# The CISG and its Impact on National Legal Systems

Franco Ferrari (Ed.)

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# Preface

The 1980 United Nations Convention on Contracts for the International Sale of Goods (CISG) is considered to be the most successful convention promoting international trade. In light of it being in force in 70 countries around the world and it covering more than two thirds of world trade, this cannot surprise.

According to many commentators, this success is due, *inter alia*, to the fact that the Convention does not directly impact on the domestic law of the various legal systems in which it enters into force, as it applies only to international – as opposed to purely domestic – contracts. The Convention, in other words, does not impose changes in the domestic law, which makes it easier for States to adopt the Convention. This does not mean, however, that the Convention does not have any impact on the domestic law at all. This book analyzes – through 24 country reports as well as a general report submitted to the 1st Intermediate Congress of the International Academy of Comparative Law held in November 2008 in Mexico City – to what extent the Convention *de facto* influences domestic legal systems; in particular, the book examines the Convention's impact on the practice of law, the style of court decisions and the domestic legislation in the area of contract law.

Verona, October 2008 *Franco Ferrari*

# Country Reports

# Argentina

*María Blanca Noodt Taquela*

## General information

The United Nations Convention on Contracts for the International Sale of Goods (hereinafter: CISG) is in force in Argentina since January 1, 1988.[1]

Generally speaking it is looked upon as a very useful and well balanced instrument which allows a wide range of party autonomy.

Many efforts have been made in Argentina, in particular in Buenos Aires, to raise awareness of it being in force in bar associations, as well as in universities. Lots of lectures, seminars, and Congress dealing with the Convention had taken place in Argentina. As far as I know the Convention is not so well known in business circles, in spite of the fact that practicising lawyers, in general, know about the existence of the CISG.

## I. CISG's impact on practicing lawyers

1. Most of practicising lawyers are aware of the CISG. This is due to the efforts that were made for twenty five years to spread the existence, contents, and advantages of the Convention, among the legal community.

Sometimes, practising lawyers include conditions in their clients' contracts, that modify CISG rules, i.e. lack of conformity or damages. Moreover, lawyers sometimes add a certain period of time to notify lack of conformity.

Practicising lawyers in general try to avoid the Convention's application to individual contracts. One of the reasons for excluding application of CISG to contracts is that main standard forms are prepared by sellers with the aim to exclude liability of the seller in a lot of circumstances. As the Convention has a good balance between seller's and buyer's obligations, it is not useful for the interests of the sellers.

2. The coming into force of the CISG in Argentina has not had any impact on the way practicing lawyers draft their briefs and memoranda, as far as I know.

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[1] The Vienna Convention was approved by Law n° 22.765 of 1983 and ratified on July 19th, 1983.

In addition, the mandate to interpret the CISG in light of its international character and the need to promote uniformity in its application has not had any impact on the drafting of briefs and memoranda.

As far as I could find out, in CISG related cases practicing lawyers do not tend to refer to more case law than in purely domestic disputes. They do not tend neither to refer to more commentators than in purely domestic disputes.

On the other hand, the cites of foreign legal writing and foreign case law are not frequent when dealing with CISG related disputes. I do not know what are the reasons of this lack of cites, when some useful databases on case law on CISG are available in Internet.

3. It is not habitual that practicing lawyers use CISG solutions in purely domestic disputes to corroborate the results they want to reach, but may be that this happens in some cases.

## II. CISG's impact on scholars

1. Scholars are the group of legal circles in Argentina that most attention have devoted to the CISG, both before and after its coming into force.

Perhaps private international law scholars are the most interested on the CISG. Also commercial contract law professors and scholars have focused their attention on the Convention.

The attention devoted to the CISG by scholars and professors have had a great impact on the awareness and application of the CISG, due to the quantity of books, articles, seminars, and courses at graduate and postgraduate level dealed with the CISG.

Scholars have mainly focused on the CISG itself rather than compared with domestic law. Nevertheless a few comparisons between the CISG and Argentine domestic law took place, in general with the aim of highlighting the differences between both systems.

Among other efforts to encourage the study of CISG, the University of Buenos Aires has participated in the Willem C. Vis International Commercial Arbitration Moot for several years. The Argentine Chamber of Commerce organized in 1999 a Moot on International Arbitration and International Sale of Goods, among commercial organizations, bar associations and universities of countries of Mercosur. The University of Buenos Aires is also conducting a Moot that follows the aims of the Willem C. Vis Moot, that is taking place in 2008 for first time.[2]

2. The enforcement of the CISG in Argentina impacted in local treatises, both on domestic and international law. References to CISG can be found in works on Argentine domestic commercial contract law, and com-

[2] http://www.derecho.uba.ar/institucional/deinteres/el_problema_2008.pdf

plete chapters are devoted to the CISG in private international law legal works.

3. Scholars works on CISG has had a great influence on Argentine legal system. Their works impacted on legal practice and legal education. One example may be mentioned: the characterization of a contract as international was changed by scholars when the CISG entered into force in Argentina. Before that, private international law scholars used to considered a contract as international, when its place of execution and its place of conclusion were located in different States. This characterization was changed when the Vienna Convention entered into force in Argentina: scholars began to affirm that a contract was international when the place of business of one party is located in a different State where the place of business of the other party is located.

4. I could not find out any information about the use of CISG's interpretations, to interpret other uniform law instruments.

## III. CISG's impact on courts

1. The CISG's coming into force has not had any impact on the style of court decisions, for instance, I could not find more references to case law.

2. Argentine courts are not conscious enough of the mandate to interpret the CISG in light of its international character and in general do not take into account the need to promote uniformity in its application. Unfortunately I should say that Argentine courts have shown a certain homeward trend.

The courts ruled that lack of conformity of goods should be proved by expert arbitrators under art. 476 of the Argentine Commercial Code, which they considered applicable to the international contract of sale of goods, due to a legal loophole in the CISG on this issue.[3]

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[3] CNCom, sala E, 24/04/2000, *"Mayer, Alejandro c/ Onda Hofferle GMBH & Co. s/ ordinario"*, El Derecho, 2001, t.194, pp. 495-499; CNCom., sala E, 7/11/2002, *"Cervecería y Maltería Paysandú S.A. c. Cervecería Argentina S.A."*, La Ley, 2003-D, pp. 416-419, http://cisgw3.law.pace.edu/cisg/wais/db/cases2/020721a1.html, comentado por Jorge R. *Albornoz,* "Compraventa internacional de mercaderías. Ley aplicable. Disconformidad del comprador respecto de la calidad de la mercadería" en DeCITA 03/2005, pp. 500-505 y JNCom. 15, S. 29, 08/09/2006, *"Bravo Barros, Carlos Manuel del Corazón de Jesús c. Martínez Gares, Salvador s. ordinario"*, http://www.diprargentina.com. The two first mentioned judgments were issued by the Commercial Court of Appeals of Buenos Aires City and the last decision was ruled by a 1st instance Commercial Court of the same city.

3. As far as I know, there are not reported cases in Argentina on the use of the CISG in relation to contracts not covered by its sphere of application.

4. I could not find out any information about courts having relied on interpretations of the CISG to interpret other uniform law instruments.

## IV. CISG's impact on legislators

1. The CISG influenced the discussion on private international law reform in Argentina to some degree. The works for drafting a private international law began in the seventies, but the law never succeeded to be passed by the Parliament. The impact of CISG was mainly directed to the context of the drafted law rather than the discussion on law reform itself. Some principles of the Convention have been adopted in the private international law drafted law. The impact of CISG is not limited to sale-specific topics; it influence may be seen in other issues as well.

The Convention has not had any influence on civil or commercial codes reforms, in spite of the fact that the reform of these codes had been an old aim of Argentina.

2. The CISG did not lead ultimately to law reform. One of the reasons why there have been no reform of private international law in Argentina is that legislators are usually devoted to urgent political matters, in particular those that raised with the economic emergence.

3. There are not differences between the CISG and the Argentine domestic law that have been modelled after the adoption of the Vienna Convention. The differences may be find in the Civil Code and in the Commercial Code that were enacted in the XIX century.

4. There has not been any reform of Argentine domestic law modelled after the CISG was in force.

# Brazil

*Iacyr de Aguilar Vieira*

## Introduction and General Issues

To verify the application of the United Nation Convention on Contracts for the International Sale of Goods (hereinafter: CISG) in Brazil, we researched various segments of the national legal community.[1] The analysis of the answers submitted, along with other national and foreign bibliographies on the subject matter, allowed us to trace the profile of the current situation in Brazil.[2]

Even though Brazil had participated at the preliminary discussions of the 97th Diplomatic Conference to discuss and approve the uniform text,[3] the country has not signed nor adopted the CISG.[4] For that reason, CISG is currently not in force in Brazil. This fact is surprising, considering that Brazil (along with other countries) has actively participated as the Vice-President of the Conference, and that it was part of the Convention's Writing Com-

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1 Only approximately twenty percent of the 50 questionnaires sent were replied to.

2 I would like to thank Professors Nádia de Araújo, Lauro da Gama e Souza Jr,, Eduardo Grebler, Fernando Amorim, Florisbal Del'Olmo, Ruy Rosado de Aguiar Jr. (the judge of the Superior Court of Justice), Velloso, Pugliese & Guidoni, Advogados, the International Chamber of Commerce (ICC); the Chamber of Commerce of Italy, the Chamber of Commerce Brazil-Germany, and UNCITRAL.
A special thanks to the postgraduate student, Daniel Froes Batata (Brazilian Lawyer currently pursuing his MBA in International Business at Pittsburg State University, USA), for the translation of this report to the English language and for his collaboration to the text. Also, to the doctorate student Gustavo Vieira da Costa Cerqueira (Brazilian Lawyer currently pursuing his Doctorate programs at Université Robert Schuman, Strasbourg, France) and to the doctorate student Nathalia Arruda Guimarães (Brazilian Professor currently pursuing his Doctorate programs at Coimbra's University, Portugal), who has provided valuable insights during the composition of this report.

3 Document A/CONF.97/18.

4 Brazil's delegation was composed of the Minister of Foreign Affairs, Professor Francini Neto, of the First Secretaries, Mrs. Mair Ione Vilhena de Vasconcelos and Mr. José Antonio de Macedo Soares (Alternative Representatives) and of the Brazilian National Treasury Attorney, Mr. Luciano Benevolo de Andrade (A/CONF.97/INF.2).

mittee.[5] Brazil has even approved the final text of the Convention and signed the Convention's Final Minute during its 12th Plenary Session.[6]

While writing my doctoral dissertation,[7] I sent a letter to the Brazilian Ministry of Foreign Affairs to inquire about Brazil's reasons for not adopting the CISG. The answer received was that *"there has not been an internal initiative by any organization or sector of the society,"* and that *"there are no substantial reasons that justify Brazil's non adhesion to the CISG."*[8]

In what refers to private international law, Brazil has closely followed Joseph Story's lessons,[9] adopting the principle of the territoriality of laws and of the prevalence of the State's sovereignty. This position may have led the country to a more conservative approach in adopting international conventions.[10] Such conservatism is more clearly observed during Brazil's military dictatorship period, which began after the military coup of 1964 and lasted until the end of the 1980s. In this period, the Legislative role has been severely reduced both in the internal law and the private international law

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5 A/CONF.97/18, p. 188-189.

6 A/CONF. 97/SR.12.

7 *I. de Aguilar Vieira,* La Convention des Nations Unies sur les contrats de vente internationale de marchandises et son applicabilité au Brésil, Thèse, Strasbourg, 2003. Doctoral dissertation elaborated under the supervision of Prof. Claude Witz, and defended on September of 2003 at Université Robert Schuman de Strasbourg, France.

8 Electronic mail sent on 26 April 2002 by Sr. José Vicente da Silva Lessa, who was at the time Director of the International Acts Division of the Brazilian Ministry of Foreign Affairs. The response to the questionary about the impact of the CISG in Brazil, sent by Professor Lauro Gama Souza on January 28, 2008, corroborates Sr. José Vicente's answer.

9 See for example *J. Samtleben*, Derecho Internacional Privado en América Latina. Trad. I. C. Bueno-Guzmán. Buenos Aires: 1983, p. 4-275; *J. Samtleben*, El territorialismo de leyes en América Latina, in: Primer Seminario Nacional de Derecho Internacional Privado, México (1979) 171 seq.; *F. Juenger*, Contract Choice of Law in the Americas, in: The American Journal of Comparative Law. A Quaterly 45-1 (1997) 195-208; *J. Story*, *Commentaries on the Conflict of Laws*, 7 ed. Littlebrown & Co., 1872, p. 278-279. *R. Octavio*, L'Amérique et la codification du droit international privé, in: Revue de droit international privé XXV (1930) 633-665; *W. Goldschmidt*, Droit international privé latino-américain, in: Journal de droit international 1 (1973) 65-96; *A. M. Villela*, L'unification du droit international privé en Amérique Latine, in: Revue critique droit international privé (1984) 233-265. But see also *A. M.Garro*, Unification and Harmonization of Private Law in: Latin America, in: The American Journal of Comparative Law 40 (1992) 587-616.

10 *W. B. Rechsteiner*, Direito Internacional Privado, Teoria e Prática, São Paulo: Saraiva, 2003, p. 56.

spheres.[11] During this period, various important international conventions have been signed; however, they have not been incorporated into the Brazilian Law. For example, the International Labor Organization Convention was not ratified by Brazil until much later, and the Vienna Convention on the Law of Treaties of 1969 has not been presently ratified by Brazil. The Inter American Convention on International Commercial Arbitration, signed in Panama in 1975, was only enacted in Brazil on 9 May 1996 (Enactment n. 1902); and the important United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention of 1958) was recently enacted (Decree n. 4.311 of 23 July 2002) and has been in force only since 5 September 2002.

These recent ratifications are examples of a process, initiated by Brazil in 1990, of effective adoption of the international conventions.[12] The adhesion to the Statute of UNIDROIT (enacted in Brazil on 2 August 1993, by Decree n. 884) and to the Statute of the Hague Conference of Private International Law (enacted in Brazil on 1 July 2001, by Decree n. 3832) reveal Brazil's intention to actively participating in the development of private international law and in endowing itself with international legal instruments that will help the country to better participate in international commerce. Parallel to this trend, we observe an increase in Brazilian lawyers' participation in international organizations that promote the uniformity of laws. Furthermore, we observe an increase in Brazilian students' participation in private international law courses and events outside the country, especially postgraduate courses and the courses promoted by the Hague Academy of International Law.

Regarding the adoption of the CISG by Brazil, the literature presents different opinions. To some jurists, the Legislative Power is inert because it does not know the CISG. The lack of awareness of the legislatures is due to the lack of pressures by the legal community, which cannot draw their attention for problems like this, which do not have a strong political appeal. For that reason, there is no evidence that is will be adopted at the moment.[13]

Many affirm that the main obstacle to the adoption of the Convention's text is the lack of awareness of the CISG, as well as a lack of an effective compromise by the Brazilian government and parliament in adopting legal mechanisms capable of strengthening international commerce.[14] Moreover,

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[11] *G. N. Nazo*, Lei Geral de Aplicação das Normas Jurídicas, in: Revista dos Tribunais 613 (1986) 32-43.

[12] *J. Dolinger* e *C.Tiburcio*, O DIP no Brasil no Século XXI, in: Revista Mexicana de Derecho Internacional Privado, Número Especial (2000) p. 79 seq.

[13] *N. de Araújo*, electronic mail sent on 13 February 2008.

[14] *F. Amorim*, electronic mail sent on 13 February 2008.

some jurists highlight the problems of contradictory interpretations that may arise in the application of the CISG due to imprecise and flexible terms.[15] However, optimism is present. Some jurists believe that the CISG will be adopted – even if the adoption procedure occurs in a slower manner than compared to other conventions procedures.[16] Others mention the existence of legal study commissions and groups, such as the *Centro de Estudos das Sociedades de Advogados*, which intends to recommend the adoption of the CISG to the Ministry of Foreign Affairs.[17]

The fact that Brazil has not yet adopted the CISG does not preclude, however, its application by the Brazilian judges or by the arbiters located in Brazil, to decide the litigations involving contracts for the sale of goods between parties established in Brazil, and parties established in States that have adopted the CISG.

Hence, it is important to present the conditions of applicability of the CISG in Brazil (I), before we proceed to the analysis of the possible impacts of this uniform law in Brazil (II).

## I. Conditions of Applicability of the CISG in Brazil

Since the Convention establishes specific criteria for its application (1), conditions of applicability of the CISG in Brazil must be analyzed from the stand point of convention's text, and then from the Brazilian legal order stand point since the CISG is not mandatory to non-signatory States (2).

### 1. CISG applicability conditions

CISG establishes, in its first article, the criteria of internationality of the contracts and, at the same time, presents the applicability criteria. Thus, article one gathers two applicability conditions of the Convention.

The internationality of contracts, adopted by the CISG, is a legal criterion. It requires that the parties have their establishments in different States.

The applicability criteria chosen by the CISG are also legal. Such criteria require that the parties must have their establishments in contracting States (Article 1.1.*a)* of the CISG) or that the private international law rules lead to the application of the law of a contracting State (Article 1.1.*b)* of the CISG).

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15 *W. B. Rechsteiner*, Direito Internacional Privado, cit. p. 54-55.

16 *F. Del'Olmo*, electronic mail sent on 26 January 2008.

17 As pointed by Velloso, Pugliese & Guidoni, Advogados, in a written communication dated February 01, 2008, this entity intends to recommend the adoption of the CISG to the Brazilian Ministry of Foreign Affairs in the first semester of 2008.

Thus, the area of application of CISG rules is widened by the later article – which makes CISG application possible even when the parties are established in non-contracting States. This is possible thanks to the rules of conflict, which allow the expansion of the uniform law by its direct application (a) as well as by its indirect application (b).

### a) Direct Application

Article 1.1.*a)* determines the autonomous, or direct, application[18] of the CISG when the parties are established in contracting States. In other words, CISG – if part of both the legal systems involved – is applicable as the suppletive or "non-mandatory" law. It makes no difference whether the parties were or were not aware of the existence of the Convention,[19] or whether the parties knew that the States where they are established were a party to the Convention.

Because the CISG has adopted the "*opting out*" system, its application is automatic. The CISG's application automatically arises when the conditions stated in Article 1 are satisfied. However, the Convention will not be applied if the parties totally or partially exclude its application, or if they modify its effects.[20]

The CISG norms allow the parties to exclude the application of the Convention or, subject to articles 12 and 95,[21] to derogate from or to vary the effect of any of its provisions.[22] Even though article 6 of the CISG has been written in general terms – avoiding thus any reference to the possibility of an implied-in-facts exclusion of the Convention – this does not mean that the exclusion of the conventional law must at all times be expressly made.[23] Hence, as long as the parties are established in contracting States

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18 *F. Ferrari*, Contrat de vente internationale – Applicabilité et applications de la Convention de Vienne sur les contrats de vente internationale de marchandises, 2ème éd. Bâle: Helbing & Lichtenhahn, Bruxelles: Bruylant, Paris: Forum Européen de la Communication, 2005, p. 43 seq.

19 Cf. *F. Ferrari*, Contrat de vente internationale, 2ère éd. cit., p. 44.

20 *C. Witz*, L'exclusion de la Convention des Nations Unies sur les contrats de vente internationale de marchandises par la volonté des parties (Convention de Vienne du 11 avril 1980), in: Recueil Dalloz Sirey 17 (1990) 107-112.

21 Several states have however declared a reservation against the application of the rule in Art. 1(1) lit. (b) CISG under Art. 95 CISG.

22 *F. Ferrari,* Exclusion et inclusion de la CVIM, in: Revue de droit des affaires internationales 3-4 (2001) 401-414.

23 *F. Ferrari,* Exclusion et inclusion de la CVIM, cit., p. 403. See also, *F. Ferrari,* Contrat de vente internationale, 1ère éd., Bâle/Bruxelles: Helbing & Lichtenhahn/ Bruylant, 1999, p. 54, note 238. *K. Neumayer* et *C. Ming,* Convention de Vienne

and have not expressly or impliedly excluded the application of the uniform law – in the form established by Article 6 of the CISG[24] – the judge, or the arbiter, does not have to turn to the conflict-of-law system to determine the applicable law.[25]

Considering that until the present Brazil is not part of the contracting-States list, the automatic application cannot occur in Brazilian legal system. Therefore, the possibility of application of the uniform law in the country must be analyzed under another perspective established by the CISG: the indirect application of the Convention's rules as a recourse of the conflict-of-law system.

### b) Indirect Application

Article 1.1.*b)* creates the possibility of the application of the CISG when private international law rules lead to the application of the law of a contracting State. Because this disposition allows the use of the CISG when the parties are not established in a contracting State, it spreads the use of the uniform law.

In regard to geographic and legal frontiers, it is important to note that the CISG is not mandatory to non-contracting States.[26] However, it can be applied by the courts of a non-contracting State as *lex causae* – as determined by the local conflict-of-law rules.

Nevertheless, the indirect application is conditional to the nonexistence of the declaration by the contracting State as mentioned in Article 95 of the CISG, which gives States the power not to be bound by the Article 1.1.*b)* rules.

This means that the courts of a State that has declared that it will not be bound by Article 1.1.*b)* will only apply the CISG when both parties have their respective establishments in contracting States.[27]

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sur les contrats de vente internationale de marchandises. Commentaire, Ed. François Dessemontet, CEDIDAC, 1993, p. 83.

[24] *F. Ferrari,* Contrat de vente internationale, 1ère éd., cit., p. 54, note 238. See also, *K. Neumayer* et *C. Ming,* Convention de Vienne sur les contrats de vente internationale de marchandises. Commentaire, cit., p. 83.

[25] *F. Ferrari,* Contrat de vente internationale, 1ère éd. cit., p. 55 (citing *K. Bell,* The sphere of Application of the Vienna Convention on Contracts for International Sale of Goods, Pace International Law Review, 8 (1996), 247).

[26] *K. Neumayer* et *C. Ming,* Convention de Vienne sur les contrats de vente internationale de marchandises. Commentaire, cit., p. 44.

[27] *K. Neumayer* et *C. Ming,* Convention de Vienne sur les contrats de vente internationale de marchandises. Commentaire, cit., p. 591.

Another situation discussed by the literature refers to the hypothesis in which a party that is established in a contracting State that has not made the declaration chooses the law of another contracting State that has made the declaration. Under these circumstances it is assumed that the parties tacitly intended to exclude the application of the CISG.[28]

Furthermore, another problem regarding the applicability of Article 1.1.*b)* refers to the concept of conflict-of-law rules. The European doctrine embraces the possibility of the parties to choose the applicable legislation for their contractual relations. As observed by C. Witz,[29] the Principle of Autonomy is undoubtedly part of the private international law norms. Hence, it must be considered when Article 1.1.*b)* is to be applied.

In a more strict sense, K. Neumayer and C. Ming understand that the rule of Article 1.1.*b)* is only valid to the extent of objective criteria. Under these circumstances, the true intent of the parties must be analyzed by the evidences presented by the concrete case. Furthermore, it is necessary to understand whether or not the parties were making reference to the national law.[30]

As observed in the jurisprudence, the first thesis seems to prevail over the second one. The CISG was applied in a decision handed down by the Higher Regional Court of Cologne[31] and in an arbitral award handed down by the International Chamber of Commerce – ICC Paris,[32] because the Convention was in force in Germany and in France, respectively. The court and the arbiters supported their decision on the grounds that both countries were bound by Article 1.1.*b)*. A different decision was handed down by the Civil Court of Monza. The judges refused to apply the Convention on the grounds that Article 1.1.*b)* of the CISG should not be applied under the circumstances of the case because the parties had chosen a different law.[33]

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[28] *S. Marchand,* Les limites de l'uniformisation matérielle du droit de la vente internationale: mise en œuvre de la Convention des Nations Unies du 11 avril 1980 sur la vente internationale de marchandises dans le contexte juridique suisse. Faculté de Droit de Genève/Bâle et Francfort-sur-le-Main: Helbing & Lichtenhahn, 1994, p. 104.

[29] *C. Witz,* Les premières applications jurisprudentielles du droit uniforme de la vente internationale, cit., p. 25-26.

[30] *K. Neumayer* et *C. Ming,* Convention de Vienne sur les contrats de vente internationale de marchandises. Commentaire, cit. p. 49.

[31] OLG Köln, 22 feb.1994.

[32] CCI, 1993, Affaire 6653, JDI (1993), p. 1040.

[33] Tribunale Civile di Monza, 14 gen. 1993, *Nuova Fucinati S.p.A.* c. *Fondmetal International A.B.,* in: Giurisprudenza Italiana I (1994) 146. See also, Il Foro Italiano, I (1994) 916. Case n. 54 (CLOUT). Commentary *C. Witz*, Les premières applications jurisprudentielles du droit uniforme, cit., p. 44-45 and *Bonell*, Giurisprudenza Italiana I (1994) 145. *Di Paola*, Il Foro Italiano, I (1994) 917.

Because the CISG is not mandatory in non-contracting States, the basis for its legitimate application in Brazil must be analyzed under the Brazilian conflict-of-law rules.

## 2. Hypothesis of applicability of the CISG in Brazil

In Brazil, the private international law is essentially governed by the *Lei de Introdução ao Código Civil de 1942 (LICC)*,[34] which remains in force even after the promulgation of the new Civil Code.[35] In addition to the LICC, the Brazilian Arbitrage Law and some conflict-of-laws conventional rules are also in force in the country.[36]

As observed on Article 9 of the LICC, Brazil adopts the *locus regit actum* principle in determining what law is applicable to obligations. Such rule, stated in the heading of the article, is applicable to the contract formation, to its substance, and to its effects. In reference to contract execution, the LICC determines the application of the Brazilian law when the contract is to be executed in Brazil – except in what refers to the extrinsic aspects of the contract, in which case the foreign law shall be applied (Article 9, § 1 of the LICC).

Regarding the imperative characteristic of the above-mentioned Article 9, both the literature and the courts do not have a concrete positioning. The doubt lies on the fact that the former *Lei de Introdução ao Código Civil* (of 1916) explicitly allowed the parties to choose the applicable law. The LICC of 1942, however, omitted the expression "except when the parties estipulate differently." The new text has caused profound discussions whether it is possible or not for the parties to choose the applicable law in regard to international contracts.

Because of the doubts regarding the acceptability of the principle of the autonomy of will as determinant criterion of the applicable law, the applicability of the CISG in Brazil may depend on the selected forum. Hence, we will first analyze the hypothesis of application of the CISG by the public courts (a) and later by the arbitral courts.

### a) Applicability of the CISG in Brazil by public courts

The literature and the courts are not unanimous in reference to the present matter. Refusal to apply the principle of the autonomy of will to interna-

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34 Decree-Law n. 4.657 of September 4, 1942.

35 Law n. 10.406 of January 10, 2002; DOU on January 11, 2002.

36 Law n. 9.307 of September 23, 1996.

tional contracts still prevails in litigations brought before public courts.[37] Nonetheless, there are decisions handed down by courts other than STF (Brazilian Federal Supreme Court) and STJ (Brazilian Superior Court of Justice) that accept the principle of the autonomy of will, such as the one delivered by the *Primeiro Tribunal de Alçada de São Paulo*.[38] The literature, on the other hand, is favorable to the application of the principle even in the absence of explicit legal authorization.[39]

*De lege ferenda*, this possibility is also addressed on articles 9 and 10 of the Inter American Convention on the Law Applicable to International Contracts, held in Mexico in 1994, and concluded at fifth Inter-American Specialized Conference on Private International Law (CIDIP V).

Brazil has signed the Inter-American Convention and its ratification may undoubtedly impose the application of the principle of the autonomy of will in the country. Then, the possibility of the application of the CISG by public courts will be effective. However, after the ratification, Brazilian public courts will face other issues presented by this Inter-American Convention. As an example, courts will have to decide what the "*closest ties*" are that link the contract to the laws of a State. Another problem mentioned by the literature is that this Convention is only applicable to parties established or residing in States that are party to this Inter-American Convention because it has no *erga omnes* effect.[40]

Although there are no reported cases at this moment, it is possible – due to the objective element of connection outlined by Article 9 of the LICC – to have an effective application of the CISG by Brazilian courts. That is, when a contract has been celebrated in a State that has adopted the CISG, the parties can require the application of the Convention to the contract form in litigations that involve the contract formation. They can also require its application to the substance and effects of the contract because of the *locus regit actum* rule.

When the contract is executed in Brazil, the Brazilian legislation must be applied to the intrinsic aspects of the act, such as contractual capacity of the parties, legality, and form (the contract must be in whatever form the law requires or does not forbid). The Brazilian Civil Code (Article 104) considers these aspects as essential to the contract. The applicability of the CISG to extrinsic aspects of the contract is still possible. This possibility character-

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37 Recurso Extraordinário n. 93.131, MG, *Banco do Brasil v. Champalimaud*, in: Revista Trimestral de Jurisprudência, vol. 101, t. III, 1982, p. 1149.

38 Agravo de Instrumento n. 465457, 29 August 2002. 11ª Cãmara do 1º Tribunal de Alçada do Estado de São Paulo.

39 *W. B. Rechsteiner*, Direito Internacional Privado, Teoria e Prática, cit.,p. 142. See also, *N. de Araújo*, Contratos Internacionais: Autonomia da vontade, Mercosul e Convenções Internacionais, Rio de Janeiro: Renovar, 1997, p. 184.

40 *W. B. Rechsteiner*, Direito Internacional Privado, Teoria e Prática, cit., p. 141.

izes the phenomenon known as "*depeçage*." It is important to highlight the difficulty in tracing a line between intrinsic and extrinsic elements of a contract. This problem has always divided the Brazilian literature.[41]

In cases where the rules of conflict of Article 9 of the LICC determine the application of the Brazilian law, CISG will not be applied, except by analogy in the remote and limited hypothesis of utilization of the CISG as an expression of international commerce customs (as allowed by Article 4 of the LICC). This happens because the Brazilian legal system of laws lacks norms that deal specifically with the international sale of goods. Also, the norms of the Civil Code (that rule national sale of goods) are not appropriate to the international environment.

### b) Applicability of the CISG in Brazil by arbitral courts

The Brazilian arbitrage law (*Lei de Arbitragem)* is clear in admitting the *election iuris*. As stated in Article 2, the parties can freely choose the law applicable to the contract, as long as the choice does not offend the public order and the customs. Thus, the CISG can be used when the parties choose the laws of a State party to the Convention.

The CISG can be applied if the parties include an arbitration clause in their contracts that allows the choice of law. Another possibility arises when the parties make reference to the *lex mercatoria*, principles, uses and customs of the international commercial law or equivalent. Under these circumstances, an arbitral court may decide to apply the CISG as the expression of the international commerce rules (as it has been doing).[42]

Although the application of the CISG is possible when the parties choose it and submit it to arbitration, we did not find any record of arbitral awards that have done so in Brazil.[43]

In what refers to arbitrage, it is important to note that the Agreement on International Commercial Arbitration, signed in Buenos Aires on 23 July

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41 *J.G. Rodas*, Elementos de conexão do direito internacional privado brasileiro relativamente às obrigações contratuais, in: Rodas (ed.), Contratos internacionais, 2ª ed., São Paulo: Revista dos Tribunais, 1995, p. 9-49. *E. Espínola* e *E. Espinola* Filho, A Lei de Introdução ao Código Civil Brasileiro, Vol. 2, 3ª ed., Rio de Janeiro: Renovar, 1999, p. 409 seq. See also *A. Junqueira de Azevedo*, Negócio jurídico: existência, validade e eficácia, São Paulo: Saraiva, 2002, p. 32 seq.

42 See Arbitral Award ICC n. 9.887 (1998) in: ICC International Court of Arbitration Bulletin 11 (2000-2) 109-110. Commentary, *A.Mourre*, Application of the Vienna International Sales Convention in Arbitration, *ICC International Court of Arbitration Bulletin* 17 (2006-1) 43-50.

43 The Brazilian's Arbitration Courts did not answer the questionnaires sent.

1998, is in force in MERCOSUL (Decision n. 3/98 of CMC).[44] The agreement addresses the issue of international arbitrage between private entities and, based on the principles of private international law and of international commercial law, it allows the parties to choose the applicable law. Under this Agreement, if the parties do not indicate the chosen law, the arbiter must base his/her decision on the above-mentioned principles (Article 10). Therefore, under these circumstances the CISG can also be applied in Brazil.

Brazil's adhesion to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, concluded in New York on 10 June 1958 – which was promulgated without reservation in Brazil by the Decree n. 4.311 on 23 July 2002 – allows the execution of an arbitral award based on the CISG, against a party located in Brazil. This fact demonstrates how important it is for Brazilian business people and lawyers to know and understand the CISG.

## II. The impact of the CISG in Brazilian Law

### 1. CISG's impact on practicing lawyers

After having analyzed the answers to the questionnaires, we concluded that Brazilian lawyers are usually not aware of the CISG. However, this trend is changing due to the fact that international commercial law is being taught in most Brazilian law schools. Also, the creation of *lato* and *strico sensu* postgraduate courses in international law and integration law tends to contribute to this change. Additionally, events such as extension courses and conferences, which are are usually attended by a great number of students, contribute to the dissemination of the CISG in Brazil.[45]

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[44] Promulgated by Decree n. 4.719 of 4 May 2003. This Agreement is identical to the Agreement on International Commercial Arbitration, celebrate among MERCOSUL, Republic of Bolivia and Republic of Chile (Decision n. 4/98, of CMC). To better understand these and other agreements on international arbitrage see *N. Taquela*, Arbitraje internacional em el Mercosur, Buenos Aires: Ciudad Argentina, 1999.

[45] *Velloso, Pugliese & Guidoni*, Advogados, electronic mail sent on 1 February 2008; and *N. de Araújo*, electronic mail sent on 13 February 2008.
Under the scientific direction of this author and with the support of the French Embassy in Brazil, two conference cycles have been organized in several Brazilian universities: UFRGS, UNI-CEUB, UFV, UFMG, UFES, USP and PUC-Rio. Both these cycles addressed two important topics: The bicentennial anniversary of the *Code Civil* (2004), and its influence on South-American rights and the international contracts of commercial trade. French and South-American jurists

Because of the intensification of the study of public and private international law and of regional integration law, Brazilian lawyers have been more interested on the subjects and have been discussing them more in professional circles. However, even after the above-mentioned changes, it is rare to find Brazilian lawyers (who have not studied abroad) who have some type of experience with the CISG.[46]

Another reason that contributes to the lack of knowledge of the CISG is that only recently Brazilian companies have started to include the foreign market – either by means of export or by foreign direct investments – in their commercial strategy. Some internal measures favored this new scenario, such as the promulgation of the Arbitrage Law in 1996, which is very similar to the UNCITRAL Model Law.[47] Discussions of the most important subjects in international commerce are being promoted by universities, Chambers of Commerce, and by Arbitration Chambers in many cities through the sponsorship of Conferences.

Brazilian law firms, on the other hand, have not been utilizing the CISG even in contracts that have arbitration clauses. Also, international commerce rules, principles, and customs or even the *lex mercatoria* have not been utilized as applicable law to contracts or in litigations. However, we also do not observe the systematic and explicit recommendation for the exclusion of the CISG.[48]

As mentioned, the CISG has not been widely utilized by Brazilian jurists who are involved with international contracts. When it is utilized, it is utilized under arbitral jurisdiction. Because the majority of the Brazilian arbitral awards are confidential, the access to these files is limited. Therefore, it is difficult to estimate the use of the CISG in these cases.[49]

The use of foreign literature in petitions and in opinions given by lawyers and consultants is common in Brazil. Also, comparing the laws of different States is a common practice among Brazilian and Latin-American jurists.[50]

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spoke on both these cycles about international contracts and the 25th anniversary of the CISG (2005). The acts of both these conference cycles can be found in the collective book *Estudos de Direito Comparado e de Direito Internacional* (currently in press) – coordinated by Professors Iacyr de Aguilar Vieira and Véra M. Jacob de Fradera.

46 *Velloso, Pugliese & Guidoni*, Advogados, electronic mail sent on 1 February 2008.

47 *Velloso, Pugliese & Guidoni*, Advogados, electronic mail sent on 1 February 2008.

48 *Velloso, Pugliese & Guidoni*, Advogados, electronic mail sent on 1 February 2008.

49 *Velloso, Pugliese & Guidoni*, Advogados, electronic mail sent on 1 February 2008.

50 *R. David*, "L'originalité des droits de l'Amérique latine", in R. DAVID, Le droit comparé: droits d'hier, droits de demain, Coll. "Etudes Juridiques Comparatives", A. TUNC (dir.), Paris, Economica, 1982, pp. 161-173. See also, C. *Jauffret-Spinosi*, Rapport Introductif aux Journées franco-italiennes de l'Association Henri Capitant, La circulation du modèle juridique français, Paris: Litec, 1993, p. 100.

The access to foreign literature on international commerce is facilitated to Brazilians by references made in international law and international commerce books,[51] and by the direct access that some Brazilian lawyers have to this literature.

Thus, the principles and concepts mentioned in the CISG can gradually be absorbed by the national legal practice. However, until the present, there are no reports of the use of the CISG in purely domestic disputes. As mentioned, except in cases where the arbitral forum is chosen, parties in Brazil are usually not free to choose the law that is going to be applied to their contracts.[52]

There are no norms that specifically rule the contracts for the international sale of goods in Brazil.[53] Two of the main difficulties to the Brazilian exporter are the price and the payment. The State intervention in such matters is evident. The contracts for the international sale of goods are subject to the rules established by several Ministries (of Finance, of Mines and Energy, of Agriculture, of Health, and of Development, Industry and Foreign Trade) and also by the Central Bank. For a long time, Bank of Brazil's *Carteira do Comércio Exterior* (CACEX) acted as the main executor of the policies written by this board of Ministries. Even though CACEX was substituted by the *Câmara de Comércio Exterior* (CAMEX) in 1995, the scenario remains the same in the present.

The execution of export and import activities is still done under the supervision of the State, through the *Brazilian Secretary of Foreign Trade* (SECEX) and through the *Brazilian Export and Investment Promotion Agency* (APEX) – both of which are subordinate to the *Ministry of Development, Industry and Foreign Trade* (MDIC). All Brazilian exporters must be registered in the SECEX. In January 1997, SECEX implemented a computerized foreign trade system (SISCOMEX) to deal with documents related to foreign trade. The rules are strict, and make the export procedure very difficult. There is a minimum-capital requirement for the formation of exporting companies, and the registration in the SECEX is mandatory.

A scholar mentioned in 1985 the total lack of a "contract" between the parties, who only miss it when there are flaws in the commercial operation. He also observed that the simplicity of such operations contrast with the intricacies of scholars' discussions. This international trade dynamic, which has the contract (even unwritten ones) as its instrument, is the crucial point in international contracts in his opinion. Also of importance is the Private International Law, which still lacks practical, viable and harmonious solu-

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51 *Velloso, Pugliese & Guidoni*, Advogados, electronic mail sent on 1 February 2008.

52 *Velloso, Pugliese & Guidoni*, Advogados, electronic mail sent on 1 February 2008.

53 *L. da Gama e Souza Jr.*, electronic mail sent on 28 January 2008.

tions that can follow the dynamic of the international trade, mainly in what refers to conflict of laws and to contractual relations.[54]

This reality, which is still held true in the present, can be gradually changed due to the growing number of partnerships formed between Brazilian and foreign law firms and due to the activities of the Chambers of Commerce, which are present in almost all the capitals of Brazilian states.

## 2. CISG's impact on scholars

Brazilian jurists have dedicated a fair amount of attention to the CISG both before and after it entered into force. This fact can be observed by the number of publications on the matter, which grows proportionally to the country's opening to international trade.[55]

On the other hand, the fact that the CISG is not in force in Brazil reduces the appeal for its study.[56] It is expected that Brazil's integration to the CISG will become a reality in the future.[57] Nonetheless, this integration can already be seen presently at the university level, where a select group of jurists have turned their attention to the CISG.

This group is composed of experts in contract law[58] and private international law scholars;[59] however, there is no coordination of activities between these members. Many of them work independently or rarely in partnerships.[60]

The study of the CISG can also be observed in some groups registered in the *National Council for Scientific and Technological Development* (CNPq).

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54 *S.L. Zaragoza,* Estudo comparativo sobre os contratos internacionais: aspectos doutrinários e práticos, in Contratos internacionais, 1st ed., 1985, 1st, p. 51-90, spec. p 69.

55 As observed in the Brazilian bibliography shown in the Annex, the number of publications on the CISG is growing every year, especially since 1990.

56 *R. Rosado de Aguiar Jr.*, written communication on 19 February 2008.

57 *L. da Gama e Souza Jr.*, electronic mail sent on 28 January 28 2008; *F. Del'Olmo*, electronic mail sent on 26 January 2008; and *N. de Araújo*, electronic mail sent on 13 February 2008.

58 *F. Del'Olmo*, electronic mail sent on 26 January 2008.

59 *L. da Gama e Souza Jr.*, electronic mail sent on 28 January 2008.

60 Some committees are being created by the *Associação sul americana de direito internacional privado (ASADIP)* to study texts from different international organizations. The American Association of Private International Law was founded In Asuncion, Paraguay, on 6 October 2007, and has members from various South American countries. Among the above-mentioned committees, one that has special importance is the committee dedicated to the study of the texts adopted by the UNCITRAL.

Furthermore, some groups created by professors in several universities located in different states in Brazil are dedicated to the study of the CISG. Examples of such professors and their respective universities are: Antenor Madruga (UCB), Nádia de Araújo (PUC-Rio), Lauro Gama, (PUC-Rio), Daniela Vargas (PUC-Rio), Eduardo Grebler (PUC-Minas), Fernando Amorim (UFAL), Marilda Rosado de Sá Ribeiro (UERJ), Ricardo Almeida (UERJ), Fabiana Ramos (UFF), Ricardo Perlingeiro (UFF), Véra Maria Jacob de Fradera (UFRGS), Claudia Lima Marques (UFRGS), Daniela Jacques (UFRGS), and Iacyr de Aguilar Vieira (UFV).[61]

For many years the Law Schools of the *University of São Paulo* and of the *Federal University of Rio Grande do Sul* have the study of CISG as part of their curriculum, especially in their postgraduate programs. This trend is being followed by various other Law Schools, both at graduate and undergraduate levels. This fact is contributing to the dissemination and to the application of the CISG.[62] Furthermore, the relevance of teaching the CISG in universities is amplified if taken into consideration the role of the literature in the construction of the Brazilian law.[63]

The participation of professors and students from Brazilian universities in international competitions that debate different problems related to international contracts regulated by the CISG has also been observed. One example of these competitions is the Willem C. Vis Moot Court, which was sponsored by UNCITRAL. Students from the universities UFRGS, UFMG, FGV-Law, and Unicuritiba have participated in this competition.[64]

Other projects, such as the ones organized by this author at the Universidade Federal de Viçosa, must also be mentioned. Several research studies on the CISG have been undertaken at the Scientific Initiation level. Their results have been published in Brazil and have received prizes in the Scientific Initiation Conference of Minas Gerais State and of other states of the federation.

Professor Eduardo Grebler (PUC Minas), who also contributes to the dissemination of the CISG by teaching it to his students, translated the Convention to Portuguese and has several publications on the subject. Professors Jacob Dolinger and Carmem Tiburcio have also translated the Convention to Portuguese. Both translations have been available for a long time at the internet website cisg-br. The site is kept by Professor Patrícia Galindo da Fonseca (UFF), who has also been studying the CISG for many years. At PUC-Rio, the courses organized by Professor Nadia de Araújo always mention how important the Convention is and how important it is for Brazil to

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61 *N. de Araújo*, electronic mail sent on 13 February 2008.

62 *Velloso, Pugliese & Guidoni*, Advogados, electronic mail sent on 1 February 2008.

63 *F. Del'Olmo*, electronic mail sent on 26 January 2008.

64 *E. Grebler*, electronic mail sent on 17 February 2008.

adopt it. She also mentions the topic in her books and articles on private international law and on international contracts.

The CISG has been studied in Private International Law classes at the *Universidade Federal de Alagoas* (UFAL) and at the *Centro de Estudos Superiores de Maceió*. Professor Aurélio Bôaviagem (*Universidade Federal de Pernambuco* – UFPE) teaches the CISG in his undergraduate and graduate classes. Professor Sylvio Loreto (UFPE) also teaches the Convention in his Private International Law graduate class.[65]

The above mentioned activities have been contributing to the spread of the CISG through the Brazilian legal community.[66] The familiarity with the topic is making national jurists more aware of the problems associated with not having the CISG in force in Brazil.[67] However, according to some, in practice these activities have not had any impact on the Brazilian legal environment. Some argue that the CISG has not been applied in Brazil neither in public courts nor in arbitral courts – even with the rules of conflicts.[68]

When analyzing the CISG, Brazilian scholars tend to compare the Convention to the national law.[69] They tend to show how important it is for Brazil to adopt the Convention.[70] They also compare the CISG's rules about contract nonperformance to the fundamental notion of nonperformance currently applied in Brazilian courts.[71]

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65 *F. Amorim*, electronic mail sent on 13 February 2008.

66 *F. Del'Olmo*, electronic mail sent on 26 January 2008.

67 *F. Amorim*, electronic mail sent on 13 February 2008.

68 *L. da Gama e Souza Jr.*, electronic mail sent on 28 January 2008.

69 *L. da Gama e Souza Jr.*, electronic mail sent on 28 January 2008; *F. Del'Olmo*, electronic mail sent on 26 January 2008; and *N. de Araújo*, electronic mail sent on 13 February 2008. Professor Grebler argues in one of his studies that there is no incompatibility between the Brazilian Law and the Convention. See also, *I. de Aguilar Vieira*, La Convention des Nations Unies sur les contrats de vente internationale de marchandises et son applicabilité au Brésil, Thèse, Strasbourg, 2003.

70 *F. Del'Olmo*, electronic mail sent on 26 January 2008.

71 *L. da Gama e Souza Jr.*, electronic mail sent on 28 January 2008. *R. Rosado de Aguiar Jr.*, written communication on 19 February 2008. See: *R.R. de Aguiar Jr.* A Convenção de Viena (1980) e a resolução do contrato por incumprimento, in: *Revista da Faculdade de Direito da Universidade Federal do Rio Grande do Sul* 10 (1994) 7-21. See also, *V.M. Jacob de Fradera,* O conceito de inadimplemento fundamental do contrato no artigo 25 da lei internacional sobre vendas, da Convenção de Viena de 1980, in: Revista da Faculdade de Direito da Universidade Federal do Rio Grande do Sul 11 (1996) 55-66. But see also *G.V. da Costa Cerqueira*, "O Cumprimento Defeituoso nos Contratos de Compra e Venda Internacional de Mercadorias – Uma análise comparativa entre o Direito brasileiro e a Convenção de Viena de 1980", in: O Novo Direito Internacional, Estudos em homenagem a Erik Jayme, Cláudia Lima Marques e Nádia de Araújo

Even though CISG is not in force in Brazil, national books make reference to its rules.[72] These references are made despite the Convention's lack of influence[73] (or light,[74] or imperceptible influence,[75] as prefer some authors) on Brazilian legal structure. Various studies have already shown that there is no incompatibility between the text of the CISG and Brazilian law on obligations and contracts. Thus, there are no reasons for its non adoption in Brazil.[76] Rather, its adoption would renovate several technical aspects of the national law on sale of goods.

The efforts of professors and jurists will certainly contribute to spread the knowledge of the CISG, for its uniform applicability and its interpretation in the future. These efforts will also contribute to a better knowledge, by future lawyers, of the consequences of the CISG and, thus, of the conveniences of its adoption.[77]

These efforts, however, are not restricted to a limited group of professors and jurists. Although the subject appeals more specifically to people involved in the areas of international commerce,[78] private international law and contract law,[79] the Convention can draw the attention of jurists from several fields because of its practical importance and because of its relevance to the areas of contracts and obligations.

It is a fact that scholars' publications have an enormous impact on the daily life of Brazilian lawyers and on their formation.[80] They are constantly used to support court decisions and other legal activities.[81] Nevertheless, the publications on the CISG have had very little or no impact on Brazilian legislators and courts until the present.

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(coord.), Rio de Janeiro: Renovar, 2005, p. 497-548. See also, G.V. *da Costa Cerqueira*, "Defective performance in contracts for the international sale of goods. A comparative analysis between the Brazilian Law and the 1980 United Nations Convention on Contracts for the International Sales of Goods", in: Review of the Convention on Contracts for the International Sale of Goods (CISG)/ Pace International Law Review (2005-2006) 23-84.

72 *N. de Araújo*, electronic mail sent on 13 February 2008.

73 *L. da Gama e Souza Jr.*, electronic mail sent on 28 January 2008.

74 *F. Del'Olmo*, electronic mail sent on 26 January 2008.

75 *L. da Gama e Souza Jr.*, electronic mail sent on 28 January 2008.

76 *F. Amorim*, electronic mail sent on 13 February 2008.

77 *F. Amorim*, electronic mail sent on 13 February 2008.

78 *L. da Gama e Souza Jr.*, electronic mail sent on 28 January 2008.

79 *F. Del'Olmo*, electronic mail sent on 26 January 2008.

80 *L. da Gama e Souza Jr.*, electronic mail sent on 28 January 2008.

81 *F. Amorim*, electronic mail sent on 13 February 2008.

## 3. CISG's impact on courts

The research on the impact of the CISG on Brazilian courts has revealed that there are no decisions applying the CISG by Brazil courts. However, the Convention was implicitly utilized to support the idea of "substantial performance" in decisions of the Rio Grande do Sul state Court of Appeals and of the Superior Court of Justice.[82]

It is traditional in Brazil to study scholars' opinions to understand a subject matter. Only recently, though, Brazil has started to study case law. Even in court decisions, the citation of scholars' opinions is very common.[83]

Even though the North American judicial system is increasingly influencing the Brazilian judicial system, there have been no reports of this influence in decisions regarding the contracts for the international sale of goods – except, as mentioned, on the substantial performance matter.

Also, there have not been reports of decisions referring to the utilization of the CISG to the interpretation of other uniform law instruments. However, the literature has already embraced this possibility.[84]

As our research on the Brazilian literature shows, Brazilian courts do not usually accept choice-of-law clauses in international contracts.[85] According to some, however, there is a tendency for the acceptance of these clauses in the near future.[86] Some believe that Brazilian courts misinterpret choice of law clauses. According to them, the courts' interpretations are ambiguous because they apply the clause but do not explicitly accept that the law is legally binding.[87] Others argue that courts misinterpret Article 9 of the LICC, i.e. they understand that the article prohibits the use of the principle of autonomy of will – expressed in the Convention – when it actually does not. They also argue that the principle of autonomy of will must be applied even without express authorization of the law.[88]

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82 Written communication by the Justice Minister Ruy Rosado de Aguiar Jr., on 19 February 2008. See decision in the case: Ap. Civil n° 588012666, 12 April 1988 (TJRGS), and decision REsp n. 272739/MG (STJ, 1 March 2001 and REsp n. 76362/MT (STJ, 11 December 1995).

83 *A.Wald*, Rapport Brésil, in: La circulation du modèle juridique français, Travaux de l'Association Henri Capitant, vol. XV, Paris: Litec, 1994, p. 125-136.

84 *I. de Aguilar Vieira*, La Convention des Nations Unies sur les contrats de vente internationale de marchandises et son applicabilité au Brésil, cit. But see also *L. da G. e Silva Jr.*, Contratos Internacionais à luz dos Princípios do UNIDROIT 2004: soft law, Arbitragem e Jurisdição. Rio de Janeiro: Renovar, 2006.

85 *Velloso, Pugliese & Guidoni*, Advogados, electronic mail sent on 1 February 2008.

86 *F. Del'Olmo*, electronic mail sent on 26 January 2008.

87 *N. de Araújo*, electronic mail sent on 13 February 2008, and *L. da Gama e Souza Jr.*, electronic mail sent on 28 January 2008.

88 *F. Amorim*, electronic mail sent on 13 February 2008.

### 4. CISG's impact on legislators

In Brazil, the President has exclusive competency to conclude international treaties,[89] which must then be approved by the National Congress.[90]

According to the responses to the questionnaires sent to the Brazilian government, until the present there has been no report of suggestion for the adhesion to the CISG by Brazil on any of the following institutions: Ministry of Foreign Affairs, Ministry of Justice, and Presidency of the Republic.

The questionnaires sent to the Brazilian Chamber of Deputies and to the Federal Senate have not been returned. For that reason, we could not analyze the legislators' opinions on the possibility of incorporating the CISG into the Brazilian legal system and on its influence to Brazilian legislation reform, especially in what refers to contract and obligations law.

Nonetheless, the present Brazilian Civil Code was promulgated in 2002. Even though the commission in charge of its elaboration was composed of university professors, there has been no influence of the CISG on the new Civil Code. Also, despite the fact that the elaboration of the Civil Code has lasted over 25 years, Brazilian legislators have not taken into consideration the CISG project or the Vienna Convention of 1980. It is presumable that the members of the writing commission were aware of the Hague Convention on the international sale of goods that resulted in the CISG.

## III. Conclusion

In conclusion of the first section of this report, we emphasize the importance to Brazilians of knowing the CISG. Even though there are no reports of Brazilian courts applying it, German courts already have applied it to cases where Brazilian companies, or parties established in Brazil, were one of the litigating parties.[91]

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89 Constitution of the Federal Republic of Brazil, Article 84, inc. VIII.

90 Constitution of the Federal Republic of Brazil, Article 49, inc. I.

91 See the sentence Oberlandesgericht Hamburg, 1 U 31/90, 26 November 1999, in: Oberlandesgerichts-Rechtsprechungsreport de Hamburg, Allemagne. Case n. 348 (CLOUT). The court did not answer to the quesiton of whether the buyer's right (keep the benefit of reselling the goods) was originated from the Vienna Convention or from the German law, which also allowed compensation. The example, however, demonstrates the necessity of Brazilian companies to know the Vienna Convention. Because almost two thirds of the international commerce is ruled by the uniform law, Brazilian companies may face situations such as the one presented. See also the sentence Oberlandesgericht Karlsruhe, 7U 40/02, 10 December 2003, in: Internationales Handelsrecht 62-55; CVIM-online.ch, see website:

Because of this possibility, the matter became extremely important, and even more important if taken into consideration the fact that Brazil is part of the integration process established by the Treaty of Asuncion. Furthermore, considering that the CISG is in force in Argentina, Paraguay, Uruguay and Chile[92] (as an associate member of MERCOSUL),[93] the matter has special magnitude. Additionally, Venezuela – which is a candidate to MERCOSUL – has already signed the Convention (but has not yet ratified it).

Besides, according to the recommendation of the CIDIP IV (Resolution n. 2, 1989) and to the literature,[94] the adhesion to the CISG by OAS member States could be a factor of harmonization and, consequently, of prevention of conflicts, not only within MERCOSUL but also to other countries and blocs with which Brazil negotiates.[95]

In conclusion of the second section of this report, we will recapture some of the answers on the questionnaires. These answers may help to complement the above analysis and may be helpful for jurists, judges, and legislators to coordinate future studies on the subject matter.

To some, the lack of knowledge of the Convention and the lack of an effective compromise by the Brazilian government and parliament are the

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http://www.cisg-on-line.ch/cisg/urtheile/911.pdf. See also, http://www.cisgw3.law.pace.edu/ Décisions/031210g.1.html – Case n. 635 (CLOUT).

92 Argentina adhered to the Convention on 19 July 1983, and the Convention came into force in the country on 1 January 1988; Uruguay adhered to the Convention on 25 January 1999, and the Convention came into force in the country on 1 February 2000; Paraguay adhered to the Convention on 13 January 2006, and the Convention came into force in the country on 1 February 2007; Chile signed the Convention, the text of the Convention was approved in the country on 7 February 1990 and it came into force in the country on 1 March 1991.

93 See Agreement of Economic Complementation MERCOSUL – Chile, 25 June 1996.

94 *L.R.F. da Silva,* Das regras contratuais no MERCOSUL: as normas conflituais e as normas de Direito Material, in: MERCOSUL – Seus efeitos jurídicos, econômicos e políticos nos Estados-Membros. M. Basso (org.) Livraria do Advogado Editora: Porto Alegre, 1997, pp. 189-208. See also A.M. *Garro*, Armonización y unificación del derecho privado en America latina: esfuerzos, tendencias y realidades, in: Direito e Comércio Internacional – Tendências e Perspectivas. Estudos em homenagem a Irineu Strenger. São Paulo: LTr, 1994.

95 *I. de Aguilar Vieira*, O interesse na utilização de um Direito Uniforme sobre a venda internacional, como é o caso da "Convenção das Nações Unidas sobre Contratos de Compra e Venda Internacional de Mercadorias": o equilíbrio das suas regras, a sua compreensão e seu caráter incompleto, in: Direito internacional privado. *L. F. Franceschini* e M. *Wachowicz* (org.), Curitiba: Juruá, 2001, p. 187.

greatest obstacle to the adoption of the CISG in Brazil. These institutions could provide legal mechanisms to facilitate international commerce.[96]

To others the reference to the international nature of the CISG, and the necessity of standardizing its application, are crucial to the Brazilian legal order. These measures would have a strong impact on contract formation and on dispute resolution.[97]

The publication of articles in Brazil from foreign lawyers would also be very useful and would provide subsidies to the Brazilian legal community, as well as the study of case law. Court decisions are being increasingly available and accessible through magazines and Internet websites, particularly those that specialized in publishing decisions in which the CISG was applied.[98]

The issue of the applicable law in international contracts is closely related to the "*sécurité juridique*" and, therefore, is extremely relevant. Legislators' involvement in this matter is essential because it can be a very useful tool for contracts and for the economy.[99]

The improvement of the international commerce in Brazil requires that legislators change the present regulations either by adopting international conventions, by changing the LICC, or by creating one General Regulation on Private International Law.[100]

In what refers to the matter of the law applicable to international contracts (especially those of sale of goods), it is necessary that Brazil ratify the Inter American Convention on the Law Applicable to International Contracts (Mexico Convention of 1994). Consequently, to avoid different treatment of the subject between signatory and non-signatory countries, it is

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[96] *F. Amorim*, electronic mail sent on 13 February 2008.

[97] *Velloso, Pugliese & Guidoni*, Advogados, electronic mail sent on 1 February 2008.

[98] *Velloso, Pugliese & Guidoni*, Advogados, electronic mail sent on 1 February 2008.

[99] *L. da Gama e Souza Jr.*, electronic mail sent on 28 January 2008.

[100] Three projects that aimed to modify the LICC have been presented to the Brazilian Congress: the *Projeto de Lei Geral de Aplicação das Normas Jurídicas*, elaborated by Haroldo Valladão (Law Project n. 264/1984, Federal Senate), which has not been approved; the *Projeto de Lei de Aplicação das Normas Jurídicas* (Law Project n. 4.905/1995), which has been withdrawn before voting; and Law Project n. 243, 5 November 2002, which is still in the Federal Senate. In the literature, see: J.Grandino Rodas, *Substituenda est lex Introductoria*, in *Revista dos Tribunais*, 630, April 1988, p. 243-245. See also, "*Proposta de redação de nova lei de introdução ao Código Civil Brasileiro*" authored by the Group of Studies on the Lei de Introdução ao Código Civil – Curso de especialização: *O Novo Direito Internacional* – 4th edition – PPGD/UFRGS, coordinated by Professors Claudia Lima Marques and Marília Zanchet, in: Cadernos de Pós-Graduação em Direito – PPGDir./UFRGS, IV (2005), p. 115-202.

necessary that the Mexico Convention substitutes for the article 9 of the LICC.[101]

Brazil's participation in MERCOSUL has been an important factor of development for the private international law. As seen in the beginning of this report, this bloc has been involved in activities dedicated to the unification of the private international law sponsored by regional and global international organizations. Examples are the UNIDROIT and the Hague Convention on Private International Law. The latter has recently altered its statutes to admit regional economic integration organizations as members.[102]

The eventual adoption of the CISG by Brazil will have a very important impact on court decisions. Two aspects of court decisions are going to be most affected: the choice of applicable law rule (which is already a principle of the CISG) and the contracts for the international sale of goods substantive law.

More importantly, the eventual adoption of the CISG by Brazil will bring more consistency to economic operations because the Convention will provide the parties with elements for the creation and better execution of the contracts. In the words of a scholar: *"le juridique n'est pas forcément judiciaire."*[103]

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[101] *N. de Araújo*, electronic mail sent on 13 February 2008.

[102] See *G.V. da Costa Cerqueira*, A Conferência da Haia de Direito Internacional Privado como fonte de direito uniforme para os processos regionais de integração econômica, in: Protección de los consumidores en América – Los trabajos de CIDIP (OEA), Diego P. Fernández Arroyo y José A. Moreno Rodríguez (coords.), Centro de Estudios de Derecho, Economía y Política (CEDEP), Asunción: Ed. Revista Jurídica La Ley, 2007, pp. 303-346, com especial atenção ao Mercosul. See also *G.V. da Costa Cerqueira*, La Conférence de La Haye de droit international privé. Une nouvelle voie pour le développement du droit international privé des organisations régionales d'intégration économique, in: Revue de droit uniforme/Uniform Law Review, 4-2007, p. 1-37.

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# Canada

*John P. McEvoy*

## Introduction

The 1980 United Nations Convention on Contracts for the International Sale of Goods (CISG) (also known as the Vienna Convention) is perceived as relatively successful. It entered into force on 1 January 1988; that is, twelve months after the deposit of the tenth instrument of ratification. Among the states parties at that time were China, the Soviet Union and the United States of America. Twenty years later, the number of state parties has grown to seventy including countries from the industrialized North and the developing South; the civil law, common law, and mixed legal traditions; and varying economic systems reflecting the old East-West divide. The CISG transcends cultures and languages. Its realization has been a singular achievement which stands to the credit of UNCITRAL and its inclusive approach to convention negotiation and drafting. Yet, initial optimism which greeted the CISG has faded with the realization that it has not achieved its full potential. The reasons for this are many and are grounded in the Convention itself. The experience of Canada well illustrates both the initial acceptance of the CISG and its subsequent rejection by those who were intended to be its prime beneficiaries.

A member of the WTO and of the G8, Canada acceded to the CISG on 23 April 1991 and it came into force for Canada on 1 May 1992 in accordance with the twelve months delay period established by the CISG, article 99(2). All provinces and territories as well as the federal Parliament enacted implementing legislation to make the CISG part of domestic substantive law. In theory, the CISG should be a significant factor in Canadian international trade. Canadian export and import trade in goods with its largest trading partner, the United States, alone is measured in millions of dollars per second each and every hour of every day of the year.[1] Yet, the CISG barely

[1] See: Statistics Canada, 'Vital Economic and Social Statistics about Canada and the United States: Imports of Goods and Services and Exports of Goods and Services', CANSIM series at www.statscan.ca. To illustrate the magnitude of international merchandise trade, the value of total merchandise trade for January 2008 was reported at $72.7 billion comprising some $38 billion in exports and $34.7 billion in imports. These statistics do not include values for trade in services, capital flow, investment income or other transfers. Statistics Canada, 'The Daily',

registers on the consciousness of Canadians, let alone Canadians involved in international trade as exporters or importers. Canadian courts have only rarely considered the CISG and, in many Canadian law faculties, the CISG is not taught to students in courses on commercial law. In many instances, the existence of the CISG is acknowledged in Canada by its express exclusion rather than its application to contracts for the international sale of goods. This paper will examine the experience and challenges of the CISG in Canada.

## I. CISG arrives in Canada

### 1. The CISG and the Uniform Law Conference of Canada

Canada fully participated at the Vienna diplomatic conference which adopted the CISG in 1980.[2] The following year, Jacob S. Ziegel (University of Toronto) and Claude Samson (Université Laval) prepared and submitted a report on the Convention for the information and consideration of the 1981 annual meeting of Uniform Law Conference of Canada.[3] Established in 1918, the Uniform Law Conference is a forum at which federal, provincial and territorial representatives (styled 'commissioners') consider, review and draft proposals to harmonize law in matters within the legislative jurisdiction of the provinces (through recommended 'Uniform Statutes') and to reform matters within federal legislative jurisdiction. The Conference undertakes its work in two sections: the Uniform Law Section dealing with essentially private law matters and the Criminal Law Section dealing with criminal law reform. The Uniform Law Section's response to the Ziegel-Samson report in 1981 was less than enthusiastic as the commissioners resolved that "adoption … of this convention … be left to each jurisdiction to study and consider on its own."[4] Coincidentally, at this 1981 meeting, the commis-

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11 March 2008, 'Canadian International Merchandise Trade, January 2008' at www.statscan.ca

2 Uniform Law Conference of Canada, Proceedings of the Sixty-Sixth Annual Meeting, 1984, 151 at 153 and *J.S. Ziegel*, Canada and the Vienna Sales Convention (1986-87) 12 Can. Bus. L.J. 366, 368.

3 Uniform Law Conference of Canada, Proceedings of the Sixty-Third Annual Meeting, 1981, 34. Ziegel, supra, note 2, states that the report was not published in any law-related journal but that the federal Department of Justice distributed an abbreviated version to responsible provincial officials. Professors Ziegel and Samson had participated in the work of the diplomatic conference as members of the Canadian delegation, see: U.L.C.C., Proceedings of the Sixty-Sixth Annual Meeting, supra, note 2 at 153-54.

4 Ibid., at 34.

sioners also adopted a report on reform of domestic sale of goods legislation and recommended enactment of a new Uniform Sale of Goods Act based on work undertaken by the Ontario Law Reform Commission for which Ziegel served as project director.[5] The CISG cause did not advance at either the 1982 or 1983 annual meetings of the Uniform Law Conference of Canada.

In 1984, federal commissioners to the ULCC again raised the subject of the CISG in their report on 'Canadian Activities in the Area of Private International Law'.[6] The report characterized the ULCC's 1981 resolution as a 'wait and see' approach to ascertain the positions of Canadian trading partners and noted that six countries had, by then, either ratified or acceded to the CISG.[7] Of more compelling significance, the federal commissioners reported that officials in the United States were optimistic that the U.S. Senate would exercise its constitutional power to consent to the CISG so that it would come into force in that country. As to the CISG itself, the federal commissioners characterized it as of limited scope (concerning issues of formation of contract, the mutual obligations of buyers and sellers and the passing of risk); in a language format which reflects Canadian linguistic duality (English and French); with provisions consistent with the law of both the common law provinces and of Quebec (a civil law jurisdiction); and containing a federal state clause which would facilitate accession notwithstanding the absence of consent by some provinces.[8] Finally, the federal commissioners noted that the federal Minister of Justice had written to provincial governments requesting consideration be given to implementing legislation.[9] This time the Uniform Section of the Conference responded with a resolution referring the CISG to two delegations (Nova Scotia and the federal) "for drafting purposes and a report in 1985".[10]

In 1985, Nova Scotia and the federal delegations reported with a recommendation, adopted by the Conference, that "the draft Uniform International Sale of Goods Act be adopted … as a uniform Act and recommended

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5 Supra, note 3 at 34 and Ontario Law Reform Commission, Report on Sale of Goods, 1979. The Uniform Act reflects a reform of sale of goods law not inconsistent with the general approach of the Uniform Commercial Code, Article 2. The Ontario Law Reform Commission Report reviewed the development by UNCITRAL of what became CISG from the creation of the Working Group in 1969 to the 1978 decision by the Commission to adopt a draft CISG which 'will be submitted for approval in the near future at a diplomatic conference to be convened for this purpose' (at 22).

6 Uniform Law Conference of Canada (1984), supra note 2, at 153.

7 Uniform Law Conference of Canada (1984), supra note 2, 154.

8 Uniform Law Conference of Canada (1984), supra note 2, 154-55.

9 Uniform Law Conference of Canada (1984), supra note 2, 154.

10 Uniform Law Conference of Canada (1984), supra note 2, 34.

for enactment in that form."[11] The Uniform Act consists of only six provisions with the complete text of the CISG appended as a Schedule. The Uniform Act identifies the CISG as the subject Convention; authorizes the designated provincial Minister to request the Government of Canada to declare the Convention, "except subparagraph 1(b) of Article 1", in force in the province; declares the Convention "except subparagraph 1(b) of Article 1" in force in the province as of the date it comes into force pursuant to article 99 of the Convention; requires the provincial Minister to publish the effective date in the provincial Gazette; and declares the Act to prevail in the event of a conflict with other provincial legislation. The recommended critical exclusion of "subparagraph 1(b) of Article 1" rendered the CISG inapplicable "when the rules of private international law lead to the application of the law of a Contracting State." The exclusion is consistent with the general view in favour of certainty in contractual obligations such that selection of the law of a country is understood to mean its internal law and not its private international law rules ('renvoi avoidance').

Provincial and territorial governments did not all enact the Uniform Act immediately. In 1988, four jurisdictions enacted the CISG legislation;[12] an additional eight jurisdictions enacted legislation in the period 1989 to 1991;[13] and the final jurisdiction to enact, Yukon Territory, did so in 1992.[14] Thus, as a result of federal-provincial-territorial cooperation, Canada acceded to the CISG on 23 April 1991, with an effective date of 1 May 1992 for the CISG to enter into force. By its instrument of accession, Canada declared, per article 93, the CISG to be in force in the eight provinces and one territory that had, as of 23 May 1991, enacted the enabling legislation and declared, per article 95, that British Columbia "will not be bound by

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11 Uniform Law Conference of Canada, Proceedings of the Sixty-Seventh Annual Meeting, 1985, 33.

12 International Sale of Goods Act, S.N.S. 1988 c. 13; International Sale of Goods Act, S.O. 1988 c. 45 (Ontario); International Sale of Goods Act, S.P.E.I. 1988 c. 33 (Prince Edward Island); and International Sale of Goods Act, S.N.W.T. 1988(2) c. 9 (the Northwest Territories later divided to create the new territory of Nunavut).

13 International Sale of Goods Act, S.N. 1989 c. 29 (Newfoundland and Labrador); International Sale of Goods Act, S.N.B. 1989 c. I-12.21 (New Brunswick); International Sale of Goods Act, S.M. 1989-90 c. 18 (Manitoba); International Sale of Goods Act, S.B.C. 1990 c. 20 (British Columbia); International Conventions Implementation Act, S.A. 1990 c. I-6.8 s. 2 (Alberta); International Sale of Goods Act, S.S. 1990-91 c. I-10.3 (Saskatchewan); An Act respecting the UN Convention on Contracts for the International Sale of Goods, S.Q. 1991 c. 68 (Québec); and International Sale of Goods Contracts Convention Act, S.C. 1991 c. 13 (Canada).

14 International Sale of Goods Act, S.Y. 1992 c. 7 (Yukon).

Article 1.1 b) of the Convention"[15] (thus, indicating that only British Columbia had followed the example of the Uniform Act by excluding application of article 1.1(b)). The following year, on 9 April 1992, Canada issued a new article 93 declaration extending the CISG to Quebec and Saskatchewan; a declaration on 29 June 1992 extending the CISG to the Yukon Territory; and a final declaration on 31 July 1992 withdrawing the article 95 declaration in relation to British Columbia.[16]

The arrival of the CISG in Canada coincided with a number of significant developments which served to marginalize its eventual role in Canadian law. First, initial consideration of the CISG coincided with the adoption by the ULCC of a reform of domestic sale of goods legislation based, at least in part, on article 2 of the Uniform Commercial Code. After this effort, there was thus little interest in revisiting reform of domestic sales legislation in light of the CISG itself. Jacob Ziegel's involvement with both the Ontario Law Reform Commission's sales project, which became the ULCC Uniform Law, and the report prepared for the ULCC on the CISG (having served as a member of the Canadian delegation) raises the possibility of temporary conflicting interests. Notwithstanding this, Jacob Ziegel, as we shall see, became a driving force promoting the CISG in Canada. Second, the CISG was initially marginalized by its association with a discrete area of law, Private International Law. It will be recalled that the CISG reappeared on the ULCC agenda in 1984 as an item in a report on Canadian activities in relation to Private International Law. Third, the Uniform Act recommended by the ULCC merely adopted the CISG as domestic law with the convention text appended as a schedule to the Act. Thus, jurists in Canada were given little legislative guidance or assistance in understanding the CISG – except the statutory indication that it can be avoided by a properly framed clause in a contract involving the international sale of goods. Fourth, the CISG essentially rolled out as domestic legislation over a four year period, 1988-1991. The length of time involved and the lack of any sense of real urgency impliedly sent a negative message to Canadian jurists about the necessity for understanding the new international sales regime. Thus, the CISG did not enjoy an auspicious beginning in Canada.

## 2. The CISG from a Common Law Perspective

Early common law commentary on the CISG focussed in part on the modalities of Canadian accession to the Convention. In Canadian constitu-

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15 Canada Treaty Series 1992/2, 70.

16 Canada Treaty Series 1999/2, 70-75. British Columbia effectively withdrew its declaration by amending its implementation statute to delete the limitation, see: Attorney General Statutes Amendment Act 1992, S.B.C. 1992 c. 31 s. 13.

tional law, the federal government has authority to negotiate international treaties as an executive function but not the legislative authority to implement all treaties so negotiated. Since at least 1937, it has been generally accepted (though subject to some doubt) that treaty implementation in Canada follows the distribution of legislative jurisdiction between Parliament and the provincial Legislatures as declared in the Constitution Act, 1867, sections 91 and 92.[17] Thus, under which federal or provincial legislative class of subject should one place international sale of goods?

It is trite law in Canada that the regulation of international trade is a matter within exclusive federal legislative competence in relation to "trade and commerce'.[18] Yet, is a contract for the sale of goods in the province for ultimate delivery elsewhere properly characterized as international trade or as a local contract? Does it depend on when the property in the goods passes to the purchaser? These are the type of questions for which there are no absolute answers but only general indicators in Canadian constitutional law. Though the scope of federal 'trade and commerce' jurisdiction has broadened in Canadian law in the last fifty years, as courts have been inspired by the concept of the Canadian economic union, the issue has not been entirely free from doubt as judicial decisions have made distinctions on the basis of whether legislation aims at the regulation of production, marketing, contracts, or distribution. For example, in relation to the ultimate delivery of farm products from one province to another, judges of the Supreme Court of Canada have held that "individual contracts for the sale and purchase of goods in a province do not engage federal power under s. 91(2) where any applicable provincial legislation relates merely to the terms of the contract".[19]

It is in this context of constitutional uncertainty that the federal government developed a *mode de vie* which involves extensive consultation with

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[17] Attorney General for Canada v. Attorney General for Ontario (the Labour Conventions Case), [1937] Appeal Cases 326. Doubts on this limitation have been expressed by *I.C. Rand*, Some Aspects of Canadian Constitutionalism, Canadian Bar Review 38 (1960) 135 at 142 and Chief Justice Bora Laskin in *MacDonald v. Vapour Canada* [1977] 2 Supreme Court Reports 134 at 169.

[18] Constitution Act, 1867 section 91(3). See: *Citizens Insurance Company v. Parsons* (1881) 7 Appeal Cases 96 at 118 (P.C.): "Construing therefore the words 'regulation of trade and commerce' by the various aids to their interpretation …, they would include political arrangements in regard to trade requiring the sanction of parliament, regulation of trade in matters of inter-provincial concern, and it may be that they would include general regulation of trade affecting the whole [country]."

[19] *Attorney General of Manitoba v. Manitoba Egg and Poultry Association* [1971] Supreme Court Reports 689 at 713 (per Laskin J.) summarizing the Court's decision in Reference re Farm Products Marketing Act (Ontario) [1957] S.C.R. 198.

provincial officials in relation to treaty negotiations on matters within exclusive provincial legislative jurisdiction and the inclusion of provincial representation in official delegations involved in such negotiations. Ratification or accession by Canada to treaties on matters within provincial legislative jurisdiction is facilitated by a federal state clause permitting Canada to ratify or accede to a treaty in respect of only those provinces which either express consent or enact implementing legislation, as appropriate.

In a 1986 textbook on international business transactions law, the authors made little more than passing reference to the CISG but noted the importance of provincial legislative jurisdiction to its implementation, coupled with the importance of the federal state clause to simplify the process of Canadian accession.[20] Similarly, Ziegel, in his early published commentary, stressed the internal constitutional arrangements for Canadian accession to the CISG and the decision of the federal government "that domestic implementation of the Sales Convention is a provincial responsibility and that the federal government cannot accede to the Convention without provincial concurrence".[21] Attention also centred on the restrictive declarations permitted by the CISG which deserved consideration. Ziegel, for example, praised the ULCC Uniform Act for not including a declaration under article 12 in combination with article 96 to exclude a sales contract or modification thereof "other than in writing" or under article 92 to exclude application of Part II or III of the Convention. Though the decisions not to include such declarations were characterized as 'sound', Ziegel took exception to the ULCC Uniform Act for excluding article 1(1)(b) because "international public policy favours wide application of the Convention".[22] Finally, Ziegel argued in favour of a joint Canada-United States article 94 declaration to exclude application of the CISG to international sales contracts between the two countries because of the existence of the "same or closely related legal rules".[23] Addressing similar constitutional and interpretative issues, Errol Mendes published a lengthy article in 1988 in the Journal of Law and

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[20] *J.-G. Castel*, *A.L.C. de Mestral* and *W.C. Graham*, International Business Transactions and Economic Relations: Cases, Notes, and Materials on the Law as it Applies to Canada 1986, 560-61.

[21] *J.S. Ziegel*, Canada and the Vienna Sales Convention supra note 2, 369. Professor Ziegel had earlier discussed CISG in a 1982 lecture at McGill University; see: *J.S. Ziegel*, Should Canada Adopt the International Sales Convention?, Meredith Memorial Lectures, 1982. Professor Ziegel made passing mention of CISG in *J.S. Ziegel*, The Future of Commercial Law in Canada, University of British Columbia Law Review 20 (1986) 1 at 21.

[22] *J.S. Ziegel*, Canada and the Vienna Sales Convention, supra note 2, 371.

[23] *J.S. Ziegel*, Canada and the Vienna Sales Convention, supra note 2, 371-74.

Commerce, a journal of the University of Pittsburgh School of Law[24] – beginning a trend of Canadian academics publishing articles on the CISG in foreign law journals not readily accessible by Canadian jurists. Mendes took exception to some of the comments of Ziegel but differed principally by rejecting the view that an article 94 declaration should be made to exclude the CISG from application to Canada-United States sales contracts. To his credit, Mendes provided valuable comparative analysis of the CISG with the sale of goods legislation in the common law provinces, with Quebec law and with article 2 of the U.S. Uniform Commercial Code. The 1988-89 University of Detroit Law Review includes an analysis similar to that of Mendes comparing the CISG with existing Canadian and United States law.[25]

A one man CISG industry, Ziegel returned to the theme of appropriate declarations under the CISG in his 1991 article entitled "Canada Prepares to Adopt the International Sales Convention".[26] Discussing the then state of implementation legislation, he characterized as 'unfortunate' the divergent federal and provincial attempts to instruct interested parties on how to exclude application of the CISG. In his view, "[t]here was no need for the [federal or provincial legislation] to say anything about the proper way to exclude the Convention."[27] Of concern were varying statutory formulae directing parties wishing to exclude application of the CISG to state in a contract either 1) that the law of an identified jurisdiction applies or 2) that the CISG is excluded. Ziegel also took issue with British Columbia for its declaration in relation to article 1(1)(b):

> … it is not clear what motivated it. It is not easy to see how merchants will be caught by surprise if art. 1(1)(b) is retained. *The Convention has been well-publicized* and there is little excuse for a merchant regularly engaged in international transactions not to know whether or not the jurisdiction of the proper law of the contract has adopted the Convention.[28]

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[24] *E.P. Mendes*, The U.N. Sales Convention & U.S.-Canada Transactions: Enticing the World's Largest Trading Bloc to do Business under a Global Sales Law, 8 Journal of Law and Commerce (1988) 109.

[25] *L.K. Tomko*, United Nations Convention on the International Sale of Goods: Its effect on United States and Canadian Sales Law, 66 University of Detroit Law Review (1988-1989) 73.

[26] *J.S. Ziegel*, Canada Prepares to Adopt the International Sales Convention, Canadian Business Law Journal 18 (1991) 1.

[27] *J.S. Ziegel*, Canada Prepares to Adopt the International Sales Convention, Canadian Business Law Journal 18 (1991) 3.

[28] *J.S. Ziegel*, Canada Prepares to Adopt the International Sales Convention, Canadian Business Law Journal 18 (1991) 5-6 [emphasis added]. Unfortunately, Professor Ziegel did not explain how the CISG had been publicized other than through his own efforts.

Ziegel concluded this article with advice for lawyers to become familiar with the CISG and to resist the temptation to exclude its application as a standard practice. As he stated, "[i]t is in … everyone's interest that the soundness and workability of the Convention be put to the test rapidly and the meaning of the more difficult article be established authoritatively …"[29]

## 3. CISG from a Civil Law Perspective

For civilists, interest in the CISG found early expression in a colloquium organized by, among others, Louis Perret of the Université d'Ottawa, Faculté de droit, Section civil.[30] Just as common law jurisdictions may have been less than enthusiastic about harmonizing provincial sales law with the CISG because of contemporaneous efforts to reform sales law consistent with article 2 of the U.S. Uniform Commercial Code, Quebec jurists were similarly engaged in a law reform project which had occupied their attention for decades – a new Code civil du Québec. In 1975, the Civil Code Revision Office released a "*Report on Sales*" prepared by its Committee on the Contract of Sale.[31] This report obviously predates the CISG itself and there is no mention of the then on-going UNCITRAL efforts to achieve a convention. There are, however, two footnote references to the work of the diplomatic conference which led to revision of the 1964 Hague Convention on the International Sale of Goods.[32] These footnote references are merely supportive of other cited sources and not of real significance. Similar references to the Hague Convention also appear in the 1977 "*Report on the Quebec Civil Code*" issued by the Civil Code Revision Office.[33]

After much discussion and contribution by many jurists, the new Civil Code was enacted in December, 1991 and came into force in 1994.[34] A reading of the Civil Code articles pertaining to Obligations and Sales invites a ready comparison with the CISG but the inspiration may rest more with consistency with common law principles and the U.S. Commercial Code

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29 *J.S. Ziegel*, Canada Prepares to Adopt the International Sales Convention, Canadian Business Law Journal 18 (1991) 16.

30 L. Perret and N. Lacasse (eds.), Actes du colliques sur la vente internationale, 1989.

31 Civil Code Revision Office, Report on Sale, 1975. The Office released its first report, on matrimonial regimes, in 1966.

32 Civil Code Revision Office, Report on Sale, 1975, 6-7 and 66-67 (the report appears in a bilingual format with the French language version on the left page and the English language version on the right page).

33 Civil Code Revision Office, Report on the Québec Civil Code, 1977, for example, Volume II, 563 and footnote 40.

34 S.Q. 1991, c. 64.

than with the CISG directly. Direct inspiration from the CISG is readily identified in the published "*Commentaires du ministre de la Justice*"[35] which indicate the source for each article of the Code as well as more detailed commentary on the significance of the provision.

The "*Commentaires du ministre de la Justice*" identify the CISG with five articles of the Code civil du Québec. The first is article 1456 paragraph 2 which is found in Book V 'Obligations' under Title One 'Obligations in General': "The debtor of the obligation to deliver the property continues … to bear the risks attached to the property until it is delivered." This paragraph is identified as inspired by the CISG article 69. The other four articles are found in Book V under Title Two 'Nominate Contracts', Chapter 1, 'Sales'. The four articles are:

> **Art. 1736** The buyer of movable property may, if the seller fails to deliver it, consider the sale resolved if the seller is in default by operation of law or if he fails to perform his obligation within the time allowed in the notice of default.
>
> **Art. 1738** A buyer who discovers a risk of infringement of his right of ownership shall, within a reasonable time after discovering it, give notice to the seller, in writing, of the right or claim of the third person, specifying its nature.
>
> The seller may not invoke tardy notice from the buyer if he was aware of the right or claim or could not have been unaware of it.
>
> **Art. 1739** A buyer who ascertains that the property is defective may give notice in writing of the defect to the seller only within a reasonable time after discovering it. The time begins to run, where the defect appears gradually, on the day that the buyer could have suspected the seriousness and extent of the defect.
>
> The seller may not invoke tardy notice from the buyer if he was aware of the defect or could not have been unaware of it.
>
> **Art 1740** The seller of movable property may, if the buyer fails to pay the sale price and to accept delivery of it, consider the sale resolved if the buyer is in default by operation of law or if he fails to perform his obligations within the time allowed in the notice of default.

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[35] Gouvernement du Québec, Commentaires du ministre de la Justice: Le Code civil du Québec, 1993 (2 volumes).

> The seller may also, where it appears that the buyer will not perform a substantial part of his obligations, stop delivery of the property in transit.

These four articles are identified as inspired, respectively, by the CISG article 49 for C.c.Q. article 1736 which is described as "de droit nouveau"; the CISG article 43 for C.c.Q. article 1738 (one of three sources identified); the CISG articles 39 and 40 for C.c.Q. article 1739 (one of three sources identified); and the CISG article 71 for C.c.Q. article 1740 (one of three sources identified). It is of historical interest to note that the 1977 draft civil code had specified choice of law rules governing international sale of goods, based on the 1955 Hague Convention,[36] and that the 1987 draft Bill more directly implicated the CISG by providing

> **Article 1853** Lors d'une vente internationale de biens meubles, le titre *Des obligations* s'interprète, s'il y a lieu, en tenant compte du texte de la Convention des Nations Unies sur les contrats de vente internationale de marchandises, adoptée à Vienne en 1980.[37]

These proposals were not carried forward into the C.c.Q. Instead, the legislature enacted a revised choice of law rule for contracts of sale based on the combined inspiration of the 1955 Hague Convention, the 1986 Hague Convention on the Law Applicable to Contracts for the International Sale of

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[36] Supra, note 33 Volume 1 at 597 (draft article 22 of Book Nine 'Private International Law'). The related commentary at Volume II at 994 (French language version) explains that the proposal was based on the 1955 Convention de la Haye de 1955 sur la loi applicable aux ventes à caractère international d'objets mobiliers corporels, see Hague Conference on Private International Law, Collection of Conventions, Convention III. The proposed article 22 read:
When a sale of corporeal moveable objects is international in character, it is governed by the law of the State expressly designated by the parties.
In the absence of express designation, the sale is governed by the law of the State where the vendor is domiciled at the time he receives the purchase order. If the purchase order is received by an establishment of the vendor, the sale is governed by the law of the State where the establishment is situated.
However, the sale is governed by the law of the State where the purchaser is domiciled, or in which he has the establishment which gave the purchase order, if the purchase order was received in that State by the vendor or his representative.

[37] Avant-projet de la loi, Loi portant réforme au Code civil du Québec du droit des obligations, (première session, 33ième Législature, 1987) and incompletely quoted in C. *Samson*, L'harmonisation du droit de la vente: l'influence de la Convention de Vienne sur l'évolution et l'harmonisation du droit des provinces canadiennes, Les Cahier de droit 32 (1991) 1001 at 1025.

Goods,[38] the 1980 Rome Convention on the Law Applicable to Contractual Obligations,[39] and the 1987 Swiss Statute on Private International Law, article 119.[40] As mentioned above, Quebec separately implemented the CISG as domestic law by statute in 1991.[41]

In this context, it is interesting to observe that Claude Samson of Université Laval published an article in 1991 on the influence of the CISG on the harmonization of provincial sales law in Canada.[42] It will be recalled that it was Samson who, along with Ziegel, participated at the Vienna conference as Canadian delegates in 1980 and prepared the report on the CISG submitted to the ULCC in 1981. In the article, Samson compared the CISG with the proposed C.c.Q. representing civil law and the ULCC's Uniform Sales of Goods Act representing common law in relation to issues of consideration, offer and acceptance in formation of contract, irrevocability of an offer, and remedies for breach of contract. In general, he found the CISG and Québec civil law in harmony on these issues but the CISG and the common law provinces in disharmony. For example, in this analysis, consideration, a critical feature of the law of contracts in common law, is not a defining feature in civil law. Thus, both the CISG article 29(2) and Québec civil law permit contractual parties to modify their contract by simple agreement and, though the Uniform Sale of Goods Act contains a similar rule, the common law jurisdictions of Canada do not take a consistent approach.[43] In his conclusion, Samson stated that "les rédacteurs du projet de Code civil ont assez bien réussi à harmoniser les règles du projet de code et celles que prévoit la Convention de Vienne sur ces questions".[44] For the common law jurisdictions, Samson detected a lack of political will to adopt the ULCC Uniform Sale of Goods Act and proposed, as a means to promote

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38 Hague Conference on Private International Law, Collection of Conventions, Convention XXXI (22 December 1986).

39 19 June 1980 (80/934/EEC).

40 Supra, note 35, Volume II, at 1984.

41 Supra, note 13.

42 C. *Samson*, L'harmonisation du droit de la vente: l'influence de la Convention de Vienne sur l'évolution et l'harmonisation du droit des provinces canadiennes, Les Cahier de droit 32 (1991) 1001.

43 C. *Samson*, L'harmonisation du droit de la vente: l'influence de la Convention de Vienne sur l'évolution et l'harmonisation du droit des provinces canadiennes, Les Cahier de droit 32 (1991) 1001 at 1008.

44 C. *Samson*, L'harmonisation du droit de la vente: l'influence de la Convention de Vienne sur l'évolution et l'harmonisation du droit des provinces canadiennes, Les Cahier de droit 32 (1991) 1001 at 1025.

bijural harmony within Canada, that the CISG apply to interprovincial as well as international sale of goods.[45]

## 4. Initial Impact of CISG

In 1992, an article appeared in the Emory International Law Review entitled "Impact of the Vienna Sales Convention on Canada".[46] Having briefly summarized the CISG, the ULCC Uniform Sale of Goods Act, and the constitutional position in relation to Canadian accession, the author identified three essential variances between the CISG and what the author described as "Canadian sales law" – though without mention of Québec civil law. The identified variances were: 1) the writing requirement for sales contracts in the common law provinces compared to the lack of such a requirement in the CISG; 2) 'the battle of the forms' which in common law Canada is resolved by finding no contract formation until performance begins compared to the CISG approach of permitting an acceptance subject to new conditions if the offeror does not object; and 3) the passing of risk, exemplified by the Ontario sales legislation, at the time title passes to the buyer regardless of delivery compared to the linking of the passing of risk with delivery under the CISG.[47] Though promoting the CISG, the author concluded with the statement that "[b]usiness people … still have reason to exercise caution. The terms of the Convention have not been tested in Canadian courts … The Convention also fails to address important aspects of sales law."[48]

A review of treatises published during this initial period does not demonstrate strong academic interest in the CISG. Two leading treatises by the same author on private international law in Québec and on private international law in the common law provinces, published in 1980 and 1986, respectively both briefly discuss the Hague Sales Convention but not the CISG (though not expected in the 1980 text);[49] and a 1988 student case-

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45 *C. Samson*, L'harmonisation du droit de la vente: l'influence de la Convention de Vienne sur l'évolution et l'harmonisation du droit des provinces canadiennes, Les Cahier de droit 32 (1991) 1001 at 1026.

46 *L.A. Donner*, Impact of the Vienna Sales Convention on Canada, Emory International Law Review 6 (1992) 743.

47 *L.A. Donner*, Impact of the Vienna Sales Convention on Canada, Emory International Law Review 6 (1992) 749-50.

48 *L.A. Donner*, Impact of the Vienna Sales Convention on Canada, Emory International Law Review 6 (1992) 750-51.

49 *J.-G. Castel*, Droit international privé Québecois, 1980, 530 discussing the report on ciivl code reform and the 1955 Hague Convention and *J.-G. Castel*, Canadian Conflict of Laws, 1986, 568. See also: *J.-G. Castel*, Introduction to Conflict of Laws (2nd Ed.), 1986.

book by the same author on private international law contains no mention of the CISG.[50] Another academic text on Canadian private international law published in 1983 is similarly silent regarding the CISG.[51] In the area of sales law, the leading common law text in Canada in its edition of 1986 also made no mention of the CISG.[52]

In this initial period beginning with the adoption of CISG in 1980 and ending when the CISG entered into force in Canada in 1992, commentary about CISG focussed on domestic constitutional arrangements to permit accession, the nature and scope of permitted declarations under the CISG, and comparison with domestic law in terms of both the common law provinces and the civil law of Québec. Commentators paid particular attention to the ULCC Uniform Sales of Goods Act and to the new C.c.Q. both of which reform efforts seemingly siphoned interest from the CISG and left it marginalized as a discrete matter of interest to Private International Law. Recognizing that the content of the reform was immutable, commentary in this period is what one might expect in relation to a law reform project of this nature with a major focus on implementation.

## II. From Implementation to the First Canadian Case: 1992 to 1998

Following implementation of the CISG in 1992, Canadian jurists awaited the first Canadian case to address the CISG, a period which ended in 1998. This is not to characterize the intervening period as silent but as relatively inactive with only three articles[53] and one published doctoral thesis sum-

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50 *J.-G. Castel*, Conflict of Laws: Cases, Notes and Materials (6th Ed.), 1988, chapter 11 'Contracts'.

51 *J.G. MacLeod*, The Conflict of Laws, 1983, chapter 7 'Obligations: Contract'.

52 *G.H.L. Fridman*, Sale of Goods in Canada (3rd Ed.), 1986, 7 discusses, under the heading 'Revision and Reform of the Law', the draft Bill proposed by the Ontario Law Reform Commission which the ULCC adopted in 1984 as the Uniform Sale of Goods Act. In chapter 20, pp. 473-78, 'Sale of Goods in the Conflict of Laws', Professor Fridman does not mention the CISG.

53 *R.W. Riegert and R.J. Lane*, Canadian Production in and to American Markets: Bilateral Trading Issues, Alberta Law Review 32 (1994) 284 (26 pages); *D. Lecossois*, La détermination du prix dans la Convention de Vienne, le U.C.C. et le droit français: critique de la première décision relative aux articles 14 et 55 de la Convention de Vienne, McGill Law Journal 41 (1996) 513 (27 pages); and *L. Marquis*, La bonne foi en droit commercial international uniforme à la lumière du paradigme culturel du développement, Revue de droit de l'Université de Sherbrooke 26 (1996) 247 (34 pages). Briefer CISG articles were published in other legal publications; for example, *G. Owen*, Vienna Convention, agency arrange-

mary[54] published in Canadian law journals. The two authors of the first journal article, legal counsel for different oil companies, devoted one and one-half pages (of a twenty-six pages article on relevant trade law issues) to the CISG and concluded that portion of their discussion with the statement: "While it is the opinion of many lawyers that the CISG may represent an unacceptable set of codified commercial laws in the particular circumstances of today's international trade, businesses may well adapt to it and find it more acceptable over time."[55] The second journal article, authored by a French lawyer who had completed graduate legal studies at McGill University, addressed an early Hungarian court decision.[56] The third journal article focussed on the impact of the direction contained in the CISG article 7 for the "observance of good faith in international trade".[57] On a more positive note, academic writers began to include the CISG in their treatises on private international law and on the law of sales. For example, the third edition of Castel's text, "*Canadian Conflict of Laws*",[58] which appeared in 1994, briefly summarized the CISG and concluded:

> Since the Convention does not govern the validity of the contract of sale, this question will continue to be governed by state laws to be determined by ordinary conflict of laws rules. Thus, every international sale contract will be subject to at least two sets of rules.[59]

In relation to the law of sales, the fourth edition of Fridman's "*Sale of Goods in Canada*",[60] which appeared in 1995, repeated under the heading "Revision and Reform of the Law" the discussion from the previous edition concerning the Ontario Law Reform Commission's draft Bill which the ULCC had adopted in 1981 as a Uniform Sale of Goods Act[61] but added relatively extensive discussion of the CISG in a chapter entitled "Sale of Goods in the Conflict of Laws".[62] A portion of this discussion addressed the exclusion of

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ments can pose problems in international business deals, The Lawyers Weekly 13 (22 October 1993) 13 and *J. Babe*, The legal pitfalls of electronic data interchange, The Lawyers Weekly 17 (23 May 1997) 3.

54 *R. Nevry*, La détermination du prix pars un tiers dans la vente internationale de marchandises, McGill Law Journal 43 (1998) 996 (one half page).

55 *R.W. Riegert and R.J. Lane*, supra, note 53, 292.

56 Pratt & Whitney v. Malev Hungarian Airlines (Superior Court, Hungary) as translated at Journal of Law & Commerce 13 (1993) 31.

57 *L. Marquis*, supra, note 53.

58 *J.-G. Castel*, Canadian Conflict of Laws, 1994, 594-95.

59 *J.-G. Castel*, Canadian Conflict of Laws, 1994, 595.

60 *G.H.L. Fridman*, Sale of Goods in Canada (4th Ed.), 1995.

61 *G.H.L. Fridman*, Sale of Goods in Canada (4th Ed.), 1995, 6-7.

62 *G.H.L. Fridman*, Sale of Goods in Canada (4th Ed.), 1995, 471-8.

the CISG from international sales contracts and raised questions sure to confound even the jurists most interested in the CISG:

> … if the Convention does not expressly deal with something governed by the Convention, such a question is to be settled in conformity with the general principles on which the Convention is based, or, if these are absent, in conformity with the law applicable under the rules of private international law. This seems to be a very obscure provision. Are the principles on which the Convention is based those set out in the Preamble, which refers to the establishment of a 'New Economic Order' and the development of international trade and the removal of legal barriers to such trade? Or is this a reference to some presumably, but not necessarily, discoverable principles underlying the provisions of the Convention. And what is meant by the reference to the law applicable by virtue of the rules of private international law? It is to be hoped that, in the course of time, these conundra will be resolved. How Canadian courts are to solve them, if and when they arise, is difficult to say.[63]

## 1. *Nova Tool & Mold*: The 'First' Canadian Case

The generally reputed 'first Canadian case' was released on 16 December 1998 to general dismay. *Nova Tool & Mold v. London Industries Inc.*[64]arose from the sale of steel molds manufactured by an Ontario vendor and delivered to the purchaser in Ohio for use in the manufacture of plastic auto parts. When the purchaser discovered defects in some of the molds, it had another supplier fix the problems, rather than return the molds to the vendor, because of immediate production needs or with the consent of the vendor. The purchaser then refused to pay the total purchase price when invoiced for the molds and countered with a claim for the costs it incurred to fix the defective molds. In the action commenced by the Ontario vendor on the unpaid invoice, Malev J., of the Ontario Court (General Division), granted judgment in favour of the defendant Ohio purchaser. Notwithstanding the international nature of the sale involving a vendor and purchaser from states party to the CISG, Malev J. made only passing reference to a claimed reliance by the purchaser on the Ontario legislation implementing the CISG and on the CISG itself:

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[63] G.*H.L. Fridman*, Sale of Goods in Canada (4th Ed.), 1995, 478-79 (citations omitted).

[64] [1998] Ontario Judgments No. 5381 (QuickLaw). The reasons for decision were not reported in the general reporting series such as the Dominion Law Reports, the Ontario Reports (3rd) or the topical reporting series.

> It was the policy of Nova to make any required repairs to a mold at its expense for one year from the date of delivery, provided that the repairs were required due to defects for which it was responsible and not caused by its customer. This was only company policy and not a term of the contract. It is not relevant. I have already quoted the warranty provisions in the contract. *London relies on this contractual warranty and also relies on the implied warranties under the International Sale of Goods Act R.S.O. 1990 c. I.10. London relies particularly on Article 1(1)(a) and (1)(b), 35(1), 36(1), (2), 45(1)(a), (1)(b) and 74 all of which follow as Schedule "B".*[65]

That brief mention exhausted discussion of the CISG.

## 2. Reaction to Nova Tool & Mold

In an article on the 'first case', Ziegel understatedly described *Nova Tool* as "not a good precedent for the treatment of the Convention in future Canadian litigation."[66] He noted that Malev J. had not recorded in his reasons for decision any argument on the CISG by counsel at trial thus raising the distinct possibility that the parties had not relied on the CISG at all.[67] The lessons of *Nova Tool* were, for Ziegel, in marked contrast to his earlier statement about the CISG being "well publicized" and rather clear:

> It is safe to assume that the level of consciousness about the Convention is very low among commercial lawyers in Canada, as it is among U.S. lawyers. It is my distinct impression that a very large number of contracts between Canadian and U.S. parties still fail to exclude the Convention if the parties do not mean it to apply to the contract – not because the parties wish to be governed by the Convention but because they do not know enough about the Convention to appreciate that a simple reference to the law of a state or a province is not sufficient to exclude the Convention
>
> I also think it safe to assume that … most Canadian and U.S. lawyers would much prefer to be governed by the domestic sales laws of Canada or the U.S. than by the Convention …

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65 [1998] Ontario Judgments No. 5381 (QuickLaw), para. 61 (emphasis added).

66 *J.S. Ziegel*, Canada's First Decision on the International Sales Convention, Canadian Business Law Journal 32 (1999) 313.

67 *J.S. Ziegel*, Canada's First Decision on the International Sales Convention, Canadian Business Law Journal 32 (1999) 317-18.

> Canadian and U.S. commercial lawyers had better take the International Sales Convention much more seriously that they have up to now.[68]

In a later comment on *Nova Tool* and other CISG cases, another commentator expressed the opinion that "Canadian courts have been reluctant to apply [the CISG], appearing to be more comfortable applying domestic law in its place or, at the very least, alongside it."[69] However, this criticism of the courts seems rather misplaced given the role of Canadian trial judges and the proper focus of criticism should have been where Ziegel placed it, on legal counsel. But, if legal counsel did not present legal arguments at trial based on the CISG, it is logical to assume that both sides to the litigation must have determined that no benefit would have been gained by presenting such argument; in other words, the CISG did not provide either party with an advantage in relation to the issues in dispute.

Two additional points deserve mention as a form of a postscript to *Nova Tool*. First, the Ontario Court of Appeal affirmed the findings of Malev J. and dismissed an appeal on the merits by the Ontario vendor, with one exception.[70] As the parties themselves acknowledged, the damages awarded by Malev J. did not account for the fact that a portion of the costs incurred by the Ohio purchaser to complete one of the mold contracts would have had to be paid to the Ontario vendor had it completed the contract according to its terms. Thus, the Court reduced the damage award by that amount. The reasons for decision of the Ontario Court of Appeal, per Finlayson J.A., do not mention the CISG which reinforces Ziegel's belief that counsel failed to present legal argument based on the CISG. Second, though *Nova Tool* was indeed the first reported Canadian case in which a party included the CISG in its pleadings, *Nova Tool* is not the first Canadian case to *mention* the CISG. That honour goes to the 1997 decision of the Court of Québec in *Campeau v. Muhling*.[71] The cause of action in *Campeau*, however, did not concern an international sale of goods and the CISG is mentioned only because the trial judge quotes the "*Commentaires du ministre de la Justice*" which, as discussed above, identifies the CISG as one of the courses for C.c.Q. article 1739, an article in issue in the matter before the court.

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[68] *J.S. Ziegel*, Canada's First Decision on the International Sales Convention, Canadian Business Law Journal 32 (1999) 318-19.

[69] *R. Sharma*, The United Nations Convention on Contracts for the International Sale of Goods: The Canadian Experience, Victoria University of Wellington Law Review 36 (2005) 847.

[70] *Nova Tool & Mold Inc. v. London Industries Inc.*, 2000 CanLII 5134 (Ontario C.A.). CanLII is the Canadian Legal Information Institute; court decisions and legislation are available in the English and French languages at its website (www.canlii.ca).

[71] [1997] Arrèts du Québec no. 2375 (QuickLaw), para. 7.

## III. From the First Case to the Present: 1999 to 2007

Since the release of *Nova Tool* in December 1998 and its subsequent appeal, Canadian appeal courts have expressly referred to the CISG two times; trial courts have done so seventeen times; and an administrative appeal tribunal has done so once. These decisions are not spread evenly across the ten provinces, three territories, and federal jurisdiction but are clustered in five provinces – British Columbia, Saskatchewan, Manitoba, Ontario, and Québec – and the Federal Court. Many of these references to the CISG have been passing references; few have been central to the issues in litigation.

### 1. Passing Reference to CISG in Court Decisions

Four Québec trial court decisions make only passing reference to the CISG. Two mention the CISG when quoting the "*Commentaires du ministre de la Justice*" on C.c.Q. articles relevant to the issues in litigation;[72] one merely references the Québec statute implementing the CISG to illustrate the domestic implementation of an international treaty by statute;[73] and one refers to the CISG in a footnote to explain the concept of "biens de même espèce" as related to the CISG concept of "marchandise de même type".[74] Six court decisions from other Canadian jurisdictions (four trial and two appeal courts) merely mention the CISG when reproducing a contractual choice of law clause which expressly excludes its application.[75] One court decision concerned the scope of an arbitration clause with mention of the CISG arising when the court reproduced, without further discussion of the CISG, the relevant contractual clause which declared "the prevailing law to be the

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[72] *Aubut c. Martel*, [1999] Jugements du Québec n. 6464 (QuickLaw) at para. 16 re article 1739; *Paré c. Francoeur*, [2000] Jugements du Québec no. 1480 (QuickLaw) para. 30 re article 1456.

[73] *UL Canada inc. c. Québec (Procureur général)*, [1999] Jugements du Québec no. 1540, para. 87.

[74] *Compagnie d'assurance ING du Canada c. Goodyear Canada inc.*, [2007] Jugements du Québec no. 1532 (QuickLaw) at case report footnote 4.

[75] *STMicroelectronics inc. c. Matrox Graphics inc.*, [2007] Jugements du Québec no 14364 (C.A.) (QuickLaw) and the related trial court decision reported as *Hewlett-Packard France c. Matrox Graphics Inc.*, [2007] Jugements du Québec no 113 (C.S.) (QuickLaw); *Ford Aquitaine Industries SAS v. Canmar Pride (The)*, [2005] Federal Court Judgments No. 535 (C.A.) (QuickLaw) and its related trial decision *Ford Aquitaine Industries SAS v. Canmar Pride (The)*, [2004] F.C.J. No. 1743 (F.C.T.D.) (QuickLaw); *Multiactive Software Inc. v. Advanced Service Solutions Inc.*, [2003] B.C.J. No. 945 (QuickLaw); and *Beechy Stock Farm (1998) Ltd. v. Managro Harvestore Systems (1997) Ltd.*, [2002] S.J. No. 240 (QuickLaw).

United Nations Convention on Contracts for the International Sale of Goods (1980) and the Laws of Canada."[76] In one trial decision, the court held the CISG not applicable to an international sales contract entered into by the parties before the enabling legislation had been enacted in the province.[77] In two decisions, the court considered it unnecessary to analyze the CISG because of consistency between its provisions and provincial sale of goods legislation in relation to the matter in issue.[78]

In two court decisions, the CISG played a decidedly secondary role in the context of determining jurisdiction to adjudicate. The first instance concerned the existence or not of a real and substantial connection of the parties and subject matter of the dispute to the forum to justify the court exercising jurisdiction to adjudicate and the issue of appropriateness of the plaintiff's choice of forum in light of the doctrine of forum *non conveniens*.[79] The reference to the CISG arose when the trial judge stated that the parties acknowledged the CISG as the law of the forum; that the CISG therefore governed the contract of sale of a tractor from a Belgian vendor to Ontario purchasers; and that by the CISG the contract was deemed to have made in

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[76] *Sonox Sia c. Albury Grain Sales Inc.*, [2005] Québec Judgments no. 9998 (C.S.) (Quicklaw)(in English) para. 10.

[77] *General Refractories Co. of Canada v. Venturedyne, Ltd.*, [2002] Ontario Judgments No. 54 (S.C.) (QuickLaw) at para. 10.

[78] *Kellogg Brown & Root Inc. v. Aerotech Herman Nelson Inc.*, [2004] Manitoba Judgments No. 181 para. 50 (C.A.) (QuickLaw) dismissing an appeal from the trial decision, [2002] Manitoba Judgments No. 376 (QuickLaw) and *Dunn Paving Ltd. v. Aerco Trading Inc.*, [2001] Ontario Judgments No. 1736 (S.C.) (QuickLaw). *Kellogg Brown & Root* concerned the meaning of 'acceptance' in the context of the sale of 282 portable heaters by a Manitoba vendor to a Texas purchaser. The Court of Appeal found that both CISG and the provincial legislation provide that a purchaser who takes delivery and thereafter acts in relation to the subject goods in a manner that is inconsistent with continued ownership by the vendor, has thereby accepted the offer of sale. In early 2005, the Supreme Court of Canada refused leave to appeal, [2004] Supreme Court of Canada Rulings on Applications for Leave to Appeal and Other Motions (S.C.C.A.) No. 344; interestingly one of the stated grounds of appeal was that the Court of Appeal had 'erred in its interpretation of and failure to apply the International Sale of Goods Act'. In *Dunn Paving Ltd*, the court held that sale by sample under both CISG and provincial sales legislation is similar and, even assuming the matter involved a sale by sample, the defendant Michigan purchaser had sufficient time to inspect and reject the subject scrap metal when delivered by the plaintiff Ontario vendor and that, over the term of the contract, the purchaser had acquiesced in the vendor's method of credit adjustment for deficient goods.

[79] *Shane v. JCB Belgium N.V.*, [2003] Ontario Judgments No. 4497 (S.C.) (QuickLaw).

Belgium from where the offer was issued and the acceptance received.[80] That the CISG pointed to the law of Belgium as applicable to the contract proved of little weight in the forum *non conveniens* analysis because of the lack of any real dispute between the parties regarding the terms of the contract.[81] The court found both a real and substantial connection to Ontario to ground jurisdiction to adjudicate and that the vendor had failed to demonstrate Belgium was a more appropriate forum. In the second instance,[82] a Superior Court master mentioned the CISG when considering whether a forum selection clause contained in a packing slip altered the terms of the contract when the earlier oral contract had been fully formed by telephone in terms of price, quantity and delivery dates without mention of forum selection. After referring to the CISG and listing articles considered particularly relevant, Master C. MacLeod stated:

> There is of course no suggestion that the parties turned their minds to the convention but all parties agree it is the law that governs offer and acceptance. To that extent, the law of the contract appears to be the same whether the courts of the United States, Ontario or France are called upon to adjudicate. The convention provides rules for oral formation of contracts and it also provides for amendments to the terms of contracts but has particular rules for substantial amendments.[83]

Without further mention or discussion of the CISG, the master concluded that the forum selection clause inserted into the packing slip by the French vendor did not apply to the first order for goods delivered to the Ontario purchaser, but did apply to subsequent orders because the purchaser would have been on notice of the clause.

In the sole administrative tribunal decision,[84] the CISG is used to supplement the appeal tribunal's analysis of when a New York purchaser of clothing goods had 'purchased' the goods from a foreign supplier for the purpose of Canadian import duty regulations. The basic issue was whether the importer had entered into an agreement to sell the goods to a retailer in Canada before it had a sales contract with the foreign supplier in China. In determining this issue, the appeal tribunal considered both the common law

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80 *Shane v. JCB Belgium N.V.*, [2003] Ontario Judgments No. 4497 (S.C.) (QuickLaw) para. 27.

81 *Shane v. JCB Belgium N.V.*, [2003] Ontario Judgments No. 4497 (S.C.) (QuickLaw) para. 50.

82 *Chateau Des Charmes Wines Ltd. v. Sabate, USA, Inc.*, [2005] Ontario Judgments No. 4604 (S.C.) (QuickLaw).

83 *Chateau Des Charmes Wines Ltd. v. Sabate, USA, Inc.*, [2005] Ontario Judgments No. 4604 (S.C.) (QuickLaw) para. 13.

84 *Cherry Stix Ltd. v. Canada (Border Services)*, [1005] CanLII 57517 (C.I.T.T.).

rule, that acceptance be communicated to the offeror, and the CISG rule that acceptance is effective when it is received by the offeror.

Quick mathematical calculation indicates that seventeen of twenty CISG related trial and appellate court decisions contain only a modest reference to the CISG. That leaves only three cases of any real substance.

## 2. The CISG in Issue in Court Decisions

The first court decision of substance is *La San Giuseppe v. Forti Moulding Ltd.*,[85] a 1999 decision of the Ontario Superior Court concerning the sale of picture frame mouldings (and a saw) between an Italian vendor and an Ontario purchaser who retailed the items in Ontario. The sales relationship between the parties commenced in 1989, prior to the entry into force of the CISG in Ontario, and continued over the years with the Ontario purchaser sending orders to Italy and the Italian vendor delivering goods to Ontario, with some variance in quality and quantity as is normal in the trade. The parties never entered into a written contract covering their business relationship. In 1996, the vendor commenced a breach of contract action in Ontario because the purchaser had fallen behind in paying its account with the vendor, with an amount owing in excess of 48 million lira.

At trial, the Ontario purchaser resisted the Italian vendor's reliance on the CISG by arguing that the CISG, brought into force in Ontario in 1992, did not have retroactive application to a continuing master contract which began in 1989. The trial judge, Swinton J., rejected the argument on non-retroactivity by reasoning that each order sent by the purchaser, after the 1992 entry into force of the CISG, constituted a new contract because each order specified the essential terms of quantity, price and term when accepted by the vendor.[86] Swinton J. also referred to and applied the CISG articles 2(a), 39(1)(2) and 40 to hold, respectively, that the contracts between the parties were for the supply of commercial goods and so were not covered by the CISG exclusion of contracts for the sale of personal or domestic goods; that the purchaser had an obligation to notify the vendor within a reasonable time, and at most within two years, of any lack of conformity of the goods; and that the vendor could not rely on the purchaser's obligation to notify if the lack of conformity was either known to the vendor or the vendor "ought reasonably to have been aware" of the lack of conformity and had not disclosed it to the purchaser.[87] Applying this law to the evidence, Swin-

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[85] [1999] Ontario Judgments No. 3352 (QuickLaw).

[86] [1999] Ontario Judgments No. 3352 (QuickLaw) paras. 28-29.

[87] [1999] Ontario Judgments No. 3352 (QuickLaw) para. 31. Note that in using the expression 'ought reasonably to have been aware', Swinton J. varied from the phrasing in CISG article 40 which refers to 'could not have been unaware'.

ton J. determined that the purchaser had failed to make timely complaints about defective picture frame mouldings and, in any event, the evidence established a trade practice to tolerate a level of defects approximating 10%; the saw was as ordered by the purchaser and had been used by the purchaser on a daily basis for four years before being sold for approximately half the original sale price; and that the occasional over-delivery of goods, also consistent with trade practice, had been accepted and paid for by the purchaser as required by both provincial sale legislation and the CISG article 52(2). Finally, it should be noted that Swinton J., in the absence of direct evidence on this point and without explanation for the basis for so doing, took judicial notice of Italy's 1986 ratification of the CISG to find that the vendor's and purchaser's places of business were both in contracting states and that the applicable private international law rules pointed to application of the law of a state party, namely Ontario.[88]

It is to be observed that Swinton J. interpreted the CISG as if it were ordinary domestic law and without reference to existing foreign jurisprudence or doctrine – an approach not consistent with its "international character" as expressed in article 7. In reaction to *La San Giuseppe*, published as a postscript to his comments on *Nova Tool*,[89] Ziegel did not raise this last point but did question the legal basis for taking notice of ratifications of United Nations treaties by states other than Canada and considered Italy rather than Ontario as a more likely proper law of the sales contract. He praised *La San Giuseppe* as

> prov[ing] the value of the parties' contractual relations being governed by the Convention where seller and buyer are located in states with very different legal systems. It was unrealistic to expect Forti to know anything about Italian sales law and equally unrealistic to require LSG to familiarize itself with the details of Ontario sales law. The Convention neatly solves the conundrum (as it was intended to) by providing the parties with a common sales code …[90]

The second court decision of substance is *Mansonville Plastics (B.C.) Ltd. v. Kurtz GmbH*.[91] A 2003 British Columbia trial decision, *Mansonville Plastics* concerned an action vendor by a B. C. purchaser alleging breach of contract and breach of statutory warranties of fitness by a German manufacturer of

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88 [1999] Ontario Judgments No. 3352 (QuickLaw) para. 28 referring to CISG, article 1.

89 *J.S. Ziegel*, Canada's First Decision on the International Sales Convention, Canadian Business Law Journal 32 (1999) 319 et seq.

90 *J.S. Ziegel*, Canada's First Decision on the International Sales Convention, Canadian Business Law Journal 32 (1999) 324-25.

91 [2003] British Columbia Judgments No. 1958 (S.C.) (QuickLaw).

equipment used to make 'styrofoam' products for construction and other industrial uses. The vendor delayed delivery of the equipment because the purchaser failed to provide a timely letter of credit after confirmation of the order. This presented the issue as to whether the vendor's delayed performance was excused by the purchaser's noncompliance with its obligations. The defendant vendor argued that it suspended performance of its obligations because it became "apparent that the other party will not perform a substantial part of his obligations …" per the CISG articles 71(1) and (3). On the evidence, Tysoe J. held the vendor had properly suspended its performance; had given notice to the purchaser as required by article 71(3); and that the period of suspension ended when the purchaser made the final payment. Thus, the purchaser's complaint of late delivery was justified for the period after this payment. The second CISG issue concerned the quantity, quality and description obligations of the vendor per article 35. Though reproducing article 35 of the CISG in his reasons for decision, Tysoe J. declared the obligations to be of "like effect" under provincial sales legislation[92] and analyzed domestic sales jurisprudence to interpret the nature and scope of these obligations. In taking this approach, it seems clear from the reasons for decision that Tysoe J. conformed to the arguments of the parties. There is no indication that counsel brought to the court's attention foreign jurisprudence or, indeed, any doctrine on point. Tysoe J. granted judgment in favour of the plaintiff purchaser but for an amount one-fifth of its claim.

The third court decision of some substance is *Diversitel Communications Inc. v. Glacier Bay Inc.*,[93] an Ontario Superior Court decision released two months after *Mansonville Plastics*. The parties to the international sales contract were an Ontario purchaser and a California vendor of vacuum panel insulation needed by the purchaser to fulfil its own contractual obligations. In this instance, the purchaser had specified a precise delivery schedule and had made a partial payment of $40,000 when it forwarded the purchase order. The vendor did not meet the delivery schedule. Though alternative solutions were considered, the purchaser eventually terminated the contract and brought an action for recovery of its $40,000 plus interest. Legal argument at trial focussed on the concept of 'fundamental breach' with the plaintiff purchaser arguing that the CISG, article 25 in combination with articles 33 and 49, established a lower threshold for fundamental breach than that required by the common law. Significantly, the plaintiff supported its position by submitting what the trial judge, Roccamo J., described as "a bundle of case law on UNCITRAL texts which reflects how a number of European Courts have construed late delivery under article 33 as tantamount to fundamental breach of contract, pursuant to article 49".[94] Included

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92 [2003] British Columbia Judgments No. 1958 (S.C.) (QuickLaw) para. 83.

93 [2003] Ontario Judgments No. 4025 (S.C.) (QuickLaw).

94 [2003] Ontario Judgments No. 4025 (S.C.) (QuickLaw) para. 28.

with this material was a German decision[95] which Roccamo J. summarized in his reasons for decision to illustrate the argument before concluding that he was not satisfied that the CISG and the common law differed in their respective standards for fundamental breach. The evidence satisfied Roccamo J. that the purchaser had made known to the vendor that time was of the essence and that the vendor was expected to satisfy the delivery schedule. The vendor having failed to do so, the purchaser was justified to terminate the contract and the court ordered the return of the partial payment plus interest.

As just recounted in some detail, the record of court and administrative tribunal decisions during the fifteen year period (1992-2007) does not reflect a significant CISG impact in Canadian legal practice. With any law reform, a period of delay is to be expected before the reform is reflected in pleadings, oral arguments and court decisions. But, regardless of one's perspective on the merits of CISG, three court decisions in fifteen years – in which CISG plays a substantive role in determining the rights and obligations of the parties – cannot be characterized as a significant impact.

## 3. Commentary on the CISG

### a) Law Journals and Law Reviews

As with the court and tribunal decisions, commentary on the CISG in law journals (and law reviews) varies in significance with commentary ranging from substantive analysis to a mere footnote reference. Specific mention of the CISG in the title of a journal article is more likely to increase awareness than a footnote citation, with or without commentary, because of the enhanced visibility of the title. In addition to specific mention in the title of an article, the CISG is likely to come to the attention of an interested jurist when the title of a journal article conveys a focus on international trade issues pertaining to sales rather than, for example, the WTO. So, for present purposes, the journal commentary of interest is that with either the CISG expressly mentioned in the title of the journal or the CISG is implicitly relevant due to the apparent subject matter of the article. Within these parameters, relevant journal articles were published each year since 1999 and appear in eight different journals, including both common law and civil law journals.[96]

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[95] Oberlandesgericht Celle; 20 U 76/94

[96] The statistics were compiled after searches on QuickLaw and LegalTrac using the search phrases 'international sale of goods' and 'vente internationale de marchandises' (February and March 2008).

In six of the focus years, only one journal article appears to have been published each year while in three of the years, three articles were published each year. Eight journal articles were published in the English language and seven in the French language. Only five of the fifteen journal articles mention the CISG specifically in the title compared to ten in which the CISG is implicitly a logical subject of discussion given the article's title. Seven of the eight journals which published these articles are directly associated with Canadian university law faculties; the eighth is published by a private legal publisher. The journals are as follows (with the number, year of publications and affiliation appearing in parentheses): *Asper Review of International Business and Trade Law* (1 article in 2005; University of Manitoba);[97] *Cahiers de Droit* (1 article in 2005; Université Laval);[98] *Canadian Bar Review* (1 article in 2003; Canadian Bar Association);[99] *Canadian Business Law Journal* (2 articles in 1999 and 2006; Canada Law Book);[100] *Manitoba Law Journal* (1 article in 2000; University of Manitoba);[101] *McGill Law Journal* (3 articles in 1999 and 2005; McGill University);[102] *Revue juridique Thémis* (5 articles in 2001, 2002 and 2007; Université de Montréal);[103] and *Revue québécoise de*

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[97] *R. DeLaurell*, The Role of the Legal Regimes in New Industrial Economic Theory, Asper Review of International Business and Trade Law (2005) 195-207.

[98] *F. Gélinas*, Codes, silence et harmonie – Réflexions sur les principes généraux et les usages du commerce dans le droit transnational des contrats, Les Cahiers de droit 46 (2005) 941-60.

[99] *E.S. Darankoum*, L'Application Uniforme de la Convention de Vienne sur la Vente Internationale de Marchandise, La Revue du Barreau Canadien 82 (2003) 83-124.

[100] *J.S. Ziegel*, supra note 66 and *A.I. Pribetic*, The (CISG) *Road Less Travelled: GreCon Dimiter Inc. v. J.R. Normand Inc.*, Canadian Business Law Journal 44 (2006) 92-114. The subject of the latter article is a Supreme Court of Canada decision which could have, but did not, discuss CISG in the context of forum selection clauses. There is no suggestion in the case reports at either the Supreme Court of Canada or Québec Court of Appeal that counsel relied on or even mentioned CISG.

[101] *B. J. Freedman*, Electronic Contracts Under Canadian Law – A Practical Guide, Manitoba Law Journal 28 (2000) 1-60

[102] *P. B. Maggs*, The Process of Codification in Russia: Lessons Learned from the Uniform Commercial Code, McGill Law Journal 44 (1999) 281-300; *M. G. Rozenberg*, The Civil Code of the Russian Federation and International Agreements, McGill Law Journal 44 (1999) 473-490; and *T. Bevilacqua*, L'article 3 de la Convention de Vienne et les contrats complexes dans le domaine de l'informatique: une lecture de la jurisprudence pertinente, McGill Law Journal 50 (2005) 553-593.

[103] *G. Lefebvre*, Termes de commerce: L'utilisation des termes de commerce dans la vente internationale de marchandises: la prudence s'impose …, Revue juridique

*droit international* (1 article in 2004; Société québécoise de droit international – with a committee of direction consisting of professors from l'Université du Québec à Montréal, l'Université Laval, l'Université de Sherbrooke, l'Université de Montréal, and McGill University).[104] These journals are included in searchable databases of Canadian legal literature and are readily available through Canadian law libraries and through commercial internet access.

In addition to Canadian law journals and reviews, commentary on the CISG and Canada has been published in foreign law journals[105] and in publications directed specifically at practising lawyers.[106] The contrast between the two types of publications could not be starker. The foreign journal articles are lengthier and generally more positive about the future of the CISG in Canada, particularly after the first few court decisions mentioning the

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Thémis 35 (2001) 453-462; *M. J. Bonell*, The UNIDROIT Principles of International Commercial Contracts and the Harmonisation of International Sales Law, Revue juridique Thémis 36 (2002) 335-354; *L. Da Gama E Souza jr*, The UNIDROIT Principles of International Commercial Contracts and their Applicability in the MERCOSUR Countries, Revue juridique Thémis 36 (2002) 375-419; *A.-M. Trahan*, Les Principes d'UNIDROIT relatifs aux contrats du commerce international, Revue juridique Thémis 36 (2002) 623-636; and *G. Lefebvre*, La vente documentaire internationale: la problématique de l'application de la common law au Québec, Revue juridique Thémis 41 (2007) 207-275. The Bonell and Da Gama E Souza articles were also published in the collection Les principes d'Unidroit et Les Contrats Internationaux: Aspects Practiques, 2001.

104 *E. S. Darankoum*, L'application de la convention des nations unies sur les contrats de vente internationale de marchandises par les arbitres de la chambre de commerce internationale en dehors de la volonté des parties est-elle prévisible?, Revue québecoise de droit international 17 no. 2 (2004) 1-31.

105 For example, *J.S. Ziegel*, The Future of the International Sales Convention from a Common Law Perspective, New Zealand Business Law Quarterly 6 (2000) 336-347; *C.Sukurs*, Harmonizing the Battle of the Forms: A Comparison of the United States, Canada and the United Nations Convention on Contracts for the International Sale of Goods, Vanderbilt Journal of Transnational Law 34 (2001) 1481-1515; and *R. Sharma*, The United Nations Convention on Contracts for the International Sale of Goods: The Canadian Experience, Victoria University of Wellington Law Review 36 (2005) 847-58. On the Canadian website dedicated to CISG (www.cisg.ca), Peter Mazzacano (the site webmaster) includes a bibliography in which two of his own three CISG writings are identified as published in foreign publications.

106 For example, *B.Barin*, UN model conciliation law: Can Canada make history again?, The Lawyers Weekly 23 (14 November 2003) 9 and 16; and *B.N. Zuffranieri and J.I. Feinstein*, UN Sale of Goods Convention may be trap for the unwary, The Lawyers Weekly 23 (12 December 2003) 11.

CISG. In a 2000 article published in a New Zealand journal, Ziegel identifies cultural factors (lack of effective exposure to the CISG at law faculties), economic factors (the cost of CISG research by lawyers unfamiliar with its content in the context of legal claims the value of which do not justify the research cost), and legal factors (such as exclusion of the CISG by the parties to an international sales contract and the number and variety of reservations available to states parties) as explaining the relative non-use of the CISG in Canada.[107] In a 2005 article also published in a New Zealand journal, R. Sharma reviewed the then state of relevant Canadian case law and found "a marked willingness to apply the Convention's provisions and international law interpreting it. While Canadian courts have been slow to recognise and employ the provisions of the CISG, with time and education it is likely that they will become much more savvy in applying the Convention's provisions appropriately. Commercial lawyers practising in this area must lead the way by educating themselves …"[108]

In contrast, the message in publications directed at the practising legal profession in Canada are more wary and less inviting. Two examples from *The Lawyers Weekly* illustrate this message of caution. A brief article published in November 2003 on conciliation and arbitration of commercial disputes includes the less than positive message:

> If you ask any lawyer in the world practising or teaching international commercial law what direction they think their field of expertise is going to take in the next 20 years, nine out of 10 will direct you to the International Institute for the Unification of Private Law (UNIDROIT) principles, the UN Convention on Contracts for the International Sale of Goods and other similar international documents and *then tell you to go and "figure it out for yourself."*[109]

The following month, December 2003, there appeared an article entitled "UN Sale of Goods Convention may be trap for the unwary" in which the authors assert that "many North American legal practitioners on both sides of the border are barely aware of the CISG"; advise that 'international sellers and buyers are well advised to consider specifying the application of other law"; and conclude that, because of the number of oral sales contracts and the failure of parties to consider choice of law clauses, "[i]nternational practitioners therefore have little choice but to become well versed in the provisions of the CISG in order to safeguard their clients' interests."[110] Not the most ringing endorsement of the subject matter.

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[107] *Ziegel*, supra, note 105 at 344-46.

[108] *Sharma*, supra note 105 at 858.

[109] *Barin*, supra note 106 at 16 (emphasis added).

[110] *Zuffranieri and Feinstein*, supra note 106 at 11.

### b) Legal Treatises

Logically, treatises on contracts, sales, private international law, and international trade law are the more likely sources of commentary on the CISG than texts on other legal subjects, with texts on sales being the most probable source. That logic reflects Canadian reality.

Canadian treatises on contracts, regardless of whether from a common law or civil law perspective, do not include significant coverage on the CISG. Instead, Canadian treatises focus primarily, and often exclusively, on domestic contracts rules. For example, J.D. McCamus, "*The Law of Contracts*"[111] and S.M. Waddams, "*The Law of Contracts*",[112] both published in 2005, do not address the CISG – though it is to be expected that future editions will at least mention the CISG because of its inclusion in a more recent text, J. Swan, "*Canadian Contract Law*"[113] published in 2006. Commercially available teaching materials for common law courses on contracts law have recently begun to bring CISG to the attention of law students.[114] In Québec civil law, it should similarly be expected that CISG will find its way into basic texts on the law of obligations though a leading text, "*Beaudouin et Jobin, Les Obligations* (6e éd)"[115] refers four times to the CISG but only, for example, when discussing C.c.Q. article 1456, one of the five articles identified in the "*Commentaires du ministre de la Justice*" as at least partially inspired by the CISG.

Both civil law and common law academic texts on sales law have increasingly focussed on the CISG with each new edition. In civil law, this increased attention is dramatically illustrated by the 1993, 2001 and 2007

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111 *J.D. McCamus,* The Law of Contracts, 2005.

112 *S.M. Waddams*, The Law of Contracts, 2005.

113 *J. Swan*, Canadian Contract Law, 2006, section 4.2.3.1, page 265 comparing the CISG article 19 with UCC article 2-207 and section 7.2, page 458, footnote 18 discussing the CISG article 72.

114 For example, *J. Swan, B.J. Reiter and N.C. Bala*, Contracts: Cases, Notes and Materials (7th Ed.), 2006, 548-49 mentions CISG in the context of the 'battle of forms' and *C. Boyle and D.R. Percy*, Contracts: Cases and Commentaries (7th Ed.), 2004, 63-64. These course books are to be contrasted with *S.M. Waddams, M.J. Trebilcock, J.W. Neyers, J.D. McCamus and* M.A. *Waldron*, Cases and Materials on Contracts (3rd Ed.), 2005 which does not discuss CISG even though the Swiss Federal Code of Obligations and the German Civil Code are given attention.

115 *P.-G. Jobin et N. Vézina*, Beaudouin et Jobin, Les Obligations (6e éd), 2005, paras. 92, 441, 454, and 835. The 5th edition, published in 1998, contained only one reference to CISG.

editions of P.-G. Jobin, "*La Vente*".[116] From a single footnote mention in the 1993 edition[117] to five text and footnote mentions in the 2001 edition,[118] the CISG enjoys the attention of seventeen paragraphs in the 2007 edition with most mentions within the body of the text rather than mere footnote references.[119] In contrast, another leading civil law text on sales, D.-C. Lamontagne, "*Droit de la vente*" (3e éd)(2005)[120] focuses on sales within the context of the C.c.Q. and does not discuss or even mention the CISG. The leading common law text on sales, G.H.L. Fridman, "*Sale of Goods in Canada*", has similarly increased its CISG content with each edition but continues to relegate its principal discussion to a single chapter on sales contracts and private international law.[121]

Private international law treatises consistently include at least some coverage of the CISG ranging again from mere passing reference in a footnote to full discussion in the main body of the text. These different treatments are evident in two leading civil law texts. G. Goldstein and E. Groffier, "*Droit International Privé: Théorie générale*" (Tome I)[122] published in 1998 contains one footnote reference to the CISG and two passing mentions in the text which contrasts unfavourably to the 2006 edition of C. Emanuelli, "*Droit international privé québécois*" (2e edition)[123] which includes a general overview of the CISG in the main text. Though not a general text on private international in Québec civil law, mention should also be made of the recently published S. Guillemard, "*Le droit international privé face au contrat de vente cyberspatial*".[124] Available text commentary in the common law tra-

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[116] *P.G. Jobin*, La Vente dans le Code civil du Québec, 1993; *P.-G. Jobin*, La Vente (2e èdition), 2001; and *P.-G. Jobin* et *M. Cumyn*, La Vente (3e èdition), 2007.

[117] *P.G. Jobin*, La Vente dans le Code civil du Québec, 1993, 126 (para. 158, note 720).

[118] *P.-G. Jobin*, La Vente (2e èdition), 2001, paras. 70, 117, 141, 151 and 185. Three of these references to CISG are found in the text itself (with further footnote mention on two of the three occasions) while two are just footnotes.

[119] *P.-G. Jobin* et *M. Cumyn*, La Vente (3e èdition), 2007, paras. 4, 71, 92, 126, 148, 149, 150, 151, 164, 166, 167, 169, 182, 183, 229, 230 and 233.

[120] *D.-C. Lamontagne*, Droit de la vente (3e éd), 2005.

[121] *G.H.L. Fridman*, Sale of Goods in Canada (5th Edition), 2004, 423-33, chapter 20, 'Sale of Goods in the Conflict of Laws'.

[122] *G. Goldstein* et *E. Groffier*, Droit International Privé: Théorie générale (Tome I), 1998, paras. 8, 54 and 76.

[123] *C. Emanuelli*, Droit international privé québécois (2e édition), 316-317, paras. 542-43. The commentary is essentially the same as that which appeared in the first edition published in 2001 at 267-69, paras. 504-505.

[124] *S. Guillemard*, Le droit international privé face au contrat de vente cyberspatial, 2006 (also available electronically through the Université Laval law library at www.ulaval.ca).

dition can be found in J. Walker, "*Castel and Walker Canadian Conflict of Laws*" (6th Ed.)[125] which contains a paragraph summary of the CISG along with two passing textual references.

Trade law in Canada is primarily concerned with trade regulation through the GATT, the WTO, the North American Free Trade Agreement (NAFTA) and other regulatory regimes. Thus, it is not surprising to find trade law treatises not addressing the CISG[126] while others, such as J.-G. Castel et al, "*The Canadian Law and Practice of International Trade: With Particular Emphasis on Export and Import of Goods and Services*" (2nd Ed.)(1997);[127] M.J. Nicholson, "*Legal Aspects of International Business: A Canadian Perspective*" (2nd Ed.) (2007)[128] and W. E. Kosar, "*Cases & Materials: International Business & Trade Law as Applied and Interpreted in Canada*" (2005)[129] provide relatively extensive commentary. The Kosar text provides the expected overview of the CISG but also summaries of two Canadian court decisions (*La San Giuseppe v. Forti Moulding Ltd* and *Kellogg Brown & Root Inc. v. Aerotech Herman Nelson Inc*) as well as one foreign decision (*Sacovini S.r.l. v. Société Les Fils de Henri Ramel et al*[130] from the French Cour de cassation). Inclusion of the French decision reinforces for the reader the international aspect to CISG interpretation. Finally, special mention is owed to J. Klotz, "*International Sales Agreements: An Annotated Drafting and*

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[125] *J. Walker*, Castel and Walker Canadian Conflict of Laws (6th Ed.), 2005-07 (looseleaf), paras. 1.11, 31.5f and 31.8f. Editions by Professor Castel of this text subsequent to that of 1994 (supra, note 58) continued the brief overview and the same concluding comment about international sales being subject to two sets of rules. See for example, *J.-G. Castel*, Canadian Conflict of Laws (4th Ed.), 1997, 634-35, para. 488.

