LLM PAPER

THE CISG: ADVANTAGES AND DISADVANTAGES WHEN COMPARED TO SOME NATIONAL LAWS

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Definition of the Subject Matter, Objective and Tasks, Methodology, Scope, Hypothesis and Structure of the LLM Paper

Subject Matter
The subject matter of the present work is to show the advantages and disadvantages of the United Nations Convention on Contracts for the International Sale of Goods (hereinafter referred to as the ‘CISG’ or ‘Convention’) when comparing the provisions thereof with the respective legal norms of the same field of regulation of the Civil Code of the Republic of Lithuania (hereinafter referred to as the ‘Civil Code’ or ‘CC’) and the Principles, Definitions and Model Rules of European Private Law (Draft Common Frame of Reference; hereinafter referred to as the ‘DCFR’).

Objective and Tasks
The objective of this LLM Paper is to provide the prospective parties to a contract on sale of goods with an overview of consequences of the law applicable to the contract on sale of goods and to emphasize the pros and cons of those legal sources (the CISG, the Civil Code and the DCFR).

Seeking to achieve this objective, the following tasks will be fulfilled:
1) the regulation of the parties’ obligations and remedies for breach of contract made by the parties will be overviewed;
2) shortcomings of each legal instrument or respective provisions thereof will be shown;
3) advantages of each legal instrument or respective provisions thereof will be emphasized;
4) advices as regards some aspects of obligations of the parties and remedies available will be given to the prospective contracting parties.

Method
The method used in the LLM paper is comparative analysis of the legal sources and academic texts on the matter concerned.

Scope
The scope of the comparison will be limited to analysis of regulation of obligations of the parties to the contract on sale of goods and remedies for breach of contract.

Hypothesis
It will be pursued to verify the hypothesis that the CISG is not the most advantageous legal act to choose as the law governing the contract when considering obligations of the parties and remedies available to them.

Structure
The LLM Paper will be composed of three parts: firstly a brief introduction to all three legal sources, modes of their application to the contracts on sale of goods will be given. The second part (A) will overview the obligations of the parties: obligations of the seller will be discussed first and followed by the buyer’s obligations. The third part (B) will be devoted to the remedies available for the aggrieved parties.
INTRODUCTION

I. Brief Introduction to the Legal Sources of the Comparative Analysis


The CISG is a multilateral treaty which has entered into force on 1 January 1988. Since then, the CISG has gained worldwide acceptance: as of today, approximately 80 per cent of the world’s trade in goods are thereof (potentially) governed by the Convention. The States members range from the least economically developed to the most developed, and all major legal traditions of the world are represented among them.

The parties’ rights and obligations and the remedies available to them are provided for in Articles 30-65 and 74-77 of the CISG. The Convention’s rules embody solutions from many legal systems and such rules are followed by the draftsmen of national legal acts: ‘the former Socialist States and the successor States of the former Soviet Union (...) were orienting themselves on the CISG as they reconstituted their system of private law and adopted it, in part, as domestic sales law or commercial law. Similarly, the basic structures of the Principles for International Commercial Contracts drawn up by UNIDROIT, the Principles of European Contract Law drawn up by the Working Party led by Ole Lando and the Draft Common Frame of Reference drawn up by the Study Group on a European Civil Code and the Aquis Group, which are intended as models for an international or European law of contract, are strongly influenced by the CISG’. However, even though the CISG is considered to be a predecessor of the Civil Code of the Republic of Lithuania and the DCFR, the provisions of the latter two do not necessarily repeat the CISG’s norms and may be considered as more advantageous (or disadvantageous, as the case may be) to the parties to the contract for sale of goods.

2. The Civil Code of the Republic of Lithuania

The Civil Code of the Republic of Lithuania was enacted by the law as of 18 July 2000 No. VIII-1864, and is in legal force since 1 July 2001. The structure, scope and methods of regulation of the legal relationships governed by the Civil Code were influenced by the civil codes of Quebec and the Netherlands and the background of the Civil Code is based on a legal western tradition and principles of international law. The Civil Code is considered as a modern set of rules embodied and codified in a single legal act.

The scope of regulation of the Civil Code is provided for in Article 1.1. Part 1 CC:

The Civil Code of the Republic of Lithuania shall govern property relationships and personal non-property relationships related with the aforesaid relations, as well as family relationships. In the cases provided for by laws, other personal non-property relationships shall likewise be regulated by this Code.

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1 The Convention was prepared by the United Nations Commission on International Trade Law (UNCITRAL) and adopted by a diplomatic conference on 11 April 1980
3 Franco Ferrari (J.D.), Franco Ferrari, Harry M. Flechtner (ed), The draft UNCITRAL Digest and Beyond – Cases, Analysis and Unresolved Issues in the U.N. Sales Convention (Sellier European Law Publishers 2004) 1
4 Schwenzer, Schlechtriem (n 2) 10-11
Legal rules regarding the subject matter of this LLM paper – rights and obligations of the parties to the contract on sale of goods and remedies available for a breach of sales rules – are governed by Book Six Part IV Chapter XXIII of the Civil Code and the general provisions on remedies for non-performance of contracts can be found in Book Six Part I Chapter III Section Two CC.


On 11 October 2004 the Commission published a Communication from the Commission to the European Parliament and the Council, COM (2004) 651 final, which proposed that the CFR should provide ‘fundamental principles, definitions and model rules, which could assist in the improvement of the existing acquis communautaire, and which might form the basis of an optional instrument if it were decided to create one. The Commission itself has repeatedly stated that the CFR is supposed to be a ‘tool box’ for future legislation in the field of contract law.

On the 18 of April 2008 the Council endorsed a report defining its position on four fundamental aspects of the Common Frame of Reference. Its purpose would be a tool for better lawmaking targeted at Community lawmakers. Its content would be a set of definitions, general principles and model rules in the area of contract law to be derived from a variety of sources. Its scope would be general contract law, including consumer contract law. And its legal effect would be a set of non-binding guidelines to be used by the lawmakers at Community level on a voluntary basis as a common source of inspiration or reference in the lawmaking process.

Even though the DCFR is considered to be the soft law and its future is still a matter of discussions and political will, ‘Pragmatic supporters of the idea of the future European Civil Code (or Code of Obligations, or Code of Contracts) are fully aware that in the short and medium term, only few European countries, if any, will allow their domestic laws to be replaced by a binding European set of rules’. However, the aim of the present LLM paper is not to discuss the possible ways of DCFR becoming binding therefore the analysis of the DCFR will be made notwithstanding its non-binding nature. The obligations of the parties arising from the sales contract are provided for in Book IV Part A of the DCFR and the remedies available to them – in Book III Chapter 3 of the DCFR.

Considering the fact that CISG is often called as one of grandfathers of the DCFR, it does not come as a surprise that the rules of the DCFR concerning the sale of goods show extensive similarities with the CISG. Those similarities will be discussed when comparing the two and discussing the advantages and/or disadvantages thereof.

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7 CFR stands for ‘Common Frame of Reference’
13 Clive (n 11)
II. Modes of Application of the Respective Norms of the CISG / the Civil Code / the DCFR to the Contract on the Sale of Goods

Before starting the comparison of the three legal sources concerned, it should be noted that the ways how they become applicable to the contracts on sale of goods vary. ‘After adoption of the Convention, all Contracting States now have two sets of sales law rules: the domestic sales law (which continues to apply to most sales between parties residing in the country in question) and the CISG (which applies primarily as between parties residing in different CISG Contracting States).’\textsuperscript{15}

The CISG may apply to the contract without the parties choosing that it should just because the parties’ place of business are in different states which are the Contracting States or the rules of private international law lead to the application of the law of a Contracting State.\textsuperscript{16} For certain international sales contracts CISG will determine the legal interpretation and implementation of the contract unless the parties explicitly make its terms inapplicable to the contract.\textsuperscript{17} Hence, the CISG is subject to opt-out rule. When the parties to a contract choose to opt out from application of CISG, they should state that the domestic law of a particular country or other international legal act is applicable – indication of the country without stating that solely the domestic legal provisions apply may cause the situation when the CISG applies anyhow because it is ratified by the country chosen and is considered as part of its domestic legal order. On the other hand, the CISG establishes the party autonomy principle\textsuperscript{18} and the Convention is deemed to be of ‘a primarily non-mandatory character’\textsuperscript{19} because the parties may deviate from its’ rules by establishing the modified provisions in their contract on sale of goods. Therefore, even though the Convention is applicable to the contract, the contract provisions that deviate from the Convention rules prevail over the default rules established in the CISG.

Article 1.37 of the Civil Code provides for the rules of determining the law applicable to contractual obligations. The law agreed upon by parties to the contract governs the contractual obligations thereof. Such chosen law may govern the entire contract or any part or parts thereof expressly indicated by the parties. Furthermore, the parties may at any time change the chosen law by the mutual consent. If no law applicable to a contractual obligation is designated by the agreement of the contracting parties, the law of the state with which the contractual obligation is most closely connected shall apply. As regards the contract on sale of goods, the seller’s obligations are the most characteristic to the contract, therefore, in the absence of the law chosen, the law of the seller’s domicile or central administration applies to the contract. Such provisions of national legislation are in line with the rules set forth by the Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the Law Applicable to Contractual Obligations (Rome I)\textsuperscript{20}. Article 3 thereof provides the parties to a contract with a right to choose the law governing a contract or part thereof and to change such agreement made. In case the law applicable to the contract has not been chosen, a contract for the sale of goods shall be governed by the law of the country where the seller has his habitual residence (Article 4 (1) (a) of the Rome I Regulation). Even the rules of the private international law established in the Civil Code do not expressly indicate that the law of the seller’s domicile should be applicable to the contract on sale of goods,

\textsuperscript{15} Herbert Bernstein, Joseph M. Lookofsky, Understanding the CISG in Europe (Kluwer Law International 2002) 1
\textsuperscript{16} Article 1(1) CISG
\textsuperscript{17} G. Gregory Letterman, UNIDROIT’s Rules in Practice: Standard International Contracts and Applicable Rules (Kluwer Law International 2001) 13
\textsuperscript{18} Article 6 CISG: ‘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’
\textsuperscript{20} [2008] OJ L 177/6
the outcome of the more general rule is the same and corresponds to the provisions of the Rome I Regulation.

DCFR, as a ‘rigidly systematized, non-legislative codification of patrimonial law in Europe’\(^{21}\), is a non-binding instrument, which is not applicable to the contract of the parties unless the parties might wish, particularly when seeking neutral ground, to incorporate some of the DCFR’s provisions into their contracts or to use some terms and concepts derived from the DCFR and provide that they are to be interpreted in accordance with the DCFR. These rules can nevertheless be followed by the parties to the contract by simply incorporating them into the agreement binding upon the parties to the contract.\(^{22}\) The parties in such a way may not only supplement the national legal provisions, but also replace them. However, matters not expressly provided for in the contract, will still be governed by the provisions of the national law, applicable to such contract, not the DCFR because of its non-binding nature – the DCFR as such may not be chosen by the parties as the law governing the contract.

Refraining from further contemplations of applicability of the discussed three legal sources to the contract, further analysis will be made on condition that the parties to a contract on sale of goods have chosen the respective legal sources and expressly provided for such choice in their contract by entering the respective provisions into it.

\(^{21}\) Jansen, Zimmermann (n 9) 112
\(^{22}\) Clive (n 11)
A. OBLIGATIONS OF THE PARTIES

All three legal sources regulate the obligations of the parties quite similarly and just several differences enabling to consider one or another of them more advantageous could be distinguished and will be reflected further in this LLM Paper. Such similarity of legal regulation is mostly circumstanced by the fact that the CISG is a predecessor the Civil Code and the DCFR. Both the DCFR and the Civil Code also embrace aspects of consumer protection within their relevant provisions, whereas the consumer protection rules are explicitly excluded from the scope of regulation of the Convention. Furthermore, greater complexity and minuteness is observed in the Civil Code and is due to the scope of the legal act itself. The convenience and comprehensiveness of the DCFR is that this legal source initially provides for the list of obligations of the respective party and afterwards details such provision. ‘The reader can thus see at a glance what the basic obligations are, and then move on to the immediately succeeding Articles to see more detail on each of them’.24

It should be noted that the scope, substance and content of such obligations are determined chiefly by the contract and the rules of the Convention or the Civil Code (depending to the law applicable) are invoked only in cases when the contract is silent.25

The following part of the LLM Paper will separately overview the seller’s and the buyer’s obligations provided in all three legal sources discussed. Generally, the seller has obligations to transfer the ownership to the goods, to deliver the goods and documents and to make sure that the goods are in conformity with the contract. The seller’s obligations are mirrored by the buyer’s obligations of making payment and taking the delivery of the goods (and documents).

I. Obligations of the Seller

1. Main Obligations of the Seller

The main obligations of the seller listed in all three legal sources concerned26 slightly vary: while CISG mentions the transfer of goods, property in goods and the documents related therewith and obligations related to the conformity of goods, the Civil Code and the DCFR go further in this regard and give due consideration to the seller’s obligation to warrant the ownership of goods.

