: cf. Judgment of the First Instance Court of Zilina (Slovakian Republic) dated 25.10.2007 [15 Cb/10/2004] (electronically published in <http://cisgw3.law.pace.edu/cases/071025k1.html>).

<sup>92</sup> See also Multi-Member First Instance Court of Athens (*ΜΜΠρΑθ*) 4505/2009 (not published) [facts and editorial remarks by the writer in English in <<http://cisgw3.law.pace.edu/cases/094505gr.html>>].

#### 2.4. Burden of proof in connection with non-conformity

It has been judged that after receipt of the goods (CISG art. 60(b)), if a non-conformity arises, the buyer has the burden to prove that the goods did not correspond to the contract at the time of transfer of risk (CISG art. 36 § 1, 67-69); however, if the buyer, following receipt of the goods, examines the goods within as short a period as is practicable in the circumstances, discovers a non-conformity and give notice to the seller specifying the nature of the lack of conformity (events that have to be proved by the buyer if necessary), then, the burden of proof is shifted and it is for the seller to prove that at the time of transfer of risk the goods conformed to the contract of sale<sup>93</sup>.

#### 2.5. Remedy for damages<sup>94</sup>

If the buyer claims damages, then the amount of damages shall be calculated based on the criteria of CISG art. 74<sup>95</sup>.

It has been judged that CISG art. 74 practically establishes the monetary compensation of all damages, which the obligor foresaw or ought to have foreseen at the time of the conclusion of the contract. Furthermore, damages provided under the CISG are also in form of a monetary amount and constitute a positive difference; i.e. it includes, what the damaged party would have obtained had the contract been performed (positive-existing loss and loss of profits) (see CISG art. 74 § 1 (a)). The intention is to put the promisee (damaged party) in the (financial) condition he would be, had the promisor performed his obligation (or had it been duly performed). But in order for the damages to be compensated, the promisor should have foreseen it (*subjective foreseeability*) or ought to have foreseen it (*objective foreseeability*) as a possible consequence of the contractual breach at the time the contract was concluded<sup>96</sup>.

<sup>93</sup> Multi-Member First Instance Court of Athens (*ΜΠΠΑΘ*) 4505/2009 (not published) [facts and editorial remarks by the writer in English in <<http://cisgw3.law.pace.edu/cases/094505gr.html>>].

<sup>94</sup> For the legal remedy of damages cf. analytically *A. Valtoudis, in Northern Greece Law Union (ENOBE), the Vienna Convention for international sales of goods, 2001, p. 47 seq. A. Pouliades, Judicial Review (Κριτική) 2002, 151.*

<sup>95</sup> For the text of art. 74 CISG see above footnote 71. cf also Multi-Member Court of First Instance of Athens (*ΜΠΠΑΘ*) 2282/2009 *Companies and Enterprises Law Review (ΑΕΕ)* 2009, 831 [editorial remarks by the writer in English in <<http://cisgw3.law.pace.edu/cases/092282gr.html>>] pursuant to which damages due under CISG art. 74 consist in an amount equal to the damage that the other party sustained as a result of the contractual breach.

<sup>96</sup> Multi-Member First Instance Court of Athens (*ΜΠΠΑΘ*) 4505/2009 (not published) [facts and editorial remarks by the writer in English in <<http://cisgw3.law.pace.edu/cases/094505gr.html>>] [where it is further stated that the subject of the foreseeability set out in CISG art. 74 is limited to the type and the extent of the damage and not the breach itself; accordingly the breaching promisor, even if deliberately breached the contract, is not liable for any damage, but only for the foreseeable damage under the criteria set out in CISG art. 74]. Single-Member First

In connection with the interpretation of CISG art. 74 it has been judged that a court must firstly examine whether the breaching promisor foresaw the damage and if this cannot be established, then it must examine whether the breaching promisor ought to have foreseen the damage. In particular, it is accepted that for the determination of the subjective foreseeability of the promisor in breach, subjective factors related to this promisor are taken into consideration such as his knowledge at the time of the contract conclusion in connection with the risk that caused the damage, any expert capabilities or knowledge that he might possess in connection with the trade concerned, any feedback that he might have received from the promisee in connection with the specific risk(s) etc. On the other hand the criterion for the determination of the objective foreseeability is the foreseeability of the “ideal promisor”, i.e. a prudent and reasonable promisor involved in the trade concerned and where the breaching promisor also belongs, having also taken into consideration the purpose of the specific sale contract under examination<sup>97</sup>. Furthermore it is accepted that for the determination of the objective foreseeability of the promisor in breach, objective factors are taken into consideration such as the allocation of certain risks in the contract, the nature and the object of the contract, the specific protective purpose of contractual obligations<sup>98</sup>, the trade concerned in which the parties are active, the existence of trade usages (see CISG art. 9) etc<sup>99</sup>.