[126] For example: *J.R. Johnson*, International Trade Law, 1998; *M.J. Trebilcock and R. Howse*, The Regulation of International Trade (3rd Ed.), 2005; and *L.H. Herman*, Canadian Trade Law: Practice and Procedure, 2007- (looseleaf).

[127] *J.-G. Castel* et al, The Canadian Law and Practice of International Trade: With Particular Emphasis on Export and Import of Goods and Services (2nd Ed.), 1997, Chapter 5, 149-165.

[128] *M.J. Nicholson*, Legal Aspects of International Business: A Canadian Perspective (2nd Ed.), 2007, chapter 7, 202-234. The commentary repeatedly compares the legal position in relation to specific issues at common law, the UCC and CISG. Unfortunately, the first heading after the introduction of the subject is 'Opting Out of the CISG', at 202 though this is followed immediately by discussion under the heading 'Advantages of the CISG' at 204.

[129] *W. E. Kosar*, Cases & Materials: International Business & Trade Law as Applied and Interpreted in Canada, 2005, 224-238.

[130] Cited to [1997] 2 European Current Law Monthly Digest (London) No. 88.

*Negotiating Guide*" published by Canada Law Book in 1997[131] which Kluwer International published in revised form the following year, 1998, and which is still included in their catalogue.[132]

In addition to the commentary in these treatises, Canadian jurists have ready access to foreign commentary held in law library collections.[133]

### c) Legal Education

Twenty Canadian law faculties provide legal education leading to professional qualification as a lawyer: fourteen law faculties are common law only; four law faculties are civil law only; and two provide legal education in both common law and civil law – University of Ottawa through two distinct sections of its Faculty of Law/ Faculté de Droit and McGill University by means of an integrated program of civil law and common law which results in students receiving both civil and common law degrees. These law faculties are unevenly dispersed across Canada but are located in eight of the ten provinces; eleven institutions are located in the two most populous provinces, Ontario and Québec.[134]

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[131] *J. Klotz*, International Sales Agreements: An Annotated Drafting and Negotiating Guide, 1997.

[132] *J. Klotz with J.A. Barrett*, International Sales Agreements: An Annotated Drafting and Negotiating Guide, 1998. See: www.kluwerlaw.com/KLI/ for the Kluwer catalogue.

[133] For example, *M.R. Will*, International Sales Law Under CISG: the U.N. Convention on Contracts for the International Sale of Goods (1980): The First 555 or so decisions, 1999.

[134] Ontario and Québec have six and five institutions, respectively, viz. faculties of law at Windsor University, University of Western Ontario, York University, University of Toronto, Queens University and University of Ottawa / Université d'Ottawa in Ontario and Université de Québec à Montréal, Université de Montréal, McGill University, Université Laval and Université de Sherbrooke in Québec. Three provinces, British Columbia, Alberta and New Brunswick each have two law faculties, viz. University of British Columbia and University of Victoria in British Columbia; University of Alberta and University of Calgary in Alberta; and University of New Brunswick and Université de Moncton in New Brunswick. Three provinces have one law faculty each viz. University of Saskatchewan in Saskatchewan, University of Manitoba in Manitoba and Dalhousie University in Nova Scotia. University of Victoria operated Akitsiraq Law School in Nunavut (2001-2005) as a one time venture to provide legal education to one cohort of northern law students. Law faculties do not exist in Prince Edward Island nor in Newfoundland and Labrador.

A review of law degree program requirements and course descriptions at Canadian law faculties[135] confirms that each faculty requiring students to complete a basic level or introductory commercial law course dedicates that course to domestic commercial law, including sales law. It is readily apparent that the major impediment to achieving wide exposure to the CISG by Canadian law students is that courses in which the CISG is a logical component of study, and for which the course description specifically mentions the CISG, are optional rather than compulsory so that only a subset of students take the course. As well, some relevant courses have enrolment limitations because the course is designated a seminar course in which students prepare essays and make presentations on specific topics. Examples of these challenges to CISG education are the International Business Law course at the University of Manitoba Faculty of Law and the International Business Transactions course at the University of Windsor Faculty of Law – the Manitoba course is presented in a seminar format and is limited to sixteen students; the Windsor course is a lecture style course limited to thirty students. Whether entitled "International Commercial Transactions", "International Business Transactions", "Droit de commerce international" or "Droit des transactions commerciales internationales", these courses are optional at both civil law and common law faculties. Courses on international trade law at Canadian law faculties focus primarily on trade regulation through the WTO, GATT, NAFTA, etc. and are also optional. A final source of potential exposure to the CISG is a course on private international law or conflict of laws. Again, the challenge is the almost universal designation of such courses as optional to the program of study. Only three law faculties (University of Alberta, Université d'Ottawa (civil) and University of New Brunswick) include the study of private international law as a compulsory component of the degree program. Apparently, no Canadian law faculty includes in its curriculum a course devoted exclusively to the CISG – at least, as far as one can tell by the course names and descriptions though such a course might exist as a special subjects course with a focus on the CISG.

The lesson from this curriculum review is that the exposure to the CISG by students undertaking studies at Canadian law faculties is undermined by the 'optional' designation of the most relevant courses.

### d) Continuing Legal Education

Continuing legal education (CLE) for practising lawyers is compulsory in most Canadian jurisdictions with credit given for attendance at a number of sessions per year. Subjects for CLE sessions are generally developed by advi-

[135] The program requirements and course descriptions were reviewed using information available on the website of each law faculty (March 2008).

sory committees in each jurisdiction taking into consideration recent legal developments as well as levels of interest or the perceived importance of particular topics or issues. Private CLE providers concentrate on discrete subject areas – usually labour and employment matters – but the general CLE providers in Canadian jurisdictions are the national Canadian Bar Association and its branches in each province and territory (though in British Columbia, it is the Continuing Legal Education Society (CLE-BC) which is jointly administered by the representatives of the two law faculties in the province and representatives of the CBA, BC Branch and the Law Society of British Columbia). Within CBA, there are sections or fora for those interested in discrete legal subjects, such as International Law, which provide legal updates and conferences on matters of interest. Within the CBA umbrella, there is also the Canadian Corporate Counsel Association (CCCA) which provides CLE sessions particularly relevant to its members. For members of the judiciary, continuing legal education is provided by the National Judicial Institute and the CBA's Canadian Judges Forum which report no CISG related CLE events during the past five years.

From a telephone survey of these CLE providers, it appears that only two CLE events have been presented by major CLE providers in the last five to seven years (the time period varied with the memory of the organization representative). In 2002, the Ontario Bar Association (the provincial branch of the CBA in that province) presented a CLE conference in Toronto entitled "Drafting Essentials: How to Internationalize Your Commercial Contracts, January 24, 2002" which included an overview of the CISG and related analysis by a practising lawyer.[136] In 2006, the National Section on International Law of the Canadian Bar Association held a CLE conference in Montréal entitled "Jurisprudence on International Treaties: Update on International Jurisprudence and on Its Use Before Canadian Courts and Tribunals". This CLE event, a national conference, had three concurrent sessions on 'Commercial Law', 'Labour and Human Rights', and 'Trade and Investment'. One of the four speakers at the three hour Commercial Law session updated conference attendees on the CISG.[137] Other CLE providers in large market areas such as CLE-BC and CCCA report no relevant CLE presentations.

The general lack of CLE sessions on the CISG confirms both the lack of interest and importance that CLE planners associate with the CISG as they identify and develop programs aimed to attract the attendance of fee-paying practising lawyers at CLE events. It is a supply/demand reaction in the CISG marketplace.

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[136] C. M. *Janssen*, A Glimpse at the Implications of the Convention on the International Sale of Goods For a Canadian Practitioner, (24 January 2002) (this essay is available from the Publications office of the OBA).

[137] G. *Saumier*, 'International Sale of Goods Convention' (29 September 2006).

### e) Legislators and Law Reformers

Interest in the CISG by Canadian legislators and law reformers appears to have evaporated when all jurisdiction enacted implementing legislation following the recommendation by the Uniform Law Conference in 1985. All jurisdictions enacted statutes which included the complete text of the CISG appended as a schedule and no Canadian jurisdiction specifically amended its domestic sales legislation to conform to provisions contained in the CISG. This statement is subject to the qualification that, as discussed above, the "*Commentaires du ministre de la Justice*" identify five articles of the *Code civil du Québec* as at least co-inspired by the CISG. In 1998, the ULCC returned its attention to the CISG when it consolidated into a single Uniform Act the recommended Uniform Act of 1985 and the conventions on the limitation period in the international sale of goods.[138] A review of collections of reports and studies prepared for Canadian law reform commissions and institutes subsequent to 1985 did not reveal any relevant reports.

## Conclusion

The CISG has entered Canadian legal consciousness but seemingly more in relation to its avoidance than its actual application to international sales. Idle moments spent on the internet searching Canadian websites for CISG related content disclosed some surprises that confirm the almost automatic exclusion of the CISG. It is no surprise when international sellers in Canada exclude the application of CISG.[139] But why exclude CISG in the 'terms of use' of websites for a professional association, an organization matching volunteers with social agencies in one city, a dating or matchmaking service,

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[138] Convention on the Limitation Period in the International Sale of Goods (New York, 14 June 1974) and the Protocol amending the Limitation Convention on the Limitation Period in the International Sale of Goods (Vienna, 11 April 1980). See Uniform Law Conference of Canada, Proceedings of the Sixty-Seventh Annual Meeting, 1985, 33.

[139] For example, PIKA Technologies Inc (www.pikatechnologies.com) excludes the application of CISG at paragraph 18 'Law' of its Sales Terms and Conditions; Pratt & Whitney Canada Corp. (https://portal.pwc.ca) does so at clause 11 'Language and Governing Law' of its Standard Conditions of Sale; and Kellogg Canada Inc. does so under the heading 'Choice of Law' in its Terms and Conditions of Use of Kellogg Web Site. Other examples include Sport Systems Canada Inc. (sports equipment), Com Dev International Ltd. (space hardware subsystems), and Globalstar Canada Satellite Co. (various types of phones).

and a listing service for private home sales?[140] Yet, it is done as a matter of course. What is really surprising is the absence of any mention of the CISG where it should be most expected – government websites promoting export and import sales by providing information for exporters and importers and entrepreneurs generally[141] and the website of a manufacturers and exporters organization.[142] The irony is that, while not readily available to exporters, importers and manufacturers, links to the CISG can be found on a government website promoting informed consumers.[143] That the CISG does not apply to international sales of goods for personal or household use would seem to undermine the value of that information on a website dedicated to consumers.

To gauge knowledge and the attitudes of lawyers about the CISG and with appropriate organizational approval, a survey instrument was sent by email to approximately 100 members of the Canadian Corporate Counsel Association.[144] The survey consisted of eight questions which could be answered very briefly yet only seven responses were received. The lack of response may itself be telling about interest in and attitudes about the CISG (or perhaps about me but I prefer to focus on the CISG). Given the multitude of responsibilities of corporate counsel, only a subset of members surveyed would have responsibilities related to international sales and indeed all who responded confirmed their awareness of the CISG. It may be that many of the ninety-three who did not respond are not aware of the CISG and so did not feel the need to respond. Fault may lie with the methodology of using an email survey or with the questions, etc. and, though it was not a scientifically valid survey, the results from the seven respondents are interesting. As mentioned, all seven confirmed awareness of the CISG though how they became aware differed: private research and reading – 3; legal work on a file – 3; a course taken while studying law – 2 (Conflict of Laws – 2, International Law – 1 and Sale of Goods – 1); and a continuing legal educa-

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[140] Canadian Psychiatric Association (www.cpa-apc.org); Volunteer Toronto (http://volunteertoronto.on.ca); DreamMates (http://personals.canada.com); and Private Home Sellers (http://privatehomesellers.hci.ca)

[141] These Government of Canada websites are www.exportsource.ca, www.importsource.ca, and www.canadabusiness.ca, respectively (sites accessed 13 February 2008). I brought this oversight to the attention of a responsible official.

[142] Canadian Manufacturers & Exporters Portal at www.cme-mec.ca (accessed 9 February 2008).

[143] Canadian Consumer Information Gateway at http://consumerinformation.ca (accessed 17 November 2007).

[144] The survey email was sent through the good offices of the CBA and with the approval of the appropriate executive committee of CCCA.

tion conference – 1.[145] None of the seven respondents report having used the CISG to support legal reasoning concerning a domestic sale of goods though one indicated that such use of the CISG could be appropriate. Four respondents indicated that the CISG has had no impact on standard form contracts; 3 responded that the CISG has had an impact but only in the sense of excluding its application. Experience with the CISG for 4 respondents occurred when excluding its application to a contract and 3 did not have direct experience. One of the automatic CISG excluders gave a more detailed explanation:

> Generally that is what I was taught. It was thought better to spell provisions out or provide for the law to be applicable to the contract specifically and for that law to be one of known and familiar commercial effect; that is, the laws of a common law province of Canada, the laws of a state in the USA (excluding California or Louisiana) or another commercial jurisdiction, e.g. the laws of England.

A second excluder responded:

> … a number of the provisions contained in CISG are not acceptable terms and conditions for the contracts that I generally work on. In practice, it is easier to exclude CISG and then just insert into the contract … the actual terms and conditions that [I] wish to apply.

And a third excluder identified an additional factor of real significance to practising lawyers:

> Another reason to exclude: ensuring timeliness of domestic [case law] reporting is enough of a concern, let alone trying to ensure you are up to date about foreign decisions that may impact the interpretation.

These views are consistent with published commentary and are probably generally held. This does not mean that lawyers and law firms in Canada are entirely devoid of interest in the CISG. Some firms, for example, promote the CISG with their clients by articles in firm publications.[146]

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[145] The total exceeds six because respondents were invited to identify all answers that applied.

[146] For example, a Factsheet entitled 'Selling Goods Abroad' highlights CISG in point form at www.langmichener.ca (search 'sale of goods'); *D.L. Kiselbach*, 'International Conventions Assist in the Enforcement of Supply Contracts' (2006, 3rd quarter) International Trade, Customs and Commodity Tax Quarterly Bulletin at 1-2 available at www.millerthomson.ca (publications); Montreal law firm

In sum, it is fair to state that awareness of the CISG among practising lawyers has increased but that its use has been limited by the tendency to exclude its application from international sales contracts. The CISG is so under used in Canada that, in general, Canadian lawyers have not developed expertise in its interpretation nor in foreign research reflecting its international character. Use of the CISG to bolster legal arguments in domestic sales litigation or disputes is virtually non-existent. Among scholars, particularly in relation to sales, private international law and international trade law, there is evidence of continuing and expanding interest in the CISG as reflected in both law review articles and treatises. Unfortunately, this scholarly interest in the CISG is not reflected in court decisions. The paucity of CISG case law in Canada, whether common law or civil law, demonstrates a lack of informed legal argument presented to courts; a lack of sensitivity to the international character of the CISG which should inform its interpretation; and a lack of argument in domestic sales litigation invoking the CISG to support, by analogy, arguments grounded in domestic sales law. The CISG began its Canadian connection associated with private international law and was implemented by discrete legislation with its complete text appended as a schedule. There it has remained. The CISG has not informed law reform in other subject areas but remains as it has been, rules applicable to the international sale of goods but which can be excluded by the parties – and paper never refused to take ink. The future of the CISG in Canada can only look brighter.

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Lecours & Lessard includes CISG on its website at www.lecourslessard.com under 'Législation canadienne – Québec'.

# China

*Shiyuan Han*

## I. CISG's impact on practicing lawyers

### 1. The awareness of the CISG by practicing lawyers

Before the coming into force of the CISG in China in the year 1988, practicing lawyers have known little about the CISG, mainly from the writings of scholars rather than from the need of practicing. The former Ministry of Foreign Economic Relations and Trade of P.R.C. has distributed a circular on executing the CISG,[1] and the Supreme People's Court of P.R.C. (hereafter "Sup. People's Ct.") has correspondently distributed a notice on the matter to the courts all over the country.[2] The circular and the notice have played an important role in making the CISG to be aware.

It entered another phase after the entering into force of the CISG in China on January 1, 1988. Because the CISG is now a component part of the legal system of the P.R.C., it is a natural result for it to be a component part of legal education and National Judicial Examination.[3] In other words, students of law schools in China should have learned the CISG, and test questions on the CISG may be encountered in National Judicial Examina-

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1 Guan yu zhi xing Lian He Guo guo ji huo wu xiao shou he tong gong yue ying zhu yi de ji ge wen ti [Several Questions That Shall be Paid Attention to in Enforcing UN's CISG] (promulgated by the Ministry of Foreign Economic Relations and Trade, Dec. 4, 1987) (P.R.C.).

2 Zhuan fa Dui Wai Jing Ji Mao Yi Bu guan yu zhi xing Lian He Guo guo ji huo wu xiao shou he tong gong yue ying zhu yi de ji ge wen ti de tong zhi [Notice on Redistribution of the Ministry of Foreign Economic Relations and Trade's Several Questions That Shall be Paid Attention to in Enforcing UN's CISG] (promulgated by the Sup. People's Ct., Dec. 10, 1987) (P.R.C.).

3 In the P. R. of China, a national examination named "Lawyer's Qualification Examination" (Lü shi zi ge kao shi) was firstly held on Sep. 27 and 28, 1986. From then on, the examination is held annually. Since 2002, the Lawyer's Qualification Examination was changed into the "National Judicial Examination" (Guo jia si fa kao shi). The change means that, no only for those who want to a lawyer, but also for those who want to be a judge or a prosecutor, it is necessary for them to pass the Examination.

tions. For those who want to be an eligible lawyer in China, it is now necessary to understand or even gain a mastery of rules of the CISG.

## 2. Seldom excluding the CISG by practicing lawyers

In China people can find an article written by practicing lawyers advocating excluding the CISG. It says that, because of some important differences between the CISG and the new Contract Law of the P.R.C.,[4] if the contract terms which are drafted in accordance with the Contract Law of P.R.C. are interpreted according to the rules of CISG or a foreign law, this will naturally cause a different meaning. A catholicon to avoid this kind of trouble is to include a term on applicable law. For example, to exclude the CISG by an express term and make it clear that the Contract Law of the P.R.C. is applicable to the contract.[5] But I would like to say that it is seldom for practicing lawyers who are aware of the CISG to exclude it in China. One reason for this is that the CISG is deemed fair for the parties of a foreign-related contract. It is easier for a foreigner to accept the CISG than to accept the Contract Law of the P.R.C., also the latter, just as what will be showed in Part IV of this paper, follows many rules of the former.

## 3. Practicing lawyers, cases and legal writings

It must be admitted that practicing lawyers are more and more willing to supply resembling cases or judgments to tribunals nowadays, no matter if in purely domestic disputes or in foreign-related ones. It should also be noticed that there is no case-law-system in the P.R.C. and judges in China have no duty to follow the so called "Doctrine of Precedent". Having been aware of advantages of case law, the Sup. People's Ct. has raised a so called "Cases Guidance", as a measure of reform of trial mode. The former President of the Sup. People's Ct. Mr. Yang Xiao has said in his Working Report of the year 2007 that, the Sup. People's Ct. should exert itself in exploring the institution of "Cases Guidance".[6] The former Vice-president of the Sup. People's

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4 Contract Law (promulgated by the Nat'l People's Cong., Mar. 15, 1999, effective Oct. 1, 1999) (P.R.C.), an English version is available at http://www.lawinfochina.com/ (last visited Mar. 30, 2008).

5 See *Hengtao Wang/Lin Gao/Ping Fan*, She wai he tong zhong de fa lü guan xia [Legal Jurisdiction in Foreign Related Contracts], Zhongguo lü shi [Chinese Lawyer] 2004:3, 34.

6 *Yang Xiao*, Zhui gao ren min fa yuan gong zuo bao gao [The Working Report of the Sup. People's Ct.], Zhonghua Renmin Gongheguo Zui gao ren min fa yuan gong bao [Sup. People's Ct. Gaz.] 2007:3, 8.

Ct. Mr. Jianming Cao, who is now the President of the Supreme People's Procuratorate, has once written: "Cases in the P.R.C. are different from those in Anglo-American law system in that, they are not sources of law and can not be cited directly in a judgment. But cases are reflections of trial activities; they are outcomes of a combination of legal rules and practices, which has a vivid character of social reality and practicability; they may show an interpretation process which turned abstract and ambiguous legal provisions to concrete and visual behavior norms. Cases are an important carrier which makes legal principles and provisions concrete and practicable. They make it easier for judges to understand and carry out laws, and by this way the aim to show guidance to judges may be achieved."[7] Selected judgment documents are issued by several ways, such as newspaper, internet, database, gazette of the Sup. People's Ct. and books.

The function of the cases or judgments, if they are supplied to tribunals by practicing lawyers, is at the utmost supplying them an idea, namely how the dispute should be treated. Nowadays the cases or judgments are mainly in Chinese. It may be said that, in the near future when the ability of foreign language and legal specialty of Chinese practicing lawyers reaches a high level, foreign cases or judgments will also come into their visual field.

Legal writings, no matter if in Chinese or in any other language, are almost never cited in judgments in the P.R.C. Nevertheless, it cannot be said that Chinese practicing lawyers and judges pay less attention to legal writings. Legal writings have an indirect influence to judgments, and the influence of them on judgments will be more and more prominent in the coming days in China. It should be remarked that more and more foreign legal writings have been translated and published in China. For example, the third edition of Professor Schlechtriem's textbook on the CISG has been translated into Chinese and published in the year 2006 in Beijing.[8]

## 4. CISG solutions used in purely domestic disputes

Sometimes Chinese practicing lawyers use CISG solutions in purely domestic disputes to corroborate the results they want to reach. One reason lies in that, many rules of the CISG, as will be showed in part IV of this paper, have been followed by Contract Law (P.R.C.). In interpreting these rules, it

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7 *Jianming Cao*, Jia qiang an li yan jiu tui jin fa zhi xian dai hua [Strengthening Case Studies and Improving Laws' Modernization], in: Shuchen Wu (ed.), Pan li zhi du yan jiu [Studies on Case Law System], Vol. 1, 2004, p. 1 seq.

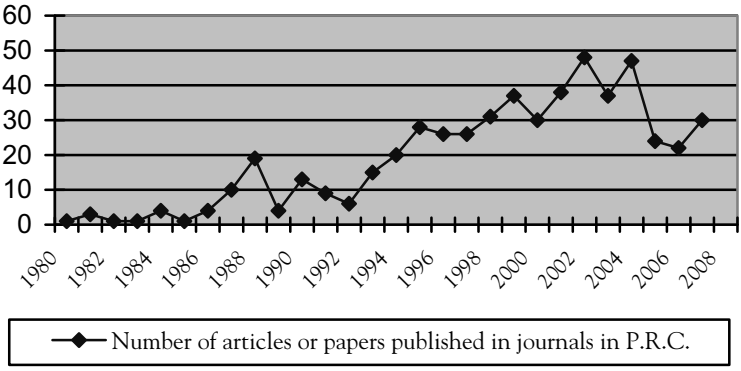
8 *Schlechtriem*, Lian He Guo guo ji huo wu xiao shou he tong gong yue ping shi [Commentary on the UN Convention on the International Sale of Goods], 3rd edn., 2006 (transl. Huini Li).

is not only helpful, but also necessary, to make a reference to the interpretations of the CISG.

## II. CISG's impact on scholars

### 1. Attention devoted to the CISG by Chinese scholars

How much attention Chinese scholars have devoted to the CISG both before and after its coming into force? As an answer, I would like to show you a chart as below which shows the changes of the number of articles or papers published in journals in China from 1980 to 2007. In order to obtain the statistic, I have used a famous Chinese database named "Zhong guo qi kan wang" (Chinese Journals Internet).[9]




Before CISG's coming into force (from 1980 to 1987), the average number of articles or papers published of every year is 3.125. After CISG's coming into force (from 1988 to 2007), the average number is 25.5. The statistic does not include the number of master degree theses and doctor degree theses. If they are included, the quantitative difference of the two phases will be even larger. Studies on the CISG have attracted more and more attention in China, and the deepness of the studies has also been enhanced in these years. For example, in the year 2007 there is a doctor degree thesis (of Fudan University, Shanghai) which is on the interpretation of the CISG.[10]

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[9] "Zhongguo qi kan wang" (Chinese Journals Internet), see database: http://ckrd.cnki.net/grid20.

[10] See *Ying Liu*, Lian He Guo guo ji huo wu xiao shou he tong gong yue jie shi wen ti yan jiu [A Study on Problems of Interpretation of the UN Convention on the International Sale of Goods], 2007.

In China scholars studying the CISG can be divided into two groups: one group consists of international law scholars and the other consists of civil and commercial law scholars.

### a) International law scholars' studies on the CISG in China

The studies on the CISG by Chinese international law scholars are carried out under different titles: some scholars under a title of International Economic Law;[11] some under International Commercial Law;[12] some under International Trade Law;[13] and some even under Private International Law.[14] In addition, there are also several types of Commentary on the CISG in China.[15] And the CISG is also accordingly taught in different courses in different universities. If compared with the studies by civil and commercial law scholars, the studies by international law scholars seem to be more attractive. It should be said that the group of international law scholars has achieved more in researching works on the CISG. For example, an international symposium under the title "The Application and Interpretation of the CISG in Member States" has been held by international law scholars at Wuhan University in October, 2007.

### b) Civil and commercial law Scholars' studies on the CISG in China

Some Chinese civil and commercial law scholars, especially contract law scholars, have made comparative studies between the CISG and the Con-

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11 See e.g. *Shuyi Gao* (ed.), Guo ji jing ji fa zong lun [A General Theory of International Economic Law], 1989, p. 150 seq. See also *Peizhao Che*, Guo ji jing ji fa gai yao [An Outline of International Economic Law], 2003, p. 126 seq.

12 See e.g. *Datong Feng* (ed.), Guo ji shang fa [International Commercial Law], 1991, p. 203 seq.

13 See e.g. *Daming Shen/Datong Feng* (eds.), Guo ji mao yi fa xin lun [A New Study on International Trade Law], 1989, p. 14 seq. See also *Chuanli Wang* (ed.), Guo ji mao yi fa [International Trade Law], 3rd edn., 2005, p. 22 seq.

14 See e.g. *Depei Han* (ed.), Guo ji si fa [Private International Law], 2nd edn., 2007, p. 349 seq.

15 See e.g. *Yuqing Zhang* (ed.), Guo ji huo wu mai mai tong yi fa Lian He Guo guo ji huo wu xiao shou he tong gong yue shi yi [The Uniform Law of International Sale of Goods: A Commentary on UN Convention on the International Sale of Goods], 1998; *Wei Li*, Lian He Guo guo ji huo wu xiao shou he tong gong yue ping shi [A Commentary on CISG], 2002.

tract Law (P.R.C.).[16] One important aim of this kind of comparative studies is to promote the interpretation of the Contract Law (P.R.C.). One example is the seller's right to cure lack of conformity, which is prescribed in Art. 37 of the CISG. However, a counterpart can not be found out from the Contract Law (P.R.C.). In a comparative study, it is advocated that a similar concept, i.e. the obligor's right to cure, should be admitted in Chinese legal theories, and the concept is also in accordance with Good Faith as prescribed in Art. 6 of Contract Law (P.R.C.).[17]

### 2. Impacts of scholarly writings devoted to the CISG in China

The impacts of scholarly writings by Chinese scholars on legal practice and legal education should be admitted, albeit it is difficult to quantitatively show them. When there is an ambiguous meaning on an article of the CISG in legal practice, it goes without saying for a lawyer or a judge to look up relevant scholarly writings. Professors and law students attach much importance to the scholarly writings devoted to the CISG in the course of teaching and learning.

## III. CISG's impact on courts

### 1. No impact on the style of court decisions

The CISG's coming into force had no impact on the style of court decisions in China. Since January 1, 1993, the style of court decisions has been prescribed by the Sup. People's Ct. with a set of patterns of litigation documents. The aims of this set of patterns of litigation documents are to improve and increase the quality of litigation documents, to heighten the level of trial and judgment and to increase the working ability of judges.[18] But it has also brought some problems or even troubles.

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16 See e.g. *Shiyuan Han*, Lun gen ben wei yue [On Fundamental Breach], Jilin da xue she hui ke xue xue bao [Jilin University Journal of Social Sciences] 1999:4, 30 seq. See also *Shiyuan Han*, He tong fa zong lun [The Law of Contract], 2nd edn., 2008.

17 See *Shiyuan Han*, Lü xing zhang ai fa de ti xi [A System of the Law of Disturbances of Performance], 2006, p. 357.

18 See Zui Gao Ren Min Fa Yuan guan yu shi xing fa yuan su song wen shu yang shi de tong zhi [Sup. People's Ct. Notification on the Putting into Trial Use of Patterns of Litigation Documents of Court] (promulgated by the Sup. People's Ct., June 20, 1992) (P.R.C.).

One problem of them is that, there is only one fixed style of judgment for thousands of cases, just like thousands of people have the same face. The fixed style of judgment is criticized as a kind of "Ba Gu", which means a special style of writing popular in Ming Dynasty (from the year 1368 to 1644) and Qing Dynasty (from the year 1644 to 1911) in China and which is now a word having a derogatory meaning.

One trouble of them is that, people can find some articles of laws being applied in the judgment, but people sometimes cannot find out why the case is decided in that specific way and what the exact meaning of the rule applied in the case is. Another trouble of them is that, jurisprudence (case law) and doctrine (scholarly writings), no matter Chinese ones or foreign ones, have not been cited or mentioned in judgments. A reason for it is that they are not sources of law in China.

Perhaps things are not as bad as they seem to be. In China more and more energies are spent to promote the reform of court decision's style. Rome was not built in one day; the Great Wall of China was not built in one day too. The reform in China needs more time.

## 2. Uniformity of the CISG's application in China

Uniformity of application of the CISG has been emphasized by Chinese scholars. Just as one Chinese author has put it:

"A fair solution of disputes can not be ensured by International uniform substantive law itself. It hangs on the uniformity of interpretation and application of the uniform law. The CISG is ultimately interpreted and applied by sovereignty's courts or arbitral tribunals. It is more likely for judges or arbitrators with different legal system background to put the CISG into a framework of native law system, to look at the CISG through coloured spectacles of domestic law system and native culture, to understand and interpret the CISG with a thinking style, a knowledge system and interpretation techniques of domestic laws. As a result, the same article of CISG will be interpreted differently, and the same case will be given different results by different courts."[19]

The Sup. People's Ct. has for several times distributed notices to courts all over the country to emphasize the matter. "To trial a case it must be assured that, facts are objectively and entirely recognized and legal rules are accurately and appropriately applied. Except that the three special types of contracts are to be applied with laws of the P.R.C. according to Art. 126(2) of Contract Law (P.R.C.), people's courts should correctly select applicable laws according to relative provisions or the agreements of the parties. Inter-

[19] See *Wei Li*, Lian He Guo guo ji huo wu xiao shou he tong gong yue ping shi [A Commentary on CISG], 2002, p. 31.

national treaties that the P.R.C. has acceded to should be applied prior, unless the provisions are ones on which the P.R.C. has announced reservations. International customs may be consulted in the same time."[20] People's courts all over the country are asked by the Sup. People's Ct. "to apply Chinese laws, foreign laws, international treaties and international customs accurately and to protect the legal interests of both Chinese and foreigners equally".[21]

Generally speaking, courts of in the P.R.C. are able to apply the CISG accurately and assure uniformity of application of the CISG in China.[22] From judgments of recent years it can be showed that, most part of courts of China have a correct viewpoint on the relation between the application of the CISG and the application of domestic laws. For example, in many judgments of the last century it can be found that, many courts did not distinguish where the CISG was applied and where domestic law was applied, but

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[20] See Zui Gao Ren Min Fa Yuan guan yu shen li he zhi xing she wai min shang shi an jian ying dang zhu yi de ji ge wen ti de tong zhi [Sup. People's Ct. Notification on Several Questions That Shall be Paid Attention to in Putting on Trial and Enforcing Foreign Related Civil and Commercial Cases] (promulgated by the Sup. People's Ct., Apr. 17, 2000) (P.R.C.).

[21] See Zui Gao Ren Min Fa Yuan yin fa Zui Gao Ren Min Fa Yuan guan yu wei gou jian she hui zhu yi he xie she hui ti gong si fa bao zhang de ruo gan yi jian de tong zhi [Sup. People's Ct. Notification on the Distribution of Opinion of Sup. People's Ct. on Providing Judicial Safeguard for the Construction of Socialist Harmonious Society] (promulgated by the Sup. People's Ct., Jan 15, 2007), Zhonghua Renmin Gongheguo Zui gao ren min fa yuan gong bao [Sup. People's Ct. Gaz.] 2007:3, 17.

[22] See e.g. *Zhonghua Shanghai gong si su Kolorit TM Co. LTD* [*Zhonghua Shanghai Co. v. Kolorit TM Co. LTD*] (The Second Shanghai Interm. People's Ct., 2005) (P.R.C.), available at http://www.lawyee.net/Case/Case_Display.asp?RID=125459&KeyWord= (last visited Mar. 29, 2008); *Shanghai Dong Lin guo ji jing mao you xian gong si su Aodaliya Qiang Sheng you xian gong si* [*Shanghai Dong Lin Co. LTD v. Johnson Trading Australia PTY LTD*] (The Second Shanghai Interm. People's Ct., 2005) (P.R.C.), available at http://www.lawyee.net/Case/Case_Display.asp?RID=127339&KeyWord= (last visited Mar. 29, 2008); *Shanghai Shan Shan Rui Yuan jin chu kou mao yi you xian gong si su Yidali Laolun Piyena gong si* [*Shanghai Shanshan Riuyuan Import and Export Trade Co. LTD v. Lanificio Ing. Loro Piana & C.S.P.A. Italy*] (The Second Shanghai Interm. People's Ct., 2006) (P.R.C.), available at http://www.lawyee.net/Case/Case_Display.asp?RID=127423&KeyWord= (last visited Mar. 29, 2008); *Ruishi Milimite gong si su Henan Sheng tu chan jin chu kou gong si* [*Mintermet S. A. v. Local Product Import and Export Co. of Henan Province*] (Henan Higher People's Ct., 2000) (P.R.C.), available at http://www.lawyee.net/Case/Case_Display.asp?RID=30123&KeyWord= (last visited Mar. 29, 2008).

enumerated articles both of the CISG and of domestic laws.[23] However, in many judgments of recent years, it can be found that, many courts have had a clear conscience that the CISG should be applied directly, and that only on the questions not covered by the CISG it is the turn to the question whether a Chinese law should be applied according to an international private law.[24]

It goes without saying that not all courts have followed the requirement of a uniform application of CISG in China. One can still find a few counter-examples. The reasons for this are as follows:

### a) Legislation's reason

Art. 1(1) of the CISG states: "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." According to Professor Schlechtriem's interpretation, the conditions of application of the CISG itself should be complied with. If the conditions of application of the CISG are satisfied, it will be not correct to use a rule of private international law.[25] But Art. 142(2) of General Principles of the Civil Law of the P.R.C. (GPCL) as a rule of private international law states: "If any international treaty concluded or acceded to by the People's Republic of China contains provisions differing from those in the civil laws of the People's Republic of China, the provisions of the international treaty shall apply, unless the provisions are ones on which the People's Republic of China has announced reservations." Although a drafter of the Article have said: "Art. 142(2) of GPCL is on a principle of precedence of international

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[23] See e.g. *Meiguo Heng Da shi pin you xian gong si su Rizhaoshi shui chan ji tuan zong gong si, Rizhao Ri Rong shui chan you xian gong si* [*Hang Tat FLLDS USA INC. v. Rizhao City Aquatic Products Group Parent Co. & Rizhao Rirong Aquatic Products Co. LTD* ] (Rizhao Interm. People's Ct., 1999) (P.R.C.), available at http://www.lawyee.net/Case/Case_Display.asp?ChannelID=2010103&KeyWord=&RID=9405 (last visited Mar. 29, 2008).

[24] See e.g. *Mou Xinjiapo you xian gong si su Dong Ling mao yi you xian gong si deng* [*A Singapore Co. LTD v. Dongling Trade Co. LTD*] (The First Shanghai Interm. People's Ct., 2004) (P.R.C.), available at http://www.lawyee.net/Case/Case_Display.asp?RID=58944&KeyWord= (last visited Mar. 29, 2008); *Wuhan Zhong Ou zhi yi you xian gong si su Wan Long guo ji mao yi you xian gong si* [*Wuhan Zhong'ou Clothing Manufacture Co. LTD v. Wanlong International Trade Co. LTD*] (Wuhan Interm. People's Ct., 2004) (P.R.C.), available at http://www.lawyee.net/Case/Case_Display.asp?RID=65276&KeyWord= (last visited Mar. 29, 2008).

[25] *Schlechtriem*, Internationales UN-Kaufrecht, 2. Aufl., 2003, p. 8.

treaties in application. If any international treaty contains any relevant provision, then Chapter VIII (i.e. "Application of Law in Civil Relations with Foreigners") will not be applied, and the relevant provision of the international treaty shall be applied. If the international treaty contains provisions differing from those in our country's civil laws, the provisions of the international treaty shall be applied prior too."[26] Art. 142(2) of GPCL has still caused some confusion in practice. People can find out from some cases that, according to the provision, a few courts in China have taken "a differing provision" between international treaties and domestic laws a precondition of an application of the former.[27] This viewpoint has been criticized by a few Chinese scholars.[28]

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[26] *Zongyi Fei*, in: Angran Gu/Jiafu Wang/Ping Jiang etc., Zhonghua Renmin Gongheguo min fa tong ze jiang zuo [A Course of Lectures on GPCL of the P.R.C.], 2000, p. 298.

[27] For example, in *Shanghai Wangruixiang shi zhuang you xian gong si su Qu Shi you xian gong si, Shanghai si chou ji tuan you xian gong si* [*Shanghai Wangruixiang Fashionable Dress Co LTD v. Qushi Co. LTD & Shanghai Silk (Group) Co. LTD*] (The First Shanghai Interm. People's Ct., 2003) (P.R.C.), the court has ruled: "As the parties have not chosen in an agreement the law applicable when there is a dispute, so the law to be applied shall be determined according to the principle of proximate connection … This case shall be applied with the law of P. R. China. While the places of business of the two parties of the international sale of goods in this case are in different Contracting States of the CISG, according to Art. 142(2) of GPCL, if the CISG contains provisions differing from those in the civil laws of the P. R. China, the provisions of the CISG shall apply. As to the issues of the dispute of this case, the provisions of the CISG have no difference from those of Contract Law of the P. R. of China, so this case shall be ruled according to Contract Law of the P. R. of China." The case is available at http://www.lawyee.net/Case/Case_Display.asp?RID=95454&KeyWord= (last visited Mar. 29, 2008). A similar statement may be found in *Shanghai Wei Jie dian zi she bei you xian gong si su Chao Neng you xian gong si* [*Shanghai Weijie Electronic Device Co. LTD v. Superpower Supply INC*] (The First Shanghai Interm. People's Ct., 2000) (P.R.C.), available at http://www.lawyee.net/Case/Case_Display.asp?RID=115510&KeyWord= (last visited Mar. 29, 2008).

[28] See *Zhidong Chen/Jiahua Wu*, Lun Lian He Guo guo ji huo wu xiao shou he tong gong yue zai Zhongguo de shi yong [On the Application of UN Convention on the International Sale of Goods in P.R.C.], Fa xue [Law Science] 2004:10, 107 seq.

### b) Judge's reason

Some judges have not understood the CISG correctly. One example is that, some judges in the first instance have applied Chinese laws to contracts of sale of goods between parties whose places of business are in different Contracting States. The ground for them is Art. 145(2) of GPCL, which states: "If the parties to a contract involving foreign interests have not made a choice, the law of the country to which the contract is most closely connected shall be applied." Appeals Courts have, according to Art. 1(1)lit.(a) of the CISG, determined it a wrong application of law in the first instance and have put the results right.[29]

## 3. Outspread application of the CISG

"Outspread application" here means that the CISG is used in relation to contracts not covered by its sphere of application. There are two types of "outspread application" of the CISG in China. One is based on a selection of the parties; the other is based on a selection of a court.

One case concerns the parties' selection of application of the CISG during court trial, although the contract is not covered by the CISG's sphere of application.[30] In this case there should be no problem for the court to apply the CISG to the contract.

When the parties have not selected the CISG and the contract is beyond the sphere of application of the CISG, there are two possibilities, either to justify domestic law solutions adopted in areas where there is much dispute both in legal practice and scholarly writing, or to be a wrong application of the CISG. The first possibility has not been found yet in the cases that I have collected. The second possibility can be proved by a case. This is a case in the year 2002 between a company whose business place is South Korea and a company whose business place is in China. Wuhan Intermediate People's Court has ruled that: "While both parties have not chosen any applicable law for the contract when it is concluded, and both South Korea where

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[29] See e.g. *Lu Hai you xian gong si su Jiedongxian Hai Fu shui chan fa zhan you xian gong si deng* [*Inland Sea Incorporated v. Jiedong County Haifu Aquatic Products Development Co. LTD etc.*] (Guangdong Higher People's Ct., 2004) (P.R.C.), available at http://www.lawyee.net/Case/Case_Display.asp?RID=57910&KeyWord= (last visited Mar. 29, 2008).

[30] See e.g. *Xianggang Lian Zhong qi ye zi yuan you xian gong si su Xiamen jing ji te qu guo ji mao yi xin tuo gong si* [*Hongkong Lianzhong Enterprise Resources Co. LTD v. Xiamen Special Economic Zone International Trade Trust Co.*] (Xiamen Interm. People's Ct., 1993) (P.R.C.), available at http://www.lawyee.net/Case/Case_Display.asp?RID=25977&KeyWord= (last visited Mar. 29, 2008).

the plaintiff's place of business is in and China where the defendant's is in are Contracting States of the CISG, CISG is applicable to the contract according to it's Art. 1(1)lit.(a)."[31]As a matter of fact, South Korea has not been a Contracting State of the CISG yet by that time.

## IV. CISG's impact on legislators

### 1. An introduction of Contract Law (P.R.C.)

Since the reform and opening-up of China in 1978, the set-up of a legal system of P.R.C. has been attached importance to. A lot of civil laws have been enacted gradually, including Economic Contract Law (1980), Law on Economic Contracts Involving Foreign Interest (1985), GPCL (1986) and Law on Technology Contracts (1987). As one of the earliest Contracting States of the CISG, China has paid much attention on the CISG. The early laws on contract of P.R.C., especially Law on Economic Contracts Involving Foreign Interest (1985), had been influenced by the CISG. Here what will be analyzed is Contract Law (1999, hereafter: CL), whose entering into force has simultaneously annulled the former three contract laws (i.e. Economic Contract Law, Law on Economic Contracts Involving Foreign Interest, and Law on Technology Contracts). This report will show to what extent the CL (P.R.C.) has been impacted by the CISG.

The CL (P.R.C.) has three parts, i.e. General Provisions, Special Provisions and Supplementary Provisions. There are totally 428 articles. The contents of the law are as follows:

General Provisions
Chapter 1 General Provisions;
Chapter 2 Conclusion of Contracts;
Chapter 3 Validity of Contracts;
Chapter 4 Performance of Contracts;
Chapter 5 Modification and Assignment of Contracts;
Chapter 6 Termination of Contractual Rights and Obligations;
Chapter 7 Liabilities for Breach of Contracts;
Chapter 8 Other Provisions;

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[31] See e.g. *Hanguo Xian Dai zong he shang she zhu su Hubeisheng wu jin kuang chan jin chu kou gong si* [*Hyundai Multiple Commerce Co. of South Korea v. Hubei Province Metals and Minerals Import and Export Co.*] (Wuhan Interm. People's Ct., 2001) (P.R.C.), available at http://www.lawyee.net/Case/Case_Display.asp?RID=19370&KeyWord= (last visited Mar. 29, 2008).

Specific Provisions
Chapter 9 Sales Contracts;
Chapter 10 Contracts for Supply of Power, Water, Gas, or Heat;
Chapter 11 Gift Contracts;
Chapter 12 Contracts for Loan of Money;
Chapter 13 Leasing Contracts;
Chapter 14 Financial Leasing Contracts;
Chapter 15 Contracts for Work;
Chapter 16 Contracts for Construction Projects;
Chapter 17 Transportation Contracts;
Chapter 18 Technology Contracts;
Chapter 19 Storage Contracts;
Chapter 20 Warehousing Contracts;
Chapter 21 Commission Contracts;
Chapter 22 Contracts of Commission Agency;
Chapter 23 Intermediation contracts;

Supplementary Provisions

## 2. A guide idea of legislators of the CL (P.R.C.)

In the guide ideas of legislators of the CL (P.R.C.) which are set up by the legislative plan of the law, the first one states: "Considering the real needs of the reform and opening-up of China and the development of socialist market economy, the set-up of a nationally unified market and an access to the international market, we shall sum up the experiences of legislators and judges and the results of theoretical researches concerning contracts in China, draw broadly on the successful experiences of other countries and regions on laws and cases, adopt to the best of our abilities common rules reflecting objective laws of modern market economy, and harmonize rules of Chinese law with those of international conventions and international customs."[32] Here "international conventions" means mainly the CISG. The unification and perfection of contract law is a real need of the development of market economy of China. To follow the CISG in many rules is an independent selection of the Chinese people. The reasonableness of the selection may be proved by the reasonableness of the CISG itself, as it is a crystallization of wisdom of so many excellent scholars and experts.

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[32] *Huixing Liang*, Min fa xue shuo pan li yu li fa yan jiu [Studies on Civil Law Theories, Cases and Legislations], Vol. 2, 1999, p. 121.

## 3. Manifestations of Chinese law's following the CISG

Just as Professor Huixing Liang, who is a main drafter of CL (P. R.C.), has put it, the drafters of the law "have consulted and absorbed rules of the CISG on offer and acceptance, avoidance (termination) with a *Nachfrist*, liabilities for breach of contract, interpretation of a contract and sales contract".[33] So it may be said that the CISG's impacts on CL (P.R.C.) are not only limited to sale-specific topics, it has had an impact on non sale-specific issues as well.

### a) Conclusion of contracts

If we compare Chapter 2 "Conclusion of Contracts" (Art. 9-43) of CL (P.R.C.) with Part II "Formation of the contract" (Art. 14-24) of the CISG, we can find out that the former has drawn lessons from the latter sufficiently. One example is the problem of whether an offer is binding and whether it may be revoked. This was one of the most difficult issues met in the course of unification of the law on contract formation, because it was necessary to bridge the gap between different views. While the notion that an offeror is bound by his offer is established in Germanic legal systems and also in Scandinavia, the Romanic and common law systems have taken the opposite approach.[34] The former civil law theories of China followed theories of Germanic legal systems on acknowledgement of a binding nature of an offer.[35] But the view has not been adopted by CL (P.R.C.). CL (P.R.C.) follows Art. 16 of the CISG in Art. 18 and 19. Art. 18 states: "An offer may be revoked. The revocation notice shall reach the offeree before it has dispatched a notice of acceptance." Art. 19 states: "An offer may not be revoked, if (1) the offeror indicates a fixed time for acceptance or otherwise explicitly states that the offer is irrevocable; or (2) the offeree has reasons to rely on the offer as being irrevocable and has made preparation for performing the contact."

We can still find many other similarities between the CISG and CL (P.R.C.) in "Conclusion of Contracts", such as: concept of an offer (CISG Art. 14(1); CL Art. 14); an invitation to make offers (CISG Art. 14 (2); CL

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[33] *Huixing Liang*, Cong san zu ding li zou xiang tong yi de he tong fa [From Three Separate Parts to a Unified Contract Law], Zhongguo fa xue [China L. Sci.] 1995:3, 9.

[34] See *Schlechtriem*, in: Schlechtriem (ed.), Commentary on the UN Convention on the International Sale of Goods (CISG), 2nd edn., 1998 (transl. G. Thomas), p. 118.

[35] See *Anmin Ye*, in: Jiafu Wang (ed.), Zhongguo min fa xue min fa zhai quan [Doctrine of Chinese Civil Law: Obligations], 1991, p. 290.

Art. 15); effectiveness of an offer on its reaching the offeree (CISG Art. 15(1); CL Art. 16(1)); withdrawal of an offer (CISG Art. 15(2); CL Art. 17); termination of an offer (CISG Art. 17; CL Art. 20(1)); concept of an acceptance (CISG Art. 18(1); CL Art. 21); effectiveness of an acceptance on its reaching the offeror (CISG Art. 18(2); CL Art. 26(1)); *Willensbetaetigung* (CISG Art. 18(3); CL Art. 22 and 26(1)); alterations (CISG Art. 19; CL Art. 30-31); late acceptance (CISG Art. 21; CL Art. 28-29); withdrawal of an acceptance (CISG Art. 22; CL Art. 27); time when a contract is concluded (CISG Art. 23; CL Art. 25). In addition, Art. 10(1) of CL (P.R.C.) states: "The parties may use written, oral or other forms in entering into a contract." This will bring almost the same results of Art. 11 of the CISG, which has been reserved by the P.R.C.

### b) Integration of liability for non-conformity with remedies for breach of contract in general

Generally speaking, Chinese law is a member of the families of civil law system. So people tend to take it for granted that warranty liabilities for defect in things, which origins from aedilitian remedies of Roman law, can be found in Chinese laws. Before the coming into force of CL (P.R.C.), there is much dispute on this question in scholarly writings. In CL (P.R.C.), Art. 153 states: "The seller shall deliver the subject matter in compliance with the agreed quality requirements. Where the seller gives the quality specifications for the subject matter, the subject matter delivered shall comply with the quality requirements set forth therein." Art. 155 states: "If the subject matter delivered by the seller fails to comply with the quality requirements, the buyer may demand the seller to bear liability for breach of contract in accordance with Article 111 of this Law." Art. 111 is in Chapter 7 "Liabilities for Breach of Contracts". It states: "Where the quality fails to satisfy the agreement, the breach of contract damages shall be borne in the manner as agreed upon by the parties. Where there is no agreement in the contract on the liability for breach of contract or such agreement is unclear, nor can it be determined in accordance with the provisions of Article 61of this Law, the damaged party may, in light of the nature of the subject matter and the degree of loss, reasonably choose to request the other party to bear the liabilities for the breach of contract such as repairing, substituting, reworking, returning the goods, or reducing the price or remuneration." Although a few scholars take an opposite viewpoint,[36] nowadays the mainstream of Chinese scholars is on that CL (P.R.C.) does not follow the Ro-

[36] See e.g. *Jianyuan Cui*, Wu de xia ci dan bao ze ren de ding xing yu ding wei [On Classification of the Nature and Status of Defects Guarantee], Zhongguo fa xue [China L. Sci.] 2006:6, 32.

man model of a "two tier approach". The so-called "warranty liabilities for defect in things" are integrated with remedies for breach of contract in general. CL (P.R.C.) follows a unitary approach.[37] In some degree, it can be said that CL (P.R.C.) is influenced by the CISG. After CL (P.R.C.), BGB, which is a member of the families of civil law system too, has realized a similar integration since January 1, 2002.[38]

### c) Passing of risk

Passing of risk of a subject matter of sales has been regulated by CL (P.R.C.) Art. 142-149. Except Art. 148, other articles are very similar to those of the CISG, including: the delivery rule of risk's passing (CL Art. 142; CISG Art. 69(1)); delay of obligee rule (CL Art. 143; CISG Art. 69(1)); risk's allocation in respect of goods sold in transit (CL Art. 144; CISG Art. 68. It should be pointed out that there is no *proviso* in CL Art. 143.); the first carrier rule (CL Art. 145; CISG Art. 67); buyer's fail to take delivery rule (CL Art. 146; CISG Art. 69(1)); seller's failure to deliver relative documents and materials does not affect the passing of the risk (CL Art. 147; CISG Art. 67(1)); buyer's bearing of the risk does not affect its right to other remedies (CL Art. 149; CISG Art. 70).

By the way, Art. 148 of CL (P.R.C.) states: "Where the quality of the subject matter does not conform to the quality requirements, making it impossible to achieve the purpose of the contract, the buyer may refuse to accept the subject matter or may terminate the contract. If the buyer refuses to accept the subject matter or terminate the contract, the risk of damage to or missing of the subject matter shall be borne by the seller." There is no counterpart in the CISG. It is said the rule is inspired by a rule of the UCC of the U.S.A.[39] If it is compared with Art. 2-510 of the UCC, Art. 148 of CL (P.R.C.) is not the same thing and some change has been made.

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[37] See e.g. *Shiyuan Han*, Chu mai ren de wu de xia ci dan bao ze ren yu wo guo he tong fa [Seller's Guarantee Liability on Defect of Things and China's Contract Law], Zhongguo fa xue [China L. Sci.] 2007:3, 170. For the distinction between a "two tier approach" and a "unitary approach" on this matter, see *P. Huber*, Comparative Sales Law, in: Reimann/Zimmermann (eds.), The Oxford Handbook of Comparative Law, 2006, p. 956.

[38] See *Zimmermann*, The New German Law of Obligations: Historical and Comparative Perspectives, 2005, p. 79 seq.

[39] See *Kangsheng Hu* (ed.), Zhonghua Renmin Gongheguo he tong fa shi yi [Commentary on Contract Law of P.R.C.], 1999, p. 229.

### d) Unsicherheitseinrede and anticipatory breach

Art. 71 of the CISG is on *Unsicherheitseinrede*[40] and Art. 72 on anticipatory breach. This kind of mixed reception style, i.e. a combination of rules both from the civil law system and from the common law system, may find its counterpart in CL (P.R.C.). Art. 68 and 69 of CL (P.R.C.) are on *Unsicherheitseinrede* and Art. 94(2) and 108 are on anticipatory breach.

According to Art. 94(2) of CL (P.R.C.), a party to a contract may terminate the contract, if prior to the expiration of the period of performance, the other party expressly states, or indicates through its conduct, that it will not perform its main obligation. Whether a demand for performance (*Mahnung*) is necessary for termination where the other party indicates through its conduct it will not perform its main obligation, it is not stated in Art. 94(2). As a systematic interpretation of the above rules, it is pointed out that a demand for performance is necessary. This conclusion can be induced from Art. 69, which requires the party who suspends its performance in accordance with its *Unsicherheitseinrede* shall timely notify the other party. If the other party fails to regain its ability to perform and fails to provide appropriate assurance within a reasonable time, the suspending party may terminate the contract.[41] This conclusion of interpretation may also be reproved by Art. 72 of the CISG.

### e) Other provisions

There are some other provisions which may show Contract Law's following with the CISG, including: seller's duties (CISG Art. 30; CL Art. 135 and 136); place of seller's delivery (CISG Art. 31; CL Art. 141); time of seller's delivery (CISG Art. 33; CL Art. 138 and 139); installment contracts (CISG Art. 73; CL Art. 166); damages (CISG Art. 74; CL Art. 113(1)).

## 4. Manifestations of Chinese law's partial following the CISG

### a) Fundamental breach

The idea of fundamental breach has been accepted by CL (P.R.C.), i.e. Art. 94(2-4). But Art. 94(2-4) has a few differences from Art. 25 of the CISG. Firstly, there is a *proviso* in Art. 25 of the CISG, i.e. "unless the party in breach did not foresee and a reasonable person of the same kind in the

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40 *Schlechtriem*, Internationales UN-Kaufrecht, 2. Aufl., 2003, p. 163.

41 See *Shiyuan Han*, He tong fa zong lun [The Law of Contract], 2nd edn., 2008, p. 462.

same circumstances would not have foreseen such a result". There is no such a *proviso* in CL (P.R.C.). As to the difference, an author has pointed out: "Chinese legal rule on criteria of a fundamental breach is not so strict like that of the CISG. It has not employed a rule of foreseeability and emphasizes only the seriousness of the result of a breach as a criteria of a fundamental breach. This means a subjective standard has been abandoned. In doing so, arbitrariness in determining a fundamental breach because of a subjective standard may be reduced and factors adverse to the protection of an obligee may be decreased."[42] Secondly, as to the contractual duty not being performed, CISG has no further requirement. What it only requires is the result. As a contrast, both Art. 94(2) and Art. 94(3) require what not being performed is a "main obligation".

### b) Conformity of the subject matter of sales

Art. 35 of the CISG regulates the conformity of goods in the quantity, quality, description and package as required. In CL (P.R.C.), the matter is not regulated in one article, but in several articles separately. The conformity of goods in quality is regulated in Art. 153, 154, 155, 168 and 169 etc. The conformity of goods in quantity, though it is not like that in quality regulated as the seller's obligations directly, is still regulated by relative articles, such as Art. 72, 158 and 162 etc. As to the conformity of goods in the description, it may be treated as a matter of conformity in the quality (for example Art. 153) or sales based upon a sample (Art. 169). CL (P.R.C.) does not use the expression of "ordinary use purpose" or "particular purpose", but it uses an expression of "the normal standards of the kind" (in Art. 169), which perhaps has a similar function with "ordinary use purpose" of the CISG. As to the conformity of goods in the package, Art. 156 of CL (P.R.C.) is almost the same as Art. 35(2) lit. (d) of the CISG.

Art. 38 of the CISG is on the period for examining the goods. A counterpart of CL (P.R.C.) is its Art. 157, which states: "Upon receipt of the subject matter, the buyer shall inspect it within the agreed inspection period. Where no inspection period is agreed, the buyer shall timely inspect the subject matter." When there is no agreed period, the two articles are the same that the buyer shall inspect the goods timely or within as short a period as is practicable. One apparent difference of the two articles is that CL (P.R.C.) has no further detailed provisions as Art. 38(2) and (3) of the CISG. The difference does not mean that the drafter of CL (P.R.C.) did not believe Art. 38 of the CISG is reasonable. The main concern here of the drafter, as it seems to me, is a reality of China, i.e. the much complicated the

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[42] *Liming Wang*, He tong fa xin wen ti yan jiu [A Study on New Topics of Contract Law], 2003, p. 544.

rule is, the much complicated for it to be passed in the National People's Congress.

### c) Exemption

The reason of exemption in the CISG is "an impediment beyond his control" (Art. 79). A counterpart of CL (P.R.C.) is a force majeure, which is defined as "any objective circumstances which are unforeseeable, unavoidable and insurmountable" (Art. 117). Because of the word "and" in this article, the exemption in CL (P.R.C.) is much stricter than its counterpart of the CISG.

Art. 79(5) of the CISG states: "Nothing in this article prevents either party from exercising any right other than to claim damages under this Convention." Amongst the promisee's other remedies are avoidance of the contract (Art. 45(1)(a), 49, 51, 61(1)(a) and 64) and a reduction in the contract price (Art. 50).[43] According to Art. 94(1) of CL (P.R.C.), if it is rendered impossible to achieve the purpose of contract due to an event of force majeure, the parties to a contract may terminate the contract. Although it is not clear in CL (P.R.C.) whether price reduction can be affected by an event of force majeure, the same result should be achieved through an interpretation.

### d) Termination (avoidance)

Art. 97 and 98 of CL (P.R.C.) are almost the same with Art. 81 of the CISG. The only difference is the last sentence of Art. 81(2) of the CISG, i.e. "if both parties are bound to make restitution, they must do so concurrently". A similar sentence can not be found in CL (P.R.C.). But it is theoretically advocated that *exception non adimpleti contractus* (CL Art. 66) may be applied analogically to both parties' duty to make restitution.[44]

Art. 82(1) of the CISG lays down the – Roman law – principle that restitution may be claimed only if the buyer can return the goods in the condition in which he received them. The right to avoid the contract should be exercisable by the buyer only if he can return the goods in an unimpaired condition. If he cannot, the remedy of avoiding the contract is blocked – in

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[43] See *Stoll*, in: Schlechtriem (ed.), Commentary on the UN Convention on the International Sale of Goods (CISG), 1998 (transl. G. Thomas), p. 622.

[44] See *Shiyuan Han*, He tong fa zong lun [The Law of Contract], 2nd edn., 2008, p. 263.

principle restitution should not take place.[45] A similar rule does not exist in CL (P.R.C.). And there is no rule on the problem in CL (P.R.C.). In order to replenish the gap in law, it is advocated to follow the rule of § 346(2) of the new German Civil Law (BGB), which obliges the obligor to compensate the value of the thing instead of to make restitution. In the meantime, its right to termination is not extinguished.[46]

## 5. Manifestations of Chinese law's not following the CISG

### a) The byuer's obligation to take delivery of the goods

Comparing with Art. 53 and 60 of the CISG, Art. 159 of CL (P.R.C.) provides only that the buyer shall pay the price in the agreed amount. It does not take it an obligation for the buyer to take delivery of the goods. As a reason for the difference, the drafter of the article of CL (P.R.C.) has thought that taking delivery of goods is not a duty but a right of the buyer. Accordingly, delay of acceptance of obligee, in the viewpoint of the drafter, is not a breach of contract.[47]

### b) The time of taking over as a reference-point of damages

Art. 76(1) of the CISG has a *proviso*, which stats: "If, however, the party claiming damages has avoided the contract after taking over the goods, the current price at the time of such taking over shall be applied instead of the current price at the time of avoidance." It is said that there was concern lest the reference-point of the time of avoidance might be subject to abuse, *e.g.*, by buyers who had received goods and who might be tempted to delay a decision on avoidance to take advantage of changes in the market price. In response, a second sentence was added. Here the damages would be based on the current price "at the time of such *taking over*" – a definite earlier time not subject to unilateral postponement.[48] There is no similar rule in CL (P.R.C.). In practice, on the one hand the buyer may select a reference-point of damages; on the other hand the court has a right of discretion.

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45 See *Leser*, in: Schlechtriem (ed.), Commentary on the UN Convention on the International Sale of Goods (CISG), 1998 (transl. G. Thomas), p. 644.

46 See *Shiyuan Han*, He tong fa zong lun [The Law of Contract], 2nd edn., 2008, p. 484.

47 See *Huixing Liang*, Min fa [Civil Law], 1988, pp. 403-404. See also *Huixing Liang*, in: Jiafu Wang (ed.), Zhongguo min fa xue min fa zhai quan [Doctrine of Chinese Civil Law: Obligations], 1991, p. 232.

48 See *Honnold*, Uniform Law for International Sales, 3rd edn., 1999, p. 452.

### 6. CISG and law interpretation in China

Nowadays scholars in China have paid more and more attention to following methods of law interpretation and gap-filling.[49] They have attached much importance to receptions of relative legal theories when the reception of law has been achieved. CL (P.R.C.) is a product of comparative law. In order to interpret those articles which derive from or are inspired by the CISG, Chinese civil law scholars have paid much attention to CISG's relative theories and interpretations.[50]

## V. Conclusion

In this paper, I have tried to make a brief account on the impacts of the CISG on practicing lawyers, judges, scholars and legislators in the P. R. of China. What I should have also introduced, is the CISG's impacts on the practice of international commercial arbitration. Especially the China International Economic and Trade Arbitration Commission (CIETAC) has given many awards, in which the CISG is applied, and these awards have already attracted a lot of attention worldwide.[51]

The birth of the CISG took place just at the beginning of China's reform and opening-up. The signature of China of the CISG on September 30, 1981 shows the resolution of Chinese people to open up and to follow an international standard of rules of market economy. The entering into force of the CISG on January 1, 1988 has given, and will continuously give, impacts on practicing lawyers, judges, scholars and legislators in the P. R. of China.

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[49] For example, Professor Karl Larenz's famous book *Methodenlehre der Rechtswissenschaft* has been translated into Chinese and published in China. See *Larenz*, Fa xue fang fa lun [A Theory on Methods of Legal Science], 2003, (transl. Aie Chen).

[50] For example, I have for many times cited Professor Schlechtriem's commentary on the CISG in Chapter 3 "He tong de ding li" [Formation of contract] in my book "He tong fa zong lun" [The Law of Contract].

[51] Many of CIETAC's awards can be found at http://www.cisg.law.pace.edu.

# Croatia

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## General Information

The UN Convention on International Sale of Goods (hereinafter: CISG) came into force for the first time in Croatia on 1 January 1988. At that time Croatia was a federal republic of the former Socialist Federal Republic of Yugoslavia (hereinafter: SFRY). SFRY had signed and ratified the CISG on 11 April 1980 and 27 March 1985 respectively,[1] and thus became one of the original eleven states in which the CISG came into force on 1 January 1988.

Croatia declared its independence from SFRY on 8 October 1991 by the Constitutional Decision on Sovereignty and Independence of the Republic of Croatia of 25 June 1991,[2] and the Decision of the Croatian Parliament of 8 October 1991.[3] According to point III of the Constitutional Decision on Sovereignty and Independence, international treaties which were entered into or acceded to by the SFRY would apply in the Republic of Croatia by virtue of the rules of international law on succession of states in respect of international treaties, provided such rules were not contrary to the Constitution of the Republic of Croatia and its legal order. Notification of succession of Croatia to the CISG followed in 1998,[4] and according to that notification, the CISG came into force in respect of the Republic of Croatia on 8 October 1991.[5] No reservation with respect to the application of the CISG in Croatia has been made.[6] Therefore, it could be said that in 1991 Croatia

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1 See Službeni list Socijalističke Federativne Republike Jugoslavije – Međunarodni ugovori (Official Gazette of the Socialist Federal Republic of Yugoslavia – International Treaties) No 10/1/84.

2 Narodne novine (Official Gazzete of the Republic of Croatia – hereinafter: NN) No 31/91.

3 NN 53/91.

4 Narodne novine – međunarodni ugovori (Official Gazette of the Republic of Croatia – International Treaties – hereinafter: NN MU) No 15/98.

5 It is unclear why it took seven years before Croatia notified its succession to the CISG.

6 See http://www.unilex.info/dynasite.cfm?dssid=2376&dsmid=13351&x=1.

became a contracting state to the CISG for the second time, but this time as an independent state.

Ever since the CISG entered into force, there has been an obvious distinction between scholars, on the one side, and the business community and practising lawyers, on the other, as regards the interest that the CISG caused. As will be demonstrated in this paper, until recently the CISG caused little or no interest in the business community and among practising lawyers. In contrast, scholars have shown a lot of interest in the CISG. Over the years, numerous academic papers and books have been published in which Croatian scholars have strived to raise awareness of the CISG among the general public; many university programmes, both in law faculties and in economics or business administration faculties, have included lectures on the main features of the CISG. These efforts have given rise to some new developments. As will be demonstrated below, in the last few years a new trend of increased application of the CISG has emerged in Croatian courts and state bodies more frequently promote the application of the CISG in the business sector. These latest developments show that awareness of the CISG in Croatia is constantly growing.

## I. CISG's impact on practising lawyers

Generally speaking, awareness of the CISG among practising lawyers in Croatia is rather weak. This is probably due to the relatively poor involvement of Croatian business in international trade and consequently the relatively poor involvement of Croatian practising lawyers in international disputes. The inadequate level of awareness of the CISG among practising lawyers is one possible reason why the standard contract forms of Croatian traders, even when they are extensively involved in international trade,[7] in principle do not refer to the CISG. Bearing this in mind, it might be argued that the non-exclusion of the application of the CISG from the general contract forms of Croatian traders is a consequence of insufficient knowledge of the CISG, and that it might be the case that Croatian traders, when providing for Croatian substantive law to be applicable to their contracts, simply neglect the fact that the CISG is a part of Croatian substantive contract law as well,[8] and that by choosing Croatian substantive law to govern an international sales contract, they also provide for the application of the CISG.

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[7] See, for instance, general contract terms of the firm "Dalekovod", http://www.dalekovod.com/pdf/opci-uvjeti-poslovanja-dalekovoda.pdf.

[8] According to Article 140 of the Constitution of the Republic of Croatia (NN 41/01-revised text, 55/01), international treaties, which are concluded and ratified in accordance with the Constitution and which are published, form part of internal legal order of the Republic of Croatia and take precedence over the law.

On the other hand, it might be argued that those Croatian traders who are aware of the CISG do not exclude its application from their standard contract forms because the majority of rules set forth in the CISG closely resemble rules set forth in the Croatian Civil Obligations Act (hereinafter: the COA).[9] In that respect, it might be argued that by applying the CISG to their international transactions, Croatian traders do not depart significantly from their familiar and comfortable legal background. Finally, inadequate bargaining power when negotiating international sales contracts might be one of the reasons why Croatian traders frequently do not exclude the application of the CISG from their general contract forms. As often happens, the final content of the contract reflects the bargaining powers of the parties involved in negotiations. When confronted with a disadvantageous position in relation to their counterparts, instead of settling with the application of unfamiliar foreign law, a Croatian trader might choose the CISG to govern their contract.

However, with the emergence of international firms in the Croatian market, the trend is obviously changing. We have been able to detect several examples of general contract forms of international firms doing business in Croatia in which the application of the CISG has been explicitly excluded.[10] Although examined general contract forms do not reveal reasons for this exclusion of the application of the CISG, it seems plausible to say that in the majority of cases[11] this exclusion was due to the fact that the traders who have formulated these general contract forms did not want their contractual relations to be governed by rules they are not familiar with, and whose application does not offer a sufficient level of legal certainty. As is often suggested in the literature, the CISG has been rarely applied in practice, even in countries extensively involved in international trade.[12] As sug-

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9 NN 35/05, 41/08.

10 See, for instance, the general contract terms of the licence agreement of ADOBE (http://www.borah.org/bruce/acro8/Autoplay/Legal/Adobe%20Acrobat%208%20Standard/5.0.0/hr_HR/license.html), the general contract terms of the licence agreement of Research In Motion UK Limited Company (http://www.blackberry.com/legal/pdfs/BBEU/BBEU_SLA_Croatia_Croatian.pdf), the general contract terms of SIEMENS (http://www.siemens.hr/index.jsp?sdc_p=ft4ml23s2uo2000001386866i2000001397123pc39z3), and the general contract terms of VAUST Austria (http://www.vaust.at/croatia/verkaufsbedingungen.php).

11 Of course, in the case of the above-mentioned general contract terms of Research in Motion UK Limited Company, the application of the CISG obviously has been excluded due to the fact that this company is registered in the United Kingdom, which is not a contracting party to the CISG.

12 See, for instance, *Ch. Sheaffer*, The Failure of the United Nations Convention on Contracts for the International Sale of Goods and a Proposal for a New Uniform

gested, this is predominantly due to the CISG's ambiguity and deficiency in providing for a defined structure of interpretation, which has all too often led to domestic courts interpreting the CISG's provisions in accordance with their own domestic law, rather than in accordance with the CISG's international character.[13] On the other hand, the CISG permits contracting states to exclude certain parts of the CISG, thus creating uncertainty in its implementation in the sense that the court applying the CISG must be familiar with both the text of the Convention itself and the extent to which the Convention applies in a particular state. This is probably why the examined general contract forms provide for the application of the general contract law of the state in which the traders who have made them have their places of business. Obviously, the traders who have adopted these general contract forms were of the opinion that the CISG does not offer a sufficient level of legal certainty for their international transactions.

Recently, certain initiatives aimed at raising awareness of the CISG in the business community are noticeable. In this respect, the activities of ministries responsible for certain economic sectors should be emphasised, because they have issued several manuals aimed at the promotion of the importation sector and international trade in general. Among other things, these manuals comprise basic information on dispute resolution possibilities in international trade, and special attention is given to the CISG and the possibility of applying the CISG in international sales contracts.[14]

As to the impact of the CISG on contemporary legal practice, there is no empirical evidence that practising lawyers have changed the way of drafting briefs and memoranda or that they have changed the way they substantiate their arguments. Perhaps this is due to the fact that so far only few CISG related cases have come before Croatian courts, and that these cases, conducted before the Supreme Court of the Republic of Croatia and the High Commercial Court of the Republic of Croatia, have mainly dealt with the issue of the non-application of the CISG by first instance courts. In this respect, it might be argued that until recently practising lawyers and judges at first instance courts were not even aware of the existence of the CISG. Also, there is no empirical evidence that in CISG related cases, practising lawyers refer to more case law than in purely domestic disputes, nor that in CISG related cases practising lawyers refer to more commentators then in purely domestic disputes. Perhaps this is due to the fact that until recently practic-

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Global Code in International Sales Law, Cardozo Journal of International and Comparative Law (Cardozo J. Int'l & Comp. L.) 15, (2007), pp. 469-70.

13 See, *Sheafer*, Cardozo J. Int'l & Comp. L., p. 476.

14 See, for instance, Manual for exporters – step by step, Ministry of Crafts, Small and Medium-Sized Entrepreneurship of the Republic of Croatia, 2003 (http://www.mingorp.hr/UserDocsImages/IZVOZ.pdf)

ing lawyers in Croatia hardly ever referred to commentators, even in purely domestic disputes. However, it is noticeable that this practice has recently started to change. In substantiating their arguments, practising lawyers today refer more frequently to legal writing and other informal sources of interpretation. Admittedly, even when practising lawyers do refer to commentators, they mainly refer to domestic legal writing. However, in cases involving the application of domestic law harmonised with European law, some practising lawyers in Croatia have recently started to interpret the provisions of domestic law with the help of foreign commentators of European law. It is to be expected that this trend will spread in the future even to CISG related cases.

Finally, we have not been able to find an example of a domestic dispute in which practising lawyers have used the CISG or any other international source of law as a tool for the interpretation of domestic law.

## II. CISG's impact on scholars

The CISG is often the subject of legal writing in Croatia. This was also the case during the time when the Republic of Croatia was one of the republics of the former SFRY and before the CISG came into force. Legal scholars who wrote about the CISG do not belong to any specific legal branch of private law – the CISG is a topic which has attracted the interest of scholars who otherwise research private international law, commercial law or civil law. The CISG is a topic in many different types of publication – reviews, articles, master's dissertations and doctoral theses.

### List of publications on the CISG:

*S. Babić*, Obveza predaje robe kupcu u ostvarenju ugovora o prodaji (Obligation of the Seller to Deliver the Goods) Pravo i porezi 6 (1997), 1110-1115 (36-41).

*J. Barbić*, Sklapanje ugovora o prodaji – Usporedba Konvencije UN o medjunarodnoj prodaji robe (Beč, 1980) i Zakona o obveznim odnosima (Conclusion of Sales Contracts – Comparison of the UN Convention on International Sale of Goods (Vienna, 1980) and the Law of Obligations), in: Konvencija UN, Sarajevo (Radnički univerzitet "Đuro Đaković") (1988) 41-85.

*M. Baretić*, Predugovorna odgovornost (Pre-contractual Liability), Zbornik Pravnog fakulteta u Zagrebu, 49 (1999), 49-99.

*R. Brnabić*, Raskid ugovora prema Konvenciji Ujedinjenih naroda o ugovorima o međunarodnoj prodaji robe (Avoidance of Contract under the CISG), Pravni fakultet u Zagrebu, 2004.

Z. *Ćesić*, Prijelaz rizika u Konvenciji UN o ugovorima o međunarodnoj prodaji robe (Transfer of Risk under the CISG), Hrvatska pravna revija, 4 (2004), 11; 28-37.

A. *Goldštajn*, U povodu desetogodišnjice Konvencije UN o međunarodnoj prodaji robe: rezultati i problemi (Ten Years of the CISG: Results and Challenges), Zbornik Pravnog fakulteta u Zagrebu, 40 (1990), 3; 375-377.

A. *Goldštajn*, Konvencija Ujedinjenih naroda o ugovorima o međunarodnoj prodaji robe u strukturi prava međunarodne trgovine (UN Convention on Contracts for the International Sale of Goods in the Structure of International Trade Law). Referat za XVI jugoslovensko savjetovanje o pravno-ekonomskim problemima u unutrašnjem i vanjskotrgovačkom poslovanju, Postdiplomski studij iz Privatnog prava na Pravnom fakultetu u Zagrebu, Zagreb: Informator (1980) 3-60.

A. *Goldštajn*, Autonomne norme i autonomne sankcije u domaćem i međunarodnom trgovačkom pravu: odnos države i prava; interakcija domaćega i međunarodnoga trgovačkog prava (Autonomous Norms and Autonomous Sanctions in Domestic and International Commercial Law: Relationship between State and Law; Interaction between Domestic and International Commercial Law), in: Katičić/Padjen eds., Pravo i društvo, Vol. II: 1981-1982, Zagreb: JAZU (1983) 87-105.

A. *Goldštajn*, Petnaest godina Konvencije UN u ugovorima o metjunarodnoj prodaji robe (Fifteen years of the CISG), 43 Informator: instruktivnoinformativni list za ekonomska i pitanja, Zagreb (1995) 4308: 1-3.

A. *Goldštajn*, Trgovačko ugovorno pravo – međunarodno i komparativno (International and Comparative Commercial Contract Law) "Narodne novine", Zagreb, 1991.

V. *Gorenc, F. Schwank, Z. Slakoper*, Međunarodna pravila za kupoprodaju, plaćanja i arbitražu (Sales, Payments and Arbitration in International Commerce) RRJP, Zagreb, 1996.

*H. Horak, J. Štajfer*, Ponuda po Zakonu o obveznim odnosima i Konvenciji UN o ugovorima o međunarodnoj prodaji robe (The Offer for the Conclusion of Contract under the Croatian Obligations Act and the CISG), Zbornik radova Pravnog fakulteta u Splitu 42(2005), 547-573.

*D. Klasiček*, Bečka konvencija o međunarodnoj prodaji robe i međunarodno privatno pravo (UN Sales Convention and Private International Law) Pravni vjesnik: tromjesečni glasnik za pravne i društveno-humanističke znanosti Pravnog fakulteta u Osijeku, 19 (2003), 1-2, 25-33.

*I. Kunda, J. Mutabžija*, Odgovornost prodavatelja za pravo ili potraživanje trećih osoba s osnove intelektualnog vlasništva prema Bečkoj konvenciji o međunarodnoj prodaji robe (Seller's Liability For Third Party Rights or Claims Based on Intellectual Property Pursuant to the CISG), Zbornik Pravnog fakulteta Sveucilišta u Rijeci, 2/2005, 733-794.

B. *Lukšić*, Problem tzv. "Nachfrista" u međunarodnoj prodaji robe ("Nachfrist" in the International Sale of Goods) Pravo i porezi: časopis za pravnu i ekonomsku teoriju i praksu / Vilim Gorenc = izvješća za gospodarsku praksu. – 14 (2005), 6; 11-14.
B. *Malagurski*, Međunarodno pravo: procesi ujednačavanja međunarodnog ugovornog prava, primjeri općeg i regionalnog ujednačavanja (Unification of International Contract Law – General and Regional Examples), Pravni vjesnik 20 (2004), 273-295.
D. *Mlikotin-Tomić*, Ugovor o međunarodnoj prodaji (The International Sales Contract), Pravo i porezi: časopis za pravnu i ekonomsku teoriju i praksu, 10 (2001),7; 3-9.
D. *Mlikotin-Tomić*, Pravo međunarodne trgovine (The Law of International Trade), Školska knjiga, Zagreb, 1999.
S. *Petrić*, Odgovornost za materijalne nedostatke stvari prema novom Zakonu o obveznim odnosima (Liability for the defects of a thing according to the new Code on Obligations), Zbornik Pravnog fakulteta Sveučilišta u Rijeci, 1/2006, 87-128.
K. *Piršl*, Ponuda i prihvat po Konvenciji Ujedinjenih naroda o ugovorima o međunarodnoj prodaji robe (Offer and Acceptance under the CISG), Zbornik Pravnog fakulteta u Rijeci, 1985, 145-160.
K. *Sajko*, Kolizijskopravna i materijalnopravna razina određivanja mjerodavnog prava za suštinu arbitražnog spora: primjena Rimske konvencije o mjerodavnom pravu za ugovorne obveze od 1980. i Bečke konvencije o međunarodnoj prodaji robe od 1980. (Rules of Conflict and Substantive Law in Arbitration: the Application of the 1980 Rome Convention and the 1980 Vienna Convention), Pravo u gospodarstvu, 36 (1997), 77-103.
Z. *Slakoper*, Načelo savjesnosti i poštenja u trgovačkim ugovorima s međunarodnim obilježjem (The Principle of Good Faith in International Commercial Contracts), Zbornik Pravnog fakulteta u Rijeci, 23 (2003), 1; 511-549.

In Croatian legal literature on the CISG both approaches suggested in the questionnaire are applied – some academic publications deal exclusively with the CISG, and in others the CISG is compared with the main legal source of Croatian contract law – the COA, which came into force on 1 January 2006. There are two main reasons why a comparison between the CISG and the COA is made. Some scholars compare the COA with the different legal sources of foreign and international contract law, including the CISG. Other scholars emphasise the connection between the CISG and the COA, because of the influence that the CISG (more precisely the Draft of the CISG) had on Croatian contract law. The COA of 2006 is a modified version of the Civil Obligation Act of 1978 (hereinafter: COA 1978), and the COA 1978 was to some extent influenced by the Draft of the CISG.

Legal writing on the topic of Croatian contract law also includes the topic of the CISG. The reason for such an approach is that it is a necessity when one is writing about commercial contracts of sale. Despite the fact that the CISG is applicable in international sale of goods regardless of the type of contract[15] (only consumer contracts are excluded[16]), international sale of goods, in principle, falls into the category of commercial contracts, and will rarely be qualified as a civil law contract.[17] Consequently, texts which deal with commercial contracts of sale include analysis of the provisions of the CISG. Because of the monistic system, the CISG is mentioned in texts on Croatian contract law which are not exclusively about commercial contracts.

The academic community also promotes the CISG through courses which are part of the curricula of law faculties in Croatian universities. The basic features of the CISG are taught at the Law Faculties in Zagreb, Split, Rijeka and Osijek as a part of the Commercial Law course. A mandatory course in Private International Law, taught in all four law faculties in Croatia, also covers certain features of the CISG. The Faculty of Law in Rijeka and the Faculty of Law in Split include in their curricula a course on International Commercial Law, which includes the CISG. Finally, the main features of the CISG are taught in courses on commercial law conducted at faculties of economics and business administration. It should also be mentioned that students from the Faculties of Law at the University of Zagreb and the University of Rijeka participated in the Willem C. Vis International Commercial Arbitration Moot – which, apart from arbitration, always covers the topic of the CISG. However, a decisive factor in the promotion of the CISG is the recent change in the trend of case law.

It is hard to estimate the impact of scholarly writing on the CISG. Legal practitioners in most cases are not in the habit of quoting legal literature, and court decisions rarely contain references to legal literature. Notwith-

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15 Art. 1 (3) CISG.

16 Art. 2 (a) CISG.

17 Croatian civil law belongs to so-called monistic systems (on the division between monistic and dualistic private law systems see *L. Vékás*, Privatrechtsreform in einem Transformationsland, in: Basedow/Drobnig/Ellger/Hopt/Kötz/Kulms/Mestmäcker, 75 Jahre Max-Planck-Institut für Privatrecht, Mohr Siebeck, 2001, p. 1056). This means that the COA is a legal source for both civil law contracts and commercial law contracts. However, the division between civil law contracts and commercial law contracts is still relevant for a number of practical reasons (e. g. the jurisdiction of "ordinary" or commercial courts, the application of custom and previous course of dealings, different time-limits etc). See *A. Goldštajn*: Privredno ugovorno pravo (Commercial contract law), 3rd edition, Informator, Zagreb, 1980, pp. 4 and 24.

standing this, it can be assumed that legal literature has done its work in promoting the CISG, even without explicit references in court decisions.

## III. CISG's impact on courts

Until recently, Croatian courts simply ignored the CISG. The Convention has not been applied even in cases where clearly it should have been. However, this trend started to change in 2003 when the Supreme Court of the Republic of Croatia issued decision no. II Rev-61/99-2 of 12 March 2003 by which the Court quashed the decisions of the Commercial Court and the High Commercial Court on the basis of the non-application of proper substantive law. The case involved a dispute between an Italian seller and a Croatian buyer over payment of the price agreed by the sales contract. In its decision, the Supreme Court of the Republic of Croatia held that lower courts did not apply proper substantive law since, instead of the CISG, they applied the COA. The Supreme Court of the Republic of Croatia held that the dispute had arisen out of an international sales contract and that the parties to the contract had not explicitly agreed on the governing substantive law. Therefore, the Supreme Court of the Republic of Croatia was of the opinion that this case should have been resolved on the basis of the CISG, arguing that this conclusion could be reached on the basis of Article 1 of the CISG.

Obviously influenced by the arguments of the Supreme Court of the Republic of Croatia in the above-mentioned decision, in the years that followed the High Commercial Court issued a series of seven decisions in which it ruled on the application of the CISG.

In decision XXVIII Pž-2728/4-3 of 26 July 2005 the High Commercial Court partly reversed the decision of the Commercial Court in Zagreb, with the argument that the dispute between the Italian seller and the Croatian buyer ought to be resolved on the basis of the CISG, and not on the basis of Italian substantive law, applied by the lower court in this case. The High Commercial Court held that the lower court should have applied the CISG pursuant to its Art. 1(1)(a) since the contracting parties' place of business was in different contracting states and the parties did not explicitly exclude the application of the CISG nor did they agree on a national substantive law to be exclusively applicable to their contract. Furthermore, the High Commercial Court held that the sales contract was concluded pursuant to Arts. 23 and 24 of the CISG, when the buyer's order reached the seller. Hence, although the High Commercial Court affirmed the lower court's decision, it emphasized that this decision should have been reached on the basis of the CISG.

In decision XXVIII Pž-5580/03-3 of 26 September 2006, the High Commercial Court quashed the decision of the Commercial Court in Zagreb,

arguing that the case involved a dispute arising out of an international sales contract concluded between a seller from Austria and a buyer from Croatia and that, since the parties to the contract did not explicitly exclude the application of the CISG, nor agree on a national substantive law to be exclusively applicable to their contract, the lower court should have resolved the dispute on the basis of the CISG.

In decision XXXVI Pž-2047/03-8 of 19 December 2006, the High Commercial Court rejected the appeal of the defendant and partly affirmed and partly reversed the decision of the Commercial Court in Rijeka, arguing that the lower court had properly applied the CISG to resolve the dispute between the Austrian seller and the Croatian buyer, but it had failed to calculate the interest properly.

In decision XXXVI Pž-4301/04-3 of 20 February 2007, the High Commercial Court rejected the appeal of the defendant and affirmed the decision of the Commercial Court in Rijeka. The High Commercial Court was of the opinion that the lower court had properly applied the CISG and that it had reached the decision in accordance with Arts. 53-60 of the Convention.

In decision LII Pž-7365/04-3 of 11 July 2207, the High Commercial Court rejected the appeal of the defendant and affirmed the decision of the Commercial Court in Zagreb. The High Commercial Court was of opinion that the dispute should have been resolved pursuant to the CISG. Although the lower court did not specify the source of law pursuant to which it reached the decision, the High Commercial Court held that the same decision would have been reached pursuant to the provisions of the CISG.

In decision IV PŽ-1134/05-3 of 30 October 2007, the High Commercial Court quashed the decision of the Commercial Court in Zagreb, arguing that the lower court had reached the decision on the false presumption that Croatian substantive law should apply to the case. The High Commercial Court was of opinion that the CISG should have been applied instead, and that with the application of a proper substantive law the lower court would have reached a different decision.

Judging from the cited decisions, so far the application of the CISG has not influenced the style of decisions of Croatian courts. In its argument, the High Commercial Court relied exclusively on the text of the Convention, and we found no reference to domestic or foreign case law, or to legal writing.

Furthermore, in the cited decisions we found no reference to the international character of the CISG, nor to the need to promote uniformity in its application. As previously stated, in interpreting the Convention the High Commercial Court relied exclusively on the text of the Convention and did not specifically consider the character of the CISG, nor the issue of worldwide uniformity in its application.

Finally, there is no empirical evidence that the Croatian courts used the CISG in relation to contracts not covered by its sphere of application, nor

that the courts used the interpretations of the CISG in order to interpret other uniform law instruments.

## IV. CISG's impact on legislators

There are strong indications that the CISG has had an impact on contemporary Croatian contract law legislation, albeit indirectly. The CISG was not "implemented" in the new COA because this was not necessary. The CISG forms an integral part of Croatian legal order, like any other international agreement, pursuant to conditions stipulated by Art.140 of the Croatian Constitution.

The main legal source of contract law in Croatia is the COA. The COA is, as mentioned earlier, a modified version of the COA 1978. In respect of the conclusion of a contract and the rights and obligations of parties to a sale of goods contract, the COA was, in comparison to the COA 1978, more significantly amended only in relation to the rights of buyers regarding defective goods in order to implement Directive 1999/44/EC into Croatian legal order.

Why is the COA 1978 relevant for current Croatian contract law and the application of the CISG in Croatian legal practice? According to the legal literature, in drafting the COA 1978 legislators took into account the Draft of the CISG.[18] The Convention relating to a Uniform Law on the International Sales of Goods of 1964 (hereinafter ULIS) also served as a role model for the COA 1978, and the impact of the CISG and the ULIS on the COA 1978 can be clearly noticed in a number of provisions of the COA 1978.[19] Because of the fact that the new COA, in relation to the conclusion of contract and the contract of sale, has not significantly departed from the COA 1978, the CISG and ULIS have impacted on contemporary Croatian contract law.

The connections between the CISG, the COA 1978 and the new COA can be observed in a number of different points in the process of the conclusion of contracts. The COA 1978 and the COA follow the pattern of the CISG regarding the formation of contracts. The contract is concluded by

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[18] *S. Petrić*, Odgovornost za materijalne nedostatke stvari prema novom Zakonu o obveznim odnosima (Liability for the defects of a thing according to the new Civil Obligations Act), Zbornik Pravnog fakulteta Sveučilišta u Rijeci, 1/2006, p. 97.

[19] For example notion "reasonable" in various combinations can be found in Art. 194, 346 (3-4), 361 (3), 365 (1), 384 (2-3), 387, 392, 411, 415 (1), 423 (1), 426, 431, 432, 447 (2), 461 (1), 597 (2), 687 (2), 738 (1) lit. 3, 811 (2), 818 (2), 819 (5), 886, 901 (2), 985 (2), 1036 (2), 1052 (3), 1075 (1), 1076 (3), 1122 (1) COA.

accepting the offer.[20] The COA adopted the so-called receipt theory which is also the solution of the CISG.[21] Generally speaking the COA is similar to the CISG in all contract law aspects where the CISG has adopted solutions based on the civil law tradition. However, in those aspects which are "borrowed" from the common law, the COA and the CISG do not follow the same path.[22] For example, unlike the CISG, according to the COA an offer is binding from the moment it reaches the offeree.[23]

One of the principles of contract law in the COA 1978 and the COA is informality of contracts (Formfreiheit) – which is accepted in most civil law traditions. The number of provisions in the COA 1978 and the COA relating to this area of contract law closely resemble the provisions of the CISG.[24] Apart from the general rule that the contract is valid regardless of the form in which it was concluded,[25] the COA 1978 provides that the contract is concluded in written form if the parties exchange letters or reach the agreement via telex or any other means that enable the content and identity of the parties to be established with certainty.[26] The new COA contains the same provision and the only difference is the exclusion of the telex (as an obsolete technology) from the provision.[27]

A system of liability for defective goods (lack of conformity) in the COA is similar to the CISG but it should be stressed that it is more connected to the ULIS.[28] However, this does not mean that the COA is not compatible with the CISG. The COA establishes the duty of the buyer to examine the goods[29] and the duty of the buyer to give notice of a defect to the seller, both for civil law and commercial contracts.[30] Failing to do this has a serious consequence – the buyer will lose the right to rely on a defect in the goods.

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20 Art. 252 (1) COA.

21 Art. 15 CISG.

22 See *J. Vilus*, Komentar Konvencije UN o međunarodnoj prodaji robe (Commentary on the United Nations Convention on the International Sale of Goods) Informator, Zagreb, 1981, p. 54.

23 Art. 16 (1) CISG.

24 According the Art. 4 (a) the CISG does not govern the validity of contract. However, by promulgating the principle of informality (Art. 11) the CISG actually "eliminates" one of the conditions of validity of the contracts.

25 Art. 11 CISG and Art. 67 COA 1978.

26 Art. 72 (4) COA 1978.

27 Art. 292 (4) COA.

28 *Petrić*, o.c., p. 102.

29 This duty does not exist in the respect of the consumer contracts – Art. 403 (4) COA.

30 Art. 403 and 404 (1) COA. For duty to examine the goods in the CISG see Art. 38.

One of the comments regarding Directive 1999/44/EC[31] was "… that the implementation of a directive can sometimes be most delayed in a state whose laws will ultimately be relatively unchanged".[32] This could also be true of the position of the CISG in Croatian contract law. One of the reasons why the CISG has somehow passed unnoticed by legal practice is that it did not involve any radical changes to Croatian law. In this respect both the new COA and the COA 1978 contain provisions regarding the sale of goods which are similar to the CISG, though in detail each system offers different solutions.

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[31] Directive 1999/44/EC of the European Parliament and of the Council of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees.

[32] G. *Howells*, Ch. *Twigg-Glesner*, Much ado about nothing? The Implementation of Directive 99/44/EC into English Law, in: M. J. Schermaier (Hrsg.), Altes Gewährleistungsrecht und die Umsetzung der Richtlinie, 1999/44/EG, Sellier, European Law Publishers GmbH, München, 2003, p. 303.

# Czech Republic

*Naděžda Rozehnalová*

## General information

The Czech Republic is a contracting party to the United Nations Convention on Contracts for the International Sale of Goods (CISG). For original Czech and Slovak Federal Republic (ČSFR) the Convention became a part of a legal system on April 4th, 1991.[1] After the division of ČSFR, the Czech Republic succeeded to the Convention.[2] For the introduction of the position of the CISG in Czech, let us say earlier in Czechoslovak legal order, it seems appropriate to preface two notes:

(a) In 1963 the Czechoslovak Socialist Republic (ČSSR) adopted the Code of International Commerce.[3] It was so called "material" rule of private international law. This Code was applicable as long as parties to the contract stipulated the choice of Czechoslovak law. The Code of International Commerce dealt with the contractual relationships with foreign element. Its regulation was strongly affected by the subject-matter of two unified Hague Uniform Law Conventions.[4] It was obvious for Czech professional legal public engaged in legal problems of relationships with foreign element that the special rule of law existed to regulate the cross-border relations.

(b) The provisions of the CISG were greatly reflected in the regulation of purchase contract in New Czech Commercial Code.[5] Of course, the provisions in the Commercial Code signify the rank of further questions ex-

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1 See Sdělení Federálního ministerstva zahraničních věcí č. 160/1991 Sb. o vstupu v platnost Úmluvy OSN o smlouvách o mezinárodní koupi zboží.

2 The former CSSR signed the CISG on 1 September 1981. The instrument of ratification was deposited on 5 March 1990. The Convention entered into force for the former Czechoslovakia on 1 April 1991. On 28 May and 30 September 1993, respectively, Slovakia and the Czech Republic, deposited instruments of succession, with effect from 1 January 1993, the date of succession of both States. CISG was ratified with the reservation against the application of the rule in Art. 1(1) lit. (b) CISG under Art. 95 CISG.

3 Act No. 101/1963 Coll., Code of International Commerce.

4 Ćonvention on a Uniform Law on the Formation of Contracts for the International Sale of Goods, Convention on a Uniform Law on the International Sale of Goods.

5 Act No. 513/1991 Coll., the Commercial Code, as amended.

cluded or not regulated under the CISG provisions. The ground of this reflection was inexperience with the regulation of relations within the market-oriented mechanism and pursuit to search for certain model provisions. These were found in the Code of International Commerce and the CISG. It is a paradox that the model regulating cross-border relations was primary used for domestic relations.

As a Czech doctrine of private international law, so the legal practice emphasized the meaning of existence of legal rules dealing with cross-border relations not on domestic national basis but through international regulation. This conviction was widely shared among the lawyers acting in the area of international private and commercial law. This position led as to the participation of the former Czechoslovak Socialist Republic (ČSSR) on work in UNCITRAL, thus the CISG was signed and subsequently ratified.

## I. CISG's Impact on Practicing Lawyers

1. The knowledge of the CISG among practical lawyers is various. With respect to the specifics of development in the Czech Republic (by the year 1990 the monopoly of foreign trade and the existence of closed group of lawyers dealing with the problems of foreign trade), the CISG is well-known rather by the younger generation of lawyers who have finished their studies in 90's or later. The older lawyers have more likely problems with knowledge of the CISG. There was none research in the Czech Republic concerning the practical application of the CISG. Therefore the above mentioned are only empirical evidences.

To the utilization of the CISG among practical lawyers, we quote the following facts:

(a) In relations between the Czech Republic and the Slovak Republic there exists very strong effort to exclude the CISG and apply the Commercial Code (it was adopted in ČSFR and nowadays both provisions reflect a great degree of similarity).

(b) In purchase contract the law of the CISG member state without exclusion of the CISC is often chosen by the parties. The application of the CISG is for parties to the contract frequently surprising (in accordance with article 10 of the Constitution of the Czech Republic, the application of the CISG as an international treaty has the priority over internal rules; its application is obligatory).

(c) So far as the lawyers are well familiarized with the CISG, the pursuit of its exclusion and application of national law exists. The arguments vary. The most frequent argument is the problematic application of the article 4 and problems with lump-sum damages. Frequently, the party agrees on exclusion under the pressure of a foreign partner who requires the application of own national law.

(d) According to the trade terms, the exclusion of the CISG and the choice of Czech law have occurred in past few years. Sometimes it is an act of business strategy and parties to the contract agree finally on application of the CISG.

2. No, this tendency has no proof. By that time, the trend towards citation of the CISG case law and exercise of ordinarily available databases is comparatively low. Without doubts, it is lower than in purely domestic cases. The same we can say about using of foreign commentaries.

3. At the level of practical lawyers the trend to corroborate the results they want to reach by using of CISG solution is not developed.

## II. CISG's Impact on Scholars

1. Only sporadic attention was given to the CISG until its entry into force in the Czech Republic. After it entered into force, many publications were concerned with the Convention.[6] With respect to the fact that the first basic textbook of international private law[7] in the Czech Republic has contained not only problems of choice of law but also problems of unified substantive law (uniform law), the scholars from the area of private international law are dealing also with international commercial law. Such scholars also handle courses in international commercial law where the legal regime of business transactions is regularly lined. The scholars in the field of contract law deal with analysis of the CISG only sporadically (more likely it is possible to record their analysis of Principles of European Contract Law and UNIDROIT Principles of International Commercial Contracts than of the CISG).

It is more common to find analysis of the CISG and case law. Uniquely, we can find the comparisons of the CISG and the Czech Commercial Code especially in student's scientific works (dissertations and diploma thesis). The textbook comparing the CISG and the Commercial Code does not ist. In fact, the Commercial Code has adopted in essence the most provisions of the CISG.

2. In general information it was quoted that the text of the CISG was used in the process of formation of the Czech Commercial Code in the section "Contract of Sale".[8] In the first commentaries the links to the CISG model were included, in other were gradually eliminated. The interpretation

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6 See for example *A. Kanda,* Mezinárodní kupní smlouva, Praha (1999). *N. Rozehnalová*, Kupní smlouva v mezinárodním obchoddě, Brno (1993). *N. Rozehnalová*, Právo mezinárodního obchodu, Praha (2006).

7 *Z. Kučera*, Mezinárodní právo soukromé, Brno (2006).

8 Act No. 513/1991 Coll., the Commercial Code, as amended, for example vol. II, art. 409-470.

of the provisions of sale contract in Commercial Code made by scholars from the field of commercial law refers in no case to the CISG text, its commentaries or its case law.

According to our experiences, it is important to teach and support courses at colleges to increase the notification of CISG.

3. The importance of theoretical works addressed to the CISG is increasing. It is clear in legal education. The students at all faculties of law in the Czech Republic are acquainted with the CISG otherwise in various profundities. The analysis of the CISG including case law is even separate course within the frame of doctoral degree studies. The students also gain basic knowledge at some faculties of economics. The impact on practice seems to be increasing. It is a result of new discussions regarding to the appropriateness of use in e-commerce, newly published decisions etc.

4. No, we did not face to the interpretation of the CISG to interpret other uniform instruments in Czech legal practice.

## III. CISG's Impact on Court

1. The available decisions do not lead to using of case law by courts to support their standpoints. However, the database of decisions to CISG in the Czech Republic is not wide[9] and especially the database of Arbitration Court attached to the Economic Chamber of the Czech Republic and Agricultural Chamber of the Czech Republic is not published from greater part.[10]

2. In published decisions there is neither the trend towards interpretation of the CISG in the light of its international nature, nor the trend towards national interpretation. Any Czech decision familiarized to us expressly solves the problems of interpretation. So far as we can judge the interpretation, it is possible to characterize it as a deliberate interpretation under the influence of national law. It is because of the question of autonomous interpretation with regard to the international origin is far away for lawyers who were primary raised for the area of national law. It seems possible that under the influence of interpretation and application of European law, the sphere of interpretation will also change.

3. No, we did not face to such application of the CISG.

4. No.

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[9] The collection of cases of the Supreme Court is available on http://www.nsoud.cz. There are only three CISG's cases in this collection (29 Cdo 1501/2000 from 16.5.2001, 29 Odo 1206/2003 from 25.1.2005, 32 Odo 725/2004 from 29.3.2006).

[10] In the database of the Arbitration Court attached to the Economic Chamber of the CR and Agricultural Chamber of the CR were published some CISG's decisions. See "Retrospektiva rozhodnutí".

## IV. CISG's Impact on Legislators

1.-2. As we mentioned above, the legal regulation of purchase contract in the Commercial Code is highly similar to the regulation in the CISG and is based on the CISG. However, this was not caused by the discussion on reform of contractual obligations, but by the specific development in the Czech Republic after 1990. Although it has resulted in high similarity of the regulation of purchase contract in the CISG and the Czech Commercial Code, this fact was not affected by discussion, or reform influence of the CISG. It was caused by the necessity to adopt legal standards which are accordant with the requirements of market-oriented mechanism. The provisions in the CISG were assumed as appropriate basis for purchase contract regulation. In fact, also time had specific position in this process. It was necessary in relatively short time to modify legal regulation.

3. Yes, the specific differences exist. The Convention was not taken over tel quel but its text was the ground for the Commercial Code provisions. So far as the conclusion of contract is concerned, also partly for the Civil Code. It is mainly concerned with different verbal expression or text arrangement. The fundamental contentual differences are not much obvious.

For example:

- questions of general nature (partly different rules for interpretation of legal acts in § 266 of Commercial Code);
- some questions regarding the conclusion of contract (article 19, par. 2 of CISG was not adopted, Civil code – which otherwise follows the CISG regulation of conclusion of contract – assumes "mirror rule");
- consequence of not giving notice of lack of conformity of the goods is not lapse of claim (see article 38 of CISG), but only limitation (see § 428 of Commercial Code);
- diverse formulation of substantial breach of contract (§ 345, par. 2 of Commercial Code).

The ground for different formulation was contained in explanatory report only for conclusion of contract (traditionally, "mirror rule" was applicable in the Czech Republic). For other questions the ground is not expressed and was neither included in explanatory report.

4. No. Although the provision is based on the CISG, it is not interpreted under the influence of case law on the CISG and the international origin of such rules of law is not taken. It arises relatively clear from the published case law on the Commercial Code.

# Denmark

*Joseph Lookofsky*

## General information and introduction

### 1. Entry into force in Denmark

The 1980 United Nations Convention on Contracts for the International Sale of Goods (CISG) was ratified by the Kingdom of Denmark on 14 February 1989.

The Convention entered into force in Denmark on 1 March 1990.

The Danish CISG ratification was, however, made subject to two significant declarations, often commonly referred to as "reservations."

As explained in the following, the practical effect of these Danish CISG reservations is that the Convention is not "fully in force" in Denmark, at least not to the same (full) extent as it is in most other CISG Contracting States.

### 2. The Danish CISG reservations

#### a) The Article 92 reservation

When Denmark ratified the CISG in 1989, it declared, pursuant to Article 92(1), that it would "not be bound" by CISG Part II (Contract Formation).

The consequence of this declaration, according to Article 92(2), is that Denmark is not to be considered a "Contracting State" within paragraph (1) of Article 1 in respect of matters governed by that Part of the Convention.[1]

Two main arguments were advanced by those Danish jurists who advocated that Denmark ratify the Convention (in 1989) subject to an Article 92 reservation with respect to CISG Part II.

First, as regards the "revocability of offers," the Part II rules were said to be unduly influenced by corresponding Common law rules; in particular, the seemingly extensive right of an offeror to revoke its offer pursuant to Article 16(1) was perceived as inconsistent with traditional Danish legal concep-

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[1] See generally *J. Lookofsky*, Understanding the CISG, 3rd (Worldwide) ed. 2008, § 8.4.

tions.[2] Secondly, it was feared that CISG Part II – which regulates only contact formation, but not contract validity – might create "uncertainty" as to whether a valid sales contract had been made.

Neither of these arguments seems convincing upon closer analysis.[3]

It is in any case important to recognize that the Danish Article 92 declaration has not achieved the results which the Danish legislator seemed to expect in 1989 (when the declaration was made); on the contrary, it is now generally recognized that Article 92(2), which renders Denmark a non-Contracting State with respect to CISG Part II, does not preclude the application of CISG Part II by virtue of the rule in Article 1(1)(b) in cases when the applicable private international law rules of the forum point to the substantive sales law of a *non*-Scandinavian Contracting State.[4]

For this and other reasons, most Danish commentators and practitioners now view the Article 92 reservation as counter-productive to Danish interests.[5] Regarding efforts undertaken to withdraw the Danish Article 92 reservation see head (c) below.

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2 The general Danish rule for centuries has been that promises are binding – and offers irrevocable – by default, for the time stated or for a "reasonable" time. See *Lookofsky*, The Scandinavian Experience with the Vienna Sales Convention (CISG), in: Ferrari (ed.), The 1980 Uniform Sales Law. Old Issues Revisited in the Light of New Experiences, 2003.

3 As regards revocability, the starting point in paragraph (1) of CISG Article 16 is modified by significant exceptions (in paragraph 2) which greatly narrow the gap between Common and Danish domestic law. As regards the second argument, the rules on contract formation in Chapter I of the Danish Contracts Act are clearly distinguishable from the rules on contract validity (Chapter III of the Act), so the replacement of domestic law (Chapter I of the Act) with international law (CISG Part II) would hardly create more "uncertainty" than that which was created by the Danish ratifications of CISG Part III.

4 See *Lookofsky* supra note 1, §§ 2.4 and § 8.4. For commentary on a Danish case where CISG Part II was applied by a Danish court, see *Lookofsky*, Alive and Well in Scandinavia, CISG Part II, in: J. Law & Com., 1999, Vol. 18, p. 289 et seq., also at http://cisgw3.law.pace.edu/cisg/biblio/lookofsky1.html.

5 Note in this connection that the Article 95 declarations made by China and the United States will prevent Chinese and American courts and tribunals from applying CISG Part II by virtue of Article 1(1)(b), with the likely (and from a Danish perspective unfortunate) result that Chinese and American domestic sales contract formation law will often apply.

### b) The Article 94 declaration

Pursuant to Article 94(1) of the Convention, two or more *Contracting States* which have the same or closely related legal rules on matters governed by the CISG may at any time declare that the Convention is not to apply to contracts of sale or to their formation where the parties have their places of business in those States.

Article 94(2) permits similar declarations with respect to *non-Contracting States* which share such closely related rules.

When Denmark, Finland, Norway and Sweden ratified the CISG, they all made declarations pursuant to Article 94, paragraphs 1 and 2.[6]

In principle the "matters governed by this Convention" – i.e. the matters to which Article 94, paragraphs (1)-(2) refer – relate both to the formation of the contract of sale (CISG Part II) and to the rights and obligations of the seller and the buyer arising from such a contract (CISG Part III). But since the reservations made by the Scandinavian States pursuant to Article 92 (described above) render the Article 94 reservations irrelevant with respect to CISG Part II,[7] the practical effect of the Danish Article 94 reservation relates to CISG Part III.

Even to this extent, however, the Danish Article 94 reservation has become problematical, since Denmark – unlike its Scandinavian neighbors – refused to "re-write" its domestic Sales Act (*Købeloven* of 1906) in the "image of CISG."[8] For this reason, it no longer seems appropriate to describe the Scandinavian States as jurisdictions which share "closely related" domestic sales law rules (i.e., as required by CISG Article 94), and it has therefore

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6 *Denmark* made the following declaration:
"Under paragraph (1) cf. paragraph (3) of article 94, Denmark declares that the Convention is not to apply to contracts of sale where one of the parties has his place of business in Denmark, Finland, Norway or Sweden and the other party has his place of business in another of the said States. Under paragraph 2 of article 94, Denmark declares that the Convention is not to apply to contracts of sale where one of the parties has his place of business in Denmark, Finland, Norway or Sweden and the other party has his place of business in *Iceland* [emphasis added here]."
Significantly, *Iceland*, which ratified the CISG on 10 May 2001, did *not* make an Article 94 declaration.

7 The effect of the declarations made by the Scandinavian States pursuant to *Article 92* is that no Scandinavian court would apply CISG Part II vis-à-vis another Scandinavian court, and this would be true even if the Scandinavian States had not also made declarations pursuant to Article 94. Re. the Article 92 reservations see also *Lookofsky*, supra n.1, § 8.4.

8 See generally *Lookofsky*, Consequential Damages in Comparative Context, 1989, p. 195 et seq.

been suggested that the Scandinavian Article 94 declarations be either re-written or withdrawn.[9]

The efforts to withdraw the Article 92 and 94 reservations are noted in (c) below.

### c) Efforts to withdraw the Article 92 and 94 reservations

The International Chamber of Commerce (ICC) is a key business interlocutor among (e.g.) the United Nations, WTO and G8. In the Nordic region, the ICC is composed of national committees in Denmark, Sweden, Norway and Finland. On behalf of its member companies, in the Nordic Region and across the world, the ICC has written to the Nordic Ministries of Justice to bring their attention to problems created by the CISG Article 92 declarations made by the four Scandinavian States (Denmark, Finland, Norway and Sweden) as well as the Article 94 declarations made by the five Nordic States (i.e., the four Scandinavian States and Iceland). In the view of the ICC, the current Scandinavian reservations create complexity and uncertainty, not only for the local business community but for all traders doing business with companies in the Nordic region. This is particularly true as regards the Article 92 reservations, which only the four Scandinavian States, but none of the other CISG Contracting States, have made.

To support its position the ICC provided the Scandinavian Ministers of Justice with a series of concrete observations and experiences that have been reported to the ICC by its members, in Scandinavia and elsewhere:

> Nordic ICC member companies have reported that the fact that China has ratified CISG is reason enough in itself for removing the Nordic reservations, so as to avoid undue confusion in negotiations between companies in the Nordic region and China. The same is true as regards other major trading partners such as those in the USA the EU.
>
> Most business people and lawyers from countries outside Scandinavia are not even aware of the Nordic Article 92 reservations. This is especially true as regards small and medium-sized enterprises (SME's). Foreign companies, as well as many Nordic companies, are often surprised to learn about these reservations, and they may be even more surprised to learn that the rules in CISG Part II sometimes apply to contracts with Scandinavian merchants anyway, i.e., notwithstanding the reservations.
>
> The CISG Part II rules on Contract Formation are, in some respects, more modern and up-to-date than the corresponding Nordic laws. If, for

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9 For additional details *see Lookofsky*, supra n.1, § 8-6.

example, one compares Article 19 of CISG to Article 6 of the Nordic Contract Acts, CISG Article 19 represents an improvement on the Nordic Article 6. Electronic contracting would, in cases involving a Scandinavian merchant, likely be facilitated by removal of the Article 92 reservations. For example, it would be easier to determine the will of the parties under CISG Part II than under the otherwise applicable (domestic) law. Also, CISG Articles 15 and 24 are considered to be well-suited for contracting using electronic means.

Removing the reservations would allow universities and business schools to spend more time teaching students about the substantive core of the CISG, instead of wasting valuable time teaching the (complex) rules on application of the reservations.

For these (and other) reasons, and since ICC sees no compelling reasons to maintain the reservations, the ICC has strongly recommended that the reservations be withdrawn, as authorized pursuant to CISG Article 97(4).[10]

## 3. Reputation, awareness

Although it would be difficult to provide an objective overall evaluation of the reputation of the Convention in Denmark, many individual factors tend to indicate that the Convention generally enjoys a good reputation here.

Shortly after Denmark's ratification of the Convention, significant efforts were undertaken, particularly at the university level, to raise CISG-awareness. As a result, most Danish jurists are well-aware of the Convention's entry into force in Denmark, as well as its main content and significance. Some concrete examples will be provided in this section, others in subsequent sections.

### a) Legal education

The single most significant factor contributing to CISG-awareness in Denmark is surely the attention paid to the CISG at the three law faculties in Denmark which offer the 5-year "cand.jur." curriculum, the successful completion of which is a key prerequisite for securing permission to practice law as a Danish Advocate.

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[10] A copy of the ICC's letter has been supplied by the ICC to the present author for inclusion in this IACL Report. The author remains an active supporter the ICC initiative.

In 1992 Denmark's largest law school, the University of Copenhagen Law Faculty,[11] introduced a "CISG module" (comprising 12 class-hours of CISG instruction and 200 pages of required CISG reading)[12] as part of the required 2nd year course in the Law of Obligations. Since then, the written examinations in Obligations have included questions which require students to apply the CISG rules to concrete fact-patterns involving an international sales element. Starting in 2008 this "CISG module"[13] will be repositioned (in Copenhagen's revised law school curriculum) as an element in a new required 3rd year course in English: "European & International Commercial Law."[14]

At Denmark's second largest law faculty at the University of Aarhus, key CISG features are covered within the framework of a 3rd year course in Private Law,[15] just as 4th and 5th year students can also select CISG-related electives.[16] Similar mandatory and elective elements are part of the law school curriculum at law faculty of the University of Southern Denmark.[17]

All three of these Danish law schools are currently (2008) active participants in the Vis (CISG) Moot Court competition.[18]

### b) CISG Denmark (www.cisg.dk)

"CISG Denmark" is a collaborative (awareness-raising) effort between law researchers from four prominent Danish institutions of higher learning: The University of Copenhagen, the University of Aarhus, the Copenhagen Business School and the Aarhus School of Business.

The primary aim of the Collaboration, which was founded in the fall of 2000, is to maintain an informative CISG website (www.cisg.dk) which

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11 With over 4,000 registered law students. See http://jur.ku.dk/english/.

12 See the first and second editions of *Lookofsky*, Understanding the CISG in Scandinavia, 1992 & 1996 (part of the required course reading in Copenhagen during the period in question).

13 Including the text cited supra n. 1.

14 See http://sis.ku.dk/kurser/viskursus.aspx?knr=102270.

15 See *Kristensen/Nielsen/Iversen*, Lærebog i dansk og international køberet, 2004. Only the "main CISG features" of this work are currently (2008) comprised by the required course reading at the University of Aarhus: see http://www.jura.au.dk/bachelor/undervisningsplan/f08.pdf.

16 See http://mit.au.dk/kursuskatalog/kurser.cfm?udbudid=9748&elemid=14434&topid=1&sem=&udd=&art=&hom=. See also http://mit.au.dk/kursuskatalog/kurser.cfm?udbudid=11807&elemid=19993&topid=1&sem=&udd=&art=&hom=.

17 See, e.g., http://www.sam.sdu.dk/study/fag/fag.shtml?fag_id=2335 and http://www.sam.sdu.dk/study/fag/fag.shtml?fag_id=2366.

18 See http://cisgw3.law.pace.edu/cisg/moot/Individual_team_schedules.pdf.

provides relevant information on CISG court practice in Denmark. The establishment and content of this CISG "satellite" website, which is presented in English as well as Danish language formats, were inspired by the well-known Pace "CISGW3" database (www.cisg.law.pace.edu) to which the "cisg.dk" site is linked.

# I. CISG's impact on practicing lawyers

## 1. Awareness, impact

### a) Awareness

In Denmark the average practicing lawyer is likely to be very much "aware" of the CISG, since most of these lawyers, as part of their legal education, have read a CISG textbook, attended CISG classes, and then, on that basis, have been tested on acquired CISG-knowledge during one or more law school exams.

To take one prominent example: some 7,000 jurists obtained their MA degree in law (cand.jur.) from the University of Copenhagen during the period 1992-2007. Since the CISG has been an integral part of the BA-curriculum in Copenhagen during that entire period,[19] and since other Danish law faculties have followed suit in recent years,[20] we can assume that a very large percentage of Danish practicing lawyers are very well acquainted with the CISG.

Even as regards Danish jurists whose law degrees are of older vintage, CISG awareness has been increased by virtue of CLE (Continuing Legal Education) courses related to the CISG. Such courses have, for example, been established and run by the Danish Society of Advocates (*Advokatsamfundet*) in cooperation with the Danish Jurists Association (DJØF), together with the participation of Danish university academics.[21]

### b) Impact on standard forms, opting out etc.

No (reported) surveys have been conducted which might provide statistical information as regards the impact of CISG awareness on the contents of standard contracts forms formulated by Danish lawyers for use by Danish companies (exporters and importers of goods).

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19 See supra, text with n. 12.

20 See supra, text with n. 15-17.

21 Several such courses were held (and taught by the present writer) during the years immediately following the Convention's entry into force in Denmark (1990).

There does, however, seem to be considerable (direct and indirect) evidence suggesting that Danish practicing lawyers who are aware of the CISG – and there, as just indicated, many of these – do *not* tend to exclude it (opt out), as is sometimes otherwise suggested in legal writing (concerning lawyers outside Denmark).

The "applicable law" clause contained in the widely-used Nordic General Conditions (for the supply of machines and other equipment) – the "NL"[22] standard terms – supports this contention. According to the NL, the applicable law is the "law of the vendor's country."

> 41. All disputes arising out of the contract shall be judged according to the law of the Vendor's country.

Since the CISG is an integral part of Danish law,[23] this provision is generally understood as comprising a reference to the CISG rules.[24]

Significantly, Danish case law (the reported decisions of cases adjudicated by Danish courts) reveals no example of a post-1990 international sales contract which excluded the CISG (in favor of Danish domestic law).

Furthermore, only a limited number of Danish sellers or buyers could be presumed to possess such a significant degree of bargaining power that they could convince a non-Danish contracting party to agree to the inclusion of a choice-of-law clause which designates the Danish domestic Sales Act (*Købeløben*) as the applicable law. No (official) English translation of this statute has ever been prepared, just as case law and scholarly writing on this subject is generally inaccessible to foreigners not well-versed in Danish.

## 2. Briefs, memoranda, citations, etc.

The coming into force of the CISG in Denmark does not seem to have had any significant impact on the way practicing Danish lawyers draft their briefs and memoranda.

Judging by the CISG decisions rendered thus far by Danish courts (as well as the extracts of the litigating parties' arguments, which are often in-

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22 Nordiske leveringsbetingelser.

23 With the exception of CISG Part II: see supra, General Introduction and Information.

24 Because the NL provides for dispute settlement by arbitration, it is not possible to provide "case law" documentation, but it widely recognized that the NL provision which dictates the application of the law of the Vendor's country is properly interpreted as a reference to the CISG rules (though with the exception of the rules in Part II and inter-Scandinavian sales: see supra, General Introduction and Information).

cluded in the case reports), there is no evidence that Danish practicing lawyers tend to refer to more case law in CISG related cases than in purely domestic disputes. Nor is there any evidence that Danish practicing lawyers tend to refer more to the opinions of commentators in CISG cases than in purely domestic disputes, i.e., they do not tend to cite more foreign legal writing and case law, etc.[25]

The "negative" character of these observations might provide some indirect (circumstantial) evidence that Danish practitioners are reluctant to respect the CISG Article 7 mandate (to interpret the CISG in light of its international character and the need to promote uniformity in its application). However, as indicated below, it would seem that other factors are also influential in this context, including the role generally played by "precedent" in Danish law.[26]

### 3. Corroboration of domestic results

There is no evidence that practicing lawyers use CISG solutions in purely domestic disputes to corroborate the results they want to reach.

## II. CISG's impact on scholars

### 1. Attention, groups, impact, comparisons

Danish scholars have devoted considerable attention to the CISG, both before and after its coming into force. A search of academic writing published (in Danish) in the literary segment of the Danish Law Reports (*Ugeskrift for Retsvæsen*) during the period 1982-2008 reveals that the CISG has been the main (or a subsidiary) subject in at least 80 scholarly articles.[27]

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[25] Although international sales cases have been reported where Danish practitioners have cited only domestic sources and cases, these would seem to represent isolated instances.

[26] See section III infra. Re. Article 7(1) see generally *Lookofsky*, supra note 1, §§ 2.8 and 2.9; see also *Ferrari*, Have the Dragons of Uniform Sales Law Been Tamed? Ruminations on the CISG's Autonomous Interpretation by Courts, in: Andersen/Schroeter (eds.), Sharing International Commercial Law across National Boundries, 2008, p. 134 et seq.

[27] See, e.g., *Lando & Nielsen*: EU-kommissionens forslag til lovvalgsregler for kontrakter, UfR, 2007, p. 1; *Lando*: Obligationsretlige loves sprog og struktur, UfR, 2006, p. 239; *Rostock-Jensen*: Mellemhandlerens hæftelse for produktskade, UfR, 2006, p. 211; *Berg*: Ansvarsgrundlaget for den negative kontraktsinteresse – kan den negative kontraktsinteresse tilkendes på objektivt grundlag ved

As indicated by the variety of topics addressed in this collection of articles, it does not seem possible to identify a specific group of Danish (commercial law) scholars that more than any other one has focused its attention on the CISG.

In devoting their attention to the CISG, some Danish scholars have mainly focused on the CISG itself, whereas others have compared the CISG with Danish domestic law. Where such comparisons have taken place, the intent has usually been to compare the content and potential impact of the particular international and domestic rules concerned, so as to emphasise relevant similarities as well as differences.

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ophævelse af køb?, UfR, 2005, p. 173; *Lookofsky*: Hensynet til fremmed retspraksis ved fortolkning af CISG, UfR, 2005, p. 45; *Langsted & Ulfbeck*: Erstatningsretlige grænseområder – Professionsansvar og produktansvar, UfR, 2004, p. 207; *Frost*: Tilbud og opfordringer i elektronisk handel, UfR, 2003, p. 359; *Ulfbeck*: Totalharmonisering af produktansvaret – Køberetlige regler som alternativ til mellemhandlerhæftelsen?, UfR, 2003, p. 1; *Frost*: Ret og pligt til afhjælpning, UfR, 2002, p. 384; *Bang-Pedersen*: Mere om transport i tilgodehavender fra eksport, UfR, 2002, p. 140; *Fogt*: Rettidig reklamation og ophævelse af købeaftale efter CISG (VLD 10.11.1999, 9. afdeling, B 2919-98 utrykt), UfR, 2002, p. 129; *Hertz & Lookofsky*: CISG og værneting i UfR 2001.1039 H, UfR, 2001, p. 558; *Lavesen & Nørtved*: Renvoi, UfR, 2001, p. 553; *Hagstrøm*: Nordisk Obligationsrett, UfR, 2001, p. 349; *Krenchel*: Om retsfortabende passivitet, UfR, 2000, p. 180; *Hedetoft, Gammelgaard*: Incoterms 2000, UfR, 2000, p. 150; *Hertz*: Bruxelles-konventionens artikel 5, nr. 1, UfR, 1999, p. 533; *Møgelvang-Hansen & Lookofsky*: En ny dansk indenlandsk købelov: KBL III?, UfR, 1999, p. 240; *Hertz & Lookofsky*: CISG del II og værneting i UfR 1998.1092 ØLK, UfR, 1999, p. 6; *Lookofsky*: Om forvaring, værneting & "Surprising standard terms", UfR, 1998, p. 495; *Lando*: Billighed og redelighedsom retlig standard, UfR, 1998, p. 413; *Lookofsky*: Formuerettens harmonisering: Towards a European Civil Code, UfR, 1997, p. 251; *Hertz*: Danske domstoles anvendelse af Bruxelles-konventionens kompetenceregler, UfR, 1997, p. 43; *Lookofsky*: At fremme en ensartet anvendelse af CISG De første 100 afgørelser om den internationale købelov, UfR, 1996, p. 139; *Lookofsky*: Kontraktsværneting ved betalingsstedet: UfR 93.802 og Custom Made, UfR, 1994, p. 428; *Iversen*: Nye ICC-regler om remburs, UfR, 1993, p. 464; *Lookofsky*: Om værneting og lovvalg ved køb – yderligere kommentarer til en international privatretlig dom, UfR, 1993, p. 308; *Adamsen*: Supplerende bemærkninger om forholdsmæssigt afslag i entrepriseretten, UfR, 1992, p. 473; *Lookofsky*: KBL II og indirekte tab, UfR, 1989, p. 239; *Lando*: Kampen om formularen, UfR, 1988, p. 1; *Andersen*: Edb-leverandørens ansvar for ophavsretligt begrundede retsmangler, UfR, 1987, p. 121; *Lando*: Lex mercatoria i international handelsvoldgift, UfR, 1985, p. 1; *Kruse*: En ny international og en ny nordisk købelov, UfR, 1984, p. 25; *Lookofsky*: Om det Internationale Kontraktsansvarsgrundlag, UfR, 1982, p. 277.

### 2. Scholarly reference

In several significant contexts, Danish domestic law treatises have been affected by the coming into force of the CISG, in that references to the CISG can be found in many Danish language works on Danish domestic contract and/or sales law.[28] This indicates one significant way in which Danish scholars – most prominently scholars working within such fields of contract law, sales law and private international law – have helped to promote awareness of the CISG.

### 3. Scholarly impact

While is would be difficult to assess the overall impact which scholarly writing devoted to the CISG had in Denmark, it is clear that such writing has increased CISG-awareness.

This is, for example, true as regards the impact of Danish scholarly writing on Danish legal practice, in that Danish practitioners regularly cite scholarly works (primarily Danish language works) to support their arguments in court.

The significant impact of CISG scholarly writing on Danish legal education has already been noted.[29]

### 4. Interpretation of uniform instruments

There seem to have been few instances, if any, where Danish scholars have used interpretations of the CISG to interpret other uniform law instruments.

## III. CISG's impact on courts

### 1. Style of decisions

The coming into force of the CISG has not (yet) had any significant impact on the style of Danish court decisions, neither as regards citations to scholarly writing, nor as regards the citation of case law.

It has, for example, not been possible to find an increased number of references to scholarly writing in the CISG decisions rendered by Danish

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[28] See, e.g., *Andersen & Lookofsky*, Lærebog i obligationsret (Teaching Manual on the Law of Obligations) Vol. 1, 2005. See also *Lookofsky & Ulfbeck*, Køb: Dansk indenlandsk købsret (Danish Domestic Sales Law), 2008.

[29] See supra, part I(1)(a).

courts; nor would anyone familiar with the traditional style of Danish judicial decisions expect that to be the case.

The Danish Supreme Court, for example, limits its own references to both (Danish) scholarly writing and prior (Danish) case law to the inclusion of an occasional (single) footnote, attached to the (unofficial) "head note" of the decision in question, which briefly lists the scholarly sources and prior cases to which the Court has found occasion to refer, though *not* necessarily "follow".

Although it is generally recognized that Danish courts often take prior decisions (case law) into account, such prior decisions are very rarely included (expressly mentioned) as part of the *ratio* of the subsequent decision as such.

It should be emphasized in this connection that the Scandinavian family of legal systems, to which Denmark belongs, constitutes a separate category (family), conceptually distinct from both Civil and Common law.[30] Furthermore, since the judgments rendered by Danish courts differ significantly, both in style and substance, from those rendered in the other Scandinavian jurisdictions, the limited impact of foreign CISG case law in this connection seems in large measure attributable to the limited role of "precedent" in Danish law in general.

According to Danish legal philosophy and long-standing tradition, the main task of a Danish court asked to resolve a given (CISG-related or other) controversy is simply to resolve the concrete dispute which has been brought before it (i.e., to decide who wins, whether damages claimed by the plaintiff should be awarded, etc.). In some circumstances, the judgment-rendering court's decision might also be said to set a "precedent," although the prior decisions of Danish courts are never regarded as "binding" in the Common law sense.[31]

Moreover, since a Danish court's main task is to achieve a reasonable outcome (decide who should win, how much etc.), and not to create a (non-binding) precedent, the *ratio* of that Danish decision will usually be formulated in the very *briefest* of terms.

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[30] See *Tamm,* The Danes and their Legal Heritage, in: Dahl/Melchior/Tamm (eds.), Danish Law in a European Perspective, 2002, p. 43 (adjusting the view of René David who counted Nordic law as a Civil law). Accord: *Lookofsky*, The CISG's Impact on Legislators, in: Ferrari (ed.), The 1980 Uniform Sales Law – Old Issues Revisited in the Light of New Experience, 2003.

[31] See *Tamm*, id., p. 57.

For these reasons, the basis and significance of any given Danish decision is often difficult to determine, even for academics, thus reducing the likelihood that it will subsequently be cited as a precedent.[32]

The general reluctance of Danish courts to cite (even) Danish "precedents" surely contributes to the apparent reluctance of Danish courts to cite foreign CISG decisions which might otherwise be regarded as persuasive (non-binding) CISG precedents.

It does, on the other hand, seem likely that these long-established traditions will change, albeit slowly, with the passage of time. This seems especially likely in the CISG context as young Danish advocates, trained in the CISG and aware of significant CISG foreign case law,[33] begin to cite these (non-binding) precedents as part of their written and oral arguments before Danish courts.

## 2. Uniformity of interpretation

Since references to domestic "precedents" are rarely included as part of the ratio of Danish court decisions,[34] it hardly seems surprising that Danish courts have not (overtly) indicated any inclination to cite foreign CISG case law, even though the absence of such citations might seem to evidence insufficient regard for the international character of the Convention and the need to promote uniformity in its application.

To compound the problem, Danish courts, following long-established judicial tradition, sometimes even omit express references to relevant (Danish) statutory rules. But when a Danish court, following the same Danish tradition, omits references to (obviously) relevant CISG treaty provisions, this too might be taken as evidence of a "homeward trend."

In a CISG case decided in 2002 by the Danish Maritime & Commercial Court,[35] a middleman/seller (S) in Denmark first offered "Whole Round" mackerel to middleman/buyer (B) in Germany. In subsequent telefax communications, however, S specified the goods using certain Latin designations. On the basis of these descriptions, and given the fact that these parties, in accordance with the custom of fish merchants generally, had previously traded fish using Latin designations, the Court held that B could not deny that the subject matter of the contract was mackerel of the precise kind

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[32] See *Lookofsky*, Precedent and the Law in Denmark, in: Hondius (ed.), Precedent and the Law, 2007, also available at http://cisgw3.law.pace.edu/cisg/biblio/lookofsky15.html.

[33] Regarding the CISG as part of modern Danish legal education, see part I(a) of this report.

[34] See supra, part III(1).

[35] Available at http://cisgw3.law.pace.edu/cases/020131d1.html.

specified, notwithstanding the fact the subsequent order confirmation and invoice sent by both S described the goods as "Whole Round mackerel" (without the Latin or German specifications, which B during the trial claimed not to understand). Although the opinion of the Court does not indicate which rules or precedents provided the basis for its decision on this particular point, the relevant CISG provisions (Articles 8, 9 and 35) clearly seem to support the holding.[36] It should also be emphasized that the portion of the court's opinion which relates to the (un)timeliness of the buyer's notice of non-conformity directly refers to the relevant CISG rules, just as the seller's arguments (included as a separate part of the published opinion) also refer to relevant CISG case law.[37]

A subsequent CISG decision, rendered by the Danish Supreme Court in 2008,[38] provides another relevant example. In this case a Danish seller of Japanese motorcycles (S) claimed 3.9 million DKR in damages from a defaulting German buyer (B), corresponding to the difference between the contract price and the price obtained by S in a subsequent cover sale, plus interest thereon calculated from the resale date. Whereas the High Court (first instance) found S entitled to its full claim, the Supreme Court (majority) modified that decision, holding that S failed to re-sell the motorcycles at a sufficiently high (reasonable) price, and that S was entitled only to interest calculated as of the commencement of the action;[39] for these reasons, the Supreme Court awarded S a combined "discretionary" sum of 2 million DKR. Neither decision (*ratio*) contains any express reference to CISG provisions relevant for the calculation of damages, but it seems clear that both instances, in accordance with the positions expressed in the parties' arguments, took CISG Articles 74, 75 and 77 into account. As regards the calculation of interest, however, the Supreme Court's omission of any reference to CISG Article 78 or to foreign CISG precedent (or to Danish domestic law or precedents for that matter) makes it difficult to determine the basis for its decision not to follow the High Court on that particular point, especially since the Supreme Court's decision on interest accords with the usual calculation of interest under Danish domestic (statutory) law.

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[36] See the note by *Lookofsky* at http://cisgw3.law.pace.edu/cases/020131d1.html#cn. See also *Lookofsky*, CISG Case Law in Scandinavia, in: Ferrari (ed.) Quo Vadis CISG? Celebrating the 25th Anniversary of the United Nations Convention on Contracts for the International Sale of Goods, 2005, p. 193 et seq.

[37] See the abstract by C. *Andersen* at http://cisgw3.law.pace.edu/cases/020131d1.html#ca.

[38] See Ugeskrift for Retsvæsen (2008) 181 H (Danish Supreme Court).

[39] For scholarly opinion and precedents supporting this calculation of interest under CISG Article 78, see *Lookofsky*, supra n. 1, §§ 6.18 and 6.31.

### 3. Corroboration of domestic solutions

There do not appear to have been any reported instances where Danish courts have used the CISG in relation to contracts not covered by its sphere of application.

### 4. Interpretation of other uniform instruments

There do not appear to have been instances where Danish courts have relied on interpretations of the CISG to interpret other uniform law instruments.

## IV. CISG's impact on legislators

### 1. Law reform discussion

The CISG has most certainly influenced the discussion on law reform in Denmark. To account for this influence, however, one must consider this topic within the larger Scandinavian context.

The Scandinavian countries have long shared much common legal culture. Among other things, our shared values formed the basis of the model law cooperation which led to the enactment of the original, essentially uniform Sales Acts, although it must be remembered that each sovereign State within the Scandinavian region retains the right to exercise a legislative mind of its own.

After the adoption of the CISG in 1980, a joint Working Group was established by the Scandinavian Ministers of Justice. This Group was assigned two related tasks: (a) to make a recommendation as to the ratification of the Vienna Convention and (b) to prepare proposals for new domestic Sales of Goods Acts. As regards proposals for new domestic legislation, the drafts not only paid considerable attention to the Vienna Convention text; they also included proposals for a new system of "liability differentiation" (which has no counterpart whatsoever in the CISG liability regime).

In 1987 the Finnish Parliament adopted the (first Finnish) Sale of Goods Act. In 1988 Norway followed Finland's lead,[40] as did Sweden (in 1990).

In Denmark, however, commentators were highly critical of the results achieved by its three northern neighbors, and this scholarly critique was focused on the new (Finnish/Norwegian/Swedish) "liability differentiation" scheme.