1.1. Transfer of Ownership

‘The obligation to transfer ownership is essential to the very notion of a sales contract; if the parties contract out of this obligation, their contract can generally not be considered to be a contract for the sales of goods.’27 Transfer of goods for the possession and use of the other party is traditionally considered to be a lease contract or a contract for use of the goods, if the transfer is gratuitous.

23 Article 2(a) CISG states that the Convention does not apply to sales of goods bought 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.
27 Von Bar (n 8) 1252
The Convention does not govern whether the property in the goods has in fact been transferred to the buyer, therefore the fact of transfer of the title into goods shall be established according to the law applicable determined under the rules of the private international law. Seeking to avoid uncertainty what will be the consequences that the Convention led to, the parties are recommended to stipulate the rules on the transfer of ownership in the contract.

In contrast, the DCFR extensively regulates when the ownership is transferred in Book VIII: the basic requirements on transfer are set out in Article VIII. – 2:101 DCFR.

The Civil Code provides for the rules regarding warranty of the ownership and quality of goods. According to Article 6.317 Part 2 CC, the warranty (guarantee) of ownership and quality exists whether or not it is stated in the contract of purchase-sale, i.e. the Civil Code provides for the warranty under law which is mandatory and therefore protects the buyer in such a way. Furthermore, the seller is bound to discharge the things of all pledge (hypotheccs), to warrant the buyer that the delivered things have not been seized and are not an object of a legal action, also that the seller has not been deprived of the right to dispose of the things and there are no encumbrances. The seller of an immovable thing is a warrantor towards the buyer for any violation or restrictions of public law affecting the thing which are exceptions to the ordinary law of ownership. Should the seller fail to disclose any limitations to the ownership or possession of the goods, he shall be held liable for any and all such encumbrances.

The Civil Code does not differentiate the basis of the third party’s claims: the Civil Code bounds the seller to represent and warrant to the buyer that the things delivered are free from any right or claim of any third party, unless the buyer agreed in advance to accept the things subject to that right or claim after the seller gave a due notice thereof to the buyer. Therefore the civil Code establishes the general regime and it differs from the one established in the CIGN and the DCFR which distinguish between the legal basis of the third parties’ rights or claims: both latter legal instruments state that the seller must deliver goods which are free from any a) any right or claim of a third party, and b) right or claim of a third party based on industrial property or other intellectual property.

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28 Article 4 (b) CISG states that the Convention “is not concerned with the effect which the contract may have on the property in the goods sold”
30 VIII. – 2:101: Requirements for the transfer of ownership in general
(1) The transfer of ownership of goods under this Chapter requires that:
(a) the goods exist;
(b) the goods are transferable;
(c) the transferor has the right or authority to transfer the ownership;
(d) the transferee is entitled as against the transferor to the transfer of ownership by virtue of a contract or other juridical act, a court order or a rule of law; and
(e) there is an agreement as to the time ownership is to pass and the conditions of this agreement are met, or, in the absence of such agreement, delivery or an equivalent to delivery.
(2) For the purposes of paragraph (1)(e) the delivery or equivalent to delivery must be based on, or referable to, the entitlement under the contract or other juridical act, court order or rule of law.
(3) Where the contract or other juridical act, court order or rule of law defines the goods in generic terms, ownership can pass only when the goods are identified to it. Where goods form part of an identified bulk, VIII. – 2:305 (Transfer of goods forming part of a bulk) applies.
(4) Paragraph (1)(e) does not apply where ownership passes under a court order or rule of law at the time determined in it.
31 Article 6.321 CC
32 Articles 41 – 42 CISG
33 Articles IV. A. – 2:305 – IV. A. – 2:306 DCFR
‘Freedom from such rights or claims permits the buyer to enjoy undisturbed possession and ownership of the goods’. Therefore it should be considered that the freedom from any claims of the third parties, even though is linked to the conformity of the goods (established in Chapter II Section II of the CISG (Conformity of the goods and third party claims) and Chapter 2 Section 3 of Part A of Book IV DCFR (Conformity of the Goods)) is the essential and integral part of the ownership of the goods and should be considered as a part of the proper performance of seller’s obligation to transfer the ownership in the goods. Such point of view is inter alia substantiated by the provisions of the Civil Code: according to Article 6.317 Part 1 CC, ‘The seller is bound under the contract of purchase-sale to deliver the things to the buyer, i.e. put the things into the buyer’s possession by the right of ownership (trust) and to warrant ownership of the things and the quality thereof’.

Another aspect of the right of ownership into the goods is the creditor’s (seller’s) right of retention of title in case of non-performance of the obligations of the debtor (buyer). ‘Since the Convention is not concerned with the passing of property, it does not lay any rules in respect of retention of title’. The legitimate way of retention of title is the possible stipulation in the contract that the goods remain in property of the seller until the full payment of the price under Article 58 CISG. As regarding other two legal sources, the general rules on retention of the title set out in Article 6.69 Part 1 and detailed in the Book Four of the Civil Code, or, in case of application of the DCFR rules, Article IV. E. – 2:401 would apply.

1.2. Delivery of the Goods

Place of Delivery

‘Delivery relates to the act which the seller is obliged to perform in order to give the buyer possession of the goods, whereas the consequence of such act, namely the actual acquisition of the possession by the buyer is not covered’. Considering the variety of different possibilities of defining the place of delivery and actions of the seller that need to be made in order to deem such obligation duly performed, none of the three legal sources concerned establish the list of scenarios of delivery. Instead they all provide for the general rules on delivery in case the contract does not specify the exact place of performance. The seller’s obligation of delivery is considered to be performed after: handing over the goods to the first carrier (in case of carriage), placing the goods at the disposal of the buyer (in case of goods to be drawn from a specific stock or to be manufactured or produced), or, in the other cases – placing the goods at the buyer’s disposal at the seller’s place of business at the time of conclusion of the contract. Basically, all three legal instruments establish the general rule that the delivery is performed when the goods are made available to the buyer, or, put it in Incoterms rules, the term EXW (Ex-Works) is applicable unless agreed otherwise by the parties. It should always be kept in mind that the parties’ will prevails over the general rules set forth by the laws, therefore ‘if a price-delivery term (such as a term defined in the Incoterms) is included in the contract, it defines the place of performance and excludes the Convention’s rule’.

The Civil code enhances the buyer’s interest in the view that (emphasis added) ‘the obligation to deliver the things shall be deemed performed when the seller puts the buyer in possession of the

35 Schwenzer, Schlechtriem (n 2) 493
36 Book Four of the Civil Code is dedicated to the material law (rights in rem etc.)
37 Schwenzer, Schlechtriem (n 2) 490
38 Published by the International Chamber of Commerce (ICC). Incoterms 2010 rules came into effect on 1 January 2011 and replaced the previous edition of the rules – Incoterms 2000
things or consents to his taking possession of it and all hindrances are removed’. Such rule is closely connected with the transfer of risk therefore in some cases the mere putting of goods into the buyer’s possession is not sufficient and the seller bears the risk related with the loss of or damage to the goods until the total removal of all the remaining hindrances. Article 6.318 Part 3 of the Civil Code also links the moment of delivery with the moment from which the fruits and revenue from the things belong to the buyer. Such consequences occur even if the right of ownership to the things passes to the buyer later than the physical control over them. Furthermore, CC distributes the costs of delivery and prescribes the latter to the seller\textsuperscript{40} (unless the parties agree otherwise).

The CISG\textsuperscript{41} and the DCFR\textsuperscript{42} designate separate articles for delivery involving carrier and impose three supplementary obligations to the seller: to specify the goods in a notice to the buyer of the consignment when the goods are not clearly identified; to make reasonable arrangements when bound to arrange for carriage of the goods; and to provide the buyer, at his request, with all available information necessary to enable the buyer to effect insurance (if the seller is not bound to arrange for insurance covering the carriage of goods). Such rules help in allocation of risks and costs when the parties do not stipulate it in their contract.

Should the delivery include carriage, the performance of obligation to deliver consists of delivery of goods to a carrier and enabling the buyer to receive them by handing over the relevant documents to him. ‘This method of delivery reflects the important role that documents play in international commercial sales transactions, which frequently involve the carriage of goods’.\textsuperscript{43} DCFR separately mentions handling over documents to the carrier if one is involved. ‘It should be noted that the rule on delivery in the case of carriage only applies if an independent carrier transports the goods. Therefore, it does not cover cases where the seller’s or the buyer’s own employees undertake the carriage of the goods’.\textsuperscript{44}

**Time of Delivery**

Along with place of delivery, time of delivery is the second aspect of due performance of the seller’s obligation discussed. Time of delivery is defined by the date or period fixed in the contract and if such time is not defined, the delivery shall be made within reasonable time after conclusion of the contract. ‘“Reasonable” means a time adequate in the circumstances’.\textsuperscript{45} Therefore the notion of reasonableness varies on case-to-case basis and must be considered withstanding any and all circumstances relevant to the particular situation. The same rationale is followed in the DCFR in this regard when consulting the definition of the term ‘reasonable’ which may be found in the list of definitions of the DCFR.\textsuperscript{46}

The Civil code is more precise in regard of establishing the rules on estimation of reasonableness of the delivery time: where the time of delivery is not specified in the contract, the things are bound to be delivered within a reasonable time after the conclusion of the contract of purchase-sale. In this case Article 6.53 CC, i.e. general rules on time of performance of obligations, shall apply accordingly.\textsuperscript{47} The Civil Code links the time of performance of an obligation, when the exact moment

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\textsuperscript{40} Article 6.317 Part 5 CC  
\textsuperscript{41} Article 32 CISG  
\textsuperscript{42} Article IV. A. – 2:204 DCFR  
\textsuperscript{43} Von Bar (n 8) 1260  
\textsuperscript{44} Ibid 1261  
\textsuperscript{46} What is ‘reasonable’ is to be objectively ascertained, having regard to the nature and purpose of what is being done, to the circumstances of the case and to any relevant usages and practices  
\textsuperscript{47} Article 6.53. Time-limit for performance of an obligation
is not defined in the contract, to the demand of the party for performance of the other party’s obligation. The requested to perform obligation should be performed by the debtor within seven days from the day when the creditor requested the performance unless such period is contrary to the nature of an obligation or the criterion of reasonableness. The DCFR goes parallel way as the Civil Code by supplementing the special provisions of the sales contracts by the general provisions on performance of obligations and gives reference to Article III – 2:102 DCFR stipulating the time of performance. These rules are similar to the ones of the CC, however the exact period of seven days is not established and the buyer is free to choose a reasonable period to grant the seller with in order to perform his duties.

It should be noted that late delivery is considered to be a breach of contract, whereas the early delivery is deemed to be as lack of conformity which may be cured subject to the rules provided for by the legal acts. ‘This right to cure does not allow the seller to deliver the goods earlier than agreed. Instead, if the seller tenders delivery before the due date (...) the buyer has a right to either refuse or accept delivery under IV.A. – 3.105 (Early delivery and delivery of excess quantity) paragraph (1).’

The right to cure, however, is limited and may not cause the buyer unreasonable inconvenience or expense. ‘This implies that, generally speaking, fixing a moment for performance of the obligation to delivery merely prevents the buyer from claiming performance until the agreed moment for performance, but does not stand in the way of early performance by the seller’. The Civil Code in principle allows early performance of an obligation: Article 6.53 Part 3 of the Civil Code stipulates that ‘The debtor shall have the right to perform the obligation before the expiry of the time-limit determined for its performance unless this is prohibited by laws, the contract, or is contrary to the essence of the obligation.’

1.3. Delivery of the Documents

There are two categories of documents: documents representing the goods and documents related to the goods. The major difference between those two is that the second category does not deprive the buyer from taking over the goods while failure to deliver documents of the first category means that the buyer cannot take over the goods. However, the authors of the UNCITRAL Digest of case law on the CISG do not make such distinction and state that ‘ “Documents relating to the goods” in the sense of article 34 include, in the main, documents that give their holders control over the goods’. Notwithstanding the differences in naming different categories of the documents, probably no one would challenge that some documents prove the ownership into goods while the others just specify the use, technical specifications or other relevant information regarding the goods. The Civil Code stipulates:

1. If the time-limit for the performance of an obligation is not established, or it is determined by the moment of demand to perform the obligation, the creditor shall have the right to demand it at any time, and the debtor shall have the right to perform the obligation at any time. Though, when a certain time-limit is necessitated by the nature of the obligation, the manner or place of its performance, it may be fixed by the court upon the demand of one of the parties.
2. The obligation whose time-limit of performance is not determined, must be performed by the debtor within seven days from the day when the creditor requested the performance unless a different time-limit of performance results from laws or the essence of the contract. In such cases, the time-limit for performance must be reasonable and enable the debtor to perform the obligation properly.
3. The debtor shall have the right to perform the obligation before the expiry of the time-limit determined for its performance unless this is prohibited by laws, the contract, or is contrary to the essence of the obligation.