Instance Court of Thessalonica (*ΜΠρΘεσ*) 14953/2003, NOMOS Legal database no. 432741 [facts and editorial remarks by the writer in English in <<http://cisgw3.law.pace.edu/cases/030001gr.html>>]. Cf. also *A. Valtoudis*, in *Northern Greece Law Union (ENOBE)*, The Vienna Convention for international sales of goods, 2001, p. 70-72. *J. Lookofsky*, Consequential Damages in the CISG Context, *Pace International Law Review* (19) 2007, 63, p. 74. It should be noted that Single-Member First Instance Court of Thessalonica (*ΜΠρΘεσ*) 14953/2003 concludes that the criterion of the foreseeability in the CISG practically replaces the criterion of the appropriate causality (*prosfori aitiotita*) and the criterion of the object of the law norm (*skopos toy kanona dikeou*) by which the Greek legal doctrine and case law attempts to limit damages under the Greek Civil Code. Cf. also *P. Kornilakis*, *Special contractual Law*, Volume I, 2002, p. 111, 114, 124 seq. *G. Nikolaidis*, The international sale of goods pursuant to the Vienna Convention, 2000, p. 113. Cf. and Court of Appeals of Lamia (*ΕφΛαμ*) 63/2006, *Commercial Law Survey (ΕπισκεΛ)* 2006, 1108 [facts and editorial remarks by the writer in English in <<http://cisgw3.law.pace.edu/cases/060001gr.html>>]: in this latter judgment the court of appeal proceeds with an extended analysis on the question of the extent of damages in the CISG; in particular, this judgement points out that the criterion for the extent of damage under the CISG is the objective foreseeability, as it is accepted by Greek legal doctrine and case law under the Greek Civil Code, within the context of the theory of the appropriate cause, with the difference that not any probable damage (*pithani zimia*) can be compensated, as the theory of appropriate cause supports, but any possible damage (*dinati zimia*) resulting from the breach, thus increasing the broadness of the damage that can be compensated under the CISG, in comparison to the damage that can be compensated under the Greek Civil Code. For the latter judgment, see also above par. VII.1.4 and footnote 66.

<sup>97</sup> Multi-Member First Instance Court of Athens (*ΠΠρΑθ*) 4505/2009 (not published) [facts and editorial remarks by the writer in English in <<http://cisgw3.law.pace.edu/cases/094505gr.html>>]. Cf. *D. Flambouras/G. Petrochilos*, *Commercial Law Review (EEmpD)*, 2000, 1, p. 53.

<sup>98</sup> *A. Valtoudis*, in *Northern Greece Law Union (ENOBE)*, The Vienna Convention for international sales of goods, 2001, p. 71-72.

<sup>99</sup> *A. Mullis*, Twenty-Five Years On - The United Kingdom, Damages and the Vienna Convention, *Rebels Zeitschrift für ausländisches und internationales Privatrecht*, 71 (2007), 35, p. 46.

In addition, it has been judged that non-physical damage and damage to goodwill is not compensable under the CISG, since such damage cannot, as a general rule, be considered foreseeable<sup>100</sup>.

Finally, it has been judged that the calculation of damage under the CISG is specific (and not abstract), as is the case under the Greek Civil Code; in particular, under CISG art. 77, the party suffered damage must take all reasonable measures to mitigate the loss; failure of this party to take such reasonable measures, will entitle the party in breach to claim reduction in the damages in the amount by which the loss should have been mitigated<sup>101</sup>.

## 2.6. Remedy for avoidance of contract<sup>102</sup> - meaning of fundamental breach

According to CISG art. 49 § 1, the buyer may declare the contract avoided if the lack of conformity of the goods with the contract is fundamental. The meaning of a fundamental breach is provided for by CISG art. 25<sup>103</sup>.

