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The Impact of Uniform Law on National Law: Limits and Possibilities – CISG and Its Incidence in Dutch Law

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1. Introduction

Although uniform law and national law appear to be separate systems of law, they are also intertwined. Uniform law will generally take precedence over national law. Therefore, it is important to appreciate the exact scope of application of uniform law. If only national law is applicable, one may wonder whether the application of such national law may be influenced by the relevant provisions of uniform law. It has to be assumed that a national legislature, when drafting new laws, will search for inspiration from the provisions of uniform law. The question arises whether this has occurred in The Netherlands. These questions will be discussed in the following contribution with regard to national sales law in The Netherlands and the uniform law in the UN Convention on Contracts for the International Sale of Goods (hereafter: the CISG).

Even though the scope of application of the CISG differs from that of the Dutch Civil Code, the two instruments are also rather similar. As will be illustrated, the CISG has had an important influence on the development of the law of obligations in The Netherlands. It is difficult to underestimate the influence of the CISG on national sales law. The incidence of the CISG on national law appears in different ways. It would be beyond the scope of this contribution to illustrate all aspects in which the CISG has influenced contract law in The Netherlands. Therefore, a number of examples will be provided to show the extent of the influence that this convention has had, and still has, for contract law in The Netherlands. It is not the purpose of this paper to provide an overview of the sales law in The Netherlands. For the main part, this contribution searches for the influence of the CISG and for resemblances and similarities between national sales law and the CISG.

In the following, the influence of the CISG in general will first be discussed. First of all, the CISG as such has influenced, albeit indirectly, the newly developed Dutch Civil Code (Section 2). Secondly, an overview of the impact of the CISG in The Netherlands would be incomplete without referring to the influence of the CISG on international law instruments

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(Section 3). Thirdly, the influence of the CISG will be illustrated with respect to the interpretation of provisions of the Dutch Civil Code (Section 4). The Dutch approach towards the CISG will also be shortly addressed (Section 5).

2. The Influence of the CISG on the Dutch Civil Code

In order to provide a complete picture of the incidence of the CISG in The Netherlands, it is necessary to illustrate the history of the CISG. The codification of uniform private law started in 1964. Under the auspices of the UNIDROIT Institute for the Unification of Private Law, two conventions were drafted containing uniform law for the international sale of goods. These are the Hague Sales Law Conventions: the Convention relating to a Uniform Law on the International Sale of Goods (hereafter: ULIS) and the Convention relating to a Uniform Law on the Formation of such contracts (hereafter: ULF). Both conventions came into force in 1964. They were, however, never very successful; only nine states ratified these conventions.² Shortly thereafter, UNICTRAL took the initiative to draft a new convention for contracts for the international sale of goods. This new convention, the CISG, was drafted on the basis of ULIS and ULF.

ULIS and ULF have also had a decisive influence on the development of the law of obligations in The Netherlands. In 1992, a new Civil Code – including sales law – was enacted in The Netherlands, the *Burgerlijk Wetboek* (hereafter: BW). Before that time, The Netherlands had already ratified the CISG. At the exact same time of the enactment of the new Civil Code, the CISG came into force in The Netherlands.³ This new Civil Code was developed on the basis of a Benelux initiative.⁴ In the middle of the previous century, efforts were made to harmonise private law in the three Benelux countries (Belgium, Luxembourg and The Netherlands). These efforts resulted in the drafting of a Uniform Law. While preparing this Uniform Law, the draftsmen turned to the international instruments that were in force at the time: ULIS and ULF.⁵ The Benelux Draft follows ULIS as much as possible.⁶ Since the new Dutch Civil Code is based on this Benelux Draft, the provisions concerning sales law in this Civil Code also clearly resemble the provisions of ULIS; the Benelux Draft and the BW have both adopted the rules in ULIS albeit in a more concise and clearer wording.

As Bertrams⁷ has acknowledged the significance of ULF and ULIS can be best demonstrated if one realises that between ULIS and the provisions concerning sales law in the Dutch Civil Code, there are only two material differences. First of all, the concept of ‘fundamental breach’ in ULIS as a requirement for avoidance of the contract, that is also contained in Arts. 25 and 49 CISG, has not been adopted in the BW. Secondly, Art. 19(1) ULIS providing that delivery consists in the handing over of goods which are in conformity with the contract, was not

² R.I.V.F. Bertrams and S.A. Kruisinga, *Overeenkomsten in het internationaal privaatrecht en het Weens Koopverdrag*, Deventer: Kluwer 2007, pp. 197-198.

³ *Trb. (Tractatenblad, Treaty Series)* 1981, 184; *Trb.* 1986, 61.

⁴ M.C. Bianca and S. Grundmann (eds.), *EU Sales Directive. Commentary*, Antwerp: Intersentia 2002, p. 21; E.H. Hondius, *Specific Contracts*, in: J. Chorus, P.H.M. Gerver and E.H. Hondius (eds.), *Introduction to Dutch law*, New York: Kluwer Law International 2006, p. 227; Asser-Hijma 5-I, Deventer: Kluwer 2007, pp. 50-51.

⁵ M.C. Bianca and S. Grundmann (eds.), *EU Sales Directive. Commentary*, Antwerp: Intersentia 2002, p. 88.

⁶ R.I.V.F. Bertrams, *Enige aspecten van het Weens Koopverdrag, Preadvies voor de Vereniging voor Burgerlijk Recht*, Lelystad: Koninklijke Vermande 1995, p. 2.

⁷ R.I.V.F. Bertrams, *Enige aspecten van het Weens Koopverdrag, Preadvies voor de Vereniging voor Burgerlijk Recht*, Lelystad: Koninklijke Vermande 1995, p. 2.

introduced in the BW. This provision has also not become a part of the CISG, as it is an unfortunate provision, as will be explained in more detail in Section 4.

Even though the Benelux draft was later abandoned, it has thus served as the basis for the new sales law in The Netherlands. In general, one can say that the new sales law in The Netherlands, which entered into force in 1992, shows many similarities to the ULF and ULIS. Compared to ULIS, the direct influence of the CISG on the provisions concerning sales law in the Dutch Civil Code has been limited. One of the characteristics of this new Civil Code is the introduction of a general part on private law. There are, nowadays, eight different parts to the Civil Code, which can be found in the different 'Books' of the Civil Code. The provisions that are relevant for sales law can be found in the Civil Code in Book 3, which concerns private law in general, in Book 6 that governs the law of obligations in general and in Book 7 on specific contracts.⁸ One of the specific contracts governed by Book 7 of the Civil Code is the sales contract, which is provided for in Title 1 of Book 7 BW. The provisions in the Books 3 and 6 of the Civil Code are also applicable to sales contracts, provided that the provisions in Book 7 BW do not deviate thereof. This is called the 'layered structure' (*gelaagde structuur*) of the Dutch Civil Code. According to Art. 7:6 BW, most provisions in Title 1 of Book 7 BW are mandatory for consumer sales contracts. For commercial sales contracts, most provisions are non-mandatory.⁹

3. The Influence of the CISG on International Law Instruments

The influence of the CISG is also apparent in international law instruments that are relevant for the development of the law of obligations, including sales law, in The Netherlands. For example, the CISG has clearly served as a source of inspiration for the development of the Consumer Sales Directive and the Draft Common Frame of Reference. Because the implementation of the Consumer Sales Directive gave rise to some important changes in the Dutch Civil Code, this research will focus on this Directive and will not discuss whether the CISG has had any influence on other EU Directives.¹⁰ With respect to the Consumer Sales Directive, this contribution will illustrate that this Directive has also influenced the development of the Dutch Civil Code. Whether the Draft Common Frame of Reference will become relevant for The Netherlands is hard to predict at this stage.

3.1 The EU Directive on Consumer Sales

In 1999, the European Parliament and the Council agreed on the Directive on certain aspects of the sale of consumer goods and associated guarantees (hereafter: the Consumer Sales Directive or CSD).¹¹ Implementation of this Directive changed the terms which are to be implied into contracts of sale concluded between a professional seller and a consumer buyer

⁸ In fact, not all parts of the Civil Code entered into force in 1992; Books 3, 5 and 6, as well as parts of Book 7 entered into force in 1992. Compare also: E.H. Hondius, Classification, in: J. Chorus (ed.), Introduction to Dutch law, New York: Kluwer Law International, pp. 69-71.

⁹ For some provisions, there is, however, some debate about the (non-)mandatory nature of these provisions.