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[40] The Norwegian version of the act assumed a highly controversial form. See *Hagstrøm*, CISG – Implementation in Norway, an Approach Not Advisable, in: Internationales Handelsrecht, 2006, p. 246 et seq.

For this and other reasons, the Danish Government made no attempt to enact a new Danish Sales Act patterned on the new Scandinavian model.[41]

In 1999 two Danish scholars set forth a different model for Danish domestic Sales Act reform. This proposal advocates the retention of numerous (still viable) portions of the original Sales Act (of 1906), but it also advocates that several of the Act's original provisions be replaced with more modern CISG-inspired improvements.[42]

## 2. Law reform in practice

So far, the CISG has not led to law reform in Denmark, at least not to (significant) direct reform of the Danish Sales Act (*Købeloven*).[43]

It should, however, be emphasized that the CISG has "indirectly" affected domestic contract and sales law in Denmark, in that Denmark has implemented the EU Directives on Unfair Contract Terms and Consumer Guarantees, both of which contain provisions which were clearly inspired by the CISG.[44]

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41 The fact that most Danish merchants (and their organizations) seem quite content with the Sales Act as it stands also tends to maintain the status quo. The work-load in the Danish Ministry of Justice created by the need to implement the steady tide of new EU-legislation has also been cited as an impediment to Sales Act revision in Denmark.

42 See *Lookofsky & Møgelvang-Hansen*, En ny dansk indenlandsk købelov: KBL III?, in: Ugeskrift for Retsvæsen (B), 1999, p. 240 et seq.

43 The Danish CISG ratification did, however, lead to a minor revision of § 1 of the Danish (domestic) Sales Act (Købeloven of 1906), so as to indicate that international sales are now subject to the CISG.

44 See, e.g., *Henschel*, Creation of Rules in National and International Business Law: A Non-National, Analytical-Synthetic Comparative Method, in: Andersen/Schroeter (eds.), Sharing International Commercial Law across National Boundries, 2008, p. 189 et seq.

# France

*Claude Witz*

## I. Introduction

La Convention de Vienne est en viguseur en France depuis le 1er janvier 1988. La France fait ainsi partie du groupe des dix premiers Etats dont la ratification, l'acceptation, l'approbation ou l'adhésion étaient requis pour que la Convention de Vienne puisse entrer en vigueur, selon l'article 99, alinéa 1er de la Convention.[1] Dans les premiers mois et années qui ont suivi l'entrée en vigueur de la Convention en France, une série d'articles,[2] d'ouvrages[3] et d'actes de colloques[4] n'ont pas manqué d'attirer l'attention des

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1 V. loi n°82-482 du 10 janv. 1982, décret n°87-1034 du 22 déc. 1987, D. 1988, p. 30.

2 V. notamment *Christian Mouly*, « Que change la Convention de Vienne sur la vente internationale par rapport au droit français interne ? », D. 1991, chr., p. 77 et s.

3 *Bernard Audit*, La vente internationale de marchandises – Convention des Nations Unies du 11 avril 1980, LGDJ 1990, Collection Droit des Affaires; *Vincent Heuzé*, La vente internationale de marchandises, Ed. GLN Joly 1992; *Karl H. Neumayer* et *Catherine Ming*, Convention de Vienne sur les contrats de vente internationale de marchandises, Commentaire, édité par *François Dessemontet*, Cedidac, Lausanne, 1993, diffusé en France par Litec; pour les publications ultérieures: *Claude Witz*, Les premières applications jurisprudentielles du droit uniforme de la vente internationale, LGDJ 1995; *Vincent Heuzé*, La vente internationale de marchandises, Droit uniforme, *in* Traité des contrats (*Jacques Ghestin*, dir.), LGDJ 2000, *Franco Ferrari*, Contrat de vente internationale, (1ère éd.), Bâle/Bruxelles, Helbing&Lichtenhahn/Bruylant 1999; du même auteur, Contrat de vente internationale, Applicabilité et applications de la Convention de Vienne sur les contrats de vente internationale de marchandises, (2ème éd.), Bâle/Bruxelles/Paris, Helbing&Lichtenhahn/Bruylant/Forum Européen de la Communication 2005; *Peter Schlechtriem* et *Claude Witz*, Convention de Vienne sur les contrats de vente internationale de marchandises, Dalloz 2008.

4 V. *Yves Derains* et *Jacques Ghestin* (dir.), La Convention de Vienne sur la vente internationale et les incoterms, actes du colloque des 1er et 2 déc. 1989, LGDJ 1990; *Claude Witz* (dir.), L'application de la Convention de Vienne sur la vente internationale de marchandises: premier bilan, Paris, 13 oct. 1995 (non publié); colloque CCI et Feduci, « 25 ans de pratique de la Convention de Vienne: bilan et perspectives », Paris, 20 juin 2005 (non publié).

juristes sur le nouvel instrument. Tout praticien qui suit l'actualité juridique a nécessairement été informé de l'entrée en vigueur de la Convention.[5] Tout étudiant en droit, ayant suivi une formation complète universitaire,[6] connaît l'existence de la Convention ainsi que les grands traits de son contenu. Depuis l'entrée en vigueur de la Convention, des colloques et séminaires ont lieu, à intervalles réguliers, même si leur nombre est relativement limité.[7]

## II. L'impact de la Convention de Vienne sur les avocats

1. Tout avocat consciencieux connaît l'existence de la Convention de Vienne. Les articles de doctrine et les décisions de jurisprudence commentées par des universitaires ou des praticiens ont nécessairement attiré l'attention des avocats sur l'application de la Convention en France. Il est difficile de mesurer l'impact qu'ont pu avoir ces informations sur la rédaction des conditions générales de contrat. Dans les grandes entreprises, ce sont les

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5 Des articles d'information ont été publiés non seulement dans des revues spécialisées, mais également dans des revues généralistes; parmi les articles parus dans des revues spécialisées, V. *Michael Joachim Bonell*, « La nouvelle Convention des Nations Unies sur les contrats de vente internationale de marchandises », Droit et pratique du commerce international, 1981, p. 7-35; *Philippe Kahn*, « La Convention de Vienne du 11 avril 1980 sur les contrats de vente internationale de marchandises », RID comp. 1981, p. 951-986; *Jean-Pierre Plantard*, « Un nouveau droit uniforme de la vente internationale de marchandises », JDI 1988, p. 311-377; parmi les articles parus dans des revues généralistes: *Christian Mouly*, « Que change la Convention de Vienne sur la vente internationale par rapport au droit français interne ? », D. 1991, chr., p. 77 et s.

6 Selon une spécificité française, des passerelles et équivalences sont possibles à stade avancé des études, ce qui permet à des étudiants d'autres filières (notamment des instituts de sciences politiques et des écoles de commerce) d'intégrer les facultés de droit ou de se présenter aux examens pour entrer au Barreau ou dans la magistrature. Il est à craindre que ces étudiants connaissent peu la Convention de Vienne, d'autant que les épreuves à l'examen d'entrée dans les écoles professionnelles d'avocats et à celui de l'ENM (Ecole Nationale de la Magistrature) privilégient les épreuves de culture générale et de synthèse, sans prévoir d'épreuves particulières en droit international privé (conflits de lois et droit uniforme) et en droit interne des contrats spéciaux; pour un examen critique de ces formations incomplètes, v. *Patrick Maistre du Chambon*, « Le service public de l'enseignement du droit et les facultés de droit », D. 2006, p. 172.

7 V. *supra*, note 4.

juristes d'entreprise eux-mêmes, et non les avocats,[8] qui préparent les conditions générales de vente ou d'achat. Les petites et moyennes entreprises ont certainement le réflexe, en l'absence d'un service juridique propre, de suivre les conditions générales préparées par les organisations professionnelles des différents secteurs d'activités industrielles ou commerciales. A ce jour, il n'existe pas en France d'études qui permettent d'évaluer dans quelle mesure les conditions générales, qu'elles soient faites sur mesure par les entreprises ou préconisées par les organisations professionnelles, mettent à l'écart la Convention de Vienne.

2. La réponse à la question de savoir dans quelle mesure les avocats tiennent compte, pour l'interprétation de la Convention, « de son caractère international et de la nécessité de promouvoir l'uniformité de son application » (art. 7, al. 1er), dépend, à notre avis, de la taille ou du profil des cabinets d'avocats. Il est certain que les grands cabinets d'avocats établis à Paris et dans les grandes villes de province ont le réflexe de se référer tant à la jurisprudence qu'à la doctrine étrangères, grâce notamment aux banques de données internationales. Mais il nous a été permis de constater personnellement, à propos de plusieurs litiges, que des cabinets d'avocats, même de petite dimension, se réfèrent à la jurisprudence et à la doctrine étrangères. En ce domaine, il faut toutefois se garder de toute généralisation. Si certaines juridictions de première instance, notamment les tribunaux de commerce, voire des cours d'appel, malmènent la Convention, la responsabilité en incombe partiellement aux avocats qui ignorent la Convention ou la lisent à la lumière de leur droit national.

## III. L'impact de la Convention de Vienne sur la doctrine

1. Les universitaires n'ont pas manqué de s'intéresser à la Convention de Vienne dès avant son entrée en vigueur. Mais leurs travaux et analyses n'ont été publiés que dans des revues ou ouvrages spécialisés.[9] Il va de soi que l'entrée en vigueur de la Convention a élargi notablement le cercle des universitaires qui ont intégré la Convention de Vienne dans leur champ de recherche. Dans les premières années suivant l'entrée en vigueur de la Convention de Vienne, ce sont plutôt les spécialistes de droit international privé

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8 Contrairement à la situation d'autres pays, comme l'Allemagne, les juristes salariés d'entreprises industrielles ou commerciales ne peuvent pas être membres du Barreau et porter le titre d'avocat.

9 *Michael Joachim Bonell*, v. *supra*, note 5; *Michel Borysewicz*, « Conventions et projets de convention sur la vente internationale de marchandises », *in* Les ventes internationales de marchandises, Colloque FIEDA, Faculté de droit d'Aix-en-Provence des 7 et 8 mars 1980, Economica 1981, p. 16 et s.; *Philippe Kahn*, v. *supra*, note 5.

et de droit du commerce international qui se sont consacrés à la Convention de Vienne.[10] Au fil des ans, l'attention portée par les spécialistes du droit des contrats à la Convention de Vienne s'accroît régulièrement. L'intérêt porté par ce second groupe d'universitaires est reflété par les manuels et traités de droit français des contrats.[11] Dans le cercle des universitaires œuvrant en droit interne, par opposition à celui des internationalistes, on peut relever avec satisfaction l'intérêt croissant porté à la Convention de Vienne par ceux des spécialistes du droit des contrats qui s'attachent aux sources internationales et européennes du droit des contrats ou qui entendent fertiliser le droit des contrats par le droit comparé.[12] Une chronique d'actualité spécifiquement consacrée à la jurisprudence relative à la Convention de Vienne paraît presque chaque année dans une revue juridique généraliste et de large diffusion.[13] Les sentences arbitrales rendues sous l'égide de la Cour

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10 V. *Bernard Audit*, *op. cit.*, (note 3), *Vincent Heuzé*, *op. cit.*, (note 3); *Bernard Audit*, Répertoire de droit international Dalloz, V° Vente, Tome III, 1998, avec des mises à jour régulières; *Philippe Kahn*, « Vente commerciale internationale » J-Cl. International, Fasc. 565-A-5 (sept. 1989).

11 V. *François Collart-Dutilleul* et *Philippe Delebecque*, Contrats civils et commerciaux, 8ème éd., D. 2007; *Jérôme Huet*, Traité de droit civil – Les principaux contrats spéciaux, 2ème éd., LGDJ 2001; *Bernard Gross* et *Philippe Bihr*, Contrats: Ventes civiles et commerciales, baux d'habitation, baux commerciaux, PUF 2002.

12 V. les chroniques régulières tenues par les auteurs suivants: *Jean-Pierre Marguénaud* et *Pauline Remy-Corlay*, « Sources internationales », RTD civ.; *Marie-Laure Niboyet*, « Contentieux judiciaire international et européen », Gaz. Pal.; *Pascale Deumier* et *Dominique Bureau*, « Droit international privé des contrats », RDC; *Pierre Mousseron*, « Commerce international », Droit et patrimoine.

13 Recueil Dalloz, « Droit uniforme de la vente internationale de marchandises », somm. comm., par une équipe de recherche des Universités de la Sarre et de Strasbourg, sous la dir. de *Claude Witz*, 1997, 1998, 1999, 2000, 2002, 2003; « Droit uniforme de la vente internationale de marchandises », panorama de jurisprudence par *Claude Witz*, 2005, 2007; V. aussi les références à la jurisprudence relative à la Convention de Vienne dans la chronique régulière « Droit international privé des affaires », RDAI, tenue successivement par *Alexis Mourre* (1999-2002), puis conjointement avec *Yasmine Lahlou* (2002-2005), qui s'en occupe désormais exclusivement (2006); des commentaires de décisions jurisprudentielles françaises paraissent régulièrement dans des revues de droit international (JDI, Rev. crit. DIP) ou les revues généralistes (Recueil Dalloz, JCP). Ainsi, les arrêts de la Cour de cassation sur l'applicabilité d'office de la CVIM par les juges, tempérée par la prise en compte du comportement procédural des parties, ont été publiés, avec de nombreux commentaires, dans maintes revues: Cass. civ. 1ère, 26 juin 2001 (aff. Bureau), D. 2001, jur., p. 2591, obs. V. *Valérie Avena-Robardet*; D. 2001, jur., p. 3607, obs. *Claude Witz;* Contrats, conc., consomm., nov. 2001, p. 13, obs. *Laurent Leveneur*; RTD com. 2001, p. 1052, obs. *Jean-Michel Jacquet;*

d'arbitrage de la Chambre de commerce internationale (CCI/ICC) sont analysées dans des revues de langue française.[14] Des études ciblées sur tel ou tel aspect de la Convention de Vienne paraissent régulièrement dans des revues françaises de droit international,[15] de droit comparé,[16] ou, plus rarement, dans des revues consacrées au droit interne français[17] ou dans des ouvrages collectifs.[18]

Les universitaires s'intéressant à la Convention de Vienne sans faire partie du groupe des internationalistes, par leurs travaux et enseignements, pré-

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Rev. crit. DIP 2001, p. 93, obs. *Horatia Muir Watt*; Petites Affiches 2002, n°29, p. 17, obs. *Alexandre Malan*; Cass. civ. 1ère, 25 oct. 2005: Bull. civ. 2005, I, n°381; Rev. Lamy Droit civil 2005, n°22, p. 8, obs. *Cécile Le Gallou*; RDC 2006, n°2, p. 515 et s., obs. *Pascale Deumier;* D. 2005, AJ, p. 2872, obs. *Eric Chevrier*; Rev. crit. DIP 2006, p. 373 et s., note *Dominique Bureau;* RTD com. 2006, p. 249, obs. *Philippe Delebecque*; *ibid*. p. 468, obs. *Bernard Bouloc*; RTD civ. 2006, p. 268 et s., obs. *Pauline Remy-Corlay*; Droit et patrimoine, déc. 2006, p. 74 et s., spéc. p. 78 et s., obs. *Marie-Élodie Ancel;* D. 2007, pan., Droit uniforme de la vente internationale de marchandises, p. 530 et s., spéc. 532 et 539, obs. *Claude Witz*. Par ailleurs, une banque de données est spécifiquement consacrée à la jurisprudence française: http://www.cisg-france.org

14 V. JDI (Clunet), Chronique de jurisprudence des sentences de la CCI; v. divers articles relatifs à la Convention de Vienne parus au Bulletin de la Cour Internationale d'Arbitrage de la CCI.

15 V. par ex., dans les revues suivantes, **1)** Clunet (JDI): *Franco Ferrari*, « La Convention de Vienne sur la vente internationale et le droit international privé », JDI 2006, p. 27 et s.; *Nadine Watté* et *Arnaud Nuyts*, « Le champ d'application de la Convention de Vienne sur la vente internationale, La théorie à l'épreuve de la pratique », JDI 2003, p. 365 et s.; *Claude Witz*, « Les vingt-cinq ans de la Convention des Nations Unies sur les contrats de vente internationale de marchandises, Bilan et perspectives », JDI 2006, p. 5 et s. **2)** RDAI: *Franco Ferrari*, « La charge de la preuve dans la Convention des Nations Unies sur le contrat de vente internationale de marchandises (CVIM) », RDAI 2000, p. 665 et s.

16 V. par ex., Revue internationale de droit comparé: *Eid Rawach*, « La validité des clauses exonératoires de responsabilité et la Convention de Vienne sur la vente internationale de marchandise », RID comp. 2001, p. 141 et s.

17 V. par ex., *Karim Missaoui*, « La validité des clauses aménageant la garantie des vices cachés dans la vente internationale de marchandises », JCP 1996, I, 3927; *Anne Cytermann-Sinay*, « L'application d'office de la Convention de Vienne relative à la vente internationale de marchandises et le respect du principe du contradictoire », Gaz. Pal. 2003, 1, p. 234 et s.

18 V. par ex., *Jean-Michel Jacquet*, « Le droit de la vente internationale de marchandises: le mélange des sources » *in* Souveraineté étatique et marchés internationaux à la fin du 20ème siècle, Mélanges en l'honneur de *Philippe Kahn*, Litec 2000, p. 75 et s.

sentent, bien évidemment, la Convention de Vienne en opérant des rapprochements plus ou moins étroits avec le droit interne. Cette comparaison, destinée à des lecteurs français, a lieu à des fins pédagogiques. Dans l'ensemble, l'appréciation portée dans les ouvrages, qu'il s'agisse d'ouvrages de droit interne ou d'ouvrages de droit du commerce international ou encore de commentaires dans les encyclopédies juridiques, est favorable. Ces écrits ont un objectif principalement didactique. On ne saurait donc s'attendre à ce qu'ils contiennent des plaidoyers en faveur d'une réforme du droit interne de la vente ou une interprétation jurisprudentielle du droit interne influencée par la Convention de Vienne.

2. La très grande majorité des ouvrages de droit interne des contrats spéciaux traite de la Convention de Vienne dans ses grandes lignes. Une particularité éditoriale française est la publication annuelle de codes accompagnés, sous les articles respectifs, par des résumés de jurisprudence. Les éditions Dalloz et Litec jouent à cet égard un rôle de premier plan. Généralement, ces codes contiennent en annexe des textes de loi ou des conventions internationales ayant un rapport avec la matière traitée par ces codes. C'est ainsi que la maison d'édition Dalloz reproduit dans son Code de commerce la Convention de Vienne et, sous chaque article, sont résumées des décisions jurisprudentielles françaises, mais aussi étrangères. Concernant ces dernières, il s'agit presque exclusivement de celles qui ont fait l'objet d'une analyse par la doctrine française.[19]

Les répertoires faisant l'objet de mises à jour régulières contiennent des commentaires de la Convention de Vienne. Il s'agit avant tout de répertoires de droit international.[20] La présentation qui en est faite est synthétique, en un nombre limité de pages, et apparaît nettement plus succincte que celle que l'on trouve par exemple en Allemagne. Ces présentations synthétiques ont pour trait principal de présenter les grands axes de la réglementation sans vouloir entrer dans les détails et dans toutes les difficultés de mise en œuvre des différentes normes. De même, ces répertoires n'entendent pas offrir un large panorama de la jurisprudence.

Par ailleurs, les monographies sous forme de commentaires de textes de lois article par article sont largement étrangères à la tradition éditoriale française.[21] Il existe toutefois, en langue française, un commentaire article par

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[19] Il s'agit pour l'essentiel de décisions parues dans la chronique annuelle de jurisprudence relative à la Convention de Vienne au Dalloz.

[20] Jurisclasseur de droit international et Répertoire de droit international Dalloz, V. *supra,* note 10. V. aussi, Lamy Contrats Internationaux, dirigé par *Henry Lesguillons* et *Lionel Costes*; Dictionnaire Joly, Pratique des contrats internationaux Joly, *Vincent Heuzé*, Rédacteur en chef.

[21] V. toutefois *Vlad Constantinesco*, *Robert Kovar*, *Denys Simon*, Traité sur l'Union européenne, Economica 1995.

article de la Convention de Vienne.[22] Celui-ci, datant de 1993, n'a pas été réédité.

Il nous semble que suffisamment d'efforts sont déployés par la doctrine française pour attirer l'attention des juristes français sur l'existence de la Convention de Vienne et les informer des grands axes de la réglementation. Il est peut-être permis de regretter qu'il n'y ait pas davantage d'articles d'approfondissement des difficultés d'application de la Convention de Vienne. On peut aussi regretter que, lors des réformes de droit interne, les solutions de la Convention de Vienne n'aient pas été suffisamment prises en compte.[23] Trop rares aussi sont les thèses de doctorat consacrées à la Convention de Vienne.[24]

3. Grâce à la doctrine, tout juriste consciencieux connaît plus ou moins l'existence de la Convention de Vienne. Les avocats ne manquent pas de se référer, dans leurs mémoires et plaidoiries, aux écrits de la doctrine. Grâce à la doctrine, les avocats prennent aussi le réflexe de citer à l'appui les décisions jurisprudentielles étrangères. Les étudiants des facultés de droit connaissent bien l'existence et certaines des difficultés d'application de la Convention. Ainsi, tout étudiant français connaît la célèbre controverse liée aux articles 14 et 55 de la Convention de Vienne.

Mais il ne conviendrait pas d'en déduire que tout juge connaît nécessairement la Convention de Vienne. La plupart des décisions de première instance émanent, en ce domaine, des tribunaux de commerce dont la particularité est d'être composés exclusivement de juges consulaires. Sauf dans les grandes villes, les juges consulaires n'ont souvent qu'une formation juridique incomplète. Il n'est dès lors pas surprenant qu'un certain nombre de décisions de première instance soient décevantes car elles ignorent la Convention de Vienne ou la malmènent. Un constat comparable peut être dressé à propos de quelques arrêts de cours d'appel. Toutefois, la qualité des décisions s'améliore au fil des ans.

4. Des hypothèses dans lesquelles des auteurs prennent appui sur la Convention de Vienne pour interpréter d'autres instruments de droit uni-

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22 Convention de Vienne sur les contrats de vente internationale de marchandises, Commentaire, *Karl H. Neumayer* et *Catherine Ming*, CEDIDAC, Lausanne 1993, diffusion en France, Litec 1993.

23 V. *infra*, V.

24 V. *Eddy Mazerolles*, Les apports de la Convention de Vienne au droit interne de la vente, thèse Poitiers, LGDJ 2003, n°175. *Iacyr de Aguilar Vieira*, La Convention des Nations Unies sur les contrats de vente internationale de marchandises et son applicabilité au Brésil, thèse Strasbourg, 2003; V. aussi des thèses au champ d'investigation plus large, la Convention de Vienne étant toutefois au coeur des développements: *Marie-Camille Pitton*, Le rôle du jugement étranger dans l'interprétation du droit conventionnel uniforme, Paris I, 2007; *Guillaume Weiszberg*, Le « raisonnable » en droit du commerce international, Paris II, 2003.

forme, ne nous sont pas connues. En revanche, la doctrine n'hésite pas, pour éclairer les Principes du droit européen du contrat, à se référer aux solutions de la Convention de Vienne.[25]

## IV. L'impact de la Convention de Vienne sur la jurisprudence

1. Quelques observations sur le style judiciaire français s'imposent liminairement. Même si le droit français est l'un des piliers de la famille des pays de tradition civiliste, le style judiciaire français n'emprunte nullement les traits communs à un grand nombre de systèmes juridiques de cette famille. Ainsi, la Cour de cassation ne cite jamais d'opinion doctrinale. En dépit de l'influence traditionnelle de la doctrine française sur l'interprétation des normes légales, les juges du fond s'abstiennent généralement de citer les auteurs. Tel est même le cas lorsque les juges reprennent presque mot à mot des affirmations doctrinales.[26] Ainsi, le style judiciaire français s'oppose radicalement au style judiciaire allemand ou suisse. Pas davantage, les juges ne se réfèrent à la jurisprudence existante pour appuyer leurs solutions ou pour mieux marquer un revirement de jurisprudence. Les juges de première ou de deuxième instance ne citent généralement pas la jurisprudence de la Cour de cassation, même s'ils entendent le plus souvent la suivre fidèlement. La Haute cour ne se réfère jamais à ses arrêts antérieurs. La doctrine française est ainsi amenée à jouer un rôle de premier plan pour éclairer les solutions jurisprudentielles et notamment pour dégager la portée de la décision: s'agit-il d'une solution traditionnelle ou d'un revirement de jurisprudence ? Pour les questions nouvelles, la doctrine ne manque pas de mettre en relief les considérations qui ont pu amener les juges à prendre telle ou telle position.

Chaque pays est, bien sûr, libre d'adopter le style judiciaire qui lui convient. Toutefois, il est légitime de se demander si les engagements internationaux de la France ne doivent pas, le cas échéant, inciter les juges à infléchir leur style traditionnel. Cette question mérite tout particulièrement d'être soulevée à propos de la Convention de Vienne. Selon l'article 7, alinéa 1er, pour l'interprétation de la Convention, « il sera tenu compte de son caractère international et de la nécessité de promouvoir l'uniformité de son application ». On peut déplorer que cette consigne n'ait eu aucune influence sur le style judiciaire français. En mettant en œuvre la Convention de

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[25] V. notamment *Pauline Remy-Corlay* et *Dominique Fenouillet* (dir.), Les concepts contractuels français à l'heure des Principes du droit européen des contrats, D. 2003, collection Thèmes et commentaires; *Catherine Prieto* (dir.), Regards croisés sur les principes du droit européen du contrat et sur le droit français, Presses Universitaires d'Aix-Marseille 2005.

[26] V. CA Versailles, 7 janv. 1987, D. 1987, p. 485; RTD civ. 1987, p. 741, obs. *Jacques Mestre*.

Vienne, les juridictions françaises sont restées fidèles à leur style judiciaire. Elles n'ont entrepris aucun effort particulier pour faciliter la compréhension de leurs décisions par les juristes étrangers, et notamment par les juges étrangers soucieux de prendre en compte la jurisprudence française dans le cadre de la mise en œuvre du précepte posé par l'article 7, alinéa 1er. Inversement, les juges français ne citent pour ainsi dire jamais des décisions judiciaires étrangères, au soutien de leurs décisions. On ne peut guère que citer la Cour d'appel de Grenoble.[27] Les juges français ne semblent pas avoir pris conscience de leur appartenance à une « communauté judiciaire à l'échelle internationale » dont le bon fonctionnement impliquerait un style judiciaire renouvelé.

2. L'image de la jurisprudence française est contrastée. A côté des décisions jurisprudentielles appliquant correctement la Convention, un certain nombre malmènent la Convention. Le plus souvent, ces applications contestables résultent de ce que les juges lisent la Convention avec leurs « lunettes de juristes nationaux »: ils n'ont pas suffisamment fait d'efforts pour s'abstraire de leur droit national et appliquer la Convention avec un regard neuf. Il est ainsi possible d'évoquer un « *homeward trend* », sans pour autant que celui-ci soit conscient. Ces mauvaises applications peuvent être surtout relevées dans les premières années de mise en œuvre de la Convention.[28] Toutefois, le niveau des arrêts français s'améliore au fil des ans.[29]

On peut regretter que la Cour de cassation ne fasse pas d'effort particulier pour démarquer les solutions issues de la Convention de Vienne de celles du droit interne. Ainsi, elle n'a pas hésité à utiliser une formule dangereuse, celle selon laquelle « le vendeur n'avait, en sa qualité de producteur, pas pu ignorer … », inspirée du droit interne.[30] Cette formule risque de donner l'impression aux juges du fond que le vendeur doit être traité, sous l'empire de la Convention de Vienne, comme il l'est en droit interne.[31]

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27 V. CA Grenoble, 23 oct. 1996, Rev. crit. DIP, p. 756 et s., note *Anne Sinay-Cytermann*; JDI 1998, p. 125 et s., note *André Huet*.

28 V. notamment CA Chambéry, 25 mai 1993, RJ com. 1995, p. 242 et s., note *Claude Witz;* cet arrêt a été stigmatisé à une large échelle, v. notamment le *Comité consultatif de la CVIM*, avis n°4, Rapporteur: *Pilar Perales Viscasillas*, commentaire n°2.12; CA Aix-en-Provence, 21 nov. 1996, arrêt consultable sous: http://www.cisg-france.org.; sur l'arrêt aixois, v. nos obs. critiques sous Cass. civ. 1ère, 26 mai 1999, D. 2000, jur., p. 788 et s.

29 V. par ex. CA Paris, 6 nov. 2001; RTD com. 2002, p. 210, obs. *Jean-Michel Jacquet*; D. 2002, jur., p. 2795, obs. *Claude Witz*.

30 Cass. civ. 1re, 4 oct. 2005, D. 2007, pan., Droit uniforme de la vente internationale de marchandises, p. 530, spéc. p. 532 et p. 539, obs. *Claude Witz*, RTD civ. 2006, p. 272 s., obs. *Pauline Remy-Corlay*.

31 En droit interne français, le vendeur professionnel est censé irréfragablement connaître les vices cachés de la chose vendue.

3. L'influence de la Convention de Vienne sur la mise en œuvre judiciaire du droit interne est très limitée. Le seul exemple patent, que l'on puisse donner, est celui d'un arrêt de la Cour de cassation, Chambre commerciale.[32] Pour comprendre cet arrêt, il faut rappeler que le Code civil ne règlemente pas le processus de formation du contrat, présentant ainsi une « lacune béante »[33] que l'Avant-projet de réforme du droit des contrats et des obligations entend combler.[34] Pour démarquer l'offre d'une simple proposition à émettre une offre (*invitatio ad offerendum*) ou une invitation à entrer en pourparlers, la Cour de cassation s'est nettement inspirée de l'article 14 CVIM en énonçant « qu'entre commerçants, une proposition de contracter ne constitue une offre que si elle indique la volonté de son auteur d'être lié en cas d'acceptation ». Cette source d'inspiration s'éclaire d'autant mieux que la Chambre commerciale s'est prononcée à la lumière de l'avis du Conseiller Jean-Pierre Plantard, qui faisait partie de la délégation française à la Conférence diplomatique de Vienne d'avril 1980.

Une autre source potentielle d'influence de la Convention de Vienne sur le droit interne a trait à la difficile ligne de démarcation, en droit interne de la vente, entre la garantie des vices cachés et l'obligation de délivrance de choses conformes. En 1986, la Cour de cassation, (Assemblée plénière) n'avait pas hésité à absorber la garantie des vices cachés de l'acquéreur dans l'obligation générale de délivrer des biens conformes.[35] Ainsi, elle avait gommé les différences entre les deux actions, au profit de l'action la plus large et la plus favorable à l'acheteur. A partir des années 1992 et 1993, la Cour de cassation a restauré la distinction entre les deux actions.[36] L'exemple de la Convention de Vienne, qui consacre une notion unitaire, celle de la conformité, aurait pu encourager la Cour de cassation à rester fidèle à la solution adoptée en 1986. Elle ne l'a pas fait, ce qu'il est permis de regretter, car la distinction entre les deux actions en droit interne de la vente suscite un contentieux très abondant.

4. A notre connaissance, il n'existe pas d'exemple jurisprudentiel dans lequel des juges français auraient pris appui sur la Convention de Vienne pour interpréter des textes de droit uniforme.

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32 Cass. com., 6 mars 1990, JCP 1990, II, 21583, note *Bernard Gross*.

33 V. *Gérard Cornu*, « L'évolution du droit des contrats en France », 1ères Journées juridiques franco-japonaises, 4-10 oct. 1979, Journées de la Société de législation comparée 1979, RID comp., n°spéc., vol. 1, p. 446 et s.

34 V. *infra*, V, 2.

35 Cass. Ass. Plén., 7 févr. 1986, D. 1986, p. 293, obs. *Alain Bénabent*; JCP 1986, II, 20616, obs. *Philippe Malinvaud*.

36 Sur cette évolution, V. *François Collart Dutilleul* et *Philippe Delebecque*, Contrats civils et commerciaux, 8ème éd., D. 2007, n°327, p. 288 et s.

## V. L'impact de la Convention de Vienne sur le législateur

Pour mesurer l'éventuel impact de la Convention de Vienne sur le législateur français, deux réformes doivent être mises en relief.

### 1. La transposition en France de la Directive de 1999 sur certains aspects de la vente et des garanties des biens de consommation

La première réforme qu'il convient d'envisager est celle du droit de la vente, dans le cadre de la transposition de la Directive de 1999 sur certains aspects de la vente et des garanties des biens de consommation. On sait que cette Directive, en retenant le concept unitaire de conformité, a été influencée sur ce point par la Convention de Vienne. La question s'est posée de savoir, en France, ainsi que dans d'autres pays européens, s'il ne fallait pas profiter de la nécessaire transposition de la Directive en droit interne pour opérer une réforme d'ampleur du droit de la vente. Au lieu de limiter la réforme aux ventes de biens de consommation, n'eût-il pas été opportun de réformer le droit commun de la vente, en abandonnant notamment la distinction entre la garantie des vices cachés et la délivrance de choses conformes ? Le Groupe de travail qui avait été institué par le Ministère de la justice et présidé par Mme le Professeur Viney, avait préconisé une telle réforme d'ampleur et avait souhaité voir adoptée une notion unitaire, celle de la conformité, en prenant appui sur la Convention de Vienne.[37] Malheureusement, cette réforme d'ampleur n'a pas abouti, notamment sous la pression des milieux d'affaires qui craignaient que l'esprit consumériste animant la Directive ne soufflât sur l'ensemble du droit de la vente, notamment dans les relations entre professionnels.[38] Lors des débats relatifs au second projet, qui devait conduire à une réforme limitée aux ventes aux consommateurs, on a même pu faire valoir, de manière critiquable, que le concept unitaire de conformité ne manquerait pas de susciter de nouvelles difficultés, comme le révèleraient la jurisprudence relative à la Convention de Vienne ou encore le droit suisse.[39]

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[37] V. *Geneviève Viney*, « Quel domaine assigner à la loi de transposition de la directive européenne sur la vente ? », JCP 2002, I, Nr.158.

[38] V. notamment *Olivier Tournafond*, « De la transposition de la directive du 25 mai 1999 à la réforme du droit civil », D. 2002, chr., p. 2883 et s.

[39] V. *Olivier Tournafond*, « La nouvelle « garantie de conformité » des consommateurs: commentaire de l'ordonnance n°2005-136 du 17 févr. 2005, transposant en droit français la directive du 25 mai 1999 », D. 2005, chr., p. 1557 et s., spéc. p. 1558-1559.

## 2. La réforme du droit français des obligations

La seconde réforme qui mérite d'être mise en rapport avec la Convention de Vienne est encore en cours. C'est celle du droit des obligations et de la prescription. Les pouvoirs publics, relayant une initiative doctrinale, entendent réformer le Titre III du Livre troisième du Code civil, resté pour l'essentiel inchangé dans sa lettre depuis 1804. Au moment où ces lignes sont rédigées, l'Avant-projet que prépare le Ministère de la justice n'a pas encore été dévoilé. Il s'appuierait sur l'Avant-projet doctrinal émanant de la Commission présidée par le Professeur Pierre Catala.[40]

L'impact de la Convention de Vienne sur l'Avant-projet de réforme de la Commission présidée par le Professeur Pierre Catala est faible, ce que l'on peut regretter. Si l'on examine cet Avant-projet, on peut relever, à propos de la formation du contrat, que l'Avant-projet s'oppose à la Convention de Vienne sur plusieurs points. C'est ainsi que l'Avant-projet retient le concept unitaire de révocation sans opérer de distinction entre la révocation et la rétractation.[41] Dans le cadre de la définition de l'offre, l'Avant-projet consacre la notion d'offre, même lorsqu'elle est adressée au public.[42] L'Avant-projet ne prévoit pas de règle particulière à l'interprétation des déclarations de volonté sur le modèle de l'article 8 CVIM. Sur le plan des effets de l'inexécution des obligations contractuelles, l'impact de la Convention de Vienne est faible, sans toutefois être inexistant. Cette influence se manifeste à propos d'une part de la minimisation des dommages à la charge de la victime de l'inexécution et d'autre part de la résolution. En ce qui concerne la minimisation des dommages,[43] les auteurs de la proposition de réforme se réfèrent à l'exemple donné par la Convention de Vienne.[44] Les auteurs de la

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40 V. Ministère de la justice, Avant projet de réforme du droit des obligations et de la prescription, La documentation française, Paris, 2006.

41 Projet d'article 1105-2.

42 Projet d'article 1105-1.

43 V. projet d'article 1373: « Lorsque la victime avait la possibilité, par des moyens sûrs, raisonnables et proportionnés, de réduire l'étendue de son préjudice ou d'en éviter l'aggravation, il sera tenu compte de son abstention par une réduction de son indemnisation, sauf lorsque les mesures seraient de nature à porter atteinte à son intégrité physique ».

44 V. *Geneviève Viney*, « Exposé des motifs » des projets d'articles relatifs à la responsabilité civile, in Avant-projet de réforme du droit des obligations et de la prescription, loc. cit., p. 168: la reconnaissance de la possibilité de modération « est admise aujourd'hui par la plupart des droits des pays voisins de la France ainsi que par la Convention de Vienne sur la vente internationale de marchandises et les Principes du droit européen du contrat préconisent son adoption »; du même auteur, « Le droit de la responsabilité dans l'Avant-projet Catala », in La création

proposition de réforme accueillent aussi la résolution unilatérale, qui prendrait place à côté de la résolution judiciaire, le créancier se voyant offrir une option entre les deux modes de résolution.[45] L'exposé des motifs se garde toutefois d'invoquer l'exemple de la Convention de Vienne, sans doute en raison de différences non négligeables entre la résolution unilatérale du projet et la résolution réglementée par la Convention de Vienne.[46] Les auteurs de la proposition de réforme restent fidèles à la nécessité d'une mise en demeure en matière de responsabilité contractuelle.[47] En ce qui concerne les dommages-intérêts, l'avant projet reste bien sûr fidèle à l'article 1150 du Code civil selon lequel seul le dommage prévisible est réparable,[48] sauf faute dolosive à laquelle la jurisprudence assimile la faute lourde. Mais point de trace, dans l'Avant-projet, de règles précises de calcul des dommages-intérêts dans l'hypothèse d'une résolution du contrat.[49]

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du droit jurisprudentiel, Mélanges en l'honneur de *Jacques Boré*, D. 2007, p. 473 et s., spéc. p. 490.

45 V. Projet d'article 1158.

46 Outre le maintien de la résolution judiciaire, pour laquelle la victime pourrait opter, mentionnons l'interpellation préalable faite au débiteur de satisfaire à son engagement dans un délai raisonnable (projet d'art. 1158) et la possibilité offerte au débiteur de saisir le juge « en alléguant que le manquement qui lui est imputé ne justifie pas la résolution du contrat » (projet d'art. 1158-1, al. 1er). Ainsi le projet ne consacre pas la condition préalable d'une contravention essentielle, eu égard au pouvoir de contrôle judiciaire a posteriori et facultatif, le juge pouvant « selon les circonstances, valider la résolution ou ordonner l'exécution du contrat, en octroyant éventuellement un délai au débiteur » (projet d'art. 1158-1, al. 2).

47 V. projet d'article 1365: « La réparationf du préjudice résultant du retard suppose la mise en demeure préalable du débiteur. La mise en demeure n'est requise pour la réparation de tout autre préjudice que lorsqu'elle est nécessaire pour caractériser l'inexécution ».

48 V. en ce sens, art. 74 CVIM.

49 V. art. 75 et 76 CVIM.

# Germany

*Ulrich Magnus*

## I. Introduction

The CISG has been termed a cornerstone of unification of substantive contract law and a point of crystallisation of a new lex mercatoria with great impact on domestic law.[1] Germany is an example for which the last part of this judgment is particularly justified.

To some extent this is due to the history which intensely connects Germany and the uniform sales law. It were Ernst Rabel[2] and his collaborators in Berlin in the early thirties of the last century who prepared a very first draft of an international sales convention and published its still famous comparative foundation, "Recht des Warenkaufs"[3] (Law of Sale of Goods). Decades later Germany belonged to the few Contracting States of the Hague Sales Law of 1964 (the predecessor of the CISG) and especially to those even fewer states where this uniform sales law played in fact a significant role in practice. Although Germany was then not among the first countries to ratify the CISG in 1988 it followed rather rapidly in 1991. For a considerable while the German courts had the lead in the international application of the CISG. No wonder, that the first CISG cases published by UNCITRAL[4] in its databank CLOUT[5] were seven German decisions and one Italian and in 2000 one third of the 600 CLOUT cases were of German origin. No wonder, that also courts from other jurisdictions referred to, and followed, German CISG decisions when applying the Vienna Sales Convention.[6]

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1 See *P. Schlechtriem*, in: Schlechtriem/Schwenzer (eds.), Commentary on the UN-Convention on the International Sale of Goods (CISG) (2nd ed. 2005) Introduction para. III. 4.

2 Before the Nazis expelled him in 1939 Rabel was Director of the then Kaiser-Wilhelm-Institut for Foreign and Private International Law in Berlin. Rabel emigrated to the United States (Ann Arbor, Michigan).

3 Vol. 1 (1936); vol. 2 (1957/58). As to the influence of this work see *H. Rösler*, Siebzig Jahre Recht des Warenkaufs von Ernst Rabel, Rabels Zeitschrift für ausländisches und internationales Privatrecht (RabelsZ) 70 (2006) 793.

4 The United Nations Commission on International Trade Law, seated in Vienna.

5 Case Law on UNCITRAL Texts. This databank started in 1993.

6 See for instance: *Medical Marketing International v. Internazionale Medico Scientifica, S.R.L.* (US Dist. Ct., E. D. La., 1999) 1999 WL 311945, 1999 U.S. Dist.

And rather recently – in 2002 – the CISG found its way even into the German Civil Code. This occurred via the European Consumer Sales Directive[7] which in turn borrowed – partly literally – from the CISG and whose implementation finally resulted in the adaptation of the general contract law, in particular of the remedies for breach of contract, to the model of the CISG.[8]

## II. General acceptance of the CISG in Germany

The CISG has entered into force in Germany on 1 January 1991.[9] Since then it is part of German law. A differentiated picture as to the CISG's acceptance in Germany will become apparent when the different fields are examined where the CISG may play a role. But if an overall answer is to be given it can be said that the CISG is the only private law convention which in Germany has had and still has a broad impact on almost all possible fields where it can play a role.

## III. CISG's impact on practising lawyers in Germany

There are a number of rather recent surveys on the acceptance of the CISG by practising lawyers in Germany.[10] None of these surveys is fully representative. Nonetheless, they show at least significant tendencies.

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Lexis 7380, CISG-online Nr. 387; Swiss Federal Court (Bundesgericht, BG) 13 November 2003, Internationales Handelsrecht (IHR) 2004, 215; Tribunale de Vigevano (Italy) 12 July 2000, IHR 2001, 72 (German translation)

7 Directive no. 1999/44 of the European Parliament and of the Council of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees.

8 See thereto below under IV. 1.

9 In the former German Democratic Republic (GDR) the CISG entered into force even a little earlier, namely on 1 March 1990. Though this could have led to problems in the wake of the German re-unification on 3 October when the West-German law was introduced in the Eastern part, in practice no such problems, let alone cases have been reported.

10 See *M. F. Köhler*, Das UN-Kaufrecht (CISG) und sein Anwendungsausschluss (2007) 310 et seq.; *J. Meyer*, UN-Kaufrecht in der deutschen Anwaltspraxis, RabelsZ 69 (2005) 457 et seq.

## 1. Awareness of practising lawyers of the CISG

### a) Awareness in general

Lawyers who in Germany practise in the field of international sales law are in their vast majority aware of the existence of the CISG. The available figures show that almost 100% of these lawyers know the CISG[11] although most of them do not practise exclusively in this field.[12] Between awareness of the existence of the CISG and precise knowledge of its contents there is however a wide range within which the degree of knowledge varies.

### b) Sources of information

Since there are no precise figures in this respect it can only be speculated how practising lawyers have become aware of the CISG. The sources from which practitioners may have drawn their knowledge are probably the following: In the first years after the CISG's entry into force in Germany many introductory courses on the CISG were offered by lawyers' associations, chambers of commerce, publishing houses and even universities. Today, the CISG is part of the ordinary curriculum of most German law faculties (although generally not on a mandatory but optional basis). Moreover, since the CISG is commented on in almost every standard commentary on the German Civil code, since CISG cases are published in the law journals, since there exists a special journal on CISG cases,[13] and since the CISG played a major role in the discussion on the recent reform of the German Civil Code it can hardly be overlooked by practitioners.

### c) Impact of the CISG on standard contract forms

There are no indications that the practitioners' awareness of the CISG had a direct effect on the contents of standard contract forms except insofar that still many forms do exclude the CISG. But there was a strong indirect effect. After the already mentioned reform of the German law of obligations ("Schuldrechtsreform") of 2002 the standard contract forms had to be adapted to the new law. And because the new law was mainly based on the model of the CISG the latter crept indirectly also into those standard forms.

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11 See *M. F. Köhler* (preceding fn.) 312.

12 *M. F. Köhler* (fn. 10) 312; *J. Meyer* (fn. 10) RabelsZ 69 (2005) 483.

13 Internationales Handelsrecht (IHR) – International Trade Law. The Journal started in 1999.

### d) Extent of exclusion of the CISG and reasons for it

While German practitioners almost regularly excluded the Hague Uniform Sales Law of 1964 and while business associations at that time recommended the exclusion almost without exception, this tendency changed to a considerable extent under the CISG. An increasing number of business associations does no longer regularly and systematically recommend their members to exclude the CISG. Neither is this the general attitude of books or collections containing standard forms for international sales contracts.[14] On the other hand, many recommendations survived which still recommend the exclusion of the CISG. The present picture is thus split.[15] The mentioned surveys reveal that the majority, namely two-thirds of the lawyers practising in the field of international sales still tries to exclude the CISG.[16] The reported main reasons for this reluctance towards the CISG are two which are interconnected: first, that the CISG is too little known.[17] Second, doubts concerning legal certainty. It is feared that solutions under the CISG cannot be foreseen due to too many vague terms which the CISG uses.[18] Further reasons are that the respective client wished the exclusion of the CISG generally also because he did not know it;[19] it is also thought that the CISG does not offer evident advantages when compared with the application of German law.[20] A final and rarely outspoken reason should be added: habit and tradition. Since it has been the longstanding habit of German business circles to exclude the uniform sales law this is still a wide-spread tradition under the CISG.[21]

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14 See *J. Meyer* (fn. 10) RabelsZ 69 (2005) 463 et seq. and the references given there.

15 *J. Meyer* (fn. 10) RabelsZ 69 (2005) 463 et seq.

16 *M. F. Köhler* (fn. 10) 313; *J. Meyer* (fn. 10) RabelsZ 69 (2005) 484 et seq.

17 *M. F. Köhler* (fn. 10) 315; *J. Meyer* (fn. 10) RabelsZ 69 (2005) 474 et seq.

18 *J. Meyer* (fn. 10) RabelsZ 69 (2005) 474 et seq.

19 *J. Meyer* (fn. 10) RabelsZ 69 (2005) 476.

20 *M. F. Köhler* (fn. 10) 315 et seq., 318 et seq.

21 See to the reasons for the exclusion of the CISG and criticising the frequent exclusion also *R. Koch*, Wider den formularmäßigen Ausschluss des UN-Kaufrechts, Neue Juristische Wochenschrift (NJW) 2000, 910; *P. Mankowski*, Überlegungen zur sach- und interessengerechten Rechtswahl für Verträge des internationalen Wirtschaftsverkehrs, Recht der Internationalen Wirtschaft (RIW) 2003, 2 (8 et seq.); *S. Regula/B. Kannowski*, Nochmals: UN-Kaufrecht oder BGB? Erwägungen zur Rechtswahl aufgrund einer vergleichenden Betrachtung, IHR 2004, 45; but for an exclusion *F.-J. Schillo*, UN-Kaufrecht oder BGB? – Die Qual der Wahl beim internationalen Warenkaufvertrag – Vergleichende Hinweise zur Rechtswahl beim Abschluss von Verträgen, IHR 2003, 257.

### e) Evaluation

The surveys appear also to reveal that the reluctance towards/satisfaction with the CISG depends to a great deal on how much practitioners specialise in international sales, how much they have to do with the CISG in their daily work and how much they therefore precisely know of the CISG. The more specialised they are the more advantages of the CISG they see and vice versa.[22] But even the knowledge of the advantages – in particular its neutrality towards both parties and low information cost[23] – seems not to affect the preponderant attitude towards an exclusion of the CISG.[24] The fear of uncertain and unforeseeable results under the CISG evidently prevails in many cases.

However, the view that the CISG does not guarantee sufficient legal certainty is based on prejudice. For most questions which may arise under the CISG there exists today international case law[25] and regularly a clearly prevailing view which is followed by the great majority of decisions. Moreover, the majority view can be rather easily taken from the (Draft) UNCITRAL Digest[26] which presents the international case law on the CISG in an objective and neutral way. If this material is presented to the court seized with the case in question it can be forecasted with the same certainty as in a purely domestic case that the court will follow the majority view.[27] It is therefore the task of the respective practitioner to prepare the case sufficiently.

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22 See *M. F. Köhler* (fn. 10) 330; *J. Meyer* (fn. 10) RabelsZ 69 (2005) 479; in the same sense *U. Magnus*, Das Haager Einheitskaufrecht und die gegenwärtige deutsche Praxis, NJW 1977, 2000, 2002.

23 See extensively thereon *P. Mankowski*, Überlegungen zur sach- und interessengerechten Rechtswahl für Verträge des internationalen Wirtschaftsverkehrs, RIW 2003, 2 (8 et seq.).

24 See *J. Meyer* (fn. 10) RabelsZ 69 (2005) 472 et seq.

25 The most comprehensive CISG-databank, the CISG-databank of the Pace University (New York) lists now (March 2008) more than 2000 decisions available at least in an English abstract.

26 The Draft has been published in F. Ferrari/H. Flechtner/R. A. Brand (eds.), The Draft UNCITRAL Digest and Beyond: Cases, Analyses and Unresolved Issues in the U.N. Sales Convention (2004) 501 et seq. An updated version will be published soon by UNCITRAL in the six UN languages.

27 See as an example Tribunale di Padua, 31 March 2004, IHR 2005, 33. The Italian Court rightly stresses the importance of legal certainty: with respect to the applicable rate of interest the Court states that it is more important to develop an internationally uniform solution even if this solution may not be convincing in all and every respect than to develop always new solutions which may fit better the individual case but do not allow a general forecast which interest rate will be applied.

Also the further critique that the CISG uses too many too vague terms does not really fit with the CISG, for this criticism applies as well to most national sales laws. In order to cover all possible different sales situations a modern sales law has to provide and secure sufficient flexibility. For this end, it must use flexible terms like "reasonable" or "substantial".[28] And again, the core meaning of most if not all uncertain terms used in the CISG has been already specified by international case law.[29]

Any recommendation to exclude the CISG must also be seen in the light that it presupposes that the exclusion will be valid. In practice, the exclusion of the CISG is regularly tried to be achieved by a choice of law clause which either determines the law of a Non-CISG state as governing law or which explicitly chooses the domestic law of a CISG state (for instance "Swiss law without the CISG").[30] But it is not at all for sure that such choice of law is always valid. In particular in the frequent case that both parties rely in their standard contract terms on their own domestic law the result will often be that neither term becomes part of the parties' agreement.[31]

## 2. Impact of the CISG on the practice

Having given opinions for German courts since 1973 and having served part-time as a judge at a court of appeal since 1994 I have some personal practical experience with briefs and memoranda of practising lawyers. It is not my impression that the CISG's entry into force has changed in any particular way the style in which practitioners draft their statements of claim or defence or plead in court. As would be expected in a Civil Law jurisdiction

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[28] For the CISG see for instance Art. 3, 8, 25, 39 etc. (reasonable, substantial); for the EU Consumer Sales Directive Art. 2 (2) (d) and (4), 3 (3) and (5), 5 (3) ([un-]reasonable, disproportionate, significant, appropriate, incompatible).

[29] An example is the "reasonable time" in Art. 39 (1) CISG. The international case law fixes this time between two weeks and one month if no further circumstances require a shorter or longer period (see BGHZ 129, 75; Oberster Gerichtshof (Supreme Court, Austria, OGH) Juristische Blätter (JBl) 1999, 318 (320)). Although this period is not definite in the sense of absolute precision it has proved that it allows in practice a clear decision for almost all cases.

[30] See thereon *Ferrari*, in: Schlechtriem/Schwenzer, Kommentar zum Einheitlichen UN-Kaufrecht – CISG – (4. Aufl. 2004) Art. 6 n. 19 et seq.; *Magnus*, in: Julius von Staudinger, Kommentar zum Bürgerlichen Gesetzbuch mit Einführungsgesetz und Nebengesetzen, Wiener UN-Kaufrecht (CISG) (ed. 2005) Art. 6 n. 23 et seq.

[31] The question depends on the applicable law which for this purpose must first be determined. The applicable law depends in turn on the court which is competent to decide the case.

they tend to quote the respective literature on the CISG where necessary while cases are less often cited. In general it is the German literature on the CISG which is cited. Quotations of foreign CISG cases or literature unless in German are unusual. This is partly owed to the fact that the language in court is German[32] and the court or the other party can request a translation of documents in foreign language.[33] But it should not be overlooked that the German commentaries on the CISG are strictly devoted to an internationally uniform interpretation of the CISG based on the international jurisprudence and literature. Thus, by citing these commentaries practitioners rely indirectly but nonetheless effectively on a uniform interpretation of the CISG.

In comparison to purely domestic cases there is no significant difference in style and method of the drafting of briefs etc. in CISG cases except that the specialised CISG literature is cited. According to my experience the mandate to interpret the CISG in a uniform manner (Art. 7 (1) CISG) is only reflected in the indirect way just mentioned but not by the manner how briefs are drafted.

### 3. CISG as argument in Non-CISG cases

The fact that the CISG was more or less the model for the recent German "Schuldrechtsreform" could nourish the expectation that the CISG is often cited when new provisions of the reformed BGB have to be interpreted and applied. But in briefs etc. of practising lawyers this happens rarely if at all. They regularly confine themselves to quotations of literature or case law on the new provisions (although these sources often draw on the corresponding CISG provision).

## IV. CISG's impact on scholars in Germany

### 1. Scholarly interest in the CISG

In comparison to other countries there is a particularly high scientific interest in the CISG in Germany. It is evidenced by hundreds of dissertations which either exclusively or at least partly focus on the CISG,[34] by – at pre-

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[32] § 184 Gerichtsverfassungsgesetz (Act on the constitution of courts, GVG).

[33] § 142 (3) Zivilprozessordnung (Civil Procedure Code, ZPO).

[34] In 2007 alone the following dissertations which more or less concentrate on the CISG were published in Germany (without claiming any completeness): *Martin W. Brölsch*, Schadensersatz und CISG (2007); *Anja N. Ewert,* Die Gefahrtragung beim Kaufvertrag: Eine rechtsvergleichende Studie des deutschen und englischen

sent – fourteen extensive commentaries on the CISG,[35] by handbooks,[36] specialised monographs[37] and countless articles on the subject. Almost every book on the law of contractual obligations at least mentions the CISG.

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sowie des UN-Kaufrechts (2007); *Söntje Julia Hilberg*, Die autonome Anwendbarkeit des UN-Kaufrechts auf moderne Geschäftsfelder (2007); *Tatjana Himmen*, Die Lückenfüllung anhand allgemeiner Grundsätze im UN-Kaufrecht (2007); *Elisabeth Sauthoff*, Die Annäherung der Schadensersatzhaftung für Lieferung mangelhafter Ware an das UN-Kaufrecht (2007); *Nils Schmidt-Ahrendts*, Das Verhältnis von Erfüllung, Schadensersatz und Vertragserfüllung im CISG (2007); *Markus Schönknecht*, Die Selbstvornahme im Kaufrecht. Eine Untersuchung der voreiligen Mängelbeseitigung durch den Käufer unter Berücksichtigung der Parallelproblematik im UN-Kaufrecht (2007); *Sofia Stathouli*, Die Haftung des Verkäufers für Sachmängel und Falschlieferung nach dem Wiener Übereinkommen über den internationalen Warenkauf unter Berücksichtigung des deutschen und des griechischen Rechts (2007); *Ulrike Teichert*, Lückenfüllung im CISG mittels UNIDROIT-Prinzipien – Zugleich ein Beitrag zur Wählbarkeit nichtstaatlichen Rechts (2007); *Melanie Ch. Würz*, Die kognitiven Normelemente des UN-Kaufrechts: Wissen und Unkenntnis im CISG (2007).

35 *A. Achilles*, in: Ensthaler, Gemeinschaftskommentar zum Handelsgesetzbuch mit UN-Kaufrecht (7th ed. 2007); *I. Saenger*, in: Bamberger/Roth, Kommentar zum Bürgerlichen Gesetzbuch Bd. 3 (2nd ed. 2007); *F. Enderlein/D. Maskow/H. Strohbach*, Internationales Kaufrecht. Kaufrechtskonvention. Verjährungskonvention. Vertretungskonvention. Rechtsanwendungskonvention (1991); *F. Ferrari/E.-M. Kieninger/P. Mankowski/K. Otte/I. Saenger/A. Staudinger*, Internationales Vertragsrecht (2007); *R. Herber/B. Czerwenka*, Internationales Kaufrecht. Kommentar zu dem Übereinkommen der Vereinten Nationen vom 11. April 1980 über Verträge über den internationalen Warenkauf (1991); *H. Honsell* (ed.), Kommentar zum UN-Kaufrecht (1997); *U. Magnus*, in: Julius von Staudinger, Kommentar zum Bürgerlichen Gesetzbuch mit Einführungsgesetz und Nebengesetzen, Wiener UN-Kaufrecht (CISG) (ed. 2005); Münchener Kommentar zum Bürgerlichen Gesetzbuch(-collaborator) Bd. 3 (4th ed. 2004); Münchener Kommentar zum Handelsgesetzbuch(-collaborator) vol. 6 (2nd ed. 2007); *G. Reinhart*, UN-Kaufrecht. Kommentar zum Übereinkommen der Vereinten Nationen vom 11. April 1980 über Verträge über den internationalen Warenkauf (1991); *H. Rudolph*, Kaufrecht der Export- und Importverträge (1996); Schlechtriem/Schwenzer, Kommentar zum Einheitlichen UN-Kaufrecht – CISG – (4th ed. 2004); *A. Lüderitz a. o.*, in: Soergel, Kommentar zum Bürgerlichen Gesetzbuch vol. III (13th ed. 2000); *W. Witz/Ch. Salger/M. Lorenz*, Kommentar und Vertragsgestaltung zum CISG (2000).

36 See for instance *H.-W. Eckert/J. Maifeld/M. Matthiessen*, Handbuch des Kaufrechts (2007); *W. Seitz/H. Büchel* (eds.), Beckscher Richterhandbuch (2nd ed. 1999); *U. Verweyen/V. Foerster/O. Toufar*, Handbuch des Internationalen Warenkaufs. UN-Kaufrecht (CISG) (2006).

When the specific German history with the CISG is recalled it is no wonder that since its very beginnings the Uniform Sales Law aroused particular scientific interest. In fact there is a strong unbroken tradition of interest in, and research on international sales law in Germany. Again, we find the name of Ernst Rabel at the beginning of this tradition. It were in particular his pupils[38] (and their pupils[39]) and also all of Rabel's post-war successors in the directorship of his Institute (now the Max-Planck-Institute of foreign and private international law in Hamburg) who carried on the tradition to further and promote the unification of international sales law.[40] These scholars were mainly specialists of comparative law, some also of private international law. And they were joined by other comparatists. But when in 1980 the CISG was concluded also general contract law scholars became interested. The reason for this growing interest was the parallel initiative of the German government to reform the German law of obligations.[41] A Commission for the reform of the German law of obligations was installed which in 1992 came out with the proposal to adapt the German Civil Code to the model of the CISG.[42] The majority of civil law scholars refused this proposal. But when the European Consumer Sales Directive had to be implemented into German law in rather short time until 2002 the Government came back to the proposal and introduced it after hot debates and with slight amendments. A side-effect was that the CISG became

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37 See in particular *B. Piltz*, Internationales Kaufrecht (1993); *P. Schlechtriem*, Internationales UN-Kaufrecht (4th ed. 2007).

38 In particular *E. v. Caemmerer* and *E. Wahl*. Others like *F. Kessler* and *M. Rheinstein* immigrated like Rabel also to the United States and became influential law professors there. *v. Caemmerer* and *Wahl* promoted the uniform sales law not only by writing on it and contributing influential parts to the first commentary on the Hague Sales Law: *H. Dölle* (ed.), Kommentar zum Einheitlichen Kaufrecht (1976) but also by interesting their pupils for it.

39 Among *v. Caemmerer's* pupils *G. Hager, H. Leser* and in particular *P. Schlechtriem* maintained the international sales tradition; *E. Wahl's* respective pupil was *G. Reinhart*.

40 First *H. Dölle*, then *K. Zweigert*, then the triumvirats *U. Drobnig, H. Kötz* and *E.-J. Mestmäcker* and today *J. Basedow, K. Hopt* and *R. Zimmermann*. *K. Zweigert's* pupils were *H. Kötz* and *U. Magnus*; *U. Drobnig's* pupil *J. Basedow*.

41 The reform project started with preparatory scientific expert opinions which were published in 1981 and 1983: Gutachten und Vorschläge zur Überarbeitung des Schuldrechts (ed. by the Minister of Justice) Vols. I and II (1981), Vol. III (1983). The most influential opinion was *U. Huber's* contribution which already requested to adapt the BGB to the model of the CISG.

42 Abschlussbericht der Kommission zur Überarbeitung des Schuldrechts (ed. by the Minister of Justice) (1992).

widely known. Today it can be safely said that every private law scholar has heard of the CISG and has some knowledge of it.

Those scholars who devote their attention to the CISG mainly focus on the Convention in that they discuss its provisions and solutions, or comment on it, in the light of the international court practice and scholarly writing.[43] But they generally point also at CISG provisions or solutions which are at variance with the internal German law. Mainly this is done to clarify differences and to inform about them, also to discuss their justification. Partly, it is done to enable a clearer choice whether or not the CISG should be excluded.

## 2. CISG's traces in scholarly writing

As already mentioned, today almost every treatise on the domestic German law of obligations at least mentions the CISG. So do also the commentaries on the BGB which in Germany are particularly important for the application of the law. Not only do most of them contain a full commentary on the CISG.[44] Often the comments also on the single provisions of the BGB on contractual obligations refer to the respective article of the CISG.[45] Nonetheless, where a CISG-article is the apparent background of a BGB-provision the interpretation of the latter could and should be brought still stricter in line with the international understanding of the underlying CISG-article. This task could be achieved by both specialists of the CISG and contract law scholars.

## 3. Influence of scholarly writing

In Germany scholarly writing has generally a wider impact on legal practice, in particular on the courts than it has in many other countries. In particular in common law countries it is precedents which in the eyes of judges and courts primarily count.

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[43] See in particular the commentaries cited in n. 35.

[44] The CISG is fully commented on in the big three BGB commentaries (on several hundred pages each): Münchener Kommentar zum Bürgerlichen Gesetzbuch Vol. 3 (4th ed. 2004); Soergel, Kommentar zum Bürgerlichen Gesetzbuch Vol. III (13th ed. 2000); Julius von Staudinger, Kommentar zum Bürgerlichen Gesetzbuch mit Einführungsgesetz und Nebengesetzen, Wiener UN-Kaufrecht (CISG) (ed. 2005). It is further fully commented on in Bamberger/Roth, Kommentar zum Bürgerlichen Gesetzbuch Vol. 3 (2nd ed. 2007).

[45] See as one example standing for countless others *B. Dauner-Lieb*, in: Anwaltkommentar BGB, Vol. 2 (2005) § 280 n. 14, 17.

German scholarly writing on the CISG and on its predecessor, the Hague Uniform Sales Law, influenced first the courts. Since the Hague Law and the Vienna Law was 'new' law that differed at least in its structure and style from German domestic law the courts in particular when seized for the first time with the new law welcomed any help for the interpretation of the uniform sales law offered by scholarly writing. And the Federal Supreme Court when finally deciding on CISG-problems tends generally to follow the view on the interpretation of a specific CISG-provision which already prevails in scholarly writing.[46] There are only few exceptions where the Court preferred the minority view.[47]

Scholarly writing had also a strong influence on German legislation. It was mainly Ulrich Huber's legal opinion (*Gutachten*) for the German Minister of Justice which laid the ground that the German "Schuldrechtsreform" was based on the CISG model.[48] The official Commission for the reform of the law of obligations ("Schuldrechtskommission") adopted that idea, too.[49]

The impact of scholarly writing on daily legal practice, for instance on the contents of standard contract forms, is less remarkable. Standard forms generally mirror how the courts apply the law and react thereto. But since the courts regularly adopt the majority view advanced in legal literature there is also a certain indirect influence of legal writing. An example for this proposition is the interpretation of the contract term "This contract is governed by German law." The clause is ambivalent. It may refer only to German domestic law thereby excluding the (former Hague Law or the) Vienna Sales Law. It may on the contrary include the uniform law which by its rati-

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46 See thereto *U. Magnus*, CISG in the German Federal Civil Court, in: Ferrari (ed.), Quo Vadis CISG? Celebrating the 25th Anniversary of the United Nations Convention on Contracts fort he International Sale of Goods (2005) 211.

47 An example is the Court's decision that the period for the examination of the goods and giving notice of defects under Arts. 38 and 39 (1) CISG is as a rule of thumb roughly one month if no special circumstances like perishable goods etc. require a shorter period (BGH 8 March 1995, BGHZ 129, 75, in English on the Internet http://cisgw3.law.pace.edu/cisg/wais/db/cases2/950308g3.html; BGH 3 November 1999, Transportrecht-Internationales Handeslrecht (Transp-IHR) in English on the Internet http://cisgw3.law.pace.edu/cisg/wais/db/cases2/991103g1.html). Prior to this decision the view prevailed that in the absence of specific circumstances the average period was about two weeks. The Federal Supreme Court prolonged the former period in the interest of an internationally acceptable solution since other countries allow for a longer notice period or require no period at all.

48 *U. Huber*, Leistungsstörungen, in: Gutachten und Vorschläge zur Überarbeitung des Schuldrechts Vol. I (ed. by the Minister of Justice, 1981) 647.

49 Abschlussbericht der Kommission zur Überarbeitung des Schuldrechts (ed. by the Minister of Justice) (1992).

fication has become part of German law. After the majority of scholars and some lower courts had strongly advocated the latter view, also the Federal Supreme Court adopted it.[50] The effect of the Court's decision was that an exclusion of the CISG in particular in standard contract terms must be drafted in a rather explicit way, for instance by the clause: "This contract is governed by German law without the CISG". And in numerous cases standard contract terms were then drafted in this way. Thus, both the courts and the preceding scholarly writing influenced in cooperation the legal practice.

## 4. Interconventional interpretation

Thus far, the CISG is referred to in order to interpret other conventions only on few occasions. It appears to be the case only if a provision of another convention has been drafted after the model of the CISG. An example is the Brussels Convention of 27 September 1968 on jurisdiction and the enforcement of judgments in civil and commercial matters (which is still in force in Denmark but has been replaced for the other EU Member States by the Brussels I Regulation which has almost the same contents). It contains a provision on the formal validity of choice of jurisdiction clauses[51] which has been modelled after the CISG.[52] In legal literature on the Brussels Convention and Brussels I Regulation it is argued that the interpretation of the provision of the Brussels instruments should follow the interpretation of the CISG.[53]

Only few German scholars have advocated in a general way that interpretations of the CISG should be used for the interpretation of other uniform law instruments concerning private law matters and vice versa.[54] Al-

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[50] See BGH 4 December 1985, BGHZ 96, 313 (to the Hague Uniform Sales Law and explicitly relying on the majority opinion in legal literature); in the same sense under the CISG: BGH 23 July 1997, NJW 1999, 3309, 3311.

[51] Art. 17 (1) (b) and (c) Brussels Convention and Art. 23 (1) (b) and (c) Brussels I Regulation.

[52] Art. 9 CISG.

[53] See *J. Kropholler*, Europäisches Zivilprozeßrecht (6th ed. 1998) Art. 17 n. 46; *id.*, Europäisches Zivilprozeßrecht (8th ed. 2005) Art. 23 n. 50 et seq.; *U. Magnus*, in: Magnus/Mankowski (eds.), Brussels I Regulation (2007) Art. 23 n. 122; *P. Mankowski*, in: Rauscher (ed.), Europäisches Zivilprozeßrecht Kommentar (2nd ed. 2006) Art. 23 Brüssel I-VO n. 31.

[54] See for instance *O. Beier*, Grundsätze eines europäischen transportmittelübergreifenden Schadensrechts für den Gütertransport (1999) insbes. 292; *U. Magnus*, Das Schadenskonzept des CISG und transportrechtlicher Konventionen, in: FS Herber (2000) 27; *id.*, Konventionsübergreifende Interpretation internationaler

though some basic terms and concepts (for instance: damage, causation, duty of mitigation, exemption from liability etc.) are used in a number of uniform private law conventions – in particular in international transport conventions – it is generally argued that each convention should be interpreted in an autonomous way.[55] That means that terms of the convention should not be interpreted by reference to any national system but only by reference to the system and structure of the respective convention itself.

## V. CISG's impact on German courts

### 1. Impact on the style of court decisions

It is not visible that the CISG's entry into force in Germany had a significant impact on the courts' style to draft their decisions. The reference to other courts' decisions is less frequent than the reference to legal literature and even rarer is the reference to decisions of courts of foreign countries.[56] This is not only true for the lower courts but in general also for the Federal Supreme Court.[57] There are also no general differences between the style of decisions on CISG matters and decisions on other matters except that normally no decisions of foreign courts are cited at all unless specific international matters are at stake.

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Staatsverträge privatrechtlichen Inhalts, in: Aufbruch nach Europa – 75 Jahre Max-Planck-Institut für Privatrecht (eds. J. Basedow et al., 2001) 571.

55 See for instance *J. Basedow*, in: Münchener Kommentar zum HGB Vol. 7 (1997) Einleitung CMR n. 19.

56 A small and not representative but nevertheless telling survey had the following result: Out of 11 German CISG decisions reported in 2007 in IHR only 1 decision cited a foreign – Austrian – court decision (LG Krefeld 20 September 2006, IHR 2007, 161) whereas further 6 decisions cited own or other German CISG decisions (OLG Koblenz 10 October and 14 December 2006, IHR 2007, 36; OLG Köln 22 February 2006, IHR 2007, 71; LG Aschaffenburg 20 April 2006, IHR 2007, 109; LG Bamberg 23 October 2006, IHR 2007, 113; LG Coburg 12 December 2006, IHR 2007, 117; OLG Köln 12 January 2007, IHR 2007, 200). But with the exception of three they all quote – sometines rather extensively – the respective German legal literature. The also the similar results reported by *D. de Lukowicz*, Divergenzen in der Rechtsprechung zum CISG. Auf dem Weg zu einer einheitlichen Auslegung und Anwendung? (2001) 41 et seq.

57 See for instance BGH 2 March 2005, IHR 2005, 158 (scholarly writings and two – Austrian – decisions cited); BGH 11 January 2006, IHR 2006, 82 (only scholarly writings cited).

## 2. International interpretation of the CISG or homeward trend

Having collected and prepared the German CISG decisions for UNCITRAL and its CLOUT system for more than a decade it is my impression that German courts today do neither directly nor indirectly on a subconscious level follow a homeward trend. As far as the interpretation of the CISG is concerned the courts and in particular the Federal Supreme Court try to avoid any interpretation which merely imports the domestic solution into the CISG. This holds true even though the courts generally do not quote foreign case law on the CISG but refer for an international interpretation only to the German commentaries on the CISG.[58] The courts evidently trust – but in my view they are justified to trust – that the commentaries correctly inform about the international understanding of the CISG provisions. Nevertheless, in one of its recent decisions the Federal Supreme Court felt the need to repeat the maxim of an international and autonomous interpretation of the CISG and underpinned that this kind of interpretation generally does not allow any redress to concepts developed under national law.[59] Only in the first years after the CISG had entered into force in Germany a certain homeward trend of the lower courts could be observed which partly imported concepts of German domestic law into the interpretation of the CISG, for instance in that the courts applied the very strict and short notice period of German law[60] for the interpretation of Art. 38 and 39 CISG.[61] But as already mentioned the Federal Supreme Court corrected this practice and prolonged the examination and notice period in the interest of an internationally acceptable solution for the CISG.[62]

A homeward trend could be imagined in still another sense namely, systematically favouring the party of the court's country. However, I have not seen a single decision which justified the impression that the court favoured in a certain way the German party of the lawsuit. On the contrary, the first German decisions on the notice period which fixed this period very sharply[63] were regularly to the disadvantage of German buyers who lost all remedies for delivery of defective goods if they had failed to comply with the

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58 See *D. de Lukowicz*, Divergenzen in der Rechtsprechung zum CISG. Auf dem Weg zu einer einheitlichen Auslegung und Anwendung? (2001) 42 et seq.

59 BGH 2 March 2005, IHR 2005, 158 (159).

60 See § 377 Handelsgesetzbuch (Commercial Code – HGB): examination and notice immediately after delivery (regular period of seven days).

61 See for instance LG Stuttgart 31 August 1989, Praxis des Internationalen Privat- und Verfahrensrechts (IPRax) 1990, 316; LG Aachen 3 April 1990, RIW 1990, 491; OLG Düsseldorf 8 January 1993, IPRax 1993, 412.

62 See supra fn. 47.

63 See supra fn. 61.

short notice period (whereas buyers in other CISG countries could often rely on a more generous period).

The reason why German courts strive for an internationally uniform interpretation of the CISG – although with restricted own means and relying on the judgment of others (the commentators) – and do not treat businesses of the own country more favourable than businesses from other CISG countries is probably a simple one: there are as many German businesses which buy as there are which sell on an international basis.[64] An internationally uniform interpretation of the CISG is particularly essential for these businesses, though also for internationally trading businesses from other countries. And German courts can effectively contribute to a uniform interpretation of the CISG and have done so successfully in the past.

## 3. Extension of the CISG to other fields of contract law

German courts do not appear to have applied the CISG beyond its scope. Since under constitutional law the courts are bound by law and statute (Recht und Gesetz)[65] they are in a strict sense not allowed to apply the CISG which is part of German law in situations where the conditions of its applicability are not fulfilled. The only possibility of admissible application is the CISG's use as argument. However, I am not aware of court decisions outside the CISG which have referred to the CISG in order to justify their solution.

## 4. Interconventional interpretation

Thus far, there appears to be no German case law which relies on the CISG in order to interpret other uniform law instruments be they either international conventions or EU enactments. There is, however, case law relying on the EU Consumer Sales Directive for the interpretation of new provisions of the German BGB which have implemented the Directive.[66] Indirectly this is a reference to the CISG because the Directive has borrowed

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64 Germany – the country has been worldchampion in exports in the last years – imports almost as much as it exports.

65 See Art. 20 Grundgesetz (Basic Law – GG).

66 See for instance BGH 16 August 2006, Zeitschrift für das gesamte Schuldrecht (ZGS) 2006, 384 (here the Federal Supreme Court seized the European Court of Justice with a preliminary ruling on the question whether German domestic law complies insofar with the Directive as the buyer must compensate the seller for the use of defective goods which the buyer justifiedly returns after a short while of use).

largely from the CISG. But the courts do not directly refer to the CISG in these cases.

## VI. CISG's impact on the German legislator

### 1. CISG as a trigger for discussion on law reform

It would be an exaggeration though only a slight one to state that the CISG triggered the far-reaching German "Schuldrechtsreform" of 2002. When the initiative to reform the German law of obligations was launched (in 1978) several reasons were given: mainly to bring the written law in line with the law as applied by the courts. For, the courts had shaped the BGB by interpretation or even invention of new legal institutions in a way that the text of the Civil Code did no longer fully represent the law. A further reason was that this part of German law should be brought in line with international conventions, in particular with the Uniform Sales Law.[67] In the discussions preceding the reform the CISG played a major role. As already mentioned the Commission for the reform of the law of obligations formulated a full proposal which adapted the BGB to a great extent to the model of the Uniform Sales Law.[68] The Commission regarded the general concept of the CISG as convincing and extended it with few exceptions to the general law of obligations (rather similar to what at almost the same time the UNIDROIT Principles of International Commercial Contracts and the Principles of European Contract Law undertook). The Commission's proposal met with wide approval when being discussed on the German Lawyers Meeting in 1994.[69] But the German legislator did not react to this proposal[70] and it is doubtful whether the legislator would have reacted at all had not Europe intervened. The ultimate driving force behind the German "Schuldrechtsreform" was the development of the European private law and the need to implement the European Consumer Sales Directive. As mentioned

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67 See Abschlussbericht der Kommission zur Überarbeitung des Schuldrechts (ed. by the Minister of Justice) (1992) and a short version for discussion on the 60th Deutschen Juristentag (German Lawyers Meeting – DJT) in Münster in 1994 (also ed. by the Minister of Justice).

68 See *R. Herber*, The German Experience, in: Ferrari (ed.), The 1980 Uniform Sales Law. Old Issues Revisited in the Light of Recent Experinces. Verona Conference 2003 (2003) 59 (64 et seq.).

69 See Beschlüsse des 60. Deutschen Juristentages, Münster 1994, Abteilung Zivilrecht.

70 In the meantime also the political situation had changed from chancellor Kohl (Christian Democrats) to chancellor Schröder (Social Democrats).

the background of this Directive was again the CISG.[71] In transposing the Directive the German legislator chose a 'great solution' which did not merely add a further special statute ('small solution'). Instead, the legislator followed the proposal of the Commission for the reform of the law of obligations and changed some basic concepts and many provisions of the BGB fundamentally. The result was that much of the CISG was taken over by the new general law of obligations of the BGB as well as by its special part on sales and on services.[72]

Also an even earlier influence of the Uniform Sales Law on German legislation deserves mentioning: When the German legislator enacted the "Reisevertragsgesetz" (Travel Contract Act) of 1979[73] which regulated the duties and liability of travel operators the structure of that Act was already based on the structure and basic concepts of the Uniform Sales Law:[74] a single notion of breach of contract, possible cumulating of termination and damages, rather strict liability for non-performance.

The Uniform Sales Law and in particular the CISG can be understood as the fertile soil on which the reform of the Civil Code's general law of obligations and large parts of its special provisions on contracts was planted. Although the Uniform Sales Law was not the main reason for reform its existence added to the climate for reform and served as the major inspiring source for the revision of the law.[75]

## 2. CISG's real influence on law reform

As will have become apparent from the foregoing passage, the CISG influenced not only the German reform discussion, the Convention had also a strong real impact on the final outcome of the "Schuldrechtsreform", a reform that is regarded as the most important revision of the BGB since 1900

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71 See *D. Staudenmayer*, Die EG-Richtlinie über den Verbrauchsgüterkauf, NJW 1999, 2393 (Staudenmayer was the EU official who was responsible fort he Directive).

72 See *R. Herber*, The German Experience, in: Ferrari (ed.), The 1980 Uniform Sales Law. Old Issues Revisited in the Light of Recent Experiences. Verona Conference 2003 (2003) 59 (66 et seq.).

73 The Act was implanted into the Civil Code: §§ 651a-m BGB.

74 The Hague Uniform Sales Law was the inspiring source for the „Reisevertragsgesetz"; see *J. Eckert*, in: von Staudinger, Kommentar zum Bürgerlichen Gesetzbuch mit Einführungsgesetz und Nebengesetzen (ed. 2003) Vorbem zu §§ 651a – m n. 14.

75 In the same sense also *R. Herber*, The German Experience, in: Ferrari (ed.), The 1980 Uniform Sales Law. Old Issues Revisited in the Light of Recent Experiences. Verona Conference 2003 (2003) 59 (66 et seq.).

when the Civil Code entered into force.[76] This reform and likewise the CISG's influence were not limited to sale-specific matters but changed the general law of obligations. The changes therefore apply to all kinds of contracts. The Travel Contract Act is a further specific example that the underlying concepts of the Uniform Sales Law can be, and have been, transposed to other than sales contracts.

## 3. Differences between CISG and implementations modelled on it

As mentioned the general law of obligations and the special contract law for sales, services and travel contracts have been modelled after the CISG respectively its predecessor. That does not mean that all or most CISG provisions have been literally adopted; most basic concepts of the CISG and a number of its formulations have been implanted into the BGB. And partly this has been done in the form that CISG provisions had been given by the Consumer Sales Directive. Thus, the CISG has crept into German domestic law largely in an indirect way.

However, in regard of conceptual aspects it must be stressed that there are many more similarities than differences between the CISG and its German offspring. Both the German "Schuldrechtsreform" and the "Reisevertragsgesetz" have adopted the unitary concept of breach of contract which abolished the former German categories of different kinds of breach of contract with different consequences; cumulating of termination of contract and damages is now introduced into German domestic law; also the discrepancy between general rules for breach of contract and special warranty remedies ("Gewährleistung") has been overcome. All this was inspired by the Uniform Sales Law.

A major theoretical difference between the CISG and present German contract law concerns the question whether a party in breach should be strictly liable in damages – with a very limited possibility of exemption – or whether fault should be required. The former is the concept of the CISG (Art. 79) whereas the BGB still requires that the party in breach is at fault in order to become liable in damages (§ 280 (1) sent. 2 and § 651f (1) BGB). However, in case of breach fault is presumed. The party in breach must prove that it was not at fault. The hurdle for this proof is rather high. Therefore, the difference to Art. 79 CISG which excuses a party only for impediments of performance beyond its control is in practice much less important than could be expected from the theoretical viewpoint.

Further differences concern the formulation of single provisions. For instance, the wording of the definition of the conformity of goods used by Art. 35 CISG and by § 434 BGB differs rather widely because the BGB fol-

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[76] See *H. Heinrichs*, in: Palandt, BGB (67th ed. 2008) Einleitung n. 10.

lows more closely the formulation of the Consumer Sales Directive. The substantive difference between the different texts is, however, less dramatic.

### 4. Interpretation of domestic law in the light of the CISG model

Thus far it can be observed that the interpretation of those provisions of the BGB which have been more or less directly modelled after the CISG takes the CISG insofar into account – if at all – as commentaries mention the CISG as part of the legislative history of the respective provision.[77] But the model of the CISG is not used to support or develop solutions for the domestic law.

On the other hand, the interpretation of those provisions which were introduced into the BGB via the Consumer Sales Directive takes rather regular account of the Directive with which the domestic provision must comply.[78] In these cases the CISG is only indirectly present as model for the Directive.

In sum, the interpretation of CISG-inspired domestic law does not really and fully take account of the underlying model.

## VII. Concluding remarks

Although the CISG has had a considerable impact on the development of the modern law of contract, in particular of sales, services and travel contracts in the daily application of the new law does the CISG play a less important role. There is still a rather clear distinction between the CISG as the special law for international sales and the 'normal' domestic sales law. After the German and the European legislator have enacted law texts on sales matters which do not fully comply with the CISG text it should now

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[77] See as an example the comments on § 280 BGB (this provision introduced the unitary concept of breach of contract into German domestic law): *B. Dauner-Lieb*, in: Anwaltkommentar BGB, Vol. 2 (2005) § 280 n. 14, 17; *H. Otto*, in: von Staudinger, Kommentar zum Bürgerlichen Gesetzbuch mit Einführungsgesetz und Nebengesetzen (ed. 2004) § 280 n. C 2, 27, E 63, 87, 122. But for instance *H. Heinrichs*, in: Palandt (67th ed. 2008) § 280 n. 2 does not mention the CISG although he stresses that the provision corresponds with international instruments like the UNIDROIT Principles and the Principles of European Contract law.

[78] See for instance as an example of a court decision: BGH 16 August 2006, ZGS 2006, 384 (see fn. 65); as an example of scholarly writing: *A. Matusche-Beckmann*, in: von Staudinger, Kommentar zum Bürgerlichen Gesetzbuch mit Einführungsgesetz und Nebengesetzen (ed. 2004) § 434 n. 37 et seq. (for questions of the definition of conformity).

be the task of courts and scholars to avoid as far as possible and reasonable a further drifting apart of both sets of rules. This is not to say that the differences between the European Directive and the CISG are not understandable: the CISG intends to regulate international sales primarily between merchants while the European Directive aims at the protection of buying consumers. It is astonishing enough that the Directive could borrow from an instrument for merchants. This fact alone may nurture doubts whether a strict distinction between so-called b2b and b2c transactions is always justified. It shows in my view that the main policy considerations on which the CISG is based correspond to basic commandments of justice which apply both to business and consumer transactions. This is a further reason to bridge the still existing gap between the CISG and the internal contract and sales law.

# Greece

*Eleni Zervogianni*[*]

## I. Introductory remarks

Greece acceded to the United Nations Convention on Contracts for the International Sale of Goods (CISG) by Law 2532/1997 of November 11, 1997. On January 12, 1998 the instrument of accession was deposited to the Secretary-General of the United Nations (Art. 91 (4) CISG) and on February 1, 1999 the CISG entered into force in respect of Greece (Art. 99 (2) CISG).

As stated in the explanatory report of Law 2532/1997, the reasons which led Greece to the accession to the CISG were threefold: *First*, it was considered that Greece would stand to gain from the unification of the law on the international sales of goods. In view of its success, the CISG, which had already been ratified by numerous states (45 by that time) and had attained the status of a new lex mercatoria, was seen as appropriate means of uniform regulation of international sales.[1] Besides, the states with which Greece had significant trade relations were among those that had already adopted the CISG.[2] Hence, subject to Art. 1 (1) lit. (b) CISG, this convention was anyway likely to apply in Greece as foreign law, especially as regards the import trade.[3] *Second*, the stipulations of the CISG presented extensive similarities

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* The author would like to thank Dr. Anna Mantakou and Froso Dimakou-Kiaou for their valuable comments on the practice of law in Greece.

1 Cf. explanatory report of Law 2532/1997 at I. On this issue see esp. *Pamboukis*, Lex Mercatoria as Applicable Law in International Contractual Obligations [in Greek] 1996, p. 43; *Vrellis*, The United Nations Convention on Contracts for the International Sale of Goods. Thoughts on the Necessity of Greece's Accession [in Greek], Koinodikion 1996, 21 seq., at 24.

2 See explanatory report of Law 2532/1997 at IV.

3 According to Art 1 (1) lit. (b) CISG, this Convention applies to contracts of sale of goods between parties whose place of business are in different states when the rules of private international law lead to the application of the law of a Contracting State. According to Art. 4 (1) of the Rome Convention on the Applicable Law to Contractual Relations of 1980, in the absence of choice of law by the parties, the contract shall be governed by the law of the country with which it is most closely connected. Furthermore, Art. 4 (2) of the Rome Convention provides that it shall be presumed that the contract is most closely connected with

with the relevant Greek provisions and thus Greek jurists would not be expected to confront significant difficulties when dealing with it.[4] Moreover, at the points where the provisions of the two legal documents deviated, it has been acknowledged that the CISG provisions constituted mostly an improvement.[5] *Third,* the fact that CISG consists of default rules (Art. 6), and thus the parties may exclude its application, was also weighted up.[6]

On the whole, the CISG is looked upon as a solid legal text with a clear orientation towards the needs of the practice.[7] Nevertheless, it does not lack criticism: It is often stressed that several provisions are a result of a compromise and undermine its effect as an instrument of law unification.[8] In addi-

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the country where the party who is to effect the performance which is characteristic of the contract has his habitual residence (…). In the case of a sales contract, it is accepted that the characteristic performance is the non-monetary one, i.e. the performance of the seller. On this issue see esp. *Vrellis*, supra note 1, 40.

4 See explanatory report of Law 2532/1997 at IV. See also *Vrellis*, supra note 1, 26. It is worth noting that after the reform of the Law of sales of 2002 (see infra, under section V) domestic law is even more similar to the CISG.

5 See explanatory report of Law 2532/1997 at IV. See also, among others, *Vrellis*, supra note 1, 24 seq., at 28; *Stathopoulos*, The (under ratification) United Nations Convention on the International Sales of Goods and the Law of the Civil Code – Innovations Regarding Contractual Breaches [in Greek], Nomiko Vima (NoV) 1997, 1085-1098; *Nikolaidis*, The International Sale of Goods According to the Vienna Convention [in Greek], 2000, p. 127. Cf. also *Pouliadis*, The United Nations Convention on the International Sale of Goods and the Law of the Civil Code: the Model for the Unifications of the Provisions on Breach of Contract [in Greek], Episkopisi Emporikou Dikaiou (EpiskED) 1998, 19-44. Contra: *Karampatzos*, in: Papanikolaou/Roussos/Christodoulou/ Karampatzos, The New Law of Seller's Liability [in Greek] (2003), at N. 454 seq.

6 See explanatory report of Law 2532/1997 at IV.

7 See supra note 5. See also *Dimas*, International Conventions on the Sale of Goods: The United Nations Convention of 1980 (Vienna Convention) – Law 2532/1997 [in Greek], Nomiko Vima (NoV) 1998, 432-436, at 434-435; *Kornilakis*, 'A Dogmatic Approach of the New Rules – The Notion of Fundamental Breach of Contract', in: Kornilakis/Pouliadis/Valtoudis, The Vienna Convention on the International Sales of Goods [in Greek] 2001, p. 7-24, at p. 24.

8 See esp. *Karampatzos*, supra note 5, N. 457. See also *Chelidonis*, 'The Transition from Specific Performance to Damages – A Proposal for the Improvement of the Civil Code', in: Doris/Chelidonis (eds.), Issues on the Application of the Vienna Convention on the International Sale of Goods (Law 2532/1997) [in Greek] 2004, p. 109-146, at p. 113 seq., referring especially to the compromises behind Art. 28 CISG. For a comprehensive analysis on the compromises in the CISG see *Nikolaidis*, The Vienna Convention on the International Sales of Goods (Law

tion, the absence of general clauses referring e.g. to good faith or to the abuse of rights, is considered to deprive the Convention from flexibility, since it eliminates the possibility of introducing deviations from its provisions on equity considerations.[9] Finally, the Convention is thought to favor the seller and to disregard the potential asymmetry of bargaining power between the parties as well as the need to protect the weaker party.[10] In any case this criticism does not get as far as the rejection of the Convention.

After Greece acceded to the CISG, a number or lectures and colloquia have been organized in order to raise awareness of this Convention.[11] These activities were mostly addressed to lawyers and only secondarily to business circles.[12] Moreover Greek Law Schools have also engaged in endeavors in order to promote knowledge on the CISG, especially by including it in the materials of courses on civil or commercial law, offered usually, but not exclusively, at postgraduate level, as well as by supporting internet sites which provide information on the Greek case-law and literature on CISG.[13]

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2532/1997): Its Creation and the Compromises it Reflects [in Greek], Kritiki Epitheorisi Nomikis Theorias kai Praxis (KritE) 2/1999, 119-164.

9 See explanatory report of Law 2532/1997 at II 4 and *Stathopoulos*, supra note 5, 1098.

10 See esp. *Doris*, 'Comparative Approach of the Choices of Systematic Organization of the Rules on the Sales of Goods in the Civil Code and the Vienna Convention – Critical Remarks', in: Doris/Chelidonis (eds.), Issues on the Application of the Vienna Convention on the International Sale of Goods (Law 2532/1997) [in Greek] 2004, p. 155-180.

11 The first relevant event was oganized in Athens on 18.10.1995 (i.e. before Greece's accession to the CISG) by the UNCITRAL and the Athens Chamber of Commerce and Industry. Moreover on 10.6.1997 the Piraeus Bar Association hosted a lecture by Prof. Stathopoulos on the CISG. After Greece's accession, the Greek Association of Civil Lawyers has organized conferences on the CISG in Athens on 23.1.1998, together with the Athens Bar Association, and on 16.1.2002, together with the Court of First Instance of Athens, as well as in Thessaloniki on 14.1.2000, together with the Lawyer's Society of Northern Greece. Moreover colloquia on the CISG have been organized by the Macedonian Association of Commercial Law in Thessaloniki on the 19.11.1997, and by the Law Faculty of the Democritus University of Thrace in Komotini on 2 and 3.11.2001.

12 The role of the Chambers of Commerce and Industry in the raising of awareness of the CISG has been rather marginal: The Chamber of Athens participated in the organization of the seminar on 18.10.1995 (supra note 11), whereas the contribution of the Chamber of Thessaloniki consisted in providing the room for the conference which took place in Thessaloniki on 14.1.2000 (supra note 11).

13 See http://web.auth.gr/law/index.php?lang=el&rm=69&mn=112 [last visited on 11.8.2008] of the Department of Civil, Civil Procedure and Labor Law of the Law Faculty of the University of Thessaloniki as well as the Greek contribution in the

## II. CISG's impact on practicing lawyers

Despite the fact that numerous lectures and colloquia have been organized on the CISG,[14] a great number of Greek lawyers, if not the majority, are rather unaware of the Convention. This effect may be attributed to the way law is practiced in Greece: Although the number of law firms increases steadily during the last years, law firms are still few, as compared to the total number of lawyers, and their size is usually relatively small (of about 5-20 members). Most lawyers practice the law solo.[15] Hence there is a lack in specialization, which renders it difficult for lawyers to follow up recent legal developments, especially on an international level. Evidence in support of the argument on the weak awareness of lawyers regarding the CISG may be provided by fact that the Hellenic Institute of International and Foreign Law has repeatedly received requests from lawyers to grant information on (national) foreign laws on sales, in cases which actually fell within the scope of application of the CISG. As a consequence CISG cannot be expected to have had considerable (if any) impact neither on the contents of standard contracts forms, nor on the drafting of briefs and memoranda. In any case, younger lawyers may be better informed on the CISG than their senior colleagues, due to the increased probability that they have dealt with the CISG in the course of their studies.[16]

Even if lawyers happen to be aware of the CISG, it could be expected that, provided that their bargaining position allows for it, they would rather exclude its application, by ruling that the contract will be governed by the law of sales of the Greek Civil Code (hereinafter: CC). This reaction of lawyers is not CISG specific, but rather commonplace when it comes to international instruments, and is due to the fact that legal professionals are more familiar with domestic law. The attitude of a lawyer towards the CISG may however differ, depending on the interests of his client in a specific case: The law of the Greek Civil Code on sales is considered to be more buyer-friendly than the CISG.[17] Therefore, if the lawyer represents the seller, he

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Pace database on the CISG by the Department of Civil Law of the Faculty of the University of Athens in: http://cisgw3.law.pace.edu/cisg/greek-cisg/index2.html [last visited on 11.8.2008].

14 See supra note 11.

15 See *Hatzis*, 'Legal Profession in Greece' in: Jurist – Legal News and Research: http://jurist.law.pitt.edu/world/greece.htm [last visited on 11.8.2008].

16 See supra, under section I in fine.

17 See *Doris*, supra note 10, p. 166 seq., who points out the provisions of Arts. 35 (3) CISG, 39, 43, 46 and 49 CISG as particularly buyer friendly. See also *Dimitriadis*, The Law of Sales of the Civil Code and the International Convention on the Sales of Goods (CISG) [in Greek], Armenopoulos (Arm) 2006, 1183-1187, at

may be unwilling to exclude the application of the CISG in the specific contract.

As far as the reference to foreign legal writing and case-law is concerned, although it is incontestably crucial for the uniform interpretation and application of the CISG, it is doubtful whether lawyers indeed site foreign sources in their lawsuits or statements before the Greek courts. As a general tendency, Greek lawyers resort to foreign sources mainly if the domestic ones do not suffice. This presumption could be supported by the fact that in the (few) Greek judgments applying the CISG, only Greek authors are cited. In any case, international literature and case-law is taken into account indirectly, since the vast majority of legal scholars writing on the CISG include foreign references in their writings.

Overall it becomes evident that most Greek lawyers are not familiar with the CISG. Hence, it can not be expected that they would draw arguments from the CISG in purely domestic disputes. Anyhow, such a necessity does not seem to exist, since the provisions of the Greek Civil Code on the sales contract, as reformed in 2002,[18] tend to converge to the rules set forth by the CISG.

## III. CISG's impact on scholars

Already before the coming into force of the CISG in respect of Greece, legal scholars had devoted attention to it.[19] The volume of the relevant literature increased considerably in the few years following the accession of Greece to

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1187. For more extensive analysis of the differences between the CISG and the Greek Civil Code see infra (under section V 3).

18 Law 3043/2003. See infra under section V.

19 See *Kozyris*, 'Some Observations on the Sphere of Applicability of the Vienna Convention on Contracts for the International Sale of Goods', in: Liber Amicorum Nikolaos Deloukas, Vol. 1 (1989) 493-503; *Witz/Kapnopoulou*, The Vienna Convention on the International Sale of Goods and the Recent Case-Law [in Greek], Elliniki Epitheorisi Europaikou Dikaiou (EEEurD) 1995, 561-576; *Vrellis*, supra note 1. See also *Liakopoulos*, General Part of Commercial Law [in Greek], already in the first edition of 1991, p. 51-55; *Farmakidis*, The Law of Greek External Trade [in Greek] 1993, 192-202; *Pamboukis*, supra note 1, esp. p. 42-43 and 244-248; *Gazis*, Thoughts on the Future of the Legal Science [in Greek], Kritiki Epitheorisi Nomikis Theorias kai Praxis (KritE) 1/1997, 13-70, at note 107; *Pouliadis*, The Concurrence of Special and General Norms in the Civil Liability of the Seller, Vol I. Warranty and Non-Performance – Doctrinal and Policy Analysis [in Greek], 1997; *Stathopoulos*, supra note 5.

the CISG, especially in the period from 1998 to 2002.[20] Nowadays, not many articles deal exclusively with the CISG.[21] However, the CISG has

[20] Several books on the CISG have been published in Greece. See *Koutsoukis*, The United Nations Convention on the International Sales of Goods (texts) [in Greek] 2000; *Nikolaidis*, supra note 5; *Kornilakis/Pouliadis/Valtoudis*, The Vienna Convention on the International Sales of Goods [in Greek] 2001; *Nikolaidis*, The Scope of Applicability of the Vienna Sales Convention [in Greek] 2001; *Doris/Chelidonis* (eds.), Issues on the Application of the Vienna Convention on the International Sale of Goods (Law 2532/1997) [in Greek] 2004. Moreover the following articles have appeared in Greek law reviews: *Dimas*, supra note 7; *Dimas*, The Scope of Application of the United Nations Convention on the International Sales of Goods [in Greek], Dikaio Epicheiriseon kai Etairion (DEE) 1998, 452-455; *Karakostas*, The Notion of "Defect" According to Arts. 534 seq. CC, Art. 6 of Law 2251/1994 on "Consumer Protection" and Arts. 25 and 35 (1) of the Vienna Convention on the International Sale of Goods (Law 2532/997)[in Greek], Dikaio Epicheiriseon kai Etairion (DEE) 1998, 1240-1243; *Pouliadis*, supra note 5; *Tsouganatos*, The Transfer of Risk According to Articles 66-70 of the United Nations Convention on the International Sale of Goods [in Greek], Epitheorisi Emporikou Dikaiou (EEmpD) 1998, 509-529; *Will/Pouliadis*, The Limitation Period for the International Sale of Goods. Thoughts on the Occasion of the Decision of 10.10.1997 of the Appeals Court of Geneva (Chambre Civile de la Cour de Justice, 10.10.1997, ACJC/1230/1997) [in Greek], Kritiki Epitheorisi Nomikis Theorias kai Praxis (KritE) 2/1998, 123-136; *Bechlivanis*, The Creation of a European Law of Sales – Directive 1999/44/EC, United Nations Convention and Civil Code [in Greek], Armenopoulos (Arm) 1999, 1660-1677; *Giannopoulos*, The Scope of Application of the Vienna Convention of 1980 on International Sales of Goods [in Greek], Elliniki Epitheorisi Europaikou Dikaiou (EEEurD) 1999, 621-644; *Nikolaidis*, supra note 8; *Petrochilos*, Arbitration Conflict of Laws Rules and the 1980 International Sales Convention, Revue Hellénique de Droit International (RHDI) 1999, 191-218; *Valtoudis*, The Problem of the Concurrence of the Liability for Defective Goods under the Vienna Convention with National Tort Law [in Greek], Armenopoulos (Arm) 1999, 327-351; *Valtoudis*, The Seller's Right to Remedy His Failure to Perform His Obligations According to the Vienna Convention (CISG) [in Greek], Armenopoulos (Arm) 1999, 595-609; *Flambouras*, Discharge from Liability for Non-Performance of the Contract of Sales in the Vienna Convention on the International Sales of Goods [in Greek], Epitheorisi Emporikou Dikaiou (EEmpD) 2000, 679-711; *Flambouras*, The Problem of the Adjudication and Assessment of Interest in the Vienna Convention on the International Sale of Goods [in Greek], Kritiki Epitheorisi Nomikis Theorias kai Praxis (KritE) 1/2000, 195-213; *Giannopoulos*, Principles of Interpretation of the United Nations Convention on the International Sale of Goods (Vienna 1980) [in Greek], Epistimoniki Epetirida Armenopoulou 2000, 83-102; *Nikolaidis*, The Definition of the Scope of Application of the New Laws on Sale (CISG, Direc-

gained a stable place in the legal writings on sales contracts; references to the CISG may be found in the most significant books on sales[22] as well as on treatises referring to particular issues of the sales contracts.[23]

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tive 1999/44/EC) in Relation to the Law of Sale of the Civil Code [in Greek], Dikaio Epicheiriseon kai Etairion (DEE) 2000, 806-812; *Petrochilos/Flambouras*, The Vienna Convention on the International Sales of Goods as Interpreted by the Arbitral Tribunals [in Greek], Epitheorisi Emporikou Dikaiou (EEmpD) 2000, 1-62; *Arvanitakis*, The Impact of the Vienna Convention on the International Sales of Goods on Procedural Law [in Greek], Chronika Idiotikou Dikaiou (ChrID) 2001, 673-683; *Chelidonis*, Law 2532/1997 (Vienna Convention on the International Sale of Goods) – Definition of Its Scope of Application and Contractual Theory [in Greek], Chronika Idiotikou Dikaiou (ChrID) 2001, 870-879; *Chelidonis*, The "Fundamental Breach of Contract" in Art. 25 of the Vienna Convention [in Greek], Epitheorisi Emporikou Dikaiou (EEmpD) 2002, 663-678; *Kornilakis*, Issues on the Application of the Vienna Convention on the International Sales of Goods. The Introduced Regulating Framework – The Right of Rescission of the Contract [in Greek], Kritiki Epitheorisi Nomikis Theorias kai Praxis (KritE) 1/2002, 133-150; *Nikolaidis*, The Importance of Good Faith and the Precontractual Liability According to the Vienna Convention on International Sales of Goods [in Greek], Chronika Idiotikou Dikaiou (ChrID) 2002, 886-900; *Pantelidou*, Issues Relating to the Allocation of Risk in the Vienna Convention on the International Sale of Goods [in Greek], Chronika Idiotikou Dikaiou - (ChrID) 2002 97-102; *Pouliadis*, The Main Characteristics of the Regulation of Compensation in the Vienna Convention for the International Sales of Goods [in Greek], Kritiki Epitheorisi Nomikis Theorias kai Praxis (KritE) 1/2002, 151-166.

21 See *Dimitriadis*, supra note 17; *Flambouras*, The Recent Greek Case-Law on the Vienna Convention of 1980 on the International Sales of Goods – Issues of Private International Law [in Greek], Intervention in the 17th Conference of the Greek Association of Commercial Lawyers (Chania, 2-3.11.2007) (unpublished); *Pamboukis*, 'The Concept and Function of Usages in the United Nations Convention on the International Sale of Goods', in: Stathopoulos/Beys/Doris/Karakostas (eds.), Festschrift für Apostolos Georgiades zum 70. Geburtstag, 2006, p. 839-867. See also the dissertation of *Stathouli*, Die Haftung des Verkäufers für Sachmängel und Falschlieferung nach dem Wiener Übereinkommen über den internationalen Warenkauf unter Berücksichtigung des deutschen und griechischen Rechts, 2006.

22 See *Filios*, Law of Obligations. Special Part [in Greek], 5th ed. Vol I/1 (2002), § 19a; *Kornilakis*, Special Part of the Law of Obligations [in Greek], Vol. I (2002), §§ 22-27; *Papanikolaou/Roussos/Christodoulou/Karampatzos*, The New Law of Seller's Liability [in Greek] (2003), esp. N. 382 seq.; *Ap. Georgiades*, Law of Obligations. Special Part [in Greek] Vol I (2004) § 11. See also *Kiantos*, Private Law of International Trade [in Greek], 4th ed. 2005, p. 848-971.

From the very beginning the scholars who focused their attention on the CISG the most were those of private law, and especially civil law.[24] The strong interest of the scholars of civil law on the CISG could be attributed to the fact that the entry into force of the CISG in respect of Greece, timely coincided with the issuance of the European Directive 99/44/EC on consumer sales and thus triggered a more general discussion on the reform of the Greek Civil Code in respect to the sales contract, which in fact took place in 2002.[25] In contrast, the scholars of private international law who have dealt with the CISG are relatively few.[26]

With regard to their aim, legal writings on the CISG may be distinguished in two main groups: those which focus on specific issues of the CISG and contribute to its interpretation,[27] and those which present the rules of the CISG and proceed to their comparison with domestic law.[28] Such comparisons aim mainly at pointing out the similarities between the two instruments, in order to render the CISG more familiar to the reader, whereas differences have been discussed from a de lege ferenda perspective, especially until the recent reform of the Civil Code provisions on sale.[29] Comparative remarks may be also found in the writings of the first group, but not as frequently, since they may risk, rather than promote, the autonomous interpretation of the CISG.

A common element in almost all scholarly writings on the CISG is the citation of foreign literature and, to a lesser extent, of foreign case-law. The sources cited are mainly in German and, secondarily, in English language, while few references in French and Italian may be retrieved as well. However, the interaction between the interpretation of the CISG and this of

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23 See, among others, *Pouliadis*, The Seller's Responsibility in the System of Breach of Contract [in Greek] 2005; *Karampatzos*, Unforeseeable Change of Circumstances in the Bilateral Contract [in Greek] 2006; *Flambouras*, The Allocation and the Transfer of Risk in the Contract of Sale of Goods [in Greek] 2007.

24 See e.g. the writings by *Chelidonis*, *Doris*, *Filios*, *Flambouras*, *Gazis*, *Georgiades*, *Karampatzos*, *Kornilakis*, *Pantelidou*, *Pouliadis*, *Stathopoulos* and *Valtoudis* mentioned supra (notes 19-23). Some scholars of commercial law have also dealt with the CISG. See esp. *Farmakidis*, *Kapnopoulou*, *Kiantos*, *Kozyris*, *Liakopoulos* and *Tsouganatos*, mentioned supra (notes 19-23).

25 Law 3043/2002. See infra, under section V.

26 See esp. *Giannopoulos*, *Pamboukis*, *Petrochilos* and *Vrellis* (see supra notes 19-21).

27 See for instance *Tsouganatos*, supra note 20; *Flambouras*, The Problem of the Adjudication and Assessment of Interest, supra note 20; *Nikolaidis*, The Importance of Good Faith, supra note 20; *Pantelidou*, supra note 20.

28 See for instance *Stathopoulos*, supra note 5; *Pouliadis*, supra note 5; *Bechlivanis*, supra note 20; *Kornilakis*, supra note 7; *Doris*, supra note 10; *Dimitriadis*, supra note 17.

29 Explicitly so: *Bechlivanis*, supra note 20, 1677.

other uniform law instruments has not been treated at length in the Greek literature.[30]

Scholarly writings on the CISG have been the primary source of information of jurists on this issue.[31] Due to the fact that CISG is new to lawyers and judges, the influence of scholarly writings can be reasonably expected to be decisive, at least until there is sufficient (Greek) case-law on these issues.[32] In addition, due to the fact that the persons who are most engaged in writing on the CISG are university professors and researchers, their writings have increased influence on students and are often included in the teaching materials, especially in post-graduate level. Finally, the references to the CISG in treatises on the law of sales are the most influential ones,[33] due to the fact that jurists are accustomed to consulting these same sources in domestic cases as well.

## IV. CISG's impact on courts

Generally, Greek courts still seem to be rather unfamiliar with the CISG. So far only a handful of Greek court decisions which refer to the CISG have been published in the legal press. More concretely, there may be retrieved three decisions of Appeals Courts,[34] five decisions of Courts of First In-

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30 The relation between the CISG and other international law instruments is slightly touched upon by *Flambouras*, The UNIDROIT Principles of International Commercial Contracts – Scope of Application – Issues of Private International Law [in Greek], Kritiki Epitheorisi Nomikis Theorias kai Praxis (KritE) 1/2001, 217-242, at 240-242. Cf. also *Pamboukis*, supra note 21, p. 861 seq.

31 See however supra (under section II) on the lawyers' lack of awareness on the CISG.

32 This result is also supported by the fact that the (few) Greek court decisions on the CISG rely mainly on the relevant Greek scholarly writings. See esp. decision 165/2005 of the Single-Member Court of First Instance of Larissa, Legal Database Intracom-Nomos. Cf. also decisions 63/2006 of the Appeals Court of Lamia, Episkopisi Emporikou Dikaiou (EpiskED) 2006, 1108 and 22513/2003 of the Multi-Member Court of First Instance of Thessaloniki, Armenopoulos (Arm) 2003, 1802.

33 See supra note 22.

34 See decisions: 4861/2006 of the Appeals Court of Athens, Episkopisi Emporikou Dikaiou (EpiskED) 2006, 841; 63/2006 of the Appeals Court of Lamia, supra note 32; 2923/2006 of the Appeals Court of Thessaloniki, Episkopisi Emporikou Dikaiou (EpiskED) 2007, 168. In the last decision the court abstained from the adjudication of the case on procedural grounds (indefinite claim).

stance,[35] whereas an additional (unpublished) decision of a Court of First Instance is reported in the literature.[36] The existence of so few court decisions on the CISG could lead to the suspicion that courts have overlooked its application in cases which would actually fall within its scope.[37] However, no published court decision which would confirm this perspective has been detected.

An important decision on the CISG which merits consideration is the decision 165/2005 of the Single-Member Court of First Instance of Larissa.[38] In this decision the court proceeded to the application of the CISG on the basis of Art. 1 (1) lit. (a) GISG, since both parties were located in Contracting States of the CISG (Greece [seller] and Yugoslavia [buyer]).[39] The court explicitly referred to the autonomous interpretation of the CISG and stressed that, according to Art. 28 (1) of the Greek Constitution, the provisions of CISG prevail over the provisions of domestic law.[40] Next, the court proceeded to the examination of two thorny issues: a) the interest rate on sums in arrears, which in the case in question were damages due because of the breach of contract by the seller, and b) the limitation period of the compensation claim of the buyer. More concretely:

As regards the interest rate, the Court of First Instance of Larissa ruled that, although Art. 78 GISG does not refer to the height of this rate, this matter is meant to be covered in accordance with the Convention. Hence, in order to fill the gap the court sought for the underline general principles of the CISG (Art. 7 (2) CISG) and came up the following result: A basic

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35 See decisions: 22513/2003 of the Multi-Member Court of First Instance of Thessaloniki, supra note 32; 43945/2007 of the Single-Member Court of First Instance of Thessaloniki, Chronika Idiotikou Dikaiou (ChrID) 2008, 52; 16319/2007 of the same Court, Chronika Idiotikou Dikaiou (ChrID) 2008, 147; 165/2005 of the Single-Member Court of First Instance of Larissa, supra note 32; 14953/2003 of the Single-Member Court of First Instance of Thessaloniki, Legal Database Intracom-Nomos.

36 See *Flambouras*, supra note 21.

37 Cf. *Witz/Kapnopoulou*, supra note 19, 566, who provide a similar explanation for the small number of French court decisions on the CISG from the period 1988-1995.

38 See supra note 32.

39 The CISG would also be applicable on the basis of Art. 1 (1) lit (b). The court did not proceed to the examination of this point, since, once the conditions of Art. 1 (1) lit. (a) are met, this is redundant.

40 Art. 28 (1) of the Greek Constitution provides that international conventions become operative according to their respective conditions as of the time they are ratified by statute and that they shall be an integral part of domestic Greek law and prevail over any contrary provision of the law. This point is also mentioned in decision 63/2006 of the Appeals Court of Lamia, supra note 32.

principle of the CISG is its uniform interpretation. In order to achieve this result, the issue in question should be decided on the basis of an independent criterion. Then the court opted for good faith as a criterion, noting that this principle ought to govern the international trade.[41] On this premise it was decided that the crucial interest rate is the rate in the country of the creditor of the monetary obligation [in the specific case it was the buyer who claimed damages], since this is the interest rate he would be entitled to, had he concluded a contract with a domestic seller.[42] This issue had also been treated along the same lines in the decision 1314/2000 of the Single-Member Court of First Instance of Athens.[43] On the conterary, according to the recent decision 43945/2007 of the Single-Member Court of First Instance of Thessaloniki,[44] no general principle of the CISG may lead to a solution as to the height of the due interest rate and thus the issue should be decided in conformity with the law applicable by virtue of the rules of private international law.

After having dealt with the due interest rate, the Court of Larissa proceeded to the examination of the issue of the prescription of the buyer's claims. The prescription of the claims is neither treated in the CISG directly, nor is there a general principle which could serve in the solution of this problem. Hence the court resorted to the conflict rules of the Rome Convention on the Applicable Law to Contractual Relations of 1980,[45] and concluded that Greek law was applicable in the case in question.[46] The next problem which the court had to face was the conciliation of the provision of Art. 39 CISG, according to which the buyer must notify the seller on the lack of conformity of the goods to the contract within two years from the date he was handed over the goods, and of Art. 554 CC (before its amendment in 2002),[47] according to which the buyer's rights arising from a defect or lack of conceded quality of the product have to be exercised within six months. The court ruled that the period provided for in Art. 554 CC starts running after the buyer has notified the seller according to Art. 39 CISG. This decision took into consideration the argumentation of a relevant Swiss

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41 Cf. also Art. 7 (1) CISG in fine.

42 The court relied upon the relevant scolarly writings, namely *Witz/Kapnopoulou*, supra note 19, 575 and *Flambouras*, supra note 27, 202 seq. See also the analysis of this decision in *Flambouras*, supra note 21.

43 As sited in the decision 165/2005 of the Court of Larissa and as reported by *Flambouras*, supra note 21.

44 See supra note 35.

45 Ratified by Law 1792/1988.

46 See Art. 4 (2) of the Rome Convention (see also supra note 3). It is worth noting that Greece has not ratified the New York Convention on the Limitation Period in the International Sale of Goods of 1974.

47 On the reform of the Greek law of sales see infra under section V.

decision, as documented in the Greek literature.[48] However, the court deviated from it, adopting the German solution, which has also be seen in the literature as preferable.[49]

However, decisions such as the decision 165/2005 of the Court of First Instance of Larissa still seem to constitute an exception, rather than the rule. Other Greek decisions on the CISG do not reach the same level of analysis. They are rather confined to the mere reference of the provisions of the CISG, with few general comments as well as with some comparative remarks vis-à-vis the relevant domestic provisions.

In some instances a certain insecurity of the judge as to the application if the CISG may be detected: In decision 4861/2006 of the Appeals Court of Athens,[50] the appellant demanded the review of the decision of the Court of First Instance on the grounds that this court had failed to proceed to the application of the CISG in the specific case, which fell within its scope. The Appeals Court ruled that both the provisions of the Greek Civil Code and those of the CISG would lead to the same result and thus rejected the appeal. This was indeed so in the particular case, therefore there is not much to criticize as to the outcome of the decision.[51] It is striking, however, that the court avoided treating the question of whether the CISG was actually applicable in the case in question.

In another decision,[52] the Multi-Member Court of First Instance of Thessaloniki explicitly applied the CISG on the basis of Art. 1(b) of the Convention in the case of breach of a contract concluded between an Italian seller and a Greek buyer. In the case in question, the machines sold were defective and the buyer incurred expenses in order to proceed to the necessary repairs as well as loss of profits due to his inability to use the purchased machine. The court accurately referred to the CISG provisions on the rights of the buyer in case of breach of duty by the seller and judged that the latter should cover the costs of repair of the buyer and compensate him for his lost profits. Since all amounts were in arrear, it was recognized that the buyer was also entitled to interest. However, the court seems to have assumed that

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48 See *Will/Pouliadis*, supra note 20.

49 Ibid, referring to Art. 3 of the Law of 5.7.1989 (BGBl 1989 II, 586), by means of which Germany ratified the CISG.

50 See supra note 34.

51 The claimant (seller) had proceeded to the rescission of the contract because of the breach of duty of the buyer but he was still claiming the full price of the goods as damages. Cf. also decision 43945/2007 of the Single-Member Court of First Instance of Thessaloniki, supra notes 39 and 44.

52 See decision 22513/2003 of the Multi-Member Court of First Instance of Thessaloniki, supra note 32.

the applicable interest rate would be the Greek one, without proceeding to the further examination of the issue.[53]

Similar to the above-mentioned decision of the Court of First Instance of Thessaloniki is the decision 63/2006 of the Appeals Court of Lamia.[54] A further characteristic of this last decision is the extensive comparison between the provisions of the CISG and of the Greek Civil Code, which did not serve a particular purpose. This could be understood as an attempt to understand the CISG through the prism of domestic law, which is however not recommendable, since it may lead to the misinterpretation of the CISG.[55]

The small number of court decisions on the CISG allows neither for generalizations nor for the detection of a common trend of the Greek case-law concerning the interpretation of the CISG. It is worth noting, however, that, all in all, Greek decisions on the CISG do not present special characteristic which would differentiate them substantially from decisions on purely domestic matters. Recourse to foreign literature and case-law is only made by means of secondary sources, i.e. only to the extent they are referred to in the domestic literature. Overall, the impact of the CISG on the style of court decisions as well as on the interpretation of domestic law or other uniform law instruments is still negligible (if any).

## V. CISG's impact on the legislator

### 1. The way to the Greek reform of the law of sales

In the years following the accession of Greece to the CISG, Greek scholars dealt extensively with the comparison of the CISG to the Greek domestic law and evaluated the alternative forms of regulation of the sales contract. The CISG approach was considered as a reasonable simplification of the legal framework of sales, and of contracts in general, which would be de lege ferenda preferable to the existing Greek regulation.[56] This was especially

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53 Cf. *Witz/Kapnopoulou*, supra note 19, 575-576, referring to (and criticizing) a similar decision of the Appeals Court of Paris.

54 See supra note 32.

55 Decision 63/2006 of the Appeal Court of Lamia, supra note 32, provides already a relevant example: In its attempt to explain the relation between the doctrine of foreseeability and the theory of adequate cause, it reaches the conclusion that the scope of recoverable damages is larger under the foreseeability doctrine than under the theory of adequate cause. Anyhow, this misconception did not have practical implications in the specific case. For a correct approach of the relation between foreseeability and adequate cause see *Pouliadis*, supra note 5, 29-31.

56 See supra notes 5 and 7.

stressed in regard to the adoption by the CISG of the single notion of "breach of contract" and to the explicit recognition of the obligation of the seller to deliver goods which are in conformity with the contract. Greek law, on the contrary, differentiates between impossibility of performance, delay and improper performance of a contract and also provides special rights to the buyer in case of sale of defective goods or goods lacking a conceded quality, which, until the recent reform in 2002, did not fall under the rubric of improper performance.[57]

Nevertheless, it is rather improbable that the discussion triggered upon the accession of Greece to the CISG would have actually led to a law reform, had it not been for the issuance of the Directive 99/44/EC on consumer sales. It was only on this occasion that a legislative committee on the reform of the law of sales was formed, comprised by prominent professors of civil law.[58] The committee considered three reform options: the *first* option consisted in the incorporation of the necessary measures for the implementation of the Directive 99/44/EC in the special legislation on consumer protection. The *second* option was the reform of the whole set of provisions of the Civil Code on sales, by generalizing the provisions of the European Directive and thus extending its scope of application beyond consumer sales. The *last* option referred to a general reform of the Greek contract law, following the example of Germany.

The legislative committee decided for the second option, namely for the reform of Civil Code as regards the sales contract. The first option was rejected on the grounds that it would lead to a further fragmentation of the legal framework on sales. As regards the third option, the legislative committee acknowledged that it merited further consideration, since it would present the advantage that Greek law could be rendered more compatible to the CISG. Nevertheless, due to the pressing deadline for the implementation of Directive 99/44/EC, it was considered that there would not be enough time in order to proceed on a solid basis to a more general reform of contract law.[59] The committee implied that such a reform would be wishful when the circumstances matured but since 2002, when the reform of the law of sales was introduced by Law 3043/2002, no discussion on a new amendment of the law of obligation has taken place.

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[57] See, among others, *Stathopoulos*, supra note 5, 1086 seq.; *Pouliadis*, supra note 5, 22 seq.; *Kornilakis*, supra note 7, p. 15 seq. See however *Karampatzos*, supra note 5, N. 437 seq. Cf. also *Chelidonis*, The "Fundamental Breach of Contract", supra note 20, 677-678.

[58] See explanatory report of Law 3043/2002 at I 1.

[59] According to Art. 11 (1) of Directive 99/44/EC, Member States shall have adopted measures for the implementation of this Directive until 1.1.2002. However, the relevant Greek legislative committee was only formed on 22.11.2000. On this issue see explanatory report at I 4.

## 2. Fields of approximation of the Greek law of sales to the CISG

Even though it was not the CISG itself which triggered the Greek reform of the law of sales, an approximation between the domestic law and the CISG may be detected. A part of this approximation is consequential, in the sense that the European Directive 99/44/EC, after which Greek law was modeled, was deeply influenced by the CISG. Hence, the core element of all abovementioned texts is that the seller assumes the obligation to deliver to the buyer goods which are in conformity with the contract.[60]

The approximation of Greek law and CISG goes further than that, thus manifesting that the Greek legislative committee took the CISG provisions into account when drafting the new law. More concretely:

The Greek legislator deviated from the provisions of the Directive 99/44/EC as regards the relation among the rights provided to the buyer in case of lack of conformity of the goods to the contract. According to Art. 3 (3) and (5) of the Directive, the rights of the buyer to require a reduction of the price of the thing or rescind from the contract[61] are conditional upon the non existence of his right to claim the replacement or repair of the good or upon the failure of the seller to proceed to the replacement or repair within reasonable time and without significant inconvenience to the consumer. The Greek legislator did not adopt this ordering of the buyer's rights. Instead it recognized the possibility of the buyer to freely choose among all abovementioned rights the one he wishes to exercise. This choice of the legislator brought Greek law closer to the CISG.[62]

In addition, the legislative committee on the reform of the law of sales proceeded to the review of further issues, not treated by the Directive, and amended them in accordance to the spirit of the CISG: Namely, the new Art. 543 CC explicitly provides the possibility of the buyer to claim full compensation for the damages incurred because of the rescission of the contract. This rule constitutes an innovation as compared to the previous legal regime, in which only *reasonable* compensation could be claimed in such a case, and corresponds to the provisions of Arts. 45 (2) and 61 (2) CISG.[63]

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60 See Art. 35 (1) CISG, Art. 2 (1) of Directive 99/44/EC and Art. 534 CC.

61 Provided that the lack of conformity is not minor.

62 See Art. 45 (2) CISG and Art. 540 CC.

63 The obligation of the breacher to grant reasonable compensation in case of rescission of the contract is provided by Art. 387 CC of the General Part of the Law of Obligation, which, until 2002, applied also in the case of rescission of a sales contract, due to the lack of any special provisions. However, even under this legal regime, the buyer could reach the same result (i.e. avoid the contract and receive damages for the remaining loss) by claiming the so-called "big compensation" calculated on the basis of the theory of difference. On this issue see esp. *Pouliadis*, 'The Right of Rescission and the Possibility of its Concurrence with the Claim of

Although it is obvious that the legislator was influenced by the CISG, at least as to the abovementioned reforms, the relevant provisions are essentially interpreted under the prism of domestic law, without direct references to the interpretation of the CISG. This interpretation, however, may be indirectly influenced by the relevant tendencies as to the CISG, to the extent that domestic sources refer to it.

## 3. Persisting divergences between the Greek law of sales and the CISG

Divergences between the Greek law of sales and the CISG are deemed to exist, since the Greek law reform did not cover the whole scope of the CISG.[64] For the goals of the current analysis, only the main differences of the texts in issues which would actually fall within the scope of the Greek law reform are considered.

Important diversities between the Greek Civil Code and the CISG are dictated by the different goals of the above-mentioned legal texts: The Greek legislator opted for the generalization of the provisions of the Directive, which aim at the protection of the weaker party in the transaction (i.e. the consumer), and thus focused on non-commercial transactions. The CISG, on the other hand, provides rules for trade partners with comparable bargaining power.[65] Hence most of the differences between the two legal documents may be understood in the light of these considerations.

First, the new Greek law of sales, following the Directive, provides to the buyer a broader right of replacement, as compared to the CISG. More concretely, according to Art. 534 CC the buyer may claim the replacement of the good upon the event of any breach of contract, unless replacement is impossible or overly costly, whereas according to Art. 46 (2) CISG the buyer may require delivery of substitute goods only in case of *fundamental breach* of the contract, in the sense of Art. 25 CISG.[66] The restrictive provision of the CISG as regards the replacement of the good is due to the concern of imposing a heavy burden to the seller, given the increased transportation costs associated with international transactions. The provision of the Directive, on the other hand, was considered more apt for generalization,

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Damages', in: *Kornilakis/Pouliadis/Valtoudis*, The Vienna Convention on the International Sales of Goods [in Greek] 2001, p. 25-43.

64 See supra, under V 1.

65 See *Doris,* supra note 10, p. 162-163; *Karampatzos*, supra note 5, N. 456; Cf. *Karakostas*, supra note 20, 1243; *Bechlivanis*, supra note 20, esp. 1663.

66 It is worth noting that the CISG does not include any provision which relieves the seller from his obligaion to replace the thing if this burdens him excessively. On this issue see *Dimitriadis*, supra note 17, 1185.

since there are no sufficient grounds for the restriction of the right of replacement of the buyer in domestic sales.[67]

In some instances the Greek legislator has adopted provisions which are even more protective for the buyer as compared to those of the Directive 99/44/EC.[68] For instance, the Greek legislative commission amended Art. 537 CC, so that the seller may be relieved from his obligations due to the delivery of a good which lacks conformity to the contract only if the buyer has been aware of the lack of conformity at the time the contract was concluded. This provision is apparently more favorable to the buyer than Art. 2 (3) of the Directive and 35 (3) CISG, according to which the seller may not be held liable in cases where it is considered that the buyer could not reasonably be unaware of the lack of conformity.[69]

Likewise, the Greek legislator chose not to adopt the provision of Art. 5 (2) of the Directive 99/44/EC that, following the pattern of Art. 39 CISG, reads that Member States may provide that, in order to benefit from his rights the consumer must inform the seller within a specific period of time from the date on which he detected such lack of conformity. This provision serves the rapid settlement of the issues between the parties.[70] However, the Greek legislative Committee abstained from the introduction of such an obligation, since it was seen as an excessive burden to the buyer,[71] which was not sufficiently justifiable in non-commercial transactions.[72]

Further divergences between the new Greek law of sales and the CISG may be spotted on issues not covered by the Directive. In these cases, in spite of the different rules, the results of the application of the Civil Code and of the CISG are often similar. However, the reluctance of the legislator to discuss the adoption of these CISG rules may be attributed to the fact that such provisions would actually constitute a foreign body in the Greek legal system and would thus endanger its coherence. More concretely:

The Greek legislator did not proceed to the introduction of strict liability of the parties for breach of contract, as provided in Arts. 45 (1) lit. (b) and 61 (1) lit. (b) CISG. Hence, under Greek law, the seller is held strict liable

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67 See *Karampatzos*, supra note 5, N. 449.

68 On this possibility see Art. 8 (2) of the Directive 99/44/EC.

69 It is worth noting that, before its revision, Art. 537 CC was closer to the provision of Art. 35 (3) CISG, than after the revision. More precisely, according to the older version of Art. 537 CC, the seller was not liable for any defect that the buyer ignored because of gross negligence, unless the seller had promised to the buyer the non existence of the defect or had intentionally withheld it. On this issue see in more detail *Doris*, supra note 10, p. 166-167.

70 See *Karampatzos*, supra note 5, N. 456.

71 See explanatory report of Law 3043/2002 at II 8.

72 Cf. *Karampatzos*, supra note 5, N. 456.

only in case of delivery of goods which lack conformity to the contract,[73] and, even then, his obligation to compensate the buyer is contingent upon his fault. The introduction of a complete scheme of strict liability was rejected as it would constitute a significant deviation from the rule of negligence.[74] Nonetheless, as pointed out in the literature in practice, the differences are not really significant. This is due to the fact that, on the one hand, under Greek contract law the culpability of the breacher is presumed and, on the other hand, that the CISG provides extensive exemptions from strict liability:[75] Apart from the exception of Art. 79 CISG, strict liability is also restricted by the provision of Art. 25 CISG in fine, according to which a breach is not fundamental, if it could not have been foreseen.[76]

Finally, the Greek legislator did not adopt the doctrine of foreseeability as to the assessment of damages[77] since it is not compatible with the theory of difference, which is the prevailing one in Greece. According to this last theory, the breacher is in principle liable for all damages incurred, foreseeable or not, provided that they have been adequately caused by his act (or omission). However, the results tend to converge eventually: The restriction of the due damages may be achieved in Greek law as well, through the application of Art. 300 CC according to which compensation may be reduced if the injured party failed to draw the attention of the debtor to the risk of an unusually large damage. Moreover it is also supported that the doctrine of foreseeability is in a way comprehended in the theory of the aim of the legal rule (Normzwecklehre), which is also recognized in Greece, at least in the doctrine.[78]

## VI. Concluding remarks

An overall assessment of the CISG's impact on the Greek legal order, almost ten years after it entered into force in respect of Greece, would be as follows: Academic scholars, mainly scholars of civil law, soon drew attention to CISG in their writings. They also realized the necessity of the raising of awareness to the CISG and undertook considerable activities in order to promote the knowledge on this Convention. Nevertheless, the average lawyer is still rather unaware of the CISG and thus unwilling to apply it. Likewise, the relevant court decisions are few and the judges seem, in certain

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73 Thus the buyer is not strictly liable in other cases of breach of contract, such as the delay or the impossibility of performance. See *Dimitriadis*, supra note 17, 1184.

74 See *Karampatzos*, supra note 5, N. 444. Cf. *Stathopoulos*, supra note 5, 1097.

75 See *Stathopoulos*, ibid. See also, *Pouliadis*, supra note 5, 26 seq.; *Doris*, supra note 10, p. 174 seq.

76 On this point see *Doris*, ibid.

77 See Art. 74 CISG.

78 See esp. *Pouliadis*, supra note 5, 31.

instances, insecure when having to apply the CISG. Anyhow, the importance of the CISG in Greece is bound to increase; as the similar experiences of other countries have already shown, domestic legal systems often need some time in order to assimilate international legal instruments. The fact that courses on the CISG are offered at universities and that references to the CISG are made in all major treatises on the law of sales constitute, beyond doubt, a promising, and eventually deciding, factor in this process.

# Israel

*Gabriela Sharev*

## General information

The United Nations Convention on Contracts for the International Sale of Goods (hereinafter: CISG) is indeed in force in Israel. It was incorporated into Israeli domestic law by the Sales (International Sale of Goods) Law, 1999. Yet, the CISG has little impact in Israel.

In order to fully understand the minor impact of the CISG on Israeli law, the law relating to international sale of goods prior to the CISG ought to be examined.

In 1964 Israel ratified both Hague Conventions relating to the Uniform Law of International Sale of Goods, namely:

1. The Hague Convention on a Uniform Law of International Sales, 1964 (hereinafter: ULIS)
2. The Hague Convention on a Uniform Law on the Formation of Contracts for the International Sale of Goods, 1964 (hereinafter: ULFC).

The ratification of these conventions led to the enactment of the Sale (International Sale of Goods) Law, 1971, and the Sale (Formation of Contracts for the International Sale of Goods) Law, 1978. Prior to the these laws, the Hague Conventions had also an indirect influence on the legislation of domestic contract laws.

It should be noted here that upon the establishment of the state of Israel, in 1948, Israeli private law was mainly common-law, judge-made, law. The Israeli parliament started to enact in the area of private law only in the mid-sixties. The two main enactments governing contract law in Israel were legislated in the seventies. These laws are: Contracts (General Part) Law, 5733-1973 (hereinafter: General Contracts Law) and Contracts (Remedies for Breach of Contract) Law, 5731-1970 (hereinafter: Remedies Law).

These Laws derive from various sources, amongst them the Hague Conventions. Thus, for example, the first chapter of the General Contracts Law, dealing with formation of contracts, is clearly influenced by the Uniform Law on the Formation of Contracts for the International Sale of Goods (ULFC). By the same token, some of the sections of the Remedies Law, mainly those dealing with damages, are influenced by the Uniform Law of International Sales (ULIS). Obviously, these two Laws, enacted in the sev-

enties, could not be effected directly by the CISG, which was adopted in 1980, but rather they were influenced by both Hague conventions.

Although the ULFC and the ULIS were repealed once Israel ratified the CISG, on August 16, 2001, the Hague Conventions still has a greater impact on Israeli domestic law, much more than the impact of the CISG.

Thus, in spite of the fact that the CISG is in force in Israel and has been incorporated into Israeli law, it does not have much visibility and awareness among the Israeli legal community. Yet, it should be mentioned that an Israeli scholar, Prof. Arie Reich, has an internet site dedicated to the CISG.[1]

## I. CISG's impact on practicing lawyers

Unlike the Hague Conventions, incorporated into Israeli law as early as 1971, the CISG has little impact on practicing lawyers. Not many lawyers are aware of the CISG, and therefore it does not generally effect the way they draft their briefs and memoranda or in the way they solve domestic disputes.

## II. CISG's impact on scholars

1. Scholars writing about the subject are rare, and they are mainly contract law scholars. These are Eyal Zamir[2] and the author of these lines.[3] Even in these writings the CISG is usually mentioned only by way of comparison to domestic law.

An important effort to raise awareness to the CISG has been made by Prof. Arie Reich, in his above-mentioned internet site and in his writings, devoted to the CISG as a legal source in domestic law.

2. Some treatises on domestic law mention and refer to CISG, but only by way of comparison or in order to find the source of the domestic law analysed and applied.[4]

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1 www.biu.ac.il/LAW/cisg/index.htm .

2 Eyal Zamir, "*European Tradition, the Conventions on International Sales and Israeli Contract Law*", *in* European Legal Traditions and Israel (A.M. Rabello ed.) 1994, p. 499

3 Gabriela Shalev, "*International Sale of Goods Between Europe and Israel*", *in* Essays on European Law and Israel (A. Rabello, ed.) (Jerusalem,1996), pp. 1113-1121.

4 See, for example: Eyal Zamir, Sale Law, 1968, in Commentary on Laws Relating to Contracts, 155-157 (The Harry Sacher Institute for Legislative Research and Comparative Law, Jerusalem, 1987), in Hebrew.

## III. CISG's impact on courts

1. The CISG was incorporated into Israeli law only on November 25, 1999, and came into force as a binding law only on February 5, 2000.