It should be noted that, especially for the cases of lack of conformity of the goods with the sale contract (CISG art. 35), it is accepted that in order to characterise a breach as fundamental, various factors are taken into account such as: (a) the seriousness of the breach, i.e. to what extent the goods do not conform with the requirements of the contract, so that eventually, they can be considered as inappropriate for the intended use which has been made known to the seller (*level of qualitative deviation*)<sup>104</sup>; (b) the total contractual price for the buyer and the amount

<sup>100</sup> Multi-Member First Instance Court of Athens (*ΙΙΙΙΡΑΘ*) 4505/2009 (not published) [facts and editorial remarks by the writer in English in <<http://cisgw3.law.pace.edu/cases/094505gr.html>>]; cf. *A. Valtoudis*, in *Northern Greece Law Union (ENOBE)*, The Vienna Convention for international sales of goods, 2001, p. 71-72.

<sup>101</sup> Multi-Member First Instance Court of Athens (*ΙΙΙΙΡΑΘ*) 4505/2009 (not published) [facts and editorial remarks by the writer in English in <<http://cisgw3.law.pace.edu/cases/094505gr.html>>]. That is, CISG art. 77(a) (which corresponds to art. 300 of the Greek Civil Code) provides for the obligation to each party claiming damages to mitigate the loss. Furthermore, it is accepted in terms of interpretation that the said obligation consist of the adoption of all appropriate measures for the mitigation of loss, which are expected, under the specific circumstances, to be adopted by a party acting in good faith; it does not however include the adoption of measures including unusual and unreasonable expenses. If the party claiming damages breaches his obligation under CISG art. 77(a), then the party who breached the contract may, under art. 77(b), request reduction of the damages to the extent it (the damages) could be limited; for these issues cf. analytically *H. Stoll/G. Gruber*, in *P. Schlechtriem/I. Schwenzer*, *Commentary on the UN Convention on the international sale of goods*, 2005 2<sup>nd</sup> ed., p. 790.

<sup>102</sup> For the remedy of avoidance cf. analytically *P. Kornilakis*, *Judicial Review (Κριτική)* 2002, 133; also *D. Flambouras*, *The international sale*, in *Ch. Pamboukis* (edit.), *International Transactions Law*, Athens, par. 1190-1238.

<sup>103</sup> For the meaning of fundamental breach also see above par.VII.1.3.

<sup>104</sup> *P. Kornilakis*, *Special contractual Law*, volume I, 2002, p. 148.

of damage he sustained<sup>105</sup>; and (c) the extent to which the buyer reasonably had the ability to use the goods in another (alternative) manner<sup>106</sup> and then to claim damages for the loss he sustained due to the breach<sup>107</sup>.

It has been judged<sup>108</sup> that the a contract can be avoided with an informal declaration of the seller. Furthermore, CISG art. 26 provides that “a declaration of avoidance of the contract is effective only if made by notice to the other party”. Finally, CISG art. 27 applies. Accordingly, it is not important if the avoidance declaration was indeed received by the party in breach; to the extent it was duly dispatched, the sender, i.e. the party who suffered the breach, may invoke it and the breaching party bears the risk of non receipt.

Upon the exercise of the right of avoidance both parties are released from their contractual obligations, subject to any damages claims (see CISG art. 81 § 1)<sup>109</sup>, while the party who performed the contract either in whole or in part may claim from the other party to return the amounts he had paid under the contract (see CISG art. 81 § 2(a)). If both parties are obliged to return amounts, they must simultaneously perform such return (see CISG art. 81 § 2(b)). However, the buyer is deprived of the right to declare the contract avoided, if he is

<sup>105</sup> R. Koch, *Review of the Convention on Contracts for the international sale of goods (CISG)*, 1998, 257.

<sup>106</sup> It has been judged that, if the goods can be used by the buyer (even for a certain type of restricted use), normally there will be no fundamental breach of contract; cf. relevant Judgment of the Court of Appeals (*Oberlandesgericht*) of Hamburg (Germany) dated 25.1.2008 (12 U 39/00) (published in <http://cisgw3.law.pace.edu/cases/080125g.html>). It has however been judged that the breach is fundamental when, due to lack of conformity, the buyer cannot resell the goods; cf. Single-Member First Instance Court of Thessalonica (*ΜΠρΘεσ*) 14953/2003 NOMOS legal database no. 432741 [facts and editorial remarks by the writer in English in <http://cisgw3.law.pace.edu/cases/030001gr.html>]: in this case the car shock absorbers which were sold to the buyer did not conform with the contractual description; the court judged that this fact deprived the buyer to what he was entitled to expect from the specific sale contract, i.e. to resell the goods purchased for profit making (since the shock absorbers that were delivered to him could not be installed in the specific types of vehicles of his customers); therefore, the first criterion of CISG art. 25 was met and, since there was a fundamental breach of contract by seller, the buyer was entitled to declare the contract avoided. It should be noted that the court did not examine the second criterion set out by CISG art. 25 for its application (foreseeability by the seller of the impact of the consequences of the breach on the buyer).

