



**SPECIFICATIONS AND THE CONTRACTUAL RELATIONSHIP:
ARTICLE 65 OF THE CISG IN LIGHT OF PECL ARTICLE 7:105**

*by Andrea L. Charters**

Nordic Journal of Commercial Law

issue 2004 #2

I. Introduction

Article 65 of the Convention on Contracts for the International Sale of Goods (the "CISG")¹, setting forth an opportunity for the seller to impose certain specifications in light of the buyer's failure to do so, raises particular questions of interpretation given the Principles of European Contract Law (the "PECL")². CISG Article 65 sets forth a mechanism for the seller to supply specifications for a sale of goods transaction where the buyer has failed to do so. The PECL, on the other hand, states a similar right of parties in a generalized fashion, not merely applying to a narrow context. These provisions are set forth below, in comparison, with emphasis added to heighten the contrast and the key provisions of each section:

CISG Article 65

(1) 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.

(2) If the seller makes the specification himself, he must inform the buyer of the details thereof and *must fix a reasonable time within which the buyer may make a different specification*. If, after receipt of such a communication, the buyer fails to do so within the time so fixed, the specification made by the seller is binding.

PECL Article 7:105

(1) Where an obligation may be discharged by one of alternative performances, the choice belongs to the party which is to perform, unless the circumstances indicate otherwise.

(2) *If the party which is to make the choice fails to do so by the time required in the contract, then:*
(a) if the delay in choosing is fundamental, the right to choose passes to the other party;
(b) if the delay is *not fundamental*, the other party may give a *notice fixing an additional period of reasonable length* in which the party to choose must do so. If the latter fails to do so, the right to choose passes to the other party.

Thus, the CISG provision is limited to certain basic information about the goods, such as the "form, measurement or other features of the goods", which have not been specified by the buyer where the contract calls for the buyer to do so by a certain date. The portion of the PECL which is more directly applicable is the second paragraph of Article 7:105, which applies "If the party which is to make the choice fails to do so by the time required in the contract . . ." Thus, the PECL does not delimit the remedy to basic choice of specifications pertaining to the goods.

This approach of the PECL thus generalizes through the substantive provision of Article 7:105, rather than through offer and acceptance provisions, as will be shown to be done in the CISG, which was drafted a decade and a half earlier.³ There is thus movement over time toward a more relationship based principle, away from the technical features of offer and acceptance. This legal history observation may be eclipsed, however, by recent developments, discussed in Section IV, which may have greater practical effect.

II. Context for Interpreting Article 65 in Light of Principles of European Contract Law Article 7:105

a. *Canonical interpretations show that the practical needs of traders require an Article 65 provision*

Practical needs of traders require an Article 65 provision. Article 65 of the CISG is clearly necessary to show that the contract is not void for vagueness and to prevent a "hold up" by the buyer, who might force the seller to seek adjudication rather than negotiation in the face of declining demand or increasing supply for the product.⁴

Certain features of the goods may be left to future choice by the buyer, such as color or style, even automobile option⁵ specifications. This should not, of course, extend to having the seller supply complex, scientific or technical specifications of custom goods for which a design supplied by the buyer is essential. The language of the CISG and past commentary agree on these issues.⁶

Three factors would point away from application of Article 65 in the context of custom engineered goods. First, a long series of exchanges about the goods would be likely. Thus, the failure of the buyer to respond to a deadline for a specification would not be an abrupt failure to call for the goods. Second, the custom nature of the contract could involve a service component to the contract, which might be supplied by another party. Third, the countervailing feature of the risk of quality claims by an already dissatisfied or lackadaisical buyer would increase the risk of suit over quality.

