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## of the Faculty of Law in Belgrade

# Belgrade Law Review

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# АНАЛИ

## ПРАВНОГ ФАКУЛТЕТА У БЕОГРАДУ

ЧАСОПИС ЗА ПРАВНЕ И ДРУШТВЕНЕ НАУКЕ

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# EDITORIAL NOTE

More than 30 years have passed since the UN Convention on Contracts for the International Sale of Goods (CISG) was drafted and adopted, and 23 years since it entered into force. With 76 signatory states the CISG is the most widely accepted uniform law regulating the transactions in the area of international sales of goods to date and covers over two thirds of the world trade. It establishes a comprehensive code of legal rules governing the formation of contracts for the international sale of goods, the obligations of the buyer and seller, remedies for breach of contract and other aspects of the contract.

The Republic of Serbia (as a part of former Yugoslavia) was one of the first countries to ratify the CISG and incorporate it as its law for international sales. With dissolution of Yugoslavia the importance of the CISG for the region did not decrease. To the contrary, all former republics of Yugoslavia filed notifications of succession to the CISG and its importance further grew as it became the main source of law for hundreds of sales contracts concluded between trade partners from different countries established on this territory. Furthermore, the growing importance of the CISG for Serbia is marked by the fact that Serbian foreign trade is predominantly oriented to partners coming from the countries of the CEFTA region and the EU, the vast majority of them being signatories to the Convention. Consequently, Serbian courts and the Foreign Trade Court of Arbitration often have a chance to apply the CISG. However, as the experience in many other countries shows, its application is not always consistent. This is why it is particularly important to enable, not only scholars, but also judges and arbitrators to be informed of the current trends in application and interpretation of the CISG.

The process of unification of law does not require just the adoption of common rules – it must be followed by the uniform application of international legal instruments. In order to make the unification of international sales law a true success, we must constantly share our experiences in application of the Convention and other sources of international trade law. With this goal in mind, the University of Belgrade Faculty of Law hosted a large international conference on unification of sales law in No-

vember 2010 which gathered more than two hundreds of lawyers from Serbia and abroad who examined the most controversial issues under the Convention. The Editorial board would like to use this opportunity to thank all the organizers, sponsors and participants of this successful event as it represented a fruitful source for many contributions contained in this volume.

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# THE USE OF THE CISG IN DOMESTIC LAW*

*The article gives an overview of the use of the CISG to aid the development of contract law in the major common law jurisdictions. The aim of the article is to explore whether there is cross fertilisation in regard to the use of the CISG the idea being that the more the CISG is used in the domestic context to give content to do mestic law the more familiar and comfortable courts and counsel get with it and might, therefore, ultimately apply the CISG more regularly in international sales.*

Key words: *CISG. Interpretation. Development of domestic contract law ju risprudence.*

Generally, when the relationship between the CISG and domestic law is discussed, the principal focus is on stressing that domestic case law and doctrine may not be used to interpret CISG terms and that an autonomous international interpretation applied by all courts and tribunals is the ultimate aim.[1] Put another way, the fear expressed is that interpretation of the CISG by reference to domestic law concepts will taint the task of the

* This article started out as a contribution to the Uniform Sales Law Conference "The CISG at Its 30th Anniversary" in Belgrade in November 2010. In Belgrade, the paper specifically addressed the concepts of good faith and pre and post contractual conduct in contract interpretation from the common law perspective in particular how domestic common law courts, and in particular New Zealand courts, have used those concepts to develop their own jurisprudence. This paper, incorporating the conference paper, takes a wider view.

1 See I. Schwenzer, P. Hachem, "Art. 7", *Commentary on the UN Convention on the International Sale of Goods (CISG)*, (eds. P. Schlechtriem, I. Schwenzer), Oxford University Press, Oxford 2010[3], paras 9 et seq; B. Zeller "The Challenge of a Uniform

domestic court in a CISG case, which is to search for and give effect to the universal, autonomous meaning of the particular CISG provision in issue.

This paper looks at the relationship between the CISG and domestic law in a completely different way. It seeks to explore the extent to which (if any) the CISG has influenced domestic contract law developments. The author has chosen to focus on four common law[2] countries — the United Kingdom,[3] New Zealand,[4] Canada,[5] and Australia[6] — in order to explore the hypotheses that the use of the CISG in interpreting and developing domestic law can result in a greater awareness and use of the CISG itself in the courts, and in turn thereby enable judges and counsel to become more familiar with and comfortable in working with the CISG.

A databases search revealed that the domestic case law in which the application of the CISG (either as the applicable law or the comparator) was a significant factor is sparse. To some degree this result was not surprising because anecdotal evidence suggests that the knowledge of the CISG, especially in common law countries, is minimal.[7] The Australian/New Zealand database (AustLII) had the most entries under the used search term "international sale of goods"[8] which is most likely due to the materials included in the database.

The research did not reveal over all evidence of cross fertilisation. The only country where a cross fertilisation can be ascertained is New Zealand: the country where the CISG has been used most to aid the development of domestic contract law. Since New Zealand had only one CISG case the evidence is probably too tenuous to support the hypothesis of this paper.

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Application of the CISG Common Problems and their Solutions", *Macquarie Journal of Business Law (MqJlBLaw)*, 2006, 14.

[2] Of interest and for a later paper is the question whether civil law courts also use the CISG to aid their argument in regard to domestic law and if they do how they do it.

[3] The United Kingdom has not ratified the CISG.

[4] CISG in force since 1 October 1995.

[5] CISG in force since 1 May 1992.

[6] CISG in force since 1 April 1989.

[7] See overview of the standing of the CISG in various countries: F. Ferrari, *The CISG and its Impact on National Legal Systems*, Sellier, European Law Publishers, Munich 2009.

[8] For relevant case law: search term "international sale of goods": CanLII (49 entries legislation, academic articles, 12 cases in which the CISG had relevance); AustLII (296 entries, 14 Australian cases where the CISG had relevance; 3 New Zealand cases where the CISG had relevance); BaiLII (108 entries, 1 case where the CISG had relevance). The BaiLII entries included due to the search term numerous European Court of Justices decisions in regard to taxation or jurisdictional questions.

## 1. UNITED KINGDOM AND NEW ZEALAND

Articles 7 and 8 CISG hold a particular fascination for common law lawyers. They contain two concepts which were for a long time very foreign to common law: good faith (Article 7) and the use of pre– and post-contractual conduct as an aid to contract interpretation (Article 8). What is quite interesting is how the New Zealand courts and the House of Lords/the UK Supreme Court have actually used Article 7 and 8 CISG to develop their own jurisprudence in the area of contract interpretation. In addition, in New Zealand the CISG has been referred to in four cases to aid the development of domestic law other than in the area of Articles 7 and 8 CISG. Of the four jurisdictions examined, New Zealand has so far made the most use of the CISG as a reference point for the development of domestic law. To some degree this is a surprising result given the size of the country and its relative lack of exposure to international sale of goods litigation as compared to the other three, far larger jurisdictions. On the other hand it is perhaps not so surprising in that New Zealand courts are relatively open to foreign and international influences when shaping domestic law.[9]

The CISG has been in force in New Zealand since 1994.[10] However, it was not until June 2010 that the first substantive judgment on the CISG was delivered.[11] Nine judgments that cite the CISG can be found on New Zealand judgment databases,[12] and anecdotal evidence suggests

[9] P. Butler "The Use of Foreign Jurisprudence by the New Zealand Supreme Court", *Festschrift for Ingeborg Schwenzer* (forthcoming 2011).

[10] Sale of Goods Act (United Nations Convention) Act 1994, which annexes the CISG as a Schedule and provides that the CISG has the force of law as a code in New Zealand in place of other New Zealand laws (such as the Sale of Goods Act 1908).

[11] *Smallmon & Transport Sales & Anor* (High Court Christchurch, CIV 2009 409 000363, 30 July 2010, French J): The Smallmons operate a road transport and earthmov ing business in Queensland. In 2006, they purchased four trucks to use in their business from a New Zealand company, Transport Sales Limited. The trucks were then shipped to Queensland where the Queensland authorities refused to register them on the grounds of alleged non compliance with Australian vehicle standards. Although an exemption was later granted, the trucks are registered only on a restricted basis. As the contract did not address registration requirements, the Smallmons contended for an implied term that the trucks must be fit for purpose.

Justice French held there was no question that the CISG applied to the contract. The question was whether the implied warranties of fitness for purpose in Article 35(2) of the CISG were breached. As an interpretative aid, both parties had sought to rely on domestic law; however, French J confirmed that such law was inapplicable. Instead, her Honour distilled the applicable principles from international cases and commentary. According to these authorities, a seller is not generally responsible for compliance with the buyer's regulatory standards unless special circumstances applied. Here, none did. Thus, the claim failed.

[12] None of the cases undertook an in depth analysis of the CISG. In fact all those cases are used to back up a court's interpretation of domestic law: compare P. Butler

that commercial law firms in New Zealand exclude the CISG in their contracts. The CISG is hardly taught in law schools and overall the apathy in regard to the CISG is such that not even an opposition against the CISG exists in New Zealand.[13] In summary, the CISG has only limited presence in the New Zealand legal landscape.

As regards to the United Kingdom the obvious first point is that the CISG has not been adopted in the UK. Accordingly, its relevance to domestic litigation in any form is inevitably limited. That said, it has to be noted that the overall resistance to adopting the CISG appears to have decreased.[14] Lord Sainsbury of Turville from the Department of Trade and Industry[15] responded to a question by Lord Lester of Herne Hill QC in the House of Lords in 2005 that "[t]he UK intends to ratify the convention, subject to the availability of parliamentary time. There have been delays in the past for a number of reasons, but we propose to issue a consultation document in the course of the next few months to examine the available options".[16] However, more than five years later, no consultation document has yet been released.

While the level of opposition to the CISG in the UK has decreased, the remaining opposition is not insignificant. Much of the English resistance to ratification relates to scepticism about the practical effectiveness of the buyer's remedies provided under the CISG compared to the available remedies under English law. Another commonly raised concern is that the CISG is less suitable to commodity sales than the

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"New Zealand", *The CISG and its Impact on National Legal Systems* (ed. F. Ferrari), Sellier, European Law Publishers, Munich 2009, 251, 254. Therefore, those cases will be dealt with under I.1. and I.2.

[13] See for a general overview of the prevalence of CISG use and scholarship: P. Butler, *Ibid.*, 251.

[14] When the United Kingdom Department of Trade and Industry published a consultative document on this issue in 1989, it identified three advantages for British accession to the convention: uniformity in international sales law was desirable and the convention's rules would constitute "common ground" on which business might be transacted; secondly, a uniform law might reduce expensive litigation of preliminary issues as to the proper law of a contract; and, thirdly, accession would allow courts and arbitrators in the United Kingdom to have a market share in the resolution of disputes under the convention and to participate in the evolution of its jurisprudence [Department of Trade and Industry (UK), *United Nations Convention of International Sale of Goods: a consultative document,* Department of Trade and Industry, London 1989]. The Department of Trade and Industry issued another consultative paper in 1997 and based on the responses it received, the Department issued a position paper in February 1999 stating that the Convention should be brought into national law when there is time available in the legislative programme [Department of Trade and Industry (UK), *United Nations Convention on Contracts for the International Sale of Goods (Vienna Sales Convention)*, position paper, Department of Trade and Industry, London February 1999].

[15] Now called the United Kingdom Department for Business, Innovation and Skills (BIS).

[16] 669 Parl Deb, HL (5th ser) (2005) WA 86.

English Sale of Goods Act 1979 due, in part, to the CISG's stricter provisions on contract avoidance in the case of non-conforming goods and documents.[17] The hostility towards the CISG is common to both practitioners and academics working in the field in England.[18] Other than concerns regarding the legal consequences of the ratification of the CISG, one of the sceptics' concerns seems to be that the ratification of the CISG in the United Kingdom might lead to a reduction in the number of international arbitrations coming to England. In other words, the resistance might stem from the fear that an increase in the uniformity of the rules of international trade law might increase the opportunities for arbitration of international trade disputes in fora outside traditional centres such as the City of London.[19]

Despite the rather gloomy picture in regard to the CISG in the UK and New Zealand the courts in both jurisdictions have not been unaware of the CISG. The decisions discussed in this paper show that the CISG has been used, albeit in a limited way, as an aid to domestic contract law development. Would courts and tribunals follow especially New Zealand's foot-steps in using the CISG in developing their domestic law that in turn would lead to a more unified approach by courts and tribunals when applying the CISG. It is a case of mutual fertilisation. However, based on the New Zealand and United Kingdom experience that fertilisation seems to be more likely to occur in the smaller jurisdiction.[20]

### 1.1. Article 7(1) – Good faith

Article 7(1) states

> In the interpretation of this 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*. [emphasis added]

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[17] M. Bridge, "A Law for International Sales", *Hong Kong Law Journal (HKLJ)* 37/2007, 17, 22, 23, 40; B. Zeller "Commodity Sales and the CISG", *Sharing International Law Across National Boundaries: Festschrift for Albert H Kritzer on the Occasion of his 80th Birthday* (eds. C. B. Andersen, U. Schroeter), Wildy, Simmonds and Hill Publishing, London 2008, 627, 628.

[18] See M. Bridge, *Benjamin's Sale of Goods*, Sweet & Maxwell, London 2010[8], at 12 081 but for a Scottish take on the issue see A. Forte "The United Nations Convention on Contracts for the International Sale of Goods: Reason or Unreason in the United Kingdom", *University of Baltimore Law Review* 26/1997 51 66.

[19] Compare Hon. Justice J. Douglas "Arbitration of the International Sale of Goods Disputes under the Vienna Convention" (paper delivered at the Institute of Arbitra tor and Mediators Australia National Conference 2006) available at *http://cisgw3.law.pace.edu/cisg/biblio/douglas.html* (last accessed 28.10.2010).

[20] See in regard to the willingness to use foreign jurisprudence by the New Zealand Supreme Court: P. Butler (forthcoming 2011). It also has to be noted, of course, that the CISG is in force in New Zealand since 1 October 1995.

As readers will be aware, there has been a robust debate on the proper interpretation of the phrase "observance of good faith in international trade". Some authors and courts contend that Article 7(1) holds the contracting parties to a good faith standard in regard to their conduct.[21] Others argue that Article 7(1) concerns the interpretation of the CISG only and cannot be applied directly to individual contracts.[22] For present purposes it is not necessary to endorse one view over the other since what this paper is concerned with is whether and how "observance of good faith in international trade" has been used by New Zealand and UK courts.

Aside from specific types of contracts, insurance being the notable example, there is no recognised extra-contractual duty in UK law on one party to disclose facts that may turn out to be of importance to another. This can be contrasted with the position in other countries including Australia and Canada where the notion of good faith is more readily accepted.[23]

### *1.1.1. New Zealand*

In *Bobux Marketing v. Raynor Marketing*[24] the New Zealand Court of Appeal examined the question whether the express wording of a contract made it impossible to imply a term giving a party the right to terminate the agreement on reasonable notice. The majority held that a deviation from the express wording of the contract was not possible.[25] Thomas J, dissenting on that point, examined the development of the concept of good faith in common law, including references to the CISG and the UNIDROIT principles.[26] His Honour found that good faith was perceived "as loyalty to a promise"[27] and that there should be an obligation

[21] See OLG Brandenburg (18 Nov 2008) CISG online 1734; OLG Oldenburg (5 Dec 2000) CISG online 618; compare: N. Hofmann "Interpretation Rules and Good Faith as Obstacles to the UK's Ratification of the CISG and to the Harmonization of Contract Law in Europe", *Pace International Law Review (Pace Int'l LRev)* 22/2010, 145, 165.

[22] I. Schwenzer, P. Hachem, para 17; P. Schlechtriem, *Internationales UN Kau frecht*, Mohr, Tuebingen 2008, para 44; U. Schroeter "Freedom of contract: Comparison between provisions of the CISG (Article 6) and counterpart provisions of the Principles of European Contract Law", *Vindobona Journal* 6/2002, 257, 261.

[23] J.M. Paterson "Duty of good faith", *Law Institute Journal* 2000, 47; J.W. Carter, E. Peden "Good Faith in Australian Contract Law", *Australian Construction Law Newsletter* 94/2004, 6.

[24] [2002] 1 NZLR 506 (CA).

[25] *Bobux Marketing v. Raynor Marketing* [2002] 1 NZLR 506 [72] [77] per Blanchard J.

[26] *Bobux Marketing v. Raynor Marketing* [2002] 1 NZLR 506 [39].

[27] *Bobux Marketing v. Raynor Marketing* [2002] 1 NZLR 506 [41].

to perform in good faith, at least in long-term contracts. Thomas J relied solely on the language of good faith in Article 7(1) of the CISG to support his argument; he did not engage in a substantive discussion of Article 7(1) and the literature and jurisprudence outlined earlier. Thus His Honour ignored thereby the debate whether Article 7(1) is applicable in regard to the conduct of the parties in the individual contract or "just" stipulates a general interpretation method in regard to the CISG itself,[28] preferring to assert that Article 7(1) directly applied to the contractual relationship of the parties. [29]

### *1.1.2. United Kingdom*

At this point various database searches have not revealed case law which analyses Article 7(1) CISG to aid argumentation in regard to the role of good faith in English contract law. An optimist would argue that this is because the enlightened English judiciary and legal profession adhere to the view that Article 7(1) CISG stipulates a general interpretation principle in regard to the CISG and is, therefore, of no assistance in the discussion of whether there is a place for "good faith" in English contract law. The pessimist (or realist) will argue that unfamiliarity with the CISG is the reason for its non-use in examining the issue!

### *1.1.3. Conclusion*

"Good faith" is probably such an amorphous concept which received much attention outside sales contracts, for example, in regard to insurance contracts or employment contracts that it is not necessarily surprising that courts do not rely on Article 7(1) of the CISG. There are other more familiar domestic sources that can be referenced instead. Further, domestic courts dealing with domestic sales law would probably consider that there is only minimal use for Article 7(1) if they follow the view that Article 7(1) concerns the interpretation of the CISG only and is not intended to imply a duty of good faith as part of individual contracts. Therefore, the academic and jurisprudential analysis of good faith in Article 7 is not necessarily suitable or the strongest argument to make the CISG palatable to common law countries.[30]

As can be seen from the following analysis of Article 8 of the CISG, the interpretation principles of Article 8 of the CISG are the more promising legal concepts to prove the thesis advanced in this paper.

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[28] I. Schwenzer, P. Hachem, para. 16 et seq.

[29] However, compare Justice French in *Smallmon & Transport Sales & Anor* (High Court Christchurch, CIV 2009 409 000363, 30 July 2010) [87] concurring with the view that Art 7(1) promotes an autonomous CISG interpretation principle.

[30] Compare also N. Hofmann, 145.

### 1.2. Article 8 – Pre- and Post-contractual Party Conduct

Article 8(3) of the CISG reads

> In determining the intent of a party or the understanding a reasonable person would have had, due consideration is to be given to all relevant circumstances of the case including *the negotiations*, any practices which the parties have established between themselves, usages and *any subsequent conduct of the parties*. [emphasis added]

The interpretation of a contract with reference to *negotiations* and *any subsequent conduct of the parties* is prima facie contrary to the common law doctrine of the parol evidence rule. According to the parol evidence rule the written agreement is the exclusive record of the intention of the parties;[31] accordingly, the legal recognition of additional oral agreements between the parties has traditionally been denied and the use of extrinsic material or conduct to ascertain parties' intention has been eschewed.[32] In contrast, Article 8 and especially Article 8(3) of the CISG, invite the court or the arbitral tribunal to make use of any surrounding circumstances – including pre- and post- contractual conduct of the parties. However, it also has to be acknowledged that commentators on the CISG have agreed that written agreements will be afforded special consideration under it.[33]

#### *1.2.1. United Kingdom*

The orthodox English position was that even if the written contract is an incomplete or an inaccurate record of what the parties agreed, the parties are stuck with what was written: extrinsic evidence of terms which were agreed but which were, by accident or design, omitted from the

[31] It is acknowledged that (a) that for the purposes of this paper the analysis of contract interpretation has been simplified and (b) there is no uniform parol evidence rule in existence among common law countries or even among the states in the United States, see: B. Zeller "The Parol Evidence Rule and the CISG a Comparative Analysis", *Comparative Law Journal of South Africa* 36/2003, available under http://cisgw3.law.pace.edu (last accessed 2 Jan 2011); see also CISG Advisory Council Opinion No 3, *Parol Evidence Rule, Plain Meaning Rule, Contractual Merger Clause and the CISG* (23 Oct 2004), Rapporteur: Professor Richard Hyland); compare Lord Morris in *Bank of Australasia v. Palmer* [1897] AC 540, 545.

[32] See P. Butler "The Doctrine of Parol Evidence Rule and Consideration A Deterrence to the Common Law Lawyer?", *Celebrating Success; 25 Years United Nations Convention on Contracts for the International Sale of Goods,* SIAC, Singapore 2006, 54, 56. It has to be noted that Art 11 explicitly states that a contract of sale need not to be concluded in or evidenced by writing and is not subject to any other requirement as to form.

[33] See M. Schmidt Kessel "Art. 11", *Commentary on the UN Convention on the International Sale of Goods* (CISG) (eds. P. Schlechtriem, I. Schwenzer), Oxford University Press, Oxford 2010[3], para 14.

written agreement, could not as a general rule be relied upon for the purposes of contract interpretation.[34] Not surprisingly, English courts found quickly that the strict adherence to the rule could lead to unjust results. Therefore, the parol evidence rule has many exceptions and its ambit is quite unclear.[35] A separate issue, however, has been the interpretation of the written contract. In regard to the latter the plain meaning rule applied: the chosen language had to be taken as representing the intention of the parties. Extrinsic evidence was not admissible in order to find a different meaning, for "that would amount to the Court holding that the parties really meant something different from what they chose to say".[36] Where the language of the contract was ambiguous the courts could consult the factual background.[37]

In regard to the interpretation of a contract, unlike the New Zealand Supreme Court, the House of Lords, as it then still was, in *Chartbrook Ltd v. Persimmon Homes Ltd* reaffirmed the traditional rule that pre-contractual negotiations are inadmissible as evidence of the parties' contractual intentions. The rule excluding evidence of pre-contractual negotiations did not, however, exclude use for the purpose of establishing facts relevant as background which were known to the parties.[38] Lord

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[34] See *Evans v. Roe et al* (1872) LR 7 CP 138; see also Law Commission, *Law of Contract The Parol Evidence Rule* (Working Paper No 70, London 1986), 6 et seq. The Law Commission Report excluded the consideration of interpretation rules. It should be noted that where a term was mistakenly included or omitted the equitable doctrine of rectification could be invoked to reverse the mistake but it is important to note that rectification is not a doctrine concerned with contract interpretation, but rather contract documentation and that the modern English approach to interpretation does away in many cases with the need to seek rectification.

[35] See for an overview of the exceptions and the case law: also Law Commission, *Law of Contract The Parol Evidence Rule* (Working Paper No 70, London 1986), 6 et seq; P. Butler, (2006), 54, 56

[36] See D. McLauchlan, "Plain Meaning and Commercial Construction: Has Australia Adpoted the ICS Principles?", *Journal of Contract Law* 25/2009, 7, 8 citing *Benjamin Developments Ltd v. Robt Jones (Pacific) Ltd* [1994] 3 NZLR 189, 203 (CA, per Hardie Boys J) summarising the position in detail.

[37] *Prenn v Simmonds* [1971] 1 WLR 1381, 1384 (Wilberforce LJ). Lord Hoffmann in *Investors Compensation Scheme Ltd v. West Bromwich Building Society* [1998] 1 WLR 896, 912. 913 summarised the English contract interpretation principles.

[38] *Chartbrook Ltd v. Persimmon Homes Ltd* [2009] AC 1101 [42] per Lord Hoff mann. The case involved a developer (C) who entered into an agreement with a house builder (P) for the development of a site which C had recently acquired. Under the agreement P agreed to obtain planning permission for C's land and, pursuant to a licence from C, enter into possession and construct a mixed residential and commercial development and sell the properties on long leases. C agreed to grant the leases at the direction of P, which would receive the proceeds for its own account and pay C an agreed price for the land. Under the agreement the price was the aggregate of the total land value

Hoffmann considered not only comparative but also international material – dismissing both due to the different framework they were working under which could not be transposed into English law. His Lordship stated[39]

> Both the *Unidroit Principles of International Commercial Contracts* (1994 and 2004 revision) and the *Principles of European Contract Law* (1999) provide that in ascertaining the "common intention of the parties", regard shall be had to prior negotiations.... The same is true of the United Nations Convention on Contracts for the International Sale of Goods (1980). But these instruments reflect the French philosophy of contractual interpretation, which is altogether different from that of English law...

