

Rechtswissenschaftliche Fakultät Institut für Zivilrecht Wintersemester 2017 KU UN-Kaufrecht – Uniform Sales Law

# The United Nations Convention on Contracts for the International Sale of Goods (CISG)

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# The United Nations Convention on Contracts for the International Sale of Goods (CISG)

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# The United Nations Convention on Contracts for the International Sale of Goods (CISG)

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### **Obligations of the seller – Time of delivery – Articles 30 and 33**

#### Article 30

The seller must deliver the goods, hand over any documents relating to them and transfer the property in the goods, as required by the contract and this Convention.

#### Article 33

The seller must deliver the goods:

(a) if a date is fixed by or determinable from the contract, on that date;

(b) if a period of time is fixed by or determinable from the contract, at any time within that period unless circumstances indicate that the buyer is to choose a date; or

(c) in any other case, within a reasonable time after the conclusion of the contract.

**Obligations of the seller – Time of delivery – Articles 30 and 33** 

- Whether the property in the goods has in fact been transferred to the buyer is not a question governed by the CISG; it must be determined by reference to the law designated by the rules of private international law of the forum.
- Neither does the CISG govern the effect of a retention of title clause on the property in the goods
- A party asserting that a date or a period for delivery has been agreed upon must prove such agreement.
- "Reasonable" means a time adequate in the circumstances (e.g. two weeks after the seller received the first instalment on the price for the delivery of a bulldozer; 10 months in the case of a loader whose agreed refurbishment could last 120 to 180 days)
- Where the parties did not specify the delivery date in the contract, acceptance of the goods by the buyer without protest may indicate that delivery was made within a reasonable time

#### **Obligations of the seller – Place of delivery – Article 31**

#### Article 31

If the seller is not bound to deliver the goods at any other particular place, his obligation to deliver consists:

(a) if the contract of sale involves carriage of the goods — in handing the goods over to the first carrier for transmission to the buyer;

(b) if, in cases not within the preceding subparagraph, the contract relates to specific goods, or unidentified goods to be drawn from a specific stock or to be manufactured or produced, and at the time of the conclusion of the contract the parties knew that the goods were at, or were to be manufactured or produced at, a particular place — in placing the goods at the buyer's disposal at that place;

(c) in other cases — in placing the goods at the buyer's disposal at the place where the seller had his place of business at the time of the conclusion of the contract.

**Obligations of the seller – Place of delivery – Article 31** 

- Art. 31 (a) only applies if it is neither the seller's nor the buyer's own obligation under the contract to transport the goods from the seller's place of business (or from where they are located) to the buyer's place of business (or wherever specified by the buyer)
- "Handing over," in Art. 31 (a), means that the carrier is given possession of the goods. The handing over of documents relating to the goods does not appear to constitute handing over the goods themselves, and does not constitute delivery of the goods unless otherwise agreed by the parties
- As a general rule, parties split the liability for customs duties, charges and licences: seller assumes export-related liabilities, buyer assumes import-related liabilities
- Placing goods "at the buyer's disposal" means taking all necessary steps so that the buyer can collect them.

#### **Obligations of the seller – Delivery of documents – Article 34**

#### Article 34

If the seller is bound to hand over documents relating to the goods, he must hand them over at the time and place and in the form required by the contract. If the seller has handed over documents before that time, he may, up to that time, cure any lack of conformity in the documents, if the exercise of this right does not cause the buyer unreasonable inconvenience or unreasonable expense. However, the buyer retains any right to claim damages as provided for in this Convention.



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RFC GHE092502HK5

#### BILL OF LANDING FOR PORT TO PORT SHIPMENT

| Shipper (Complete Name And Address)<br>Shenzhen Ailisheng Trade Co., Ltd.<br>Phoenix Road,Luohu district, Guangdong<br>Shenzhen city,China<br>Telephone and fax: 086-755-36922075<br>Consignee (Complete Name And Address)<br>Alejead Pc S.A.S - Aptdo Postal 28059<br>Carrera 100 5-39 – Cali - Valle - Colombia<br>Telephone and email: 059-032-4491451 -<br>alejead@hotmail.com |                      |   | Packing List No.:   | 219618043-1                    | Bill of Landing No.<br>SSOF090406718 |
|--|----------------------|---|---|--------------------------------|--------------------------------------|
|  |                      |   | Freight And Char<br>Shipper<br>at shen zhen /Gu   |                                | Terms Of Sale:<br>FOB (2010)         |
|  |                      |   | Number of Original Bill of Landing Issued: Three (3)  |                                |                                      |
|  |                      |   | Place and date of issue: 15 – August – 2010<br>Shen zhen / China  |                                |                                      |
| Notify Party (Complete Name And Address)<br>Same as consignee  |                      |   | For Release Of Shipment, Please Contact:<br>Agencia de Aduanas Siacomex Ltda – Buenaventura<br>Calle 2 No. 2º-58 – PBX: (052) 242 2798<br>Fax: (052) 242 4823 - buenaventura@siacomex.com |                                |                                      |
| Place of Receipt:<br>Shen Zhen / China   | Port Of L<br>Shangai | oading:                                   |   | tainer/Package Received By The |                                      |
| Place of Delivery: Port Of D<br>Cali / Colombia Buenaver   |                      |   | Carrier: 1/0  |                                |                                      |
|  |                      | ntura / Colombia                          | For Transshipment Vessel/Vo<br>To: Maersk Line CSCL LE  |                                | yage:<br>HAVRE / 0029W               |
| Marks And<br>Numbers<br>20' steel Dry Cargo<br>Container No:<br>CSQU3054383  | No. of PKGS          | Go<br>500 units of 15.6<br>core i7 8GB RA | s each one with a<br>4 <sup>3</sup> and 1 pallet  | Gross Weight<br>1650 Kg        | Measurement<br>10.2 M <sup>3</sup>   |

including those on the back pages. If required by the Carrier, one original of this Bill of Landing must be surrendered duly endorsed in exchange for the goods or delivery order. In witness whereof original Bill of Landing has been signed in the number stated below, one of which being accomplished the other(s) to be void.

