

An International Approach to the
Interpretation of the United Nations
Convention on Contracts for the
International Sale of Goods (1980) as
Uniform Sales Law

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This work was produced under the auspices of the
Pace Institute of International Commercial Law

 **CAMBRIDGE**
UNIVERSITY PRESS

CAMBRIDGE UNIVERSITY PRESS

Cambridge, New York, Melbourne, Madrid, Cape Town, Singapore, São Paulo

Cambridge University Press

32 Avenue of the Americas, New York, NY 10013-2473, USA

www.cambridge.org

Information on this title: www.cambridge.org/9780521868723

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First published 2007

Printed in the United States of America

A catalog record for this publication is available from the British Library.

Library of Congress Cataloging in Publication Data

Interpretation of the United Nations Convention on Contracts for the International Sale of Goods (1980) as Uniform Sales Law / edited by John Felemegas.

p. cm.

Includes bibliographical references and index.

ISBN-13 978-0-521-86872-3 (hardback)

ISBN-10 0-521-86872-6 (hardback)

1. United Nations Convention on Contracts for the International Sale of Goods (1980) 2. Export sales contracts. I. Felemegas, John, 1970-

K1028.3198.159 2006

343'.0878-dc22 2006008749

ISBN 978-0-521-86872-3 hardback

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necessary for the buyer to be able to take possession. Normally, this would include the identification of the goods to be delivered; the completion of any pre-delivery preparation, such as packing, to be done by the seller; and the giving of such notification to the buyer as would be necessary to enable him to take possession.⁹² In general, "the obligation to deliver in such circumstances consists of taking all steps necessary under the contract"⁹³ so that the buyer has nothing else to do other than to take the goods at the place of delivery.⁹⁴ In addition, if the goods are in the possession of a bailee, such as a warehouseman or a carrier, they might be placed at the disposal of the buyer by such means as the seller's instructions to the bailee to hold the goods for the buyer or by the seller handing over to the buyer in appropriate form the documents that control the goods.⁹⁵

⁹² *Supra* n. 88; Comment 16.

⁹³ See Germany 23 June 1998 Provincial Court of Appeal Hamm, case presentation including English translation is available online at <http://cisgw3.law.pace.edu/cases/980623g1.html>.

⁹⁴ *Supra* n. 36, Digest 9.

⁹⁵ *Supra* n. 88, Comment 17.

Time for delivery and early delivery: Comparison between the provisions of CISG Articles 33 and 52(1) and the counterpart provisions of the PECL (Articles 7:102 and 7:103)

Colin Ying

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I. INTRODUCTION

According to Article 30 CISG, the seller has three obligations that should be performed as required by the contract and the Convention: (i) an obligation to deliver the goods, (ii) an obligation to hand over any documents relating to the goods, and (iii) an obligation to transfer the property in the goods. Article 33 CISG deals with one aspect of the seller's first-mentioned obligation to deliver the goods,¹ ascertaining the time for delivery, whereas Article 52(1) CISG sets out the legal consequences of an early delivery of the goods by the seller.

¹The Convention does not generally deal with the third obligation, see Article 4: "[...] except as otherwise expressly provided in this Convention, it is not concerned with: [...] (b) the effect which the contract may have on the property in the goods sold."

In this context, Article 33 provides for three situations: (i) where the contract fixes a date or permits a date to be fixed; (ii) where the contract fixes a period of time or permits a period of time to be fixed; and (iii) any other situation (e.g., where the contract is silent as to the date or time for delivery). In the first situation, the seller must deliver the goods on the date so fixed. In the second situation, the seller must deliver the goods on any date within the period so fixed, unless circumstances indicate that the buyer is to choose a date within that period. In the third situation, the seller must deliver the goods within a reasonable time after the conclusion of the contract.

Delivery by the seller on the due date obliges the buyer to take delivery of the goods, as well as to pay the price for them as required by the contract and the Convention (Article 53 CISG). On the other hand, if the seller delivers the goods before the due date, the buyer is not obliged to take delivery at that time, but has the option of taking or refusing to take delivery (Article 52(1) CISG). If the seller delivers the goods after the due date, he will be in breach of contract, although the buyer may still be obliged to accept delivery then while being entitled to appropriate remedies (damages being the norm) in accordance with Article 45 CISG. This chapter focuses on early rather than late delivery.

