

The Formation of an International Sales Contract of Investment Goods

A Comparison between Swiss and English Law

Thesis DAS Paralegalism

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Purely for reasons of better readability references are used in male form for definitions and verbalisations. Naturally, it is always applied to both sexes.

List of Abbreviations

Art./Arts.	Article/Articles
B2B	Business to Business
B2C	Business to Consumer
BBl	Bundesblatt (Federal gazette)
BGBI.	Bundesgesetzblatt (Federal law gazette)
BGE	Bundesgerichtsentscheid (Official compilation of Judgments of the Federal Tribunal)
CC	Swiss Civil Code
c.i.c.	culpa in contrahendo
CISG	United Nations Convention on Contracts for International Sale of Goods
cit.	citation
CHF	Swiss Francs
CO	Code of Obligation
Co.	Company
CO ₂	carbon dioxide
cons.	consideration
DAB	Dispute Adjudication Board
ed./eds.	editor/editors
EEC	European Economic Community
EFTA	European Free Trade Association
e.g.	for example
etc.	et cetera
EU	European Union
FIDIC	Fédération Internationale des Ingénieurs Conseils/ International Federation of Consulting Engineers
f.o.b.	free on board

FOSFA	Federation of Oil, Seeds and Fats Associations
GAFTA	Grain and Feed Trade Association
HL	House of Lords
ICC	International Chamber of Commerce
IEA	International Energy Agency
i.e.	id est (in other words)
Incoterms [®]	International Commercial Terms
LCD	Swiss Federal Law of Unfair Competition
LME	London Metal Exchange
LOI	Letter of Intent
Ltd	Limited
no.	number
OECD	Organisation for Economic Co-operation and Development
OLG	Oberlandesgericht (Higher Regional Court)
para.	paragraph
PIL	Private International Law
S.p.A.	Società per Azioni (public limited company)
SOGA	Sales of Goods Act 1979
subs.	subsection
U.C.C.	Uniform Commercial Code
UCPDC	Uniform Customs and Practice for Documentary Credits
UK	United Kingdom
UN	United Nations
UNCITRAL	United Nations Commission on International Trade Law
USA	United States of America
v	versus
VAT	value added tax

Preamble

International sales contracts of the investment goods industry are in many respects a challenge for the buyer as well as for the seller. Besides the technical aspects such contracts have to cover, the commercial and legal conditions are not inconsiderable indeed. Contracts of investment goods have a high financial impact and are in many respects of high risk to companies entering into such kind of commitment. The achievement of a well balanced contract, satisfying the involved parties sufficiently to insure a smooth performance of the signed agreement, should be an objective.

What appears clear and simple in theory proves to be quite often difficult to put into practice as time and competitive pressure occasionally leave little room for contract negotiation and, hence, a well balanced drafting of a future contract. Depending on the respective development in order intake of the supplier company in connection with the general market situation at the time of bidding, it might happen that sales managers tend to agree on contract conditions too quickly to save the deal without calling a legal expert in for support. The quintessence might be an agreement with terms and conditions in favour of the buyer but to the disadvantage for the seller in respect of the performance of the contract.

Furthermore, the acceptance of a foreign law system to be applicable to the contract without knowing the legal regulations they include, may have serious consequences for a supplier company in case any dispute arises during performance. Think of litigation in a foreign court, different language, the hire of a lawyer familiar to the law regulations in the buyer's country, etc.

This work shall give an overview of the complexity that the formation of a contract may cause and how it is legally influenced by various national laws and uniform rules available since the international trade and the general focus on cross-border business transaction has gained increasing significance. Non-lawyers involved in contract negotiations, to which this work is addressed to, shall receive herewith a supportive document for a better understanding of the subject of forming an international sales contract for investment goods.

1 Investment Goods – the Object of the Contract

Investment goods, also known as capital goods, are either goods used in manufacturing companies to produce products for the sale to business or consumers such as office furnitures or commodities like xerox paper, writing materials, nespresso capsules etc., or those goods exclusively produced for the B2B market¹. This work deals with investment goods manufactured for the international business market focused on the expansion of the electrical networks around the globe. This kind of investment goods are getting more important in this business sector as, on one hand, the primary energy demand will increase by 36% for the next two decades according to the International Energy Agency and, on the other hand, the general requirements for CO₂ reduced energy production worldwide has become an increasingly important topic². The energy producing industries have in this regard a high demand to develop environmentally friendly energy producing and transmitting solutions.

Buyers of those investment goods are most often governmental owned companies being in charge of either country or regional wide time-based maintenance and expansion of the power grid systems. The contracting goods purchased by those investors are substations, power plants or whole systems as a turnkey project to guarantee the delivery of energy power to the consumers in factories and households in their area of responsibility.

The drafting of a contract covering those projects needs a careful preparation by the involved parties. As such huge and expensive projects are lasting for years until the contractual commitment ends, it is essential to have a well prepared and drafted agreement, especially for the selling party.

¹ WISEGEEK.

² INTERNATIONAL ENERGY AGENCY, Factsheets. The International Energy Agency (IEA) is an autonomous organisation founded as a response to the oil crises in 1974 and is linked to OECD. The IEA consists of 28 member countries whereof Switzerland and the United Kingdom were one of the founding members. All member countries of IEA are also members of the OECD. The mission of IEA is to ensure “reliable, affordable and clean energy” to their members and to focus on the four main areas of energy security, economic development, environmental awareness and engagement worldwide.

2 Formation of the Contract

Basically, the formation of an international sales contract of investment goods does not much differ from any other sales contract. However, cross-border business transactions involving contracting parties from different countries could make the choice of the applicable law for an agreement to an issue if the rules of the jurisdiction chosen are unknown to any party. The ignorance of the law system is in fact a central problem arising in an international sales transaction³. In avoidance of causing such problems it is advisable to each party negotiating an international sales contract of investment goods to deal with the corresponding legal law system prior to signature of any agreement.

2.1 Historical Background of the Law Systems

There are three major jurisdiction systems existing around the world:

- common law system
- civil law system
- mixed system⁴

The latter is a mixture of common and civil law. Several countries have implemented the hybrid legal system as, e.g. Scotland, South Africa, and Namibia⁵.

The common law has its roots back to the twelfth century when King Henry II of England introduced the basic structure of the common law system⁶. At that time Kings of England still had great power. In 1215, after most important barons had participated in an open rebellion against the King to stand in for their rights documented in the “Charter of Liberty” dating back to 1100, the Magna Carta was created; one of the most fundamental agreements to shape common law⁷.

The primary source of the common law is case law. Therefore, common law developed on a case-by-case basis whereas each reported case

³ HOLLOWAY/MURRAY/TIMSON-HUNT, para.21-001.

⁴ BUGG, page 6.

⁵ LINHART, page 1.

⁶ BUGG, page 2.

⁷ NORMAN, page 1.

formed a precedent⁸. In addition to the case decisions based on judgments and judicial opinions of judges, the common law implemented decisions made by the power of parliament with legislations and statutes since the nineteenth century. Nowadays, statutory law supplemented with case law covers the needs to operate modern states⁹.

The civil laws system developed historically from the principles of the Roman law. "Corpus Juris Civilis" or the body of civil law was issued in the sixth century by the order of Justinian I, Eastern Roman Emperor. The continental European system of law as well as numerous legal systems of Asia, Africa and Eastern Europe based their legal system on civil law. However, each country developed its own civil law system individually, so that different statutes and codes form the foundation of the law system in those countries¹⁰.

This work will focus on the common law system of England and the civil law system of Switzerland.

2.2 Formation of a Contract based on Swiss Law

The contract law in Switzerland is set forth in the Swiss Code of Obligations (CO) and entered into force as per 1 January 1912¹¹. The statutory provisions in the CO are separated in two parts:

- The General Part (Arts. 1–183) regulates in general the formation, performance and termination of contracts, the special conditions with obligations and the assignment of claims and debts.
- The Special Part (Arts. 184-551) covers the individual contractual relationship amongst the involved parties such as sales contract, barter contract, contract for work and services, contract of tenancy, employment contract, etc.

As the state, represented by the parliament, lies down the general rules of law, the power for any revision or modifications of the provisions

⁸ LINHART, page 1.

⁹ BUGG, page 2.

¹⁰ BUGG, page 4.

¹¹ ANSAY/DESSEMONTET/Bucher Eugen, page 107.

stated in the CO are passed by the parliament. If it is decided that any modification of the provisions are subject to referendum, the people of Switzerland make the final decision for the enactment by their vote¹².

The requirements for the formation of a contract are the mutual assent of the parties according to Art. 1 of the CO as well as their agreement to the basic provisions of the contract (CO Art. 2). This required consent is basically valid for all kind of contracts and creates its effectivity.

2.2.1 Offer and Acceptance

The formation of a contract is usually based on an offer and its acceptance. The offeror declares with his offer the intention to be bound under an agreement with the specified content including all the necessary elements of the intended future contract. The offeree receiving the offer shall only say "yes" to the offered conditions for the future contract¹³. Any deviations made to the specified content of the offer by the offeree will be deemed to be a counter-offer.

According to Swiss law an intention of being bound to an offer is presumed. Therefore, if the offeror does not want to be bound to his offer, he shall express his intention to have prepared an offer without binding force (CO Art. 7 I)¹⁴.

In case the offer has a timely fixed expiry date for the submission of the acceptance to the offer, the offeror is bound to his offer up to the expiration of that deadline. He will be released if the acceptance by the offeree does not reach the offeror at the latest by the defined expiry date (CO Art. 3). Should the offeree send his acceptance for an agreement between absentees seasonably before the fixed date of the offer expires but the acceptance reaches the offeror after that said date, the offeror is obliged to declare his intention not to be bound thereon immediately after receipt of the acceptance, otherwise the contract is concluded and binding (CO Art. 5 III).