48 Von Bar (n 8) 1267
50 Von Bar (n 8) 1256
Together with (the goods – aut.) the seller is bound to surrender to the buyer the related documents and the titles of ownership in his possession, where this is prescribed by the contract or this Code. If the seller himself needs the above documents for enforcing other rights not related to the things sold, the seller is bound to deliver to the buyer copies of the documents validated in the established manner.\(^{52}\)

1.4. **Ensuring the Conformity of the Goods**

Obligation to deliver goods that conform to the requirements of the contract and of the Convention in terms of quantity, quality, description and packaging is one of the most important obligations of the seller, therefore the due consideration and attention is given to it by all three legal sources.\(^{53}\) This obligation is separate from the seller’s obligation to deliver goods and exists even if the seller does not deliver goods at all.\(^{54}\)

‘Non-conformity is a catch-all notion describing any derogation or deviation of the goods from what the buyer was entitled to expect under the sales contract’.\(^{55}\) DCFR clarifies what the conformity entail and its definition of the criteria establishing conformity (‘The goods must’) are slightly more straightforward than CISG rules which stipulate when the goods do not conform to the contract, i.e. provides for the presumption of non-conformity. However such differences in drafting does not change the result that in so far as the goods, unless the contract provides otherwise, are supposed to live up to certain standards and expectations’.\(^{56}\)

Generally, 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. As the Civil Code indicates,\(^{57}\) where the contract contains no specific requirements, the goods should correspond to the regular requirements. Article 35(2) CISG lists standards relating to the goods’ quality, function and packaging that, while not mandatory, are presumed to be a part of sales contracts.\(^{58}\) DCFR, being inspired by Article 35(2)\(^{59}\) of the CISG, establishes the same list and supplements it by the requirement to supply the goods along with such accessories, installation instructions or other instructions as the buyer may reasonably expect to receive and requirement to possess such qualities and performance capabilities as the buyer may reasonably expect.\(^{60}\)

This rule is very important as it emphasises the buyer’s point of view (...). However, it should be pointed out that not all subjective expectations of a buyer which are unknown to the seller should have an influence on the question of conformity, even if they are reasonable. (...) In evaluating the buyer’s expectations, regard must be had to what one can expect from certain comparable goods.\(^{61}\)

Under the Lithuanian Civil Code, the reasonable expectations of the buyer are taken into consideration when deciding if the particular quality requirements are necessary for the things to be fit for the purpose they would ordinarily be used or for a particular purpose.\(^{62}\)

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\(^{52}\) Article 6.318 Part 1 CC

\(^{53}\) Part III Chapter II Section II CISG, Book IV Part A Chapter 2 Section 3 DCFR, Articles 6.327 – 6.343 CC

\(^{54}\) von Bar (n 8) 1273

\(^{55}\) Loos (n 49) 18

\(^{56}\) von Bar (n 8) 1283

\(^{57}\) Article 6.327 Part 1 CC


\(^{59}\) von Bar (n 8) 1287

\(^{60}\) Article IV. A. – 2:302 DCFR

\(^{61}\) von Bar (n 8) 1286

\(^{62}\) Article 6.333 Part 6 CC
While the CISG and the DCFR give broad guidelines as to the quality requirements the goods need to conform with, the Civil Code provides for more detailed requirements for quantity, range, quality, completeness, assortment, containers and packaging of the goods that the seller should bear in mind and consequences of failure to follow such requirements, such way minimising the possible disagreements between the parties to the contract and making the Civil Code more advantageous in this regard to the parties if compared with the CISG.

Exceptionality of the DCFR comparing to the CISG and the Civil Code is that the DCFR establishes the rule that ‘the goods must possess the qualities and performance capabilities held out in any statement on the specific characteristics of the goods made about them by a person in earlier links of the business chain, the producer or the producer’s representative which forms part of the terms of the contract by virtue of II. – 9:102 (Certain pre-contractual statements regarded as contract terms)’. As the Comments on the mentioned article explain, ‘such statements are very influential, as buyers may often trust more in advertisements and brand literature than in the expertise given by the retailer’. There is no doubt that such statements may influence the buyer’s expectations therefore should be kept in mind then evaluating them, however, different standards on professional knowledge should be established to the consumer and to the professional (business) which is usually bound to bear greater risk related to the transaction. This might be the reasoning why, as the Notes on the given article indicate, countries are likely to restrict such rule (if establish it at all) with the consumer sales. Absence of such provision in the CISG could also be explained by the same reasoning, since the consumer sales are out of the scope of regulation of the CISG. Albeit the Civil Code does not provide the rule established in the DCFR neither in general sales provisions, nor in the chapter dedicated to the consumer sales contracts, it approaches this matter differently: the producer, distributor, supplier, importer or any other person distributing the things in his own name is bound to give a warranty of the quality of the things against any latent defects which render them unfit for the use for which the things were intended or which so diminish their usefulness that the buyer would not have bought it or paid so high a price had he been aware of them. The seller is not bound, however, to warrant against any latent defect known to the buyer or any apparent defect that can be perceived by a prudent and diligent buyer without any need of expert inspection.

Put differently, the parties involved in the supply chain and acting under their own name have an obligation to represent the quality of the goods sold (produced, distributed, supplied, imported). Once such representations and warranties are given, a person shall be liable for the defects of the goods unless he proves that the defects appeared after the delivery of the things to the buyer due to improper use or violation of the rules of preservation thereof or through the fault of third persons or as a result of superior force. Consequently, according to the CC, persons making statements, not the seller as in DCFR, are bound by the statements made relating to the quality of the goods.

A rule which could be found in all the legal sources concerned is that the seller in either case should not be liable 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. Such rule balances the otherwise strict liability of the seller.

63 Article IV. A. – 2:303 DCFR
64 von Bar (n 8) 1296
65 Article 6.333 Part 2 CC and Article 6.333 Part 6 CC
66 Article 6.333 Part 3 CC
67 Article 35(3) CISG; Article IV. A. – 2:307(1) DCFR ; Article 6.327 Part 2 CC
68 von Bar (n 8) 1306
Even though the examination of the goods is the interest and obligation of the buyer, the CISG lists it within the chapter governing obligations of the seller. This is linked to the seller’s obligation of delivery and ensuring the conformity of the goods delivered: ‘the time when a buyer is required to conduct an examination of the goods under article 38 is intimately connected to the time when the buyer ‘ought to have discovered’ a lack of conformity’. The time for the buyer’s examination generally corresponds to the time risk of loss passes to the buyer. The importance of prompt examination is explained in the UNCITRAL Digest of case law on the CISG:

After the goods have been delivered, the seller may waive its right to object to the propriety of the buyer’s examination of the goods, or it may be estopped from asserting such right. On the other side, it has been asserted that a buyer may lose its rights to object to a lack of conformity if the buyer takes actions indicating acceptance of the goods without complaining of defects that it had discovered or should have discovered in its examination.

As regarding examination of the goods, the CISG and DCFR are abstract and only give details to possible inspection of goods in carriage or redirected goods in transit. The general rule established in the CISG and in the DCFR is that the goods may be examined within as short a period as is practicable in the circumstances, however neither of them identifies the moment when the buyer may start to exercise such right. The Civil Code is more precise in this regard: according to Article 6.328 CC, the buyer shall have the right to examine the goods from the moment of entry into the contract or presentation of the offer, before making the payment or before accepting the thing, in each way acting in a manner corresponding to the criteria of reasonableness. Furthermore, the Civil Code distributes the costs of inspection (Article 6.328 Part 2) and foresees a possibility to prescribe the mandatory inspection of the quality of goods by laws or the contract (Article 6.337).

The CISG and the DCFR associate the end of seller’s liability for conformity of the goods with the moment of passing the risk over to the buyer, whereas the Civil Code relates it to the transfer of the ownership of the goods. The justification on linking the liability for lack of conformity with passing the risk is that the goods have left the seller’s sphere of influence and the seller can no longer control them. Secondly, this rule ensures that the buyer assumes the risk of payment together with the risk of lack of conformity. The moment of transfer of risk is established in Articles 66-70 CISG or in Chapter 5 of Part A of Book IV DCFR. The general rule is that 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. ‘It is the time that the lack of conformity comes into existence, not the time it is discovered (or should have been discovered), that is critical for the rule in article 36(1)’. That is why the second sentence of the Article 36(1) CISG explicitly notes that the seller would be held liable if the lack of conformity becomes apparent after the time of passing of risk. Furthermore, a seller is liable for a lack of conformity arising after the time when risk passed to the buyer, but only if the lack of conformity is due to a breach made by the seller. The rationale of the CISG (and the DCFR) is more logical and ensuring the contracting parties with more legal certainty. Meanwhile, the rule established in the Civil Code is more beneficial to the buyer, since the parties may provide for in the contract that the ownership to the goods passes to the buyer at the later time (notwithstanding if it would be the time of payment or fulfilment of the other conditions precedent). However, the buyer

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71 Article 38 CISG

72 Article IV. A. – 4:301 DCFR

73 von Bar (n 8) 1310-1311

has a burden of proof to show that the defects appeared before the delivery of the things or due to reasons which appeared before the delivery of the things.

Freedom from any claims or rights of the third parties, including the ones arising from industrial or intellectual property, is discussed above in Part A Chapter I Section 1 Subsection 1.1 of this LLM Paper when describing the seller’s obligation to transfer ownership into the goods to the buyer. The CISG and the DCFR consider it as the part of the goods’ in chapter 1.1 of the present LLM conformity with the contract and this approach may not be considered as unfounded, since the ‘Notion of conformity covers so called legal defects as well as material or corporeal shortcomings’. The DCFR, as well as the CISG, deal with this situation ‘as an aspect of conformity rather than as one of obligation to transfer ownership, holding, in the language of DCFR, that “the goods must be free from any right or claim of a third party”’. However, for the reasons laid down above in Part A Chapter I Section 1 Subsection 1.1, this aspect is closely related with the ownership of goods and seller’s ability to transfer it to the buyer without any encumbrances.

All three legal sources discussed impose an obligation to the buyer to give a notice to the seller specifying the nature of the lack of conformity within a reasonable time after he has discovered or ought to have discovered it. As author MacQueen observes,

Reasonable time runs from when the goods are supplied, or, if it is later from the time when the buyer discovered, or could reasonably be expected to have discovered the non-conformity. Thus it is clear that a latent defect not detected on or shortly after the buyer takes over the goods may still give rise to non-conformity and a claim thereon once it emerges or is found by a buyer. Requirement to give a notice on lack of conformity has been deemed to serve several different purposes: to promote prompt clarification as to whether a breach has occurred, to give the seller the information needed to determine how to proceed in general with respect to the buyer’s claim, to facilitate the seller’s cure of defects, to promote the quick settlement of disputes, to assist the seller in defending himself etc. The DCFR provides for an exception of the notice rule in case of partial delivery: the buyer does not have to notify the seller that not all the goods have been delivered, if the buyer has reason to believe that the remaining goods will be delivered. The duty for the buyer to give a notice on lack of conformity of the goods covers material or corporeal shortcomings as well as the legal defects. However, ‘Article 44 softens – although it does not eliminate – the consequences suffered by a buyer that has failed to give the notice called for by either article 39 (1) (which requires notice of lack of conformity in delivered goods) or article 43 (1) (which requires notice of third party claims relating to the goods)’. Buyer’s remedies for a lack of conformity concerning which it has not given proper notice may be restored in whole or in part under CISG articles 40 and 44. The remedies available for the Buyer in case of lack of conformity will be discussed in the Part B of this LLM Paper.

75 von Bar (n 8) 1303
76 MacQueen (n 24) 5
77 Ibid 11
79 Article IV. A. – 4:303 DCFR
80 Article 39 CISG
81 Article 43 CISG
84 See Part B Chapter II Section 1
The cut-off period for the buyer’s claims regarding the defects of the things sold provided by all three legal sources is generally equal to the period of warranty of quality or fitness for use or, if it is not established – 2 years\(^\text{85}\) therefore none of the sources is more advantageous in this regard.

2. Additional Obligations of the Seller

Commentators on the CISG point out that:

Additional obligations of the seller, going beyond of the Article 30 CISG, may arise from the contract, from usages affecting the contract (Article 9), or from the principle of good faith (as general principle under Article 7(2)). Where the contract as a whole falls within the scope of application of the Convention, such obligations will also be subject to the Convention’s rules since they are obligations arising from the contract (Article 4, first sentence).\(^\text{86}\)

The Civil Code, as a comprehensive legal act, explicitly imposes some additional obligations to the seller among those noteworthy is the obligation to preserve the things where the right of ownership or trust passes to the buyer before the delivery of the sold. The similar additional obligation of the seller is also established in Article 85 CISG. The DCFR provides for a portion of the special rules related with the consumer contract for sale. However, taking into consideration that the Convention does not apply to the consumer sales contract, such rules will not be discussed herein.