Article 7:102 PECL is virtually identical to Article 33 CISG in all material respects, if one treats the CISG seller as the PECL party required to perform and the CISG buyer as the PECL "other party." The same three situations in the CISG are dealt with in the PECL using the same terminology.

Like Article 52(1) CISG, Article 7:103(1) PECL gives a party in the position of the buyer the same option to decline a tender of early performance by the other party, but goes on to qualify the exercise of the option. The party in question loses the option where acceptance of the tender of early performance "would not unreasonably prejudice its interests." In addition, Article 7:103(2) PECL states that "[a] party's acceptance of early performance does not affect the time fixed for the performance of its own obligation," but the Convention has no comparable Article.

There thus appear to be two differences between Article 52(1) CISG and Article 7:103 PECL, and these differences are analyzed after a comparison is made between Article 33 CISG and Article 7:102 PECL.

II. ASCERTAINING THE TIME FOR DELIVERY (ARTICLE 33 CISG AND ARTICLE 7:102 PECL)

Delivery of the goods consists of placing the goods at the buyer's disposal at the appropriate place, doing such act as may constitute delivery under the terms of the contract, or, where the contract of sale involves the carriage of goods, handing the goods over to the first carrier for transmission to the buyer.²

It should not be problematic to determine the time for delivery in the first two situations covered by paragraphs (a) and (b) of Article 33 CISG or paragraphs (1) and (2) of Article 7:102 PECL. A specific date or period of time can be stated in or determinable from the contract,³ and where the contract fixes the period of time or allows it to be fixed from objective criteria, any date within that period can be the date of delivery, unless circumstances indicate that the buyer is to choose a date within that

² See Article 31 CISG, which deals with the place of delivery. Article 33 CISG deals with the time for delivery; see also the Secretariat Commentary on Article 31 of the 1978 Draft [*draft counterpart of CISG article 33*].

§ 2, available online at <http://cisgw3.law.pace.edu/cisg/text/secomm/secomm-33.html>. Article 31 of the 1978 Draft is identical to Article 33 CISG, except for the omission of "or" between paragraphs (a) and (b) of Article 33.

³ A date determinable from a usage that is applicable to the contract under Article 9 CISG or Article 1:105 PECL, comes within the first situation.

period. One such circumstance may be where the buyer is to arrange for the transport of the goods and the contract is FOB or where the intention is to permit the buyer to schedule the exact arrival time of the goods so as not to overtax his storage and handling capacity.⁴

The date in the third situation (paragraph (c) of Article 33 or paragraph (3) of Article 7:102 PECL) is more flexible and indeterminate. Where no date or period of time for delivery is fixed or capable of being fixed from the contract, the time for delivery is within "a reasonable time after the conclusion of the contract." A reasonable time after the conclusion of the contract will vary from case to case and will depend on all the circumstances, such as the nature of the goods, the distance covered, and the parties' statements during negotiations.⁵ According to Honnold, "[w]hat is 'reasonable' can appropriately be determined by ascertaining what is normal and acceptable in the relevant trade."⁶ Schlechtriem has suggested that the rule in paragraph (c) should take precedence over a hypothetical inconsistent national law that might provide that where an indeterminate delivery date has been agreed upon, the seller is liable to deliver immediately.⁷ On the other hand, one might suppose that if a seller did deliver immediately, even if not obliged to do so, the seller would have delivered "within" a reasonable time after the contract was concluded.

As was previously mentioned, under both the Convention and PECL, in the first situation where the delivery date is fixed by or determinable from the contract, the seller must deliver the goods on the date so fixed or determined. In the second situation where a period of time for delivery is fixed by or determinable from the contract, the seller must deliver the goods on any date within that period, unless circumstances indicate that the buyer is to choose a date within that period. In any other case, the seller must deliver the goods within a reasonable time after the conclusion of the contract.