¹² FEDERAL ASSEMBLY – THE SWISS PARLIAMENT, Duties of Federal Assembly.

¹³ ANSAY/DESSEMONTET/Bucher Eugen, page 114.

¹⁴ ANSAY/DESSEMONTET/Bucher Eugen, page 114.

The commencement of effectiveness of an agreement between absentees is at the time of dispatch of the acceptance (CO 10 I), but the legal effect of the contract is fulfilled when the acceptance is received by the recipient. From the legal point of view this difference of effectiveness is justified by the fact that the risk of posting the acceptance remains with the offeree until the mail reached the offeror's sphere of influence¹⁵.

2.2.2 Form-Requirements

The article 11 of the CO stipulates that contracts require a special form for their validity only if it is regulated by law. Binding agreements may be concluded verbally or even by conclusive actions showing the intention to enter into a contract, as for example by placing consumer goods on the conveyor at the supermarket checkout with the intention to purchase those goods¹⁶. The law stipulates three different form-requirements for the conclusion of a contract that has to be considered:

- *written document* ⇒ e.g. the contract of gift (CO Art. 243 I);
- *formal requirements* ⇒ e.g. the contract of suretyship not exceeding an amount of CHF 2'000.00 (CO Art. 493 II);
- *notarial deed* ⇒ e.g. the sale of land (CO Art. 216)¹⁷.

2.2.3 Legal Reasons for Contract Voidance

Since the development of the principle of freedom of contract in the seventeenth and eighteenth centuries in Swiss law with the main aspects of

- the freedom to conclude or not to conclude a contract;
- to choose the contracting partner;
- to establish the provisions of a contract;

It must be observed that any impossible or illegal content of the contract becomes null and void (CO Art. 20 I)¹⁸.

¹⁵ BÖHRINGER/MÜLLER/MÜNCH/WALTENSPÜHL, para.2.19.

¹⁶ ANSAY/DESSEMONTET/Bucher Eugen, page 111.

¹⁷ ANSAY/DESSEMONTET/Bucher Eugen, page 112.

¹⁸ ANSAY/DESSEMONTET/Bucher Eugen, page 109.

Impossibility is for instance a contract including an object of sale which does not exist at the time of contract conclusion. Therefore, such a contract cannot be executed at all times. The knowledge by any party entering into such a contract may be held liable under the rules of *culpa in contrahendo* (see below art. 5.1)¹⁹.

Illegality is any kind of subject term of a contract violating the public order, offending morality or infringing personal rights (CO Art. 19 II).

2.2.4 Obligation, Title and Risk Transfer

The basic provisions for a sales contract are the obligation of the seller to deliver the ordered goods and those of the purchaser to pay the agreed selling price (CO Art. 184).

An additional important obligation of Art. 184 is the *transfer of property* of the sales object from the seller to the buyer. Depending on the type of object, i.e. whether the object of the contract is an individualized object, like a painting by Picasso, or movable goods or even land, the ownership passes to the buyer at different stages of the contracting process (CO Art. 185). According to Swiss contract law the rules are as follows:

- *individualized sales object* ⇒ at the moment of contract conclusion;
- *movable goods* ⇒ at the moment of their physical transfer;
- *sale of land* ⇒ at the moment of inscription in the register²⁰.

Besides the passing of risk, Art. 185 of CO also rules *the risk of loss*. Should, for example, a individualized sales object perish during a fire or due to larceny prior to delivery, the buyer must pay the selling price despite the absence of the counterperformance by reason of subsequent impossibility, if the accidental destruction is verifiably not within the responsibility and liability of the seller. The title as well as the risk of loss passes to the buyer at the moment of contract signature²¹.

¹⁹ ANSAY/DESSEMONTET/Bucher Eugen, page 113.

²⁰ ANSAY/DESSEMONTET/Bucher Eugen, page 138.

²¹ ANSAY/DESSEMONTET/Bucher Eugen, page 139.

2.2.5 Contract for Work and Services

This type of contract is ruled according to the Arts. 363 to 379 of the Swiss Code of Obligation. The main characteristics of a contract for work and services are the obligations to produce a certain work by the entrepreneur and the remuneration for the completed work by the orderer (CO Art. 363). Work in this sense means to produce a certain result. Not just the production of the object is the key element of the contract but the end result of the produced and completed work, as for example the shoeing of a horse. The horseshoe is the product forged by the blacksmith and the result of work is the shod horse²².

Investment goods individually manufactured according to the orderer's requirements by the entrepreneur, delivered to site and installed to a complete work to make it ready for take-over are referred to *contracts for work and materials*. According to Swiss law this type of contract is a mixed contract governed by the provisions of contract of sales (CO Art. 184-236) and contract for work and services (CO Art. 363-379). The main legal difference between the contract for work and services and the contract for work and materials is the provision of warranty of title in the latter type of contract. This provision is ruled according to the provisions of contract of sales whereas all other conditions of the contract for work and materials are governed by the provisions of the contract for work and services. The warranty of title is a condition to be fulfilled by the entrepreneur to insure that he is in possession of the title of all materials he uses to manufacture the goods for the ordered work²³.

The main legal issue of those kinds of contracts according to Swiss law is the strict bearing of risk by the entrepreneur up to the time of taking-over of the work by the orderer. If the entrepreneur fails to deliver the promised result as contractually agreed, he may not be able to claim for any payment even if he is not responsible for the failure²⁴.

²² ANSAY/DESSEMONTET/Bucher Eugen, page 141.

²³ BÖHRINGER/MÜLLER/MÜNCH/WALTENSPÜHL, para.10.7.

²⁴ ANSAY/DESSEMONTET/Bucher Eugen, page 141.

2.3 Formation of a Contract based on English Law

As described in art. 2.1 of this work, case law alone is not sufficient anymore to operate a modern state. Legislations and statutes are the legal grounds of English law supplemented by the case law principles. It is the UK Parliament having one of the main roles to debate and to enact laws²⁵. Up to 1973, it was the UK Parliament's sovereignty represented by the capacity of the House of Commons, the House of Lords and the Crown as the only power to implement laws in the UK. Since the UK Parliament has enacted the European Communities Act 1972 in 1973 and thus made UK a member of the EEC (since 1992 the EU), it bound itself to incorporate the provisions of the EU law into UK national law. Therefore, EU law has preceded the national law ever since. As a consequence, the UK Parliament's debates on new laws are influenced by the decisions of the EU and limit their parliamentary sovereignty²⁶.

English law requires four elements on the contracting parties to create a binding contract:

- consideration
- offer
- acceptance
- intention to create legal relations

2.3.1 Consideration

As a general rule in English law a contract is only binding if it is either made in a deed (see below art. 2.4, para.3) or furnished by consideration. The basis of the doctrine of consideration is the idea of reciprocity²⁷, i.e. the contracting parties exchange goods or services for payment of money and will constitute thereby sufficient consideration²⁸. The requirement of consideration intends to limit the enforceability of agreements to a certain extent. Such doctrine of consideration will also

²⁵ WWW.PARLIAMENT.UK, Making laws.

²⁶ HOLDSWORTH MICHAEL, page 4.

²⁷ PEEL, para.3-002.

²⁸ NORMAN, page 9.

be taken into account even if a contract is intended to be legally binding²⁹.

The definition of consideration is *the promise* to give anything in value such as an item or service by the promisee, thus either the promisee gives the value or the promisor receives the value³⁰. It is the promisee from where the consideration must move³¹, i.e. the person who receives the promise can only enforce it if he, himself, provides the consideration and not a third party³². Therefore, the promise is the main element of consideration and, in addition, it is what the law is concerned with and not with the fact having furnished consideration for a contract³³.

Historically, the rule for consideration dates back in 1602 and was reasoned by the judgment of the Chief Justice of the King's Bench, John Popham in causa of the Slade's case. The case was about a claim by the grain merchant John Slade against Humphrey Morley who denied having ever entered into an agreement with the plaintiff. The debates were about the form of action, i.e. whether the complaint could be sued in assumpsit or sued in dept. Based on the arguments of Slade's council, Eduard Coke, the Chief of Justice Popham decided in favour of the claim to be sued in assumpsit³⁴. The impact of this judgment laid the basis for the development of the requirements for the doctrine of consideration. Ever since consideration is one of the required elements for binding contracts and it is firmly established in modern case law in England³⁵.

2.3.2 Offer

An offer is an expression or intimation by words or conduct of willingness to enter into a legally binding commitment with a contract, and specifies terms and conditions of the binding agreement to be accepted

²⁹ PEEL, para.3-001.

³⁰ PEEL, para.3-004.

³¹ BUCHER, page 51.

³² PEEL, para.3-023.

³³ PEEL, para.3-004.

³⁴ BUCHER, page 36.

³⁵ BUCHER, page 36.

by the recipient of the offer³⁶. An offer is valid when the following four basic requirements are fulfilled:

- communication from the offeror to the offeree
- comprising language of commitment
- serious intention by the offeror
- comprising subject matter and price consideration³⁷.

In English law an offer, as long as it is not accepted, can be withdrawn by the offeror³⁸. Such withdrawal must be noticed to the offeree and must also reach the addressee; the mere posting of the notice will not be sufficient³⁹.

Offers, expressly stating a fixed validity date, will terminate and cannot be accepted after that date. If an offer contains no specific expiry date it will lapse after a reasonable time. What a reasonable time is depends on the circumstance of the business transaction. For example, offers for perishable goods or goods dealt at the LME would lapse after a short time⁴⁰.