b. *Legislative history is sparse*

The legislative history of Article 65 is sparse. Significant disagreement about including the provision was raised, but it had an antecedent in the Uniform Law of International Sales, the predecessor of the CISG, and the consensus of opinion was in favor of keeping a provision of this type.⁷

c. *Sparse case law does not obviate need for the provision*

The sparse case law does not obviate the need for this provision, although only two cases reported or digested in English, or in any language in a major, international source of cases, address Article 65.⁸ The cases reaffirm what would be concluded based on the text of Article 65. One 1996 German case, not available in translation into English, is cited in the Draft UNCITRAL Digest as stating that where the seller has failed to make a specification, "the buyer retains the right to make its own specification."⁹ A 1995 German case, available in English, pertaining to options on standard BMW Series 3 automobiles, involved no objection by the buyer to the specifications, and objection only to the dates of delivery.¹⁰

The lack of case law may reflect the operation of Article 65 as law that allows parties to operate "in the shadow of the law" without adjudication. This is particularly likely, since where a seller believes that a buyer is not likely to adhere to the contract, the seller will probably avail itself of other remedies that may be more swift, with fewer responsibilities on the seller. Where there is a good

relationship between the parties, however, the seller might avail itself of Article 65 procedures without any ensuing litigation.

We shall return to this emphasis on the contractual relationship after a discussion of how four comparative issues may be resolved.

III. PECL Article 7:105 Supports an Interpretation in Light of the Contractual Relationship

a. Reading in light of the PECL: Resolving four comparative issues

Four technical issues are raised by PECL Article 7:105 in relation to CISG Article 65: (1) whether the buyer retains the right to choose if the seller does not do so; (2) whether the PECL concept of fundamental delay influences the CISG provision; (3) whether PECL provisions regarding (a) currency matters and (b) a number issues related to each other, affect the CISG provision; and (4) whether usages may influence CISG rights and obligations.

The PECL specifies that, "If the [seller] fails to do so, the right to choose passes to the [buyer]."¹¹ It is implicit in the language of the CISG, however, that the right to choose remains with the buyer if the seller does not avail itself of its Article 65 rights, and it was reportedly so held, as digested in the Draft UNCITRAL Digest regarding the 1996 German case.¹²

The PECL provides that failures to choose shall be divided into failures that are fundamental and those that are not, with those that are not fundamental requiring notice, as in the CISG.¹³ Given the apparent reticence of parties to avail themselves of CISG Article 65 in contentious situations, as evidenced by the sparse case law,¹⁴ it is difficult to imagine parties concluding that they could rely on the "fundamental" delay provision of PECL Article 7:105(2)(a), however. The "fundamental" delay provisions of the PECL thus do not appear to influence CISG Article 65.

The PECL further provides that currency of payment matters shall be governed by Article 7:108 and matters of performance of a number of obligations related to each other shall be governed by Article 7:109.¹⁵ Neither of these specialized provisions addresses the general issue of specifications of goods, provided for in CISG Article 65.

While the major English commentary to the PECL also suggests that usages may determine who shall make a choice,¹⁶ this suggestion is not relevant where the specifications of characteristics of goods issue clearly dictates the seller taking over this responsibility from the buyer, in Article 65 of the CISG. The implementation of Article 65, on the contrary, might be seen to benefit greatly from the insights of CISG Article 8(3) circumstances and Article 9 usages under the CISG. Expert testimony or prior case experience might address these issues.

b. Reading in light of the PECL: Relationship over offer and acceptance and knowledge

The 1995 German case pertaining to delivery of BMW automobiles addressed the delivery date through CISG Articles 18 and 29, pertaining to contract formation and offer and acceptance.¹⁷ There was apparently less recourse for the seller under Article 65, the language of which points to

"features of the goods." In contrast, the PECL language, which does not so limit to specifications, could have included the delivery date of the goods under its Article 7:105. This contrast in approach shows an important development in the law, creating a more relationship based provision, rather than an offer and acceptance provision.

In the PECL, the substitution of choice provision is much broader than in the CISG. Rather than leaving other matters, such as delivery of the goods,¹⁸ to the offer and acceptance provisions, the PECL adopts a more modern approach of handling substitution of choice through a relationship oriented provision, the broad Article 7:105. While litigants could consider a PECL inspired approach to CISG Article 65 if, in some cases, the offer and acceptance provisions were inadequate, the major observation here is that the PECL, a decade and a half more recently drafted, takes a more relationship based approach, rather than an offer and acceptance approach.