Delivery after the relevant due date amounts to a breach of contract, which entitles the buyer to the remedies described in Article 45 CISG and in particular the remedy of damages. Late delivery in itself does not automatically allow the buyer to avoid the contract. Under Article 49 CISG the buyer can avoid the contract for late delivery only if (i) the seller's failure to deliver on time amounts to a "fundamental breach of contract," as defined in Article 25 to mean in essence a breach that results in such detriment to the buyer as substantially to deprive him of what he is entitled to expect under the contract, or (ii) the seller fails to, or declares that he will not, deliver within a reasonable additional

⁴Secretariat Commentary on Article 31 of the 1978 Draft [draft counterpart of CISG article 33], *supra* note 2, §§ 6 and 7; Peter Schlechtriem, *Uniform Sales Law – the UN Convention on Contracts for the International Sale of Goods*, Manz (1986), p. 66, fn 244; Fritz Enderlein and Dietrich Maskow, *International Sales Law: United Nations Convention on Contracts for the International Sale of Goods; Convention on the Limitation Period in the International Sale of Goods*, Occana (1992), p. 136; Ole Laudo and Hugh Beale (eds), *Principles of European Contract Law*, Kluwer (2000), pp. 332–333.

⁵Germany 27 April 1999 *Oberlandesgericht* [Appellate Court] Naumburg, case presentation including English translation available online at <http://cisgv3.law.pace.edu/cases/990427g1.html>; (the court took into account the buyer's statement nominating 15 January 1997 as the latest delivery date in ruling that delivery after that date would not be within a reasonable time under Article 33(c) CISG).

⁶John Honnold, *Uniform Law for International Sales under the 1980 United Nations Convention*, 3rd ed., Kluwer (1999) p. 101. Frans van der Velden argues that reasonableness must be regarded as a general principle of the Convention: see "The Law of International Sales: The Hague Conventions 1964 and the UNCITRAL Uniform Sales Code 1980 – Some Main Items Compared" in CCA Voskuil and JA Wade (eds.), *Hague-Zagreb Essays 4 on the Law of International Trade*, Martinus Nijhoff (1983) p. 59. Cf. Article 1:302 PECL, which states how reasonableness is to be judged.

⁷Peter Schlechtriem, "The Seller's Obligations under the United Nations Convention on Contracts for the International Sale of Goods" in NM Galston and H Smit (eds), *International Sales: The United Nations Conventions on Contracts for the International Sale of Goods*, Matthew Bender (1984), pp. 6-1-6-4 and 6-15.

time fixed by the buyer under Article 47 CISG.⁸ The position is essentially the same under Articles 8:106, 9:103, and 9:301 PECL.⁹

III. CONSEQUENCES OF EARLY DELIVERY BY THE SELLER (ARTICLE 52(1) CISG AND ARTICLE 7:103 PECL)

Both Article 52(1) CISG and Article 7:103 PECL deal with performance of its obligations by a contracting party (the seller in the Convention) before the due date, as well as the consequential position of the other party (the buyer in the Convention). It is thought that neither Article can apply to the situation where the date or period of time for delivery is not fixed by or determinable from the contract and where the seller's obligation is only to deliver before a reasonable time has elapsed after the contract is concluded (i.e., where Article 33(c) CISG or Article 7:102(3) PECL sets the delivery time). Delivery at any time within that period cannot amount to early delivery under Article 52(1) CISG or early performance under Article 7:103 PECL.

Article 52(1) CISG is placed in Part III (Sale of Goods), Chapter II (Obligations of the Seller), Section III (Remedies for Breach of Contract by the Seller) of the Convention. It therefore appears to treat delivery by the seller before the due date determined in accordance with Article 33 CISG as ordinarily a breach of contract. Early delivery is at least non-performance by the seller of its obligation to deliver, and in those circumstances, the buyer has the option of taking or refusing to take delivery of the goods, because having to accept early unanticipated delivery by the seller may cause the buyer additional expense or inconvenience. Article 52(1) CISG does not purport to qualify the buyer's right to exercise that option.¹⁰

Article 7:103(1) PECL gives a party in the position of the buyer the same option, but qualifies the exercise of the option. The party in question loses the option where acceptance of the tender of early performance "would not unreasonably prejudice its interests." In addition, Article 7:103(2) goes on to provide that "[a] party's acceptance of early performance does not affect the time fixed for the performance of its own obligation." Consequently, the fact that the buyer accepts early delivery may not mean that the buyer in turn has to pay the purchase price (the buyer's only relevant obligation for our purposes¹¹) before the contractual date for payment. The Convention has no express provision that parallels Article 7:103(2).