2.3.3 Acceptance

A final and unqualified expression of assent to the terms and conditions of an offer indicates its acceptance⁴¹. Such expression of assent must be in accordance with the terms and conditions of the offer in the sense of the *mirror image rule*. Otherwise, it would amount to a counter-offer when the offeree introduces a new, not existing term in the original offer. Such new condition would destroy the original offer entirely⁴². As a general rule, it must be pointed out that silence does not constitute acceptance of an offer⁴³.

The question when an acceptance takes effect according to English law

³⁶ PEEL, para.2-002.

³⁷ NORMAN, page 9.

³⁸ HOLLOWAY/MURRAY/TIMSON-HUNT, para.3-006.

³⁹ PEEL, para.2-058.

⁴⁰ PEEL, para.2-064.

⁴¹ PEEL, para.2-015.

⁴² NORMAN, page 10.

⁴³ PEEL, para.2-042.

cannot be answered by stating one general rule. In case an acceptance is posted, the English court cases distinguish between the following three different "consequences":

- firstly, a posted acceptance prevails over a withdrawal letter to the offer sent prior to the acceptance to the offeror which had not reached the offeror when the acceptance was handed over to the post office;
- secondly, an acceptance takes effect at the time of posting even then when the acceptance never reaches the offeror because it gets lost in the post by accident;
- thirdly, a contract is effective at the time of posting and would precede another agreement affecting the object of the contract made after the original acceptance had been posted but before it had reached the offeror

Other circumstances like misdirected acceptance due to a fault of the offeree, or because the offeror has given wrong information so that misdirection was of his cause or other possible irregularities of posted acceptances would have to be analysed on a case-by-case basis to ensure the effectiveness of the contract⁴⁴.

The above-mentioned posting rules do not apply for any acceptance sent in any form of electronic communication, as for example by facsimile message, email or via web-site trading. With the choice of this mode of communication the sender knows immediately if the transmission of his message was successful or not. Thus, an unsuccessful transmission will lead to ineffectiveness of the contract. The situation is different when the acceptance is received by the recipient but wholly or partly illegible. The sender will not be in the position to know this circumstance. Therefore, it is suggested that an illegible received acceptance by the recipient is effective⁴⁵.

⁴⁴ PEEL, para.2-033.

⁴⁵ PEEL, para.2-032.

2.3.4 Intention to create Legal Relations

An agreement supported by consideration is binding as a contract, if it was made with an intention of creating legal relations⁴⁶. This technical term as a matter of English law refers to a court's presumption that parties to a commercial contract wished it to be enforceable by a court⁴⁷. Such intention shall be recognised as part of the contract in writing for the purpose of the avoidance of any doubt⁴⁸.

2.3.5 Form-Requirements

Contracts in English law can be made informally⁴⁹. The majority of the contracts are concluded either orally or by conduct and sometimes in writing. Where legislation has limited the principle of form freedom of contracts, the contracting parties have to consider the statutory regulations. The statutory form-requirements are distinguished in three categories for the effectiveness of the corresponding contracts⁵⁰:

- *Contracts made in writing* ⇒ e.g. all contracts governed by the Consumer Credit Act 1974; contracts based on the Law of Property (Miscellaneous Provisions) Act 1989⁵¹;
- *Contracts made to be evidenced in writing* ⇒ contracts of guarantee⁵²;
- *Contracts to be made by deed* ⇒ e.g. for the alienation of a legal estate in land; for the legal lease of more than three years; or to commute a promise into a legally binding commitment⁵³.

2.3.6 Illegality

Also in England the principle of freedom of contract has been firmly established since the nineteenth century when judges took the view that any person of full capacity should have the freedom to conclude a con-

⁴⁶ PEEL, para.4-001.

⁴⁷ Baird Textile Holdings Ltd v Marks & Spencers Plc [2001] EWCA Civ 274, para.13.

⁴⁸ PEEL, para.4-028.

⁴⁹ PEEL, para.5-003.

⁵⁰ RICHARDS, page 109.

⁵¹ RICHARDS, page 110 et seq.

⁵² RICHARDS, page 115.

⁵³ RICHARDS, page 110.

tract of any kind⁵⁴. Nevertheless, contracts involving business transactions and services of a legal wrong, i.e. contracts where the terms agreed are contrary to positive law⁵⁵, morals and good manner and public policy are on the ground of illegality⁵⁶. This includes also contracts violating any statutes⁵⁷. The law may regard illegal contracts as ineffective and void⁵⁸.

2.3.7 Obligation, Title and Risk Transfer

On 1 January 1980 the updated *Sale of Goods Act 1979* entered into force after the formality of Royal Assent to make the Bill into an Act was announced by the Lords Commissioner on 6 December 1979⁵⁹. This Act of Parliament has regulated English contract law and UK commercial law in terms of goods sold and purchased ever since. It is the basic regulation in terms of any kind of business transaction of sale for the B2B and B2C market. The Sale of Goods Act 1979 also applies to international contracts if they are governed by English law but does not apply when the contract is subject to foreign law⁶⁰.

The Act regulates inter alia that:

- the transfer of ownership in goods to the buyer is based on mandatory consideration [section 2(1)];
- the goods forming the object of the contract of sale may be either existing or be manufactured after the contract conclusion and, in addition, the seller must be in possession or the owner of the object of the contract for sale [section 5(1)];
- the goods are according to the description where the contract was based on sale of goods by description [section 13(1)];
- the goods are of satisfactory quality, and fit for all the purposes for which the goods are supplied [section 14(2) et seq.].

⁵⁴ PEEL, para.01-004.

⁵⁵ LAW.COM., positive law is statutory man-made law, which is based on universally accepted moral principles.

⁵⁶ PEEL, para.11-003.

⁵⁷ PEEL, para.11-007.

⁵⁸ PEEL, para.11-001.

⁵⁹ WWW.PARLIAMENT.UK, Making laws.

⁶⁰ HOLLOWAY/MURRAY/TIMSON-HUNT, para.21-001.

The Act rules the *transfer of property* respectively ownership in section 17 with the heading *Property passes when intended to pass*. The legislation leaves it to the parties when the intention to transfer the property to the buyer may be performed. A corresponding provision in the contract shall be stipulated. Should any different intention appear, section 18 of the Act defines five rules how the intention shall be ascertained.

The *passing of risk* is conditioned on the transfer of property unless otherwise agreed according to section 20 of the Act. Should any delivery of the goods be delayed then the defaulting party, whether it is the seller or buyer, shall be at risk in regard of loss “which might not have occurred but for such fault” [section 20(2)].

Supplementary Acts to consider in connection with the Sale and Goods Act 1979 are the following legislations when dealing with the sale of goods and services:

- Amendment Sale and Supply of Goods Act 1994;
- Supply of Goods and Services Act 1982;
- Unfair Contract Terms Act 1977.

2.4 Summary

The great difference between the legal systems of Switzerland and England for the formation of a contract is the doctrine of consideration. Consideration is no requirement for the legal system of Switzerland with the consequences that:

- offers to enter into a contract may be binding;
- the rule “consideration must move from the promisee” (see above art. 2.3.1, para.2) is no provision; it is understood that a third party is not obliged to a contract if he is ignorant of it;
- a contract shall be of legality otherwise, as mentioned in art. 2.2.3, any illegal content of the contract will invalidate the agreement accordingly (CO Art. 20);

- the special formal requirement of a deed must not be fulfilled⁶¹.

Another important difference is the rule of effectiveness of a contract. Although in English law the general rule of an acceptance to be communicated to the offerer shall be fulfilled to bring the contract into effectiveness, several numbers of cases contravene the principle of the general rule and an acceptance may be effective, although it is not communicated⁶². Swiss law has in this regard different regulations. It distinguishes between effectiveness and legal effectiveness (see above art. 2.2.1, para.4).

The requirement to have a contract issued in *form of a deed* is a special requirement in English law developed separately to the requirements of consideration to turn a promise into a binding obligation⁶³. This requirement is often a condition of English companies or of buyers in countries linked to the common law system, who wish to conclude an international sales contract based on the laws of England. The vendor, not familiar with the regulations of the common law, must be aware of the difference between signing a deed or a “simple” agreement with regard to the period of limitation. A deed has a period of limitation of twelve years whereas a contract is limited to six years⁶⁴. The foreign vendor is well-advised to negotiate this condition before entering into a contract with a contractual commitment of limitation for an entire period of twelve years.

Besides the special regulations in connection with a deed both jurisdictions recommend contracts in writing when commercial provisions are agreed involving very large amounts of money and thereby are of a certain degree of risk, as this is the case with international sales contracts of investment goods⁶⁵.

Although Swiss and English law have the provisions for a binding contract covered by statute, the parties are free to amend and change the

⁶¹ ANSAY/DESSEMONTET/Bucher Eugen, page 112 et seq.

⁶² PEEL, para.2-023.

⁶³ RICHARDS, page 110.

⁶⁴ BUGG, page 19.

⁶⁵ RICHARDS, page 109.

terms and conditions to be covered by a contract the way it is most suitable for their business transaction under the concept of freedom of contract. The only exception to be considered is, that mandatory statutory provisions shall be fulfilled.

3 International Sales Law and Uniform Rules

Cross-border business transactions require a wide knowledge in the area of export and import trade besides the cognisance of the legislation in force in the countries of the contracting parties. As it happened, terms were interpreted in different manners by the parties of different states and led to misunderstandings, as for example the interpretation of the delivery term “f.o.b.”⁶⁶. In the United States of America “f.o.b.” means “free on board” as it is understood in other countries around the world in the same manner. But, the Uniform Commercial Code of the United States, first published in 1952 and applicable in all States within the USA, stipulates “f.o.b.” to be on board of a “vessel, car or other vehicle”⁶⁷. In addition, the American “free on board” condition supports the delivery term “f.o.b. place of destination” with the meaning that destination could also be a place of no harbour town. To the understanding of other countries, including Switzerland and the UK, the delivery term “f.o.b.” applies for shipment by seafreight only. Moreover, the place of loading the goods onto the vessel can only be a harbour town. This definition reflects those of the International Commercial Terms, better known as Incoterms[®], published by the International Chamber of Commerce in Paris (see below Art. 3.5)⁶⁸.