IN ACCEPTING THIS BILL OF LANDING, the Shipper, Consignee, Holder hereof, and Owner of the goods, agree to be bound by all of its stipulations, exceptions and conditions, whether written, printed or stamped on the front or back hereof, as well as the provisions above Carrier's published Tariff Rules and Regulations.

|                         | Prepaid                           | Collect | Shipped on Board: 20 – August – 2010<br>Place: Shangai |  |
|-------------------------|-----------------------------------|---------|--|--|
| Occean freight          | USD 3.300                         |         |  |  |
| n Witness Whereof 3 ori | Signature:<br>B/No: SSOF090406718 |         |  |  |

The contract evidenced by Bill of Landing is governed by the laws of the Hong Kong Special Administrative Region. Any proceeding against the carrier must be brought in the courts of the Hong Kong Special Administrative Region and no other court.

#### It is mutually agreed that 1. DEFINITIONS

- Carrier Cargo Container Line Limited
- Container includes any container flat open top open sided container transportable tank or similar article of transport used to consolidate
- arises when the Place of Receipt and or the Final Destination Combined Transport
- Port to Port arises when the Port of Loading and the Port of Discharge only are shown on the face hereof and neither the Place of Receipt nor the Final Destination are stipulated on the face hereof.
- shall include the Shipper Consignee the Holder of the Bill of Lading the Receiver and the Owner of the goods. Merchant
- shall mean the cargo described on the face of this Bill of Lading. Gonds
- Interpretaion: Words in the singular shall include where the context admits the plural and vice versa.

2. PARAMOUNT CLAURE The Bill of Large has here effect subject to any National Legislation as installed in the county of transmit being acyratory to be happed here or the Happe Hust as amendad by the Protocol signed all Buscies on the 25d February 16d (beh Nagu-tanian) and the State of the State State of the State State of the State to any search, such term that is a void to that extends for the current table entropy of the term that is a void to that extends for the current table entropy of the term that is a void to that extends for the current table entropy of the term that is a void to that extends for the current table entropy of the term that is a void to that extends for the current table entropy of the term table and the current table of the term table on the term, contained and exception and entropy of the current table contained or more benefacility resp. Barties or immunities goin the Carrier than thore and current table Adv.

WARRANTY The Shopper warrants that in agreeing to the terms hereof he is the owner or has the authory of the person owning or entitled to possession of the goods.

RESPONDENT:
 Response in the second second

If discharge ii) Where incidental to the Port to Port shipment, precarriage, oncarriage, carriage riand, storage prior to loading or after discharge from the Ocean vessell, loading or inloading of goods into or from containers or the supply of containers are required back contributes the Carrier as this agent with by the Merchant, the Merchant hereby constitutes the Carrier as his agent with authority to enter into any contract on his benaft and the Carrier shall be under no

authority is enter into any contract on his behalf also me userer man de www.ine operated labelly waterpools for between any gas 2 carter; bales of dentries in presentage, cartering and any contract of the second seco

Carrier as agent for the Merchant. Any such charges shall be deemed height within the definition of height the first to hors alsophiem charger of the contract, any compared Court or Tribunal shall decore that the Carrier is table as principal for any precarriage, contranges, carringer leands, torside or inhanting of goods, the Carrier's tablety. If any, shall be determined in accordance with the provisions of clause (4) below (Conthered Transport).

B. COMBINED TRANSPORT The carrier shall be responsible for loss or damage to the following extent but no

(i) With respect to loss/damage howsoever occurring within the period of responsibility under clause 4(A|0) above, liability of the Carrier shall be determined under the

Under Solars al. (1) With respect to like a damage interviewer occurring outside the period of (1) With respect to likes a damage interviewer operating outside the period of the setting of the scalar amount recoversid by the Careford in the scalar amount recoversid by the scalar amo

y their nature are liable to loss or wastage, or to be damaged when not packed or when not properly packed (c) Compliance with the instruction of the Merchant or his agent. (d) Handling, stowage, loading or unloading of the goods by or on behalf of the

e) inherent vice of the goods.
 f) insufficiency or inadequacy of marks or numbers on the goods, coverings or

(g) Strike, lockout, stoppage or restraint of labour, from whatever cause and

(ii) attract, bubble, topping to instantic unador, incline reserve cause and (iii) That acido attraction thread and/or loss or damage to the poots caused by any time party.
(i) Any other cause or event whatscaver or howsower ansing unless it is proven that the loss or damage resulted from an act or omission of the Camer done with ment to cause is or damage or exclusion from an act or omission of the Camer done with ment to cause is or damage or exclusion in the indevided in tail loss or

intent to cause loss or camage or recivesity with the knowledge that loss or damage would probably result. (v). If it cannot be proven when the loss or damage occurred the loss or damage shall be deemed to have occurred outside the Carrier's period of responsibility within the meaning of clause 4(A)(i) above.