<sup>107</sup> P. Huber, *CISG-The Structure of Remedies*, *Rebels Zeitschrift für ausländisches und internationales Privatrecht*, 71 (2007), 13, p. 26 with further references.

<sup>108</sup> Similarly Single-Member First Instance Court of Thessalonica (*ΜΠρΘεσ*) 14953/2003, NOMOS legal database no. 432741 [facts and editorial remarks by the writer in English in <http://cisgw3.law.pace.edu/cases/030001gr.html>].

<sup>109</sup> The prevailing view is that after the declaration of avoidance, the contract is not entirely cancelled, but continues to apply as framework, the avoidance transforming the contract into an agreement to wind up the contractual relationship, with the right to damages as the most important, but not the sole, continuing feature: cf. P. Kornilakis, *Special contractual Law*, Volume I, 2002, p. 151-153; R. Hornung, in P. Schlechtriem/I. Schwenzer, *Commentary on the UN Convention on the international sale of goods*, 2005 2<sup>nd</sup> ed., p. 855-856 where opposite views are quoted.

incapable of returning the goods substantially in the condition in which he received them (see CISG art. 82 § 1)<sup>110</sup>.

### VIII. Obligations of the buyer – Seller's remedies in case of breach of seller's obligations

The primary contractual obligations of the buyer under the CISG are governed by art. 53–60 and include the obligation for the payment of the contractual price and the obligation of taking delivery of goods<sup>111</sup>.

In particular, the buyer must pay the price for the goods pursuant to the provisions of the sale contract and the CISG (see CISG art. 53–58). In particular it has been judged that the buyer must pay the price to the seller at the seller's place of business (art. 57 § 1(b)) and within the time set out in the contract of sale or arising from the contract of sale which is the time when the seller places either the goods or documents controlling their disposition at the buyer's disposal (CISG art. 58 § 1 and 59)<sup>112</sup>.

In relation to the time that the contractual price must be paid, CISG art. 58 § 1 provides that in the absence of an agreement to the contrary, the buyer is obliged to pay the contractual price, as soon as the goods or the documents controlling their disposition are made available to him; furthermore, pursuant to CISG art. 59, at the said time, the obligation of the buyer for the payment of the price is due, without any call or reminder by the seller being necessary<sup>113</sup>.

Furthermore, in contrast to the view prevailing under the Greek Civil Code, according to CISG art. 53, the buyer is obliged to take delivery of the goods<sup>114</sup>.

<sup>110</sup> Similarly Single-Member First Instance Court of Thessalonica (*ΜΠρΘεσ*) 14953/2003, NOMOS legal database no. 432741 [facts and editorial remarks by the writer in English in <<http://cisgw3.law.pace.edu/cases/030001gr.html>>].

<sup>111</sup> See also Multi-Member First Instance Court of Athens (*ΜΜΠρΑθ*) 4505/2009 (not published) [facts and editorial remarks by the writer in English in <<http://cisgw3.law.pace.edu/cases/094505gr.html>>].

<sup>112</sup> Multi-Member First Instance Court of Athens (*ΜΜΠρΑθ*) 4505/2009 (not published) [facts and editorial remarks by the writer in English in <<http://cisgw3.law.pace.edu/cases/094505gr.html>>].

<sup>113</sup> Similarly Single-Member First Instance Court of Thessalonica (*ΜΠρΘεσ*) 43945/2007 *Chronicles of Private Law (ΧρΙΔ)* 2008, 52, 53 [facts and editorial remarks by the writer in English in <<http://cisgw3.law.pace.edu/cases/080002gr.html>>].