For the avoidance of doubt and wrong interpretation of contractual terms and conditions, different organisations implemented standardised contract terms and unified the international sales law in the last decades. Such efforts can be divided in three categories:

- Uniform rules of general character to apply to all types of international sale contracts, e.g. CISG, Incoterms[®], UCPDC;

⁶⁶ HOLLOWAY/MURRAY/TIMSON-HUNT, para.2-006.

⁶⁷ U.C.C. Sect. 2-319 F.O.B.

⁶⁸ HOLLOWAY/MURRAY/TIMSON-HUNT, para.2-006.

- Rules applicable to a certain type of business as for trade in commodities or investment goods, e.g. GAFTA, FOSFA, FIDIC;
- General terms of business issued by exporters and importers⁶⁹.

Some of the uniform rules define the law to be applicable in the contract or intended to have it defined, whereas other rules regulate the applicable law only if the parties have defined it in their contract⁷⁰.

In principle, when seller and buyer are based in different countries, the private international law (PIL) is applicable by default for any contract the parties may conclude. The PIL is the so-called “conflict of law”. Should any dispute arise and must be adjudicated, the PIL sets the rules for the law to be applicable and the jurisdiction of courts to be addressed. Each individual case must be justified independently for such determination⁷¹.

3.1 Private International Law

Each country has its own system of private international law.

3.1.1 The Swiss Private International Law

Switzerland has enforced the Private International Law on 1 January 1989. The article 116 of the PIL determines the rules of the applicable law in case of any contract dispute as follows:

- the contract is governed by the law the parties agreed to (PIL 116 I);
- the choice of law shall be expressed or indicated clearly in the contract or result from the circumstances. In addition, it is governed by the law chosen (PIL 116 II).

In case the choice of law is missing the contract is governed by the law of that country to which it is most connected with (PIL Art. 117 I). That is where the characteristic performance of the contract is assumed to be rendered. Thus, the law of that country will apply where a party performs the characteristic obligation and has its business residence. This

⁶⁹ HOLLOWAY/MURRAY/TIMSON-HUNT, para.32-001.

⁷⁰ HOLLOWAY/MURRAY/TIMSON-HUNT, para.32-001.

⁷¹ HOLLOWAY/MURRAY/TIMSON-HUNT, para.21-001.

is for an international sales contract of investment goods the place where the goods are manufactured and dispatched⁷².

Based on the principle of the habitual residence, lawsuits of contracts are to dispute at the habitual residence of the defendant, if he has no residence in Switzerland. Otherwise the jurisdiction of the Swiss courts is in charge. Are contracting parties involved, whose countries have ratified the Lugano Convention, the place of performance of the contract is the place of jurisdiction⁷³.

The Lugano Convention on jurisdiction and the recognition and enforcement of judgements in civil and commercial matters, briefly the *Lugano Convention*, was concluded in 2007 and is the successor of the Lugano Convention dated 16 September 1988. The Convention entered into force for the EU member states excluding Denmark on 1 January 2010, and Switzerland enforced it on 1 January 2011⁷⁴. The Convention strengthens the legal protection of persons established in the territories of the contracting parties of the Convention⁷⁵.

3.1.2 The English Private International Law

England determines the governing law to the contract by referring to the *Contract (Applicable Law) Act 1990*. This Act came into force on 1 April 1991 and deals with the choice of law problems in contracts. The Act enabled the UK to ratify the Rome Convention on the law applicable to contractual obligations which was signed by the United Kingdom on 7 December 1981⁷⁶. The provisions of the Rome Convention apply to the United Kingdom with some exception as stipulated in the Act in Art. 2, subs. 2 and 3⁷⁷.

According to the Convention and based on the principle of freedom of choice “a contract shall be governed by the law chosen by the parties. The choice must be expressed or demonstrated with reasonable certainty by the terms of the contract or the circumstances of the case. By

⁷² ANSAY/DESSEMONTET/Dessemontet François/Stoffel Walter, page 311.

⁷³ ANSAY/DESSEMONTET/Dessemontet François/Stoffel Walter, page 310.

⁷⁴ THE FEDERAL DEPARTMENT OF JUSTICE AND POLICE.

⁷⁵ Lugano Convention, Preamble, para.1.

⁷⁶ Contract (Applicable Law) Act 1990 Art.1(a).

⁷⁷ HOLLOWAY/MURRAY/TIMSON-HUNT, para.21-004.

their choice the parties can select the law applicable to the whole or a part only of the contract” (Art. 3, subs.1, Rome Convention).

If the parties have not defined the applicable law to their agreement, the Convention stipulates that the contract shall be governed by the law of the country with which it is most closely connected⁷⁸. This is similar to the provision established in the PIL of Switzerland.

The non-contractual obligation of tort is regulated in the *Private International Law (Miscellaneous Provisions) Act 1995*. The current English conflict of law in relation to tort is set out in this Act and governs situations occurring abroad by claim in tort. It regulates the applicable law when the parties have forborne to determine the governing law to their agreement⁷⁹.

Have the parties of a contract failed to specify the court which shall have jurisdiction over any dispute arising from the contract, the determination of the jurisdiction must be followed in the precedence of the following three relevant set of rules according to English legislation:

- Council Regulation (EC) 44/2001 called *The Judgements Regulations* rules the provisions of jurisdiction within the EU and it is mandatory in its application. The Judgments Regulations are the successors of the Brussels Convention of 1968. The Lugano Convention applies to the same subject matter when the contracting parties are from the EU member states (excluding Denmark) and the EFTA States Iceland, Norway and Switzerland;
- The traditional English law of jurisdiction will be applicable, if the aforesaid Regulations and Convention cannot be applied;
- Jurisdiction within the UK⁸⁰.

Supplementary to the aforesaid it should be mentioned that Switzerland (since 1957) and the United Kingdom (since 1955) are members of the *Hague Conference on Private International Law*. This organisation has made its mission to harmonise the private international law to reduce

⁷⁸ Rome Convention Art. 4, subs 1.

⁷⁹ HOLLOWAY/MURRAY/TIMSON-HUNT, para.21-017.

⁸⁰ HOLLOWAY/MURRAY/TIMSON-HUNT, para.22-001.

the danger of conflict in law amongst the different regulations given in all the private international laws existing in each individual country⁸¹.

3.2 CISG or the Vienna Convention

The United Nations Convention on Contracts for the International Sales Law – CISG, also known as *Vienna Convention*, adopted on 11 April 1980 came into effect on 1 January 1988. Currently 77 states have adopted the Vienna Convention. Switzerland ratified and enforced the Convention on 1 March 1991 whereas the United Kingdom has not yet ratified the CISG. Instead, the UK has enacted *The Uniform Laws on International Sales Act 1967* for international sales contracts of goods whose parties are in different contracting states⁸². This Act will only apply if it has been agreed upon by the parties⁸³.

The Vienna Convention was developed on the basis of the two Hague Uniform Laws of 1964, namely *Uniform Law on Formation* and *Uniform Law on International Sales*. The provisions of those Uniform laws were implemented in one Convention partly deviating from the original codes. The intention of the Vienna Convention is the harmonisation of international trade law. It does automatically prevail over the national sales code or sales law for all those states having adopted the Convention⁸⁴.

3.2.1 Applicability of the CISG

Art. 1(1) of the Vienna Convention regulates the applicability in the following way:

“This Convention applies to contracts of sale of goods between parties whose places of business are in different States:

(a) when the States are Contracting States; or

(b) when the rules of private international law lead to the application of the law of a Contracting State.”

⁸¹ HCCH HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW, page 1.

⁸² HOLLOWAY/MURRAY/TIMSON-HUNT, para.32-023.

⁸³ HOLLOWAY/MURRAY/TIMSON-HUNT, para.32-019.

⁸⁴ HOLLOWAY/MURRAY/TIMSON-HUNT, para.32-026 et seq.

Thus, contracting parties having their place of business in states that have not adopted the CISG may well have their contract governed by the Vienna Convention. However, care has to be taken in the choice of the governing law to such contracts. It must be of a state that has adopted the CISG⁸⁵.

Art. 2 of the Vienna Convention stipulates that sales contracts of goods bought for personal, family or household as well as for auction, stocks, shares, ship vessel and much else do not apply to CISG.

Where the parties wish the Convention not to apply to their contract but any national law of their choice, or they wish to “derogate from or vary the effect of any of its provisions”, they may do so according to Art. 6 of the CISG but have to consider Art. 12 that regulates the form of contract. The exclusion of CISG to a contract may be stipulated in the corresponding provision as e.g.: “The contract shall be governed exclusively by the laws of Switzerland excluding CISG”.

3.2.2 CISG and Private International Law

The Convention does not cover all provisions important to an international sales contract. Neither the passing of property of goods nor the delivery term and the fixing of the price are stipulated anywhere in the Convention. Any such gaps of regulations are covered by Art. 7(2) of CISG. It determinates that any provision, not expressly ruled in the Vienna Convention, shall be settled according to the general principles of it. In absence of such principles they shall be settled “in conformity with the law applicable by virtue of the rules of private international law” (see above Art. 3.1)⁸⁶.