Therefore, courts decisions mentioning and applying the CISG are rather rare.

2. Courts in Israel show indeed a homeward trend. The reason for it is twofold: the lack of awareness of the CISG, as well as the fact that most of the international business disputes are usually directed to arbitration.

3. In an important case, the Israeli Supreme Court referred to the CISG: C.A. 3912/90, *Eximin, Belgian Corporation v. Textile and Footwear Italstyle Ferarri Inc*., P.D. 47(4)64. It is interesting to note that the decision in that case was handed down before the CISG came into force, and the CISG was referred to by way of analogy.

This case dealt with a sale contract between an Israeli manufacturer and a Belgian purchaser, who ordered certain jeans boots for exportation to its customer in the U.S. The contract requested the manufacturer to attach a symbol to the boots, which was a trademark of Levi's Jeans. Upon importation to the U.S. the goods were confiscated by the U.S. Customs Authorities because of breach of the trademark. Later on, a compromise was reached whereby the symbol was removed, and the boots were sold in the U.S. market at a much reduced price. The Belgian buyer sued for its losses, claiming that the Israeli manufacturer failed to provide a clean title, under Article 52(a) of the Hague Uniform Law. When applying, by way of analogy, Article 42 of the CISG, the Court reached the conclusion that the seller does not bear responsibility for the fact that the goods were subject to a trademark of a third person, since in the circumstances, the buyer must have known about this fact or could not have been unaware of it at the time of the conclusion of the contract. Moreover, the buyer himself had supplied the seller with the designs for the boots, which included the trademark. Nevertheless, the Court ruled that the seller should bear part of the loss, because of its breach of the duty to act in good faith, a duty arising from Section 39 of the General Contract Law. In the Court's opinion, both the seller and the buyer must have known that the products were infringing the famous trademark of Levi's, and in ignoring this fact they both acted in bad faith. In that case the Court developed a new doctrine of "contributory fault", well known in the law of torts, but hitherto not recognized in the law of contract. The loss was therefore to be shared by the seller and the buyer in equal shares (50%/50%).[5]

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[5] It should be noted that this decision was criticized by Prof. Reich in his internet site, in the following words: "The relevant provision of the CISG, namely Article 42, deals expressly and in detail with this type of situation, when the goods are subject to intellectual property rights. According to this provision, if the Buyer

However, more court decisions refer to and apply the "Hague Laws", which were part of Israeli domestic law for 28 years, usually by way of analogy and in order to strengthen or corroborate the reasoning of the decision.

4. Israeli courts have not yet relied on interpretations of the CISG to interpret other uniform law instruments.

## IV. CISG's impact on legislators

1. The Israeli legislator or Israeli legislators have always been aware of the importance of uniformity in business law and the removal of legal barriers in international trade. Throughout its history Israel has incorporated both the Hague Conventions and the CISG into its law.

Thus, there is no surprise that we find great resemblance between the Israeli statutory contract and sale law and international trade laws, like those annexed to the Hague Conventions and the CISG. The Israeli legislator was practically guided and inspired by these uniform laws when drafting and enacting domestic contract and sale law.

2. CISG has not yet influenced the discussion on law reform in Israel, the reason being that Israel is one of the few states that ratified and adopted the Hague Conventions. Israel's main contract laws, namely: the General Contract Law, 1973, the Remedies Law, 1971 and the Sale Law, 1968, all came into force before the Vienna Convention and the CISG. On the other hand, both ULFC and ULIS had a great impact on Israeli legislation in the area of domestic contract law.

Thus, for example, sections 10 and 11 of the Remedies Law, dealing with damages upon breach of contract, are very similar to Articles 82 and 84 of the CISG, although they were enacted almost 10 years prior to the Vienna Conventions. Another example can be found in the first 11 sections of the General Contract Law, taken almost verbatim from ULFC. This similarity stems from the fact that many of the CISG's Articles were based on the Hague Conventions.

3. In 1999 the CISG was fully incorporated into Israeli law, in relation to international sale of goods. Yet its impact on domestic law is still minor, although some of its provisions are part of Israeli domestic law, because of influence and inspiration of the Hague Conventions. Only time will tell whether the CISG will have greater effect on Israeli law.

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knew, or could not have been unaware of these rights, the Seller does not bear responsibility in this regard, and is not under the obligation to supply goods that are clean from such rights. It is clear from the provision, that this applies even when the Seller knew about the infringement, since this is a precondition for any liability on his part. Thus, the Supreme Court's solution of dividing the liability between the parties is clearly inconsistent with that of the CISG, and probably with that of the Hague Convention as well."

# Italy

*Marco Torsello*

## Introduction

In Italy, the United Nations Convention on Contracts for the International Sale of Goods (hereinafter: "CISG") was ratified on December 11th, 1985[1] and entered into force on January 1st, 1988, when it also came into force in all nine states which had first adopted it.[2]

Italy ratified the CISG in its "basic" format, that is to say, without making any declaration or reservation permitted under Part IV of the Convention.[3] However, as Italy was one of the states where the 1964 Hague Conventions, setting forth a Uniform Law on the Formation of Contracts for the International Sale of Goods (the 1964 Hague Formation Convention)[4] and a Uniform Law on the International Sale of Goods (1964 Hague Sales Convention)[5] respectively, were in force, pursuant to Art. 99(3) CISG Italy at

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1 Ratification of the Convention took place by virtue of the statutory law n. 765 of December 11, 1985, published in the Italian Official Journal (Gazzetta Ufficiale), Ordinary Supplement, n. 303 of December 27, 1985.

2 Besides Italy, the other states where the Convention entered into force on January 1, 1988 are Argentina, China, Egypt, France, Hungary, Lesotho, Syrian Arab Republic and United States of America. The Convention is now in force in seventy countries; for a complete list with dates of adoption (i.e. ratification, accession, approval, acceptance or succession) see the Uncitral website at: http://www.uncitral.org/uncitral/en/uncitral_texts/sale_goods/1980CISG_status.html.

3 For an overview of declarations and reservations permitted under the CISG, see *Torsello*, Reservations to international uniform commercial law conventions, 5 Uniform Law Review (2000) 35.

4 See Convention Relating to the Uniform Law of the Formation of Contracts for the International Sale of Goods, July 1, 1964, with Annex: Uniform Law on the Formation of Contracts for the International Sale of Goods, reprinted in 13 American Journal of Comparative Law (1964) 472.

5 See Convention Relating to the Uniform Law of International Sale of Goods, July 1, 1964, with Annex: Uniform Law of International Sale of Goods, reprinted in 13 American Journal of Comparative Law (1964) 453. For a commentary on the Hague Conventions see, e.g., *Bernini*, The Uniform Laws on International Sale: The Hague Conventions of 1964, 3 Journal of World Trade (1969) 671; *Tunc*, Les Conventions de La Haye du 1er juillet 1964 portant loi uniform sur la

the same time denounced both 1964 Hague Conventions to the effect of substituting the CISG for the latter conventions.[6]

It is common knowledge that the CISG was drafted in six different official languages, namely Arabic, Chinese, English, French, Russian and Spanish; hence, an official Italian version of the CISG does not exist. After the Italian statute n. 765 of 1985 was passed by means of which the CISG was ratified, it was published in the Italian Official Journal[7] along with a non-official translation of the CISG. Interestingly, however, the Italian versions of the CISG to be found in books containing the Italian Civil code and related statutes do not reproduce the Italian (non-official) translation published in the Official Journal, but rather a translation published as an appendix to the well-known commentary edited by Bianca and Bonell,[8] which is somewhat different.

Although neither one of the two Italian versions is to be regarded as "official", which is why neither one should have any specific role in the interpretation of the Convention,[9] it must be pointed out that most court decisions applying the CISG do not seem to be aware of the differences in the text.[10] Indeed, on the one hand, no decision seems to have ever made any

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vente international d'objets mobiliers corporels. Une étude de cas sur l'unification du droit, Revue international de droit comparé (1964) 547; as for the reasons why the Hague conventions were not successful (compared to the CISG), see *Bergsten*, Basic Concepts of the UN Convention on the International Sale of Goods, in *Doralt* (ed.), Das Uncitral Kaufrecht im Verleich zum österreischen Recht (1985) 15.

6 Indeed, before the said denunciation the CISG could not enter into force, as explicitly noted by the Italian Supreme Court: see Corte di Cassazione, 24 October 1988, n. 5739, Diritto del commercio internazionale (1992) 636, pointing out that this mechanism was necessary in view of the rule (Art. 90 CISG) according to which the CISG "does not prevail over any international agreement which has already been or may be entered into and which contains provisions concerning the matters governed by this Convention, provided that the parties have their places of business in States parties to such agreement".

7 The 'Gazzetta Ufficiale della Repubblica Italiana'.

8 See *Bianca / Bonell* (eds.), Commentary on the International Sales Law. The 1980 Vienna Sales Convention (1987) 825.

9 In general terms, on the issue of multiple texts and consequent interpretative challenges, see *Flechtner*, The Several Texts of the CISG in a Decentralized System: Observations on Translations, Reservations and Other Challenges to the Uniformity Principle in Article 7(1), 17 Journal of Law & Commerce (1998) 187.

10 In fact, notwithstanding the fact that the Italian text doesn't have any role to play in the interpretation of the Convention, it would nonetheless be of some interest to evaluate the extent to which each one of the several texts reflects the prevailing interpretative options derived from the reading of the official texts.

kind of comparison between the two different Italian versions; on the other hand, while some decisions have made references to the translation published in the Official Journal,[11] others have used the one first published in the commentary edited by Bianca and Bonell.[12] Most interestingly, in some (yet limited) cases, courts adjudicating CISG cases have correctly acknowledged the need to refer to one of the official, non-Italian, versions of the CISG for the purpose of its interpretation. In one case, for instance,[13] the court had to address the issue of whether a specific type of long-term contract, which under Italian law would be qualified as "somministrazione" fell within the scope of application *ratione materiae* of the CISG. The court correctly referred to Art. 73 CISG; however, it acknowledged that the Italian translation[14] does not represent an official version and therefore compared the translation of the provision at hand ("contratti a consegne successive") with the English ("contracts for the delivery of goods by installments") and the French ("contrats à livraisons successives") official versions of the CISG provision, on which the court correctly relied.

Since its adoption and its coming into force, the CISG has certainly played an increasingly relevant role in the Italian legal system from several different viewpoints; nevertheless, it would not be appropriate to overestimate that role and to overlook the fact that it still has not gained widespread popularity and that only few players are aware of its existence, despite its importance in international business.[15]

In the following sections, an attempt will be made at pointing out and evaluating the extent to which the CISG has had an impact on some of the different formants of the Italian legal system.[16] Section II will thus be de-

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[11] See, for instance, Tribunale Rovereto, 21 November 2007, available at: http://www.cisg-online.ch/cisg/urteile/1590.pdf, which quoted the non-official translation of Art. 8 CISG published in the Italian Official Journal along with the piece of legislation ratifying the Convention.

[12] See, for instance, Tribunale Modena (Separate branch of Carpi), 9 December 2005, published in http://www.giuremilia.it, which quoted the translation of Art. 7 CISG first published in the Commentary edited by Bianca and Bonell.

[13] Tribunale Padova, 11 January 2005, Rivista di diritto internazionale privato e processuale (2005) 791.

[14] In fact, the court gave account that the Italian translation considered was the one published in the Official Journal.

[15] For a similar statement as to the relevance of the CISG in international business, see *Ferrari*, La vendita internazionale. Applicabilità ed applicazioni della Convenzione delle Nazioni Unite sui contratti di vendita internazionale di beni mobili (2006) 26.

[16] For an overview of the role of 'legal formants' in the study of law and, in particular, in comparative law, see *Sacco*, Legal Formants: A Dynamic Approach to

voted to the evaluation of the CISG's impact on Italian practicing lawyers[17] and will address the issue of their awareness of the existence of the uniform instrument, as well as that of the effects of that awareness (if any) on their practice; Section III will deal with the impact of the CISG on Italian scholars, in other words, it will highlight the extent to which the "dottrina" devoted its attention to the CISG during its preparation, after its adoption and following its entry into force, and will examine the context in which the CISG was considered and the methodological goals pursued in its analysis; Section IV will then consider the CISG's impact on domestic courts, evaluate the way in which it affected their style and scrutinize the courts' adherence to the CISG's interpretative mandate; Section V will deal with the impact of the CISG on the Italian domestic legislator and address the question of whether the CISG has at all influenced law reform; lastly, Section VI will draw some conclusions based on the analysis previously conducted.

## I. CISG's impact on Italian practicing lawyers

The first issue to be addressed is that of the impact of the CISG on Italian practicing lawyers, including attorneys at law and legal consultants working as in-house lawyers in large-size corporations on a permanent basis.

The question of the extent to which the CISG has had an impact on practicing lawyers is a very difficult one to answer, since no reliable data or specific statistical studies exist in this respect.[18] The information which will be provided hereafter is therefore derived from indirect sources, primarily from court decisions referring to the approach taken by practicing lawyers to the case. Of course, data drawn from judicial sources provide an unbalanced perspective in that they cannot give account of the approach to the issue taken by lawyers who are not litigators, such as in-house legal consultants working for large-size corporations on a permanent basis. Although this feature of the analysis is certainly of some significance and may negatively af-

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Comparative Law, American Journal of Comparative Law (1991) I, 1 and II, 343; *Gambaro / Sacco*, Sistemi giuridici comparati (2000) 6.

[17] Although practicing lawyers are usually not considered independently as constituting one of the relevant formants of a legal system (in fact, see *Sacco*, Legal Formants, 1, referring to three main formants, namely the legislative formant, the judicial one and the doctrinal one), it seems appropriate in this work to consider practicing lawyers independently in view of the relevant role played in determining the incidence of an international instrument on domestic law.

[18] For a study devoted to the impact of globalization on the Italian legal system and the structure of law practice, see *Monateri/Musy* (eds.), Globalizzazione e giustizia. L'impatto della globalizzazione sul sistema giuridico italiano e sull'organizzazione degli studi legali (2003).

fect its reliability, one should also consider the peculiar structure of the average Italian corporation, which, compared to that of corporations of most other European countries, is more often than not small or medium-sized, rather than large-sized; this, in turn, entails that in most cases Italian corporations do not have in-house lawyers, which is why to get legal advice they rely, instead, on the same external legal practitioners who also litigate in court the disputes in which the corporation is involved. Accordingly, the lack of data as to the impact of the CISG on in-house legal consultants is probably less relevant in Italy than it is in most other legal systems, at least in Europe.

If one were to answer the question as to the degree of awareness about the existence and the applicability of the CISG on the basis of what can be inferred from Italian court decisions, one could not but acknowledge the almost complete lack of awareness on the part of Italian practicing lawyers.[19] Indeed, in several cases courts adjudicating disputes involving the CISG had to resort to the principle "iura novit curia"[20] and to apply the CISG notwithstanding the absolute lack of any reference to it not only by the party who would have been disadvantaged by the rules set forth in the CISG,[21] but also by the opposing party who could have benefited from the application of the CISG.[22]

The situation which has just been described, based on data stemming from the analysis of Italian CISG case law, is more frustrating than one would assume from the interest shown by many practicing lawyers to initiatives such as conferences and meetings devoted to international contracts in general, and international sales in particular. In this respect, it may be of

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19 For a similar remark see *Ferrari*, Overview of case law on the CISG's international sphere of application and its applicability requirements (Articles 1(1)(a) and (b)), International Business Law Journal/Revue de droit des affaires internationales (2002) 961.

20 Under the principle "iura novit curia", the court is required to resort to its own knowledge to identify and apply the legal rules relevant to the case at hand, irrespective of the parties' submissions and arguments.

21 Indeed, that party would not have any interest in making reference to the Convention.

22 Cases where the parties' lawyers completely overlooked the applicability of the CISG and failed to make any argument based on it are not infrequent. See, for instance, Tribunale Cuneo, 31 January 1996, Diritto del commercio internazionale (1996) 653; Tribunale Vigevano, 20 July 2000, Giurisprudenza italiana (2000) 280; Tribunale Padova, 25 February 2004, Giurisprudenza italiana (2004) 1405. The same situation occurred also in arbitral proceedings and the panel reached the same result, applying the CISG on the basis of the principle "iura novit curia": Chamber of National and International Arbitration Milan, 28 September 2001, available at: http://cisgw3.law.pace.edu/cases/010928i3.html.

some interest to point out that the Italian National Bar Association ("Consiglio Nazionale Forense") introduced in 2008 a requirement of continuing legal education[23] under which practicing lawyers are required to obtain a certain number of professional credits. In the first few months of application of the new rules, initiatives dealing with the CISG have indeed taken place, although the number of such initiatives is, not surprisingly, very limited compared to initiatives devoted to purely domestic matters.[24] On the one hand, one would expect that in the course of time this new approach will expose more practicing lawyers to the CISG, thus supporting the spreading of information and consequent spread of awareness among practicing lawyers; on the other hand, however, notwithstanding the importance of the subject, a very tentative estimate based on the participation ratio (drawn solely from the rapporteur's direct experience) suggests that those participating in CISG-related events are the same (very few) practicing lawyers who already have knowledge of the CISG's existence and applicability to international contracts for the sale of goods.

## 1. Impact on litigation in courts

Given the overall limited awareness of the existence and applicability of the CISG among practicing lawyers, it is difficult to assess which type of impact this limited awareness may have on litigation in courts and on the drafting of briefs and memoranda.

As already pointed out above, in many cases in which the CISG has been applied, the lawyers completely ignored the existence and applicability of the CISG and pleaded the case exclusively on the grounds of the domestic rules which would have been applicable had the case been a purely domestic one, that is: they based their arguments solely on the rules contained in the Italian "Codice Civile".[25] As already pointed out, this has not prevented a few particularly skilled and learned judges from applying the CISG, although it is not possible to provide data as to the number of cases[26] where the Convention's applicability has simply been overlooked by lawyers and judges alike.

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[23] The system has been introduced by the Consiglio Nazionale Forense with Regulation of July 13, 2007.

[24] A list of the events organized by the National Bar Association as well as by the single Local Bar Association has been published at: http://www.consiglionazionaleforense.it/visualizzazioni/vedi_elenco.php?areanumber=80.

[25] Namely, Articles 1470 ff. of the Italian Codice Civile.

[26] Presumably this number is likely to be a rather large one.

By and large, although references to the CISG are at times made,[27] it is probably correct to assert that in most cases the applicability of the Convention is simply ignored and overlooked. There is, however, one specific issue with respect to which the analysis of recent case law shows that litigating lawyers have relatively often made reference to the CISG to support their legal arguments, namely that of the assessment of international jurisdiction under the Brussels Convention of 1968,[28] first, and the EC Regulation n. 44/2001,[29] after the substitution of the latter for the former.

Indeed, both the abovementioned international instruments address the issue of special jurisdiction under Article 5, under which a party domiciled in a member state may be sued before the court of another member state if that court is located in the state where performance has or should have taken place.[30] In order to positively affirm the jurisdiction it is therefore of pivotal relevance to provide an answer to the question as to where "delivery" is to be regarded as taking place.[31] In this respect, one should keep in mind that most international sales involve carriage; consequently, the place where the goods are handed over by the seller to the first carrier is often different from that where the (last) carrier hands over the goods to the buyer. Hence, if the relevant notion of "delivery" were to coincide with the hand-

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27 For instance, in the case decided by Tribunale Busto Arsizio, 13 December 2001, Rivista di diritto internazionale privato e processuale (2003) 150, the court refers to the defendant's argument that the plaintiff's claim was barred in view of the time limits set forth under Article 39 CISG.

28 Brussels Convention of 27 September 1968 on jurisdiction and the enforcement of judgments in civil and commercial matters, EC Official Journal, L 299, 31 December 1972, 32.

29 Council Regulation (EC) n. 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, EC Official Journal, L 012, 16 January 2001, 1.

30 In fact, under Art. 5 of the Brussels Convention, "[a] person domiciled in a Contracting State may, in another Contracting State, be sued: // 1. in matters relating to a contract, in the courts for the place of performance of the obligation in question […]". The EC Regulation is more precise as to the obligation to be taken into account and Art. 5 of Reg. 44/2001, after substantially reproducing the text contained in the 1968 Convention and cited above, adds the following clarification: "[…] for the purpose of this provision and unless otherwise agreed, the place of performance of the obligation in question shall be: // – in the case of the sale of goods, the place in a Member State where, under the contract, the goods were delivered or should have been delivered […]".

31 For an analysis of this issue with comparison of Italian case law and foreing cases, see *Ferrari*, L'interpretazione autonoma del Regolamento CE 44/2001 e, in particolare, del concetto di 'luogo di adempimento' di cui all'art. 5, n. 1, lett.b, Giurisprudenza italiana (2006) 1016.

ing over to the first carrier, this would result in the court in the country of the exporting seller (or in the different country of the handing over of the goods to the first carrier[32]) being competent to adjudicate the case; if, on the contrary, the relevant notion of "delivery" were to coincide with the final delivery at destination, this would result in the court in the country of the importing buyer (or in the different country of final destination of the goods) being competent to adjudicate the case.[33] Accordingly, in several disputes the lawyers supporting the view that the competence of the Italian court was to be positively affirmed as a result of the goods having been delivered in Italy to the first carrier made explicit reference – as the substantive rule applicable to the transaction – to art. 31(a) CISG, according to which «[i]f the seller is not bound to deliver the goods at any other particular place, his obligation to deliver consists: // *(a)* if the contract of sale involves carriage of the goods // – in handing the goods over to the first carrier for transmission to the buyer».[34]

In a recent case adjudicated by the Italian Supreme Court,[35] the defendant (seller) argued in favor of the jurisdictional competence of the Italian court on the basis of the argument that the disputed obligation was that of the payment of the price, and therefore invoked the application of Article 57 CISG in order to support the view that the "place of performance" was located at the seller's domicile, *i.e.*, in Italy. The lawyer thus invoked the CISG, albeit incorrectly. Indeed, the court correctly objected that, unlike under the Brussels Convention,[36] under the new EC Regulation n. 44/2001 (applicable to the case at hand) the obligation to be taken into consideration for the purpose of assessing jurisdiction in disputes dealing with international sale contracts is always the delivery of the goods, irrespective of whether the dispute relates to the performance of that obligation or to the performance of the payment of the purchase price.[37] As a result, the court did resort to the CISG, although not to the provision wrongfully invoked by the defendant (seller), but rather to Art. 31(a), which sets forth the relevant rule maintaining that in contracts for the sale of goods involving carriage,

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[32] For a similar statement, see Tribunale Modena, 25 October 2007, n. 1891/2007, unpublished.

[33] For further details, see *Ragno*, Forum destinatae solutionis e Regolamento (CE) N. 44 del 2001: Alcuni spunti innovativi dalla giurisprudenza di merito, Giurisprudenza di merito (2006) 1413.

[34] See, for instance, Tribunale Rovereto, 21 November 2007.

[35] Corte di Cassazione, 20 June 2007, n. 14300, in Rivista di diritto internazionale privato e processuale (2008) 511.

[36] See the well-know decision in the De Bloos case: ECJ, 6 October 1976, *De Bloos v. Bouyer* (C-14/76).

[37] For a similar observation by a court of first instance, see Tribunale Arezzo, 3 July 2006, Juris Data database (2006).

delivery of the goods takes place where the goods are handed over to the first (independent) carrier.

After all, the defendant's lawyer put forward a wrong argument and seemed to be unaware of the difference between the "old" rule under the Brussels Convention and the "new" one under EC Regulation n. 44/2001; on the other hand, however, he demonstrated to be well aware of the existence and applicability of the CISG and of the possibility of referring in his briefs and memoranda to the Convention as a legal tool to be used in litigation in court.

## 2. Impact on standard contract forms

For a long period of time, in most cases standard contract forms used in the international context by Italian business operators were either the very same ones used domestically, or mere translations into English of the same standard contract forms used in Italian for domestic transactions.[38] Nowadays, however, this approach seems to be changing slowly but radically; business operators seem to be more and more aware of the need to draft specific standard contract forms for the purpose of carrying out their transnational business, in view of the specific logistic, economic and legal difficulties which characterize international transactions.[39]

By and large, compared to the degree of awareness about the existence and applicability of the CISG which one may register when looking at the approach to litigation in court taken by practicing lawyers, the degree of awareness observable through the analysis of standard contract forms seems greater. This should come to no surprise, as it is the result of the aforementioned increased awareness on the part of business operators that specific competences are needed to properly draft standard contract forms to be used for international transactions. Hence, unlike transnational disputes, which are almost constantly litigated by the same lawyers who litigate any other domestic dispute for the same client (thus lacking specific knowledge as regards international matters), the task of drafting international contracts, including standard contract forms, is increasingly assigned to legal consultants contacted specifically for that purpose, who are therefore expected to

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[38] For a study on the use of standard contract forms under the CISG from the Italian perspective, see *Frigo*, L'efficacia delle condizioni generali di contratto alla luce delle Convenzioni di Roma e di Vienna del 1980, Diritto del commercio internazionale (1993) 521.

[39] For an overview of the most frequent specificities of international sales compared to domestic ones, see *Katz*, Remedies for Breach of Contract under the CISG, 25 International Review of Law and Economics (2005) 378.

have specific skills and knowledge about international contract practice.[40] The main reason for this is rather simple and mostly practical: standard contract forms for international transactions need be drafted in (legal) English and most Italian lawyers who would litigate (in Italian) a transnational dispute before a domestic court lack the language skills necessary to draft a legal text in English.[41]

As a result of the foregoing, in an increasing number of cases standard contract forms are drafted by lawyers who are aware of the existence and potential applicability of the CISG, and it is therefore relevant to examine how that awareness affects the way in which standard contract forms for the international sale of goods are drafted.

The impact of the drafters' awareness may be appreciated (at least) at two different levels. On the one hand, the awareness may induce practicing lawyers drafting standard contract forms to use the CISG as a contract drafting tool;[42] on the other hand, it brings about the need to decide whether to let the Convention apply to the transaction,[43] or to opt-out of the Convention,[44] thus falling back on the more "comfortable" applicability of a set of better-known domestic rules (either as a result of the parties' contractual choice of the law applicable, or as a result of the default private international law rules, when they lead to the application of the domestic law of the

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40 For an overview of the reasons why specific skills and knowledge are relevant to the drafting of international contracts, see *Frignani*, Il contratto internazionale (1990) 128.

41 On the difference between ordinary and legal language, see *Pozzo* (ed.), Ordinary Language and Legal Language (2005).

42 For a study devoted to this possible use of the CISG, see *Brand / Flechtner / Walter* (eds.), Drafting Contracts under the CISG (2008).

43 A well-known feature of the CISG consists in its entirely dispositive nature; for further analysis of this character, see *Torsello*, Common Features of Uniform Commercial Law Conventions. A Comparative Study Beyond the 1980 Uniform Sales Law (2004).

44 On the possibility of opting-out of the Convention, see *Ferrari*, La vendita internazionale. Applicabilità e applicazioni della Convenzione delle Nazioni Unite sui contratti di vendita internazionale di beni mobili (2006) 199; *Lookofsky*, Opt-Outs under Article 6, Duke Journal of Comparative Law (2003) 272.

party willing to exclude the CISG in favor of its own domestic law[45]), or conversely to make the Convention apply when it would not otherwise.[46]

With respect to the use of the CISG as a contract drafting tool, it seems safe to affirm that in many instances the Convention has represented a relevant source of inspiration for drafters of standard contract forms. This is particularly the case in respect of those issues in relation to which the Convention succeeded in creating a bridge between differing domestic notions. For instance, it is not uncommon to find the notion of fundamental breach used in standard contract forms and defined in terms which closely resemble those of Art. 25 CISG.[47]

In situations like the one just mentioned, the Convention plays a very important role as a common working tool for the parties and a legal "lingua franca",[48] which may be adopted with relative ease by lawyers trained in non-English speaking jurisdictions when they are drafting a legal document in English. Conversely, when the Convention does not play that role and the terms used by its drafters do not bridge a conceptual gap between different jurisdictions, drafters of standard contract forms often prefer a different terminology. This appears to be the case with respect to the largely prevailing use in Italian standard contract forms drafted in English of the notion of

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45 In fact, the mere opting-out of the CISG (without a positive choice of the law applicable) will usually (although not always) lead to the applicability of the domestic law of one of the parties, namely the seller, according to the private international law rules of the *forum*.

46 For a similar observation see *Winship*, Changing Contract Practices in the Light of the United Nations Sales Convention: A Guide for Practitioners, 29 International Lawyer (1995) 525.

47 Under Article 25 CISG "[a] breach of contract committed by one of the parties is fundamental if it results in such detriment to the other party as substantially to deprive him of what he is entitled to expect under the contract, unless the party in breach did not foresee and a reasonable person of the same kind in the same circumstances would not have foreseen such a result"; for a commentary on this provision, see *Ferrari*, Fundamental Breach of Contract under the UN Sales Convention – 25 Years of Article 25 CISG, 25 Journal of Law & Commerce (2006) 489; for an Italian court decision dealing with the notion of fundamental breach, see Court of Appeal Milan, 20 March 1998, Rivista di diritto internazionale privato e processuale (1998) 170.

48 See *Schlechtriem*, 25 Years of the CISG: An International *Lingua Franca* for Drafting Uniform Laws, Legal Principles, Domestic Legislation and Transnational Contracts, in *Brand/Flechtner/Walter*, Drafting Contracts under the CISG (2008) 157.

"termination" instead of that of "avoidance" used by the CISG.[49] The more so, where the language used by the CISG is the result of a compromise between different solutions adopted in different jurisdictions, thus resulting in the use of a rather vague notion, the adoption of which would not serve well the need for certainty and predictability which is of utmost importance for business operators drafting standard contract forms. Accordingly, it should come to no surprise that standard contract forms reject the use of rather undefined standards such as that of "reasonableness"[50] and prefer more precise rules, providing a clear guideline to the parties to the contract.

## 3. Tendency to exclude the CISG by practicing lawyers aware of its existence

At this point, it seems appropriate to focus on the impact that the awareness of the existence and applicability of the CISG has on the decision of whether to opt-out of the Convention.

In the early days of the CISG's applicability in Italy, not unlike in other jurisdictions,[51] the general attitude of lawyers towards the Convention was mostly of skepticism, which is why lawyers were inclined to exclude the Convention's application.[52]

In many cases, however (partly as a result of the lack of awareness of the CISG's existence and applicability), the choice of law clause contained in standard contract forms only provides for the applicability of "Italian law",

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[49] For further details, see *Torsello*, Remedies for breach of contract under the 1980 U.N. Convention on Contracts for the International Sale of Goods, 9 Vindobona Journal of International Commercial Law and Arbitration (2005) 253.

[50] See *Perlingieri*, Lo standard del 'reasonable man', La Vendita Internazionale (1981) 327; *Callegari*, La denuncia dei vizi nella Convenzione di Vienna: un difficile incontro con il criterio del *reasonable man*, Giurisprudenza italiana (1998) 982; *Sagliaschi*, La ragionevolezza nel sistema rimediale della convenzione di Vienna sulla vendita internazionale, Rivista di diritto internazionale privato e processuale (2003) 135; *Troiano*, La 'ragionevolezza' nel diritto dei contatti (2005).

[51] See *De Ly*, Opting-Out: Some Observations on the Occasion of the CISG's 25th Anniversary, in *Ferrari* (ed.), Quo Vadis CISG? Celebrating the 25th anniversary of the United Nations Convention on Contracts for the International Sale of Goods (2005) 25.

[52] A very common clause would therefore provide as follows: "I rapporti tra le parti sono disciplinati dalle leggi della Repubblica italiana, con espressa esclusione delle norme contenute nella Convenzione di Vienna sui contratti di vendita internazionale di beni mobili dell'11 aprile 1980" (standard contract form of a medium size Italian corporation available on the Internet).

and it is common knowledge that such a choice cannot amount in itself to the exclusion of the CISG, as the Convention is part of the chosen (Italian) legal system.[53]

When this situation occurs, however, it is difficult to assess whether the text of the clause is the result of the lack of awareness on the part of its drafter regarding the existence and applicability of the CISG, or whether it is the result of a precise strategy, according to which the drafter wants to make the Convention apply to the transactions governed by the standard contract form without explicitly referring to the CISG. Although the former scenario is still likely to occur more often than not, it is this rapporteur's view that in a relevant number of cases the drafter of the standard contract form intentionally omits to mention the CISG, even though the drafter wants it to apply to the client's international sales. The reason supporting this conclusion is based on the acknowledgment of the specialized competence often possessed by lawyers drafting standard contract forms (in English); if one were to agree that those drafting the choice of law clauses do posses that competence, in the sense that they are aware of the CISG's existence and applicability, one would then need to address the question as to whether the competent drafter would have any specific reason to explicitly mention the Convention, since it applies anyway, without the need for any opting-in by the parties. To put it differently, a competent drafter may deem it appropriate not to disclose to the potential contractual counter-parts that the rules applicable to the transaction are those contained in the CISG. The way to pursue that goal is rather clear and it implies a choice of "Italian law"[54] as the applicable law, without mentioning the CISG.

## 4. Use of CISG-based solutions in purely domestic disputes

The last relevant aspect which deserves consideration here relates to the use by practicing lawyers of CISG-based solutions in purely domestic disputes.

It has already been pointed out that in (transnational) disputes where the issue at hand is that of the jurisdiction of Italian courts, lawyers have often referred to the CISG to support their arguments. In purely domestic disputes, however, reference to the CISG seems less likely to occur when the Convention is not the law governing the transaction at issue. Indeed, one could imagine a need to resort to the CISG only if it could provide some interpretative support and play a gap-filling role *vis-à-vis* the relevant domestic rules, which is unlikely to be the case when the transaction in question is

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[53] For a similar observation, see Tribunale Rimini, 26 November 2002, Giurisprudenza italiana (2003) 896.

[54] Of course, the same would also apply to the choice of any other law of a contracting state.

a sales transaction, exhaustively addressed by provisions to be found in the Civil code and supported by numerous court decisions.

An indirect confirmation of the foregoing may stem from the analysis of different types of transactions, with respect to which the Italian domestic law does not provide an exhaustive set of rules; this is the case, for instance, with regard to financial leasing transactions: under Italian domestic law there are no rules specifically devoted to financial leasing; conversely, Italy is one of the contracting states of the 1988 Ottawa Convention on International Financial Leasing,[55] which sets forth rules applicable to leasing transactions when the lessor and the lessee are located in different states.[56] The lack of specific domestic rules has induced some lawyers to make reference to the Ottawa Convention also in purely domestic transactions and even to assert its applicability by analogy. In some instances, this approach was accepted by courts, who consequently applied that Convention as the law applicable to the purely domestic transaction by analogy.[57] In subsequent cases, however, the Italian Supreme Court rejected the approach leading to the application by analogy,[58] although it acknowledged that the rules set forth in the Convention "although not directly applicable, may constitute a useful reference tool in the adjudication of the case".[59]

It seems correct to argue that a similar use of the CISG as an interpretative reference in purely domestic cases seems less likely, in view of the less stringent need, with respect to contracts for the sale of goods, to look outside the boundaries of the domestic legal system in order to find argumentative tools to be used in purely domestic transactions. Nevertheless, this use should be supported and has in fact taken place in some (yet limited) cases, where the CISG was referred to in order to support the conclusion already reached on the basis of different arguments.[60]

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55 The 1988 International Financial Leasing Convention (the text of the Convention is available in English on the Internet at: http://www.unidroit.org/english/conventions/1988leasing/1988leasing-e.htm) is in force in France, Italy, Nigeria, Hungary, Panama, Latvia, Russian Federation, Belarus and the Republic of Uzbekistan.

56 For a commentary on the Ottawa leasing convention, see *Torsello*, La disciplina uniforme del leasing finanziario internazionale, *Berlinguer* (ed.), Finanziamento e internazionalizzazione di impresa (2007) 187.

57 See Tribunale Napoli, 29 March 2001, Diritto e giustizia (2001) 401.

58 See Corte di Cassazione, 28 November 2003, n. 18229, Giustizia civile (2004) 1506.

59 See Corte di Cassazione, 16 November 2007, n. 23794, Giustizia civile (Massimario 2007) 11.

60 See Tribunale Roma, 4 January 1999, reported by Tribunale Bergamo, 19 April 2006, Corriere del merito (2006) 835.

## II. CISG's impact on scholars

It is safe to assert that the CISG has had a very significant impact on Italian scholars and scholarly writing alike. In fact, the adoption of the CISG and its subsequent coming into force in Italy triggered a great attention by legal scholars and it is of some interest to point out that this proved to be the case with respect to scholars who had very different backgrounds and who approached the study of the CISG from very different perspectives.

Italian comparative lawyers often highlighted the success of the new approach toward unification, capable of bridging the gaps between different legal systems on the basis of an accurate comparative analysis of the similarities and differences between the various legal systems;[61] international business lawyers stressed the importance of a supranational instrument potentially applicable to a significant part of world trade;[62] private international law scholars observed with interest the new unification strategy adopted by the drafters, who abandoned the 1964 Hague conventions' "erga omnes" approach[63] as regards the sphere of application, in favor of the need for a link (either geographical or legal[64]) between the transaction and at least one contracting state;[65] contract lawyers remarked the novelty of most of the substantive solutions adopted by the Convention.[66]

In one way or another, both for CISG enthusiasts and for those who never came to consider it in positive terms, the CISG represented a milestone in legal scholarship in all countries where the Convention was

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61 See *Bonell*, La nuova disciplina della vendita internazionale di cose mobili nella convenzione di Vienna del 1980, in: *Tedeschi / Alpa* (eds.), Il contratto nel diritto nord-americano (1980) 261.

62 See *Frignani*, Il contratto internazionale (1990) 305.

63 The "erga omnes" approach had been adopted by previous conventions, including the 1964 Hague Conventions; see *Bariatti*, L'interpretazione delle convenzioni internazionali di diritto uniforme (1986) 26.

64 For further details on the CISG's sphere of application, see *Ferrari*, L'ambito di applicazione della convenzione di Vienna sulla vendita internazionale, Rivista trimestrale di diritto e procedura civile (1994) 893.

65 See *Lanciotti*, Norme uniformi di conflitto e materiali nella disciplina convenzionale della compravendita (1992).

66 See the several contributions collected in *Bianca* (ed.), Convenzione di Vienna sui contratti di vendita internazionale di beni mobili (1992).

adopted (including Italy[67]), as well as in many where the Convention is still not in force.[68]

## 1. Scholars' attention to the CISG

A considerable number of Italian scholars devoted attention to the CISG from the outset, right after its adoption and long before its entry into force. As soon as in the early Eighties, shortly after the adoption of the CISG in Vienna, scholars turned their attention to the new instrument and conferences were organized to analyze and discuss the new Convention. In this respect, it appears appropriate to recall here the conference organized in S. Margherita Ligure on September 26-28, 1980, the acts and proceedings of which were published in a book in 1981.[69] Other important contributions were published in books and law reviews in the first seven years following the adoption of the CISG,[70] before its entry into force in 1988. Interestingly

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[67] For a study specifically devoted to the impact of supranational sources of law on the Italian legal system, see *Ferreri*, Le fonti a produzione non nazionale, *Pizzorusso / Ferreri* (eds.), Le fonti del diritto italiano (1998) 191.

[68] Indeed, the CISG is studied in depth also in legal systems where it is not in force, like the United Kingdom; see, for instance, *Bridge*, The International Sale of Goods: Law and Practice (2007).

[69] See AA.VV., La vendita internazionale. Atti del Convegno di S. Margherita Ligure (26-28 settembre 1980), (1981).

[70] See, e.g., *Anelli*, La 'forza maggiore' nel contratto di vendita internazionale, Rivista dei dottori commercialisti (1983) 10; *Bariatti*, L'interpretazione delle convenzioni internazionali di diritto uniforme (1986); *Bonell*, La revisione del diritto uniforme della vendita internazionale, Giurisprudenza commerciale (1980) 116; *Id.*, L'interpretazione del diritto uniforme alla luce dell'Art. 7 della Convenzione di Vienna sulla vendita internazionale, Rivista di diritto civile (1986) 221; *Boschiero*, Le convenzioni internazionali in tema di vendita, in *Rescigno* (ed.), Trattato di diritto privato (1987) 231; *Carbone / Luzzatto*, I contratti del commercio internazionale, *Rescigno* (ed.), Trattato di diritto privato, 11. Obbligazioni e contratti (1984) 128; *Cassoni*, La compravendita nelle Convenzioni e nel diritto internazionale privato italiano, Rivista di diritto internazionale privato e processuale (1982) 429; *Conetti*, Disciplina uniforme della compravendita internazionale, Rivista trimestrale di diritto e procedura civile (1983) 272; *Draetta*, La 'battle of forms' nella prassi del commercio internazionale, Rivista di diritto internazionale privato e processuale (1986) 319; *Frignani*, Compravendita internazionale, *Frignani* (ed.), Il diritto del commercio internazionale: Manuale teorico-pratico per la redazione dei contratti (1985) 169; *Leone*, La vendita internazionale, Rivista trimestrale di diritto e procedura civile (1984) 1324; *Lopez de Gonzalo*, Osservazioni sulla disciplina dell'obbligazione di consegna nella vendita internazionale a condi-

enough, in that same period of time Italian law reviews also published (in Italian) some papers commenting on the reception of the CISG in different legal systems.[71]

Not surprisingly, the attention to the Convention by Italian scholars increased considerably after its entry into force (in 1988); consequently, between the end of the Eighties and the early Nineties many papers were published,[72] including (in 1989) the highly influential collection of papers edited by professor Bianca.[73]

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zioni F.O.B., Diritto del commercio internazionale (1987) 356; *Memmo*, Il contratto di vendita internazionale nel diritto uniforme, Rivista trimestrale di diritto e procedura civile (1983) 180; *Negri*, I vizi della cosa nella vendita internazionale di beni mobili (Italia-Francia), Rivista di diritto civile (1987) 149; *Padovini*, La vendita internazionale dalle convenzioni dell'Aja alla convenzione di Vienna, Rivista di diritto internazionale privato e processuale (1987) 47; *Rubino Sammartano*, La non conformità della cosa venduta, Foro padano (1984) 199; *Zeno-Zencovich*, Il luogo del pagamento del prezzo nella vendita internazionale, Giurisprudenza italiana (1987) 911.

71 Besides the foreign papers presented at the 1980 conference in S. Margherita Ligure and published in the collection mentioned above in 1981 (including papers by *Date-Bah*, *Farnsworth*, *Goff* and *Maskow*), see *Reinhart*, Dieci anni di giurisprudenza tedesca sulla legge uniforme della vendita internazionale di beni mobili, Giurisprudenza commerciale (1986) 404; *Id.*, Italia e Repubblica Federale Tedesca nel passagio dal vecchio al nuovo diritto uniforme della vendita, Diritto del commercio internazionale (1989) 119; *Sweet*, La convenzione UNCITRAL (United Nations Commission on International Trade Law) per la vendita internazionale di beni: osservazioni di un docente americano, Rivista del dritto commerciale e del diritto generale delle obbligazioni (1984) 299; after the entry into force of the CISG, see also *Jayme*, La compravendita internazionale di beni mobili nei rapporti tra Italia e Germania (1990) 219.

72 See, among many others, *Bernardini*, La compravendita internazionale, *Mirabelli et Al.* (eds.), Rapporti Contrattuali nel Diritto Internazionale (1991) 77; *Bianca*, La risoluzione del contratto per inadempimento: riflessioni sul confronto tra diritto italiano e la Convenzione di Vienna, Scritti in onore di Angelo Falzea (1991) 115; *Bin*, La non conformità dei beni nella convenzione di Vienna sulla vendita internazionale, Rivista trimestrale di diritto e procedura civile (1990) 755; *De Nova*, L'ambito di applicazione 'ratione materiae' della convenzione di Vienna, Rivista trimestrale di diritto e procedura civile (1990) 749; *Frignani*, Gli usi del commercio internazionale e la loro rilevanza giuridica, *Draetta / Vaccà* (eds.), Fonti e Tipi del Contratto Internazionale (1991) 91; *Galgano*, Il diritto uniforme: la vendita internazionale, *Galgano* (ed.), Atlante di Diritto Privato Comparato (1992) 211; *La China*, La convenzione di Vienna sulla vendita internazionale di diritto uniforme. Profili processuali: la giurisdizione, Rivista trimestrale di diritto e procedure civile (1990) 769; *Luzzatto*, Vendita. Diritto internazionale privato. La

However, the limited application of the CISG by domestic courts following the Convention's entry into force is likely to have played a role in somehow slowing down the enthusiasm shown by scholars for the new uniform instrument. It was therefore of utmost importance that precisely in that same period the scholarly approach changed radically. Although less scholars focused on the Convention, those who did abandoned any kind of parochialism when studying the Convention, which is why it seems in fact inappropriate to qualify those scholars as merely "Italian", given the truly international approach adopted in their work. The reference here is made primarily to highly esteemed scholars, such as Michael Joachim Bonell, whose commentary in English co-edited with Cesare Massimo Bianca[74] is certainly not a merely Italian piece of work[75] (let alone his subsequent pivotal role in the drafting of the Unidroit Principles of International Commercial Contracts), and Franco Ferrari, who, starting from the mid-Nineties, wrote nearly one hundred papers in Italian,[76] English,[77] German[78] and French,[79] specifically devoted to the CISG.

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Convenzione di Vienna del 1980, Enciclopedia del diritto (1993) 507; *Mazzoni*, Cause di esonero nella Convenzione di Vienna sulla vendita internazionale di cose mobili 'force majeure' nei contratti internazionali, Rivista del diritto commerciale e del diritto generale delle obbligazioni (1991) 539; *Sacerdoti*, I criteri di applicazione della convenzione di Vienna sulla vendita internazionale: diritto uniforme, diritto internazionale privato e autonomia dei contraenti, Rivista trimestrale di diritto e procedura civile (1990) 733; *Veneziano*, La Convenzione di Vienna vista attraverso le opere di commento a carattere generale e le prime applicazioni giurisprudenziali, Rivista del diritto commerciale e del diritto generale delle obbligazioni (1992) 925.

73 *Bianca* (ed.), Convenzione di Vienna sui contratti di vendita internazionale di beni mobili, Le Nuove Leggi Civili Commentate (1-2/1989), also published as an independent publication in 1992.

74 *Bianca/Bonell*, Commentary on the International Sales Law. The 1980 Vienna Sales Convention (1987).

75 Moreover, as regards professor Bonell it would not be possible here to list all his publications regarding the CISG in English and German, besides those in Italian; just to mention a few significant ones dating back to the early Nineties, see *Bonell*, International Uniform Law in Practice – Or Where the Real Trouble Begins, 38 American Journal of Comparative Law (1990) 865; *Id.*, UN-Kaufrecht und das Kaufrecht des Uniform Commercial Code im Vergleich, 58 Rabels Zeitschrift für ausländisches und internationales Privatrecht (1994) 20.

76 See, among the very first ones, *Ferrari*, L'ambito di applicazione della convenzione di Vienna sulla vendita internazionale, Rivista trimestrale di diritto e procedura civile (1994) 893; in more recent times (among many others) *Id.*, La vendita internazionale: applicabilità ed applicazioni della Convenzione delle Nazioni Unite sui contratti di vendita internazionale di beni mobili (2nd ed., 2006).

Moreover, the small group of scholars specifically focusing on the CISG also succeeded in informing foreign scholars about the first decisions on the Convention adopted by courts from Italy[80] and abroad,[81] so that also other scholars, who in the meantime got acquainted with the idea that the new

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77 See, for instance, *Ferrari*, The Sphere of Application of the Vienna Sales Convention (1995); *Id.*, Have the Dragons of Uniform Sales Law Been Tamed? Ruminations on the CISG's Autonomous Interpretations by Courts, *Andersen/Schroeter* (eds.), Sharing International Commercial Law across National Boundaries: Festschrift for Albert H. Kritzer on the Occasion of his Eightieth Birthday (2008) 134.

78 See, for instance, *Ferrari*, Der Begriff des 'internationalen Privatsrecht' nach Art. 1 Abs. 1 lit.b) des UN-Kaufrechts, Zeitschrift für Europäisches Privatrecht (1998) 162; *Id.*, Wesentliche Vertragsverletzung nach UN-Kaufrecht: 25 Jahr Artikel 25 CISG, Internationales Handelsrecht (2005) 1.

79 See, e.g., *Ferrari*, La jurisprudence sur la CVIM: un nouveau défi pour les interprètes?, Revue de droit des affaires internationales (1998) 495; *Id.*, La Convention de Vienna sur la vente internationale et le droit international privé, Journal du droit international (2006) 27.

80 For a commentary on the first Italian reported decision (Tribunale Monza, 14 January 1993), see *De Nova*, Risoluzione per eccessiva onerosità e Convenzione di Vienna, Contratti (1993) 580; *Bonell*, La prima decisione italiana in tema di Convenzione di Vienna sulla vendita internazionale, Giurisprudenza italiana (1994) 145; *Ferrari*, Diritto uniforme della vendita internazionale: questioni di applicabilità e diritto internazionale privato, Rivista di diritto civile (1995) 669; *Maglio*, I criteri di applicazione della convenzione di Vienna sulla vendita internazionale: una sentenza italiana non persuasiva e l'insegnamento della giurisprudenza tedesca, Contratto e impresa/Europa (1996) 29.

81 See, in particular, *Liguori*, La Convenzione di Vienna sulla vendita internazionale di beni mobili nella pratica: un'analisi critica delle prime cento decisioni, Foro italiano (1996) 145; *Ferrari*, Brevi considerazioni critiche in materia di interpretazione autonoma ed applicazione uniforma della Convenzione di Vienna, Rivista di diritto civile (1998) 81; more recently, see also *Graffi*, L'applicazione della Convenzione di Vienna in alcune recenti sentenze italiane, European Legal Forum (2000/2001) 240; *Ferrante*, La battle of forms nella Convenzione di Vienna: una recente decisione del Tribunale federale tedesco, Contratto e impresa/Europa (2003) 485; *Janssen*, La durata dei termini d'ispezione di non conformità dei beni nella convenzione di Vienna: la giurisprudenza di non conformità dei giudici nazionali, Contratto e impresa/Europa (2003) 1321; *Ferrari*, Nuove e vecchie questioni in materia di vendita internazionale tra interpretazione autonoma e ricorso alla giurisprudenza straniera, Giurisprudenza italiana (2004) 1405.

instrument was also becoming a useful and relevant tool in practice, started to increasingly devote attention to the CISG again.[82]

## 2. Relationship between the study of the CISG and domestic law

The attention devoted to the CISG by Italian scholars in the course of time has had an influence not only on the work of those specifically focusing on uniform commercial law, but also on the work of other scholars focusing primarily on domestic matters.

This is – at least to some extent – the result of the interest devoted from the outset to the CISG by some comparative lawyers[83] and by some contract lawyers,[84] which in turn resulted in the CISG being extensively referred to and compared to domestic solutions in domestic law treaties devoted to contracts or, more specifically, to sales law.[85] Although only to a limited extent,

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[82] Among others, see *Ferreri*, Vendita internazionale di beni mobili, Digesto delle discipline privatistiche, Sezione civile, vol. XIX (1999) 703; *Veneziano*, Nonconformity of goods in international sales: a survey of current case law on CISG, International business law journal/Revue de droit des affaires internationales (1997) 39; *Torsello*, Transfer of Ownership and the 1980 Uniform Sales Convention: A Regretful Lack of Uniform Regulation?, International business law journal/Revue de droit des affaires internationales (2000) 939; *Graffi*, L'Interpretazione autonoma della Convenzione di Vienna: rilevanza del precedente straniero e disciplina della lacune, Giurisprudenza di merito (2004) 873.

[83] It is still not infrequent to report some skepticism on the part of comparative lawyers who see the unification process as a threat to legal diversity and to the positive competition among legal systems. For an attempt at replying to those critics, see *Torsello*, Common Features of Uniform Commercial Law Conventions. A Comparative Study Beyond the 1980 Uniform Sales Law (2004) 271; for an overview of the different positions at stake, see *Mattei*, Il problema della codificazione civile europea e la cultura giuridica. Pregiudizi, strategie e sviluppi, Contratto e impresa/Europa (1998) 207; *Zoppini* (ed.), La concorrenza tra ordinamenti giuridici (2004), containing papers by *Zoppini*, *Alpa*, *Somma*, *Lipari*, *Portale*, *Torchia*, *Ferrarese*, *Monateri*, *Lupi*, *Lombardo* and *Cassese*.

[84] Indeed, not only professor Bianca, but also many others among the scholars who contributed to the 1992 commentary (*Bianca*, Convenzione di Vienna sui contratti di vendita internazionale di beni mobili) were primarily (or also) domestic contract law scholars; this certainly applies to *Patti*, *Rubino*, *Lipari*, *Fusaro*, *Vettori*, *Cottino*, *Bonfante*, *Angelici*, *Bonelli*, *Ponzanelli*, *Scognamiglio*.

[85] See, among many others, *Alpa/Bessone*, I contratti in generale (1991); *Bianca*, Diritto civile. Il contratto (1987); *Carresi*, Il contratto, *Cicu/Messineo* (eds.), Trattato di diritto civile e commerciale (1987); *Collura*, Importanza dell'inadempimento e teoria del contratto (1992) 49; *Di Majo*, L'adempimento dell'obbli-

the CISG thus became a point of comparative reference whenever scholars were addressing the issue of contract law either from a purely domestic, or from a comparative perspective.[86]

## 3. Impact of scholarly writing devoted to the CISG

The attention paid by Italian legal scholars to the CISG is considerable, a very positive circumstance, which has led to a significant number of papers devoted to the CISG being published in the Italian legal literature. However, this considerable attention devoted by legal scholars has not, in turn, resulted in the spreading of a comparable interest in (and a comparable acquaintance with) the CISG by practicing lawyers and courts. As a matter of fact, although in theory – as Italy is a civil law jurisdiction – scholarly writing is expected to be influential in practice, in the area at hand, this appears to be the case only to a very limited extent.

The reason for this probably lies in the decreasing attention that practicing lawyers pay to law treaties and scholarly writings, as a result of the (wrong) belief that they can get all the information they need from handier computer databases or practice-oriented commentaries, which for the most part only focus on domestic law, at least in Italy.[87]

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gazione (1993); *Galgano*, Diritto civile e commerciale (2004); *Sacco/De Nova*, Il contratto (2004); *Rescigno*, Manuale di diritto privato (4th ed., 1984); with specific regard to sales contracts, see *Bianca*, La vendita e la permuta, in Trattato di diritto civile italiano (1993); *Bin*, La vendita, *Galgano* (ed.), I grandi orientamenti della giurisprudenza civile e commerciale (1995); *Luminoso*, La compravendita (2007).

86 As a matter of fact, the same role as a comparative reference, along with the CISG, is increasingly played also by the Unidroit Principles of International Commercial Contracts; see *Basedow*, Uniform Law Conventions and the UNIDROIT Principles of International Commercial Contracts, Uniform Law Review (2000) 129; *Nabati*, Les régles d'interpretation des contrats dans les Principes d'UNIDROIT et la CVIM: entre unité structurelle et diversité fonctionnelle, Uniform Law Review (2007) 247.

87 For some of the few exceptions, namely Italian commentaries also (or primarily) devoted to international commercial law instruments, see *Alpa/Zatti*, Commentario breve al codice civile. Leggi complementari, I (1999), commenting on the CISG, as well as on the Rome Convention on the law applicable to contractual obligations and on other relevant conventions in the field of private international law and international substantive law; see also *Ferrari* (ed.), Le convenzioni di diritto del commercio internazionale. Codice essenziale con regolamenti comunitari e note introduttive (2002), with comments on the CISG (*Rizzieri*), the CMR (*Sancisi*), the Factoring Convention (*Torsello*), the Leasing Convention (*Frigna-*

Furthermore, a relevant role may also be attributed to a specifically Italian characteristic, namely the fact that under Italian law courts are prohibited from citing legal scholars explicitly.[88] Indeed, a court decision may refer to the "prevailing opinion" in scholarly writing, to the "best opinion", to the "opinion to be shared by the court". Under no circumstances, however, may the court identify the scholars referred to. This is likely to emphasize the divide between those (few) who already possess the knowledge about the scholarly opinion referred to by the court and those (many) who are not in the position to recognize the citation and to fully understand the reasons and the implications of the court's reference. As a result, court decisions, which nowadays (thanks to computerized database of case-law) are the most effective vehicle for the spreading of legal information,[89] are prevented from transferring the pieces of information regarding the identity of the scholars who have in-depth analyzed a specific issue and who have inspired the decision adopted by the court.

By and large, also the impact of scholarly writing devoted to the CISG on legal education is not as significant as one would expect. This is primarily due to the fact that in Italian legal education there are no specific courses on international sales. As a consequence, when at all taught, the CISG is taught as part of broader courses, either on general contract law, or (more frequently) on comparative private law[90] or international business transactions.[91] Given the foregoing, in most cases only little attention can be devoted to the CISG, it being only part of a much broader course, so that the information offered to law students is often limited to a brief summary of the

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*ni*), the Rome Convention (*Zanobetti*), the Brussels Convention and Reg. 44/2001 (*De Cristofaro*), the Hague Convention on the Taking of Evidence Abroad (*Borghesi*), the Insovency Regulation (*De Cristofaro*) and the New York and Geneva Conventions on Arbitration (*Giovannucci Orlandi*).

88 This is due to the specific prohibition which was originally introduced by Article 264 of the Royal Decree of 14 December 1865, n. 2641, subsequently confirmed in Art. 118(3) of the Executive provisions accompanying the Italian Code of Civil Proceedings, according to which in the motivation of court decisions "any citation of legal authors must be omitted"; for a comment on this provision, with historical references as to the reasons for its introduction in the system, see *Barbagallo/Missori*, Il linguaggio delle sentenze, La Nuova Giurisprudenza Civile Commentata (1999) 91.

89 For a similar statement, see *Veneziano*, Uniform interpretation: What is being done? Unofficial efforts and their impact, in: *Ferrari* (ed.), The 1980 Uniform Sales Law. Old issues Revisited in the Light of Recent Experiences. Verona Conference (2003) 327.

90 This is the case, for instance, at Bologna Law School.

91 This is the case in many Law Schools, including Verona, Trento and others.

main rules of the Convention, without any deeper analysis on the basis of specific scholarly works.

## 4. Use of the CISG to interpret other uniform law instruments

On the basis of the foregoing, it seems safe to maintain that the CISG has become a fundamental point of reference in the field of international uniform commercial law and that Italian legal scholars have widely acknowledged that role.[92] Accordingly, the CISG has often been regarded as a indispensable point of reference also with respect to other instruments, as can be observed on various levels.

First, the CISG has been given a relevant role to play with respect to the interpretation of other international instruments which in practice apply along with the former and therefore need to be coordinated with it. This is primarily the case (already referred to above[93]) of the relationship between the CISG and the Brussels Convention, now substituted by the EC Regulation n. 44/2001, which calls for a direct resort to notions derived from the CISG in order to identify the place of delivery of the goods.

Secondly, the CISG has been considered by legal scholars a very important reference and source of inspiration with respect to instruments of soft law, such as the Unidroit Principles of International Commercial Contracts[94] and the Principles of European Contract Law.[95] Indeed, there is a

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92 This conclusion seems to be confirmed by the pivotal role played by the CISG in the most popular Italian treaties dealing with international contracts in general, or with international commercial law in general; see, among others, *Frignani*, Il contratto internazionale (1990); *Carbone/Luzzatto*, Il contratto internazionale (1994); *Bortolotti*, Manuale di diritto commerciale internazionale. 1. Diritto dei contratti internazionali (2001); *Galgano/Marrella*, Diritto del commercio internazionale (2007).

93 See supra, Section II, par. 1.

94 For Italian papers commenting on the Unidroit Principles and comparing the Principles either with the CISG or with Italian domestic law, see, e.g., *Alpa*, Prime note di raffronto tra i Principi dell'UNIDROIT e il sistema contrattuale italiano, Contratto e impresa/Europa (1996) 316; *Benedetti/Grondona*, La conclusione del contratto nella Convenzione di Vienna 11.4.1980 sui contratti di vendita internazionale di beni mobile e nei Principi UNIDROIT, *Cendon* (ed.), Il diritto privato nella giurisprudenza – I contratti in generale (2000); *Corapi*, L'equilibrio delle posizioni contrattuali nei principi Unidroit, Europa e Diritto Privato (2002) 23; *Marrella*, La nuova lex mercatoria. Principi Unidroit ed usi dei contratti del commercio internazionale (2003); *Veneziano*, La Convenzione sulla Vendita Internazionale e i Principi UNIDROIT dei contratti commerciali internazionali in

general consensus as to the fact that the CISG has been a relevant source of inspiration for the drafters of the aforementioned instruments,[96] which in turn should support the view that the interpretation of the latter ones should be coherently developed along the lines of the interpretation already consolidated with respect to the CISG.[97]

Last, and most importantly, the CISG has also been used by Italian scholars for the purpose of favoring an inter-conventional interpretation.[98] Indeed, the evaluation of the impact of the CISG on subsequent Conventions,[99] as well as the comparative analysis of different instruments,[100] high-

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due recenti lodi della Corte Arbitrale della Camera di Commercio di Vienna, Rivista dell'arbitrato (1995) 547.

95 See, e.g., *Carbone*, L'inquadramento normativo, l'autonomia interpretativa dei "principi" di un diritto europeo dei contratti ed il loro impiego, Rivista di diritto internazionale privato e processuale (2000) 885; *Castronovo*, Il contratto e l'idea di codificazione nei Principi di diritto europeo dei contratti, in: *Vettori* (ed.), Materiali e commenti sul nuovo diritto dei contratti (1999) 854; *Cusmai*, L'esecuzione del contratto nei principi di diritto europeo e nei principi dei contratti commerciali internazionali. Appunti sull'influenza di common law e di civil law, Vita notarile (1998) 1847; *Peleggi*, La compensazione nei Principi UNIDROIT dei contratti commerciali internazionali e nei Principi di Diritto Europeo dei Contratti: un primo confronto, Diritto del commercio internazionale (2002) 927.

96 See *Bonell*, The CISG, European Contract Law and the Development of a World Contract Law, 56 American Journal of Comparative Law (2008) 1.

97 For a similar approach, see *Flechtner*, The CISG's impact on international unification efforts: the Unidroit Principles of International Commercial Contracts and the Principles of European Contract Law, in: *Ferrari* (ed.), The 1980 Uniform Sales Law. Old Issues Revisited in the Light of Recent Experiences (2003) 169; *Felemegas* (ed.), An International Approach to the Interpretation of the United Nations Convention on Contracts for the International Sale of Goods (1980) as Uniform Sales Law (2007).

98 See *Ferrari*, I rapporti tra le convenzioni di diritto materiale uniforme in materia contrattuale e la necessità di un'interpretazione interconvenzionale, Rivista di diritto internazionale privato e processuale (2000) 669.

99 For a study specifically devoted to the analysis of the impact of the CISG on subsequent conventions, see *Torsello*, The CISG's Impact on Legislators: The Drafting of International Contract Law Conventions, in: *Ferrari* (ed.), The 1980 Uniform Sales Law. Old Issues Revisited in the Light of Recent Experiences (2003) 199.

100 See *Ferrari*, Principi generali inseriti nelle convenzioni internazionali di diritto uniforme: l'esempio della vendita, del "factoring" e del "leasing" internazionali, Rivista di diritto internazionale privato e processuale (1997) 651; *Id.*, The rela-

lighting the consistency of the unification strategies adopted, have led scholars dealing with the issue at hand to the conclusion that the goal of the creation of an overall coherent legal framework for international commercial contracts would be best served if each supranational legal instrument were to be interpreted in the light of the interpretation (including relevant case law) developed at the international level with respect to other instruments.[101] If this approach were to be extensively adopted, it goes without saying that the CISG would become a primary source of reference for any other international uniform contract law convention.

## III. CISG's impact on courts

It is self-evident that the very purpose of the unification of private law is at risk of being frustrated, should the uniform text of an international convention be subject to divergent interpretations by the domestic courts adjudicating similar cases, resulting in non-uniform applications of the same international instrument.[102] Indeed, among other possible sources of non-uniformity, the divergence of interpretations of the same international uniform law convention is probably the most dangerous one, as it may jeopardize the main goal pursued by the international legislature. The problem is, in fact, exacerbated by the circumstance that any convention of the kind in question relies for its interpretation and enforcement on the decentralized national adjudicating courts of each contracting state.[103]

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tionship between international uniform contract law Conventions, Uniform Law Review (2000) 69.

[101] For a similar conclusion, see *Ferrari*, How to Create One Uniform Law, 5 Vindobona Journal of International Commercial Law and Arbitration (2001) 3; *Torsello*, Common Features of Uniform Commercial Law Conventions. A Comparative Study Beyond the 1980 Uniform Sales Law (2004) 271.

[102] Accordingly, *Ferrari*, La vendita internazionale. Applicabilità e applicazioni della Convenzione delle Nazioni Unite sui contratti di vendita internazionale di beni mobili (2006) 15.

[103] For a similar statement see *Enderlein/Maskow*, International Sales Law. United Nations Convention on Contracts for the International Sale of Goods – Convention on the Limitation Period in the International Sale of Goods (1992) 56, where the Authors observe that "since the CISG is applied by the deciding organs *in a decentralized fashion*, there is a great risk that those organs reach differing solutions, which could reduce the results of the unification of law" (emphasis in the original text); for a proposal to create a transnational Tribunal, acting as an appellate court endowed with the power to revise decisions taken by national courts in order to assure the uniform application of international uniform law Convention, see *Sohn*, Proposal for an International Tribunal to Interpret Uniform Legal

In order to properly deal with the issue at hand, Article 7(1) of the CISG states that in the interpretation of the Convention "regard is to be had to its international character and to the need to promote uniformity in its application and the observance of good faith in international trade".[104] Hence, in providing guidelines for interpretation, the Convention sets forth three different criteria to be taken into account in the interpretation of the uniform instrument: the Convention's "international character", the promotion of "uniformity" in its application as well as the promotion of the "observance of good faith" in international trade. The last criterion is the most controversial one.[105] The reference to "good faith" in the context of the rule on inter-

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Texts, Uniform Commercial Law in the Twenty-first Century: Proceedings of the Congress of the United Nations Commission on International Trade Law (18-22 May 1992) (1995) 50.

[104] Article 7(1) CISG is certainly one of the Convention's provision most commented on; for papers specifically dealing with this provision see, e.g., *Carbone*, L'ambito di applicazione ed i criteri interpretativi della convenzione di Vienna, Rivista di diritto internazionale privato e processuale (1980) 84; *Bonell*, Article 7, *Bianca/Bonell*, Commentary on the International Sales Law. The 1980 Vienna Sales Convention (1987) 65; *Ferrari*, Interpretation of the Convention and gap-filling: Article 7, in *Ferrari/Flechtner/Brand* (eds.), The Draft Uncitral Digest and Beyond: Cases, Analysis and Unresolved Issues in the U.N. Sales Convention (2004) 138; *Rizzi*, Interpretazione ed integrazione della legge uniforme sulla vendita internazionale di cose mobili, Rivista di diritto privato (1997) 237; *Hillmann*, Applying the United Nations Convention on Contracts for the International Sale of Goods: The Elusive Goal of Uniformity, 1 Cornell Review of the Convention on Contracts for the International Sale of Goods (1995) 21; *Kramer*, Uniforme Interpretation von Einheitsprivatrecht -mit besonderer Berücksichtigung von Art. 7 UNKR, Juristische Blätter (1996) 137; *Honnold*, The Sales Convention: From Idea to Practice, 17 Journal of Law & Commerce (1998) 181; *van Alstine*, Dynamic Treaty Interpretation, 146 University of Pennsylvania Law Review (1998) 687; *Felemegas*, The United Nations Convention on Contracts for the International Sale of Goods: Article 7 and Uniform Interpretation, Pace Review of the Convention on Contracts for the International Sale of Goods (CISG) (2000-2001) 115; *Gerhart*, The Sales Convention in Courts: Uniformity, Adaptability and Adoptability, *Sarcevic/Volken* (eds.), The International Sale of Goods Revisited (2001) 77; *Witz*, L'interprétation de la CVIM: Divergences dans l'interprétation de la Convention de Vienne, *Ferrari* (ed.), The 1980 Uniform Sales Law. Old Issues Revisited in the Light of Recent Experiences (2003) 253.

[105] For papers analyzing the role of good faith within the CISG, see, e.g., *Farnsworth*, Duties of Good Faith and Fair Dealing under the UNIDROIT Principles, Relevant International Conventions and National Laws, 3 Tulane Journal of International and Comparative Law (1995) 47; *Schlechtriem*, Good Faith in German Law and in International Uniform Laws, *Bonell* (ed.), 24 Saggi, Conferenze e Seminari

pretation is the result of a compromise between the position that supported the insertion of a general principle of good faith directly applicable to the parties to the contract, and the position that feared that such a solution would lead to unacceptable uncertainty as to the content of the parties' rights and obligations.[106]

As to the other interpretative criteria provided for in the CISG (i.e., regard to its international character and promotion of uniformity), they call for what is usually referred to as the "autonomous interpretation" of the Convention, under which interpreters (primarily the domestic courts) are required to omit any possible reference to domestic concepts in the process of interpretation.[107] It has been pointed out, however, that "opting for the 'autonomous' interpretation […] does not resolve […] all the interpretive problems, since this choice is not one of interpretive technique or method, but rather one of policy",[108] whereas the need for the interpretation to be autonomous leaves open methodological questions as to the hermeneutic techniques to be applied.[109]

It is apparent that the international character of the transaction and the need to promote uniformity in its application largely concur to enhance the autonomous interpretation of the Convention, although the need to promote uniformity is often pointed out as the main interpretative goal of the provision. However, ranking the two criteria may prove to be misleading, in that the two criteria seem to provide different perspective to the interpreter. While the need to promote uniformity describes the ultimate goal of the

– Centro di studi e ricerche di diritto comparato e straniero (1997); *Ranieri*, Bonne foi et exercise du droit dans la tradition du civil law, Revue internationale de droit comparé (1998) 1055; for an Italian court decision dealing with the issue of good faith under the CISG, see Court of Appeal Milan, 11 December 1998, Rivista trimestrale di diritto e procedura civile (1999) 112.

106 For a historical overview of the provision at hand see *Bonell*, Article 7, *Bianca/Bonell*, Commentary on the International Sales Law. The 1980 Vienna Sales Convention (1987) 65; *Honnold*, The Sales Convention: From Idea to Practice, 17 Journal of Law & Commerce (1998) 181.

107 See, however, *Ferrari*, CISG Case Law: A New Challenge for Interpreters, 17 Journal of Law & Commerce (1998) 249, where the author, although maintaining the same view expressed in the text, points out a number of concepts that, notwithstanding the need for autonomous interpretation, exceptionally have to be interpreted "domestically".

108 See *Ferrari*, Uniform interpretation of the 1980 Uniform Sales Law, *Rabello* (ed.), Essays on European Law and Israel (1996) 200.

109 The issue is addressed by *Gerhart*, The Sales Convention in Courts: Uniformity, Adaptability and Adoptability, *Sarcevic/Volken* (eds.), The International Sale of Goods Revisited (2001) 81.

interpretative process, reference to internationality describes the context within which the interpretative process must take place.[110]

In particular, the need to conduct the interpretative process in the international context suggests that courts applying the CISG should take into due account foreign case law which previously applied the same international instrument.[111] This widely shared view raises in turn the question as to the existence of a sort of supranational "stare decisis",[112] which, although it would bring the benefit of assuring consistency among the decisions adopted in different jurisdiction, must be firmly denied in view of the absence of a hierarchical structure of courts in the international context.[113] Lacking such a structure, there would be no possibility of "overruling" any previous decision, even if the decision were clearly inconsistent with the Convention.

## 1. The CISG's impact on the style of court decisions

The foregoing suggests that courts play a pivotal role in assuring the uniform application of an international convention such as the CISG.[114] It is therefore of utmost importance to examine the extent to which courts are aware

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[110] See *Torsello*, Common Features of Uniform Commercial Law Conventions (2004) 162.

[111] The need for reference to case law has been often stressed by legal scholars: see, e.g., *Patterson*, United Nations Convention on Contracts for the International Sale of Goods: Unification and the Tension Between Compromise and Domination, 22 Stanford Journal of International Law (1986) 283; *Winship*, Changing Contract Practices in the Light of the United Nations Sales Convention: A Guide for Practitioners, 29 The International Lawyer (1995) 528.

[112] For an isolated position favoring a supranational "stare decisis" doctrine, see *Di Matteo*, An International Contract Law Formula: The Informality of International Business Transactions Plus the Internationalization of Contract Law Equals Unexpected Contractual Liability, 23 Syracuse Journal of International Law & Commerce (1997) 79; according to *Bonell*, Article 7, *Bianca/Bonell*, Commentary on the International Sales Law. The 1980 Vienna Sales Convention (1987) 91, the authority of precedent should be recognized not to a single isolated decision, but to "a body of international case law".

[113] For cases expressly confirming this view, see infra, Section IV, par. 1.

[114] For a similar observation see *Sekolec*, Preface – Digest of case law on the UN Convention: The combined wisdom of judges and arbitrators promoting uniform interpretation of the Convention, *Ferrari/Flechtner/Brand* (eds.), The Draft UNCITRAL Digest and Beyond: Cases, Analysis and Unresolved Issues in the U.N. Sales Convention (2004) 1.

of the existence and applicability of the Convention, as well as of the way in which the Convention needs to be interpreted and applied in practice.

Unfortunately, if one were to consider the large majority of Italian court decisions, the evaluation could not but be an extremely negative one. Nothing can reasonably justify the fact that relevant courts such as those in Milan, Rome, Turin, Bologna or Genova (just to mention a few) only decided a limited number of cases (if any) in which the CISG applied. It is apparent that the number of transactions governed by the CISG taking place in those areas is absolutely incompatible with the substantial lack of relevant case-law and the only reasonable justification for the lack of case law lies in that both lawyers and judges regularly overlooked the applicability of the Convention to international sales transaction to which the CISG should have applied.

In this overall frustrating scenario, it would be extremely difficult to assess whether and to what extent the CISG has affected the style of court decisions. In fact, there are two ways to answer this question: one way is to look at the general picture and to provide a firm answer that the CISG has had no impact whatsoever on the style of court decisions; the other way is to emphasize the existence of a very small group of extremely learned and skilled judges, who in the last decade have rendered a significant number of sophisticated and highly appreciated decisions, which in terms of quality rank way above the average Italian decisions in the field of international contracts.

Keeping in mind that we are now referring to an "enlightened minority", it is appropriate to report the existence of Italian court decisions which in the application of the CISG adopted a completely new style compared to the usual one adopted for purely domestic cases and, in particular, made extensive reference to foreign case law to decide the cases at hand. Although not the first one to quote foreign case law,[115] the one decision which first stood out for the extent to which it made reference to foreign decisions is that rendered by the court of Vigevano (H.J. Alessandro Rizzieri),[116] which contains reference to forty foreign decisions, including court decisions[117] and arbitral awards.

The court demonstrated to be fully aware of the role of foreign case law. Indeed, it rejected the view that a court should abide by foreign precedents

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[115] See Tribunale Cuneo, 31 January 1996, which quoted two foreign court decisions.

[116] Tribunale Vigevano, 20 July 2000; not suprisingly, Justice Rizzieri is also the author of the comment on the CISG contained in the commentary on international commercial law instruments edited by *Ferrari* (ed.), Le convenzioni di diritto del commercio internazionale. Codice essenziale con Regolamenti comunitari e note introduttive (2002) 47.

[117] The court referred to decisions form Austria, France, Germany, the Netherlands, Switzerland and the United States.

according to a supranational "stare decisis" doctrine,[118] but rather acknowledged that those foreign precedents «albeit non-binding, as suggested by a few legal writers, must nevertheless be taken into account in order to guarantee and promote a uniform application of the Vienna Sales Convention».

Furthermore, the decision at hand was also innovative with respect to its style, in that it did not limit its sources of knowledge of relevant precedents to law reports and law reviews, but also resorted extensively to databases available on the Internet[119] in order to find the foreign decisions relevant to the case.[120] The court thus overcame the two critical obstacles that often limit the capability of courts of taking foreign cases into account, namely the difficulty to retrieve foreign decisions and the difficulty to have access to foreign cases in a language understandable to the interpreter.[121]

The decision of the court of Vigevano immediately became a widely-acclaimed model, and for very good reasons.[122] In addressing the issues relevant to the case at hand (exclusion of the Convention, notice of non-conformity, measure of damages, burden of proof) it adopted an approach previously unknown not only in Italian case law,[123] but also in foreign case law regarding the CISG.[124]

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[118] A similar statement had previously been made also by Tribunale Pavia, 29 December 1999, Corriere giuridico (2000) 932.

[119] For papers dealing with the official and the unofficial efforts respectively, see *De Ly*, Uniform Interpretation: What is Being Done Official Efforts, and *Veneziano*, Uniform Interpretation: What is Being Done Unofficial Efforts, both in *Ferrari* (ed.), The 1980 Uniform Sales Law. Old Issues Revisited in the Light of Recent Experiences (2003) 335 and 325.

[120] Indeed, in citing relevant cases, along with many references to domestic and foreign law journals, the court often referred to websites as the primary source of information; in particular, the court made references to the CLOUT database (the database managed by Uncitral, 'Case Law on Uncitral Texts'), to the Unilex database (www.unilex.info), to the database held by Pace University (http://cisgw3.law.pace.edu), as well as to other databases run by other Universities and institutions.

[121] For a similar statement as to the difficulties encountered by judges required to take foreign case law into account, see *Ferrari*, Applying the CISG in a truly uniform manner: Tribunale di Vigevano (Italy), 12 July 2000, 6 Uniform Law Review (2001) 206.

[122] In fact, the decision has been translated from Italian into many other languages, including English, French and German, and it has been commented on by many scholars in several different jurisdictions.

[123] In previous decisions courts had at times pointed out the difference between the Convention and Italian law (see, for instance, Pretura Torino, 30 January 1997, Giurisprudenza italiana (1998) 982, which highlighted the difference between the 'reasonable time' criterion used in Article 39 CISG and the fixed 8-day period set

## 2. Courts' adherence to the CISG interpretative mandate

The most relevant quality of the decision rendered by the court of Vigevano consisted in its strict compliance with the CISG's interpretative mandate. The court, in fact, complied with the goal of promoting uniformity in the CISG's application and carried out its hermeneutic activity having due regard to the international character of the CISG.[125] In other words, it is safe to assert that the court acted as a truly international adjudicator.

A similar approach was taken also by some subsequent courts which explicitly adhered to the interpretative methodology adopted by the court of Vigevano. Although in several cases the subsequent decision was taken by the same judge who had rendered the innovative judgment mentioned above,[126] in one decision rendered a few years after "Vigevano" both the court and the judge were different ones, but the outcome was as exemplary as the one reached by the court of Vigevano.

The decision in question is the one rendered by the court of Rimini on 26 November 2002 (H.J. Francesco Cortesi).[127] In view of its clarity, its en-

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in Article 1495 of the Italian civil code), thus showing the awareness of the need to avoid a homeward trend in the interpretation of the supranational instrument; however, they failed to properly address the issue of the appropriate means to interpret the international convention.

[124] For a similar statement, see *Ferrari*, Tribunale di Vigevano: Specific Aspects of the CISG Uniformly Dealt With, 20 Journal of Law & Commerce (2001) 225.

[125] An attempt at interpreting the Convention within an international context had also previously been made by Court of Appeal Genova, 24 March 1995, Diritto marittimo (1995) 1054, where the court pointed out that "according to the accepted scheme of the international sale FOB – Free on Board – port of loading agreed, which is binding inter partes as an international trade usage under Article 9 CISG as well as under the standard terms of the National Iranian Oil Commission referred to in the contract, the seller performed its obligation of delivery when the oil entered the tanks of the ship. Therefore, the seller had to bear the risk of any loss or damage to the goods that may have occurred before that moment".

[126] In fact, short after the decision of 12 June 2000 H.J. Alessandro Rizzieri moved from the court of Vigevano to the court of Padua; it should come to a surprise, then, that many of the subsequent decisions which one would list among the "exemplary" ones were rendered by the court of Padua.

[127] See Tribunale Rimini, 26 November 2002, Giurisprudenza italiana (2003) 896, with a comment by *Ferrari*, Vendita internazionale tra forum shopping e diritto internazionale privato: brevi note in occasione di una sentenza esemplare relativa alla Convenzione delle Nazioni Unite del 1980; for a comment in English see also *Id.*, International Sales Law and the Inevitability of Forum Shopping: A Com-

compassing scope and its in-depth analysis of the issue of the applicability of the CISG[128] (some aspects of which were addressed by means of "obiter dicta" for the very purpose of providing a complete picture), the decision at hand stands as a road-map for judges in charge of applying the Convention. In this respect, not only did the decision at issue adhere to the CISG's interpretative mandate, but it even went beyond that mandate in that it provided a stimulus and a guideline to other courts as to the way in which to comply with that mandate.

Italian courts, however, did not prove to be very receptive in this respect and the positive example provided by the decisions of Vigevano and Rimini remained almost isolated, although with the remarkable exception of a series of decisions subsequently rendered by the court of Padova (H.J. Alessandro Rizzieri).

In the first decision dating February 2004,[129] the court, once again quoted a considerable number of foreign decisions and pointed out the need for a judge to resort to computerized means and databases in order to acquire the proper knowledge of foreign cases.

Shortly afterwards, in a decision rendered on March 31, 2004,[130] the court addressed the substantive issue of the time of payment and the highly disputed one of the rate of interest, pointing out that «one must then make reference to the law applicable by virtue of the norms of the private international law of the forum», supporting its view on the basis of several court decisions from different jurisdictions.

On January 11, 2005,[131] the same court rendered a new decision, where it addressed the question of the effects of a choice of law clause making appli-

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ment on Tribunale di Rimini, 8 Vindobona Journal of International Commercial Law and Arbitration (2004) 1.

[128] In particular, the decision at hand dealt in great detail with the issue of the relationship between uniform substantive law and private international law, an issue which had previously been addressed only by scholars (see *Boschiero*, Il coordinamento delle norme in materia di vendita internazionale (1990); *Ferrari*, CISG and Private International Law, *Ferrari* (ed.), The 1980 Uniform Sales Law. Old Issues Revisited in the Light of Recent Experiences (2003) 19), but never by court decisions.

[129] Tribunale Padova, 25 February 2004, Giurisprudenza italiana (2004), 1405; for a comment on the decision at hand, see *Graffi*, L'interpretazione autonoma della Convenzione di Vienna: rilevanza del precedente straniero e disciplina della lacune, Giurisprudenza di merito (2004) 873.

[130] Tribunale Padova, 31 March 2004, Giurisprudenza di merito (2004) 1065; for a comment on the decision in question, see *Ferrari*, La disciplina sostanziale della vendita internazionale ed il saggio d'interessi, Giurisprudenza di merito (2004) 1069.

[131] Tribunale Padova, 11 January 2005, The European Legal Forum (2005) II.

cable the "laws and regulations of the International Chamber of Commerce of Paris, France". The court thus had the chance to state that the clause did not qualify as a "choice of law" clause according to private international law rules, since under the 1980 Convention on the Law Applicable to Contractual Obligations the law chosen by the parties must be that of a sovereign state.

Finally, about one year later,[132] the court rendered a new decision, the main object of which was not the CISG, but rather the EC Regulation n. 44/2001; however, when it came to determine the "place of delivery" of the goods for the purpose of affirming the special jurisdiction under Article 5 of the "Brussels" Regulation, the court interestingly observed that «[t]he Regulation does not provide an answer to this question […]. Thus, to this end, the CISG must be relied upon as it constitutes a set of rules which, as seen, even the European legislature has used as a model due to its acceptance at the international level and its ability to bring uniformity and autonomy of results. Under the CISG Article 31, "if the seller is not bound to deliver the goods at any other particular place" and the contract for sale involves carriage of the goods, the seller performs by "handing the goods over to the first carrier for transmission to the buyer." It should also be noted that this approach has been adopted in two other "autonomous" (but not binding, as opposed to the CISG) texts, i.e., the UNIDROIT Principles (see Article 6.1.6. paragraph 1(b)) and the Principles of European Contract Law (Article 7:101, paragraph 1(b))».[133]

It would be inappropriate not to acknowledge once again the fact that the decisions mentioned above constitute a "enlightened minority" within a vast majority of low-quality Italian decisions about the CISG. However, at the same time it would be inappropriate also not to acknowledge that those enlightened decisions have indeed triggered a positive effect and have influenced subsequent decisions rendered by the Italian Supreme Court. In fact, the decision on jurisdiction which has just been referred to was followed by a series of decisions by the Italian Supreme Court,[134] which accepted almost in full the solution maintained by the court of Padova. Furthermore, in an an-

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[132] Tribunale Padova, 10 January 2006, Giurisprudenza di merito (206) 1413, with a comment by *Ragno*, Forum destinatae solutionis e Regolamento (CE) N. 44 del 2001: Alcuni spunti innovativi dalla giurisprudenza di merito; see also *Ferrari*, L'interpretazione autonoma del Regolamento CE 44/2001 e, in particolare, del concetto di 'luogo di adempiemento' di cui all'art. 5, n. 1. lett. b, Giurisprudenza italiana (2006) 1016.

[133] English text presented at: http://cisgw3.law.pace.edu/cases/060110i3.html.

[134] See Corte di Cassazione, 27 September 2006, n. 20887, Giustizia civile (2007) 1393; Corte di Cassazione, 3 January 2007, n. 7, Rivista di diritto internazionale privato e processuale (2007) 1105; Corte di Cassazione, 20 June 2007, n. 14300, Rivista di diritto internazionale privato e processuale (2008) 511.

other recent decision the Supreme Court,[135] although without any citation of foreign decisions, provided a very keen analysis of the Convention's sphere of application and properly addressed the issue of formal requirements under Article 11 CISG.

## 3. Courts' reference to the CISG in non-CISG cases

It has already been pointed out above[136] that at times practicing lawyers have made references to international instruments to support their arguments in cases where the instrument was undisputedly not applicable. It has also been pointed out that courts have at times supported those arguments and have based their decisions (also) on the rules contained in the uniform instrument.[137]

In fact, the foregoing has occurred primarily in cases where the transaction at hand was not directly and/or exhaustively governed by domestic rules, which is very unlikely to be the case with respect to a sale of goods transaction of the kind governed by the CISG. Nevertheless, at times Italian courts have nonetheless made reference to the CISG also in non-CISG cases, at least for the purpose of supporting a conclusion already reached on a different basis.

In a recent case, for instance, a court had to deal with a dispute regarding a claim for restitution stemming from a purely domestic transaction.[138] However, after reaching a preliminary solution on the sole basis of the analysis of Article 2033 of the Italian Civil code (a solution which in fact did not entirely correspond to the literal interpretation of the provision), the court tried to corroborate its solution by referring to the text of Article 81(2) CISG, as well as the corresponding provision of the Unidroit Principles, and finally adopted the solution which it had found to be most common in the international context.

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[135] See Corte di Cassazione, 16 May 2007, n. 11226, available at: http://www.unilex.info/case.cfm?pid=1&do= case&id=1192&step=FullText.

[136] See above, Section II, par. 4.

[137] In the case referred to above, at par. 4 of Section II, the international instrument applied by analogy was the 1988 Ottawa Convention on International Financial Leasing.

[138] See Tribunale Bergamo, 19 April 2006, Corriere del merito (2006) 835.

## 4. Courts' reference to the CISG in interpreting other uniform law instruments

Legal scholars have often highlighted that the CISG has been a fundamental source of inspiration for the drafters of subsequent uniform instruments,[139] thus suggesting that the former should be taken into great consideration also for the purpose of interpreting the latter ones, in view of the enhancement of an inter-conventional interpretation.[140]

Italian court decisions, however, have not had many opportunities to apply the aforementioned approach, primarily as a result of the limited number of disputes regarding transactions governed by international instruments other than the CISG.

One remarkable exception to the foregoing relates to the attention devoted to the CISG by Italian courts in charge of applying the Brussels Convention, now substituted by the EC Regulation n. 44/2001. Indeed, the relationships between the two instruments are self-evident: under Article 5 of the Brussels Convention (as well as under Article 5 of Regulation n. 44/2001), a party domiciled in a member state may be sued before the court of another member state if that court is located in the state where performance has or should have taken place.[141] In order to positively affirm the jurisdiction of the court in charge of the case it is therefore of utmost importance to provide an answer to the question as to where "delivery" takes place.[142]

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[139] See *Torsello*, The CISG's Impact on Legislators: The Drafting of International Contract Law Conventions, *Ferrari* (ed.), The 1980 Uniform Sales Law. Old Issues Revistited in the Light of Recent Experiences (2003) 199.

[140] For a similar statement, see *Ferrari*, I rapporti tra le convenzioni di diritto materiale uniforme in materia contrattuale e la necessità di un'interpretazione interconvenzionale, Rivista di diritto internazionale privato e processuale (2000) 669.

[141] In fact, under Art. 5 of the Brussels Convention, "[a] person domiciled in a Contracting State may, in another Contracting State, be sued: // 1. in matters relating to a contract, in the courts for the place of performance of the obligation in question […]"; the EC Regulation is more precise as to the obligation to be taken into account and Art. 5 of Reg. 44/2001, after substantially reproducing the text contained in the 1968 Convention and cited above, adds the following clarification: "[…] for the purpose of this provision and unless otherwise agreed, the place of performance of the obligation in question shall be: // – in the case of the sale of goods, the place in a Member State where, under the contract, the goods were delivered or should have been delivered […]".

[142] See supra, Section II, par. 1.

As mentioned earlier already, in addressing the issue at hand, the court of Padova[143] provided a very sound solution to the question at hand. Accordingly, the court held that «the term of "sale of goods" is not defined by the Regulation. In this case it would also not be appropriate to resort to domestic law definitions, which would otherwise impair a uniform application of the Regulation across the Member States. An "autonomous" interpretation must be pursued. To this end, it would be useful resorting to the CISG […] Resorting to the CISG is proper because the concept that needs to be determined (sale of goods) is of a substantive nature and, in consideration of the prominent role the CISG plays at the international level and in consideration of its "expansive" nature. While it is true that the CISG constitutes an autonomous set of rules, it does not mean that its concepts are not applicable outside the CISG itself. It is not a coincidence that the European legislature used the CISG as a reference for drafting Directive 1999/44/EC of the European Parliament and of the Council of 25 May 1999, relating to certain aspects of the sale of consumer goods and associated guarantees».[144]

The court thus assigned to the CISG a specific and innovative role – in view of its truly international character –, namely that of a point of reference for the interpretation of other uniform instruments.

## IV. CISG's impact on legislators

Although to different degrees, the CISG appears to have had an impact on all actors active in the Italian legal system thus far considered (practicing lawyers, scholars and courts). The same, however, cannot be said with respect to the Italian legislator, who seems to have been only to a very limited extent influenced by the CISG. In a way, this may be regarded as the result of the fact that since the Convention's adoption and its entry into force in Italy there have not been major changes of the provisions of the Italian Civil code dealing with commercial contracts. In fact, the only relevant changes which have occurred were the result of the transposition into the Italian legal system of the rules introduced at Community level by means of EC Directives addressing contractual issues, yet primarily in the field of consumer contracts.[145]

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[143] Tribunale Padova, 10 January 2006, Giurisprudenza di merito (206) 1413, with a comment by *Ragno*, Forum destinatae solutionis e Regolamento (CE) N. 44 del 2001: Alcuni spunti innovative dalla giurisprudenza di merito.

[144] English text presented at: http://cisgw3.law.pace.edu/cases/060110i3.html.

[145] For further comments on the impact of consumer law in the Italian legal system see, among many others, *Alpa*, Il diritto dei consumatori (1999); *Amato*, Per un diritto europeo dei contratti con i consumatori (2003); *Benacchio*, Diritto privato della comunità europea. Fonti, modelli, regole (2004); *Buonocore*, Contratti del

Accordingly, one could mention the rules on the sale of consumer contracts,[146] adopted by the Italian legislator first by means of the addition of new provisions into the Civil code,[147] and then by inclusion of those same provisions in the new Consumer Code enacted in 2005.[148] Moreover, one could also mention the rules on late payments in business transactions,[149] introduced by the Italian legislator in 2002.[150]

In these as well as in other cases, however, the Italian legislator adopted a rather mechanical approach and merely transplanted the text of the relevant EC Directive into the domestic legal system without any major discussion about the reform introduced. As a result, it seems safe to affirm that the CISG's impact on the Italian legislator has been only indirect, if at all. Beyond doubts, the CISG had an impact on the EC legislator with respect to the drafting of the instruments mentioned above,[151] and this in turn resulted, yet only indirectly, in the implementation in the Italian legal system of rules inspired by the CISG.

## V. Final remarks

The analysis which has been carried out thus far suggests that the CISG has had a considerable impact on the Italian legal system as a whole. Although

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consumatore e contratti d'impresa, Rivista di diritto civile (1995) 1; *Somma*, Il diritto dei consumatori è un diritto dell'impresa, Politica del diritto (1998) 679; *Stanzione* (ed.), La tutela del consumatore tra liberismo e solidarismo (1999).

146 See EC Directive n. 99/44/EC of the European Parliament and of the Council of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees. For comments on the directive, see *Zaccaria/De Cristofaro*, La vendita dei beni di consumo (2002); see also the several contributions (by *Bin*, *Fadda*, *Ciatti*, *Falzone*, *Calvo*, *Delogu* and *Pinna*) published in Contratto e impresa/Europa (II-2000).

147 Article 1519-*bis* ff. of the Italian Civil Code, introduced with the Legislative Decree 2 February 2002, n. 24, but then abolished.

148 'Consumer Code' enacted with Legislative Decree 6 September 2005, n. 206.

149 See EC Directive n. 2000/35/EC of the European Parliament and of the Council of 8 August 2000 on combating late payment in commercial transactions; for a study commenting on this Directive and the domestic rules implementing it, see *Arnò/Ferri*, La nuova normativa sui ritardi di pagamento nelle transazioni commerciali (2003).

150 Legislative Decree 9 October 2002, n. 231.

151 See *Troiano*, The Exclusion of the Seller's Liability for Recognizable Lacks of Conformity under the CISG and the New European Sales Law: The Changing Fortunes of a Notion of Variable Content, *Ferrari* (ed.), The 1980 Uniform Sales Law. Old Issues Revisited in the Light of Recent Experiences (2003) 147.

it has not directly affected the initiatives of the legislator, nor has it directly triggered any law reform process, the impact of the CISG is clearly visible on all other actors active in the legal system, namely practicing lawyers, scholars and courts.

Of course, the degree to which the CISG is capable of affecting the system is still limited in that the Convention is still widely perceived as a distinct and autonomous set of rules of interest only for specialized "insiders", whereas most lawyers, scholars and judges wrongfully believe that they may comfortably persist in ignoring the Convention.

To be sure, this attitude is slowly but surely changing and it is already possible to acknowledge that the relevant contribution of the skilled practitioners, the passionate experts and the learned judges whose work has been described in this paper has succeeded in creating awareness of the need to contribute to the creation of an overall coherent legal framework for international business transactions.

# Japan

*Shinichiro Hayakawa**

## General information

As of today (March 31, 2008), the United Nations Convention on Contracts for the International Sale of Goods (CISG) is not in force in Japan. However, the Japanese government (cabinet), having decided to accede to this Convention, has recently requested that the Diet consent to the accession. As there seems to be no substantial obstacle to obtaining the consent, it is highly probable that Japan will accede to CISG in 2008 and that CISG will be in force in our country from sometime in 2009.

Two questions arise as to the history of Japanese attitudes toward CISG.[1] First, why has it taken so long to take steps towards joining CISG? Second, what is the reason underlying Japan's recent movement towards accession?

In Japan, the Ministry of Justice plays a major role in making policy decisions concerning legal structures including relevant international instruments. Soon after CISG entered into force in 1988, the Ministry of Justice seriously considered Japan's accession to CISG and formed an informal study group to prepare for the accession. This study group conducted an in-depth analysis of CISG over approximately four years but suspended its work in 1993. The reason for this suspension was two-fold.

After the burst of the so-called bubble economy in Japan, the Ministry of Justice became overwhelmed with an urgent legislative agenda to bring about fundamental reform to insolvency law, security law, corporate law, etc., in order to cope with the critical economic situation. It could not spare any more energy on the implementation of CISG.

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* The author wishes to thank Professor Hiroo Sono, who is currently serving as Counselor in the Civil Affairs Bureau in the Ministry of Justice, for his valuable advice in the course of the preparation of this report. All internet resources cited in this report were last visited on March 31, 2008 unless otherwise indicated.

1 With respect to the history of Japan and CISG, see *Nomi*, The CISG from the Asian Perspective (http://cisgw3.law.pace.edu/cisg/biblio/nomi.html); *Kashiwagi*, Ratification by Japan of the Vienna Sales Convention" 4 University of Tokyo Journal of Law and Politics 92 (2007); *Sono (Hiroo)*, Contract Law Harmonization and Non-contracting States: The Case of the CISG, (paper presented at the UNCITRAL Congress "Modern Law for Global Commerce", 9-12 July 2007, Vienna ( http://www.uncitral.org/pdf/english/congress/Sono_hiroo.pdf )

In addition to this lack of human resources in the Ministry of Justice, there was not enough enthusiasm on the part of those engaged in cross-border sales: they were basically sceptical of, if not hostile to, CISG. For example, large trading companies found no real benefit in applying CISG to their sales contracts: they felt that the traditional sales contracts containing a choice of applicable law clause sufficiently suited for their purposes. They were more concerned with the possible uncertainties that CISG might bring to their business.

However, things have changed. Most of the urgent legislative tasks have been fulfilled such that the Ministry of Justice can now focus sufficient energy towards the accession to CISG. Furthermore, people engaged in imports/exports have gradually become aware of the benefits of having CISG incorporated into the Japanese legal system. This change in perception has basically been brought about by the overwhelming success of CISG over the two past decades. The number of contracting states has more than doubled. Also, past we now have rich sources of case law for CISG, which secures certainty and predictability of interpretation to a considerable extent. In addition to this traditional sales contracts containing a choice of law clause have become less attractive to Japanese parties: trades with Asian countries have been increasing sharply and, with the decline of the bargaining power of Japanese companies, it has been getting harder and harder to insert into the contracts a conflict of law clause which designates Japanese law as the applicable law. It would then be better to have CISG applied than to be governed by a foreign law which is not necessarily refined and satisfactory by Japanese legal standards.

As CISG is not yet in force in Japan, the impact of CISG is naturally very limited at present and we do not have sufficient materials to predict and discuss its possible impact in the future. Accordingly, our answers to the questionnaire posed by the General Reporter might be short and blunt, for which we would like to apologize in advance: we do hope to have some opportunity in the near future to update and elaborate on our answers by taking into consideration the effects that Japan's accession will have brought to Japanese society.

## I. CISG's impact on practicing lawyers

1. Most Japanese practicing lawyers may not be aware of CISG. As CISG is not yet in force in Japan, it is quite natural that lawyers who handle domestic cases only – and this is the case for a large majority of Japanese lawyers – are not familiar with CISG.

Practicing lawyers who specialize in cross-border transactions are certainly aware of CISG. It would be hard for such lawyers to do business without having at least a basic knowledge of one of the most important and suc-

cessful international instruments in this field. Whether this awareness has had any impacts on the contents of standard contract forms is a difficult question to answer. Cross-border sales contracts drafted by Japanese practicing lawyers do not, in most cases, fall into the scope of application of CISG in the first place. In these cases, there is expected to be minimal impact. In the cases where CISG could be applied, for example through Article 1 (1) (b), it seems to have been the prevailing practice to exclude CISG in the standard contract forms. The reason for this exclusion is not clear, but we could assume, as described above, that people engaged in this field (practicing lawyers as well as staff of trading companies) were somewhat sceptical of CISG mainly because of its possible uncertainties and unpredictability.

2. There have been virtually no cases heard by Japanese courts where CISG is applicable or even related. Accordingly, the questions posed in I-2 are not yet relevant in Japan.

3. The answer to the question in I-3 is simply "no". Even those practicing lawyers who are aware of CISG are not accustomed to using it. It is therefore highly unlikely, at least in the current state of affairs, that Japanese lawyers are capable of benefiting from the ideas underlying CISG in resolving purely domestic disputes.

## II. CISG's impact on scholars

1. We could answer only half of the first questions in II-1: the extent of the scholarly attention to CISG prior to its coming into force in Japan.

In Japan scholars have devoted a great deal of attention to CISG from the very beginning. Late Professor Shinichiro Michida, who was a professor of international transaction law, had vigorously participated in the preparation and negotiation of CISG in UNCITRAL as a Japanese delegate. He devoted himself to the propagation of this convention in Japan, writing theses and giving lectures on various occasions.[2] Then came Professor Kazuaki Sono, also a professor of international transaction law, who served as the Secretary General of UNCITRAL from 1980 to 1985 and worked hard for the wide acceptance of CISG throughout the world. After he returned home from Vienna, Professor Sono made every effort to promote CISG in Japan: he was one of the key-members of the study group set up by the Ministry of Justice in 1989.

Thanks to the contributions by some leading law professors including these two eminent pioneers, CISG obtained a great deal of attention

[2] See for example *Michida*, Kokusai Buppin Baibai Joyaku to Kokuren Kaigi (Draft International Sales Convention and UN Resolution) (1)-(8) [in Japanese], 661 Jurist 97, 662 Jurist 105, 663 Jurist 102, 664 Jurist 104, 665 Jurist 104, 667 Jurist 105, 668 Jurist 113, 669 Jurist 106 (1978).

amongst the academic community in Japan. Not only professors of international transaction law and private international law but also professors of civil law (national law for contract, torts, etc.) became increasingly interested in CISG. Civil law scholars in Japan are, and are required to be, more or less comparatist. As Japan inherited its civil law system from Europe, in particular from France (Code Napoleon) and Germany (BGB), Japanese civil law professors are susceptible to what is going on in European civil law countries. For them, CISG is an invaluable source of reflection on domestic contract law and contract law in general. It can be said that civil law scholars' interests lay mainly in the comparison between CISG and Japanese contract law, whereas academics in the fields of international transaction law and private international law would rather be interested in CISG itself.

2. The questions in II-2 are inquires about the impacts of the coming into force of CISG on domestic law treatises. Although these questions are not relevant, strictly speaking, to a non-contracting state like Japan, we would like to take this opportunity to point out that CISG has already had some impact on Japanese domestic law treatises even prior to its coming into force.

CISG has introduced some rules unfamiliar to traditional Japanese contract law.[3] For example, we were not familiar with the concept of "fundamental breach of contract", "obligation to mitigate loss", "anticipatory breach", or "suspension of performance".

These new concepts were so stimulating that some Japanese civil law professors wrote various treatises introducing these ideas and tried to incorporate them, in one way or another, into Japanese contract law.

3. As CISG is not yet in force in Japan, scholarly writing about CISG may not have direct impact on individual cases brought before the court. These writing, however, do have an important impact on our theory of contract law as we mentioned above. That impact will in turn influence our legal practice through various channels, in particular legal education and the development of legislation.

In contract law textbooks, as well as in contract law classes, it is now very common for professors to frequently refer to CISG and some other international instruments to make students understand domestic contract law better by comparing it with international standards. The ideas underlying CISG will thus penetrate into the minds of future law practitioners. It will surely make a great difference in our legal practice on contracts even if Japan does not join into CISG.

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[3] See for example *Sono (Hiroo)*, Contract Law Harmonization and Non-contracting States: The Case of the CISG (paper presented at the UNCITRAL Congress "Modern Law for Global Commerce", 9-12 July 2007, Vienna http://www.uncitral.org/pdf/english/congress/Sono_hiroo.pdf) pp.5-6.

The important impact of scholarly writing on CISG will also be realized through the implementation of legislation. The Ministry of Justice is now contemplating a fundamental reform of the Civil Code including contract law. Professor Takashi Uchida, who is now organizing and directing this reform as special counsel to the Ministry of Justice, is a great connoisseur of CISG. Under his direction, the scholarly writing about CISG will be taken fully into consideration in the process of drafting the new Japanese Civil Code.

4. Scholars interested in CISG are usually also interested in other uniform law instruments. Accordingly, such scholars tend to make use of reflections on CISG in discussing other uniform law instruments such as UNIDROIT principles and PECL, and vice versa.

## III. CISG's impact on courts

As CISG is not yet in force in Japan, the questions in III (1 to 4) are not relevant.[4]

## IV. CISG's impact on legislators

1. As we mentioned above in II-3, Japan is currently in the process of a fundamental reform of the Civil Code. We cannot say that CISG has triggered the discussion of this reform, but it is certain that the success of CISG has given impetus to the discussion.[5] CISG's impact is not limited to sale-specific topics but reaches beyond this to contract law in general and even to the whole civil code.

2. The reform of the Japanese Civil Code has just commenced and will take several years to accomplish. It is quite clear, however, that the reform will not be limited to sale-specific topics.

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[4] Although there is a decision by Tokyo District Court which refers to CISG, its reasoning is not correct. With respect to this decision, see *Sono (Hiroo)*, Contract Law Harmonization and Non-contracting States: The Case of the CISG, (paper presented at the UNCITRAL Congress "Modern Law for Global Commerce", 9-12 July 2007, Vienna http://www.uncitral.org/pdf/english/congress/Sono_hiroo.pdf) pp. 3-4.

[5] For example, see the Mission Statement of *Japanese Civil Code (Law of Obligations) Reform Commission* (http://www.shojihomu.or.jp/saikenhou/lawofobligations/missionstatement.pdf). As one of the reasons for an imminent need for fundamental reform, the Mission Statement points out that "an increasingly harmonised body of transnational and international contract law formulated as a response to the rapid globalisation of the market economy has emerged."

3. It is too early to predict what our new Code Civil will look like, because the reform is still in the initial stage. However, it is likely that the new Code Civil will not incorporate the rules of CISG *tel quel*. Although CISG is certainly one of the important sources of reference, legislation is a long and complicated process of negotiations and discussions so that many other considerations should also be taken into account before Japan reaches its final destination.

4. We are unsure as to whether or not Japanese domestic law will be "modelled after CISG". As such, we could not answer the question in IV-4 properly at least at this stage.

# Mexico

*Hernany Veytia**

## Introduction

"Tell me with whom you go and I will tell you who you are" is a frequent quoted proverb in Mexico. And if we apply it to CISG the result would be all the legal profession, but regrettably not the Mexican business community. Before enter into the discussion of the protagonist or main characters[1] in CISG development in Mexico, let's describe the time and scenario: the time, the last twenty years and the place, the whole country, not just Mexico City.[2]

Mexico is the world's 9th biggest economy, the 7th most important global commercial trader,[3] and the 4th consumer of luxury goods.[4]

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* The author is grateful for the comments on this note to Mr. Jorge I. Veytia and ProMexico staff and Commercial Offices at the Mexican Embassies in Europe, and the Americas.

1 The terms protagonist, main character and hero are variously (and rarely well) defined and depending on the source may denote different concepts. In classical and later theater the protagonist is the character undergoing a dramatic change (*peripeteia*), both of his own character and external circumstances, with the plot either going from order to chaos (in a tragedy, with a reversal of fortune bringing about the downfall of the protagonist, usually an exceptional individual, as a result of a tragic flaw (*hamartia*) in his personality), or from chaos to order (in a comedy, with the protagonist going from misfortune to prosperity and from obscurity to prominence).

2 Although the Mexican delegation was very active at Vienna Conferences, (its head of the delegation, Roberto Mantilla Molina became the president of the second commission on CISG). Mexican Senate ratified CISG on 14 October de 1987, the president signed it on November 17 and was deposited at United Nations on December 29 1987, therefore according with CISG Art. 99-2 entered into force in Mexico on January 1989. The text of CISG was published at the Mexican National Register (Diario Oficial de la Federación) on March 17, 1988.

3 See for instance www.investinmexico.com.mx.

4 "L'enrichissement de la classe moyenne et l'accès au crédit ont provoqué un boom sur le haut de gamme. Non sans risques. Une cathédrale dédiée au luxe, où une armée de vendeuses sert de rares clientes au pouvoir d'achat impressionnant: tel est Saks Fifth Avenue, à Mexico, la première succursale en Amérique latine de la

Mexico has the highest income per capita in Latin America. It is the biggest exporter and importer and has the highest income per capita in Latin America.[5] Mexico alone exports roughly equivalent to the sum of the exports of Brazil, Argentina, Venezuela, Uruguay, and Paraguay.[6] Mexican trade is fully integrated with that of his North American partners: More than 85% of Mexican exports go to the United States and Canada[7] and close to 65% of its imports come from these two countries. Other major trade agreements have been signed with the European Union, Japan, Israel and many countries in Central and South America. Most of Mexican trade is performed among related companies.[8]

From the 500 largest corporations in México, 468 have foreign investors as shareholders, including the entire financial sector.[9] 16 of the largest Mexican corporations are quoted at the New York Stock Exchange,[10] among the suppliers of the transnational corporations doing business in Mexico are over 16,000 foreign companies established and incorporated as Mexican legal entities in the country, where they not only enjoy a big local market but also have a solid platform for boosting their exports.[11] When the disputes arise within the same economic group they are settled among themselves.[12] Trade with the US and Canada has tripled since the implementation of NAFTA in 1994. Mexico has 12 free trade agreements with over 40 countries including, Guatemala, Honduras, El Salvador, the European Free Trade Area, and Japan.

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prestigieuse enseigne new-yorkaise. Ouvert fin novembre 2007 dans le centre commercial de Santa Fe, un quartier de bureaux haut de gamme et de tours résidentielles situé au nord-ouest de la capitale, ce magasin est devenu le symbole d'un certain Mexique, très minoritaire mais attractif pour les grandes marques" *Stolz, J,* Le Mexique est le quatrième consommateur mondial de luxe. Le Monde Eonomie, Article publié le 19 Février 2008 p. 1.

5 See http://siteresources.worldbank.org/DATASTATISTICS/Resources/GNIPC.pdf.

6 Note that in the very recent years Brazilian economy has improved considerably and the data are from 2004. Brazil up to now is not part of CISG. Further information on http://www.wto.org/english/res_e/statis_e/its2006_e/its06_overview_e.pdf.

7 In 2000 were 90% the decrease is due to the entrance of new Chinese and Indian exports. See www.economia.gob.

8 A general approach of Mexican Legal System related with foreign investment can be seen in http://www.mexico-trade.com/DOINGMX.htm.

9 América Economia (www.americaeconomia.com) and www.economia.gob.mx.

10 www.nyse.com.

11 www.economia.gob.mx See Negociaciones Internacionales and then SIAVI (a list of importers and exporters for every single product).

12 Controversies among the Jewish or Chinese community are also solved in their own tribunals. In Mexicali (border city) with the largest population of Chinese in the country no cases are registered at courts.

However regional disparities and income inequality continue to be a problem in Mexico. While all constituent states of the federation have a Human Development Index (HDI) superior to 0.70 (medium to high development), northern and central states have higher levels of HDI than the southern states. Nuevo León and the Federal District have HDI levels similar to European countries, whereas that of Oaxaca and Chiapas is similar to that of Syria or Egypt. At the municipal level, disparities are even greater: San Pedro Garza García in Nuevo León has an HDI similar to that of Italy, whereas, Metlatonoc in Guerrero, would have an HDI similar to that of Malawi. The majority of the federal entities with high development (superior to 0.80) are located in the northern region (with the exception of Jalisco, Aguascalientes, the Federal District, Querétaro, as well as the southeastern states of Quintana Roo and Campeche). The less developed states (with medium development in terms of HDI, superior to 0.70) are located at the southern Pacific coast (with the exception of Veracruz).[13]

In the poor areas of Mexico CISG is almost completely unknown, in most of the states its known in academic circles due to CISG Moots (National & International),[14] and in the rich states, located close to the United States border and the business cities of Monterrey, Guadalajara and the capital CISG is frequently used, either as an entire course at the university, post-graduate courses on international business transactions, argued by the parties and included in contracts. Therefore it is difficult to have a unique approach to CISG in Mexico.

## I. General Information on CISG in Mexico

In Mexico as in many other countries in Latin America leading practitioners are also law professors. The development of CISG can be linked to the biography of singular individuals who combine their activities as attorney-in-law with that of teachers at the leading universities in the country. Among others, the Public Notary Dr. Jorge Sanchez Cordero, Jose María Abascal, Alejandro Osuna, Herfried Woss, Fernando Vazquez Pando, Victor Carlos Garcia Moreno, Sofía Gomez Ruano, and other members of the Mexican Academy of Private International Law. Special reference is to be made to Alejandro Osuna who has built his personal Blog devoted to CISG.[15]

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13 http://www.buyinmexico.com.mx/Bancomext/aplicaciones/businesscenter/foreingTrade.jsp.

14 The moot gives an opportunity to law students to interact with law students from other countries and other cultures thereby equipping them with a multicultural approach which is undoubtedly an asset in arbitrations as well as one of the aims of this competition.

15 Further information on http://cisgmexico.blogspot.com.

Mexico was very active at UNCITRAL in the drafting of CISG.[16] Jorge Sanchez Cordero was one of the members of the Mexican Delegation. The head of the delegation was Prof. Roberto Mantilla (who later become the president of the second Commission at UNCITRAL), Prof. Barrera Graff,[17] continued to participate at UNICTRAL works. Both scholars were also the authors of the most well known textbook on corporate and commercial law. Barrera Graff also was the founder of one of the largest law firms in the country.[18]

Jose Maria Abascal Zamora, at that time professor at Universidad Iberoamericana and litigator, published weekly articles on CISG in 1994/95 he also introduced the Unidroit Principles to the business community through his weekly newspaper articles.[19]

Sofia Gomez Ruano, a former participant of the Vienna Moot, in her capacity of Secretary General of the Mexican Center of Arbitration, organizes every year a National Moot on CISG. For the first Moot she used the material of previous Vienna Cases.[20] Now the drafters of the cases use to be local

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16 *Vazquez Pando*, Comentarios a la convención sobre los contratos de compraventa internacional de mercaderías a la luz del derecho mexicano [Commentary on the CISG in Light of Mexican Law – in Spanish], 10 Anuario Jurídico, México, D.F. (1983) 31-57.

17 For the history of the CISG in Mexico see *Barrera Graf*, La Convención de Compraventa Interancional de Mercaderias, en Boletín de Derecho Comparado, Nueva Serie Año XVI, No. 48 (1983).

18 Siqueiros, Barrera y Torres Landa. His partner Jose Luis Siqueiros also has published on CISG and other international instruments.

19 Among *Abascal* publications: *1994/1995*. [Reports on international commercial law – in Spanish], published in the guia legal [legal guide] section of the newspaper Financiero, analisis (Mexico, D.F.); La compraventa internacional de mercaderías [The international sale of goods]; a nine-part series, in: Financiero. Complete bibliography can be seen at http://www.cisg.law.pace.edu/cisg/biblio/alpha00.html.

20 With Prof. Bergsten not only authorization and compliments, but also with the best wishes that CISG Moot would become something like the Football World Cup, with local, national and regional phases. Prof. Bergsten had the idea of the The Willem C. Vis International Commercial Arbitration Moot. A prestigious annual international moot court competition held in Vienna, Austria. The issues for the moot are always based on an international sales transaction subjected to the United Nations Convention on Contracts for the International Sale of Goods, 1980 and also involves procedural issues of arbitration. The moot consists of submitting written memoranda prior to the moot on designated dates for both sides of the dispute (Claimant and Respondent in legal terminology). The oral arguments phase of the moot is held in Vienna.

arbitrators. The 7th edition of a Mexican moot on CISG and Arbitration organized by CAM is sponsored by most of the leading Mexican law firms. Last year students from seventeen universities from Mexico City, Mexico State, Puebla, Jalisco, Nuevo León, Sonora, Coahuila, San Luis Potosí, Tamaulipas, Baja California and Yucatán. The venue was the Campus del Tecnológico de Monterrey (TEC): Campus Ciudad de México, Campus Estado de México, Campus Monterrey, and Campus Puebla.[21] This Moot is the most well known in the country. Information on the Moot is sent to all universities in the country.

Law Firms and local companies sponsor teams and the Moot itself. Practitioners in Mexico use to be very active at the IBA[22] and participate on UNCITRAL working groups. At the leading law schools either at bachelor or postgraduate courses CISG and other international legal instruments are widely promoted.

In some cases, the controversy among Mexican subsidiaries of transnational companies is solved in Mexico subject to national legislation. The national sale of goods contract is regulated by the Civil and Commercial Code. In international contracts usually the American counterparty sends its agreement with a clause that CISG shall not be applicable.

Regardless of the effort in promoting CISG in Mexico, according with UNILEX only seven cases have been reported:[23]

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|---|---|
| 04.05.1993 | COMPROMEX, Comisión para la Protección del Comercio Exterior de Mexico |
| 29.04.1996 | COMPROMEX, Comisión para la Protección del Comercio Exterior de Mexico |
| 30.11.1998 | COMPROMEX. Comisión para la Protección del Comercio Exterior de Mexico |
| 14.07.2000 | Juzgado sexto de Primera Instancia del Partido de Tijuana |
| 10.03.2005 | Primer Tribunal Colegiado en Materia Civil del Primer Circuito |
| 30.08.2005 | Sixth Civil Court of First Instance, Tijuana, Baja California |
| 03.10.2006 | Juzgado Primero Civil de primera instancia del Distrito Judicial de Lerma de Villalba, Estado de México |

21 Further information at www.camex.com.mx/concurso.

22 www.ibanet.org.

23 Canada, the other USA neighbor has 12 cases.

And one in a US court where claimant was a Mexican corporation. In Barbara Berry, S.A. de C.V. v. Ken M. Spooner Farms, Inc the US Court of Appeals, 9th Circuit reversed and remanded because judge erred in not apply CISG to the international transaction.

The first three cases where published by COMPROMEX[24] legal opinions ended in "recommendations" (not awards).[25] They have been widely commented not only by Mexican scholars but also were reported in several books on CISG. For example, in the Costeña case, the most relevant issue was related with the packing, pineapples arrived in good conditions, but the cans were damaged and not suitable to be sold to end customers. This case was filed by Herfried Woess, an Austrian lawyer living in Mexico, at that time he had just arrived from his LL.M. in UK. Now Prof. Woess is also admitted into practice in Mexico. He teaches at the university international transactions and also is a frequent speaker at IBA and other international seminars on WTO, ICC, and other subjects. He also has been involved in an automotive case in which the UNIDROIT Principles were the applicable law. He acted both as drafter of the agreement and acted on behalf of his client in the arbitration proceeding.[26]

The two Tijuana cases were initiated by a Law Professor and attorney at Law, Alejandro Osuna.[27] He lives in Tijuana, (a Pacific coast city situated on the U.S.-Mexico border adjacent to the city of San Diego, California border city), Osuna's practice is focused in cross border transactions. Although he argued his cases quoting CISG articles,[28] since the local judiciary was not familiar with the Convention the award was based on national civil

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[24] Institution that later became Bancomex and now is PROMEXICO (www.promexico.gob.mx).

[25] Dulces Luisi, S.A. de C.V. v. Seoul Int'l Co., Comisíon para la Proteccíon del Comercio Exterior de Mexico, Mexico, 30 Nov. 1998, *published in* DIARIO OFICIAL § 1, at 69-74 29 January. 1999, available at http://cisgw3.law.pace.edu/cases/930504m1.html. *See Osuna*, Dictamen Relativo a la queja promovida por Dulces Luisi, S.A. de C.V., en Contra de Seoul International Co. LTD., y Seoulia Confectionery Co., 19 J.L. & COM. 265 (2000). *See Osuna-González*, La COMPROMEX y su aplicación de la Convención sobre la Compraventa Internacional de 1980 (Instituto de la Judicatura, Poder Judicial del Estado de Baja California (2000) (Mex.)). *See Garro*, Some Misunderstandings about the U.N. Sales Convention in Latin America, in Quo Vadis Cisg? Celebrating the 25th anniversary of the United Nations Convention on Contracts for the International Sale of Goods 113 (ed *Ferrari* (2005).

[26] Under the Mexican Chamber of Commerce Rules, (based on UNCITRAL).

[27] LLM, University of Pittsburgh, (1998). He practices and teaches law in Tijuana, Baja California, Mexico, specializing in international commercial contracts and litigation.

[28] See http://www.cisg.law.pace.edu/cisg/biblio/osuna.html.

code with a vague references to CISG. Prof. Alejandro Osuna (LL.M. Pittsburgh) is also a frequent coach at the Vienna Moot, author of CISG articles among others, commentaries on Mexican cases.[29]

## II. CISG's impact on practicing lawyers.

A Mexican law firm differentiates itself form its competitors if it can be unique at something that is valuable to clients. Differentiation is one of the two types of competitive advantage a law firm may possess in Mexico. (Although at the top law firms, where international legal services are becoming a commodity, the differentiation is mostly on the decoration, address, and size of the offices.)

Several American law firms have established a branch office in Mexico City. Their attorneys in the associated firm in Mexico use to be trained in New York office; they work in close collaboration.[30] with members of the international firm's corporate international department in other offices. Their Mexican practice encompasses many practice areas, including cross-border and domestic transactions, equity and debt offerings, project finance and infrastructure, privatizations, intellectual property, mergers and acquisitions, telecommunications and venture capital, among others. Therefore other than drafting in Spanish the international purchase orders or sale orders from transnational corporations, usually practicing lawyers are not request to take part in CISG transactions. The most important reason is that attorney's fees increase the costs of the transactions. If a problem arises, usually cost-benefit analysis in time, cost and willingness to maintain a good relation with the counterpart drives to the result that lawyers are not invited to the transactions neither to the dispute.

Boutique firms (usually solo-practitioners or a small group of former partner at a larger firm) use to focus in personal attention to its few clients and

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[29] See http://cisgmexico.blogspot.com.

[30] An euphemistic way to say that the strategy is defined in New York or Washington (in other Latin American countries also Miami could be added, but its not the case of Mexico) and the "local" work is performed in Mexico, for example the comments to the drafts sent from US or the notices, filings and registers that have to be done in Mexico. Partners at local law firms invest most of their time having personal meetings with high ranked governmental authorities, networking with peers at the Mexican Bar Association, visiting clients (usually executives at transnational corporations) and sending information messages to their colleagues in New York. This kind of work can be either reported as billing hours or enjoyable for the partner. It is not within the scope of mission of the leading law firms in the country to devote their time to low cost cases or to small clients with CISG problems.

lower prices. Mexico City and other cities traditional top lawyers (those of a law professor who also practice law and fully participates at the Mexican Bar Association) differentiates themselves offering creative services to local clients. Usually their advice is worthy because:

a) They serve client's need anywhere, thanks to its network through the International Bar Association
b) Simplify in just one-stop law firm all the legal need of the clients. (The same attorney can provide advice on commercial, tort, tax, labor and other issues related with the international transactions)
c) Cost-effective. Differentiation is usually costly and someone has to pay for it. These boutique firms have few but selective clients doing international transactions.

At the border with the US several firms offer services under CISG.[31] Usually their clients come through their social or family relations. The law firms at the border cities are usually run by few partners. Few firms have most of the 80% of the market share on corporate and commercial transactions. US law firms also render services on US law to Mexican citizens, mostly in the torts field. In some States US attorneys target Mexican's clients according with their geographic areas, based on historical data collected by trade associations or government agencies. In the oil industry, for example, the distinction between majors and independents is an accepted segmentation. Traditional categorizations schemes for client's varieties or industry sector are also typical at border US/Mexico cities. There are US lawyers who deal exclusively with the Mexican agro sector. These American attorneys usually work in collaboration with a Mexican attorney and they ask at least 20% of the claim in case of success either in the US or in Mexican courts.

## III. Standard Contracts Forms

### 1. Sale of Goods Standard Contracts Forms.

In Mexico the international corporations usually for tax and operational reasons incorporate a subsidiary in Mexico, therefore this entity is considered a Mexican corporation and CISG would not be applicable for its transactions. However even if by law are Mexican in their day-by-day activities they follow the guidelines and internal procedures from the headquarters. Most of these corporations are in charge of the logistic, insurance, marketing, and distribution services with related parties, many times within the same group of economic interest based in the US. They use purchase orders or other standard forms drafted in the US, translated into Spanish and

[31] http://cisgmexico.blogspot.com.

adapted into Mexican legal framework, by a Mexican law firm. In all the contracts examined by the author of this report, CISG is expressly excluded, following the US standard form. The argument by US attorney is that UCC is much more complete. Than CISG not even has a definition of "Sale of Goods", that the remedies are not accepted practice at the corporation, etc.

Very little international trade is performed by the so called PYMES (small and medium size corporations). The major difficulty they face is the lack of access to credit. The Mexican "buró de crédito[32]" is a debtor list, where all who during the previous Mexican crisis didn't pay their debts are not subject to credit. US corporations as well as banks are frequent users of the Mexican *buró de crédito* services. It is considered a due diligence procedure before entering into commercial transactions with a buyer or seller in Mexico.

Although recent amendments to the Mexican Commercial Code (in 2000 and 2003) specifically provide for electronic messages and electronic signatures as a valid means of creating a legal and binding contract.[33]US corporations when dealing with Mexicans (not related party), treat the seller or buyer as the contract may end up in litigation.

While verbal or electronic documents are valid, due to Mexico's rigid rules on evidentiary procedure, private documents (those not of public record or signed before a Notary Public) can only be legally recognized by the party who signed them. This means that only original documents, signed by the defendant/buyer can be recognized in court through deposition. Any other documents, including unsigned copies, faxes and emails, will simply not be considered by the court to be attributable to the defendant, if the defendant objects to them. Lacking originally signed documents, the claimant will be required to provide at least two witnesses to prove each fact of the case.[34]

In drafting this answer to the proposed questionnaire the reporter contacted by phone most Bancomext offices in the world. The most relevant problem in international trade doing business from and with Mexico is related to tax law and administrative requirements, rather than civil law or the application of CISG.

- Very frequently the PYMES business relations starts in a trade show or commercial visit organized by Bancomext or other governmental agency The Mexican party gets very enthusiastic not only of the deal but also on

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32 http://www.burodecredito.com.mx.

33 A Mexican approach to CISG and electronic commerce can be seen in *Graham*, La Convención de Viena sobre la Compraventa Internacional de Mercaderías y el Comercio Electrónico, The CISG and Electronic Commerce – in Spanish, Revista Electrónica de Derecho Informático. Number 39 published at http://v2.vlex.com/global/redi/detalle_doctrina_redi.asp?

34 http://www.credit-to-cash-advisor.com/news_350.html.

the opportunity to have a friend abroad. They rely more in the honest hand shake than in the written contract. They don't like to spend in attorneys nor in documentary credit. Their transactions are closed by cash through money transfer through Western Union or any other money transfer transactions. The participation of lawyers is "feel" as a lack of good faith.

- The "pedimento de importación", usually is the only evidence a party has. This proves that the debtor actually imported the goods.
- Invoice. The information on the invoice does frequently does not match that on the purchase order. In many cases because the use of codes or abbreviations.
- Order Confirmation. In many cases the Mexican party instead of sending an order confirmation starts performance without written agreement. The problem arises when no order confirmation exits and it's very difficult to obtain from a Mexican court compensation for goods in process or for lost sales based on a buyer order that is later canceled unfairly.

In some trade sectors, the standard form is drafted in English and works also among Latin American countries. As an example the trade on sugar between a Brazilian seller[35] and a Mexican buyer is subject to English Law!!![36]

## IV. CISG's impact on scholars

In Mexico, as in many other countries in Latin America, the professional research is considered a hobby for practitioners. Mexican government has devoted efforts and resources thorough the National System for Research[37] to encourage scholars to publish. However one of the requisites is not having a private practice, therefore, full time legal scholars rather devote their energy to other areas with wider audiences, such as constitutional law, family law, or environmental law. For example the only full time scholar who has written books on CISG is Jorge Adame Goddard.[38] He wrote one of them from the classic Roman law approach.

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35 Brazil is not CISG signatory.

36 One of the largest supermarkets chain in the country.

37 http://www.conacyt.mx/SNI/Index_SNI.html.

38 *Adame Goddard,* La obligación del vendedor de entregar las mercancías, según la Convención de Viena sobre compraventa internacional de mercaderías, interpretada a la luz del Derecho Romano clásico [Duty of Seller to Deliver the Goods under the CISG Interpreted in the Light of Classic Roman Law, – *in Spanish*], in: Estudios Jurídicos en memoria de Roberto L. Mantilla Molina, México: Porrua (1984) 47-60 See also *Adame Goddard*. El Contrato de Compraventa Internacio-

The other authors are leading practitioners who use to teach at the university. They are also member of the Mexican Academy of Private Internationals Law. This Academy organizes every single year a seminar on new trends on international trade. Frequently CISG and other Uncitral works are part of the program. Among the most prolific authors on international commercial contracts are Mario de la Madrid and the author of this article, but the majorities of authors who have written on CISG have done so from the Comparative and Private International Law point of view.

At bachelor and graduate levels CISG cases and Unidroit Principles are frequently used as reading material. At Panamericana University in Mexico City the Moot has become an optional course in itself. This University has participated in The Annual Willem C. Vis International Commercial Arbitration Moot since 1993 (first Moot).[39] The invitation was sent for the first Moot due to the presence in Pace of a Mexican Scholar 14 years later, in the fourteen Moot three Mexican Universities participated: Universidad Panamericana (Mexico City and Guadalajara) and the National University of Mexico (UNAM).[40]

Since CISG awards are easy and free to access through the Internet,[41] in some leading universities in Mexico such as: Universidad Iberoamericana, ITAM, Tecnologico de Monterrey, Universidad Panamericana, La Salle among others, this has helped to teach international private law, postgraduate courses on international trade and arbitration on Case Method methodology. Where students are allow to defend the buyer, or the seller or act as arbitrators. In students opinion: "its much more fun"; "it helps you to see that the law is not stone written but can be flexible"; "it helps you to think rather than simply put to work your memory skills"; "I am sure this is a much practical approach"; etc.

Since the 80s, the members of the Mexican delegation at CISG have written on CISG and strongly recommended its ratification. The Mexican Academy of Private International Law every single year (for more than 30 years) organize a National Seminar in which topics related with CISG, arbitration and other international private law developments are discussed. Some members of the Mexican Academy of Private International Law also are advisors on private international law at the Ministry of Foreign Affairs

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nal. Ed. McGraw-Hill. México (1994), complete bibliography in www.cisgw3.law.pace.edu.

39 http://cisgw3.law.pace.edu/cisg/moot/participants1.html.

40 A pity most of the years, the Mexican participation has been more for the joy to do some tourism rather than the opportunity to enjoy the intellectual challenge. The best students at the leading Mexican Law School consider a better experience to spend their summer in an internship at WTO, ICC, UNICTRAL rather than devote their time to the Moot. In most universities is a non for credit effort.

41 Thanks to Pace University Efforts as well as UNILEX.

and in such capacity follows Unidroit, Uncitral, the Hague works. Among the first in publishing on CISG were Prof Barrera Graff, Fernando Vazquez Pando, Leonel Pereznieto, Jorge Sanchéz Cordero, and Jose Luis Siqueiros. There are several articles in which CISG is compared with Mexican legislation and others in which is compare in its application worldwide.

## V. CISG's impact on courts

There is no relevant impact of CISG on courts. Recently the Mexican Supreme Court attracted the cases on CISG due to the fact that local judges were not applying CISG, but the domestic legislation.[42]

In Mexico the average cost of the procedure, according with the World Bank reports is 32% of the claim and the court usually takes in average 415 days to render its award.[43] From the Mexican binding precedents it can be said that because of the statistics the judiciary has to achieve, they tend to solve the dispute by a dismiss due to procedural issues rather than enter into the merits of the case. In arbitration the scenario is different, arbitrators appointed by the Mexican Chamber of Commerce, the International Chamber of Commerce or the Mexican Center of Arbitration are so well informed on CISG and other international instruments such as the UNIDROIT Principles, usually they are quoted, as doctrine.

The judiciary both in US and in Mexico rather prefer to apply local law rather than CISG.

For example: *Barcel SA de CV v Styeve Kliff*.[44]

> A Mexican buyer and a U.S. seller verbally entered into a contract for the sale of promotional cards with the image of the singer known as "Britney Spears" – and of other characters of the movie "Crossroads". Buyer brought an action against Seller asking for termination of the contract of sale and the consequent restitution of the money paid in advance to Seller.
>
> According to Buyer, the cards – that were supposed to be included inside potato chip bags – were not food contact compatible. It argued the goods were non-conforming due to the fact that the cards had a bad odor and were toxic, and hence, they could not be used for the purpose for which they were intended. In doing so, Buyer alleged that the law applicable

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42 See *Osuna blog* at http://cisgmexico.blogspot.com.

43 http://www.doingbusiness.org/ExploreEconomies/Default.aspx?economyid=127.

44 Juzgado Primero Civil de primera instancia del Distrito Judicial de Lerma de Villalba, Estado de México. Case 254/2004 award on 03.10. (2006) reported at www.unilex.info.

was the Mexican domestic sales law, while Seller claimed that the dispute had to be settled under CISG.

The Court found that, even though the goods seemed to be non-conforming, Buyer had failed to provide sufficient proof demonstrating it had properly informed Seller of the above mentioned circumstance. Invoking Art. 383 of the Mexican Commercial Code, the Court held that Buyer should have informed Seller in writing of the lack of conformity of the goods within 5 days after it had discovered their defects. Failure to give proper notice results under Mexican law in the loss of the buyer's right to rely on lack of conformity. Accordingly, the Court concluded that Buyer had failed to give notice in writing of non-conformity or in any case had failed to provide sufficient proof of having given such notice. Consequently, Buyer's claim was dismissed without further examination of Seller's counterclaims.

In so deciding the Court considered it irrelevant to decide whether the Mexican domestic sales law was applicable or whether the dispute was to be settled under CISG. According to the Court the relevant provisions of the two laws (i.e. Art. 383 of the Mexican Commercial Code and Art. 39 CISG) were basically the same and therefore there was no point in deciding which of the two was to be applied.

A case solved by the United States court where claimant was a Mexican corporation. *Barbara Berry, S.A. de C.V. v. Ken M. Spooner Farms, Inc* In this case the US Court of Appeals, 9th Circuit reversed and remanded because judge erred in not applies CISG to this international transaction.

A US seller and a Mexican buyer entered into a contract for the sale of raspberry roots to be planted in Mexico. Upon the goods' arrival, the buyer paid the price and opened the boxes where the roots had been stored. Prominently displayed on the top of each individual box was a clause, also reproduced on the invoices issued by the seller before shipment of the goods, exonerating the seller from liability? The buyer brought an action against the seller on the ground of lack of conformity. The seller contested any responsibility invoking the exclusionary clause.

The Court of First Instance (see U.S. District Court, Western District of Washington at Tacoma, 13-04-2006, full text and abstract available in Unilex) found that the question of whether or not the exclusionary clause was unconscionable, and therefore unenforceable, was a matter expressly excluded from the scope of CISG (Art. 4(a) CISG). Then, the Court made recourse to domestic law (i.e. US law), according to which it found the clause to be valid and enforceable.

The buyer appealed the decision.

After confirming that CISG was applicable under its Art. 1(1)(a), the Appellate Court held that the First Instance Court should have applied CISG in order to determine whether the exclusionary clause had become part of the contract. The Court also added that it would agree with the First Instance Court's analysis as to the enforceability of the exclusionary clause if it was found to be part of the contract under CISG.