<sup>114</sup> CISG art. 60 further specifies the buyer's obligation for taking delivery of goods by providing that “The buyer's obligation to take delivery consists: (a) in doing all the acts which could reasonably be expected of him in order to enable the seller to make delivery; and (b) in taking over the goods”. For the purposes of CISG art. 60(b), “taking over” means physical receipt of goods by the buyer. See also Multi-Member First Instance Court of Athens

If the buyer does not perform his obligation(s) under the sale contract or under the CISG, the seller has the following remedies<sup>115</sup>:

- (i) to claim from the buyer to perform his obligation (i.e. to pay the contractual price, to take delivery of the goods or to perform any other contractual obligation), unless the seller has exercised a remedy which is inconsistent with such requirement (see CISG art. 61 § 1(b) and 62) (*specific performance*); or
- (ii) if the non-performance by the buyer constitutes a fundamental breach (CISG art. 25), to declare the contract avoided; it should be noted that the seller may also declare the contract avoided if the buyer does not perform his obligation to pay the contractual price or to take delivery of the goods within the reasonable additional period of time set by the seller (see CISG art. 61 § 1(a), 63 and 64 §1(b)) (*avoidance*); and
- (iii) to claim damages; the seller is not deprived of the right to claim damages by exercising such damages remedy in addition to other remedies (see CISG art. 61 § 1(b), 61 §2 and 74-77) (*damages*).

The buyer's liability is not connected to the existence or non-existence of fault, i.e. the buyer's liability is objective and relates only to the (objective) fact of the contractual breach<sup>116</sup>.

It should be noted that the declaration by the seller of the contract avoided results to the release of both parties from their contractual obligations (see CISG art. 81 § 1)<sup>117</sup>; however, the right to declare the contract avoided does not affect a claim to damages of the person declaring the contract avoided (see CISG art. 61 § 1(b) and 74-77). In view of this, it has been judged<sup>118</sup> that the person declaring the contract avoided is entitled to claim both positive (actual) loss suffered and negative loss (loss of profits) and therefore that, if the seller declares the contract avoided, the compensable positive (actual) loss shall include any damage he suffered, such as, e.g., the

(*IIIρAθ*) 4505/2009 (not published) [facts and editorial remarks by the writer in English in <<http://cisgw3.law.pace.edu/cases/094505gr.html>>].

<sup>115</sup> For the remedies of the seller in the event of contractual breach by the buyer cf. analytically in *D. Flambouras*, *The international sale*, in *Ch. Pamboukis* (edit.), *International Transactions Law*, par. 964-966, 1031, 1058 seq. See also Multi-Member First Instance Court of Athens (*IIIρAθ*) 4505/2009 (not published) [facts and editorial remarks by the writer in English in <<http://cisgw3.law.pace.edu/cases/094505gr.html>>].

<sup>116</sup> See above footnote 58.

<sup>117</sup> It is accepted that after the contract of sale has been declared avoided, it becomes an agreement to wind up (see above footnote 109 in detail). At that time, the parties are released from their contractual obligations (CISG art. 81 § 1), while they are obliged to return anything they received following performance of the contract (CISG art. 81 § 2).

<sup>118</sup> Court of Appeals of Athens (*EφAθ*) 4861/2006, *Commercial Law Survey (ΕπισκεΔ)* 2006, 841 [facts and editorial remarks by the writer in English in <<http://cisgw3.law.pace.edu/cases/060000gr.html>>]. From the examination of the background and the text of this judgment one may conclude that in this case the seller did not make use of the relevant rights granted: (a) by CISG art. 75 providing for specific calculation of damages (see above, par. VII.1.4 and footnote 70); or (b) by CISG art. 76 providing for abstract calculation of damage.

transportation costs, insurance premiums or depreciation of the value of goods due to wear etc; however, the compensable positive loss of the seller does not include the contractual price of the goods sold, since upon declaration of the contract avoided, it is terminated and the seller is entitled to demand from the buyer to return the goods sold (see CISG art. 81 § 2).

### IX. Applicable law for the determination of the interest rate<sup>119</sup>

CISG art. 78 provides that “If a party fails to pay the price or any other sum that is in arrears, the other party is entitled to interest on it, without prejudice to any claim for damages recoverable under article 74”.

With reference to art. 78 it has been judged that, under the CISG, interest is due, without a notice being necessary to be served upon the promisor of the monetary obligation and regardless of any damage sustained by the promisee of the monetary obligation<sup>120</sup>. In the event of non-payment by the buyer of the price for the goods, it has been judged that interest becomes due as from the time when the buyer is obliged to pay the price pursuant to the contract of sale and the CISG<sup>121</sup>.