3.2.3 The Development of CISG Application in Contracts

The Vienna Convention did not convince the parties in international trade when it was introduced to them after its enforcement in the early days. As it contained unfamiliar and new provisions unknown to the contracting parties and their lawyers, it was preferred to exclude its

⁸⁵ HOLLOWAY/MURRAY/TIMSON-HUNT, para.32-027.

⁸⁶ HOLLOWAY/MURRAY/TIMSON-HUNT, para.32-028.

application in sales contracts⁸⁷. The concern of the parties about the quality of CISG and the vague legal concept of certain provisions such as “fundamental breach” or “reasonable time” generally raised the opinion that the certainty of law was threatened. In addition, the lack of completeness of CISG was another reason not to trust in the regulations of the Convention⁸⁸.

Gradually over the years and as a result of CISG now being part of the standard curriculum of law schools in numerous countries, the application of the Vienna Convention in sales contracts has increased due to the better understanding of the regulations⁸⁹. Even business associations, that had ab initio their reservations, meanwhile recommend applying CISG in the standard terms and sales contracts to their members⁹⁰. Furthermore, when it was realised that the provisions easily could vary or could be derogated from by appropriate contract drafting without prejudice to the contracting parties, the application of CISG gained steadily increasing importance⁹¹.

Nevertheless, at the occasion of the *1st Intermediate Congress of the International Academy of Comparative Law* held in Mexico-City in November 2008, countries were requested to submit their reports on the subject to what extent the Convention has influenced the national legal system since its enforcement in their country. Switzerland as well as the United Kingdom took part in the survey and furnished their reports⁹².

Switzerland's Conclusion

The results of the survey show that the awareness of CISG in Switzerland is high. Despite this awareness the impact was more on scholars than on legal practice. The majority of the lawyers still prefer to exclude CISG when drafting a sales contract. The reason for this conduct is not much the one of awareness but the trusting of the Convention due to

⁸⁷ KRÖLL/MISTELIS/VISCASILLAS, para.40.

⁸⁸ KRÖLL/MISTELIS/VISCASILLAS, para.41.

⁸⁹ KRÖLL/MISTELIS/VISCASILLAS, para.42.

⁹⁰ KRÖLL/MISTELIS/VISCASILLAS, para.43.

⁹¹ KRÖLL/MISTELIS/VISCASILLAS, para.44.

⁹² FERRARI, Preface.

the lack of certainty and fear of undesired influences of other jurisdictions. The level where a majority of lawyers feel confident working with the CISG has not yet been reached as knowledge of and familiarity with the Convention still needs to be improved. Therefore, the lawyers do not fully appreciate the advantages of the application of CISG in sales contracts yet.

This circumstance might also be the reason that Swiss national sales law generally favours the seller more than the buyer. The strict notice requirement (Art. 201 CO) and the short limitation period (Art. 210 CO) are clear indices for the unconscionability of the seller. Although CISG is certainly more buyer-friendly than Swiss domestic law, it would be wrong to argue that the Convention is to the disadvantage of the seller. The CISG provides well balanced rules for both buyer and seller and is the reason why the Convention is also referred to as being a “neutral” law and equals both parties⁹³.

United Kingdom's Conclusion

As above-mentioned (Art. 3.2) UK has not ratified the CISG yet. This may be the reason that most practicing lawyers in England have a relatively low awareness of CISG. However, the trend to deal with CISG has emerged in England because of two reasons:

- English courts increasingly have to deal with English cases on the CISG;
- the notion that an advice from a lawyer to his client to better apply the Sales of Goods Act 1979 instead of CISG to his contract because it may be more favourable to the corresponding business transaction, and later it turns out to be a false-advice with the consequence that the client holds his lawyer liable for his wrong interpretation put the use of CISG in a new light.

Nevertheless, in the UK the majority standard contracts and standard terms continue to favour the application of SOGA and English law in its entirety⁹⁴. This will not change as long as the UK does not promote the

⁹³ FERRARI, Hachem Pascal/Widmer Corinne, page 296 et seq.

⁹⁴ FERRARI, Baasch Andersen Camilla, page 305.

ratification of CISG as a priority matter to be adopted in their legal system⁹⁵.

3.3 FIDIC – International Federation of Consulting Engineers

The International Federation of Consulting Engineers is a commercial registered association in the canton Geneva/Switzerland since 2006⁹⁶. The year of foundation was 1913 and the federation was formed by three national associations of consulting engineers in Europe. Today, FIDIC has in total 89 members of national associations of which “Union Suisse des Sociétés d’Ingénieurs-Conseil” in Bern represents Switzerland and the “Association of Consultancy and Engineering” in London is the representative of the UK⁹⁷.

Besides the promotion of business interests of companies supplying technology-based intellectual services for the built and natural environment, FIDIC published in 1999 standard forms of contract in four different editions:

- Conditions of Contract for Construction (*Red Book*)
- Conditions of Contract for Plant and Design-Build (*Yellow Book*)
- Conditions of Contract for EPC/Turnkey Project (*Silver Book*)
- Short Form of Contract (*Green Book*)⁹⁸

The publications are better known under their short names (italicised in aforesaid list) that were developed from the colour of the book covers.

As this work concentrates on investment goods manufactured exclusively for the international business market focused on the expansion of the electrical networks around the globe, as described in Art. 1, it shall be focused on the Yellow Book which General Conditions are recommended for investment goods contracts for electrical and/or mechanical plants. Furthermore, this standard form of contract covers in detail the provisions for “the design and execution of building or engineering

⁹⁵ FERRARI, Baasch Andersen Camilla, page 311.

⁹⁶ ZEFIXTM, International Federation of Consulting Engineers.

⁹⁷ FIDIC, INTERNATIONAL FEDERATION OF CONSULTING ENGINEERS.

⁹⁸ FIDIC, Foreword, page 1.

works. Under the usual arrangements for this type of contract, the Contractor designs and provides, in accordance with the Employer's requirements, plant and/or other works; which may include any combination of civil, mechanical, electrical and/or construction works"⁹⁹.

The Yellow Book also illustrates on the basis of graphical representations three different typical sequences in regard of "Principle Events during Contacts for Plant and Design-Build", "Payment Events" and "Dispute Events"¹⁰⁰. Each graphical representation indicates the article of the relating provision of the General Conditions helping to find the right provision in the book.

The General Conditions cover all important provisions that an investment goods contract may require of the kind referred to in the Yellow Book. There are in total 20 clauses whereof each clause has several sub-clauses. From Employers obligation; Design; Tests on Completion; Defects Liability; Termination by Employer to Claims, Disputes and Arbitration; all of them and more are specified in the General Conditions¹⁰¹.

Depending on the applicable law to govern the contract it may be of need to modify some of the provisions, in particular if the General Conditions are to be considered for domestic contracts¹⁰². The General Conditions refer in clause 1.4 to the law provision which says:

*"The Contract shall be governed by the law of the country (or other jurisdiction) stated in the Appendix to Tender"*¹⁰³.

The FIDIC regulations provide that claims and disputes shall be adjudicated by a Dispute Adjudication Board (DAB) before the commencement of arbitration. The appointment of the DAB shall be jointly made by the contracting parties. Depending on the conditions of the contract, either one or three members for the DAB are to appoint. Should the decision of the DAB dissatisfy the contracting parties and such dissatisfaction cannot be settled amicably, the DAB's decision will not become

⁹⁹ FIDIC, Foreword, page 1.

¹⁰⁰ FIDIC, Foreword, page 4 et seq.

¹⁰¹ FIDIC, Foreword, page 6 et seq.

¹⁰² FIDIC, Foreword, page 1.

¹⁰³ FIDIC, General Conditions, page 5.

final and binding. Consequently, the dispute shall finally be settled by the ICC International Court of Arbitration. Otherwise the DAB's decision becomes binding and will be final by the parties' acceptance¹⁰⁴.

3.4 Excursion: Dispute Resolving by Arbitration

The ICC International Court of Arbitration is created by the International Chamber of Commerce and is a non-governmental institution. It has its residence at the headquarters of the ICC in Paris and is the world's leading institution to settle international commercial and business disputes. Any arbitration dealt by the ICC International Court of Arbitration will be performed according to the Rules of Arbitration enforced on 1 January 1988¹⁰⁵. Revised Rules of Arbitration are launched and will be in force as from 1 January 2012¹⁰⁶. Other important institutes to be used in international commercial arbitration are, e.g. *The London Court of International Arbitration* and *The UNCITRAL Model law on International Commercial Arbitration*¹⁰⁷.

Contrary to litigation, arbitration is the less expensive method to resolve any dispute arising from the performance of a contract. It allows having disputes resolved fairly and finally. Parties having their residence in different countries with different legal systems might have reservations to submit their resolution to a court of different legal system which they are not familiar with. One further advantage of arbitration is that each party nominates one arbitrator of their own choice. The usual process of arbitration in international commercial disputes requires one additional neutral third party which is in turn elected by the nominated arbitrators¹⁰⁸.

The decision for arbitration is a binding award "on the parties by virtue of the nature of the arbitration agreement itself and under most systems of arbitral rules and arbitral law". International conventions such as the *New York Convention on the Recognition and Enforcement of Foreign*

¹⁰⁴ FIDIC, General Conditions, page 62 et seq.

¹⁰⁵ HOLLOWAY/MURRAY/TIMSON-HUNT, para.23-013.

¹⁰⁶ ICC INTERNATIONAL CHAMBER OF COMMERCE, 2012 Rules of Arbitration.

¹⁰⁷ HOLLOWAY/MURRAY/TIMSON-HUNT, para.23-014 et seq.

¹⁰⁸ HOLLOWAY/MURRAY/TIMSON-HUNT, para.23-001.