An aspect that has to be developed in both Mexico and US is the scope of limit of liabilities and warranties in international trade.

To limit the scope of the warranty or liability by means of special terms brings indisputable advantages. The obligor discards certain risks, or it makes them foreseeable and bearable. Such limitation of liabilities is sometimes as necessary condition to the performance of especially risky ventures it can allow innovation and technical progress. It is often required to make the risk insurable, or at least to render the cost of insurance bearable. It may also benefit the other party in the form of a price reduction.

Limitation and exception clauses can become abusive when they lead to exaggerated irresponsibility or when they deprive the aggrieved party of lawful remedies. Such concerns have appeared in most legal systems, and the validity of such clauses is limited everywhere.

There are so many issues in CISG that when it interacts with Mexican and US legal system has to be clarified, as examples:

"Liability (*responssabilté, Haftung)* may be defined as the obligation to compensate for damages caused to another person. This obligation results either form failure to perform the contract (contractual liability) or from a tort (tort liability).

"Warranty" (*garantie, Garantie*) refers to the scope of some contractual obligations specially those borne by the seller concerning defects in the goods sold. The seller is liable for such defects in an objectives way, independently for any fault on his part.

Liability and warranty are also limited in time. The statute on limitation in itself constitutes a legal limit on liability: after a certain period of time the obligor can no longer be sued by the obligee. A further research on limitation on the consequences has to be developed, particularly at the light of Art 74 and Unidroit Principles 7.4.2.

a) Limitation of the Amount payable.
b) Liability Deductible
c) Exemption of Joint Liability
d) Exclusion of Consequential Damages
e) Exclusion of Unforeseeable Damages

In the United States is relatively frequently to request the application of Mexican Law to limit the amount of damages, for example in an helicopter crash, damages were awarded in application of Mexican Law instead of US law, place of the manufacturer.[45]

## VI. CISG's impact on legislators

The Mexican Congress is bicameral – that is, it is composed of two chambers. The upper chamber is the Senate (*Cámara de Senadores or Senado*). The lower house is the Chamber of Deputies (*Cámara de Diputados*). Both chambers are very political oriented, decisions are mostly taken on political party guidelines and none of them has CISG as a priority, or even in their agenda. However at the executive branch, the Mexican Ministry of Foreign Affairs has a Commission of Advisers on Private International Law. The development of CISG as well as other works of UNCITRAL, UNIDROIT, OAS (CIDIPs), and The HAGUE are frequently discussed. The Mexican Ministry of Foreign Affairs have been very active in recommending the ratification of several treaties and convention to the Senate. However up to now, in writer opinion, there is no influence at all of CISG in local legislation. However

[45] Helicopters transporting workers to offshore oil rigs in the Gulf of Mexico have met with tragedy far too often. Since 2000, at least 40 helicopters have crashed into the Gulf of Mexico. In *Hernandez v. Aeronaves de Mexico, S.A.*, 583 F.Supp. 331 (N.D.Cal. 1984) The court applied Mexican law and denied punitive damages in actions arising from the crash in Mexico of a Mexican airliner and resulting in death of California domiciliaries, but applying California's more generous compensatory damages law. In *Tubos de Acero de Mexico, S.A. v. American International Investment Corp., Inc.*, 292 F.3d 471 (5th Cir. 2002) The court hold that punitive damages were unavailable because the defendant was a Mexican corporation and the pertinent conduct and injury had occurred either in Mexico or in Louisiana, and neither jurisdiction allowed punitive damages. The author in her capacity of Chief Cousel for Business Transactions at Chrysler Mexico represented Chrysler in *Gonzalez, et al v. Chrysler Corporation*, et al, 301 F.3d 377 (5th Cir. 2002) where the court decided: [M]exico, as a sovereign nation, has made a deliberate choice in providing a specific remedy for this tort cause of action. In making this policy choice, the Mexican government has resolved a trade-off among the competing objectives and costs of tort law, involving interests of victims, of consumers, of manufacturers, and of various other economic and cultural values. In resolving this trade-off, the Mexican people, through their duly-elected lawmakers, have decided to limit tort damages with respect to a child's death. It would be inappropriate – even patronizing – for us to denounce this legitimate policy choice by holding that Mexico provides an inadequate forum for Mexican tort victims.

due to NAFTA most of commercial legal framework was amended to conform to the United States and Canadian Parameters: Bankruptcy, Antitrust, Telecommunications, Foreign Investment Law, Commercial Code, Securities, etc. CISG Art. 7 was replicated in CIDIPS conventions.

## VII. Final words, from globalization of sale of goods to the legal services as a "good" under globalization.

### 1. NAFTA impact in legal services.

After NAFTA, is evident in top Mexican law firms that their legal US practices have been transplanted into Mexico. Couldn't be done in a different way. Those firms are the legal representatives of subsidiaries of transnational corporations [doing business in Mexico]. Nowadays, autoclaimed global firms (but in fact US or London centered) may use "off-shore" legal services from other members of their network in order to become more competitive in the international market. But up to now it's not a frequent practice in Mexico. Our proposal would be the creation of a per-profit institution (for example under the supervision of UNIDROIT) to develop "tailor made" global consulting services for transnational corporations.[46] For example purchase orders, standard contract terms and offer the "certification" that there are in compliance with the best practices in international private law and international trade law.[47]

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[46] In the same way that SGS (www.sgs.com) and other certification agencies are paid for the verification of the conformity of the goods at the ports, the proposed institution would be responsible to apply the relevant international instruments at the best interest of its clients. The proposed institution also would serve as a research and development department for global law firms for new services they can deliver to their clients.

[47] In the same way that the IFC (International Finance Corporation) is to the World Bank. (www.ifc.org). IFC provides loans, equity, structured finance and risk management products, and advisory services to build the private sector in developing countries following World Bank programs.

## 2. Why worry and invest time and effort in training the judiciary on CISG if everything can be solved through arbitration with the advantage of State savings?

Let's promote arbitration and invite parties to sign contracts in writing. Parties often seek to resolve their disputes through arbitration because of a number of perceived potential advantages over judicial proceedings:

1. when the subject matter of the dispute is highly technical, arbitrators with an appropriate degree of expertise can be appointed
2. arbitration is often faster than litigation in court
3. arbitration can be cheaper [at least for the tax payers or State]
4. arbitral proceedings and an arbitral award are generally private
5. the arbitral process enjoys a greater degree of flexibility than the courts
6. because of the provisions of the New York Convention 1958, arbitration awards are generally easier to enforce abroad than court judgments
7. in most legal systems, there are limited avenues for appeal of an arbitral award, which can mean swifter enforcement and less scope for a party to delay matters.
8. In Mexico parties at the arbitration proceeding may ask the local judge to dictate interlocutory measures and enforce them against a party, making it easier for a party to take steps to avoid enforcement of an award, such as the relocation of goods offshore.
9. Mexico is part of the CIDIP convention on applicable law.

Furthermore, what for others is a disadvantage, in Mexico has been surpassed:

1. the parties need to pay for the arbitrators, which adds an additional layer of legal cost. [To avoid this disadvantage, the Mexican Chamber of Commerce has arbitration rules and young arbitrators to small amount disputes. The payment of arbitration fees is compensated also with the time in which these young attorneys[48] solve the disputes].[49]
2. Although usually thought to be speedier, when there are multiple arbitrators on the panel, juggling their schedules for hearing dates in long cases can lead to delays. [It depends, the administrator use not to appoint an arbitrator in a second case if has not rendered the award in the previous one, the parties can save cost and time with experience]

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48 From top law firm as pro-bono and as a way to training their attorneys providing exposure to real arbitration scenarios.

49 See for example, www.canacoarbitraje.com.mx.

### 3. Cemex, Telmex, Pemex, Bimbo, Farmacias del Ahorro, and other big Mexican corporations are becoming global, but their exports strategy, contracts and disputes are out-sourced to United States Law firms.

Executives at Mexican Corporations[50] like to protect their own job, a way to do it is to reduce risks, in order to do it, they rely in the goodwill of US law firm "trademarks" legal opinion, contracts, and implementation of their business strategies. This is a cultural aspect of Mexican identity. We have a natural tendency to favor things and services from Europe or United States,[51] just the opposite from the Brazilians who have a strong nationalism. In Mexico the so called *malinchismo*[52] can also be found in legal publications, where European and American authors are much more quoted than other Mexican colleagues'.[53]

In most of the occasions in order to take advantage of the double taxation treaties, transnational corporations are advised to incorporate a trading company in The Netherlands, the trading company is who deals with exports. Therefore in our opinion in the future would not be easy to find big CISG settled by national courts on international sales.

The interaction in between domestic legislation and CISG is not enough. So many times the applicable law is in a foreign jurisdiction. Students, scholars and practitioners have to be familiar with ALL INTERNATIONAL INSTRUMENTS. It's a pity that the 100% of the 100 largest law firm globally[54] are from UK or USA (*Common Law)*. Those 100 law firms render services almost to all transnational corporations who are the big players on international trade.

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50 Not only the subsidiaries of US corporations in Mexico.

51 The terms in Spanish is "Malinchismo". The Mexican Literature Novel Prize, Octavio Paz addresses the issue of La Malinche's role as the mother of Mexican culture in The Labyrinth of Solitude. He uses the analogy that she essentially helped Cortés take over and destroy the Aztec culture by submitting herself to him. His claim summarizes a major theme in the book, claiming that Mexican culture is a labyrinth.

52 The Brazilians has the motto: "Orgulho brasileiro" (The proud to be Brazilian), sometimes referred as the Best of Brazil are the Brazilians. Brazilians had long resented the United States. Brazil as leader of the Mercosur trading bloc as a larger volume of trade with Europe than with the United States.

53 With the only exception of friends who are members of the Mexican System for Research (SNI) and they take into consideration for their yearly evaluation the number of times an author is quoted in Mexico or abroad.

54 http://en.wikipedia.org/wiki/List_of_law_firms.

As the CEO of one of the largest global corporations said:[55] "Business is about people", the development of CISG in Mexico has been done thanks to individuals. Its time to celebrate the first 20 years of their success in promoting CISG in Mexico, but also the opportunity to give an urgent call to the business community to draft contracts (first step), without the reference that CISG shall not be applicable. Or even better to include the UNIDROIT Principles as applicable law to their contracts.[56]

Nowadays, is a fact that law in the books (statutes, cases, etc.) did not determine the results of legal disputes in Mexico.[57] CISG shall operate on a premise that has to be uniformed applied in the same way in the entire globe.[58] Accepting this premise shall move international jurisprudence or the study of law in the abstract, away from hypothetical predictions and closer to empirical reflections of fact.

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55 Former General Electric CEO. *Welch*, Winning, New York (2005).

56 UNIDROIT Principles on International Commercial Contracts (2004).

57 Particularly when the law in books is referred to international private law, foreign books and cases.

58 See CISG Art. 7.

# New Zealand

*Petra Butler*

## General Information

New Zealand ratified the United Nations Convention on Contracts for the International Sale of Goods ("CISG") in 1994 after the New Zealand Law Commission in 1992 in its report "The United Nations Convention on Contracts for the International Sale of Goods: New Zealand's Proposed Acceptance" had emphatically advocated its ratification.[1] The Sale of Goods (United Nations Convention) Act 1994 ("1994 Act") has been in force since 1 October 1995.[2] While during the preparation of the Law Commission report some interest in the CISG was sparked, since the enactment of the 1994 Act, the CISG has lived a rather unnoticed life. The extent to which the CISG is taught in law schools is dependent on the individual lecturer. Even though it has in some years been the subject of the contract qualification exams for overseas trained lawyers, the CISG is generally not part of the compulsory contract course for undergraduate students. If the CISG is taught it will generally be for a couple of lectures in private international law or international commercial law.[3] Due to Victoria University of Wellington's involvement in the Willem C Vis Moot, Victoria University has in the last six years developed the most substantial academic analysis of the CISG.[4] In 2005 Victoria University hosted a symposium on the CISG

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1 *New Zealand Law Commission*, The United Nations Convention on Contracts for the International Sale of Goods: New Zealand's Proposed Acceptance, NZLC R23 (1992), paras 125 et seq.

2 It has to be noted that the 1994 Act is a code (s 5 of the 1994 Act). In regard to domestic sale of goods contracts the Sale of Goods Act 1908 is applicable which is based on the equivalent English legislation. No amendments have been made to bring the 1908 and the 1994 Acts more in line with each other.

3 The author contacted colleagues which previously had shown at least an interest in the CISG but they confirmed that they only taught a couple of ours at the most on it.

4 At Victoria University 11 masters' papers examining aspects of the CISG could be located. All were supervised by the author. Auckland University holds two masters' papers on the CISG. None could be located at Otago University or Canterbury University. The LLM paper of *Hennig Lutz*, The CISG and the Common Law Courts: Is there really a problem?, Victoria University Law Review

celebrating the 10th anniversary of having domestic force in New Zealand.[5] However, even the widely published symposium and the world reknown speakers could not awaken the CISG from its sleeping beauty sleep.
The legal profession is largely not aware of the CISG and a search on the available databases reveals that the CISG has been mentioned in only seven judgments in the past ten years. Why the CISG, after an enthusiastic endorsement by the New Zealand Law Commission, has not taken hold in New Zealand is hard to fathom especially since most of New Zealand's trading partners, the US, China, and Australia are members to the CISG. One possible explanation might be that also international arbitration does not play a huge role in New Zealand.

## I. CISG's impact on practising lawyers

As far as the author could ascertain, the CISG has had no impact on practising lawyers.[6] Discussions with the legal profession indicate that senior lawyers in particular are often not aware of the CISG or only have become aware of the existence of the CISG when forced to by litigation, often involving a foreign party. Anecdotal evidence also suggests that standard form contracts used by the big commercial law firms in New Zealand have excluded the CISG. There is also anecdotal evidence that contracts, especially between parties in Australia and New Zealand, which would be governed by the CISG are not recognised as such and that the proper law of the contract is used by lawyers (and probably ultimately by the courts) to determine the issues which have arisen.

## II. CISG's impact on scholars

Overall, there is no significant CISG scholarship in New Zealand.[7] As mentioned earlier, the most significant scholarship is conducted at Victoria Uni-

(VUWLR) 35 (2004) 711 has become a standard item for course materials for courses covering the CISG in New Zealand and even Australia.

5 The Symposium papers were published in 36 (2005) VUWLR 781 et seq and include contributions, inter alia, by Professor Peter Schlechtriem and Professor Ingeborg Schwenzer. The papers can also be found on http://www.cisg.law.pace.edu.

6 The author spoke with many senior lawyers in the top New Zealand law firms as well as with the ex Vis Mooters who are now working in those law firms.

7 Other than the articles by David McLauchlan (fn 13) only three other article (other than the articles stemming from student papers and from the conference held in 2005 at Victoria University) could be located: *Ty Twibell*, International

versity of Wellington mainly by master students.[8] Topics in which the CISG received some analytical examination included, for example, The CISG and Common Law Courts: Is There Really a Problem?,[9] Towards a European Contract Law,[10] Bringing the CISG Home- Restitutionary Considerations for the CISG in the Domestic Context,[11] or Reconsidering Domestic Sale of Goods Remedies in Light of the CISG.[12] The author of this paper is publishing a text book on the CISG. It is hoped that this will give the CISG a higher profile within New Zealand. The CISG has been continuously used by Professor David McLauchlan to back up his thesis in regard to contract interpretation.[13] Thomas J in *Yoshimoto v Canterbury Golf International Ltd* stated the following: "Professor McLauchlan has correctly pointed out that it is odd that evidence of the parties' negotiations are admissible to aid the interpretation of international sales agreements but not commercial or other domestic contracts."[14]

Also the CISG will be the problem for the compulsory mooting programme for second year students at Victoria University in 2008 which

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law for domestic consumption: understanding the United Convention on Contracts for the International Sale of Goods, Law Society Journal 36(8) Sep 1998: 66-69; *Kent France*, More conventional wisdom, 19 (2005) New Zealand Business, 59 (the article focuses on how the CISG differs from New Zealand domestic law); *Jacob Ziegel*, The future of the International Sales Convention from a common law perspective, 2000 NZBLQ, 336.

8 The author contacted the other university law libraries in New Zealand and only two other master thesis' could be located. Those two thesis' were written in German at the University of Auckland. ("Intangible goods als Leistungsgegenstand internationaler Online-Kaufvertraege: im UN-Kaufrecht und internationalen Privatrecht sowie in deutschen Verbraucherschutzgesetzen" (2003); „UN-Kaufrecht und eCommerce: Problembereiche bei der Anwendung des Wiener Uebereinkommens auf Internet-Vertraege" (2003)).

9 *Henning Lutz*, 35 (2004) VUWLR 711.

10 *Dominik Kallweit*, 35 (2004) VUWLR 269.

11 *Rebekah Plachecki*, 2006 New Zealand Law Students' Journal, 131- this paper won the student journal prize.

12 *Nicholas Whittington*, 37 (2006) VUWR 421; this paper won also the Colin Patterson Memorial Prize in 2005.

13 *David McLauchlan*, The Plain Meaning Rule of Contract Interpretation (1995) 2 NZBLQ 80; Subsequent Conduct as an Aid to Interpretation (1996) 2 NZBLQ 237; Contract Formation, Contract Interpretation, and Subsequent Conduct (2006) 25 UQLJ 7, where Art 8(3) CISG is used to show that pre-contractual negotiations and post-contractual conduct can be taken into account when interpreting a contract.

14 *Yoshimoto v Canterbury Golf International Ltd* [2001] 1 NZLR 523 (per Thomas J) para 88; referring to *David McLauchlan*, A Contract Contradiction, at 193.

means that this year approximately 350 students will analyse and moot a CISG problem and will, therefore, at least have knowledge of its existence.

## III. CISG's impact on courts

Seven judgments that mention the 1994 Act can be found on New Zealand judgment databases. None of the judgments undertakes an in depth analysis of the CISG. In fact in all the cases the CISG provisions are used to back up a court's interpretation of domestic law. Since there are only seven judgments I will give a short summary of each in turn:

*Attorney-General v Dreux Holdings Ltd*[15]
The Court of Appeal in *Attorney-General v Dreux Holdings Ltd* had to construe an agreement for the sale of a large number of parcels of land found to be surplus to requirements on the restructuring of the railways. Counsel for Dreux urged the Court when construing the contract to take into account subsequent conduct of the parties in its implementation. The majority of the Court was in the end able to construe the contract without considering the parties' subsequent conduct. Nonetheless, the Court did express views as to whether recourse to subsequent conduct was permissible. While not expressing a firm view, the majority noted the CISG and its Article 8(3). The majority noted that there was something to be said for the idea that New Zealand domestic contract law should be generally consistent with the best international practice.

*Tri-Star Customs and Forwarding Ltd v Denning*[16]
In *Tri-Star Customs and Forwarding Ltd v Denning* the respondents had entered into a written agreement with the appellant whereby they granted a lease of a commercial building to the appellant together with an option to purchase the building. There were various offers and counter-offers before a final agreement was reached. The various offers and the final agreement specified that the annual rental was "plus GST." However, the purchase price was recorded with no mention of GST. The issue was whether the respondents' understanding of what they would get out of the transaction, that means, the prices plus GST, would qualify as a unilateral mistake under section 6(1)(a)(i) of the Contractual Mistakes Act 1977. To decide that, the Court had to determine whether for that section the appellant had to have had actual knowledge of the respondents' mistake or whether constructive knowledge was sufficient. The Court of Appeal held that the section in question required actual knowledge citing Articles 2(a), 9(2), 38(3), and

15 (1996) 7 TCLR 617.
16 [1999] 1 NZLR 33.

49(2) of the CISG as examples of legislation where the concept of "knew or ought to have known" was frequently captured but by the use of those express words.[17]

*Integrity Cars (Wholesale) Ltd v Chief Executive of New Zealand & anor*[18]
The issue in the case was whether the value for tariff purposes of certain goods imported into New Zealand included the export and inspection charges paid by the New Zealand importer to a Japanese company. One of the questions which the Court had to resolve to answer the issue was whether an agency existed between Integrity Cars and the Japanese exporter. The Court made the following observation: "For a number of reasons we do not consider that the New Zealand common law of agency should have the decisive role it had in the High Court judgment. The relevant transactions occurred in Japan (there was no evidence of Japanese law) and because of their international character may have been subject to the United Nations Convention on Contracts for the International Sale of Goods to which both Japan and New Zealand are party (no argument was addressed to it)."[19] Even though it is laudable that the Court did consider the CISG, Japan is not a member state in 2001.

*Yoshimoto v Canterbury Golf International Ltd*[20]
A commercial contract was in issue. A particular clause might be said to have a plain meaning, and was held to have such a plain meaning by the Judge at first instance. The context, the commercial objective of the contract and its contractual matrix, however, pointed away from that meaning. In addition, reliable extrinsic evidence was available which confirms that this plain meaning was not what the parties actually intended. The question of interpretation, therefore, involved an examination of the contract, the commercial objective of the contract and the contractual matrix. The extrinsic evidence and the admissibility of that evidence had also to be considered. Thomas J made extensive reference to Article 8 CISG as a tool to interpret the contract:"It would, of course, be open to this Court to seek to depart from the law as applied in England on the basis of this country's implementation in 1995 of the United Nations Convention on Contracts for the International Sale of Goods. Liberal provisions for the interpretation of

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17 *Tri-Star Customs and Forwarding Ltd v Denning* [1999] 1 NZLR 33, 37.

18 [2001] NZCA 86 (2 April 2001).

19 *Integrity Cars (Wholesale) Ltd v Chief Executive of New Zealand & anor* [2001] NZCA 86 (2 April 2001) para 19.

20 [2001] 1 NZLR 523 (CA): the decision was appealed to the Privy Council. The Privy Council did not consider the CISG.

international sales contracts are included in this Convention."[21] Further, Thomas J also referred to the UNIDROIT principles in regard to aiding the consideration of the surrounding circumstances.[22] Thomas J cited *Attorney-General v Dreux Holdings Ltd* to emphasise the idea that the court should follow the best international practice.

*Thompson v Cameron*[23]

*Thompson v Cameron* arose out of bankruptcy proceedings. Part of the bankruptcy settlement was a settlement agreement. The issue in *Thompson v Cameron* was the interpretation of the settlement agreement and in particular in how far pre-contractual negotiations and post-contractual conduct could be taken into account to determine the meaning of a contractual term. The Court discussed *Attorney-General v Dreux Holdings Ltd*[24] and the Court's reference in that case to the 1994 Act but not *Yoshimoto v Canterbury Golf International Ltd*.[25] The Court found that the state of the law was still unclear as to whether pre-contractual negotiations and post-contractual conduct could be taken into account and, therefore, concentrated to take into account only the "factual matrix" having no regard to pre-contractual negotiations or post-contractual conduct.[26]

*KA (Newmarket) Ltd v Hart*[27]

The issue of interest for the present inquiry in *KA (Newmarket) Ltd v Hart* was whether the price of materials was to be on a per roll or per metre basis. Since the issue arose as part of a breach of contract claim in a strike out application the Court stated that, after the defendant had argued that firstly one could not amend a claim upon terms implied by sections of the Sale of Goods (United Nations Convention) Act 1994; and secondly that certain provisions in the agreement oust terms which are implied by the 1994 Act since that Act allows parties to contract out of the statutory default rules, the issues were too important not to be tried.[28]

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21 *Yoshimoto v Canterbury Golf International Ltd* [2001] 1 NZLR 523 (per Thomas J) para 88.

22 *Yoshimoto v Canterbury Golf International Ltd* [2001] 1 NZLR 523 (per Thomas J) para 89.

23 HC Auckland (27 March 2002) AP117/SW99 (Chambers J).

24 (1996) 7 TCLR 617.

25 [2001] 1 NZLR 523 (CA).

26 *Thompson v Cameron* HC Auckland (27 March 2002) AP117/SW99 (Chambers J) para 22.

27 HC Auckland (4 July 2002) CP 467-SD01 (Heath J).

28 *KA (Newmarket) Ltd v Hart*, HC Auckland (4 July 2002) CP 467-SD01 (Heath J) paras 34, 35.

*International Housewares (New Zealand) Ltd v SEB SA*[29]

The case of *International Housewares (New Zealand) Ltd v SEB SA* concerned a distribution agreement between the parties for electrical compliances and Tefal non-stick cookware into New Zealand. The question arose whether the contract in question contained an implied term as to the merchantable quality of the goods. The Court held that the contract contained an implied term that the goods supplied were to be of merchantable quality.[30] The Court stated:[31]

> The insertion of an implied term as to merchantable quality could hardly be described as radical. Contracts for the supply of goods have for many years had such a term implied into them by statute in many jurisdictions. The desirability of such a term is also recognised internationally by the United Nations Convention which forms the basis for one of the plaintiff's claims in this proceeding.

It is of course interesting to note that "merchantability" is not what is necessarily required under Article 35 CISG.[32]

In summary, the only issue where a tentative impact of the CISG can be felt is in regard to question to what extent pre-contractual negotiations and post contractual conduct can be taken into account when interpreting a contract. As *Thompson v Cameron*, however, suggests, that issue is still not settled and in that case Court has not taken the step to affirm *Attorney-General v Dreux Holdings Ltd*[33] and *Yoshimoto v Canterbury Golf International Ltd*.[34] However, in a recent Supreme Court judgment the Supreme Court

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29 HC Auckland (31 March 2003) CP 395-SD01 (Master Lang).

30 *International Housewares (New Zealand) Ltd v SEB SA*, HC Auckland (31 March 2003) CP 395-SD01 (Master Lang) para 58.

31 *International Housewares (New Zealand) Ltd v SEB SA*, HC Auckland (31 March 2003) CP 395-SD01 (Master Lang) para 59. It has to be noted that

32 See CLOUT case No. 123 [GERMANY *Bundesgerichtshof* [Supreme Court] 8 March 1995, available online at http://cisgw3.law.pace.edu/cases/950308g3.html] (see full text of the decision). One court has stated that, to comply with article 35(2)(a), goods must be of average quality, and not merely marketable; see [GERMANY *Landgericht* [District Court] Berlin 15 September 1994, available online at http://cisgw3.law.pace.edu/cases/940915g1.html] [English translation by Martin Eimer, translation edited by Ruth M. Janal]. Compare [NETHERLANDS *Arbitration Institute* case no. 2319 of 15 October 2002, available online at http://cisgw3.law.pace.edu/cases/021015n1.html] (rejecting both average quality and merchantability tests, and applying a "reasonable quality" standard) [English text] (citation from UNCITRA Digest on the CISG, Art 35).

33 (1996) 7 TCLR 617.

34 [2001] 1 NZLR 523 (CA).

has held that post-contractual conduct can be taken into account to interpret a contract.[35] Even though there was no direct reference to the 1994 Act or the CISG Tipping J referred to Blanchard's judgment in *Dreux* where his Honour held that taking account of subsequent conduct would accord with general international trade practice.[36]

## IV. CISG's impact on legislators

The CISG has not influenced any law reform in New Zealand. After its enactment if fell into a sleeping beauty slumber. It will need more than a few dedicated and interested individuals to awaken it.

## V. Overall Summary

Unfortunately, the overall summary is brief: the CISG is the step-child of commercial contract law in New Zealand. There is no obvious reason why that should be the case since some of New Zealand's biggest trading partners are also member states. Unfortunately, the research activity at one university will probably not teach enough students to make a difference in New Zealand, especially since most of the students who undertake the more in-depth research are mainly German students. One hope might be that the CISG gets hold of New Zealand.

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[35] *Wholesale Distributor v Gibbons* [2007] NZSC 37 see especially the judgment of Thomas J paras [111] et seq.

[36] *Wholesale Distributor v Gibbons* [2007] NZSC 37 per Tipping J para [55].

# Russia

*Elvira Talapina*

Le 23 mai 1991 le Soviet Suprême de l'URSS a pris la décision sur l'adhésion de l'URSS à la Convention de l'Organisation des Nations Unies sur les contrats de vente internationale des marchandises (la Convention de Vienne). L'adhésion était accompagnée par la déclaration suivante :

Vu les articles 12 et 96 de la Convention l'Union des Républiques Soviétiques Socialistes déclare que toute disposition de l'article 11, de l'article 29 ou de la deuxième partie de la Convention autorisant une forme autre que la forme écrite pour la conclusion, la modification ou la résiliation amiable d'un contrat de vente, soit pour toute offre, acceptation ou autre manifestation d'intention, ne s'applique pas dès lors qu'une des parties a son établissement (entreprise, société) dans l'Union des Républiques Soviétiques Socialistes.

La lettre de l'adhésion a été déposée le 16 août 1990. La Convention de Vienne est entrée en vigueur pour l'URSS le 1 septembre 1991.

Dès le 24 décembre 1991 la Fédération de Russie continue d'être membre à l'Organisation des Nations Unies en remplaçant l'ancienne Union des Républiques Soviétiques Socialistes. A partir de cette date la Russie a toute la responsabilité selon tous les droits et obligations de l'URSS.

## Le principe de la priorité des règles internationales

La législation russe (à partir de la Constitution) a la position assez précise en ce qui concerne l'hiérarchie des normes. Ainsi selon l'art. 15 (partie 4) de la Constitution de la Russie les principes et normes universellement reconnus du droit international et les traités internationaux de la Fédération de Russie sont partie intégrante de son système juridique. Si d'autres règles que celles prévues par la loi sont établies par un traité international de la Fédération de Russie, les règles du traité international prévalent.

La Convention de Vienne est le traité international selon notre Loi du 15 juillet 1995 sur les traités internationaux de la Fédération de Russie.

Le principe de la priorité des règles du traité international sur celles de la loi russe se confirmait plusieurs fois dans les décisions de la Cour Constitutionnelle de la Fédération de Russie. Prenons par exemple la décision du 20 novembre 2007 concernant le contrôle de la constitutionnalité des certains articles du Code de la procédure pénale. Il s'agit notamment de l'article 1 du

Code de la procédure pénale qui assure que les principes et normes universellement reconnus du droit international et les traités internationaux de la Fédération de Russie sont partie intégrante de la législation russe sur la procédure pénale. Si d'autres règles que celles prévues par le Code de la procédure pénale sont établies par un traité international de la Fédération de Russie, les règles du traité international prévalent.

Ce principe constitutionnel se répète dans le Code civil de la Fédération de Russie (l'art. 7): les traités internationaux de la Fédération de Russie sont appliqués directement aux relations civiles, excepté les cas quand le traité international prévu l'édition d'un acte interne (national) pour son application. Si le traité international de la Fédération de Russie établit d'autres règles que celles qui sont prévus par la législation civile, les règles du traité international prévalent.

Ainsi toutes les bases légales pour l'application de la Convention de Vienne ont était crées dans notre pays. De plus, il existe le principe général de sa priorité sur la législation nationale.

Conformément en Russie il y a beaucoup de juristes spécialisés dans le domaine du commerce extérieur qui appliquent la Convention de Vienne dans leurs activités, en travaillant sur les contrats de vente internationale.

## I. La situation de la pluralité des traités internationaux

Pour la Russie un point le plus problématique de la Convention de Vienne est la définition du droit applicable dans les conditions de la pluralité des traités internationaux. Par exemple, il y a un Accord sur les conditions générales des livraisons des marchandises entre les entreprises (sociétés) des Etats – participants de la Communauté des Etats Indépendants (Kiev, le 20 mars 1992). Quelques participants de cet Accord (notamment la Biélorussie, le Kirghizstan, la Moldavie, la Russie, l'Ouzbékistan et l'Ukraine) participent aussi à la Convention de Vienne. Cela provoque une discussion sur le rapport de ces deux actes. L'opinion dominante de notre doctrine est suivante : en prenant en considération l'art. 90 de la Convention et le caractère spécial de l'Accord (la réglementation impérative des contrats de la livraison ayant le but de la réalisation des relations intergouvernementales) il faut reconnaître la priorité de l'Accord sur la Convention de Vienne dans les cas où le contrat de la livraison se trouve dans le champ d'application de l'Accord et de la Convention à la fois.[1] Pourtant certains scientifiques croient que les relations sont réglées avant tout par la Convention puisque la Convention de Vienne a été ratifiée et donc elle a le valeur de la loi (I.V.Eliseev).

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[1] *A.Aksenov,* Unification des normes sur la vente internationale dans le Communauté des Etats Indépendants, Revue de la législation étrangère et de droit compare, 3, 2007, p.147.

## II. L'application de la Convention de Vienne aux tribunaux russes

Dans notre pays les litiges à caractère économique entrent en compétence du système des tribunaux d'arbitrage (qui sont tribunaux d'Etat). Ces tribunaux appliquent le Code de la procédure devant les tribunaux d'arbitrage (à présent c'est le Code adopté en 2002). Dans ce Code il y a l'article 13 qui énumère les actes à caractère normatif appliqués pendant le procès judiciaire. Dans cette liste les traités internationaux occupent la deuxième place après la Constitution de la Fédération de Russie et dépassent même les lois fédérales constitutionnelles! La norme constitutionnelle sur la priorité des règles du traité international sur la loi nationale se répète dans le même article.

*L'exemple de la confirmation pratique de cette priorité a été donné dans le Circulaire du 16 février 1998 de la Présidence la Cour Supérieur d'arbitrage de la Fédération de Russie «L'aperçu de la jurisprudence sur les affaires avec la participation des personnes étrangères».*

*Le contrat de la livraison a été conclu entre la société anonyme russe et la société bulgare. En fonction des conditions du contrat la partie bulgare s'est engagée à livrer la production cosmétique. L'assortiment des marchandises a été défini par le protocole spécial étant la partie intégrante du contrat, et ce protocole n'a pas pu être changé par n'importe quel cocontractant. Le paiement devait être fait après la réception des marchandises par l'acheteur selon la quantité et la qualité.*

*L'acte de la prise de livraison a établi que la partie bulgare a violé les conditions du protocole spécial ayant changé l'assortiment de la production unilatéralement. Le vendeur a refusé la demande de l'acheteur de remplacer les marchandises selon le protocole.*

*En exposant les circonstances de l'affaire le demandeur (la société anonyme russe) s'est référé aux normes du Code civil de la Fédération de Russie. Le défendeur a argumenté sa réponse à la base des dispositions de la Convention de l'ONU sur les contrats de vente internationale des marchandises.*

*Le tribunal d'arbitrage a pris en considération les circonstances suivantes:*

*Le contrat a été conclu entre les participants dont les entreprises se trouvaient dans les Etats différents, c'est-à-dire on peut caractériser ce contrat comme celui du commerce extérieur;*

*Les parties ont choisi à titre du droit applicable le droit russe;*

*L'article 15 (partie 4) de la Constitution de la Fédération de Russie prévoit que les traites internationaux de la Fédération de Russie sont partie intégrante de son système juridique, la même disposition est fixée dans le Code civil russe (art.7). Cela signifie que les traités internationaux composent une partie du système de la législation russe;*

*La Russie et la Bulgarie sont les participants de cette Convention;*

*Le choix du droit russe comme du droit applicable signifie le choix du système juridique russe en général et non pas des lois particulières.*

Ainsi le tribunal d'arbitrage a appliqué les règles du traité international et donc celles de la Convention.

La question sur le rôle de la doctrine dans la jurisprudence et notamment de la doctrine du droit international est bien compliquée en Russie. Selon les traditions juridiques russes les tribunaux doivent prendre en compte le texte écrit. Il y a un cas de l'application indirecte de la doctrine dans le Code de la procédure devant les tribunaux d'arbitrage : si les relations ne sont pas réglées directement par la loi fédérale ou par d'autres actes normatifs soit par le contrat et s'il manque une coutume d'affaires applicable, les tribunaux d'arbitrage appliquent les normes du droit réglant les relations similaires (l'analogie de la loi). Dans le cas d'absence des telles normes les tribunaux examinent les affaires selon les conditions générales et le sens des lois fédérales et des autres actes normatifs (l'analogie du droit). On peut dire que l'analogie du droit est liée à la doctrine mais assez modérément.

On peut expliquer telle "direction" par le droit écrit aussi à l'aide de conditions de la légitimité des jugements (art.170 du Code de la procédure devant les tribunaux d'arbitrage) : dans la décision il faut indiquer les lois ou les autres actes à caractère normatif qui font la base pour la décision ainsi que les motifs selon lesquels le tribunal n'a pas appliqué les textes normatifs auxquels les parties (le demandeur et le défendeur) se référaient.

Le droit des tribunaux à l'interprétation officielle n'est pas clair dans la législation russe. Certainement, les tribunaux interprètent les normes en train de la procédure judiciaire. Sur ce plan l'interprétation donnée par la Cour de plus haute instance est obligatoire pour les tribunaux. En outre selon l'art. 13 de la Loi sur les tribunaux d'arbitrage en Fédération de Russie le Plénum de la Cour Supérieure d'arbitrage de la Fédération de Russie examine et généralise la pratique de l'application des lois et des autres actes à caractère normatif par les tribunaux d'arbitrage. Il donne les explications sur les questions de la pratique judiciaire en forme des arrêtés qui sont obligatoires pour les tribunaux d'arbitrage en Fédération de Russie. L'obligatoire de ces arrêtés est intensifiée par la nouvelle de la législation russe suivante : maintenant dans la partie motivée de la décision on peut faire les références aux arrêtés du Plénum de la Cour Supérieure d'arbitrage de la Fédération de Russie sur les questions de la pratique judiciaire. Les scientifiques l'examinent comme un pas du législateur vers la reconnaissance du précédent judiciaire comme une source du droit. Il faut remarquer qu'il n y a pas d'un arrêté de la Cour Supérieure d'arbitrage à propos de questions de la Convention de Vienne. Cela témoigne indirectement l'absence des contradictions importantes à propos de son application par les tribunaux dans le pays.

Il est nécessaire aussi remarquer, que la plupart des contrats de livraison à caractère extérieur en Russie comprennent la clause de compromis (compromis d'arbitrage) prévoyant le compétence de l'Arbitrage commercial in-

ternational auprès de la Chambre de commerce de Russie[2] (un arbitrage proprement dit). Pendant dix dernières années environ 500 litiges a résolu à la base de la Convention de Vienne par l'Arbitrage commercial international.[3] On dit que c'est l'Arbitrage commercial international et non pas les tribunaux d'arbitrage qui a la plus grande expérience d'application de la Convention dans notre pays. De plus l'Arbitrage commercial international a réussit éviter la tentation des références à la législation russe. Selon l'arbitre S.Lebedev, l'application d'un acte international à partir des positions du droit national est dangereuse. Dans la pratique de l'Arbitrage commercial international il y a beaucoup de cas quand les arbitres argumentent les décisions par les références aux sources normatives étrangères et même à la doctrine.[4]

## III. L'influence de la Convention de Vienne sur la législation russe

L'acceptation de la Convention a exercé l'influence sur le contenu de la législation civile de la Russie, d'autant plus que c'était la période de reformes. La première partie de nouveau Code civil de la Fédération de Russie a été acceptée en 1994. Probablement, c'est pourquoi il ne fallut pas des changements de la législation en vigueur, la législation civile russe après la chute de l'URSS a été construite déjà compte tenu le texte de la Convention. Par exemple, sous l'influence de la Convention de Vienne le Code civil de la Russie contient : la règle sur l'obligation du vendeur livrer les marchandises libres de tout droit ou prétention d'un tiers (l'art. 460), les droits différenciés de l'acheteur aux conséquences inégales de la livraison des marchandises de la qualité inadéquate (l'art. 475), le délai déterminé pour examiner et trouver les manquements des marchandises (l'art. 477), la précision des obligations de l'acheteur de prendre les marchandises (l'art. 484), les catégories de la violation essentielle du contrat de la livraison (l'art. 523), les règles sur les dommages-intérêts abstraites (l'art. 524).[5]

Ainsi, les dispositions de la Convention de Vienne 1980 ont été largement utilisés pendant la préparation du Code civil en Russie. Comme résultat nous voyons beaucoup des normes de la législation russe sur les contrats de vente qui sont similaires avec les dispositions de cette Convention.

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2 Voir l'activité de l'Arbitrage (http://www.tpprf-mkac.ru/en/).

3 M.*Rosenberg*, La jurisprudence de l'Arbitrage commercial international sur les questions de l'application de la Convention de Vienne, L'arbitrage commercial international, 3, 2006, p.15.

4 A.*Komarov*, Les lacunes de la Convention de Vienne et les litiges économiques, L'arbitrage commercial international, 3, 2006, p.12.

5 Voir *N.Vilkova*, Droit des contrats dans la pratique internationale, Moscou, 2004.

Peut-être, le plus aigu "désaccord" de la Russie avec les règles de la Convention est reflété dans sa déclaration de l'adhésion. En Russie le contrat de la vente internationale des marchandises est le contrat du commerce extérieur. C'est pourquoi les règles spéciales du commerce extérieur sont applicables aux contrats de vente selon la Convention. Sur ce plan c'est la disposition de l'art. 162 du Code civil de la Fédération de Russie qui est plus importante (le non-respect de la forme écrite simple pour la conclusion d'un contrat du commerce extérieur entraîne la nullité du contrat). Selon l'affirmation des arbitres de l'Arbitrage commercial international, dans notre pratique il n'y avait aucun cas de contrat du commerce extérieur conclu sous la forme orale avec les Russes. Mais il y avait les cas des changements du contrat pendant les négociations qui ne sont pas régularisés par écrit. La pratique de l'Arbitrage commercial international dit : si le changement du contrat n'était pas régularisé par écrit, ce changement n'avait pas lieu.[6]

Ainsi, la position de la législation russe et de la jurisprudence est suivante: la législation nationale peut être appliquée subsidiairement en tant que la question n'est pas réglée par la Convention de Vienne et on ne peut pas le décider à partir des principes généraux de la Convention.

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6 M.*Rosenberg*, La jurisprudence de l'Arbitrage commercial international sur les questions de l'application de la Convention de Vienne, L'arbitrage commercial international, 3, 2006, p.20.

# Slovenia

*Damjan Možina*

## General information

In Slovenia, the United Nations Convention on Contracts for the International Sale of Goods has been force since 25 June 1991, by way of succession from the Socialist Federal Republic of Yugoslavia.[1] Generally, the convention is viewed upon very positively, particularly among legal scholars. It is being taught in law schools and is frequently dealt with in Slovenian legal literature. A textbook on CISG in the Slovene language has been published recently.[2] Furthermore, the convention is being successfully promoted by the participation of Slovenian law students at the Willem C. Vis International Commercial Moot Court. However, Slovenian courts applied the CISG only in a handful of cases (*infra*).

With regard to legislation, uniform sales law was very influential upon the Slovenian Obligations Code (2002).[3] Not only provisions governing the sales contract, but also some key concepts of general contract law (e.g. the conclusion of contracts and liability for damages from breach of contract), demonstrate a high degree of congruity with the CISG. This can be explained by the fact that the makers of the Yugoslav federal Obligations Act (1978),[4] the predecessor of the Slovenian Obligations Code, followed many examples of uniform sales law at the time, namely the Hague Conventions (1964) – predecessors of the CISG.

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1 Yugoslavia signed the convention on 11 April 1980 and ratified it on 27 December 1984, see OJ SFRY – Int. Contracts, Nr. 10/1 from 31. Dec. 1984. The statement of Slovenia's succession to the convention was made on 22 November 1993 (see OJ Rep. of Slovenia Nr. 65/93 from 3 Dec. 1993) and deposited with the Secretary General on 7 January 1994, but it is effective as from 25 June 1991 when Slovenia proclaimed independence from Yugoslavia.

2 *Schlechtriem/Možina*, Pravo mednarodne prodaje (Law on international sales), Ljubljana 2006.

3 OJ 83/2001.

4 Zakon o obligacijskih razmerjih (The act on obligational relations), OJ SFRY 29/1978, 39/1985, 57/1989.

## I. CISG's impact on practicing lawyers

1. It is difficult to assess the impact of the CISG on practicing lawyers since no research has been made. Practicing lawyers in Slovenia – in particular those involved in international transactions – are certainly aware of the existence of the CISG, but they rarely have to do with cases other then those where the CISG is excluded.

Younger lawyers have become aware of the CISG at university, others through legal literature and professional experience. They certainly could not have become aware of it at the state bar exam, since, regretfully, the CISG is not included in the curriculum.[5] For the most part, the awareness of the convention doesn't mean that lawyers know the details of its content or even foreign literature or case law, but rather that the exclusion of the CISG is included on their checklists. It is also illustrative, that Slovenian lawyers and even law firms don't have commentaries of the CISG. The awareness of the convention had no impact on the contents of standard contract forms. But there is a growing number of cases where lawyers advise their clients on the CISG. However, if disputes arise, they tend to be resolved out of court.

In contracts for the sale of goods where Slovenian lawyers advise one of the parties the CISG is often excluded. There are several possible explanations for this tendency. Firstly, the mere awareness of the CISG is not sufficient for its use; most Slovenian lawyers don't have in-depth knowledge of uniform sales law and international private law. As a consequence, they tend to avoid it if they can. Secondly, in a number of contracts, foreign parties, especially sellers, are using their contract forms, prepared by their lawyers, which already contain clauses excluding the CISG. The role of Slovenian lawyers is limited to checking the accordance of contracts with mandatory rules of national law. There is a general tendency of Slovenian lawyers to follow drafts submitted by foreign clients or even opposite parties. We have to bear in mind that although its economy is growing, Slovenia is a very small country: it has two million people, its own language and a legal system with an independent tradition of only 17 years. The functioning of the judicial system in terms of the speed of the proceedings is highly problematic. As a rule, the jurisdiction of Slovenian courts as well as the application of Slovenian law is excluded in international commercial contracts. This illustrates the role of Slovenian lawyers in drafting these contracts and in disputes arising from them.

2. As already indicated, the CISG has had little influence on the way practicing lawyers draft their briefs and memoranda.

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[5] See Programme for the state bar exam (in Slovenian), available at: http://www.mp.gov.si/fileadmin/mp.gov.si/pageuploads/2005/PDF/Seznam_pravnih_virov_in_literature_za_PDI_.pdf (visited 25 March 2008).

3. Practicing lawyers do not use solutions of the CISG in purely domestic disputes.

## II. CISG's impact on scholars

1. In Yugoslavia, uniform sales law received a lot of scholarly attention even before the CISG came into force. Scholars have written treatises on Hague sales law conventions and uniform sales law was very influential in the preparation of the Yugoslav Obligations Act.[6] As early as 1981 a commentary on the CISG was published in Serbo-Croatian[7] and many other publications followed in the 1980s.[8] However, in a few years after the CISG came into force, Yugoslavia disintegrated. In Slovenian legal literature after independence the convention has been the object of scholarly attention as well. In the 1990' several articles discussed individual issues of the CISG[9]

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6 See e.g. *Draškić*, Duties of the seller according to uniform rules on international sales (in Serbian), Institut for comparative law, Belgrade, 1966; *Vilus*, Unification of International Sales Law by International Conventions (in Serbian), Jugoslovenska revija za medjunarodno pravo 18 (1971), No. 1, 30-59. See also *Kapor*, ULIS and the Yugoslav law of obligations (in Serbo-Croatian), Collection of Papers on Foreign and Comparative Law on the Occasion of the 25th Anniversary of the Institute of Comparative Law and in Honour of Prof. Blagojević, Belgrade 1981, p 149.

7 *Goldštajn/Vilus*, A Commentary on the United Nations Convention on the International Sale of Goods, Zagreb, Informator 1981.

8 A selection: International sales contract – A collection of papers (in Slovene), Gospodarski vestnik, Ljubljana 1987; UN Convention on the International Sale of Goods – A Collection of Papers (in Serbo-Croatian), University "Djuro Djakovič", Sarajevo, 1988; *Draškić*, International Sales Contracts according to Uniform Rules and Comparative Law, Institut drustvenih nauka, Belgrade 1987; *Vilus*, The Vienna Convention on International Sale of Goods and the Compromises upon which it rests, Anali Pravnog fakulteta u Beogradu 33/1985), p. 351.

9 *Tratnik*, Problemi z uporabo Dunajske konvencije (Problems with application of the Vienna Convention), Pravna praksa No. 379/1997, p. 34; *Tratnik*, Nove možnosti razlage Dunajske konvencije? (New possibilities of interpretation of the Vienna Convention?) Pravna praksa No. 366/196, p. 11; *Kranjc*, Vsebina pogodbe, če stranki uporabita nasprotujoče si splošne pogoje poslovanja (The content of contract in case of contradicting general contract terms), Pravna praksa 6/1997, p. 3, *Ilešič*, Od Rima … do Dunaja … prek Slovenije (From Rome … to Vienna … through Slovenia), Podjetje in delo 6/1998, p. 710.

and some over-all study-oriented presentations were published.[10] Later scholarly discussions intensified[11] and in 2005 a section of the Slovenian yearly Jurist Conference was devoted entirely to the CISG in honour of its 25th anniversary.[12] In 2006 a textbook on the CISG in Slovene was pub-

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[10] *Tratnik*, Mednarodno gospodarsko pravo (International commercial law), Law Faculty in Maribor, 1999; *Pivka/Puharič*, Pravo mednarodne trgovine (The law of international trade), 2. ed., Uradni list, Ljubljana 1994.

[11] See: *Verdel-Kokol*, Kupčeva pravica do razveze pogodbe v luči Dunajske konvencije (The buyer's right to terminate the contract in the Vienna Convention), Podjetje in delo 8/2000, p. 1616; *Ferčič*, Določitev kupnine z vidika Dunajske konvencije (Determination of price in the light of Vienna convention), Podjetje in delo 5/2001 p. 628; *Schlechtriem*, Uporaba Dunajske konvencije o mednarodni prodaji blaga pred državnimi sodišči in izenačevanje pogodbenega prava v EU (The use of Vienna convention on international sales in national courts and harmonisation of contract law in the EU), Podjetje in delo 5/2003, p. 761; *Ferčič*, Test pogojev za uporabo Dunajske konvencije (The test of conditions of application of the CISG), Podjetje in delo 5/2005, p. 738; *Repas*, Odgovornost prodajalca za pravne napake blaga po Dunajski konvenciji (The liability of the seller for legal defects in the Vienna Convention), Podjetje in delo 1/2003, p. 54; *Ekart*, Der unbestimmte Kaufpreis nach dem Wiener Kaufrecht – Theoretische Ansätze und Entwicklungen in der Rechtssprechung, Slovenian law review, vol. 3 (2006), p. 177; *Možina*, Mednarodna prodajna pogodba (International Sales Contract), in: Juhart/Plavšak, Commentary of the Obligations Code, GV Založba 2004; *Vončina*, Bistvene kršitve po Dunajski konvenciji ZN o mednarodni prodaji blaga (Fundamental breach in UN-convention for international sale of goods), Podjetje in delo 5/2004, p. 806.

[12] Published in Podjetje in delo 6-7/2005: *Kranjc*, Uporaba pravil Dunajske konvencije, načel mednarodnega pogodbenega prava in nacionalnega prava v sporih iz mednarodne prodajne pogodbe (Application of the CISG, principles of international contract law and national law in disputes arising from international sales contracts); *Balažic*, Dunajska konvecija in slovenska sodišča (Vienna convention and Slovenian courts); Tratnik, Dunajska konvencija – kompromis med različnimi pravnimi sistemi (Vienna convention – a compromise between legal systems); *Možina*, Kršitev pogodbe v konvenciji ZN o mednarodni prodaji blaga in v slovenskem pravu (Breach of contract in CISG and Slovenian law); *Vlahek*, Odstop od pogodbe po Dunajski konvenciji (Termination of contract in Vienna Convention); *Rajgelj*, Pogoji in ovire pri uveljavljanju sankcij za kršitev mednarodne prodajne pogodbe (Conditions and obstacles in enforcement of remedies for breach of international sales contract); *Repas*, Prodaja blaga s kršitvijo blagovne znamke (Sale of goods infringing a trademark).

lished,[13] as well as a comparative treatise on breach of contract, including a study on the CISG.[14]

Scholars, writing about the CISG, also deal with contract law and other areas of private law. In a small country like Slovenia, it is impossible to identify a specific group of scholars (e.g. private international law scholars) whose work is focused primarily on the CISG. Scholars have presented and discussed various aspects of the CISG, as well as compared domestic law with the CISG.[15] The purpose behind these comparisons was to identify areas where solutions of the Obligations Code and the CISG are identical or very similar and literature and case-law on the CISG could be used for understanding and application of national law of obligations. On the other hand, the purpose was also the identification of issues, where national law is different from the CISG: in cases where these solutions are unsound, the convention could be used as a possible source of inspiration for a legislative reform.

2. As already indicated, uniform sales law has been influential already in Yugoslav times, prior to coming of the existence of the CISG. Also in Slovenian legal literature, some references to the CISG can be found in treatises on contract law, above all in situations where national contract law contains identical or similar solutions as the CISG and foreign commentators are being cited,[16] but also in cases where scholars prefer the solutions of the CISG to the ones of national law.[17] In order to promote awareness of the CISG scholars should further research uniform sales law as well as try to use foreign literature and case law on the CISG for improving the quality of national law. Scholars should promote the use of uniform law in international transactions among businessmen. Especially for a small country like Slovenia, whose law and jurisdiction tend to be avoided in international contracts, the use of international uniform and neutral legal instruments is much better than the use of foreign law.

3. Scholarly writing has certainly promoted the CISG and contributed to the awareness of it in Slovenia. However, in the light of the influence Slovenian case-law on the CISG which is almost non-existent, it seems that the level of awareness among practicing lawyers and especially judges is still too low. Reports indicate that courts as well as lawyers tend to ignore the CISG even in cases where the convention is applicable: if both parties refer

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13 *Schlechtriem/Možina*, Prevo mednarodne prodaje (The law of international sales), Uradni list, Ljubljana 2006.

14 *Možina*, Kršitev pogodbe (Breach of contract), GV Založba, Ljubljana 2006.

15 See the works from the previous two footnotes.

16 E.g. *Možina*, in: Juhart/Plavšak, OZ s komentarjem (Commentary of the Obligations Code) book III, GV Založba 2004, p. 346 and 350.

17 E.g. *Juhart* in: Juhart/Plavšak, OZ s komentarjem (Commentary of the Obligations Code), book II, GV Založba 2004, p. 361.

to national law instead of the CISG, the judge, reluctant to "complicate" the dispute, (wrongfully) regards it as an agreement on opting out.[18] It has been suggested that the judges and lawyers feel inclined not to apply the CISG also because in majority of cases the result would be the same as under national contract law.[19] Perhaps the knowledge about the CISG, promoted by the availability of Slovenian and international literature will change this in the future. At present, it seems that it can be most useful in legal education.

4. Scholars have not used interpretations of the CISG to interpret other uniform law instruments.

## III. CISG's impact on courts

1. As already indicated, there are only a few cases where Slovenian courts applied the CISG. In some of them issues at hand were the ones not regulated by the CISG (e.g. validity of contract, prescription of claims) and the courts applied national law determined by international private law.[20] In fact, decisions were based on the CISG only in two cases,[21] however without any impact on the style of court decisions. The court did not refer to Slovenian nor foreign scholarly writing let alone to case law.

2. In the two aforementioned cases neither a homeward trend nor interpretation according to Art. 7 CISG can be established.

3. The courts haven't used the CISG in relation to contracts not covered by its sphere of application.

4. The courts didn't rely on interpretation of the CISG to interpret other uniform law instruments.

## IV. CISG's impact on legislators

1. As already indicated, uniform sales law (Hague Conventions from 1964) played a very important role in the making of the Yugoslav Obligations Act (1978), predecessor of the Slovenian Obligations Code. The Hague uniform law inspired not only several provisions on sales contract, but also some key concepts of general contract law. The preparation of the

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[18] *Balažic*, Dunajska konvencija in slovenska sodišča (Vienna convention and Slovenian Courts), Podjetje in delo 6-7/2005, p. 1202.

[19] Ibidem.

[20] See: Supreme Court of Slovenia, Case Nr. III Ips 69/96; Court of Appeal Koper, Case Nr. Cpg 90/93.

[21] See: Court of Appeal Ljubljana, Case Nr. I Cpg 1305/2003 and Case Nr. I Cpg 577/98.

Obligations Act was based on a draft (so called Sketch), prepared by Prof. Konstantinović,[22] which more strongly reflects the influence of uniform law than the adopted version of the Act. Regretfully, almost no *travaux préparatoires* for the Obligations Act are publicly available, thus the reasons for adopting specific solutions are unclear.

In general contract law, the influence of uniform sales law is reflected in the chapter on the conclusion of contract (Art. 26-43 Obligations Act) and in the concept of damages for breach of contract, which, unlike most continental codes, is not based on fault, but on unforeseeable circumstances beyond control (Art. 263 Obligations Act).[23] The liability of the debtor for damages for breach of contract is limited to reasonably foreseeable damage, except in the case where breach was intentional or grossly negligent (Art. 266 Obligations Act).

On the other hand, the Obligations Act also includes some outdated solutions and approaches, e.g. the absence of the uniform approach to breach of contract and a very different treatment of non-performance (delay), defective performance and impossibility of performance. Moreover, the Act established a very complicated regulation of notification of defects to the seller as a prerequisite for all remedies of the buyer.[24] In some cases the adopted version of the Act moved away from its draft, e.g. the time limit of seller's liability for material defects was shortened from 2 years upon delivery to only 6 months, and the prescription period for buyer's remedies was transformed in a cut-off period of only 1 year (running from notification of the defect).[25]

The Obligations Act was transformed into the Slovenian Obligations Code in 2002 without any conceptual changes and only minor modifications as well as new numbering of articles. Modifications in the chapter on conclusion of contract were aimed at bringing the legislation closer to the

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[22] *Konstantinović*, Obligacije i ugovori, Skica za zakonik o obligacijama i ugovorima (Obligations and contracts – a Sketch for a code), Belgrade 1969 (in Serbian).

[23] This was the concept in the draft. In the adopted version of the Act the condition that the circumstaces be "external" was left out, which led the majority of scholars to think that also "internal" circumstances (i.e. fault) can be taken into account thus turning the concept back to subjective criteria or "subjective-objective" criteria. See *Ilešič*, OZ z uvodnimi pojasnili (Introduction to Obligations Code), Uradni list, Ljubljana 2002, p. 40. However, the prevailing view in modern Slovenian theory tends to accept the (so called) objective concept which is close to Art. 79 CISG. See: *Plavšak*, in Juhart/Plavšak, OZ s komentarjem (Commentary of the Obligations Code) book II, p. 215.

[24] See Art. 481 and 482 Obligations Act (Art. 461 and 462 Obligations Code).

[25] See Art. 482 and 500 Obligations Act (Art. 462 and 480 Obligations Code).

CISG.[26] In one case, a modification by the Obligations code deviated from the CISG.[27] Regretfully, bringing the Obligations Code closer to the CISG wasn't sought with regard to other issues of contract law, where a range of outdated and incoherent solutions of the Yugoslav Obligations Act were preserved in the Slovenian Obligations Code, the most prominent example being very different treatment of delay (non-performance) and material defects (defective performance) as well as time-limits of liability of the seller for material defects which are far too short. The expert group preparing the reform proceeded from the assumption that the concept of the Yugoslav Obligations Act was in accordance with modern trends in comparative law. On the grounds that it withstood the test of the practice and was well accepted by the Slovenes, a conservative approach with regard to changes was chosen,[28] raising the question why the reform was made at all.

2. As indicated above, the CISG itself did not lead to law reform, although some modifications, above all with regard to conclusion of contracts in general contract law were motivated by the CISG. The question whether the contract and sales law should be brought closer to the CISG was not discussed, probably due to the fact that far-reaching changes were rejected from the outset.

3. As indicated above, it was not the CISG but its predecessor – Hague uniform sales law – that influenced the Yugoslav Act on Obligations whose contents were later, with modifications, transformed into the Slovenian Obligations Code. Not all parts of uniform sales law were equally influential.

4. The Yugoslav Obligations Act, as well as the Slovenian Obligations Code, although they contain several concepts taken from uniform sales law (the Hague conventions), have predominantly not been interpreted in a way that takes account of its model. This can be attributed to several factors, one of which is legal tradition: the codes which were in force before WWII (in Slovenian territory the Austrian Civil Code), continued to be applied until the Obligations Act was adopted in 1978 and shaped the mentality of lawyers.

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[26] So was Art. 22 Par. 2 OC modeled entirely after Art. 14 par. 2 CISG, Art. 26 OC after Art. 20 Par. 1 COSG, Art. 29 and 31 OC after Art. 19 Par. 2 and 3 and Art. 21 CISG.

[27] With regard to the foreseability rule, the reference point in time in Obligations Act (Art. 266) was the moment of *conclusion of the contract*, like in the CISG (Art. 74), whereas in the new Obligations Code, the debtor is liable for damage, which he could reasonably have foreseen at the moment of *breach of contract* (Art. 243). No explanation for this change was ever offered.

[28] *Ilešič*, Obligacijski zakonik (Introduction to Obligations Act), Ljubljana 2003, p. 28 (in Slovene).

# Spain

*Gabriel Garcia Cantero*

## General information

Is the United Nations Convention on Contracts for the International Sale of Goods (hereinafter: CISG) in force in your country? If so, could you give a general account of how it is looked upon in your country and what efforts are being made to raise awareness of it being in force (in business circles, bar associations as well as universities)? If not, could you give a short account of the reasons which have led your legislator to not enter it into force? Are any efforts being undertaken to enter it into force?

## I. CISG's impact on practicing lawyers

1. Are practicing lawyers aware of the CISG? If so, could you give a detailed account of how practicing lawyers (have) become aware of it and the impact of this awareness on the practice of law? In doing so, could you also examine the issue of whether this awareness has had any impact on the contents of standard contracts forms? Do practicing lawyers who are aware of the CISG really tend to exclude CISG as often suggested in legal writing? If so, could you elaborate on the reasons for this? If not, could you elaborate on why it appears that way?

Cet impacte chez les practiciens espagnols va se produire avec un certain rétard par rapport à d'autres pays, et, une fois produit, d'avec une force plutôt faible, et tout cela du aux plusieures raisons que je vais énumérer:

- La ratification de la Convention par l'Espagne s'est produit en 1991, c.à d. depuis plus d'une dizaine d'années après la signature du CV, et cette date sera-t-il le point de départ de tout le procés succesif pour en mésurer le (faible) impact;
- la Convention de Vienne (CV) s'applique exclusivement aux ventes internationales des marchandises, ce qui fixe strictement son champ d'application.

En effet, pour mieux analyser cet aspect, il faut savoir qu'en droit espagnol on distingue plusieurs régimes du contrat de vente. D'une part, et à propos de la vente civil, il faut se référer aux arts. 1145-1537 du Code civil, qui réprésente le régime basique de ce contrat (auquel il faudra ajouter les dispositions du « Droit foral » – c.à.d. le régime special existente d'en certains territoires, tel que Navarra ou la Catalogne –). Aprés c'est la vente commerciale (réglée aux arts.325-345 du Code commerce, avec l'application suppletive du Code civil). Et finalement la vente international soumise aux règles du Droit international privé contenues aux arts. 10. núm. 5 et núm. 10 du Code civil et aux Traités ratifiés par l'Espagne (et notamment, la CV). La doctrine scientifique en tient compte de cette division du travail « ratione materiae » pour en traiter les différents aspects du contrat de vente, et d'habitude sous l'angle de la propre specialité (On peut constater ce fait en consultant les exposés sur le contrat de vente en droit civil, commerciel ou de droit international privé).

Il faut ajouter encore que depuis notre adhésion à l'Union Européenne les practiciens s'avaient interéssés plutôt au Droit communautaire qu'au Droit uniforme. Depuis la Loi de 1984 sur la protection de consommateurs, l'importance de cette branche du Droit s'est accrue de plus en plus (et notammente une fois promulgué le Texte Réfondue de celle-là en décembre 2007, lequel ne signifie pas la codification du Droit de la Consommation, tel qui s'est passeé en Italie). Il faudra ajouter que, le cas écheant, la CV a interéssé les practiciens au fur et à mesure que le Droit communautaire l'en avait integré.

En conséquence, les practiciens espagnols on invoqué et utilisé la CV devant les Tribunaux espagnols s'ils en avaient l'ocassion d'y plaider; mais ils n'essayerent pas de généraliser se règlementation international aux autres ventes soumises au droit espagnol, ou à d'autres contrats.

2. Has the coming into force of the CISG in your country had any impact on the way practicing lawyers draft their briefs and memoranda? In other words, has the mandate to interpret the CISG in light of its international character and the need to promote uniformity in its application had any impact on the drafting of briefs and memoranda? Do you believe that in CISG related cases practicing lawyers tend to refer to more case law than in purely domestic disputes? Do you believe that in CISG related cases practicing lawyers tend to refer to more commentators than in purely domestic disputes? Do practicing lawyers cite to foreign legal writing and case law (thus complying with the aforementioned mandate) or do they solely cite to domestic sources and cases when dealing with CISG related disputes?

Ma réponse est négative à toutes les questions. Le peu de cas posés devant les Tribunaux espagnols n'ont pas donné à un débat important à l'égard de l'interpretation de la CV, lequel est possé seulement par les académiciens.

3. Do practicing lawyers use CISG solutions in purely domestic disputes to corroborate the results they want to reach?

La réponse est aussi négative à cette question.

## II. CISG's impact on scholars

1. Could you give an account of how much attention scholars have devoted to the CISG both before and after its coming into force? Is it possible to identify a specific group of scholars (private international law scholars rather than contract law scholars) that more than any other one has focused its attention on the CISG? What impact does this specific group's focus on the CISG have on the awareness and application on the CISG? In devoting their attention to the CISG, have scholars mainly focused on the CISG itself or have they compared the CISG with their domestic law? Where such comparison has taken place, what was the intent behind it?

Si bien cet impact sera-t-il aussi tardive que chez les practiciens, il sera plus profond. Les pioniers seront les spécialistes en Droit International Prive et les commercialistes:

CALVO CARAVACA: «La Convención de Viena de 1980 sobre venta internacional: Algunos Problemas de aplicación» dans le vol. «Homenaje a Verdera Tuells», (Madrid 1994) págs. 381-413;

ESPLUGES MOTA: «Compraventa internacional», dans le vol. «Derecho del comercio internacional» (dir. Fernández Rozas) (Madrid 1996) págs. 303-322.

CALVO CARAVACA et FERNANDEZ DE LA GANDARA, «El contrato de compraventa internacional de mercancías», dans le vol. «Contratos internacionales» (dirigé par eux-mêmes) (Madrid 1997), págs.144-399.

Il faut atteindre à l'année suivante pour voir la parution d'un grande ouvrage rédigé majoritairemente par des civilistes (dix sur 14 des collaborateurs):

«La compraventa internacional de mercaderías. Comentario de la Convención de Viena», dirigé par Díez-Picazo (Madrid 1998).

Il faut s'arrêter devant ce commentaire du CV. Le prof. Díez-Picazo, ancien Membre de la Cour Constitutionnelle et Prof. Emérite de l'Univ. Autonome de Madrid, jouit d'un grand prestige scientifique en Espagne,

auteur des Manuels qui ont connu une grande difussion (et notammente, «Fundamentos de Derecho civil patrimonial», 6me ed. (2007) et «Sistema de Derecho Civil» (en collaboration avec le Prof. et Conseilleur de la Cour de Cassation, Gullón Ballesteros) 9 éme ed. (2001). Pour la plupart les autres collaborateurs de ce Commentaire de la CV sont des professeurs de Droit civil, et ils utilissent les commentaires les plus répandus en Europe (la 2éme ed. de Honnold, 1991; Bianca-Bonell, 1987; Von Caemerer-Schlechtriem, 1990; Bento-Moura, 1986; Garro-Zuppi, 1990; Audit, 1990; Dereins-Ghestin, 1990; Ferrari, 1994 etc.).

Surtout il faut rémarquer la prise de position, – très claire et nette – du Díez-Picazo à l'egard du Droit uniforme, et specialément de la CV qui contient, à son avis des solutions pour les problèmes généraux du Droit contractuel. Cela réprésente, sans doute, un point de départ dans l'évolution souhaitable de la doctrine civiliste espagnole qui s'ouvre au droit uniforme, mais non pas sans réticentes et difficultés.

Dans la ligne d'accepter une réception tres ample de la CV il faut citer d'autres auteurs:

ALCOVER GARAO: «La transmisión del riesgo en la compraventa mercantil. Derecho español e internacional» (Madrid 1991);

MEDINA DE LEMUS: «La venta internacional de mercaderías» (Madrid 1992);

VAZQUEZ-LEPINETTE.» Compraventa internacional de mercaderías. Una visión jurisprudencial (Pamplona 2000);

TAMAYO CARMONA. «Responsabilidad y riesgo contractual: Normas de la Convención de Viena sobre venta internacional de mercaderías e Incoterms» (Valencia 2002);

Isabel DE LA IGLESIA MONGE: «El principio de conformidad del contrato en la compraventa» (Madrid 2002);

CALVO CARAVACA-CARRASCOSA GONZALEZ: «Contrato internacional, nueva lex mercatoria y principios UNIDROIT sobre contratos comerciales internacionales», dans le vol. «Homenaje Díez-Picazo», (Madrid 2003), II, págs. 1539-1568;

VIDAL OLIVARES: «La noción de persona razonable en la compraventa interncional», id. id.

Natividad GOÑI URRIZA, «La compraventa internacional» dans le vol. «Derecho privado europeo» (coord. Cámara Lapuente) (Pamplona 2003) págs.715-740.

En réssumé: D'après la réception par la doctrine civiliste espagnole du principes de la CV, et notamment par la divulgation pratiquée par le prof. DIEZ-PICAZO dans son commentaire aux arts. 14 à 20 de celle-ci,

et dans d'autres ouvrages, une partie des auteurs se manifestent, en général, très ouverts quant à la réforme de notre Code civil en matière de la formation du contrat (voyez aussi DIEZ PICAZO, «Fundamentos», vol. I, 6 éme ed. págs. 327 et suivant) ainsi qu'au principe de la conformité de la chose vendue (cfr. MORALES MORENO, com. à l'art. 35 CV), ou à la question des risques dans la vente (cfr. le com. de CAFFARENA LAPORTA aux arts. 66-70).

Mais il y a d'autres auteurs moins sensibles à la réception des nouveux principes (ALBALADEJO, LACRUZ et collaborateurs etc.) ; en fait on peut consulter des Manuels sur la vente civil sans y rencontrer aucune allusion au CV.

2. Were domestic law treatises affected by the coming into force of the CISG? To put it differently, can references to the CISG be found in works on your domestic contract and/or sales law? What could scholars do to promote awareness of the CISG? Is there a specific group of scholars that could/should do more other ones?

Cette influence est très nette dans les ouvrages de Droit International privé et aussi chez les mercantilistes. À l'heure actuelle, cette influence reste faible chez les civilistes ; mais surtout il y un groupe des jeunes chercheurs qui sont très au courant du Droit uniforme et que dans l'avenir proche ils se feront sentir dans l'opinion générale; plus nombreux sont-t-ils, d'autre parte, les spécialistes en Droit de la consommation et par ce biais, quelques uns d'entre eux, ils peuvent se mettre en contact avec le droit uniforme.

3. What impact has scholarly writing devoted to the CISG had in your country? In answering, could you also examine the role of scholarly writing on, for instance, legal practice (such as its impact on standard contract forms) as well as legal education?

Je pense que progressivemente la CV sera plus connue en Espagne qu'auparavant, et surtour par les éfforts deployés par l'équipe dirigé par le Prof. Díez-Picazo.

Moi-même je me charge d'actualiser le volume III du grand Traité de Droit civil de Castán Tobeñas, dont la 16éme ed. a paru en 1992, et j'espére d'en tenir compte.

4. Have scholars used interpretations of the CISG to interpret other uniform law instruments?

Trés peu, sauf les exceptions dejà indiquées.

## III. CISG's impact on courts

1. Has the CISG's coming into force had any impact on the style of court decisions? Following the coming into force of the CISG is it possible, for instance, to find more references to scholarly writing in common law courts and more citations to case law in the courts of civil law countries?

Jusqu'á présent les citations de la CV dans les arrêts des Cours espagnoles son plutôt rares.

2. Are courts taking the aforementioned mandate to interpret the CISG in light of its international character and the need to promote uniformity in its application into account or have they shown a homeward trend? If so, could you give examples? Or is it rather possible to discern a homeward trend? If so, what are the reasons for not doing so? Could you give some examples?

Pas à ma connaissance.

3. Have courts in your country used the CISG in relation to contracts not covered by its sphere of application, for instance to justify or corroborate (domestic law) solutions adopted in areas where there is much dispute both in case law and scholarly writing?

Exceptionnellement, j'en connaie deux arrêts de la Cour de Cassation qui cite la CV pour renforcer l'interpretation du droit interne. Celle de 31 octobre 2006, à propos d'une vente immobilière (résolution à la demande du vendeur par manque du paiement du prix), et celle de 22 décembre 2006, à propos de la résolution d'un contrat de location d'immeuble (pas apte pour l'activité à deployer par le locataire).

4. Have courts relied on interpretations of the CISG to interpret other uniform law instruments?

Pas, à ma connaissance; seulement le font quelques auteurs.

## IV. CISG's impact on legislators

1. To what extent has the CISG influenced the discussion on law reform in your country? In answering, could you also reply to the question of whether the CISG has triggered such discussion or whether it has "merely" given new impetus to such discussion, if at all? Could you also answer the question of whether the CISG's impact on such discussion was limited to sale-specific topics or whether it has had an impact on non sale-specific issues as well?

Le champ des obligations et contrats en droit espagnol a été l'objet récemment des quelques reformes partiélles et sectorielles, surtout pour la protection des consommateurs en appliquant les Directives de l'U.E. La Loi fondamentale de 1984 a été modernisée par le Texte réfondu de 2007, qui a inclu les Lois sur les contrats célébrés en dehors de l'établissement (1991), la Loi sur la responsabilité par les produits defectueux (1994), la Loi sur les voyages combinés (1995) et la Loi sur les garanties de la vente des biens de consommation (2003). Mais d'autres d'autres lois spéciaux sont restés en dehors du texte réfondu (par exemple, la Loi de 1995 du crédit à la consommation, la Loi de 1998 sur les conditions géneraux de la contratation, la Loi de 2002 sur les services de la société de l'information et du commerce électronique, et la Loi de 2003 sur les garanties de la vente de biens de consommations. A la différence de l'Allemagne ou du Pays Bas, notre législateur n'a pas poursuivi l'integration du droit de la consommation dans le Code civil. Dans cette matière, le texte communautaire le plus importante est réprésenté par la Directive de 1999 sur quelques aspects de la vente et les garanties des biens de consommation. Mais cette Directive n'ai fait pas aucune allusion directe à la CV. ; et d'autre part, on rémarque que l'influence de cette Directive sur les droits nationaux et plus importante que celle de la CV (cfr. Giovanna Capilli, «Las garantías en los bienes de consumo», ADC, 2007, pág. 1693). En général, les lois internes qui developpent celle-ci gardent silence aussi à ce propos.

Pour le moment la CV n'a pas qu'une certaine influence doctrinale sur le Droit espagnol du contrat de vente.

2. Did the CISG ultimately lead to law reform? If so, was the reform limited to sale-specific topics or did it concern non sale-specific issues as well? If not, could you give an account of the reasons for which there was either no reform at all or a reform that, however, was not modelled after the CISG?

La réponse négative est dejà raisonnée auparavant.

3. Are there differences between the CISG and the domestic law that has been modelled after the CISG? In other words, has the CISG been taken over *tel quel* or have there been adoptions? If there have been adaptations, what are the reasons for this?

Non, la CV n'a pas exercé une influénce directe dans le droit interne

4. Has the domestic law modelled after the CISG been interpret in a way that takes the interpretations of its model into account?

Dans l'avenir, la CV en pourra être tenue en compte pour interpreter le droit interne sur le contrat de vente, mais pas exclusivement.

# Switzerland

*Corinne Widmer and Pascal Hachem*

## Introduction

In 2005, *Peter Schlechtriem* stated that "[t]he United Nations Convention on Contracts for the International Sale of Goods (CISG) […] has […] gained worldwide acceptance."[1] In Switzerland, this acceptance dates back to 1 March 1991, when the CISG entered into force.[2] Already in 1989, the Swiss Federal Council[3] emphasised the increasing importance of the international sale of goods and the necessity for a clear and transparent set of rules governing contracts in this area of law.[4] It considered that ratifying the CISG would to a large extent eliminate difficult questions concerning conflict of laws, since the CISG regulated its sphere of application autonomously in its Article 1(1)(a).[5] Moreover, the Federal Council stated that the CISG offered solutions tailored to the needs of international commerce,[6] in particular by substantially restricting the seller's duty to cure any breach of its obligations.[7] The Federal Council was also persuaded that parties would more readily agree on a choice of law clause if a "neutral" law were designated to govern the contractual relationship.[8] Consequently, and in light of the fact that major trading partners of Switzerland had already become – or were

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1 *Schlechtriem*, in: Schlechtriem/Schwenzer, Commentary, 'Introduction' para 1.

2 For the current status of the Convention and the different dates on which the CISG entered into force in the respective member states, see http://www.uncitral.org/uncitral/en/uncitral_texts/sale_goods/1980CISG_status.html.

3 The Swiss federal government consists of the seven members of the Federal Council (*Bundesrat/Conseil fédéral/Consiglio federale*); see http://www.admin.ch/br/index.html?lang=en for further information.

4 Message of the Swiss Federal Council concerning the United Nations Convention on Contracts for the International Sale of Goods, *Bundesblatt* 1989 I 745, 838.

5 *Ibid.*, p. 838. According to Article 1(1)(a) CISG, the Convention applies where both parties have their places of business (see Article 10 CISG) in different contracting states. Recourse to conflict of law rules is only required where a party is not located in a contracting state; see Article 1(1)(b) CISG.

6 *Ibid.*, p. 838.

7 *Ibid.*, p. 838.

8 *Ibid.*, p. 838.

about to become – parties to the Convention,[9] the Federal Council recommended the adoption of the CISG.[10]

Since then, more than 17 years have passed, and the question arises whether the CISG's impact on legal practice in Switzerland has been as large as the Federal Council's message might lead one to expect. In order to assess the importance of the CISG "in action", the following four points shall be addressed in this report: the CISG's impact on practicing Swiss lawyers, the CISG's impact on Swiss scholars,[11] the CISG's impact on Swiss courts, and the CISG's impact on Swiss legislators.[12]

## I. The CISG's Impact on Practicing Lawyers

### 1. The Authors' Survey

One of the questions put to the authors by the general reporter was whether practicing lawyers were familiar with the CISG and whether such awareness had had any impact on the practice of law. In order to gain insight into Swiss legal practice, the authors conducted a survey amongst the registered lawyers practicing in the fields of commercial law and/or conflict of laws in the three major Swiss centres of commerce, namely Basel, Geneva and Zurich.[13] All lawyers were members of the Swiss Bar Association at the time of survey.[14] In total, 13.7% of the lawyers contacted by us responded,[15] with 12.5%, namely 170 lawyers, actually filling out the questionnaire.[16]

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9 *Ibid.*, pp. 838-9.

10 *Ibid.*, p. 746.

11 In this report, the term "Swiss scholars" comprises those legal scholars who either teach at Swiss universities or practice in Switzerland, regardless of their nationality.

12 Switzerland is a federal State. Accordingly, legislative power is distributed amongst the Federal State (*Bund/Confédération/Confederazione*) and the Cantons (*Kantone/Cantons/Cantoni*).

13 As the survey was conducted by e-mail, only those lawyers were contacted whose e-mail addresses were listed in the Swiss Bar Association's register; in total, approx. 1358 lawyers. The contact and practice details of the respective lawyers were taken from the website of the Swiss Bar Association at www.swisslawyers.com.

14 Cf. fn. 13, above.

15 This figure does not include automatically generated e-mail responses relating to holidays or maternity leave (see also fn. 16, below).

16 Approx. 1.5% of the e-mails sent out by us could not be delivered to the e-mail addresses listed with the Swiss Bar Association, and approx. 3.6% of the lawyers

The questionnaire[17] was designed so as to enable both lawyers who had no practical experience with international sales as well as those who did to participate in the survey. Of the 170 lawyers who filled out the questionnaire, 17 indicated that they were not involved with international sales in their daily practice, leaving 153 in a position to answer all of the twelve questions. Six of the questions[18] could be answered only by lawyers working in the field of international sales law. Thus, depending on whether the question was addressed to all participants or only to those actually involved with international sales law in their legal practice, either 153 or 170 lawyers responded.

The twelve questions included in the questionnaire can be divided into three categories. The aim of the first category was to determine how often and at what stage (contract drafting and/or litigation) participants came into contact with international sales law. The second category related to the participants' knowledge of the CISG, and the third category was concerned with issues surrounding choice of law clauses. Participants were also asked to indicate whether they had already been invited to take part in empirical research on the CISG before.

Participants were asked to place a check next to their preferred response(s). Some questions called for only one response,[19] whereas others allowed participants to select several responses.[20] Three questions also allowed for individual comments.[21] Where such individual comments corresponded in essence to the "check the box" responses, they were treated as such for the purposes of calculating percentages.

## 2. The Lawyers' Responses

### a) Relevance of International Sales in Participants' Day-to-Day Practice

Participants were first asked to indicate the extent to which their work related to international sales contracts.[22] The majority (55.88%) estimated that up to 10% of their legal practice is concerned with such contracts. The second largest group (23.5%) reported that up to 25% of their practice re-

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contacted by us were away on holiday or maternity leave when our survey was conducted.

17 The French language version of the questionnaire is attached at the end of this report; see annex I.

18 I.e., questions 2 and 6-10; see annex I.

19 See annex I, questions 1-4, 6, 7, 9, 10 and 12.

20 *Ibid.*, questions 5, 8 and 11.

21 *Ibid.*, questions 4, 8 and 11.

22 *Ibid.*, question 1.

lates to international sales law. Only a minority (7.05%) of participants estimate that their involvement with international sales makes up to 50% of their legal practice, and only 3.5% of participants actually crossed the 50%-line. 10% of participants stated that they had no practical involvement at all with international sales law.

The second question was concerned with the nature of the individual lawyers' involvement with international sales. The responses showed that the focus of the majority (56.2%) lies on drafting contracts, whereas only 24.18% are concerned primarily with litigation. The remaining 19.6% of participants reported that they conduct litigation and draft contracts in equal measure.

### b) Knowledge of the CISG

The third question asked participants to assess their knowledge of the CISG. The responses show that a majority consider their knowledge of the CISG to be "basic" (55.29%). 37.05% of participants rate their knowledge of the Convention as good. Only a very small minority (1.76%) reported that they were unfamiliar with the CISG, whereas 5.29% had at least "heard of it". Only one participant named the Convention as his predominant area of practice.

In the fourth question, participants were asked where they had learnt about the CISG. The purpose of this question was to determine where participants had first come into contact with the Convention, and accordingly, only one response was expected. However, many participants marked more than one of the responses, thus indicating the different sources from which they derived their knowledge of the CISG. Nonetheless, the responses did show clearly that university education is the primary source of knowledge of the CISG (57.65% of participants). Legal practice itself, including legal internships, followed second (35.29%). Other responses indicated that scholarly writings (24.12%) and continuing education (23.53%) are also important sources of knowledge. Participation in the Willem C Vis International Commercial Arbitration Moot was also named, albeit by a very small minority (1.76%).

The participants were then asked whether and, if so, how they kept abreast of current developments in this field of law.[23] Participants could select more than one answer. The responses show that a majority of participants are concerned with such developments if and when the need arises in a specific case (66.47%). However, a fair number of participants (30%) also keep up to date regardless of a specific case, e.g. by reading journals, attending professional meetings and conferences, etc. 18.3 % of participants actu-

[23] *Ibid.*, question 5.

ally involved in international sales reported that they do not keep up with current developments at all.

### c) Choice of Law Clauses

In the sixth question, participants were asked whether they ever *chose* the CISG as governing law in their sales contracts. A clear majority of participants (65.36%) answered in the negative. 16.34% of participants reported that it depended on which side they were representing, i.e. the buyer or the seller. 13.72% responded that it was rare for them to choose the CISG as governing law, although it did occur. Only 4.57% of participants stated that they choose the CISG regularly.

When asked whether they ever *excluded* the CISG from their contracts,[24] 16.34% of the participants once more responded that it depended on which side they were representing, i.e. the buyer or the seller. 11.76% of participants reported that they did not exclude the CISG, and 9.8% answered that it was rare for them to exclude the CISG, although it did occur. A clear majority, however, namely 62.09% of participants, reported that they generally exclude the CISG from their contracts.

Participants were then asked to explain their motives for excluding the CISG in a given case.[25] Again, one or more responses could be selected. The answers showed that the main reason for excluding the CISG is a lack of certainty. This response, which was selected by 41.83% of participants, can be interpreted in two different ways, namely either as the individual participant's feeling of insecurity due to lack of familiarity with the Convention, or as a perceived lack of legal certainty in this area.

A similar number of participants (40.52%) exclude the CISG for fear of undesired influences of other jurisdictions. 37.25% responded that they excluded the CISG because its application did not lie in the interest of their clients, and a similar number reported that they excluded the Convention as per their client's instructions (31.37%). 16.33% stated that in contract negotiations, most parties refused to accept a choice of law clause designating the CISG.

The individual responses to this last question are also of particular interest. Several participants pointed out that the CISG did not cover all questions which might arise in case of conflict, in particular validity issues and limitation periods. Accordingly, they preferred to designate one national law to cover all potential issues rather than have the contract governed in part by the CISG and in part by a distinct national law.

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[24] *Ibid.*, question 7.

[25] *Ibid.*, question 8.

Participants were then asked how they reacted if the opposing party in contract negotiations wished to choose the CISG as governing law.[26] 11.76% responded that they would generally accept such a proposal, whereas a similar number of participants (11.11%) would generally refuse. 23.53% of participants answered that it depended on which side they were representing, i.e. the buyer or the seller. The majority, however, namely 53.59% of participants, reported that this practically never occurred.

Conversely, should the opposing party wish to exclude the CISG from the contract,[27] 60.13% of participants would accept such proposal, and only 6.54% would refuse. 20.26% of participants answered that it depended on whether they represented the buyer or the seller. 13.07% of participants declared such requests to be rare.

When asked about the advantages of the CISG,[28] 42.35% of participants could think of none at all. Those participants who could discern advantages stated that the Convention rendered legal relationships with parties from other countries more transparent (34.70%), that negotiating parties could more readily agree on the CISG than on a national law (25.88%), that the CISG was more buyer-friendly (16.47%), and that its application lay in the interest of their clients (4.12%). Several participants added individual comments, stating that the Convention provided a balanced and fair body of rules tailored to the needs of modern-day business. One participant remarked that the Convention helped contracting parties avoid interminable discussions about legal details thanks to its broad political acceptance, thus enabling substantial cuts in transaction costs.

### d) Empirical Research on the CISG in Switzerland

The responses to the final question[29] show that empirical research on the CISG in Switzerland is still in its infancy. 69.41% of participants reported this to be the first time they had been invited to participate in a survey on the Convention. The remaining participants stated that they had already received similar invitations before, either with increasing (27.65%) or decreasing (2.35%) frequency or with no discernible tendency in either direction (0.58%).

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26 *Ibid.*, question 9.

27 *Ibid.*, question 10.

28 *Ibid.*, question 11.

29 *Ibid.*, question 12.

## 3. Analysis

The results of the survey show that an overwhelming majority of practicing lawyers in Switzerland (over 98% of participants) are familiar with the CISG, and that law school is the most important source of knowledge of the Convention. Nonetheless, most participants (62.34%) do not rate their knowledge as good, but rather as basic or less. Thus, it is hardly surprising that a clear majority of participants generally exclude the CISG in their contracts (62.09%) and state that it is unusual for parties in contract negotiations to even suggest the CISG as governing law (53.59%). The fact that so many participants (42.35%) could not even think of one single advantage of the CISG over national law is also an indication that many Swiss lawyers are not familiar enough with the Convention and prefer to exclude it in favour of a law they are more comfortable with. The lack of popularity of the CISG is confirmed by the fact that only a small minority of practicing lawyers (6.54%) would refuse an opposing party's proposal to exclude the Convention.

On the other hand, 25% of participants consider one of the Convention's advantages to be that negotiating parties will more readily agree on the CISG than on a national law. At first glance, this may seem to contradict the responses described above, namely that the CISG is usually excluded by the parties. However, it is important to note that this response was often selected by lawyers whose predominant area of practice lies in litigation (as opposed to drafting of contracts) or who have no practical experience with international sales law, and, curiously enough, also by several of those same lawyers who had declared that they generally exclude the CISG in their contracts.

From a practical viewpoint, the fact that the Convention does not cover all issues which may arise in case of conflict, in particular the eminently important question of statute of limitations, is also a problem. It is easier to choose one law to govern the whole contract than to choose the CISG for some issues and a distinct national law for others, especially as the latter approach carries with it the risk of conflict between the two chosen bodies of law. In Swiss law, for example, there is debate over the relationship between Article 39(2) CISG, which provides that the buyer loses the right to rely on a lack of conformity of the goods if he does not give the seller notice thereof at the latest within a period of two years from the date on which the goods were actually handed over to the buyer, and the shorter limitation period of one year from delivery as provided in Article 210 of the Swiss Code of Obligations[30] (CO).[31] This debate can be avoided altogether by

[30] *Bundesgesetz vom 30. März 1911 betreffend die Ergänzung des Schweizerischen Zivilgesetzbuches (Fünfter Teil: Obligationenrecht)/Loi fédérale du 30 mars 1911 complétant le code civil suisse (Livre cinquième: Droit des obligations)/Legge federale del 30*

choosing Swiss law to the exclusion of the CISG. Thus, an international sales contract drafted by Swiss lawyers will typically include a clause such as the following:

> "This Agreement and all business concluded in execution of this Agreement shall be exclusively governed by, construed and enforced in accordance with the substantive laws of Switzerland without regard to principles of conflicts of laws; the UN Sales Convention on Contracts for the International Sale of Goods dated April 11, 1980 (CISG) shall be excluded."

## II. The CISG's Impact on Scholars

### 1. Attention Devoted to the CISG in Legal Education

On a smaller and less formal scale, the authors also conducted a survey[32] amongst several university professors currently teaching private law and/or conflict of laws at Swiss law schools.[33] The aim of this survey was to determine the importance of the CISG in the respective law school's curriculum. Our theory was that one of the reasons the Convention is so often excluded in Swiss practice may be that it receives little attention at law school, with the result that students are not familiar enough with the CISG to feel comfortable applying it once they become attorneys.

The results of this survey confirmed the first author's own teaching experience at the University of Basel, namely that there are marked differences between law professors when it comes to the amount of time spent teaching law students about the CISG. In general, the CISG is introduced to students

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*marzo 1911 di complemento del Codice civile svizzero (Libro quinto: Diritto delle obbligazioni)*, SR 220. For the official German, French and Italian language versions of all Swiss Federal Acts, including the CO, see http://www.admin.ch/ch/d/sr/sr.html.

[31] On this problem and its possible solutions, see *Schwenzer*, in: Schlechtriem/Schwenzer, Commentary, Art. 39 paras 28-29 and *Will*, Meine Grossmutter in der Schweiz …: zum Konflikt von Verjährung und Rügefrist nach UN-Kaufrecht, in: Rauscher/Mansel (eds.), Festschrift für Werner Lorenz zum 80. Geburtstag, 2001, pp. 623 *et seq.*, with further references.

[32] The French language version of the questionnaire is attached at the end of this report; see annex II.

[33] Switzerland currently has nine universities with own law faculties, namely Basel, Berne, Fribourg, Geneva, Lausanne, Lucerne, Neuchâtel, St. Gallen and Zurich.

in classes on Swiss contract law ("Law of Obligations, Special Part"[34]), which is a compulsory subject at bachelor level. However, the amount of time actually spent lecturing on the CISG in these classes differs greatly, ranging from 1 lecture hour to 10-15 lecture hours, depending on who is teaching the class. Not surprisingly, those law professors who are involved in coaching their law school's team for the Willem C Vis International Commercial Arbitration Moot[35] also place particular emphasis on the CISG in their lectures.

The popularity of questions on the CISG in oral or written examinations also differs greatly between law schools and law professors. In response to question 5 of our survey,[36] which asked whether and how often participants raised CISG issues in their exams, some professors stated that yes, of course they set exam questions on the CISG, and regularly.[37] Others reported that they never or hardly ever did. One explanation given for this reticence was that students "couldn't cope with the CISG very well".

At some law schools, e.g. Basel, Geneva and Lausanne, special attention is paid to the CISG in masters degree classes on international sales law or international commercial law. The Convention is also discussed in classes on comparative private law. Moreover, many Swiss law schools have a long-standing tradition of participating in the Annual Willem C Vis International Commercial Arbitration Moot, e.g. Basel (since 1994/1995) and Geneva (since 1998/1999),[38] and a very successful one at that.[39] Some law

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[34] *Obligationenrecht, Besonderer Teil/Droit des obligations, Partie spéciale/Diritto delle obbligazioni, Parte speciale*.

[35] In the 15th Willem C Vis Arbitration Moot (2007-2008), every Swiss law school participated except one.

[36] See annex II.

[37] For two interesting examples of written CISG examination questions set at the University of Berne in 2003 and 2007, see *Koller/Stalder*, Verunreinigter Paprika – ein Prüfungsfall aus dem Bereich des UN-Kaufrechts (CISG) mit prozessualen Aspekten, recht 2004, 10 *et seq*., and *Koller*, The Burning Fireball: Bachelor-Klausur im Privatrecht, iusfull.ch 2007, 236 *et seq*. (available at http://www.iusfull.ch/letztehefte/documents/der_fall_Koller.pdf).

[38] For lists of all teams ever to have participated in the Moot since the very first Willem C Vis International Commercial Arbitration Moot in 1993-1994, see http://www.cisg.law.pace.edu/cisg/moot/mootlist.html#14.

[39] See also fn. 35, above. For the many prizes and distinctions won, e.g., by the different teams and individuals representing the University of Basel over the years, see http://ius.unibas.ch/lehre/dozierende/privatrecht/eigene-seiten/person/fountoulakis_christiana/seite/2035/. For Swiss "field reports" on the Moot, see, e.g., *Fountoulakis/Reinhard*, Der sechste Willem C Vis International Commercial Arbitration Moot, recht 2000, 37 *et seq*.; *Suter et al.*, Erfahrungsbericht zum Willem C Vis Moot Court, Jusletter of 27 June 2005.

school professors also touch upon the CISG in their classes on private international law, albeit only briefly.

## 2. Attention Devoted to the CISG in Legal Research

In civil law jurisdictions, the law is traditionally considered a hermeneutical science, and legal scholars devote a great deal of attention to new sets of rules. To date, more than 100 contributions from roughly 50 Swiss scholars[40] can be found which are directly concerned with the CISG, comprising commentaries, doctoral theses, articles in collected works and legal journals and case annotations. These contributions either focus on the Convention itself or compare its provisions with domestic laws or uniform projects such as the UNIDROIT Principles on International Commercial Contracts[41] or the Principles of European Contract Law.[42] The vast majority of such texts were published after the Convention entered into force in Switzerland on 1 March 1991.[43] Today, the leading commentary[44] on the CISG in German and English language is edited by a faculty member of a Swiss law school, namely *Ingeborg Schwenzer* (University of Basel). Professor Schwenzer also operates the database www.cisg-online.ch which features CISG case law, various materials on the CISG and CISG-related legal texts.

The CISG is also discussed in many standard treatises on Swiss domestic law, although both the precise scope of discussion and the way in which it is broached vary greatly between authors. The topic is generally discussed in treatises on domestic contract law, either briefly[45] or at length.[46] In treatises on the general part of the Swiss law of obligations, i.e., that part which deals, *inter alia*, with formation and validity of contracts and delay in per-

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40 For the meaning of the term "Swiss scholar" in this report, see fn. 11, above.

41 See http://www.unidroit.org/english/principles/contracts/main.htm.

42 See http://frontpage.cbs.dk/law/commission_on_european_contract_law.

43 See fn. 2, above.

44 *Schwenzer* (ed.), Schlechtriem/Schwenzer, Kommentar zum Einheitlichen UN-Kaufrecht: das Übereinkommen der Vereinten Nationen über Verträge über den internationalen Warenkauf (CISG), 5th ed., Munich 2008; *Schlechtriem/Schwenzer* (eds.), Commentary on the UN Convention on the International Sale of Goods (CISG), 2nd English edn., Oxford 2005.

45 Cf., e.g., *Huguenin*, Obligationenrecht, Besonderer Teil, 3rd ed, Zurich 2008; *Guhl et al.*, Das schweizerische Obligationenrecht mit Einschluss des Handels- und Wertpapierrechts, 9th ed., Zurich 2000.

46 Cf., in particular, *Honsell*, Schweizerisches Obligationenrecht, Besonderer Teil, 8th ed., Berne 2006; *Keller/Siehr*, Kaufrecht: Kaufrecht des OR und Wiener UN-Kaufrecht, 3rd ed., Zurich 1995; cf. also *Tercier*, Les contrats spéciaux, 3rd ed., Zurich 2003.

formance and payment (Articles 1-183 CO[47]), comparisons between the CISG and the Swiss Code of Obligation are often drawn, albeit selectively.[48] Comparisons with the CISG are also made in commentaries on Swiss domestic law.[49]

A closer look at the authors of Swiss contributions on the CISG shows that the scholars who pay particular attention to the CISG are primarily contract law scholars. Swiss doctoral theses on the CISG are also generally supervised by contract scholars.[50] As the Convention consists of rules of substantive law, the heightened interest of contracts scholars in the CISG seems only natural. Nonetheless, several contracts scholars in Switzerland also conduct research on conflict of laws, so that a distinction between the two cannot always easily be drawn. In any case, contracts scholars working on the CISG are unlikely to have a "pure" substantive law focus.

On the other hand, conflict of law issues relating to the CISG are usually discussed only in connection with substantive law issues, e.g. where a substantive law issue is not governed by the CISG. Conflict of law scholars come into their own, however, when jurisdictional issues are raised in connection with contracts governed by the CISG. Thus, much attention has been devoted to the interplay between Article 31 CISG and Article 5(1) of the Lugano Convention.[51] Article 5(1) of the Lugano Convention establishes jurisdiction of the courts at the place of performance of the contractual obligation in question. If the "obligation in question" is the seller's delivery obligation under Article 30 CISG, then the place of performance of such obligation shall be determined in accordance with Article 31 CISG.[52] In the European Union, the question of the CISG's influence on jurisdic-

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47 Cf. the reference in fn. 30, above.

48 See, e.g., *Gauch et al.*, Schweizerisches Obligationenrecht, Allgemeiner Teil, 8th ed., Zurich 2003, para 3159, on the uniform concept of breach of duty under the CISG as opposed to the distinction drawn in Swiss domestic law between impossibility (*Unmöglichkeit*), delay in performance (*Schuldnerverzug*) and liability for non-conformity (*Mängelhaftung*). Cf. also *Koller*, Schweizerisches Obligationenrecht, Allgemeiner Teil, Berne 2006.

49 Cf., e.g., *Thévenoz et al.*, Code des obligations: Commentaire ("Commentaire Romand"), Basel 2003 (see, in particular, the commentaries on Articles 201, 203 and 215 CO); *Schönle*, Kauf und Schenkung, Zürcher Kommentar, 3rd ed., Zurich 1993.

50 Cf., e.g., *Burkart*, Interpretatives Zusammenwirken von CISG und UNIDROIT Principles, Basel 2000 (doctoral thesis supervised by Professor *E.A. Kramer*, University of Basel).

51 Lugano Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters of 16 September 1988. For the text of the Convention, see http://curia.europa.eu/common/recdoc/convention/en/c-textes/lug-idx.htm.

52 See *Widmer*, in: Schlechtriem/Schwenzer, Commentary, Art. 31 paras 89 *et seq.*

tional issues has become more controversial with the coming into force of the so-called "Brussels I Regulation",[53] which has to a large extent replaced the former Brussels Convention.[54] Although Switzerland is not a member of the European Union, similar controversies will arise with the coming into force of the revised Lugano Convention,[55] which is modelled on the Brussels I Regulation.[56]

## 3. The Scholars' Impact on Legal Practice

In determining the impact of scholars on the awareness and application of the CISG in Switzerland, three situations must be distinguished: (1) the impact of scholars on legal education, (2) the impact of scholars on legal practice, and (3) the impact of scholars on court decisions.

As pointed out abore,[57] a majority of practicing lawyers in Switzerland come into contact with the CISG at law school. The scholarly influence on legal education has a direct bearing on legal practice. It also seems probable that the application of the CISG by tomorrow's lawyers, judges and arbitrators will be strongly influenced by the writings of such professionals' former academic teachers. Accordingly, as far as awareness of and familiarity with the CISG amongst young legal professionals are concerned, scholars play a central role.

With regard to scholarly impact on court decisions, it is important to remember that in Switzerland (as indeed in most civil law jurisdictions), courts in their decisions refer not only to case law, but also cite extensively to scholarly writings. These citations are not limited to contributions which support the court's reasoning; rather, they also comprise texts that argue the opposite position. Scholarly contributions thus play an important part in

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53 Council Regulation (EC) No 44/2001 of 22 December 2000 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters; for the text of the Regulation, see http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32001R0044:EN:NOT.

54 On the controversies surrounding the interplay between Article 31 CISG and the new Art. 5(1)(b) Brussels I Regulation, cf. *Widmer,* in: Schlechtriem/Schwenzer, Commentary, Art. 31 paras 93 *et seq.*

55 It is not yet certain when the revised Lugano Convention will enter into force in Switzerland, although it certainly will be later than 1 January 2010 (see http://www.bj.admin.ch/bj/en/home/themen/wirtschaft/internationales_privatrecht/lugano_uebereinkommen/0.html).

56 Cf., e.g., *Markus,* Der Vertragsgerichtsstand gemäss Verordnung "Brüssel I" und revidiertem LugÜ nach der EuGH-Entscheidung Color Drack, Zeitschrift für schweizerisches Recht (ZSR) 2007 I, 319 *et seq.*

57 Cf. I.3, II.1.

helping to adjust the CISG to new developments in international trade and in supporting courts to strive for a correct application of the Convention.

## III. The CISG's Impact on Courts

### 1. Style of Court Decisions

The CISG-online database[58] currently lists 142 Swiss court decisions on the CISG, 20 of which are decisions of the Swiss Federal Supreme Court. Thus, since the coming into force of the CISG on 1 March 1991,[59] Swiss courts have decided an average of eight CISG-related cases per year.

As is the case in most other civil law jurisdictions, courts in Switzerland traditionally cite both to case law as well as to scholarly writings in their decisions. This was true before the coming into force of the CISG and remains so to this day. A Swiss court will usually refer to other court decisions if a similar question has already been dealt with by other courts and then, in a second step, state that this reasoning is in line with the prevailing opinion in legal doctrine or, as the case may be, that it deviates from the majority view. If the issue raised in a given case has not yet been decided in case law, the court will analyse scholarly writings and refer to them in its decision. However, it will do this regardless of whether the governing law is the CISG, Swiss domestic law or, indeed, a foreign law applicable by virtue of the Swiss conflict of law rules. Thus, the coming into force of the CISG in Switzerland has not had any apparent impact on the style of court decisions.

### 2. Uniform Interpretation of the CISG

The mandate of uniform interpretation of the Convention set forth in Article 7(1) CISG has presented Swiss courts with some problems. Whilst progress has been made, there remain areas where consistency with case law from other jurisdictions has not been achieved. A notorious example is the "reasonable period of time" within which the buyer must notify the seller of the non-conformity of goods under Article 39(1) CISG. The corresponding provision within the Swiss Code of Obligations (CO)[60] is Article 201 CO. However, unlike Article 39(1) CISG, Article 201 CO requires that notice be given to the seller immediately (*sofort/sans délai/subito*) after the buyer has (or ought to have) discovered the lack of conformity. In this respect, Swiss

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58 See http://www.cisg-online.ch.

59 See the reference in fn. 2, above.

60 See the reference in fn. 30, above.

law is even harsher on the buyer than Austrian[61] and German[62] law, for unlike in those countries, the duty to give immediate notice under Art. 201 CO is not restricted to commercial sales where both parties are merchants.[63] Because of the requirement that the buyer notify the seller immediately, a buyer may lose the right to rely on a lack of conformity already after a very short period of time.

The restrictive approach adopted by the Swiss Code of Obligations has also influenced Swiss courts deciding cases governed by the CISG. In the same way as courts from Germany and Austria, Swiss courts have interpreted – and sometimes still interpret – the term "reasonable period" under Article 39(1) CISG very strictly.[64] In contrast, courts in other countries tend to grant considerably longer periods.[65] In 1995, *Ingeborg Schwenzer* attempted

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61 Cf. §§ 377, 378 of the Austrian Commercial Code (*Handelsgesetzbuch*).

62 Cf. § 377 of the German Commercial Code (*Handelsgesetzbuch*).

63 See, e.g., decision of the Swiss Supreme Court, 28 May 2002, CISG-online 676 (para 2.1.2); cf. also *Schwenzer*, in: Schlechtriem/Schwenzer, Commentary, Art. 39 para 4.

64 See Commercial Court Zurich (Switzerland), 26 April 1995, CISG-online 248 (Floatarium: 24 days considered too late); District Court Cuneo (Italy), 31 January 1996, CISG-online 268 (sports clothing: 23 days considered too late); Commercial Court Zurich (Switzerland), 30 November 1998, CISG-online 415 (lambskin jackets: notice after more than 14 days considered too late). See also the references in fn. 72, below.

65 See *Shuttle Packaging Systems, L.L.C. v. Jacob Tsonakis, INA S. A. and INA Plastics Corporation,* U.S. Dist. Ct. (W. D. Mich.), 17 December 2001, CISG-online 773 = 2001 U.S. Dist. LEXIS 21 630: In case of complex machines, the buyer cannot be expected to notify the seller within a few weeks; *TeeVee Toons, Inc. (d/b/a TVT Records) & Steve Gottlieb, Inc. (d/b/a Biobox) v. Gerhard Schubert GmbH,* U.S. Dist. Ct. (S.D.N.Y.), 23 August 2006, CISG-online 1272 (approx. two months considered reasonable without further explanation). For an example from Chinese arbitration see CIETAC, 3 June 2003, CISG-online 1451 ("it is only nine months"). See also Court of Appeal Colmar (France), 24 October 2000, CISG-online 578 (adhesive foil: approx. six weeks), and comment by *C. Witz,* D. 2002, Somm. 393; Court of Appeal Versailles (France), 29 January 1998, CISG-online 337 (six to eleven months). In contrast, two months or longer were considered unreasonable, see Court of Appeal Paris (France), 6 November 2001, CISG-online 677 = D. 2002, 2795, with comment by *C. Witz*, Court of Appeal Aix-en-Provence (France), 1 July 2005, CISG-online 1096 (more than two months), Court of Appeal Gent (Belgium), 4 October 2004, CISG-online 985 (nine months); District Court Veurne (Belgium), 15 January 2003, CISG-online 1056 (nearly three months); District Court Rimini (Italy), 26 November 2002, CISG-online 737 (six months); Court of Appeal La Coruña (Spain), 21 June 2002, CISG-online 1049 (two and a half months); District Court Hasselt (Bel-

to find a compromise between these different approaches by proposing a one-month period as the average notification period for durable goods, a suggestion which has now become known around the world as the "noble month".[66] Shortly thereafter, the German Federal Supreme Court referred to this average one – month period, albeit guardedly,[67] and again, less guardedly, on other occasions.[68]

Today, some Swiss courts also follow the "noble month" concept.[69] The determination of the "reasonable period of time" under Article 39(1) CISG is thus an example of how courts may take a step towards uniform interpretation of the CISG. Nonetheless, in Switzerland as well as in other jurisdictions with seller-friendly notice provisions, there is still a risk of falling back into old habits. The Austrian Supreme Court, for example, has repeatedly insisted on an overall period for examination under Article 38 CISG and notification under Article 39 CISG of not more than 14 days in total,[70] a

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gium), 6 March 2002, CISG-online 623 (two months); Maritime Commercial Court (Denmark), 31 January 2002, CISG-online 868 (seven months); District Appeal Court Arnhem (Netherlands), 27 April 1999, CISG-online 741 (two years).

66 *Schwenzer,* in: Schlechtriem (ed.), Kommentar zum Einheitlichen UN-Kaufrecht (CISG), 2nd German edn., Munich 1995, Art. 39 para 7. For a historical view see *Schwenzer,* The Noble Month (Articles 38, 39 CISG) – The Story Behind the Scenery, 7 European Journal of Law Reform (2005), 353 *et seq.*

67 German Federal Court (*Bundesgerichtshof*), 8 March 1995, CISG-online 144 (New Zealand mussels).

68 German Federal Court, 3 November 1999, CISG-online 475; see also German Federal Court, 30 June 2004, CISG-online 847 (more than 2 months considered unreasonable).

69 Cf. Swiss Supreme Court (*Bundesgericht/Tribunal fédéral/Tribunale federale*), 13 November 2003, CISG-online 840, upholding the judgment of the Court of Appeal Lucerne (Switzerland), 12 May 2003, CISG-online 846. See also Court of Appeal Lucerne (Switzerland), 8 January 1997, CISG-online 228.

70 Supreme Court of Austria (*Oberster Gerichtshof*), 15 October 1998, CISG-online 380; Supreme Court of Austria, 27 August 1999, CISG-online 485; Supreme Court of Austria, 14 January 2002, CISG-online 643.

position that is supported by several German-speaking authors.[71] Several Swiss courts have been equally strict.[72]

## IV. The CISG's Impact on Legislators

To date, the CISG has not had any apparent impact on Swiss legislators,[73] nor has it triggered or influenced Swiss law reform projects. In recent years, discussions on law reform in Switzerland have focused, *inter alia*, on penal law, tort law, corporate law, and issues surrounding non-marital relationships rather than on contract law. Perhaps if scholars were to refer to the Convention more often as a role model in their contributions on Swiss domestic law, this might provide an incentive for courts and legislators to harmonise such law with the CISG.

## V. Conclusion, or: What Scholars Should – and Could – Do

Seventeen years after the coming into force of the CISG in Switzerland, two conclusions can be drawn: First, awareness of the CISG's existence in Switzerland is high. Second, despite this awareness, the CISG has had more impact on scholars than on legal practice.

These conclusions are supported by the responses to our surveys. The abundant literature available in German language, decisions by Swiss courts[74] and, in particular, university education have ensured that a majority of practicing lawyers and students currently enrolled in Swiss law schools are aware of the CISG. Indeed, in our survey amongst practicing lawyers, a clear majority of participants stated that they had basic or even good knowledge

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71 *Magnus*, in: Staudinger (ed.), Kommentar zum Bürgerlichen Gesetzbuch mit Einführungsgesetzen und Nebengesetzen, Wiener UN-Kaufrecht (CISG), 13 edn., Berlin 2005, Art. 39 para 49; *Kramer*, Rechtzeitige Untersuchung und Mängelanzeige bei Sachmängeln nach Artt. 38 und 39 UN-Kaufrecht – eine Zwischenbilanz, in: Kramer/Schuhmacher (eds.), Beiträge zum Unternehmensrecht, Festschrift für Hans-Georg Koppensteiner zum 65. Geburtstag, pp. 617-628.

72 See District Court Appenzell Ausserrhoden (Switzerland), 9 March 2006, CISG-online 1375 ("one week generally considered to be the appropriate period for notice"); District Court Schaffhausen (Switzerland), 27 January 2004, CISG-online 960 ("average of one week generally considered appropriate"); Commercial Court St. Gallen (Switzerland), 11 February 2003, CISG-online 900 (only a few days for examination, notice after three months therefore unreasonable).

73 On the distribution of legislative power in Switzerland, see fn. 12, above.

74 See III.1, above.

of the CISG.[75] Nonetheless, when drafting sales contracts, a majority of these same lawyers prefer to exclude the CISG without further ado. Clearly, the issue is not so much one of awareness, but rather of understanding and, in a manner of speaking, of "trusting" the Convention.

Thus, Swiss scholars now need to address why the Convention is regularly excluded in practice. The two main reasons given by practicing lawyers in our survey were lack of certainty and fear of undesired influences of other jurisdictions, and these motives should form the starting point for analysing the (lack of) popularity of the CISG in Switzerland.

As far as the "undesired influences"-response is concerned, it would appear that many Swiss lawyers suffer from the proverbial fear of the unknown and do not fully appreciate the advantages an application of the CISG might have. Knowledge of and familiarity with the Convention have not yet reached a level where a majority of lawyers feel confident actually working with the CISG. It seems that many lawyers perceive foreign legal ideas as detrimental to their client's legal position and assume that Swiss clients are better served by Swiss domestic law. Such assumption would, however, be based on a misconception. Swiss domestic sales law generally favours the seller, e.g. by imposing a strict notice requirement (Article 201 CO[76]) and a short limitation period (Article 210 CO[77]) for pursuing claims against the seller in case of non-conforming goods. For these very same reasons, however, Swiss domestic law is not necessarily a wise choice for buyers. Thus, the merits of the CISG over Swiss domestic law (and vice versa) may well depend on which side a lawyer is representing, a fact which is acknowledged by less than a quarter of participants in our first survey.[78] The underlying assumption of a majority of lawyers seems to be that a party's domestic law is always best for that party, and such assumption is most certainly a fallacy.

On the other hand, while the CISG is definitely more buyer-friendly than Swiss domestic law, it would be wrong to assume that the Convention places unreasonable burdens on the seller. The CISG is not only called a "neutral" law because it is equally (un)familiar to both parties, providing neither with a "home law"-advantage,[79] but also because it provides well-balanced rules for both buyer and seller. However, this balance can only be achieved in practice if scholars and courts are prepared to abandon dogmatic habits developed in their own domestic laws. Here as in other areas, more

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75 See I.2.b, above.

76 See III.2, above.

77 See I.3, above.

78 Cf. I.2.c, above.

79 See, e.g., *Fountoulakis*, The Parties' Choice of 'Neutral Law' in International Sales Contracts, 7 European Journal of Law Reform (2005), 303, 313, available at http://www.cisg.law.pace.edu/cisg/biblio/fountoulakis.html.

attention needs to be devoted to the mandate of uniform interpretation of the Convention in Article 7(1) CISG.

As pointed out above, the "lack of certainty"-response can be understood in two different ways, namely as a perceived lack of legal certainty or as the individual's feeling of insecurity due to lack of familiarity with the Convention. As far as the first possible interpretation is concerned, such perception might only be refuted through comparative research. Legal certainty is best achieved by a consistent practice of courts around the world, and such consistency requires that the mandate of uniform interpretation in Article 7(1) CISG be observed diligently. Examining how the Convention is applied in different countries and comparing such application with that of similar provisions of domestic sales laws would help identify the influence of domestic laws on the interpretation of the CISG in different countries, and this, in turn, would show whether courts in member states are complying with Article 7(1) CISG or not.

Quite recently, such research was initiated at the University of Basel in the form of the "Global Sales Law Project". The aim of this ambitious project is to give a detailed account of today's sales laws throughout the world by means of extensive comparative research. All official languages of the United Nations as well as the German language are covered by the project team, which consists of a core team of seven research assistants from Germany, Australia, Mexico, Cameroon, Egypt, China and Georgia, respectively. The second author of this report is a member of the project team and one of its two senior assistants. The team has already started its research of national sales laws.[80]

As far as the second possible interpretation of the "lack of certainty"-response is concerned, the key to change lies in the hands of law professors. The responses to our survey show that law schools are the primary source of knowledge of the CISG. It seems more than probable that the extent to which the CISG is taught at law school will have a direct impact on its popularity with tomorrow's practicing lawyers. Although the CISG appears to be a compulsory subject at all Swiss law schools, the time actually spent discussing its rules and, in particular, its advantages over domestic law varies greatly. However, a student who has had only minimal contact with the CISG at law school will hardly choose the Convention over Swiss domestic sales law once he or she becomes a legal practitioner. Thus, in the long run, devoting more lecture and examination time to the CISG in law school is likely to be the most effective method of increasing the CISG's practical importance in Switzerland.

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[80] For further information, see http://www.globalsaleslaw.org. The project is led by faculty member Ingeborg Schwester.

# Annex I

Questionnaire concernant la pertinence pratique de la
Convention des Nations Unies du 11 avril 1980 sur les contrats de vente internationale de marchandises (CISG) en Suisse

Insérez directement dans le document un x à la réponse correspondante!

1) Le pourcentage des contrats de vente internationaux dans votre activité est de:
   - ___ 0 % (→ allez aux questions (3) – (5) et (11) – (12))
   - ___ moins de 10%
   - ___ moins de 25 %
   - ___ moins de 50%
   - ___ plus de 50%

2) Si vous avez indiqué à la question (1) plus de 0%: vous consacrez-vous plutôt à la rédaction de contrats ou plutôt à la conduite de procès?
   - ___ Essentiellement conduite de procès
   - ___ Essentiellement rédaction de contrats
   - ___ les deux domaines dans une même proportion

3) La CISG vous est-elle familière?
   - ___ Matière inconnue
   - ___ En ai entendu parler
   - ___ Connaissances de base
   - ___ Bonnes connaissances
   - ___ Activité dominante

4) Où avez-vous appris à connaître la CISG?
   - ___ Par l'enseignement universitaire
   - ___ Dans la pratique (tribunal / cabinet d'avocat)
   - ___ Formation continue
   - ___ Publications
   - ___ Autrement/ailleurs:
     _____

5) Vous informez-vous des développements dans ce domaine juridique? (plusieurs réponses possibles)

___ Je m'y intéresse lors d'un cas concret
___ Lis régulièrement des publications, etc.
___ Participation à des conférences
___ Participation au Willem C Vis International Commercial Arbitration Moot (Viennes ou Hong Kong) en tant que Participant/Arbitre/Coach
___ Non

6) Soumettez-vous, par le biais d'une clause désignant le droit applicable, des contrats de vente à la CISG, par ex. dans des «Conditions Générales»?

___ Oui, régulièrement
___ Oui, mais rarement
___ Dépend du fait si mon client est vendeur ou acheteur
___ Non

7) Excluez-vous l'application de la CISG dans les contrats, par ex. dans des «Conditions Générales»?

___ Oui, régulièrement
___ Oui, mais rarement
___ Dépend du fait si mon client est vendeur ou acheteur
___ Non

8) Si vous excluez l'application de la CISG, pour quelle raison? (plusieurs réponses possibles)

___ Incertitude dans ce domaine
___ Eviter l'application de principes normatifs ressortissant à des ordres juridiques étrangers
___ L'application n'est pas dans l'intérêt de mon client
___ L'application de la CISG est difficilement imposable lors de négociations
___ Souhait du client
___ Autre(s):
_____

9) Comment réagissez-vous, si la partie adverse souhaite l'application de la CISG au contrat?

___ Je refuse généralement
___ J'accepte en général
___ Dépend si mon client est vendeur ou acheteur
___ N'arrive pratiquement jamais

10) Comment réagissez-vous si la partie adverse souhaite exclure l'application de la CISG?

___ Je refuse généralement
___ J'accepte en général
___ Dépend si mon client est vendeur ou acheteur
___ N'arrive pratiquement jamais

11) Quels avantages trouvez-vous à l'application de la CISG? (plusieurs réponses possibles)

___ Est plus facilement imposable lors de négociations que le droit national
___ Contribue à la transparence du commerce avec des parties étrangères
___ Est souvent plus bénéfique aux clients
___ Est plus bénéfique aux acheteurs
___ Autre(s):
_____
___ Aucun

12) Finalement, combien de questionnaires de ce type avez-vous déjà reçu(s) ?

___ Aucun jusqu'à présent
___ De plus en plus
___ De moins en moins

## Annex II

### Questionnaire concernant l'importance de la Convention des Nations Unies du 11 avril 1980 sur les contrats de vente internationale de marchandises (CISG) dans l'enseignement universitaire en Suisse

1) Est-ce que votre université participe au "Willem C Vis International Commercial Arbitration Moot" et, le cas échéant, depuis quand y participe-t-elle?

2) Est-ce que la CISG fait partie des sujets d'examen à votre université?

3) Dans quel(s) cour(s) la CISG est-elle enseignée à votre université? (droit des obligations partie générale/spéciale; droit international privé etc.)? Est-ce qu'il s'agit là de cours obligatoires ou facultatifs?

4) Combien de temps est dédié à la CISG dans le cadre des cours obligatoires à votre université (estimation des heures d'enseignement)?

5) Lors des examens universitaires, vous arrive-t-il de poser des questions sur la CISG? Le cas échéant:
   - s'agit-il d'examens par écrit ou oraux?
   - de telles questions sont-elles posées rarement? régulièrement? souvent?

# United Kingdom

*Camilla Baasch Andersen*

## Introduction

With the 1980 UN Convention on Contracts for the International Sale of Goods (CISG) in force in 70 States from all parts of the world at the time of writing, a commonly quoted statistic for its application is that it applies to countries representing ¾ of the world's trade.[1] CISG states number both industrial nations and developing states, and of the former the majority of States can be said to have ratified. For a number of years, two major industrial nations have been notably absent from the list of CISG member states: Japan and the United Kingdom. But now, with an imminent Japanese ratification of the CISG,[2] the UK is soon to be the lone industrial state, as well as the lone EU state, absent from the CISG club.

The relationship between the CISG and the UK is an interesting one, reminiscent of a recalcitrant romantic entanglement. While the UK was instrumental in shaping the CISG,[3] and has voiced a decision in principle to ratify,[4] the date is never set, and the knot never tied. Much has been written

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1 Taken from the CISG database at: www.cisg.law.pace.edu/

2 *The CISG will enter into force in Japan on 1st August 2009. For more information on the ratification progress of the CISG in Japan, see H. Sono,* Japan's Accession to the CISG: The Asia Factor, Journal of Japanese Law Vol 13 No. 21 (2008).

3 The UK were instrumental in shaping the Common Law compromises of the CISG, and draft provisions which specifically accommodate Common Law jurisdictions – a prime example is Article 28 CISG which allows a judge to refrain from utilising the remedy of specific performance unless he/she would do so under his/her own domestic legal system.

4 According to *The Hon. Justice James Douglas,* Lord Sainsbury, the Under Secretary of State for the Department of Trade and Industry in the House of Lords has stated that: "the United Kingdom intends to ratify the convention, subject to the availability of parliamentary time" on Feb 7th 2005. See Arbitration of the International Sale of Goods Disputes under the Vienna Convention available at http://cisgw3.law.pace.edu/cisg/biblio/douglas.html. This position is also reflected by the Department of Trade and Industry (UK), United Nations Convention on Contracts for the International Sale of Goods (Vienna Sales Convention), position paper (London: Department of Trade and Industry, February 1999).

on why the UK has not ratified the CISG,[5] and it is worth exploring this reasoning.

This report is thus comprised of two halves.

The first half seeks to address those of the questions posed for the national reporters which apply to the non-ratifying UK, on the basis of questioning conducted amongst scholars and practitioners in England.[6]

The latter half of the report will attempt to identify the current ratification status of the CISG in the UK, addressing some (well known) academic territory briefly, but also taking some practical considerations, partly based on a letter composed for this report by the Department for Business, Enterprise and Regulatory Reform (BERR), formerly the Department of Trade and Industry (DTI).

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5 See amongst others: *Bridge*, Uniformity and Diversity in the Law of International Sale, Pace International Law Review 15 (Spring 2003) 55-89, *Bridge*, The Bifocal World of International Sales: Vienna and Non-Vienna in *Cranston ed* Making Commercial Law (Oxford: Oxford University Press 1997), pp 277-96, *Moss*, Why the United Kingdom Has Not Ratified the CISG, Journal of Law and Commerce (2005) 1 from 483, *Nicholas*, The Vienna Convention on International Sales Law, Law Quarterly Review 105 (1989) 201-243, *Mullis*, Twenty-Five Years On – The United Kingdom, Damages and the Vienna Sales Convention, Rabels Zeitschrift für ausländisches und internationals Privatrecht (RabelsZ) 71 (2007) 35-51, *Williams*, Forecasting the Potential Impact of the Vienna Sales Convention on International Sales Law in the United Kingdom, Pace Review of the Convention on Contracts for the International Sale of Goods (CISG), Kluwer Law International (2000-2001), *Takahashi*, Right to Terminate (Avoid) International Sales of Commodities, Journal of Business Law 102 (2003), *Lee*, The UN Convention on Contracts for the International Sale of Goods: OK for the UK? Journal of Business Law (1993) 131-148, *Zeller*, Commodity Sales and the CISG in *Andersen & Schroeter (eds,)* Sharing International Commercial Law across National Boundaries 627-640 (2008). See also the thought-provoking (short) newspaper articles: *Wheatley*, Why I oppose the Winds of Change, The Times 27 March 1900 and the reply *Goode*, Why Compromise Makes Sense, The Times 22 May 1990.

6 The universities and law firms consulted will remain anonymous, at their (majority) request. The survey has only been conducted in England, omitting Wales, Ireland and Scotland. The mixed jurisdiction of Scotland represents a different set of problems which – for the purposes of this report – are conveniently overlooked.

# I. National Report – England (representing UK)

## 1. CISG's impact on practicing lawyers

The general awareness of the CISG in England among most practicing lawyers is – predictably – relatively low. A number of high profile professional trade law specialists are familiar with the existence of the CISG, but not with its content – a fact of unfamiliarity which may spawn further disinterest in seeing it ratified. However, a number of trade specialists form leading law firms in London are taking a special interest in the CISG, not just because of the possibility of imminent ratification, but because of two emerging trends:

a) English cases on the CISG are appearing as the CISG finds its way to the English Courts. Although this might well happen where conflict of laws rules appoint the CISG in trade disputes, no such case has been reported.[7] But two cases are reported on the CISG database, where the CISG is taken as an expression of sound commercial practice. The savvy trader is thus obliged to know it as the applicable law of a potential trade partner.
and
b) The notion that a client might have been better advised to apply a law other than the standard choice of the Sales of Goods Act 1979 is putting the duty to use the CISG in a new light. It has been discussed in CISG literature whether a lawyer can be liable for advising an opt-out of the CISG where the CISG was a better choice for the client. But can this liability extend to a liability for failure to nominate the CISG where it would not normally apply, and would have been a better choice? If a client would have been in a better position if the CISG had been chosen as applicable law (a choice which English courts would be highly likely to respect by way of honouring party autonomy regardless of its connection with the contract or the parties), can legal council be liable for not advising it as the right choice? Even if he cannot be liable for this – which it is likely that he cannot – it is a sound commercial argument that the lawyer which can advise the best choices will be the better lawyer; and better lawyers bill more money. So good (expensive) lawyers must know all the options to advise the best options – and in some cases this necessitates knowing the CISG. This is increasingly beginning to happen in the trade sector.

Nevertheless, the majority of standard contracts and standard contract terms in the UK continue to favour the application of SOGA and English law in its entirety. This is inexorably tied to the favouring of English commercial

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7 A close call is reported in Italy 10 January 2006 District Court Padova (*Merry-go-rounds case*) at: http://cisgw3.law.pace.edu/cases/060110i3.html

courts as quick and professional dispute resolution mechanisms, and the notion that the homeward trend of English commercial courts will mean a preference for their own domestic law.

## 2. CISG's impact on scholars

### a) Law Teaching

The CISG is being overlooked in many undergraduate commercial law courses throughout England. Despite the lack of UK ratification, it is relevant to international trade for many (apparent) reasons. But numerous universities in England focus solely on the national law, especially at undergraduate level. But rather than reflect any conscious choice to overlook the CISG, this is more likely to reflect a decision to focus on domestic sales at undergraduate level due to a scarcity of time to commit to a more detailed study. Very few universities teach international sales at undergraduate level as part of commercial law – perhaps symptomatic of an isolationist approach to law, but certainly not in keeping with the climbing statistics on international transactions in commerce.

At postgraduate level, however, there is a very different picture. With the increasingly competitive market for LLM students in England, Universities are offering what students are interested in, and Commercial Law specialisation is coming first as the number one student's choice in the vast majority of English universities. This means that there is a very detailed choice and curriculum available in the leading universities who compete for the attention of the best LLM students. And the CISG is an integral part of the courses in international sales which are run in this context.

Figures for educational activity at postgraduate level involving the CISG may then cause the observer to conclude that English law students are gaining CISG knowledge. But this is a misleading conclusion. As the majority of LLM students are recruited from abroad, however, this means that the vast majority of law students being educated on the CISG in England are not English – and much of the knowledge imparted is "exported" again.

As a result of the allocation of the CISG to (almost) exclusive Postgraduate teaching, and the international composition of the average LLM classes, only a limited amount of English law students leave University with a working knowledge of the CISG. This may well affect both the popularity of the convention for ratification, and any period of adjustment as the judiciary and counsel acclimatise themselves to applying a new international sales law *if* it is ratified.

### b) Research and Writing

A handful of commercial law scholars in England have shown interest in the CISG, and expertise in writing about it. But the majority of their CISG research is not published in the UK. Scholars based in English universities who – amongst other subjects – specialise in the CISG tend to have the majority of their research in the CISG published in German or American journals.[8] The average legal professional wishing to re-educate him- or herself on general matters of law will thus only rarely stumble across scholarship on the CISG in the English journals.

On a more positive note, however, the leading textbook in England on commercial law, written by Prof Roy Goode,[9] contains a small section on the CISG in the last edition.[10] But, although this means that some information on the CISG is available widely to English students and practitioners, it is a very small section (14 pages out of 1210) and it is not cross referenced from other sections of the Trade law sections. It seems that the CISG is an oddity, something to be included in specialised sections, rather than viewed comprehensively as part of trade law. And as long as it is viewed as a niche-subject it is unlikely to obtain popular support.

The English Sales of Goods Act (SOGA) from 1979, which is based on the English common law of sales, was restated around the same time as CISG diplomatic conferences were concluding. There is no evidence, however, that the law commission found any inspiration in the CISG or made an effort to ensure compatibility, the way it happened in other domestic law legislatures (like Scandinavia). In fact, it is interesting to note that English law abandoned the concept of "fundamental breach" around the time that the CISG re-invented it.

## 3. CISG's impact on courts

As a country accustomed to shared law through the common wealth and the common law, one might expect the English courts to understand and apply the notion of shared international case law better than most others have,

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8 See e.g. the work of *Bridge, Mullis,* etc. supra fn 5, published in RabelZ, Pace review, Journal of Business Law, etc.

9 *Goode,* Commercial Law, Penguin 2004. It is worth noting that Sir Roy Goode has also served on the CISG Advisory Council, and is thus more exposed to the CISG than most English scholars.

10 With the retirement of Sir Roy Goode last year, we are unlikely to see any future editions of this excellent work.

and be more likely to embrace the global jurisconsultorium of the CISG.[11] But there is no statistical or empirical information to support this – and examples from another Common Law jurisdictions have not been encouraging in this respect, and seem to dismiss this assumption summarily. Recent studies on the jurisconsultorium have shown that more mundane factors like the re-education of the judiciary and the age of the judges has more to do with implementation of new ideas in law than the legal culture of the country in question. Italy, with its Civil law background and wonderful CISG case law track record is a good example of this.

There are, at the time of writing, only two reported cases from English Courts, applying the CISG. They are both from 2006, and both from the Court of Appeal: *ProForce Recruit Ltd v Rugby Group Ltd*,[12] and *The Square Mile Partnership Ltd v Fitzmaurice McCall Ltd*.[13] And they both share an intersesting aspect, as both are domestic cases between an English buyer and an English seller, where the judges uses the CISG Art. 8 as a source of inspiration for a reasonable rule for interpreting conduct. Although the judges in these cases appear to be different,[14] they use the exact same phrasing to justify the use of the CISG.[15] In the *ProForce* case, the judges stated:

> "In addition, careful consideration may have to be given to the aims to be achieved by contractual interpretation and the precise extent to which the law requires an objective interpretation […]. It may be appropriate to consider a number of international instruments applying to contracts. The UN Convention on Contracts for the International Sale of Goods (1980) provides that a party's intention is in certain circumstances relevant, and in determining that intention regard is to be had to all relevant circumstances, including preliminary negotiations."

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11 For more information on the Global Jurisconsultorium and the duty to share case-law and scholarship across national boundaries where laws like the CISG are shared, see *Andersen*, Uniform Application of the International Sales Law (Kluwer 2007), *Ferrari*, Have the Dragons of Uniform Law been Tamed?, in *Andersen & Schroeter (eds)*, Sharing International Commercial Law across National Boundaries (Wildy, Simmons & Hill 2008) p. 134-167, *Andersen*, The Uniform International Sales Law and the Global Jurisconsultorium, Journal of Law & Commerce Vol 24 Issue 2 (2005) p. 159-179.

12 Available at: http://cisgw3.law.pace.edu/cases/060217uk.html

13 Available at: http://cisgw3.law.pace.edu/cases/061218uk.html

14 *ProForce* was decided by Lord Justice Mummery and Lord Justice Richards, and *Square Mile* was decided by Lady Justice Arden and Lord Justice Jonathan Parker.

15 For a commentary on these decisions, see *Bonell*, The UNIDROIT Principles and CISG – Sources of Inspiration for English Courts?, Uniform Law Review (2006) p. 305.

They also apply the UNIDROIT principles in the same vein. The same wording is used in the *Square Mile* case. So, in other words, four different judges on two different occasions have found English law deficient in providing a solid rule or framework for interpreting conduct – and on both occasions the CISG has been consulted as a source of inspiration to close this gap.

This is the closest we can come to seeing any judiciary effect of the CISG in current English law. And though it may be a small step, it is indicative of the good will borne towards the CISG as an expression of good commercial sense, and the willingness of justices to supplement even domestic law with its provisions. Why, then, the lack of ratification?

## II. UK Ratification of the CISG

As national reporter for the UK, the present author is in an odd position, glaring into a crystal ball to find an answer which I have presupposed for years.

Having obtained initial legal training in Denmark – some time ago – where the CISG is the applicable law to international sales, I shall freely admit that having matured in a CISG environment, I have always questioned its non-application more than I have been looking for good reasons to ratify. I have awaited the ratification by the UK as a natural step, almost unquestioning as to why the UK would halt progress or "oppose the winds of change" as Derek Wheatley phrases it. And I am not alone in presupposing that the CISG is something the UK wants or needs. In the context of the UK and the CISG, the question for most scholars from CISG states would seem to be: "why NOT ratify?" rather than "why should England, Wales, Scotland and Ireland change its law of international sales?"

But, of course, for the English academic and practitioner in a commercial field, the question is the latter – what are the real and actual incentives to ratification? Why change that which is not broken? Why should the treasured and popular SOGA make way for the CISG?

Many academics have sought complex and intelligent answers to the question as to why the UK is so reluctant to ratify. They range from explanations regarding the superiority of the English law and incompleteness of the CISG system,[16] to issues of unsuitability of the CISG for the use in Documentary sales,[17] and unfamiliarity with the CISG system of damages.[18] I will not revisit these discussions in depth.

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16 See *Wheatley*, fn 5.

17 See *Bridge*, fn 5.

18 See *Takahashi*, fn 5.

The suitability of the CISG for international sales as a whole is, at this time, proven. And while its may seem relatively "incomplete" as a uniform law created in a transnational environment when compared to a full domestic legal system, one thing must be kept in mind: overarching legal orders are an unavailable luxury for uniform international laws, but they do not exist in a vacuum. On the arena of international commercial law, the CISG exists in a delicate relationship with national laws and legal standards, and is complemented by other international conventions and legal standards of harmonised commercial law, like INCOTERMS, Hague Visby rules, UNIDROIT, PECL, etc., all of whom exist outside any traditional nation/state hierarchy and coexist symbiotically.