In addition, CISG Article 65 explicitly requires that the seller act on preferences of the buyer "*which may be known to him.*" The PECL does not directly include such a provision, although the "fundamental" delay requirement adverts to some knowledge requirements.¹⁹ Although the more flexible language of the PECL again indicates a more modern drafting, the usefulness of this provision as a guide to interpretation of the CISG leaves the litigant with little to rely on. The knowledge requirements of the CISG are complex, subtle and varied²⁰ and one is clearly included in Article 65.

IV. Communications Technology and CISG-AC Opinion No. 1 Hold the Promise for More Use of Article 65

Any reticence of sellers to avail themselves of the Article 65 provisions, which require a "*reasonable time within which the buyer may make a different specification*" after notice, may be reduced by the recent scholarship of CISG-Advisory Council Opinion no. 1 on Electronic Communication under CISG,²¹ which clarifies the provisions required for a writing and thus, for written notice,²² which may be required by many contractual provisions.

V. Conclusion

Interpretation of CISG Article 65 in light of PECL Article 7:105 thus shows an historical progression in the drafting, but does not leave a litigant with much recourse to obtain strategic advantage, either in terms of flexibility in or tightening of the provisions. The Articles seem to pass each other without contact. A bigger benefit for interpretation of Article 65 seems to stem not from interpretation in light of the PECL, but from the practical advance of CISG-AC Opinion no. 1, which I have recently argued is a great benefit to clarity in defining "writing,"²³ and thus, to notice related provisions generally.

(Endnotes)

* Adjunct Professor, Washington University School of Law, St. Louis, Missouri, U.S.A.; J.D. Harvard Law School, M.S.W. Washington University, A.B. Yale University.

¹ United Nations Convention, adopted 1980, available at <<http://cisgw3.law.pace.edu/cisg/text/treaty.html>>. [hereinafter referenced in the text by article].

² Principles of European Contract Law, complete and revised version 1998, available at <<http://cisgw3.law.pace.edu/cisg/text/textef.html>>. [hereinafter referenced in the text by article].

³ Compare *supra* CISG, note 1, with *supra* PECL, note 2 (citing adoption dates).

⁴ See Albert H. Kritzer, *International Contract Manual: International Sales Law Reporter, Guide to Practical Applications of the United Nations Convention on Contracts for the International Sale of Goods* at 519 ~ 522 (1994) (as supplemented) (analyzing provisions of Article 65, reviewing other commentaries and comparing with the Uniform International Sales Law and Uniform Commercial Code Section 2-311(3)); John O. Honnold, *Uniform Law for International Sales*, 3d ed. (1999) 357-58, at 358 (arguing that wasteful production and failure to mitigate damages would be subject to "commercial and legal hazards that are so serious that extreme cases are unlikely to arise"); Gunter Hager, *Article 65*, in Peter Schlechtriem, ed., *Commentary on the International Sale of Goods (CISG)* (1998) (Geoffrey Thomas, trans.) 497-499, at 498 (arguing that in cases of extreme refusal to supply specifications when asked, production of goods according to the seller's own specifications is warranted, without a duty to mitigate loss)(citations omitted); and Annotated Text of CISG: Article 60 (collecting sources on meaning of Article 60 buyer's obligation to take delivery, referred to in Article 65, primarily as duty of cooperation, not specific performance), available at <<http://cisgw3.law.pace.edu/cisg/text/e-text-60.html>>. But see Jacob S. Ziegel, Report to the Uniform Law Conference of Canada on Convention on Contracts for the International Sale of Goods (1981) ("it is difficult to become excited over art. 65 one way or the other") (referring to the debate over specific performance vs. damages) available at <<http://cisgw3.law.pace.edu/cisg/text/ziegel165/html>>.

⁵ See *infra* note 10 and accompanying text.

⁶ CISG, *supra*, note 1 at Article 65 ("form, measurement, or other features of the goods"); Kritzer, *supra* note 4 at 520 (analyzing example of 1,000 pairs of shoes).