II. Obligations of the Buyer

1. Main Obligations of the Buyer

The distribution of articles dedicated to obligations of the seller and obligations of the buyer is different in all three legal sources. Generally, the prominent attention of all three legal sources is given to the seller’s obligations and such proportion is presumably based on the fact that the seller has the performance which is mostly characteristic to the contract on sale of goods. However the buyer’s obligations are another side of the coin and not of the lower importance thus will be thoroughly seen below.

The main obligations of the buyer\(^\text{87}\) are payment of price and taking delivery of the goods. The DCFR lists taking over of the documents representing or relating to the goods along with the obligations mentioned above. Such obligation is corresponding to the seller’s obligation of delivery of documents and notwithstanding the fact that is not separately emphasized in the CISG and/or the Civil Code, is reflected in the legal provisions thereof. Some sales do not involve documents at all therefore this obligation may become irrelevant. In contrary, the documentary sales is the type of sales where taking the delivery of documents becomes the essential step of performance of the parties’ obligations.

1.1. Payment of the Price

‘The obligation to pay the price is essential for a sales contract in the strict sense’\(^\text{88}\) (goods in exchange of money). The transfer of the goods without monetary consideration is generally considered as a gift or charity. The Civil Code explicitly establishes monetary consideration for the

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\(^{85}\) Article 39 CISG; Article IV. A. – 4:302 DCFR; Article 6.338 CC


\(^{87}\) Article 53 CISG, Article IV. A. – 3:101 DCFR, Article 6.305 CC

\(^{88}\) von Bar (n 8) 1319
sale of goods: the ‘price of the thing being sold shall be fixed in cash by agreement between the parties’.\textsuperscript{89} If the consideration is other goods (a thing in exchange of the other things) then the contract should be deemed to be barter contract or the exchange contract. The CISG deals exclusively with the sales contracts in the strict sense and the other two legal sources, due to their complexity, cover the other abovementioned types of contracts as well.

Article 54 CISG basically establishes the duty for the buyer to cooperate with the seller by performing all steps necessary to satisfy the preconditions for payment, however the buyer is not responsible for the result thereof,\textsuperscript{90} in other words, the buyer is obliged just to take all reasonable steps and comply with formalities in order to achieve the result, i.e. make payment, but not to make sure that any and all obstacles, whether arising from seller’s part of from authorities or banking rules, would be removed.

Article 54 CISG has two important effects: firstly, it assigns responsibility for the tasks it references to the buyer, who must thus bear the costs thereof (unless otherwise specified in the contract), secondly, the failure to perform the steps provided in the Article discussed constitutes a breach, not merely a factor in a possible anticipatory breach of contract.\textsuperscript{91} The first of the above effects is explicitly stated in the Civil Code: the buyer is also bound to pay any expenses incidental to the deed of purchase and sale.\textsuperscript{92}

If no price has been agreed upon and the parties have not made any concrete indication as how to calculate the price, there are two main approaches under the different systems in this regard: the contract is regarded as void, or it is still valid and it is presumed that the parties have agreed upon a reasonable price or a market price etc.\textsuperscript{93} All three legal instruments concerned represent the second approach, however they give the different indicators to follow when the price is not fixed in the contract:

1) according to Article 55 CISG, where a contract has been validly concluded but does not expressly or implicitly fix or make provision for determining the price, the parties are considered, in the absence of any indication to the contrary, to have impliedly made reference to the price generally charged at the time of the conclusion of the contract for such goods sold under comparable circumstances in the trade concerned;
2) the DCFR\textsuperscript{94} stipulates that the price payable in such circumstances is the price normally charged in comparable circumstances at the time of the conclusion of the contract or, if no such price is available, a reasonable price;
3) the Civil Code\textsuperscript{95} embodies both solutions: where the price is neither explicitly nor implicitly fixed in the contract, nor the rules for fixing the price is agreed upon, it should be deemed that the parties have impliedly made reference to the price generally charged at the time of the conclusion of the contract for such thing sold under comparable circumstances in the trade concerned and, where the price is non-existent, the price meeting the criteria of reasonableness.

Considering the fact that the criterion of reasonableness is rather vague, the CISG and the CC are more objective by benchmarking the determination of the price by the comparable market value.

\textsuperscript{89} Article 6.313 Part 1 CC
\textsuperscript{92} Article 6.344 Part 3 CC
\textsuperscript{93} von Bar (n 8) 1320-1321
\textsuperscript{94} Article II. – 9:104 DCFR
\textsuperscript{95} Article 6.313 Part 2 CC
It should also be mentioned that the DCFR and the Civil Code provide for the rules for unilateral determination of the price by the party or by a third person and rules regarding settlement of the price when it is based on the non-existing criteria. In contrast, ‘If the CISG applies to a contract, any rights under domestic law for one of the parties, usually the seller, to unilaterally determine the price are excluded.’

There is a debate on whether there is no conflict between the provisions of the CISG: Article 14 thereof, stating that ‘A proposal is sufficiently definite if it indicates the goods and expressly or implicitly fixes or makes provision for determining the quantity and the price’ and Article 55, providing for criteria to be followed in case the contract does not include the price of the goods. UNCITRAL Digest of case law on the United Nations Convention on the International Sales of Goods holds that in determining the applicability of Article 55, one must refer first and foremost to the intention of the parties, though the jurisprudence of the courts and arbitrations of applicability of Article 55 and/or Article 14 of the Convention differs. Such point of view is followed by authors Herbert Bernstein and Joseph Lookofsky:

we need to discern the true intention of the parties: if they intended to be bound without a price clause, then the parties’ intention should be permitted to prevail in accordance with Article 6 which allows the parties to derogate from or vary effect of any CISG provision including those pertaining to contract formation.

The situations when the offer is validly made and the contract does not stipulate the price nor its determination mechanisms are more than probable, therefore without going deeper in this theoretical matter, it would be hard to disagree with author’s Loukas Mistelis’ observation that

CISG Article 55 is merely a gap-filling provision designed to provide a structure to determine a price term when the parties have validly concluded a contract but have failed to create, or have created an indefinite, price term. The first sentence of the Article makes clear that the application of Article 55 is based on the state court or arbitral tribunal determining that the offer did not fail for lack of definiteness.

**Place of Payment**

‘Generally, the place of performance is presumed to be the debtor’s place of business, residence etc., unless the parties have agreed otherwise. For monetary performance, on the other hand, this is only exceptionally the rule’. Hence, the place of payment varies under the different legal systems. Article 57(1) CISG embody the most common approach to this matter stipulating that unless otherwise agreed by the parties, the payment is to take place at the seller’s place of business or, when payment is to be made against handing over the goods or of documents – at place where the handing over takes place. The Civil Code provides for the default rule that unless bound to pay the price at a specified place, the buyer must pay the price at the place of delivery of the thing. There are no special provisions on the place of buyer’s obligation to pay the price in the sales part

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96 Article II. – 9:105 DCFR, Article 6.313 Part 4 CC  
97 Article II. – 9:106 DCFR, Article 6.313 Part 5 CC  
98 Article II. – 9:107 DCFR, Article 6.313 Part 6 CC  
99 Schwenzer, Schlechtriem (n 2) 820  
101 Bernstein, Lookofsky (n 15) 71  
103 von Bar (n 8) 1323  
104 Article 6.314 Part 1 CC
of the DCFR, therefore the general rules on place of performance which stipulate, that the place of performance of a monetary obligation is the creditor’s place of business, should be followed.

The case law on the question whether the rule of article 57(1), establishing payment of the price at the seller’s place of business as a default principle should also be applied to other monetary obligations arising out of a contract of sale governed by the CISG, is not uniform. In this regard the rule established in the DCFR is broader and encompasses all obligations of the monetary nature, therefore preventing inconsistency of jurisprudence on this matter.

Time of Payment

No special provisions on the time of buyer’s obligation to pay the price can be found in the sales part of the DCFR, therefore the general rules on time of performance should be followed. The CISG and the CC provide for the same general rule on the time of payment of the price: unless the exact time of payment is established in the contract, the payment is due when the seller places either the goods or documents controlling their disposition at the buyer’s disposal. Both legal acts establish the simultaneous handing over of the goods and payment of the price such way ensuring that neither of the parties gains an advantage over the other party. Notwithstanding the fact that the CISG is not concerned with the effect which the contract may have on the property in the goods sold, the second sentence of the Article 58(1) enables the seller to condition a payment upon handing over of the goods or documents, thus to exercise his right of retention if the buyer fails to make a payment. At the same time, the buyer’s concern in conformity of the goods is safeguarded, because the buyer is not bound to pay the price until he has had an opportunity to examine the goods, only to the extent that the provisions of the contract governing delivery and special rules on payment are consistent with such right. Certainly, the contract may set forth the different rules. ‘Article 58 (3) says nothing about whether the buyer is entitled to suspend payment of the price if examination reveals that the goods are not in conformity with the contract’.

The importance of the exact definition of the time of payment particularly is that from the moment when the payment is due the seller shall have a right to demand the interest prescribed by law or contract. It should be noted that the seller’s right to receive payment is unconditional in the sense that the seller is not bound to request the payment to be made nor perform any other actions beyond the performance of his obligation to deliver the goods. The interest begins to accumulate as soon as the price becomes due and the seller does not have to make a prior demand for payment in order to calculate interest or resort to the remedies.

The CISG entails no rules on the currency of payment. This matter is left unregulated and should be decided according to the gap-filling rules, established in Article 7(2) of the Convention: ‘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

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105 Book IV Part A DCFR
106 Article III. – 2:101 DCFR
108 Article III. – 2:102 DCFR
109 Article 58 CISG
110 Article 6.314 Part 2 CC
111 See Part A Chapter I Section I Subsection 1.11.1 of the present LLM Paper
112 Article 58(3) CISG, Article 6.314 Part 3 CC
114 See Part B Chapter II Section 7 of the present LLM Paper for interest as one of the remedies
principles, in conformity with the law applicable by virtue of the rules of private international law.’ The DCFR\textsuperscript{116} and the Civil Code\textsuperscript{117} explicitly entail rules on currency of payment therefore provide for more legal certainty and could be considered as more advantageous for the overall commercial sales contracts in this respect.

1.2. Taking Delivery

Authors of the DCFR note that taking delivery is a genuine obligation of buyer,

that is to say, that the buyer’s failure to take delivery of the goods rise to remedies on the part of the seller. Therefore the present rules do not embrace the idea of taking delivery as a soft obligation, which merely results in \textit{mora creditoris} rather than an enforceable right to performance by the seller.\textsuperscript{118}

‘The place and time for taking over the goods do not necessarily have to be identical to the place and time of delivery (...) or to the place and time of payment (...). However, in most cases, the place of taking delivery will be the place where the seller has to deliver the goods (...).’\textsuperscript{119} The place of delivery in practice is often defined by one of the trade terms, and most commonly by one of the Incoterms rules.

According to Article 60 CISG, the buyer’s obligation to take delivery consists of (a) performance of all acts reasonably required to enable the seller to make delivery and (b) taking over the goods. The place of taking delivery and time thereof are left outside of this Article, therefore Article 31 CISG and Article 33 CISG would be a reference to these issues.

The DCFR\textsuperscript{120} and the Civil Code\textsuperscript{121} approach the obligation of the buyer discussed in a similar way. The Civil Code makes an obligation to accept things conditional,\textsuperscript{122} however such conditionality may be derived from the other two legal sources concerned as well.

An obligation to cooperate with the seller by performing all acts that could reasonably be expected in order to enable the seller to perform the obligation to deliver may become irrelevant when the general rule of delivery established by the CISG applies, i.e. the seller is deemed to have performed the obligation of delivery by placing the goods at the buyer’s disposal.\textsuperscript{123} As to regard of the obligation of taking over of the goods, the respective article of the DCFR explicitly states, that as the case may be, taking over is of the documents representing the goods, not the material goods, ensures the same result – the buyer is deemed to have performed his obligation.\textsuperscript{124}

Article 60 does not specify when the buyer is entitled to reject the goods. Other articles of the Convention provide for two specific cases: where the seller delivers before the fixed date for

\begin{itemize}
  \item \textsuperscript{116} Article III. – 2:109 DCFR
  \item \textsuperscript{117} Article 6.36 CC
  \item \textsuperscript{118} von Bar (n 8) 1319-1320
  \item \textsuperscript{119} Schwenzer, Schlechtriem (n 2) 862
  \item \textsuperscript{120} Article IV. A. – 3:104 DCFR
  \item \textsuperscript{121} Article 6.346 CC
  \item \textsuperscript{122} Civil Code states that the buyer is bound to accept the delivered things, \textbf{unless he is entitled to demand replacement of the things or rescission of the contract} (emphasis added)
  \item \textsuperscript{123} von Bar (n 8) 1328
  \item \textsuperscript{124} Eg. when the goods are placed in a particular place for collection of the buyer or when the goods are already at the buyer’s disposal under the other grounds than sale of these goods (the buyer uses/leases the thing and then buys them from the seller)
\end{itemize}
delivery (article 52 (1)), and where the seller delivers a quantity of goods greater than that provided for in the contract (article 52 (2)).