¹⁰ Compare on the influence of the CISG on the EU Package Tour Directive and the EU Directive on Cross-Border Transfers: U. Magnus, The CISG's Impact on European Legislation, in: The 1980 Uniform Sales law, Old Issues Revisited in the Light of Recent Experiences, ed. F. Ferrari, Sellier 2003, pp. 142-143. Compare on the EU Late Payment Directive: M. Pilar Perales Viscasillas, Late Payment Directive 200/35 and the CISG, 19 Pace International Law Review (Spring 2007/1).

¹¹ Directive of the European Parliament and of the Council of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees (No. 1999/44/EC), OJ L 171/12.

and have also made some changes in terms of the remedies to which buyers are entitled. The EU Member States had to implement this Directive into their national legislations before 1st January 2002.¹² In The Netherlands, the Consumer Sales Directive has been implemented in the provisions of Title 1 of Book 7 of the BW. Even though the Directive only governs consumer sales contracts concerning moveable goods, most of the provisions in the BW in which the Consumer Sales Directive has been implemented also govern commercial sales contracts in The Netherlands, i.e. the whole of sales law.¹³ This will be further elaborated on in Section 4. The Consumer Sales Directive does not, however, govern all issues concerning sales law: it only regulates a limited number of topics.

Although in contrast to the CISG the Consumer Sales Directive is drafted for consumer sales, the Consumer Sales Directive is largely based on the CISG.¹⁴ In the words of Magnus, the Consumer Sales Directive ‘follows more or less completely the structure of the CISG’ and it is ‘the most prominent example of the influence of the CISG on European legislation’.¹⁵ This Directive has adopted parts of the general structure of the CISG and some of its definitions and provisions.¹⁶ The deviations are limited to very few issues. Magnus¹⁷ goes as far as to state that the Directive and its transposition into national law should be interpreted in the light of the underlying CISG provision: to the extent that the Directive relies on the CISG, the (uniform) interpretation of the CISG by national courts should also be taken into account when provisions of the Directive and their understanding are at stake. It would seem that this is also true for the other international law instruments that are (partly) based on the CISG, such as the UNIDROIT Principles for International Commercial Contracts, the Principles of European Contract Law and the Draft Common Frame of Reference for European contract law. These instruments will be discussed hereafter.

3.2 The UNIDROIT Principles for International Commercial Contracts and the Principles of European Contract Law

As of 1980, when the CISG was drafted, a number of initiatives have led to the creation of international law instruments, such as the Principles of European Contract Law (hereafter: PECL) and the UNIDROIT Principles for International Commercial Contracts (hereafter: the UNIDROIT Principles). These Principles contain non-binding general rules for all contracts, including sale of goods contracts. Both the basic structure of the UNIDROIT Principles and the PECL, which are intended as models for an international or European law of contract, are strongly influenced by the CISG.¹⁸ Most provisions of the PECL and the UNIDROIT

¹² Article 11 of the Consumer Sales Directive.

¹³ M.C. Bianca and S. Grundmann (eds.), *EU Sales Directive. Commentary*, Antwerp: Intersentia 2002, p. 29.

¹⁴ S.A. Kruisinga, (Non-)conformity in the 1980 Convention on Contracts for the International Sale of Goods: a uniform concept?, Antwerp: Intersentia 2004, p. 10; M.C. Bianca and S. Grundmann (eds.), *EU Sales Directive. Commentary*, Antwerp: Intersentia 2002, p. 28.

¹⁵ U. Magnus, *The CISG's Impact on European Legislation*, in: *The 1980 Uniform Sales law, Old Issues Revisited in the Light of Recent Experiences*, ed. F. Ferrari, Sellier 2003, pp. 132, 134.

¹⁶ M.C. Bianca and S. Grundmann (eds.), *EU Sales Directive. Commentary*, Antwerp: Intersentia 2002, p. 17.

¹⁷ U. Magnus, *The CISG's Impact on European Legislation*, in: *The 1980 Uniform Sales law, Old Issues Revisited in the Light of Recent Experiences*, ed. F. Ferrari, Sellier 2003, p. 135.

¹⁸ P. Schlechtriem and I. Schwenzer (eds.), *Commentary on the UN Convention on the International Sale of Goods*, Oxford: Oxford University Press 2005, Introduction, p. 10; B. Zeller, *CISG and the Unification of International Trade Law*, New York: Routledge Cavendish 2007, p. 95; F. De Ly, *Sources of International Sales Law: An Eclectic Model*, 25 *Journal of Law and Commerce*, Issue no. 1 (Fall 2005/Spring 2006), 1-12.

Principles which deal with subjects also covered by the CISG are in full accordance with the respective CISG provisions.¹⁹

3.3 The Draft Common Frame of Reference for European Contract Law

In a number of resolutions, the European Parliament has stated that harmonisation of private law is essential for the internal market.²⁰ In its Communication of 11th July 2001, the EU Commission initiated a debate on possible problems resulting from divergences in national contract law, and secondly on options for the future of contract law in the EU. The Commission considered whether there was a need for any harmonisation in the area of contract law and started to consider the desirability and the feasibility of an EU instrument on contract law, in order to achieve a more coherent European contract law.²¹ At the time, the Commission explicitly referred to the CISG as a source of inspiration.

The EU Commission has requested a group of researchers to establish a Draft Common Frame of Reference for European contract law (hereafter: DCFR). This was submitted to the European Commission at the end of 2007 and was published in February 2008.²² It contains a set of definitions, general principles and model rules in the field of contract law. The European Commission will identify which parts of the DCFR will be integrated in a forthcoming document, for example in a White Paper on a Common Frame of Reference.²³ So far, the legal effect of the Common Frame of Reference may range from a non-binding legislative document to the foundation for an optional instrument in European contract law.

This DCFR may thus form the basis for further developments in the area of European contract law. It is clear that the CISG has had an important influence on the development of the DCFR. In the following, the influence of the CISG on the DCFR will be illustrated. The structure of the DCFR is as follows. The first Book contains the general provisions; the second Book governs contracts and other juridical acts. The third Book contains provisions for obligations and corresponding rights. Book IV, Part A deals with Sales, as part of the Book on Specific Contracts, which also deals with Lease, Services and other topics. The topic of sales is, at this stage, a very prominent issue in the DCFR and the CISG has proven inspirational to the drafters of the DCFR. The parts of the DCFR on sales were mostly based on the Principles of European Law on Sales (hereafter: PEELS).²⁴ The PEELS were drafted by a working team within the framework of the Study Group on a European Civil Code. This is a

¹⁹ U. Magnus, *The CISG's Impact on European Legislation*, in: *The 1980 Uniform Sales Law, Old Issues Revisited in the Light of Recent Experiences*, ed. F. Ferrari, Sellier 2003, p. 143.

²⁰ Compare for example, in the European Parliament resolution on the approximation of the civil and commercial law of the Member States of 15 November 2001, COM(2001)398. Compare also E.H. Hondius, *Gemeenschappelijk referentiekader (common frame of reference): kiem van een Europees BW?*, *Tijdschrift voor Consumentenrecht en handelspraktijken* 2008/4, pp. 134-143.

²¹ Communication from the Commission to the Council and the European Parliament on European contract law, 11 July 2001, COM(2001) 398 final.

²² *Principles, Definitions and Model Rules of European Private Law. Draft Common Frame of Reference (DCFR). Interim Outline Edition*, Munich: Sellier European Law Publishers 2008. The submission of the DCFR to the European Commission led to a number of newspaper articles in the Netherlands; some publications were written in response to them: compare A.S. Hartkamp, M.W. Hesselink, E.H. Hondius and J.M. Smits, *Een Europees BW?*, *NJB* 2007/39, pp. 2482-2488.

²³ European Parliament resolution of 3 September 2008 on the common frame of reference for European contract law.

²⁴ E. Hondius et al. (eds.), *Principles of European Law. Study Group on a European Civil Code. Sales*, Munich: Sellier European Law Publishers 2008, pp. 102-103; B. van Zelst, *The Politics of European Sales Law*, diss. UvA 2008, p. 188.

network of academics from across the EU that conducts comparative law research in private law in the various legal jurisdictions of the Member States. One of the aims of this Study Group is to draft a codified set of Principles of European Law for the law of obligations.²⁵ In drafting the PEELS, “(t)he CISG served as the starting point for drafting specific rules on sales because of its wide acceptance and its influence on various national sales laws and on the Consumer Sales Directive itself”.²⁶

In respect of the conflicts of law rules, the way has been paved for the enactment of an optional instrument for contract law in the European Union. The Rome I Regulation,²⁷ which will replace the EC Convention on the Law Applicable to Contractual Obligations, provides in preamble 14 that should the Community adopt rules of substantive contract law, such an instrument may provide that the parties may choose to apply those rules. Lagarde²⁸ also believes that under the Rome I Regulation the incorporation of the DCFR or an optional instrument into a contract will become possible.