Nonetheless, Lord Hoffmann in *Chartbrook*[40] acknowledged that giving effect to what a reasonable person would have understood the parties to have meant, when using the language they did, might sometimes require to give the particular language a different meaning. His Lordship emphasised that there was no barrier to applying a contextual interpretation.[41] Plain and unambiguous ordinary meanings could be displaced by context and background although, as is also emphasised in *Chartbrook*, there must be a strong case to persuade the court something has gone wrong with the contractual language.[42] However, Professor McLauchlan points out that there is no need to get too enthusiastic about his Honour's

(TLV) and the balancing payment. The balancing payment was defined as the additional residential payment (ARP) and was '23.4% of the price achieved for each Residential Unit in excess of the Minimum Guaranteed Residential Unit Value less the Costs and Incentives'. After the development was built a dispute arose over the correct amount of the ARP. It was C's case that the meaning of the definition was that from the price achieved, the Minimum Guaranteed Residential Unit Value (MGRUV) and the Costs and Incentives (C&I) would be deducted and 23.4% of the result had to be taken. That figure was the price to be paid for an individual unit that, together with the figures for similar calculations on all the other units, made up the ARP. Accordingly that and the TLV was the price. On the agreed figures, C's calculation produced a TLV of 4,683,565 and an ARP of 4,484,862, making 9,168,427 in all. C commenced proceedings for that unpaid amount. P claimed that the purpose of dividing the price into TLV and ARP was to give C a minimum price for its land, calculated on current market assumptions, and to allow for the possibility of an increase if the market rose and the flats sold for more than expected. The definition meant that the C&I was deducted from the realised price to arrive at the net price received by P, then calculate 23.4% of that price. The ARP was the excess of that figure over MGRUV. On that calculation the ARP was 897,051. P sought to rely on documents which formed part of the pre contractual negotiations in aid of its construction. In the alternative, P counterclaimed for rectification of the agreement.

39 *Chartbrook Ltd v. Persimmon Homes Ltd* [2009] AC 1101 [39].

40 [2009] UKHL 38, [2009] AC 1101.

41 *Chartbrook Ltd v. Persimmon Homes Ltd* [2009] AC 1101 [21]; [25].

42 *Chartbrook Ltd v. Persimmon Homes Ltd* [2009] AC 1101 [14], [15].

statement (unlike some of the New Zealand Supreme Court Justices in *Vector Gas Ltd v. Bay of Plenty Energy Ltd* [43]) since it only re-states what has been the law in England since Lord Wilberforce's judgment in *Prenn v Simmonds*[44] and which had not resulted in a real shift towards what one could describe as all-encompassing contextual contract interpretation.[45]

In summary, despite being aware of the use of pre-contractual negotiations as an interpretive tool in regard to the interpretation of contracts governed by the CISG, the House of Lords has dismissed any approximation of English contract interpretation in line with CISG interpretation principles, on the broad basis that the latter reflect the French, and therefore not English, philosophy of contract interpretation.

### *1.2.2. New Zealand*

In New Zealand a comparatively greater shift has occurred in regard to the use of pre-and post-contractual conduct as an aid to contract interpretation. In recent years academic and extra-judicial writing has challenged the traditional rationalisation of why pre-contractual (and post-contractual) material is treated as irrelevant.[46] Sitting in New Zealand's highest court, the Supreme Court, Mc Grath J recently noted in *Vector Gas Ltd v. Bay of Plenty Energy Ltd* that "[o]ver the past 40 years the common law has increasingly come to recognise that the meaning of a contractual text is clarified by the circumstances in which it was written and what they indicate about its purpose" [47] (it is not quite clear though whether his Honour is only referring to New Zealand or also, slightly overenthusiastically, to England). An impact of the CISG can be felt in regard to the question of the extent to which pre- and post-contractual conduct can be taken into account when interpreting a contract.[48]

The Court of Appeal in *Attorney-General v. Dreux Holdings Ltd*[49] 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

[43] [2010] 2 NZLR 444 (SC).

[44] [1971] 1 WLR 1381 (HL).

[45] D. McLauchlan, "Contract Interpretation in the Supreme Court Easy Case, Hard Law?", *New Zealand Business Law Quarterly* 16/2010, 229, 253.

[46] Compare D. McLauchlan, "Contract Interpretation: What Is It About?", *Sydney Law Review* 31/2009, 5; *Vector Gas Ltd v. Bay of Plenty Energy Ltd* [2010] 2 NZLR 444 [72](SC) per McGrath J.

[47] [2010] 2 NZLR 444 [77] (SC).

[48] It has to be noted that McGrath J dismissed the idea that prior negotiations could form part of the factual matrix .

[49] (1996) 7 TCLR 617.

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. Nevertheless, the Court did express views as to whether recourse to subsequent conduct was permissible. While not expressing a firm view, the majority looked at Article 8(3) CISG. 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.

In *Yoshimoto v. Canterbury Golf International Ltd*[50] a commercial contract was at 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 confirmed 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 of prior negotiations and the admissibility of that evidence had 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 1994 of the United Nations Convention on Contracts for the International Sale of Goods. Liberal provisions for the interpretation of international sales contracts are included in this Convention."[51] His Honour also cited *Dreux* to emphasise the idea that the court should follow the best international practice. (Interestingly, Lord Hoffmann relied on Thomas J's statements in *Yoshimoto* to illustrate the contrary view to the one his Lordship advanced in *Chartbrook*.[52])

In *Thompson v. Cameron*[53] (a case arising out of bankruptcy proceedings) the issue concerned the interpretation of a settlement agreement. A particular issue was 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 *Dreux* and the reference therein to the CISG, but did not refer to *Yoshimoto*. 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 on analysing only the "factual matrix"–

[50] [2001] 1 NZLR 523 (CA): the decision was appealed to the Privy Council no consideration of the CISG.

[51] *Yoshimoto v. Canterbury Golf International Ltd* [2001] 1 NZLR 523 [88].

[52] *Chartbrook Ltd v. Persimmon Homes Ltd* [2009] AC 1101 [32] et seq.

[53] HC Auckland (27 Mar 2002) AP117/SW99 (Chambers J).

having no regard to pre-contractual negotiations or post-contractual conduct.[54]

The Supreme Court (New Zealand's highest Court since 2003) finally, in *Gibbons Holdings Ltd v. Wholesale Distributors Ltd* held that evidence of subsequent conduct was admissible.[55] Even though there was no direct reference to the Sale of Goods (United Nations Convention) Act 1994 or the CISG Tipping J referred to Blanchard J's judgment in *Dreux* where his Honour said that taking into account subsequent conduct would accord with general international trade practice.[56]

In 2010 in *Vector Gas Ltd v. Bay of Plenty Energy Ltd*[57] the Supreme Court was asked to decide the question whether pre-contractual negotiations could be taken into account. *Vector Gas* concerned parties that had a long-term agreement whereby Vector Gas Ltd supplied gas to Bay of Plenty Energy Ltd. Vector gave notice of termination of the agreement. The lawyers representing the parties reached agreement that pending the determination of litigation concerning the validity of the termination, Vector would supply Bay of Plenty with gas. There was an exchange of correspondence which referred to a cost per gigajoule (GJ) plus transmission costs and the figure of $6.50 per GJ was discussed, but a final letter from Bay of Plenty's lawyer referred to a price of $6.50 per GJ without referring to transmission costs. This was accepted by Vector's lawyer. Dispute then arose as to the meaning of the agreement. Vector's lawyer argued that the price of $6.50 per GJ meant a price for gas only, not including transmission costs; Bay of Plenty argued that the price of $6.50 per GJ did include transmission costs.

Five different judgments were delivered, with each reflecting, as McLauchlan points out, to varying degrees, different understandings of the principles of contract interpretation.[58] Their Honours could not even agree on whether the agreement was ambiguous. However, all judges agreed that Vector's appeal should succeed but differed on how to justify this result conceptually. Four of the judges in *Vector Gas Ltd v. Bay of Plenty Energy Ltd* in line with the Supreme Court in *Chartbrook* held that it was not necessary for there to be an ambiguity in the wording of a contract before the Court could resort to reading pre-contractual materials as an aid to establishing the factual background. Reference could be made to

54 *Thompson v. Cameron* HC Auckland (27 Mar 2002) AP117/SW99 (Chambers J).

55 [2008] 1 NZLR 277 (SC).

56 *Gibbons Holdings Ltd v. Wholesale Distributors Ltd* [2008] 1 NZLR 277 [55].

57 [2010] 2 NZLR 444 .

58 D. McLauchlan, "Common Intention and Contract Interpretation", *Lloyd's Maritime and Commercial Law Quarterly* 2011, forthcoming for an in depth discussion on *Vector*.

the negotiations in order to establish the commercial context, the market in which the parties were operating and the subject-matter of the contract if it showed objectively what the parties intended their words to convey.[59] Only Tipping J stated clearly that evidence of prior negations was admissible.[60] Unfortunately, none of the judges took account of the discussions of their brethren in earlier case law referring to international practice of the CISG which would have given them valuable assistance in their reasoning.

Therefore, there is an indication that the Supreme Court will not follow the House of Lords in *Chartbrook* was not surprising given its earlier decision in *Gibbons* where the Supreme Court had refused to follow their Lordships' decisions that subsequent conduct was inadmissible as an aid to interpretation.[61] Their Honours' analysis, however, could have been strengthened by referring to the CISG (an argument not open to the House of Lords in the same way) and international best practice. Given that the judges in previous decisions used reference to the CISG and international best practice as embodied by, for example, the UNIDROIT principles to strengthen their argument is unfortunate since it would have again emphasised that connectedness between international and domestic sale of goods law.

However, in summary it has to be noted that the Supreme Court has set New Zealand on the path to interpret its domestic contracts in line with Article 8(3) of the CISG, the issue of prior negotiations yet to be finally decided.

### 1.3. Miscellaneous New Zealand decisions

As already mentioned, New Zealand courts have referred most often of all surveyed jurisdictions to the CISG: mostly to illustrate a legal concept the court applied.

> In *Tri Star Customs and Forwarding Ltd v. Denning*[62] 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 final agreement was reached. The various offers and the fi-

[59] *Vector Gas Ltd v. Bay of Plenty Energy Ltd* [2010] 2 NZLR 444 [4], [13], [14], [23], [27], [62], [151]. See also a detailed discussion of the judgment: D. McLauchlan "Contract Interpretation in the Supreme Court Easy Case, Hard Law? 16 (2010) New Zealand Business Law Quarterly, p. 229.

[60] *Vector Gas Ltd v Bay of Plenty Energy Ltd* [2010] 2 NZLR 444 [29] per Tipping J;

[61] *Gibbons Holdings Ltd v. Wholesale Distributors Ltd* [2008] 1 NZLR 277.

[62] [1999] 1 NZLR 33 (CA).

> nal agreement specified that the annual rental was "plus GST". However, the purchase price was recorded $720,000 with no mention of GST. It was clear that unless the agreement specified otherwise the purchase price was inclusive of GST. The respondents maintained that they understood that they would receive $720,000 out of the transaction. The High Court had awarded the respondents relief under the Contractual Mistakes Act 1977 finding that there was a qualifying unilateral mistake in terms of s 6(1)(a)(i). The High Court found that though the appellant had no actual knowledge of the mistake it should have been aware of the existence of the mistake. An argument that the contract should be rectified because it did not record the true intentions of the parties was rejected. On appeal the Court had to decide whether the respondents' undertaking of what they would get out of the transaction between respondent and claimant would qualify as a unilateral mistake under section 6(1)(a)(i) of the Contractual Mistake Act 1977. To decide that, the Court had to determine whether for that section the appellant had to have had actual knowledge of the respondent's 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 49(2) 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.[63]

The question whether a contract (between the parties) contained an implied term as to the merchantable quality of the goods arose in *International Housewares (New Zealand) Ltd v. SEB SA*.[64] The Court observed:

> 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 proceedings.[65]

It is of course interesting to note that "merchantability" is not what is necessarily required under Article 35 CISG.[66]

Similarly, in *Integrity Cars (Wholesale) Ltd v. Chief Executive of New Zealand Customs Services & anor* the Court laudably considered the CISG. However, unfortunately incorrectly, the Court said, that the CISG would apply between New Zealand and Japan and in regard to agency. At the time Japan had not ratified the CISG and agency is not dealt with in the CISG.

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63 [1999] 1 NZLR 33, 37 (CA).

64 HC Auckland (31 March 2003) CP 395 SD01 (Master Lang).

65 HC Auckland (31 March 2003) CP 395 SD01 (Master Lang) [59].

66 See CLOUT case No 123 (Germany) (8 March 1995) *http://cisg3.law.pace.edu/cases/950308g3.html* (last accessed 12 Jan 2011); compare Arbitration Institute (Netherlands) case No 2319 (15 October 2002) *http://cisg3.law.pace.edu/cases/021015n1.html* (last accessed 12 Jan 2011).

### 1.4. Conclusion

In summary, the only issue where the CISG has had an impact can be felt is in regard to the question to what extent pre-contractual negotiations and post-contractual conduct can be taken into account when interpreting a contract. The New Zealand courts, in particular Justice Thomas, have used Article 8 of the CISG as an aid to advance pre- and post-contractual conduct as part of the contract interpretation canon. The openness to include international negotiated principles has influenced a shift in New Zealand's contract interpretation law. Justice French in *Smallmon & Transport Sales & Anor* (New Zealand's first judgment regarding a contract to which the CISG applied) emphasised that on the basis of Article 7(1) CISG recourse to the domestic system had to be avoided when interpreting and applying the CISG. Her Honour took recourse to Articles 8 and 8(3) of CISG when interpreting the contract between the parties.[67] Even though her Honour stressed the autonomous interpretation of the CISG it certainly must have helped that the New Zealand domestic law on contract interpretation was akin to that of the CISG.

## 2. AUSTRALIA

As Lisa Spagnolo points out in her comprehensive article on Australia's relationship with the CISG, Australian courts, even though they made a promising start in *Roder Zelt-und Hallenkonstruktionen GmbH v. Rosedown Park Pty Ltd* [68]and *Perry Engineering Pty v. Bernold AG*[69]*,* have now cultivated the tendency "to cite non-applicable domestic legislation, case law, or concepts where the CISG was the governing law, often due to the reluctance of counsel to engage with the CISG."[70] The extensive review of the eleven Australian CISG cases by Lisa Spagnolo reveals that courts and counsel do seem to be more comfortable with domestic contract law paradigms than an autonomous interpretation of the CISG.[71]

The CISG's notion of good faith was mentioned in two Australian cases. In *Renard Constructions (ME) Pty Ltd v. Minister for Public Works*[72]

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[67] *Smallmon & Transport Sales & Anor* (High Court Christchurch, CIV 2009 409 000363, 30 July 2010) [87] et seq.

[68] (1995) 57 FCR 216 (Federal Court South Australia).

[69] *Perry Engineering Pty v. Bernold AG* [2001] SASC 15 (unreported, Burley J, 1 Feb 2001)

[70] L. Spagnolo "The Last Outpost: Automatic CISG opt outs, Misapplications and the Costs of Ignoring the Vienna Sales Convention for Australian Lawyers", Melbourne Journal of International Law 10/2009, 1, 29.

[71] *Ibid.*, 1, 27 et seq.

[72] (1992) 26 NSWLR 234 (CA).

Priestley JA mentioned Article 7(1) CISG in passing when discussing whether there was a notion of good faith in Australian contract law.[73] Again, it was mentioned in passing in *South Sydney District Rugby League Football Club Ltd v. New Ltd* Finn J when discussing good faith.[74]

Article 8 CISG has also been an Article drawn upon in Australian jurisprudence.[75] The New South Wales Court of Appeal in *Franklins Pty Ltd v. Metcash Trading Ltd* observed:[76]

> Much ink has been spilt over the last 30 years on this topic [contract interpretation]. It is intimately connected in analysis with the applicable underpinning theory of the determination of contractual rights and liabilities. If, as the above references make clear, the governing theoretical framework as to the determination of contractual rights and obligations is the objective theory, it is difficult to see how later conduct has a place in the ascertainment of the parties' objectively assessed intentions.

The Court further observed, relying on the High Court in *Pacific Carriers v. BNP Paribas,*[77] *Equuscorp v Glengallan*,[78] and *Toll v. Alphapharm*[79] that the construction of a written contract is to be determined by what a reasonable person in the parties' position would have understood it to mean in the circumstances and context in question. Therefore, the Court pointed out how parties later acted, was probative of what they themselves thought their obligations were, since that was difficult to reconcile with the objective paradigm.[80] The Court observed that it would not be difficult to take the parties' later actions into account if the paradigm in place would resemble Articles 4.1–4.3 of the UNIDROIT Principles of International Commercial Contracts since it gives a primary role to the ascertainment of the actual common intention of the parties.[81] The Court noted that Article 8 CISG is to similar effect to Art 4.2 of the UNI-

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[73] *Renard Constructions (ME) Pty Ltd v. Minister for Public Works* (1992) 26 NSWLR 234, 264 (CA).

[74] (2000) 177 ALR 611, 696. See extensive discussion of this case and *Renard* in L. Spagnolo, 1, 34, 35 pointing out that both judges had each written extensively extrajudicially on comparative law issues ad participated in international uniform law issues.

[75] See in regard to "good faith" in Australian law J.W. Carter, E. Peden "Good Faith in Australian Contract Law", *Australian Construction Law Newsletter* 94/2004, 6; J.M. Paterson, 47. Carter and Peden argue that "good faith" is part of Australian contract law (at 6) which might explain why judgments do not need to rely (rightly or wrongly) on Article 7; L. Spagnolo, 1, 30.

[76] [2004] HCA 35.

[77] (2005) 218 CLR 471.

[78] [2004] HCA 52.

[79] [2009] NSWCA 407 [40]

[80] [2009] NSWCA 407 [6].

[81] [2009] NSWCA 407 [7].

DROIT Principles. However, following from its earlier observation, the Court concluded that it was unnecessary to discuss the effect, if any, which the adoption of the CISG by all States and Territories will have on the primacy of the objective theory since as Lord Hoffmann had pointed out in *Chartbrook Ltd v. Persimmon*[82] the UNIDROIT Principles and the CISG reflected civil law principles.[83] The Court, therefore, followed the House of Lords, rejecting the influence of the CISG on domestic contract law due to its perceived origin in the civil law.

In *Limit (No 3) Ltd v. ACE Insurance Ltd*[84] the New South Wales Supreme Court held that the respondent, an insurance company, was required to indemnify a joint venture under a policy for some portion of liability incurred by a joint venture. The applicants, a Lloyds syndicate and other Lloyds insurers, had made payments to the joint venture as per another policy. The Court found that it was just and equitable to order recoupment of any liability of which the respondent was relieved by the applicants. One of the issues arising was the proper construction of one of the clauses in the insurance contract. The Court[85] referred to the Singapore Court of Appeal decision in *Zurich Insurance (Singapore) Pte Ltd v. B-Gold Interior Design & Construction Pte Ltd*[86] where the Singapore Court had mentioned Article 8 CISG in passing.

Contract interpretation was also at the heart of the High Court of Australia's decision in *Koompahtoo Local Aboriginal Land Council v. Sanpine Pty Ltd*.[87] The litigation arose from a joint venture agreement between the appellant and respondent. When the joint venture came into financial difficulties and the appellant's administrator terminated the agreement the respondent commenced proceedings seeking a declaration that the termination was invalid and that the agreement was still on foot. The issue was whether contractual terms could be classified as "intermediate" and what consequence the breach of such term had.[88] Kirby J, agreeing with the majority, albeit disagreeing with the classification of contract terms as "intermediate", referred to the CISG as an example of a general codification of contractual remedies law adopted in some common law countries that had not adopted the concept of "intermediate" contract terms.[89]

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82 [2009] AC 1101 [39].

83 [2009] NSWCA 407 [8], [9].

84 [2009] NSWSC 514.

85 [2009] NSWSC 514 [147].

86 [2008] SGCA 27 [62].

87 [2007] HCA 61.

88 [2007] HCA 61 [106] et seq per Kirby J.

89 2007] HCA 61 [108].

Article 8 CISG which facilitated a shift in contract interpretation in New Zealand has not done the same in Australia. Australia followed the English approach which results in a split contract law paradigm– international sale of goods to which the CISG is applicable will have to be interpreted in accordance with Article 8 whereas domestic sale contracts will be more anchored in the written contract. Article 7(1) CISG was mentioned as an example of the notion of good faith in contract law before good faith became an established legal principle in Australia. However, it was rather mentioned in passing without any analysis and by judges with considerable experience in comparative law analysis. Therefore, it cannot be concluded that cross-fertilisation has taken place.

## 3. CANADA

Interestingly neither Articles 7 nor 8 CISG have been drawn upon to develop Canadian contract law. Good faith is an established principle in Canadian contract law,[90] and it is, therefore, not surprising that Article 7 has not been called upon (rightly or wrongly) to develop that principle. Similarly, Article 8 has not been used to dispel the parol evidence rule. Canadian jurisprudence has not followed the parol evidence rule in the strict sense for a long time.[91] However, the CISG has been cited in four cases in which the Courts applied common law.[92] Twenty CISG cases can be found on the CanLII database. Genevieve Saumier's summary about the state of CISG jurisprudence in Canada mirrors that of Lisa Spagnolo's for Australia. She observes that the understanding of the CISG is not very high.[93]

Article 3(1) CISG was used by the Respondent as an example to illustrate the meaning of "sale" in *Cherry Stix Ltd v. Canada Border Services Agency*.[94] The issue was whether there was a transfer of title of goods by Cherry Stix to Wal-Mart prior to their importation into Canada and subsequently whether pursuant to the Customs Act, the CBSA was correct in applying the transaction value to determine the value for duty of the

[90] J. Swan, *Canadian Contract Law*, LexisNexis, Canada 2006, 243 et seq.

[91] Compare Lambert JA in *Gallen v. Allstate Grain Co Ltd* (1984) 9 DLR (4th) 496, 506; J. Swan, 509 et seq.

[92] See in regard to an overview of Canadian CISG jurisprudence: G. Saumier "International Sale of Goods Law in Canada: Are we missing the Boat?", *Canadian International Lawyer* 7/2007, 1; 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.

[93] G. Saumier, 1 et seq.

[94] 2010 CanLII 38689.

goods in issue. The Canadian International Trade Tribunal in its decision did not draw on the CISG.

*Brown & Root Services Corp v. Aerotech Herman Nelson Inc*[95] concerned a contract for the sale of portable heaters between a Manitoba vendor and a Texas buyer. Even though the CISG would have applied to the contract the Court failed to recognise its applicability and resolved all of the issues with exclusive reference to Manitoba statute law, common law and domestic cases. However, the defendant relied on Articles 38 and 40 to enhance its position in that the claimant took too long if it was intending to assert a fundamental breach or repudiation of the contract. The Court accepted the principle stipulated by Articles 38 and 40 but rejected the argument on the facts.

A contract for Styrofoam-making equipment was at the centre of *Mansonville Plastics (BC) Ltd v. Kurtz GmbH*[96] (German seller, British Columbian buyer). In resolving the various "warranty" claims raised by the buyer, the Court submerged the CISG within domestic sales law and did not give it any autonomous role or interpretation. The defendant had relied on Article 71 CISG which provides that a party to a contract may suspend the performance of his/her obligations if it becomes apparent that the other party will not perform a substantial part of his/her obligations. The Court did not rely on Article 71 in its discussion of whether the defendant was entitled to suspend performance.

Similarly, in *Diversitel v. Glacier*[97] the determination that a fundamental breach had occurred was made on the basis of Ontario common law precedents, despite the fact that CISG case law had been cited to the Court extensively by the plaintiff in regard to what constitutes a fundamental breach.[98] However, the Court stated that "the plaintiff submits that regardless of this Court's interpretation of the International Sale of Goods Act, it has met the common law test in establishing a fundamental breach of contract."[99]

In summary, the Canadian example shows that the CISG can aid the discussion in a wider range of domestic contract law issues than good faith and contract interpretation. Canada counts more CISG cases than New Zealand or Australia which might be due to the United States (which is also a CISG member state) being its most important trading partner. However, unfortunately the found case law is probably too sparse to support a hypothesis of cross-fertilisation.