GENERAL (applicable to both Port to Port shipments and Combined Transport) (i) The Carrier shall in no circumstances whatsoever be responsible for any direct or indirect loss or damage sustained by the Merchant occasioned through delay whether by reaction of representation or otherwise by the Carrier, his servaritis or

whether or resource to expression to express whittoever be liable for indirect, or consequential ics howsower or warescoresr areas, (ii) All goods standered by the Marrison to the Carner for carnage shall be carried in a container (with or writing) paid Selectings to third parties, in the case of the container supplies by the Carner).

#### 5. CONTAINERS

c. Optimalities (i) These the Mechanic and the Carrier or his agent agree in writing to under deck sequence (before or at the time of booking the carrage of the goods) the Carrier shall have the points to loss containers or maker without notes to the Singeer and if they are so carried the Hague-Vitaby Rules shall apply and the goods shall combridge a decarrad liverage.

contribute in General Average. (i) In the case of five animals and cargo requested by the Merchant to be carried on deck and which in this Bill of Lading are stated to be carried on deck and are so carried the Hegue-Visby Rules shall apply and the goods shall contribute in general

Calling the regular-tracy nuties shall apply and the globols shall controller in general call in the case of a container suspiced by the Mechanic or by the Carner to the Merchanit for the Merchanit suse, the following conditions shall apply. (a) The Shope, before using a container shall inspect it to make centain that it is clean, sound and suitable for the type of curpo he is shoping and the Shoper shall have the right to reject any massificatory container bottler using

shall have the optits there is an unstatistation youtcame before use (ii) The Currer shall be under in Salabian without the shart of less or the goods have been passed or those of the containers of by the unstatistive of any pools the ordinance cancella. If the share been passed or those of the containers of by the unstatistive of the solar pools. The ordinance cancella, the share been passed or those of the containers of by the unstatistive of the solar pools. The ordinance cancella, the share been passed or the containers of the the unstatistive of the share been provided and the solar than the pool page the due to the manuer is which the goods less them pain and the container and the solar than the pool separate page that the due and a set which the Cancer may not the restor of and separates. Ther cluster and search the Cancer may not the restor of and the states and the states and search the Cancer may not the restor of and the states and the states and the states the states of the states of the states and the states and the states the states of the states of the states and the states and the states the states of the states of the states and the states and the states and the states of the the states and the states and the states and the states and the states of the states and the s

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diagence on the part of the Carner. (v) The Carrier shall be entitled but under no obligation to open any container at any time and to inspect the contents. If it thereupon appears that the contents or

any part thereof cannot safety or properly be carried further, either at all or without thing dart theretor claimost safety or properly be claimed within the other at an or without counting any additional allegeness or lateng any messive or relation to the containing in its contents or any part thereof the Claimer may abandon the transportation relef and or take any messures and or uncu any reachandel additional algorites to carry or to continue the claimage or to store the same above or total under cover in or down all any place when stored parallel control to control the delivery or other store the delivery. inder this Bill of Lading The Merchant shall indemnify the Carrier against any reasonable additional

The Merchal shall indemnly the Carver against any reasonable adolocial explores is nonzero the society doctariant to Caase S<sup>-1</sup> and show are uncaved at the Consigners or Recover's premises, the Consigners so receiver's are regionable for texample entry contracts can and in a useble contion in a register and suitable for the carvage of Largo of any description target pace of discharge, or other pace nonzero by enumer within the precided in the president to them. Show a Container not be relating within the precident merce to them. Show a Container not be relating within the precident merce the bala for any demonstration by the Container within the the precident to them. Show a Container not be relating within the precident merce the shall be also be any demonstration. Since the container within the precident such that any demonstration by the Container within the precident merce the shall be also be any demonstration. The container within the precident such that any demonstration by the Container and the container and the shall be also the any demonstration by the container and the shall be also the any demonstration. The container and the container and the container and the shall be also the any demonstration by the container and the shall be also the any demonstration by the container and the container any demonstration by the container and the shall be also the any demonstration and the container and the shall be any demonstration and the container and the shall be any demonstration and the container a

the mericular status de nade for any demonstrange, ross to expension much may area from such non-return. Ivv) The Merchant agrees to incernnly the Carrier for any loss or damage to the container of for any labitity arising from any act or omsson by the Merchant. Ibs servants or Agents, arising directly or indirectly from, but not limited to the packing or stowage of cargo in the container or the use thereof. in the event that the Carrier agrees to transport any empty container not

loaded with goods for a Merchant or any other pany, such transportation shall be undertaken only in accordance with the terms of this BH of Lading notwithstanding that no formal BH of Lading be issued for such return transportation.

#### 6. CONTRACTUAL VOYAGE The voyage access to Bro Co

6. CONTRACTUAL VOYAGE The vayage approximation for Econtractor Colomage recorded in this Bit of Lading includes to yoots, pack or packass whitebower in any other whither in or out of the seaal colomation. The seaan economy is the seaan economy of the seaan economy of Sectorage strends area coming to call at any one or times of the usual colomany or comments where a large comments and the seaan economy of the comments where a large comments of the seaan economy of the comments where the search or constractive through economy of comments with the present or any provide in the beyond and the basis to the resolution of the theory of the search and the search and the comments with the present or any provide in the beyond and the basis to the resolution of the theory of the search and the search and the models. Assistant compasses, separing or op docking with or which it has all goods or basisting of the search and the search of the search of the search or basisting of the search search on the search and goods or or basisting of the search search on the search and the search of th

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4. IOTECHNOLING INTERFECTION OF A DESCRIPTION OF A DES 8. NOTIFICATION AND DELIVERY

17. LIMITATION

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The port or oscience of any of the Bronsaka matters arrang and entry being refused by the Port. Customs or other appropriate Authorities, Carrier shall be all beiny to bring back; or re-ship such goods to the port of shipment at the sole risk and expense of the Mechant. The Carrier shall be entitled to recover the costs by reason of the compliance with these regulations or requirements whether caused by neoligence or not.

by negligence or not. (w) The Merchent shall further be kable to pay on demand day by day all storage charges and/or demurrage charges in regard to containers (as defined herein) in accordance with the tariff which may be obtained from the Carner.