4. The Influence of the CISG – Some Examples

To illustrate the influence of the CISG, some examples will be given in order to show in what respects the CISG has had – and will have – influence on the development of the Dutch law of obligations. In some cases that were decided on the basis of the Dutch Civil Code, a reference has been made to particular provisions in the CISG. These references were used to show that the Civil Code has to be interpreted in a particular way, which was in accordance with the CISG. The CISG is then used to provide an additional argument for the way the court has interpreted the Dutch civil law. Moreover, with respect to a number of provisions of the Dutch Civil Code, some scholars have argued that these provisions should be interpreted in accordance with the CISG.

4.1 Party Autonomy

Both the BW and the CISG allow the contracting parties to a sales contract a lot of freedom. Party autonomy is the starting point. In both systems, the parties to a commercial sales contract may derogate from the legal provisions if they wish to do so. Art. 3 ULIS and Art. 6 CISG expressly provide so and, indirectly, Art. 7:6 BW does the same. This latter provision states that in the case of a consumer purchase, the provisions concerning sales contracts may not be derogated from to the disadvantage of the consumer and the rights and remedies that are awarded to the consumer buyer may not be limited or excluded. This same principle of party autonomy can also be found in Art. II. – 1:102 DCFR.

²⁵ V. Heutger and C. Jeloschek, *Towards Principles of European Sales Law*, in: A. Hartkamp e.a. (ed.), *Towards a European Civil Code*, Kluwer Law International 2004, p. 533.

²⁶ E. Hondius et al. (eds.), *Principles of European Law. Study Group on a European Civil Code. Sales*, Munich: Sellier European Law Publishers 2008, p. 104. Compare also: V. Heutger and C. Jeloschek, *Towards Principles of European Sales Law*, in: A. Hartkamp e.a. (ed.), *Towards a European Civil Code*, Kluwer Law International 2004, p. 545; E. Hondius, *CISG and a European Civil Code, Some Reflexions*, *Rabels Zeitschrift für ausländisches und internationales Privatrecht* 2007/1, p. 107. Compare, for example, the similarity between Art. 9 CISG and Art. II. – 1:104 DCFR.

²⁷ Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations, OJ L 177/6. This Regulation will apply from 17 December 2009 (arts. 28 and 29 of the Rome I Regulation).

²⁸ Reference to this view was made by A.V. Lauber, *Conference ‘CFR and Existing EC Contract Law’*, Münster, 10-11 December 2007, *ERPL* 2008/2, p. 379.

4.2 The Definition of a Contract of Sale

Both the CISG and the Consumer Sales Directive deal with all sales and most work contracts related to goods. Work contracts related to the delivery of goods are also governed by the Directive and are treated like sales contracts. Art. 1(4) of the Consumer Sales Directive states that contracts for the supply of consumer goods to be manufactured or produced shall be deemed contracts of sale in the Consumer Sales Directive. This provision is clearly based on Art. 3(1) CISG which also provides that contracts for the supply of goods to be manufactured or produced are to be considered sales contracts, unless the party who orders the goods undertakes to supply a substantial part of the materials necessary for such manufacture or production. The CSD provision has been implemented in the new Art. 7:5(4) BW, providing that if the goods to be delivered still have to be produced such contract will in principle also be regarded as a consumer sales contract.²⁹

4.3 Interpretation (Art. 8 CISG)

Interpretation of contracts is governed by Art. 8 CISG.³⁰ The Dutch Civil Code does not contain a similar provision on interpretation. The criteria to be used in Dutch law can be found in the case law by the *Hoge Raad* (Dutch Supreme Court).³¹ In The Netherlands, the *Hoge Raad* is situated at the top of the judicial hierarchy and it may only decide on questions of law. Important decisions by the *Hoge Raad* are published in the journal *Nederlandse Jurisprudentie (NJ)*. Some of these decisions are annotated. The *Procureur-Generaal* at the *Hoge Raad* has an advisory role in cases which are brought before the *Hoge Raad*. The *Procureur-Generaal* at the *Hoge Raad* is an independent officer, who is not subject to the supervision of the Minister of Justice. The *Procureur-Generaal* or his deputies the *Advocaten-Generaal* (Advocates General) deliver an advisory opinion (*Conclusie*) in all civil cases decided by the *Hoge Raad*. These advisory opinions play an important role in the development of the case law by the *Hoge Raad*.³²

In illustrating the influence of the CISG on the development of Dutch law, reference will be made to two such advisory opinions, in which a reference was made to Art. 8(3) CISG, in order to find the correct rules for interpretation of contracts according to Dutch law. Art. 8(3) CISG provides that in determining the intent of a party, or the understanding a reasonable person would have had, due consideration is to be given to all relevant circumstances of the case including the negotiations, any practices which the parties have established between themselves, usages and any subsequent conduct of the parties.

In a case that was decided by the *Hoge Raad* in 1988 the Advocate-General, Mr. Hartkamp, explicitly referred to the CISG. He stated in his advisory opinion that in the interpretation of declarations and conduct of a party according to Dutch law, the intent of that party needs to be determined and the understanding that a reasonable person would have had of the declarations and the conduct or behaviour of that party. For the interpretation of declarations and conduct

²⁹ Aanpassing van Boek 7 van het Burgerlijk Wetboek aan de richtlijn betreffende bepaalde aspecten van de verkoop van en de garanties voor consumptiegoederen, *Kamerstukken II* 2000/01, 27 809, no. 3, pp. 4, 13 (*Memorie van Toelichting*, MvT).

³⁰ P. Schlechtriem and I. Schwenzer (eds.), *Commentary on the UN Convention on the International Sale of Goods*, Oxford: Oxford University Press 2005, Art. 8, no. 3, p. 113.

³¹ Two very important decisions are: HR 13 March 1981, NJ 1981, 635 (Haviltex) and HR 20 February 2004, NJ 2005, 493 (DSM/Fox).

³² A.F.M. Brenninkmeijer, *Judicial Organization*, in: J. Chorus (ed.), *Introduction to Dutch law*, New York: Kluwer Law International 2006, pp. 53-61.

of a party the later conduct of the contracting parties may also be taken into account. He confirmed this by referring to Art. 8(3) CISG. The Dutch Supreme Court followed the advisory opinion of the Advocate-General without, however, the express reference to the CISG.³³

The same occurred in a case decided in 2002.³⁴ The case was as follows: a letter of intent preceded the conclusion of two contracts. A dispute arose about the interpretation of these contracts. Both contracts provided that they replaced any earlier made agreements between the parties. The Advocate-General, Mr. Keus, stated in his advisory opinion that this does not preclude the letter of intent from playing a role in the interpretation of both contracts. While interpreting a contract, one has to take all the circumstances of the case into account, including the negotiations that preceded the conclusion of the contract. The Advocate-General found an additional argument for this position in the application of Art. 8(3) CISG.

4.4 Conclusion of the Contract

Both the CISG and the BW provide that, in principle, a contract comes into existence through offer and acceptance (Art. 23 CISG and Art. 6:217 BW). Once a valid offer has been correctly accepted by the offeree, a contract has been concluded. The provisions in the BW and the CISG are very similar in this respect. Part II of the CISG, however, contains some provisions that are more specific than those in the Dutch Civil Code.³⁵ For example, the Dutch Civil Code does not define the concepts 'offer' and 'acceptance', whereas Arts. 14 and 18 CISG clearly define what amounts to an offer or an acceptance.³⁶ The District Court (*rechtbank*) of Utrecht³⁷ applied the CISG in the interpretation of Dutch law. As Book 6 of the Dutch Civil Code does not contain any definition of an offer, the District Court provided a definition thereof analogous to the provision in Art. 14 CISG. The court held that an offer is a proposal for concluding a contract addressed to one or more specific persons.