⁷ See Victor Knapp, *Article 65*, in C.M. Bianca and M.J. Bonell, eds., *Commentary on the International Sales Law: The 1980 Vienna Sales Convention* (1987) 475-482, at 476.

⁸ See *infra* notes 9 and 10 and sources cited therein. The Pace CISG W3 database and the Draft Digest are the two major sources of collected cases and digests in English. See also Ralph Amisshah, *Cross-References and Editorial Analysis, Article 65*, available at <<http://cisgw3.law.pace.edu/cisg/text/cross/cross-65.html>>.

⁹ Franco Ferrari, Harry Flechtner, and Ronald A. Brand, eds., *The Draft UNCITRAL Digest and Beyond: Cases, Analysis and Unresolved Issues in the U.N. Sales Convention*, (2004) at 749, note 1, citing Landgericht Aachen, Germany, 19 April 1996, available on the Internet at <<http://www.jura.uni-freiburg.de/iprl/cisg/urteile/text/165.htm>>.

¹⁰ Oberlandesgericht [Provincial Court of Appeal] München, 7 U 1720/94, 8 February 1995, available at <<http://cisgw3.law.pace.edu/cases/950208g1.html>>. (holding that notice of avoidance of the contract after 2 ½ years violated the principle of good faith, where the seller had been ready to deliver the automobiles a few months hence and that, in fact, there was not breach at all).

¹¹ See PECL Article 7:105, *supra* note 2 at paragraph (2)(b).

¹² See *supra* note 9 and accompanying text.

¹³ Compare PECL Article 7:105, *supra* note 2 at paragraph (2)(a) and CISG Article 65, *supra* note 1 at paragraph (1).

¹⁴ See *supra* notes 8-10 and accompanying text.

¹⁵ Ole Lando and Hugh Beale, eds. *Principles of European Contract Law, Parts I and II*, Combined and Revised (2000), at Article 7:105 Commentary.

¹⁶ *Id.*

¹⁷ *Supra* note 10 at 15(bb); see generally Peter Schlechtriem, Effectiveness and Binding Nature of Declarations (Notices, Requests or Other Communications) under Part II and Part III of the CISG, Cornell Review of the Convention on Contracts for the International Sale of Goods (1995) 95-114 (discussing offer and acceptance, the "receipt" rule and related subjects), reproduced and available at <<http://cisgw3.law.pace.edu/cisg/biblio/schlecht.html>>.

¹⁸ See Kritzer, *supra* note 4 at 521-22 (discussing Article 77 provisions re: selection of the vessel for shipment).

¹⁹ For a discussion of the "fundamental" requirement in the context of a breach, rather than a delay, see the sources identified in the Guide to Article 65, available at <<http://cisgw3.law.pace.edu/cisg/text/peclcomp65.html>>, including PECL Article 8:103, defining "fundamental non-performance" to include a foreseeability requirement in one paragraph and "intentional" non-performance in another. See also Principles of European Contract Law: Knowledge and behavior of person for whom a party is responsible (discussing PECL Article 1:305 on imputed knowledge and intentions), available at <<http://cisgw3.law.pace.edu/cisg/text/knowbeh.html>> (including reproducing Lando & Beale, *supra* note 15 at 134-136).

²⁰ See Article 8(3) of the CISG for a discussion of general guidance on the knowledge requirements; Amisshah, *supra* note 8 at definition of "may be known to" (citations omitted); and Annotated Text of CISG: Article 65 words and phrases - Degrees of knowledge (cross referencing numerous knowledge requirements).

²¹ 15 August 2003. Rapporteur: Professor Christina Ramberg, Gothenburg, Sweden, available at <<http://cisgw3.law.pace.edu/cisg/CISG-AC-op1.html>>.

²² See *id.*

²³ See Andrea L. Charters, *Growth of the CISG with Changing Contract Technology: "Writing" in Light of the UNIDROIT Principles and CISG-Advisory Council Opinion no. 1*, available at <<http://cisgw3.law.pace.edu/cisg/biblio/charters.html>>.