2. Additional Obligations of the Buyer

Other obligations of the buyer other than taking delivery and paying the purchase price ‘may include (...) the buyer’s obligation not to purchase directly from the seller’s suppliers, not to resell into specific countries, or to maintain confidentiality. Those obligations may only arise from the contract, either by express agreement of the parties or by implied terms’.

The Civil Code explicitly lists more obligations of the buyer: buyer’s obligation to preserve the things where the buyer has the right to return them to the seller, (possible) obligation to insure the goods, however these obligations are complementary and subject to provide security for payment of the price, to supply materials needed for the manufacture or production of the goods, an obligation to submit specifications regarding the form, measurement or other features of the goods etc.

126 Schwenzer, Schlechtriem (n 2) 808
127 Article 6.347 CC
128 Article 6.316 CC
B. **REMEDIES**

The CISG separately lists remedies for a breach of contract by the buyer\(^\text{130}\) and remedies for a breach of contract by the seller\(^\text{131}\) after the obligations of the respective party. However, the systems of remedies available to both parties are substantially identical therefore will be discussed generally, at the same time taking into account the specialities applicable to each of the parties.

The Civil Code is structured in such way that the remedies follow the respective obligation of the other party, i.e. an obligation is complemented by the remedy available to the other party for non-performance of such obligation. The general rules on remedies for non-performance of obligations are provided for in Book Six Part II Chapter XVII (Legal Effects of Non-performance of Contracts), and for non-performance of the monetary obligations – Book Six Part I Chapter II Section Six of the Civil Code.

The DCFR does not separately establish the list of remedies available to the parties to the contract on sale of goods and the general rules on remedies laid in Chapter 3 of Book III of the DCFR applies to the sales contracts. ‘The remedial scheme in the DCFR does not provide many specifics for sales contracts\(^\text{132}\) therefore the general remedies are applicable *mutatis mutandis* to the contract on sale of goods. Some modifications of the buyer’s remedies for lack of conformity are stipulated in the Sales part of the DCFR\(^\text{133}\) and the other modifications of the remedies of the sales part are related to the consumer sales and fall outside of the scope of subject matter of the present LLM Paper.

The general overview of similarities and differences of regulation on remedies will be given in the first Chapter of this Part and the second Chapter will be devoted to the particular remedies available to the parties.

I. **General Overview of Regulation on Remedies**

While the similar regulation of obligations of the parties was observed in the Part A of the LLM Paper, ‘The parallelism between DCFR and CISG seems to be less intense as far as the area of remedies for non-performance is concerned’.\(^\text{134}\)

The CISG differentiates the remedial scheme in cases when the party fails to perform its obligations and when the party causes a fundamental breach. The concept of fundamental breach is defined in Article 25 CISG: 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.

In order to rank as fundamental, a breach must be of a certain nature and weight. The aggrieved party must have suffered such detriment as to substantially deprive it of what it was entitled to expect under the contract. The breach must therefore nullify or essentially depreciate the aggrieved party’s justified contract expectations.\(^\text{135}\)

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\(^\text{130}\) Articles 61-65 CISG

\(^\text{131}\) Articles 45-52 CISG

\(^\text{132}\) Loos (n 49) 27

\(^\text{133}\) Book IV Part A Chapter 4 DCFR

\(^\text{134}\) Troiano (n 14) 401

Like the CISG, the DCFR acknowledges the doctrine of fundamental non-performance. Paragraph 2 of Article III. – 3:502 DCFR clearly defines when the non-performance of a contractual obligation may be considered as fundamental – there are three elements in the definition: firstly, what was the creditor entitled to expect, second, whether the non-performance substantially deprives the creditor of what he was entitled to expect and third, whether the debtor foresaw or could reasonably be expected to have foreseen the result.136 Furthermore, Paragraph (2)(b) of Article III. – 3:502 DCFR stipulates that the non-performance of a contractual obligation is fundamental if it is intentional or reckless and gives the creditor a reason to believe that the debtor’s future performance cannot be relied on. The CISG has no provision on intentional or reckless non-performance, therefore in this respect the DCFR seems to improve and complete rule laid down in the CISG.137

The regulation of the fundamental non-performance found in the CISG and the DCFR slightly differs from the approach established in the Civil Code. Article 6.217 CC provides that a party may dissolve the contract where the failure of the other party to perform it or the defective performance thereof is considered to be an essential violation of the contract. The Civil Code further lists the conditions138 that must be taken into account when determining whether a violation of a contract is essential. Besides the elements of fundamental non-performance found in the CISG and the DCFR, the Civil Code takes into consideration whether the nature of the contract, strict compliance with the conditions of the obligation is of essential importance, the nature of non-performance (if it was made of malice prepense or of great imprudence) and the position of the non-performing party, therefore the concept of essential violation established in the Civil Code is to be interpreted more strictly than the notion of fundamental non-performance established in the CISG and the DCFR.

Notwithstanding the differences in regulation, the parties to a contract on sale of goods may stipulate that the particular obligations are essential to their contractual relations and non-performance of such obligations would be considered to be fundamental and entitle to terminate the contract unilaterally by the aggrieved party upon the notification sent to the party in breach. Furthermore, ‘the parties may wish to confer an express right to terminate for any non-performance, however minor, or even for something which is not a non-performance at all’.139 Such right rises from the principle of party autonomy which is relevant to all three legal sources discussed. In either case such provisions of the contract comply with the principle of good faith and should not unjustifiably give neither of the parties excessive advantage.

Unlike the CISG, the DCFR140 “distinguishes between remedies available for not-excused non-performance and remedies for non-performance of an obligation which is excused due to an impediment or results from behaviour of the other party”.141 The main difference between the latter

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136 von Bar (n 8) 853-854
137 Troiano (n 14) 408
138 Article 6.217 Part 2 CC:
   In determining whether a violation of a contract is essential, the following conditions must be taken into account:
   1) whether the aggrieved party is substantially deprived of what he was entitled to expect under the contract, except in cases when the other party did not foresee or could not have reasonably foreseen such result;
   2) whether, taking into consideration the nature of the contract, strict compliance with the conditions of the obligation is of essential importance;
   3) whether the non-performance is made of malice prepense or of great imprudence;
   4) whether the non-performance gives the aggrieved party the basis to suppose that he cannot believe in the future performance of a contract;
   5) whether the non-performed party, who was preparing for performance or was effectuating the performance of the contracts, would suffer significant damages if the contract were dissolved
139 von Bar (n 8) 856
140 Article III. – 3:101 DCFR
141 Troiano (n 14) 401
two is that in case of an excused non-performance, the aggrieved party is not entitled to claim damages and/or enforce specific performance.

The Civil Code establishes the same scheme of remedies available to the aggrieved party irrespective of the fact whether a breach is excusable. Noteworthy is Article 6.324 Part 1 which establishes somewhat differentiation in the basis of non-performance like in the DCFR (emphasis added – aut.): if the seller refuses without a good reason to deliver the thing to the buyer, the latter shall have the right to refuse to perform the contract of purchase-sale and claim damages. However, this provison is more an exception than a rule and does not allow making general conclusion that the Civil Code makes a difference between the excusable and non-excusable non-performance.

Neither the CISG nor the Civil Code establishes explicit distinction between the excused and non-excused non-performance however both legal sources exempt the party from damages on certain conditions:

1) In case of the CISG, the concept of non-performance is used for both excused and non-excused non-performance: ‘Article 45 CISG attaches the same remedies to all cases of non-performance, no matter whether excused or not’.142 Paragraph 5 of Article 79 CISG, which introduces the notion of impediment beyond control, states that the exemption from liability applies only to the damages and does not preclude the aggrieved party from exercising any of his rights under the Convention. ‘Article 79 (5) of the Convention specifies that a successful claim to exemption shields a party from liability for damages, but it does not preclude the other party from “exercising any right other than to claim damages” ’143.

2) The provisions on force majeure, established in Article 6.612 CC shall not deprive a party of exercising the right to dissolve the contract, or to suspend its performance, or to require interest due. Therefore, the damages are excluded and may be claimed in only cases when the party who failed to perform a contract did not inform the other party about the arising of an impedimental circumstance amounting to force majeure.

The Convention144 provides for that no period of grace may be granted to the defaulting party by a court or arbitral tribunal when the aggrieved resorts to a remedy for breach of contract. This way the Convention precludes the deviation from the remedial scheme established in the CISG and misbalance between the parties subject to different jurisdictions.

II. Particular Remedies Available to the Parties

1. Specific Remedies in Case of Non-Conformity of Goods

The non-conformity as a material deficiency of obligation to deliver the goods and as one of the seller’s obligations was discussed in Part A of this LLM paper.145 Since an obligation to deliver the goods which are in conformity with the contract falls on the seller, the remedies in this case are available to the buyer.

Generally, in case of non-conformity, the buyer may request the delivery of substitute goods, repair of the non-conforming goods or reduce the price.

142 Ibid 402
144 Article 45(3) CISG and Article 61(3) CISG
145 See Part A Chapter I Section 1 Subsections 1.1 and 1.4
1.1. Requesting to Deliver the Substitute Goods or to Repair the Goods

Firstly, according to Article 46(2) CISG, in case of delivery of non-conforming goods, the buyer may require delivery of the substitute goods only if the lack of conformity constitutes a fundamental breach of contract. Whether the seller commits a fundamental breach by delivering the non-conforming goods should be estimated according to the general principles of establishing the fundamental breach: the buyer should be substantially deprived of what he is entitled to expect under the contract.

Article 46 (2) applies if (a) the seller has delivered non-conforming goods; (b) the non-conformity constitutes a fundamental breach of contract; and (c) the buyer has requested replacement of the non-conforming goods “either in conjunction with notice given under article 39 or within a reasonable time thereafter.” If these conditions are met, article 46 (2) entitles the buyer to require delivery of substitute goods.146

Secondly, Article 46(3) CISG establishes that 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. The difference from the previous paragraph of Article 46 CISG (delivery of substitute goods) is that the repair may be required irrespectively if the non-performance was fundamental. The choice between Article 46(2) CISG and 46(3) CISG is based on the seriousness of non-conformity and possibility to remedy such deficiencies with the minimum expenses.

Article 4.214 of the Civil Code stipulates that the right to obtain performance includes the right to demand a repair or replacement of a defective performance, or elimination of defects in performance by other means taking into consideration the provisions of Article 6.208 of the Civil Code. Article 6.334 CC, which specifies the rights of the buyer of things of unsatisfactory quality, allows the buyer to rely upon the listed remedies at the buyer’s choice – the buyer is entitled to demand, at his own choice (1) to replace the non-conforming goods; (2) to reduce the purchasing price; (3) that the seller eliminates the defects or reimburses the buyer’s expenses for the elimination of defects or (4) to restore the price and repudiate the contract, where the sale of things of unsatisfactory quality is an essential breach of contract.

The situation of delivery of non-conforming goods is closely related to the seller’s right to cure. ‘The allowance of a reasonable opportunity to cure is consistent with the notion of good faith and fair dealing and with the desire to uphold the contractual relations where possible and appropriate’.147 Article 48 CISG provides for a general right for the seller to cure: 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 buyer of expenses advanced by the buyer. However, such right is subject to Article 49, stipulating the buyer’s right to stipulate the contract avoided.

The DCFR148 entitles the debtor (the seller) promptly after being notified of the lack of conformity, to offer to cure it within a reasonable time and at the debtor’s own expense, and the creditor (the buyer) may not pursue any remedy for non-performance, other than withholding performance, before allowing the debtor (the seller) a reasonable period in which to attempt to cure the non-

147 von Bar (n 8) 812
148 Article III. – 3:202 DCFR
However, the right to cure may not necessarily be given to the debtor in cases set in Article III. – 3:203 DCFR, including the cases when the non-performance is fundamental. Consequently, if the non-performance is fundamental, the creditor is not obliged to give the debtor a possibility to cure (including a possibility to return or replace item according to Article III. – 3:201 DCFR). In this sense, the regulation of the DCFR differs from the one established in the CISG which links the seller’s right to deliver substitute goods (right to cure) if the breach of contract is based upon late delivery or the violation of any obligation of the seller other than the obligation to deliver conforming goods, the notice on price reduction is required to be given. The value of the price reduction should be calculated proportionally between the value of non-conforming goods and the value of conforming goods would have had at that time.