10. LIEN (i) The Carrier his servants or Agents shall have a lien on the goods and the right (ii) country of the servants of the server shall be a server of the server of 90. LBM cross the services or Agenes shall have a black on the goods and the right is black the goods and the regult provide such on the length (included is the regult included in the regult included is the regult included in the regult included is the regult included in the regult included in the regult included is the regult included in the regult included in the regult included is the regult included in the regult included in the regult included is the regult included in the regult included in

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b) To recover how the Encoder of the goods or the Princesh that of Encoder how the Encoder of Encoder how the Encoder of Encoder

n the lease agreement. (c) To recover from the Shipper (or the Principal) of the goods -lines, imposts, expenses, loss or damage referred to in Clause 9. 11. GENERAL AVERAGE

General AVERAGE

 General Average shall be adjusted at any port or place at th Carrier and in accordance with the York-Antwerp Rules 1974 as

temps and the carver delivers the goods without obtaining security to ( (ii) if the Carver delivers the goods without obtaining security to ( controbutions, the Marchant by taking delivery of the goods under responsibility to pay such contributions and to provide such cash security for the estimated amount of such contributions as the ably require. The same to apply to any contribution of th salvage and or special charges. (iii) The Carrier shall be under no obligation to exercise any L Average contribution due to the Merchant.

#### BOTH TO BLAME COLLISION CLAUSE, NEW JASON CLAUS AUSES 1 AND 2 are deemed to be incorporated in this Bill of L CLAUSES 1 AND 2 are deemed to be incorp.

13. CARRIER'S LIABILITIES IN THE EVENT OF BLOCKADE, DEL La campactria substituties in the start of statution consistence, such a commolence such as a substituties of the statuties of the statutie whether by delay or otherwise howsoever or make it unsafe or im

where is growing or comments non-solver or make it unsale or unsale transmit to prove the solution of the solution of the solution of the or definitually in reacting discharge or learning the port or place or definitually in reacting discharge or learning the port or place warranty or rule of Law non-infittanding - (a) To proved of such comment port as the Camer shall discretion select and discharge migroups.

there: (c) To retain the goods on board the ship and/or return them to in d discharge in the same or substituted ship and there discharge is sole ask and expense of the Shipper/Consignee and/or Owner of (d) To abandon the carraige of the goods by allow at such core the Carner shall in his absolute discretion select, and discharge

The container When The special sign bases abandwale of signal special term in the Signal When The special signal bases and the special signal shares and such associates and the special signal shares and the special signal signal terms of the special signal signal shares and the special signal signal special signal participation special signal signal special signal special signal special signal special signal special specia

14. DESCRIPTION OF GOODS (i) This Bill of Lading shall be prima facie evidence of the shipment external apparent good order and condition (unless otherwise st ascertainable by reasonable means of checking the containers is whether or not the cargo is loaded into the container by the Mercha

party: (i) Eccept as provided for in Clause 14 (i) no representation is mad as to the weight, contents, measure, quantity, quality, description, or or the value of the goods and the Carrier shall be under no obligat billy whatsoever in respect of such description or particulars.

15. CARRIER'S RIGHT OF DISPOSAL Without prejudice to Cause 10 above, if the goods are not taken to with 21 days of discharge (or in the case of perishable goods with came inal be at loteny and without notice to the Marchani of the go them to the appropriate authority or self the goods as ativities for whom it may concern where the Camera at hits sole discretion reasonal we value mait would be obtained in the safe or action of the goods (or in the safe). would be less than the outstanding (and in the case of perishable go storage and similar charges

#### 16. LANDING CHARGES

10. LANDING CHARGES The goods shall in all cases be landed by the vessel and not by the k landing charges and all expenses arising after discharge of the discharge on to quay, surfax d'entrepol, stavedoring, handing, over des. whardage dues, storage etc. shall be payable by the Merchant i Lighterage, and expenses of weighing, measuring, valuing and counti at port of discharge, to be paid by the Merchant of the goods, any ou custom of the port to the contrary notwithstanding.

#### e monetary sability of the Carrier shall not exceed the applicable der the Hague/Hague Visby Rules (whichever shall be applicable)

20. DANGEROUS GOODS

unit for the purposes of package limitation shall be the number of cor to on the face of the Bill of Lading. 18. JURISDICTION Is. JURGONDIAI (i) Urises the Cannor otherwise agrees in writing all claims and urbeir or in connections with the Bill of Laking shall be referred associated by the interaction of the thermal appointed by the Munchann. The two Advances tappointed of heir advances in claims hall be determined absolutive aver-age of the advance of the claims hall be determined absolutive aver-age of the advances of the advances of the advances of the appointed of the Advances. The constant extended by or constance of the registrate advances. The constant extended by or constance of the registrate advances the two and extended by or constances of the registrate advances the two and extended by or constances of the first the constant by the Advances of the down and advances of the advances of the down and the advances of the one species of the link basis and advances of the down and the species advances of the one species of the link basis and advances of the one species of the link basis advances of the down advances of the one species of the link basis advances of the one species of the one species of the link basis advances of the one species of the one species of the link basis advances of the one species of the one speci

(i) In the event that an extension or extensions to the one year to to in 0 above state paralled by the clarify, such strategistics are a clause (i) above. Telenomic for the purposes of this clause table products to the generality of the foregoing. (iii) ha accostance with section 1 jubres acception of any time as (whether such acceptance be expressed or implied) shall be deer mation of the Longenia. Busels.