Art. 6:225(1) BW contains a similar provision as that in Art. 19(1) CISG. In principle, both provisions state that if a purported acceptance differs from the offer, this will not amount to an acceptance, but will constitute a counter-offer.³⁸ Art. 6:225(2) BW has adopted the same standard as Art. 7(2) ULF. Both provisions – and also the later Art. 19(2) CISG – no longer require that the acceptance complies exactly with the offer.

What has not been adopted is the criterion in Art. 19(2) CISG that the different terms in the acceptance may not materially alter the offer. This was because Book 6 of the Dutch Civil Code contains general provisions for all contracts, including other contracts than international sales contracts. Therefore, art. 6:225(2) BW will only apply if the differences concern points of minor importance. It may be questioned, however, whether this is really a different approach compared to ULF and CISG. It has been argued in the literature that, in fact, these criteria are not in any way different, because it is hard to assume that there is a difference

³³ Hoge Raad 20 May 1988, NJ 1988, 781. Compare also the advisory opinion by Advocate-General mr. Bakels in HR 26 October 2001, LJN: AB2791.

³⁴ HR 9 August 2002, NJ 2002, 472.

³⁵ R.I.V.F. Bertrams, *Enige aspecten van het Weens Koopverdrag*, Preadvies voor de Vereniging voor Burgerlijk Recht, Lelystad: Koninklijke Vermande 1995, p. 7.

³⁶ Art. II – 4:204 DCFR contains a provision that is almost identical to art. 18(1) CISG.

³⁷ Rb. Utrecht 1 August 2001, NJ 2002, 157.

³⁸ Art. II – 4:208 DCFR is very similar to art. 19 CISG.

between terms which concern minor points and clauses that do not materially alter the terms of the offer.³⁹

4.5 Breach of Contract

The starting point in the CISG, the Consumer Sales Directive and Title 1 of Book 7 BW is the objective liability of the seller for delivery of defective goods. Such liability does, in principle, not depend on any negligent behaviour by the seller. Art. 3(1) CSD provides that the seller shall be liable for any lack of conformity which exists at the time the goods were delivered. This formulation corresponds almost literally with Art. 36(1) CISG and Art. IV.A. – 2:308(1) DCFR. Similarly, the remedies that are available for the buyer in Arts. 7:21 and 7:22 BW – to claim repair, delivery of substitute goods, avoidance of the contract or reduction of the purchase price – do not depend on any negligent behaviour by the seller.

One of the provisions that has not been adopted from ULIS in the Dutch Civil Code is Art. 19 ULIS, which provides that delivery consists in the handing over of goods which are in conformity with the contract. This provision as such has also not become part of the CISG, which distinguishes between the obligation of the seller to deliver the goods (Art. 30 CISG) and the duty to ensure that the goods are in conformity with the contract (Art. 35 CISG). This same distinction has also been made in Dutch law, in Arts. 7:9 and 7:17 BW.

4.6 (Non-)conformity

In the new rules on the sale of goods in the Dutch Civil Code, the notion of conformity replaced the regulation of hidden defects. This part of the Civil Code has been modelled after the aforementioned Benelux draft for a Uniform Law.⁴⁰ The concept of (non-)conformity in Art. 35 CISG corresponds almost literally with the requirements in Art. 7:17 BW. This provision was clearly – indirectly – inspired by the provisions in ULIS.⁴¹ Both provide that the goods need to be in conformity with the contract. In Art. 35(2)(a) and (b) CISG it is provided that the goods have to be fit for their normal purpose and for any particular purpose that was made known to the seller. The goods will not have to be fit for such particular purpose if the buyer did not rely, or if it was unreasonable for him to rely on the seller's skill and judgment.

These criteria have been brought together in Art. 7:17(2) BW, which provides that the goods are not in conformity with the contract if they do not have the characteristics that the buyer may expect them to have, having regard to the nature of the goods and any statements that were made by the seller; the buyer may expect the goods to have the characteristics that are needed for ordinary use and the presence of which he did not need to doubt; the goods also need to have the characteristics that are necessary for a particular purpose that has been agreed upon in the contract. The requirements of Art. 35(2)(a) and (b) CISG were brought together in the BW requirement concerning “the characteristics that the buyer may expect”. The same used to be true for Art. 35(3) CISG, which provides that the seller is in principle not

³⁹ Compare HR 7 November 1986, NJ 1987, 934 annotator Brunner and H.C.F. Schoordijk, *Het algemene gedeelte van het verbintenissenrecht naar het Nieuw Burgerlijk Wetboek*, Deventer: Kluwer 1979, pp. 488-489.

⁴⁰ M.C. Bianca and S. Grundmann (eds.), *EU Sales Directive. Commentary*, Antwerp: Intersentia 2002, p. 88; E.H. Hondius, *Specific Contracts*, in: J. Chorus, P.H.M. Gerver and E.H. Hondius (eds.), *Introduction to Dutch law*, New York: Kluwer Law International 2006, p. 227. R.I.V.F. Bertrams, *Enige aspecten van het Weens Koopverdrag*, Preadvies voor de Vereniging voor Burgerlijk Recht, Lelystad: Koninklijke Vermande 1995, p. 2.

⁴¹ R.I.V.F. Bertrams, *Enige aspecten van het Weens Koopverdrag*, Preadvies voor de Vereniging voor Burgerlijk Recht, Lelystad: Koninklijke Vermande 1995, p. 2.

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.

According to Art. 2(3) CSD there shall be deemed not to be a lack of conformity if, at the time the contract was concluded, the consumer (buyer) was aware, or could not reasonably be unaware, of the lack of conformity. This part of the provision has its origin in Art. 35(3) CISG. It thus refers to cases where the buyer could not have failed to notice the lack of conformity. It can be said that when the buyer knew or could not have been unaware of the lack of conformity at the time of purchase, there is, strictly speaking, no lack of conformity because the buyer has accepted the goods as they stand.⁴²

In the literature based on the CISG it is stated that an obligation based on facts, of which one “could not have been unaware” does not impose a duty on the buyer to investigate. In the words of Honnold:⁴³ “these are the facts that are before the eyes of one who can see”. This expression is used in the CISG to lighten the burden of proving knowledge, which can otherwise only be proved with difficulty. There is little practical difference between the provisions that refer to facts that a party “knows” and provisions that refer to facts of which a party “could not have been unaware”. Which particular lack of conformity ought to have been apparent to the buyer is to be determined by considering the buyer’s position.⁴⁴ In this author’s opinion, this will also apply to the same wording that was used in the Consumer Sales Directive.

Art. 2(3) CSD has been implemented in Art. 7:17(5) BW which provides that the buyer cannot rely on any lack of conformity if, at the time of the conclusion of the contract, he was aware of this lack of conformity or this was reasonably known to him. This latter requirement does also not imply a duty to investigate on the buyer. However, this is meant to prevent the buyer relying on the fact that he was not aware of the defect, even though it would be practically impossible that the buyer failed to notice this defect.⁴⁵ This provision is applicable to all sales contracts in The Netherlands. The scope of application of this provision has thus not been limited to consumer sales contracts.

The introduction of the concept of conformity in the Dutch Civil Code turned out to be very useful when the Consumer Sales Directive prescribed that the EU Member States should introduce the notion of conformity, at least for consumer sales contracts.⁴⁶ Article 2(1) of the Directive provides that the seller must deliver goods which are in conformity with the contract of sale. This is almost identical to both Art. 35(1) CISG and Art. 7:17(1) BW. Art. 2(2)(a) CSD provides that the goods have to be fit for the purposes for which goods of the same type are normally used. This is clearly based on Art. 35(2)(a) CISG, which – indirectly – formed

⁴² For the Directive, this was mentioned in: Explanatory Memorandum to the first Draft, COM (95) 520 final, p12.

⁴³ J.O. Honnold, *Uniform Law for International Sales under the 1980 United Nations Convention*, Kluwer Law International, The Hague: Kluwer Law International 1999, p. 260.

⁴⁴ P. Schlechtriem and I. Schwenzer (eds.), *Commentary on the UN Convention on the International Sale of Goods*, Oxford: Oxford University Press 2005, Art. 35 no. 34, pp. 426-427.

⁴⁵ *Aanpassing van Boek 7 van het Burgerlijk Wetboek aan de richtlijn betreffende bepaalde aspecten van de verkoop van en de garanties voor consumptiegoederen*, *Kamerstukken II* 2000/01, 27 809, no. 3, p. 6, 18 (MvT).