Arbitral Awards of 1958, also known as *New York Convention*, facilitate the acceptance of international arbitral awards. This is an advantage compared to courts judgments as at present no equivalent of international acceptance for courts judgments is existing¹⁰⁹. The New York Convention is ratified and in force in 146 UN member states. Switzerland ratified the convention in June 1965 and enforced it on 30 August 1965, whereas the United Kingdom and Northern Ireland implemented the convention on 23 December 1975¹¹⁰.

Thus, any arbitration rule and its procedure shall be considered before the parties enter into a contract. Any lack of a valid provision of arbitration in an agreement could result in a non-binding award and the dispute would have to be resolved by a court¹¹¹.

3.5 Incoterms[®] – International Commercial Terms

A non-neglectable and underestimated provision of any international sales contract is the delivery condition. As described in Art. 3 the indication of a certain delivery term often leads to misunderstandings in case it is not clearly stipulated in the contract. In addition, the choice of the delivery term has an impact on the calculation of the sales price¹¹². Therefore, such term of delivery must be defined with clear indication of the basic rules at the time of the offer preparation to avoid any negative cost impact later on during contract performance, if the parties might have different understanding of the delivery term.

The globally best known and accepted commercial standards delivery terms are the Incoterms[®] of the ICC International Chamber of Commerce in Paris. First published in 1936 and updated several times to take account of the continuing increasing development of international trade, ICC published in 2010 the latest edition of the Incoterms[®] and set them in force on 1 January 2011¹¹³.

¹⁰⁹ HOLLOWAY/MURRAY/TIMSON-HUNT, para.23-005.

¹¹⁰ UNICITRAL UNITED COMMISSION ON INTERNATIONAL TRADE LAW.

¹¹¹ HOLLOWAY/MURRAY/TIMSON-HUNT, para.23-006.

¹¹² HOLLOWAY/MURRAY/TIMSON-HUNT, para.2-001.

¹¹³ INCOTERMS[®], page 5.

The new Incoterms[®] incorporate eleven delivery rules for any mode of transport including rules for transportation carried out on the roadway, by airfreight and seafreight¹¹⁴. Each rule, explained in a set of three-letter trade terms, e.g. EXW or FCA, refers to the delivery in a certain manner and stipulates who of the contracting parties bears which obligation and duty¹¹⁵. The correct indication of a delivery term according to delivery rules of ICC may read:

“DAP Wrangelstrasse 24, Berlin/Germany Incoterms[®] 2010”

“DAP” means Delivered at Place, “Wrangelstrasse 24, Berlin/Germany” indicates the name of place of destination with the precise address, “Incoterms[®] 2010” is the precision of the basic regulation plus the year of publication to which rules the delivery term relates to.

Delivery terms stipulated in a contract by the example above makes the undertaking of obligations and duties for the contracting parties clear. The Incoterms[®] “DAP”, for instance, rules that the seller pays for carriage to the named place of destination excluding the costs related to import clearance. He bears all risks of transport up to the delivery of the goods to the disposal of the buyer (place of goods destination) and makes the transport ready for unloading that must be done by the buyer¹¹⁶. Similar to the above are all other ten Incoterms[®] in detail described.

3.6 Individual Standard Terms

Besides the various available unifications of terms for international sales contracts described in detail above with CISG and FIDIC, most of the companies have their own standard terms to which they would like to form their sales agreement. The advantage, to which it is often referred to, is the time-saving negotiation for the business responsible by using those standard forms. They usually cover provisions by boilerplates defined by lawyers allowing for agreement to a business transaction more quickly.

¹¹⁴ INCOTERMS[®], page 5.

¹¹⁵ HOLLOWAY/MURRAY/TIMSON-HUNT, para.2-001.

¹¹⁶ INCOTERMS[®], page 65.

This apparently easy way of mostly uncontrolled using of pre-formulated terms for contracts may lead to legal difficulties in case of dispute. It must be considered that the requirements of the applicable mandatory law and contract law rules may precede and make individual provisions of such standard terms null and void¹¹⁷. One of the main causes of difficulties by using pre-formulated standard terms is the conflict of the provisions when each party insists on the applicability of their own standard terms under the same contract¹¹⁸. See for more details below in Art. 3.7.

Still, if the parties decide not to use uniform conditions nor standard contract forms for their business agreement, it is important that either party incorporates general terms and conditions that meet the standards of international trade. Litigation can often be avoided when either party is able to refer to provisions in the general terms and conditions that were part of the offer and accepted for the contract. Subsequent discussion may be avoided this way¹¹⁹.

3.7 Battle of Forms

As described aforesaid in art. 3.6, para. 2, the *battle of forms* refers to the not uncommon situation in which the offeror makes an offer including pre-formulated terms and conditions to form the contract and the offeree responds with its own general terms and condition of contract. This circumstance is leading to colliding provisions for the formation of a contract which is dealt in different jurisdictions with varying solutions¹²⁰.

3.7.1 Regulations in Germany

Germany, for example, having also a civil law system like Switzerland, adopted legal regulations for the use of general terms of business already in the mid 70s of the last century. The German *Law of standard business conditions* entered into force on 1 April 1977 and was valid

¹¹⁷ BUGG, page 29.

¹¹⁸ BUGG, page 30.

¹¹⁹ HOLLOWAY/MURRAY/TIMSON-HUNT, para.32-014 et seq.

¹²⁰ BUGG, page 30.

until it was repealed by the *Act on Modernisation of the Law of Obligation* on 1 January 2002¹²¹. The substantive regulations were then transferred to the *German Civil Code (BGB)* and are now covered by §§ 305 to 310¹²². General terms and conditions will not constitute part of a contract if they are not incorporated into the final contract and agreed to by the counter-party (§ 305 BGB). This provision is based on the decision made by the OLG Koblenz¹²³:

*"Where parties exchange letters and each time refer to their contradicting terms and conditions, none of their standard forms becomes part of the contract. Nevertheless, a contract is validly concluded if it becomes clear that the parties did not want to have the contract fail just because of the lack of consensus on the general terms and conditions"*¹²⁴.

In short, any conflicting terms cancel each other out and the provisions of the applicable law form the contract¹²⁵.

3.7.2 Regulations in the United States of America

The Uniform Commercial Code (UCC) Art. 2, §2-207 was the first attempt to solve the "battle of form" problem by statute¹²⁶. It adopted a different method by stipulating in section 1 that "a definite and seasonable expression of acceptance or a written confirmation which is sent within a reasonable time operates as an acceptance even though it states terms additional to or different from those offered or agreed upon". Such additional terms will apply to the contract unless, cit.:

- " (a) the offer expressly limits acceptance to the terms of the offer;
- (b) they materially alter it; or
- (c) notification of objection to them has already been given or is given within a reasonable time after notice of them is received."

¹²¹ BGBl. part I No. 61 page 3187, Art. 6 para.4, dated 29.11.01.

¹²² BGBl. part I No. 61 page 3143, Art. 1 para.12, dated 29.11.01.

¹²³ SCHLECHTRIEM, page 1.

¹²⁴ OLG Koblenz WM 1984, 1347 et seq.

¹²⁵ BUGG, page 30.

¹²⁶ SCHLECHTRIEM, page 4.

3.7.3 Regulations in United Kingdom

Under English law, when an offeree accepts the offer but refers to his usual terms of conditions to be applicable to the contract, the offeree's statement is a counter-offer and no acceptance to the original offer. The offeror is free to accept or reject the counter-offer or to make another counter-offer in return¹²⁷.

In the lawsuit *BRS v Arthur V Crutchley Ltd* the court decided that the notice "Received under [the defendants'] conditions" stamped on the delivery note by the defendant, that was handed over by the driver of the claimant to him and the delivery document in turn included the claimants reference to his "condition of carriage", was a counter-offer and was accepted by the claimant when the delivery of the goods was finally performed. This decision supported the so-called "*last shot*" doctrine¹²⁸. Thus, where conflicting terms and conditions are exchanged each is a counter-offer until the last version is accepted by the party having it as last received.

3.7.4 Situation in Switzerland

Compared with other countries the legislation of the Swiss Confederation has no such explicit statutory provisions for terms and conditions adopted. The only Federal Law referring to the use of general terms and conditions is art. 8 of the *Law against Unfair Competition (LCD)* enforced on 1 March 1988 and currently in revision. The general condition of this law is the prohibition of every practice, deceit and frauds which cases give rise to be contrary to good faith¹²⁹. The provision of Art. 8 LCD, headed with *Use of unfair general terms and conditions*, refers to the unfair acting of one party by making pre-formulated terms and conditions applicable to a contract that are in a misleading manner to the disadvantage of the other party. This could be either when the terms and conditions significantly deviate from final or analogously lawful order, or when the distribution of rights and duties are significantly contradictory to the nature of the contract.

¹²⁷ PEEL, para.2-019.

¹²⁸ PEEL, para.2-020.

¹²⁹ ANSAY/DESSEMONTET/Dessementet François, page 185.

In recent years the Law against Unfair Competition showed legal deficiencies in connection with the structuring of individual business practices as well as with the legal enforcement including the cooperation with foreign supervisory of fair trading authorities¹³⁰. This circumstance induced the Federal Council to send its message to the parliament accordingly. In June 2011 the National Council and the Council of States passed the revision of law with changes on the original text proposed by the Federal Council and sent its version of enactment to the facultative referendum. The term to file a referendum expired on 6 October 2011¹³¹.

In future, the new Art. 8 of LCD shall consider only the protection of the consumers for unfair use of general terms and conditions by excluding all other levels of trade like the professionals¹³². Their freedom of contract shall not be affected as required by the parliament.

No referendum was filed to the Federal Office of Justice prior to the expiry date of the term of referendum¹³³. The Federal Council will now determine the date of enactment for the revision of the LCD based on the text of enactment by the parliament¹³⁴.