95 2002 MBQB 229.

96 [2003] BCJ 1958.

97 [2003] OJ No 4025 (Ont Sup Ct).

98 [2003] OJ No 4025 (Ont Sup Ct) [26] [28].

99 [2003] OJ No 4025 (Ont Sup Ct) [29].

## 4. CONCLUSION

It is often emphasised by CISG commentators that courts and arbitral tribunals have to embark on a "domestic law free" analysis of the CISG. That must be, generally speaking, correct. However, the CISG was not created in vacuum. In fact, it has been heralded as a successful amalgamation of civil and common law. In practice, as also evidenced by the commentaries, often a comparative analysis is employed when interpreting a CISG provision. It might be the case that the success of the CISG lies partly in the influence it has (has had) on domestic legal systems. A fertilisation between the domestic and international sale of goods law might in the end lead to greater consistency in the application of the CISG.

New Zealand (of the countries surveyed in this article) has made use of the persuasive precedent character of the CISG the most. Probably partly due to being a small jurisdiction with a certain lack of precedent New Zealand counsel and courts are more quickly willing to look to overseas jurisprudence, legislation and international law to aid their argument and/or development of the domestic legal system.

It will be for a more comprehensive research project to examine what the experience of civil law countries is, some of which have, when revising their domestic contract law, incorporated CISG concepts into their new contract law.[100]

[100] For example Germany.

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# THE CONTRIBUTION OF UNCITRAL TO THE HARMONIZATION OF INTERNATIONAL SALE OF GOODS LAW BESIDES THE CISG*

*This article discusses two lesser known UNCITRAL texts on sale of goods law: the Convention on the Limitation Period in the International Sale of Goods (the Limitation Convention) and the Uniform Rules on Contract Clauses for an Agreed Sum Due upon Failure of Performance. It illustrates the importance of the Limitation Convention for regional economic integration, in particular, in Eastern Europe, and makes suggestions for legislative activities relating to this Convention with a view to promoting its use and uniform interpretation. Finally, it argues that technical assist ance in trade law reform may be particularly effective in addressing certain conse quences of globalization, and therefore calls for increased attention of international actors to this field of work.*

Keywords: *UNCITRAL. Limitation Convention. Agreed Sum Due upon Fail ure of Performance. Regional economic integration. Technical assistance in trade law reform.*

The United Nations Commission on International Trade Law (UNCITRAL) is the core body in the United Nations system for the modernization and harmonization of international trade law. For more than forty years UNCITRAL has been active as a law-making body, preparing texts covering many of the areas relevant to international trade. While the first efforts of UNCITRAL went towards the preparation of treaties, following the example of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards that foreshadowed the establishment of the Commission, attention was eventually paid also to texts of a less binding na-

* The views expressed herein are those of the author and do not necessarily re flect the views of the United Nations.

ture, which are often considered "soft law" sources. Model laws were thus prepared with a view to complementing conventions by facilitating their uniform application and interpretation; later, legislative guides and similar texts were also drafted, in an effort to further complete existing instruments and support their adoption.

This article discusses UNCITRAL's less well-known texts on sale of goods law, illustrates some of the UNCITRAL Secretariat's current technical assistance activities in this area and finally makes some suggestions for future action.

## 1. THE FIRST BORN: THE LIMITATION CONVENTION

In the area of international sale of goods, UNCITRAL started work in its early days by capitalizing on the extensive preparatory studies carried out in the previous decades as well as on the conventions finalized shortly before the establishment of the Commission, namely, the Convention relating to a Uniform Law on the Formation of Contracts for the International Sale of Goods, 1964, (ULF)[1] and the Convention relating to a Uniform Law on the International Sale of Goods, 1964 (ULIS).[2] In this context, the first outcome of the work of UNCITRAL was the Convention on the Limitation Period in the International Sale of Goods (the Limitation Convention),[3] which intended to consolidate a limited, but complex area of the law of sale of goods.

The Limitation Convention was a forerunner and indeed functionally forms a part of the United Nations Convention on Contracts for the International Sale of Goods (CISG). [4] In fact, the text of the Limitation Convention was finalized and adopted as a separate treaty due to the uncertainty then surrounding the possibility to conclude rapidly the preparation of the CISG.[5]

The Limitation Convention establishes uniform rules governing the period of time within which a party under a contract for the international sale of goods must commence legal proceedings against another party to assert a claim arising from the contract or relating to its breach, termination or validity. By doing so, it brings clarity and predictability on an aspect of great importance for the adjudication of the claim.

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[1] United Nations, *Treaty Series*, 834, 169.

[2] United Nations, *Treaty Series*, 834, 107.

[3] Concluded in 1974 and amended in 1980: United Nations, *Treaty Series* 1511, 3.

[4] Concluded in 1980. United Nations, *Treaty Series* 1489, 3.

[5] However, a sudden acceleration in the drafting process brought to the adoption of the CISG in 1980.

In fact, most legal systems limit or prescribe a claim from being asserted after the lapse of a specified period of time to prevent the institution of legal proceedings at such a late date that the evidence relating to the claim is likely to be unreliable or lost and to protect against the uncertainty that would result if a party were to remain exposed to unasserted claims for an extensive period of time. However, numerous disparities exist among legal systems with respect to the conceptual basis for doing so, resulting in significant variations in the length of the limitation period and in the rules governing the claims after that period. Those differences may create difficulties in the enforcement of claims arising from international sales transactions. In response to those difficulties, the Limitation Convention was prepared and adopted in 1974. The convention was amended by a Protocol adopted in 1980 in order to harmonize its text with that of the CISG, in particular, with regard to scope of application and admissible declarations.

The Limitation Convention applies to contracts for the sale of goods between parties whose places of business are in different States if both of those States are Contracting States or, but only in its amended version, when the rules of private international law lead to the application of the law of a Contracting State. It may also apply by virtue of the parties' choice if so allowed under applicable law.

The Convention sets the limitation period at four years (art. 8).[6] Subject to certain conditions, that period may be extended to a maximum of ten years (art 23). Furthermore, the Limitation Convention also regulates certain questions pertaining to the effect of commencing proceedings in a Contracting State.

The Limitation Convention further provides rules on the cessation and extension of the limitation period. The period ceases when the claimant commences judicial or arbitral proceedings or when it asserts claims in an existing process. If the proceedings end without a binding decision on the merits, it is deemed that the limitation period continued to run during the proceedings. However, if the period has expired during the proceedings or has less than one year to run, the claimant is granted an additional year to commence new proceedings (art. 17).

No claim shall be recognized or enforced in legal proceedings commenced after the expiration of the limitation period (art. 25(1)). Such expiration is not to be taken into consideration unless invoked by parties to the proceedings (art. 24); however, States may lodge a declaration allowing for courts to take into account the expiration of the limitation period on their own initiative (art. 36). Otherwise, the only exception to the rule barring recognition and enforcement occurs when the party raises its

[6] Article numbers refer to the consolidated text of the amended version of the Limitation Convention.

claim as a defense to or set-off against a claim asserted by the other party (art. 25(2)).

Despite clear complementarities between the CISG and the Limitation Convention, the former has been significantly more successful in terms of adoption by States than the latter. Several reasons contribute to explain this: lack of resources, including parliamentary time, for international trade law reform may have induced some countries to prioritize the adoption of the CISG over that of the Limitation Convention;[7] moreover, in certain jurisdictions prescription is associated with public policy issues, and are therefore more hesitant to adopt supranational uniform texts in this field; finally, at the outset the Limitation Convention was perceived as a product of the interests of Socialist countries and as such was received with caution in Western and Central Europe. The adoption of the Limitation Convention in capitalist countries, including the United States of America, did not affect this view sufficiently to influence the pattern of its adoption.[8]

Nevertheless, the Limitation Convention did not disappear from the international arena. Scholars kept this treaty in due consideration in light of its remarkable technical content.[9] Some States interested in creating a comprehensive legal framework for contracts for the international sale of goods continued adopting the Convention. In other cases, such calls were not immediately heeded. This was the case, for instance, in the People's Republic of China, where the adoption of the Convention has been recommended.[10] This was also the case in Canada, where the Uniform Law Commission prepared in 2000 a new Uniform International Sales Conventions Act meant to deal with multiple conventions relevant in the field.[11] However, the Uniform International Sales Conventions Act

[7] K. Sono, "The Limitation Convention: the Forerunner to Establish UNCITRAL Credibility", *http://cisgw3.law.pace.edu/cisg/biblio/sono3.html*, 3 December 2010.

[8] The USA ratified the Limitation Convention on 5 May 1994, i.e. twenty years after the original adoption of the treaty.

[9] Selected articles discussing the Limitation Convention include: K. Boele Woelki, "The Limitation of Rights and Actions in the International Sale of Goods", *Uniform Law Review / Revue de droit uniforme* 4:3:1999, 621 650; A. F. Hill, "A comparative study of the United Nations Convention on the Limitation Period in the International Sale of Goods and Section 2 725 of the Uniform Commercial Code", *Texas international law journal*, Winter 1990, 1 22. See also R. Zimmermann, *Comparative Foundations of a European Law of Set off and Prescription*, Cambridge University Press, Cambridge New York 2002. Moreover, the provisions of the Limitation Convention are commented in I. Schwenzer (ed.), *Schlechtriem & Schwenzer, Commentary on the UN Convention on the International Sale of Goods (CISG)*, Oxford University Press Oxford 2010[3], 1215 1270.

[10] H.Song, J. Zhao, "Comments on the Convention on the Limitation Period in the International Sale of Goods Discussing the possibility of ratifying the Convention", *International Trade Journal,* 6/1984, 48 52.

[11] Available at *http://www.ulcc.ca/en/us/index.cfm?sec 1&sub 1u6*, 3 December 2010

has not yet been adopted by any Canadian jurisdiction. The reasons are manifold: limited visibility of the matter at the political level and therefore priority on the legislative agenda; complexity of dealing with a number of treaties (including the two versions of the Limitation Convention) simultaneously; on-going reform towards even shorter prescription periods (two years) at the domestic level. However, such arguments do not preclude further legislative action, provided adequate reasoning and support are provided.

Case law applying the Limitation Convention has not been readily available. However, this seems more related to the difficulty of accessing existing decisions than to the lack thereof. In fact, the first abstracts relating to the Limitation Convention are about to be published by the UNCITRAL secretariat in the Case Law on UNCITRAL Texts (CLOUT) collection.[12] Easy availability of case law is likely, on the one hand, to raise the awareness of practitioners on the Limitation Convention, thus leading to its wider application, and, on the other hand, to highlight the importance of reporting existing cases, thus paving the way to collecting further material to be used for orientation and guidance.

Moreover, the Limitation Convention is now receiving renewed interest in light of a global trend that sees legislative reform towards a reduction of the time period necessary for limitation and, at the same time, increased difficulty in ascertaining applicable law, in part due to that legislative reform activity.[13]

Countries exporting manufactured goods should be particularly interested in increasing predictability in this area of the law by adopting the Limitation Convention. This is even more important for small and medium-sized enterprises, as protracted uncertainty over potential liability may significantly affect the management of their limited capital and assets.

Moreover, the Limitation Convention is interesting not only for its intrinsic technical qualities and for the fact that it sheds light on a particularly intricate area of the law of sale of goods. At times of repeated calls for further codification of uniform texts, it seems particularly advisable to seek careful coordination between regional and global levels, and to capitalize on existing texts by using them as building blocks towards the establishment of a broader legislative framework. Hence, the adoption of the Limitation Convention should be seen as a step towards further

[12] These abstracts relate to cases from Cuba, Hungary, Montenegro, Serbia and Ukraine.

[13] Y. Sugiura, "Japan After Acceding to the CISG Should We Consider Ratifying the Limitation Convention Next?", *Towards uniformity: the 2nd annual MAA Schlechtriem CISG conference* (eds. i. Schwenzer, L. Spagnolo), Eleven/Boom Publishers, The Hague 2011.

legal and economic integration at all levels, and as such should be promoted and implemented.

The Limitation Convention is already particularly relevant in certain regions of the world, namely Eastern Europe, where it enjoys widespread adoption. Further expansion of its application would therefore be particularly useful to strengthen certainty in regional commercial relations. Besides promoting awareness with a view to fostering uniform interpretation, further legal reform may also be usefully undertaken in this region. In fact, one main difference between the unamended and the amended version of the Convention lies in the scope of application. The unamended text foresaw application exclusively when all parties to the contract for sale of goods are located in States parties to the Convention. The relevant article 3 was amended to bring it in line with the article 1(1) (b) CISG and allow for application of the Limitation Convention when the rules of private international law make the law of a State party applicable to the contract of sale.[14] This means that the Limitation Convention may apply also when one or more of the parties to the contract do not have its place of business in a State party to the Limitation Convention, as long as the law applicable to the contract of sale is that of a State party to the Convention. This mechanism may significantly expand the reach of the Convention.

The Socialist Federal Republic of Yugoslavia adopted the Limitation Convention in 1978, necessarily, in its unamended version. When they became parties to the Convention (as successors to the Socialist Federal Republic of Yugoslavia), Bosnia and Herzegovina, Montenegro and Serbia did not adopt the treaty in its amended version, and therefore the original narrower scope of application of the Convention still applies in those countries. Slovenia, meanwhile, adopted the amended text of the Limitation Convention, while Croatia and the Former Yugoslav Republic of Macedonia have not yet adopted the Convention in any form.

States that are still a party to the original text of the Limitation Convention should, therefore, consider adopting its amended version,[15] and those that are not yet a party should consider becoming parties to this more recent text. This recommendation could apply as well to other States in South East Europe, such as Bulgaria, an original signatory of the Limitation Convention that has yet to ratify it.

[14] K. Sono, section IV.C, points out that article 3 of the Limitation Convention, as amended, refers to the law applicable to the contract of sale, and not to the law applicable to the limitation period.

[15] Montenegro has already expressed its intention of doing so.

## 2. A CONTRACTUAL TOOL: THE UNIFORM RULES ON CONTRACT CLAUSES FOR AN AGREED SUM DUE UPON FAILURE OF PERFORMANCE

After the conclusion of the CISG, work on sale of goods continued for a few more years, leading to the preparation of the Uniform Rules on Contract Clauses for an Agreed Sum Due upon Failure of Performance (the Uniform Rules).[16] The Uniform Rules seek to unify the treatment, particularly as to validity and application, of clauses that provide for the payment by a party of a specified sum of money as damages or as a penalty in the event of the failure of the party to perform its contractual obligations in an international commercial transaction.[17]

The Uniform Rules failed to attract immediate interest for a number of reasons not directly related to their content: the matter had been raised at a late stage in the context of CISG negotiations, and its discussion in the Working Group was postponed to after the conclusion of the CISG; the Working Group kept the topic on the agenda for several sessions, but was increasingly involved in work in other fields, such as arbitration and transport law;[18] moreover, this was an early example of an UNCITRAL text to be used contractually, and not intended for statutory adoption. While later such texts became more common, it may have been difficult at the time to fully appreciate the value of the Uniform Rules when applied by virtue of contractual choice.

Though their use in practice does not seem to be widespread, the Uniform Rules constitute an important intellectual achievement as they suggest a viable compromise between the notions of liquidated damages clauses, which are acceptable in many jurisdictions, and of penalty clauses, which may, on the contrary, find more difficulties in being recognized by courts.[19] Moreover, by limiting the power of judicial intervention to cases when the sum agreed "is substantially disproportionate in relation to the loss that has been suffered",[20] they anticipated and may further

[16] UNCITRAL, *Yearbook*, vol. XIV: 1983, part three, II, A (272).

[17] On the Uniform Rules, see A. Komarov, "The Limitation of Contract Damages in Domestic Legal Systems and International Instruments", *Contract damages: domestic and international perspectives* (eds. D. Saidov, R. Cunnington), Hart Pub., Oxford Portland 2008, 245 264; P. Hachem, *Agreed Sums Payable upon Breach of an Obligation Rethinking Penalty and Liquidated Damages Clauses*, Eleven/Boom Publishers, The Hague 2011, as well as his contribution to this volume.

[18] The area of work of that Working Group was generically identified in "International Contract Practices". The documents produced by that Working Group are available at *http://www.uncitral.org/uncitral/en/commission/working groups/2Contract Practices.html*

[19] However, the Uniform Rules may find application only in presence of liability for failure to perform: Uniform Rules, article 5.

[20] Uniform Rules, article 8.

support the trend towards the mitigation of such clauses when excessive which is present, in particular, in civil law countries. Given the regular calls for undertaking new codification projects in the field of contract law and, more specifically, of provisions relating to contractual damages, the Uniform Rules need to be taken into due consideration when discussing such projects.[21]

## 3. CURRENT TECHNICAL ASSISTANCE ACTIVITIES RELATING TO THE LAW OF SALE OF GOODS

From the administrative standpoint, the UNCITRAL Secretariat receives and allocates resources mainly on the basis of the legislative work carried out in UNCITRAL Working Groups. Therefore, the lack of an active working group dealing with sale of goods after the adoption of the Uniform Rules did not facilitate supporting the promotion of the adoption and of the uniform interpretation of texts on sale of goods in the long term. Nevertheless, important results were achieved, for instance with the establishment of the CLOUT (Case Law on UNCITRAL Texts) case reporting system. CLOUT proved in turn to have strong points (multilingualism) and weaknesses (uneven coverage of jurisdictions and irregular timing in the publication of abstracts). CLOUT represents the main source of information on CISG case law in certain languages, and a useful complement in the others, especially when reporting cases from jurisdictions not usually covered by other sources. Moreover, CLOUT contains cases on texts relevant for the law of sale of goods other than the CISG, such as the Limitation Convention and certain legislative provisions on e-contracting inspired by UNCITRAL texts on electronic commerce. The Digest of Case Law on the CISG has also proven to be useful.

With respect to case law analysis, additional work by the UNCITRAL Secretariat in identifying trends that may challenge the uniform interpretation of the CISG is already planned, subject to availability of resources. That work should enable the Commission's consideration of additional appropriate measures to further streamline the application of the CISG in the various jurisdictions while at the same time preserving the flexibility already contained in the text of that treaty.[22]

The renewed focus on technical assistance and cooperation activities in the UNCITRAL Secretariat opened the door to a more comprehen-

[21] This will be the case for the forthcoming CISG Advisory Council Opinion on "Scope of the CISG under Article 4 Fixed sums".

[22] For a recent discussion of the open textured nature of the provisions of the CISG, see H. A. Blair, "Hard Cases under the Convention on the International Sale of Goods: A Proposed Taxonomy of Interpretive Challenges", forthcoming in *Duke Journal of Comparative & International Law*, 2010. Available at SSRN: *http://ssrn.com/abstract 1695634*

sive approach to its work in the area of sale of goods. The promotion of the adoption of the CISG based on certain parameters such as regional trading patterns has started bearing fruit. Moreover, a more systematic approach has contributed to highlight a contradiction in the common attitude of practitioners towards the CISG that sees, on the one hand, a desire to benefit from a uniform law of sales in theory and, on the other hand, frequent opting out of the CISG in practice due to reasons not always evident.[23] Fortunately, recent evidence indicates that the opting out practice is becoming less prevalent.[24]

The increase in the technical assistance activities of the UNCITRAL Secretariat relating to uniform texts on sale of goods is particularly justified in light of some enduring effects of globalization: the steep increase in cross-border trade, including in regional economic integration organizations; the fragmentation of some sovereign States into smaller entities; and the widespread use of electronic communications.

Uniform law provides specific answers to such issues. It increases legal predictability of international transactions, especially with respect to legal systems of countries that are newcomers in global markets, and therefore reduces transaction costs. It re-creates legal uniformity in regions that, despite political separation and sometimes conflict, keep strong economic, linguistic and cultural ties, and therefore helps to counter the negative economic effects of State fragmentation and, through renewed ties, may assist in preventing further tensions. It provides a complete enabling legal framework for the use of electronic communications, which are best dealt with on the basis of supranational texts given the inherent identity of the underlying operations in each country as well as the ability of new technologies to interact at great distance, now further improved by their ubiquitous mobility. Thus, modern, comprehensive and coherent legislation based on international standards may assist in fostering economic development through the use of information and communication technologies and, in particular, in bridging the digital divide that still penalizes certain countries.

In short, globalization may well aim at reducing State regulation; however, it does not exclude, but rather demands a sophisticated enabling legislative environment. Many jurisdictions may face challenges in developing such an environment on their own. As a result, the need for international cooperation, especially in critical areas such as international

[23] See the data collected by S. Vogenauer, *Civil Justice Systems in Europe: Implications for Choice of Forum and Choice of Contract Law a Business Survey Final Results*, Oxford, October 2008.

[24] See the contributions of L. Mistelis and N. Schmidt Ahrendts in this *volume*, and H.M. Flechtner, "Changing the Opt Out Tradition in the United States", *University of Pittsburgh Legal Studies Research Paper Series*, Working Paper No. 2010 10, March 2010. Available at SSRN: *http://ssrn.com/abstract 1571281*

trade, is thus more acute. As sale of goods represents the backbone of cross-border commerce, it should receive attention and resources accordingly.

## 4. SUGGESTIONS FOR FUTURE ACTIVITIES

The project on the "Implementation of the United Nations Convention on the International Sale of Goods and the system of international commercial arbitration in Southeast Europe " provides an example of a successful initiative in the promotion of the adoption and uniform interpretation of the CISG.[25] Thanks also to this project, the CISG has become the common law for sale of goods in the Balkans, and indeed the whole of Central and Eastern Europe.[26] Significant capacity-building has fostered interest for the CISG in the region: case reporting, scholarly studies, and analysis of judicial application have increased, to the benefit of the overall knowledge of the Convention and of its uniform implementation in the region.

Replicating this initiative in other regions would be desirable. In particular, Central and Eastern European economies in transition have traditionally expressed strong interest for the uniform law of sale of goods and a revival of such tradition would be welcome. Activities could include strengthening capacity, especially with respect to academic dialogue and access to specialized academic and research resources by young scholars, and adopting a more comprehensive and structured approach in case collecting and reporting, with a view to providing a complete overview of regional CISG interpretative trends.

Legislative work could foresee a review of certain CISG declarations that seem out of line with current business needs, such as those on written form and those excluding the application of article 1(1)(b) CISG, with a view to submitting to the consideration of Governments the possibility of withdrawing those declarations. Such work should also build on the above-mentioned considerations to promote the broader adoption

[25] F. von Schlabrendorff, F. von. Implementation of the United Nations Convention on the International Sale of Goods and the system of international commercial arbitration in Southeast Europe: a report on a GTZ project, undertaken with the support of the United Nations Commission on International Trade Law, S.l., 2010.

[26] European States that have not yet adopted the CISG include, among EU member States: Ireland, Malta, Portugal and the United Kingdom; among non EU member States: Andorra, Liechtenstein, Monaco and San Marino. The position of such States vis à vis adoption of the CISG is not even. For instance, in 1992 the Irish Law Reform Commission recommended the adoption of the CISG in its Report on the United Nations (Vienna) Convention on Contracts for the International Sale of Goods (LRC 42 1992). San Marino, still a party to the ULF and the ULIS, may consider denouncing those treaties and adopting the CISG soon.

of the Limitation Convention in its amended form. Moreover, several countries, for instance in the Balkans, could start considering adopting legislation on electronic communications based on UNCITRAL texts, including the United Nations Convention on the Use of Electronic Communications in International Contracts (the Electronic Communications Convention).[27] Indeed, two of the main functions of the Electronic Communications Convention are to provide legislation to countries lacking any, and to promote a common core set of rules on electronic communications, thus facilitating the removal of legal obstacles to international trade, including those arising from existing treaties such as the CISG. Thus, the Electronic Communications Convention is immediately relevant for the law of sale of goods when a transaction is conducted using electronic means.

[27] Concluded in 2005. United Nations Publication Sales No. E.07.V.2 (treaty not yet in force). Other relevant UNCITRAL texts include the UNCITRAL Model Law on Electronic Commerce, 1996, with additional article 5 bis as adopted in 1998 (United Nations Publication Sales No. E.99.V.4), and the UNCITRAL Model Law on Electronic Signatures, 2001 (United Nations Publication Sales No. E.02.V.8).