Whether the apparent silence of the Convention on these two PECL points means that the buyer's position under the CISG is different from that under the PECL is now examined.

1. Qualification of the Buyer's Option to Refuse to Take Delivery

The buyer's general obligation to take delivery set out in Article 60 CISG includes an obligation to do "all the acts which could *reasonably* [emphasis added] be expected of him in order to enable the seller to make delivery" and to take over the goods. Although Article 52(1) CISG appears to give the buyer an absolute option to refuse to take early

⁸ Article 47 CISG gives the buyer the right to extend the seller's time for performance while preserving the former's right to claim damages for the delay. The seller's failure to, or declaration that he will not, deliver within the extended period allows the buyer to avoid the contract.

⁹ See Bruno Zeller, *Editorial Remarks: Guide to Articles 47 and 49(1)(b) CISG, and Comparison with Principles of European Contract Law*, available online at <<http://cisgv3.law.pace.edu/cisg/text/peclcomp47.html>>.

¹⁰ However, Article 86 CISG may compel the buyer in some circumstances to take possession of the goods on the seller's behalf although the buyer has rejected the goods.

¹¹ The buyer has two obligations under the CISG: to pay the price for the goods and to take delivery of the goods. The former obligation is more relevant for present purposes, where the hypothesis is that the buyer has taken early delivery.

delivery, the exercise of such an option may arguably be constrained by Article 60 CISG and in any event must be governed by the general principle of reasonableness applicable under the CISG.¹² In addition, there is a separate view that, when considering whether to refuse to take early delivery, the buyer must act in good faith under Article 7(1) CISG.

On the issue of good faith generally in the Convention, Felemegas has argued forcefully that the CISG imposes no substantive duty of good faith on parties to a contract of sale and that Article 7(1) only requires the observance of good faith in interpreting the Convention.¹³ Magnus adopts a contrary stance,¹⁴ and his approach finds support in the Secretariat Commentary on Article 48 of the 1978 Draft [*draft counterpart of CISG Article 52*].¹⁵ The Secretariat's opinion on the point was that, although the buyer's right to refuse to take delivery does not depend on whether early delivery causes the buyer extra expense or inconvenience, "the buyer must have a reasonable commercial need to refuse to take delivery since article 6 [the draft counterpart of Article 7(1) CISG] requires the observance of good faith in international trade."¹⁶

Given therefore an obligation under the CISG on the buyer's part to conduct himself reasonably or to observe good faith when exercising the option under Article 52(1), the buyer's right to refuse early delivery cannot be unqualified, and the counterpart provision in Article 7:103 PECL contains an appropriate qualification consistent with the principles of the Convention. Thus, if the ship carrying the goods arrives a week before the contractual delivery date, the buyer who has storage room available will not be entitled to refuse to take early delivery, where the seller is prepared to cover the buyer's expenses and carry the risk during storage of the goods until the contractual delivery date.

2. Effect of Acceptance of Early Delivery on the Time for the Buyer's Performance of His Obligations

Two situations should be distinguished: where the contract specifies the time for payment and where it does not.

a. Time for Payment Specified

One of the buyer's two obligations under Article 53 CISG is to pay the contract price for the goods "as required by the contract and [the] Convention."¹⁷ Article 59 CISG governs the time for payment by the buyer, which is "the date fixed by or determinable from the contract and [the] Convention." Therefore, if the contract fixes a particular date for payment, the buyer is not obliged to pay the seller before that date arrives, even if the

¹²Peter Schlechtriem writes that "the rule that the parties must conduct themselves according to the standard of the 'reasonable person' . . . must be regarded as a general principle of the Convention": *supra* note 4, p. 22 fn 41, and p. 39. Frans van der Velden, *supra* note 6, p. 59, also argues that reasonableness must be regarded as a general principle of the Convention. See also Albert Kritzer, "Overview Comments on reasonableness as a general principle of the CISG," available online at <http://cisgw3.law.pace.edu/cisg/text/reason.html>.