Moreover, the commodities trade issue – which was always the most compelling argument against ratification – seems to have found resolution on several levels. Firstly, by acknowledging that the flexibility of application of the CISG can accommodate commodities trade in three ways; Article 6 ensures freedom to opt out, Article 9 ensures that any existing trade customs in place in the commodities trade will prevail, and Article 8 takes into consideration the intention of the parties. Secondly, Zeller and Schwenzer have suggested solutions to the remedial issues with commodities trade within the CISG, supplemented with INCOTERMS, on the basis of existing CISG caselaw. They both make a powerful argument to the effect that views which consider the CISG unsuitable for commodities trade is an erroneous "preconceived domestic view".[19]

But, in fact, regardless of the numerous ruminations on the reason behind the resistance against the CISG, there is no effective *opposition* to the CISG in the UK. The position of the government is not opposing ratification. The green light for ratification was given ten years ago in 1998 – but it is not high priority to implement this decision, and has been beset with unforeseen obstacles.

A succinct article by Sally Moss of the former Department of Trade and Industry (now the BERR) outlined the position very clearly in 2004: is has simply not been a parliamentary priority and there has not been sufficient support to push ratification through.[20] As Mike Hayes of the BERR writes, in a letter kindly prepared for me for the use of this report:

> "As you know the Department has undertaken three consultations on UK accession and a decision was taken in 1998 to legislate to implement the Convention. However, due to unforeseen circumstances this momen-

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[19] See *Zeller*, fn 5 at p. 632-633, and *Schwenzer* The Danger of Domestic Pre-Conceived Views with Respect to the Uniform Interpretation of the CISG: The Question of Avoidance in the Case of Non-Conforming Goods and Documents, Victoria University of Wellington Law Review Vol 36. No 4, 795.at 800 (2005).

[20] See *Moss*, fn 5.

tum was lost. Last year we decided to look at this matter again and began an informal evidence gathering exercise."

As many will know, the unforeseen circumstance he refers to is the illness of the Lord who was to carry the suggestion to ratify to parliament. Since then, a non-parliamentary route has been considered (as Parliamentary commitments and a busy timetable made scheduling for this low-priority request difficult), but this non-parliamentary route has recently been abandoned, however. What is sought now is popular support to make the decision to ratify an interesting one, politically.

And this is where we see the most effective opposition of all – a lack of political momentum.

With no actual opposition, there is no battle to fight, no persuasion to make. The UK is happy, in principle, to embrace the CISG. It is where the decision requires action that the lethargic stumbling block is found. The decision to implement may well be made, but there is not sufficient interest to take this decision forward, there is no momentum behind it.

This lack of momentum re-opens the point of my initial musings on the approach we take to the issue of the UK and the CISG. The UK has decided to ratify because it saw no reason not to. But because there is no compelling incentive to actually ratify, there is no priority in realising this decision. And unless actual advantages of ratification are found, this delay for lack of momentum could be perpetual.

Advantages to CISG ratification are numerous: join the CISG and help shape its autonomous terms, encourage trade by removing costly negotiations and sharing substantive law. But a more pressing argument emerges: as the Chinese market expands, and matures to a level of confidence and innovation, it is showing a preference for the CISG which has made itself felt amongst its trading partners.[21] If the UK wishes to be part of the growing economic opportunities that the CISG brotherhood represents, it needs to get on board. But the UK already knows this, so clearly, the above reasons are not compelling enough to make ratification a priority.

My crystal ball is foggy – we may very well be facing a stalemate, and this slow starter may be a non-starter after all. Despite any lack of ill will towards the CISG, there does not seem to be sufficient good will to push things forward.

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[21] Hiroo Sono attributes the Japanese decision to ratify (which, like the UK has also been stalemated on the issue for many years) largely to what he call "the Asia Factor" and a need to be part of the emerging Chinese trade market, see *H. Sono* fn 5.

# United States of America

*Alain A. Levasseur*

The two questions we have chosen to answer out of the four asked by Professor Franco Ferrari, the General Reporter, have led us to pursue the extensive research and analysis undertaken up to the month of November 2004 by H.M. Flechtner in "The CISG in US Courts: The Evolution (and Devolution) of the Methodology of Interpretation."[1] After presenting a summary of Professor Flechtner's article in lieu of an Introduction to our survey, we will report on the questions asked regarding the CISG's impact on US Courts (Part I) and the CISG's impact on US legislation (Part II).

## Introduction

The federal courts did not truly begin to make use of the CISG until ten years after the USA has ratified the CISG which entered into force in the United States on Jan.1,1988. The main point of interest that can be found in U.S. federal cases on the CISG is the methodology of the federal courts in their interpretation and implementation of the Convention. As H. Flechtner states *"CISG decisions from U.S. courts have not exhibited a great deal of enthusiasm for consulting foreign authority."* When some U.S. federal courts did consult foreign commentators of the CISG and foreign cases on the same convention, one can only conclude that most of these U.S. cases turned inward to use 'domestic' cases and authors. *"The examples of laudable interpretative methodology in U.S. caselaw on the CISG are the exceptions rather than the rule."* Most of the federal courts' decisions have actually hidden behind the 'false' excuse that there is little CISG caselaw outside the U.S. caselaw on the CISG. *"A disturbing number of U.S. decisions … are guilty of an even more grievous "sin of commission" – the use of cases that apply U.S. domestic sales and contract law in interpreting the Convention … Worse yet, the courts asserting that UCC caselaw can guide them in interpreting the CISG actually put the idea in practice …"* In his conclusion, H.Flechtner charged the U.S. courts with "a split personality. There is much in the caselaw that shows U.S. courts taking quite seriously their obligations under Article 7(1) CISG to interpret the Convention from an international perspective and to

[1] At pages 91 to 111 in: Quo Vadis CISG?, Edited by *Franco Ferrari*, Bruylant 2005, sellier. european law publishers.

promote uniformity (as well as the observance of good faith) in its application … On the other hand, U.S. courts still have far to go with regard to locating and using the vast store of information on foreign CISG cases and commentary that is readily available in English … U.S. decisions include flagrant and disturbing examples of the homeward trend in operation …"[2]

The above comments and observations from H. Flechtner are a fitting introduction to own survey of the few U.S. cases handed down since November 2004. Furthermore, our own conclusion will parallel H.Flechtner's as will be obvious from our own study of the CISG's impact on U.S. courts since the end of 2004 (Part I) and our survey of the CISG's impact on U.S. legislators (Part II).

## I. The CISG'S Impact on U.S. Courts

As a preliminary observation, we asked ourself whether the impact that the CISG might have had on the style of the U.S. courts could have come through the use of scholarly writing as opposed to caselaw per se. We were not able to identify any use of and any quotation from any foreign, in the sense of non-U.S., doctrinal writing in the body of an opinion. Here and there however, one can find a reference to foreign authors and American authors in a footnote and, interestingly enough, such a reference was borrowed by the judge or judges from a party's brief. For example, in the case of *Barbara Berry, S.A.de C.V.v.Ken M.Spooner Farms, Inc*,[3] in the Appelant's brief, footnote 8 reads: *"A recent Italian case is the best example of following the CISG's principles regarding the need to consider foreign case law to promote uniformity. The court quoted prior decisions by courts in Austria, Germany, the Netherlands, Switzerland and the United States. Franco Ferrari, Tribunal di Vigevano: Specific Aspects of the CISG Uniformity Dealt With, 20 J.L.& COMM.225, 231 (1996)"*. The same brief refers to American authors, Larry A. DiMatteo and John O. Honnold.

To the extent that CISG Advisory Council Opinions can be considered as "persuasive authority", there are some references to such Opinions at least in the parties' briefs. For example, in the U.S. District Court for the Western District of Washington case of Delizia v. Columbia Distributing Company,[4] we find in the Plaintiff's reply brief a reference to the CISG Advisory Council Opinion No.2, Examination of the Goods and Notice of Non-Conformity: Articles 38 and 39, and CISG Advisory Council Opinion No.1, Electronic Communications under CISG, 15th August 2003. Since the case

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2 *Id.*

3 2006 WL2701361 (9th Cir. 8/16/06); for opinion see 2007 WL 4039341 (9th Cir. 11/16/07).

4 2004 WL 2975203 (W.D. Wash. 9/9/04).

was settled we have no Court decision in this case to tell us whether the District Court would have been convinced by "La Delizia's" brief.

Much more common, although seldom different from one case to another, are the references made by U.S. Courts to the UCC and to U.S. cases (1). In a few decisions we find well considered references to the CISG as the applicable source of law (2).

## 1. The CISG: U.S. cases and the UCC.

In the landmark case of *Raw Materials Inc. v. Manfred Forberich GmbH & Co.KG*,[5] the U.S. District Court for the Northern District of Illinois, adopted language from the Plaintiff's brief to the effect that "RMI asserts that" *while no American court has specifically interpreted or applied Article 79 of the CISG, caselaw interpreting the Uniform Commercial Code's ("U.C.C.") provision on excuse provides guidance for interpreting the CISG's excuse provision since it contains similar requirements as those set forth in Article 79"… This approach of looking to caselaw interpreting analogous provisions of the UCC has been used by other federal courts. See, e.g., Delchi Carrier S.p.A. v. Rotorex Corp … Furthermore, Forberich does not dispute that this is proper and, in fact, also points to caselaw interpreting the UCC … Accordingly, in applying Article 79 of the CISG, the Court will use as a guide caselaw interpreting a similar provision of § 2-615 of the UCC."*

In the 2005 case of *Genpharm Inc.v. Pliva-Lachema A.S.*,[6] "the Plaintiff relies on an international treaty, known as the United Nations Convention on Contracts for the International Sale of Goods ("CISG") as a basis for this Court's subject matter jurisdiction. The Defendants contend that the subject matter jurisdiction of this Court is lacking because the instant dispute is outside the scope of the CISG." Confronted with this issue of whether or not the CISG was applicable, the Federal District Court [New York] made this very broad statement that "There are only a handful of American cases interpreting the CISG. In deciding issues under the treaty, courts generally look to its language and to the principles upon which it is based. Delchi Carrier …; see also Chicago Prime Packers, Inc, …; Usinor Industeel, … ("Federal caselaw interpreting and applying the CISG is scant."). Although the Court referred to "a case with similar facts" in which a "court in the second Circuit applied the CISG", the Federal District Court nevertheless stated that "This result would also be appropriate if analyzed under the UCC. The Second Circuit has recognized that "caselaw interpreting analogous provisions of Article 2 of the Uniform Commercial Code … may also inform a court where the language of the relevant CISG provisions tracks that of the

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5 2004 WL 1535839 (N.D. Ill. 7/7/04).

6 361 F.Supp. 2d 49 (E.D.N.Y. 3/19/05).

UCC. However, UCC caselaw 'is not per se applicable.'" Here the Court finds that caselaw interpreting contract formation under Article 2 of the UCC is helpful. Courts look to the "essence" or main objective of the agreement when deciding whether an agreement is a contract for the sale of goods covered by the UCC." Yet the Court went on to state that "there can be no question that the instant dispute involves an agreement to supply goods … The CISG expressly provides that it "governs only the formation of the contract of sale and the rights and obligations of the seller and buyer arising from such contract." CISG, art 4. The applicability of the CISG is not restricted to contracts after formation or contracts containing definite prices or quantities …" Since the main issue was one of "the court's treaty jurisdiction", it appears that the use of the CISG was intended, properly so, only for the Court to have "subject matter jurisdiction". Having jurisdiction, the Court ruled ultimately that "the motion to dismiss … on the ground of forum non conveniens is denied."

The U.S. District Court for the Northern District of Illinois, in *Caterpillar v. Usinor Industeel*,[7] noted that *"Plaintiffs bring their claims under the CISG, Illinois law, and French law" and continued with the statement that the "CISG preempts Plaintiffs' UCC and promissory estoppel claims only if such claims fall within the scope of the CISG". The Court went on to state that "Caselaw interpreting the preemptive effect of the CISG is sparse. Usinor Industeel, … noting the dearth of federal cases interpreting the CISG …; courts must be reluctant in finding federal preemption of a subject "traditionally governed by state law." … Accordingly, the court begins by looking at the text of the CISG." And the Court did indeed look at the text which "limits its application to claims between buyers and sellers." Since Caterpillar was not the buyer in the case, the Court could only rule that "CMSA, not Caterpillar, bought the steel … As such only CMSA can assert claims under the CISG …" Therefore, "As for the substantive allegations, Article 35 of the CISG provides that the seller must deliver goods which are of the quality and description required by the contract; … Article 36 establishes the seller's liability for any lack of conformity. CMSA has asserted that Usinor did not provide goods of the quality and description required …; CMSA has also asserted that the steel did not possess the qualities held out by Usinor as a sample. CMSA has thus sufficiently stated a claim under the CISG."*

In *Amco Ukrservice et al. v. American Meter Company*,[8] the Federal District Court [Pennsylvania] was faced with the question as to whether or not the CISG was applicable to joint venture agreements and distributorship agreements. The Court stated that *"because the CISG does not apply to the joint venture agreements … Pennsylvania law, and not Ukrainian law, governs the plaintiffs' claims." However the Defendant, "American Meter, argues that the CISG governs the plaintiffs' claims because, at bottom, they seek damages for its*

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7 209 F.Supp. 2d 880 (N.D. Ill. 3/28/02).

8 2004 WL 816923 (E.D. Pa. 4/13/04).

*refusal to sell them goods and that, under the CISG, the supply provisions of the agreements are invalid because they lack sufficient price and quantity terms. Apart from a handful of exclusions that have no relevance here, the CISG does not define what constitutes a contract for the sale of goods … In the few cases examining this issue, courts here and in Germany have concluded that the CISG does not apply to such contracts … Two German appellate cases have similarly concluded that the CISG does not apply to distributorship agreements … but does govern sales contracts that the parties enter pursuant to those agreements. See OLG Düsseldorf, …; OLG Koblenz, … We therefore join the other courts that have examined this issue and conclude that, although the CISG may have governed discrete contracts for the sale of goods that the parties had entered pursuant to the joint venture agreements, it does not apply to the agreements themselves."*

In *Delizia v. Columbia Distributing Company*,[9] the Court dealt with the issue of the merchantability of Pinot Grigio, *"a wine that is produced to be consumed when fresh". The Defendant, in its response, had mentioned that "the wine was not inspected as required by the United Nations Convention on Contracts for the International Sale of Goods ("CISG"), and that once a problem was identified" they acknowledged that they had not provided timely notice to La Delizia. Borrowing the exact language of the Plaintiff's reply, the Court stated that "there is no indication that an inspection was conducted at that time required under the CISG. See CISG Advisory Council Opinion No.2, Examination of the Goods and Notice of Non-Conformance: Articles 38 and 39 …" Still borrowing from the Plaintiff's reply the Court added that "the perishability of an item heightens, not diminishes the need for prompt notice. See White & Summers, Uniform Commercial Code …". "La Delizia contends that under the CISG, once … Columbia had notice of non-conformity, they had the duty to give La Delizia notice within a reasonable time- and more than five months is not reasonable under the CISG as a matter of law … Columbia Seattle does not cite any CISG case holding that a delay in giving notice of more than five months, which is the minimum delay in the instant case, was reasonable. As Columbia Seattle appears to recognize, the body of CISG law clearly supports La Delizia's position in this case …" When Columbia Seattle attempted to bring a U.S. and UCC case favorable to its side (Peter Pan Seafoods, Inc … ), "The court found that the UCC "'imposes a duty of good faith upon all transactions [and] … a delay of nearly six months by the buyer in informing the seller of the intended revocation is insufficient compliance with the good faith obligation." The Court ruled that "Columbia Seattle offers no reason why it could not have notified La Delizia of the potential problem earlier. An email would have sufficed. See CISG Advisory Council Opinion No.1 Electronic Communications under CISG, 15 August 2003 …" It followed, as the Court stated, that "The 2000 Pinot Grigio at issue was merchantable at the time of delivery … Even if the wine was non-conforming because of an unspecified "hidden*

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9 2004 WL 2975203 (W.D. Wash. 9/9/04).

*defect", an inspection of the wine was not conducted timely as required under the CISG …"*[10]

## 2. Cases applying the CISG and foreign cases

In the years 2006 and 2007, two U.S. Courts of Appeal were presented with the opportunity to take the CISG almost exclusively as the focus of their legal analysis. The judges were also 'skillfully' invited to elaborate on the application of the Convention on the basis of the learned and scholarly briefs submitted by both parties.

In the case of *Treibacher Industrie, A.G. v. Allegheny Technologies, Inc.*[11] the Appellee's brief was replete with meticulous references to and precise citations from the CISG as well as carefully selected opinions of foreign courts which interpreted and applied the Convention. The best way to give credit and, at the same time, commend the Appellee for their legal analysis of the issues in this case, is to give here a few excerpts from their brief:

"Under the CISG, the intent of the parties controls the meaning and interpretation of a contract. See Switzerland 5, April 2005 Supreme Court, case/document no.4C.474/2004 … Contrary to TDY's assertion (defendant/appellant in the case), the CISG mandates that in determining the parties' intent, "due consideration is to be given to all relevant circumstances of the case."(emphasis added) CISG Art.8(3) … The district court did precisely what this Article requires; it looked at each of the listed factors, as well as other "relevant circumstances."… International courts applying the CISG have considered just such evidence in other cases. For example, in Switzerland 5, April 2005, …

CISG Art. 8. Likewise, Article 9(1) provides that parties are bound by their course of dealings: (1) The parties are bound by any usage to which they have agreed … (2) The parties are considered … to have impliedly made applicable to their contract or its formation a usage …" TDY's analysis is flawed for many reasons. First, TDY does not acknowledge the existence of Article 8(3) which states … Likewise, TDY's interpretation of Article 9(2) renders Article 9(1) … meaningless … In short, the reference in Article 9(1) to practices established by the parties is one example of many situations where binding expectations may be based on conduct. See Articles 19(2), 21(2), 35(2)(b), 47 (2), 73(2). John O. Honnold, Uniform Law for International Sales Under the 1980 United Convention … Honnold goes on to explain that Article 8(3) exists … Courts follow this interpretation of the CISG … Other commentators agree that international trade usage is not

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[10] A lot of credit must be given to the Plaintiff's lawyers for having submitted to the court such a well researched brief.

[11] 464 F.3d 1235 (11th Cir. 9/12/06).

the only factor to be examined. Alexander Goldstein suggests a hierarchy ranking of factors to be considered, as follows: … TDY offers absolutely no authority stating that Article 9(2) renders Articles 8 and 9(1) meaningless. Instead, TDY relies upon a tortured interpretation of the CISG drafting history … TDY selectively quotes from a treatise by Schlechtrien. However, the language following immediately the portion quoted by TDY puts the passage in its true context … Peter Schlechtrien, Uniform Sales Law-The UN Convention on Contracts for the International Sale of Goods, … In summary, the only way to give effect to all provisions of the CISG is to do what the district court did-look at all the circumstances surrounding the transactions, including the conduct of the parties … [T]he CISG requires that "a party who relies on a breach of contract must take such measures as are reasonable in the circumstances to mitigate the loss … resulting from the breach." CISG Art.77. The burden of proof for a failure to mitigate damages under the CISG is on the breaching party. See Appellate Court (Oberlandesgericht) Celle 2 September 1998 …; Germany (Landgericht Darmstadt) 9 May 2000 … As the Supreme Court of Austria has pointed out, the burden of demonstrating failure to mitigate damages under the CISG is substantial: … Austria 6 February 1996 Supreme Court."

On the basis of such a well researched and articulated brief, the U.S. Court of Appeal for the Eleventh Circuit did not have to write very long an opinion. After endorsing the District Court's ruling as having "properly construed the contract under the CISG-according to the parties' course of dealings –", the Court of Appeal began its analysis by "discussing the CISG, which governs the formation and rights and obligations under contracts for the international sale of goods. CISG. Arts. 1, 4; Article 9 (1) …, 9(2) …; CISG, art. 8(1) … art. 8(2) … CISG, art. 8(3)." The Court of Appeal went on to state that "the district court did not commit clear error in finding that Treibacher reasonably mitigated its damages. Article 77 of the CISG requires a party claiming breach of contract to "take such measures …" Article 77, however, places the burden on the breaching party to "claim a reduction in the damages in the amount by which the loss should have been mitigated." And the C.A. to conclude that "the district court properly determined that, under the CISG, the meaning the parties ascribe to a contractual term in their course of dealings establishes the meaning of that term in the face of a conflicting customary usage of the term … Accordingly, the judgment of the district court is 'affirmed'."

If in the case of *Barbara Berry, S.A. de C.V. v. Ken M. Spooner Farms, Inc.*[12] the Court of Appeal's opinion to 'reverse and remand' is extremely short, it is probably because the Appellant's Brief and Reply raised many issues of material fact regarding the formation of the contract. The Court of Appeal, in a four paragraph decision, stated that "The United Nations Con-

12 2007 WL 4039341 (9th Cir. 11/16/07).

vention on Contracts for the International Sale of Goods ("the CISG") governs the formation of contracts for the sale of goods between parties whose places of business are located in different member states … Therefore, the principles of the CISG apply to the contract between Barbara Berry and Spooner Farms. See CISG, arts. 1,4. The district court erred in failing to first analyze the formation of the Barbara Berry-Spooner Farms contract under the CISG. We reverse due to this error because, applying the CISG, there exist genuine issues of material fact as to when a contract was formed between Barbara Berry and Spooner Farms, what terms were included in the contract, and whether those terms were later varied." As regards the Appellant's Brief, a review of the Table of Authorities is very revealing of the thorough research the lawyers conducted for the benefit of Barbara Berry, S.A., the plaintiff-appellant in the case. Among the authorities cited, besides "Treaties" meaning the United Convention on Contracts for the International Sale of Goods, we find a list of *Federal Cases and State Cases* but also a list of "*International CISG Cases*", six of them: one German case, one US case, one French case, two Belgian cases and one Swiss case. The Table of Authorities ends with "*Treatises*" and under this heading we find a reference to one article from each one of the following three authors and in the following order: Larry A. DiMatteo, Franco Ferrari, and John O. Honnold.

The last paragraphs of the Appellant's Brief and the same Appellant's Reply Brief are worth quoting: Appellant's Brief: "VI Conclusion: This is not a UCC case, though the District Court treated it as one. It failed to properly apply the CISG or analyze the facts of the case within that context, including the fundamental question of contract formation. As a result, the District Court did not apply the proper law and made erroneous legal assumptions." Appellant's Reply Brief: "the District Court's decision ignored numerous issues of fact, … For the foregoing reasons, Barbara Berry respectfully requests this Court (i) reverse the District Court's decision; 9ii) hold that the CISG is the applicable law to use in determining the terms of the parties' contract; …"

## II. The CISG and Legislation

The above survey of the most illustrative U.S. cases on the CISG since November 2004 leads to concurring in the comments made by some scholars on what could be referred to as an arm's-length relationship between the CISG on the one hand and the UCC on the other hand. An answer to the question regarding the extent to which the CISG has or may have influenced any discussion on law reform in the USA can be found in the federal Congressional Record and be expressed in a few words: the CISG has not influ-

enced a discussion on law reform as far as the UCC is concerned.[13] A search of the Record leaves one with the impression, and the reaction, that there is little, if any, evidence that the CISG has been on the minds of state legislators or the members of the American Law Institute and the National Conference of Commissioners on Uniform State Laws. One will find, obviously, extensive debates in Congress on the CISG at the time of the ratification and enactment of the Convention in 1986 but not much since. (1: CISG and UCC). One exception to the lack of influence of the CISG "could" be found in the legislation of that only state of the United States that is still tied, to some extent, to the civil law tradition by its civil Code, the State of Louisiana. That connection between the CISG and the Louisiana civil Code fits perfectly in the internal and outward legal nature of the CISG. Indeed, the latter has been drafted in a 'code style' of writing so familiar to civil law lawyers and scholars and many of its provisions embody civil law rules and principles foreign to the common law and the UCC traditions. (2: The Louisiana exception).

## 1. CISG-UCC

The particular topic of "The relationship between the UCC and the CISG and the Construction of Uniform Law" was addressed by Professor Franco Ferrari in an article that bears the title given here in quotation marks. For Professor Ferrari, a comparison between the CISG and the UCC "though interesting and stimulating, serves hardly any practical purpose. One can go even further and state that the results of similar comparisons undertaken by other scholars for instance the assertion that the UCC's and CISG's basic concepts of good faith and trade usages are similar in approach and content are misleading. Although the UCC has greatly influenced the CISG, it is impossible and even perilous to assert that the aforementioned sets of rules are similar in content, or, even worse, that they "are sufficiently compatible to support claims of overall consistency." … The comparison is dangerous because it makes one believe-erroneously – that the concepts of the CISG correspond to those of the UCC and can therefore be interpreted in light of the UCC … One should not see similarities where there are necessarily significant differences … It is shortsighted and misleading to say that the concepts of the CISG correspond to those of the UCC and that the UCC lawyer can find comfort in the CISG's similarities to the UCC. Allowing these assumptions to remain uncorrected will defeat the purposes of the CISG."

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[13] It is actually the opposite: the UCC has had an influence of the drafting of the CISG. *Susanne Cook*, CISG: From the Perspective of the Practitioner, 17 Journal of Law and Commerce (1998) 343-353.

In a 1998 article, Professor Henry Gabriel listed some of the "Reasons for the CISG's Lack of Influence on the Revisions of Article Two" and asserted that "the CISG has not proven to be an appropriate model for the revision". Indeed, "Unlike the UCC, the CISG is not based on any particular set of underlying established domestic legal principles, and instead, was drafted to be independent or, rather than to work in conjunction with, any particular domestic law". Professor Gabriel's conclusion is very clear and straightforward: "the drafting committee to revise Article Two has chosen not to use the CISG as a model for the revision … [and] as a member of the drafting committee … I am convinced that the CISG is not an appropriate model for Article Two … For the reasons I suggest in this Article, the actual influence of the CISG on the revision of Article Two of the Uniform Commercial Code has been minimal."[14]

## 2. CISG-Louisiana Civil Code

By Acts 1993, No.841, the Louisiana legislature amended, revised and reenacted Title VII, "Of Sale" of Book III of the Civil Code consisting in Articles 2438 through 2659. On that occasion an entire new Chapter, Chapter 13, "Sales of Movables", was integrated into the existing structure of the Code articles on the law of sale.

The choice of the word and concept "movables" instead of "goods" as in the UCC and the CISG was meant to fit this type of contract of sale within the framework of the Civil Code which include articles, like articles in other civil law codes, on *movables* and *things* but does not include articles dealing with '*goods*'. As far as the Articles 2601-2617 of this Chapter 13 are concerned, we have written elsewhere that "it is beyond doubt that they have been strongly inspired and influenced by the Convention on Contracts for the International Sale of Goods (or CISG) and by the UCC. It will be necessary, therefore, to look into these two sources to find help and guidance in interpreting these Articles."[15]

The display in parallel of the texts of some articles of the Louisiana civil Code with articles of the CISG will show that the latter text has had some influence on the former.[16]

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[14] The Inapplicability of the United Nations Convention on the International Sale of Goods as a Model for the Revision of Article Two of the Uniform Commercial Code, 72 Tul. L. Rev. 1995-2014 (1998)

[15] Louisiana Law of Sale and Lease, A Précis, Alain Levasseur & David Gruning, LexisNexis 2007 at p. 18.

[16] The influence of the UCC is also obvious but it is not our purpose here to evaluate the influence of the UCC on the Louisiana civil Code.

### a) Louisiana Civil Code Article 2601:[17]

*"An expression of acceptance of an offer to sell a movable thing suffices to form a contract of sale if there is agreement on the thing and the price, even though the acceptance contains terms additional to, or different from, the terms of the offer, unless acceptance is made conditional on the offeror's acceptance of the additional or different terms. Where the acceptance is not so conditioned, the additional or different terms are regarded as proposals for modification and must be accepted by the offeror in order to become a part of the contract.*

*Between merchants, however, additional terms become part of the contract unless they alter the offer materially, or the offer expressly limits the acceptance to the terms of the offer, or the offeree is notified of the offeror's objection to the additional terms within a reasonable time, in all of which cases the additional terms do not become a part of the contract. Additional terms alter the offer materially when their nature is such that it must be presumed that the offeror would not have contracted on those terms."*

CISG Article 19 (2) & (3)

*(2) However, a reply to an offer which purports to be an acceptance but contains additional or different terms which do not materially alter the terms of the offer constitutes an acceptance, unless the offeror, without undue delay, objects orally to the discrepancy or dispatches a notice to that effect. If he does not so object, the terms of the contract are the terms of the offer with the modifications contained in the acceptance.*

*(3) Additional or different terms relating, among other things, to the price, payment, quality and quantity of the goods, place and time of delivery, extent of one party's liability to the other or the settlement of disputes are considered to alter the terms of the offer materially.*

### b) Louisiana Civil Code Article 2603:

*The seller must deliver to the buyer things that conform to the contract.*

*Things do not conform to the contract when they are different from those selected by the buyer or are of a kind, quality, or quantity different from the one agreed.*

CISG Article 35 (1) & (2) first sentence:

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[17] Particular attention should be attached to the use of the words: "*the additional terms alter the offer materially*" in Art.2601 and this last word "**materially**" in particular which appears in CISG Art. 19 (2) & (3).

*(1) The seller must deliver goods which are of the quantity, quality and description required by the contract and which are contained or packaged in the manner required by the contract.*

*(2) Except where the parties have agreed otherwise, the goods do not conform with the contract unless they:*

### c) Louisiana Civil Code Article 2605:

*A buyer may reject nonconforming things within a reasonable time. The buyer must give reasonable notice to the seller to make the rejection effective. A buyer's failure to make an effective rejection within a reasonable time shall be regarded as an acceptance of the things.*

CISG Article 39 (1):

*(1) The buyer loses the right to rely on a lack of conformity of the goods if he does not give notice to the seller specifying the nature of the lack of conformity within a reasonable time after he has discovered it or ought to have discovered it.*

### d) Louisiana Civil Code Article 2616:

*When the contract requires the seller to ship the things through a carrier, but does not require him to deliver the things at any particular destination, the risk of loss is transferred to the buyer upon delivery of the things to the carrier, regardless of the form of the bill of lading.*

*When the contract of sale requires the seller to deliver the things at a particular destination, the risk of loss is transferred to the buyer when the things, while in possession of the carrier, are duly tendered to the buyer at the place of destination.*

*…*

CISG Article 67:

*(1) If the contract of sale involves carriage of the goods and the seller is not bound to hand them over at a particular place, the risk passes to the buyer when the goods are handed over to the first carrier for transmission to the buyer in accordance with the contract of sale. If the seller is bound to hand the goods over to a carrier at a particular place, the risk does not pass to the buyer until the goods are handed over to the carrier at that place. The fact that the seller is authorized to retain documents controlling the disposition of the goods does not affect the passage of the risk.*

*(2) …*

One should not be surprised by the similarities we have identified above since the main drafters of the Louisiana Civil Code Articles who assist the

Louisiana State Law Institute in updating and revising the Civil Code have been trained both in the civil law and the common law and, thus, could easily identify with the spirit and methodology of the CISG, often itself a compromise between the two main legal traditions as is in many respects the law of the State of Louisiana.

## Conclusion

These words of Susanne Cook can serve as a fitting conclusion to this short survey on the influence of the CISG on the legislators and on the courts: "*Among scholars, the CISG has been hailed as the new Lex Mercatoria, an honor it deserves in light of its inclusive drafting procedure and acceptance among scholars, but it is still in the process of earning recognition among courts, practitioners and merchants … To most practitioners and merchants, CISG continues to evoke the general sense of discomfort that stems from the unknown … Until the CISG seasons into a statute that enjoys wide familiarity among practitioners and a recognized tradition of fair interpretation in the courts, practitioners and merchants will be inclined to negotiate for application of the home advantage, i.e., applying the U.C.C.*"[18]

## Appendix

**US cases from November 2004**
**Yearbook of CISG cases 2008-2000**

**Federal Courts of Appeal**

- *Chicago Prime Packers v. Northam*, 408 F.3d 894 (7th Cir. 5/23/05)

Chicago Prime, a Colorado corporation, and Northam, a partnership formed under the laws of Ontario, Canada, are both wholesalers of meat products … it was undisputed that the parties entered into a valid and enforceable contract for the sale and purchase of ribs, that Chicago Prime transferred a shipment of ribs to a trucking company hired by Northam, and that Northam had not paid Chicago Prime for the ribs. Northam argued that it was relieved of its contractual payment obligation because the ribs were spoiled when its agent, Brown, received them. The district court concluded that it was Northam's burden to prove nonconformity, and held that Northam had failed to prove that the ribs from Chicago Prime were spoiled at the time of transfer to Brown. The court went on to state alternative holdings in favor of Chicago Prime based on its finding that, "even if the

[18] CISG: From the Perspective of the Practitioner, V. Susanne Cook, 17 Journal of Law and Commerce (1998) 343-353

ribs were spoiled at the time of transfer, Northam … failed to prove that it examined the ribs, or caused them to be examined, within as short a period as is practicable under the circumstances, or that it rejected or revoked its acceptance of the ribs within a reasonable time after it discovered or should have discovered the alleged non-conformity." *Chi. Prime Packers, Inc. v. Northam Food Trading Co.*, 320 F.Supp.2d 702, 711 (N.D.Ill.2004). The court awarded Chicago Prime the contract price of $178,200.00, plus pre-judgment interest of $27,242.63 …

[2] The CISG does not state expressly whether the seller or buyer bears the burden of proof as to the product's conformity with the contract. Because there is little case law under the CISG, we interpret its provisions by looking to its language and to "the general principles" upon which it is based. *See* CISG Art. 7(2); *see also Delchi Carrier SpA v. Rotorex Corp.*, 71 F.3d 1024, 1027-28 (2d Cir.1995) The CISG is the international analogue to Article 2 of the Uniform Commercial Code ("UCC"). Many provisions of the UCC and the CISG are the same or similar, and "[c]aselaw interpreting analogous provisions of Article 2 of the [UCC], may … inform a court where the language of the relevant CISG provision tracks that of the UCC." *Delchi Carrier SpA*, 71 F.3d at 1028 "However, UCC caselaw 'is not *per se* applicable.'" *Id.* (quoting *Orbisphere Corp. v. United States*, 726 F.Supp. 1344, 1355 (Ct. Int'l Trade 1989))

[3] A comparison with the UCC reveals that the buyer bears the burden of proving nonconformity under the CISG.

[4] … just as a buyer-defendant bears the burden of proving breach of the implied warranty of fitness for ordinary purpose under the UCC, under the CISG, the buyer-defendant bears the burden of proving nonconformity at the time of transfer …

[7] … the district court did not clearly err in finding that Northam did not meet its burden of proof as to its affirmative defense of nonconformity.

- *Treibacher Industrie, A.G. v. Allegheny Technologies, Inc.*, 464 F.3d 1235 (11th Cir. 9/12/06)
- *Valero Marketing & Supply Co. v. Greeni Trading Oy.*, 2007 WL 2064219 (3d Cir. 7/19/07)

On August 15, 2001, Greeni contracted with Valero to sell to Valero 25,000 metric tons of naphtha … The confirmation contained the agreed upon price term and provided that delivery was to be to Valero's tanks in New York Harbor between September 10 and 20, 2001 … Valero sent its own written confirmation to Greeni on August 17, 2001. That document generally confirmed the terms of the August 15 Agreement … Greeni arranged for a vessel to carry the naphtha from Greeni's stock location in Europe to Valero's tanks in New York Harbor … on a ship called the BEAR G … Greeni obligated itself on August 29, 2001 to use the BEAR G to ship the naphtha, and only after that, on August 30, 2001, proposed the BEAR G to Valero … Valero ultimately rejected the BEAR G … Despite Valero's rejec-

tion of the BEAR G, and because Greeni was unable to find another vessel, Greeni loaded the naphtha destined for Valero onto the BEAR G … the master of the BEAR G estimated an arrival in New York Harbor on September 21, 2001, outside the contractual delivery window.

On September 14, 2001, the parties entered into a new agreement (the "September 14 Agreement"). Valero … sent a proposal to Greeni suggesting that it would not permit Greeni to offload the naphtha directly at the terminal but would take delivery only by barge because Greeni had chosen to use an unapproved vessel, the BEAR G, to ship the naphtha. Valero also stated that, because it would be impossible for Greeni to deliver within the contractual window, Valero would accept the total volume of product delivered by Greeni to their terminal no later than midnight on September 23. For this accomodation [sic] the contract price will be adjusted by a discount of $0.0175 per us gallon. After this time Valero is not obligated to take any more volume under this contract … The BEAR G arrived in New York Harbor on September 22 at 3:30 in the morning. Greeni asserts that it could have delivered the naphtha by the end of the day on the 22nd, within the contract extension time, if Valero had not insisted that delivery be by barge. The parties do not dispute that no naphtha was delivered to Valero by September 24 … Both parties claim they sustained significant losses … Valero filed suit against Greeni in the United States District Court for the District of New Jersey on November 13, 2001, alleging that Greeni had breached the contract between the parties. Greeni counterclaimed, asserting that it was Valero that had breached the contract … The Court also found that the September 14 Agreement constituted a new contract … The District Court … concluded that Valero's rejection of the BEAR G was unreasonable, and thus a violation of the August 15 Agreement. The Court also found that, under the CISG, Greeni had breached the August 15 Agreement by arriving in New York Harbor two days outside the contractual window set by that agreement. However, the Court concluded that the delay did not entitle Valero to avoid its obligations under the contract because that two-day delay did not amount to a fundamental breach of the August 15 Agreement … The Court highlighted Article 47 of the CISG … The Court held that, in consequence of that provision, Valero did not have the right to demand that Greeni enter into the September 14 Agreement, and thus despite its earlier holding to the contrary, the Court ruled that the September 14 Agreement was of no effect. Therefore, the District Court found that Valero was entitled to recover damages only for the two-day delay between the September 20 delivery deadline in the August 15 Agreement and the day the BEAR G arrived in New York Harbor. It went on to find that Valero had not proven it suffered any damages from that delay. It also found that, because Valero improperly avoided its obligations under the August 15 Agreement, Greeni was entitled to recover damages for Valero's failure to accept delivery of and pay for the naphtha as required by that Agreement … The District Court

thus found that the September 14 Agreement was of no effect … We do not agree with that reasoning. Assuming that the September 14 Agreement would not have been an appropriate use of Article 47 of the CISG, as the District Court held, that does not mean that the September 14 Agreement was an ineffective contract modification. Article 29 of the CISG discusses contract modification and states simply that "[a] contract may be modified or terminated by the mere agreement of the parties."… The "mere agreement" of the parties reflected in the September 14 Agreement thus constituted a permissible contract modification under Article 29, rather than an extension of time for performance under Article 47 of the CISG. Accordingly, the September 14 Agreement was valid and governed the conduct of the parties for the remainder of their interaction.

- *Barbara Berry, S.A. de C.V. v. Ken M. Spooner Farms, Inc.*, 2007 WL 4039341 (9th Cir. 11/8/07)

**District Courts**

- *Kliff v. Grace Label, Inc.*, 355 F.Supp.2d 965 (S.D.Iowa Jan 25, 2005)
- *Genpharm Inc. v. Pliva-Lachema A.S.*, 361 F. Supp. 2d 49 (E.D.N.Y. 3/19/05)
- *Caterpillar v. Usinor Industeel*, 305 F. Supp. 2d 659 (N.D. Ill. 3/30/05)
- *Portimex v. Zen-Noh*, 2005 WL 1388612 (E.D.La. 6/7/05)
- *McDowell Valley Vineyards, Inc. v. Sabaté USA Inc. et. al.*, 2005 WL 2893848 (N.D.Cal. 11/2/05)
- *American Mint, LLC v. GOSoftware, Inc.*, 2006 WL 42090 (M.D.Pa. 1/6/07)
- *American Biophysics v. Dubois Marine Specialties*, 411 F.Supp.2d 61 (D.R.I. 1/30/06).
- *Wausau Tile, Inc. v. Navigators Insurance Co., et al.*, 2006 WL 278856 (W.D.Wis. 2/2/06)
- *China North Chemical Industries v. Beston Chemical Corp.*, 2006 WL 295395 (S.D.Tex 2/7/06)
- *Beltappo Inc. v. Rich Xiberta, S.A.*, 2006 WL 314338 (W.D.Wash. 2/7/06)
- *Multi-Juice, S.A. v. Snapple Beverage Corp.*, 2006 WL 1519981 (S.D.N.Y. 6/1/06)
- *Prime Start Ltd. v. Maher Forest Products Ltd.*, 442 F. Supp. 2d 1113 (W.D. Wash. 7/17/06)
- *Tee Vee Tunes v. Gerhard Schubert GmbH*, 2006 WL 2463537 (S.D.N.Y. 8/23/06)
- *Miami Valley Paper, LLC v. Lebbing Engnoineering & Consulting GmbH*, 2006 WL 2924779 (S.D.Ohio 10/10/06)
- *Tyco Valves & Controls Distribution GmbH v. Tippins, Inc.*, 2006 WL 2924814 (W.D.Pa. 10/10/06)

- *Travelers Property Casualty Co. of America v. Saint-Gobain Technical Fabrics Canada Limited*, 2007 WL 313591 (D.Minn. 1/31/07)
- *Zhanjiang Go-Harvest Aquatic Products Co., Ltd. v. Southeast Fish & Seafood Co.*, 2007 WL 1549458 (S.D.Fla. 4/25/07)
- *Cedar Petrochemicals, Inc. v. Donghu Hannong Chemical Co., Ltd.*, 2007 WL 2059239 (S.D.N.Y. 7/19/07)
- *Easom Automation, Inc. v. Thyssenkrupp Fabco, Corp.*, 2007 WL 2875256 (E.D.Mich. 9/28/07)
- *Guang Dong Light Headgear Factory Co., Ltd. v. ACI International, Inc.*, 2007 WL 2893589 (D.Kan. 9/28/07)
- *Sky Cast, Inc. v. Global Direct Distribution, LLC*, 2008 WL 754734 (E.D.Ky. 3/18/08)
- *Macromex Srl. v. Globex International, Inc.*, 2008 WL 1752530 (S.D.N.Y. 4/16/08)

**State Courts**

- *Vision Systems, Inc. v. EMC Corp.*, 2005WL 705107 (Mass.Super 2/28/05)

## Addendum

on self-executing and non self-executing treaties; on ratification; on the enforcement of foreign judgments

**Medellin v. Texas**
128 S.Ct. 1346
U.S.Tex.,2008.
Supreme Court of the United States
Jose Ernesto MEDELLÍN, Petitioner,
v.
TEXAS.
Argued Oct. 10, 2007.
Decided March 25, 2008.

**Background:** Following affirmance of his conviction for capital murder and death sentence, denial of his initial application for habeas corpus, denial of his federal petition for writ of habeas corpus, denial of his application for certificate of appealability, and grant of petition for writ of certiorari by the United States Supreme Court, Mexican national filed subsequent application for writ of habeas corpus from Texas Court of Criminal Appeals. Following United States Supreme Court's dismissal of federal writ as improvidently granted, 544 U.S. 660, 125 S.Ct. 2088, 161 L.Ed.2d 982, the Texas

Court of Criminal Appeals, 206 S.W.3d 584, ordered additional briefing and, 223 S.W.3d 315, dismissed application as abuse of writ. Certiorari was granted.

*Syllabus*

An agreement to abide by the result of an international adjudication can be a treaty obligation like any other, so long as the agreement is consistent with the Constitution. In addition, Congress is up to the task of implementing non-self-executing treaties, even those involving complex commercial disputes. … Foreign judgments awarding injunctive relief against private parties, let alone sovereign States, "are not generally entitled to enforcement." Restatement (Third) of Foreign Relations Law of the United States § 481, Comment *b,* p. 595 (1986) … The President's authority to act, as with the exercise of any governmental power, "must stem either from an act of Congress or from the Constitution itself." *Youngstown Sheet & Tube Co. v. Sawyer,* 343 U.S. 579 … the responsibility for transforming an international obligation arising from a non-self-executing treaty into domestic law falls to Congress, not the Executive. … It is a fundamental constitutional principle that " '[t]he power to make the necessary laws is in Congress; the power to execute in the President.' …

ROBERTS, C. J., delivered the opinion of the Court, in which SCALIA, KENNEDY, THOMAS, and ALITO, JJ., joined. STEVENS, J., filed an opinion concurring in the judgment. BREYER, J., filed a dissenting opinion, in which SOUTER and GINSBURG, JJ., joined …

while treaties "may comprise international commitments … they are not domestic law unless Congress has either enacted implementing statutes or the treaty itself conveys an intention that it be 'self-executing' and is ratified on these terms." … The label "self-executing" has on occasion been used to convey different meanings. What we mean by "self-executing" is that the treaty has automatic domestic effect as federal law upon ratification. Conversely, a "non-self-executing" treaty does not by itself give rise to domestically enforceable federal law. Whether such a treaty has domestic effect depends upon implementing legislation passed by Congress …

[14] The President has an array of political and diplomatic means available to enforce international obligations, but unilaterally converting a non-self-executing treaty into a self-executing one is not among them. The responsibility for transforming an international obligation arising from a non-self-executing treaty into domestic law falls to Congress … this Court has explained, when treaty stipulations are "not self-executing they can only be enforced pursuant to legislation to carry them into effect." … Moreover, "[u]ntil such act shall be passed, the Court is not at liberty to disregard the existing laws on the subject."… The requirement that Congress, rather than the President, implement a non-self-executing treaty derives from the text of the Constitution, which divides the treaty-making power between the President and the Senate. … If the Executive determines that a treaty should

have domestic effect of its own force, that determination may be implemented "in mak[ing]" the treaty, by ensuring that it contains language plainly providing for domestic enforceability. If the treaty is to be self-executing in this respect, the Senate must consent to the treaty by the requisite two-thirds vote, *ibid.*, consistent with all other constitutional restraints.

[15] Once a treaty is ratified without provisions clearly according it domestic effect, however, whether the treaty will ever have such effect is governed by the fundamental constitutional principle that " '[t]he power to make the necessary laws is in Congress; the power to execute in the President.' " … As already noted, the terms of a non-self-executing treaty can become domestic law only in the same way as any other law-through passage of legislation by both Houses of Congress, combined with either the President's signature or a congressional override of a Presidential veto. See Art. I, § 7. Indeed, "the President's power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker."… A non-self-executing treaty, by definition, is one that was ratified with the understanding that it is not to have domestic effect of its own force. That understanding precludes the assertion that Congress has implicitly authorized the President-acting on his own-to achieve precisely the same result. We therefore conclude, given the absence of congressional legislation, that the non-self-executing treaties at issue here did not "express[ly] or implied[ly]" vest the President with the unilateral authority to make them self-executing. See *id.*, at 635, 72 S.Ct. 863 (Jackson, J., concurring).

# Uruguay

*Cecilia Fresnedo de Aguirre*

## General information

The United Nations Convention on Contracts for the International Sale of Goods (hereinafter: CISG) is in force in Uruguay since February 1, 2000.[1]

Main efforts to raise awareness of it being in force are made at the universities. The contents and application of the Convention is taught in regular and postgraduate courses and seminars. It has also been dealt with in books[2] and articles in law reviews.[3]

As far as I could find out, there have been few actions, if any, in business circles or bar associations to raise awareness of the Convention being in force.

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1 The Vienna Convention was approved by law n° 16.879 of October 21, 1997 and ratified on January 25, 1999.

2 *Opertti Badán/Fresnedo de Aguirre*, Contratos Comerciales Internacionales. Últimos Desarrollos Teórico-Positivos en el Ámbito Internacional, Fundación de Cultura Universitaria (1997); *Fresnedo de Aguirre*, Curso de Derecho Internacional Privado, Tomo I, Parte General, 2nd. Ed., Fundación de Cultura Universitaria (2004), 55, 167, 312; *Aguirre Ramírez/Fresnedo de Aguirre*, Curso de Derecho del Transporte, Parte General, Fundación de Cultura Universitaria (2000), 77-85; *Barea*, Régimen Jurídico del Comercio Exterior, Tomo I, La Compraventa Internacional de Mercaderías, Facultad de Derecho, Universidad de la República/ Fundación de Cultura Universitaria (2003); *Hargain/Mihali*, Régimen Jurídico de la Contratación Internacional en el MERCOSUR, BdeF (1993), 9-12, 89-101; *Espulgues Mota/Aguilar Vieira/Moreno Rodríguez*, Compraventa Internacional de Mercaderías: La Convención de Viena de 1980 sobre Compraventa Internacional de Mercaderías, in *Espulgues Mota/Hargain* (coord.), Derecho del Comercio Internacional, MERCOSUR-Unión Europea, Reus-BdeF (2005), 345-397.

3 *Santos Balandro*, Uruguay ratifica la Convención de Viena de 1980 sobre los Contratos de Compraventa Internacional de Mercaderías. Un Análisis de sus Disposiciones Generales, in: Revista Uruguaya de Derecho Internacional Privado, Año III, Nº 3, 13-52; *Matteo Terra*, La ley aplicable y la jurisdicción competente en el comercio electrónico internacional, in: Revista Uruguaya de Derecho Internacional Privado, Año V, Nº 5, 121-153; *Aragone Coppola*, Compraventa Internacional de Mercaderías y los Incoterms 2000, in El Derecho Digital, 2003.

## I. CISG's impact on practicing lawyers

1. Some practicing lawyers are aware of the CISG, particularly those who deal with these kinds of cases, but I am afraid that there are many who are not. They became aware of it through the above referred courses and articles, or by requiring expert opinions in specific cases. The impact of this awareness on the contents of standard contracts forms, if any, is not noticeable in the large numbers.

Some times practicing lawyers who are aware of the CISG tend to exclude it from their clients contracts, particularly those who are giving legal advice to the seller. Perhaps that is due to the fact that when sellers or their legal advisers draft their contracts, they try to incline the balance in their favour, while the Convention has a good balance between seller's and buyer's obligations. This is so particularly regarding their liability for the goods sold to the buyer.

2. As far as I know, the coming into force of the CISG in Uruguay had none – or little – impact on the way practicing lawyers draft their briefs and memoranda.

I would say that in CISG related cases practicing lawyers refer to case law and commentators as much as in purely domestic disputes.

It has always been a widespread use in Uruguay that practicing lawyers and judges cite to foreign legal writing and case law in most cases, particularly French, Spanish, German and Italian sources, depending on the matter. That is not exclusively when dealing with CISG or other international uniform Conventions related disputes. I do not think that the target is to complying with the mandate to interpret the CISG in light of its international character and the need to promote uniformity in its application, but to reinforce and support their arguments and interpretation of the legal texts in general.

3. I could not find any case where practicing lawyers use CISG solutions in purely domestic disputes to corroborate the results they want to reach or for any other reason, but there could be some isolated case in that sense.

## II. CISG's impact on scholars

1. I dare say that both before and after the CISG coming into force most private international law scholars mentioned the Convention as an example of supranational uniform law and explained its scope of application in their courses. In postgraduate courses they have always gone further on its contents. Perhaps I could say they have devoted more attention to the Convention after its coming into force. The matter is also dealt with by commercial law scholars.

I think that the impact of this specific group's focus on the CISG is not enough yet in order to guarantee the awareness and application of the CISG among the national legal community.

I would say that in devoting their attention to the CISG, scholars have mainly focused on the CISG itself, rather that comparing it with their domestic law.

2. References to and detailed developments on the CISG can be found in private international law or in international commercial law works,[4] but not in domestic law ones.

Scholars have devoted an adequate attention to the CISG in graduate courses and in legal works, but they could increase awareness of the CISG through seminars and postgraduate courses. Private international law and international commercial law scholars could do more than other ones in this connection.

3. Scholarly writing in Uruguay has produced some works on the CISG,[5] which are consulted by practicing lawyers, judges and students. They also consult foreign scholarly writing on the matter.

4. As far as I could find out, scholars have not used interpretations of the CISG to interpret other uniform law instruments.

## III. CISG's impact on courts

1. I think that the CISG's coming into force has had no impact on the style of court decisions. There have always been numerous citations to case law and to scholarly writing in the courts of Uruguay, regarding not only the CISG, but in general.

2. Regarding your question on courts taking the aforementioned mandate to interpret the CISG in light of its international character and the need to promote uniformity in its application, I cannot say yet, for as far as published case law is concerned, there is no verdict referring the CISG. Thus, I cannot discern a homeward trend in this connection. However, I would say that – generally speaking – our courts do not show a homeward trend. On the contrary, they are prone to apply supranational uniform instruments or foreign law whenever private international law rules state so.

3. As I said in the previous paragraph, there are no published cases where Uruguayan courts have used the CISG in relation to contracts covered by its sphere of application, let alone in relation to contracts not covered by its sphere of application. However, there are a few cases where the New York Convention of 1974 on the limitation period in the international sale of goods is applied or referred to.

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4 See footnotes 2 and 3.

5 See footnotes 2 and 3.

4. I could not find any case where courts have relied on interpretations of the CISG to interpret other uniform law instruments.

## IV. CISG's impact on legislators

1. I would say that the CISG was only one of many elements that influenced the discussion on private international law reform in Uruguay, not that on domestic commercial and civil law. The CISG has not triggered such discussion; it has just added some interesting ingredients.

The CISG's impact on such discussion was not limited to sale-specific topics or even to contracts in general, but to other international commercial issues.

2. Private international law reform in Uruguay is still in course. As I said in the previous paragraph, the CISG did not lead to law reform, but it was one of the elements that moved private international law scholars to face such an updating task.

3. The domestic law was not modified at all after the ratification of the CISG in Uruguay.

4. See previous paragraph.

# Venezuela

*Claudia Madrid Martínez*

## Información General

Luego de intensos trabajos preparatorios y de barajar, incluso, la posibilidad de exhortar a los Estados a ratificar las Convenciones que contienen la Ley Uniforme sobre la Venta Internacional de Objetos Mobiliarios Corporales y la Ley Uniforme sobre la Formación de los Contratos de Venta Internacional de Objetos Muebles Corporales, se reunió en Viena, entre los días 10 de marzo y 11 de abril de 1980, la Conferencia Internacional de Plenipotenciarios, previamente convocada por la Asamblea General de la Organización de las Naciones Unidas. Delegaciones de sesenta y dos Estados estuvieron presentes, bajo la dirección del profesor húngaro Gyula Eorsi, para la aprobación de la Convención de las Naciones Unidas sobre los Contratos de Compraventa Internacional de Mercaderías.

Lamentablemente, Venezuela no participó en las discusiones previas a la Conferencia, limitándose a enviar un observador a la misma.[1] El texto de esta Convención fue aprobado por nuestro país el 28 de septiembre de 1981,[2] pero hasta la fecha no se ha producido su ratificación. Por tal razón, nuestros jueces no pueden aplicar tan importante instrumento convencional.

Pero más que hablar de un rechazo a la Convención de Viena, debemos lamentar el silencio de parte de académicos, profesionales y círculos de negocios en relación con la ratificación de la Convención. Silencio que, desde el punto de vista del fondo de la Convención no tiene justificación, sobre todo si constatamos que, en efecto, las soluciones consagradas por este instrumento convencional son perfectamente compatibles con el Derecho interno venezolano.

En efecto, lo cierto es que luego de analizar el contenido de la Convención no encontramos razones de peso que justifiquen su no ratificación por parte de Venezuela. Así lo hemos dejado saber en un trabajo anterior.[3]

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1 Así lo reporta *Parra Aranguren*, Legislación uniforme sobre la compraventa internacional de mercaderías, Revista de la Facultad de Derecho, Universidad Católica Andrés Bello, 35 (1986) 66.

2 Dato tomado en: http://www.uncitral.org/uncitral/es/uncitral_texts/sale_goods/1980CISG_status.html.

3 *Madrid Martínez*, Responsabilidad civil en materia de compraventa internacional de mercaderías, en: Ley de Derecho Internacional Privado, Libro Homenaje a

En ese momento afirmamos, tras constatar la compatibilidad entre los principios generales en materia de responsabilidad civil contractual recogidos por nuestra legislación, Código Civil y Código de Comercio, y las soluciones contenidas en la Convención de Viena sobre Compraventa Internacional de Mercaderías, que tal semejanza no es exclusiva de esa materia, razón por la cual no encontramos inconveniente en la adhesión de Venezuela al mencionado instrumento internacional.

De hecho, ratificamos nuestra opinión en el sentido de estimar que la participación de Venezuela en este tratado sería profundamente beneficiosa para su actuación protagónica en el comercio internacional. Nuestro Estado no debe permanecer inerte ante la constante evolución del comercio. Este día a día exige una regulación adaptada a su dinámico desarrollo y Venezuela no debe dar la espalda a esta situación.

## I. Impacto de la Convención de Viena en la Práctica

No podríamos afirmar de manera fehaciente, que los abogados venezolanos ignoren el contenido de la Convención, mas sí podemos apreciar que en la práctica, muchos prefieren excluirla expresamente, evitando el sometimiento de sus relaciones contractuales a la misma.

En efecto, en la práctica venezolana podemos encontrar contratos internacionales en los cuales las partes, con el objeto de evitar cualquier posibilidad de aplicación de la Convención, al elegir como competente el Derecho de un Estado parte en la misma, añaden en su cláusula sobre Derecho aplicable – además de una exclusión de las normas sobre conflicto de leyes de manera de evitar el reenvío, a través de un referencia directa a las normas materiales del Estado en cuestión – una exclusión expresa de la Convención de Viena. Ello para evitar su aplicación, incluso en los supuestos en los cuales la controversia se plantee ante los tribunales de un Estado parte en la misma.

Sin embargo, también podemos apreciar situaciones en las que se ha aplicado la Convención a contratantes establecidos en Venezuela, aunque no por constituir éste el Derecho elegido por las partes para regir el contrato. Así, en una reciente decisión de la Casación francesa[4] se aplicó la Convención a un contrato cuyas partes no se encontraban establecidas en Estados partes, ni eligieron la Convención para regular su relación, sino que la misma resultó ser aplicable por ser el Derecho francés el competente para

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Gonzalo Parra-Aranguren, Caracas, Tribunal Supremo de Justicia, Colección Libros Homenaje Nº 1, 2001, Vol. II, pp. 297 ss.

4 Puede reportarse la sentencia francesa dictada por la Cour de Cassation, Chambre Comérciale en fecha 20/02/2007, caso Société Mim v. Société YSPL, en: http://www.unilex.info/dynasite.cfm?dssid=2376&dsmid=13354&x=1.

157 regir el contrato en virtud de los artículos 4,1 y 4,2 del Convenio de Roma sobre Ley Aplicable a las Obligaciones Contractuales.

## II. Impacto de la Convención de Viena en los Estudiosos del Derecho

Luego de su aprobación en Viena en 1980, fueron publicadas en Venezuela algunas reseñas sobre tal evento, sin que se invitara al Estado venezolano a pronunciarse al respecto.[5] Igualmente, podemos encontrar trabajos en los que se hace referencia a la Convención, bien sea de manera general,[6] bien para analizar algunas de sus normas,[7] pero tampoco se ha planteado el problema de la ratificación de la misma.

Igualmente, debemos añadir que en los programas de la mayoría de las Universidades venezolanas, el mayor interés por el análisis de la Convención ha sido demostrado por los especialistas en materia de Derecho internacional privado, más que por los estudiosos de los contratos. Estos últimos se limitan a analizar la regulación del contrato de compraventa en el Derecho interno, con escasas referencias de Derecho comparado

Ahora bien, en los programas para estudiar Derecho internacional privado, se dedica un tema a los contratos internacionales y, en él, los docentes de esta asignatura hacen referencia al contrato de compraventa internacional de mercaderías y, desde luego, a la Convención de Viena, como ejemplo paradigmático de la unificación sustantiva en esta materia.

En conversaciones sostenidas con profesores de Derecho internacional privado,[8] pudimos constatar que la opinión prácticamente generalizada es que, en efecto no hay razones de fondo para la no ratificación de la Convención. Este silencio por parte del Estado venezolano es injustificado. Pero también debemos reconocer que desde las instancias académicas y profesionales poco o nada se ha hecho para exhortar a la autoridad competente en orden a la ratificación de la Convención.

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5 *Linares*, Convención sobre Contratos para la Compraventa Internacional de Mercaderías, Revista de Derecho Público, 4 (1980) 118 ss.

6 *Parra Aranguren*, Legislación uniforme …, ob. cit., 65 ss.; *L. Cova Arria*, La compraventa internacional, Revista de Derecho Marítimo, 7 (1987) 162 ss.

7 *Hernández-Breton*, Usos no pactados: del Código de Comercio Alemán (HGB) a la Convención de las Naciones Unidas sobre los Contratos de Compraventa Internacional de Mercaderías (Viena 1980), Revista de la Facultad de Ciencias Jurídicas y Políticas, Universidad Central de Venezuela, 90 (1993) 81 ss.; *C. Madrid Martínez*, responsabilidad civil en materia de compraventa internacional …, ob. cit.

8 Tatiana Maekelt y Eugenio Hernández-Breton.

## III. Impacto de la Convención de Viena en los Tribunales

Ya hemos afirmado que al no haber ratificación de parte de Venezuela, la Convención de Viena es inaplicable de manera directa por nuestros jueces. Por tal razón, no existe en nuestro país decisión judicial en la que se haya aplicado este instrumento normativo, por lo cual podemos decir que el impacto de la misma en nuestros tribunales es prácticamente nulo.

Sin embargo, no descartamos la posibilidad de que nuestros jueces puedan recurrir a este instrumento, sobre la base de algunas precisiones en relación con el artículo 1 del instrumento en estudio. Recordemos que, de conformidad, con el artículo 1 de la Convención de Viena, este tratado se aplicará a los contratos de compraventa de mercaderías entre partes que tengan sus establecimientos en Estados diferentes, cuando esos Estados sean Estados Contratantes; o cuando las normas de Derecho internacional privado prevean la aplicación del Derecho de un Estado contratante.

Desde luego, es claro que, de conformidad con el primer supuesto, si uno de los contratantes tiene su establecimiento en Venezuela, la Convención no es aplicable. Sin embargo, podrían plantearse algunas dudas, en relación con el artículo 1,1,b, norma que consagra lo que ha sido calificado por algunos autores como una cláusula de extensión.[9] Es necesario aclarar, aunque luce obvio, que para que esta norma sea aplicable es necesario que la controversia se esté ventilando ante los tribunales de un Estado parte de la Convención.[10]

Hay, sin embargo, quien estima aplicable la Convención cuando la norma de conflicto de un Estado no parte en la misma, indica la aplicación del Derecho de un Estado parte; mas tal aplicación no se debería a un mandato de la norma contenida en el artículo 1,1,b, sino más bien a las propias normas de conflicto del Estado no parte. Semejante afirmación se debe a que la intención de los redactores de esta disposición fue que la compraventa internacional de mercaderías estuviese gobernada por un grupo de normas accesibles en varios idiomas y cuidadosamente estudiadas en varias partes del mundo, en lugar de estar sujeta al Derecho interno de algún país cuyo conocimiento sea menos accesible.[11] Tal posibilidad de aplicación supone la aceptación de la incorporación de la Convención de Viena al Derecho interno del Estado que la ratifica,[12] tesis con la cual no estamos de

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9 *Boggiano*, Contratos internacionales, Buenos Aires, DePalma, 1990, p. 92.

10 *Garro y Zuppi*, Compraventa internacional de mercaderías, Buenos Aires, Ediciones La Roca, 1990, p. 91. Ver también *Boggiano*, Contratos internacionales …, ob. cit. p. 92.

11 *Garro y Zuppi*, Compraventa internacional de mercaderías …, ob. cit., p. 91.

12 *Guardiola Sacarrera*, La compraventa internacional. Importaciones y exporttaciones, Barcelona, Bosch Casa Editorial, 1994, p. 31.

acuerdo, puesto que entendemos que el tratado, luego de su ratificación no se transforma en Ley interna.

Ahora bien, nosotros podríamos más bien preguntarnos por aquellos casos en los que las partes, establecidas en Estados no partes en la Convención, decidan aplicarla a su relación contractual, haciendo uso de la autonomía conflictual. En este caso, algunos autores estiman que tal elección es más una manifestación de la autonomía material que de la autonomía conflictual.[13] En efecto, si ante el juez venezolano se planteara una controversia relacionada con un contrato que las partes han decidido someter a la Convención de Viena, éste deberá aplicar la Convención, mas no como el sistema aplicable al contrato, pues el Derecho así elegido equivaldría a una cláusula incorporada al mismo cuyo valor dependerá del ordenamiento jurídico determinado como competente a falta de elección.

Otra posibilidad sería calificar las soluciones contenidas en la Convención como *Lex mercatoria*, afirmación cuestionada por algunos autores[14] y que supondría aceptar la procedencia de los llamados contratos sin ley. Considérese que en el sistema venezolano de Derecho internacional privado, tanto la Convención Interamericana sobre Derecho Aplicable a los Contratos Internacionales,[15] como la Ley de Derecho Internacional Privado venezolana,[16] establecen que, ante la falta de indicación del Derecho aplicable por las partes, el juez, en busca del ordenamiento jurídico más vinculado con el contrato, "*También tomará en cuenta los principios generales del Derecho Comercial Internacional aceptados por organismos internacionales*", ordenando además que se apliquen, "*cuando corresponda, las normas, las costumbres y los principios del Derecho Comercial Internacional, así como los usos y prácticas comerciales de general aceptación, con la finalidad de realizar las exigencias impuestas por la justicia y la equidad en la solución del caso concreto*" (Arts. 9 y 10 CIDACI; 30 y 31 LDIPV). Sobre la base de estas disposiciones, el juez venezolano puede, en efecto, recurrir a la *Lex mercatoria*.

Sin embargo, tras reconocer que la voluntad de las partes sólo es jurídicamente relevante conforme a los límites establecidos en la Ley y a pesar de mostrar cierta simpatía por la aceptación de tal posibilidad, Romero estima que "*la existencia misma de las normas de Derecho Internacional Privado en materia de determinación del Derecho aplicable al contrato presuponen que el mismo debe estar conectado al Derecho de más de un Estado, de lo contrario ningún conflicto de leyes se plantearía. La esencia misma de las normas sobre el*

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13 *Fernández de la Gándara y A.L. Calvo Caravaca*, La compraventa internacional de mercaderías, en: Contratos internacionales, (Fernández de la Gándara y Calvo Caravaca, Dir.), Madrid, Tecnos, 1997, p. 175.

14 *Idem*.

15 Suscrita durante la CIDIP-V, México 1994, ratificada por Venezuela y publicada en la Gaceta Oficial Extraordinaria. N° 4.974 de 22/09/1995.

16 Gaceta Oficial N° 36.511, de fecha 06/08/1998. Vigencia, 06/02/1999.

*Derecho aplicable limitan la posibilidad de concebir un contrato que no esté sujeto a un ordenamiento jurídico estatal*".[17]

Nosotros consideramos que la aceptación casi ilimitada de la libertad conflictual casa mal con la prohibición de que las partes elijan una reglamentación no estatal. Es paradójico, en efecto, permitir que las partes puedan combinar diferentes Leyes estatales y construir un marco jurídico *ad hoc*, distinto del previsto en cada uno de los sistemas elegidos individualmente considerados e impedir, por otro lado, que las partes puedan someter el contrato a una normativa autónoma que, a diferencia de las Leyes estatales, ha sido concebida atendiendo a la internacionalidad del contrato.[18]

Tal interpretación podría verse apoyada en el hecho de que tanto el artículo 10 de la Convención de México, como el 31 de la Ley de Derecho Internacional Privado establecen que "*Además de lo dispuesto en los artículos anteriores, se aplicarán, cuando corresponda, las normas, las costumbres y los principios del derecho comercial internacional, así como los usos y prácticas comerciales de general aceptación con la finalidad de realizar las exigencias impuestas por la justicia y la equidad en la solución del caso concreto*", disposición que con semejante encabezamiento – resaltado por nosotros – no parece limitada a los casos de ausencia de elección del Derecho aplicable. De manera que puede corresponder aplicar *Lex mercatoria* cuando las partes así lo decidan.

A pesar de nuestra posición, no dejamos de reconocer la natural tendencia del juez estatal a rechazar este tipo de soluciones. Así, en la célebre decisión del caso Pepsicola, la Sala Político Administrativa de la entonces Corte Suprema de Justicia sólo llega a aplicar los Principios Unidroit para complementar su interpretación de lo que ha de entenderse por contrato internacional.[19]

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[17] *Romero*, Derecho aplicable al contrato internacional, en: Liber Amicorum, Homenaje a la Obra Científica y Académica de la profesora Tatiana B. de Maekelt, Caracas, Facultad de Ciencias Jurídicas y Políticas, Universidad Central de Venezuela, Fundación Roberto Goldschmidt, 2001, T. I, pp. 252-254.

[18] *Bouza Vidal*, La elección conflictual de una normativa no estatal sobre contratos internacionales desde una perspectiva europea (Consideraciones sobre el Plan de Acción de la Comisión de febrero de 2003), en: Pacis artes. Obra homenaje al profesor Julio D. González Campos, Madrid, Universidad Autónoma de Madrid, Eurolex, 2005, T. II, p. 1320.

[19] En la citada sentencia del 09 de octubre de 1997, la Corte Suprema de Justicia, en Sala Político Administrativa afirmó "*Un enfoque complementario del planteamiento anterior se encuentra en los 'Comentarios' explicativos de los Principios Generales para los Contratos Mercantiles Internacionales preparados por el Grupo de Trabajo del Instituto Internacional para la Unificación del Derecho Privado (UNIDROIT) que indican, entre otras cosas, que el carácter internacional de un contrato puede ser definido en una gran variedad de formas y que los Principios no acogen expresamente*

## IV. Impacto de la Convención de Viena en la Legislación

En relación con este último punto, nada podemos añadir. En vista de la no ratificación por parte de Venezuela de la Convención de Viena sobre Compraventa Internacional de Mercaderías, su influencia en nuestra legislación es nula. Lo que sí debemos reafirmar es la compatibilidad entre ambas fuentes, de manera que no podría ser considerado el Derecho interno como un obstáculo para la ratificación de la convención.

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*ninguna de ellas. Sin embargo indican que a la noción de contrato internacional debe dársele una amplia interpretación, de manera tal de excluir solamente aquellas situaciones que no involucren elementos internacionales, es decir, aquellos contratos en que todos los elementos relevantes se encuentran vinculados a un único país …* ". Ver: *E. Hernández-Breton*, Lo que dijo y no dijo la sentencia Pepsi Cola, Revista de la Facultad de Ciencias Jurídicas y Políticas, Universidad Central de Venezuela, 109 (1998) 167.

# The CISG's Impact on EU Legislation

*Stefano Troiano*

## Introduction

Five years ago, in 2003, Franco Ferrari gathered in Verona some of the world's most distinguished experts in the field of the 1980 UN Convention on Contracts for the International Sale of Goods (CISG) and invited them to "revisit old issues" concerning Uniform Sales Law "in the light of recent experiences".[1] A special session of the conference was devoted to the CISG's impact on domestic and international legislation, including a paper dealing with the CISG's impact on EU legislation.

For all those who are acquainted with the results of that debate, a paper devoted again to the influence of the CISG on EU legislation could appear nonsensical. What kind of new contribution might be added in this respect to what had been already said five years ago by so many distinguished scholars? Do we need to stress what none today would ever deny, i.e. that the CISG has had an extraordinarily important influence on EU legislation thus far? In fact, as Ulrich Magnus brilliantly illustrated in the paper he delivered at that time,[2] it is undeniable that several EU legal enactments are directly or indirectly drawn from the CISG model.[3]

However, it would be grossly unfair for me to dodge my task by simply referring to what Ulrich Magnus said on that occasion. For this reason I will resume the topic again but at the same time I will try to approach it from a slightly different perspective by focusing on the changes occurred in EU legislation in the last years and, especially, on what is probably going to happen in the future in this field.

The core question could be formulated as follows.

Granted that the CISG had an enormous impact on EU legislation, has this impact changed in quantity or in quality during the last years? Has it increased or diminished? Are there new areas of EU Law which in the meanwhile have been contaminated by the CISG's pulling power? And

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1 The proceedings of the conference have been published as *Ferrari* (ed.), The 1980 Uniform Sales Law. Old Issues Revisited in the Light of Recent Experiences, 2003.

2 *Magnus*, The CISG's Impact on European Legislation, in: *Ferrari* (ed.), The 1980 Uniform Sales Law. Old Issues Revisited in the Light of Recent Experiences, 129.

3 See later on for details.

above all, will the CISG continue to have the same impact or is its attractiveness bound to decline inexorably in the forthcoming decades?

These issues will be dealt with in the second part of the present report, which will to a great extent be devoted to the impact that the CISG are presumably going to have on the so-called "Common Frame of Reference". This is a new set of principles, model rules and definitions which is likely to be approved in the next years by the European Institutions[4] and should serve as guidance for legislators and interpreters for the future development of European contract law.

In turn, the first part of the paper will be dedicated to a – necessarily rapid – overview on the *status quo*, i.e. on the different EU enactments which best represent the past and present influence of the CISG on European legislation.

## I. The CISG's Influence on Specific EU Enactments

### 1. General Remarks: Why is the CISG Model so Attractive for Europe?

As already anticipated, the existing state of EU legislation clearly shows that many EU enactments have been to a greater or lesser extent influenced by the CISG.

Before analyzing them in detail, one may wonder why the CISG has had so much influence on the process of harmonization of European private law thus far.

A simple answer might be based on the fact of being the CISG part of the legal systems of most EU Member States. Precisely, 23 out of the 27 EU Member States, i.e. more than 4/5 of the whole European Union, have ratified the CISG at the present date.[5] Only four countries, after all a small minority, have not done it yet, namely United Kingdom, Ireland, Portugal and Malta.[6] Thus, at least *de facto* the CISG represents a common pillar of European contract law already. For the same reason the CISG has always been considered as a set of common rules within the EU, although, officially, it does not find its source in EU legislation.

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4 However, an "academic" Draft of the possible CFR has already been published on January 2008. See later on, Part II.

5 Cyprus was the last Member State to ratify the UN Sales Convention on 1 april 2006.

6 The United Kingdom is, however, party to the The Hague Uniform Law of International Sales 1964 (ULIS): on the reasons of this "splendid isolation" cf. *Magnus*, 25 Jahre UN-Kaufrecht, Zeitschrift für Europäsiches Privatrecht (ZEuP) 2006, 97, fn. 12.

Yet, it would be incorrect to explain the strong impact of the CISG on EU legislation by resorting to a merely geographical argument. The reason for this is probably more profound and is related to the fundamental role which the CISG plays as being undoubtedly the world's most comprehensive, ambitious and, nevertheless, successful attempt to achieve an internationally unified set of rules on the prototype and the master of all contracts: the contract of sale.[7] It follows that such an important achievement towards the unification of contract law could not be ignored by the European Union, which is undoubtedly the most comprehensive movement for unification of national laws at a regional level.

Moreover, in the States which have ratified it, the CISG have contributed to renew the national sales law from the inside. According to the criterion of systematic interpretation of the law, the CISG is indeed an interpretive landmark of the rules of a given system. Thus, it has contributed to spread new legal solutions, rules and principles in the contracting States, in spite of their different (or sometimes even conflicting) legal traditions, and it has given a chance to redefine legal concepts under a new perspective.

The CISG impact on the laws of the EU Member States can therefore be described as the result of two main converging inputs, a first one coming from the inside of the legal system and the other one coming from the outside of it.

In the first respect, the CISG can be regarded as a sort of "virus", the nature of which is, however, benign. This virus has in increasing doses been injected in the laws of the EU Member States and, through them, has spread throughout the EU, giving shape to a set of common rules and principles in the field of cross-border sales transactions.

In the second respect, this process prepared the ground for the intervention by the EU institutions aimed at harmonizing the national laws on sale within the EU in the light of the CISG's model and to extend some of the principles underlying the CISG to a broader scope of application than simply sales law. As a result, the legal systems of the EU Member States (including those States which are not contracting parties to the CISG) have been to a smaller or a greater extent molded after the likeness of the Uniform Sales Law.

In the Member States which ratified the CISG one may describe this process by resorting to the image of a double expansive effect of the CISG: a direct one, deriving from the fact of being the state party to the convention,

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[7] Moreover, the CISG represents the most important effort, also as far as drafting and terminology choices are concerned, to reach an agreement or a sort of sustainable compromise between common law and civil law systems in this field. As to the worldwide success of the CISG see, for instance, *Magnus*, 25 Jahre UN-Kaufrecht, Zeitschrift für Europäisches Privatrecht (ZEuP) 2006, 96 et seqq.

and an indirect one, deriving from the implementation by the state of EU rules which are drawn from the CISG model.

The topic of direct implementation of the CISG in each European state which is party to the convention is dealt with by my colleagues in their domestic law report. I will therefore not even touch upon it.[8]

In theory, a comprehensive study dealing with the CISG's impact on the process of harmonization of EU private law should include an analytical survey on how the EU enactments shaped after the model of the CISG have actually been implemented in every Member State. However, the limited scope of the present paper makes it impossible to outline this impact in detail with regard to all countries involved. The study will therefore be restricted to a general overview on EU legislation in the strict sense, basically EC and EU Treaties (so-called primary EU law) and Regulations and Directives (secondary EU law). The transposition of these enactments in the different Member states will not be taken into account.

## 2. The Consumer Sales Directive

### a) The Consumer Sales Directive as the "Trojan Horse" for the Propagation of CISG's Rules and Principles in EU Contract Law

Many EC Directives in the field of private law boast noble antecedents. For instance, the Unfair Contract Terms Directive of 1993 (93/13/CE) drew large inspiration from the German Law on Standard Contracts Terms (AGB-Gesetz 1976) and to a smaller extent from the UK Unfair Contract Terms Act (UCTA 1977).

The model of the Consumer Sales Directive of 1999 was, undoubtedly, the CISG.[9]

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[8] As far as the indirect influence of the CISG is concerned, i.e. the influence which is mediated through the philter of EU legislation, it is important to remind that the indirect character of this process increases the risk of unfaithful translation or implementation of the legal pattern in the given legal system: a risk which is inherent in all cases of assimilation of foreign legal models. This is true, in particular, for the case of domestic legislation enacted under EU directives, where implementation becomes a two-step process, during which the Member States enjoy large discretion in translating the Directive's goals. This sort of double philter enhances the risk of a wrong, inaccurate or simply divergent implementation of the pattern by national legislators. Thus, in these cases, the indirect transposition of the CISG model into domestic law may considerably differ from Member state to Member state.

[9] There is unanimous consent on this assertion: see *Grundmann*, Verbraucherrecht, Unternehmensrecht, Privatrecht – warum sind sich UN-Kaufrecht und EU-

Obviously, also domestic experiences within the EU have been taken into account in drafting the Directive. However, there are grounds to affirm that these experiences have only indirectly influenced the drafting of the Directive, i.e. through the lens of the CISG itself, in the belief that the latter already represents a sort of synthesis of the principles governing the law of sales in the Member States. The CISG was privileged as it offered the model for a successful compromise between the different European legal systems.

This is not a mere conjecture but is explicitly spelled out[10] in the preparatory documents and confirmed by the EU officers who worked at the Directive.[11] For the first time in such a considerable extent a non-European act, namely an international convention, officially plays the role as a model for an EU enactment.

This choice is even more significant if one bears in mind that the Consumer Sales Directive is the most important European provision in the field of the law of contract, which affects the very heart, one may say, of the "classical" law of contract and obligation.[12]

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Kaufrechts-Richtlinie so ähnlich?, Archiv für die civilistische Praxis (AcP) 2002, 40 et seqq.; *Id.*, Consumer law, commercial law, private law: How can the Sales Directive and the Sales Convention be so similar?, European Business Law Review (Eur.Bus.L.Rev.) 2003, 237 et seqq.; *Kruisinga*, What do consumer and commercial sales law have in common? A comparison of the EC Directive on consumer sales law and the UN Convention on contracts for the international sale of goods?, European Review of Private Law (Eur.Rev.Priv.L.) 2001, 177 et seqq.; *Montfort*, A la recherche d'une notion de conformité contractuelle – Etude comparée de la Convention de Vienne, de la directive 1999/44 et de certaines transpositions nationales, European Review of Private Law (Eur.Rev.Priv.L.) 2006, 487 et seqq.; *Schroeter*, UN-Kaufrecht und Europäisches Gemeinschaftsrecht, 2005, 38; *Corapi*, La direttiva 99/44/CE e la Convenzione di Vienna sulla vendita internazionale: verso un nuovo diritto comune della vendita?, Europa e diritto privato (Eur. Dir. Priv.) 2002, 657 et seqq.; *Micklitz*, Ein einheitliches Kaufrecht für Verbraucher in der EG?, Europäische Zeitschrift für Wirtschaftsrecht (EuZW) 1997, 229, 230.

10 This is expressly stated by the European Commission in the report illustrating the grounds for the Proposal for a European Parliament and Council Directive on the sale of consumer goods and associated guarantees, COM(95) 520 fin., 6.

11 *Staudenmayer*, Die EG-Richtlinie über den Verbraucherkauf, Neue Juristische Wochenschrift (NJW) 1999, 2393 et seq.

12 *Schwartze*, Die zukünftige Sachmängelgewährleistung in Europa – Die Verbrauchsgüterkauf-Richtlinie vor ihrer Umsetzung, Zeitschrift für Europäisches Privatrecht (ZEuP) 2000, 544, 545; *Staudenmayer*, NJW 1999, 2393; *Reich*, Die Umsetzung der Richtlinie 1999/44/EG in das deutsche Recht, Neue Juristische Wochenschrift (NJW) 1999, 2397, 2398.

Given its crucial importance, the transposition of the Directive forced many EU Member States to fully rethink the law of sales and its relationship with the general law of obligation. By adopting the so-called "big solution", some of these countries decided to reform comprehensive part of their civil codes (this is the German case).[13] In these states the influence of the CISG has therefore spread throughout the domestic law of obligation far beyond the scope of application of the Directive (and, hence, of the CISG also).[14]

However, an extensive debate on what the directive's impact on the general law of contract might be took place also in the States which confined themselves to merely transposing the directive within its original subjective and objective scope of application.

Hence, the Consumer Sales Directive is the living example of an indirect impact of the CISG on the legislation of EU Member States. This means that, whether they liked it or not, even those States which have refused so far to ratify the CISG have indirectly (i.e. through the philter of the EU Consumer Sales Directive ) been "contaminated" by the "CISG virus".[15]

Altogether, it does not wonder that the Consumer Sales Directive was met with criticism among those who envisaged the risk of a colonization of their centenary, or even millenary, legal traditions. And no wonder that, following this attitude, a French scholar went so far as to describe the Consumer Sales Directive as a "Trojan horse", created to permit uniform sales law to penetrate the domestic private law of sale through the back door …[16]

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The importance of this Directive is witnessed by the fact that the EU Commission expressly regarded it as the starting point for a more comprehensive and coherent harmonization of private law in the EU Member States. See Proposal for a European Parliament and Council Directive on the sale of consumer goods and associated guarantees COM(95) 520 fin., 6.

13 See *Schlechtriem*, 10 Jahre CISG – Der Einfluß des UN-Kaufrechts auf die Entwicklung des deutschen und des internationalen Schuldrechts, Internationales Handelsrecht (IHR) 2001, 12 et seq.

14 See for instance *Glöckner*, Die Umsetzung der Verbrauchsgüterkaufrichtlinie in Deutschland und ihre Konkretisierung durch die Rechtsprechung, Juristen Zeitung (JZ) 2007, 654; *Herber*, The German Experience, in: *Ferrari* (ed.), The 1980 Uniform Sales Law. Old Issues Revisited in the Light of Recent Experiences, 59 ss.

15 The strenght of this impact depends also on the mandatory nature of both the Directive and the national provisions which transpose the Directive into national law (see Article 7 Consumer sales Directive), while the CISG mostly contains default rules.

16 *Raynard*, De l'influence communautaire et internationale sur le droit de la vente: quand une proposition de directive s'inspire d'une convention internationale pour compliquer, encore, le recours de l'acheteur, Revue trimestrielle de droit civil (Rev. Trim. Dr. civ.) 1997, 1020, 1024: « Ainsi le droit communautaire s'apprête

From the CISG the EU Legislator has drawn the general system of the seller's liability for non-conformity of the goods, including, above all, the key notion of lack of conformity and the asset of the remedies for the lack of conformity.

Before analyzing these aspects in detail, it must be added that the influence of the CISG and Consumer Sales Directive has gone far beyond the borrowing of specific rules or remedies. The Consumer Sales Directive has also borrowed from the CISG general standards of judgment and conduct, like, just to make an example, the standard of "reasonableness".[17] Thus, standards and notions created in the framework of the uniform commercial law – and sometimes unknown to the legal tradition of the one or the other EU Member state – have broken through the private law of all EU Member States, building what on may define as a new common heritage of European private law boasting an international ascendancy.

In some cases the Consumer Sales Directive goes even beyond the CISG by extending or generalizing principles laid down in the CISG or building original solutions which are not provided in the CISG.[18] As far as these cases are concerned, the Directive represents a higher step in the development of the CISG's principles and reflects the attempt to modernize them.

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à jouer un rôle inattendu de Cheval de Troie pour permettre au droit de la vente internationale d'investir le droit civil de la vente interne».

17 At least 37 references to reasonableness can be counted in the CISG. For an exhaustive list of all provisions in which this notion, under different formulations (e.g. "reasonable", "reasonably", "unreasonable", etc.), appears in the CISG, see *Diesse*, La bonne foi, la coopération et le raisonnable dans la Convention des Nations Unies relative à la vente tnternationale de marchandises (CVIM), Journal de Droit International (J.D.I.) 2002, 55 note 156. Similarly, the EU Directive makes reference to reasonableness five times, in matters closely related to those envisaged by the CISG. It can be concluded that the CISG made it possible for the EU Directive to adopt the standard of reasonableness in spite of different legal traditions. Following the implementation in domestic law, reasonableness has thus become a uniform concept of European sales law. On this issue cf. *Troiano*, The Exclusion of the seller's liability for reconizable lacks of conformity under the CISG and the new European sales law: the changing fortunes of a notion of variable content, in: *Ferrari* (ed.), The 1980 Uniform Sales Law. Old Issues Revisited in the Light of Recent Experiences, 147 et seq. and *Id.*, La ragionevolezza nel diritto dei contratti, 2005.

18 For similar remarks see *Grundmann*, Einleitung, in: *Grundmann/Bianca*, EU-Kaufrechtslinie. Kommentar, 2002, 19 et seq.

### b) EU Consumer Sales Law Molded after International Commercial Sales Law: Convergence despite Conflicting Rationales?

The general influence that the CISG had on the drafting of the Consumer Sales Directive is even more striking if one bears in mind that the CISG and the Directive significantly differ as to their subjective and objective scope of application.

While the CISG governs only international sales transactions between businesses, the Directive deals with sales transactions between businesses and consumers, regardless of the domestic or transnational nature of the transaction.[19] In principle, the CISG does not apply to international *consumer* sales.

Moreover, the CISG has a wider objective scope of application than the Directive. The CISG governs not only the obligation of the seller to deliver goods conforming with the contract and the respective remedies of the buyer. It covers also the conclusion of the contract, the further obligations of the seller (and the respective remedies of the buyer) and, finally, the obligations of the buyer (and the respective remedies of the seller). In other words, the CISG deals with specific issues of the law of sales but at the same time it contains a comprehensive regulation of issues (e.g. the conclusion of the contract) which traditionally belong to the general law of contract. The Consumer Sales Directive has a more narrow scope of application, governing only remedies for lack of conformity. In accordance with its purpose (consumer protection), the core of the Directive is restricted to the remedies of the buyer for non-performance by the seller of the primary obligation to deliver goods conforming to the contract.

In the light of these remarks, it cannot be denied that by choosing the CISG as the main model for drafting the Sales Directive, the EU intended to extend to consumer sales principles which were initially conceived exclusively for commercial transactions.

It may be doubted whether this is a sound approach to consumer law.

At a first glance, the need to protect weaker contracting parties which underlies consumer law seems to be at odds with the decision to transpose to

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[19] It must be reminded that the Consumer Sales Directive applies not only to contract of sale but also to "contracts for the supply of consumer goods to be manufactured or produced" (Article 1 (4) Directive). A similar extension of the scope of application is provided also from Article 3 (1) CISG, the formulation of which does not seems, however, to lead to the same results, insofar as the text extends the application of the Convention to "contracts for the supply of goods to be manufactured or produced", excluding, however, this extension where "the party who orders the goods undertakes to supply a substantial part of the materials necessary for such manufacture or production".

consumer law rules conceived for transactions which take place between businesses and, moreover, in an international framework.[20]

If one considers the issue more attentively, however, the approach is far less inconsistent that it may seem.

The Consumer Sales Directive is not concerned with C2C transactions,[21] to which an extension of commercial rules would be impossible, but with B2C transactions. All things considered, regulating B2C transactions means regulating the market and, within the market, businesses, which have to make their activity conform to the standards required in the consumer market.[22]

On the other hand, the common opinion that the CISG is not at all concerned with consumer transactions needs to be clarified in the light of Article 2 lit. a CISG, which introduces a subjective element aimed at protecting the reasonable reliance of the seller. According to this Article, consumer sales which the seller could not recognize as such are not excluded from the scope of application of the Convention.[23] Where the purpose of the purchase is a personal, family or household use, the sale is a consumer sale and is, therefore, excluded from the CISG. However, despite the personal character of the purpose, knowledge or non justified ignorance of this purpose by the seller may open the way to the application of the Convention, albeit in exceptional cases.[24]

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[20] Similar doubts are expressed by *Medicus*, Ein neues Kaufrecht für Verbraucher?, Zeitschrift für das Insolvenz Praxis (ZIP) 1996, 1925.

[21] It goes without saying that the term "C2C", and specifically the notion of "consumer", is used here in a very broad sense. "Consumer" is not an absolute notion. It presupposes the relationship with a "professional" (i.e. a business). Hence, a contractual ralationship opposing two consumers is a contradiction in terms, whereas only the party who acquires goods or services from a professional can be regarded as a "consumer".

[22] Along the same lines *Magnus*, in: *Ferrari* (ed.), The 1980 Uniform Sales Law. Old Issues Revisited in the Light of Recent Experiences, 132: "Consumer protection is in the first line regulation of business activities".

[23] Precisely, according to Article 2 lit a the CISG does not apply to "sales … of goods bought for personal, family or household use, unless the seller, at any time before or at the conclusion of the contract, neither knew nor ought to have known that the goods were bought for any such use".

[24] In these (though marginal) cases, CISG and Directive really overlap, thus raising a delicate issue of conflict between the two sets of rules. This issue is somehow linked to the general topic of the present paper: the solution of the conflict between CISG and EU Directive is indeed an aspect of the CISG's impact on EU legislation. Were one to decide that the CISG should prevail on the Directive, this would result in a (relevant) limitation to the application of EU Legislation. A comprehensive study of this issue would, however, reach so far as to require a sep-

### c) The CISG's Role in Interpreting the Consumer Sales Directive and the National Provisions Transposing It: The Principle of the Most Uniform Interpretation

The fact that the Consumer Sales Directive largely relies on the CISG has important consequences also as to the interpretation of the Directive. In particular, it substantiates the idea that the Directive must be interpreted in the light of the CISG.

This follows from the application of the settled criteria of interpretation of EU law and, especially, of both the historical and the objective-teleological criteria. According to both criteria, the CISG's role as a model for the Directive cannot be denied.[25] Hence, the CISG plays an important role also in the interpretation of the national provisions which implement the Directive. This follows from the rule, generally recognized within the EU, according to which all national provisions which implement a Directive must be interpreted by national courts in the light of the rationale underlying the Directive. The uniformity of this interpretation is ensured by the European Court Justice, to which questions of doubt concerning the interpretation of the Directive can (or must, in case of judges of last instance) be referred to. Albeit through the philter of the Directive, the CISG must therefore be taken into account by national judges when ascertaining the meaning of the national provisions aimed to transpose the Directive into domestic law.

The CISG's role in the interpretation of the Consumer Sales Directive enhances the similarities already existing between the two sets of rules and permits to soften the differences which nevertheless may be found between them.

Sometimes CISG and Sales Directive differ only slightly as to the wording but the differences in wording may easily be overcome by interpreting the Directive in the light of the corresponding provisions in the CISG.

Of course, this does not permit to obliterate all differences: the possibility to refer to the CISG is precluded in all cases in which the distance in wording between Directive and CISG is the result of a deliberate choice by the

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arate analysis, which cannot be developed here. For a deeper analysys of this issue see, e.g., *Schroeter*, UN-Kaufrecht und Europäisches Gemeinschaftsrecht, *passim*.

[25] See *Schroeter*, UN-Kaufrecht und Europäisches Gemeinschaftsrecht, 586; *Jud*, Die Rangordnung der Gewährleistungsbehelfe: Vebrauchsgüterkaufrichtlinie, österreichisches, deutsches und UN-Kaufrecht im Vergleich, Jahrbuch des Zivilrechtswissenschaft (Jb.J.ZivRWiss.) 2001, 205, 208. Specifically as to the Consumer Sales Directive see *Magnus*, in: *Ferrari* (ed.), The 1980 Uniform Sales Law, Old Issues Revisited in the Light of Recent Experiences, 129, 135.

EU legislator to deviate from the uniform sales law model.[26] This decision does not need to be spelled out in the preparatory documents of the EU enactment. It may as well result from a systematic and teleological interpretation of the text. No matter what the reason of the deviation is, there can be no doubt that in these cases the EU legislator's intention shall not be arbitrarily corrected by the interpreter.[27]

Under a more general point of view, a uniform interpretation of Consumer Sales Directive and CISG should be disregarded in all cases where a divergent and, especially, a more protective rule for the consumer than for the commercial buyer appears to be justified in the light of the specific rationale of consumer protection underlying the Directive.

Apart from these cases, the opinion seems correct according to which the interpretation of the Directive in the light of the CISG "should try to achieve as far as possible a uniform understanding in order to avoid unjustified differences between the rules applying to international professional sales and those applying to consumer sales (be they domestic or international)".[28]

### d) Common Features and Differences between Consumer Sales Directive and CISG:

#### i. General Features

It is well known that the rules on the seller's liability for defective goods and the respective remedies under the CISG is the outcome of an attempt to combine the heritages of both Roman Law and Common Law in this area, by at the same time simplifying what could be simplified and avoiding old-fashioned or not useful distinctions. This attempt, the success of which is undeniable, has managed to achieve two results: uniformity of the rules on liability in commercial sales transactions, on the one hand, and a significant modernization of the same rules, on the other hand.

The Roman tradition, which is still at the basis of the continental system, is traditionally based on the concept of the seller giving a "guarantee" to the buyer, i.e. ensuring that the goods are not defective. The reference to the concept of "guarantee" permits to build the seller's liability for defective goods as an autonomous genus of liability detached from the general rules on

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[26] This is the case, for instance, of Article 1 (4) Consumer Sales Directive, which was modified according to the opinion of the European Parliament proposing a deviation from the rule laid down in Article 3 (1) CISG.

[27] *Schroeter*, UN-Kaufrecht und Europäisches Gemeinschaftsrecht, 586; *Riesenhuber*, System und Prinzipien des Europäischen Vertragsrechts, 2003, 478.

[28] *Magnus*, in: *Ferrari* (ed.), The 1980 Uniform Sales Law, Old Issues Revisited in the Light of Recent Experiences, 135.

liability for non-performance of an obligation. Hence, partial deviations from the general law of obligation are accepted. In several continental law systems, the most important deviations have traditionally consisted in the no-fault character of the seller's liability, in some special features of the remedies given to the buyer (which are usually restricted to an alternative) and, finally, in special rules on time limitations. However, it is typical of the Roman system also that these special rules (with their corresponding remedies) do not apply where the defect is so important that the good delivered by the seller is completely different from the good the buyer was entitled to receive. Moreover, in some systems, different, and sometimes even inconsistent, rules apply depending on the nature of defect and, especially, on whether it consists in a true defect or in the lack of a promised quality.

Under all these regards, which will be dealt with in detail in the following pages, the Consumer Sales Directive follows the CISG's structure very closely.[29]

### ii. The Unification of All Different Cases of Non-Performance for Defective Goods

**The uniform notion of "lack of conformity"**: Directly drawing on the CISG (the model of which was The 1964 Hague Uniform Law of International Sales, ULIS), the Directive's approach to the issue of the seller's liability for defective performance is dominated by the attempt to remove useless distinctions, albeit deep-rooted in domestic legal traditions, and provide instead one and the same rule for all cases of defective performance.

As already anticipated, some legal systems of Roman tradition distinguish between true tangible defects and the case of lack of a promised quality, providing slightly different rules for the two cases.[30] Moreover, they make a further (and even more important) differentiation between the two cases mentioned just now, on the one hand, and the case of an *aliud pro alio*,[31] on the

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[29] See *Magnus*, in: *Ferrari* (ed.), The 1980 Uniform Sales Law. Old Issues Revisited in the Light of Recent Experiences, 133.

[30] See, for instance, in the Italian Civil Code, Articles 1490 (concerning defects: "vizi") and 1497 (dealing with the lack of a promised quality: "mancanza di qualità").

[31] The distinction between delivery of a completely different good (*aliud*) and defective good existed, for instance, in Italy and in Germany. In both countries, the transposition of the Directive and the consequent introduction of a uniform notion of lack of conformity have definitively removed this distinction. For Italy see *Patti*, Art. 129, in: Bianca (ed.), La vendita dei beni di consumo, 2006, 75 (the issue is however diputed: for a different view see *Bianca*, Consegna di aliud pro alio e decadenza dai rimedi per omessa denunzia nella Direttiva 1999/44/CE, Contrat-

other hand, i.e. the delivery of a completely different good, the latter case being usually excluded from the scope of application of the guarantee-based system (and being instead governed by the general rules on non-performance, requiring among other fault by the debtor for liability to arise).

Instead of a (slightly or radically) different set of rules for each type of defective performance, under the Consumer Sales Directive the rule on liability and the related remedies are the same. Like in the CISG, this result is achieved by unifying all the above mentioned cases under the elastic notion of "conformity with the contract" (Article 2 (1) Consumer Sales Directive) and the corresponding, and equally elastic, concept of "lack of conformity" (Article 3 (1) Consumer Sales Directive ).

For many EU legal systems this represents the most important novelty introduced by the Directive. Although Recital 7 of the Directive claims the principle of conformity with the contract to be "common to the different national legal traditions", it is, however, a fact that, before the transposition of the Directive, the idea of the seller's liability for defective goods was nothing but a vague common requirement underlying different legal rules, while the Directive's added value has undoubtedly consisted in transforming this vague convergence in a truly common rule of decision.[32]

**The obligation to deliver goods which are in conformity with the contract**: More precisely, according to Article 2 (1) Consumer Sales Directive the seller must deliver goods to the consumer which are in conformity with the contract of sale. Exactly like the CISG, by introducing an "obligation"

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to e Impresa/Europa (Contr. impr./Eur.) 2001, 19. For the situation in Germany after the transposition of the Directive see *Lorenz*, Aliud, peius und indebitum im neuen Kaufrecht, Jus (Jus) 2003, 36.

[32] This has been achieved by drawing from the CISG the general concept of conformity with the contractthrough which the Member States have been faced with a quite new approach to the seller's liability. This approach is restricted, in principle, to consumer sales, but indirectly affects the general law of obligation and, at least in the countries which have decided to transpose the directive by adopting the so-called "big solution", reaches even further and directly innovates on the general principles of the law of obligation. This is the case of the well-known German "größe Lösung", which has given the start for a comprehensive modernization of the whole German law of obligation (*Schuldrechtsmodernisierung*). To a smaller extent, also Austria provided for a systematic integration of the new rules in the civil code (for details on both States see the reports on national legislations collected in the present book). Many other countries have sticked instead to the Directive's scope of application and avoided to adopt comprehensive amendments of their sales law. This is the case, among others, of Italy: see G. *De Cristofaro*, La nuova disciplina codicistica dei contratti per la fornitura dei beni mobili conclusi da consumatori con professionisti, Studium iuris (St. iur.) 2002, 1176, referring to this decision by the Italian legislator as a "missed chance".

to deliver conform goods, the Directive traces the seller's liability for defective goods back to the general rules on the debtor's liability for non-performance of an obligation. By doing so, the classical dichotomy between non-performance and guarantee (which has historically dominated many European legal traditions) is abandoned in favor of a more modern and uniform approach.

**The notion of "conformity with the contract"**: At a first glance, it might appear that Consumer Sales Directive and CISG adopt two different approaches as far as the definition of the requirement of conformity to the contract is concerned. Whereas the CISG enumerate the cases in which the goods do not conform with the contract,[33] the Directive reverses this approach by resorting to a presumption of conformity. In other words, it enumerates the circumstances the existence of which allows the presumption that the goods are conform with the contract.[34]

The differences in the approach are not, however, to be overestimated.[35] In both cases the results are much alike, all in all both rules establishing the requirements according to which the interpreter has to ascertain whether the good is conform with the contract or not.

It must also be stressed that under both sets of rules the legal requirements for conformity leave considerable space to party autonomy, the general principle being that the goods must be conform with the standards which the parties have agreed upon.[36] Hence, the legal requirements apply only where the agreement does not specify these standards.[37]

**Specific requirements for conformity. Differences between CISG and EU Directive**: Coming now to the specific requirements for conformity, the similarities are very extensive.

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[33] *Magnus*, in: *Ferrari* (ed.), The 1980 Uniform Sales Law. Old Issues Revisited in the Light of Recent Experiences, 136.

[34] Art. 2 (2) Consumer Sales Directive: "Consumer goods are presumed to be in conformity with the contract if they […]". It is, however, common opinion that this provision introduces no "presumption" in the strict sense of the term: see *De Cristofaro*, Difetto di conformità al contratto e diritti del consumatore, 2000, 60.

[35] See Article 35 (2) CISG: "except where the parties have agreed otherwise, the goods do not conform with the contract unless they:salvo diverso accordo tra le parti i beni non sono conformi al contratto se non […]".

[36] See *Grundmann*, Verbraucherrecht, Unternehmensrecht, Privatrecht – warum sind sich UN-Kaufrecht und EU-Kaufrechts-Richtlinie so ähnlich?, 46.

[37] *Magnus*, in: *Ferrari* (ed.), The 1980 Uniform Sales Law. Old Issues Revisited in the Light of Recent Experiences, 136.

First, both CISG and Directive converge towards requiring that the goods have the qualities of the goods which the seller has shown to the buyer (or the consumer) as a sample or a model.[38]

Secondly, both set of rules require that the goods are fit for the purpose to which goods of the same kind usually serve[39] or to any special purpose required by the buyer and brought to the knowledge of the seller at the time the contract was concluded.[40]

Yet, there are some differences, which emphasize the EU legislator's intention to go beyond the CISG and correct some of its deficiencies.

In particular, while the Consumer Sales Directive demands that the special purpose for which the consumer requires the goods has been accepted by the seller, under the CISG no acceptance by the seller is required for the special purpose to be taken into account in ascertaining conformity. Conversely, according to Article 35 (2) lit. b) CISG the special purpose does not pay any role in defining whether the good is conform with the contract "where the circumstances show that the buyer did not rely, or that it was unreasonable for him to rely, on the seller's skill and judgment".

According to some scholars, these differences, again, should not be overrated.

As to the first issue, in particular, the principle of uniform interpretation of Consumer Sales Directive and CISG should permit to interpret the requirement of acceptation by the seller in such a broad sense as to exclude that a real consent is needed.[41]

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38 Cf. Article 35 (2) lit. c) CISG ("… possess the qualities of goods which the seller has held out to the buyer as a sample or model"), and Article 2 (2) lit. a) Consumer Sales Directive ("… comply with the description given by the seller and possess the qualities of the goods which the seller has held out to the consumer as a sample or model). The Directive goes more in the details insofar as it requires also that the goods correspond to the statements of the seller.

39 Cf. Article 35 (2) lit. a) CISG ("… are fit for the purposes for which goods of the same description would ordinarily be used"); Article 2 (2) lit. c) Consumer Sales Directive ("… are fit for the purposes for which goods of the same type are normally used").

40 See Article 35 (2) lit. b) CISG ("… are fit for any particular purpose expressly or impliedly made known to the seller at the time of conclusion of the contract, except where the circumstances show that the buyer did not rely, or that it was unreasonable for him to rely, on the seller's skill and judgement"); and Article 2 (2) lit b) Consumer Sales Directive ("… are fit for any particular purpose for which the consumer requires them and which he made known to the seller at the time of conclusion of the contract and which the seller has accepted").

41 Cf. *Magnus*, in: *Ferrari* (ed.), The 1980 Uniform Sales Law. Old Issues Revisited in the Light of Recent Experiences, 137.

It is, however, arguable whether the requirement of acceptation can be so much watered down as to be identified in practice with the mere knowledge of the consumer's purpose by the seller. As some national transpositions of Article 2 (2) lit b) Directive actually illustrate,[42] the formulation of the Directive seems to be rigid enough to exclude (or, at least, admit that national interpreters exclude) that bare silence by the seller can be regarded as equivalent to acceptation.

**The importance of public statements**: Where the Consumer Sales Directive indisputably deviates from the CISG is on the importance which is given to public statements by third parties in defining the notion of conformity with the contract**.**

As Article 2 lit d) states: "Consumer goods are presumed to be in conformity with the contract if they … show the quality and performance which are normal in goods of the same type and which the consumer can reasonably expect, given the nature of the goods and taking into account any public statements on the specific characteristics of the goods made about them by the seller, the producer or his representative, particularly in advertising or on labeling".[43]

No comparable rule is to be found in the CISG. In this respect, the rule of the Directive can be regarded as a very important achievement in the field of contract law. For the first time it is recognized in general terms that, albeit with some exceptions,[44] statements by third parties, including advertising and labeling by the producer, concur, in principle, to define the content of the agreement and, correspondently, what the seller is bound to perform to the buyer and the buyer is entitled to expect as a performance. As a result, for these statements to play a role, it does not need to be demonstrated that the parties have expressly or tacitly relied on them in their agreement.

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[42] See Article 129 (2) lit. d), Italian Consumer Code (d.lgs. 6 september 2005, n° 206), which expliclty admits a tacit acceptation by the seller, this way, however, implicitly excluding that bare silence may suffice (see *Zaccaria/De Cristofaro*, La vendita dei beni di consumo. Commento agli artt. 1519bis -1519 novies del Codice Civile, 2002, 52 et seq.

[43] Some scholars have expressed, however, a completely different view, stigmatizing the deviation from the CISG model: see, in particular, *Medicus*, Ein neues Recht für Verbraucher?, Recht der internationalen Wirtschaft (RIW) 1996, 1926.

[44] See Article 2 (4) Consumer Sales Directive: "The seller shall not be bound by public statements, as referred to in paragraph 2(d) if he: – shows that he was not, and could not reasonably have been, aware of the statement in question, – shows that by the time of conclusion of the contract the statement had been corrected, or – shows that the decision to buy the consumer goods could not have been influenced by the statement."

It may be argued whether this deviation finds its justification in the fact of being the buyer a consumer, i.e. a person who is normally more exposed than other contracting parties to the "Sirens" of advertising. Were this conjecture to be true, it would explain the specific rule laid down in the CISG and, at the same time, exclude that this rule may be extended by the interpreter beyond the rationale and, hence, the scope of application of the Directive.[45]

**The exclusion of liability for recognizable lacks of conformity**: A further analogy can be found in the rule concerning the case in which the buyer, at the time the contract was concluded, knew or could not ignore the existence of a lack of conformity. Both the CISG and the Consumer Sales Directive exclude, in such a case, that there is a lack of conformity or exclude that the seller is liable for it.[46]

Article 2(3) Directive provides that "there shall be deemed not to be lack of conformity, if, at the time the contract was concluded, the consumer was aware, or could not reasonably be unaware of the lack of conformity". The rule is essentially drawn from Article 35 (3) CISG, stating that "the seller is not liable … for any lack of conformity of the goods if at the time of the conclusion of the contract the buyer knew or could not have been unaware of such lack of conformity".[47]

At a first glance, there is only a slight difference between Art. 2(3) Directive and Article 35(3) CISG. The EU Directive sets a standard according to which the buyer's conduct should be evaluated. It is the standard of "reasonableness", which cannot be found in Article 35 CISG. Probably, the EU legislator wished to improve the CISG model by providing the interpreter with a specific interpretive criterion of the party's conduct.

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45 The German legislator has, however, clearly shown not to share this view, insofar as it decided to extend the relevance of advertising to all contracts of sale, be they between a professional and a consumer or between two professionals. Cf. *Grundmann*, European sales law – reform and adoption of international models in German sales law, 247 and *Bernreuther*, Sachmangelhaftung durch Werbung, Wettbewerb in Recht und Praxis (WRP), 2002, 368 et seq.

46 As to the differences in wording between the CISG ("the seller is not liable …") and the Directive ("there shall be deemed not to be lack of conformity …"), see *Troiano*, The exclusion of the seller's liability for recognizable lacks of conformity under the CISG and the new European Sales Law: the changing fortunes of a notion of variabl contente, in: *Ferrari* (ed.), The 1980 Uniform Sales Law. Old Issues Revisited in the Light of Recent Experiences, 147 et seq.

47 The drafters of the CISG modelled this provision on the grounds of pre existing provision of EU Member States. Among the most important ones, one should mention Article 1642 French Civil Code, § 460 German Civil Code (before the recent reform of the German law of obligations) or, finally, Article 1491 Italian Civil Code.

It is controversial whether this difference in terminology results in a substantially different rule.

It may be argued that the reasonableness test implies a higher standard of care by the buyer than the standard which is usually regarded as to be required under Article 35 CISG.[48] According to the common understanding of this Article (especially the wording "could not have been unaware of"), the seller's liability is only excluded when the defect could have been detected by the buyer with *a minimum effort*. In other words, the seller is not liable (only) when the buyer inspected the goods with *gross negligence*. To the contrary, the notion of "reasonableness" seems to imply that the consumer has to conduct himself like "a reasonable person". If the standard of the reasonable person were to be regarded as functionally equivalent to the traditional standard of the "bonus pater familias",[49] this might open the way to a reading of Article 2(3) Directive which significantly deviates from the rule laid down in Article 35 CISG. A consumer would be required to inspect the goods with a higher standard of care (the one of the "bonus pater familias") than a professional buyer.[50]

### iii. Nature and Structure of the Remedies for Lacks of Conformity.

**General remarks**. As has been anticipated, another aspect under which the Consumer Sales Directive gets very close to the CISG is in defining and structuring the remedies for lacks of conformity.

Once again, the system of remedies[51] adopted within the CISG represents the result of the successful attempt to combine both Roman law and

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[48] See *Magnus*, Art. 25, Wiener UN-Kaufrecht (CISG), 13th revised ed., 1999, 325 et seqq. This approach complies with the meaning of other CISG provisions which make use of the same wording (see *Honnold*, Uniform Law for International Sales under the 1980 United Nations Conventions, 1999, 3rd ed., 260.

[49] This is however very controversial: see, for further details, *Troiano*, in: Ferrari (ed.), The 1980 Uniform Sales Law. Old Issues Revisited in the Light of Recent Experiences, 156 et seqq.

[50] It goes without saying that this would be a very odd result, since the Directive is aimed at protecting the consumer and should therefore require a lower standard of care from the consumer than from a professional buyer. The paradox may probably be avoided by interpreting the Directive in the light of its purpose of consumer protection and in the light of the CISG: see again *Troiano*, in: *Ferrari* (ed.), The 1980 Uniform Sales Law. Old Issues Revisited in the Light of Recent Experiences, 156 et seqq.

[51] For a comprehensive study on this issue cf. *P. Huber*, CISG – The Structure of Remedies, in Rabels Zeitschrift für ausländisches und internationales Privatrecht (RabelsZ) 2007, 13 et seqq. See also *Torsello*, Remedies for Breach of Contract

Common law heritage. The Roman tradition which is still at the basis of the continental system hinging on the concept of "guarantee"[52] leaves the choice to the buyer within a restricted set of remedies consisting in termination (the roman *actio redhibitoria*), on one side, and price reduction (the roman *actio quanti minoris*), on the other side.

Traditionally nor termination neither price reduction for sales of defective goods depend on fault. As has already been stressed, the no fault-liability system represents a deviation from the general principles on liability for non-performance under European continental law, which usually require fault by the debtor for liability to arise. However, fault is usually required –in the field of liability for defective goods also – as far as compensation of damages is concerned. On the other hand, damages are conceived as an additional and autonomous remedy, they are not an alternative to termination or price reduction.

A further deviation concerns the claims for performance: whilst the continental tradition generally favors performance claims in case of non-performance, at least in some continental legal systems (especially those which base transfer of title on consent) the situation is much more complicated in the case of sales of defective goods, in which the existence of a right to repair or to replace the goods is highly debated.

The Common law generally provides for a system of no-fault based liability for non performance (with some objective cause of exemptions) and gives to compensation for damages the role of a general remedy. No performance claims are allowed. In principle, this is also the case for the liability arising from the delivery of defective goods in a contract of sale. Termination is possible, but only in the case when a severe breach of contract has occurred.[53]

The CISG and, under its influence, the Consumer Sales Directive also create a sort of fusion between these systems of remedies. They, however, do not renounce to graft new original elements onto the existing ones. Hence, according to both the Common Law general rule and the Civil law special one, the seller's liability is conceived as an objective liability; the alternative remedies of termination and price reduction are maintained but next to them the buyer is given the choice between repair or replacement.

Moreover, as will be explained later on, both the CISG and the Consumer Sales Directive design the remedies just mentioned by following a hierarchical architecture, in which preference is given, in principle, to re-

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under the 1980 U.N. Convention on Contracts for the International Sale of Goods, in Vindobona Journal of International Commercial Law and Arbitration (Vind.J.Int.Comm.L.Arb.) 2005, 256 et seqq.

52 See above.

53 On the other hand, under Common law price reduction is not considered as a general remedy.

placement and repair.[54] The idea which is behind this choice is that, thanks to their conservative nature, replacement and repair are more functional remedies for the parties than termination and price reduction, the first one bringing the contractual relationship to an end, the second one significantly altering the content of the contract and, thus, the economical substance of the transaction. Consistent with this idea is the rule according to which termination is allowed only in case of serious lacks of conformity.

Under all these regards, the Consumer Sales Directive follows the CISG example.[55]

Let us consider these different issues separately:

**The seller's objective liability**: The seller's liability under the Directive is conceived as a no-fault liability. This follows from Article 3 (1) of the Directive which makes no reference to any fault requirement and according to which "the seller shall be liable to the consumer for any lack of conformity which exists at the time the goods were delivered".

The provision is almost identical to Art. 36 (1) CISG: "The seller is liable in accordance with the contract and this Convention for any lack of conformity which exists at the time when the risk passes to the buyer, even though the lack of conformity becomes apparent only after that time".[56]

**Performance claims (repair and replacement) as general remedies for non-performance of the contract of sale**: Art. 3 (3) Directive states clearly that "In the first place, the consumer may require the seller to repair the goods or he may require the seller to replace them, in either case free of charge, unless this is impossible or disproportionate". The provision corresponds in its substance to the rule laid down in Article 46 CISG, although there are some discrepancies in the wording.

In particular, Article 46 CISG, on the one hand, allows the buyer to require "delivery of substitute goods" (replacement) "only if the lack of conformity constitutes a fundamental breach of contract" (Article 46 (2) CISG), on the other hand, it allows him to "require the seller to remedy the lack of conformity by repair, unless this is unreasonable having regard to all the circumstances" (Article 46 (3) CISG).

Following the lines of the CISG, under the Consumer Sales Directive also repair and replacement play the role of general remedies for non-performance.

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[54] As will be illustrated later on, the hierachical architecture of the remedies is very clearly present in the Directive, whereas some doubts may arise as to its existance under the CISG. It will however be pointed out that, despite these doubts, the two sets or rules do not differ so much as to the substance.

[55] See *Magnus*, in: *Ferrari* (ed.), The 1980 Uniform Sales Law. Old Issues Revisited in the Light of Recent Experiences, 133.

[56] See Articles 35 (1) and 36 (1) CISG.

As has already been pointed out, the general character of the remedies innovate on many continental legal traditions, which have historically been reluctant in recognizing a general right to cure to the debtor in case of non-performance.

By explicitly providing an *obligation* of the seller to *deliver* goods which are *in conformity with the contract* it becomes possible to design both repair and replacement as remedies for non-performance of the mentioned obligation. In other words, by asking the seller to repair the good or to replace it the buyer is nothing but exercising his general right to an exact performance by the debtor.[57]

It must however be reminded that under Article 28 CISG, "a court is not bound to enter a judgment for specific performance unless the court would do so under its own law in respect of similar contracts of sale not governed by this Convention". Thus, the provision of the CISG partially restricts the general character of the claim for specific performance, by taking contrasting national laws into account.[58]

As one can draw from the text of above mentioned Articles of the CISG and the Directive, the CISG seems to require a different (and more severe) prerequisite for a claim to replacement to arise, i.e. that the breach of contract be "fundamental",[59] whereas the Sales Directive only requires that the replacement remedy be not "disproportionate" in comparison to the repair remedy, which means not too expensive or burdensome for the seller.

These restrictions are not identical,[60] although it may be argued that the application of the latter rule will not lead to significantly different results than in first case: The less serious the lack of conformity is, the more likely it is that replacing the good would cost disproportionately more to the seller than simply repairing it. On the contrary, if the lack of conformity represents a fundamental breach of contract, it is reasonable to assume that re-

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57 This rule innovates for instance on the Italian legal system, which until the directive did not recognize a general claim for exact performance to the buyer (or recognized it only in very restricted terms): cf. *Corapi*, La direttiva 99/44/CE e la Convenzione di Vienna sulla vendita internazionale: verso un nuovo diritto comune della vendita?, 657 et seq. Similar remarks may concern German law also: see e.g. *Schroeter*, Das Wahlrecht des Käufers im Rahmen der Nacherfüllung, Neue Juristische Wochenschrift (NJW) 2006, 1761 et seqq.

58 Cf. *Ferrari*, What sources of law for contracts for the international sale of goods?, Internationales Handelsrecht (IHR) 2006, 18 et seq.

59 For a detailed analysis of this concept see *Ferrari*, Wesentliche Vertragsverletzung nach UN-Kaufrecht – 25 Jahre Artikel 25 CISG, Internationales Handelsrecht (IHR) 2005, 1.

60 Cf., for the italian debate on this issue, *Zaccaria/De Cristofaro*, La vendita dei beni di consumo. Commento agli artt. 1519bis -1519 novies del Codice Civile, 75.

placement would be more convenient for the seller than repair or even represent the only possible remedy at hand.[61]

Conversely, a common feature of both rules is the fact of being both repair and replacement free of charge for the buyer.

In conclusion, albeit with some differences, the CISG and the Directive follow a very similar approach as to the right for specific performance. Both tend in fact to favor the remedy which is still possible or not too much expensive.[62]

**Termination**: Both the CISG and the Consumer Sales Directive give the buyer the possibility to react to non-performance by terminating the contract, i.e. definitively removing the contractual relationship.

The rules, however, are not identical, and this lets some doubts arise as to whether termination under the CISG is a residual remedy (as it is in the Directive) or not.

The CISG[63] gives the buyer the right to *immediately* "avoid" (i.e. "terminate", according to the terminology used in the Consumer Sales Directive) the contract of sale only if the breach of contract is "fundamental".[64] The buyer must exercise this right through a declaration which must be given within a reasonable time.[65]

The requirement that the breach of contract be fundamental is justified in the light of the "destructive" nature of termination. Setting the contract aside despite a (non-fundamental) breach would cause "considerable unnecessary and unproductive costs, such as those associated with the return or storage of the goods".[66]

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61 For similar remarks see *Magnus*, in: Ferrari, The 1980 Uniform Sales Law. Old Issues Revisited in the Light of Recent Experiences, 134.

62 See *Magnus*, in: Ferrari, The 1980 Uniform Sales Law. Old Issues Revisited in the Light of Recent Experiences, 140.

63 Article 64 (1) lit. a) CISG.

64 Article 49 (1) lit. a) CISG.

65 Article 49 CISG.

66 So *Ferrari*, Fundamental breach of contract under the UN Sales Convention: 25 years of article 25 CISG, Journal of Law and Commerce (Journ.L.comm.) 25 (2006), 490 et seq., adding that "this limitation helps to contain the number of cases in which the damaged party may take advantage of the defaulting party's breach in order to revise an agreement based on a specific economic situation or to shift the risk of a change in the market conditions to the other party". The author stresses also that the concept of fundamental breach under the CISG is not the exact transposition into the uniform sales law of the controversial notion of fundamental breach of contract under UK law: the CISG's notion represents an autonomous concept and has to be interpreted autonomously (*Ferrari*, ivi, 491 et seq.).

Under the EU Directive, termination, like price reduction, is available only if the remedies of repair or replacement (i.e. claims to specific performance) are impossible, excessively expensive or the seller have enacted them too late and in a way which is burdensome for the consumer.[67] Moreover, termination is disallowed where the lack of conformity is a minor one.[68]

In the light of these provisions, the rules which apply under the CISG and the Directive diverge as to two specific issues.

First of all, unlike the CISG, the Directive gives *residual* character to the remedy of termination even in cases of *fundamental* lack of conformity. Also in these cases, before terminating the contract, the consumer has to exercise the remedies of repair and replacement. Only if these remedies are unsuccessful or the seller fails to repair or replace the good, may the consumer rely on a right to termination.

However, though as a residual remedy, under the Directive termination seems to be possible even where the lack of conformity is not "fundamental". A different rule applies under the CISG, since above mentioned Article 49 provide a right to terminate the contract for a non-fundamental breach of contract only where the buyer has assigned a supplementary deadline (*Nachfrist*) to the seller to perform and, despite this supplementary period, the seller does not perform (Article 49 (1) lit. b) CISG).

The divergence between CISG and Consumer Sales Directive is, however, more apparent than real.

A more attentive interpretation of the notion of fundamental breach of contract[69] under Article 25 CISG should permit to reach very similar results.

As most commentators to the CISG have correctly pointed out, the notion of fundamental breach of contract under Article 25 CISG does not rely

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67 Article 3 (5) Consumer Sales Directive.

68 Article 3 (6) Consumer Sales Directive.

69 Undeniably, the notion of fundamental breach of contract is one of the most controversial issues under the CISG: see hereon *Ferrari*, Fundamental breach of contract under the UN Sales Convention: 25 years of article 25 CISG, 489 et seqq.; *Graffi*, Case law on the concept of 'fundamental breach' in the Vienna Sales Convention, Revue de Droit des Affaires Internationales/International Business Law Journal (RDI/Int.Bus.L.J.) 2003, 338 et seqq.; *Koch*, The Concept of Fundamental Breach of Contract under the United Nations Convention for the International Sale of Goods, Pace Review of the Convention on Contracts for the International Sale of Goods (CISG) 1998, 1999, 177 et seqq.; *Lubbe*, Fundamental breach under the GISG: A source of fundamentally divergent results, in Rabels Zeitschrift für ausländisches und internationales Privatrecht (RabelsZ) 2004, 446; *Lurger*, Die wesentliche Vertragsverletzung nach Art. 25 CISG, Internationales Handelsrecht (IHR) 2001, 91 et seqq.; *Torsello*, Remedies for Breach of Contract under the 1980 U.N. Convention on Contracts for the International Sale of Goods, 261.

on the fact of being the non-performed obligation "fundamental". On the contrary, what must be "fundamental" under the provision is the *breach* itself, i.e. the *violation* of the contractual obligations, not the obligation which is not performed. Precisely, according to Article 25 CISG, a fundamental breach consists in the circumstance of resulting the non-performance (be it of a primary or an accessory obligation)[70] "in such detriment to the other party as substantially to deprive him of what he is entitled to expect under the contract, unless the party in breach did not foresee and a reasonable person of the same kind in the same circumstances would not have foreseen such a result".

In the light of these remarks, it may therefore be argued, following the prevailing opinion,[71] that the non-performance of an obligation cannot be regard as fundamental where the non-performance can still be cured by the seller by repairing or replacing the good, unless this would cause any significant harm to the buyer. It is hence confirmed that termination is, also under the CISG, a residual remedy.[72]

As to the second issue, i.e. that the Directive seems to allow termination also where the non-performance is not fundamental, it must on the contrary be reminded that Article 3 (6) Directive disallows termination where the lack of conformity is minor.[73] Furthermore, the Directive allows termination

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[70] See, e.g., BGH 3rd April 1996, in: http://cisgw3.law.pace.edu/cases/960403g1.html.

[71] See *Ferrari*, Fundamental breach of contract under the UN Sales Convention: 25 years of article 25 CISG, 502-503; *Schlechtriem*, Art. 25, in: Schlechtriem/Schwenzer (eds.), Kommentar zum Einheitlichen UN-Kaufrecht. Das Übereinkommen der Vereinten Nationen über Verträge über den internationalen Warenkauf – CISG, 4th ed., 2004, 319. See also the decisions of the following courts: HG Argau, 5 November 2002, in: http://cisgw3.law.pace.edu/cases/021105s1.html, 179-180; OLG Köln, 14 October 2002, Internationales Handelsrecht (IHR) 2003, 3, 15 et seqq.; Cour d'Appel Grenoble, 26 april 1995, in: http://www.cisg-france.org/decisions/2604952v.htm. *Contra*, however, *Koch*, The Concept of Fundamental Breach of Contract under the United Nations Convention on Contracts for the International Sale of Goods (CISG), Pace Review of the Convention on Contracts for the International Sale of Goods (Pace Rev.) 322. This interpretation is in line also with the text of Article 48 (1) CISG, from which it seems reasonable to draw a general right of the seller to cure non-performance.

[72] *Huber*, CISG – The Structure of Remedies, 17. See further *Ferrari*, Remarks on the Uncitral Digest's Comments on Article 6 CISG, Journal of Law and Commerce (J.L.Comm.) 2005, 56.

[73] Article 3 (6) Consumer Sales Dierective: "The consumer is not entitled to have the contract rescinded if the lack of conformity is minor" See *Grundmann*, Verbraucherrecht, Unternehmensrecht, Privatrecht – warum sind sich UN-Kaufrecht und EU-Kaufrechts-Richtlinie so ähnlich?, 51.

only if repair and replacement are disproportionate. This requirement is almost equivalent, in its concrete outcome, to the requirement of the breach of contract being fundamental: the more serious is the breach, more likely it is that the repair and replacement are disproportionate in comparison with termination.[74]

**Price reduction**: The requirements for the price reduction remedy to be applied are completely different in the Consumer Sales Directive than in the CISG.

Like termination, also price reduction is regarded by the Directive as a subsidiary remedy, applicable only where the same requirements exist which allow termination of the contract.

On the contrary, the CISG simply designs this device as a facultative remedy, to which the buyer may freely resort.[75]

**Time limits**: Some similarities exist between the CISG and the Directive also as far as time limits are concerned. Both texts provide for a maximum time frame of two years starting from the time of delivery, the expiration of which causes the buyer to lose the right to rely on a lack of conformity (see Article 39 (2) CISG and Art. 5 (1) Consumer Sales Directive). Both texts provide again for a shorter cut-off period for the buyer to give notice of the lack of conformity to the seller (see Article 39 (1) CISG and Art. 5 (2) Consumer Sales Directive).[76]

Despite these similarities, the rules differ under both aspects rather sharply. The two-years limit under the CISG is also a cut-off period, since the lost of the right depends on the lack of notice of the lack of conformity, while the two years period in the Sales Directive is a limitation period, the lost of the rights depending on the mere fact of the lack of conformity not revealing itself within two years.

Moreover, the shorter cut-off period for the notice is a flexible one under the CISG, being only required it to be "reasonable", while it is a fixed one (two months) under the Directive. It was probably a deliberate option which

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74 Cf. *Zoll*, UN-Kaufrecht und Common Frame of Reference im Bereich der Leistungsstörungen: Ein Betrag aus der Perspektive der Acquis Group, Zeitschrift für Europäisches Privatrecht (ZEuP) 2007, 242.

75 See *Sondhal*, Understanding the remedy of price reduction – A means to fostering a more uniform application of the United Nations Convention on Contracts for the International Sale of Goods, Vindobona Journal of International Commercial Law and Arbitration (Vind.J.Int.Comm.L.) 2003, 255 ff.

76 It must however be pointed out that, unlike the CISG, the provision of the Directive concerning the burden of the consumer to give notice of the lack of conformity to the seller is not binding for the Member States which only have the faculty, not the obligation, to adopt such a rule in their legal systems. Many Member States, however, did adopt this rule: see, e.g., Article 132 (2) Italian Consumer Code.

was dictated – dare I say, negatively dictated – by the experience of the CISG's concrete application by the courts and by the difficulties which the courts have encountered so far in concretizing the vague "reasonable time" notion.[77]

### iv. Matters governed by the CISG but ignored by the EU Directive

**Defects in packaging**: The CISG (Article 35 (2) lit. d) states that "the goods do not conform with the contract unless they … d) are contained or packaged in the manner usual for such goods or, where there is no such manner, in a manner adequate to preserve and protect the goods". This provision has no equivalent in the Consumer Sale Directive. The Directive does not address the issue of defects consisting in lacking or incorrect packaging at all. According to some scholars, the absence of an express rule might be overcome through interpretation. Precisely, one should bear in mind that Article 2 (5) Consumer Sales Directive, as we will show later on, expressly provides that incorrect installation of the goods is treated as a case of non-conformity of the goods themselves. From this rule it might be argued that it is a general principle under the Directive that the non-performance of an accessory duty is to be regarded as a lack of conformity. Since also packaging is an accessory duty, the same principle would also apply to this case.[78]

**Compensation for Damages**: While the CISG contains several rules on damages, which intensively solve the most important issues concerning damages, the European legislator has deliberately let the issue of damages for delivery of defective goods outside the scope of the directive.[79] It goes without saying that this does not mean that compensation for damages caused by the delivery of defective goods is excluded. The idea is the same underlying the CISG:[80] compensation for damages is naturally attached to any breach of the contract of sale; it is "the regular and minimum remedy" for it.[81] However, probably because of the self-evidence of the remedy, of its general

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77 Probably, the EU legislator's reasoning was that a fixed time limit would better serve the goal of harmonising the rules on the seller's liability, especially within an area, like the EU, which is geographically restricted and, thus, despite some differences, shares common traditions.

78 See *Grundmann*, Verbraucherrecht, Unternehmensrecht, Privatrecht – warum sind sich UN-Kaufrecht und EU-Kaufrechts-Richtlinie so ähnlich?, 49.

79 Cf. Recital 6 Consumer Sales Directive.

80 See in particular Articles 45 (1) (b) and Article 61 (1) (b) CISG. See also Art. 79 (5) which excludes that it is excused.

81 *Magnus*, in: *Ferrari* (ed.), The 1980 Uniform Sales Law. Old Issues Revisited in the Light of Recent Experiences, 134.

character, the EU legislator has preferred to leave the regulation of it completely to the applicable national law. This apparently neutral choice has created some uncertainties, especially in those European legal systems which at the same time have general rules on damages for breach of contract and a special set of rules for damages arising from defective goods, which differ under some aspects, for instance as to time limits, which are usually the same for all remedies for lack of conformity and, thus, for damage claims also.

The question is, hence, the following one: In the absence of a provision in the Sales Directive, is the remedy of damage in the area of consumer transactions governed by the special provisions concerning sales or do the general rules on damage apply?[82]

These complicated issues, which cannot obviously be solved here, show how the rules on compensation for damages applicable under the CISG may significantly differ from those governing consumer sales transactions under national laws.

**Right to retain payment or to suspend it**: Unlike the CISG (see in particular Article 71 (1) CISG), the Consumer Sales Directive does not contain rules recognizing the right of the consumer to retain payment or to suspend it.[83] These rights are therefore governed by the applicable domestic law.

## v. Matters governed by the Consumer Sales Directive but ignored by the CISG

**The presumption on the existence of the lack of conformity**: The Directive also contains some specific rules which have no equivalent in the CISG and can be considered as an in improvement or a specification of the CISG model. One of these rules is laid down in Article 5 (3) Directive, which provides that, "unless proved otherwise, any lack of conformity which becomes apparent within six months of delivery of the goods shall be presumed to have existed at the time of delivery unless this presumption is incompatible with the nature of the goods or the nature of the lack of conformity".

**Incorrect installation or incorrect installation instructions**: Article 2 (5) Consumer Sales Directive provides that "Any lack of conformity resulting from incorrect installation of the consumer goods shall be deemed to be equivalent to lack of conformity of the goods if installation forms part of the contract of sale of the goods and the goods were installed by the seller or under his responsibility". The provision goes forth by stating that "This shall

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[82] See e.g. in Italy *Zaccaria – De Cristofaro*, La vendita dei beni di consumo, 142 et seqq.

[83] See *Magnus*, in Ferrari (ed.), The 1980 Uniform Sales Law. Old Issues Revisited in the Light of Recent Experiences, 140.

apply equally if the product, intended to be installed by the consumer, is installed by the consumer and the incorrect installation is due to a shortcoming in the installation instructions". The provision has no exact equivalent in the CISG and represents a significant improvement of the model laid down in the CISG.

However, despite the absence in the latter of a specific rule on incorrect installation, there can be no doubts that the rule applies under the CISG also. This follows from a correct interpretation of the requirement that the goods be "fit for the purposes for which goods of the same type are normally used" (Article 35 (2) (a)). From this requirement it follows that the seller is liable for the lack of conformity consisting in lack of fitness for the normal purpose regardless what the cause of this lack of fitness may be. Hence, if the incorrect installation renders the goods unfit for their ordinary purpose, this is a lack of conformity for which the seller is held to be liable.[84]

**Contractual Guarantees**: Unlike the CISG, the EU Directive gives specific guidance as to the form and the content of contractual guarantees which the seller might spontaneously offer to the consumer (Art. 6 Consumer Sales Directive).

**The final seller's right to redress**[85]

Article 4 Consumer Sales Directive states that, where the final seller is liable to the consumer because of a lack of conformity resulting from an or omission by the producer, a previous seller in the same chain of contracts or any other intermediary, the final seller must be able to pursue remedies against the person or persons liable in the contractual chain. The Directive leaves the procedures and conditions of exercise of this right to national law. The CISG provides no specific remedy for this case.

## 3. The CISG's Influence on Other EU Directives: the Package Tour Directive

Beside the Consumer Sales Directive, the CISG has influenced other important EU Directives. However, while in the first case the influence is explicit

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[84] See *Magnus*, in Ferrari (ed.), The 1980 Uniform Sales Law. Old Issues Revisited in the Light of Recent Experiences, 139, and *Kruisinga*, What do consumer and commercial sales law have in common? A comparison of the EC Directive on consumer sales law anf the UN Convention on contracts for the international sale of goods, 182.

[85] Cf. Article 4 Consumer Sales Directive. See also *Magnus*, Der Regreßanspruch des Letztverkäufers nach der Richtlinie über den Verbrauchsgüterkauf, in: *Basedow/Einhorn/Girsberger/Meier/Schnyder* (eds.), Private law in the international arena. From National Conflict Rules Towards Harmonization and Unification – Liber Amicorum Kurt Siehr, 2000, 329.

and very strong, in the other cases the connections with the CISG are considerably weaker or even hardly noticeable.