19. LIABILITY OF SERVANTS AND SUB-CONTRACTORS

14. LUBLIT OF BRIVARTS AND SUB-CONTRACTORS In service versions, appear bit no service in specific of the Care inspacedent sub-contractors, amplicyed by the Career in any automative bit sub-contractors amplicyed by the Career in any inspace to desult on his part while schedule in the contract of career every acceletor, instance condens and lowly hearn care inspaced and particular schedule in the contract of the career bank and the career of the theorem of the Career bank and the career of the theorem of application of career of the career of the theorem of a part of the Career bank and to protect every schedule in the queries of the Career bank and to protect every schedule in the queries of the Career bank and the protect every schedule in the queries of and any schedule acceleration of the schedule of application contractors shall be derived to accelerate and part of indicare bank and the schedule acceleration and the schedule of and for proteins and an or most the his schedule of application contractors shall be derived to accelerate acceleration and the schedule schedule acceleration and and the schedule accelerations that and the proteins and an or most the his schedule acceleration and the schedule schedule acceleration accel 20. DANGENOUS GOODS GOODS OF A DANGEROUS OR HAZARDOUS NATURE AND OR MATERIAL MUST NOT BE TENDERED FOR SHIPMENT UNLES CERTIFICATE OF DECLARATION HAS BEEN PREVIOUSLY O

#### **Obligations of the seller – Delivery of documents – Article 34**

- "Documents relating to the goods" in the sense of Art. 34 includes primarily documents that give their holders control over the goods (bills of lading, dock receipts and warehouse receipts) but they also include insurance policies, commercial invoices, certificates (e.g. certificates of origin, weight, contents or quality), and other similar documents
- If neither the contract nor trade usages nor practices between the parties provide specific modalities for handing over the documents, the seller must tender the documents "in such time and in such form as will allow the buyer to take possession of the goods from the carrier when the goods arrive at their destination, bring them through customs into the country of destination and exercise claims against the carrier or insurance company."
- The handing over of non-conforming documents (e.g. invoice discrepant from contract, non-negotiable BoL instead of order BoL, BoL from which is clear that goods were loaded on, instead of below deck, "unclean" BoL) constitutes a breach of contract to which the normal remedies apply.

### **Conformity of goods – Physical conformity – Article 35**

#### Article 35

(1) The seller must deliver goods which are of the quantity, quality and description required by the contract and which are contained or packaged in the manner required by the contract.

(2) Except where the parties have agreed otherwise, the goods do not conform with the contract unless they:

(a) are fit for the purposes for which goods of the same description would ordinarily be used;

(b) are fit for any particular purpose expressly or impliedly made known to the seller at the time of the conclusion of the contract, except where the circumstances show that the buyer did not rely, or that it was unreasonable for him to rely, on the seller's skill and judgement;

(c) possess the qualities of goods which the seller has held out to the buyer as a sample or model;

(d) are contained or packaged in the manner usual for such goods or, where there is no such manner, in a manner adequate to preserve and protect the goods.

(3) The seller is not liable under subparagraphs (a) to (d) of the preceding paragraph for any lack of conformity of the goods if, at the time of the conclusion of the contract, the buyer knew or could not have been unaware of such lack of conformity.

#### **Conformity of goods – Physical conformity – Article 35**

- Comprehensive regime covering all types of lack of conformity for which domestic systems often have different rules (*aliud/peius* (Austria), *vice caché/vice apparente* (France) conditions/warranties (UK); express/implied warranties (US) etc.)
- Art. 35 (2) standards relating to the goods' quality, function and packaging that, while not mandatory, are presumed to be a part of sales contracts (i.e. they are implied terms that bind the seller even without affirmative agreement thereto)
- However, Art. 35 (2) (a), requires only that the goods be fit for the purposes for which they are ordinarily used (i.e. goods need not be perfect or flawless, unless perfection is required for the goods to fulfil their ordinary purposes). Depending on the circumstances and the parties' agreement, this may be the seller's or the buyer's country, or the country of ultimate use
- Also, quantity deviations may not constitute lack of conformity as long as they remain within customary range for the trade concern

#### **Conformity of goods – Legal conformity – Articles 41 and 42**

#### Article 41

The seller must deliver goods which are free from any right or claim of a third party, unless the buyer agreed to take the goods subject to that right or claim. However, if such right or claim is based on industrial property or other intellectual property, the seller's obligation is governed by article 42.

#### Article 42

(1) The seller must deliver goods which are free from any right or claim of a third party based on industrial property or other intellectual property, of which at the time of the conclusion of the contract the seller knew or could not have been unaware, provided that the right or claim is based on industrial property or other intellectual property:

(a) under the law of the State where the goods will be resold or otherwise used, if it was contemplated by the parties at the time of the conclusion of the contract that the goods would be resold or otherwise used in that State; or

(b) in any other case, under the law of the State where the buyer has his place of business.

[...].