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# DOCUMENTS THAT SATISFY THE REQUIREMENTS OF CISG ART. 58[*]

*Article 58 of the CISG triggers the buyer's obligation to pay for the goods at the time when the goods or "documents controlling their disposition" are placed at the buyer's disposal, unless the parties have agreed that the obligation to pay shall occur at some other time. This Article considers the meaning of the phrase "documents controlling their disposition". It seems originally to have been intended to refer only to documents giving the buyer the right to take possession of the goods, such as negotiable bills of lading or warehouse receipts. Documents of that kind are far less frequently used in modern transportation practice than they were when the CISG was drafted. The Article shows that most of the documents used for international transportation of goods in the 21st century do not satisfy a narrow interpretation of Article 58. Two alternatives are possible: first, to continue with a narrow interpretation of Article 58, which condemns it increasingly to irrelevance, or secondly, to broaden the interpretation to accommodate changes in international transportation practice. This Article argues for the latter approach.*

Key words: *Negotiable and non negotiable transport documents.*

## 1. INTRODUCTION

What are "documents controlling [the] disposition" of the goods for purposes of Art. 58 of the U.N. Convention on Contracts for the Inter-

[*] I thank Jessica Marrero and Jennifer Rohrback for their invaluable research assistance, and also my doctoral students Han Deng and Yehya Badr for their assistance in translating the Chinese and Arabic texts of the CISG, respectively.

national Sale of Goods (the CISG)? Under Art. 58(1), the buyer's obligation to pay arises when the seller places the goods or "documents controlling their disposition" at the buyer's disposal (unless the parties agree that payment should be made at some other specific time). Article 58(2) provides that if the contract involves carriage of the goods, the seller may send the goods to the buyer on terms whereby the goods or "documents controlling their disposition" will not be handed over to the buyer except against payment of the price. What documents trigger the buyer's obligation under Art. 58(1) and what documents may the seller withhold under Art. 58(2)?

The phrase "documents controlling their disposition" is narrower than the phrase used in CISG Arts 30 and 34, "documents relating to them" (meaning the goods). Articles 30 and 34 are concerned with the seller's primary obligation to "hand over" the documents "relating to" the goods. Clearly, only some of the documents "relating to" the goods are "documents controlling their disposition", so there is broad (but not universal) agreement that the phrase in Art. 58 is narrower in meaning than that in Arts 30 and 34. For example, a document such as a surveyor's report on the pre-shipment condition of the goods *relates* to the goods (and so must be "handed over" under Arts 30 and 34) but it does not control their disposition in the narrow sense. Conversely, the phrase "documents controlling their disposition" is more generic than the phrase "shipping documents", which appears in Arts 32 and 67(2), and it focuses on different qualities of the document than the phrase "documents embodying the contract of carriage", which appears in Art. 68.

Henry Gabriel has suggested that the phrase "documents controlling their disposition" refers only to documents giving the buyer the right to take possession of the goods, such as bills of lading or warehouse receipts.[1] Dietrich Maskow has argued for a broader view, namely that the phrase should be interpreted to refer to "any documents that are required in practice by the buyer", which may extend to include invoices or certificates of origin if the buyer is required by the Customs authorities of its country to present those documents before taking delivery.[2] Peter Schlechtriem argued for a still broader interpretation, namely that "controlling" documents should be interpreted in the sense of Arts 30 and 34, so that even an insurance certificate, for example, should be included, even though it is not required for the disposition of the goods, because the seller has not "placed the goods at the buyer's disposal" until the insur-

[1] H. Gabriel, "The Buyer's Performance under the CISG: Articles 53 60 Trends in the Decisions", *Journal of Law & Commerce* 25/2005, 280 81.

[2] D. Maskow, "Article 58", *Commentary on the International Sales Law, The 1980 Vienna Sales Convention* (eds. C.M. Bianca & M.J. Bonell), 1987, 427.

ance certificate has been tendered.[3] Manuel Alba Fernández has recently argued for a functional interpretation that would allow Art. 58 to adapt to new practices and legal changes, so that any transport document issued under a contract of carriage that enables the buyer to take delivery from the carrier should qualify.[4]

There is plenty of scope for scholarly disagreements of this kind because the CISG contains no definition of "documents controlling their disposition" and little assistance in the interpretation of the phrase can be found in the *travaux préparatoires* to Art. 58 itself. The phrase appeared in the Working Group draft as part of what was then Art. 39 and was adopted without comment by Committee of the Whole I in 1977.[5] It was incorporated in the Draft Convention of 1978 (then as Art. 54)[6] and was adopted, again without comment, as part of Art. 58 at the Diplomatic Conference in Vienna in 1980.[7] The only change made at the Diplomatic Conference was to introduce at the beginning of the article the words, "If the buyer is not bound to pay the price at any other specific time", a proposal made in the First Committee by Argentina, Spain and Portugal.[8] At no time was there any discussion of what kind of documents would trigger the buyer's obligation to pay. The UNCITRAL Secretariat Commentary on Art. 54 in the 1978 Draft simply repeats the phrase "documents controlling their disposition" without elaboration.[9]

The best interpretive assistance to be found in the *travaux préparatoires* lies not in the legislative history of Art. 58 itself, but in the legislative history of Art. 68. In the 1978 Draft, then-Art. 80 (which became Art. 68) used the same phrase, "documents controlling their possession",

[3] P. Schlechtriem, *Uniform Sales Law The U.N. Convention on Contracts for the International Sale of Goods*, 1986, 82. In the same spirit, the most recent edition of Schlechtriem's commentary states that maturity of the buyer's obligation to pay is dependent on the seller's presentation of "all documents as required by the contract", including "insurance documents, certificates of origin or quality and/or customs documents". F. Mohs, "Article 58", *Schlechtriem & Schwenzer, Commentary on the UN Convention on the International Sale of Goods (CISG)* (ed. I. Schwenzer), 2010, 849.

[4] M. Alba Fernández, "Documentary Duties of the Seller in Contracts for the International Sale of Goods: A Case for an Autonomous Interpretation of Article 58 of the Vienna Sales Convention", *Scritti in Onore de Francesco Berlingieri, 1 2010 Il Diritto Maritimo*, 2010, 3.

[5] *UNCITRAL Yearbook VIII: 1977* (1978); A/CN.9/SER.A/1977; E.78.V.7, 49.

[6] UNCITRAL, *Report on Eleventh Session* (1978), A/33/17, 19.

[7] A/CONF.97/L.13, para. 35.

[8] A/CONF.97/C.1/L.189.

[9] Secretariat of the United Nations Commission on International Trade Law (UNCITRAL), *Secretariat Commentary*, A/CONF. 97/5, Commentary to Art. 54 of the 1978 Draft Convention, available at *http://www.cisg.law.pace.edu/cisg/text/secomm/secomm 58.html*, 22 July, 2010.

which now appears only in Arts 58 and 67(1). At the Diplomatic Conference in Vienna, the First Committee approved an amendment to then-Art. 80 proposed by the United States, to substitute the words "documents embodying the contract of carriage" for "documents controlling their disposition".[10] Proposing the amendment, John Honnold said that the expression "documents controlling their disposition" was likely to be understood as being limited to negotiable bills of lading, whereas the rule about passing of risk in what became Art. 68 should apply whether the document was negotiable or not.[11] The Chairman, Roland Loewe, agreed, saying that the phrase "documents controlling the disposition of the goods" did indeed mean negotiable documents.[12]

The Chinese and Russian texts of Art. 58, (Russian: "либо товарораспорядительные документы") are equivalent in meaning to the English text "documents controlling their disposition". In the Arabic, French and Spanish texts, Art. 58 speaks literally of documents *representing* the goods, although it seems that in Spanish, at least, the phrase is understood in the narrower sense to mean documents entitling the holder to possession.[13] In Spanish, the relevant phrase is: "los correspondientes documentos representativos". In French, it is: "des documents représentatifs des marchandises". In Arabic, it is: اهلثمت يتلا تادنتسملا وا.

Although the delegates at Vienna did not debate the meaning of the phrase "documents controlling their disposition" when considering Art. 58, it seems likely from their discussion about Art. 68 that they had in mind the traditional, negotiable bill of lading issued by an ocean carrier, which is the paradigm document controlling the right to possession of the goods it represents. Although negotiable bills of lading of this kind are still common when goods are carried by sea in bulk, they are much less common than they used to be in liner trades of goods carried by sea in containers, as Sections 2.1, 2.2 and 2.3 of this paper will demonstrate. Sections 2.5 and 2.6 will show that the documents used for international carriage of goods by road, rail and air are not (except in North America) and have never been "documents controlling [the] disposition" of the goods under the narrow interpretation of the phrase that makes it equivalent to documents giving the holder the right to possession. Thus, to summarize Section 2 in advance, bills of lading issued directly by ocean carriers control the disposition of the goods in the narrow sense, as do ship's delivery orders. Negotiable bills for sea carriage issued by intermediaries,

[10] A/CONF.97/C.1/L.231.

[11] Report of the First Committee, A/CONF.97/11, 32nd meeting, para. 13 (1980).

[12] *Ibid.*, para. 17.

[13] M. Alba Fernández, 15.

sea waybills, air waybills, and road and rail consignment notes do not control the disposition of the goods in the narrow sense. In short, only two of the many different types of international transport document now in use clearly fall within the narrow interpretation of Art. 58.

Two responses are possible. The first is to argue for a broader interpretation of Art. 58, one closer in meaning to documents *representing* the goods, as being much better suited to the kinds of document used for international transportation of goods in the 21st century.[14] This would at least match the literal text of the Arabic, French and Spanish versions, if not the way in which that text is apparently understood.[15] All of the transport documents considered in Section 2 *represent* the goods, each of them being at least a receipt acknowledging the carrier's possession of the goods and its undertaking to carry them to their destination. Under this broad interpretation of Art. 58(1), presentation of any kind of transport document would trigger the buyer's payment obligation.

An alternative approach would be to confine Art. 58 narrowly to traditional negotiable bills of lading, so that no other kind of transport document could trigger the buyer's obligation to pay the price under Art. 58(1). If any of the other kinds of transport document were to be used, the buyer's obligation to pay would be triggered only by the seller placing the *goods* at the buyer's disposition, there being no "documents controlling [the] disposition" of the goods. These two alternative interpretations will be considered in Section 4; the former is preferred. Section 3 considers other kinds of documents, such as warehouse receipts, ship's delivery orders and the other documents that a buyer typically asks to see as applicant under a letter of credit.

## 2. TRANSPORT DOCUMENTS

### 2.1. Negotiable bills of lading and their decline

The classic example of a "document controlling [the] disposition" of the goods is the negotiable bill of lading issued by an ocean carrier. A bill of lading is made negotiable[16] by insertion of the words "To Order"

[14] *Ibid.*, 16 24.

[15] *Ibid.*.

[16] Strictly speaking, a bill of lading "To Order" is not negotiable, but transferable: see *Kum v. Wah Tat Bank* [1971] 1 Lloyd's Rep. 439 at 446 (P.C.); *J.I. MacWilliam Co. Inc. v. Mediterranean Shipping Co. S.A. (The Rafaela S)* [2005] 2 A.C. 423 at 444 per Lord Bingham. It cannot give the transferee better title than the transferor has. It may, however, transfer the transferor's contractual rights to the transferee by indorsement, including the right to possession of the goods.

in the box where the consignee is to be identified.[17] This operates as a promise by the carrier to deliver the goods at the named port of discharge to the order of the shipper (the person putting the goods on the ship, usually the seller or its representative) or other identified person.[18] The order is given to the carrier by indorsing the bill of lading and sending it to the person who is to take delivery, usually in return for the purchase price.[19] The new holder then presents the original bill of lading to the carrier at the port of discharge. The carrier is entitled and obliged to deliver to the holder of the original bill of lading, without inquiring about whether it is the true owner of the goods.[20] The document thus controls the right to possession of the goods – it is the "key to the warehouse".[21] Whoever has the indorsed original bill of lading is entitled to possession of the goods,[22] so there can be no doubt that such a document would satisfy the description in Art. 58 of "documents controlling... disposition" of the goods, even under the narrow interpretation.

"Straight" bills of lading name the consignee. They are not negotiable but they must be transferred to the named consignee and presented to the carrier in order for the consignee to be entitled to take possession of the goods.[23] Because the carrier is entitled to demand surrender of the

[17] *Henderson v. Comptoire d'Escompte de Paris* (1873) L.R. 5 P.C. 253 (PC) ("[T]o make bills of lading negotiable, some such words as 'or order or assigns' ought to be in them").

[18] *Parsons Corp. v. C.V. Scheepvaartonderneming "Happy Ranger" (The Happy Ranger)* [2002] 2 Lloyd's Rep. 357 at 363 para. [27] per Tuckey L.J.

[19] The bill of lading may be indorsed to the particular person e.g. "Deliver to B or B's order" which is called special indorsement, or indorsement in full, or it may be indorsed in blank, by the shipper simply writing its name on the back, which then means that whoever holds the bill is entitled to possession of the goods. See *Scrutton on Charterparties and Bills of Lading*, (eds. S. Boyd et al.), 2008[21], 169. See also *Bandung Shipping Pte Ltd v. Keppel Tatlee Bank Ltd* [2003] 1 S.L.R. 295 at [18] [20]; [2003] 1 Lloyd's Rep. 619 at 622 per Chao Hick Tin, J.A. Indorsement in blank is more common in practice.

[20] *Barber v. Meyerstein* (1870) L.R. 4 H.L. 317.

[21] *Sanders Bros v. Maclean & Co.* (1883) 11 Q.B.D. 327 at 341 per Bowen L.J.

[22] The U.N. Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea 2009 (the Rotterdam Rules), Art. 47(1)(a)(i) adds the requirement that the holder of a "negotiable transport document" must properly identify itself as well as surrendering the original document *if* it is the shipper, consignee or person to whom the document has been indorsed. The requirement that the holder identify itself does not apply when the document has been indorsed in blank, which is what is usually done in practice: Rotterdam Rules, Arts 1(10)(a)(ii), 47(1)(a)(i). The Rotterdam Rules, Art. 47(1)(b) provides that the carrier shall refuse delivery if the original document is not surrendered or the holder does not properly identify itself (if required to do so).

[23] *APL Co. Pte Ltd v. Voss Peer* [2002] 4 S.L.R. 481; [2002] 2 Lloyd's Rep. 707 (Sin.C.A.); *J.I. MacWilliam Co. Inc. v. Mediterranean Shipping Co. S.A. (The Rafaela S)* [2005] 2 A.C. 423 (H.L.); *Porky Products, Inc. v. Nippon Express USA (Illinois), Inc.*, 1

original straight bill of lading before handing over the goods, this kind of document must also be regarded as a "document controlling...disposition" of the goods in the narrow sense of CISG Art. 58, as the buyer cannot take possession of the goods without the original document.

As noted above, the classic negotiable bill of lading is used far less often in modern international transportation than it was thirty years ago when the CISG was made. Increasingly, it has been replaced by non-negotiable sea waybills,[24] which are dealt with in Section 2.2. Sea waybills are particularly common for containerized cargoes on relatively short sea voyages, when the ship may arrive at the port of destination before there has been time for a traditional negotiable bill of lading to be negotiated to the intended receiver.[25] When negotiable bills of lading are used in relation to goods carried in containers, they are often issued by operators that are known as NVOCCs (Non-Vessel-Operating Common Carrier) in North America and as freight forwarders or multimodal transport operators (MTOs) elsewhere. Bills of lading of that kind are considered in Section 2.3.

### 2.2. Sea waybills

Sea waybills are non-negotiable transport documents for carriage of goods by sea. Their non-negotiable nature is unmistakable: they usually have the word "Non-Negotiable" printed across them in large, diagonally-sloping letters. In the box where the consignee's name is to be written, the caption is usually "Consignee (not to order)", making it clear that this document should *not* be made out "To order", as a negotiable bill of lading would be.[26] The intended consignee is named on the waybill.

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F.Supp.2d. 227 (S.D.N.Y. 1997). See also H. Tiberg, "Legal Qualities of Transport Documents", *Maritime Law* 23/1998, 32; H. Tiberg, "Transfer of Documents", Lloyd's Maritime and Commercial Law Quarterly (L.M.C.L.Q.) 2002, 541, pointing out that German and Scandinavian law call such bills "recta bills", which are "presentation documents", in the sense that they must be presented to the carrier to take delivery. The Rotterdam Rules, Art. 51.2(b) provides that where a non negotiable transport document contains a surrender clause, as straight bills of lading do, the consignee must present the original document(s) to the carrier in order to exercise its right to control the goods.

[24] In 1989, it was estimated that 70% of all liner goods on North Atlantic routes were carried under sea waybills: see A. Lloyd, "The Bill of Lading: Do We Really Need It?", *L.M.C.L.Q.* 1998, 49.

[25] P. Todd, *Bills of Lading and Bankers' Documentary Credits*, Lloyd's of London Press, London New York 2007[4], 31 32.

[26] See, e.g., the Linewaybill and Combiconwaybill forms, two standard form sea waybills created by the Baltic and International Maritime Council (BIMCO), available online in several places, including *https://noppa.lut.fi/noppa/opintojakso/ac40a0050/.../merirahtikirja.pdf* (Linewaybill) and *http://www.infomarine.gr/bulletins/chartering forms/combiconwaybill.pdf* (Combiconwaybill).

The carrier undertakes to deliver to the named consignee. Importantly, there is no "surrender clause" on a sea waybill as there typically is on bills of lading, requiring one of the original bills of lading to be surrendered to the carrier in return for the cargo or a delivery order.[27] That is because the named consignee does not have to present the original sea waybill to the carrier in order to take delivery[28] (unlike the named consignee on a straight bill of lading, which must surrender the original bill of lading[29]). The named consignee simply identifies itself to the carrier as the person to whom delivery must be made. That procedure is reflected in the new U.N. Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea 2009 (the Rotterdam Rules), Art. 45, which deals with: "Delivery when no negotiable transport document or negotiable electronic transport record is issued". Article 45(a) simply provides that the carrier shall deliver the goods to the consignee, which must properly identify itself as the consignee if the carrier requests it to do so.

Because there is no longer any need to present an original document to take delivery, sea waybills are very often made in electronic form and are simply e-mailed from consignor to consignee.

Given these qualities, there can be little doubt that a sea waybill is *not* a "document controlling...disposition" of the goods under the narrow interpretation of CISG, Art. 58. The document merely reflects the delivery instruction given by the shipper to the carrier. Unlike a bill of lading, the document itself has no impact on the disposition of the goods, which will be delivered by the carrier to the consignee no matter what happens to the waybill document. The consignee would be entitled to possession of the goods on arrival even if it never received a copy of the sea waybill, because the carrier's obligation is simply to deliver to the named consignee upon proper identification.[30]

Some sea waybills reserve to the shipper the right to change the consignee after the goods have been shipped. Others provide that the shipper is entitled to transfer the "right of control" to the consignee, provided that option is noted on the sea waybill and exercised before the carrier receives the cargo.[31] These variants allow one or other party, either the shipper or the consignee, to change the delivery instructions by

[27] See, e.g., the Conlinebill form, a BIMCO standard form bill of lading available in many places online, including *http://www.formag agencies.com/docs/charters/conlinebill.pdf*.

[28] H. Tiberg,(2002), 542.

[29] See *supra* note 23.

[30] This will also be the position under the Rotterdam Rules, Art. 45(a).

[31] See, e.g., the Linewaybill and Combiconwaybill forms, *supra* note 26.

substituting a new person to whom the carrier must make delivery.[32] Not even these types of sea waybill are "documents controlling... possession" of the goods under the narrow interpretation of CISG, Art. 58. Even when the option to change the identity of the consignee is exercised, the document itself plays no part in the disposition of the goods. It merely reflects the fact that the shipper has reserved to itself a right, or has transferred a right to the consignee. The substituted consignee is entitled to take delivery if it can identify itself as the substituted consignee, not by virtue of the sea waybill document itself.

A sea waybill does, however, undoubtedly *represent* the goods under the broader interpretation of CISG, Art. 58. It operates as a receipt for the goods, showing their quantity, weight and apparent condition when handed to the carrier, and it is evidence of the carrier's obligation to carry them to their destination.[33] To that extent, the waybill serves as a kind of sign or symbol for the goods while they are in the carrier's possession.

### 2.3. Bills of lading issued by multimodal transport operators, freight forwarders and NVOCCs

In many cases, the seller or buyer of goods has little experience in dealing with international carriers. A seller of goods on CIP terms has contracted to arrange for carriage and insurance of the goods to the named port of destination[34] but it may not know how to go about contracting with a shipping line or buying cargo insurance. Often, traders in goods engage operators who specialize in international transportation, effectively delegating the task to them. Such operators are called many different things in different countries, often indicating slight differences in their function: freight forwarders, NVOCCs, logistics operators, multimodal transport operators (MTOs), etc.[35] An NVOCC undertakes to arrange transportation from point A to point B. Very often, it undertakes none of the carriage itself, but rather sub-contracts with road, rail, ocean and sometimes air carriers.[36]

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[32] The Rotterdam Rules deal with this situation, too, in Art. 51.1, which defines the "controlling party" for a non negotiable transport document without a surrender clause as the shipper, "unless the shipper, when the contract of carriage is concluded, designates the consignee, the documentary shipper or another person as the controlling party".

[33] C. Proctor, *The Legal Role of the Bill of Lading, Sea Waybill and Multimodal Transport Document*, Interlegal 1997, 83.

[34] International Chamber of Commerce, INCOTERMS 2000, CIP, para. A3. INCOTERMS 2010 come into operation on 1 January 2011.

[35] Hereafter, I shall use the North American name Non Vessel Operating Common Carrier (NVOCC), because it conveniently emphasizes the fact that such operators do not carry the goods themselves.

[36] The Rotterdam Rules are drafted to make provision for this kind of arrangement as well as the traditional form of carriage by sea, where the ocean carrier contracts directly

The seller or buyer of the goods makes a contract with the NVOCC; the NVOCC makes sub-contracts with the actual carriers of the goods. When the seller hands the goods over to the NVOCC's first sub-contracting carrier, the NVOCC usually issues its own document to the seller, acknowledging receipt of the goods and undertaking to carry them to the named destination. Just like an ocean carrier, the NVOCC may issue a bill of lading[37] (sometimes called a "house" bill of lading), which is negotiable if made out "To Order" or non-negotiable if made "straight" for delivery to a named consignee, or the NVOCC may issue a waybill,[38] which merely acknowledges receipt and evidences the contract of carriage. The goods are actually carried by the NVOCC's sub-contractors pursuant to the terms of the contracts between the NVOCC and the actual carriers. The NVOCC may have bought a large block of space on an ocean vessel on a liner route under a slot charter party or some other kind of contract between the NVOCC and the ocean carrier.[39] Alternatively, the NVOCC buys space on a carrying ship on an ad hoc basis, depending on how much trade it arranges between the two ports in question. The ocean carrier usually issues its own transport document naming the NVOCC as shipper.[40] That document is usually a straight bill of lading (often

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with the shipper. Rotterdam Rules, Art. 1(6)(a) defines "performing party" as a person other than the carrier that performs any part of the carrier's obligations. "Carrier" is defined as a person who enters into a contract of carriage with a shipper: Rotterdam Rules, Art. 1(6). Thus, the Rules provide for the situation where the contracting "carrier" does not perform itself, but sub contracts with "performing parties".

[37] See, e.g., the Negotiable FIATA Multimodal Transport Bill of Lading (FIATA FBL), designed for use by multimodal transport operators and issued subject to the UNCTAD/ICC Rules for Multimodal Transport Documents, available at many locations online, including *http://www.pier2pier.com/links/files/Certi/FBL.pdf*.

[38] See, e.g, the FIATA Multimodal Transport Waybill (FIATA FWB), designed for use by multimodal transport operators, available in *http://www.oasis open.org/committees/download.php/14902/annex2r.pdf*.

[39] See, e.g., *Metvale Ltd v. Monsanto International SARL (The MSC Napoli)* [2009] 2 Lloyd's Rep. 246 (slot charterers seek limitation); M. Reilly, "Identity of the Carrier: Issues under Slot Charters", *Tulane Maritime Law Journal* 25/2001, 505. If the contract between NVOCC and ocean carrier is a slot charter, the Rotterdam Rules would not apply as between ocean carrier and NVOCC: see Art. 6.1. Other types of carriage sub contract might be governed by the Rotterdam Rules, although if the contract between NVOCC and ocean carrier amounts to a "volume contract" as defined in Art. 1(2), then special rules would apply as between the NVOCC and the ocean carrier, by operation of Art. 80.