Hence, if it is true that there has been some influence, it would be exaggerated to imagine the CISG having played an extensive role in molding these Directives.

This is the case of the Package Tour Directive of 1990,[86] the underlying structure of which, according to an author, could be traced back to the model of the CISG.[87]

This opinion stresses the similarities existing between several rules of the Directive and some provisions of the CISG. As to the definition of the main obligations of the parties, for instance, Art. 5 (1) Package Tour Directive obliges the supplier to perform the contracted travel services. As to the consequences of non-performance, Art. 5 (2) provides the supplier's liability in damage for non-performance or improper performance of the travel services and permits the supplier to be relieved if the fault of the consumer or of a third party or if force majeure or an unforeseeable and unavoidable event has caused the damage. The system of obligations and liability is therefore very similar to the system which is laid down in the CISG. Furthermore, the Package Tour Directive contains a definition of force majeure[88] which very much resembles the one in Art. 79 (1) CISG.[89]

However, it is difficult again to say whether these similarities are the result of a precise intention to take the CISG as a model or it is the result of chance or other factors. A more reasonable explanation is that all these rules correspond to an unexpressed common set of principles and notions shared in most legal systems in the world.[90]

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[86] Council Directive of 13 june 1990 on package travel, package holidays and package tours (90/314/EEC).

[87] Magnus, in: *Ferrari* (ed.), The 1980 Uniform Sales Law. Old Issues Revisited in the Light of Recent Experiences, 142.

[88] Art. 4 (6) (b) (ii) Package Tour Directive: "force majeure, i.e. unusual and unforseeable cicumstances beyond the control of the party by whom it is pleaded, the consequences of which could not have been avoided even if all due care had been exercised".

[89] Article 79 (1) CISG: "A party is not liable for a failure to perform any of his obligations if he proves that he failure was due to an impediment beyond his control and that he could not reasonably be expected to take into account at the time of conclusion of contract or to have avoided or overcome it or its conquences".

[90] In fact, no sign can be found in the preparatory documents of this directive that the EU legislatos wanted to follow the CISG's model.

## 4. The Directive on Cross-Border Credit Transfers

Similar remarks may also concern the Directive on Cross-Border Credit Transfers of 1997.[91] Here again the Directive provides an obligation of the supplier of banking services and lays down the supplier's liability for non-performance of the obligation (Art. 6 (1)). The supplier is exempted from liability in the case of force majeure or of intervention of the victim or of a third party having caused the non-performance (Articles 9 and 6). Force majeure is defined in a way[92] that very much resembles the definition laid down in the CISG.[93]

## 5. Other directives

Some scholars have found significant connections also between the CISG and the Directive on late payments of 29 June 2000 (35/2000/EC).[94] This is in fact one of the few directives directly concerning relationship between businesses, hence directly overlapping with the CISG. There are indeed some common topics, namely the issue of interests in case of delay. Except from these issues, it does not seem however that the directive may be seriously regarded as the result of the CISG's influence.[95]

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91 Directive of the European Parliament and of the Council of 27 January 1997 on cross-border credit transfers (97/5/EC).

92 Article 9 Cross-border Credit Transfers Directive: "force majeure, namely abnormal and unforeseeable circumstances beyond the control of the person pleading force majeure, the consequences of which would have been unavoidable despite all efforts to the contrary, which are relevant to its provision".

93 For these remarks see *Magnus*, in: *Ferrari* (ed.), The 1980 Uniform Sales Law. Old Issues Revisited in the Light of Recent Experiences, 142 et seq. Some doubts are expressed on this respect by *Schroeter*, UN-Kaufrecht und Europäisches Gemeinschaftsrecht, 564, who points out that the main model for this Directive was the UNCITRAL Uniform Law on Cross-Border Transactions (hence, not the CISG).

94 *Schulte-Braucks*, Zahlungsverzug in der Europäischen Union, Neue Juristische Wochenschrift (NJW) 2001, 103, 105.

95 Some doubts on this opinion are expressed by *Schroeter*, UN-Kaufrecht und Europäisches Gemeinschaftsrecht, 586, according to whom the signs that the CISG played any significant role by the dafting of this Directive are not univocal and hardly convincing.

## II. The CISG's Influence on the Present and Future Steps Towards Further Harmonization of EU Contract Law.

### 1. The Academic Drafts for a Common European Set of Rules on Contract Law and Their Support by the European Commission

Beside EU legislation, the CISG has had a strong impact on the various efforts made towards the adoption of a future European uniform set of contract rules and principles thus far.

As is well-known, the CISG considerably influenced the drafting of the Principles of European Contract Law, of the Gandolfi-Group's European Contract Code, of the UNIDROIT Principles and, to come to more recent scholarly initiatives, of the Principles of European Law (PEL) and of the Acquis Principles.[96]

Some of these academic efforts have been directly or indirectly supported by the European Commission, which has never hidden its favorable attitude towards the idea of relying on the CISG as a model for these drafts and, in more general terms, as a model for a future comprehensive set of European rules in the filed of contract law.

This attitude clearly emerges from the well-known July 2001 Public Consultation on the Future of European Contract Law[97] (followed by the Action Plan for 'a More Coherent European Contract Law' of 12 February 2003).[98] In that occasion, even though technically speaking, the CISG is not EU law, the European Commission still decided to include the CISG – and other UN uniform law Conventions – in the broad definition of 'acquis communautaire'.[99] In doing so, the Commission wished to stress the fundamental role of the CISG as a model for the future unification of European Contract Law.[100]

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[96] See later on for details on these different projects.

[97] Communication of July 2001 from the European Commission to the Council and the European Parliament on European Contract Law (COMN 2001(398) final).

[98] Communication from the Commission to the European Parliament and the Council of 12 Febraury 2003, "A More Coherent European Contract Law – An Action Plan", COM (2003) 68 final.

[99] See Communication of July 2001 from the European Commission to the Council and the European Parliament on European Contract Law, lit. j.

[100] It may also be speculated that the European institutions had the idea or rather the hope that by referring to the CISG as a model it might be easier to find a compromise among the Member States on a specific measure. *Micklitz*, Ein einheitliches Kaufrecht für Verbraucher in der EG?, Europäische Zeitschrift für Wirtschaftsrecht (EuZW) 1997, 229, 230, who describes this choice as a "wise political move" by the European Commission.

## 2. The CISG's Influence on PECL, UNIDROIT Principles, Pavia Group's "European Contract Code", PEL and Acquis Principles

As stated before, the drafters of the PECL (so-called also "Lando Principles")[101] were perfectly aware of the importance of the CISG for the unification of European Contract law and explicitly took the CISG as a model for their work.[102]

It must however be reminded that the PECL are nothing but the result of the work of an academic network. Their primary purpose is to stoke or enrich the debate on the future of European private law. Hence, although they might have an indirect impact on the EU legislator, this impact is not sure or predictable.

The same remarks apply to the works of the so-called Gandolfi Group, i.e. the Academy of European Private Lawyers, which, directed by the Italian professor Giuseppe Gandolfi, started in 1995 with the drafting of a 'European Contract Code' ('Code européen des contrats'). The Draft of the Code was published in 2001.[103]

Though in a less sizeable form than in the PECL, the influence of the CISG is noticeable in many provisions of the Code européen des contrats, not only those directly concerning the law of sales but also in the parts of the Code specifically devoted to the general law of contract.

Like the PECL, the 'Code européen des contrats' is a scholarly draft. Whatever its impact will be on the future EU legislation, it will be nothing but an indirect influence.

It is worth mentioning here that the CISG had also a strong influence on the drafting of the UNIDROIT Principles of International Commercial

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[101] *Ole Lando and Hugh Beale* (eds.), Principles of European Contract Law – Parts I and II, prepared by the Commission on European Contract Law, 1999; *Ole Lando, Eric Clive, André Prüm and Reinhard Zimmermann* (eds.), Principles of European Contract Law – Part III, 2003.

[102] See *Lando/Beale*, Principles of European Contract Law, Parts I and II, 2000; *Lando/Clive/Prüm/Zimmermann*, Principles of European Contract Law, Part III, 2003. In particular in *Lando/Beale*, Principles of European Contract Law, Parts I and II, XXV, it is stated that "The Comission has not hesitated to borrow from legislation and Conventions dealing with specific types of contract through provisions which are suitable for general application. Thus the United Nations Convention on Contracts for the International Sale of Goods of 1980 (CISG) has been a particularly fruitful source of ideas for the Principles". Cf. also *Schroeter*, UN-Kaufrecht und Europäisches Gemeinschaftsrecht, 563.

[103] *Gandolfi* (ed.), Code Européen des contrats – Avant-projet, 2001.

Contracts.[104] The UNIDROIT Principles are the work of a group of outstanding experts in the field of uniform commercial law which gave itself the task to summarize general principles of uniform international commercial contracts. Thus, it does not come as a surprise that the main source of inspiration for this group was the most successful international convention in the field of commercial contract law, namely the CISG. The UNIDROIT principles are not meant to specifically serve the purpose of harmonizing or unifying European contract law. Nevertheless they are *de facto* influencing the debate on this field. Hence, it is not unreasonable to state that the influence of the UNIDROIT Principles on the debate concerning harmonization of European contract law is a further channel for the CISG to have an indirect impact on this process.[105]

In 1998 the task of the Lando Commission (Commission on European Contract Law) was taken over by a new academic endeavor, the Study Group on a European Civil Code (SGECC), directed by Prof. Christian von Bar. The Study Group began its labors, which have not been completed yet, in 1998. The results are being collected to form the so-called 'Principles of European Law' (PEL).[106] The Study Group decided to broaden the scope of the PECL far beyond the general principles of contract law. Thus, the new project deals also with specific contracts and obligations deriving from other sources than the contract, like benevolent interventions in another's affair,

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[104] See *Bonell*, An International Restatement of Contract Law, 2nd ed., 1997, 47: "Only exceptionally do the UNIDROIT Principles depart from the solutions adopted in CISG".

[105] See *Magnus*, Europäisches Vertragsrecht und materielles Einheitsrecht – Künftige Symbiose oder störende Konkurrenz?, in: *Mansel/Pfeiffer/Kronke/Kohler/Hausmann* (eds.), Festschrift für Erik Jayme, 2004, 1317.

[106] To date five volumes have appeared. They cover leases (*Study Group on a European Civil Code*, Principles of European Law, Lease of Goods, prepared by Lilleholt, Victorin, Fötschl, Konow, Meidell, Bjøranger Tørum, 2007), services (*Study Group on a European Civil Code*, Principles of European Law, Service Contracts, prepared by Barendrecht, Jansen, Loos, Pinna, Cascão, van Gulijk, 2006), commercial agency, franchise and distribution (*Study Group on a European Civil Code*, Principles of European Law, Commercial Agency, Franchise and Distribution Contracts, prepared by Hesselink, Rutgers, Bueno Díaz, Scotton, Veldmann, 2006), personal security contracts (*Study Group on a European Civil Code*, Principles of European Law, *prepared by Drobnig*, 2007), and benevolent interventions in another's affairs (*Study Group on a European Civil Code*, Principles of European Law, Benevolent Intervention in Another's Affairs, prepared by von Bar, 2006). Further books will follow, in 2008 on sales, unjustified enrichment law and the law regarding non-contractual liability arising out of damage caused to another, and in 2009 on mandate and loan agreements, gratuitous contracts and all the subjects related to property law.

unjustified enrichment, non-contractual liability. As far as our topic is concerned, it is very interesting to stress the draft concerning the law of sales, which is about to be published this year in its last version, complete with comments and notes concerning European national laws.

In this respect the influence of the CISG is also very remarkable.

This can easily be understood for the parts of the PEL which were already incorporated in the PECL and have been only slightly modified or adapted to a new framework. Exactly as it was in the PECL, the CISG's influence on these parts can be found primarily in the fact that many of the principles and rules laid down in the CISG have been extended to matters outside the law of sales. These rules have, thus, been elevated to general principles of the law of contract and obligation. This is the case of the rules on formation of contract or on performance and non-performance.

However, the CISG's influence on the PEL is not restricted to these issues. Even the provisions of the PEL which are completely new, and especially, as anyone can imagine, the new sub-section A of the Book IV on sales, show outstanding similarities with the CISG.

Having said that, it must be reminded that the nature of the PEL is exactly the same as the PECL. Both sets of principles are the work of an academic network and are primarily meant to contribute to the debate on the future of European private law. As will be illustrated later on, however, the work of the Study Group is probably bound to play an important role – together with the Acquis Principles – in the formation of the future political Common Frame of Reference. This would undoubtedly enhance its possible impact on future EU legislation.

The last academic initiative which is worth mentioning is, precisely, the project known under the name of Acquis Group (ACQP).

Unlike the above mentioned projects, the scope of which reached far beyond the private law of the European Union to the common principles of European legal traditions (also outside the EU area), the Research Group on the Existing EC Private Law, commonly called Acquis Group, founded in 2002, from the beginning has focused its work only on the provisions of the so-called EC Acquis, i.e. the provisions of the existing primary and secondary EC law in the field of private law. The Acquis Group has given itself the task to "present and structure the bulky and rather incoherent patchwork of EC private law in a way that should allow the current state of its development to be made clear and relevant legislation and case law to be found easily".[107] This has resulted in the drafting of a set of general principles and rules, directly drawn from the existing EU private law.[108]

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[107] See *Von Bar/Clive/Schulte-Nölke* (ed.), Principles, Definitions and Model Rules of European Private Law, Draft Common Frame of Reference, Interim Outline Edition, prepared by the Study Group on a European Civil Code and the Research Group on EC Private Law (Acquis Group), Intr. n° 58 (At present, the DCFR

In the intention of the drafters, the Acquis principles should "permit identification of shared features, contradictions and gaps in the Acquis". Thus, the ACQP may have a function for itself, namely as a "source for the drafting, transposition and interpretation of EC law".[109]

Like PECL, PEL and Gandolfi's project, the Acquis Principles also are, as such, academic texts, with no official repercussions for EU legislation. In the present paper, which is dedicated to the CISG's impact on the EU legislator, it would be therefore unreasonable to pay excessive attention to these projects.

As already anticipated, however, in the last five years the work of some of the afore mentioned groups, namely the Study Group on a European Civil Code and the Acquis Group, has acquired a new dimension, which have significantly increased the potential impact of these academic initiatives on forthcoming EU legislation.

The decisive turn has been represented by the formal invitation, which the European Commission issued to both groups, to join their efforts and concur together to the drafting of the so-called "Common Frame of Reference". The two groups accepted this invitation and, performing their contract with the Commission, presented in February 2008 the first Academic Draft of the Common Frame of Reference (DCFR).

In order to understand what the CFR and the corresponding DCFR is meant to be, we need to go back to the announcements made by the EU Commission during the years 2001-2004.

## 3. The CISG's Presumable Influence on the Future "Common Frame of Reference" (CFR)

### a) The CFR

Following its 'Public Consultation on the Future of European Contract Law' of July 2001,[110] on February 2003 the European Commission presented the

has only been published in an Interim Outline Edition, which includes neither comments nor notes on national legislation. In my quality as advisor of the Study Group on a European Contract Code I had however the chance to follow the different stages of this drafting process from the outside also as far as the comments are concerned. Hereinafter I will sometimes refer to this work in progress, with the purpose of giving a general overview on the terms of the debate among the commentators and describing what will presumably emerge from the comments.

[108] These findings are currently being published in a specific series of books.

[109] See Draft Common Frame of Reference, Intr. n° 58.

[110] Communication of July 2001 from the European Commission to the Council and the European Parliament on European Contract Law (COMN 2001(398) final).

'Action Plan on A More Coherent European Contract Law',[111] already mentioned before. The purpose was to call for comments and suggestions on possible measures for improvement of the existing EU contract law. The Commission itself proposed three measures: i. increasing the coherence of the so-called "acquis communautaire"; ii. elaborating EU-wide standard contract terms; and iii. further exploring whether there is a need for a more comprehensive measure to be adopted in the form of an 'optional instrument'. In fact, the Commission's principal proposal was to start by developing a Common Frame of Reference (CFR), i.e. a coherent set of model rules, principles and standard contract terms[112] which could be then used by the Commission itself in reviewing the existing acquis and drafting new legislation.[113]

In a further paper, 'European Contract Law and the revision of the acquis: the way forward',[114] published in October 2004, the Commission specified that the CFR should not appear in the form of legislation, although it could assist in the improvement of the existing EU legislation,[115] so as to eliminate current gaps and overlaps between the existing Directives and Regulations,[116] and might at a later stage form the basis of an optional instrument which parties might choose to govern their mutual rights and obli-

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111 COM (2003) final, OJ C 63/1 (referred to here as *Action Plan*).

112 This aspect of the plan has, however, temporarily been abandoned. See Commission of the European Communities. First Progress Report on The Common Frame of Reference, COM (2005), 456 final, p 10.

113 *Action Plan* paragraph 72.

114 Communication from the Commission to the European Parliament and the Council, COM (2004) 651 final, 11 October 2004 (referred to as *Way Forward*).

115 *Way Forward* para. 3.1.3, p. 11.

116 As one may read in the Introduction to the Interim Outline Edition of the academic DCFR, "Directives frequently employ legal terminology and concepts which they do not defin (…). A CFR which provides definitions of these legal terms and concepts would be useful for questions of interpretation of this kind, particularly if it were adopted by the European institutions – for example, as a guide for legislative drafting. It would be presumed that the word or concept contained in a directive was used in the sense in which it is used in the CFR unless the directive or regulation stated otherwise. National legislators seeking to implement the Directive, and national courts faced with interpreting the implementing legislation, would be able to consult the CFR to see what was meant" (*Von Bar/Clive/Schulte-Nölke* (ed.), Principles, Definitions and Model Rules of European Private Law, Draft Common Frame of Reference, Interim Outline Edition, prepared by the Study Group on a European Civil Code and the Research Group on EC Private Law (Acquis Group), 2008, [Hereinafter: *Von Bar/Clive/Schulte Nölke* (ed.), Draft Common Frame of Reference], Intr. 64 et seq.).

gations.[117] In the Commission's mind,[118] the main purpose of the CFR is merely to serve as a kind of a legislators' guide or 'tool box'.[119]

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[117] In the Commission's view, a more detailed discussion of this issue would however be premature at this stage.

[118] Further proposals on the scope and the purposes of the CFR can be drawn from a later paper by the Commission published in 2007, i.e. the European Commission's 'Green Paper on the Review of the Consumer Acquis' (COM(2006) 744 final of 8 February 2007 (in: http://ec.europa.eu/consumers/cons_int/safe_shop/acquis/green-paper_cons_acquis_en.pdf), although this paper does not not completely harmonize with the foregoings papaers by the Commission. In this Paper the Commission addresses the following questions, among others: whether full harmonisation is desirable, whether there should be a horizontal instrument, and whether various additional matters should be dealt with by the Consumer Sales Directive.

[119] Moreover, the Commission did not give specific guidance on what the coverage of the CFR should be. Thus, how far the CFR should reach still seems to be an open question, although it is reasonable to believe that the CFR should at least contain "the topics directly related to the existing EU contract law *acquis* in combination with general contract law issues which are relevant for the *acquis*". See Commission of the European Communities. Second Progress Report on the Common Frame of Reference, COM (2007) 447 final, pp 8-9.
According to te drafters of the DCFR, the following aspects would seem to be worthy of being taken into consideration when making the relevant political decisions: "It seems clear that the CFR must at any rate cover the fields of application of the existing directives that are under review, and any others likely to be reviewed in the foreseeable future. Thus all consumer law should be included, and probably all contracts and contractual relationships that are the subject of existing directives affecting questions of private law, since these may also be reviewed at some stage. Secondly, the CFR should cover any field in which revision of the acquis or further harmonisation measures is being considered. This includes both areas currently under review (e.g. sales, and also leasing which is discussed in the Green Paper on revision of the consumer acquis) and also areas where harmonisation is being considered, even if there are no immediate proposals for new legislation. Thus contracts for services should be covered, and also security over movable property, where divergences of laws cause serious problems. The same holds true for insurance contracts. Thirdly, in order to provide the definitions that are wanted, the CFR must cover many terms and concepts that are referred to in Directives without being defined. In practice this includes almost all of the general law on contract and contractual obligations" (*Von Bar/Clive/Schulte-Nölke* (ed.), Draft Common Frame of Reference, Intr. 67-69)

### b) The DCFR

#### i. General remarks

On December 2007, as has been mentioned above, the Study Group on a European Civil Code and the European Research Group on Existing EC Private Law (the 'Acquis Group') have presented the first academic Draft of a Common Frame of Reference (DCFR), aimed at responding to the announcements by the European Commission of 2003 and 2004. The Draft has been published in a first Interim Outline Edition[120] (without comments and national notes)[121] on February 2008. Its principal purpose is to propose a possible model for the 'political' CFR, consisting in "principles", "definitions" and "model rules"[122] of European contract law.[123] In accordance with the purpose of the CFR itself, the DCFR "does not identify particular rules that are put forward as proposals for immediate legislation. Rather the aim is to provide rules from which the legislator may draw inspiration".[124]

As stated by the members of the Drafting Team,[125] the DCFR aims "to identify best solutions, taking into account national contract laws (both case law and established practice), the EC *acquis* and relevant international instruments, particularly the UN Convention on Contracts for the International Sale of Goods of 1980'".[126] These words suffice to show the importance which the drafters of the text have attached to the CISG in drafting the DCFR.

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120 See above note 116.

121 The full and final version of the DCFR is to be submitted to the European Commission at the end of December 2008.

122 The greatest part of the DCFR consists of 'model rules'. The adjective 'model' indicates that the rules are not put forward as having any normative force but are soft law rules of the kind contained in the Principles of European Contract Law and similar publications.

123 The word 'principles' may in the present context be synonymous with 'model rules', or those model rules which are of a more general nature, or may be understood in the sense of a statement of the values that underlie the rules of the CFR and general guidance to legislators on the balance that may need to be struck between competing values.

124 *Von Bar/Clive/Schulte-Nölke* (ed.), Draft Common Frame of Reference, Intr. 62.

125 See *Von Bar/Clive/Schulte-Nölke* (ed.), Draft Common Frame of Reference, Intr. 63.

126 *Way Forward* para 3.1.3. For this reason, the DCFR therefore provides recommendations, based on extensive comparative research and careful analysis, of what should be considered if legislators are minded to alter or add to EU legislation.

It must be stressed again that, like the other foregoing texts which have been mentioned above, the DCFR is an academic, not a politically authorized paper. It originates in an initiative of European legal scholars,[127] which the European Commission is completely free to adopt or to refuse as a whole or at least in part. Hence, the political fate of the DCFR is absolutely uncertain.[128]

In the view of its drafters, however, the DCFR ought not to be regarded merely as functional to the political goal of approving the future CFR. Further purposes of the DCFR are inherent to its autonomous significance as the outcome of a large European research project on the common core of European contract law. The drafters' hope is that the DCFR will promote knowledge of private law in the jurisdictions of the European Union, and in particular will "sharpen awareness of the existence of a European private law and also (via the comparative notes that will appear in the final edition) [to] demonstrate the relatively small number of cases in which the different legal systems produce substantially different answers to common problems".[129] Moreover, as it happened with the PECL, the DCFR might receive the attention of higher courts in Europe and of national legislators charged with preparing the modernization of the relevant national law of contract.[130]

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[127] See *Von Bar/Clive/Schulte-Nölke* (ed.), Draft Common Frame of Reference, Intr. 4: "It amounts to the compression into rule form of decades of independent research and cooperation by academics with expertise in private law, comparative law and European Community law. In particular, the draft does not contain a single rule or definition or principle which has been approved or mandated by a politically legitimated body at European or national level (save, of course, where it coincides with existing EU or national legislation)".

[128] This is obviously clear to the drafters of the DCFR themselves. See *Von Bar/Clive/Schulte-Nölke* (ed.), Draft Common Frame of Reference, Intr. n° 6: "Even if a CFR should emerge, it would not necessarily, of course, have the same coverage and contents as this DCFR".

[129] See *Von Bar/Clive/Schulte-Nölke* (ed.), Draft Common Frame of Reference, Intr. n° 7.

[130] See *Von Bar/Clive/Schulte-Nölke* (ed.), Draft Common Frame of Reference, Intr. n° 8.

### ii. The coverage of the DCFR[131]

With the express consent of the Commission on European Contract Law, the DCFR is based in large part on the PECL. This is true, in particular, for Books II and III, which contain rules not only on the formation, validity, interpretation and contents of contracts and, by analogy, other juridical acts, but also on the performance of obligations resulting from them and on the remedies for non-performance of such obligations. Therefore, these Books contain several rules derived from the PECL. This does not come as a surprise if one bears in mind that the work of the Commission on European Contract Law was taken over by the Study on a European Civil Code and that the latter, together with the Acquis Group, has concretely contributed to drafting the DCFR.

However, the DCFR does not content itself with the coverage of the PECL and goes much further. It also covers a series of model rules on so-called 'specific contracts' and the rights and obligations arising from them and it embraces non-contractual obligations (namely, unjustified enrichment, damage caused to another and benevolent intervention in another's affairs) to a far greater extent than the PECL. In its final edition the DCFR will also cover some matters of movable property law (transfer of ownership, proprietary security, trust law).[132] Moreover, unlike the PECL, which did not rely on the acquis communautare, the DCFR also embraces matters of consumer protection.[133] In principle, the structure and coverage of the DCFR will be more or less the same of the PEL, which are being drafted by the Study Group on a European Contract Code.[134] In some cases, however, the DCFR deviate from the PEL.

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[131] As to the structure, the text oft he DCFR is divided into ten Books and each Book is subdivided into Chapters, Sections, Sub-sections and Articles. In addition the Book on specific contracts and the rights and obligations arising from them is divided into Parts, each dealing with a particular type of contract (e.g. Book IV.A: Sale).

[132] The coverage of the DCFR is thus considerably broader than what the European Commission seems to have in mind for the coverage of the CFR. This follows from the fact of being the 'academic' frame of reference linked to the 'political' CFR, but conceived as an independent, 'academic' text.

[133] Beacause of the partially different coverage and the different structure, the DFCR deviates from the PECL in several respects. For instance, rules drafted in the new part concerning sales law have sometimes been generalized and transformed to general principles of the law of contract, by incorporating them in the already existing Books II and III PECL.

[134] All this considered, it is clear that the coverage of the DCFR goes well beyond the coverage of the CFR as contemplated by the Commission in its communications. This corresponds to the broader prurposes of the DCFR if compared with

### c) Rules of the DCFR Directly or Indirectly Influenced by the CISG: The Influence on Sales Law

#### i. General Remarks

As already pointed out, the DCFR contains several special rules on contracts for sale of goods. These rules are laid down in the Part A of Book IV.

In drafting this part, the drafters of the DCFR had at least four different set of (binding or non-binding) rules to elaborate on: the existing EU legislation in the field of sales law (the Acquis, in the strict sense of the term), the laws of the Member States in the same area (as recently transformed on the wake of the transposition of the Consumer Sales Directive), and, as far as general principles of the law of contract may be concerned, the Principles of European Contract Law (PECL) and the UNIDROIT Principles. For the reasons explained before, all of these different sets of rules are directly or indirectly drawn from the CISG.

Hence, it does not come as a surprise that the rules of the DCFR concerning the sale of goods show extensive similarities with the CISG.

On the other hand, it must be stressed that the strong influence of the CISG on the DCFR and thus, probably also on the future CFR, will not remove all discrepancies existing between Uniform International Sales Law and EU Law.

That some discrepancies will remain can be easily understood if only one bears in mind that the CFR, as has already been pointed out, is bound to have no general binding nature and will not be adopted with a generally binding act.[135] The CFR will probably be binding only for the European Commission and only on a spontaneous basis, insofar as the European Commission will spontaneously accept to stick to it in drafting proposals for new directives or regulations. In principle, the EU Council and the Parliament, i.e. the true legislators, and the European Court of Justice, will remain free to deviate from the CFR or even ignore it completely.[136]

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the CFR, the first being not merely a tool-box for the EU legislator but also a further academic attempt towards the promotion of a uniform concept of European private law.

[135] *Magnus*, in: Festschrift Jayme, 1312; *Schmidt-Kessel*, Auf dem Weg zu einem Europäischen Vertragsrecht, Recht der Internationalen Wirtschaft (RIW) 2003, 488; *Schroeter*, UN-Kaufrecht und Europäisches Gemeinschaftsrecht, 565.

[136] *Najork/Schmidt-Kessel*, Der Aktionsplan der Kommission für ein kohärenteres Vertragsrecht: Überlegungen zu den von der Kommission vorgeschlagenen Maßnahmen, Gemeinschaftsprivatrecht (GPR) 2003/04, 6; *Schroeter*, UN-Kaufrecht und Europäisches Gemeinschaftsrecht, 565.

Secondly, in some respects the drafters of the DCFR have decided to deviate from the solutions in the CISG or have tried to improve them by introducing better provisions or generalizing the existing ones.

In the following paragraphs, only some of the similarities existing between CISG and DCFR as far as sales law is concerned will be dealt with in detail. Most of these similarities are already to be found, though at a different level, in the EU Consumer Sales Directive and are, thus, obvious or at least easily predictable. It is more interesting, therefore, to highlight the differences between the two texts, as they allow to stress where the drafters of the DCFR have tried to improve the CISG model.

### ii. Some Differences

**Definition of sale of goods**: A first difference concerns the definition of the contract of sale. Definitions of the contract of sale exist in most European national laws. Sale being the master of all contracts, these definitions turn around the same core item, i.e. the exchange between a good and its price; they significantly differ, however, as to the identification of the specific consequences of the contract, i.e. transfer of title and obligations of the parties (especially of the seller), these depending on the general principles in force in the different legal systems. Precisely to avoid these disputes, the CISG restrained itself to give a definition. The same is true for the Consumer Sales Directive, which follows the CISG's example.

In contrast, the DCFR contains a rather short and simple definition of a contract for the sale of goods (Article IV.A–1:202),[137] addressing the main obligations of the parties, i.e. the transfer of ownership on the part of the seller and the payment of the price on the part of the buyer. Although this idea is not spelled out, the definition adopted in the DCFR seems to be in line with the idea that the contract of sale is merely source of obligations, thus excluding that consent suffices for the title to be transferred to the buyer.

**Conformity with the contract**: Article IV.A.–2:302,[138] together with Article IV.A.–2:303 (Statements by third persons)[139] lays down various cri-

[137] Article IV.A.–1:202 (Contract for sale) "A contract for the "sale" of goods is a contract under which one party, the seller, undertakes to another party, the buyer, to transfer the ownership of the goods to the buyer, or to a third person, either immediately on conclusion of the contract or at some future time, and the buyer undertakes to pay the price".

[138] Article IV.A.–2:302 (Fitness for purpose, qualities, packaging): "The goods must: (a) be fit for any particular purpose made known to the seller at the time of the conclusion of the contract, except where the circumstances show that the buyer did not rely, or that it was unreasonable for the buyer to rely, on the seller's skill

teria for establishing whether a good is conform with the contract, and hence whether there is a lack of conformity. The general rule which can be drawn from these two Articles is, thus, a perfect functional equivalent of the rules laid down in Articles 35 CISG and in Article 2 Consumer Sales Directive. Moreover, exactly like it is under the texts just mentioned, the criteria for establishing conformity are conceived as default rules, the contracting parties being free to agree upon different standards in their contract.

The wording used in the DCFR is, however, slightly different. While the CISG stipulates when the goods do not conform to the contract ("the goods do not conform […] unless […]"), and the Consumer Sales Directive sets out presumptions of conformity ("goods are presumed to be in conformity […] if they […]"), the DCFR provides that "the goods must" live up to certain standards. As is recognized by the authors of the DCFR,[140] this drafting is a slight improvement of the CISG's text, as it clarifies in a positive way what conformity normally entails. Despite the different wording, the end result does not seem to differ significantly.

**Goods sold in transit**. A second deviation from the CISG concerns the rule governing the sale of goods in transit, i.e. goods that are already traveling from point of departure to their destination (Article IV.A.–5:203).[141]

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and judgement; (b) be fit for the purposes for which goods of the same description would ordinarily be used; (c) possess the qualities of goods which the seller held out to the buyer as a sample or model; (d) be contained or packaged in the manner usual for such goods or, where there is no such manner, in a manner adequate to preserve and protect the goods; (e) be supplied along with such accessories, installation instructions or other instructions as the buyer may reasonably expect to receive; and (f) possess such qualities and performance capabilities as the buyer may reasonably expect".

[139] IV.A.–2:303 (Statements by third persons): "The goods must possess the qualities and performance capabilities held out in any statement on the specific characteristics of the goods made about them by a person in earlier links of the business chain, the producer or the producer's representative which forms part of the terms of the contract by virtue of II.–9:102 (Certain pre-contractual statements regarded as contract terms)".

[140] This is at least the impression which the author could draw from his participation as advisor to the work of the Study Group on a European Civil Code. For further details see the comments to the DCFR (*Von Bar/Clive/Schulte-Nölke* (eds.), Draft Common Frame of Reference, Articles and Comments Version (not yet published – publication expected for the next months).

[141] Article IV.A.–5:203 (Goods Sold in Transit): "(1) This Article applies to any contract of sale which involves goods sold in transit. (2) The risk passes to the buyer at the time the goods are handed over to the first carrier. However, if the circumstances so indicate, the risk passes to the buyer as from the time of the conclusion of the contract. (3) If at the time of the conclusion of the contract the

The provision is probably meant to be an improvement of the very similar rule in the CISG.

In particular, Article 68 of the CISG stipulates that "The risk in respect of goods sold in transit passes to the buyer from the time of the conclusion of the contract. However, if the circumstances so indicate, the risk is assumed by the buyer from the time the goods were handed over to the carrier who issued the documents embodying the contract of carriage. Nevertheless, if at the time of the conclusion of the contract of sale the seller knew or ought to have known that the goods had been lost or damaged and did not disclose this to the buyer, the loss or damage is at the risk of the seller".

Article IV.A.–5:203 reverses the provision by making the exception of the first sentence of Article 68 CISG the rule, i.e. providing that the risk in the case of a sale of goods in transit retrospectively passes from the time the goods are handed over to the first carrier.[142] This solution is probably more in line with customary practice than that which is adopted on the CISG. The risk may, however, still pass upon the conclusion of the contract if the circumstances so indicate, for example in the absence of insurance against transportation risks.

### d) Other Rules of the DCFR directly or indirectly influenced by the CISG

#### i. General remarks

Leaving sales law aside, where similarities with the CISG were granted, it is much more interesting to establish how far the CISG's model has influenced the DCFR as to the other sections. The result of this research reveals that many solutions or principles in the CISG have been generalized and ex-

seller knew or could reasonably be expected to have known that the goods had been lost or damaged and did not disclose this to the buyer, the loss or damage is at the risk of the seller".

142 The comments explain this retrospective effect as follows: "First, it is customary practice in this kind of commercial transaction that the final buyer undertakes the whole transportation risk, usually by taking out insurance. Secondly, this type of sale is based on documents representing or relating to the goods, such as insurance and disposition documents, which the buyer may examine before entering into the contract of sale". For further details on the rationale behind this rule and the retrospective effect which it establishes, see *Von Bar/Clive/Schulte-Nölke* (eds.), Draft Common Frame of Reference, Articles and Comments Version (to be published in the next months).

tended to other fields of contract law or of the law of obligation.[143] Where this has happened, the comments to the DCFR (to be published in the next months) will certainly spell this choice out, thus highlighting that there was a general consent among the drafters on the importance of the CISG as a model for further harmonization of European contract law. The rationale behind this is that the CISG represents a model not only for the law of sales, but for the whole law of contract.[144]

However, some of these similarities are not to be overestimated.

Some of them derive from the simple fact of being the CISG itself, at least in several cases, the result of a synthesis, a fusion or even a compromise, between the legal traditions of the European systems. Hence, it would be an error of perspective to impute all these similarities to the direct influence of the CISG. Some of them must be traced back to the legal and historical background from which both the CISG and the DCFR are drawn.

The following paragraphs will focus on some of these cases.

### ii. Interpretation of the rules of the DCFR

Like PECL, the DCFR contains rules on interpretation of the DCFR itself, and like in the PECL, the corresponding rules in the DCFR are largely drawn from the CISG model.

In particular, Article I.–1:102 (Interpretation and development),[145] which is derived from Article 1:106(1) of PECL, with some drafting changes

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[143] The importance of the CISG for the elaboration of the future CFR was stressed by many scholars: see *Schmidt-Kessel*, RIW 2003, 488; *Staudenmayer*, ZEuP 2003, 828 et seqq.

[144] This is the idea of a large part of the scholars: see in particular Grundmann, in Grundmann/Bianca, Einl. Rn. 1. See also *Morgenroth*, Die Umsetzung der Verbrauchsgüterkaufrichtlinie 1999/44/EG in Spanien, Recht der Internationalen Wirtschaft (RIW), 2003, 844.

[145] Article I.–1:102 DCFR (Interpretation and development): "(1) These rules are to be interpreted and developed autonomously and in accordance with their objectives. (2) They are to be read in the light of any applicable instruments guaranteeing human rights and fundamental freedoms and any applicable constitutional laws. (3) In their interpretation and development regard should be had to the need to promote: (a) uniformity of application; (b) good faith and fair dealing; and (c) legal certainty. (4) Issues within the scope of the rules but not expressly settled by them are so far as possible to be settled in accordance with the principles underlying them. (5) Where there is a general rule and a special rule applying to a particular situation within the scope of the general rule, the special rule prevails in any case of conflict".

and additions, follows Art 7 CISG on interpretation of the Convention,[146] providing guidance to commentators on the appropriate approach to interpret the principles. According to this idea and to the CISG's pattern, Paragraph (1) adopts the principle of autonomous interpretation.[147] Finally, following the similar provision laid down in Article 7 (2) CISG,[148] paragraph (4) recognizes that the DCFR is intended to be a dynamic instrument to be built on over the years: new problems have to be solved in a way which is consistent with the general principles underlying it.

### iii. Role of Usages and Practices

Article II – 1:104 DCFR, dealing with usages and with practices which the parties to a contract have established between themselves, follows the CISG model, with however some important deviations. Paragraph (1) of above mentioned Article, according to which a usage applies if the parties have

[146] Article 7 (1) CISG: "In the interpretation of this Convention, regard is to be had to its international character and to the need to promote uniformità in its application and the observance of good faith in international trade.

[147] As it is implicitly recognized by the draftsmen of the DCFR (see *Von Bar/Clive/Schulte-Nölke* (eds.), Draft Common Frame of Reference, Intr., passim) and will for sure be spelt out in the comments (*Von Bar/Clive/Schulte-Nölke* (eds.), Draft Common Frame of Reference, Articles and Comments Version – to be published in the next months) the DCFR is meant to form a coherent system of rules in itself. Its existence and future development will therefore do not depend on national private laws. It follows that the rules of the DCFR are to be interpreted autonomously, having regard to the need to promote uniformity of application and legal certainty. In other words, for the interpretation and application of the DCFR the same approach will need to be followed which is usually adopted for the interpretation of international commercial conventions like the CISG.

[148] Article 7 (2) CISG: "Questions concerning matters governed by this Convention which are not expressly settled in it are to be settled in conformity with the general principles, in conformity with the law applicable by virtue of the rules of private international law".

expressly or tacitly agreed that it should,[149] is more or less a copy of Article 9(1) CISG.[150]

This is not true, however, of Paragraph (2). This Paragraph significantly differs from Article 9(2) CISG insofar as it provides that a usage which would be considered applicable by persons in the same situation as the parties will bind them even without their agreement, provided the usage is not unreasonable and is consistent with the express terms of the agreement.[151] Unlike Article 9(2) CISG, no reference is made in the DCFR to the implied intention of the parties. It goes without saying that the provision of the DCFR has the result of considerably broadening the scope of application of usages, thus making usages equal to legal norms, which apply independently of the volition of the parties.[152] As a further consequence of that, under the DCFR no importance is attached to the knowledge or the imputed knowledge of the parties in question. Since the application of a usage conceived as a legal norm may not depend on such factors, the usage will apply to everybody within its scope, regardless whether the party is a newcomer to the market or an outsider in the trade and therefore whether he could reasonably have any knowledge of the usage or not. In contrast, this test applies under Article 9(2) CISG.

### iv. Generalization to all notices of the so-called "receipt" principle

According to Article II.–1:106(3) (Notice), any "notice" (notion which includes the communication of a promise, offer, acceptance or other juridical act) "becomes effective when it reaches the addressee, unless it provides for a delayed effect" (par. 3). Paragraph 4 specifies when the notice reaches

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[149] Article II.–1:104(1) (Usages and practices) DCFR "(1) The parties to a contract are bound by any usage to which they have agreed and by any practice they have established between themselves … "

[150] Article 9(1) CISG stipulates that "The parties are bound by any usages to which they have agreed and by any practices which they have established between themselves". A similar formulation is to be found also in Article 9(1) ULIS.

[151] Article II.–1:104(2) DCFR "… (2) The parties are bound by a usage which would be considered generally applicable by persons in the same situation as the parties, except where the application of such usage would be unreasonable.

[152] This deviation from the CISG's model is stressed by the redactors of the DCFR in the comments. For further details on the rationale which is behind this deviation from the CISG's model, one will need to refer to the comments to the DCFR, which have not yet been published: see *Von Bar/Clive/Schulte-Nölke* (eds.), Draft Common Frame of Reference, Article and Comments Version (the publication is expected, however, for the next months).

the addressee.[153] As far as the topic of this report is concerned, the importance of this provision consists in it being the result of the generalization of a principle which already governs the CISG, being laid down, precisely, in its Article 24.[154]

### v. Form requirements In the majority of countries of the European Union, writing or other formalities are not required for the validity of contracts in general.

Like the CISG,[155] the DCFR also adopts the general principle of freedom of form. Therefore, no formal requirements are needed for contracts in general, unless particular rules require specific formality (Article II.–1:107).[156]

It is however hard to say whether this correspondence in the rules is really the result of the CISG's influence on the drafting of the DCFR. As a matter of fact, freedom of form is the general principle in most legal systems of the European Union, where writing or other formalities are not required for the validity of contracts in general.[157]

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[153] *Article II.–1:106(4) (Notice): "The notice reaches the addressee: (a) when it is delivered to the addressee; (b) when it is delivered to the addressee's place of business, or, where there is no such place of business or the notice does not relate to a business matter, to the addressee's habitual residence; (c) in the case of a notice transmitted by electronic means, when it can be accessed by the addressee; or (d) when it is otherwise made available to the addressee at such a place and in such a way that the addressee could reasonably be expected to obtain access to it without undue delay."*

[154] Under Article 24 CISG the receipt principle governs offers, acceptances and most other statements covered by Part II on formation of contracts.

[155] See Article 11 CISG, providing that a contract for the sale of goods need not be concluded in writing and is not subject to any other requirement as to form. It may be proved by any means, including witnesses. Moreover, Article 29(1) CISG stipulates that a contract may be modified or terminated by the mere agreement of the parties. A State which is party to the Convention may, however, make a declaration to the effect that articles 11 and 29 do not apply where any party has the place of business in that State. At the present stage, none of the EU Members States has made such a declaration.

[156] In particular, Article II.–1:107 (Form) provides that "A contract or other juridical act need not be concluded, made or evidenced in writing nor is it subject to any other requirement as to form". (2) Particular rules may require writing or some other formality".

[157] This holds true, for instance, of Germany, France, Austria, Italy, England and Scotland. See the national notes to Article II.–1:107 DCFR for further details.

There can be no doubt[158] that the drafters of the DCFR took the CSIG into account also as far as the drafting of Article II.–4:105 (Written modification only) is concerned. Article II.–4:105 (Written modification only) is concerned. In this respect, however, the DCFR deviates from the CISG.

According to paragraph (1) of this provision, "A clause in a written contract requiring any agreement to modify or terminate to be in writing establishes only a presumption that any such agreement is not intended to be legally binding unless it is in writing". Clauses in written contracts which provide that modification or termination by agreement must be in writing will only have evidential weight.[159] They only establish a rebuttable presumption that any such later oral agreements or agreements made by conduct were not intended to be legally binding.[160]

On the contrary CISG gives effect to no-oral modification clauses,[161] by providing that "a contract in writing which contains a provision requiring any modification or termination by agreement to be in writing may not be otherwise modified or terminated by agreement".[162]

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[158] This will be probably spelt out in the comments to the DCFR, which are to be published soon (*Von Bar/Clive/Schulte-Nölke* (eds.), Draft Common Frame of Reference, Articles and Comments Version (the publication is expected for the next months).

[159] A similar evidential rule is to be found in the laws of most of the countries of the European Union. See for instance Article 1352 Italian civil code.

[160] This will be certainly spelt out in the comments to the DCFR, which are be published soon (*Von Bar/Clive/Schulte-Nölke* (eds.), Draft Common Frame of Reference, Articles and Comments Version (the publication is expected for the next months). The comments will also shed some light on the rationale behind this rule, which seems to be connected to the general principle of freedom of contract and to the requirements of good faith and fair dealing in contractual transactions. It would be unfair to bind the parties to the form which they originally agreed upon when evidence is given that at a later stage they changed their minds reaching a new agreement, although they did not use writing.

[161] See also UNIDROIT Principles art. 2.1.18.

[162] See Article 29(2) CISG, the second sentence of which provides that "however, a party may be precluded by his conduct from asserting such a provision to the extent that the other party has relied on that conduct". The same rule is now to be found in Paragraph (2) of Article II.–4:105 DCFR, according to which "a party by word or conduct may be precluded from invoking a no-oral modification clause if the other party has acted in reliance on the word or conduct".

### vi. Requirements for the conclusion of a contract: The "offer and acceptance model"In the majority of countries of the European Union, writing or other formalities are not required for the validity of contracts in general.

Like the CISG, the rules of the DCFR governing the conclusion of contracts follow the model usually adopted in the legal systems of the EU, relying on the exchange of offer and acceptance (so-called "offer and acceptance model": Article II.–4:201 (Offer) DCFR.[163]

However, some differences exist between DCFR and CISG as far as proposals to the public are concerned. It is commonly recognized in almost all legal systems that under certain circumstances proposals to the public may amount to an offer. However, the laws differ as to the individuation of these circumstances. Unlike some national laws,[164] the general attitude of the CISG towards this kind of proposal is rather restricting. In particular, Article 14(2) CISG provides that "a proposal other than one addressed to one or more specific persons is to be considered merely an invitation to make offers unless the contrary is clearly indicated by the person making the proposal".

Paragraph (2) differs from the CISG in that it leaves the issue to be decided by the rules of interpretation,[165] i.e., after all, by the courts.

The influence of the CISG is clear also in the draft of Article II.–4:202 concerning the revocation of an offer. The general rule is that "(1) An offer may be revoked if the revocation reaches the offeree before the offeree has dispatched an acceptance or, in cases of acceptance by conduct, before the contract has been concluded." According to paragraph (3), "however, a revocation of an offer is ineffective if: (a) the offer indicates that it is irrevocable; (b) the offer states a fixed time for its acceptance; or (c) it was reasonable for the offeree to rely on the offer as being irrevocable and the offeree has acted in reliance on the offer". In these cases the offer is irrevocable.

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[163] *Article II.–4:201 (Offer ): "(1) A proposal amounts to an offer if: (a) it is intended to result in a contract if the other party accepts it; and (b) it contains sufficiently definite terms to form a contract. (2) An offer may be made to one or more specific persons or to the public. (3) A proposal to supply goods or services at stated prices made by a business in a public advertisement or a catalogue, or by a display of goods, is treated, unless the circumstances indicate otherwise, as an offer to sell or supply at that price until the stock of goods, or the business's capacity to supply the service, is exhausted."*

[164] See e.g. Article 1336(1) Italian Civil Code, which provides that a proposal to the public which contains the main elements of the contract towards whose formation the proposal is directed is effective as an offer unless it appears otherwise from the proposal or from usages.

[165] This also appears to the attitude taken by the UNIDROIT Principles which do not provide rules on offers to the public.

There can be no doubt that, by drafting Paragraph (3), the redactors of the DCFR had the CISG's model in mind and aimed at improving the rule adopted in Article 16 CISG. The two rules are indeed so similar that the influence of the CISG cannot reasonably be denied.[166]

The rule which excludes the role of silence as acceptance (Article II.–4:204 (2) DCFR)[167] also shows evident similarities with the CISG. The same principle is to be found in Article 18(1) CISG (second sentence).[168] It is well-known, however, that there is general agreement among most European legal systems that silence in itself does not amount to acceptance. As in the case of form requirements, the similarity between CISG and DCFR is therefore nothing but the result of being the CISG's provision a sort of distillate of general principles which are common to the legal traditions of (almost) all European legal systems. For this reason, it would be misleading to explain this similarity by referring to a supposed influence of the CISG on the DCFR.

The influence of the CISG is more certain as far as the rule dealing with the time of conclusion of the contract is concerned. By adopting the general "receipt" rule (Article II.–4:205),[169] the DCFR follows the line of Article 23 CISG.[170]

Paragraph (3) also, concerning the case of acceptance through performance of an act without notice, reflects the rule laid down in Article 18(3) CISG.[171]

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[166] Article 12 CISG: "(1) Until a contract is concluded an offer may be revoked if the revocation reaches the offeree before ha has dispatched an acceptance. (2) However, an offer cannot be revoked: a) if it indicates, whether by stating a fixed time for acceptance or otherwise, that it is irrevocable; or b) if it was reasonable for the offeree to rely on the offer as being irrevocable and the offeree has acted in reliance on the offer."

[167] Article II.–4:204 (2) DCFR: "Silence or inactivity does not in itself amount to acceptance".

[168] See also Article 2.1.6, second sentence UNIDROIT Principles.

[169] Article II.–4:205 (Time of conclusion of the contract) DCFR: "(1) If an acceptance has been dispatched by the offeree the contract is concluded when the acceptance reaches the offeror. (2) In the case of acceptance by conduct, the contract is concluded when notice of the conduct reaches the offeror. (3) If by virtue of the offer, of practices which the parties have established between themselves, or of a usage, the offeree may accept the offer by doing an act without notice to the offeror, the contract is concluded when the offeree begins to do the act."

[170] See also Article 2.6(2) UNIDROIT Principles.

[171] See also Article 2.6(3) UNIDROIT Principles.

Further similarities between the two sets of rules concern the following provisions:

- Article II.–4:206 (1) and (2)[172] which indicates the time limit for acceptance, i.e. the period of time within which the offeree's acceptance must reach the offeror in order to be effective, corresponding to Article 18(2) and (3) CISG;[173]
- Article II.–4:207[174] on late acceptance, paragraph (1) of which is in accordance with Article 21(1) CISG,[175] whereas Paragraph (2) is identical to Article CISG 21(2).[176]

In contrast, the DCFR deliberately deviates from the CISG as far as the rule on modified acceptance is concerned. In this respect, Article 19(3) CISG provides a list of terms the modification or the addition of which is to be considered material (e.g. terms relating to the price, payment, quality and quantity of the goods, place and time of delivery, extent of one party's liability to the other, or the settlement of disputes). Unlike the CISG, Article II.–4:208 does not contain a list of changes which are considered material.[177] It simply provides that (1) "a contract is concluded if the reply expresses a definite assent to the offer" and (2) "a reply containing terms which materially alter the terms of the offer is a rejection and a new offer". On the contrary, according to paragraph (3) "additional and different terms which do not materially alter the terms of the offer become part of the contract".[178]

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[172] *Article II.–4:206 DCFR: "(1) An acceptance of an offer is effective only if it reaches the offeror within the time fixed by the offeror. (2) If no time has been fixed by the offeror the acceptance is effective only if it reaches the offeror within a reasonable time".*

[173] See also Articles 2.6 and 2.7 UNIDROIT Principles.

[174] *Article II.–4:207 DCFR: "(1) A late acceptance is nonetheless effective as an acceptance if without undue delay the offeror informs the offeree that it is treated as an effective acceptance. (2) If a letter or other communication containing a late acceptance shows that it has been dispatched in such circumstances that if its transmission had been normal it would have reached the offeror in due time, the late acceptance is effective as an acceptance unless, without undue delay, the offeror informs the offeree that the offer is considered to have lapsed".*

[175] And Article 2.9(1) UNIDROIT Principles.

[176] And Art. 2.9(2) UNIDROIT Principles.

[177] For further details concerning the rationale which is behind this rule, one need to refer to the comments to the DCFR, which have not yet been published: *Von Bar/Clive/Schulte-Nölke* (eds.), Draft Common Frame of Reference, Articles and Comments Version (the publication is expected, however, for the next months).

[178] According to Paragraph (4), however, "If in the case mentioned in (3) the offeror has limited the acceptance to the terms of the offer, or objects without undue delay to the different or additional terms, the offer is considered to have been re-

### vii. Conflicting Standard Terms: The "Battle of Forms" in the majority of countries of the European Union, writing or other formalities are not required for the validity of contracts in general.

Article II.–4:209 DCFR deals with the well-known case of conflict between standard terms ("battle of forms"): the parties purport to conclude the contract each using its own standard terms; the two sets of terms provide, however, conflicting rules.

The solution purported in the Article is aimed at upholding the contract and is held to be most likely to accord with the reasonable expectations of the parties. Following this rationale, the rule provides that "(1) If the parties have reached agreement except that the offer and acceptance refer to conflicting standard terms, a contract is nonetheless formed". Thus, the conflict between the standards terms does not prevent the formation of the contract. This must be regarded an exception to the general rule on modified acceptance in the preceding Article. Moreover, "the standard terms form part of the contract to the extent that they are common in substance". The DCFR adopts therefore the so-called knock-out rule: the conflicting terms 'knock' each other 'out'. The rationale behind this rule is probably to be found in the idea that the existence of conflicting terms gives the evidence of a lack of consent on these terms. No set of standard terms should therefore prevail over the other.[179] All in all, this means that it is for the court to fill the gap left by the terms which knock each other out.[180]

The CISG contains no specific rule on the issue of "battle of forms". Hence, the solution must be drawn from the general rule laid down in Article 19 concerning the case of divergences between acceptance offer and acceptance. It is, however, disputed what the correct solution should be under this Article, although the prevailing view seems to exclude that the "knock-out rule" applies and that the contract is formed.[181] According to this opin-

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jected by the different or additional terms. The same applies if the offeree makes acceptance conditional upon the offeror's assent to the additional or different terms, and the offeror does not give assent within a reasonable time".

[179] For further details concerning the rationale which is behind this rule, one need to refer to the comments to the DCFR, which have not yet been published: *Von Bar/Clive/Schulte-Nölke* (eds.), Draft Common Frame of Reference, Articles and Comments Version (the publication is expected, however, for the next months).

[180] An exception to these provisions is laid down in paragraph (2), according to which, "However, no contract is formed if one party: (a) has indicated in advance, explicitly, and not by way of standard terms, an intention not to be bound by a contract on the basis of paragraph (1); or (b) without undue delay, informs the other party of such an intention".

[181] See *Gabriel*, The Battle of the Forms: A Comparison of the United Nations Convention for the International Sale of Goods the Common Law and the Uniform

ion, a contract may be regarded as formed only if the alterations are not material: the so-called "last shot rule" applies. No matter how the problem might be solved under the CISG, it is undeniable that the explicit adoption of the "knock-out rule" by the DCFR[182] represents an important achievement at least in terms of clarity, insofar as it confers certainty to transactions.

### viii. Interpretation of contracts

Similarities exist also as to the rules on interpretation of contracts.

As it is well-known, the CISG does not contain detailed provisions on interpretation but only contents itself with a statement of general principle, which is laid down in Article 8. In particular, Paragraph (1) of this Article refers to the general principle of intention, albeit limiting the scope of this assessment to the unilateral intention of each of the parties.[183] Paragraph (2) of Article 8 supplements the subjective criteria indicated in paragraph (1) by giving importance to objective criteria of interpretation. In line with these criteria, if the subjective standard of interpretation is not applicable, statements made by and other conduct of a party are to be interpreted "according to the understanding that a reasonable person of the same kind as the other party would have had in the same circumstances".

Following the majority of laws of EU Member States,[184] the general rules laid down in Article II.–8:101 DCFR[185] adopt a similar approach as the

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Commercial Code, Business Lawyer, 1994, 1053 ff.; *Ferrari*, Art. 19 CISG, in: *K. Schmidt* (ed.), Münchener Kommentar zum Handelgesetzbuch, 2nd ed., 2007, VI, 443. For the opposite view see *Schlechtriem*, Art. 19, in: *Schlechtriem/Schwenzer* (eds.), Kommentar zum einheitlichen UN-Kaufrecht, 4th ed., 2004, 276.

182 See also Article 2.22 UNIDROIT Principles.

183 Article 8(1) CISG: "For the purposes of this Convention statements made by or other conduct of a party are to be interpreted according to his intent where the other party knew or could not have been unaware what the intent was":

184 See for instance § 133 German Civil Code, § 914 Austrian Civil Code; Article 1362 Italian Civil Code; Art. 1156 French Civil Code.

185 Article II.–8:101 DCFR: "(1) A contract is to be interpreted according to the common intention of the parties even if this differs from the literal meaning of the words. (2) If one party intended the contract, or a term or expression used in it, to have a particular meaning, and at the time of the conclusion of the contract the other party was aware, or could reasonably be expected to have been aware, of the first party's intention, the contract is to be interpreted in the way intended by the first party. (3) The contract is, however, to be interpreted according to the meaning which a reasonable person would give to it: a) if an intention cannot be established under the preceding paragraphs; or b) if the question arises with a per-

CISG by equally combining the subjective and the objective method of interpretation.

First, interpretation has to focus on the common intention of the parties (see paragraph 1 and 2); secondly, in seeking what the parties' common intention was at the time the contract was made the "interpreter" has to take objective criteria such as reasonableness, good faith etc. into account (paragraph 3).

The rule laid down in paragraph (2) also fundamentally reflects the content of Article 8(1) CISG. According to this paragraph, if one party's words do not accurately express that party's intention, for instance because the intention is expressed wrongly, the other party can normally rely on the reasonable meaning of the first party's words. But this is not the case if the second party knew or could reasonably be expected to have known of the first party's actual intention.

Finally, paragraph (3) adopts the principle of objective interpretation under which interpretation should be in accordance to the meaning which would be given to the words by a reasonable person in the same situation. This rule is expressly stated to apply when it is not possible to discover any common intention of the parties by Article 8(2) CISG.[186]

Where the DCFR and the CISG differs is on the list of matters (i.e. circumstances) which may be relevant in determining either the common intention of the parties or the reasonable meaning of the contract. Paragraph (1) of the following Article[187] gives the interpreter a non-exhaustive, but

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son, not being a party to the contract or a person who by law has no better rights than such a party, who has reasonably and in good faith relied on the contract's apparent meaning."

[186] The same rule is laid down in Article 4.1(2) UNIDROIT Principles.

[187] Article II.–8:102 (Relevant matters) DCFR "(1) In interpreting the contract, regard may be had, in particular, to: (a) the circumstances in which it was concluded, including the preliminary negotiations; (b) the conduct of the parties, even subsequent to the conclusion of the contract; (c) the interpretation which has already been given by the parties to terms or expressions which are the same as, or similar to, those used in the contract and the practices they have established between themselves; (d) the meaning commonly given to such terms or expressions in the branch of activity concerned and the interpretation such terms or expressions may already have received; (e) the nature and purpose of the contract; (f) usages; and (g) good faith and fair dealing. (2) In a question with a person, not being a party to the contract or a person such as an assignee who by law has no better rights than such a party, who has reasonably and in good faith relied on the contract's apparent meaning, regard may be had to the circumstances mentioned in sub-paragraphs (a) to (c) above only to the extent that those circumstances were known to, or could reasonably be expected to have been known to, that person".

very detailed, list of circumstances which may be relevant, while Article 8(3) CISG ) refers to four factors only (the negotiations, practices between the parties, usages and subsequent conduct of the parties).[188]

### ix. Performance

The rules on performance in the DCFR have clearly been drafted with an eye on the corresponding provisions in the CISG.

This is true, first of all, for the place of performance.

Following the rule applying in many European legal systems, according to which "the debtor must seek the creditor", Article III.–2:101 DCFR[189] stipulates that the place of performance of a monetary obligation, if it has not been agreed expressly, is the creditor's residence or place of business. This is the case also under Article 57 CISG.[190]

As far as non-monetary obligations are concerned, Article III.–2:101 DCFR provides that the place of performance is the debtor's place of business. A similar rule applies also under Article 31 lit. c CISG, although this provision refers to the sellers's place of business as being the relevant place of performance only as the criteria in lit. a) and c) cannot apply.[191]

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[188] Article 4(3) UNIDROIT Principles refers to six circumstances.

[189] Article III.–2:101 DCFR: "(1) If the place of performance of an obligation cannot be otherwise determined from the terms regulating the obligation it is: (a) in the case of a monetary obligation, the creditor's place of business; (b) in the case of any other obligation, the debtor's place of business. (2) For the purposes of the preceding paragraph: (a) if a party has more than one place of business, the place of business is that which has the closest relationship to the obligation; and (b) if a party does not have a place of business, or the obligation does not relate to a business matter, the habitual residence is substituted. (3) If, in a case to which paragraph (1) applies, a party causes any increase in the expenses incidental to performance by a change in place of business or habitual residence subsequent to the time when the obligation was incurred, that party must bear the increase".

[190] See also Article 6.1.6(1)(a) UNIDROIT Principles.

[191] Article 31 CISG: "If the seller is not bound to deliver the goods at any particular place, his obligation to deliver consists: a) if the conract of sale involeves carriage of the goods – in handing the goods over to the first carrier or transmission to the buyer; b) if, in cases not within the preceding subparagraph, the contract relates to specific goods, or unidentified goods to be drawn from a specific stock or to be manufactured or produced, and at the time of the conclusion of the contract the parties knew that the goods were at, or were to be manufactured or produced at, a particular place – in placing the goods at the buyer's disposal at that place; c) in other cases – in placing the goods at he buyer's disposal at the place where the seller had his place of business at the time of the conclusion of the contract".

Paragraph (2) of mentioned Article III.–2:101 DCFR draws further on the CISG's rule insofar as it gives a definition of "place of business" which is clearly based on Article 10 CISG.[192]

The provision concerning the time of performance[193] also reflects the same rule which has been adopted in the CISG (Article 33(c)) and in the Unidroit Principles (Article 6.1.1(c)).

It must, however, be noticed that the rule is widely accepted in most European systems.[194]

### x. Remedies for non-performance

The parallelism between DCFR and CISG seems to be less intense as far as the area of remedies for non-performance is concerned. There are, indeed, various similarities. However, these similarities cannot hide a slightly different approach.

These results clear from a reading of Article III.–3:101. Unlike the CISG, this Article distinguishes between remedies for not excused non-performance and remedies for non-performance of an obligation which is excused due to an impediment or results from behavior of the other party.[195] In particular, if the non-performance is not excused, the creditor may claim

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[192] Article 10 CISG: "For the purposes of this Convention: a) if a party has more than one place of business, the place of business is that which has the closest relationship to the contract and its performance, having regard to the circumstances known to or contemplated by the parties at any time before or at the conclusion of the contract; b) if a party does not have a place of business, reference is to be made to his habitual residence".

[193] Article III.–2:102 (Time of performance): "(1) If the time at which, or a period of time within which, an obligation is to be performed cannot otherwise be determined from the terms regulating the obligation it must be performed within a reasonable time after it arises. (2) If a period of time within which the obligation is to be performed can be determined from the terms regulating the obligation, the obligation may be performed at any time within that period chosen by the debtor unless the circumstances of the case indicate that the creditor is to choose the time.

[194] See, e.g., § 271(2) German Civil Code, Art. 1184 Italian Civil Code, Art. 779 Portuguese Civil Code.

[195] According to Article II.-3:101 "(1) If an obligation is not performed by the debtor and the non-performance is not excused, the creditor may resort to any of the remedies set out in this Chapter. (2) If the debtor's non-performance is excused, the creditor may resort to any of those remedies except enforcing specific performance and damages. (3) The creditor may not resort to any of those remedies to the extent that the creditor caused the debtor's non-performance".

performance, recovery of money due or specific performance, damages. He may also withhold performance of a reciprocal obligation, terminate the contractual relationship in whole or in part and reduce the price. To the contrary, a non-performance which is excused due to an impediment does not give the creditor the right to claim specific performance or to claim damages, while the other remedies remain available also in this case.

The difference from the CISG is self-evident.

Article 45 CISG attaches the same remedies to all cases of non-performance, no matter whether it is excused or not. Remedies such as termination and price reduction are available to the creditor in both situations.

However, exactly like the DCFR, the CISG provides for some liability exemptions as far as damages are concerned. In this respect, both sets of rules are very similar. For the right to damages to arise, they do not require the non-performance to be imputable to the debtor's or the buyer's fault. Finally, both CISG and DCFR exempt the debtor or the buyer from liability when some impediments occur.

Thus, there can be no doubt[196] that Article III.–3:104 DCFR ("Excuse due to an impediment"),[197] which governs the consequences when an event which is not the fault or responsibility of the debtor prevents the debtor from performing the obligation, is largely modeled on Article 79 CISG.[198] The DCFR adopts the flexible approach which is the rule under the CISG,

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[196] For further details, see the comments to the DCFR: *Von Bar/Clive/Schulte-Nölke* (eds.), Draft Common Frame of Reference, Articles and Comments Version (publication expected for the next months).

[197] Article III.–3:104 DCFR: "(1) A debtor's non-performance of an obligation is excused if it is due to an impediment beyond the debtor's control and if the debtor could not reasonably be expected to have avoided or overcome the impediment or its consequences. (2) Where the obligation arose out of a contract or other juridical act, non-performance is not excused if the debtor could reasonably be expected to have taken the impediment into account at the time when the obligation was incurred. (3) Where the excusing impediment is only temporary the excuse has effect for the period during which the impediment exists. However, if the delay amounts to a fundamental non-performance, the creditor may treat it as such. (4) Where the excusing impediment is permanent the obligation is extinguished. Any reciprocal obligation is also extinguished. In the case of contractual obligations any restitutionary effects of extinction are regulated by the rules in Chapter 3, Section 5, Sub-section 4 (Restitution) with appropriate adaptations. (5) The debtor must ensure that notice of the impediment and of its effect on the ability to perform reaches the creditor within a reasonable time after the debtor knew or could reasonably be expected to have known of these circumstances. The creditor is entitled to damages for any loss resulting from the non-receipt of such notice."

[198] See also Article 7.1.7 UNIDROIT Principles.

instead of the more rigid doctrines of *force majeure*[199] or of impossibility which are found in several European legal systems.[200] Moreover, the first sentence of paragraph (3), concerning temporary impediments to performance, is equivalent to Article 79 (3) CISG.

Finally, also paragraph (5) is clearly modeled on Article 79(4) CISG. In application of the general duty of good faith and fair dealing, the rule provides the duty of the defaulting party to give notice of the impediment within a reasonable time.[201]

### xi. Failure to notify non-conformity

The rule laid down in Article 39(1) CISG is well-known: the buyer "loses the right to rely on a lack of conformity of the goods if he does not give notice to the seller specifying the nature of the lack of conformity within a reasonable time after he has discovered it or ought to have discovered it". Similarly, most national laws on the sale of goods require notification of non-conformity within a reasonable time or even a short time.

As has already been anticipated, the DCFR has decided to generalize this principle, beyond the contracts of sale, to all contractual obligations, at least as far as non-conforming goods or services are at stake.[202] Following this broader approach, which clearly draws on the idea that the rule is application of the general principle of good faith and fair dealing, Article III.–3:107 (Failure to notify non-conformity) provides that: "(1) If, in the case of an obligation to supply goods or services, the debtor supplies goods or services which are not in conformity with the terms regulating the obligation, the creditor may not rely on the lack of conformity unless the creditor gives notice to the debtor within a reasonable time specifying the nature of the lack of conformity". Paragraph (2) specifies that "the reasonable time runs from the time when the goods are supplied or the service is completed or from the

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[199] See Articles 1147 and 1148 of the French, Belgian and Luxembourg Civil Codes.

[200] The doctrine of impossibility is followed, e.g., in § 1447 Austrian Civil Code, § 275 German Civil Code, Articles 1218 and 1256 Italian Civil Code.

[201] The sanction for failing to give this notice is liability for the extra loss suffered by the creditor as the result of not being informed; normally the creditor will recover damages.

[202] For further details on the rationale behind this limitation, one will have to wait for the comments to the DCFR to be published: see *Von Bar/Clive/Schulte-Nölke* (eds.), Draft Common Frame of Reference, Articles and Comments Version (publication expected for the next months).

time, if it is later, when the creditor discovered or could reasonably be expected to have discovered the non-conformity".[203]

### xii. Cure by debtor of non-conforming performance

The rules in Section 2 of the DCFR give the debtor a right to cure a "non-conforming performance"[204] (see especially Article III.–3:202[205]). The general right to cure is considered application of the principle of good faith and fair dealing. It accords, moreover, with the desire to uphold contractual relations where possible and appropriate.

There is no doubt that in drafting these rules the drafters of the DCFR had the solution in mind which is laid down in the CISG and decided to expand this solution beyond the law of sales to all cases of a non-conforming performance. A general right for the seller to cure even after the date for delivery, as long as the buyer has not terminated the contract, is also provided in Article 48 CISG.[206] However, the seller cannot cure in cases where this would lead to unreasonable inconvenience or uncertainty of reimbursement for the creditor.

Article III.–3:202 can therefore be regarded as an attempt to generalize the rule laid down in the CISG.

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[203] Nevertheless, according to paragraph (3) "The debtor is not entitled to rely on paragraph (1) if the failure relates to facts which the debtor knew or could reasonably be expected to have known and which the debtor did not disclose to the creditor". It must be pointed out that this article "does not apply where the creditor is a consumer" (Paragraph (4)). The rationale behind this limitation is that "lay people may be unaware of such a legal requirement and that it could be harsh to deprive them of remedies for failure to observe it".

[204] This means a performance which does not conform to the terms regulating the obligation.

[205] Article 48 CISG: "(1) The debtor may make a new and conforming tender if that can be done within the time allowed for performance. (2) If the debtor cannot make a new and conforming tender within the time allowed for performance but, promptly after being notified of the lack of conformity, offers to cure it within a reasonable time and at the debtor's own expense, the creditor may not pursue any remedy for non-performance, other than withholding performance, before allowing the debtor a reasonable period in which to attempt to cure the non-conformity. (3) Paragraph (2) is subject to the provisions of the following Article".

[206] See also Article 37 ULIS and U.S. UCC § 2.508.

### xiii. Specific performance

Art. 46 CISG gives the buyer a general right to claim specific performance.[207] As mentioned above, however, courts are not bound to decree performance if they would not do so according to their national law (Article 28 CISG).

As has already been pointed out, the approach favorable to specific performance claims has been taken over, in substance, also by the Consumer Sales Directive.

The rules of the DCFR concerning specific performance deliberately follow this approach. However, the DCFR goes beyond the two texts just mentioned, by once again broadening the rule laid down in the CISG[208] and, above all, generalizing the CISG's approach. The rationale underlying the CISG's rule is transformed in a core rule of the general law of obligation. The modernity of this part of the Convention is, thus, openly recognized.[209]

### xiv. Right to withhold performance of reciprocal obligation

Also Article III.–3:401 DCFR, concerning the right to withhold performance of reciprocal obligation, draws inspiration from the corresponding rules in the CISG and further elaborate on them.

The main rule is that, unless obliged to perform first, the debtor of a reciprocal obligation may withhold performance until the counter-performance has been tendered (Presumption on concurrent performances).[210] This

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[207] See also Articles 24, 26, 30, 42 ULIS.

[208] It must be reminded that Article 46 (2) CISG limits this claim to cases of fundamental "breach of contract".

[209] Precisely, Article III.–3:302 DCFR provides that in case of non-monetary obligations the creditor is in principle entitled to enforce specific performance. The right to enforce performance implies also the right to require remedying of defective performance, for instance through repair, delivery of missing parts or replacement. If the debtor attempts to perform, but the attempted performance does not conform to the terms regulating the obligation, the creditor may choose to insist upon a conforming performance. The creditor has not only a substantive right to the debtor's performance but also a remedy to enforce this right specifically, e.g. by applying for an order or decision of a court. However, the right to enforce specific performance is subject to some exceptions listed in paragraph (3) and to the time limit laid down in paragraph (4).

[210] Article III.–3:401 (1) DCFR: "A creditor who is to perform a reciprocal obligation at the same time as, or after, the debtor performs has a right to withhold performance of the reciprocal obligation until the debtor has tendered performance or has performed".

rule corresponds, in principle, to art. 58 (1) CISG, which also provides for concurrent performances, giving each party a similar right to withhold performance.[211]

The influence of the CISG is clear, above all, in Paragraph (2) concerning the case of anticipated non-performance. The rules are almost identical under the CISG and the DCFR.

Under Article 71(1) CISG a party may suspend the performance of his obligations if, after the conclusion of the contract, it becomes apparent that the other party will not perform a substantial part of his obligations as a result of: (a) a serious deficiency in his ability to perform or his creditworthiness; or (b) his conduct in preparing to perform or in performing the contract. In accordance with the CISG's rule paragraph (2) DCFR provides that "(2) A creditor who is to perform a reciprocal obligation before the debtor performs and who reasonably believes that there will be non-performance by the debtor when the debtor's performance becomes due may withhold performance of the reciprocal obligation for as long as the reasonable belief continues. However, the right to withhold performance is lost if the debtor gives an adequate assurance of due performance".[212]

It is important to remind that, unlike the CISG and, now, the DCFR, the EU Consumer Sales Directive does not provide the right to withhold performance of reciprocal obligation.[213]

## xv. Termination

As far as termination as a remedy for non-performance of an obligation is concerned (Section 5), the DCFR also applies the doctrine of fundamental non-performance, which underlies Articles 25, 45, 49 and 64 CISG. The similarities are striking.

Like under the CISG, the grounds for termination under Section 5 DCFR may essentially be traced back to two types.

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[211] In more general terms, the rule laid down in paragraph (1) seems to be widely accepted in most countries where a party may withhold performance until the other party performs, both in cases of concurrent obligations and where the other party has to perform first. See on contracts in general § 320 German Civil Code; Art. 1460 Italian Civil Code; Article 6:52 Dutch Civil Code.

[212] *According to paragraph (3) "A creditor who withholds performance in the situation mentioned in paragraph (2) has a duty to give notice of that fact to the debtor as soon as is reasonably practicable and is liable for any loss caused to the debtor by a breach of that duty. (4) The performance which may be withheld under this Article is the whole or part of the performance as may be reasonable in the circumstances".*

[213] See above, Part I.

The first ground for termination is "fundamental non-performance" by the debtor, regulated by Article III.–3:502 (Termination for fundamental non-performance).[214] Termination being an extreme remedy, aimed at destroying the contractual relationship, only a fundamental non-performance, i.e. a serious breach of contract, will justify termination under this Article. It goes without saying that fundamental non-performance under the DCFR is the functional equivalent of the notion of "fundamental breach of contract" under Article 25 CISG.

Secondly, the DCFR provides what are called "equivalents to non-performance". These are: (a) where the creditor has allowed the debtor a further time to perform but the debtor has not performed within that time (Article III.–3:503) (b) where there is an anticipated fundamental non-performance (Article III.–3:504); and (c) where the debtor has failed to give an adequate assurance of performance when called upon to do so (Article III.–3:505).

Like in the CISG, termination under Section 5 DCFR may be effected by the act of the creditor alone; there is no need to bring an action in court.

In line with the CISG's rule, finally, according to Article III.–3:507[215] termination is effective only if notice of termination is given by the creditor to the debtor.[216]

Paragraph (2) of Article III.–3:502 DCFR makes clear when a non-performance of a contractual obligation may be deemed to be "fundamental". This is the case "if: (a) it substantially deprives the creditor of what the creditor was entitled to expect under the contract, as applied to the whole or relevant part of the performance, unless at the time of conclusion of the contract the debtor did not foresee and could not reasonably be expected to have foreseen that result; or (b) it is intentional or reckless and gives the creditor reason to believe that the debtor's future performance cannot be relied on".

The three elements in the definition (first, what was the creditor *entitled to expect*; whether the non-performance *substantially deprives* the creditor of

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[214] Article III.–3:502 DCFR: "(1) A creditor may terminate if the debtor's non-performance of a contractual obligation is fundamental".

[215] Article III.–3:507 (Notice of termination): "(1) A right to terminate under this Section is exercised by notice to the debtor. (2) Where a notice under III.–3:503 (Termination after notice fixing additional time for performance) provides for automatic termination if the debtor does not perform within the period fixed by the notice, termination takes effect after that period or a reasonable length of time from the giving of notice (whichever is longer) without further notice".

[216] See articles 49 and 64 CISG and Article 7.3.2 UNIDROIT Principles. Not all European systems allow the creditor to terminate by giving notice. For instance, both France and Italy generally require a judicial pronouncement for termination, and provide termination by notice or automatic termination only in some cases.

what the creditor was entitled to expect; whether the debtor *foresaw or could reasonably be expected to have foreseen* the result) are exactly the same as in Article 25 CISG.[217]

There are however some differences.

The most significant difference is that the CISG has no provision on intentional or reckless non-performance like the one provided in the Article, the Paragraph (2)(b) of which provides that if the non-performance was *intentional* or *reckless* and gives the creditor reason to believe that the debtor's future performance cannot be relied on the creditor may treat the non-performance as fundamental even if the non-performance does not substantially deprive the creditor of what the creditor could have expected to receive. In this respect, the DCFR goes seems to improve and complete the rule laid down in the CISG.

A further similarity concerns the fact that the rule for termination is applicable whether or not the non-performance was excused.[218]

As has been anticipated, the rule laid down in Article III.–3:503 DCFR, allowing termination after notice fixing additional time for performance,[219] adopts the idea, which is provided for in Articles 47, 49(1)(b) 63 and 64(1)(b) CISG, that the creditor may terminate for non-fundamental delay after giving reasonable notice. The idea is widely known within Europe,[220] although it is not accepted by all systems.[221]

Article III.–3:504 DCFR adopts the notion of "termination for anticipated non-performance", according to which "a creditor may terminate before performance of a contractual obligation is due if the debtor has declared

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[217] Also Article 25 CISG provides that a "breach … is fundamental if it results in such detriment to the other party as substantially to deprive it of what it is entitled to expect under the contract, unless the party in breach did not foresee and a reasonable person of the same kind in the same circumstances would not have foreseen such a result".

[218] See Article 79 CISG. In many European legal systems the case of termination because of supervening impossibility is treated separately from the case of termination because of a breach of contract. See, e.g., Articles 1463-1466 Italian Civil Code.

[219] Article III.–3:503 DCFR: "(1) A creditor may terminate in a case of delay in performance of a contractual obligation which is not in itself fundamental if the creditor gives a notice fixing an additional period of time of reasonable length for performance and the debtor does not perform within that period. (2) If the period fixed is unreasonably short, the creditor may terminate only after a reasonable period from the time of the notice".

[220] The best known example, and the one which has inspired the present Article of the DCFR, is the German rule on the fixation of an additonal period of time to perform, the so-called *Nachfrist*.

[221] For instance it is unknown to French law.

that there will be a non-performance of the obligation, or it is otherwise clear that there will be such a non-performance, and if the non-performance would have been fundamental". The same provision has been adopted by Article 72(1) CISG.[222]

### xvi. Restitution

The rules on restitution after termination are also very similar to the corresponding provisions of the CISG. Without going into the details, it may be said that the whole Sub-section 4 on Restitution, and especially its Article III.–3:511 DCFR,[223] is modeled on the CISG and adopts the same broad and flexible approach to restitution which underlies the Convention, the basic rule being that the recipient is obliged to return any benefit received by the other's performance.

### xvii. Price reduction

The right to reduce the price (actio quanti minoris), as provided in this Article, is found in most European legal systems and in Article 50 CISG. It is

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[222] It is worth stressing that the draftsmen of the DCFR opted here for a very neutral expression ("anticipated non-performance"), whereas the technical term which is used in other legal systems and especially in the UNIDROIT Principles (Article 7.3.3) is a slightly different one ("anticipatory non-performance"). The comments to the DCFR will probably shed some light on the rationale which is behind this slightly different wording. The end result does not seem however to differ significantly.

[223] Article III.–3:511 (Restitution of benefits received by performance): "(1) On termination under this Section a party (the recipient) who has received any benefit by the other's performance of obligations under the contract is obliged to return it. Where both parties have obligations to return, the obligations are reciprocal. (2) If the performance was a payment of money, the amount received is to be repaid. (3) To the extent that the benefit (not being money) is transferable, it is to be returned by transferring it. However, if a transfer would cause unreasonable effort or expense, the benefit may be returned by paying its value. (4) To the extent that the benefit is not transferable it is to be returned by paying its value in accordance with III.–3:513(Payment of value of benefit). (5) The obligation to return a benefit extends to any natural or legal fruits received from the benefit".

primarily applied when goods sold are defective.[224] However, in many countries the rule also applies to other contracts.[225]

Following this last approach, Section 6 DCFR generalizes the right to reduction to all contractual relationships, by providing, in Article III.–3:601, that the creditor is entitled to a reduction in the price where the debtor's performance is incomplete or otherwise fails to conform to the terms regulating the obligation.[226]

### xviii. Damage

Finally, various similarities exist between DCFR and CISG as far as damage is concerned. The general rule laid down in Article III.–3:702 is that damage generally covers both actual loss suffered and lost gain.[227] This corresponds to article 74 CISG. However, the rule is common to almost all European legal systems. It would be thus misleading to impute this similarity only to the CISG's impact on the DCFR.

The same is true also for Articles III.–3:703,[228] limiting liability to foreseeable losses; Article III.-3:704 DCFR,[229] embodying the principle that a

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[224] See § 932(1) and (4) Austrian Civil Code; Articles 534, 535, 540 French, Belgian and Luxembourg Civil Codes; § 462 German Civil Code; Article 1492 Italian Civil Code (sales contracts).

[225] See, e.g., Article 1668 Italian Civil Code on construction contracts.

[226] Article III.–3:601 DCFR (Right to reduce price): "(1) A creditor who accepts a performance not conforming to the terms regulating the obligation may reduce the price. The reduction is to be proportionate to the decrease in the value of what was received by virtue of the performance at the time it was made compared to the value of what would have been received by virtue of a conforming performance. (2) A creditor who is entitled to reduce the price under the preceding paragraph and who has already paid a sum exceeding the reduced price may recover the excess from the debtor. (3) A creditor who reduces the price cannot also recover damages for the loss thereby compensated but remains entitled to damages for any further loss suffered. (4) This Article applies with appropriate adaptations to a reciprocal obligation of the creditor other than an obligation to pay a price".

[227] Article III.–3:702: General measure of damages: "The general measure of damages for loss caused by non-performance of an obligation is such sum as will put the creditor as nearly as possible into the position in which the creditor would have been if the obligation had been duly performed. Such damages cover loss which the creditor has suffered and gain of which the creditor has been deprived".

[228] Article III.–3:703 (Foreseeability): "The debtor in an obligation which arises from a contract or other juridical act is liable only for loss which the debtor foresaw or could reasonably be expected to have foreseen at the time when the obligation

creditor should not recover damages to the extent that the loss is caused by the creditor's own unreasonable behavior; and Article III.–3:705,[230] according to which, even where the creditor has not contributed either to the non-performance or to its effects, the creditor cannot recover for loss which would have been avoided if the creditor had taken reasonable steps to do so. All these rules are conform to the CISG.[231] They are, though, provided already in most European systems.[232]

Finally, other rules of the section 7 on Damage which are modeled on the CISG are:

- Article III.–3:706 DCFR,[233] concerning cover transactions (also called "substitute transactions"), which is very similar to Article 75 CISG.
- Article III.–3:707 DCFR,[234] which provide an "abstract" way of assessing the amount of loss by referring to current price at the time of termination. A provision similar to the Article is found in Article 76 CISG.

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was incurred as a likely result of the non-performance, unless the non-performance was intentional, reckless or grossly negligent".

229 III.–3:704 (Loss attributable to creditor) "The debtor is not liable for loss suffered by the creditor to the extent that the creditor contributed to the non-performance or its effects".

230 Article III.–3:705 (Reduction of loss): "(1) The debtor is not liable for loss suffered by the creditor to the extent that the creditor could have reduced the loss by taking reasonable steps. (2) The creditor is entitled to recover any expenses reasonably incurred in attempting to reduce the loss".

231 See Articles 74, 80 and 77 CISG.

232 Cf., for instance, Article 1150 French Civil Code and Article 1225 Italian Civil Code.

233 Article III.–3:706 (Substitute transaction): "A creditor who has terminated a contractual relationship in whole or in part under Section 5 and has made a substitute transaction within a reasonable time and in a reasonable manner may, in so far as entitled to damages, recover the difference between the price and the substitute transaction price as well as damages for any further loss".

234 III.–3:707 (Current price): "Where the creditor has terminated a contractual relationship in whole or in part under Section 5 and has not made a substitute transaction but there is a current price for the performance, the creditor may, in so far as entitled to damages, recover the difference between the contract price and the price current at the time of termination as well as damages for any further loss".

# The CISG and its Impact on National Legal Systems – General Report

*Franco Ferrari*[*]

## Introduction

The 1980 United Nations Convention on Contracts for the International Sale of Goods[1] (hereinafter: CISG)[2] is generally[3] considered a success,[4] so much so, that one commentator even hailed it as "arguably the greatest leg-

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1 For the English text of the United Nations Convention on Contracts for the International Sale of Goods, see 19 International Legal Materials 668 ff. (1980). The text of the other official versions (*i.e.* Arab, Chinese, French, Russian and Spanish) can be found in: Bianca/Bonell (eds.), Commentary on the International Sales Law. The 1980 Vienna Sales Convention, 1987, p. 681-806, and in: Magraw/Kathrein (eds.), The Convention for the International Sale of Goods. A Handbook of the Basic Materials, 2nd ed., 1990, p. 169-246.

2 For a paper examining the various acronyms used for the United Nations Convention on Contracts for the International Sale of Goods in legal writing, see *Flessner/Kadner*, CISG? Zur Suche nach einer Abkürzung für das Wiener Übereinkommen über Verträge über den internationalen Warenkauf vom 11. April 1980, Zeitschrift für Europäisches Privatrecht 1995, 347 ff.

3 See, however, *Bailey*, Facing the Truth: Seeing the Convention on Contracts for the International Sale of Goods as an Obstacle to a Uniform Law of International Sales, 32 Cornell International Law Journal 273 ff. (1999); *Stephan*, The Futility of Unification and Harmonization in International Commercial Law, 39 Virginia Journal of International Law 743 ff. (1999); *Walt*, Novelty and the Risks of Uniform Sales Law, 39 Virginia Journal of International Law 671 ff. (1999).

4 See, most recently, *Davis*, Unifying the Final Frontier: Space Industry Financing Reform, 106 Commercial Law Journal 455, 477 (2001); *Gopalan*, The Creation of International Commerical Law: Sovereignty Felled?, 5 San Diego International Law Journal 267, 289 (2004); *Schlechtriem*, Of Words and Issues – Finding Common Law Language for Common Issues, Review of the Convention on Contracts for the International Sale of Goods (CISG) 79, 80 f. (2003-2004); *K. Sono*, The Rise of Anational Contract Law in the Age of Globalization, 75 Tulane Law Review 1185, 1185 (2001).

islative achievement aimed at harmonizing private commercial law".[5] What, however, is the measure of that success? Is it the number of contracting States which is indeed impressive, the CISG being in force in 70 countries[6] – with more countries to enter the CISG into force shortly?[7] Is it the percentage of world trade to which it applies, which, one must admit, is remarkable, since the CISG – supposedly – governs two-thirds of world trade,[8] if not more?[9] Or is it the fact that the CISG is increasingly being applied both by state courts and arbitral tribunals?

In this rapporteur's opinion, by itself none of the foregoing measures is sufficient to justify the foregoing conclusion. As regards the fact that the CISG is in force in 70 countries, for instance, it mainly bears witness to the CISG's political acceptability and says little about how it is received in those countries or about the level of awareness of the CISG's existence. In effect, there are contracting States in which there is little awareness of the CISG's existence, at least in the business community. This is true for instance in Argentina, where, despite many attempts to raise awareness about the CISG's existence, the CISG, albeit known by practicing lawyers, "is not so well known in business circles".[10] Similarly, in Mexico the business community does not seem to be aware of the CISG;[11] in Croatia the lack of awareness is rooted even more deeply, since "the CISG caused little or no interest in the business community and among practising lawyers",[12] al-

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5 *Lookofsky*, Loose Ends and Contorts in International Sales: Problems in the Harmonization of Private Law Rules, 39 American Journal of Comparative Law 403, 403 (1991); see also *Barnes*, Contemplating a Civil Law Paradigm for a Future International Commercial Code, 65 Louisiana Law Review 677, 678 (2005), referring to the CISG as "a monumental achievement".

6 For an up-dated list of contracting States, see the UNCITRAL website at http://www.uncitral.org.

7 In Japan, the CISG will enter into force on 1st August 2009.

8 See *Kleefeld*, Rethinking "Like a Lawyer": An Incrementalist's Proposal for First-Year Curriculum Reform, 53 Journal of Legal Education 254, 262 note 29 (2003); *Kritzer*, The Convention on Contracts for the International Sale of Goods: Scope, Interpretation, and Resources, 9 International Quarterly 203, 204 (1997); *van Alstine*, Dynamic Treaty Interpretation, 146 University of Pennsylvania Law Review 687, 689 (1998).

9 See *Andersen*, United Kingdom, supra this book, p. 303, 303; *Friehe/Huck*, Das UN-Kaufrecht in sieben Sprachen. Einführung in eine Datenbank zur variablen und dynamischen Textrecherche von Deutsch, Englisch, Französisch, Spanisch, Italienisch, Niederländisch und Chinesisch, Internationales Handelsrecht 2008, 14, 14.

10 *Noodt Taquela*, Argentina, supra this book, p. 3, 3.

11 See *Veytia*, Mexico, supra this book, p. 231, 231.

12 *Baretić/Nikšić*, Croatia, supra this book, p. 93, 93.

though there is evidence to show that this situation is changing. In Greece, too, "a great number of […] lawyers, if not the majority, are rather unaware of the Convention".[13] In Israel, "in spite of the fact that the CISG is in force [there] and has been incorporated into Israeli law, it does not have much visibility and awareness among the […] legal community".[14] In New Zealand as well, "[t]he profession is largely not aware of the CISG";[15] in Uruguay, too, "[s]ome practicing lawyers are aware of the CISG, particularly those who deal with these kinds of cases, but […] there are many who are not".[16]

The reasons for this lack of awareness are manifold; one obvious one relates to other – generally purely domestic – issues being more pressing and, thus, requiring more attention. This certainly is true as regards Canada, where the "arrival of the CISG […] coincided with a number of significant developments which served to marginalize its eventual role in Canadian law […]. Thus, the CISG did not enjoy an auspicious beginning in Canada."[17]

On the other hand, no negative inference should be drawn from the fact that more than 130 countries have not become contracting States, as the reasons do not necessarily arise from opposition to the CISG. Some countries simply favour a more regional – rather than the CISG's global – approach to the unification of sales law,[18] as they believe that this will benefit intra-regional commerce more.[19] This is true, for instance, as regards the member States of the Organization for the Harmonization of Business Law in Africa,[20] OHADA, only two member States of which – Gabon and Guinea – ratified the CISG.[21]

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13 *Zervogianni*, Greece, supra this book, p. 163, 166.

14 *Shalev*, Israel, supra this book, p. 183, 184.

15 *Butler*, New Zealand, supra this book, p. 251, 252.

16 *Fresnedo de Aguirre*, Uruguay, supra this book, p. 333, 334.

17 *McEvoy*, Canada, supra this book, p. 33, 37.

18 For papers regarding the relationship between the CISG and regional unification efforts in the area of sales law, see, e.g., *Ferrari*, Universal and Regional Sales Law: Can they coexist?, Uniform Law Review 2003, 177 ff.; *Sarcevic*, The CISG and Regional Unification, in: Ferrari (ed.), The 1980 Uniform Sales Law. Old Issues Revisited in the Light of Recent Experiences, 2003, p. 3 ff.

19 On regional versus global harmonization efforts in the area of private law in general, see *Basedow*, Worldwide Harmonisation of Private Law and Regional Economic Integration – General Report, Uniform Law Review 2003, 31 ff.

20 For an analysis of the sales law elaborated by the Organization for the Harmonization of Business Law in Africa, see *Hagge*, Das einheitliche Kaufrecht der OHADA (Organisation pour l'Harmonisation en Afrique du Droit des Affaires), 2004.

21 For papers comparing the sales law of the Organization for the Harmonization of Business Law in Africa with the CISG; see, e.g., *Ferrari*, International sales law in the light of the OHBLA Uniform Act relating to general commercial law and the

Other countries, such as the United Kingdom,[22] have not yet agreed to the CISG simply due to lack of political momentum. "With no actual opposition, there is no battle to fight, no persuasion to make. The UK[, for instance], is happy, in principle, to embrace the CISG. It is where the decision requires action that the lethargic stumbling block is found. The decision to implement may well be made, but there is not sufficient interest to take this decision forward, there is no momentum behind it."[23] In yet other countries, the CISG has not yet been ratified because the legislature has had much more pressing issues to address, a reason not unrelated to the one just mentioned. In Japan, for instance, "[a]fter the burst of so-called bubble economy[, the] Ministry of Justice became overcharged with urgent [matters], such as fundamental reforms of insolvency law, security law, corporate law, etc., to cope with the critical economic situation."[24] Thus, it was impossible to devote any energy to the ratification of the CISG. "However, things have changed. Most of the urgent legislative tasks have been fulfilled so that the Ministry of Justice could now put sufficient energy into the accession of CISG";[25] this eventually led to Japan's accession of the CISG on 1st July 2008. In other countries, the lack of ratification simply cannot be justified. This is true, for instance, of Brazil, as evidenced by a letter from the Brazilian Ministry of Foreign Affairs where it is stated that "there are no substantial reasons that justify Brazil's non adhesion to the CISG."[26] Similarly, there appears to be no valid reason for Venezuela not to adhere to the CISG either, since the CISG appears to be perfectly in line with Venezuelan domestic law.[27]

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1980 Vienna Sales Convention, International Business Law Journal 2001, 599 ff.; *Schroeter*, Das einheitliche Kaufrecht der afrikanischen OHADA-Staaten im Vergleich zum UN-Kaufrecht, Recht in Afrika 2001, 163 ff.

22 For papers on the reasons for the UK's lack of ratification of the CISG; see, e.g., *Forte*, The United Nations Convention on Contracts for the International Sale of Goods: Reason and Unreason in the United Kingdom, 26 University of Baltimore Law Review 51 ff. (1997); *Lee*, The UN Convention on Contracts for the International Sale of Goods: OK for the UK?, Journal of Business Law 131 ff. (1993); *Moss*, Why the United Kingdom Has Not Ratified the CISG, 25 Journal of Law and Commerce 483 ff. (2006); *Nicholas*, The United Kingdom and the Vienna Sales Convention: Another Case of Splendid Isolation?, 1993.

23 *Andersen*, supra note 9, at 311.

24 *Hayakawa*, Japan, supra this book, p. 225, 225.

25 *Id.* at 226.

26 *de Aguilar Vieira*, Brazil, supra this book, p. 7, 8; the truth be told, the author also refers to the fact that in Brazil the lack of ratification "is due to the lack of pressures by the legal community, which cannot draw their attention [to] problems like this, which do not have a strong political appeal", *Id.* at 9.

27 See *Madrid Martinez*, Venezuela, supra this book, p. 337, 337 f.

As for the impressively high percentage of world trade to which the CISG – supposedly – applies, it does not constitute an appropriate measure of the CISG's success either; rather, it is a way of pointing out how important the CISG is potentially for world trade, given its broad sphere of application. But the CISG's potential importance is not to be confused with its real success.

The attention devoted to the CISG both by state courts[28] and arbitral tribunals[29] appears to be a better measure of the CISG's success. Still, this is

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[28] For recent papers discussing the judicial applications of the CISG, see, apart from the papers cited infra in notes 203 and 204, *Bonell/Liguori*, The U.N. Convention on the International Sale of Goods: A Critical Analysis of Current International Case Law (Part I), Uniform Law Review 1996, 147 ff.; (Part II), Uniform Law Review 1996, 359 ff.; *Del Duca/Del Duca*, Practice under the Convention on International Sale of Goods (CISG): A Primer for Attorneys and International Traders (Part I), 27 UCC Code Law Journal 331 ff. (1995); (Part II), 29 UCC Code Law Journal 99 ff. (1996); *Dimatteo et al.*, International Sales Law: A Critical Analysis of CISG Jurisprudence, 2005; *Ferrari*, Specific Topics of the CISG in the Light of Judicial Application and Scholarly Writing, 15 Journal of Law and Commerce 1 ff. (1995); *Ferrari*, La vendita internazionale di beni mobili. Applicabilità ed applicazioni della Convenzione di Vienna, 2nd ed., 2006; *Flechtner*, The CISG in U.S. Courts: The Evolution (and Devolution) of the Methodology of Interpretation, in: Ferrari (ed.), Quo Vadis CISG? Celebrating the 25th anniversary of the United Nations Convention on Contracts for the International Sale of Goods, 2005, p. 91 ff.; *Flechtner*, More U.S. Decisions on the U.N. Sales Convention: Scope, Parol Evidence, "Validity", and Reduction of Price under Article 50, 14 Journal of Law and Commerce 153 ff. (1995); *Huber/Kröll*, Deutsche Rechtsprechung zum UN-Kaufrecht in den Jahren 2001/2002, Praxis des internationalen Privat- und Verfahrensrechts 2003, 309 ff.; *Janssen*, The Application of the CISG in Dutch Courts, in: Quo Vadis CISG? supra this note, p. 129 ff.; *Karollus*, Judicial Interpretation and Application of the CISG in Germany 1988-1994, Review of the Convention on Contracts for the International Sale of Goods (CISG) 51 ff. (1995); *Liguori*, La Convenzione di Vienna sulla vendita internazionale di beni mobili nella pratica: un'analisi critica delle prime cento decisioni, Foro italiano 1996/V, 145 ff.; *Lookofsky*, CISG Case Law in Scandinavia, in: Quo Vadis CISG?, supra this note, p. 167 ff.; *Lurger*, Überblick über die Judikaturentwicklung zu ausgewählten Fragen des CISG- Teil 1, Internationales Handelsrecht 2005, 177 ff.; Teil 2, Internationales Handelsrecht 2005, 221 ff.; *Magnus*, CISG in the German Federal Civil Court, in: Quo Vadis CISG?, supra this note, p. 211 ff.; *Perales Viscasillas*, Spanish Case Law on the CISG, in: Quo Vadis CISG?, supra this note, p. 235 ff.; *Piltz*, New Developments in UN Sales Law, 7 Vindobona Journal of International Commerical Law and Arbitration 213 ff. (2003); *Posch/Petz*, Austrian Cases on the UN Convention on Contracts for the International Sale of Goods, 6 Vindobona Journal of International Commer-

not conclusive either; the sole fact that a uniform law convention, such as the CISG, is being applied by courts and arbitral tribunals does not make it a success. Rather, it is also necessary that courts and arbitral tribunals apply it

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cial Law and Arbitration 1 ff. (2002); *Posch/Terlitza*, The CISG before Austrian Courts, in: Quo Vadis CISG?, supra this note, p. 263 ff.; *Posch/Terlitza*, Entscheidungen des österreichischen Obersten Gerichtshofs zur UN-Kaufrechtskonvention (CISG), Internationales Handelsrecht 2001, 47 ff.; *Sannini*, L'applicazione della Convenzione di Vienna sulla vendita internazionale negli Stati Uniti, 2006; C. *Thiele*, Das UN-Kaufrecht vor US-amerikanischen Gerichten, Internationales Handelsrecht 2002, 8 ff.; *Vazquez Lepinette*, Compraventa Internacional de Mercaderias. Una vision jurisprudencial, 2000; *Watté/Nuyts*, Le champ d'application de la Convention de Vienne sur le vente international. La théorie à l'épreuve de la pratique, Journal du droit international 2003, 365 ff.; C. *Witz*, L'application de la Convention de Vienne sur la vente internationale de marchandises par les juridictions françaises – Premier bilan, in: Majoros (ed.), Emptio – venditio inter nationes. Mélanges Neumayer, 1997, p. 425 ff.; C. *Witz*, Les premières applications jurisprudentielles de la Convention de Vienne sur la vente internationale de marchandises, in: *Ferrari* (ed.), The Unification of International Commercial Law. Tilburg Lectures, 1998, p. 159 ff.; C. *Witz*, Les premières applications jurisprudentielles du droit uniforme de la vente internationale. Convention des Nations Unies du 11 avril 1980, 1995; C. *Witz*, La Convention de Vienne sur la vente internationale de marchandises à l'épreuve de la jurisprudence naissante, Dalloz Chronique 143 ff. (1995); *Witz/Wolter*, Die neuere Rechtsprechung französischer Gerichte zum Einheitlichen UN-Kaufrecht, Recht der internationalen Wirtschaft 1998, 275 ff.; *Witz/Wolter*, Die ersten Entscheidungen französischer Gerichte zum Einheitlichen Kaufrecht, Recht der internationalen Wirtschaft 1995, 810 ff.; *Zeller*, The CISG in Australasia – An Overview, in: Quo Vadis CISG?, supra this note, p. 293 ff.

[29] For papers on the CISG's application by arbitral tribunals, see, e.g., *Béraudo*, La Convention des Nations Unies sur les contrats de vente internationale de marchandises et l'arbitrage, Bulletin de la Cour Internationale de l'Arbitrage de la CCI 61 ff. (1994); *De Ly*, La pratique de l'arbitrage commercial international et la vente internationale, International Business Law Journal 465 ff. (2001); *Fisanich*, Application of the U.N. Sales Convention in Chinese International Commercial Arbitration: Implications for International Uniformity, American Review of International Arbitration 101 ff. (1999); *Mourre*, Application of the Vienna International Sales Convention in Arbitration, Bulletin de la Cour Internationale de l'Arbitrage de la CCI 2006, 43 ff.; *Muir Watt*, L'applicabilité de la Convention des Nations Unies sur le contrat de vente international de marchandises devant l'arbitre international, International Business Law Journal 401 ff. (1996); *Song*, Award of Interest in Arbitration under Article 78 CISG, Uniform Law Review 2007, 719 ff.; *van Houtte*, The Vienna Sales Convention in ICC Arbitral Practice, Bulletin de la Cour Internationale de l'Arbitrage de la CCI 2000, 22 ff.

in a uniform manner,[30] *i.e.*, in a way that allows its ultimate goal, the creation of uniformity,[31] to be reached. This means, among others, that courts and arbitral tribunals have to consider the practice of other jurisdictions,[32] *i.e.*, "what others have already done".[33] Recent surveys[34] as well as, for in-

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30 For this measure of the CISG's success, see *Tuggey*, The 1980 United Nations Convention on Contracts for the International Sale of Goods: Will a Homeward Trend Emerge, 21 Texas International Law Journal 540, 554 (1985-1986).

31 It has often been pointed out that the CISG's ultimate goal is uniformity; see, e.g., *Malloy*, The Inter-American Convention on the Law Applicable to International Contracts: Another Piece of the Puzzle of the Law Applicable to International Contracts, Fordham International Law Journal 662, 667 note 17 (1995).

32 See *Andersen*, Uniform Application of the International Sales Law. Understanding Uniformity, the Global Jurisconsultorium and Examination and Notification Provisions of the CISG, 2007, p. 47; *Bernstein/Lookofsky*, Understanding the CISG in Europe, 2nd ed., 2003, p. 32-33; *Flechtner*, Recovering Attorneys' Fees as Damages under the U.N. Sales Convention: A Case Study on the New International Commercial Practice and the Role of Case Law in CISG Jurisprudence, with Comments on Zapata Hermanos Sucesores, S.A. v. Hearthside Baking Co., 22 Northwestern Journal of International Law and Business 121, 122-123 (2002); *Graffi*, Securing Harmonized Effects of Arbitration Agreements under the New York Convention, 28 Houston Journal of International Law 663, 768 (2006); *Komarov*, Internationality, Uniformity and Observance of Good Faith as Criteria in Interpretation of CISG: Some Remarks on Article 7(1), 25 Journal of Law and Commerce 75, 80 (2006); *Lookofsky*, Digesting CISG Case Law: How Much Regard Should We Have?, 8 Vindobona Journal of International Law and Arbitration 181, 184 (2004); *Lookofsky/Flechtner*, Nominating Manfred Forberich: The Worst Decision in 25 Years?, 9 Vindobona Journal of International Commercial Law and Arbitration 199, 201 (2005); *McQuillen*, The Development of a Federal CISG Common Law in U.S. Courts: Patterns of Interpretation and Citation, 61 University of Miami Law Review 509, 511 (2007); *Müller/Togo*, Die Berücksichtigung der Überzeugungskraft ausländischer Präzedenzfälle bei der Auslegung des CISG. Die neuere Rechtsprechung als Vorreiter und Vorbild, Internationales Handelsrecht 2005, 102, 103; *Whittington*, Comment on Professor Schwenzer's Paper, 36 Victoria University of Wellington Law Review 809, 812 (2005).

33 *Maskow*, The Convention on the International Sale of Goods from the Perspective of the Socialist Countries, in: La vendita internazionale. La Convenzione di Vienna dell'11 Aprile 1980, 1981, p. 39, 54.

34 See, e.g., *Ferrari*, Have the Dragons of Uniform Sales Law Been Tamed? Ruminations on the CISG's Autonomous Interpretation by Courts, in: Andersen/Schroeter (eds.), Sharing International Commercial Law across National Boundaries. Festschrift for Albert H. Kritzer on the Occasion of his Eightieth Birthday, 2008, p. 134 ff.; *Ferrari*, Do courts interpret the CISG uniformly?, in: Quo Vadis CISG, supra note 28, p. 3 ff.

stance, the Italian country report[35] show that courts increasingly apply the CISG in a way that is in line with the CISG's ultimate goal. Divergences in the CISG's application still exist,[36] however, and will continue to persist for many years. The reasons range from the lack of a supreme international tribunal with the mandate to unify diverging applications by courts from the many contracting States[37] to the wording of the CISG, which itself constitutes a source of diverging applications, as often pointed out in legal writing.[38]

When referring to the CISG's success, commentators have often also referred to the CISG's impact on national legal systems.[39] Thus, some commentators have aptly referred to the CISG's "Ausstrahlungswirkung",[40] defined as the CISG's effectiveness beyond its own scope, as – yet another – measure of the CISG's success.[41] If the CISG in fact influenced the national legal systems, this would certainly qualify as a success. This paper will examine whether the CISG really has done so and, if so, to what extent. It will mainly – albeit not exclusively – rely on the various country reports submitted to the 1st Intermediate Congress of the International Academy of Com-

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35 See *Torsello*, Italy, supra this book, p. 187, 215 ff.

36 For overviews of the divergences referred to in the text, see, e.g., *de Lukowicz*, Divergenzen in der Rechtsprechung zum CISG. Auf dem Weg zu einer einheitlichen Auslegung und Anwendung?, 2001; *Ferrari*, Divergences in the application of the CISG's rules on non-conformity of goods, Rabels Zeitschrift für ausländisches und internationales Privatrecht 2004, 473 ff.

37 See *Bonell*, L'interpretazione del diritto uniforme alla luce dell'art. 7 della convenzione di Vienna sulla vendita internazionale, Rivista di diritto civile 1986/II, 221, 226; *Gebauer*, Uniform Law, General Principles and Autonomous Interpretation, Uniform Law Review 2000, 683, 684; G. *Schmid*, Einheitliche Anwendung von internationalem Einheitsrecht, 2004, p. 32 f.

38 See *Bell*, Review of 'International Sales Law: A Critical analysis of CISG Jurisprudence', Bar News 105, 105 (2005/2006); *Gillette/Scott*, The Political Economy of International Sales, 25 International Review of Law and Economics 446, 474 ff.; *Note*, Unification and Certainty: The United Nations Convention on Contracts for the International Sale of Goods, 97 Harvard Law Review 1984, 1999 (1984); *Tuggey*, supra note 30, at 554.

39 See, e.g., *Magnus*, 25 Jahre UN-Kaufrecht, infra note 203, at 104 f.; *J. Meyer*, UN-Kaufrecht in der deutschen Anwaltspraxis, Rabels Zeitschrift für ausländisches und internationales Privatrecht, 2005, 457, 460.

40 *Magnus*, 25 Jahre UN-Kaufrecht, infra note 203, at 105; *Ragno*, Convenzione di Vienna e diritto europeo, 2008, p. 233 and 259.

41 For yet another measure of the CISG's success, see, e.g., *Gillette/Scott*, supra note 38, at 447, where the authors suggest that the success is to be measured on the basis of whether the rules of the CISG "do for the parties what the parties cannot as easily do for themselves."

parative Law, held in Mexico City from 13 to 15 November 2008, most of which are reprinted in this book.

# I. The CISG's impact on practicing lawyers

## 1. Awareness of the CISG by practicing lawyers

When examining whether the CISG has an impact on a national legal system, it is vital to analyze its impact on the various players the legal profession is made of (*i.e.*, lawyers and judges), as well as on those who create (legislators) and influence (scholars) the law in a given country.

To have an impact on practicing lawyers, the CISG must be known to them. As mentioned earlier,[42] there are countries – such as Greece,[43] Israel[44] and New Zealand,[45] as well as – at least to some extent – Italy,[46] in which practicing lawyers are rather unaware of the CISG; consequently, in those countries the CISG can have little (positive) impact on practicing lawyers.[47] On the other hand, there are countries – even countries in which the CISG has not yet entered into force – in which practicing lawyers are much more aware of its existence. In Argentina, for instance, "practicing lawyers, in general, know about the existence of the CISG."[48] Similarly, in Denmark "the average practicing lawyer is likely to be very much 'aware' of the CISG".[49] In France, too, conscientious[50] practicing lawyers are generally aware of the CISG;[51] the same is true in Germany, at least for those lawyers

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42 See supra the text accompanying notes 13-15.

43 *Zervogianni*, supra note 13, at 166.

44 *Shalev*, supra note 14, at 184.

45 *Butler*, supra note 15, at 252.

46 *Torsello*, supra note 35, at 191.

47 For a similar conclusion, see *Shalev*, supra note 14, at 184, stating – as regards the situation in Israel – that "[n]ot many lawyers are aware of the CISG, and therefore it has no impact on the way they draft their briefs and memoranda or in the way they solve domestic disputes"; also *Zervogianni*, supra note 13, at 166, where the author states – in relation to the Greek situation – that "[a]s a consequence [of the weak awareness the] CISG cannot be expected to have had considerable (if any) impact neither on the contents of standard contracts forms, nor on the drafting of briefs and memoranda."

48 *Noodt Taquela*, supra note 10, at 3.

49 *Lookofsky*, Denmark, supra this book, p. 113, 119.

50 See *C. Witz*, France, supra this book, p. 129, 130.

51 *Ibid*.

who practice in the area of international sales law.[52] A survey conducted by the two drafters of the Swiss country report[53] shows "that an overwhelming majority of practicing lawyers in Switzerland (over 98% of participants) are familiar with the CISG".[54] Even in Japan, which is not yet a contracting State, practicing lawyers "who specialize in cross-border transactions are surely aware of CISG. It would be simply hard for such lawyers to do their business without having at least basic knowledge about one of the most important and successful international instruments in this field."[55]

It appears that currently the most important sources through which practicing lawyers become familiar with the CISG are law schools,[56] since the CISG has become part of the regular law school curriculum in many countries, including China,[57] Croatia[58] and Denmark,[59] although not necessarily on a compulsory basis,[60] which limits the impact of promoting awareness of the CISG.[61]

There are other sources from which practicing lawyers can draw their knowledge of the CISG. Bar associations in contracting States have offered

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52 See *M.F. Köhler*, Das UN-Kaufrecht (CISG) und sein Anwendungsausschluss, 2007, p. 312; *Magnus*, Germany, supra this book, p. 143, 144 f.

53 For the text of the questionnaire upon which the survey referred to in the text is based, see supra this book, p. 299 ff.

54 *Widmer/Hachem*, Switzerland, supra this book, p. 281, 287.

55 *Hayakawa*, supra note 24, at 226-227.

56 See *Fresnedo de Aguirre*, supra note 16, at 333; *Widmer/Hachem*, supra note 54, at 287.

57 See *Han*, China, supra this book, p. 71, 71-72, where it is stated that "[b]ecause the CISG is now a component part of the legal system of the P.R.C., it is a natural result for it to be a component part of legal education and National Judicial Examination. In other words, students of law schools in China should have learned the CISG, and test questions on the CISG may be encountered in National Judicial Examinations. For those who want to be an eligible lawyer in China, it is now necessary to understand or even gain a mastery of rules of the CISG."

58 See *Baretić/Nikšić*, supra note 12, at 100.

59 In Denmark, this has led one commentator to state that most practicing lawyers, "as part of their legal education, have read a CISG textbook, attended CISG classes, and then, on that basis, have been tested on acquired CISG-knowledge during one or more law school exams", *Lookofsky*, supra note 49, at 119.

60 See, as regards Germany, *Magnus*, supra note 52, at 145.

61 See *McEvoy*, supra note 17, at 65, stating that "[i]t is readily apparent that the major impediment to achieving wide exposure to the CISG by Canadian law students is that courses in which the CISG is a logical component of study, and for which the course description specifically mentions the CISG, are optional rather than compulsory so that only a subset of students take the course."

introductory courses on the CISG.[62] The need to obtain CLE (Continuing Legal Education) credits has also helped to increase awareness of the CISG, at least in some countries.[63] In Canada, however, where CLE for practicing lawyers is compulsory in most jurisdictions, "it appears that only two CLE events [regarding CISG-related topics] have been presented by major CLE providers in the last five to seven years (the time period varied with the memory of the organization representative)."[64] This highlights the lack of widespread interest in the CISG in Canada.[65]

Awareness of the CISG is also promoted through the publication of both commentaries and court decisions in specialized law reviews,[66] and – and more importantly for raising general awareness of the CISG – general law reviews.[67]

## 2. Awareness of the CISG, standard contract forms and exclusion of the CISG

As mentioned earlier,[68] where there is no awareness of the CISG, the CISG cannot have a positive impact on practicing lawyers; in other words, practicing lawyers who are unaware of the CISG cannot shape their standard contract forms so as to take advantage of the CISG. This does not mean, however, that the lack of familiarity with the CISG has no effect. It probably

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62 See *Noodt Taquela*, supra note 10, at 3, referring to Argentina; *Lookofsky*, supra note 49, at 119, referring to Denmark; *Magnus*, supra note 52, at 145, referring to Germany; *Zervogianni*, supra note 13, at 165 note 11, referring to Greece.
See, however, as regards the Uruguayan situation, *Fresnedo de Aguirre*, supra note 16, at 333, stating that "there have been few actions, if any, in business circles or bar associations to raise awareness of the Convention being in force."

63 In this respect see, as regards Denmark, *Lookofsky*, supra note 49, at 119; as regards Italy, see *Torsello*, supra note 35, at 192.

64 *McEvoy*, supra note 17, at 66.

65 *Id.* at 66, stating that "[t]he general lack of CLE sessions on the CISG confirms both the lack of interest and importance that CLE planners associate with the CISG as they identify and develop programs aimed to attract the attendance of fee-paying practising lawyers at CLE events. It is a supply/demand reaction in the CISG marketplace."

66 See, e.g., Internationales Handelsrecht.

67 This led one commentator to even state that the CISG "can hardly be overlooked by practitioners", *Magnus*, supra note 52, at 145, at least not in Germany.

68 See supra the text accompanying note 47.

leads lawyers simply to adopt the exclusion clauses contained in many –[69] albeit not all –[70] standard contracts forms readily available on the internet or by contacting various associations. Interestingly enough, CISG exclusion clauses can be found "in the 'terms of use' of websites for a professional association, an organization matching volunteers with social agencies in one city, a dating or matchmaking service, and a listing service for private home sales."[71] This tells much about the level of understanding of the CISG.

Lack of awareness may also lead to some surprises, such as the CISG's application in cases where the lawyers rely on the applicability of their domestic law[72] and, therefore, plead on the sole basis of that domestic law. In effect, the mere fact that the pleadings are based solely on a given domestic law does not *per se* lead to the exclusion of the CISG.[73] This is also the view

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69 See, e.g., *Baretić/Nikšić*,supra note 12, at 95 note 10; *McEvoy*, supra note 17, at 67; *Torsello*, supra note 35, at 198 note 52; *Veytia*, supra note 11, at 239; *Widmer/Hachem*, supra note 54, at 288.

70 See *Lookofsky*, supra note 49, at 120, referring to the Nordic General Conditions (for the supply of machines and other equipment) that do not exclude the CISG, but simply refer to the law of the vendor as the applicable which includes the CISG in those countries in which it has entered into force.

71 *McEvoy*, supra note 17, at 67.

72 See also *Rozehnalová*, Czech Republic, supra this book, p. 107, 108.

73 See *Bazinas*, Uniformity in the Interpretation and the Application of the CISG: The Role of CLOUT and the Digest, in: Celebrating Success: 25 Years United Nations Convention on Contracts for the International Sale of Goods, 2006, p. 18, 26; *Graffi*, L'applicazione della Convenzione di Vienna in alcune recenti sentenze italiane, European Legal Forum 2000/2001, 240, 241; *Grijalva/Imberg*, The Economic Impact of International Trade on San Diego and the Application of the United Nations Convention on the International Sale of Goods to San Diego/Tijuana Commercial Transactions, 35 San Diego Law Review 769, 776 (1998); *Mazzotta*, The International Character of the UN Convention on Contracts for the International Sale of Goods: An Italian Case Example, 15 Pace International Law Review 437, 442 (2003); *Piltz*, Neue Entwicklungen im UN-Kaufrecht, Neue Juristische Wochenschrift 2000, 553, 555; *Reifner*, Stillschweigender Ausschluss des UN-Kaufrechts im Prozess?, Internationales Handelsrecht 2002, 52, 57; *Rosati*, Anmerkung zu Trib. Vigevano, 12. Juli 2000, Internationales Handelsrecht 2001, 78, 80; *Schlechtriem*, Aufrechnung durch den Käufer wegen Nachbesserungsaufwand – deutsches Vertragsstatut und UN-Kaufrecht, Praxis des internationalen Privat- und Verfahrensrechts 1996, 256, 256; *Spiegel*, Exclusion tacite de la Convention de Vienne par les parties et dénonciation des défaits de conformité, Recueil Dalloz-Sirey Jurisprudence 2002, 395, 395; *Wasmer*, Vertragsfreiheit im UN-Kaufrecht, 2004, p. 31 f.

held by most – albeit not all[74] – courts.[75] Pleading on the sole basis of a domestic law leads to an (implicit) exclusion of the CISG only where the parties are aware of the CISG's applicability,[76] or the intent to exclude the CISG can otherwise be inferred with certainty. If the parties are not aware of the CISG's applicability and argue on the sole basis of a domestic law merely because they mistakenly believe that this law is applicable, courts will nevertheless have to apply the CISG on the grounds of the principle *iura novit curia*,[77] provided that this principle is part of the procedural law applicable in the forum State.[78]

What, however, is the impact of the CISG on practicing lawyers who are aware of it? Do these lawyers model their standard contract forms in a way that allows their clients to benefit from the advantages the CISG may offer them?

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74 See ICC Court of Arbitration, Arbitral award n. 8453, available at http://www.unilex.info/case.cfm?pid=1&do=case&id=459&step=FullText: "It is also undisputed that the contract is subject to French law (art. 16 of the Contract). Both parties referred in their memorials and pleadings to the legal provisions applicable to sale contracts (art. 1582 et seq. of the French Civil Code). None of the parties referred to the UN Convention of 1980 on the International Sale of Goods (Vienna Convention) which is therefore considered as non applicable."
See also French Supreme Court, 26 June 2001, available at http://www.cisg-france.org/decisions/2606011v.htm.

75 See Landgericht Bamberg, 23 October 2006, available at http://cisgw3.law.pace.edu/cases/061023g1.html; Tribunale di Padova, 25 February 2004, available at http://cisgw3.law.pace.edu/cisg/wais/db/cases2/040225i3.html; Landgericht Saarbrücken, 2 July 2002, available at http://cisgw3.law.pace.edu/cisg/wais/db/cases2/020702g1.html; Oberlandesgericht Rostock, 10 October 2001, available at http://cisgw3.law.pace.edu/cisg/wais/db/cases2/011010g1.html; Tribunale di Vigevano, 12 July 2000, available at http://cisgw3.law.pace.edu/cases/000712i3.html; Kantonsgericht Nidwalden, 3 December 1997, available at http://cisgw3.law.pace.edu/cases/971203s1.html; Oberlandesgericht Hamm, 9 June 1995, available at http://cisgw3.law.pace.edu/cases/950609g1.html; Landgericht Landshut, 5 April 1995, available at http://cisgw3.law.pace.edu/cases/950405g1.html.

76 For a reference in case law to the need of the awareness of the CISG's applicability, see, e.g., Oberlandesgericht Linz, 23 January 2006, available at http://cisgw3.law.pace.edu/cases/060123a3.html.

77 See *Ferrari*, *Art*.6, in: Schlechtriem/Schwenzer (eds.), Kommentar zum Einheitlichen UN-Kaufrecht – CISG, 4th ed., 2004, p. 123, 132 f.; *Graffi*, supra note 73, at 242; *Reifner*, supra note 73, at 57.

78 See *Ferrari*, CISG rules on exclusion: Art. 6, in: Ferrari/Flechtner/Brand (eds.), The Draft UNCITRAL Digest and Beyond: Cases, Analysis and Unresolved Issues in the U.N. Sales Convention, 2004, p. 114, 131.

Unfortunately, it appears that for the most part they do not.[79] In this rapporteur's opinion, this is due to the fact that awareness of the CISG is not the same as knowledge of the CISG and the way it is interpreted and applied.[80] The latter is required to be able to take advantage of the CISG,[81] for instance by using it as a contract drafting tool.[82] Practicing lawyers who are aware of the CISG but who do not have profound knowledge of it or of the way it works more often than not insert into their standard contract forms a clause aimed at excluding the CISG,[83] generally for fear of the unknown.[84] It is often assumed that the substance of the CISG cannot be easily grasped, because it has not yet been applied often, and, therefore, it does not offer sufficient legal certainty,[85] or because it allows contracting States to declare reservations[86] that make the applicable rules even more uncertain.[87]

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79 See *Možina*, Slovenia, supra this nook, p. 265, 266;

80 For a similar statement, see *Magnus*, supra note 52, at 145.

81 For this conclusion, see also *Možina*, supra note 79, at 266, stating that "the mere awareness of the CISG is not sufficient for its use."

82 See *Torsello*, supra note 35, at 196; for an in-depth analysis of the CISG as a drafting tool, see *Flechtner/Brand/Walter* (eds.), Drafting Contracts under the CISG, 2008.

83 See *Reimann*, The CISG in the United States: Why It Has Been Neglected and Why Europeans Should Care, Rabels Zeitschrift für ausländisches und internationales Privatrecht 11,5 122 ff. (2007).

84 For this justification of the tendency to exclude the CISG, see, e.g., *McEvoy*, supra note 17, at 69, where the following reason is given for the exclusion of the CISG in favour of a different law: it is "thought better to spell provisions out or provide for the law to be applicable to the contract specifically and for that law to be one of known and familiar commercial effect."
For similar remarks, see, as regards the situation in the United States, *Philippopoulos*, Awareness of the CISG Among American Attorneys, 40 UCC Law Journal 357 ff. (2008).

85 See also *Magnus*, supra note 52, at 146, referring to *Köhler*, supra note 52, at 315, and *Meyer*, supra note 39, at 474 f., and stating that "[t]he reported main reasons for this reluctance towards the CISG are two which are interconnected: first, that the CISG is too little known. Second, doubts concerning legal certainty. It is feared that solutions under the CISG cannot be foreseen due to too many vague terms which the CISG uses." The author also adds, however, that "the view that the CISG does not guarantee sufficient legal certainty is based on prejudice. For most questions which may arise under the CISG there exists today international case law", *Id.* at 147.
See also *Reimann*, supra note 83, at 125, stating that an "important reason to opt out are the legal uncertainties, whether perceived or real, inherent in the CISG."

86 For a detailed analysis of the reservations that are admitted under the CISG as well as under various other uniform commercial law conventions, see *Torsello*,

This is why practicing lawyers tend to avoid the CISG.[88] It appears that, for these lawyers, "the devil you know is better than the devil you do not know". This argument, however, is not only unconvincing, but also misleading, as the exclusion of the CISG does not necessarily lead to the application of a domestic law with which the practicing lawyers are more familiar. The exclusion of the CISG may lead to the application of a foreign law even less familiar to the lawyers – and which may be even more disadvantageous to their clients – than the CISG. This is why the exclusion of the CISG may not be advisable[89] and may even – in extreme cases – lead to malpractice liability, at least in some contracting States to the CISG.[90]

Lawyers who contemplate excluding the CISG in their standard contract forms should be aware that the CISG is an opt-out convention, *i.e.*, it will apply unless there is an agreement as to its exclusion.[91] This means that

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Reservations to international uniform commercial law conventions, Uniform Law Review 2000, 85 ff.

87 See *Baretić/Nikšić*, supra note 12, at 95, stating that the CISG's exclusion is due, among others, to the fact that its "application does not offer a sufficient level of legal certainty. As is often suggested in the literature, the CISG has been rarely applied in practice, even in countries extensively involved in international trade. As suggested, this is predominantly due to the CISG's ambiguity and deficiency in providing for a defined structure of interpretation, which has all too often led to domestic courts interpreting the CISG's provisions in accordance with their own domestic law, rather than in accordance with the CISG's international character. On the other hand, the CISG permits contracting states to exclude certain parts of the CISG, thus creating uncertainty in its implementation in the sense that the court applying the CISG must be familiar with both the text of the Convention itself and the extent to which the Convention applies in a particular state. This is probably why the examined general contract forms provide for the application of the general contract law of the state in which the traders who have made them have their places of business. Obviously, the traders who have adopted these general contract forms were of the opinion that the CISG does not offer a sufficient level of legal certainty for their international transactions."

88 See also *Reimann*, supra note 83, at 125.

89 For this conclusion, see also *Baretić/Nikšić*, supra note 12, at 95.

90 See *Andersen*, supra note 9, at 305, for a brief analysis of whether a lawyer from a non-contracting State can be liable for advising an opt-out of the CISG where the CISG was a better choice for the client and for failure to nominate the CISG where it would not normally apply, and would have been a better choice.

91 This has often been pointed out in case law; see, e.g., Oberlandesgericht Linz, 24 September 2007, available at http://cisgw3.law.pace.edu/cases/070924a3.html; French Supreme Court, 20 February 2007, available at http://www.cisg-france.org/decisions/200207v.htm; *Travelers Property Casualty Company of America et al. v. Saint-Gobain Technical Fabrics Canada Limited*, U.S. Dist. Ct. (Minn.), 31 Janu-

those lawyers can rely on their standard contract forms and the exclusion clause therein only if their clients have more bargaining power than opposing counsel's clients.[92] Where they do not have that power, the CISG will apply (unless the standard contract terms of the opposing party exclude the CISG). Thus, practicing lawyers ultimately cannot avoid becoming more knowledgeable about the CISG. This is true even for the very purpose of excluding the CISG. Practicing lawyers have to become aware of the fact, for instance, that the choice of their domestic law does not by itself constitute an exclusion of the CISG. Thus, it is not sufficient to simply refer to "Croatian law",[93] "German law",[94] "Italian law"[95] or "Swiss Law"[96] to avoid

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ary 2007, available at http://cisgw3.law.pace.edu/cases/070131u1.html; Swiss Supreme Court, 20 December 2006, available at http://cisgw3.law.pace.edu/cases/061220s1.html; Rechtbank Arnhem, 28 June 2006, available at http://cisgw3.law.pace.edu/cases/060628n1.html; Oberlandesgericht Köln, 24 May 2006, available at http://cisgw3.law.pace.edu/cases/060524g1.html; Oberlandesgericht Köln, 3 April 2006, available at http://cisgw3.law.pace.edu/cases/060403g1.html; Oberlandesgericht Linz, 23 January 2006, available at http://cisgw3.law.pace.edu/cases/060123a3.html; Handelsgericht Zürich, 22 December 2005, available at http://cisgw3.law.pace.edu/cases/051222s1.html; *American Mint LLC v. GOSoftware, Inc.*, U.S. Dist. Ct. (M.D. Pa.), 16 August 2005, available at http://cisgw3.law.pace.edu/cases/050816u1.html; Oberlandesgericht Linz, 8 August 2005, available at http://cisgw3.law.pace.edu/cases/050808a3.html; Landgericht Neubrandenburg, 3 August 2005, available at http://cisgw3.law.pace.edu/cases/050803g1.html; Austrian Supreme Court, 21 June 2005, available at http://www.unilex.info/case.cfm?pid=1&do=case&id=1047&step=FullText; Austrian Supreme Court, 24 May 2005, available at http://cisgw3.law.pace.edu/cases/050524a3.html; Kantonsgericht Wallis, 21 February 2005, available at http://cisgw3.law.pace.edu/cases/050221s1.htm; Austrian Supreme Court, 26 January 2005, available at http://cisgw3.law.pace.edu/cases/050126a3.html; Tribunale di Padova, 11 January 2005, available at http://www.unilex.info/case.cfm?pid=1&do=case&id=1005&step=FullText; Tribunale di Padova, 31 March 2004, available at http://cisgw3.law.pace.edu/cases/040331i3.html; Tribunale di Padova, 25 February 2004, available at http://cisgw3.law.pace.edu/cases/040225i3.html.

92 See in this respect also *Lookofsky*, supra note 49, at 120, stating that "only a limited number of Danish sellers or buyers could be presumed to possess such a significant degree of bargaining power that they could convince a non-Danish contracting party to agree to the inclusion of a choice-of-law clause which designates the Danish domestic Sales Act (*Købeløben*) as the applicable law [and, thus leads to the exclusion of theCISG]."

93 See *Baretić/Nikšić*, supra note 12, at 94.

94 See Oberlandesgericht Stuttgart, 31 March 2008, Internationales Handelsrecht 2008, 102, 104; Oberlandesgericht Hamburg, 25 January 2008, available at

the application of the CISG,[97] as confirmed by many court decisions[98] and arbitral awards.[99]

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http://cisgw3.law.pace.edu/cases/080125g1.html; Oberlandesgericht Rostock, 10 October 2001, available at http://cisgw3.law.pace.edu/cases/011010g1.html.

95 See *Ferrari*, supra note 28, at 215 f.; *Torsello*, supra note 35, at 198-199; *contra*, see Ad Hoc Arbitral Tribunal Florence, 19 April 1994, available at http://cisgw3.law.pace.edu/cases/940419i3.html; Tribunale di Monza, 14 January 1993, available at http://cisgw3.law.pace.edu/cases/930114i3.html.

96 See Appellationsgericht Basel-Stadt, 22 August 2003, available at http://cisgw3.law.pace.edu/cases/030822s1.html.

97 *Contra*, see *F. Bydlinski*, Diskussionsbeitrag, in: Doral (ed.), Das UNCITRAL-Kaufrecht im Vergleich zum österreichischen Recht, 1985, p. 48, 48; *Karollus*, Der Anwendungsbereich des UN-Kaufrechts im Überblick, Juristische Schulung 1993, 378, 381.

98 For recent decisions, see Swiss Supreme Court, 17 July 2007, available at http://cisgw3.law.pace.edu/cases/070717s1.html; *Travelers Property Casualty Company of America et al. v. Saint-Gobain Technical Fabrics Canada Limited*, U.S. Dist. Ct. (Minn.), 31 January 2007, available at http://cisgw3.law.pace.edu/cases/070131u1.html; Rechtbank van Koophandel Hasselt, 28 June 2006, available at http://www.law.kuleuven.ac.be/ipr/eng/cases/2006-06-28%20Hasselt.html; Rechtbank Arnhem, 28 June 2006, available at http://cisgw3.law.pace.edu/cases/060628n1.html; Hof van Beroep Antwerpen, 24 April 2006, available at http://cisgw3.law.pace.edu/cases/060424b1.html; Rechtbank van Koophandel Hasselt, 15 February 2006, available at http://cisgw3.law.pace.edu/cases/060215b1.html; Oberlandesgericht Linz, 23 January 2006, available at http://cisgw3.law.pace.edu/cases/060123a3.html; Rechtbank van Koophandel Hasselt, 14 September 2005, available at http://www.law.kuleuven.ac.be/ipr/eng/cases/2005-09-14%20Hasselt.html; Hof Leeuwarden, 31 August 2005, available at http://cisgw3.law.pace.edu/cases/050831n1.html; Oberlandesgericht Linz, 8 August 2005, available at http://cisgw3.law.pace.edu/cases/050808a3.html; Oberlandesgericht Linz, 23 March 2005, available at http://cisgw3.law.pace.edu/cases/050323a3.html; Hof van Beroep Gent, 20 October 2004, available at http://cisgw3.law.pace.edu/cases/041020b1.html; Oberlandesgericht Düsseldorf, 21 April 2004, available at http://cisgw3.law.pace.edu/cases/040421g3.html; Oberlandesgericht Düsseldorf, 23 January 2004, available at http://cisgw3.law.pace.edu/cases/040123g1.html; Austrian Supreme Court, 17 December 2003, available at http://cisgw3.law.pace.edu/cases/031217a3.html.

99 See ICC Court of Arbitration, Arbitral award n. 11333, available at http://cisgw3.law.pace.edu/cases/021333i1.html; ICC Court of Arbitration, Arbitral award n. 9187, available at http://cisgw3.law.pace.edu/cases/999187i1.html; Arbitral Tribunal of the Hamburg Chamber of Commerce, 21 March 1996, available at http://cisgw3.law.pace.edu/cases/960321g1.html.

What has been said thus far does not mean that lawyers who are very knowledgeable about the CISG do not or should not exclude the CISG.[100] By excluding the CISG, knowledgeable lawyers may take advantage of a law that is more favourable to their clients' interests.[101] This is perfectly fine, as long as the lawyers know what they are doing.

It is worth mentioning here that there are countries in which lawyers are very familiar with the CISG but do not generally exclude it.[102] Sometimes, this occurs because a country's domestic law is less acceptable to the opposing party than the CISG which is considered a neutral set of rules[103] and, therefore, easier to agree on.[104] This is apparently the case in China, where "it is seldom for practicing lawyers who are aware of the CISG to exclude it […]. One reason for this is that the CISG is deemed fair for the parties of a foreign-related contract. It is easier for a foreigner to accept the CISG than to accept the Contract Law of the P.R.C."[105]

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[100] See also *Magnus*, supra note 52, at 147.

[101] For this reasoning, see also *Fresnedo de Aguirre*, supra note 16, at 334: "practicing lawyers who are aware of the CISG tend to exclude it from their clients contracts, particularly those who are giving legal advice to the seller. Perhaps that is due to the fact that when sellers or their legal advisers draft their contracts, they try to incline the balance in their favour"; for very similar statements, see *Noodt Taquela*, supra note 10, at 3; *McEvoy*, supra note 17, at 69; *Zervogianni*, supra note 13, at 166-167.