**Conformity of goods – Legal conformity – Articles 41 and 42** 

- CISG maintains the distinction between defect in quality (Sachmangel) and defect in title (Rechtsmangel), to which Art. 35(3) does not apply
- CISG extends conformity obligations beyond free title (Art.41) to the obligation to sell goods that are free from any third party's right or claims based on industrial property or other intellectual property (Art. 42)
- Buyer retains the right to claim legal non-conformity beyond the two-year cut-off period of Art. 39(2)

# Lack of conformity of goods – Notice requirements – Articles 38 and 39 Article 38

(1) The buyer must examine the goods, or cause them to be examined, within as short a period as is practicable in the circumstances.

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

# [...]

#### Article 39

(1) The buyer loses the right to rely on a lack of conformity of the goods if he does not give notice to the seller specifying the nature of the lack of conformity within a reasonable time after he has discovered it or ought to have discovered it.

(2) In any event, the buyer loses the right to rely on a lack of conformity of the goods if he does not give the seller notice thereof at the latest within a period of two years from the date on which the goods were actually handed over to the buyer, unless this time limit is inconsistent with a contractual period of guarantee.

Lack of conformity of goods – Notice requirements – Articles 38 and 39

- Time for buyer's examination depends on means of delivery
- Factors taken into account by courts and arbitrators to determine the reasonableness of the period include:
  - perishable or seasonal nature of goods/ whether the goods are subject to major fluctuations in price or rapid change in condition
  - volume of goods delivered by the seller/ complexity of the goods/ difficulty of conducting an examination/ whether examining the goods would entail disassembling them or removing them from packaging/ the buyer's reasonable opportunity (and the availability of necessary facilities) to examine the goods/the risk that the goods would be mixed up with those from other suppliers unless examined immediately after delivery;
  - professionalism and/or expertise of the buyer /timing and nature of the buyer's expected use or resale of the goods/ the buyer's knowledge of the seller's need for speedy notice of lack of conformity;
  - whether the goods had passed a pre-delivery inspection/ whether there were defects in prior deliveries/the fact that the buyer had requested expedited delivery of the goods; whether lack of conformity was obvious

**Obligations of the buyer – Taking delivery – Articles 53 and 60** 

#### Article 53

The buyer must pay the price for the goods and take delivery of them as required by the contract and this Convention.

#### Article 60

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.

**Obligations of the buyer – Taking delivery – Articles 53 and 60** 

- Buyer has a duty to cooperate with the seller to effect delivery (e.g. preliminary examination of the goods prior to delivery; obtaining import licences; concluding a contract of carriage or notifying the name of the vessel on board which the goods are to be delivered; giving notice to the seller within a reasonable period in connection with deliveries to be made at the buyer's request)
- Buyer has an obligation to physically take over the goods, without prejudice to the buyer's remedies arising out of lack of conformity of the goods
- However, buyer has a right to reject the goods if they are delivered before the date fixed (Art. 52 (1)), or where the seller delivers a greater quantity than provided for in the contract (Art. 52 (2)). The buyer may also reject the goods if the seller commits a fundamental breach of contract

#### **Obligations of the buyer – Price payment – Articles 58 and 59** *Article 58*

(1) If the buyer is not bound to pay the price at any other specific time, he must pay it when the seller places either the goods or documents controlling their disposition at the buyer's disposal in accordance with the contract and this Convention. The seller may make such payment a condition for handing over the goods or documents.

(2) If the contract involves carriage of the goods, the seller may dispatch the goods on terms whereby the goods, or documents controlling their disposition, will not be handed over to the buyer except against payment of the price.

(3) The buyer is not bound to pay the price until he has had an opportunity to examine the goods, unless the procedures for delivery or payment agreed upon by the parties are inconsistent with his having such an opportunity.

#### Article 59

The buyer must pay the price on the date fixed by or determinable from the contract and this Convention without the need for any request or compliance with any formality on the part of the seller.

#### **Obligations of the buyer – Price payment – Articles 58 and 59**

- The CISG default rule is simultaneous exchange of goods and price, subject to contract terms, commercial usages and practices established between the parties
- CISG has no default rules on currency of payment, but this question should be seen as within its scope, because of its logical relation with price payment ("internal gap"). In the absence of a contractual provision, price is to be paid in the currency of the place of payment or of the place of delivery
- "Documents controlling the disposition of the goods" is narrower than "documents relating to the goods" (Art. 34). Certificates of origin and quality, or customs documents, are not documents controlling the disposition of the goods so that their non-delivery does not justify a buyer's refusal to pay the price.
- Loss of or damage to the goods after the risk has passed to the buyer does not discharge him from his obligation to pay the price, unless the loss or damage is due to an act or omission of the seller (Art. 66)

#### Passage of risk – General rules – Article 67

#### Article 67

(1) If the contract of sale involves carriage of the goods and the seller is not bound to hand them over at a particular place, the risk passes to the buyer when the goods are handed over to the first carrier for transmission to the buyer in accordance with the contract of sale. If the seller is bound to hand the goods over to a carrier at a particular place, the risk does not pass to the buyer until the goods are handed over to the carrier at that place. The fact that the seller is authorized to retain documents controlling the disposition of the goods does not affect the passage of the risk.

(2) Nevertheless, the risk does not pass to the buyer until the goods are clearly identified to the contract, whether by markings on the goods, by shipping documents, by notice given to the buyer or otherwise.