In addition, it has been judged that, since CISG art. 78 is a rule incorporated in an international convention implemented in Greece, then, by virtue of art. 28 § 1 of the Greek Constitution, art. 78 supersedes any domestic Greek rule granting procedural privileges to the Greek State in connection with the time that accrual of interest commences<sup>122</sup>.

The CISG does not contain a special provision in relation to the rate of interest and the manner of its; therefore, for this issue there is a “gap”. For the filling of any gaps, CISG refers at first to the general principles on which it is based and in the absence of such principles, to the law applicable in the sale contract according to the rules of the Private International Law) of the *forum* (see art. 7 § 2 and above, par. IV.3 and 4).

<sup>119</sup> For this issue cf. analytically *D. Flambouras*, as above, in *Private International Law of Commerce*, 2008, 509, p. 517. *same author*, *Judicial Review (Κριτική)* 2000, 196.

<sup>120</sup> Multi-Member First Instance Court of Athens (*ΙΙΙΙΡΑΘ*) 4505/2009 (not published) [facts and editorial remarks by the writer in English in <<http://cisgw3.law.pace.edu/cases/094505gr.html>>]. Multi-Member First Instance Court of Thessalonica (*ΙΙΙΙΡΘΕσ*) 22513/2003, *Armenopoulos (Αρμ)* 2003, 1802 [facts and editorial remarks by the writer in English in <http://cisgw3.law.pace.edu/cases/030513gr.html>].

<sup>121</sup> Multi-Member First Instance Court of Athens (*ΙΙΙΙΡΑΘ*) 4505/2009 (not published) [facts and editorial remarks by the writer in English in <<http://cisgw3.law.pace.edu/cases/094505gr.html>>] (see also above par. VIII).

<sup>122</sup> Multi-Member First Instance Court of Athens (*ΙΙΙΙΡΑΘ*) 4505/2009 (not published) [facts and editorial remarks by the writer in English in <<http://cisgw3.law.pace.edu/cases/094505gr.html>>] [accordingly art. 21 of decree of 26-6/10-7-1944 "Code of legislation on State trials" does not apply].

The review of non-Greek court judgements and arbitral awards shows that various solutions have been suggested (and adopted) in connection with the rate of interest and its calculation<sup>123</sup>. In view, among other things, of the risk of non-uniformity due to the application of the national law to which the private international law of the *forum* refers, certain courts judged that the amount of the interest rate should not be determined with reference to the national law, but with reference to a certain criterion based on the general principles on which CISG is based. Thus on this basis, many state courts and arbitral panels referred to the rate of interest that applies in the state where the creditor of the monetary claim has his place of business<sup>124</sup>.

The last view was adopted by two Greek judgments<sup>125</sup>; however, it was not accepted by another Greek judgment<sup>126</sup> which ruled that, in connection with the rate of the interest through which the interest due is calculated, there is an external gap in the CISG (i.e. this matter is outside the sphere of application of the CISG) and, consequently, this issue is resolved in accordance with the relevant provisions of the national law which applies in accordance with the private international law rules of the *forum*.

## X. Conclusion

In the light of the above analysis and by way of general conclusion one could say that Greek courts have delivered interesting and mostly correct (although often incomplete) judgments in connection with various important matters. Such matters include:

<sup>123</sup> Cf. analytically *D. Flambouras*, as above in *Private International law of Commerce*, 2008, 509, p. 517 with further references.

<sup>124</sup> For relevant older case law cf. *D. Flambouras*, *Judicial Review (Κριτική)* 2000, 196, 207 footnotes 35, 209.

<sup>125</sup> Single-Member First Instance Court of Larisa (*ΜΠρΛαρ*) 165/2005, NOMOS legal database no. 380226 [facts and editorial remarks by the writer in English <<http://cisgw3.law.pace.edu/cases/050165gr.html>>]. Single-Member First Instance Court of Athens (*ΜΠρΑθ*) 1314/2000 (not published) [facts and editorial remarks by the writer in English in <<http://cisgw3.law.pace.edu/cases/000308gr.html>>]. These judgments applied CISG art. 7 § 2 and ruled that, although the question for the determination of the interest rate falls into the sphere of application of the CISG, in connection with this issue an internal gap exists (i.e. there is no special provision for this issue). Therefore this issue must be settled based on the general principles on which CISG is based and in particular: (i) the general principle of uniform regulation for questions arising in the international sales and (ii) the general principle of good faith which must be observed in international commerce (see above, par. IV.3); therefore, according to these general principles it was ruled that the law applicable for the determination of the interest rate must be the law of the country where the creditor of the monetary obligation has his place of business, since this would be the interest rate that he would be entitled to have in his country, had he filed an action against the obligor.