⁴⁶ E. Hondius, *CISG and a European Civil Code, Some Reflexions*, *Rabels Zeitschrift für ausländisches und internationales Privatrecht* 2007/1, p. 103.

the source of inspiration for Art. 7:17(2) BW. The Dutch legislature saw no reason to implement this part of the Directive in the Dutch Civil Code.⁴⁷

In contrast to the CISG, the CSD requires that the goods only need to comply with any particular purpose that the buyer has made known to the seller at the time of concluding the contract and which the seller has accepted (Art. 2(2) CSD). According to Magnus,⁴⁸ this should not be interpreted too strictly. As the Consumer Sales Directive is based on the CISG, he suggests that silence to a disclosed particular purpose will also lead to liability of the seller under Art. 2(2)(b) CSD if a reasonable seller would have objected to that particular purpose. It also does not seem necessary that the seller accepted the particular purpose before or at the time when the contract was concluded; a later one-sided acceptance should also suffice. This provision as such has not been implemented in Dutch sales law. The domestic legislature considered that there was no reason to implement this part of the provision, because Art. 7:17(2) BW already provided that the goods need to have the characteristics that are necessary for a special purpose that has been agreed upon in the contract.⁴⁹ The sale by sample that is governed by Art. 35(2)(c) CISG, has been similarly provided for in Art. 2(2)(a) CSD and Art. 7:17(4) BW. Art. 35 CISG as a whole has almost literally become part of the DCFR.⁵⁰

The second part of Art. 2(3) CSD is based on Art. 3(1) CISG. Art. 2(3) CSD provides that there is no lack of conformity if the presumed defect in the goods has its origin in materials supplied by the consumer. This has been implemented in Art. 7:17(5) BW, which provides that the buyer may not rely on any lack of conformity if this is due to defects in or unsuitability of the materials supplied by the buyer, unless the seller should have warned the buyer about these defects. This provision is applicable to all sales contracts, as the legislature in The Netherlands did not see any reason to limit the scope of application of this provision to consumer sales contracts only.⁵¹

According to Art. 2(5) of the Directive any lack of conformity resulting from the incorrect installation of the consumer goods shall be deemed to be equivalent to a lack of conformity of the goods if installation forms part of the contract of sale and the goods were installed by the seller or under his responsibility. This applies equally if the product, intended to be installed by the consumer, is installed by the consumer and the incorrect installation is due to a shortcoming in the installation instructions. During the discussions this was known as the "IKEA clause".⁵² Art. 2(5) CSD has been implemented in Art. 7:18(3) BW.⁵³ This is very similar to what is applicable in commercial transactions. The CISG does not state anything specifically on installation or installation instructions.

⁴⁷ Aanpassing van Boek 7 van het Burgerlijk Wetboek aan de richtlijn betreffende bepaalde aspecten van de verkoop van en de garanties voor consumptiegoederen, *Kamerstukken II* 2000/01, 27 809, no. 3, p. 5 (MvT).

⁴⁸ U. Magnus, *The CISG's Impact on European Legislation*, in: *The 1980 Uniform Sales Law, Old Issues Revisited in the Light of Recent Experiences*, ed. F. Ferrari, Sellier 2003, p. 137.

⁴⁹ Aanpassing van Boek 7 van het Burgerlijk Wetboek aan de richtlijn betreffende bepaalde aspecten van de verkoop van en de garanties voor consumptiegoederen, *Kamerstukken II* 2000/01, 27 809, no. 3, p. 5 (MvT).

⁵⁰ Compare arts IV.A. – 2:301, 302 and 307 DCFR.

⁵¹ Aanpassing van Boek 7 van het Burgerlijk Wetboek aan de richtlijn betreffende bepaalde aspecten van de verkoop van en de garanties voor consumptiegoederen, *Kamerstukken II* 2000/01, 27 809, no. 3, p. 6 (MvT).

⁵² D. Staudenmayer, *The Directive on the Sale of Consumer Goods and Associated Guarantees – a mile stone in the European consumer and private law*, ERPL 2000, p. 8.

⁵³ Aanpassing van Boek 7 van het Burgerlijk Wetboek aan de richtlijn betreffende bepaalde aspecten van de verkoop van en de garanties voor consumptiegoederen, *Kamerstukken II* 2000/01, 27 809, no. 3, p. 6 (MvT).

A case in which this issue arose was decided by the Arbitration Institute of the Stockholm Chamber of Commerce⁵⁴ on the basis of article 35(2) CISG. In this case an American seller sold a press to a Chinese buyer. During manufacture, the seller substituted a different lock-plate for the lock-plate described in the design documents given to the buyer. The seller shipped the disassembled press from the United States to China and when the buyer reassembled it in China the lock-plate was installed improperly. After a while, the lock-plate broke and the buyer claimed damages. The Arbitration Institute held that the seller was liable, because the tender of the press was not in conformity according to Art. 35(2) CISG, since the seller was aware of the possibility that the substitute lock-plate would probably fail if it was not properly installed and, nonetheless, failed to inform the buyer of the need to install the lock-plate properly.

4.7 Notification and Time Limits

Under the CISG, the buyer loses the right to rely on a lack of conformity of the goods if he does not give notice to the seller, specifying the nature of the lack of conformity, within a reasonable time after he has discovered or ought to have discovered it (Art. 39(1) CISG). Art. 38 CISG determines when the buyer ought to have discovered a defect: the buyer must examine the goods, or cause them to be examined, within as short a period as is practicable in the circumstances. In determining the length of these time periods, all the circumstances of the case are relevant, for example, the kind of remedy the buyer chooses. If he wants to rescind the contract, it would seem to be reasonable for this reasonable period of time to be somewhat shorter than if he were to claim damages. The kind of goods sold is also very relevant: in the case of a sale of perishable goods, this period of time will generally be rather short.⁵⁵

Art. 7:23 (1) BW provides quite similarly that the buyer can not rely on a lack of conformity if he does not give notice thereof to the seller within an appropriate time after he discovered or ought to have discovered the lack of conformity. This provision is clearly based on the provisions in ULIS. The provisions in ULIS on the duty to notify can also be found in Arts. 38-40 CISG, albeit in an improved text and while deleting some unimportant details.⁵⁶ The Dutch Civil Code does not contain an explicit duty to investigate. However, this duty follows, albeit indirectly, from the requirement 'ought to have discovered'.

According to Art. 5(1) of the Consumer Sales Directive the seller can be held liable if the lack of conformity becomes apparent within two years from the delivery of the goods.⁵⁷ This time-limit is not a limitation period as such, but rather a time-limit after which all claims by the buyer will expire. This provision seems to be based on Art. 39(2) CISG, which provides that the buyer loses the right to rely on a lack of conformity of the goods in any event if he does not give the seller notice thereof at the latest within a period of two years from the date on which the goods were actually handed over to the buyer. The Dutch Civil Code, in contrast,

⁵⁴ Arbitration Institute of the Stockholm Chamber of Commerce 5 June 1998, *CLOUT* no. 237.

⁵⁵ Compare for a general overview of the case law on the basis of these provisions the Advisory Council's Opinion No. 2, Examination of the Goods and Notice of Non-Conformity: Articles 38 and 39, by E.E. Bergsten, at www.cisg.law.pace.edu/cisg/CISG-AC-op2.html. Arts. 38, 39 and 40 CISG are almost identical to arts. IV.A. – 4:301, 302 and 304 DCFR.

⁵⁶ A.C. Steenbeek, *Kwartaalbericht Nieuw BW*, p. 122; R.I.V.F. Bertrams, *Enige aspecten van het Weens Koopverdrag*, Preadvies voor de Vereniging voor Burgerlijk Recht, Lelystad: Koninklijke Vermande 1995, p. 2.

⁵⁷ According to art. 7(1) Member States may provide that, in the case of second-hand goods, the seller and consumer may agree contractual terms or agreements which have a shorter time period for the liability of the seller than that set down in article 5(1). Such a period may not be less than one year.

contains a limitation period of two years. This period starts to run after the buyer gave notice to the seller of the lack of conformity (Art. 7:23(2) BW).

According to Art. 40 CISG the seller is not entitled to rely on the provisions of Arts. 38 and 39 CISG if the lack of conformity relates to facts which he knew or of which he could not have been unaware and which he did not disclose to the buyer. In order to regulate the same, Art. 7:23(1) BW provides that when the lack of conformity concerns facts that the seller knew, or ought to know, but of which he has not informed the buyer, the notification needs to be done within an appropriate time after the discovery of the lack of conformity.