However, this remedy is not available if the seller remedies any failure to perform his obligations in accordance with Article 37 CISG or Article 48 CISG or if the buyer refuses to accept performance by the seller in accordance with those articles. The remedy of price reduction is (...) not available if the breach of contract is based upon late delivery or the violation of any obligation of the seller other than the obligation to deliver conforming goods. As in all cases of non-conformity of goods, the notice on price reduction is required to be given. The value of the price reduction should be calculated proportionally between the value of non-conforming goods and the value of conforming goods would have.

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149 In the sales contract paragraph (2) of Article III. – 3:202 DCFR would be applicable in cases when the non-conforming goods are delivered on due time and the ‘new and conforming tender’ may no longer be made according to paragraph (1) of the mentioned Article

150 The party failing to perform a contract may at its own expense eliminate any defects of performance if:
   1) he gives notice without undue delay to the other party indicating the manner and time of elimination of defects;
   2) the aggrieved party has no lawful interest in refusing elimination;
   3) elimination is effected immediately;
   4) elimination is appropriate in the concrete circumstances.

151 Upon effective notice of elimination, rights of the aggrieved party that are inconsistent with the performance of the contract shall be suspended until the expiry of the time-limit allotted for elimination.

152 The aggrieved party may suspend performance of his obligations until the defects of performance are eliminated by the other party, and may also claim compensation for damages.

153 The aggrieved party shall be bound to cooperate with the other party during the whole period of the elimination of defects.

154 If the seller has delivered goods before the date for delivery, he may, up to that date, deliver any missing part or make up any deficiency in the quantity of the goods delivered, or deliver goods in replacement of any non-conforming goods delivered or remedy any lack of conformity in the goods delivered, provided that 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.

155 See Part B Chapter II Section 1 Subsection 1.1 above

The principles of the price reduction provided for by Article III. – 3:601 DCFR are similar to the ones established in the CISG. Furthermore, Paragraph (3) of this Article gives more clarity in application of the remedy of price reduction: a creditor who reduces the price cannot also recover damages for the loss thereby compensated but remains entitled to damages for any further loss suffered. However the same outcome could also be derived from the general rule of compatibility of the remedies applied cumulatively.

The Civil Code\textsuperscript{154} lists the price reduction as one of the remedies the buyer can choose from in case of delivery of the non-conforming goods. As regarding the methods of calculation of reduction of the price, Article 6.364 Part 3 of the Civil Code stipulates:

When the buyer demands that the price of the thing of inferior quality be reduced accordingly, account shall be taken of the price of the thing at the moment the demand is presented, whereas in case of refusal by the seller to satisfy the buyer’s demand, regard shall be had to the current price at the time the court or any other institution passes a decision regarding price reduction.

Unlike the CISG and the DCFR, the Civil Code links the size of the price reduction to the moment of placing a demand of the buyer or passing a decision of a court or other institution competent in such cases. The CISG and the DCFR link this moment to the time of delivery of non-conforming goods and are more reasonable in this regard by avoiding the possibility for the buyer to act in bad faith and submitting a demand and/or lodging a claim after the price has increased considerably.

2. Fixing an Additional Period of Time for Performance

The CISG provides for a possibility for the buyer (Article 47 CISG) as well as for the seller (Article 63 CISG) to fix an additional period of time of reasonable length for performance by the other party of his obligations. Unless the party fixing an additional period of time receives notice from the other party stating that the latter will not perform within the period so fixed, the party giving additional time may not, during that period, resort to any remedy for breach of contract. Such binding effect is intended for protection of the party which, in response to the other party’s notice fixing an additional period for performance, may as a result prepare the performance during that period, perhaps at considerable expense, and thus should be entitled to expect that the notifying party will accept the requested performance if it is not otherwise defective.\textsuperscript{155} However, fixing additional period of time or reasonable length for performance does not deprive the party from claiming damages for delay in performance.

What is reasonable should be decided according to all circumstances of the situation.\textsuperscript{156} Fixing additional period for performance is a right, not an obligation of a party therefore the party is free to choose whether to exercise such right. However the party may benefit from choosing to do so – retain the contractual relations or, as the case may be, declare the contract avoided. In case of non-performance which is not considered to be a fundamental breach, fixing an additional period of time for performance (Nachfrist) is prerequisite for avoidance of the contract according to Article 49 CISG (Article 64 CISG) – should the party fail to perform within the additional period of time given, the aggrieved party is then entitled to declare the contract avoided.

Special provision of the Convention concerning fixing an additional period of time but resulting in different consequences is Article 65(1) CISG:

\textsuperscript{154} Article 6.334 Part 1 CC, Article 6.363 Part 4 CC
\textsuperscript{156} For notion of reasonableness see page 11 of the LLM Paper
If under the contract the buyer is to specify the form, measurement or other features of the goods and he fails to make such specification either on the date agreed upon or within a reasonable time after receipt of a request from the seller, the seller may, without prejudice to any other rights he may have, make the specification himself in accordance with the requirements of the buyer that may be known to him.

Failure of the buyer to specify the features of the goods results in the seller’s right to do so. ‘The seller, however, is not obliged to make the specification. He may prefer to rely on the remedies available in case the buyer’s conduct constitutes a breach of contract’.

The DCFR regulates the notice fixing additional period for performance similarly to the CISG. Comments on the Article III. – 3:103 DCFR makes it clear that fixing additional period for performance is not necessarily used in case of non-fundamental non-performance; adding time for performance is a creditor’s right which he may use in case of a fundamental non-performance as well.

The Civil Code follows the same way as the CISG and the DCFR as regarding additional period for performance. Moreover, the Civil Code explicitly indicates that the notice establishing additional period should be in writing.

3. Withholding Performance

The right to withhold performance is established in the Convention’s part on the provisions common to the obligations of the seller and of the buyer. ‘The right of suspension is a very important self-help remedy for breach of contract. Article 71 entitles the creditor to suspend its performance if the fulfilment of a substantial part of the debtor’s duties is uncertain’.

Article 71 CISG provides for that a party may suspend the performance of his obligations if, after the conclusion of the contract, it becomes apparent that the other party will not perform a substantial part of his obligations as a result of (a) a serious deficiency in his ability to perform or in his creditworthiness; or (b) his conduct in preparing to perform or in performing the contract. The substantial character of non-performance is essential: if only a minor part of an obligation was not performed, the counter-performance may not be suspended and the aggrieved party should resort to the other remedies. ‘The right to suspend exists until the time for performance is due, but once the date for performance has passed the aggrieved party must look to other remedies under the Convention’. The party loses such right after the other party provides an adequate assurance of his performance according to Paragraph (3) of Article 71 CISG or when the party becomes entitled to avoid the contract. Suspension of performance should be considered as a safeguarding measure of the creditor’s interests and helps to maintain the balance in the contractual relations of the parties. ‘Unlike avoidance of the contract, which terminates the obligations of the parties (...), the suspension of contractual obligations recognizes that the contract continues and encourages mutual reassurance that both parties will perform’. Article 71(3) imposes a party seeking to withhold

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158 Article III. – 3:103 DCFR
159 von Bar (n 8) 780
160 Article 6.209 CC
161 Part III Section III Chapter V CISG
162 Schwenzer, Schlechtriem (n 2) 950
performance with an obligation to give the other party an immediate notice of the suspension. Should the notified party provide an adequate assurance of his performance, the other party’s right of suspension of performance ceases existing. The Convention does not specify what should be a sufficient assurance, therefore it is left to the parties’ agreement and the rules of national law.

Article III. – 3:401 DCFR regulates the same issue with a slightly different approach. DCFR establishes a broader right to withhold performance by differentiating in time when the performance is due. In case of concurrent performance, the performance of an obligation may be suspended until the other obligation is fully performed or is tendered to be performed. ‘This both protects the withholding party from having to advance credit to the non-performer and gives the latter an incentive to perform in order to receive the counter-performance’.

As regarding the anticipated non-performance, Paragraph (2) of Article III. – 3:401 DCFR establishes almost identical rules as the ones in the CISG. However, the DCFR does not require that the anticipated non-performance would be of a substantial part of pending obligation.

The Civil Code establishes rules that are very similar to the ones found in the DCFR. Furthermore, the parties in either case shall be bound to exercise the right of suspension in accordance with reasonableness and good faith. The Civil Code refers to the ‘suspension of performance of a contract’ and such notion is presumably imprecise, because the contract itself remains unsuspended by the parties and it’s just the performance of obligations what is being suspended.

4. Specific Performance

[A] general right to enforce specific performance has several advantages. Firstly, through specific relief the creditor obtains as far as possible what is due; secondly, difficulties in assessing damages are avoided; thirdly, the binding force of obligations is stressed. (...) On the other hand, (...) the principle of allowing the enforcement of specific performance must be limited.

Article 46 CISG establishes a general right of the buyer to require performance of the seller’s obligations in kind and Article 62 CISG entitles the seller to require performance from the buyer. ‘The right to require performance is subject to the restriction regarding specific performance set forth in article 28. If the seized court would not, on the facts of the case before, grant such remedy under its own national law, it will not be bound to do so under the Convention’. A party has a right to require specific performance of any obligation which is due. Of course, an obligation has still to be possible to be performed. The request for performance should be compatible with the other remedies; if the specific performance is impossible, then the other remedies should be invoked and, in case of partial possibility of the specific performance, the other remedies may be invoked for the remainder of obligations.

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165 von Bar (n 8) 843
166 Troiano (n 14) 405-406
167 Article 6.207. Suspension of performance of a contract
1. Where the parties are bound to perform a contract simultaneously, either party shall have the right to suspend performance until the other party begins to perform thereof.
2. Where the parties are bound to perform a contract consecutively, the party who is to perform later shall be able to suspend its performance until the first party has performed his obligations.
3. The parties shall be bound to exercise the right provided for in Paragraphs 1 and 2 of this Article in accordance with reasonableness and good faith.
168 von Bar (n 8) 829-830
170 According to the UNCITRAL Digest of Case Law on the CISG, avoidance of the contract or price reduction would be incompatible with requirement of specific performance
The DCFR follows the CISG’s approach concerning specific performance, however broadens the rule laid down in the CISG and generalises the CISG approach. Both the DCFR (Article III. – 3:301 – Article 3:302 DCFR) and the Civil Code (Article 6.213 CC) make a distinction of specific performance of the monetary and non-monetary obligations:

1) As regarding the monetary obligations, the DCFR states ‘As a rule it is always possible to enforce monetary obligations’. Article 6.213 Part 1 CC affirms such rule: ‘In the event where a party fails to perform his monetary obligation, the other party shall have the right to demand performance in kind’. However, paragraph (2) of Article III. –3:301 DCFR provides for two exceptions in this rule. Article 62 CISG drops the restriction established in Paragraph (2)(a) of Article III. –3:301 DCFR: ‘The seller is bound to the contract; and therefore obliged to tender performance to the buyer even if the latter is unwilling to receive performance, and may claim the purchase price’. The Civil Code follows the Convention in this regard and states that ‘If the buyer refuses to accept delivery of the thing and to pay the sale price, the seller may, at his discretion, demand from the buyer the payment of the price or refuse to perform the contract’.

2) Article III. –3:302 DCFR governs the enforcement of non-monetary obligations and situations when the specific performance cannot be enforced. ‘The creditor has not only a substantive right to the debtor’s performance but also a remedy to enforce this right specifically, e.g. by applying for an order or decision of a court’. In the Republic of Lithuania the Code on Civil Procedure establishes procedural rules for such action and the Civil Code foresees a possibility to impose a fine upon a failure to perform the specific performance as provided for by the judgement of a court ordering the performance in kind.

The regulation established in the DCFR and the Civil Code covers almost all obligations, not only the ones of the parties to the contract on sales, therefore governs this matter in a wider scope. Meanwhile the applicability of specific performance under the CISG is connected to the rules of national law (Article 28 CISG), therefore it would be considered disadvantageous because the parties have less legal certainty as to whether the rules of the law applicable to the specific case meet their expectations.

5. Termination (Avoidance) of the Contract

‘The most defining feature of the system of remedies in the CISG is that it aims at keeping the contract alive as long as possible in order to avoid the necessity to unwind the contract’. Therefore, termination of the contract is the remedy of last resort (ultima ratio) and is considered to be available when a party to a contract can no longer be expected to continue the contract. Such assumption is based on the fact that the parties have entered into a contract on free will seeking to satisfy their needs and to receive the reciprocal benefit therefore they should try to put their best efforts to maintain the contractual relationships and duly perform obligations arising from them.