[40] See, e.g., *Norfolk Southern Railway Co. v. Kirby*, 543 U.S. 14, 2004 AMC 2705 (2004), where an NVOCC (called a freight forwarder because it was Australian) issued a bill of lading to a seller of goods for carriage from Sydney, Australia to Huntsville, Alabama. The NVOCC/forwarder contracted with an ocean carrier, Hamburg Süd, for ocean transportation from Sydney, Australia to Savannah, Georgia, and for rail carriage from Savannah to Huntsville. Hamburg Süd issued an ocean bill of lading naming the NVOCC as shipper.

called the main bill to distinguish it from the NVOCC's "house" bill) or a sea waybill, naming the NVOCC as shipper and the NVOCC's foreign agent or subsidiary as receiver. The main bill or waybill is non-negotiable, as there is no need for it to be made negotiable because the ocean carrier simply delivers the goods to the NVOCC or its agent at the port of discharge.

Under such an arrangement, which is very common in relation to goods carried in containers, the document that passes from the seller's hands to the buyer's hands under the sale contract is the NVOCC's bill of lading. The seller and buyer usually never see the ocean carrier's transport document, which regulates the sub-contracting relationship between the NVOCC and the ocean carrier. Importantly for our present purposes, the NVOCC bill of lading cannot be regarded as a "document controlling...disposition" of the goods in the strict sense, even if it is made negotiable by inclusion of the words "To Order". True, a negotiable bill of lading issued by an NVOCC regulates the relationship between NVOCC, shipper and holder in the same way that a classic negotiable bill of lading does. The NVOCC will (or should) only hand over the goods (or arrange for them to be handed over) at the named place of destination in return for the original bill of lading, presented by the holder. Importantly, though, the NVOCC does not have (and may never have had) possession of the goods itself. It has the right to receive possession of the goods from the ocean carrier (or sub-contracting inland carrier) but that right is regulated by the terms of the contract between the NVOCC and the actual carrier. If, for example, the NVOCC owes freight to the ocean carrier, the ocean carrier may be entitled to exercise a lien over the goods for non-payment of freight, and may refuse to deliver them. In those circumstances, the NVOCC cannot give possession of the goods to the buyer of the goods at the place of destination in return for the original NVOCC bill of lading.

In other words, the NVOCC bill of lading does not *in itself* control the disposition of the goods, in the narrow sense of giving the holder the right to possession of the goods. It only does so in combination with the transport document issued by the ocean carrier (or other sub-contracting carrier). The latter document (the main bill) is not among those transferred from seller to buyer, as the seller may never see it. The NVOCC bill can have no effect in controlling the disposition of the goods in the narrow sense unless and until the ocean carrier (or other sub-contracting carrier) has made delivery under its contract of carriage with the NVOCC. Thus, a strict interpretation of Art. 58 should exclude NVOCC bills of lading from the category of "documents controlling [the] disposition" of the goods, because the NVOCC does not have and cannot give possession of the goods itself. The document may or may not control disposition

of the goods, depending on the NVOCC's relationship with the sub-contracting carriers.

There can be no doubt, however, that an NVOCC bill *represents* the goods under the broader interpretation of CISG, Art. 58. It operates as a receipt for the goods, showing their quantity, weight and apparent condition when handed to the carrier (usually the first sub-contracting actual carrier), and it is evidence of the NVOCC's obligation to arrange carriage of them to their destination.

### 2.4. Ship's delivery orders

When goods are carried in bulk, a document known as a ship's delivery order is often generated by the carrier. The shipper of goods carried in an undifferentiated bulk[41] may sell parts of the cargo to different buyers. The bill of lading issued by the carrier to the shipper when the goods are shipped on board represents the whole quantity of the goods. In order for the seller to pass to several different buyers the right to take delivery of portions of the cargo that are presently undifferentiated, the seller must present to those buyers documents giving them the right to take possession of their respective portions. In short, the seller must be able to split the whole cargo into parts. That is achieved by the seller-shipper surrendering the bill of lading to the carrier in return for several ship's delivery orders corresponding to the amounts to be delivered to each of the buyers. The seller-shipper tenders a delivery order to each buyer, who takes delivery from the carrier of the quantity of cargo corresponding to its delivery order.[42]

Standard form contracts for the sale of bulk cargoes often expressly exclude the CISG,[43] so the question whether a ship's delivery order is

[41] For example, if 40,000 metric tonnes of wheat are shipped on a ship with five holds (or 40,000 metric tonnes of oil on a ship with five cargo tanks), and the shipper later sells 25,000 metric tonnes to one buyer and 15,000 metric tonnes to another, it is impossible to tell where the first buyer's portion ends and the second buyer's portion begins, except that it will be somewhere in the middle of one of the holds (or tanks). It is possible for dry bulk cargoes to be differentiated in advance by the use of separators, and for bulk liquid cargoes to be differentiated in vessels such as parcel tankers, which carry many different cargoes in small tanks.

[42] See, e.g., *Peter Cremer, Westfaelische Central Genossenschaft G.m.b.H. v. General Carriers, S.A. (The Dona Mari)* [1973] 2 Lloyd's Rep. 366 (cargo of bulk tapioca shipped under single bill of lading split into two by issue of ship's delivery orders for smaller quantities; ship's delivery order presented in return for payment by buyers, who presented their delivery orders to the carrier to take delivery).

[43] See, e.g., GAFTA Contract No. 100, cl. 28(b)(CIF terms bulk grain); GAFTA Contract No. 119, cl. 27(b)(FOB terms bag or bulk grain): FOSFA Contract No. 24, cl. 27(b) (CIF terms soyabeans); FOSFA Contract No. 53, cl. 28(b) (FOB terms bulk vegetable and mineral oil), reproduced in M. Bridge, *The International Sale of Goods,* Oxford

a "document controlling... disposition" for purposes of CISG, Art. 58 will seldom arise in practice. If the question does arise, it seems clear that a ship's delivery order should qualify as a "document controlling...disposition" of the goods, even under the narrow interpretation of Art. 58, if tender of such a document is permitted under the sale contract. For all practical purposes, it functions in the same way as a bill of lading, except for an undifferentiated portion of the cargo on the ship.[44] Each buyer needs the ship's delivery order to take possession of its portion of the goods on the ship. The seller should be able to retain withhold the document under CISG, Art. 58(2) until the buyer pays, and the buyer should be obliged to pay under CISG, Art. 58(1) once it receives the document.

### 2.5. Road and rail consignment notes

#### *2.5.1. Under the international conventions governing road and rail carriage*

If the goods are to be carried from one country to another by road or rail, the transport document is usually a non-negotiable one. When the country of departure and the country of arrival are both party to the Convention Concerning International Carriage by Rail 1980 (COTIF), rail carriage is governed by the Uniform Rules Concerning the Contract of International Carriage of Goods by Rail (CIM), which is Appendix B to COTIF. When either the country of departure or the country of arrival is party to the Convention on the Contract for the International Carriage of Goods by Road (CMR), road carriage is governed by CMR. Although COTIF and CMR were originally confined to Europe, they both now reach far beyond, to Scandinavia, the Middle East, North Africa and (in the case of CMR) Central Asia. Forty-five countries are party to COTIF,[45]

University Press, Oxford 2007[2], Appendices 1 4. Each clause excludes the operation of the CISG. See also the NAEGA II Contract, cl. 27(b), produced by the North American Export Grain Association, Inc, which also excludes the CISG. It is available at *http://www.naega.org/images/naegacontract.pdf*, 21 July 2010.

[44] It is not possible for the original bill of lading to be surrendered in return for several new bills of lading corresponding to the buyers' respective portions, as a bill of lading must be issued on shipment or soon thereafter. Splitting a cargo issued under a single bill of lading can only be done by issuing ship's delivery orders: see *S.I.A.T. Di Del Ferro v. Tradax Overseas, S.A.* [1978] 2 Lloyd's Rep. 470 at 493 per Donaldson J.

[45] The parties are: Albania, Algeria, Austria, Belgium, Bosnia and Herzegovina, Bulgaria, Croatia, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Iran, Iraq, Ireland, Italy, Latvia, Lebanon, Liechtenstein, Lithuania, Luxembourg, The Former Yugoslav Republic of Macedonia, Monaco, Montenegro, Morocco, Netherlands, Norway, Poland, Portugal, Romania, Russia, Serbia, Slovak Republic, Slovenia, Spain, Sweden, Switzerland, Syria, Tunisia, Turkey, Ukraine and United Kingdom. Intergovernmental Organisation for International Carriage by Rail, *Intergovernmental Organisation for International Carriage by Rail (OTIF)*, para. 11 (July 2010), available at: *http://www.otif.*

of which 35 are also party to the CISG;[46] 55 countries are party to CMR,[47] of which 42 are also party to the CISG.[48]

For rail carriage under CIM and road carriage under CMR, the transport document issued by the carrier is called a consignment note. In both cases, the consignment note is non-negotiable; the consignee is named on the consignment note.[49] Consignment notes do not control possession of the goods but merely provide evidence of the contract and the condition of the goods received for carriage.[50] Under CIM, the consignment note is carried with the goods to the destination and delivered to the consignee there, and a duplicate copy is given to the consignor.[51] Under CMR, three original consignment notes are made: one is handed to the sender, one accompanies the goods and is handed to the consignee on arrival, and the third is retained by the carrier.[52] Under both conventions, the consignee is entitled to demand delivery of both the goods and the consignment note after arrival of the goods at the place designated for delivery.[53] Because the consignee takes delivery of the goods and the

*org/fileadmin/user upload/otif verlinkte files/01 vorstellung/01 allg info/OTIF Info 07 2010 e.pdf*, 6 July 2010. The membership of Iraq and Lebanon is suspended be cause international rail traffic with those states is interrupted. *Ibid.* para. 12.

[46] Of the countries party to COTIF (see *supra* note 41), only Algeria, Iran, Ireland, Liechtenstein, Monaco, Morocco, Portugal, Tunisia, Turkey and the U.K. are not party to the CISG.

[47] The parties to CMR are: Albania, Armenia, Austria, Azerbaijan, Belarus, Belgium, Bosnia and Herzegovina, Bulgaria, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Georgia, Germany, Greece, Hungary, Iran, Ireland, Italy, Jordan, Kazakhstan, Kyrgyzstan, Latvia, Lebanon, Lithuania, Luxembourg, The Former Yugoslav Republic of Macedonia, Malta, Moldova, Mongolia, Montenegro, Morocco, Netherlands, Norway, Poland, Portugal, Romania, Russia, Serbia, Slovakia, Slovenia, Spain, Sweden, Switzerland, Syria, Tajikistan, Tunisia, Turkey, Turkmenistan, Ukraine, United Kingdom and Uzbekistan. United Nations Economic Commission for Europe (UNECE), *Legal instruments in the field of transport: Convention on the Contract for the International Carriage of Goods by Road (CMR)*, at *http://www.unece.org/trans/conventn/legalinst 25 OLIRT CMR.html*, 7 July 2010.

[48] Of the countries party to COTIF (see *supra* note 37), only Azerbaijan, Iran, Ireland, Jordan, Kazakhstan, Malta, Morocco, Portugal, Tajikistan, Tunisia, Turkey, Turkmenistan and the U.K. are not party to the CISG.

[49] CIM, Art. 7 § 1(g); CMR, Art. 6.1(e). CIM, Art. 6 § 5 specifically provides that the consignment note shall not have effect as a bill of lading.

[50] H. Beale, L. Griffiths, "Electronic Commerce: Formal Requirements in Commercial Transactions" *L.M.C.L.Q.* 2002, 479; A.D. Messent, D. Glass, *Hill & Messent's CMR: Contracts for the International Carriage of Goods by Road*, 2000[3], Ch. 4.

[51] CIM, Art. 6 § 4 (duplicate copy to consignor), Art. 17 § 1 (original consignment note to be delivered to consignee).

[52] CMR, Art. 5.1.

[53] CIM, Art. 17 § 1; CMR, Art. 13.1.

original consignment note from the road or rail carrier at the same time, it is obvious that the original consignment note itself cannot constitute a "document controlling...disposition" of the goods under a narrow interpretation of CISG, Art. 58.

It has been suggested, albeit tentatively, that the provisions in CIM and CMR about the right of disposal have the effect that the duplicate consignment note (in the case of CIM) or the sender's copy[54] of the consignment note (in the case of CMR) is a document controlling the disposition of the goods for the purposes of CISG Art. 58(1).[55] Both CIM and CMR give the consignor the right to modify the contract of carriage by giving subsequent orders to the carrier including, in particular, the right to deliver the goods to a consignee different from the one entered on the consignment note.[56] The consignee has that right under CIM unless the consignor indicates to the contrary on the consignment note; under CMR, the consignee has a right of disposal only if the sender makes an entry to that effect on the consignment note.[57] Thus, under CIM, the consignee has the right of disposal and the consignor does not unless the consignment note reserves the right to the consignor.[58] Conversely, under CMR, the sender has the right of disposal and the consignee does not unless the consignment note confers the right on the consignee.[59]

In order to exercise the right of disposal, the consignor or consignee must produce to the carrier the duplicate consignment note (in the case of CIM) or the first copy of the consignment note (in the case of CMR).[60] Thus, the consignor is no longer entitled to redirect the goods if it has sent the duplicate or first copy to the consignee.[61] Conversely, the consignee cannot exercise the right of disposal until it has received the

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[54] CMR refers to this copy as the "first copy", which is the expression that will be used hereafter.

[55] L. Sevón, "Obligations of the Buyer under the Vienna Convention on the International Sale of Goods", *Juridisk Tidskrift* 106/1990, 335 (1990). See also Maskow, *supra* note 50; Alba Fernández, *supra* note 131 at 22.

[56] CIM, Art. 18 § 1(c); CMR, Art. 12.1.

[57] CIM, Art. 18 § 3; CMR, Art. 12.3.

[58] CIM, Art. 18 § 2(d) provides that the consignor's right is extinguished when the consignee becomes entitled to give orders under Art. 18 § 3. The consignee is entitled to give orders as soon as the consignment note is drawn up unless the consignor indicates to the contrary (see CIM, Art. 18 § 3), so the consignor's right is extinguished immediately unless it is expressly reserved in the consignment note.

[59] CMR, Art. 12.3.

[60] CIM, Art. 19 § 1; CMR, Art. 12.5(a).

[61] CIM, Art. 17 § 7 and CMR, Art. 12.7 provide that the carrier is liable in damages to the consignee if it follows the consignor's orders without requiring production of the duplicate (in the case of CIM) or first copy (in the case of CMR).

duplicate or first copy from the consignor.[62] This is the basis for the argument that the duplicate or first copy may be a "document controlling... disposition" of the goods for purposes of CISG, Art. 58.[63]

That view overstates the significance of the duplicate or first copy. The document itself does not control the disposition of the goods in the narrow sense. If, under CMR, the sender does not reserve the right of disposal to the consignee on the face of the consignment note, transfer of the first copy of the consignment note does not pass the right of disposal to the consignee.[64] The UNECE Ad Hoc Working Party that drafted CMR considered and rejected such a rule, on the basis that it would have been contrary to the principle that the consignment note is not a negotiable instrument but principally a document of proof.[65] If the sender exercises the right of disposal by presenting the first copy to the carrier, it can divert delivery of the goods from the named consignee but in those circumstances, *ex hypothesi*, it is not presenting a document "controlling...disposition" to the *buyer*, it is exercising a right conferred on it by CMR, using the document as a means of proving to the *carrier* that it has that right.

If the consignee has the right of disposal,[66] it cannot exercise that right unless it presents the duplicate consignment note (in the case of CIM) or the first copy of the consignment note (in the case of CMR).[67] Nevertheless, the document itself does not control the disposition of the goods in the narrow sense. The consignor cannot exercise the right of disposal even if it still holds the duplicate or first copy.[68] Transfer of the document from consignor to consignee does not transfer the right of disposal, which has always been with the consignee; it merely gives the consignee the ability to exercise that right. If the duplicate or first copy is not transferred, the consignee is entitled to demand delivery of the goods without presentation of the document.[69]

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62 CIM, Art. 19 § 1; CMR, Art. 12.5(a).

63 *Supra* note 58.

64 R. Loewe, "Commentary on the Convention of 19th May 1956 on the Contract for the International Carriage of Goods by Road", *European Transport Law* 11/1976, 352.

65 *Ibid.*

66 As it will automatically under CIM unless the consignment note provides otherwise, but not under CMR unless the consignment note so provides: see *supra* note 184.

67 *Supra* note 62.

68 CIM, Art. 19 § 2 expressly provides that the consignor's right is extinguished if the consignee has the right of disposal, "notwithstanding that he [the consignor] is still in possession of the duplicate of the consignment note".

69 CIM, Art. 17 § 1; CMR, Art. 13.1.

In summary, possession of the duplicate consignment note (in the case of CIM) or the first copy of the consignment note (in the case of CMR) does not change who has the right of disposal. If the consignor has the right of disposal, transfer of the document does not give the consignee the right; if the consignee has the right of disposal, the consignor cannot exercise the right even if it has the document. Thus, under the narrow interpretation of CISG, Art. 58, which equates "documents controlling... disposition" with documents giving the holder the right to possession, neither the duplicate consignment note (in the case of CIM) nor the first copy of the consignment note (in the case of CMR) would qualify.

Both types of consignment note *represent* the goods under the broader interpretation of CISG, Art. 58 because they operate as a receipt for the goods, showing their quantity, weight and apparent condition when handed to the carrier, and as evidence of the carrier's obligation to carry them to their destination.

### *2.5.2. In North America*

In North America, transport documents for carriage by road and rail are called bills of lading. In the United States, for example, a road or rail carrier receiving goods for transportation from the United States to another country must issue a receipt or bill of lading.[70] All bills of lading, including road and rail bills, may be either negotiable or non-negotiable.[71] Because road and rail bills of lading issued in the United States are subject to the same provisions as those governing bills of lading for carriage of goods by sea,[72] they would be "documents controlling [the] disposition" of the goods even under the narrow interpretation of CISG, Art. 58, unlike their counterparts under CIM and CMR.

## 2.6. Air waybills

Goods carried by air from one country to another as cargo are carried under non-negotiable documents called air waybills. Like sea waybills and road and rail consignment notes, air waybills simply name the consignee to which delivery must be made.

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[70] 49 U.S.C. § 11706(a)(rail); 49 U.S.C. § 14706(a)(road). Under both of these provisions, the carrier is only obliged to issue a bill of lading if it is subject to the jurisdiction of the Surface Transportation Board (STB), which is the case for road and rail carriage between the United States and a place in a foreign country: see 49 U.S.C. § 10501(a)(2)(F)(rail); 49 U.S.C. § 13501(1)(E)(road).

[71] 49 U.S.C. § 80103. 49 C.F.R. § 1035.1 stipulates the standard forms of order bills of lading and straight bills of lading that must be issued by rail carriers. 49 U.S.C. § 373.101 lists the information that must be contained in bills of lading issued by motor carriers.

[72] The Pomerene Act, 49 U.S.C. § 80101 16, applies to all bills of lading issued by a "common carrier", which includes road and rail carriers as well as sea carriers.

When the country of departure and the country of arrival are both party to the Convention for the Unification of Certain Rules for International Carriage by Air 1999 (the Montreal Convention), the Convention governs the carriage.[73] Ninety-seven countries are party to the Montreal Convention,[74] of which 57 are also party to the CISG.[75]

The Montreal Convention requires an air carrier of cargo to issue an air waybill in three original parts, one for the carrier, one for the consignee and one for the consignor.[76] The carrier is obliged to deliver the cargo to the consignee on arrival at the place of destination, unless the consignor has exercised a right of disposal similar to that considered above in relation to CIM and CMR.[77] The consignor may stop the cargo in transit or may require the carrier to deliver it to a consignee other than the one originally designated, but it can only do so upon presentation of the consignor's copy of the air waybill.[78] Unlike CIM and CMR, the Montreal Convention does not confer a similar right of disposal on the consignee. Thus, there is never any need for the consignor to send its copy or the air waybill to the consignee. Accordingly, no copy of the air waybill can be regarded as a "document controlling...disposition" under the narrow interpretation of CISG, Art. 58. The copies of the air waybill play no part in establishing the consignee's right to delivery of the goods from the carrier.

### 2.7. Summary in relation to transport documents

Negotiable bills of lading and straight bills of lading for sea carriage are "documents controlling...disposition" of the goods under the narrow reading of CISG, Art. 58 if they are issued by the sea carrier directly to the shipper. So are ship's delivery orders reflecting an undertaking by the carrier to deliver parts of an undifferentiated bulk to different receivers. Sea waybills, road and rail consignment notes and air waybills are not "documents controlling...disposition" of the goods under the narrow interpretation of CISG, Art. 58. Negotiable bills of lading for sea

[73] Montreal Convention, Art. 1.2. The Convention also governs carriage from one place to another within a single State Party if there is an agreed stopping place within the territory of another State Party: Montreal Convention, Art. 1.2.

[74] The list of countries party to the Montreal Convention can be read at: *http://www.icao.int/icao/en/leb/mtl99.pdf*, 8 July 2010.

[75] The following 17 countries are party to the CISG but not the Montreal Convention: Belarus, Burundi, Gabon, Georgia, Guinea, Honduras, Iraq, Israel, Kyrgyzstan, Lesotho, Liberia, Mauritania, Moldova, Russia, Uganda, Uzbekistan and Zambia. All other countries party to the CISG are also party to the Montreal Convention.

[76] Montreal Convention, Art. 7.

[77] Montreal Convention, Art. 13.1.

[78] Montreal Convention, Arts 12.1, 12.3.

carriage issued by NVOCCs probably are not. In North America, road and rail bills of lading do fall within CISG, Art. 58, even under the narrow interpretation.

All of these documents *represent* the goods under the broader interpretation of CISG, Art. 58. All acknowledge receipt of the goods and the carrier's obligation to carry them to their destination and to deliver them there.

## 3. OTHER DOCUMENTS

### 3.1. Warehouse receipts (or warrants)

The document known in the U.S.A. and in many other countries as a warehouse receipt (but in the U.K. as a warehouse warrant[79]) functions in much the same way as a bill of lading, but for the fact that the goods are not in transit in the possession of a carrier but rather are static in the possession of a warehouse keeper. When goods are deposited with it, the warehouse keeper issues a warehouse receipt, which may be negotiable or non-negotiable. A non-negotiable warehouse receipt is made out to a particular person, promising return of the goods to that person. A warehouse receipt is negotiable if it provides that the goods in the warehouse are to be delivered to bearer or to the order of a named person.[80] The holder of a negotiable warehouse receipt may sell or pledge the goods in the warehouse by dealing with the document.

Because it functions much like a bill of lading, a warehouse receipt is clearly a document "controlling...disposition" of the goods in the warehouse under the narrow interpretation of CISG, Art. 58. The fact that the goods remain in the warehouse until delivered to the holder of the document is immaterial, as they may still be the subject of a sale contract governed by the CISG if the seller and the buyer are in different Contracting States.[81] The German Bundesgerichtshof has described a warehouse receipt (in German, Lagerschein) as a "true transfer document" ("echten Traditionspapiere"), listing it as an example of the kind of document to which CISG, Art. 58(1) clearly applies.[82] Similarly, the Kantonsgericht

[79] In the U.K., a warehouse receipt is a non negotiable document simply acknowledging receipt of goods. Hereafter, the expression "warehouse receipt" is used in the American sense, which is in common usage in other countries, too. In the U.K. such a document would be called a warehouse warrant.

[80] See, e.g., the Uniform Commercial Code, U.C.C. § 7 104(a).

[81] CISG, Art. 1(1)(a).

[82] BGH VIII ZR 51/95 (3 April 1996), para. II.3, CLOUT Case 171. English translation by Peter Feuerstein available at *http://cisgw3.law.pace.edu/cases/960403g1.*

St. Gallen in Switzerland described a negotiable warehouse receipt ("Orderlagerschein") as the kind of document to which CISG Art. 58 clearly applies.[83]

3.2. Dock receipts (or warrants), quai receipts, mate's receipts, etc.

Sometimes, a sea-carrier or dock or terminal operator issues a document known variously as a dock receipt, dock warrant or quai receipt, which acknowledges receipt of the goods at the port for later shipment on a ship.[84] Later, often not until the goods are shipped on board the ship, the carrier issues a bill of lading in return for the dock receipt, based on the information contained in the dock receipt. This practice is much less common than it used to be because of the increased use of multimodal bills of lading, under which the multimodal carrier acknowledges receipt of the goods long before they even arrive at the port for shipment onto a vessel, and also the use of "received for shipment" bills of lading issued by the carrier acknowledging receipt of the goods at the dock or container terminal, which are later simply indorsed with the words "shipped on board". Dock receipts may, however, still be issued for goods not carried in containers (break-bulk cargo), or goods to be consolidated with other cargoes into containers at the port (LCL or Less than Container Load cargo).