4.8 Avoidance

Under the CISG, a contract may, in principle, only be avoided in case of a fundamental breach (Art. 49 CISG). The same is true under the DCFR.⁵⁸ In the Dutch Civil Code, the right to avoid a contract is regulated in Arts. 6:265-277 BW. Art. 6:265(1) BW provides that poor performance or non-performance of the obligation of a party, allows the other party to avoid the contract, unless this remedy is inappropriate considering the special nature or the limited extent of the breach of contract. The creditor is thus allowed to choose this remedy, except where the non-performance is of minor importance. The law in The Netherlands distinguishes in case of a breach of contract between the situation in which performance is still possible or permanently – or temporarily – impossible. Impossible in this meaning includes cases where it can no longer reasonably be required to perform. If performance is still possible, the obligee has only failed to perform (*in verzuim*) after the lapse of an additional period of time for performance, that the obligor allowed the obligee and as was mentioned by him in the notice of failure to perform (*ingebrekestelling*). If performance is still possible, this is a requirement for the recovery of damages or avoidance of the contract. Art. 6:265(2) BW provides that, except where performance is impossible, the obligor may only proceed in setting aside the contract if the obligee has failed to perform (*in verzuim*).

Hartlief⁵⁹ has argued that the provision in Dutch law concerning avoidance of contracts in general, needs to be revised. On the basis of both the CISG and the PECL, he concludes that the provision should be adjusted in such a way that avoidance of a contract will only be allowed if there is a fundamental breach of contract. His idea is that contracting parties can provide what type of contractual breach will amount to a fundamental breach. If the parties have not agreed thereon, some guidelines need to be provided, if the current civil code does not provide for that. In this respect, the provisions in the CISG should be taken as an example. If, in case of non-performance, the obligee makes known that he will not perform the contract, or states that performance of the contract has become impossible, avoidance of the contract should be possible. That is a fundamental breach; this is also applicable in international sales law (Art. 49(1) CISG).

If the obligee states that, in case of non-performance, he will still be able to perform the contract, albeit delayed, avoidance of the contract can only take place if the delay amounts to a fundamental breach. Avoidance is possible either if the delay amounts to a fundamental breach or if the obligee does not perform after the expiry of an additional period of time. Hartlief concludes that the current provision in Art. 6:265 BW may be interpreted in such a

⁵⁸ Compare art. III. – 3:502 DCFR.

⁵⁹ T. Hartlief, *Ontbinding: over ongedaanmaking, bevrijding en rechterlijke bevoegdheden bij ontbinding wegens wanprestatie*, Deventer: Kluwer 1994, pp. 206-208 and 219.

way as to require that avoidance of the contract is only allowed in case of a fundamental breach. This has, however, so far not been accepted by the Dutch Supreme Court (*Hoge Raad*). In a case that was decided by the *Hoge Raad*, it was argued by the obligee that the obligor may not choose the remedy of avoidance of the contract if he still has a remedy that is less burdensome for the debtor. This was, however, explicitly rejected by the *Hoge Raad*.⁶⁰

Both the Directive as well as the CISG regard avoidance as an instrument of last resort (Art. 49 CISG and Art. 3(5) and (6) CSD), which is available only where the continuation of the contract can no longer be expected of the party not in breach.⁶¹ The Consumer Sales Directive allows termination only in second instance, i.e. where the consumer is not entitled to replacement or repair (or if both are impossible) or where the seller has not repaired or replaced the goods within a reasonable time or without significant inconvenience (Art. 3(2) and (5) CSD). As in the CISG, termination is not granted in case of minor non-conformities (Art. 3(6) CSD). The Dutch legislature introduced this in the Dutch Civil Code (Art. 7:22 BW), but this provision is only applicable to consumer sales contracts; in these circumstances, failure to perform (*in verzuim*) is not required.⁶² Hijma⁶³ has noted that he is not in favour of the requirement of a formal notice of failure to perform (*ingebrekestelling*). He argues that comparative law teaches that the doctrine of breach of contract can do without the obligatory *ingebrekestelling*. He confirms this by reference to the CISG, the Consumer Sales Directive and the UNIDROIT Principles for International Commercial Contracts and the Principles of European Contract Law, none of which contains such provision.

For consumer sales, Art. 7:22(1) BW provides that in case of a lack of conformity, the buyer has a right to avoid the contract, unless the lack of conformity, given its limited meaning, does not justify avoidance of the contract and the consequences thereof. This right, however, only exists if repair and replacement are impossible or cannot reasonably be requested of the seller, or if the seller failed to comply with its obligation to repair or replace the goods within a reasonable time or without significant inconvenience, as mentioned in Art. 7:21 (3) BW.

Partial avoidance of the contract, which is possible under Art. 51 CISG, is also allowed under Art. 6:265(1) BW. As under the CISG, the setting aside does not require a lawsuit, it will suffice that the disappointed obligor declares so in writing to the other party (Art. 6:267 BW). Art. 6:270 BW provides for partial setting aside, which is defined as a proportional reduction, in quantity or quality, of the reciprocal obligations. In this way a party may obtain a reduction of his obligation (e.g. the price he has to pay) in case, for example, the other delivers only part of the goods promised; but also where the performance of a contractual obligation by the other party is insufficient in quality. In this way a partial setting aside will also constitute a generalised right to price reduction (*actio quanti minoris*). The consequences of avoidance are very similar under the CISG and the Dutch Civil Code; avoidance of the contract does not have any retroactive effect (Art. 81 CISG and Arts. 6:271-275 BW).⁶⁴

⁶⁰ HR 4 February 2000, NJ 2000, 562

⁶¹ U. Magnus, *The CISG's Impact on European Legislation*, in: *The 1980 Uniform Sales Law, Old Issues Revisited in the Light of Recent Experiences*, ed. F. Ferrari, Sellier 2003, p. 132.

⁶² *Aanpassing van Boek 7 van het Burgerlijk Wetboek aan de richtlijn betreffende bepaalde aspecten van de verkoop van en de garanties voor consumptiegoederen*, *Kamerstukken II* 2000/01, 27 809, no. 3, p. 8, 23 (MvT).

⁶³ In his annotation at HR 11 January 2002, NJ 2003, 255.

⁶⁴ A.S. Hartkamp, *Law of Obligations*, in: J. Chorus, P.H.M. Gerver and E.H. Hondius (eds.), *Introduction to Dutch Law*, New York: Kluwer Law International 2006, p. 162.

4.9 Price Reduction

In contrast to the CISG, the Consumer Sales Directive grants price reduction only under the same conditions as it grants termination. The Dutch government was of the opinion that the Directive's remedy of price reduction should not be introduced, because the same result could be reached by requesting partial avoidance of the contract.⁶⁵ Legal authors challenged this view, and finally the government had to be persuaded and introduced the remedy after all.⁶⁶ Art. 7:22(1)(b) BW now provides that in case of a consumer sales contract, the buyer has a right to reduce the purchase price in case of a lack of conformity, in proportion to the extent of the lack of conformity. This right, however, only exists if repair and replacement are impossible or cannot reasonably be requested of the seller, or if the seller failed to comply with its obligation to repair or replace the goods within a reasonable time or without significant inconvenience, as mentioned in Art. 7:21 (3) BW.

4.10 Damages

In the Dutch Civil Code, the rules on liability for damages are provided in Arts. 6:74 *et seq* BW. Art. 6:74 BW states that any failure to perform a contractual obligation obliges the obligee to compensate any damages the obligor may suffer as a result thereof, unless the failure to perform cannot be attributed to the obligee. Whether a failure to perform can be attributed to the obligee, will be discussed in the paragraph on exemption. Title 1 of Book 7 BW contains some special provisions on damages that apply only to sales contracts. These provisions are clearly based on the provisions in the CISG concerning damages.

Art. 7:37 BW, for example, is clearly based on Art. 75 CISG. Art. 75 CISG provides that if the contract is avoided and the buyer has bought replacement goods or the seller has resold the goods, the aggrieved party may recover the difference between the contract price and the price in the substitute transaction. Art. 7:37 BW also concerns cover purchase and contains the exact same, concrete method for determining the amount of damages to be paid.