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171 Troiano (n 14) 405
172 von Bar (n 8) 824
173 Where the creditor has not yet performed the reciprocal obligation for which payment will be due and it is clear that the debtor in the monetary obligation will be unwilling to receive performance, the creditor may nonetheless proceed with performance and may recover payment unless:
(a) the creditor could have made a reasonable substitute transaction without significant effort or expense; or
(b) performance would be unreasonable in the circumstances.
174 Article 6.314 Part 6 CC
175 von Bar (n 8) 829
176 Article 6.215 CC
177 Huber, Mullis (n 25) 181
However, if such contractual relations can no longer be expected to continue, the parties should have a right to declare the contract avoided (to terminate the contractual relationships). Article 26 CISG provides that a declaration of avoidance of the contract is effective only if made by notice to the other party which is intended to disclose the other party the first party’s intentions and the status of the contract, or in other words this means that ‘The Convention does not provide for an automatic (ipso facto) avoidance of contract’. ¹⁷⁹

As regards the other two legal sources concerned, the requirements on notice are set out in Article III. – 3:507 DCFR and Article 6.218 CC. The Civil Code is precise regarding the term of notice whereas the other two legal sources discussed are vaguer and indicate that the notice should be given within the reasonable period of time. The Civil Code establishes: ‘The party shall be bound to give the other party notice of dissolution in advance within the time-limit established by the contract; if the contract does not indicate such time-limit, the notice of dissolution must be given within thirty days’. ¹⁸⁰ Such definite period gives the parties more legal certainty, but on the other hand, a notification period of thirty days in certain circumstances may be a way too long due to dynamics of transactions of the particular sector of trade. In such circumstances the general principle of reasonableness would apply in defining how long the period of notification should be.

Articles 49 CISG and 64 CISG clearly distinguish the possibilities for the buyer (the seller) to declare the contract avoided firstly, when the failure by the other party to perform any of its obligations under the contract or the Convention amounts to fundamental breach of contract; or, secondly, when the party fails to perform within the additional period of time fixed by the other party or declares that it will not do so within the period so fixed. The provisions of Articles 49 CISG and 64 CISG make it clear that the party’s right to declare avoidance is not subject to time limitations as long as the other party has not duly performed. Once the party has performed, the party’s right to avoid must be exercised within specified periods established in articles 49(2) CISG or 64(2) CISG. Thirdly, Article 72 CISG grants the party with a right of avoidance in case of anticipatory breach of the contract of the other party.

All three possibilities of termination (avoidance) of a contract will be discussed below and will be compared with the respective provisions on the same matter of the DCFR and the Civil Code.

5.1. Termination after Fixing Additional Time for Performance

‘Not every delay in performance of an obligation will constitute a fundamental non-performance and so the creditor will not necessarily have the right to terminate immediately merely because the date for performance has passed’. ¹⁸¹ In such cases the creditor should have a right to fix a period of reasonable length for the debtor to perform. ¹⁸² Should a party fail to perform within the additional period of time fixed by the other party or declares that it will not perform within the period so fixed, the aggrieved party is entitled to declare the contract avoided. Therefore, failure to perform obligations within the additional period of time amounts to fundamental non-performance and leads to the same outcome – right to terminate the contract.

As regards the time period when the party may realise its right of avoidance, a party generally is not required to declare the contract avoided within a certain period of time; he can do so at any time if a

¹⁸⁰ Article 6.218 Part 1 CC
¹⁸¹ von Bar (n 8) 863
¹⁸² Fixing an additional period for performance is discussed in Part B Section II Chapter 2 of this LLM Paper
¹⁸³ In accordance with Article 47 (in case of the buyer) and with Article 63 (in case of the seller)
ground for avoidance exists. This principle is, however, subject to a limitation under Article 49 (2) CISG or Article 64(2) CISG stating when the party loses the right to declare the contract avoided.

Article III. – 3.503 DCFR establishes the possibility of termination after notice fixing additional time for performance. The DCFR, similarly to the Convention, links this ground for termination to the non-fundamental non-performance and imposes a duty to give a notice to make the performance good within the given time period which should be reasonable. The DCFR stipulates that in case if the period fixed is unreasonably short, the creditor may terminate only after a reasonable period from the time of the notice. This means that the creditor does not have a duty to ask for the court order to terminate if the period he granted to the debtor is unreasonably short. In such case the creditor just has to wait until the time that in specific circumstances could be considered to be reasonable, lapses and then terminate the contractual relationship.

The Civil Code’s approach is very similar to the one of the DCFR. Article 6.209 Part 3 CC stipulates that

In the event where delay in performance is not an essential violation of a contract, and the aggrieved party has established an additional period of time of reasonable length for the performance, this party may dissolve the contract upon expiry of that period. If the additional period is unreasonably short, it must be extended up to a reasonable length.

It should be noted that the Civil Code limits the application of the abovementioned provision if the obligation which has not been performed constitutes only an insignificant part of the obligations under the contract of the failed party.\(^\text{184}\)

5.2. Termination in Case of Anticipated Non-Performance

Article 72 of the Convention provides for the possibility for the parties to declare the contract avoided if prior to the date for performance of the contract it is clear that the other party will commit a fundamental breach of contract. ‘However, article 49 rather than article 72 applies if, at or after the date for performance, a party’s failure to perform or nonconforming performance amounts to a fundamental breach’.\(^\text{185}\)

The reasoning of Article 72 CISG is based on protection of creditor prior to the due date for performance and the idea of efficiency is reflected by allowing an early reaction to impending impediments to performance.\(^\text{186}\) Article 72(2) CISG requires the party intending to declare the contract avoided to give reasonable notice to the other party in order to permit him to provide adequate assurance of his performance, if time allows doing so. However, these requirements should not be followed if the other party has declared that he will not perform his obligations.\(^\text{187}\)

The precondition for avoidance under Article 72 CISG is that the anticipated non-performance should constitute a fundamental breach. ‘For a party to be able to avoid the contract in case of anticipatory breach a higher degree of probability of such a breach must be established than in the case of a right to suspend in Art. 71 CISG;\(^\text{188}\) ‘A very high probability that there will be a fundamental breach rather than complete certainty is required’.\(^\text{189}\) As the authors of the Principles,

Definitions and Model Rules of European Private Law: Draft Common Frame of Reference point out,

there will have to be an obvious unwillingness or inability to perform where the failure in performance would be fundamental. (...) An express repudiation by the debtor will satisfy this requirement but even in the absence of a repudiation the circumstances may make the situation clear.\textsuperscript{190}

The basis for avoidance of the contract under Article 72 CISG is conditional: a party has a right to avoid the contract if the other party does not provide adequate assurance of his performance. However, such conditionality is not absolute since a notification on intent of avoidance for anticipatory breach should be sent only ‘if time allows’.

The regulation of the anticipated non-performance in the DCFR\textsuperscript{191} is in principle analogous to the one of the Article 72 CISG. The DCFR provides for this right until it remains clear that there will be a fundamental non-performance by the debtor. The DCFR does not explicitly establish a duty to give the debtor a notice, however this could be derived from the general principle of good faith and fair dealing – the parties have to disclose their intentions and inform each other on their chosen way of acting in the contractual relationships.

The Civil Code is rather concise in respect of the anticipated non-performance. Article 6.219 CC provides for: ‘If prior to the date when performance falls due it is reasonable to think that there will be an essential non-performance by one of the parties, the other party may dissolve the contract’.

\textbf{5.3. Termination in Case of Fundamental Non-Performance}

Articles 49 CISG and 64 CISG allow the party to declare the contract avoided in case of failure to perform any of its obligations by the other party which amounts to fundamental breach of the contract. Fundamental non-performance should be assessed according to Article 25 CISG, specific contract provisions, usages and practices established between the parties and guidelines developed in the case law.\textsuperscript{192} The notion of fundamental non-performance could be found in all three legal sources concerned and is briefly discussed in Part B Chapter I of this LLM Paper\textsuperscript{193} and therefore will not be repeated herein.

‘Non-performance of obligations that arise from the contract – as opposed to being imposed by the Convention – may also constitute a fundamental breach’.\textsuperscript{194} Consequently, the parties are free to define in their contract on sale of goods which obligations are considered to be essential and what kind of non-performance will be considered to be fundamental and leading to the termination under the basis of fundamental non-performance.

When a party commits a fundamental breach of a contract, the aggrieved party is entitled to terminate the contractual relations by giving notice indicated in Article 26 CISG and declare the contract avoided. No additional time for performance should be given and no other duties are imposed upon the aggrieved party.

\textsuperscript{190} von Bar (n 8) 867-868  
\textsuperscript{191} Article III. 3:504 DCFR  
\textsuperscript{193} See pages 23-24 of the LLM Paper  
Should the buyer wish to avoid the contract due to non-conformity amounting to a fundamental breach, the notice of avoidance should be served along with the notice on non-conformity according to Article 39 CISG or both notices may be combined and expressed in one notification. Such possibility is explicitly indicated in the Civil Code. As the commentators of the CISG point out, in determining whether a breach is fundamental, the most challenging issues arise with respect to the delivery of defective goods. Considering this fact, the parties are recommended to determine the most sensitive issues in the contract and explicitly indicate what kind of non-performance and what kind of defects of the goods will be considered as fundamental.

5.4. Effects of Termination

The effects of termination (avoidance) are pointed out in the first sentence of Article 81(1) CISG: ‘Avoidance of the contract releases both parties from their obligations under it, subject to any damages which may be due’. Therefore, the termination (avoidance) has a prospective effect.

Article III. – 3:509 DCFR states that on termination, the outstanding obligations or relevant part of the outstanding obligations of the parties under the contract come to an end. As the Comments on this Article explain, ‘An obligation will be “outstanding” for this purpose if it has not been fully performed, whether or not it was due.’

All three legal sources agree that the avoidance (termination) does not affect any provision of the contract for the settlement of disputes or any other provision of the contract governing the rights and obligations of the parties consequent upon the avoidance (termination) of the contract, as well as the liability for damages for breach survives the avoidance (termination).

‘It has been almost universally recognized that avoidance of the contract is a precondition for claiming restitution under article 81 (2)’. A party who has performed the contract either wholly or in part may claim restitution from the other party of whatever the first party has supplied or paid under the contract. If both parties have performed – supplied and paid under the contract – (i.e. performed a respective part of their obligations), the restitution is to be made concurrently; such provision of the CISG ensures that neither party benefits from avoidance of the contract by postponing its duties arising from restitution.

‘Article 4(b) makes it clear that the effect of avoidance on property in the goods is not governed by the Convention. The restitution mechanism as provided by the CISG may therefore collide with national insolvency laws if the latter vest the buyer’s creditors with rights in rem over the sold goods’. For example, according to Article 6.345 of the Civil Code, if the goods are already delivered and the buyer fails to pay the price, the seller shall retain the right of recovery only until the things are in the country of their delivery or have not passed into the hands of a third person or of a hypothecary creditor or the ususfructuary right has not been laid down. In case of insolvency of the buyer, the seller cannot recover the things for which the price has not been paid if within a reasonable time the buyer’s administrator offers to pay the price or presents a guarantee of performance of the obligation. The DCFR does not deal with insolvency law therefore this issue remains unregulated.

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195 Article 6.209 Part 3 CC
197 von Bar (n 8) 886
198 Article 81 CISG, Article III. – 3:509 DCFR, Article 6.221 Part 3 CC
200 Schwenzer, Schlechtriem (n 2) 1096
Article 82 CISG states that the buyer loses the right of avoidance or to require the seller to deliver substitute goods if it is impossible for him to make restitution of the goods substantially in the condition in which he received them, save from exceptions listed in Article 82(2) CISG. ‘Article 82, which creates very broad exceptions to an avoiding buyer’s obligation to return goods in their original condition and thereby suggests that the seller generally bears the risk that the condition of the goods will deteriorate’. Should the buyer lose his right to declare the contract avoided or to require the seller to deliver substitute goods in accordance with Article 82 CISG, he nevertheless retains all other remedies under the contract and Convention.

Article 84(1) provides for that if the seller is bound to refund the price, he must also pay interest on it from the date on which the price was paid. This is based on the general assumption that interest is a compensation for the creditor for the use of his money. Interest should be paid from the date of payment and should cease to accrue when the price is actually refunded.

Article 84(2) in the meanwhile states that the buyer must account to the seller for all benefits derived from goods that were delivered under a contract that was avoided, or from goods that the buyer is requiring the seller to replace pursuant to Article 46(2). ‘Article 84 (2) has been characterized in general as requiring that the buyer “account to the seller the exchange value of all benefits which the [buyer] has derived from the goods or part of them”.

The rules on restitution after termination established in the DCFR are very similar to the ones of the CISG. Article III. – 3:510 DCFR details the restitution of benefits received by performance: where the money has been received, the amount is to be repaid (plus interest if claimed), transferable property other than money must be returned in kind and the value of benefit should be paid in case when the actual return is not possible. Article III. – 3:511 DCFR provides for the cases when the restitution is not required. When the parties’ expectations and conform counter-performance meet, there is no need to apply restitution. Such situations in principle are likely in relation to obligations which are to be performed in parts or instalments or are otherwise divisible. ‘Article III. – 3:511 is modelled on the CISG and adopts the same broad and flexible approach to restitution which underlies the Convention, the basic rule being that the recipient is obliged to return any benefit received by the other’s performance’.