Similarly, for bulk cargoes, a document known as a mate's receipt is sometimes issued when the cargo is first delivered to the ship, acknowledging receipt of the goods and stating their apparent condition. The bill of lading is later issued in conformity with, and in return for, the mate's receipt.

It has been suggested that documents such as dock receipts should be regarded as falling within CISG, Art. 58 if transferred to the buyer,[85] but that seems undesirable. The carrier's obligation is to issue a bill of lading to the shipper named on the dock receipt or mate's receipt, regardless of who is actually in possession of the receipt.[86] If the buyer's obli-

*html#cx* (last visited July 8th, 2010); original German text available at *http://www.cisg online.ch/cisg/urteile/135.htm* (last visited July 8th, 2010).

[83] Kantonsgericht St. Gallen, 3 ZK 96 145 (12 August 1997), CLOUT Case 216; CISG online No. 330. Original German text available at *http://www.globalsaleslaw.org/content/api/cisg/urteile/330.pdf* (last visited July 13th, 2010).

[84] The dock receipt may in some cases be issued by the dock or terminal operator, rather than by the carrier: see, e.g., *Ferrex Int'l, Inc. v. M/V Rico Chone*, 718 F.Supp. 451, 1989 AMC 1109 (D.Md. 1988). Whoever issues the dock receipt, it typically incorporates the terms of the carrier's bill of lading: see, e.g., *Mediterranean Marine Lines, Inc. v. John T. Clark & Son of Maryland, Inc.*, 485 F.Supp. 1330 (D.Md. 1980).

[85] Maskow, 427.

[86] This principle is firmly entrenched as a matter of English law: see *Hathesing v. Laing* (1874) L.R. 17 Eq. 92; *Nippon Yusen Kaisha v. Ramjiban Serowgee* [1938] A.C. 429 (P.C., appeal from India).

gation to pay were to be triggered by CISG, Art. 58(1) on presentation by the seller of the dock receipt or mate's receipt, the buyer might be left in the position of having to pay for the goods when the carrier could still, quite properly, issue a bill of lading to the seller, who could then sell the right to possession to someone else by indorsing the bill of lading to them.[87] Because the dock receipt or mate's receipt is not enough in itself to give the holder the right to possession of the goods, it should not qualify as a document "controlling... disposition" of the goods under the narrow interpretation of CISG, Art. 58.

It might be argued that a dock receipt or mate's receipt must be regarded as a document *representing* the goods and so must be included under CISG, Art. 58 under the broader interpretation, however undesirable the practical implications. The document does, after all, act as the carrier's (or dock or terminal operator's) initial acknowledgment of receipt of the goods, stating their quantity, weight and apparent condition. There are certainly circumstances in which it might seem appropriate at first sight to treat a dock receipt or mate's receipt as a document qualifying under CISG, Art. 58. For example, if goods are sold on FCA terms and a dock receipt is issued by the terminal operator when the goods are delivered to the port, but the goods are destroyed while waiting to be loaded, the buyer should still be obliged to pay for them because risk passes under FCA terms when the goods are handed to the terminal operator.[88] It might seem that the buyer should therefore be required to pay for the goods upon presentation by the seller of the dock receipt. However, transfer of the dock receipt would not give the buyer the right to sue the carrier or terminal operator, whichever issued the dock receipt, because it is not the contract of carriage nor even evidence of the contract of carriage, but merely a receipt.[89] Thus, the buyer should not be required to pay in return for the dock receipt, because purchase of the document would give it no rights against the carrier. In such a case, the seller should present the dock receipt to the carrier and demand a "received for shipment" bill of lading, which the carrier would be obliged to issue, notwithstanding the destruction of the goods before actual shipment. The seller should then transfer the "received for shipment" bill of lading to the buyer, demanding payment. Transfer of the "received for shipment" bill of lading would transfer to the buyer rights of suit against the carrier because it is evidence of the contract of carriage.

[87] See, e.g., *Nippon Yusen Kaisha v. Ramjiban Serowgee* [1938] A.C. 429 (P.C., appeal from India).

[88] International Chamber of Commerce, INCOTERMS 2000, FCA, paras A4, A5. INCOTERMS 2010 come into operation on 1 January 2011.

[89] *A.R. Brown, McFarlane & Co. v. C. Shaw Lovell & Sons* (1921) 7 Ll. L. Rep. 36 (mate's receipt); Bridge. 424.

This example serves to illustrate that a dock receipt or mate's receipt does not truly represent the *goods* but only the shipper's right to receive a bill of lading representing the goods. It ought not to qualify, even under the broader interpretation of CISG, Art. 58. The example also serves to illustrate a nuance that must be added to the broader interpretation. A document given by a carrier only represents the goods if it acknowledges receipt of the goods *and an undertaking to carry them to their destination*.[90] In the broader context of goods being carried from one country to another, which is explicitly referred to in CISG, Art. 58(2), it is appropriate to say that a document does not represent the goods unless it also represents the carrier's obligation to get them to their destination. A dock receipt or mate's receipt does not satisfy that requirement.

### 3.3. Survey reports, certificates of origin, etc.

Many other documents about the quality or condition of the goods may be generated before the goods leave the seller's country. When the buyer is paying by letter of credit, it will often require, via stipulation in the letter of credit issued by its bank, that the seller (the beneficiary under the letter of credit) should present such documents as a pre-shipment survey report, a packing list (in the case of goods in containers), a certificate of origin showing in which country the goods were produced, sanitary or phytosanitary certificates (in the case of food or plant products), commercial invoices, etc.

If the buyer has agreed to pay the purchase price by providing a letter of credit, the seller must present all of the documents stipulated in the letter of credit, whether or not they control the disposition of the goods, and those documents must be accepted by the nominated or confirming bank as conforming to the credit before the seller gets paid.[91] As applicant under the letter of credit, the buyer often makes payment conditional upon presentation of many kinds of document that do not control the disposition of the goods, such as commercial invoices, survey certificates, certificates of origin, packing lists, and so on. By agreeing to payment under a letter of credit, the seller accepts that it must present all of these documents before it is entitled to be paid. Thus, CISG, Art. 58(1) only has practical significance when payment is to be made other than by letter of credit.

If the buyer has not undertaken to pay by letter of credit, the question may arise whether documents of this kind fall within CISG, Art. 58, so that the buyer's obligation to pay does not arise until it receives them.

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[90] Alba Fernández, 21.

[91] *Uniform Customs and Practice for Documentary Credits*, 2007 revision (UCP 600), Articles 7, 8, 15.

As noted above, Peter Schlechtriem argued that any documents relating to the goods, including certificates of origin, should be "part of the seller's performance" under CISG, Arts 30 and 34 and so must be presented before the buyer's obligation to pay is triggered under CISG, Art. 58(1).[92] The German Bundesgerichtshof disagreed, stating that certificates of origin or quality ("Ursprungszeugnisse oder Qualitätszertifikate") are neither necessary nor sufficient to require payment of the purchase price by the buyer.[93] The Bundesgerichtshof is surely right on this point. In ordinary circumstances, certificates of origin and survey reports about the quality or condition of the goods clearly do not control the disposition of the goods in the narrow sense, nor are they even documents *representing* the goods in the broader interpretation of CISG, Art. 58. They are plainly documents *relating* to the goods, and so must be presented by the seller under CISG, Arts 30 and 34, but a buyer who has received a bill of lading or other document entitling it to possession of the goods should not be able to withhold payment simply because it has not received something like a certificate of origin or survey report.[94]

Dietrich Maskow has argued that documents such as certificates of origin should fall within CISG, Art. 58 if the buyer is required by the Customs authorities of its country to present those documents before taking delivery.[95] The same might be said in relation to sanitary or phytosanitary certificates if required by the quarantine authorities in the importing country. In these circumstances, the buyer cannot take physical possession of the goods unless and until it has the relevant document. In such a case, the certificate of origin (or other document) controls disposition of the goods even in the narrow sense. However, the Kantonsgericht St. Gallen in Switzerland has stated that CISG, Art. 58 applies to documents such as bills of lading or warehouse receipts and not to Customs documents ("ein Konossement oder ein Orderlagerschein, nicht um die Zollpapiere").[96] "Customs documents" ("Zollpapiere") could refer to any documents required by the Customs authorities in the buyer's country, such as a commercial invoice, a certificate of origin, a phytosanitary cer-

[92] Schlechtriem, *supra* note 87.

[93] BGH VIII ZR 51/95 (3 April 1996), para. II.3; CLOUT Case 171. English translation by Peter Feuerstein available at *http://cisgw3.law.pace.edu/cases/960403g1.html#cx* (last visited July 8th, 2010); original German text available at *http://www.cisg online.ch/cisg/urteile/135.htm* (last visited July 8th, 2010).

[94] Unless, of course, it has stipulated for presentation of these documents as a condition for payment under a letter of credit, in which case CISG, Art. 58(1) would not apply, in any event.

[95] Maskow, 427 428.

[96] Kantonsgericht St. Gallen, 3 ZK 96 145 (12 August 1997), CLOUT Case 216; CISG online No. 330. Original German text available at *http://www.globalsaleslaw.org/content/api/cisg/urteile/330.pdf* (last visited July 13th, 2010).

tificate, an export declaration or export permit from the authorities in the seller's country, import permits from the authorities in the buyer's country and so on.

### 3.4. Insurance certificates

Insurance certificates deserve special consideration. They are plainly not "documents controlling...disposition" of the goods under the narrow interpretation of CISG, Art. 58 because they have no effect whatever on what happens to the goods. They reflect only an obligation on the insurer to indemnify the assured in the event of loss or damage to the goods. Obviously, though, an insurance certificate is a very important document. Peter Schlechtriem highlighted the significance of such documents by positing a situation in which the purchased goods are destroyed after the risk has passed to the buyer.[97] In such a case, the buyer might be unable to claim on the insurance taken out for its benefit unless it had an insurance certificate containing details of the insurance cover. Schlechtriem's argument on this point is compelling. A buyer on CIF or CIP terms should not be compelled to pay the purchase price for goods unless and until it receives the ability to claim on the insurance relating to those goods. Although the seller's obligation to provide the buyer with details of insurance cover is imposed by the contract, the buyer's obligation to pay is not tied to it.[98]

It is desirable that the CISG should tie the two obligations together. That is impossible, however, under a narrow interpretation of CISG, Art. 58 because an insurance certificate simply does not control disposition of the goods in the narrow sense, by any stretch of the imagination. Schlechtriem's argument that "the seller has not placed the goods at the buyer's disposal"[99] until it has presented the insurance documents is unconvincing, because it is more relevant to the seller's obligation under Art. 30 to hand over the goods and documents than it is to the buyer's obligation

[97] Schlechtriem, *supra* note 130. One must also posit that the goods were sold on terms such as CIF and CIP, where the seller undertakes to buy insurance for the buyer. Schlechtriem's example would not work for goods bought on any of the F terms or CFR or CPT, because in each of those cases the buyer buys its own insurance. International Chamber of Commerce, INCOTERMS 2000, FCA, FAS, FOB, CFR, CPT, para. B3 states that the buyer has "No obligation" in relation to insurance, but in each case a footnote directs the reader to para. 10 of the Introduction, which explains that although the buyer has no obligation *to the seller* to buy insurance, that does not mean it is not in its own interest to buy insurance.

[98] International Chamber of Commerce, INCOTERMS 2000, CIF, para. A3, CIP, para. A3, both state that: "The seller must...provide the buyer with the insurance policy or other evidence of insurance cover". *Ibid.* para. B1 states only: "The buyer must pay the price as provided by the contract of sale".

[99] Schlechtriem, *supra* note 93.

under Art. 58(1). In the example posited by Schlechtriem himself, it would be impossible for the seller to place the goods at the buyer's disposal if they had already been destroyed. A better solution would be to say that the insurance certificate is a document *representing* the goods under the broader interpretation of Art. 58, and so must be presented by the seller to trigger the buyer's obligation under Art. 58(1). Admittedly, even that would be an exception, given that the interpretation otherwise favored here is that the document must acknowledge receipt of the goods and an undertaking to carry them to their destination.[100] In truth, all that an insurance certificate represents is the insurer's promise to provide an indemnity if anything befalls the goods. Without an expansive reading of Art. 58 to apply to insurance certificates, however, the situation described by Schlechtriem cannot be avoided.

## 4. INTERPRETATION OF ARTICLE 58

On one view, the phrase "documents controlling their disposition" was not well chosen because it focused inappropriately on the kinds of negotiable document used in maritime transportation. Even in 1977, when the phrase was first drafted, international carriage of goods by road, rail and air was done using documents that do not control the disposition of the goods in the strict sense. Since then, that has become true for many types of sea carriage, too. As noted in the Introduction, one possible response is to read CISG, Art. 58 expansively, so as to make it apply to all kinds of documents used for international transportation, as well as such documents as warehouse receipts and ship's delivery orders. In the literal sense, the French, Spanish and Arabic texts of the CISG all speak of documents *representing* the goods, which all of the transport documents considered in Section 2 do in one way or another. According to this view, CISG, Art. 58(1) would trigger the buyer's obligation to pay on presentation of any of the types of transport document considered in Section 2. That view is consistent with the provisions of the Uniform Customs and Practice for Documentary Credits, 2007 revision (UCP 600), which contains provisions relating to non-negotiable sea waybills (Art. 21), air transport documents (Art. 23) and road, rail or inland waterway transport documents (Art. 24). If the buyer is to pay by letter of credit, it can ask for presentation of any of these types of document as applicant under the letter of credit. Under the broad reading of CISG, Art. 58(1), the seller could make payment conditional upon the handing over of any of these documents and, under Art. 58(2) could dispatch the goods on terms that the documents will not be handed over until the price is paid.

[100] See *supra* note 94.

Another possible view is that the phrase "documents controlling their disposition" was deliberately chosen to apply only to negotiable bills of lading and other documents, like warehouse receipts and ship's delivery orders, that actually confer a right to possession of the goods. Non-negotiable air waybills and road and rail consignment notes were in daily use in 1977 when the provision was first drafted and in 1980 when the Convention was made. If the drafters had wanted to use a phrase broad enough to cover non-negotiable transport documents, they would have done so. According to this view, the references to documents in Art. 58 simply do not apply when non-negotiable transport documents are used. Because the buyer can take delivery of the goods whether or not it has possession of the non-negotiable transport document, its obligation to pay should not be contingent upon receiving the document. As a result, CISG, Art. 58(1) triggers the buyer's obligation to pay only when the goods themselves are placed at the buyer's disposition, because there are no "documents controlling [the] disposition" of the goods when non-negotiable transport documents are used. Similarly, under Art. 58(2), the seller could dispatch the goods on terms whereby the goods themselves will not be handed over until the price is paid, but could not withhold the non-negotiable transport documents relating to them – although it would have no real interest in withholding those documents, in any event, as they do not control the buyer's right to take possession of the goods. That view would be consistent with the fact that non-negotiable transport documents do not give the holder the right to possession of the goods, so the buyer routinely receives its own copy of them. The seller would be entitled to withhold delivery of the goods simply by exercising the right of disposal conferred by CIM, CMR, the Montreal Convention and (when and if they come into force) the Rotterdam Rules,[101] and not by retaining possession of the document.

There are sound practical reasons for preferring the first of the two views described above. If the goods are lost or destroyed after the risk has passed but before they have been physically delivered to the buyer, the buyer should be obliged to pay the seller, even though it will never receive the goods. That result can only be achieved by imposing an obligation on the buyer to pay in return for the documents representing the goods. For example, if the goods are sold on CIP terms, risk passes to the buyer when the seller hands the goods to the carrier who is contracted to

[101] The Rotterdam Rules, Arts 50.1(c), 51.1(a) provide that the shipper under a non negotiable transport document without a surrender clause (i.e., a sea waybill) is the "controlling party" and may give orders to the carrier replace the consignee by any other person, including the shipper itself, unless the consignee is designated as the controlling party. The seller would exercise its right under CISG, Art. 58(2) by not designating the consignee as controlling party.

bring them to the agreed place of destination.[102] If the carriage contract between seller and carrier generates a non-negotiable transport document such as a sea or air waybill or a road or rail consignment note, there is no document controlling disposition of the goods under the narrower of the two interpretations of Art. 58 described above. If the goods were to be destroyed while in the carrier's custody, the buyer's obligation to pay for them would never be triggered under the narrow view of Art. 58(1) because the goods themselves could never be placed at the buyer's disposition and there would be no "documents controlling their disposition". Thus, if the seller were to present the non-negotiable transport document and insurance certificate to the buyer, as contemplated by CIP terms, the buyer would have no obligation to pay under Art. 58(1), despite the fact that the goods were destroyed after risk had passed to the buyer. The buyer's obligation to pay would then depend solely on the contract, which might be silent on this point.[103]

In contrast, the broader reading of Art. 58 would impose an obligation on the buyer to pay in return for the non-negotiable transport document, as it ought, given that risk had passed when the goods were destroyed. The buyer could then claim against the carrier or claim on the cargo insurance policy, if the seller were also to present the insurance certificate, as it ought to under CIP terms and CISG, Art. 30. That returns us to Schlechtriem's concern, considered in Section 3.4, that the buyer might be obliged to pay under Art. 58(1) even if the seller failed, in breach of its obligation under Art. 30, to hand over the insurance certificate. As noted above, although it is something of a stretch to say that an insurance certificate is a document *representing* the goods, the broader interpretation of Art. 58 may be sufficient to address that concern.

## 5. CONCLUSION

The phrase "documents controlling their disposition" in CISG, Art. 58 should be interpreted as referring to any documents representing the goods. That interpretation is consistent with the literal text of the Arabic, French and Spanish versions of the CISG, which are equally authoritative with the English, Chinese and Russian. Any document given by a carrier that acknowledges receipt of the goods and an undertaking to carry them to their destination would qualify. That would include negotiable ocean bills of lading, whether issued by the ocean carrier itself or an NVOCC,

[102] International Chamber of Commerce, INCOTERMS 2000, CIP, paras A4, A5. INCOTERMS 2010 come into operation on 1 January 2011.

[103] INCOTERMS 2000, CIP, para. B1 simply provides that: "The buyer must pay the price as provided in the contract of sale".

straight bills of lading, sea waybills, air waybills, road and rail consignment notes (and, in North America, road and rail bills of lading). It would also include other documents that give the holder the right to possession of the goods, such as warehouse receipts and ship's delivery orders. It would not include dock receipts or mate's receipts, commercial invoices, survey reports, packing lists and certificates of origin or quality, *unless* the Customs or quarantine authorities in the buyer's country demand presentation of such a document before the goods are released to the buyer, which may be the case with certificates of origin and sanitary or phytosanitary certificates. There are sound practical reasons for concluding that insurance certificates should be included as well, although in truth they neither control the disposition of the goods in the narrow sense nor do they represent the goods in the broad sense.

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# CRITICAL ISSUES IN THE FORMATION OF CONTRACTS UNDER THE CISG

*The depth of jurisprudence and scholarly commentary on the United Nations Convention on Contracts for the International Sale of Goods (CISG) has grown exponentially over the last few decades. One example has been the increase in CISG cases in the United States from only 16 cases from 1988 to 1999 to 92 additional cases from 2000 to the middle of 2010. This Article will draw from CISG jurisprudence, but will also provide some insights from a purely American common law perspective.*[1]

*In the area of contract formation relating to CISG Articles 14, 16, and 18, there is a growing jurisprudence. According to the Institute of International Commercial Law's CISG Database, the international jurisprudence includes 162 cases relating to Article 14; 13 cases related to Article 16; and 184 cases relating to Article 18. The battle of the forms scenario under Article 19 will not be discussed. However, the interconnection between Articles 18 and 19 will be discussed.*

*This article will examine the jurisprudence relating to Articles 14, 16, and18. This examination will cover the topics of offer and acceptance, firm offers, and conduct as acceptance. From this review of the case law, and related scholarly commentary, the article analyzes the critical issues related to the application of these CISG Articles. The key insight offered is the interconnectedness of these CISG articles, along with articles 6, 8, 9, 29, and 55.*

Key words: *International sales law. Contracts. Contract formation. Firm offer rule. Written confirmations.*

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[1] Note that the American common law perspective used here includes use of Article 2 of the American Uniform Commercial Code. Article 2 of the Code relates to the sale of goods. It should also be noted that the Uniform Commercial Code is not comprehensive so, the general common law of contracts still is used to fill in the gaps in the Code.

## 1. INTRODUCTION

Part II of the CISG consists of Articles 14–24. These articles provide the offer-acceptance rules for the formation of contracts under the CISG. The thoughts that comprise this article stem from years of reading CISG cases, but more currently on a renewed focus on Articles 14, 16 and 18 performed in conjunction with the Advanced CISG Digest project spearheaded by Albert Kritzer and Sieg Eiselen.

## 2. INTERCONNECTEDNESS

In understanding the CISG and its surrounding jurisprudence, it is important not to focus on a given CISG Article in isolation to the CISG as a whole. For example, it is easier to view the battle of forms scenario under Article 19 as a singular group of cases. But, Article 19 can only be truly understood as a part of a template that includes Articles 8, 9, 14, 15, 16, 18, and 29, among others. The use of code provisions by analogy to understand other code provisions has a strong history in Civilian law.[2] In contrast, because of the common law's focus on case law that practice is not as evident, but has been used in relation to code-like enactments, such as the United States Uniform Commercial Code (UCC).[3] Part 2.1 provides some theoretical arguments for reading an independent CISG Article by analogy to other CISG Articles. Part 2.2 focuses on the practical application of the CISG given the interconnectedness of CISG Articles.

### 2.1. Theories of Interconnectedness

In Dworkinian terms, the integrity of law to provide, if not a right answer, then at least a correct answer, is based upon the entire structure of the law.[4] In our case, CISG rule application needs to be done within the entire structure of the CISG. A rule application that appears reasonable within the confines of a single CISG Article may actually be an im-

[2] R. Youngs, *English, French and German Comparative Law*, Cavendish Publishing Limited, London 1998, 47 48; J. Gordley & A.T. von Mehren, *An Introduction to the Comparative Study of Private Law*, Cambridge University Press, New York 2006, 50 54, 61 63.

[3] The American Uniform Commercial Code began as a model law that has been enacted with variations in all fifty states. The one exception is the State of Louisiana which has not enacted Article 2 (Sales). It has elected to retain the French Napoleonic Code. See W. Schnader, "A Short History of the Preparation and Enactment of the Uniform Commercial Code", *University of Miami Law Review* 22/1967, 1.

[4] R. Dworkin, "Hard Cases", *Harvard Law Review* 88/1975, 1057; R. Dworkin, "Law as Interpretation", *Texas Law Review* 60/1981, 527.

proper application due to its inability to be harmonized with the CISG as a whole. A certain rule application can only be justified if it provides a proper fit relating to the specific CISG Article or Articles, as well as the CISG as a whole.[5] In applying the CISG contract formation Articles, due regard must be given to the interpretive template provided by Articles 8 and 9.

A similar proposition is found in the hermeneutic circle that asserts that the parts of something, in this case a body of sales law rules, cannot be understood without knowledge of the whole; in turn, the whole cannot be understood without knowledge of the parts. The CISG can be seen as a series of hermeneutic circles including one that interrelates Articles within a specific subject area (Articles 14–24, Formation of the Contract), one that interrelates a given Article or bunch of Articles with Articles from other areas (Article 19 with Article 29; Article 44 with Articles 39, 43, and 50), and finally one that interrelates one Article or group of Articles with the CISG as a whole (Articles 14–24, Formation with Articles 7–13, General Provisions).

Seemingly disconnected Articles can be mined under CISG interpretive methodology for rationales in the application of other Articles. Alternatively stated, it is important to note that some of the reasons used in the application of one Article may be useful in the interpretation of another Article. A simple example is the jurisprudence involving the requirement of an indication of intent in an offer would also be pertinent to determining intent to be bound in an acceptance.