Art. 7:36 BW was clearly inspired by Art. 76 CISG. Art. 76 CISG provides that if the contract is avoided and there is a current price for the goods, the party claiming damages may, if he has not made a cover purchase or resale under Art. 75 CISG, recover the difference between the price fixed by the contract and the current price at the time of avoidance.⁶⁷ If, however, the party claiming damages has avoided the contract after taking over the goods, the current price at the time of taking over the goods shall be applied instead of the current price at the time of avoidance. The current price is the price prevailing at the place where delivery of the goods should have been made or, if there is no such current price at that place, the price at such other place that serves as a reasonable substitute, making due allowance for differences in the cost of transporting the goods.

Art. 7:36 BW provides that in case of avoidance of the contract, if the goods have a current price, the damages will be equal to the difference between the contract price and the current price at the day of non-performance. Decisive is the current price of the market where the sale

⁶⁵ M.C. Bianca and S. Grundmann (eds.), *EU Sales Directive. Commentary*, Antwerp: Intersentia 2002, p. 89.

⁶⁶ J.M. Smits, *Privaatrecht Actueel. De voorgenomen implementatie van de richtlijn consumentenkoop: een gebrekkig wetsvoorstel*, WPNR 2001/6470, pp. 1047-1049; *Aanpassing van Boek 7 van het Burgerlijk Wetboek aan de richtlijn betreffende bepaalde aspecten van de verkoop van en de garanties voor consumptiegoederen*, *Kamerstukken II* 2000/01, 27 809, no. 3, p. 8 (MvT) and no. 9, pp. 1-2 (Nota van wijziging).

⁶⁷ Compare for a very similar provision art. III. – 3:707 DCFR.

took place, or, if there is no such current price, the price of the market that can reasonably replace the aforementioned market. Both Art. 7:38 BW and Arts. 75 and 76 CISG provide that, alongside the aforementioned measures of damages, a party also has a right to any further damages that are recoverable under Arts. 74 CISG or 6:74 BW.

The main difference between Arts. 7:36 BW and 76 CISG is the following: it does not follow from Dutch law that the method of measuring the amount of damages, on the basis of the current price, is only available if the party claiming damages has not made a cover purchase or resale. Therefore, in contrast to the CISG, according to Dutch law the aggrieved party – as in accordance with Arts. 84 and 85 ULIS – will have a free choice between the measure of damages as defined in Art. 7:36 BW (current price) and the measure laid down in Art. 7:37 BW (cover purchase). In a case in which these national law provisions were applicable the Advocate-General, Mr. Hartkamp, referred in his advisory opinion to the CISG in order to show that the provisions in the CISG are clearly different from the national legislation. He argued that, therefore, the national legislation had to be interpreted in the way mentioned above, providing the aggrieved party a free choice.⁶⁸

4.11 The Right to Withhold Performance

Book 6 BW contains some special provisions on the *exceptio non adimpleti contractus*, the right to withhold performance in certain circumstances. The new Civil Code admits this *exceptio* in the field of sales contracts. It distinguishes between the cases where a party invokes the right to withhold performance in case of total non-performance by the other party and in cases where the latter has performed only partially or not properly. In the latter cases the *exceptio* is only allowed to the extent justified by the failure to perform (Art. 6:262(2) BW). This is a special provision for some special contracts, such as sales contracts. The more general provision on the right to withhold performance is to be found in Art. 6:52 BW.

The Dutch Civil Code has also introduced the so-called uncertainty exception (*onzekerheidsexceptie*), which protects the party to a sales contract who normally should be the first to perform his obligation. This party has a right to suspend performance when, by reason of unforeseen circumstances, there is a serious danger that the other party will not perform his obligation. Similarly to Art. 6:262 BW, Art. 6:263 BW distinguishes between total non-performance, on the one hand, and partial or defective performance, on the other.⁶⁹

Art. 71(1) CISG provides 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 particular circumstances. A party who suspends its performance must immediately give notice thereof to the other party, on the basis of Art. 71(3) CISG. This duty has not been mentioned explicitly in the Dutch Civil Code. Such an obligation will only exist in special circumstances, on the basis of the requirements of reasonableness and fairness in Arts. 6:2 and 6:248 BW.⁷⁰

⁶⁸ HR 6 March 1998, NJ 1998, 422.

⁶⁹ A.S. Hartkamp, *Law of Obligations*, in: J. Chorus, P.H.M. Gerver and E.H. Hondius (eds.), *Introduction to Dutch law*, New York: Kluwer Law International 2006, p. 162.

⁷⁰ M.S. Meijer, *De CISG*, in: *Internationale koop van roerende zaken naar materieel en internationaal privaatrecht*, Preadviezen voor de Vereniging Handelsrecht, Zwolle: W.E.J. Tjeenk Willink 1982, p. 195.

In a case that was decided by the *Hoge Raad*⁷¹ the Advocate-General, Mr. Hartkamp, referred to Art. 71(3) CISG in order to determine that, according to Dutch national law, the existence of a right to withhold performance – if the other party fails to perform any of its obligations – is governed by good faith. Any use of the right has to be made in accordance with the requirements of reasonableness and fairness. In principle, for the existence of such right, it may be required that first a notice is sent to the other party. In this case, the party that relied upon this right had not informed the other party before doing so. According to the Advocate-General, one of the circumstances to determine whether the right to withhold performance was against the requirements of good faith was whether the other party had any knowledge at the time of withholding performance. The *Hoge Raad* followed this approach.

4.12 Exemption

The Dutch Civil Code provides that any failure to perform a contractual obligation obliges the obligee to compensate any damages that the aggrieved party may suffer as a result thereof, unless the failure to perform cannot be attributed to the obligee (art. 6:74 BW). Art. 6:277 BW contains a similar provision for a claim of damages in case of avoidance of the contract; this provision is only applicable to particular contracts, amongst which the sales contract. Art. 6:75 BW provides that a failure to perform cannot be attributed to the obligee if it is not his or her fault, and if he or she cannot be held liable for it by the rules of law or by a legal act, or prevailing opinion in society or in the particular trade (*in het verkeer geldende opvattingen*). The obligee is always excused in case of *force majeure*. The typical example of liability following from a legal act is the assumption of liability by a contractual clause. The requirements for *force majeure* in Art. 6:75 BW are similar to those in Art. 79(1) CISG. The consequence of justifiable reliance on this exemption is also the same: no liability to pay damages as long as the impediment that hinders performance of the contract exists.⁷² A provision that is almost identical provision to Art. 79 CISG can also be found in Art. III. – 3:104 DCFR.

Art. 79(4) CISG contains a duty for the party who fails to perform to give notice to the other party of such an impediment. If the notice is not received by the other party within a reasonable time after the party who fails to perform knew or ought to have known of the impediment, he is liable to pay damages resulting thereof. The Dutch Civil Code does not contain an explicit duty to give notice in these circumstances. In the Dutch Civil Code, such a duty to provide notice can only be based on the requirements of reasonableness and fairness in Arts. 6:2 and 6:248 BW. It was assumed in 1982 by Meijer that in extenuating circumstances, such would definitely not be inconceivable.⁷³ Nowadays, this obligation to give notice has been accepted in the case law already so many times in so many situations that Bertrams⁷⁴ is of the opinion that the obligation as in Art. 79(4) CISG is also applicable in the Dutch law of obligations.

⁷¹ HR 4 January 1991, NJ 1991, 723.

⁷² Compare also art. 79(3) CISG.

⁷³ M.S. Meijer, *De CISG*, in: *Internationale koop van roerende zaken naar materieel en internationaal privaatrecht*, Preadviezen voor de Vereniging Handelsrecht, Zwolle: W.E.J. Tjeenk Willink 1982, p. 203.

⁷⁴ R.I.V.F. Bertrams, *Enige aspecten van het Weens Koopverdrag*, Preadvies voor de Vereniging voor Burgerlijk Recht, Lelystad: Koninklijke Vermande 1995, p. 50.

4.13 Preservation of the Goods

Art. 86 CISG provides that if the buyer has received the goods, but intends to reject them, he must take such steps as are reasonable in the circumstances to preserve them. He is entitled to retain them until the seller has reimbursed his reasonable expenses.

This has very similarly been provided for in the Dutch Civil Code. If the buyer has received the goods that he intends to reject, he has a duty under Dutch law to take care of the preservation of the goods as a careful obligee (art. 7:29(1) BW).⁷⁵ He may keep the goods until the seller has reimbursed the costs of preservation. The buyer who is planning to reject the goods that he has not yet received, will generally also be obliged to take care of the goods (art. 7:29(2) BW); this provision is based on Art. 92 ULIS.