¹³John Felemegas in his editorial remarks on Article 7 CISG, comparing it with Article 1:106 PECL, available online at <http://cisgw3.law.pace.edu/cisg/text/peclcomp7.html>.

¹⁴Ulrich Magnus in his editorial remarks on Article 7 CISG, comparing it with Article 1:6 UNIDROIT Principles, available online at <http://cisgw3.law.pace.edu/cisg/principles/uni7.html>.

¹⁵Article 48 of the 1978 draft corresponds and is identical in wording to Article 52 CISG.

¹⁶Secretariat Commentary on Article 48 of the 1978 Draft [*draft counterpart of CISG article 52*], § 3 and fn 1, available online at <http://cisgw3.law.pace.edu/cisg/text/seccomm/sccomm-52.html>. Although accepting that the buyer's freedom to refuse early delivery is necessarily restricted by the obligation in Article 7(1) CISG to observe good faith, Michael Will has criticized the restriction of "reasonable commercial need" placed on the buyer by the Secretariat Commentary as placing an unwarranted burden on the buyer: in CM Bianca and MJ Bonell (eds.), *Commentary on the International Sales Law*, Giuffrè (1987), p. 380.

¹⁷The buyer's other obligation under Article 53 CISG is to take delivery of the goods, but that obligation is largely academic for our purposes, because the hypothesis here is that the buyer has accepted the seller's early delivery.

seller chooses to deliver the goods to the buyer early and the buyer chooses to accept that early delivery. This is likewise the position under Article 7:103(2) PECL.

However, Enderlein and Maskow suggest in relation to Article 52(1) CISG that where the buyer accepts early delivery, in some circumstances that "may" constitute a contractual modification in regard to the period of performance under Article 29 CISG; if so, the buyer will have to perform his obligations at an earlier date.¹⁸ It is difficult to appreciate why, if a given contract is modified under Article 29 as to the delivery date by the buyer's acceptance of the seller's early delivery (thereby negating any claim for damages by the buyer for the early delivery), the buyer's obligation to pay the price must necessarily be brought forward. A possible justification for that conclusion may lie in the reasoning that the contractual date for payment must be taken to have been displaced in the modified contract, with the result that, because there is no longer a fixed payment date, Article 58(1) CISG requires the buyer to pay on actual delivery. This reasoning is not entirely convincing.

The Secretariat Commentary on Article 48 of the 1978 Draft (identical to Article 52 CISG) also recognizes that the buyer's acceptance of early delivery may in some circumstances amount to an agreed modification of the contract pursuant to Article 27 of the 1978 Draft (now Article 29 CISG).¹⁹ It is unclear what Enderlein and Maskow and the Secretariat envisage as the circumstances accompanying early delivery by the seller that will point to the contract being modified. To avoid any inference under the CISG that the contract has been modified simply by the buyer's acceptance of the seller's early delivery, a prudent buyer should declare a relevant reservation when taking delivery. Under the PECL, although a contract and any obligations under it can be likewise modified by agreement,²⁰ any implication along the lines suggested by Enderlein and Maskow advancing the date of the buyer's obligation to pay should arise less readily because of the express provision in Article 7:103(2) PECL, even if theoretically possible.

3. Time for Payment Unspecified

If the contract specifies no date for payment, the Convention provides in Article 58(1) that the buyer must pay the price when the seller places the goods or the documents controlling their disposition at the buyer's disposal in accordance with the contract and the Convention.²¹ In such a case, early delivery by the seller accepted by the buyer requires the latter to pay earlier than he would otherwise have done. This will have a bearing on whether the buyer will or should exercise the option under Article 52(1) CISG to refuse to take delivery. The result is the same if the contract expressly links the day when payment is to be made to the day of delivery, whenever that may be, without a particular date being specified: the earlier the delivery by the seller, the earlier the payment by the buyer who accepts the early delivery.