However, in case of colliding general terms and conditions in a contract based on Swiss law the prevailing doctrine of Switzerland holds the view analogously to the regulations in Germany (see above 3.7.1). Any conflicting condition of the general terms and conditions have an annulling effect and are not applicable to the contract. The provisions of the applicable law would replace them instead¹³⁵.

3.7.5 Regulations according to CISG

The problem of colliding terms between offers and acceptance for contracts governed by CISG is ruled according to article 19, section 2 and 3. The terms of the offer and acceptance will be combined if they do not

¹³⁰ Federal Council message item no. 09.069 of 2 September 2009 for the Revision of the Law against Unfair Competition, Art. 1.1.1.

¹³¹ BBI 2011 4925.

¹³² FEDERAL ASSEMBLY – THE SWISS PARLIAMENT, Curia Vista – Database of parliamentary proceedings.

¹³³ Information from the Federal Council of Justice by email dated 01.11.2011.

¹³⁴ BBI 2011 4925, II para. 2.

¹³⁵ BUGG, page 30.

materially alter the terms of the offer, i.e. terms relating but not limited to price, payment, quality and quantity of the goods, place and time of delivery, etc¹³⁶. The offeror may object orally to the deviations or by means of a notice of such effect “without undue delay”. Otherwise the terms of the offer are modified with the terms of the acceptance to the formation of the contract¹³⁷.

3.8 Summary

As illustrated in this Art. 3 the uniform rules, that could be applicable to an agreement, are from the legal point of view a very complex matter and shall not to be underestimated for the formation of a contract. It must be pointed out that not all of the uniform rules for international trade existing are dealt within this work. The focus is on the formation of contracts for investment goods. Therefore, many more of those uniform regulations do exist. Some of them have to be agreed to; others do automatically apply to an international sales contract if they are not expressly excluded.

Some are well elaborated regulations considering all needs for a balanced contract. Others have not all of the provisions regulated and must be completed and agreed to with individualised provisions in the contract by the contracting parties.

A good example is the Vienna Convention in regard of the delivery term. It has no indication to any kind of delivery condition and basic regulations. It leaves the choice of delivery condition to the contracting parties, whereas FIDIC stipulates under sub-clause 4.16 *Transport of Goods*, if not otherwise stated in the Particular Conditions, that:

- (a) *the Contractor shall give the Engineer not less than 21 days' notice of the date on which any Plant or a major item of other Goods will be delivered to Site;*

The meaning of “Goods” includes all imposed duties and obligations and are to the account of one party, i.e. the Contractor or delivering

¹³⁶ CISG, art. 19 (3).

¹³⁷ SCHLECHTRIEM, page 2.

party of the goods is in full responsibility of the delivery up to Site¹³⁸. This condition is equivalent to the Incoterms[®] 2010 of *DDP Delivered Duty Paid* and constitutes the maximum of commitment a delivering party may grant and agree to in regard of the delivery condition with the buyer¹³⁹.

But the DDP delivery term may have further challenges. As it conditions the payment of all imposed duties including the value added tax (VAT), such commitment may release a tax registration of the seller company in the country of goods destination depending on the tax regulations of that country. This is also a matter of the existence of a double tax treaty between the involved states. In addition, the contract price and its related spread sheet would have to consider all those costs of duties. That preconditions preliminary clarifications about the regulations given in the country of goods destination prior to the offer transmission.

Furthermore, when investment goods sales contracts have a lack of precision and a dispute arises in this regard, courts may deviate from the meaning set out in the Incoterms[®] to a possible disadvantage for the seller and make their decision according to the regulations given of the law applicable to the contract¹⁴⁰. Therefore, it is recommended specifying the precise delivery term already with the offer.

Individually agreed contract terms have in any case prevailing character to any regulations given by the contract laws unless they do not breach any provision of the concerning law. For the avoidance of colliding provisions by using own general terms and conditions leading to a possible "battle of forms", the parties shall agree to each single contract provision before signing the agreement. The danger of continuing to perform the contract in circumstances where there is a dispute over the applicable terms could result in delay of performance of the project and unnecessary loss of money by resolving the discrepancies at a later date.

However, it is an advantage for both parties to have the provision of resolving a dispute agreed in the contract. As illustrated in Art. 3.4, inter-

¹³⁸ TOTTERDILL, page 139.

¹³⁹ INCOTERMS[®], page 73.

¹⁴⁰ HOLLOWAY/MURRAY/TIMSON-HUNT, para.2-001.

national trade arbitration shall be given priority to litigation for the settlement of any dispute.

Finally, as this work focuses on the laws of Switzerland and England, both jurisdictions have based their contract law on the principle of:

“pacta sunt servanda” – binding contracts are to be kept!

Contracts shall be performed according the terms and conditions the contracting parties have agreed to.

4 Letter of Intent (LOI)

The letter of intent is an invention of the US-American contractual practice and quickly spread all over the world. Meanwhile it has acquired a secure place in the US-American and English practices and elsewhere¹⁴¹. A letter of intent is a document which determines contractual proceedings during the negotiation phase of a business transaction¹⁴². It includes a statement of the intention to further negotiate and eventually conclude a contract. The main issue of that kind of contractual document is whether or not such intention has a legally-binding character¹⁴³.

Several views in this regard can be found in different literatures. One perception can be concluded as follows:

A mere written statement of intent may seem to be a harmless document for an unwitting business person inducing him to sign such declaration of intention by assuming that he has not entered into a binding commitment. This is a common misconception since the heading of such letter is not relevant for the verification whether a document is binding or not, but the content of its text, i.e. which language including rights and duties have been used. Words and phrases like “must”, “shall”, “is obliged to” or “has a right to” are strong indications that LOIs are legally-binding as well as clear statements of obligations¹⁴⁴. To reduce the risk of litigation it should be stated that the content

¹⁴¹ LUTTER, page 111 et seq.

¹⁴² GOSFIELD, page 1.

¹⁴³ BUGG, page 35.

¹⁴⁴ BUGG, page 36.

of the LOI is subject to a final written agreement and does not construed as to be legally-binding¹⁴⁵.

If such disclaimer is missing and it comes to a dispute, courts would not be very much interested in what the parties originally intended. They would sustain their verdict on the facts what the parties did and construe the legal effect of their actions taken¹⁴⁶.

Another viewpoint is the version of the theory that a letter of intent is no requirement to be a binding intention as long as the promise is not supported by consideration (see above Art. 2.3.1). But also this theory is controversial as this would mean in effect that for instance social and domestic arrangements are no binding contracts. Even if the agreement involves reciprocal promises like goods against services and no payment would compensate the counter performance, no bargain would have taken place according to this perception. However, a letter of intent with the promise to enter into a contract with no support of consideration fails the condition to be a legally-binding agreement¹⁴⁷.

Fact is that letters of intent are in no legislation considered nor does any general rule exist where it could be relied on to assess the LOI properly¹⁴⁸. The Swiss legislation has based its assessment for a quasi-contractual obligation in form of a LOI on the principle of "obligation from inspired confidence (Vertrauenshaftung)"¹⁴⁹. How an addressee of a unilateral declaration must have understood in good faith (CC Art. 2) the intention of the agreement is a fundamental element for the judgement of obligation based on trust. If expectations of one party, resulting from the intention of the other party, are justified, preconditions the examination of the content and the given circumstances of the letter of intent¹⁵⁰.

Any breach of quasi-contractual obligations may result in *culpa in contrahendo* according to Swiss law.

¹⁴⁵ GOSFIELD, page 2.

¹⁴⁶ GOSFIELD, page 2.

¹⁴⁷ PEEL, para.4-027.

¹⁴⁸ ANSAY/DESSEMONTE/Bucher Eugen, page 128.

¹⁴⁹ ANSAY/DESSEMONTE/Bucher Eugen, page 125.

¹⁵⁰ ANSAY/DESSEMONTE/Bucher Eugen, page 128.

5 Culpa in Contrahendo / Pre-contractual Liability

Rudolf von Jhering, a German jurist, first published the concept of *culpa in contrahendo (c.i.c.)* in his yearbook no. 4 (1861) and thereby laid the basis for the principle of pre-contractual liability in the modern civil law system¹⁵¹. He held the view that any damage caused by the failure of the conclusion of a contract due to blameworthy conduct of one party should be recoverable¹⁵². Several countries ever since have adopted the doctrine of culpa in contrahendo in their law system.

5.1 Swiss Law and the Principle of Culpa in Contrahendo

Switzerland has a particularly precise regulation of the doctrine of culpa in contrahendo. The Swiss law determines that a legal relationship is already created at the pre-contractual phase whilst the parties evaluate the possibility of concluding a contract and negotiate certain clauses. Such a pre-contractual phase starts when the parties get in touch for the aforesaid purpose and ends when either the offer is refused or the contract is entered into. The consequence of such a legal pre-contractual relationship may lead to hold a party liable for any violation of the pre-contractual duties he must fulfil. This principle applies especially when the duties are based on the rules of good faith and are not respected in business relations¹⁵³.

The general principle of acting in good faith is the main condition of pre-contractual behaviour of the parties. Three rules have been established by the Swiss jurisdiction to support the correct pre-contractual behaviour:

1. The duty to negotiate seriously

If one party has no serious intention to negotiate and finalise a contract with another party he shall not commence any such actions.

2. The prohibition to deceive

Material concealment of important facts by one party that are essential for the other party to conclude a contract is prohibited.

¹⁵¹ ANSAY/DESSEMONTET/Bucher Eugen, page 128.

¹⁵² NOVOA, page 584.

¹⁵³ NOVOA, page 586 et seq.