Art. 88(1) CISG provides that a party who is bound to preserve the goods in accordance with Art. 86 CISG may sell them by any appropriate means if there has been an unreasonable delay by the other party. Art. 88(2) CISG provides that if the goods are subject to rapid deterioration or if their preservation would involve unreasonable costs, a party who is bound to preserve the goods in accordance with Art. 86 CISG must take reasonable measures to sell them. To the extent possible, he must give notice to the other party of his intention to sell. Again, similarly, the Dutch Civil Code provides that if in the cases mentioned in Art. 7:29 BW the goods are subject to rapid deterioration or decline or if storing of the goods would lead to severe objections or unreasonable costs, the buyer is obliged to have the goods sold in an appropriate manner (Art. 7:30 BW).

Art. 7:30 BW is clearly based on Art. 95 ULIS, which provides that where the goods are subject to rapid deterioration or their preservation would involve unreasonable expense, the party under the duty to preserve them is bound to sell them in accordance with Art. 94 ULIS. Art. 7:30 BW provides that the buyer is obliged, in the named circumstances, to have the goods sold which means that the buyer himself may not sell the goods, but that he has to arrange for this to be done through someone else. As this formulation was taken literally from Art. 95 ULIS and now that there is no clear justification for such a restriction, and there is no such restriction in Art. 88(2) CISG, Hijma⁷⁶ is of the opinion that the final part of Art. 7:30 BW may be read as if it says 'to sell or to have sold'.⁷⁷ He adds that Art. 88(3) CISG should also apply as part of the Dutch law: a party selling the goods should have the right to retain the reasonable expenses of preserving the goods and of selling them out of the proceeds of the sale.

5. Netherlands Approach Towards CISG

In order to illustrate the incidence of the CISG, some examples of the interpretation of the CISG in The Netherlands will be discussed. The courts in The Netherlands generally assume, as elsewhere, that a choice of law clause that refers to the law of a contracting state to the CISG will lead to the application of the CISG.⁷⁸ In this respect, the wording of the choice of

⁷⁵ Compare also art. 7:10(4) BW.

⁷⁶ Asser-Hijma 5-I, Deventer: Kluwer 2007, pp. 517-518.

⁷⁷ Compare also the advisory opinion by Advocate-General, mr. Wattel, in HR 12 April 2002, LJN: ZC8106.

⁷⁸ Compare R.I.V.F. Bertrams and S.A. Kruisinga, *Overeenkomsten in het internationaal privaatrecht en het Weens Koopverdrag*, Deventer: Kluwer 2007, pp. 209-210; and very recently: *Voorzieningenrechter Rechtbank*

law clause will be decisive. The Court of Appeal (*Gerechtshof*) 's-Hertogenbosch⁷⁹ was asked in 2007 to interpret the following clause: '(t)o all legal relations between (...) and the counterpart Netherlands law is exclusively applicable'. The Court of Appeal held that this clause had to be regarded as excluding the application of the CISG on the basis of Art. 6 CISG. The court referred to Art. 8 CISG and held that the use of the word 'exclusively' implied that the party who drafted this clause meant to apply only the Dutch Civil Code. If both contracting parties agree, however, to exclude the application of the CISG, this is deemed possible at any stage. For example, on appeal, the parties may still agree to exclude the Convention.⁸⁰ Where both contracting parties use general conditions that explicitly exclude the application of the CISG, the District Court of Leeuwarden did not find any reason to apply the CISG.⁸¹

Some years ago, it seemed uncertain in The Netherlands whether the CISG was applicable to issues concerning general conditions.⁸² In 2005, the *Hoge Raad* held that the CISG does govern the question, whether a party has consented to the conclusion of a contract and the general conditions that may form part thereof.⁸³ The *Hoge Raad* explicitly referred to Art. 7(2) CISG, presumably because the CISG does not contain any specific provisions concerning general conditions. The *Hoge Raad's* conclusion is very clear: whether a party consented to general conditions should be governed by the CISG and should not, it explicitly held, be resolved by any national law that may be applicable according to the rules of private international law. This decision by the *Hoge Raad* indicated the start of a new era.⁸⁴

The general approach by the courts is nowadays that the provisions in the CISG are applicable to questions concerning general conditions. Referring to Art. 8 and 14 CISG, courts held that it is not sufficient to send general conditions on the invoices used.⁸⁵ The Court of Appeal (*Gerechtshof*) 's-Hertogenbosch⁸⁶ reached the same conclusion on the basis of the Principles of European Contract Law and the UNIDROIT Principles that, according to the court, had to

Arnhem 31 January 2008, LJN: BC4029; compare in general: P. Schlechtriem and I. Schwenzer (eds.), *Commentary on the UN Convention on the International Sale of Goods*, Oxford: Oxford University Press 2005, Art. 6, no. 14, pp. 90-91.

⁷⁹ *Gerechtshof 's-Hertogenbosch* 13 November 2007, LJN: BB7736.

⁸⁰ Compare R.I.V.F. Bertrams and S.A. Kruisinga, *Overeenkomsten in het internationaal privaatrecht en het Weens Koopverdrag*, Deventer: Kluwer 2007, p. 210; and recently: *Gerechtshof 's-Hertogenbosch* 2 January 2007, LJN: AZ6352

⁸¹ *Rechtbank* (District Court) Leeuwarden 3 September 2008, LJN: BF0362.

⁸² R.I.V.F. Bertrams and S.A. Kruisinga, *Overeenkomsten in het internationaal privaatrecht en het Weens Koopverdrag*, Deventer: Kluwer 2007, p. 237.

⁸³ HR 28 January 2005, NJ 2006, 517.

⁸⁴ Interestingly, the Court of Appeal in Arnhem (*Gerechtshof Arnhem* 8 November 2005, NIPR 2006, 195) first referred to conflicts of law rules in the Rome Contracts Convention. It seems, however, that the first question should be whether the CISG is applicable. This case concerned contracts between a German seller and a Dutch buyer. The buyer argued that its general conditions were part of the contract. These conditions contain a choice of law clause that provides that Dutch law is applicable, while excluding the application of the CISG. The seller contested that the general conditions were part of the contract. The Court of Appeal held that the question whether the choice of law is valid, has to be determined on the basis of art. 3(4) and 8(1) of the Rome Contracts Convention. The Court of Appeal then applies Dutch law to the question whether the general conditions form part of the contract.

It seems, however, that the Court of Appeal should have applied the CISG as that is applicable in the present case: both contracting parties have their places of business in different contracting states. A similar case was decided in a similar way by the *Rechtbank Dordrecht* 4 April 2007, LJN: BA2595.

⁸⁵ Compare for example Hof 's-Hertogenbosch 29 May 2007, LJN: BA6976.

⁸⁶ *Gerechtshof 's-Hertogenbosch* 16 October 2002, NIPR 2003, 192.

be applied in the interpretation of the provisions of the CISG. It may, however, also be that the contracting parties have established a lasting business relationship. If parties do business together on a regular basis, they may have established such usages that it has to be assumed that the general conditions of one of the contracting parties have been implicitly accepted by the other party.⁸⁷ For reasons of legal certainty, it should be assumed that stringent requirements have to be applied in this respect; mostly these shall be the requirements in Art. 9 CISG.⁸⁸

6. Conclusion

The incidence of the CISG in the law of obligations in The Netherlands is extensive. The Civil Code that was enacted in 1992 is based on the text of ULIS, one of the predecessors of the CISG. Thus, both the codified sales law in the Netherlands and the CISG have the same basis. Therefore, the CISG has rightfully been used as a source of inspiration for the interpretation of the Dutch Civil Code. The CISG was also the basis for the Consumer Sales Directive of 1999. By implementing this Directive, the sales law in The Netherlands has again indirectly been influenced by the CISG. This is especially so because most of the provisions of this Directive were implemented in the general sales law and not only for consumer sales contracts. Moreover, the CISG has also been an important source of inspiration both for the courts in The Netherlands, as well as in the legal doctrine. The incidence of the CISG is also very clearly noticeable in the Draft Common Frame of Reference for European contract law. Only the future will show whether, and to what extent, this will become relevant for Dutch law.

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⁸⁷ Compare: Rechtbank Arnhem 17 January 2007, LJN: AZ9279 and Rechtbank Breda 27 February 2008, LJN: BC6704.

⁸⁸ Compare also: M. Schmidt-Kessel and L. Meyer, *Allgemeine Geschäftsbedingungen und UN-Kaufrecht (CISG)*, IHR 2008/5, p. 177 *et seq.*