#### Passage of risk – General rules – Article 67

- As a default rule, where the contract of sale involves carriage of the goods, the risk passes to the buyer when the seller hands over the goods to the first carrier
- The risk passes without regard to whether the seller or the buyer has title to the goods, and without regard to who is responsible for arranging transport and insurance
- A contract of sale involves the carriage of goods when it expressly or implicitly provides for subsequent carriage irrespective of who is responsible for arranging the contract of carriage (seller or buyer)
- "Handing over" of the goods is complete when the goods are in the physical custody of the carrier, i.e. actual surrender of the goods to the carrier
- Depending on the agreed terms of transportation, risk may pass already at unloading the goods alongside the ship into the carrier's custody or only at loading the goods onto the respective means of transport under the buyer's custody

Carriage terms and passage of risk

#### Incoterms 2010

EXW Ex works

(...named place)

FCA Free carrier (...named place)

### **CFR Cost and freight**

(...named port of destination)

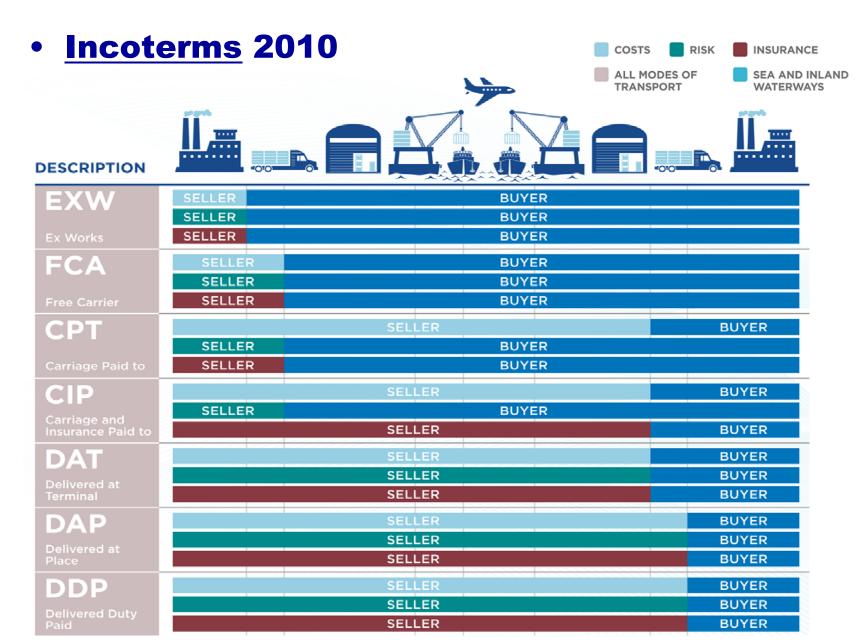
- CIF Cost, insurance and freight (...named port of destination)
- FAS Free alongside ship CPT Carriage paid to

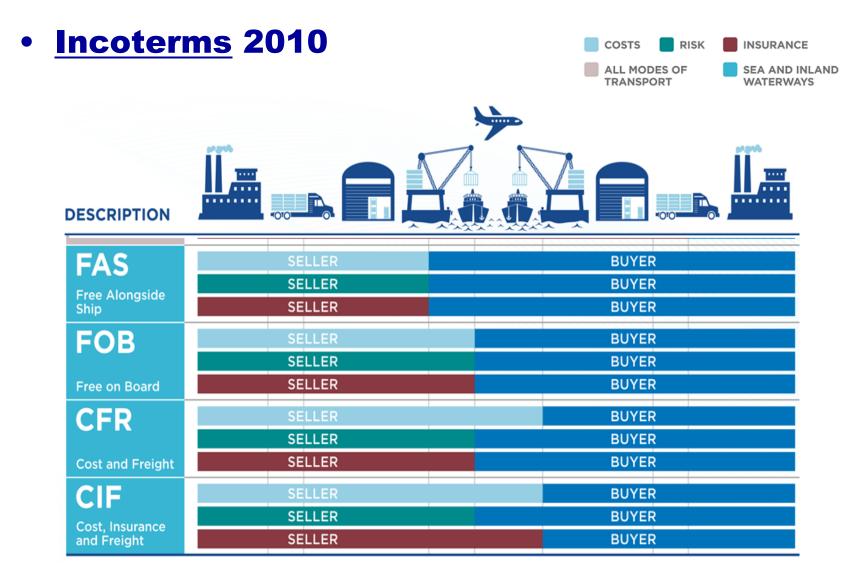
(...named port of shipment)

- (...named place of destination)
- FOB Free on board (...named port of shipment) CIP Carriage and insurance paid to (...named place of destination)

Carriage terms and passage of risk

# Incoterms 2010





#### **Special rules on passage of risk – Articles 68 and 69**

#### Article 68

The risk in respect of goods sold in transit passes to the buyer from the time of the conclusion of the contract. However, if the circumstances so indicate, the risk is assumed by the buyer from the time the goods were handed over to the carrier who issued the documents embodying the contract of carriage. Nevertheless, if at the time of the conclusion of the contract of sale the seller knew or ought to have known that the goods had been lost or damaged and did not disclose this to the buyer, the loss or damage is at the risk of the seller.

#### Article 69

(1) In cases not within articles 67 and 68, the risk passes to the buyer when he takes over the goods or, if he does not do so in due time, from the time when the goods are placed at his disposal and he commits a breach of contract by failing to take delivery.

(2) However, if the buyer is bound to take over the goods at a place other than a place of business of the seller, the risk passes when delivery is due and the buyer is aware of the fact that the goods are placed at his disposal at that place.

#### [...]

**Special rules on passage of risk – Articles 68 and 69** 

- Art. 67 inadequate when goods are sold after shipment (in transit), because buyer would be forced to assume risks retroactively
- Sale of goods in transit (common in certain commodity trades)
- However, risk may pass retroactively to the buyer as a consequence of shipment terms (e.g. CIF), but the buyer is protected against seller's bad faith

#### **Remedies of the buyer – Article 46**

#### Article 46

(1) The buyer may require performance by the seller of his obligations unless the buyer has resorted to a remedy which is inconsistent with this requirement.