Should, by way of example, an initial impossibility occur during contract negotiation and the knowing party conceals such circumstance and continues the negotiations, he would act deceiving towards the other party (see above Art. 2.2.3).

3. The duty to inform

The duty to inform amongst the parties comprises:

- the reply to questions one party may raise to the other party in connection with the contract in negotiation;
- the obligation of one party to inform the other party when the latter is relying on erroneous facts unless the party in error is acting careless and could have noticed by himself that his reliance is based on misconceptions¹⁵⁴.

The information must be true and correct on the basis of the rules of good faith, otherwise the party giving false information may be held liable¹⁵⁵. Claims for compensation justified by such incorrect information may be subject to the regulations of unlawful act according to Art. 41 of the Swiss Code of Obligations in case the claimant suffered a loss¹⁵⁶.

However, each individual case of action in connection with c.i.c. would have to be judged by court.

The statutory period of limitation of any claim from the principle of liability by c.i.c. is subject to CO Art. 60¹⁵⁷.

5.2 English Law and the Pre-contractual Liability

The principle of freedom of contract is rather recognised in English law than the principle of acting in good faith in regard to the pre-contractual relationship¹⁵⁸. Several court decisions in England demonstrate this perception. However, fact is that Lords amongst themselves hold different views of judging in similar cases.

¹⁵⁴ NOVOA, page 594.

¹⁵⁵ NOVOA, page 594.

¹⁵⁶ ANSAY/DESSEMONTE/Tercier P., page 150.

¹⁵⁷ BGE 134 III 390, page 392, cons. 4.

¹⁵⁸ GILIKER, page 35.

One illustration of such a controversial view of the same topic is, e.g. the case where the parties have reached agreement leaving the price negotiation unsettled to finalise the condition once the financing had been obtained. As the parties could not agree on that particular term, although the financing was arranged, the principle employed another contractor. The plaintiff claimed for breach of contract. The Court of Appeal rejected the claim as the judge Lord Denning had the view that the agreement, having reached prior to the confirmation of the financing, was too uncertain to classify it as to be binding. A contract cannot have terms that are to be negotiated at a later point. The corresponding case was *Courtney & Fairbairn Ltd v Tolaini Brothers (Hotels) Ltd [1975]*. Lord Denning's decision confirmed an earlier judgement by Lord Wensleydale who had the position that "an agreement to enter into an agreement upon terms to be afterwards settled between the parties is a contradiction in terms. It is absurd to say that a man enters into an agreement till the terms of that agreement are settled". That statement was made in the House of Lords case *Ridgway v Wharton 10 Eng Rep 1287, 1313 (HL 1857)*¹⁵⁹.

On the other hand, in the case of *W.N. Hillas & Co. Ltd v Arcos Ltd [1932]* Lord Wright had argued that "in strict theory, there is a contract (if there is good consideration) to negotiate, though in the event of repudiation by one party the damages may be nominal". This statement was sharply criticised by Lord Diplock (*Courtney & Fairbairn Ltd v Tolaini Brothers (Hotels) Ltd [1975]*) as to be "bad law". In one of the subsequent court cases, *Mallozzi v Carapelli S.p.A. [1976]*, the Court of Appeal was no longer prepared to accept any argumentation of a term negotiated in good faith to be a pre-contractual obligation¹⁶⁰.

Despite the clear position of the English courts in terms of the principle of good faith, the House of Lords eventually were prepared to accept the validity of a collateral agreement, like the one concluded between the parties of *Walford v Miles [1976]*. The defendant has given the promise to the plaintiff to exclusively negotiate the contract with them

¹⁵⁹ GILIKER, page 33.

¹⁶⁰ GILIKER, page 34.

and back out from further negotiations with the competitors when he receives the comfort letter of the plaintiff's banker. This kind of "lock-out" agreement with such an intention may be accepted in the view of Lord Ackner provided that it is valid for a limited time for its enforceability. As the collateral agreement of the parties in *Walford v Miles* did not include such limitation in time, the lordship decided the agreement to be unenforceable¹⁶¹.

Nevertheless, similar to the function of culpa in contrahendo or the concept of good faith, in English jurisdiction one may be hold liable in the law of torts and under the principle of equity by the concepts such as promissory estoppel, misrepresentation or undue enrichment also when no agreement exists¹⁶²:

- Promissory estoppel

Promissory estoppel is a doctrine of equity. It can be applied to arrangements which might once have been regarded as ineffective for want of consideration¹⁶³. The courts may consider promissory estoppel when injustice can be avoided by enforcement of a non-enforceable promise. As described in Art. 2.3.1 a promise without consideration is not enforceable therefore not binding. In the court case *Central London Property Trust Ltd v High Trees House Ltd [1947]* Lord Denning set out the modern principle of promissory estoppel stating that a party, who leads another to believe that he will not enforce his strict legal rights, should not be allowed to enforce this right at a later stage¹⁶⁴. Based on this statement Lord Denning set out the three requirements for promissory estoppels:

- 1.) the promise must be clear by words or conduct
- 2.) the promisee relied on the promise and as a result there was a change in circumstance
- 3.) to go back on the promise would be inequitable

¹⁶¹ GILIKER, page 37.

¹⁶² BUGG, page 41.

¹⁶³ PEEL, para.3-077.

¹⁶⁴ BUGG, page 38.

As a consequence and in particular circumstances promises may be subject to remedies even if made without any consideration. However, in any case an equitable principle is only available at the discretion of the court¹⁶⁵.

- Misrepresentation

A statement of fact about an object of purchase made by one party to another party during contract negotiation which has the effect that such statement induces the counter-party to enter into a contract means by law a “representation”. Would a contract not be concluded even though a statement of fact was expressed, such statement would not become a representation. Therefore, it needs two elements to become a representation: pre-contractual negotiations and the creation of a later contract.

When some mistake in the representation is discovered subsequent to the contract conclusion this is called “misrepresentation”. Such misrepresentation will create liability if the representation was fraudulent, negligent or in certain circumstances by innocence. If any of those conditions are proven for misrepresentation the contract will be declared voidable. The guiltless party has the choice of either continuing the contract or avoiding the contract *ab initio* besides any claim for damage¹⁶⁶.

- Undue enrichment

Undue or unjust enrichment is the circumstance where one party obtains benefit to the expense of another party without legal ground, as e.g. an incorrect payment transfer to a bank account whereupon the owner of the account becomes unjustified to property¹⁶⁷.

It can be summarised that the principle of obligation from inspired confidence (Vertrauenshaftung) has gained increasing significance in Swiss legislation also in connection with pre-contractual negotiations in the last decades¹⁶⁸.

¹⁶⁵ BUGG, page 39.

¹⁶⁶ BUGG, page 39.

¹⁶⁷ BUGG, page 40.

¹⁶⁸ ANSAY/DESSEMONTET/Bucher Eugen, page 127.

Acting in good faith is the main condition of pre-contractual behaviour and prevails over the principle of freedom of contract.

This is quite in contrast to the English law where the principle of freedom of contract still is the driving force behind the negotiation and conclusion of an agreement. The parties are deemed to be acting at their own risk during the pre-contractual negotiation phase¹⁶⁹.

6 Conclusion

The detailed explanation of the formation of international sales contracts governed either by Swiss or English law shows the complexity of drafting contracts in different legal systems. In addition to the challenges about the applicable law, there are a lot of other issues companies are faced with when doing business across international borders, as for example:

- buyer insolvency (purchaser cannot pay);
- non-acceptance (buyer rejects goods as different from the agreed upon specifications);
- credit risk (allowing the buyer to take possession of goods prior to payment);
- regulatory risk (e.g., a change in rules that prevents the transaction);
- intervention (governmental action to prevent a transaction being completed);
- political risk (change in leadership interfering with transactions or prices);
- war, piracy and civil unrest or turmoil;
- natural catastrophes, freak weather and other uncontrollable and unpredictable events

Additionally, international trade also faces the risk of unfavourable exchange rate movements as it is currently the situation on the global financial market. Furthermore, the impact of the various tax regulations in all different countries as well as the granting and managing of bank guarantees conditioned on a first demand basis may not be underestimated.

¹⁶⁹ GILIKER, page 5.

Investment goods manufactured for the business sector of power generation and transmission by the mechanical and electrical engineering industries are usually sold to public power utilities as major projects that are lasting over several years. Sellers are bound and committed for a long duration to fulfil their contractual obligations up to the end of the warranty period. It should always be considered that project teams might change at the seller and buyer side over those years. Furthermore, the performance of those long lasting major projects does not always proceed in a smooth and satisfactorily manner. Disturbances during performance might arise and could result in unforeseen challenges.

Hence, the detailed illustration of the contractual rights and duties in the civil and common law systems, the various possibility for the use of different existing uniform rules and the consideration of the circumstances mentioned in this conclusion show the indispensability of a well drafted sales contract covering all terms and conditions to mitigate the risk as much as possible.

Undoubtedly, the drafting of such international sales contracts for investment goods requires skilled professionals with legal knowledge of the international contract rules and great experience of such area of expertise besides the specialists covering the technical part of the contract. Companies are well advised to involve contract lawyers in the tendering process early enough to avoid adverse impact for want of cover of the relevant contract conditions, be it contractually or financially.

Especially in economically difficult times and if, in addition, the buyers market prevails, well drafted sales contracts of investment goods will prove to be valuable in case any problem arises during the long lasting performance of such projects. It is an investment to be worth the effort for the benefit of the seller company and the specialists who have to implement the contract according to the agreed provisions.

Statement of Validity

I herewith declare and confirm that I created this work on my own without any external help. I exclusively used the literature and material mentioned as a source of information for my work.

Würenlos, 30 November 2011

Silvia Wüst-Nast