[102] This is true, for instance, in Denmark; see *Lookofsky*, supra note 49, at 120, stating that "[t]here does, however, seem to be considerable (direct and indirect) evidence suggesting that Danish practicing lawyers who are aware of the CISG – and there, as just indicated, many of these – do *not* tend to exclude it (opt out), as is sometimes otherwise suggested in legal writing (concerning lawyers outside Denmark)."

[103] See, e.g., *Fountoulakis*, The Parties' Choice of 'Neutral Law' in International Sales Contracts, European Journal of Law Reform 2005, 303, 314, stating that "[t]he CISG is neutral law by nature. Neither party has a particular advantage when applying it; the parties are quasi on the same 'level playing field'."
For similar statements, see *De Ly*, Opting out: some Observations on the Occasion of the CISG's 25th anniversary, in: Quo Vadis CISG?, supra note 28, p. 25, 36 f.; *Magnus*, supra note 52, at 147; *McNamara*, U.N. Sale of Goods Convention: Finally Coming of Age?, 32 Feb. Colorado Lawyer 11, 20 (2003); *Nakata*, Filanto S.p.A. v. Chilewich Intl Corp.: Sounds of Silence Bellow Forth under the CISGs International Battle of the Forms, 7 The Transnational Lawyer 141, 144 (1994).

[104] See also *Widmer/Hachem*, supra note 54, at 287.

[105] *Han*, supra note 57, at 72.

### 3. The CISG's impact on memoranda, briefs, etc.

The CISG, like many other international uniform commercial law conventions,[106] requires that in interpreting it "regard is to be had to its international character and to the need to promote uniformity in its application and the observance of good faith in international trade."[107] Many legal writers argue that to interpret the CISG with regard to its "international character" requires that the CISG be interpreted "autonomously",[108] not "nationalistically", *i.e.* not in light of domestic law,[109] despite the fact that once put in

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[106] See *Ferrari*, supra note 34, at 135 f.

[107] Article 7(1) CISG; for nearly identical provisons, see Article 4(1) of the International Factoring Convention, reprinted in UNIDROIT Convention on International Factoring, reprinted in 27 International Legal Materials 943, 945 (1988); Article 6(1) of the International Financial Leasing Convention, reprinted in 27 International Legal Materials 931, 933 (1988).

[108] See, among others, *Audit*, La vente internationale de merchandises, 1991, p. 47; *Barnes*, Contemplating a Civil Law Paradigm for a Future International Commercial Code, 65 Lousiana Law Review 677, 754 (2005); *Bisazza*, Auslegung des Wiener UN-Kaufrechts unter Berücksichtigung ausländischer Rechtsprechung: ein amerikanisches Beispiel, European Legal Forum 2004, 380, 381; *Bonell*, Commento all'art. 7 della Convenzione di Vienna, Nuove Leggi civili commentate 1989, 20, 21; *U.P. Gruber*, Methoden des internationalen Einheitsrechts, 2004, p. 80; *McMahon*, Differentiating between Internal and External Gaps in the U.N. Convention on Contracts for the International Sale of Goods: A Proposed Method for Determining "Governed by" in the Context of Article 7(2), 44 Columbia Journal of Transnational Law 992, 1000 (2006); *Melin*, Gesetzesauslegung in den USA und in Deutschland, 2005, p. 355; *Lookofsky*, In Dubio Pro Conventione? Some Thoughts About Opt-Outs, Computer Programs and Preemption under the 1980 Vienna Sales Convention (CISG), 13 Duke Journal of Comparative and International Law 263, 275 (2003); *Salama*, Pragmatic Responses to Interpretive Impediments: Article 7 of the CISG, An Inter-American Application, 28 University of Miami Inter-American Law Review 225, 231 (2006); *Schlechtriem*, Requirements of Application and Sphere of Applicability of the CISG, Victoria University of Wellington Law Review 781, 789 (2005); *Schmid*, supra note 37, at 42; *Torsello*, Common Features of Uniform Commercial Law Conventions. A Comparative Study Beyond the 1980 Uniform Sales Law, 2004, p. 18.

[109] See *Honnold*, The Sales Convention in Action – Uniform International Words: Uniform Applications?, 8 Journal of Law and Commerce 207, 208 (1988), where the author states that "one threat to international uniformity in interpretation is a natural tendency to read the international text through the lenses of domestic law"; see also *Babiak*, Defining "Fundamental Breach" under the United Nations Convention on Contracts for the International Sale of Goods, 6 Temple Interna-

force international conventions become part of domestic law.[110] Consequently, one should generally[111] not have recourse to any domestic concept in order to resolve interpretive problems arising from the CISG.[112] On the other hand, "the need to promote uniformity in [the CISG's] application",[113] requires, as mentioned earlier,[114] that one consider the practice of other jurisdictions.[115]

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tional and Comparative Law Journal 113, 117 (1992); *Komarov*, Internationality, Uniformity and Observance of Good Faith as Criteria in Interpretation of CISG: Some Remarks on Article 7(1), 25 Journal of Law and Commerce 75, 76 (2006); *Kritzer*, Guide to Practical Applications of the United Nations Convention on Contracts for the International Sale of Goods, 1989, p. 109; *Schlechtriem*, Internationales UN-Kaufrecht, 4th ed., 2007, p. 45.

110 Compare *Carbone*, L'ambito di applicazione ed i criteri interpretativi della convenzione di Vienna, in: La vendita internazionale, supra note 33, p. 61, 84; *Witz/Salger/Lorenz*, International Einheitliches Kaufrecht, 2000, p. 81.

111 For exceptions see, in legal writing, *Ferrari*, CISG Case Law: A New Challenge for Interpreters?, International Business Law Journal, 1998, 495, 497 ff.; in case law, see Tribunale di Padova, 11 January 2005, available at http://www.unilex.info/case.cfm?pid=1&do=case&id=1005&step=FullText; Tribunale di Padova, 25 February 2004, available at http://cisgw3.law.pace.edu/cisg/wais/db/cases2/040225i3.html.

112 See also Honnold, JO (1999) *Uniform Law for International Sales under the United Nations Convention* (3rd ed.) Kluwer Law International 89, stating that "the reading of a legal text in the light of the concepts of our domestic legal system [is] an approach that would violate the requirement that the Convention be interpreted with regard to its international character." For a similar affirmation in case law, see Cassazione civile (Italy) 24 June 1968, Rivista di diritto internazionale privato e processuale, 1969, p. 914.

113 Article 7(1) CISG.

114 See supra the text accompanying notes 32 ff.

115 See, apart from the commentators cited supra in notes 32 and 33, *Cook*, The U.N. Convention on Contracts for the International Sale of Goods: A Mandate to Abandon Legal Ethnocentricity, 16 Journal of Law and Commerce 257, 259 (1997); *Darkey*, A U.S. Court's Interpretation of Damage Provisions Under the U.N. Convention on Contracts for the International Sale of Goods: A Preliminary Step Towards an International Jurisprudence of CISG or a Missed Opportunity, 15 Journal of Law and Commerce 139, 142 (1995); *Hartnell*, Rousing the Sleeping Dog: The Validity Exception to the Convention on Contracts for the International Sale of Goods, 18 Yale International Law Journal 1, 7 (1993); *Patterson*, United Nations Convention on Contracts for the International Sale of Goods: Unification and the Tension Between Compromise and Domination, 22 Stanford Journal of International Law 263, 283 (1986); *Reinhart*, UN-Kaufrecht. Kommentar zum Übereinkommen der Vereinten Nationen vom 11. April 1980

Has the aforementioned obligation affected practicing lawyers? In other words, has the mandate to interpret the CISG in light of its international character and the need to promote uniformity in its application had any impact on the drafting of briefs and memoranda? Has it led lawyers to refer more often than in domestic cases to commentators and court decisions?

As the country reports clearly show, these questions have to be answered negatively. "[T]here is no empirical evidence [to show] that practising lawyers have changed the way of drafting briefs and memoranda or that they have changed the way they substantiate their arguments",[116] for instance, by citing foreign sources, at least not in Argentina,[117] Croatia,[118] the Czech Republic,[119] Denmark,[120] Germany,[121] Greece,[122] Israel,[123] Slovenia[124] and Spain.[125] In France, however, briefs and memoranda drafted mainly – albeit not exclusively – in larger law firms seem to resort to foreign case law and legal writing when dealing with the CISG,[126] while in Uruguay resort to foreign case law and legal writing seems to be the general practice, inde-

über den internationalen Warenkauf, 1991, p. 30; *Zeller*, The UN Convention on Contracts for the International Sale of Goods: A Leap Forward Towards a Unified International Sales Laws, 12 Pace International Law Review 79, 104 (2000).

116 *Baretić/Nikšić*, supra note 12, at 96.

117 See *Noodt Taquela*, supra note 10, at 3.

118 See *Baretić/Nikšić*, supra note 12, at 96.

119 See *Rozehnalová*, supra note 72, at 109.

120 See *Lookofsky*, supra note 49, at 120.

121 See *Magnus*, supra note 52, at 148-149, where the author states that "[i]t is not my impression that the CISG's entry into force has changed in any particular way the style in which practitioners draft their statements of claim or defence or plead in court. […] Quotations of foreign CISG cases or literature unless in German are unusual." The author then adds that "it should not be overlooked that the German commentaries on the CISG are strictly devoted to an internationally uniform interpretation of the CISG based on the international jurisprudence and literature. Thus, by citing these commentaries practitioners rely indirectly but nonetheless effectively on a uniform interpretation of the CISG," *Id.* at 149.

122 See *Zervogianni*, supra note 13, at 167, where the author states, however, that "[i]nternational literature and case-law is taken indirectly into account, since the vast majority of legal scholars writing on CISG include foreign references in their writings."

123 See *Shalev*, supra note 14, at 184.

124 See *Možina,* supra note 79, at 266.

125 See *Garcia Cantero*, Spain, supra this book, p. 273, 274.

126 See *Witz*, supra note 50, at 131.

pendently of the size of the law firm, and not only when dealing with the CISG.[127]

## 4. The use of the CISG in purely domestic cases

As the previous chapter has clearly shown, the CISG has had virtually no impact on the style of the briefs and memoranda drafted by practicing lawyers. The next question to be looked into is whether it has had some impact on the substance of those briefs and memoranda, in particular, whether practicing lawyers use CISG solutions in purely domestic disputes to which the CISG does not apply – to corroborate the results they want to reach.

The use of solutions from international uniform commercial law conventions in purely domestic disputes is not unheard of. In Italy, for instance,[128] where leasing contracts are still innominate contracts,[129] in that no statute exists specifically governing this type of contracts,[130] reference has been made by practicing lawyers to the Unidroit Convention on International Financial Leasing[131] in purely domestic disputes, even though the Convention is exclusively applicable to international leasing contracts,[132] *i.e.*, to

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[127] See *Fresnedo de Aguirre*, supra note 16, at 334, stating that "[i]t has always been a widespread use in Uruguay that practicing lawyers […] cite to foreign legal writing and case law in most cases, particularly French, Spanish, German and Italian sources, depending on the matter. That is not exclusively when dealing with CISG or other international uniform Conventions related disputes. I do not think that the target is to complying with the mandate to interpret the CISG in light of its international character and the need to promote uniformity in its application, but to reinforce and support their arguments and interpretation of the legal texts in general."

[128] For remarks similar to the following ones, see *Torsello*, supra note 35, at 200.

[129] See *Bussani*, Contratti moderni: factoring, franchising, leasing, 2004, p. 272.

[130] See, e.g., *Martinek*, Das Leasingrecht in Italien, in: Martinek/Stoffels/Wimmer-Leonhardt (eds.), Handbuch des Leasingrechts, 2nd ed., 2008, p. 1043, 1048.

[131] See Unidroit Convention on International Financial Leasing, 27 International Legal Materials 931 (1988).

[132] See *Dageförde*, Leasingvertrag, in: Reithmann/Martiny (ed.), Internationales Vertragsrecht, 6th ed., 2004, p. 888, 892; *de Capoa/Massironi*, La disciplina materiale uniforme del leasing, in: I nuovi contratti nella prassi civile e commerciale, vol. 11, Figure della contrattazione internazionale, 2004, p. 467, 476; *Frignani*, Convenzione Unidroit sul leasing finanziario internationale (1988), in: Ferrari (ed.), Le convenzioni di diritto del commercio internazionale. Codice essenziale con regolamenti comunitari e note introduttive, 2nd ed., 2002, p. 151, 158; *Girsberger*, Leasing, in: Kronke/Melis/Schnyder (eds.), Handbuch Internationales Wirtschaftsrecht, 2005, p. 757, 762.

leasing contracts in which the parties have their places of business in different countries.[133] The lawyers argued that the Convention, in force in Italy since 1st May 1995, was to be applied by analogy. The Court of 1st Instance of Naples adopted this approach,[134] but in 2003, it was rejected by the Italian Supreme Court.[135] Nevertheless, on a later occasion, while still rejecting the aforementioned approach, the Italian Supreme Court held that the rules set forth in the Convention "although not directly applicable, may constitute a useful reference tool in the adjudication of the case."[136]

In most countries, practicing lawyers do not invoke CISG rules in purely domestic disputes. This is true not only as regards contracting States, such as Argentina,[137] Canada,[138] Croatia,[139] the Czech Republic,[140] Denmark,[141] Greece,[142] Slovenia,[143] Spain[144] and Uruguay[145] but also – and even less surprisingly – in respect of non-contracting States such as Brazil[146] and Japan.[147]

As regards the reason for this lack of reference to the CISG in purely domestic disputes, it has convincingly been suggested by the drafter of the Italian country report: "In purely domestic disputes […], reference to the CISG seems less likely to occur […]. Indeed, one could imagine a need to resort to the CISG only if it could provide some interpretative support and play a gap-filling role *vis-à-vis* the relevant domestic rules."[148] This, however, "is unlikely to be the case when the transaction in question is a sales trans-

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133 See Article 3(1) Unidroit Convention on International Financial Leasing.

134 See, e.g., Tribunale di Napoli, 29 March 2001, Diritto e giustizia 2001, 401.

135 See Italian Supreme Court, 28 November 2003, Giustizia civile 2004, 1506.

136 Italian Supreme Court, 16 November 2007, Giustizia civile – Massimario 2007, 11.

137 See *Noodt Taquela*, supra note 10, at 4, where, after stating that "is not habitual that practicing lawyers use CISG solutions in purely domestic disputes to corroborate the results they want to reach", the authors also state that "may be that this happens in some cases."

138 See *McEvoy*, supra note 17, at 70.

139 See *Baretić/Nikšić*, supra note 12, at 97.

140 See *Rozehnalová*, supra note 72, at 109.

141 See *Lookofsky*, supra note 49, at 121.

142 See *Zervogianni*, supra note 13, at 167.

143 See *Možina*, supra note 79, at 267.

144 See *Garcia Cantero*, supra note 125, at 275.

145 See *Fresnedo de Aguirre*, supra note 16, at 334, where the author, after stating that "I could not find any case where practicing lawyers use CISG solutions in purely domestic disputes to corroborate the results they want to reach or for any other reason", also states that "there could be some isolated case in that sense."

146 See *de Aguilar Vieira*, supra note 26, at 19.

147 See *Hayakawa*, supra note 24, at 227.

148 *Torsello*, supra note 35, at 199.

action, [as sales transaction, unlike leasing transactions, are in all countries] exhaustively addressed by provisions to be found in the Civil code[s or in special statutes or by] court decisions."[149] Invoking the CISG in disputes involving domestic transactions, however, is not unheard of.[150]

The general lack of reference to the CISG in purely domestic disputes makes sense only respect of those domestic sales laws that are well established and not influenced by the CISG. To the extent domestic sales law is influenced by the CISG and is not as well established, there is no reason for the lack of reference to the CISG. This is why it is neither surprising nor in contradiction with what has been said earlier that, for instance, in China – where the new (1999) domestic Contract Law is heavily influenced by the CISG –[151] "practicing lawyers [sometimes] use CISG solutions in purely domestic disputes to corroborate the results they want to reach. One reason lies in that many rules of the CISG […] have been followed by Contract Law (P.R.C.). In interpreting these rules, it is not only helpful, but also necessary, to make a reference to the interpretations of the CISG."[152]

## II. The CISG's impact on scholars

### 1. Scholarly interest in the CISG

Whereas the CISG has had only a minor impact on the world's practicing lawyers (at least on those who are not specialized in the field of import/exports contracts),[153] in many – although not all –[154] countries it has had an enormous impact on scholars.[155] This is true not only in contracting States to the CISG, such as Argentina,[156] Croatia,[157] Germany[158] and It-

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[149] *Id.* at 199-200.

[150] *Id.* at 200 note 60

[151] See *Han*, supra note 57, at 84.

[152] *Id.* at 73-74.

[153] For the importance of this distinction in Germany, see *Magnus*, supra note 52, at 147, stating that "the reluctance towards/satisfaction with the CISG depends to a great deal on how much practitioners specialise in international sales, how much they have to do with the CISG in their daily work and how much they therefore precisely know of the CISG. The more specialised they are the more advantages of the CISG they see and vice versa."

[154] See *Butler*, supra note 15, at 252, stating that "[o]verall, there is no significant CISG scholarship in New Zealand"; *Shalev*, supra note 14, at 184, stating, in respect of the Israeli situation, that "[s]cholars writing about the subject are rare."

[155] See *Noodt Taquela*, supra note 10, at 4.

[156] *Ibid.*

[157] See *Baretić/Nikšić*, supra note 12, at 97.

aly,[159] but also in some non-contracting States. This is not really surprising, since judges and practicing lawyers from non-contracting States will not be exposed to the CISG very often, and therefore have less incentive to become knowledgeable about the CISG, although exposure to it cannot be excluded *a priori*.[160] Scholars, on the other hand, are much more exposed to the CISG, as it has become one of the topics constantly discussed in academic circles.[161] That is the case, at any rate, among scholars dedicated to contract law, commercial law and private international law.[162] Unlike judges and practicing lawyers, scholars tend to focus on more than positive law, which – ontologically – makes them more receptive to rules that are not in force in their home country. Therefore, it is not surprising that scholars from non-contracting States have devoted much attention to the CISG.[163] Rather then focusing on the CISG *per se*, they tend to compare the CISG to their domestic law, in part "to show how important it is [for their country] to adopt the Convention"[164] and in part to demonstrate that "there is no incompatibility between the text of CISG and [domestic] law".[165]

One may think that it is mainly contract and commercial law specialists rather than private international law scholars who focus on the CISG, because the CISG is "merely" a substantive law convention[166] that does not set

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158 See *Magnus*, supra note 52, at 149, stating that "[i]n comaprison to other countries there is a particularly high scientific interest in the CISG in Germany."

159 See *Torsello*, supra note 35, at 201.

160 For analysis of the CISG's applicability and, thus, the exposure of judges and practicing lawyers to it in Brazil, where the CISG has not yet entered into force, see *de Aguilar Vieira*, supra note 26, p. 10 ff.

161 For a statement along the same lines, see *Torsello*, supra note 35, at 201-202, stating that "[i]n one way or another, both for CISG enthusiasts and for those who never came to consider it in positive terms, the CISG represented a milestone in legal scholarship in all countries where the Convention was adopted (including Italy), as well as in many where the Convention is still not in force." (footnote omitted)

162 See also *Hayakawa*, supra note 24, at 228, stating that for scholars the "CISG is an invaluable source of reflection on domestic contract law and contract law in general."

163 *Id*. at 227.

164 See *de Aguilar Vieira*, supra note 26, at 22.

165 *Id*. at 23.

166 In this respect see, most recently, Tribunale di Padova, 25 February 2004, available at http://cisgw3.law.pace.edu/cisg/wais/db/cases2/040225i3.html, expressly holding that the CISG "is a uniform convention on substantive law and not one on private international law as sometimes erroneously stated"; see also Tribunale di Rimini, 26 November 2002, available at http://cisgw3.law.pace.edu/cisg/wais/db/cases2/021126i3.html, holding that the CISG is a "uniform substantive

forth any private international law rule.[167] This, however, is not true, at least not everywhere.

In Mexico, for instance, it is mostly – if at all –[168] private international law scholars who have analyzed the CISG.[169] The same can be said for both the Czech Republic[170] and Venezuela.[171] In Greece, in contrast, "[f]rom the very beginning the scholars who focused their attention on the CISG the most were those of private law, and especially civil law",[172] and "the scholars of private international law who have dealt with the CISG are relatively few."[173] "The strong interest of the scholars of civil law [i]n CISG [can] be attributed to the fact that the entry into force of the CISG in […] Greece, timely coincided with the issuance of the Directive 99/44/EC on consumer sales and thus triggered a more general discussion on the reform of the Greek Civil Code in respect to the sales contract, which in fact took place in 2002."[174] Similarly, in Switzerland, "[a] closer look at the authors of Swiss contributions on the CISG shows that the scholars who pay particular attention to the CISG are primarily contract law scholars. Swiss doctoral theses on the CISG are also generally supervised by contract scholars. As the Con-

law convention"; Austrian Supreme Court, 29 June 1999, available at http://cisgw3.law.pace.edu/cisg/wais/db/cases2/990629a3.html (stating the same).

167 For this statement see *Enderlein/Maskow*, International Sales Law. United Nations Convention on Contracts for the International Sale of Goods. Convention on the Limitation Period in the International Sale of Goods, 1992, p. 370; *Ferrari*, What sources of law for contracts for the international sale of goods?, Internationales Handelsrecht 2006, 1, 4.

168 See *Veytia*, supra note 11, at 241, stating the reason why not too much attention is devoted to the CISG in Mexico: "In Mexico, as in many other countries in Latin America, professional research is considered a hobby for practitioners. [The] Mexican government has devoted efforts and resources thorough the National System for Research to encourage scholars to publish. However one of the requisites is not having a private practice, therefore, full time legal scholars rather devote their energy to other areas with wider audiences, such as constitutional law, family law, or environmental law."

169 *Id.* at 241.

170 See *Rozehnalová*, supra note 72, at 109, where the author also expressly states that "scholars in the field of contract law deals with analysis of the CISG only sporadically."

171 *Madrid Martinez*, supra note 27, at 339.

172 *Zervogianni*, supra note 13, at 170.

173 *Ibid.*

174 *Ibid.*

vention consists of rules of substantive law, the heightened interest of contracts scholars in the CISG seems only natural."[175]

In Spain[176] as well as in Uruguay,[177] both private international law and commercial law scholars are paying attention to the CISG. In Brazil, the small group of scholars that has focused on the CISG "is composed of experts in contract law and private international law."[178] In China, international law scholars focus on the CISG as do contract law and commercial law scholars, but "the studies by international law scholars seem to be more attractive."[179]

In France, it has originally been mostly private international and international commercial law scholars who have devoted their attention to the CISG; in recent years, however, this has changed and general contract law scholars, too, now focus on the CISG.[180] In yet other countries, it appears that the range of scholars focusing on the CISG is much larger. In Croatia, for instance, "[l]egal scholars who wrote about the CISG do not belong to any specific legal branch of private law – the CISG is a topic which has attracted the interest of scholars who otherwise research private international law, commercial law or civil law."[181] In Denmark, "it does not [even] seem possible to identify a specific group of Danish […] scholars that more than any other one has focused its attention on the CISG."[182]

In Germany, where the tradition of dealing with international sales goes back to Ernst Rabel,[183] prior to the CISG it had been "mainly specialists of comparative law, some also of private international law"[184] who had shown interest in international sales law. As pointed out in the German country

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[175] *Widmer/Hachem*, supra note 54, at 291, where the authors also state that "several contracts scholars in Switzerland also conduct research on conflict of laws, so that a distinction between the two cannot always easily be drawn. In any case, contracts scholars working on the CISG are unlikely to have a 'pure' substantive law focus."

[176] See *Garcia Cantero*, supra note 125, at 275.

[177] See *Fresnedo de Aguirre*, supra note 16, at 334.

[178] *de Aguilar Vieira*, supra note 26, at 20, where the author also states that "there is no coordination of activities between these [experts]. Many of them work independently or rarely in partnerships."

[179] *Han*, supra note 57, at 75.

[180] See *Witz*, supra note 50, at 131 f.

[181] *Baretić/Nikšić*, supra note 12, at 97.

[182] *Lookofsky*, supra note 49, at 122.

[183] For a paper on Ernst Rabels' impact on the international unification of sales law, see, most recently, *Rösler*, Siebzig Jahre Recht des Warenkaufs von Ernst Rabel, Rabels Zeitschrift für ausländisches und internationales Privatrecht 2006, 793 ff.

[184] *Magnus*, supra note 52, at 151.

report,[185] however, after 1980, scholars of general contract law also became interested. This was due in part to the efforts to reform the German law of obligations , in part to the fact that the new law of obligations of 2002 was heavily influenced by the CISG.[186] It also derived from the need to implement the European Consumer Sales Directive which is also heavily influenced by the CISG,[187] as the report on "the CISG's Impact on EU Legislation"[188] clearly shows. As a result, "[t]oday it can be safely said that every private law scholar [in Germany] has heard of the CISG and has some knowledge of it."[189]

Not only are there differences in the various countries as regards the scholars who devote their attention to the CISG, but the scholarship itself

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[185] *Id.* at 151-152, stating that "when in 1980 the CISG was concluded also general contract law scholars became interested. The reason for this growing interest was the parallel initiative of the German government to reform the German law of obligations. A Commission for the reform of the German law of obligations was installed which in 1992 came out with the proposal to adapt the German Civil Code to the model of the CISG.42 The majority of civil law scholars refused this proposal. But when the European Consumer Sales Directive had to be implemented into German law in rather short time until 2002 the Government came back to the proposal and introduced it after hot debates and with slight amendments. A side-effect was that the CISG became widely known." (footnotes omitted).

[186] See, e.g., *Meyer*, supra note 39, at 460.

[187] See *Troiano*, The exclusion of the sellers' liability for recognizable lacks of conformity under the CISG and the new European Sales Law: The changing fortunes of a notion of variable content, in: The 1980 Uniform Sales Law, supra note 18, p. 148-149, stating that "it is well known that the drafters of this directive have extensively, if not systematically, used the CISG as their model." For similar statements, see also G. *De Cristofaro*, Difetto di conformità al contratto e diritto del consumatore, 2000, p. 8 ff.; *Grundmann*, Europäisches Schuldvertragsrecht, 1999, p. 289; *Magnus*, Der Stand der internationalen Überlegungen. Die Verbrauchsgüterkauf-Richtlinie und das UN-Kaufrecht, in: Grundmann/Medicus/Rolland (eds.), Europäisches Kaufgewährleistungsrecht. Reform und Internationalisierung des deutschen Schuldrechts, 2000, p. 79, 79; *Schermaier*, Rechtsangleichung und Rechtswissenschaft im kaufrechtlichen Sachmängelrecht, in: Schermaier (Hrsg.), Verbraucherkauf in Europa: Altes Gewährleistungsrecht und die Umsetzung der Richtlinie 1999/44/EG, 2003, p. 3, 12 f. (in particular note 52); *Sandstedt*, Schwedisches Kaufrecht und die Umsetzung der Verbrauchsgüterkaufrichtlinie (Teil 1), Internationales Handelsrecht 2007, 90, 93.

[188] See *Troiano*, The CISG's Impact on EU Legislation, supra this book, p. 345, 348 ff.

[189] *Magnus*, supra note 52, at 152.

also differs. In some countries, such as Argentina,[190] the Czech Republic,[191] Germany and Uruguay,[192] "[t]hose scholars who devote their attention to the CISG mainly focus on the Convention in that they discuss its provisions and solutions, or comment on it, in the light of the international court practice and scholarly writing."[193] In Germany, however, scholars also refer to differences between the CISG and their domestic law; "[m]ainly this is done to clarify differences and to inform about them, also to discuss their justification. Partly, it is done to enable a clearer choice whether or not the CISG should be excluded."[194]

In Greece, the situation is somewhat similar as, at least in part, the comparisons between the CISG and domestic law "aim mainly at pointing out the similarities between the two instruments, in order to render [the] CISG more familiar to the reader, whereas differences have been discussed from a *de lege ferenda* perspective, especially until the recent reform of the Civil Code provisions on sale."[195]

In other countries the focus of publications on the CISG is completely different: In France, for instance, the main purpose behind the comparisons between the CISG and domestic law is purely pedagogical; scholars do not advocate changes of domestic sales law in light of the CISG nor do they advocate the use of CISG case law to interpret the domestic sales law.[196] The contrary seems to be true in Slovenia: one of the purposes informing comparisons between the CISG and Slovenian domestic law appears to be identifying issues in relation to which "national law is different from the

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[190] See *Noodt Taquela*, supra note 10, at 4.

[191] See *Rozehnalová*, supra note 72, at 109.

[192] See *Fresnedo de Aguirre*, supra note 16, at 335.

[193] *Magnus*, supra note 52, at 152.

[194] *Ibid.*; for papers comparing the CISG with domestic (German) law for the specific purpose of suggesting whether to opt-out of the CISG or not, see, e.g., *R. Fischer*, Vor- und Nachteile des Ausschlusses des UN-Kaufrechts aus Sicht des deutschen Exporteurs: Rechtsvergleichende Betrachtung der Verkäuferrisiken nach BGB und CISG unter Berücksichtigung jeweiliger Haftungsauschluss- und Haftungsbegrenzungsmöglichkeiten, 2008; *Regula/Kannowski*, Nochmals: UN-Kaufrecht oder BGB? Erwägungen zur Rechtswahl aufgrund einer vergleichenden Betrachtung, Internationales Handelsrecht 2004, 45 ff.; *Schillo*, UN-Kaufrecht oder BGB? – Die Qual der Wahl beim internationalen Warenkaufvertrag – Vergleichende Hinweise zur Rechtswahl beim Abschluss von Verträgen, Internationales Handelsrecht 2003, 257 ff.

[195] *Zervogianni*, supra note 13, at 170.

[196] See *Witz*, supra note 50, at 134, stating that "[c]es écrits ont un objectif principalement didactique. On ne saurait donc s'attendre à ce qu'ils contiennent des plaidoyers en faveur d'une réforme du droit interne de la vente ou une interprétation jurisprudentielle du droit interne influencée par la Convention de Vienne."

CISG, because in cases where these [domestic] solutions are unsound, the Convention could be used as a possible source of inspiration for a legislative reform."[197]

## 2. The CISG's impact on domestic treatises

As suggested in the previous chapter, the CISG has had an impact on scholarship in many countries, although the extent of this impact differs from country to country. It is important for the promotion of the CISG and of its ultimate goal, the creation of uniformity,[198] that interest in the CISG is not limited to scholars who specialize in international business law or private international law, as these areas are often considered niches not easily accessible to a wide audience. It is necessary, in other words, that the CISG be analyzed and dealt with also in more generally accessible publications, *i.e.*, in publications that target a larger, non specialized audience, since, "as long as [the CISG] is viewed as a niche subject, it is unlikely to obtain [the] popular support"[199] it needs to be truly successful in reaching its ultimate goal.

In some countries, this is happening already. There are countries in which analyses of the CISG can be found in "mainstream" legal publications, that is, publications targeting legal professionals at large and not specifically lawyers who are specialized in international commercial law or private international law. The best example is Germany, which is not surprising in light of the history of uniform sales law there.[200] In Germany, "today almost every treatise on the domestic German law of obligations at least mentions the CISG. So do also the commentaries on the BGB which in Germany are particularly important for the application of the law. Not only do most of them contain a full commentary on the CISG. Often the comments also on the single provisions of the BGB on contractual obligations refer to the respective article of the CISG."[201] One of the most influential commentaries on the German Commercial code also contains a commentary

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[197] *Možina*, supra note 79, at 269.

[198] See supra the text accompanying note 31.

[199] *Andersen*, supra note 9, at 307.

[200] See *Magnus*, supra note 52, at 143 and 151.

[201] *Id.* at 152. (footnotes omitted)
For commentaries on the German Civil code that also contain a commentary on the CISG, see Bamberger/Roth (eds.), Kommentar zum Bürgerlichen Gesetzbuch, vol. 3, 2nd ed., 2007; Münchener Kommentar zum Bürgerlichen Gesetzbuch, vol. 3, 4th ed. 2004; Soergel Kommentar zum Bürgerlichen Gesetzbuch, vol. 3, 13th ed., 2000; Julius von Staudinger Kommentar zum Bürgerlichen Gesetzbuch mit Einführungsgesetz und Nebengesetzen, Wiener UN-Kaufrecht (CISG), 2005.

on the CISG.[202] Moreover, various overviews on CISG developments are published periodically in Germany,[203] one of which appears in one of the most widely read law reviews, namely Neue Juristische Wochenschrift.[204]

In other countries, treatment of the CISG is also included in commentaries that are widely used in everyday practice, but to a much lesser extent. In Italy, for instance, "commentaries […] for the most part only focus on domestic law"; still, there are two exceptions. The most famous commentary on the Italian Civil code (*Commentario del Codice Civile Scialoja-Branca*), composed of more than 80 volumes, contains two volumes dedicated to the CISG, one dealing with Articles 1-13,[205] one with Articles 14-24.[206] Also, a commentary on the laws connected to the Italian Civil code contains a comment on the CISG.[207] In Austria, there appears to be only one commentary on the Austrian Civil code where coverage of the CISG has been included.[208]

It appears that in other countries commentaries on the Civil code containing a part specifically dedicated to a comment on the CISG do not exist. This does not mean that one cannot assess the impact of the CISG on domestic legal scholarship; rather, it means that one must turn to other kinds

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[202] See Münchener Kommentar zum Handelsgesetzbuch, vol. 6, 2nd ed., 2007.

[203] See, apart from the overview referred to in the next footnote, the one prepared by Professor Magnus, published in Zeitschrift für Europäisches Privatrecht, a most prestigious law review that, however, does not necessarily cater to mainstream lawyers, *Magnus*, 25 Jahre UN-Kaufrecht, Zeitschrift für Europäisches Privatrecht 2006, 86 ff.; *Magnus*, Das UN-Kaufrecht – aktuelle Entwicklungen und Rechtsprechungspraxis, Zeitschrift für Europäisches Privatrecht 2002, 523 ff.; *Magnus*, Wesentliche Fragen des UN-Kaufrechts, Zeitschrift für Europäisches Privatrecht 1999, 642 ff.; *Magnus*, Das UN-Kaufrecht: Fragen und Probleme seiner praktischen Bewährung, Zeitschrift für Europäisches Privatrecht 1997, 823 ff.; *Magnus*, Stand und Entwicklungen des UN-Kaufrechts, Zeitschrift für Europäisches Privatrecht 1995, 202 ff.; *Magnus*, Aktuelle Fragen des UN-Kaufrechts, Zeitschrift für Europäisches Privatrecht 1994, 79 ff.

[204] See *Piltz*, Neue Entwicklungen im UN-Kaufrecht, Neue Juristische Wochenschrift 2007, 2159 ff.; *Piltz*, Neue Entwicklungen im UN-Kaufrecht, Neue Juristische Wochenschrift 2005, 2126 ff.

[205] See *Ferrari*, Vendita internazionale di beni mobili. Vol. 1. Art. 1-13. Ambito di applicazione. Disposizioni generali, 1994.

[206] See *Ferrari*, Vendita internazionale di beni mobile. Vol. 2. Art. 14.24. Formazione del contratto, 2006.

[207] See Alpa/Zatti (eds.), Commentario breve al codice civile. Leggi complementari, vol. 1, Diritto internazionale privato – persone e famiglia – beni e proprietà – obbligazioni e contratti – responsabilità civile – lavoro e professioni, 3rd ed., 1999, p. 1443 ff.

[208] See Schwimann (ed.), ABGB-Praxiskommentar, vol. 4, 3rd ed., 2006, p. 1343 ff.

of publications, such as treatises and textbooks on domestic law, to determine whether the CISG has had an impact.

As regards Canada, the picture seems very clear: "Canadian treatises on contracts, regardless of whether from a common law or civil law perspective, do not include significant coverage on the CISG. Instead, Canadian treatises focus primarily, and often exclusively, on domestic contract rules."[209] As regards Canadian academic texts on sales law, the situation is comparable.[210] In Israel[211] as well as in Spain[212] the picture does not seem to be too different. In Venezuela, treatises on domestic law do not at all refer to or analyze the CISG.[213]

In Croatia[214] and Denmark,[215] however, it appears that domestic treatises on both commercial contracts and contract law refer to the CISG. The same can be said as regards Switzerland, where the "CISG is also discussed in many standard treatises on Swiss domestic law, although both the precise scope of discussion and the way in which it is broached vary greatly between authors."[216]

In Slovenia, "some references to the CISG can be found in treatises on contract law, above all in situations where national contract law contains

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[209] See *McEvoy*, supra note 17, at 61, where the author cites several examples: "For example, J.D. McCamus, "*The Law of Contracts*" and S.M. Waddams, "*The Law of Contracts*", both published in 2005, do not address the CISG – though it is to be expected that future editions will at least mention the CISG because of its inclusion in a more recent text, J. Swan, "*Canadian Contract Law*" published in 2006 […]. In Québec civil law, it should similarly be expected that CISG will find its way into basic texts on the law of obligations though a leading text, "*Beaudouin et Jobin, Les Obligations* (6e éd)" refers four times to the CISG but only, for example, when discussing C.c.Q. article 1456, one of the five articles identified in the "*Commentaires du ministre de la Justice*" as at least partially inspired by the CISG." (footnotes omitted).

[210] *Id.* at 61-62.

[211] See *Shalev*, supra note 14, at 184.

[212] See *Garcia Cantero*, supra note 125, at 277, stating that the CISG's influence on treatises on civil law is rather weak.

[213] See *Fresnedo de Aguirre*, supra note 16, at 335.

[214] See *Baretić/Nikšić*, supra note 12, at 100.

[215] See *Lookofsky*, supra note 49, at 123.

[216] *Widmer/Hachem*, supra note 54, at 290-291, where the authors go on to state that "[the CISG] is generally discussed in treatises on domestic contract law, either briefly or at length. In Treatises on the general part of the Swiss law of obligations, *i.e.*, that part which deals, *inter alia*, with formation and validity of contracts and delay in performance and payment (Articles 1-183 CO), comparisons between the CISG and the Swiss Code of Obligation are often drawn, albeit selectively." (footnotes omitted)

identical or similar solutions as the CISG and foreign commentators are being cited, but also in cases where scholars prefer the solutions of the CISG to the ones of national law."[217]

In France, the major treatises on specific contracts also analyze the CISG (albeit in broad terms).[218] Furthermore, in France, not unlike in Germany,[219] an overview on CISG case law from around the globe is periodically published – under the directorship of *Claude Witz* – in one of the most widely circulating generalist law reviews,[220] namely the Recueil Dalloz.[221] Moreover, in France (as well as in other countries, Italy among them), CISG case law is also, although not frequently, commented on both in specialized law reviews[222] and in more generalist law reviews, such as the Gazette du Palais[223] and Juris Classeur Périodique.[224] This certainly helps to raise awareness of the CISG among legal professionals who are specialized neither in international commercial law nor in related areas.

In the United States, the situation is not as encouraging, as only "some contracts casebooks used in U.S.-American law schools now touch on [the CISG]."[225]

## 3. The impact of scholarly writings on the CISG

As shown in the previous chapter, the CISG undoubtedly has had an impact on scholarly writings. But have these writings had any impact on legal doctrine, on practicing lawyers and/or judges? The question must be answered affirmatively.

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[217] *Možina*, supra note 79, at 269.

[218] See *Witz*, supra note 50, at 134; similarly, in Argentina, "[r]eferences to CISG can be found in works on Argentine domestic commercial contract law", *Noodt Taquela*, supra note 10, at 4.

[219] See supra the text accompanying notes 203 and 204.

[220] See *Witz*, supra note 50, at 132.

[221] For these overviews, see Recueil Dalloz 1997, 1998, 1999, 2000, 2002, 2003, 2005, 2007.

[222] See, e.g., Revue critique de droit international privé, Journal du droit international, Revue de droit des affaires internationales.

[223] See, e.g., *Cytermann-Sinay*, L'application d'office de la Convention de Vienne relative à la vente internationale de marchandises et le respect du principe du contradictoire, Gazette du Palais 2003, 234 f.

[224] See, e.g., *Missaoui*, La validité des clauses aménageant la garantie des vices cachés dans la vente internationale de marchandises, Juris Classeur Périodique 1996, 3927 f.

[225] *Reimann*, supra note 83, at 120.

To show to what extent CISG-related scholarly writings have impacted domestic legal doctrine, it may suffice to mention two experiences. In Argentina, the "characterization of a contract as international was changed by scholars when the CISG entered into force in Argentina. Before that, private international law scholars used to consider a contract as international, when its place of execution and its place of conclusion were located in different States. This characterization was changed when the Vienna Convention entered into force in Argentina: scholars began to affirm that a contract was international when the place of business of one party is located in a different State [from that] where the place of business of the other party is located."[226]

In Japan, the impact seems to be even more profound, which is surprising, considering that Japan has only very recently acceded to the Convention. Express references to or analyses of the CISG may not appear in treatises or textbooks on domestic law, but it appears that some of the CISG's principles and rules have – through scholarship – found their way into those treatises and textbooks, as noted by the drafter of the Japanese country report, according to whom the "CISG has introduced some rules unfamiliar to traditional Japanese contract law. For example, we were not familiar with the concept of 'fundamental breach of contract', 'obligation to mitigate loss', 'anticipatory breach', 'suspension of performance'. These new concepts were so stimulating that some of our law professors of civil law wrote various treatises introducing these ideas and tried to incorporate them, in one way or another, into Japanese contract law."[227]

As for the impact of CISG-related scholarly writings on practicing lawyers, that depends, *inter alia*, on whether or not the practicing lawyers are operating in contracting States. Thus, although "scholars' publications have an enormous impact on the daily life of Brazilian lawyers and on their formation",[228] because Brazil is a non-contracting State, "the publications on the CISG have had very little or no impact on [practicing lawyers and] courts."[229]

In contracting States, CISG-related scholarly writings seem to have much more impact on practicing lawyers,[230] although it is not always easy to

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[226] *Noodt Taquela*, supra note 10, at 5.

[227] *Hayakawa*, supra note 24, at 228.

[228] *de Aguilar Vieira*, supra note 26, at 23.

[229] *Ibid*.

[230] It goes without saying that the impact of scholarly writing differs among the different contracting States; in Germany, for instance, "scholarly writing has generally a wider impact on legal practice […] than it has in many other countries", *Magnus*, supra note 52, at 152. In Uruguay, "[s]cholarly writing […] has produced some works on the CISG, which are consulted by practicing lawyers, judges and

assess the extent of that impact.[231] For example, in some countries, including Croatia, "[l]egal practitioners […] are not in the habit of quoting legal literature."[232] Similarly, in China, "impacts of scholarly writings by Chinese scholars on legal practice […] should be admitted, albeit it is difficult to quantitatively show them. [Still, when] there is an ambiguous meaning on an article of the CISG in legal practice, it goes without saying for a lawyer or a judge to look up relevant scholarly writings." In Denmark, "[w]hile it would be difficult to assess the overall impact which scholarly writing devoted to the CISG had in Denmark",[233] it is clear that such writing has had an impact "on Danish legal practice, in that Danish practitioners regularly cite scholarly works (primarily Danish language works) to support their arguments in court."[234] In France, practicing lawyers refer in their briefs and memoranda to CISG-related scholarly works; indeed, it is due to these works that practicing lawyers started to refer to foreign court decisions in support of their arguments.[235]

In Greece, scholarly writings are influential in legal practice and "[d]ue to the fact that CISG is new to lawyers and judges, the influence of scholarly writings can be reasonably expected to be [even] decisive, at least until there is sufficient (Greek) case-law on these issues."[236]

The contrary appears to be true in Italy. Despite the availability of much scholarly writing on the CISG, such scholarship does not appear to be very influential on Italian practicing lawyers; this is the case even though scholarly writing normally is influential in Italy.[237] "The reason for this probably lies in the decreasing attention that practicing lawyers pay to law treaties

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students. They also consult foreign scholarly writing on the matter", *Fresnedo de Aguirre*, supra note 16, at 335.

231 For a similar statement, see, e.g., *Han*, supra note 57, at 76.

232 *Baretić/Nikšić*, supra note 12, at 100, where the authors also state that "it can [nevertheless] be assumed that legal literature has done its work in promoting the CISG", *Id.* at 101.

233 *Lookofsky*, supra note 49, at 123.

234 *Ibid.*

235 See *Witz*, supra note 50, at 135, stating that "[l]es avocats ne manquent pas de se référer, dans leurs mémoires et plaidoiries, aux écrits de la doctrine. Grâce à la doctrine, les avocats prennent aussi le réflexe de citer à l'appui les décisions jurisprudentielles étrangères."

236 *Zervogianni*, supra note 13, at 171.

237 *Torsello*, supra note 35, at 207, stating that the "considerable attention devoted by legal scholars [to the CISG] has not, in turn, resulted in the spreading of a comparable interest in (and a comparable acquaintance with) the CISG by practicing lawyers and courts. As a matter of fact, although in theory – as Italy is a civil law jurisdiction – scholarly writing is expected to be influential in practice, in the area at hand, this appears to be the case only to a very limited extent."

and scholarly writings, as a result of the (wrong) belief that they can get all the information they need from handier computer databases or practice-oriented commentaries."[238]

In contracting States,[239] scholarship on the CISG has also had an impact on courts.[240] This is not surprising, at least not in respect of those countries in which courts generally resort to scholarly writing. That would include Switzerland,[241] where CISG-related scholarly publications are very numerous and can easily be accessed by courts hearing CISG disputes.[242] In some countries, such as Austria, Germany and Switzerland, it is sufficient to read a few court decisions to realize how important scholarly writing is. Reading Italian court decisions, however, gives the impression that in Italy scholarly writing has no influence at all, since no scholars are ever cited. This, however, is not due to legal writer's lack of influence, or to the ignorance of judges, but rather to the fact that courts are by statute prohibited from citing scholars.[243] "Indeed, a court decision may refer to the 'prevailing opinion' in scholarly writing, to the

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[238] *Ibid*.

[239] Unsurprisingly, in the courts of non-contracting States, CISG-related scholarly writing has very little impact; see, e.g., *de Aguilar Vieira*, supra note 26, at 23, stating that "the publications on the CISG have had very little or no impact on Brazilian […] courts until the present."

[240] See, e.g., the Greek country report, where it is stated that "[d]ue to the fact that CISG is new to lawyers and judges, the influence of scholarly writings can be reasonably expected to be decisive", *Zervogianni*, supra note 13, at 171.

[241] See, e.g., *Widmer/Hachem*, supra note 54, at 292-293, stating, "[w]ith regard to scholarly impact on court decisions, [that] it is important to remember that in Switzerland (as indeed in most civil law jurisdictions), courts in their decisions refer not only to case law, but also cite extensively to scholarly writings. These citations are not limited to contributions which support the court's reasoning; rather, they also comprise texts that argue the opposite position. Scholarly contributions thus play an important part in helping to adjust the CISG to new developments in international trade and in supporting courts to strive for a correct application of the Convention."

[242] For this reasoning – as regards Germany – see *Magnus*, supra note 52, at 153, stating that "German scholarly writing on the CISG and on its predecessor, the Hague Uniform Sales Law, influenced first the courts. Since the Hague Law and the Vienna Law was 'new' law that differed at least in its structure and style form German domestic law the courts in particular when seized for the first time with the new law welcomed any help for the interpretation of the uniform sales law offered by scholarly writing. And the Federal Supreme Court when finally deciding on CISG-problems tends generally to follow the view on the interpretation of a specific CISG-provision which already prevails in scholarly writing."

[243] This has been completely overlooked by Sant'Elia, Editorial remarks, available at http://cisgw3.law.pace.edu/cases/000712i3.html.

'best opinion', to the 'opinion to be shared by the court'. Under no circumstances, however, may the court identify the scholars referred to. This is likely to emphasize the divide between those (few) who already possess the knowledge about the scholarly opinion referred to by the court and those (many) who are not in the position to recognize the citation and to fully understand the reasons and the implications of the court's reference. As a result, court decisions, which nowadays (thanks to computerized database of case-law) are the most effective vehicle for the spreading of legal information, are prevented from transferring the pieces of information regarding the identity of the scholars who have in-depth analyzed a specific issue and who have inspired the decision adopted by the court."[244]

## 4. The CISG and Interconventional Interpretation

As mentioned earlier,[245] there are various measures of the CISG's success. It is here suggested, that one such measure is the CISG's use by scholars in interpreting other international uniform law instruments. If this were to occur, it could be compared to an implicit acknowledgement of the CISG's role as an "indispensable point of reference"[246] and, thus, of its success. In the last few years, this "interconventional interpretation"[247] has been advocated by various commentators.[248] This systematic approach to the interpretation of international uniform law instruments has the advantage of making the unification of law process easier: it limits the number of autonomous concepts that must be dealt with simply by obviating the need to create different autonomous concepts for each international uniform law instru-

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[244] *Torsello*, supra note 35, at 208.

[245] See supra the text accompanying notes 6 ff. and 41.

[246] *Torsello*, supra note 35, at 209.

[247] *Magnus*, supra note 52, at 154.

[248] See, e.g., *Ferrari*, I rapporti tra le convenzioni diritto materiale uniforme in materia contrattuale e la necessità di un'interpretazione interconvenzionale, Rivista di diritto internazionale privato e processuale 2000, 669 ff.; *Ferrari*, Uniform Law Review 2000, 69 ff.; *Magnus*, Konventionsübergreifende Interpretation internationaler Staatsverträge privatrechtlichen Inhalts, in: Basedow et al. (eds.), Aufbruch nach Europa. 75 Jahre Max-Planck-Institut für Privatrecht, 2001, p. 571 ff.; *Torsello*, supra note 108, at 271 ff.

ment.[249] This prepares the ground for a more coherent unification of the law[250] that could replace the piecemeal unification one confronts today.

In this rapporteur's opinion, the CISG should be used as a starting point for interconventional interpretation. This is justified, *inter alia*, by the CISG's role as paradigm for international unification efforts[251] – a role that has been – implicitly – acknowledged by various international legislators when they used the CISG as a model for their unification efforts. The drafters of the Unidroit Convention on International Factoring,[252] for examples have used the CISG when they were elaborating[253] and discussing[254] that Convention.[255] Indeed, the relationship between the CISG and the Unidroit Convention on International Factoring is so close that one commentator dubbed the latter Convention an "annex" of the CISG.[256]

Scholars, furthermore, have suggested resorting to interpretations of the CISG in respect of not only the aforementioned Unidroit Convention on International Factoring,[257] but also the Unidroit Convention on Inter-

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[249] It may be appropriate to point out that the suggestion made in the text should operate independently from the question of whether the international uniform law instruments are drafted by one and the same agency or body; *contra Diedrich*, Autonome Auslegung von internationalem Einheitsrecht, 1994, p. 69.

[250] See *Ferrari*, How to create one uniform law, 5 Vindobona Journal of International commercial Arbitration 3 ff. (2000).

[251] See also *Herrmann*, The Future of Trade Law Unification, Internationales Handelsrecht 2001, 6, 8.

[252] See 27 International Legal Materials 943 ff. (1988).

[253] See Explanatory Report on the Draft Convention on International Factoring prepared by the UNIDROIT Secretariat, in: 1 Diplomatic Conference for the Adoption of the Draft UNIDROIT Conventions on International Factoring and International Financial Leasing. Acts and Proceedings, 1991, p. 88-89.

[254] See *Basedow*, Internationales Factoring zwischen Kollisionsrecht und UNIDROIT-Konvention, Zeitschrift für Europäisches Privatrecht 1997, 613, 629.

[255] See also *Ferrari*, Il factoring internazionale, 1999, p. 15.

[256] *Basedow*, supa note 254, at 629; for a reference to the Unidroit Convention on International Factoring being an "offspring" of the CISG, see, e.g., *Bussani*, Contratti moderni. Factoring. Franchising. Leasing, 2nd ed ., 2004, p. 148 note 352; *De Nova*, Il progetto UNIDROIT sul factoring internazionale, Dirititto del commercio internazionale 1987, 716, 716.

[257] For authors advocating resort to CISG concepts in interpreting the Unidroit Convention on International Factoring, see, apart from the authors cited in the previous notes, *Ferrari*, Art. 4 FactÜ, in: Münchener Kommentar zum Handelsgesetzbuch, vol. 5, Recht des Zahlungsverkehrs, Effektengeschäft, Depotgeschäft, Ottawa Übereinkommen über internationales Factoring, 2001, p. 1605, 1611 f.; *Mankowski*, Art. 4 FactÜ, in: Ferrari et al. (eds.), Internationales Vertragsrecht, 2007, p. 1055, 1056 f.

national Financial Leasing[258] and the new Uncitral Convention on the Assignment of Receivables in International Trade,[259] as these conventions have also been influenced by the CISG.[260] This is not surprising since these international commercial law conventions have the same goals as the CISG and their rules of interpretation also are identical to those of the CISG. It may be more surprising that scholars have also proposed to interpret uniform law instruments of a different kind in light of the CISG, specifically the Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (hereinafter: Brussels 1 Regulation).[261] Although this approach has been criticized,[262] on the grounds that the Brussels 1 Regulation constitutes a set of rules on international civil procedure and therefore should not be interpreted in light of a set of uniform substantive law rules, more and more authors favour this kind of approach.[263] The justification for this is rather convincing: although the Brussels 1 Regulation focuses on international civil procedure, there are instances where the heads of jurisdiction it sets forth refer to substantive law concepts, such as "sale of goods", which it does not itself define.[264] What better set of – autonomous – rules is there than the

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[258] See *Frignani*, Convenzione Unidroit sul leasing finanziario internazionale (1988), in: Le convenzioni di diritto del commercio internazionale, supra note 132, p. 151, 156.

[259] See Uncitral Convention on the Assignment of Receivables in International Trade, 41 International Legal Materials 776 (2002).

[260] See *Rudolf*, Einheitsrecht für internationale Forderungsabtretungen, 2006, p. 40 f.

[261] *See* Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, Official Journal L 12, of 16 January 2001, p. 1 ff.; Commission Regulation (EC) No 1937/2004 of 9 November 2004 amending Annexes I, II, III and IV to Council Regulation (EC) No 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, Official Journal L 334, of 10 November 2004, p. 3 ff.; Commission Regulation (EC) No 2245/2004 of 27 December 2004 amending Annexes I, II, III and IV to Council Regulation (EC) No 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, Official Journal L 381, of 28 December 2004, p. 10 ff.

[262] For a criticism, see, e.g., Tribunale di Rovereto, 28 August 2004, available at http://www.cisg-online.ch/cisg/urteile/902.pdf.

[263] See, e.g., *Ragno*, Forum destinatae solutionis e Regolamento (CE) N. 44 del 2001: Alcuni spunti innovativi dalla giurisprudenza di merito, Giurisprudenza di merito 2006, 1413, 1427 ff.; *Schlosser*, EU-Zivilprozessrecht: EuGVVO, EuEheVO, AVAG, HZÜ, EuZVO, HBÜ, EuBVO; Kommentar, 2nd ed., 2003, p. 73.

[264] See *Ferrari*, L'interpretazione autonoma del Regolamento CE 44/2001 e, in particolare, del concetto di „luogo di adempimento dell'obbligazione" di cui all'art. 5, n. 1, lett. b, Giurisprudenza italiana 2006, 1016, 1022; *Magnus*, Das UN-Kauf-

CISG[265] to be used as a reference for interpreting – in an autonomous way, as required by the Brussels 1 Regulation –[266] this substantive concept? There is none, which is why recourse to the CISG has often been advocated.[267]

Thus, it is clear that scholars – mainly, although not exclusively,[268] from Germany and Italy –[269] have suggested resorting to the CISG to interpret other uniform law instruments, thus making the CISG a success beyond its scope.

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recht und die Erfüllungsortzuständigkeit in der neuen EuGVO, Internationales Handelsrecht 2002, 45, 47.

[265] It has often been stated that the CISG constitutes a set of autonomous rules; see, e.g., *Goldstajn*, Usages of Trade and Other Autonomous Rules of International Trade According to the UN (1980) Sales Convention, in: Sarcevic/Volken (eds.), International Sale of Goods: Dubrovnik Lectures, 1986, p. 55, 55.

[266] See *Ferrari*, supra note 264, at 1022; *Piltz*, Gerichtsstand des Erfüllungsortes in UN-Kaufverträgen, Internationales Handelsrecht 2006, 53, 55; in case law, see Oberlandesgericht Karlsruhe, 12 June 2008, available at http://cisgw3.law.pace.edu/cases/080612g1.html.

[267] See, e.g., *Ferrari*, Remarks on the autonomous interpretation of the Brussels 1 Regulation, in particular of the concept of "place of delivery" under Article 5(1)(b), and the Vienna Sales Convention (on the occasion of a recent Italian court decision), International Busines Law Journal, 2007, 83, 91 ff.; *Torsello*, supra note 35, at 209.

[268] See, in respect of the situation in Japan, *Hayakawa*, supra note 24, at 229, stating that "[s]cholars who are interested in CISG are usually interested in other uniform law instruments as well. Thus such scholars tend to make use of reflections on CISG in discussing other uniform law instruments."

[269] It should be mentioned that there are various countries in which it appears that the CISG has not been used to interpret other uniform law instruments; this is true, for instance, in Argentina (see *Noodt Taquela*, supra note 10, at 5); the same can be said as regards the Czech Republic (see *Rozehnalová*, supra note 72, at 110) as well as France (see *Witz*, supra note 50, at 135 f.) and Slovenia (see *Možina*, supra note 79, at 270). In Denmark, "[t]here seem to have been few instances, if any, where Danish scholars have used interpretations of the CISG to interpret other uniform law instruments", *Lookofsky*, supra note 49, at 123.

# III. The CISG's impact on courts

## 1. The CISG's impact on the style of court decisions

As mentioned in the introductory chapter,[270] courts increasingly apply the CISG: whereas whereas in 1995 merely one hundred and fifty decisions of the CISG could be found[271] (and 444[272] and 555[273] in 1997 and 1999 respectively), today more than 2200 decisions on the CISG are known.[274] In this rapporteur's opinion, however, the number of decisions in itself is not a measure of the CISG's success. For example, the number of decisions does not reveal their quality with regard to, e.g., compliance with the mandate in Article 7(1) CISG to interpret the Convention with regard to "its international character and to the need to promote uniformity in its application".[275]

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[270] See supra the text accompanying notes 28 f.

[271] For a complete list of the first hundred and fifty applications *see Will*, International Sales Law under CISG. The UN Convention on Contracts for the International Sale of Goods. The First 150 or so Decisions, 2nd ed., 1995.

[272] See *Will*, International Sales Law under CISG. The UN Convention on Contracts for the International Sale of Goods. The First 444 or so Decisions, 6th ed., 1997.

[273] See *Will*, International Sales Law under CISG. The UN Convention on Contracts for the International Sale of Goods. The First 555 or so Decisions, 8th ed., 1999.

[274] The most complete list of judicial applications of the CISG can be found on the internet at http://cisgw3.law.pace.edu/cisg/text/casecit.html.

[275] For recent papers on Article 7 CISG, see, e.g., *Andersen*, Uniform Application of the International Sales Law. Understanding Uniformity, the Global Jurisconsultorium and Examination and Notification Provisions of the CISG, 2007; *Bisazza*, Auslegung des Wiener UN-Kaufrechts unter Berücksichtigung ausländischer Rechtsprechung: ein amerikanisches Beispiel, European Legal Forum 2004, 380 ff.; *De Ly*, Uniform Interpretation: What is Being Done? Official Efforts, in: The 1980 Uniform Sales Law, supra note 18, p. 335 ff.; *Diedrich*, Maintaining Uniformity in International Uniform Law via Autonomous Interpretation: Software Contracts under the CISG, 8 Pace International Law Review 303 ff. (1996); *Felemegas*, The United Nations Convention on Contracts for the International Sale of Goods: Article 7 and Uniform Interpretation, Review of the Convention on Contracts for the International Sale of Goods (CISG) 115 ff. (2000-2001); *Ferrari*, The CISG's Uniform Interpretation by Courts – an Update, 9 Vindobona Journal of International Commercial Law and Arbitration 233 ff. (2005); *Graffi*, L'interpretazione autonoma della Convenzione di Vienna: rilevanza del precedente straniero e disciplina della lacune, Giurisprudenza di merito 873 ff. (2004); *Happ/Roth*, Interpretation of uniform law instruments according to Principles of International Law, Uniform Law Review 702 ff. (1997); *Koneru*, The Interna-

This part of the General Report will examine not only compliance of those decisions with the mandate of Article 7(1), but also whether the style of decisions rendered by courts of contracting States[276] has changed as a result of the need to comply with that mandate. Have civil law judges started, as had been suggested by one commentator as a way to comply with the aforementioned mandate,[277] to "approximate their common law counterparts in increasing their reliance on [case law]"?[278] And have common law judges begun to take into account legal scholarship as well as legislative history – something they are normally not inclined to do? It does not appear so.

As indicated in various country reports – including the Argentinean,[279] Chinese,[280] Croatian,[281] Danish,[282] French,[283] German,[284] Greek,[285] Slove-

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tional Interpretation of the UN Convention on Contracts for the International Sale of Goods: An Approach Based on General Principle, 6 Minnesota Journal of Global Trade 105 ff. (1997); *McQuillen*, The Development of a Federal CISG Common Law in U.S. Courts: Patterns of Interpretation and Citation, 61 University of Miami Law Review 509 ff. (2007); *Niemann*, Einheitliche Anwendung des UN-Kaufrechts in italienischer und deutscher Rechtssprechung und Lehre, 2006; *Rizzi*, Interpretazione e integrazione della legge uniforme sulla vendita internazionale di cose mobile, Rivista di diritto privato 1997, 237 ff.; *Salama*, supra note 108, at 225 ff.; *Schwenzer*, The Danger of Domestic Preconceived Views with Respect to the Uniform Interpretation of the CISG: The Question of Avoidance in the Case of Non-Conforming Goods and Documents, Victoria University of Wellington Law Review 785 ff. (2005); *van Alstine*, supra note 8, at 687 ff.; *Veneziano*, Uniform Interpretation: What is Being Done? Unofficial Efforts and Their Impact, in: The 1980 Uniform Sales Law, supra note 18, p. 325 ff.; *Witz*, L'interprétation de la CVIM: divergences dans l'interprétation de la Convention de Vienne, in: The 1980 Uniform Sales Law, supra note 18, p. 279 ff.

276 The issue addressed here is not relevant in non-contracting States.

277 *Grosswald Curran*, The Interpretive Challenge to Uniformity, 15 Journal of Law and Commerce 175, 177 (1996).

278 *Ibid*.

279 See *Noodt Taquela*, supra note 10, at 5.

280 See *Han*, supra note 57, at, 76-77, stating that "[t]he CISG's coming into force had no impact on the style of court decisions in China. Since January 1, 1993, the style of court decisions has been prescribed by the Sup. People's Ct. with a set of patterns of litigation documents […]. One problem […] is that there is only one fixed style for thousands of cases."

281 See *Baretić/Nikšić*, supra note 12, at 102.

282 See *Lookofsky*, supra note 49, at 123.

283 See *Witz*, supra note 50, at 136.

284 See *Magnus*, supra note 52, at 155.

285 See *Zervogianni*, supra note 13, at 175.

nian[286] and Swiss ones,[287] "[t]he CISG's coming into force has not had any impact on the style of court decisions."[288] For instance, it was impossible to "find more references to case law [in CISG-related disputes than in non-CISG-related ones]."[289] The reasons for this are manifold. In China, for example, a decision of the Supreme People's Court imposes the style of court decisions[290] from which one cannot deviate. In Denmark, "the traditional style of Danish judicial decisions"[291] is characterized by a "general reluctance of Danish courts to cite (even) Danish 'precedents'."[292] Similarly, in France courts tend generally not to refer to cases, not even French ones; scholarly writing is generally not cited either, not even when courts copy word for word what commentators have said.[293]

In Switzerland, the reason is a completely different one: "courts in Switzerland traditionally cite both to case law as well as to scholarly writings in their decisions. This was true before the coming into force of the CISG and remains so to this day. A Swiss court will usually refer to other court decisions if a similar question has already been dealt with by other courts and then, in a second step, state that this reasoning is in line with the prevailing opinion in legal doctrine or, as the case may be, that it deviates from the majority view. If the issue raised in a given case has not yet been decided in case law, the court will analyse scholarly writings and refer to them in its decision. However, it will do this regardless of whether the governing law is

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286 See *Možina*, supra note 79, at 270.

287 See *Widmer/Hachem*, supra note 54, at 293.

288 *Noodt Taquela*, supra note 10, at 5.

289 *Ibid*.

290 See *Han*, supra note 57, at 76-77, stating that "[t]he CISG's coming into force had no impact on the style of court decisions in China. Since January 1, 1993, the style of court decisions has been prescribed by the Sup. People's Ct. with a set of patterns of litigation documents […]. One problem […] is that there is only one fixes style for thousands of cases."

291 *Lookofsky*, supra note 49, at 124.

292 *Id*. at 125.

293 See *Witz*, supra note 50, at 136, stating that "la Cour de cassation ne cite jamais d'opinion doctrinale. En dépit de l'influence traditionnelle de la doctrine française sur l'interprétation des normes légales, les juges du fond s'abstiennent généralement de citer les auteurs. Tel est même le cas lorsque les juges reprennent presque mot à mot des affirmations doctrinales. Ainsi, le style judiciaire français s'oppose radicalement au style judiciaire allemand ou suisse. Pas davantage, les juges ne se réfèrent à la jurisprudence existante pour appuyer leurs solutions ou pour mieux marquer un revirement de jurisprudence. Les juges de première ou de deuxième instance ne citent généralement pas la jurisprudence de la Cour de cassation, même s'ils entendent le plus souvent la suivre fidèlement. La Haute cour ne se réfère jamais à ses arrêts antérieurs."

the CISG, Swiss domestic law or, indeed, a foreign law applicable by virtue of the Swiss conflict of law rules."[294] This also appears to be the reason why in Uruguay "the CISG's coming into force has had no impact on the style of court decisions[:] There have always been numerous citations to case law and to scholarly writing in the courts of Uruguay, regarding not only the CISG, but in general."[295]

In Italy, the situation is slightly more complex. From the perspective of the "general picture", it appears "that the CISG has had no impact whatsoever on the style of court decisions."[296] There are, however, a few decisions, rendered by an "enlightened minority"[297] of courts – namely the Tribunale di Vigevano,[298] the Tribunale di Rimini[299] and the Tribunale di Padova[300] – "which in the application of the CISG adopted a completely new style compared to the usual one adopted for purely domestic cases."[301] One difference is that opinions by these courts have cited many other decisions, which by itself is a surprise, as this is not what Italian courts normally do; what is even more surprising, however, is that the decisions cited are almost exclusively foreign decisions. The decisions cited also include awards rendered by arbitral tribunals which is almost unheard of in Italian decisions. The aforementioned courts are also "innovative with respect to [their] style, in that [they] did not limit [their] sources of knowledge of relevant precedents to law reports and law reviews, but also resorted extensively to databases available on the Internet in order to find the foreign decisions relevant to the case[s]."[302]

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294 *Widmer/Hachem*, supra note 54, at 293.

295 *Fresnedo de Aguirre*, supra note 16, at 335.

296 *Torsello*, supra note 35, at 215.

297 *Ibid.*

298 See Tribunale di Vigevano, 12 July 2000, available at http://www.cisg-online.ch/cisg/urteile/493.htm.

299 See Tribunale di Rimini, 26 November 2002, available at http://cisgw3.law.pace.edu/cases/040225i3.html.

300 See Tribunale di Padova, 10 January 2006, available at http://cisgw3.law.pace.edu/cases/060110i3.html; Tribunale di Padova, 11 January 2005, available at http://www.unilex.info/case.cfm?pid=1&do=case&id=1005&step=FullText; Tribunale di Padova, 31 March 2004, available at http://cisgw3.law.pace.edu/cases/040331i3.html; Tribunale di Padova, 25 February 2004, available at http://cisgw3.law.pace.edu/cases/040225i3.html.

301 *Torsello*, supra note 35, at 215. (footnotes omitted)

302 *Id.* at 216.

For similar remarks, see also *Ferrari*, Applying the CISG in a truly uniform manner: Tribunale di Vigevano (Italy), 12 July 2000, Uniform Law Review 2001, 203, 206.

## 2. Autonomous interpretation v. homeward trend

As mentioned earlier,[303] the fact that the CISG is applied with increasing frequency in both courts and arbitral tribunals is not by itself a measure of the CISG's success. Instead, its success should be measured by the extent to which it is applied in compliance with the purpose of creating a uniform law "in action"[304] (rather than confining uniformity to the books). Thus, whether the CISG is a success depends – *inter alia* – on whether courts are taking into account the aforementioned mandate to interpret the CISG autonomously and in light of the need to promote uniformity in its application or whether they instead succumb to the homeward trend, *i.e.*, the "natural"[305] "tendency of those interpreting the CISG to project the domestic law in which the interpreter was trained (and with which he or she is likely most familiar) onto the international provisions of the Convention."[306] It is, in other words, the "the tendency to think that the words we see [in the text of the CISG] are merely trying, in their awkward way, to state the domestic rule we know so well."[307]

Although this homeward trend characterizes the case law of the courts of various countries, such as Argentina[308] and Israel,[309] it is most prominent in the Unites States,[310] where – unfortunately – courts seem to display it not

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303 See supra the text following notes 30 f.

304 See also *Widmer/Hachem*, supra note 54, at 282.

305 *Salama*, supra note 108, at 231.

306 *Flechtner/Lookofsky*, Nominating Manfred Forberich: The Worst CISG Decision in 25 Years?, 9 Vindobona Journal of International Commercial Law and Arbitration 199, 203 (2005).

For similar definitions, see *Keily*, Good Faith and the Vienna Convention on Contracts for the International Sale of Goods (CISG), 3 Vindobona Journal of International Commercial Law and Arbitration 15, 19 (1999); *Nottage*, Who's Afraid of the Vienna Sales Convention (CISG)? A New Zealander's View from Australia and Japan, 36 Victoria University of Wellington Law Review 815, 838 (2005); *Walt*, The CISG's Expansion Bias: A Comment on Franco Ferrari, 25 International Review of Law and Economics 342, 348 (2005); *Whittington*, supra note 32, at 811.

307 *Honnold*, The Sales Convention in Action – Uniform International Words: Uniform Application?, 8 Journal of Law and Commerce 207, 208 (1988).

308 See *Noodt Taquela*, supra note 10, at 5.

309 See *Shalev*, supra note 14, at 185.

310 See also *Salama*, supra note 108, at 225, stating that "[i]n practice it has been found that U.S. courts rely on the "homeward trend" more often than other judges in interpreting the CISG."

only on specific issues,[311] but (as suggested in the United States country report)[312] also as a matter of principle. The latter is evidenced by the following statement, found in many decisions: "caselaw interpreting analogous provisions of Article 2 of the Uniform Commercial Code ("UCC") may also inform a court where the language of the relevant CISG provisions tracks that of the UCC."[313] In this rapporteur's opinion,[314] this statement, as well as other comparable ones,[315] are not tenable; they demonstrate as suggested

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311 See, e.g., *Schmitz-Werke GmbH & Co. v. Rockland Industries, Inc.; Rockland International FSC, Inc.*, U.S. Circuit Court of Appeals (4th Circuit), 21 June 2002, available at http://cisgw3.law.pace.edu/cases/020621u1.html, which "disregarded CISG interpretive methodology and resorted to a homeward trend analysis", *Dimatteo et al.*, The Interpretive Turn in International Sales Law: An Analysis of Fifteen Years of CISG Jurisprudence, 24 Northwestern Journal of International Law and Business 299, 398 (2004); see also *Delchi Carrier SpA, v. Rotorex Corporation*, U.S. Circuit Court of Appeals (2d. Cir.), 6 December 1995, available at http://cisgw3.law.pace.edu/cases/951206u1.html, where "the U.S. court rejected the application of international case law and instead looked to the UCC and its domestic interpretations for guidance", *Sheaffer*, The Failure of the United Nations Convention on Contracts for the International Sale of Goods and a Proposal for a New Uniform Global Code in International Sales Law, 15 Cardozo Journal of International and Comparative Law 461, 477 (2007).

312 See *Levasseur*, United States, supra this book, p. 313, 315 ff.

313 See *Macromex SRL v. Globex Intern., Inc.*, U.S. District Court, Southern District of New York, 16.4.2008, 2008 WL 1752530 (S.D.N.Y.); *Travelers Property Casualty Company of America et al. v. Saint-Gobain Technical Fabrics Canada Limited*, U.S. District Court, Minnesota, 31 January 2007, available at http://cisgw3.law.pace.edu/cases/070131u1.html; *Genpharm Inc. v. Pliva-Lachema A.S.*, U.S. District Court for the Eastern District Court of New York, 19 March 2005, available at http://www.cisg.law.pace.edu/cisg/wais/db/cases2/050319u1.html; (stating also, however, that "UCC case law is not *per se* applicable to cases governed by the CISG") *Raw Materials Inc. v. Manfred Forberich GmbH & Co. KG, U.S. District Court*, Northern District of Illinois, Eastern Division, 6 July 2004, available at http://cisgw3.law.pace.edu/cases/040706u1.html.

314 For this author's view on the matter, see *Ferrari*, The Relationship Between the UCC and the CISG and the Construction of Uniform Law, 29 Loyola of Los Angeles Law Review 1021 ff. (1996).

315 See, e.g., *Schmitz-Werke GmbH & Co. v. Rockland Industries, Inc.; Rockland International FSC, Inc.*, U.S. Circuit Court of Appeals (4th Circuit), 21 June 2002, available at http://cisgw3.law.pace.edu/cases/020621u1.html, surprisingly stating that "case law interpreting provisions of Article 2 of the Uniform Commercial Code that are similar to provisions in the CISG can also be helpful in interpreting the Convention", after having stated that the "CISG directs that its interpretation be informed by its 'international character and […] the need to promote

already more than half a century ago, that "the homeward trend may be prompted not only by greater strangeness but also by greater similarity between forum and foreign [or uniform] law."[316] The mere fact that the wording of a particular CISG provision corresponds to that of a specific domestic rule (whether created by statute or case law) is *per se* insufficient to allow interpretations of the domestic rule to influence the construction of the CISG provision. Only where it is apparent from the legislative history that the drafters wanted a given concept to be interpreted in light of a specific domestic law is one allowed to resort to the "domestic" understanding of that concept.[317] All other approaches conflict with the mandate in Article 7(1) CISG, which requires an "autonomous" interpretation of – most –[318] concepts of the CISG.

The need for an autonomous interpretation has also been acknowledged by some United States courts. In *St. Paul Guardian Insurance Co. et al. v. Neuromed Medical Systems & Support GmbH, et al.*,[319] the United States District Court for the Southern District of New York held that "the CISG aims to bring uniformity to international business transactions, using simple, non-nation specific language". Similar language can be found in other United States court decisions, including *MCC-Marble Ceramic Center, Inc. v. Ceramica Nuova D'Agostino, S.p.A.*,[320] where it is expressly stated that "courts applying the CISG cannot […] substitut[e] familiar principles of domestic law when the Convention requires a different result." This line of reasoning

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uniformity in its application and the observance of good faith in international trade'." For similar statements, see, more recently, *Chicago Prime Packers, Inc. v. Northam Food Trading Co., et al.*, U.S. District Court, Northern District of Illinois, Eastern Division, 21 May 2004, available at http://cisgw3.law.pace.edu/cases/040521u1.html; for an earlier statement to the same effect, see *Delchi Carrier SpA, v. Rotorex Corporation*, U.S. Circuit Court of Appeals (2d. Cir.), 6 December 1995, available at http://cisgw3.law.pace.edu/cases/951206u1.html.

316 *Ehrenzweig*, Interstate and International Conflicts Law: A Plea for Segregation, 41 Minnesota Law Review (717, 723 (1956-1957).

317 For this conclusion, see *Achilles*, Kommentar zum UN-Kaufrechtsübereinkommen (CISG), 2000, p. 29; *Ferrari*, Art. 7, in: Kommentar zum Einheitlichen UN-Kaufrecht – CISG, supra note 77, p. 138, 142; *Magnus*, Wiener UN-Kaufrecht – CISG, 2005, p. 171.

318 It has been suggested that not all concepts of the CISG are to be interpreted autonomously; see *Ferrari*, supra note 111, at 497 ff.

319 *St. Paul Guardian Insurance Co. et al. v. Neuromed Medical Systems & Support GmbH et al.*, U.S. District Court for the Southern District of New York, 26 March 2002, 2002 WL 465312 (S.D.N.Y.).

320 *MCC-Marble Ceramic Center, Inc. v. Ceramica Nuova D'Agostino, S.p.A.*, U.S. Circuit Court of Appeals (11th Circuit), 29 June 1998, 1998 WL 343335 (11th Cir. (Fla.)).

also constitutes the basis for other United States court decisions, such as *Geneva Pharmaceuticals Tech. Corp. v. Barr Labs. Inc.*,[321] which states that "UCC case law is not *per se* applicable to cases governed by the CISG",[322] and *Calzaturificio Claudia S.n.c. v. Olivieri Footwear Ltd.*,[323] where it is expressly stated that "although the CISG is similar to the UCC with respect to certain provisions, it differs from the UCC with respect to others, including the UCC's writing requirement for a transaction for the sale of goods and parol evidence rule. Where controlling provisions are inconsistent, it would be inappropriate to apply UCC case law in construing contracts under the CISG." In another US decision, the court simply referred to the need to take the CISG's international character into account.[324]

European courts have also complied with the obligation to interpret the CISG not in light of domestic law, but rather with regard to its international character. In a Swiss case from 1993,[325] a court of first instance stated that the CISG "is supposed to be interpreted autonomously and not out of the perspective of the respective national law of the forum. Thus, […] it is generally not decisive whether the Convention is formally applied as particularly this or that national law, as it is to be interpreted autonomously and with regard to its international character." Express references to the need to interpret the CISG "autonomously" can also be found in a more recent Swiss case[326] as well as in a Spanish case,[327] an Austrian one[328] and various

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[321] *Geneva Pharmaceuticals Tech. Corp. v. Barr Labs. Inc.*, U.S. District Court for the Southern District of New York, 10 May 2002, 201 F.Supp. 2d 236.

[322] *Id.* at 281; for the statement referred to in the text, see most recently *Genpharm Inc. v. Pliva-Lachema A.S.*, U.S. District Court for the Eastern District Court of New York, 19 March 2005, available at: http://www.cisg.law.pace.edu/cisg/wais/db/cases2/050319u1.html; *Chicago Prime Packers, Inc. v. Northam Food Trading Co., et al.*, U.S. District Court, Northern District of Illinois, Eastern Division, 21 May 2004, 2004 U.S. Dist. LEXIS 9347; *Orbisphere Corp. v. United States*, U.S. Court of International Trade, 24 October 1989, 726 F. Supp. 1344, 1355 (Ct. Int'l Trade 1989).

[323] *Calzaturificio Claudia S.n.c. v. Olivieri Footwear Ltd.*, U.S. District Court, Southern District of New York, 6 April 1998, 1998 U.S. Dist. Lexis 4586.

[324] See e.g. *Medical Marketing International, Inc. v. Internazionale Medico Scientifica, S.r.l.*, U.S. District Court, Eastern District of Louisiana, 17 May 1999, 1999 WL 311945 (E.D. La.), stating that "under CISG, the finder of fact has a duty to regard the "international character" of the Convention and to promote uniformity in its application. CISG Article 7".

[325] Gerichtspräsident Laufen, 7 May 1993, available at http://cisgw3.law.pace.edu/cisg/wais/db/cases2/930507s1.html.

[326] Handelsgericht Aargau, 26 September 1997, available at http://www.unilex.info/case.cfm?pid=1&do=case&id=404&step=FullText.

very recent Italian court decisions rendered by the aforementioned "enlightened minority" of Italian courts.[329]

In Germany, some courts have simply referred to the need to interpret the CISG with regard to its international character and to the need to promote its uniform application,[330] but others have gone further. In 1996, for instance, the German Supreme Court stated that "the CISG is different from German domestic law, whose provisions and special principles are, as a matter of principle, inapplicable for the interpretation of the CISG (Art. 7 CISG)".[331] And it is this reasoning that has led the Court of Appeal of Karlsruhe to state that "German legal concepts such as '*Fehler*' and '*zugesicherte Eigenschaften*' are therefore not transferable to the CISG".[332] More recently, in 2005, the German Supreme Court stated that "insofar as the Court of Appeals refers to [various German] judgments […] in analyzing the question whether, at the time the risk passed, the delivered meat conformed with the contract within the meaning of Arts. 35, 36 CISG, it ignored the fact that these decisions were issued before the CISG went into effect in Germany and refer to § 459 BGB […]. The principles developed there cannot simply be applied to the case at hand, although the factual position – suspicion of foodstuffs in transborder trade being hazardous to health – is similar; that is so because, in interpreting the provisions of CISG, we must

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[327] See Audiencia Provincial de Valencia, 7 June 2003, available at http://cisgw3.law.pace.edu/cases/030607s4.html, stating that "[s]cholars maintain that the international character of the Convention obliges an autonomous interpretation of the Convention independent of domestic law, for this purpose, it is necessary to adopt a different methodology than used to apply domestic law. The only way to assure the uniformity of the Convention is to take into account decisions from tribunals of other countries when applying the Convention and to consult expert opinions of scholars in the subject, in order to achieve uniformity." For a favourable comment on this decision when discussing the uniform interpretation of the CISG, see *Perales Viscasillas*, Spanish Case Law on the CISG' in: Quo Vadis CISG?, supra note 28, p. 235, 240-241.

[328] See Austrian Supreme Court, 23 May 2005, available at http://cisgw3.law.pace.edu/cases/050523a3.html, stating that "[t]he CISG creates substantive law […] and is to be interpreted autonomously in accordance with CISG Art. 7. Therefore, discussions on the Austrian legal situation […] have to be omitted".

[329] See, apart from the court decisions cited in notes 298-300, Tribunale di Modena, 9 December 2005, available at http://www.cisg-online.ch/cisg/urteile/1398.pdf.

[330] See, e.g, Oberlandesgericht Frankfurt a.M., 20 April 1994, available at http://www.cisg-online.ch/cisg/urteile/125.htm.

[331] German Supreme Court, 3 April 1996, available at http://cisgw3.law.pace.edu/cisg/wais/db/cases2/960403g1.html.

[332] Oberlandesgericht Karlsruhe, 25 June 1997, available at http://cisgw3.law.pace.edu/cisg/wais/db/cases2/970625g1.html.

consider its international character and the necessity to promote its uniform application and the protection of goodwill in international trade (Art. 7(1) CISG)".[333]

## 3. Recourse to foreign case law

As already pointed out twice,[334] for the CISG to be applied in conformity with "the need to promote uniformity in its application", courts of one jurisdiction must take into account what the courts of another jurisdiction have already done. The issue is, however, whether courts do so. From the country reports one can infer that generally they do not do so in Argentina,[335] nor in Croatia,[336] the Czech Republic,[337] Denmark,[338] France,[339] Germany,[340] or some other countries.[341]

Still, there are instances in which courts of one jurisdiction, including some of the aforementioned jurisdictions, have relied on decisions rendered by courts of another jurisdiction. The most famous decision[342] in this respect is that of the Tribunale di Vigevano rendered in 2000. When dealing with some of the typical issues raised by the CISG, such as party autonomy, no-

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[333] German Supreme Court, 2 March 2005, available at http://cisgw3.law.pace.edu/cisg/wais/db/cases2/050302g1.html.

[334] See supra the text accompanying notes 32 ff. and 115.

[335] See *Noodt Taquela*, supra note 10, at 5.

[336] See *Baretić/Nikšić*, supra note 12, at 102.

[337] See *Rozehnalová*, supra note 72, at 110.

[338] See *Lookofsky*, supra note 49, at 125.

[339] See *Witz*, supra note 50, at 137.

[340] See *Magnus*, supra note 52, at 156, where the author also refers to an exception to the rule.

[341] See, as regards Slovenia, *Mozina*, supra note 79, at 270, stating that in Slovenian courts, "cases neither a homeward trend nor interpretation according to Art. 7 CISG can be established."

[342] For papers on this decision, see *Ferrari*, Problematiche tipiche della Convenzione di Vienna sui contratti di vendita internazionale di beni mobili risolte in una propsettiva uniforme, Giurisprudenza italiana 2001, 281 ff.; *Ferrari*, Tribunale di Vigevano: Specific Aspects of the CISG Uniformly Dealt with, 20 Journal of Law and Commerce 225 ff. (2001); *Ferrari*, Internationales Kaufrecht einheitlich ausgelegt, Internationales Handelsrecht 2001, 56 ff.; *Mazzotta*, supra note 73, at 437 ff.; *Rosati*, Anmerkung zu Trib. Vigevano, Internationales Handelsrecht 2001, 78 ff.; *Veneziano*, Mancanza di conformità delle merci ed onere della prova nella vendita internazionale: un esempio di interpretazione autonoma del diritto uniforme alla luce dei precedenti stranieri, Diritto del commercio internazionale 2001, 509 ff.

tice of non-conformity and burden of proof, the court referred to an unprecedented number – 40 – of foreign court decisions[343] and arbitral awards,[344] thus "show[ing] a certain willingness to take into consideration foreign decisions and […] a depth of knowledge and research of foreign case law which has not been very common among courts of many countries".[345]

The Tribunale di Vigevano is not the only Italian court to have extensively referred to foreign decisions. In 2002, the Tribunale di Rimini,[346] in a very well received decision,[347] also did so. Indeed, like the Tribunale di Vigevano, the Tribunale di Rimini also took into account the need to promote uniformity in the CISG's application and cited 35 foreign decisions and arbitral awards.[348] Similarly, in three more recent decisions, rendered on 25 February 2004,[349] on 31 March 2004[350] and on 11 January 2005,[351] the Tribunale di Padova cited 40, 24 and 14 foreign decisions respectively. In an even more recent decision, the Tribunale di Padova referred to a smaller number of foreign decisions, as the main issue the court had to deal with related only marginally to the CISG.[352] More recently, the Tribunale di

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[343] In its decision, the court referred to court decisions form Austria, France, Germany, the Netherlands, Switzerland and the United States.

[344] In its decision, the court referred to two ICC arbitral awards.

[345] *Mazzotta*, supra note 73, at 438.

[346] See Tribunale di Rimini, 26 November 2002, available at http://cisgw3.law.pace.edu/cisg/wais/db/cases2/021126i3.html.

[347] For favourable comments on the decision of the Tribunale di Rimini, see Ferrari, International Sales Law and the Inevitability of Forum Shopping: A Comment on Tribunale di Rimini, 8 Vindobona Journal of International Commercial Law and Arbitration 1 ff. (2004); *Graffi*, Spunti in tema di vendita internazionale e forum shopping, Diritto del commercio internazionale 2003, 807 ff.; *Mecarelli*, A propos du caractère inévitable du Forum Shopping dans la vente internationale, Revue de droit des affaires internationales 2003, 935 ff.

[348] In its decision, the Tribunale di Rimini referred to court decisions rendered in Austria, Belgium, France, Germany, Switzerland, the Netherlands and the United States, as well as one Hungarian arbitral award.

[349] Tribunale di Padova, 25 February 2004, available at http://cisgw3.law.pace.edu/cases/040225i3.html.

[350] Tribunale di Padova, 31 March 2004, available at http://cisgw3.law.pace.edu/cases/040331i3.html; for a comment, see *Ferrari*, La disciplina sostanziale della vendita internazionale ed il saggio d'interessi' Giurisprudenza di merito 2004, 1069 ff.

[351] Tribunale di Padova, 11 January 2005, available at http://www.unilex.info/case.cfm?pid=1&do=case&id=1005&step=FullText.

[352] See Tribunale di Padova, 10 January 2006, available at http://cisgw3.law.pace.edu/cases/060110i3.html.

Rovereto referred to two German decisions when dealing with an issue regarding jurisdiction over contracts governed by the CISG.[353]

Italian courts, however, are not the only ones to take into account decisions rendered abroad. In its decision *Chicago Prime Packers, Inc. v. Northam Food Trading Co., et al.*,[354] the U.S. District Court for the Northern District of Illinois (Eastern Division) cited 7 foreign decisions,[355] all of which it found in UNILEX,[356] a "reasoned collection of case law and an international bibliography on the CISG";[357] this decision "cited more foreign cases than any other previous American ruling on the UN Sales Convention".[358] Prior to this decision, few US courts had cited any foreign decisions at all in CISG cases.[359] More often than not, United States courts had not even bothered

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[353] See Tribunale di Rovereto, 24 August 2006, available at http://www.cisg-online.ch/cisg/urteile/1374.pdf.

[354] *Chicago Prime Packers, Inc. v. Northam Food Trading Co., et al.*, U.S. District Court, Northern District of Illinois, Eastern Division, 21 May 2004, 2004 U.S. Dist. LEXIS 9347.

[355] In its decision, the U.S. District Court referred to decisions rendered by Dutch, German and Italian courts.

[356] For a comment on UNILEX as a tool to promote the CISG's uniform application, see *Liguori*, "UNILEX": A Means to Promote Uniformity in the Application of CISG, Zeitschrift für Europäisches Privatrecht 1996, 600 ff.

[357] *Bonell/Liguori*, supra note 28, (Part I), at 147 note 1.

[358] *Teiling*, Case Analyis of Chicago Prime Packers v. Northam Food Trading, Uniform Law Review 2004, 431, 435.

[359] See *Barbara Berry, S.A. de C.V. v. Ken M. Spooner Farms, Inc.*, U.S. District Court, Western District Washington at Tacoma, 13 April 2006, 2006 WL 1009299 (W.D.Wash.) (citing one Swiss court decision); *Amco Ukrservice & Prompriladamco v. American Meter Company*, U.S. District Court, Eastern District of Pennsylvania, 29 March 2004, 2004 WL 692233 (E.D.Pa.) (citing two German decisions, both of which were taken from the Pace University website referred in n 78); *Usinor Industeel v. Leeco Steel Products*, U.S. District Court for the Northern District of Illinois, Eastern Division, 28 March 2002, 209 F.Supp. 2d 880 (citing one Australian case); *St. Paul Guardian Insurance Company et al. v. Neuromed Medical Systems & Support et al.*, U.S. District Court for the Southern District of New York, 26 March 2002, WL 465312 (S.D.N.Y.) (referring to 3 German cases); Medical *Marketing v. Internazionale Medico Scientifica*, U.S. District Court, Eastern District of Louisiana, 17 May 1999, 1999 WL 311945 (E.D. La.) (citing one decision rendered by the German Supreme Court).
It should be noted that from the text of two US court decisions one can gather that the courts had looked at foreign decisions before rendering their decisions; see *Shuttle Packaging Systems v. Tsonakis et al.*, U.S. District Court, Western District of Michigan, Southern Division, 17 December 2001, 2001 WL 34046276 (W.D.Mich.) at *8, stating that "The international cases cited by Defendants are

to look for foreign case law – which, given the previously mentioned homeward trend of United States courts, is not surprising –, but had simply (and incorrectly)[360] stated that there was virtually no case law on the CISG,[361] at

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not apposite to this discussion because they concern the inspection of simple goods and not complicated machinery like that involved in this case"; Zapata Hermanos v. Hearthside Baking, U.S. District Court, Northern District of Illinois, Eastern Division, 28 August 2001, 2001 WL 1000927 (N.D. III) at *4, stating that "That distorted reading of the language is clearly refuted by the decisions cited at [seller] Mem. 4 from other countries' courts and arbitral tribunals."

In one case, a federal Court of Appeals referred to its unsuccessful efforts to locate foreign court decisions on the issue it had to deal with; see *MCC-Marble Ceramic Center v. Ceramica Nuova D'Agostino*, U.S. Circuit Court of Appeals (11th Circuit), 29 June 1998, available at http://cisgw3.law.pace.edu/cases/980629u1.html.

[360] For critical comments see also *Hartwig*, Schmitz-Werke & Co. v. Rockland Industries Inc. and the United Nations Convention on Contracts for the International Sale of Goods (CISG): Diffidence and Developing International Legal Norms, 22 Journal of Law and Commerce 77, 98 (2003).

[361] See *Chicago Prime Packers, Inc. v. Northam Food Trading Co.*, U.S. Court of Appeals (7th Circuit), 23 May 2005, 2005 WL 1243344 (7th Cir. (Ill.)) (stating that "there is little case law under the CISG"); *Ajax Tool Works, Inc., Plaintiff, v. Can-Eng Manufacturing Ltd., Defendant*, U.S. District Court, Northern District of Illinois, Eastern Division, 29 January 2003, 2003 Westlaw 22187 (N.D.Ill., Jan 30, 2003) (stating that "case law interpreting and applying the CISG is scant"); *Usinor Industeel, v. Leeco Steel Products, Inc.*, U.S. District Court for the Northern District of Illinois, Eastern Division, 28 March 2002, 209 F. Supp. 2d 880, 884 (N.D. Ill. 2002) (stating the same); *MCC Marble Ceramic Center, Inc. v. Ceramica Nuova d'Agostino, S.p.A.*, U.S. Circuit Court of Appeals (11th Circuit), 29 June 1998, 144 F.3d 1384, 1389 (11th Cir.1998) (stating that ""[d]espite the CISG's broad scope, surprisingly few cases have applied the Convention"); *Supermicro Computer v. Digitechnic*, U.S. District Court, Northern District of California, San Francisco Division, 30 January 2001, 2001 U.S. Dist. LEXIS 7620 (stating the same); *Calzaturificio Claudia v. Olivieri Footwear*, U.S. District Court, Southern District of New York, 6 April 1998, 1998 Westlaw 164824 (stating that "there is little to no case law on the CISG in general"); *Helen Kaminski v. Marketing Australian Products*, U.S. District Court, Southern District of New York, 21 July 1997, Westlaw 414137 (1997) (stating the same); *Filanto v. Chilewich*, U.S. District Court, Southern District of New York, 14 April 1992, 789 F. Supp. 1229, 1237 (S.D.N.Y. 1992) (stating that "there is as yet virtually no U.S. case law interpreting the Sale of Goods Convention"); *Delchi Carrier SpA v. Rotorex Corp.*, U.S. Circuit Court of Appeals (2d. Cir.), 6 December 1995, 71 F.3d 1024, 1027-28 (2d Cir. 1995) (observing that "there is virtually no case law under the Convention"); for a similar (incorrect) statement in legal writing, see *Brannelly*, The United States Grant of Permanent Normal Trade Status to China: A Recipe for

times when foreign decisions were readily available. Whether the *Chicago Prime* case will have the same effect in the United States that the decision by the Tribunale di Vigevano has had in Italy is, however, doubtful, since in a more recent decision, the same U.S. District Court that had rendered *Chicago Prime* not only avoided any reference to foreign decisions, but even rejected the autonomous interpretation of the CISG in favour of a "nationalistic" interpretation: it stated in respect of "excuse" under Article 79 CISG that "case law interpreting the Uniform Commercial Code's ("U.C.C.") provision on excuse provides guidance for interpreting the CISG's excuse provision since it contains similar requirements as those set forth in Article 79."[362]

Courts of other countries have also started to refer to foreign case law, although not as extensively as the Italian courts. This is true for instance for Belgian courts: in a 2002 decision, the Rechtbank van Koophandel Hasselt[363] referred to one German and one Swiss decision; on two earlier occasions, that same court had cited two different Austrian decisions (both rendered by the Austrian Supreme Court).[364]

On several occasions, German courts – not only lower courts,[365] but also the German Supreme Court[366] – have referred to (a limited number of) for-

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Tragedy or Transformation?, 25 Suffolk Transnational Law Review 565, 572-573 (2002); *Pistor*, The Standardization of Law and Its Effect of Developing Economies' (50) American Journal of Comparative Law 97, 111 (2002).

362 *Raw Materials Inc. v. Manfred Forberich GmbH & Co. KG*, U.S. District Court, Northern District of Illinois, Eastern Division, 6 July 2004, 2004 WL 1535839 (N.D.Ill).

363 Rechtbank van Koophandel Hasselt, 6 March 2002, available at http://www.law.kuleuven.ac.be/ipr/eng/cases/2002-03-06s.html.

364 See Rechtbank van Koophandel Hasselt, 28 April 1999, available at http://www.law.kuleuven.ac.be/ipr/eng/cases/1999-04-28.html; Rechtbank van Koophandel Hasselt, 2 December 1998, available at http://www.unilex.info/case.cfm?pid=1&do=case&id=809&step=FullText.

365 See Oberlandesgericht Hamburg, 25 January 2008, available at http://cisgw3.law.pace.edu/cases/080125g1.html, citing two Austrian Supreme court decisions as well as a Swiss Supreme Court decision; Oberlandesgericht Karlsruhe, 8 February 2006, available at http://www.cisg-online.ch/cisg/urteile/1328.pdf, citing a Swiss Supreme court decision as well as a decision rendered by a U.S. district court; Landgericht Neubrandenburg, 3 August 2005, available at http://cisgw3.law.pace.edu/cases/050803g1.html, citing one Russian arbitral award; Oberlandesgericht Karlsruhe, 20 July 2004, available at http://www.cisg-online.ch/cisg/urteile/858.pdf, citing a decision rendered by the Austrian Supreme Court; Landgericht Trier, 8 January 2004, available at http://cisgw3.law.pace.edu/cases/040108g1.html, citing a US court decision; Oberlandesgericht Köln, 14 October

eign cases. Similarly, Swiss courts,[367] including the Swiss Supreme Court,[368] have on various occasions cited foreign cases, as has the Austrian Supreme Court.[369]

In one instance, an Australian court has also referred to foreign case law,[370] as has a Canadian court,[371] a Danish court[372] as well as a French court.[373]

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2002, available at http://www.cisg-online.ch/cisg/urteile/709.htm, citing a Swiss Supreme Court decision as well as a decision by the Austrian Supreme Court.

366 See German Supreme Court, 9 July 2008, available at http://cisgw3.law.pace.edu/cases/080709g1.html, citing a decision rendered by the Italian Supreme Court as well as two decisions rendered by the Austrian Supreme Court; German Supreme Court, 2 March 2005, available at http://cisgw3.law.pace.edu/cisg/wais/db/cases2/050302g1.html, citing two decisions from the Austrian Supreme Court; German Supreme Court, 30 June 2004, available at http://www.cisg-online.ch/cisg/overview.cfm?test=847, citing a Dutch and a Canadian decision, as well as an ICC arbitral award and an award of the Arbitral Tribunal of the Stockholm Chamber of Commerce; German Supreme Court, 31 October 2001, available at http://cisgw3.law.pace.edu/cisg/wais/db/cases2/011031g1.html, citing one decision of the Austrian Supreme Court.

367 See also Kantonsgericht Appenzell Ausserrhoden, 9 March 2006, available at http://www.cisg-online.ch/cisg/urteile/1375.pdf, citing one German and one Austrian decision; Handelsgericht Aargau, 5 November 2002, available at http://cisgw3.law.pace.edu/cisg/wais/db/cases2/021105s1.html, citing one German court decision; see also Obergericht Kanton Luzern, 8 January 1997, available at http://cisgw3.law.pace.edu/cases/970108s1.html, where the court, in dealing with the timeliness of the notice of non-conformity, referred to German, Dutch and US practice, without, however, quoting specific cases.

368 See Swiss Supreme Court, 13 November 2003, available at http://cisgw3.law.pace.edu/cisg/wais/db/cases2/031113s1.html, citing two decisions rendered by the German Supreme Court, one rendered by a German court of appeals as well as one rendered by a Belgian court of appeals; Swiss Supreme Court, 28 October 1998, available at http://www.cisg-online.ch/cisg/urteile/413.htm, citing a decision rendered by the German Supreme Court.

369 See Austrian Supreme Court, 25 January 2006, available at http://cisgw3.law.pace.edu/cases/060125a3.html, citing one German Supreme court decision; Austrian Supreme Court, 13 April 2000, available at http://cisgw3.law.pace.edu/cisg/wais/db/cases2/000413a3.html, citing one decision rendered by the German Supreme Court; see also Austrian Supreme Court, 15 October 1998, available at http://cisgw3.law.pace.edu/cisg/wais/db/cases2/981015a3.html, citing one decision rendered by the German Supreme Court; Austrian Supreme Court, 6 February 1996, available at: http://cisgw3.law.pace.edu/cisg/wais/db/cases2/960206a3.html, citing one German decision.

The foregoing clearly shows that courts have overcome "the two critical obstacles that often limit capability of courts of taking foreign cases into account, namely the difficulty to retrieve foreign decisions and the difficulty to have access to foreign cases in a language understandable to the interpreter."[374] This opens the door to further applications of the CISG in compliance with the mandate set forth in Article 7(1) CISG. This certainly is a success.

## 4. The CISG's application beyond its sphere

This last chapter of this part of the General Report is dedicated to the issue of whether the CISG has an impact in courts that goes beyond its sphere of application, *i.e.*, whether courts have referred to the CISG, on the one hand, to solve issues relating to situations not governed by the CISG and on the other hand to interpret other uniform law instruments.

As regards the first question, the overall answer is obvious: courts have generally not relied on the CISG to solve issues relating to situations beyond the CISG's scope. Some country reports, such as the Argentinean one[375] as well as the Croatian,[376] the Czech,[377] the Danish,[378] the Slovenian[379] and the Uruguayan one[380] make this very clear.

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370 See *Downs Investments v. Perwaja Steel*, Supreme Court of Queensland, 17 November 2000, available at http://cisgw3.law.pace.edu/cisg/wais/db/cases2/001117a2.html, citing a US court decision.

371 See *Diversitel v. Glacier*, Supreme Court of Justice, Ontario, 6 October 2003, available at: http://cisgw3.law.pace.edu/cisg/wais/db/cases2/031006c4.html, citing a German court decision.

372 See Maritime and Commercial Court of Copenhagen, 31 January 2002, available at http://www.cisg.dk/DANISH_COMMERCIAL_COURT31012002.HTM, citing two Dutch decisions and a German one.

373 See Cour d'Appel de Grenoble, 23 October 1996, available at http://cisgw3.law.pace.edu/cisg/wais/db/cases2/961023f1.html, referred to also by *Witz*, supra note 50, at 137.

374 *Torsello*, supra note 35, at 216.

375 See *Noodt Taquela*, supra note 10, at 6, stating that "there are not reported cases in Argentina on the use of the CISG in relation to contracts not covered by its sphere of application."

376 See *Baretić/Nikšić*, supra note 12, at 102, stating that "there is no empirical evidence that the Croatian courts used the CISG in relation to contracts not covered by its sphere of application."

377 See *Rozehnalová*, supra note 72, at 110.

In exceptional cases the CISG has nevertheless been relied on to solve issues that did not fall within its sphere of application. In France, for instance, where the Civil code does not contain any rules on formation of contract, the Supreme Court turned to Article 14 CISG for inspiration when having to draw a line between an offer and a mere invitation to make an offer (*invitatio ad offerendum*).[381] In England as well, the CISG has served as a "source of inspiration"[382] in purely domestic cases.[383]

In Israel, the CISG was relied on in one (international) case in which it was – for temporal reasons – not applicable.[384]

In Italy, a court of first instance[385] "had to deal with a dispute regarding a claim for restitution stemming from a purely domestic transaction. However, after reaching a preliminary solution on the sole basis of the analysis of Article 2033 of the Italian Civil code (a solution which in fact did not entirely correspond to the literal interpretation of the provision), the court tried to corroborate its solution by referring to the text of Article 81(2) CISG."[386]

In Spain, the Supreme Court resorted to the CISG twice to corroborate solutions reached on the basis of Spanish domestic law in respect of contracts not governed the CISG, namely a lease contract and a contract for the sale of an immoveable.[387] Interestingly, the German Supreme Court also relied on the CISG when dealing with a contract for the sale of an immoveable.[388]

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[378] See *Lookofsky*, supra note 49, at 127, stating that "[t]here do not appear to have been any reported instances where Danish courts have used the CISG in relation to contracts not covered by its sphere of application."

[379] See *Možina*, supra note 79, at 270.

[380] See *Fresnedo de Aguirre*, supra note 16, at 335.

[381] See *Witz*, supra note 50, at 138, also pointing out why this resort to the CISG may have occured: "Cette source d'inspiration s'éclaire d'autant mieux que la Chambre commerciale s'est prononcée à la lumière de l'avis du Conseiller Jean-Pierre Plantard, qui faisait partie de la délégation française à la Conférence diplomatique de Vienne d'avril 1980."

[382] *Andersen*, supra note 9, at 308.

[383] See *The Square Mile Partnership Limited v. Fitzmaurice McCall Limited*, Court of Appeal (Civil Division), 18 December 2006, available at http://cisgw3.law.pace.edu/cases/061218uk.html; *ProForce Recruit Ltd v Rugby Group Ltd.*, Court of Appeal (Civil Division), 17 February 2006, available at http://cisgw3.law.pace.edu/cases/060217uk.html.

[384] See *Shalev*, supra note 14, at 185.

[385] See Tribunale di Bergamo, 19 April 2006, Corriere del merito 2006, 835.

[386] *Torsello*, supra note 35, at 220. (footnote omitted)

[387] See *Garcia Cantero*, supra note 125, at 278.

[388] See German Supreme Court, 24 March 2006, Neue Juristische Wochenschrift 2006, 1960 ff.; see also German Supreme Court, 18 October 2000, Neue Ju-

In New Zealand, recourse to the CISG in cases in which it was not applicable seems to be more common practice. "In fact in all the cases [in which the CISG has been referred to] the CISG provisions are used to back up a court's interpretation of domestic law."[389] This approach was based on the reasoning that "there was something to be said for the idea that New Zealand domestic contract law should be generally consistent with the best international practice."[390]

As for whether courts have resorted to the CISG to interpret other uniform law instruments (interconventional interpretation), the answer for most countries[391] is, again, that courts do not adopt that approach, except in a (very) limited number of cases.

This statement perfectly describes the Italian situation. While courts there have not generally used interconventional interpretation,[392] in (very) limited cases (very few) courts have done so. They have adopted the approach in interpreting certain concepts in the Brussels 1 Regulation, in particular, the concepts of "sale of goods" and "place of delivery" referred to in Article 5(1)(b) of the Regulation. The first Italian court to use this approach was the Tribunale di Padova,[393] which held in 2006 (as also pointed out by the drafter of the Italian country report)[394] that "the concept of 'sale of goods' is not defined by the Regulation. It would not be appropriate to resort to domestic law definitions, as this would impair a uniform application of the Regulation across the Member States. An 'autonomous' interpretation must be pursued. To this end, it is useful to resort to the CISG […]. The CISG, ratified in Italy by Law n. 765 of 11 December 1985 and entered into force on 1 January 1988, although it is not a Convention about procedure, but 'merely' a substantive convention […]. Recourse to the CISG is proper because the concept that needs to be determined (sale of goods) is of a sub-

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ristische Wochenschrift 2001, 221 ff., referring to Article 19 CISG when having to decide whether a reply to an offer relating to a lease contract that modifies the offer amounts to an acceptance.

389 *Butler*, supra note 15, at 254.

390 *Ibid.*, citing to *Attorney-General v. Dreux Holdings Ltd.*, (1996) 7 TCLR 617.

391 As regards Argentina, see *Noodt Taquela*, supra note 10, at 6; as regards Croatia, see *Baretić/Nikšić*, supra note 12, at 102; as regards the Czech Republic, see *Rozehnalová*, supra note 72, at 110; as regards Denmark, see *Lookofsky*, supra note 49, at 127; as regards France, see *Witz*, supra note 50, at 138; as regards Israel, see *Shalev*, supra note 14, at 186; as regards Slovenia, see *Možina*, supra note 79, at 270; *Garcia Cantero*, supra note 125, at 278; as regards Uruguay, see *Fresnedo de Aguirre*, supra note 16, at 336.

392 See *Torsello*, supra note 35, at 221.

393 See Tribunale di Padova, 10 January 2006, available at http://cisgw3.law.pace.edu/cases/060110i3.html.

394 See *Torsello*, supra note 35, at 222.

stantive nature and, in consideration of the prominent role the CISG plays at the international level and in consideration of its 'expansive' nature. While it is true that the CISG constitutes an autonomous set of rules, it does not mean that its concepts are not applicable outside the CISG itself. It is not a coincidence that the European legislature used the CISG as a reference for drafting Directive 1999/44/EC of the European Parliament and of the Council of 25 May 1999, relating to certain aspects of the sale of consumer goods and associated guarantees." More recently, the Italian Supreme Court also interpreted the Brussels 1 Regulation in light of the CISG.[395]

Resort to the CISG to interpret the Brussels 1 Regulation also occurred in Germany, where as recently as June 2008 the Oberlandesgericht Karlsruhe used the CISG to interpret the concept of "sale of goods" referred to in Article 5(1)(b) of the Regulation.[396]

## IV. The CISG's impact on legislators

### 1. From very little – direct – impact …

Commentators have often stated that the CISG has had an impact on domestic legislation.[397] This last part of the General Report is dedicated to examining whether this claim is correct. If it is, there are obvious implications for assessing the CISG's success. For this claim to be correct, of course, it is not necessary for the CISG to have influenced the domestic legislation of every or even most countries.

Venezuela, for instance, has not succumbed to the "expansive reach" of the CISG mentioned earlier; not only has the CISG not entered into force there, it has had no impact on Venezuelan domestic legislation.[398] The same is true as for Brazil,[399] although the CISG's lack of impact on domestic legislation there is rather more surprising because there has been a recent major

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[395] See Italian Supreme Court, 27 September 2006, available at http://www.unilex.info/case.cfm?pid=1&do=case&id=1153&step=FullText; for an opinion to the contrary rendered, however, before the decision by the Italian Supreme Court just referred to, see Tribunale di Rovereto, 24 August 2006, available at http://www.unilex.info/case.cfm?pid=1&do=case&id=1147&step=FullText.

[396] See Oberlandesgericht Karlsruhe, 12 June 2008, available at http://cisgw3.law.pace.edu/cases/080612g1.html; see also Oberlandesgericht Oldenburg, 20 December 2007, Internationales Handelsrecht 2008, 112, 118; *contra* Oberlandesgericht Dresden, 11 June 2007, Internationales Handelsrecht 2008, 162, 165.

[397] See, apart from the authors cited supra in notes 39, *Magnus*, supra note 203, at 104 f.; *Ragno*, supra note 40, at 234.

[398] *Madrid Martinez*, supra note 27, at 343.

[399] See *de Aguilar Vieira*, supra note 26, at 25.

reform in areas covered by the CISG – specifically, a new Civil Code was promulgated in 2002. Still, "[e]ven though the commission in charge of its elaboration was composed of university professors [who were aware of the CISG], there has been no influence of the CISG on the new Civil Code."[400]

But have only non-contracting States resisted the CISG's "expansive reach"?

The country reports demonstrate that the CISG has also failed to influence domestic legislation in Contracting states. In Argentina, for instance, the "Convention has not had any influence on civil or commercial codes reforms.[401] This may not be terribly surprising, as the legislature had to focus its attention elsewhere, namely "to urgent political matters, in particular those that [were] raised with the economic emergence."[402]

Similarly, in Canada, "no […] jurisdiction specifically amended its domestic sales legislation to conform to provisions contained in the CISG."[403] In the common law jurisdictions, this was mainly due to the circumstance that "initial consideration of the CISG coincided with the adoption by the [Uniform Law Conference of Canada] of a reform of domestic sale of goods legislation based, at least in part, on article 2 of the [U.S.] Uniform Commercial Code. After this effort, there was thus little interest in revisiting reform of domestic sales legislation in light of the CISG itself."[404] As regards the civil law jurisdiction of Quebec, jurists there "were similarly engaged in a law reform project", the inspiration of which, however, "rest[ed] more with consistency with common law principles and the U.S. Commercial Code than with the CISG directly."[405]

In Denmark also, although "[t]he CISG has most certainly influenced the discussion on law reform",[406] it has not had any direct effect on domestic legislation. In other Scandinavian countries, however, "new domestic legislation […] paid considerable attention to the Vienna Convention text."[407]

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[400] *Ibid.*, where the author goes on to state that "despite the fact that the elaboration of the Civil Code has lasted over 25 years, Brazilian legislators have not taken into consideration the CISG project or the Vienna Convention of 1980."

[401] *Noodt Taquela*, supra note 10, at 6.

[402] *Ibid.*

[403] *McEvoy*, supra note 17, 67, where the author also states, however, that the statement just cited "is subject to the qualification that, as discussed above, the "*Commentaires du ministre de la Justice*" identify five articles of the *Code civil du Québec* as at least co-inspired by the CISG."

[404] *Id.* at 37.

[405] *Id.* at 41-42, where the author goes on to state that there are, however, 5 provisions of the Code civil du Québec that are co-inspired by the CISG; see *Id.* at 42 f. and 67.

[406] *Lookofsky*, supra note 49, at 127.

[407] *Ibid.*

Nevertheless, "the CISG has 'indirectly' affected domestic contract and sales law in Denmark, in that Denmark has implemented the EU Directives on Unfair Contract Terms and Consumer Guarantees, both of which contain provisions which were clearly inspired by the CISG."[408]

In France as well, the CISG seems to have had only an indirect impact on domestic legislation, again through the implementation of the EU Directive on Consumer Sales: the efforts to reform the French law of obligations which are underway seem to take little account of the CISG.[409]

In Italy, too, domestic legislation has not been directly influenced by the CISG. This is, however, not surprising: "since the Convention's adoption and its entry into force […] there have not been major changes of the provisions of the Italian Civil code dealing with commercial contracts."[410] Still, as in Denmark and France, the CISG has hand an indirect impact in Italy, through the transposition of EU Directives inspired by the CISG into the Italian legal system.[411]

In Mexico, however, the CISG has simply had no impact on local legislation at all.[412] The same can be said for New Zealand[413] and Switzerland[414] as well as Uruguay[415] and the United States,[416] with the exception of some rules to be found in the Louisiana Civil Code.[417]

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[408] *Id.* at 128.

[409] See *Witz*, supra note 50, at 140, stating that "[l]'impact de la Convention de Vienne sur l'Avant-projet de réforme de la Commission présidée par le Professeur Pierre Catala est faible, ce que l'on peut regretter."
For a paper examining in detail what the CISG could offer to French contract law, see *Lamazerolles*, Les apports de la Convention de Vienne au droit interne de la vente, 2003.

[410] *Torsello*, supra note 35, at 222.

[411] See *Id.* at 222-223, stating that "the only relevant changes which have occurred [in Italy] were the result of the transposition into the Italian legal system of the rules introduced at Community level by means of the EC Directives addressing contractual issues […]. As a result, it seems safe to affirm that the CISG's impact on the Italian legislator has been only indirect, if at all. Beyond doubts, the CISG had an impact on the EC legislator with respect to the drafting of the instruments mentioned above, and this in turn resulted, yet only indirectly, in the implementation in the Italian legal system of rules inspired by the CISG."

[412] See *Veytia*, supra note 11, at 245.

[413] See *Butler*, supra note 15, at 258.

[414] See *Widmer/Hachem*, supra note 54, at 296, where the authors also state that "if scholars were to refer to the Convention more often as a role model in their contributions on Swiss domestic law, this might provide an incentive for courts and legislators to harmonise such law with the CISG."

[415] See *Fresnedo de Aguirre*, supra note 16, at 336.

## 2. … to a very strong impact

In most of the countries discussed in the previous chapter, domestic legislation has been only indirectly affected, if at all, by the CISG. As was noted,[418] however, domestic sales legislation in the Scandinavian countries other than Denmark has been substantially influenced by the CISG.[419]

There are other countries as well where domestic legislation has been directly[420] impacted by the CISG, at times even to a much greater extent than in Scandinavia. In Estonia, for instance,[421] the CISG has had such influ-

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[416] See *Levasseur*, supra note 312, at 320-321, stating that "[a]n answer to the question regarding the extent to which the CISG has or may have influenced any discussion on law reform in the USA can be found in the federal Congressional Record and be expressed in a few words: the CISG has not influenced a discussion on law reform as far as the UCC is concerned [ …]."
See also *Flechtner*, Substantial Revisions to U.S. Domestic Sales Law (Article 2 of the Uniform Commercial Code), Internationales Handelsrecht 2004, 225, stating that "unlike those responsible for domestic sales legislation in some other States that have ratified the CISG, the drafters of the revisions to UCC Article [2] did not use the CISG as a model. They opted, instead, to work from the text of current UCC Article 2 (which long pre-dates the CISG), from other U.S. domestic legislation (such as the Uniform Electronic Transactions Act), and from their own original drafting."
Asserting that the CISG cannot function as a model for the revision of Article 2 UCC see *Gabriel*, The Inapplicability of the United Nations convention on the International Sale of Goods as a Model for the Revision of Article Two of the Uniform Commercial code, 72 Tulane Law Review 1995 ff. (1998).

[417] See *Levasseur*, supra note 312, at 322 ff.; for a detailed analysis of the relationship between the CISG and the Louisiana Civil code, see *Levasseur*, The Louisiana Experience, in: The 1980 Uniform Sales Law, supra note 18, p. 73 ff.

[418] See supra the text accompanying note 407.

[419] See *Ramberg*, Unification of Sales Law: A Look at the Scandinavian States, Uniform Law Review 2000, 201, 202; *Schlechtriem*, 10 Jahre CISG – Der Einfluß des UN-Kaufrechts auf die Entwicklung des deutschen und des internationalen Schuldrechts, Internationales Handelsrecht 2001, 12, 12.

[420] It goes without saying that in those countries as well, the CISG has had an "indirect" impact, via the transposition of the EU Directive on Consumer Sales which, as repeatedly stated, is heavily influenced by the CISG; for a paper on the transposition of the aforementioned directive in one of the Scandinavian countries – Finland –, see *Schulze Steinen*, Umsetzung der EU-Richtlinie über den Verbraucherkauf in Finnland, Internationales Handelsrecht 2003, 212 ff.

[421] See also the situation in Japan, where "a fundamental reform of the Civil Code [is in the making and in respect of which the] CISG's impact is not limited to sale-

ence.[422] As seems also to hold true – at least in part –[423] in various other post-socialist Eastern and Central European countries,[424] in Estonia the "CISG has had a strong impact on the most extensive part of the Civil Code – the Law of Obligations."[425] Unlike in Norway, Finland and Sweden,[426] where the CISG's impact is limited to sales law (as it is in Greece),[427] in Estonia the "CISG forms the basis not only for the sales contracts chapter but has also been an important source for drafting the general provisions, e.g. formation of contracts, breach of contract and exemption from liability, remedies."[428]

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specific topics but it goes far beyond to contract law in general and even to the whole civil code", *Hayakawa*, supra note 24, at 229.

422 For a paper on the CISG's influence on Estonian law, see *Sein/Kull*, Die Bedeutung des UN-Kaufrechts im estnischen Recht, Internationales Handelsrecht 2005, 138 ff.

423 In Poland, it does not apear that the CISG has had the same impact on all general contract law issues; see *Zoll*, The Impact of the Vienna Convention on the International Sale of Goods on Polish Law, With Some References to Other Central and Eastern European Countries, in Rabels Zeitschrift für ausländisches und internationales Privatrecht 2007, 81 ff., where the author points out, for instance, that while the Polish rules on formation have been heavily influenced by the CISG (at 83 ff.), the rules on remedies have not (at 89 ff.). The author also states the reason for this: "Changes in the rules concerning contract formation are probably easier to accommodate in a tranditional legalsystem. Reforming a country's system of remedies in the case of breach of contract requires much more fundamental changes in the traditional way of thinking", *Id.* at 98.

424 For this statement, see *Schlechtriem*, supra note 419, at 12.

425 *Varul*, CISG: a Source of Inspiration for the Estonian Law of Obligations, Uniform Law Review 2003, 209, 209.

426 For a reference to the CISG's influence on Swedish sales law, see *Sandstedt*, supra note 187, at 92.

427 See *Zervogianni*, supra note 13, at 177, where the author states that "[e]ven though it was not the CISG itself which triggered the Greek reform of the law of sales, an approximation between the domestic law and the CISG may be detected. A part of this approximation is consequential, in the sense that the Directive 99/44/EC, after which Greek law was modeled, was deeply influenced by the CISG. Hence the core element of all abovementioned texts is that the seller assumes the obligation to deliver to the buyer goods which are in conformity with the contract. The approximation of Greek law and CISG goes further than that, thus manifesting that the Greek legislative committee took the CISG provisions into account when drafting the new law."

428 *Varul*, supra note 425, at 209.

In Russia, too, the CISG has had a strong impact on domestic law:[429] many – although not all –[430] new rules on general contract law have been modelled after the CISG.[431]

The CISG's impact on issues beyond purely sales-related ones is not limited to post-socialist Central and Eastern European countries; in China, "as Professor Huixing Liang, who is a main drafter of [the 1999 Contract Law], has put it, the drafters of the law 'have consulted and absorbed rules of the CISG on offer and acceptance, avoidance (termination) with a *Nachfrist*, liabilities for breach of contract, interpretation of a contract and sales contract'. So it may be said that the CISG's impacts on CL (P.R.C.) are not only limited to sale-specific topics, it has had an impact on non sale-specific issues as well."[432]

In Germany, as has often been observed,[433] the CISG has "had […] a strong real impact on the final outcome of the "Schuldrechtsreform", a reform that is regarded as the most important revision of the BGB since 1900 when the Civil Code entered into force. This reform and likewise the CISG's influence were not limited to sale-specific matters but changed the general law of obligations. The changes therefore apply to all kinds of contracts."[434]

It is worth pointing out, however, that the CISG and domestic legislation modelled after it do not necessarily coincide completely: differences

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[429] See *Zoll*, supra note 423, at 87.

[430] The CISG has had only very little influence, however, on the Russian rules on formation of contracts; see *Zoll*, supra note 423, at 87 f.

[431] See *Talapina*, Russia, supra this book, p. 259, 263, stating that "[l]'acceptation de la Convention a influencé le contenu de la législation civile de la Russie […]. Par exemple, sous l'influence de la Convention de Vienne le Code civil de la Russie insère les catégories de la violation essentielle du contrat de la livraison (l'art. 523), les droits différenciées de l'acheteur aux conséquences inégales de la transmission de la marchandise de la qualité inadéquate (l'art. 475), la règle sur l'obligation du vendeur livrer la marchandise libre de tout droit ou prétention d'un tiers (l'art. 460), l'établissement d'un délai pour examiner et trouver les manquements de la marchandise (l'art. 477), la précision des obligations de l'acheteur pour l'acceptation des marchandises (l'art. 484), les règles sur les dommages-intérêts abstraites (l'art. 524)."

[432] *Han*, supra note 57, at 84.

[433] See *Schlechtriem*, Einleitung, in: Kommentar zum Einheitlichen UN-Kaufrecht, supra note 77, p. 27, 35.

[434] *Magnus*, supra note 52, at 159-160, where the author also states that "most basic concepts of the CISG and a number of its formulations have been implanted into the BGB. And partly this has been done in the form that CISG provisions had been given by the Consumer Sales Directive. Thus, the CISG has crept into German domestic law largely in an indirect way", *Id.* at 160.

may – and often actually do – exist, as the legislators have – generally –[435] not taken over the CISG *tel quel*.[436] This is true also for legislatures in those countries that have enthusiastically embraced the teachings of the CISG, such as China. Chinese Contract Law differs from the CISG, for instance, in its definition of fundamental breach, even though the CISG was used as a model.[437] There are also other differences relating, among others things, to the issue of conformity of the goods sold,[438] exemption from liability,[439] avoidance of contract,[440] etc.

In Germany, too, a comparison between the CISG and its German "offspring"[441] shows that there are some – not necessarily minor – differences.[442] One such "major theoretical difference between the CISG and present German contract law […] concerns the question whether a party in breach should be strictly liable in damages – with a very limited possibility of exemption – or whether fault should be required. The former is the concept of the CISG (Art. 79) whereas the BGB still requires that the party in breach is at fault in order to become liable in damages (§ 280 (1) sent. 2 and § 651f (1) BGB)."[443]

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[435] But see the situation in Norway, where *Hagstrom*, CISG – Implementation in Norway, an approach not advisable, Internationales Handelsrecht 2006, 246 ff.

[436] For a similar assertion see, as regards the situation in the Czech Republic, *Rozehnalová*, supra note 72, at 111, where the author first states that "the legal regulation of purchase contract in the Commercial Code is highly similar to the regulation in the CISG and is based on the CISG", and then goes on to point out that "specific differences exist. The Convention was not taken over tel quel but its text was the ground for the Commercial Code provisions."
See also, in respect of the reform efforts underway in Japan on which the CISG is having a major impact, *Hayakawa*, supra note 24, at 230, stating that "it is probable that the new Code Civil will not take over the rules of CISG *tel quel*."

[437] See *Han*, supra note 57, at 88, stating that the "Chinese legal rule on criteria of a fundamental breach is not so strict like that of the CISG."

[438] *Id.* at 88 f.

[439] *Id.* at 89.

[440] *Id.* at 89 f.

[441] *Magnus*, supra note 52, at 160.

[442] See also *Herber*, The German experience, in: The 1980 Uniform Sales Law, supra note 18, p. 59, 67, stating that "there are many details where the CISG and the new German […] law differ from each other."

[443] *Ibid.*, where it is also stated, however, that under German law "in case of breach fault is presumed. The party in breach must prove that it was not at fault. The hurdle for this proof is rather high. Therefore, the difference to Art. 79 CISG which excuses a party only for impediments of performance beyond its control is in practice much less important than could be expected from the theoretical viewpoint."

In this rapporteur's opinion, the fact that there are differences between the CISG and domestic law influenced by it does not diminish the CISG's importance as a model or source of reference for domestic legislation. Instead, this shows that a domestic legislator must take into account other more country-specific considerations when drafting statutes or codes for purely domestic purposes.[444]

## V. Conclusion

It is clear from the foregoing that the impact the CISG has had on the members of the legal community – lawyers, judges and legal scholars – varies greatly from country to country. It also varies in relation to the various segments of the legal community: legal scholars appear to be, more often than not, both more aware of and more receptive to the CISG than practicing lawyers and judges.

As regards legislators, "the inclination to incorporate CISG into their national systems of law [also] differs considerably"[445] from country to country. Nevertheless, at least throughout Europe, within the EU, the CISG's impact on legislators appears homogenous. Of course, the CISG has entered into force in 24 out of the 27 EU Member States,[446] thus, "giving shape to a set of common rules and principles in the field of cross-border sales transactions [throughout the EU]."[447] More importantly, however, "this process prepared the ground for the intervention by […] EU institutions aimed at harmonizing the national laws on sale within the EU in the light of the CISG's model and to extend some of the principles underlying the CISG to a broader scope of application than simply sales law. As a result, the legal systems of the EU Member States (including those States which are not contracting parties to the CISG) have been to a smaller or a greater extent [shaped] after the likeness of the [CISG]."[448]

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For a reference to the issue of exemption as one of the important topics in relation to which the CISG and German law differ, see also *Herber*, supra note 442, at 67.

444 For a similar statement, rendered in respect of the reform efforts underway in Japan, *Hayakawa*, supra note 24, at 230, stating that "legislation is a long and complicated process of negotiations and discussions so that many other considerations should also be taken into account before we reach our final destination."

445 *Ramberg*, supra note 419, at 201.

446 Only the Ireland, Malta, Portugal and the United Kingdom have not yet entered the CISG into force; sse also *Andersen*, supra note 9, at 303.

447 *Troiano*, supra note 188, at 347.

448 *Ibid*.

The "most prominent example"[449] of this kind of – indirect – influence by the CISG is its influence on the European Consumer Sales Directive which, as mentioned already,[450] is clearly and to a very large extent based on the CISG.[451] "For the first time in such a considerable extent a non-European act, namely an international convention, officially plays the role as a model for an EU enactment. This choice is even more significant if one bears in mind that the Consumer Sales Directive is the most important European provision in the field of the law of contract, which affects the very heart, one may say, of the 'classical' law of contract and obligation. Hence, the Consumer Sales Directive is the living example of an indirect impact of the CISG on the legislation of EU Member States. This means that, whether they liked it or not, even those States which have refused so far to ratify the CISG have indirectly (*i.e.* through the filter of the EU Consumer Sales Directive) been 'contaminated' by the 'CISG virus'";[452] this has even led scholars who feared "the risk of a colonization of their centenary, or even millenary, legal traditions",[453] to label the European Consumer Sales Directive "a 'Trojan horse', created to permit uniform sales law to penetrate the domestic private law of sale through the back door."[454]

The European Consumer Sales Directive, however did not merely "adopt […] parts of the CISG's general structure and some of its definitions and provisions";[455] as pointed out in the report on "the CISG's Impact on the EU Legislation", "[i]n some cases the Consumer Sales Directive [went] even beyond the CISG by extending or generalizing principles laid down in the CISG or building original solutions which are not provided in the CISG."[456]

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449 *Magnus*, The CISG's Impact on European Legislation, in: The 1980 Uniform Sales Law, supra note 18, p. 129, 132.

450 See supra the text accompanying note 187 ff.

451 See, apart from the authors cited supra in note 187, *Micklitz*, Ein einheitliches Kaufrecht für Verbraucher in der EG?, Europäische Zeitschrift für Wirtschaftsrecht 1997, 229, 230, *Schlosser*, How to Apply Uniform Legal Rules, European Legal Forum 2008, 14, 20; *Schroeter*, UN-Kaufrecht und Europäisches Gemeinschaftsrecht, 2005, p. 38; *Troiano*, supra note 188, at 348.

452 *Troiano*, supra note 188, at 349-350.

453 *Id.* at 350.

454 *Raynard*, De l'influence communautaire et internationale sur le droit de la vente: quand une proposition de directive s'inspire d'une convention internationale pour compliquer, encore, le recours de l'acheteur, Revue trimestrielle de droit civil 1997, 1020, 1024.

455 *Magnus*, supra note 449, at 132.

456 *Troiano*, supra note 188, at 351.

The CISG constitutes a set of rules that, while basically[457] aimed at governing international b2b transactions, has very strongly influenced domestic b2c transactions.[458] This fact "shows […] that the main policy considerations on which the CISG is based correspond to basic commandments of justice which apply both to business and consumer transactions."[459] In light of this, what is the CISG if not a success, at least in Europe,[460] where it is not only applied more often[461] than elsewhere[462] but is also applied in ways that better conform to the mandate to promote uniformity in its application?

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[457] See, however, German Supreme Court, 31 October 2001, available at http://cisgw3.law.pace.edu/cases/011031g1.html, correctly pointing out that in exceptional cases the CISG may be applicable even to (international) consumer sales; in accord, in legal writing, *Ferrari*, Art. 2, in: Kommentar zum Einheitlichen UN-Kaufrecht – CISG, supra note 77, p. 79, 81.

[458] See *Magnus*, supra note 52, at 162, stating that "[i]t is astonishing enough that the Directive could borrow from an instrument for merchants."

[459] *Ibid*.

[460] For a word of caution in using "the CISG as a model for legal harmonization within Europe", see *Reimann*, supra note 83, at 128 f.

[461] See http://cisgw3.law.pace.edu/cisg/text/casecit.html.

[462] See *Reimann*, supra note 83, at 128.

# Questionnaire

## General information

Is the United Nations Convention on Contracts for the International Sale of Goods (hereinafter: CISG) in force in your country? If so, could you give a general account of how it is looked upon in your country and what efforts are being made to raise awareness of it being in force (in business circles, bar associations as well as universities)? If not, could you give a short account of the reasons which have led your legislator to not enter it into force? Are any efforts being undertaken to enter it into force?

## I. The CISG's impact on practicing lawyers

1. Are practicing lawyers aware of the CISG? If so, could you give a detailed account of how practicing lawyers have become aware of it and the impact of this awareness on the practice of law? In doing so, could you also examine the issue of whether this awareness has had any impact on the contents of standard contracts forms? Do practicing lawyers who are aware of the CISG really tend to exclude CISG as often suggested in legal writing? If so, could you elaborate on the reasons for this? If not, could you elaborate on why it appears that way?

2. Has the entry into force of the CISG in your country had any impact on the way practicing lawyers draft their briefs and memoranda? In other words, has the mandate to interpret the CISG in light of its international character and the need to promote uniformity in its application had any impact on the drafting of briefs and memoranda? Do you believe that in CISG related cases practicing lawyers tend to refer to more case law than in purely domestic disputes? Do you believe that in CISG related cases practicing lawyers tend to refer to more commentators than in purely domestic disputes? Do practicing lawyers cite to foreign legal writing and case law (thus complying with the aforementioned mandate) or do they solely cite to domestic sources and cases when dealing with CISG related disputes?

3. Do practicing lawyers use CISG solutions in purely domestic disputes to corroborate the results they want to reach?

## II. The CISG's impact on scholars

1. Could you give an account of how much attention scholars have devoted to the CISG both before and after its entry into force? Is it possible to identify a specific group of scholars (private international law scholars rather than contract law scholars) that more than any other one has focused its attention on the CISG? What impact does this specific group's focus on the CISG have on the awareness and application on the CISG? In devoting their attention to the CISG, have scholars mainly focused on the CISG itself or have they compared the CISG with their domestic law? Where such comparison has taken place, what was the intent behind it?
2. Were domestic law treatises affected by the entry into force of the CISG? To put it differently, can references to the CISG be found in works on your domestic contract and/or sales law? What could scholars do to promote awareness of the CISG? Is there a specific group of scholars that could/should do more other ones?
3. What impact has scholarly writing devoted to the CISG had in your country? In answering, could you also examine the role of scholarly writing on, for instance, legal practice (such as its impact on standard contract forms) as well as legal education?
4. Have scholars used interpretations of the CISG to interpret other uniform law instruments?

## III. The CISG's impact on courts

1. Has the CISG's entry into force had any impact on the style of court decisions? Following the entry into force of the CISG is it possible, for instance, to find more references to scholarly writing in common law courts and more citations to case law in the courts of civil law countries?
2. Are courts taking the aforementioned mandate to interpret the CISG in light of its international character and the need to promote uniformity in its application into account or have they shown a homeward trend? If the former, could you give examples? Or is it rather possible to discern a homeward trend? If so, what are the reasons for this? Could you give some examples?
3. Have courts in your country used the CISG in relation to contracts not covered by its sphere of application, for instance to justify or corroborate (domestic law) solutions adopted in areas where there is much dispute both in case law and scholarly writing?
4. Have courts relied on interpretations of the CISG to interpret other uniform law instruments?

## IV. The CISG's impact on legislators

1. To what extent has the CISG influenced the discussion of law reform in your country? In answering, could you also reply to the question of whether the CISG has triggered such discussion or whether it has "merely" given new impetus to such discussion, if at all? Could you also comment on whether the CISG's impact on such discussion was limited to sale-specific topics or whether it has had an impact on non sale-specific issues as well?

2. Did the CISG ultimately lead to law reform? If so, was the reform limited to sale-specific topics or did it concern non sale-specific issues as well? If not, could you give an account of the reasons for which there was either no reform at all or a reform that, however, was not modelled after the CISG?

3. Are there differences between the CISG and domestic law that has been modelled after the CISG? In other words, has the CISG been taken over *tel quel* or have there been adaptations? If there have been adaptations, what are the reasons for this?

4. Has domestic law modelled after the CISG been interpreted in a way that takes the interpretations of its model into account?

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