The Civil Code establishes the similar regulation on restitution as in Article III. – 3:510 DCFR. Furthermore, Article 6.222 Part 2 CC explicitly states that ‘If the performance of a contract is successive and divisible, the party may claim restitution only of what has been received after the dissolution of the contract’. Article 6.222 Part 3 CC stipulates that restitution shall not affect the rights and duties of third persons in good faith, except in the cases established in the Civil Code. Chapter X of Book Six governs restitution and defines the grounds for restitution, place thereof, mode of restitution, estimation of monetary equivalent and other aspects relevant for restitution. Such detailed provisions give the parties more legal certainty therefore could be considered more advantageous to their contractual relationships.

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202 Interest as one of the remedies is described in Part B Chapter II Section 7 of the LLM Paper
205 von Bar (n 8) 893
206 Ibid 898
207 Troiano (n 14) 409
6. Damages

The general rule established in the CISG is that if a party fails to perform any of its obligations under the contract or Convention, the other party may exercise the rights provided in CISG and/or claim damages as provided in Articles 74 to 77 of the Convention. The aggrieved party is not deprived of any right he may have to claim damages by exercising his right to other remedies. ‘The right to claim damages under the Convention does not depend on any kind of fault, breach of express promise, or the like; it presupposes merely an objective failure of performance’.208

Article 74 CISG makes clear what elements compose damages:

- 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.

As the commentators of the CISG point out, Article 74 CISG does not exclude losses for damage to property other than the goods purchased or losses arising from damage to non-material interests, such as loss of an aggrieved party’s reputation because of the other party’s breach.209 ‘Recoverable types of loss include non-performance loss, incidental loss, and consequential loss resulting from breach of contract’.210

Article 75 CISG provides that a party claiming damages may recover the difference between the contract price and the price in the substitute transaction if the contract is avoided and if, in a reasonable manner and within a reasonable time after avoidance, a substitute transaction was concluded. Any further damages may be claimed on the basis of Article 74 CISG, therefore Article 75 CISG is complementary to Article 74 CISG. Whereas Article 74 CISG establishes the general rule on damages, Article 75 CISG is conditional – it may be applied only upon avoidance of the contract and if the aggrieved party concludes the substitute transaction within a reasonable period of time after avoidance. Furthermore, even though Article 75 CISG does not state that the price of the substitute transaction should be reasonable, the principle of good faith and fair dealing should apply to such transaction – the aggrieved party should not resell the goods at a very low price or buy the substitute goods for a very high price and then claim the difference from the defaulting party. Also Article 77 CISG imposing a duty upon the parties to mitigate damages would be applicable in such case.

Article 76 CISG ‘which provides that an aggrieved party may recover damages measured by the difference between the contract price and the current price for the goods if the contract has been avoided, if there is a current price for the goods, and if the aggrieved party has not entered into a substitute transaction’211 is also supplementary to Article 74 CISG and is also applicable in cases of avoidance of the contract. Generally either Article 75 CISG or Article 76 CISG could be invoked in the claim, however, if ‘an aggrieved party concludes a substitute transaction for less than the contract quantity, both articles 75 and 76 may apply’.212

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210 Schwenzer, Schlechtriem (n 2) 1006


Article 77 CISG imposes a party relying on breach of contract an obligation to take such measures as are reasonable in the circumstances to mitigate the loss, including loss of profit, resulting from the breach. ‘The standard for the reasonableness criterion is that of prudent businessperson in the position of the party claiming damages’. Failure to mitigate the loss entitles the party in breach to claim a reduction in the damages in the amount by which the loss should have been mitigated. Mitigation of loss is based on principle of good faith and fair dealing – the party should put its reasonable efforts to reduce the loss arising from the breach of the contract.

According to the DCFR, similarly to the CISG, the loss for which damages are recoverable includes future loss which is reasonably likely to occur. Paragraph (3) of Article III. – 3:701 DCFR details that the loss encompasses both economic and non-economic loss. Contrary to the CISG which entitles the aggrieved party to damages notwithstanding the excusableness of non-performance (save from the cases set forth by Article 79 CISG), the DCFR limits the cases of damages that the creditor is entitled to only for the non-excused debtor’s non-performance. Further, as in the CISG, Article III. – 3.703 DCFR limits the loss which the debtor is liable for with the one which the debtor foresaw or could reasonably be expected to have foreseen at the time when the obligation was incurred as a likely result of the non-performance and makes this provision even clearer by making reservation to the cases of intentional, reckless or grossly negligent non-performance. As the Comments on the discussed Article note, ‘Cases of intentional reckless or grossly negligent non-performance are often not expressly excluded from the rule (as it is in the Article 74 CISG – aut.) (...), but in practice the courts may well reach this result (...).’

The DCFR acknowledges mitigation as well. The reasoning for mitigation is explained in the Comments of the Article III. – 3:705 DCFR: ‘Even where the creditor has not contributed either to non-performance or to its effects, the creditor cannot recover loss which would have been avoided if the creditor had taken reasonable steps to do so’. Expenses which incur when mitigating loss, should be compensated by the debtor. Further provisions of the DCFR basically repeat Articles 75-76 CISG therefore will not be discussed in more detail.

The rules on damages of the Civil Code acknowledge the actual damages and lost profit as the other two legal sources. Reasonable costs to prevent or mitigate damage, as well as reasonable costs incurred in assessing civil liability and damage and reasonable costs incurred in the process of recovering damages within extrajudicial procedure shall also comprise damages in addition to the direct damages and the incomes of which a creditor has been deprived.

7. Interest

All three legal instruments agree that without prejudice to any claim for damages, if a party fails to pay any amount in arrears, the other party is entitled to interest on it.

The rate of interest usually corresponds to the average commercial bank short-term lending rate. Most national laws and international conventions establish the rate of an interest, but this question

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213 Huber, Mullis (n 25) 290
214 Article III. – 3:701 Paragraph (2) DCFR
215 See page 31 of the present LLM Paper
216 von Bar (n 8) 929
217 Article III. – 3:705 DCFR
218 von Bar (n 8) 935
220 Articles 6.249- 6.251 CC
221 Article 78 CISG, Article III. – 3:708 DCFR, Articles 6.37 and 6.210 CC
remains unregulated in the CISG. Several solutions have been proposed for the gap-filling of this issue:

Amongst others, the following solutions have been suggested (with or without reference to the general principles in the sense of Art. 7(2) CISG): the interest rate in the creditor’s state, the interest rate in the debtor’s state, an internationally accepted interest rate such as the LIBOR (London Interbank Offered Rate) or the interest rate of the European Central bank; the interest rate of the lex fori; the (complicated) rule of the UNIDROIT Principles (Art. 7.4.9).222

The other two legal sources discussed meanwhile establish the concrete interest rates:

1) Article III. – 3:710 DCFR stipulates that unless a higher interest rate is applicable, the interest rate for delayed payment is the interest rate applied by the European Central Bank to its most recent main refinancing operation carried out before the first calendar day of the half-year in question (‘the reference rate’), plus seven percentage points.

2) The Civil Code223 provides for:
   a. Where a debtor fails to meet his monetary obligation when it falls due, he shall be bound to pay an interest at the rate of five percent per annum upon the sum of money subject to the non-performed obligation unless any other rate of interest has been established by the law or contract.
   b. Where both parties are businessmen or private legal persons, the interest at the rate of six percent per annum shall be payable for a delay in payment unless any other rate of interest has been established by the law or contract.

However, due to changes in capital markets, the rates established in Article 6.210 CC in practice mostly applies to the procedural interest (calculated from the moment of lodging the action until the final and full execution of the court order) and the interest in commercial transactions are often defined in different rate. After adoption of The Law on Prevention of Late Payment in Commercial Transactions,224 the parties started to refer to its provisions because of the higher interest rate established therein. In each case should the parties set too high interest rate, the court has a right to reduce it down to the rate meeting the criteria of reasonableness if a dispute regarding the interest rate occurs.

* * *

As it may be observed after discussing remedies for non-performance of the parties to the contract on sales of goods, the DCFR and the Civil Code in most cases follow the remedial scheme established by the CISG. However, the CISG leaves quite a few issues unregulated this way leaving the parties in the state of lack of legal certainty. The parties have to thoroughly look to the provisions of private international law to make sure which law will be applicable to those unregulated issues and whether or not such rules should be changed by the contractual agreements regulating matters concerned.

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222 Huber, Mullis (n 25) 359
223 Article 6.210 CC
CONCLUSIONS

The similarities in regulation of obligations of the parties to the contracts on sales of goods and remedies available to them in case of breach of the other party’s obligations were observed and just a few differences could have been highlighted. As it was felicitously noted by the author Stefano Troiano, the parallelism between the CISG and the DCFR (and the Civil Code as well) pronounced in the obligations part seems to be less intense as far as the area of remedies is concerned. The assumption that the CISG is not the most advantageous legal source when compared to the DCFR and the Civil Code was hypothesised, however such hypothesis has both verifying and denying elements.

As regarding the denying elements, it cannot be questioned that the Convention is widely used throughout the world and its success and impact to the international trade cannot be understated. Embodying solutions of the rules from the different legal systems and availability of the Convention in six official languages and unofficial translations into majority of languages of the world also enhances its attractiveness.

As to the verification of the hypothesis points, notwithstanding the similarities between all three legal instruments discussed, some noteworthy differences in regulation of the parties’ obligations and the remedies available to them were shown:

- while the CISG (and, as a matter of fact, the DCFR) differentiates between the bases of the third party’s rights and claims (third party’s rights and claims in general and the ones arising from intellectual or industrial property), the Civil Code establishes the general regime and provides for a rule that the goods should be free from any rights and claims of the third parties;
- when the time of delivery is concerned, the CISG relies upon reasonableness while the other two legal sources discussed are more precise and establish rules in determining the delivery time or even set forth the exact period for performance of an obligation of delivery;
- time when the duty to discover the non-conformity of goods arises and allocation of the risks related therewith, established in all three legal sources concerned differ: the CISG and the DCFR link it to the delivery of goods and the Civil Code relates it with the transfer of ownership into goods;
- all three legal instruments give different guidelines that should be followed in case when the price is not fixed in the contract;
- notion of fundamental breach found in the CISG somewhat differs from the notion of fundamental non-performance provided for by the DCFR and the notion of essential violation established in the Civil Code.

Secondly, it was constantly held throughout the LLM paper that the advantageousness of one or another legal source discussed is mostly related to the legal certainty which its provisions provide to the contracting parties. Some examples of the lack of legal certainty of the CISG:

- matters of passing of title into the goods are not governed by the Convention, therefore the fact of transfer of ownership of the goods shall be established according to the law applicable determined under the rules of the private international law;
- neither the currency of payment nor the interest rate is set by the CISG and should be decided according to the gap-filling rules established in Article 7(2) of the Convention;
- the applicability of the remedy of specific performance under the CISG is connected to the rules of national law;
- the DCFR and the Civil Code establish more detailed rules on defining the term of notice on termination (the Civil Code even establishes the concrete period of thirty days of notice which should be given prior to the dissolution of the contract, unless the contract provides for
otherwise) whereas the CISG sets forth a rather vague criterion of reasonableness applicable to the notice on termination.

Even though the CISG is considered to be a predecessor of the Civil Code and the DCFR, the latter two are legal acts of much wider scope of regulation and often embody the more detailed regulation, especially of those issues that are excluded from the scope of the Convention. Such occasions, where the important aspects of transaction are excluded from regulation of CISG, leave the parties with a low level of legal certainty and situations may arise when the national law offers a solution contrary to the primary intentions that the parties have had when concluding an agreement. For the above reasons it was repeatedly stated that the parties should consciously and explicitly establish all the matters that they consider the most important and ‘sensitive’ to their contractual relationships directly into the contract this way making all their expectations equal to the law that they are bound by.
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* This table is just for information purposes. An entry in the table indicates an article of the respective legal source which addresses the relevant articles of same legal issue in the other two legal sources concerned. The table is not necessarily comprehensive and only reflects the linkage of the respective provisions of all three legal sources limited to the scope as discussed in the LLM Paper.
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<td>Article 6.249</td>
<td>Article III. – 3:701</td>
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<td>Article III. – 3:708</td>
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<td>Article 6.210</td>
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<td>Article 81</td>
<td>Article 6.221 Part 3</td>
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<td>Article 6.222</td>
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<td>Article III. – 3:511</td>
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</table>

* This table is just for information purposes. An entry in the table indicates an article of the respective legal source which addresses the relevant articles of same legal issue in the other two legal sources concerned. The table is not necessarily comprehensive and only reflects the linkage of the respective provisions of all three legal sources limited to the scope as discussed in the LLM Paper.
3. The Civil Code of the Republic of Lithuania (Official Gazette (Valstybės žinios), 2000, No. 74-2262)
4. The Law on Prevention of Late Payment in Commercial Transactions (Official Gazette (Valstybės žinios), 2003, No. 123-5571)
10. Ferrari F (ed), The CISG and its impact on national legal systems (Sellier 2008)