Whether the contract gives no specific time for payment or whether the contract links the time for payment to the time of delivery, the position under the PECL is similar to that outlined above under the CISG. If the contract "fixed" no specific date for the buyer to pay the seller, on one view Article 7:103(2) is inapplicable, and the time for the buyer's

¹⁸ Enderlein and Maskow, *supra* note 4, p. 200.

¹⁹ Secretariat Commentary on Article 48 of the 1978 Draft, § 6, *supra* note 16.

²⁰ See Articles 2:105, 2:106 and 2:107 PECL.

²¹ However, even so, the buyer may not be bound to pay until he has had an opportunity to examine the goods: Article 58(3) CISG. See further Leif Sevón, "Obligations of the Buyer under the UN Convention on Contracts for the International Sale of Goods" in Petar Sarevic and Paul Volken (eds.), *International Sale of Goods: Dubrovnik Lectures*, Oceana (1986), Chap 6, p. 217, § 2.4.2; Secretariat Commentary on Article 54 of the 1978 Draft [draft counterpart of CISG article 58], §§ 5-9, available online at <<http://cisgw3.law.pace.edu/cisg/text/secomm/secomm-58.html>>.

payment is determined solely by Article 7:104 PECL, which is effectively the time of actual delivery. If one takes the broader view that Article 7:103(2) does not require the contract to specify a particular date for the performance of the buyer's obligation to pay before it can apply, the time "fixed" for the buyer to pay the seller must be first identified. Article 7:104 PECL fixes that time as effectively the time when the seller delivers the goods in the proper performance of his contractual obligations. On that basis, according to Article 7:103(2) PECL, the buyer's acceptance of the seller's early delivery does not affect the time fixed by Article 7:104 PECL for the performance by the buyer of his obligation to pay, because that time remains the time of delivery by the seller, whenever that occurs.

IV. CONCLUSION

Article 33 CISG and Article 7:102 PECL set out the applicable rules for ascertaining the time for delivery by the seller and require the seller to deliver on time. As was earlier observed, both Articles are virtually identical in all material respects, with the same three situations in the CISG being dealt with in the PECL using the same terminology. Article 33 CISG is thus substantively on all fours with Article 7:102 PECL, and both should have the same legal effect.

In relation to early delivery by the seller, there are two differences between Article 52(1) CISG and Article 7:103 PECL. First, the former appears not to qualify the buyer's right to accept or reject the seller's early delivery, whereas the latter does so. Second, the former is silent on the effect of early delivery by the seller on the time for payment by the buyer, whereas the latter provides that a party's acceptance of early performance does not affect the time for the performance of its own obligations. However, in my opinion, these two differences are largely immaterial, as the latter merely makes more explicit what is implicit in the former. Consequently, both Articles would likely have the same effect.

Remedies available: Comparison between the provisions of CISG Articles 45 and 61 and the counterpart provisions of the PECL Articles 8:101 and 8:102

Chengwei Liu

a. Remedies available to a party are a key consideration for that party, particularly if the contract is breached. However, issues relating to the remedial provisions are difficult and have been the focus of a large part of the discussion and deliberation surrounding the application of commercial law.¹ At the same time, no aspect of a system of contract law

¹"Among the provisions in the Draft Convention on Contracts for the International Sale of Goods which were the most difficult to formulate and are among the most likely to generate controversy are those dealing with the remedies of buyer and seller for breach of contract by the other party. Many aspects of the law of sales reflect merchant practice, and to the extent that this practice is standardized in international sales transactions, the problems in formulating the text of the Draft Convention were reduced. However the provisions in respect of breach of contract do not reflect merchant practice. They reflect the efforts of lawyers from many legal systems to reconcile their views on the appropriate actions to be taken by the parties and by a tribunal in case of breach. The result has been a series of provisions which . . . are in general harmony with one another but which will often be unfamiliar to lawyers from any given legal system." See Eric