<sup>126</sup> *Single-Member First Instance Court of Thessalonica (ΜΠρΘεσ)* 43945/2007, *Chronicles of Private Law (ΧρΠΔ)* 2008, 52, 54 [facts and editorial remarks by the writer in English in <<http://cisgw3.law.pace.edu/cases/080002gr.html>>]: in this judgment it is referred that the question for the interest rate cannot be settled with recourse, in accordance with CISG art. 7 § 2, to the general principles on which CISG is based (see above par. IV.4).

- the legal nature of the CISG (its character as soft law is respected by Greek courts)<sup>127</sup>;
- the interpretation of the CISG provisions (autonomous interpretation seems to be as a general rule respected by Greek courts)<sup>128</sup>;
- the sphere of application of the CISG (Greek courts have correctly interpreted CISG art. 1 in order to apply the Vienna Convention in international contracts of sale<sup>129</sup>; Greek courts have correctly not applied the CISG if goods are purchased for family or household use<sup>130</sup>;
- the application of the methodology set out in CISG art. 7 § 2 [as a general rule in the event of matters not expressly governed by the CISG, Greek courts first apply the general principles to which CISG is based (e.g. calculation of interest) and then refer to the domestic rules of the applicable law (e.g. set-off)]<sup>131</sup>;
- the applicable rules for precontractual liability, tort and unjust enrichment (a Greek court has provided correct -in the writer's opinion- solutions in problematic areas such as pre-contractual liability, tort and unjust enrichment)<sup>132</sup>;
- the validity and effect of the international trade terms in contracts governed by the CISG (a Greek court only referred to INCOTERMS as interpretative criteria and judged that INCOTERMS do not apply in the contract of sale unless incorporated in the contract)<sup>133</sup>;
- the seller' obligations under the CISG and the remedies of the buyer in the event of seller's breach (Greek courts correctly applied and summarised the relevant CISG provisions)<sup>134</sup>;
- the seller's non-exemption from its liability for damages in the event of hardship (a Greek court was correct in not applying CISG art. 79 in an event constituting hardship)<sup>135</sup>;
- the seller's obligation to deliver to the buyer goods conforming to the contract and the buyer's duties to examine the goods and provide notice of lack of non-conformity in the event that the seller delivers non-conforming goods (Greek courts appear as a general rule to have correctly applied CISG articles 38 and 39)<sup>136</sup>;

<sup>127</sup> See above par. II.

<sup>128</sup> See above par. III.

<sup>129</sup> See above par. IV.1.

<sup>130</sup> See above par. IV.2.

<sup>131</sup> See above par. IV.3 and IV.4.

<sup>132</sup> See above par. IV.5

<sup>133</sup> See above par. V.

<sup>134</sup> See above par. VI.1.1-VI.1.3.

<sup>135</sup> See above par. VI.1.4.

<sup>136</sup> See above par. VI.2.1-2.4

- the buyer's remedy of damages and in particular the calculation of damages (Greek courts seem to have correctly applied CISG art. 74; however successful application is not a general rule)<sup>137</sup>;
- the buyer's remedy of avoidance of contract<sup>138</sup>;
- the concept of fundamental breach (Greek courts correctly treated specific breaches as fundamental)<sup>139</sup>;
- the buyer's obligations under the CISG and the seller's remedies in the event of breach by the buyer (Greek courts correctly applied and summarised the relevant CISG provisions)<sup>140</sup>;
- the calculation of the rate of interest (in this instance Greek courts do not seem to adopt a uniform approach)<sup>141</sup>.

<sup>137</sup> See above par. VI.1.4 and VI.2.5.

<sup>138</sup> See above par. VI.2.6.

<sup>139</sup> See above par. VI.1.3 and VI.2.6.

<sup>140</sup> See above par. VII.

<sup>141</sup> See above par. IX.

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