(2) If the goods do not conform with the contract, the buyer may require delivery of substitute goods only if the lack of conformity constitutes a fundamental breach of contract and a request for substitute goods is made either in conjunction with notice given under article 39 or within a reasonable time thereafter.

(3) If the goods do not conform with the contract, the buyer may require the seller to remedy the lack of conformity by repair, unless this is unreasonable having regard to all the circumstances. A request for repair must be made either in conjunction with notice given under article 39 or within a reasonable time thereafter.

**Remedies of the buyer – Articles 46 and 28** 

- The buyer's right to require performance depends on the applicable law (Art. 28). If the seized court would not, on the facts of the case, grant such remedy under its own national law, it will not be bound to do so under the Convention, and may award only damages.
- Right to performance is the first among the remedies as CISG aims at preserving the contractual relation as far as possible (delivery of substitute goods, repair of defective performance)
- Avoidance of contract is only available as a last resort remedy if the continuation of the contract would no longer be tolerable because of a severe ("fundamental") breach of contract by the seller
- Delivery of defective goods is not per se fundamental breach of contract if the goods are reparable (at least where the seller offers and effects speedy repair without any inconvenience to the buyer)

#### **Remedies of the buyer – Article 47**

#### Article 47

(1) The buyer may fix an additional period of time of reasonable length for performance by the seller of his obligations.

(2) Unless the buyer has received notice from the seller that he will not perform within the period so fixed, the buyer may not, during that period, resort to any remedy for breach of contract [but] is not deprived thereby of any right he may have to claim damages for delay in performance.

#### Article 48

(1) [...] the seller may, even after the date for delivery, remedy at his own expense any failure to perform his obligations, if he can do so without unreasonable delay and without causing the buyer unreasonable inconvenience or uncertainty of reimbursement by the seller of expenses advanced by the buyer. However, the buyer retains any right to claim damages as provided for in this Convention.

**Remedies of the buyer – Article 47** 

- Buyer may (but is not obliged to) fix an additional period of time (*Nachfrist*) of a reasonable length within which the seller must perform its obligations, paving the way to the avoidance of the contract
- Right to demand specific performance, to avoid the contract or to demand damages is suspended during this period
- If the seller performs during the additional period of time the buyer must accept the performance (but retains the right to claim damages for losses caused by the delay of performance)
- If the seller does not perform within the additional period, the buyer may resort to any available remedy, including avoidance
- Seller himself has the right to cure defective performance, unless the buyer rejects (but buyer's lack of reaction where the seller has indicated a period of cure is presumed to be acceptance)

#### **Remedies of the buyer – Articles 50 and 52**

#### Article 50

If the goods do not conform with the contract and whether or not the price has already been paid, the buyer may reduce the price in the same proportion as the value that the goods actually delivered had at the time of the delivery bears to the value that conforming goods would have had at that time. [...].

#### Article 52

(1) If the seller delivers the goods before the date fixed, the buyer may take delivery or refuse to take delivery.

(2) If the seller delivers a quantity of goods greater than that provided for in the contract, the buyer may take delivery or refuse to take delivery of the excess quantity. If the buyer takes delivery of all or part of the excess quantity, he must pay for it at the contract rate.

**Remedies of the buyer – Articles 50 and 52** 

- Price reduction available when goods that have been delivered do not conform to the contract (i.e., defects as to quantity, quality, description (*aliud*) and packaging; defects in documents relating to the goods can be treated as a case of non-conformity), whether lack of conformity amounts to fundamental breach or not
- Price reduction however not available for late delivery or breach of any obligation of the seller other than the obligation to deliver conforming goods
- Price reduction is proportionate to the value loss of the goods actually delivered as compared to the value that conforming goods would have
- Buyer retains right to price reduction even where he lost the right to avoid the contract for fundamental breach

#### **Remedies of the seller – Articles 46 and 28**

#### Article 63

(1) The seller may fix an additional period of time of reasonable length for performance by the buyer of his obligations.

(2) Unless the seller has received notice from the buyer that he will not perform within the period so fixed, the seller may not, during that period, resort to any remedy for breach of contract. However, the seller is not deprived thereby of any right he may have to claim damages for delay in performance.

#### Article 64

(1) The seller may declare the contract avoided:

(a) if the failure by the buyer to perform any of his obligations under the contract or this Convention amounts to a fundamental breach of contract; or

(b) if the buyer does not, within the additional period of time fixed by the seller in accordance with paragraph (1) of article 63, perform his obligation to pay the price or take delivery of the goods, or if he declares that he will not do so within the period so fixed.

(2) However, in cases where the buyer has paid the price, the seller loses the right to declare the contract avoided unless he does so: [...]

Remedies of the seller – Articles 63 and 64

- The additional period of time granted by the seller is established by means of a notice by the seller to the buyer indicating that the buyer has to perform (a general demand that the buyer perform or discharge its obligations immediately or promptly is not enough) within a fixed or determinable additional period (i.e. by a date or within a time period)
- The additional period of time must be reasonable according to the circumstances of the case, including commercial usages and practices established between the parties (e.g. a reasonable period with regard to taking delivery of the goods will generally be longer than that applying to payment of the price)
- Definitive failure to pay the price or a large part of the price or to open a letter of credit at the time fixed by the contract generally constitutes a fundamental breach of contract, as opposed to a mere delay (unless timely performance of the obligation to pay the price is of the essence of the contract)