A third means of viewing interconnectedness relating to the CISG is the recognition and application of meta-principles. The meta-principles of the CISG are generally recognized as the principle of good faith, its international character, and the need to promote uniformity in its application.[6] In the area of contract formation, the meta-principles most relevant are provided by Articles 8 and 9.

### 2.2. Interconnectedness within the CISG

The interconnectedness of CISG Articles in the area of contract formation is obvious in that many cases the issues of the enforceability of a contract or contractual terms implicate more than one of the offer-acceptance Articles. For example, the incorporation of general conditions or standard terms into a contract is an issue found in Articles 14, 15, 18, and 19, as well as Articles 8 (interpretation, intent) and 9 (interpretation, us-

[5] *Ibid.* See also, L. DiMatteo, "A Theory of Interpretation in the Realm of Realism", *DePaul Business & Commercial Law Journal* 5/2006, 17.

[6] See CISG Article 7(1). See also, L. DiMatteo, et al, *International Sales Law: A Critical Analysis of CISG Jurisprudence*, Cambridge University Press, New York 2005, 22 29.

age). This interrelationship was noted in a Belgium case.[7] The case involved the enforceability of a term that provided a limitation period for bringing claims. If decided strictly under Article 19 the term would likely have been considered a material alteration of the offer since it related to the "extent of one party's liability to the other." However, the court avoided the issue by holding that a contract had been formed without the incorporation of the limitation term. It held that "with regard to the conditions of sale on the backside of the invoice, [under Articles 18 and 19] it is determined that full agreement about these conditions is always required *before* the contract comes into existence and mere silence does not count as an acceptance." Note that the court holds that all the conditions of sale— whether material or non-material — required "full agreement" in order to enter into the contract and that a party is not required to object to their inclusion. A few comments are in order here. The court neglects the fact that there is a duty to object in Article 19(2) regarding any non-material terms found in the purported acceptance. Thus, the requirement of full agreement is overbroad when it encompasses non-material terms in a battle of the forms situation. The over-inclusive nature of the decision is rendered moot since a limitation period term is a material term and therefore, there is no duty to object. Even when more than one Article is not implicated in a dispute, it is important to note that some of the reasons used in the application of one Article may be useful in the interpretation of another Article. These reasons are also vital in filling in gaps in areas within the scope of CISG's coverage.[8]

Unfortunately, the clarity provided by the specialized offer-acceptance rules of Part II is often lost when they interact with each other or Articles outside of Part II. A few examples will illustrate this point more clearly. The first example implicates the appearance of conflict within Part II. Article 18(1) states that "silence or inactivity does not in itself amount to acceptance." Compare that sentence with this sentence from Article 19(2); "additional 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 notice to that effect." How does a judge or arbitrator reconcile Article 18's no requirement to object or respond in order to prevent the creation of an effective acceptance with Article 19(2)'s requirement that a party must object to additional non-material terms in a purported acceptance. The lack of clarity is relatively easy to rectify with a thoughtful scholarly analysis, but such clarity may be more difficult for an arbitrator or judge to obtain. The result is sometimes a conflation of the purposes or meanings of different Articles.

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[7] Belgium 17 May 2004 Appellate Court Ghent (Noma B.V.B.A. v. Misa Sud Refrigerazione S.p.A.), *http://cisgw3.law.pace.edu/cases/040517b1.html*.

[8] L. DiMatteo (2005), 165 166

The easiest way to argue that there is no true conflict between Article 18 and 19 is to make the distinction that Article 18(1) is a general rule for acceptance, while Article 19(2) is a specialized rule pertaining to the battle of forms scenario. This is surely true, but the better way of viewing these Articles is to view Article 19(2) as an exception to Article 18(1). This view helps remove the bias in seeing these Articles as independent of one another.

The best epistemological means of understanding the rule-exception distinction—in this case, on the issue of silence or inactivity as a method of acceptance—is to acknowledge that they reference different fact scenarios. Article 18 refers to the more generic scenario where a party receives an offer. The focus is upon the offeree to determine if she intended to be bound to a contract. For there to be an acceptance that party must proactively make a statement or show conduct that evidences intent to be bound by the offer. A contract cannot be forced upon another party based upon that party's silence or inactivity.[9] In contrast, Article 19(2) focuses primarily on the perspective of the original offeror. Without Article 19(2), any additional terms in a purported acceptance would convert that instrument into a counter-offer. Under Article 18(1), silence or inactivity of the original offer could not result in a binding contract. Article 19(2) carves out an exception where the additional terms are deemed to be non-material. In that event, silence or inactivity results in the formation of a binding contract.

The meaningful differences between Article 18 and 19 are narrowed by the broad definition of materiality implied by Article 19(3). In essence, Article 18 and 19 act as one since the instances of additional, conflicting non-material terms are negligible. The overwhelming amount of the case law finds most terms, such as forum selection clauses,[10] arbitration clauses,[11] trade terms,[12] warranty and certification[13] to name a few, as material in nature. This can be attributed in some degree to the

[9] The exception being that silence or inactivity was made a form of effective acceptance by the parties through an express agreement, course of dealings, or the implication of trade usage. See Article 18(3).

[10] See United States 31 March 2010 Federal District Court [Alabama] (Belcher Robinson, L.L.C. v. Linamar Corporation, et al.), *http://cisgw3.law.pace.edu/cases/100331u1.html*.

[11] See Germany 26 June 2006 Appellate Court Frankfurt (*Printed goods case*), *http://cisgw3.law.pace.edu/cases/060626g1.html*.

[12] See China 18 April 2003 CIETAC Arbitration proceeding (*Desulfurization reagent case*), *http://cisgw3.law.pace.edu/cases/030418c1.html*.

[13] See United States 25 July 2008 Federal District Court [Pennsylvania] (*Norfolk Southern Railway Company v. Power Source Supply, Inc.*), *http://cisgw3.law.pace.edu/cases/080725u1.html*.

behavioral phenomenon of hindsight bias.[14] A term that may have been considered non-material at the time of contract formation is likely to be viewed as material to all parties concerned if it is dispute-determining at the time of dispute.

In the end, the great equalizer in the finding or not finding an enforceable contract is the major premise that even though silence and inactivity (except under the narrow exception provided under Article 19 and as provided in Article 18(2)) may not be a ground for acceptance; activity or conduct is a ground for acceptance. A shortcoming in Article 19 is its failure to recognize this principle, as it is recognized in Article 18.

## 3. DEFINITNESS: ROLE OF EXPLICITLY AND IMPLICITLY

One theme that is consistent throughout the CISG is the role of implicit intent. The judge or arbitrator is free to imply intent or terms into a contract. This authority to imply is given expressly through such Articles as Article 8 (3) and Article 9 (usage and party practices), and Article 14(1) ("implicitly fixes" price or quantity). The power to imply is also given implicitly through the use of the term "reasonable" throughout the CISG. Nonetheless, the strongest probative evidence is evidence of the express intent of the parties. This leads to a bit of circular reasoning in that the more detail placed in a proposal the easier it is to imply an intent to be bound; the lesser the detail the less likelihood of finding the required intent. That said, Article 14 makes it clear that if there is clear intent (express words of intent or implied intent through course of dealings) to be bound, then the proposal need not contain much detail.

The definiteness requirement found in Article 14(1)—when there is a clear intent to be bound—is satisfied if the proposal (1) indicates (specifies) the goods, (2) a provision expressly or implicitly provides for determining the price, and (3) a provision expressly or implicitly provides for determining the quantity. These are issues of interpretation which will be discussed later and include: What is meant by "indicates the goods"? What is meant by "implicitly" fixing or making provision for determining the price and quantity?

### 3.1. Price Term: Articles 14 and 55

There is a debate on the relationship between Article 14 which requires at least an implicit fixing of the price term and Article 55 which acts as a gap-filler to imply a price into an open price term. Some schol-

[14] C. Sunstein, *Behavioral Law and Economics*, Cambridge University Press, New York 2000.

ars focus solely on Article 14 to determine if a contract has been formed. Under this analysis, unless the contract expressly or implicitly fixes a price, or expressly intends the price term to be open, there is no contract and therefore, no recourse to Article 55. Other scholars assert that if the offer does not fix the price, then Article 55 should be applied to fill in the gap.[15] This later approach expands the reach of Article 55 from filling in the gap of an express open price term to instances were no price term is provided. This expansion rests upon the dubious presumption that the parties implicitly agreed that Article 55 would apply to fix the price.

It has been noted that Article 14's notion of "implicitly" fixing the price term can be read broadly to include external factors not stated in the offer. This could include setting a price based open "objective parameters agreed to by the parties previously or tacitly."[16]

Article 14 (1) does not state that a price need actually be fixed. The issue then becomes how the price is to be fixed post hoc. In contrast, Article 55 provides a default rule that allows a court or arbitral panel to imply a price without the guidance of the contract. It states that when a contract does not expressly or implicitly make provision for determining the price then a price may be implied by looking "to the price generally charged at the time of the conclusion of the contract for such goods sold under comparable circumstances in the trade concerned."

This dilemma is produced because Article 14 does not reference Article 55 as a means of fixing a price. On the surface, Article 14 states that an offer *must* fix the price expressly or implicitly while Article 55 only applies to a concluded contract. The interpretive choices are that Article 55 controls Article 14 on the issue of price or that the Articles deal with completely different subjects. The former view would use Article 55 to fix the price as long as there was a general intent to enter a contract. It would salvage the contract even though the acceptance was, in reality, a response to a faulty offer or non-offer. The majority view is that if the offer implicitly fixes or provides a mechanism to fix the price, then Article 55 is not available if the price becomes indeterminable.

If the parties do not implicitly or expressly fix a price or expressly agree to an open price, then the Article 14 analysis, as noted above, would recognize the proposal as a non-offer and therefore, no contract is formed. One argument around such a conclusion is that if the other party accepts the "non-offer" the parties are implicitly derogating from the rules of Ar-

[15] Article 55 provides that the price is the price generally paid under comparable circumstances in the trade concerned at the conclusion of the contract.

[16] J. O. Albán, "Criteria for an offer," *An International Approach to the Interpretation of the United Nations Convention on Contracts for the International Sale of Goods (1980) as Uniform Sales Law* (ed. J. Felemgas), Cambridge University Press, New York 2007, 79.

ticle 14.[17] In this case, the derogation would be the elimination of Article 14's requirement that a price must be expressly or implicitly fixed in the offer. If the parties perform as if there was a contract despite the fact that none was consummated due to a lack of a price term, it would seem reasonable for a court to imply one using Article 55.

## 4. TO CONFIRM OR NOT TO CONFIRM: THAT IS THE QUESTION?

A common practice in commercial sale of goods is for the parties to come to an oral agreement which is then confirmed in writing by one of the parties. Unfortunately, the CISG does not provide a written confirmation rule to deal directly with the effect of such instruments. The result, as stated by one commentator, has been that "courts applying the Convention have unfortunately not been consistent in their treatment of such 'letters.'"[18]

The written confirmation is used in two scenarios. First, the written confirmation can be used as an instrument of offer or acceptance. If used as an offer, then there is no duty of the offeree to respond. If used as an acceptance, its effectiveness is determined under Article 18 or by Article 19. The second scenario is when two parties orally agree to a contract and one party follows it up with a written confirmation. An issue becomes does the receiving party have any duty to respond or object to terms in the confirmation that were not a part of the original agreement? The answer appears to be that there is no duty to respond or object. The contract is the one that the parties previously entered. However, the written confirmation provides powerful evidence when there is conflicting testimony as to the contents of the oral agreement.[19] The burden of proof rests on the non-confirming party to show that a material term in the written confirmation is additional and not a part of the oral agreement

The terms of a written confirmation may be incorporated into the contract by way of course of dealings or usage. A Swiss court held that there was a trade usage in which a failure to respond to a written confirmation constitutes an acceptance of the terms in the confirmation.[20] A more conservative view holds that a trade usage pertaining to the effect of a written confirmation has to be international in scope.[21] Another court

[17] P. Huber, A. Mullis, *The CISG: A New Textbook for Students and Practitioners*, Sellier, Europe 2007, 77.

[18] *Ibid.*, 87.

[19] *Ibid.*, 88.

[20] Switzerland 21 December 1992 Civil Court Basel (*Textiles case*), *http://cisgw3.law.pace.edu/cases/921221s1.html*.

[21] Germany 5 July 1995 Appellate Court Frankfurt (*Chocolate products case*), *http://cisgw3.law.pace.edu/cases/950705g1.html*.

incorporated the terms of the written confirmation into the contract based upon the duty of good faith.[22] In that case a check was attached to the confirmation. The court reasoned that by accepting the check it was accepting the terms of the confirmation. In addition, in the non-battle of the forms scenario, CISG Article 18 states that silence is generally not to be construed as an acceptance. However, some courts have construed subsequent performance or conduct following receipt of a confirmation as an acceptance of the terms in the confirmation.

## 5. RELIANCE AND FIRM OFERS

Article 16 was the result of compromise between the different approaches to irrevocable offers found in the civil and common laws. In most civil law systems, it is implied that the offer will remain open for a reasonable period of time. In common law parlance, almost all offers under the civil law are considered as firm offers. In contrast, the irrevocability of offers is very limited in the common law. The common law holds fast to the rule that the offeror is the master of the offer and has the ability to revoke any offer at any time even if the offer expressly states that it is irrevocable.[23]

### 5.1. Offers and reliance

Despite, these profound differences between the civil and common law systems, the compromise structured in Article 16 has resulted in a surprising paucity of cases. This may be due to the fact that the broad firm offer rule found in Article 16(2)(b) is partially reconcilable with the common law's doctrine of promissory estoppel. Under promissory estoppel, courts may recognize that the offeree had a good reason to assume that an offer would remain open for a certain period of time. The classic example is in the invitation to make bids for a component of a larger contract. The company making the offer or bid understands that the bid will be used as part of a larger bid on a prime contract. If the offeror elects to rescind its bid after the primary bid has been submitted an injustice is recognized and the revoking offeror will be required to pay damages.

Before analyzing reliance theory as the underlying norm of Article 16(2)(b) and the common law's promissory estoppel doctrine, the issue of whether the fixing of time necessarily results in a firm offer needs to be

[22] Switzerland 5 November 1998 District Court Sissach (*Summer cloth collection case*), *http://cisgw3.law.pace.edu/cases/981105s1.html*.

[23] See U.S. Uniform Commercial Code §2 205 (needs to be in writing, signed, and not extend beyond 90 days).

addressed? The answer is that the fixing of time may have been intended not as a firm offer, but as fixing the time upon which the offeree has to accept before the offer self-terminates. In the common law, the fixing of time, unless under the very narrow confines of the American UCC firm offer rule, does not result in irrevocability, but for self-termination of the offer. Such an intent would eliminate Article 16(2)(a)'s reach under a express or implicit derogation under Article 6.

The reliance concept as applied in Article 16(2)(b) holds that the general rule—in this case, the offeror's right to revoke an outstanding offer—is suspended in order to prevent an injustice upon the offeree. It would be an injustice if the offeror knew or should have known of the offeree's reliance upon an offer remaining open and revokes nonetheless. Reasonable reliance can be created by a communication by the offeree that it is relying on the offer to remain open, prior or course of dealings, or if there is a well-known and existing usage in the industry that such offers remain open unless expressly stated otherwise.

An Austrian court took up the issue of reliance in the broader context of the CISG and used Article 16(2)(b) as an example. In that case, a buyer asserted that the seller had waived its right to assert that the notice of non-conformity was not timely. The arbitral tribunal found that the "seller had repeatedly made statements to the buyer from which the latter could reasonably infer that the seller would not set up the defense of late notice and that, in reliance upon this, buyer refrained from taking legal action not only against its own customer, but also against seller."[24] Citing Articles 7(1) and 7(2) and, by analogy, the reliance concept expressed in Articles 16(2)(b) and 29(2), the tribunal invoked the principle of estoppel as a bar to seller's use of the defense of late notice. The tribunal based the use of estoppel on the general principle of good faith.

The determination of reasonable reliance in the case of an offer should be decided under the interpretive methodology of Article 8. First, the intent of the parties, if discernable, controls whether an offer is irrevocable or not. Second, if intent is not provable, then the reasonable person standard shall apply. The reasonable person is placed in the shoes of the offeree to determine if it was reasonable for the offeree to assume that the offer would remain open. The Secretariat Commentary on Article 14 provides an example where the offeree's reliance would be deemed reasonable. It states that "where the offeree would have to engage in extensive investigation to determine whether he should accept the offer . . . the offer . . . should be irrevocable for the period of time necessary for the offeree to make his determination."[25]

[24] Austria 15 June 1994 Vienna Arbitration proceeding SCH 4318 (*Rolled metal sheets case*), *http://cisgw3.law.pace.edu/cases/940615a4.html*.

[25] Secretariat Commentary, Article 14, paragraph 8, *http://cisgw3.law.pace.edu/cisg/text/secomm/secomm 14.html.*

## 6. CONDUCT AS ACCEPTANCE

Article 18(3) provides that in certain situations an acceptance can be effective through the conduct of the offeree. The situations in which conduct and not oral or written communications can be a means of acceptance include: (1) the offer expressly states or authorizes an acceptance by conduct, (2) the parties through previous dealings have established a practice of acceptance by conduct; and (3) a trade usage recognizes such a means of acceptance. However, a German court held that a partial delivery may indicate consent, but is not an effective acceptance under Article 18(3).[26] The court held that the delivery of less than the full quantity ordered amounted to a counter-offer that the buyer was free to accept or reject.

The most recent reported case applying Article 18 focuses on the use of conduct as a method of acceptance.[27] In the case, the offeree-buyer incorporated the offeror-seller's sales quote into its quote to a third-party. The court held that the subsequent contract with the third-party was conduct of acceptance binding the original seller to a contract to supply the goods to the original offeree. In another case, the sending of an advanced payment was held to be an acceptance.[28]

It is important to note that the lack of a notice requirement in Article 18(3) doesn't apply to all acceptances by conduct. Article 18(3) only applies when the offer expressly authorizes acceptance by conduct ("send me the goods" or "send me the payment") or there is an existing course of dealing or usage. Otherwise, the offeree must notify or the offeror must have knowledge of the offeree's acceptance by conduct.[29] Acceptance by conduct without notification and acceptance by conduct with notification affects the type of conduct or performance needed to bind the contract. When conduct by performing an act is authorized by the offer, course of dealings or usage, then Article 18(3) can be read to mean that acceptance is only triggered by completion of the act. In contrast, where notification is required the notice of the beginning of the performance of an act may be sufficient.

The conduct without notice rule provides the opportunity for abuse by the offeror. This scenario would exist where the offeree begins per-

[26] Germany 23 May 1995 Appellate Court Frankfurt (*Shoes case*), *http://cisgw3.law.pace.edu/cases/950523g1.html*.

[27] United States 21 January 2010 Federal District Court [California] (Golden Valley Grape Juice and Wine, LLC v. Centrisys Corporation et al.), *http://cisgw3.law.pace.edu/cases/100121u1.html*.

[28] See Switzerland 29 April 2004 Commercial Court St. Gallen (*Lenses case*), *http://cisgw3.law.pace.edu/cases/040429s1.html*.

[29] J. O. Albán, 103.

forming the act and before completion receives a revocation from the offeror. This possible scenario can be prevented under two interpretations of the CISG. First, Article 18(3) does not require complete performance to bind the contract. The language of "performing an act" does not necessarily mean completion of all the offeree's duties under the contract. This is supported by the language that "performing an act" could be one "*relating to* the dispatch of goods or payment of the price." The "relating to" language indicates that the beginning of performance satisfies the performing of an act requirement. The second method to prevent the injustice noted above is that the offeror has lost its ability to revoke under Article 16(2) since this would be a case of reasonable reliance.[30]

### 6.1. Articles 16(2) and 18(2)

A question to be answered is the conflict between the self-termination rule in Article 18(2) and the irrevocable offer rules of Article 16(2). As noted earlier, Article 16(2)(b) poses the question of whether an oral offer that the offeree reasonably relies upon to remain open and one in which the offeree acted in reliance is transformed into an irrevocable offer? If the offer is made orally, then the most plausible answer taken solely from the reading of the text of the CISG is that since there is a specific rule of self-termination of oral offers in Article 18(2), the offeree is precluded from relying on the offer remaining open.

Nonetheless, the expression that the offer would remain open after the termination of the oral communication would seem to trigger the firm offer rule found in Article 16(2). It could also be evidence of intent of the offeror to derogate from Article 18(2). Article 8 provides a meta-principle that underlies the interpretation of many of the Articles of the CISG. The parties intent, in this case the intent of the offeror—by expressly stating the offer will remain open or under the circumstances provided grounds for the offeree to reasonably rely on the offer remaining open—should determine whether the offer self-terminates through Article 18(2) or becomes a firm offer under Article 16(2).

## 7. GENERAL CONDITIONS AND STANDARD TERMS

The incorporation of standard terms into a contract involves a number of scenarios including when the terms are found in only one form, such as an offer, acceptance, or counteroffer; are being inserted by one of the parties subsequent to the formation of the contract; or where each party uses forms with differing or conflicting standard terms. The first

[30] P. Schlechtriem, P. Butler, *UN Law on International Sales*, Springer Verlag, Berlin 2009, 76 77.

two scenarios will be discussed here; the battle of the forms scenario is discussed in Professor Eiselen's article.

In response to the issue of whether the standard terms of one of the party's become part of the contract, two approaches can be offered. First, the terms enter the contract automatically unless the other party promptly objects to their inclusion. The second, and seemingly predominant approach, is that something more than failure to object is necessary for the inclusion of the standard terms. The receiving party—whether the offeror or the offeree—needs to be aware of the standard terms before they can be incorporated into the contract. The awareness may be actual or constructive. A German court states that "within the scope of the Convention, the effective inclusion of standard terms and conditions requires not only that the offeror's intention that he wants to include his standard terms and conditions into the contract be apparent to the recipient," but also that the "recipient of a contract offer, which is supposed to be based on standard terms and conditions, must have the possibility to become aware of them in a reasonable manner.[31]

The German court also dealt with the issue of the incorporation of standard terms by reference. It asserts that the principle of good faith found in Article 7(1) requires that the offering party not only reference the terms but also must provide or make available the terms to the other party. It notes that in the international arena some countries do not provide specific rules to regulate standard terms (such as in the United States). In addition, there are significant differences among those countries that have adopted standard terms regulations (such as Germany and France). The court concludes it is not the receiving party's duty to "enquire about the content of the standard terms and conditions." The risk of non-incorporation of the standard terms is placed on the sending party.

Some courts have emphasized the importance of a lengthy history of course of dealings. In one case, the parties agreed by telephone to enter a long-term supply contract that provided for numerous shipments and payments. The seller would send an installment, along with an invoice, and the buyer took delivery and made payment. On the face of each invoice was a provision that stated in French that: "Any dispute arising under the present contract is under the sole jurisdiction of the Court of Commerce of the City of Perpignan."[32] The court concluded that the forum selection clause was not part of any agreement between the parties. It provided the rationale that the contract was the one orally agreed to and

[31] Germany 24 July 2009 Appellate Court Celle (*Broadcasters case*) *http://cisgw3.law.pace.edu/cases/090724g1.html*.

[32] United States 5 May 2003 Federal Appellate Court [9th Circuit] (Chateau des Charmes Wines Ltd. v. Sabaté USA, Sabaté S.A.), *http://cisgw3.law.pace.edu/cases/030505u1.html*.

the unilateral and subsequent insertion of terms were not incorporated into the contract.

A 2010 United States case addressed this issue as it relates to the formation of contracts through the exchange of e-mail communications.[33] The seller's general conditions which included a forum selection clause were provided as an e-mail attachment to its sales quote. The buyer argued that the clause was not a part of the contract because the buyer had never agreed to its inclusion. Even though the general conditions were available as an e-mail attachment, the buyer argued that it was unaware of their existence and even if they were aware they did not open the attachment and accept them as part of the contract. The court held that under article 14 the sales quote was an offer. But, did the quote incorporate the general conditions? The terms were available to the receiving party through the e-mail attachment. The court noted that the general conditions were not attached to just any correspondence but were provided contemporaneously with the sales quote and thus, were part of the contract. It is important to distinguish this case from those where a party tries to insert new terms or modify the contract subsequent to formation. This case deals directly with the formation of a contract and the determination of the terms of that contract.

Another scenario is the case where following an initial agreement one of the party's attempts to incorporate its standard terms through subsequent documents? Most courts have held that general terms and conditions that are first provided in an invoice or a purchase order, subsequent to the formation of the contract, are not incorporated into the contract without express acceptance. Under Article 8, in order for standard terms to be incorporated into a contract, they must be included in the proposal in a way that the other party under the given circumstances knew or could not have been reasonably unaware of the offeror's intent to incorporate the terms.[34]

The main issue in the most recent case involving Article 18 is whether the seller's general conditions in the offer which included a forum selection clause became part of the contract.[35] Buyer argues that the mere receipt of the general conditions is not enough to incorporate them into the contract. He further argued that he did not affirmatively agree to

[33] United States 21 January 2010 Federal District Court [California] (*Golden Valley Grape Juice and Wine, LLC v. Centrisys Corporation et al.*), *http://cisgw3.law.pace.edu/cases/100121u1.html*.

[34] Austria 17 December 2003 Supreme Court (*Tantalum powder case*), *http://cisgw3.law.pace.edu/cases/031217a3.html*.

[35] United States 21 January 2010 Federal District Court [California] (*Golden Valley Grape Juice and Wine, LLC v. Centrisys Corporation et al.*), *http://cisgw3.law.pace.edu/cases/100121u1.html*.

the general conditions. The court held that the general condition terms of the offer were accepted when the buyer sold the product to a third-party. The court reasoned that since the general condition terms were part of the original offer they were not unilaterally incorporated into the contract.

In order to ensure the application of the general conditions, a Dutch court asserted that the seller should have offered the buyer a reasonable opportunity before or at the time of concluding the contract in order to become aware of their content.[36] The court concluded that the buyer did not have a reasonable opportunity to become aware of the general conditions and could not reasonably have understood that these general conditions were part of the seller's offer. In referencing the CISG, the court stated that the general conditions at hand can only become part of the contract if the application thereof was stipulated by the seller and accepted by the buyer pursuant to Article 14 et seq. of the CISG.

A recent German case[37] stated that the decisive factor is whether a reasonable person would have understood the confirmations (acceptances) as indicating an intention to incorporate the general conditions. The court's application of the reasonable person standard required that a certain threshold of communication was necessary before the general conditions could be deemed to be incorporated into the contract—at the minimum "the recipient . . . must be provided with the general conditions. CISG jurisprudence holds that there is no duty on the part of the receiving party to inquire about the content of the general conditions. That said, in the present case, the court indicated that there was an implicit duty if the incorporation of general conditions are set in a course of dealings between the parties. As to the intent requirement, the court noted that the buyer "knew from the negotiations that seller applied its general terms and conditions and intended to include them in the contract."

## 8. SUBJECTIVE-OBJECTIVE TEMPLATE

The offer and acceptance rules of CISG Part II are applied through the interpretive template of mutual intent as provided in Article 8. Article 8(1) provides a first order rule that the subjective intent of the offeror to be bound or not bound controls. However, this is conditioned by the requirement that the other party "knew or could not have been unaware of what that intent was." Failure to prove subjective intent of the sending party and knowledge or imputed knowledge of the receiving party results in the use of the second order rule—the reasonable person perspective.

[36] Netherlands 21 January 2009 District Court Utrecht (*Sesame seed case*), *http://cisgw3.law.pace.edu/cases/090121n1.html.*

[37] Germany 14 January 2009 Appellate Court München (*Metal ceiling materials case*), *http://cisgw3.law.pace.edu/cases/090114g1.html.*

In the area of the incorporation of general conditions or standard terms into a contract, as noted earlier, most courts require some objective evidence of awareness, knowledge, and/or understanding of those conditions by the receiving party before finding consent. Failing such evidence, courts have often held that the general conditions are not incorporated into the contract. U.S. courts take a much narrower view of objective evidence.[38] This should be understood under the backdrop that standard terms are generally enforced in the United States without needing to prove awareness, knowledge or understanding. The exception is if a term is subsequently found to be unconscionable (grossly unfair). Such unconscionability findings are a rarity in commercial contract adjudication. American courts do not determine if a party had actual awareness, knowledge, or understanding of the standard terms. However, they do recognize the general rule that a party cannot unilaterally change the terms of an existing contract.[39]

In applying Article 8, there is a strong argument that the inclusion of general conditions in commercial invoices over a series of transactions can lead to their incorporation. In making the argument that the receiving party gave an implied consent to their incorporation, the subjective and objective approaches merge. The subjective approach in Article 8(1) states that a party is bound if she "knew or could not have been unaware" of the other party's intent. The reasonable person standard of Article 8(2) could be used to support the argument that a reasonable person would have been aware of the general conditions and would have believed that they were intended by the other party to be part of the contract. The strength of this argument is dependent upon the course of dealings, whether the general conditions were discussed, and trade usage. But, in a given contextual setting this argument could overcome the facts that there was no express consent and that the document was subsequent to the formation of the contract.[40]

## 9. CONCLUDING REMARKS

The importance of recognizing the interconnectedness of CISG Articles is especially acute in Part II., "Formation of the Contract." In many cases, numerous Articles of Part II are brought to bear in resolving a case. This article focused on the interconnectedness of Articles 14, 16, and 18

[38] United States 16 June 2008 Federal District Court [Minnesota] (BTC USA Corporation v. Novacare et al.), *http://cisgw3.law.pace.edu/cases/080616u1.html*.

[39] *Ibid.*

[40] See OLG München 7 U 4427/97, Mar. 11, 1998 (F.R.G.), available at *http://cisgw3.law.pace.edu/cases/930113g1.html*.

as they relate to each other and to other CISG Articles, such as Articles 6, 8, 9, 19, and 55. This interconnectedness should be mined by practitioners in the fabrication of arguments and rationales on behalf of clients engaged in a dispute. It is also important to the transactional attorney in counseling its clients on the enforceability of contracts and contract terms. For example, in the area of incorporating standard terms or general conditions, it is best to expressly incorporate them into the contract. In incorporating standard terms, an attorney should advise her client to make sure the other party is aware of them, place a conspicuous reference to the terms on the face of the instrument, and provide a copy of the terms on the back of the form or attached to the form. Modification of long-term-supply contracts, such as an attempt of one of the parties to incorporate its general conditions, should be done with a greater deal of formality, such as an express agreement between the parties.

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# THE EXEMPTION PROVISIONS OF THE SALES CONVENTION, INCLUDING COMMENTS ON "HARDSHIP" DOCTRINE AND THE 19 JUNE 2009 DECISION OF THE BELGIAN CASSATION COURT

*This paper addresses the exemptions provisions, articles 79 and 80, of the United Nations Convention on Contracts for the International Sales of Goods (CISG). It begins with a general comparison of the two provisions, exploring the significance of stylistic differences between the detailed, complex, even baroque approach of arti cle 79 and the general, straightforward and vague mode of article 80. The paper then explores a recent decision of the Belgian Court of Cassation holding that the CISG incorporates, as part of its general principles, the "Hardship" provisions (articles 6.2.1 through 6.2.3) of the UNIDROIT Principles of International Commercial Con tracts. The paper argues that this decision distorts the meaning of the CISG, violates the mandate to interpret the Convention with regard for its international character, and threatens the political legitimacy of the treaty.*

Key words: *Exemption. Force Majeure. Hardship. CISG. International Sales.*

This paper explores the exemption provisions – Articles 79 and 80 – of the United Nations Convention on Contracts for the International Sale of Goods (CISG).[1] These articles contain rules under which parties to international sales contracts may be shielded from at least some of the

[1] This paper was written for a conference on the CISG organized by the University of Belgrade Faculty of Law in November 2010. I was honored by and grateful for the opportunity to participate in this conference. The honor, and my gratitude, was increased greatly by two facts: members of the University of Belgrade Law Faculty have made extraordinary contributions to understanding the Convention; the conference was held in conjunction with a meeting of the CISG Advisory Council, one of the most ambitious and creative projects to encourage an intelligent and uniform approach to the CISG.

usual legal consequences that flow from a failure to perform a contractual duty. The question of when a party should be so shielded is certainly one of the most challenging in the field of uniform commercial law.

Article 79, the broader and more significant of the two exemption provisions, is related to traditional doctrines – *force majeure*, impossibility/impracticability – with long and interesting histories in both domestic and international legal traditions.[2] The provision is one of the most complex and difficult in the CISG. Article 79(1), the core of the provision, establishes six elements (depending on how one counts) that must be satisfied before a party that has failed to perform may claim exemption under the article: 1) an "impediment" to performance must have arisen; 2) the party's failure to perform must have been "due to" the impediment (causation); 3) the impediment must have been "beyond the control" of the party claiming exemption; 4) the impediment must be one that the party claiming exemption "could not reasonably be expected to have taken . . . into account at the time of the conclusion of the contract"; 5) the impediment must be such that the party claiming exemption "could not reasonably be expected . . . to have avoided . . . it or its consequences"; and 6) the impediment must be such that the party claiming exemption "could not reasonably be expected to have . . . overcome it or its consequences."

Although Article 79 is one of the most challenging and important CISG provisions, it is not necessarily the best example of the Convention's methods. Alluding to the necessarily vague standards employed in the provision, Professor Honnold asserted that "Article 79 may be the least successful part of the half-century of work towards international uniformity."[3] Perhaps in response to these challenges, Article 79 has produced a rich and varied body of case law. Some of those decisions reflect great credit on the tribunals that have applied the provision; others raise disturbing questions about the tribunal's methods.[4] At any rate, Article 79 poses many fascinating and significant questions that demand thoughtful analysis. I will attempt to comment on one of those questions in greater depth later in this paper.

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[2] See I. Schwenzer, *Article 79*, *Commentary on the UN Convention on the International Sale of Goods (CISG)* (eds. P. Schlechtriem, I. Schwenzer), Oxford University Press, Oxford 2010[3], para. 4; J. Honnold, *Uniform Law for International Sales Under the 1980 United Nations Convention* (ed. H. M. Flechtner), Kluwer Law International 2009[4], para. 425.

[3] *Ibid.*, 627.

[4] See J. Lookofsky, H. M. Flechtner, "Nominating *Manfred Forberich*: The Worst CISG Decision in 25 Years?", *The Vindobona Journal of International Commercial Law and Arbitration* 9/2005, available at SSRN: *http://ssrn.com/abstract 1311459* (discussing Raw Materials Inc. v. Manfred Forberich GmbH, 2004 WL 1535839 (U.S. District Court for the Northern District of Illinois, 7 July 2004), available online at *http://cisgw3.law.pace.edu/cases/040706u1.html*).

Article 80 is, in a sense, the poor relative of Article 79. It appears to be a straightforward statement of a simple and obvious general principle: "A party may not rely on a failure of the other party to perform, to the extent that such failure was caused by the first party's act or omission." A Belgian court has characterized Article 80 as embodying a principle "close to *estoppel*."[5] Professor Honnold has opined that the provision "has the seductive charm of a self-evident statement,"[6] and he notes that at the 1980 Vienna Diplomatic Conference at which the text of the CISG was approved, "both supporters and opponents of this provision claimed that it embodied self-evident truth."[7]

Comparing the approaches of the Convention's two exemption provisions is revealing. Whereas proving exemption under Article 79 requires satisfying a long list of requirements that can be difficult to understand, challenging to distinguish, and daunting to apply, Article 80 only requires proof that 1) there was an "act or omission" by the other side, and 2) it caused the failure to perform by the party claiming exemption. Article 80 contains nothing beyond these two requirements that expressly limits, conditions or adjusts its application.

Article 79 includes special rules addressing a variety of specific sub-issues and procedural details, including exemption claims based on a third party's failure to perform (Article 79(2)), treatment of temporary impediments (Article 79(3), and a party's obligation to notify the other side of a claim to exemption (Article 79(4)). Article 80 includes no such detail. The fact that Article 79 has five subsections, whereas Article 80 is uncluttered by subdivisions, says much about the different approaches of the two provisions.

The consequences of exemption under Article 80 also appear to be simple and more straightforward, as well as more far-reaching, than under Article 79. Article 79(5) specifies that the article exempts a party only from liability for *damages* for non-performance, leaving other remedies for breach (such as avoidance of contract or price reduction under Article 50) unaffected.[8] Exemption under Article 80, in contrast, apparently shields a party from all remedies for its failure to perform[9]: when the

[5] Rechtbank van Koophandel Tongeren, Belgium, 25 January 2005, English translation available at *http: cisgw3.law.pace.edu/cases/050125b1.html*.

[6] Honnold, §436.

[7] *Ibid.* § 436.4 at 646.

[8] See I. Schwenzer, paras. 49, 55; Honnold, §§435.4, 435.6. The extent to which a breaching party who is exempt under Article 79 remains subject to an order for specific performance is subject to some debate. *See Ibid.* §435.5 (in particular, n. 63). *Compare* I. Schwenzer, paras. 52 54.

[9] See Ingeborg Schwenzer, "Article 80", *Commentary on the UN Convention on the International Sale of Goods (CISG)* (eds. P. Schlechtriem, I. Schwenzer), Oxford University Press, Oxford 2010[3], paras. 8, 9; Honnold, 644.

provision's requirements are satisfied, the other side "may not rely" on the failure to perform. Stripping a party of the right to "rely" on a breach is the same approach used in Article 39, which denies all remedies for non-conforming goods if the notice requirements of that provision are not satisfied.

The simplicity of Article 80 (particularly in comparison to Article 79) no doubt reflects its origins and history.[10] Although similar to an idea that appeared in Article 74(3) of the Uniform Law on the International Sale of Goods (1964) ("ULIS"), an antecedent of the CISG, Article 80 was a late addition to the Convention. It was added at the 1980 Vienna Diplomatic Conference at which the text of the Convention was finalized, based on a proposal by the (former) German Democratic Republic. Professor Honnold has observed: "Some delegates [to the 1980 Vienna Diplomatic Conference] stated that the proposal expressed the important general principle that one should not gain by a wrongful act; others noted that such a statement was unnecessary and, in any event, followed from the good faith requirement of Article 7(1) .... Most delegates seemed to feel that there might be some value and, at any rate, no danger in stating the obvious; the provision was approved."[11]

The simple structure and straightforward language of Article 80, however, belies the power of the provision: as was noted above, the consequences of exemption under Article 80 are considerably more far-reaching than under Article 79. The lack of express limitations or exceptions on the principle expressed in Article 80, furthermore, creates the possibility of far-ranging applications that are, in my view, improper, and may even undermine important aspects of the Convention's system for regulating international sales.

Perhaps unsurprisingly, given the history mentioned above, the drafting of Article 80 seems out of character for the CISG – not in keeping with the general approach of the Convention, which is characterized (usually) by more carefully-crafted and detailed provisions. In fact, Article 80 appears less like a legal provision, and more like a statement of one of the general principles of the CISG, designed to be used (according to Article 7(2)) to deal with "gaps" in the Convention – i.e., situations that the drafters did not specifically anticipate, and for which they therefore did not provide a particular rule.[12]

Because it is an express provision (whereas other "general principles" are implied from the Convention's express terms) and because it contains almost nothing in the way of express limitations on or distinc-

[10] The following account of the drafting history of Article 80 is derived from I. Schwenzer, para. 1, and Honnold, §436.1.

[11] Honnold, §436.1.

[12] See Honnold, §436.4.

tions in its use, it strikes me that Article 80 may be difficult for judges and arbitrators to apply with the kind of precision that justice, the complex demands of international commerce, and the purposes of the Convention demand. An example of this dangerous malleability is the fact that some authorities have invoked Article 80 to justify an aggrieved party's refusal to perform its duties under a contract, even though it has not avoided the contract, on the footing that the non-performance was "caused by" the other side's prior breach[13] Other authorities (with whom I agree) reject this approach; they argue that the causal link required by Article 80 between a party's failure to perform and the other party's acts or omissions is the same kind of "objective" causation required by Article 79.[14] In other words, according to the latter authorities it is not enough that the other side's prior breach *motivated* a refusal to perform; rather, the other party's acts or omissions must have prevented performance – must have, in the words of one arbitration decision, made it "impossible or nearly impossible"[15] for the other party to perform.

Among the many interesting and complex issues that have arisen under Article 79 – far more than I could hope to cover in this paper – is one that I will in fact attempt to discuss, and that was addressed in a recent decision by the Belgian Court of Cassation.[16] The issue is this: in transactions governed by the CISG, what is the status of "hardship" doctrine – "*imprévision*," *eccessica onerosita sopravvenuta*, *Wegfall der Geschäftsgrundlage* and the like – that permit a contract to be terminated, or its terms "adjusted," in the event of a "hardship" event that upsets the equilibrium of contractual burdens and benefits between the parties? Do domestic hardship doctrines continue to apply in CISG transactions, or are they displaced by the Convention? Alternatively, might the CISG it-

[13] See, e.g., decisions discussed in T. Neumann, "Shared Responsibility under Article 80 CISG", *Nordic Law Journal (Nordic L. J.)* 2/2009, 16, available online at *http://www.cisg.law.pace.edu/cisg/biblio/neumann1.html*.

[14] See, e.g., Supreme Court, Poland, 11 May 2007, English translation available at *http://cisgw3.law.pace.edu/cases/070511p1.html*; CIETAC Arbitration Decision, China, 18 December 2003, English translation available at *http://cisgw3.law.pace.edu/cases/031218c1.html*; ICC Arbitration Case No. 11849, 2003, English text available at *http://cisgw3.law.pace.edu/cases/031849i1.html*. A leading commentary put it this way: "If, for example, the buyer, without cause, refuses payment of the due price or refuses payment for previous obligations, the seller is not entitled to refuse delivery of the goods under Article 80. The breach of contract on the part of the promise is the occasion but not the cause of the non performance." H. Stoll, G. Gruber, "Article 80" *Commentary on the UN Convention on the International Sale of Goods (CISG)* (eds. P. Schlechtriem, I. Schwenzer), Oxford University Press, Oxford 2005$^2$, para. 6.

[15] ICC Arbitration Case No. 11849, 2003, English text available at *http://cisgw3.law.pace.edu/cases/031849i1.html*.

[16] Cour de Cassation/Hof van Cassatie, Belgium, 19 June 2009, Editorial Comments by Professor Siegfried Eiselen and English translation available at *http://cisgw3.law.pace.edu/cases/090619b1.html*.

self provide for termination or adaptation of a contract in case of hardship?

These questions concerning the status of hardship doctrine in CISG transactions are made more interesting by the drafting history of the Convention, which includes episodes in which "hardship" provisions were proposed to be added to the express provisions of the CISG, and such proposals were rejected.[17] Those rejected proposals included one that would specifically have empowered tribunals to adjust contract terms in the event of hardship in order to reestablish contractual equilibrium. The status of "hardship" doctrine under the Convention has previously been addressed in case law[18] and by scholars.[19] The recent decision by the Belgian Court of Cassation dealing with this area, however, suggests further exploration is required.

As my reference point for hardship doctrine I will use the hardship provisions in the UNIDROIT Principles of International Commercial Contracts. Under Article 6.2.2 of the Principles, "hardship" exists:

> where the occurrence of events fundamentally alters the equilibrium of the contract either because the cost of a party's performance has increased or because the value of the performance a party receives has diminished, and
>
> (a) the events occur or become known to the disadvantaged party after the conclusion of the contract;
>
> (b) the events could not reasonably have been taken into account by the disadvantaged party at the time of the conclusion of the contract;
>
> (c) the events are beyond the control of the disadvantaged party; and
>
> (d) the risk of the events was not assumed by the disadvantaged party.

The consequences of "hardship" are specified in Article 6.2.3 of the Principles, which provides:

> (1) In case of hardship the disadvantaged party is entitled to request renegotiations. The request shall be made without undue delay and shall indicate the grounds on which it is based.

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[17] For accounts of this history, see N. Lindström, "Changed Circumstances and Hardship in the International Sale of Goods", *Nordic L. J.* 1/2006, 2, available online at *http://www.cisg.law.pace.edu/cisg/biblio/lindstrom.html*; J. Rimke, "Force majeure and hardship: Application in international trade practice with specific regard to the CISG and the UNIDROIT Principles of International Commercial Contracts", *Pace Review of the Convention on Contracts for the International Sale of Goods* (1999 2000), 197, 218 19.

[18] E.g., Tribunale Civile di Monza, Italy, 14 January 1993, CLOUT case No. 54, English translation available at *Journal of Law and Commerce (J.L. & Comm.)* 15/1995, 153, and online at *http://cisgw3.law.pace.edu/cases/930114i3.html*; decisions discussed in Lindström, 2.

[19] E.g. I. Schwenzer, paras. 4, 42,; Honnold, §435.2; Stoll, Gruber, paras. 30 32; Lindström, 2; S. D. Slater, "Overcome by Hardship: The Inapplicability of the UNIDROIT Principles' Hardship Provisions to CISG", *Florida Journal of International Law* 12/1998, 231.

(2) The request for renegotiation does not in itself entitle the disadvantaged party to withhold performance.

(3) Upon failure to reach agreement within a reasonable time either party may resort to the court.

(4) If the court finds hardship it may, if reasonable,

(a) terminate the contract at a date and on terms to be fixed; or

(b) adapt the contract with a view to restoring its equilibrium.

These provisions are completely separate from the "force majeure" provision (Article 7.1.7) of the Principles, which reproduces the exemption rule of CISG Article 79(1). This distinction between "force majeure" and "hardship" reproduces a common dichotomy: in the Civil Law tradition, force majeure doctrine generally provides for release from liability for non-performance if post-contract-formation events rendered that performance impossible; hardship doctrine provides relief, even where a party's performance remains possible, if post-contract developments fundamentally change the expected equilibrium between that performance and what the party was to receive in exchange.[20] The relief provided by hardship doctrine, furthermore, differs from that for force majeure: under Article 6.2.3 of the UNIDROIT Principles, for example, the occurrence of "hardship" requires the parties to attempt to renegotiate the terms of their agreement in a fashion that restores the original contractual equilibrium; should such renegotiation fail, a court is empowered to terminate the agreement or, more interestingly (from the common law perspective), "adapt" the contract – i.e., impose changed contractual terms not agreed to by the parties – to restore that equilibrium.

In short, the hardship regime of the UNIDROIT Principles (reflecting, I believe, most Civil Law hardship doctrines in this regard) has *two* significant features that distinguish it from traditional force majeure doctrine. First, the standard for triggering relief is different – and more relaxed – under hardship doctrine: hardship includes events that do not render a party's performance impossible, but merely (much) more difficult and/or expensive (or that render the return performance that a party is to receive much less valuable to it) so that the contractual equilibrium is upset. Second, hardship doctrine provides for the possibility of relief

[20] It is not clear if the dichotomy between the "impossibility" standard traditionally required under "force majeure" and the "something less than impossibility standard" for "hardship" is maintained in the UNIDROIT Principles. Comment 6 to the UNIDROIT Principles' definition of hardship, Article 6.2.2., states that "there may be factual situations which can at the same time be considered as cases of hardship and of force majeure," and, as the Comment explains, "hardship" doctrine looks "to allow the contract to be kept alive although on revised terms" an approach that cannot be pursued if performance is impossible. On the other hand, both situations in which the comments to UNIDROIT Article 7.1.7 suggest that the Principles' force majeure provision could be invoked successfully Illustrations 1(2) and 2 appear to involve impossibility.

not available under force majeure doctrine – an obligation on the part of the parties to attempt to renegotiate the contract and, most strikingly, the possibility that a court will impose changed contractual terms not agreed to by the parties in order to restore the contractual equilibrium.

From the perspective of one trained in U.S. commercial law, the standard defining "hardship" in Article 6.2.2 of the UNIDROIT Principles is not particularly surprising or disturbing. At least in a rough way, it resembles the concept of "impracticability" under U.S. domestic law, found in § 2–615 of the Uniform Commercial Code ("U.C.C."). The U.S. impracticability provision provides a party relief from liability for non-performance where that performance was rendered "impracticable" – more difficult in the extreme, including extremely more expensive, but not necessarily impossible – by a post-contract-formation "contingency," provided the contingency was not reasonably foreseeable at the time the contract was formed and its risk was not otherwise assumed by the adversely-affected party. Certainly the examples of "hardship" in contracts for the sale of goods offered in the Comments to Article 6.2.2 of the UNIDROIT Principles – e.g., "a dramatic rise in the price of the raw materials necessary for the production of the goods or ... the introduction of new safety regulations requiring far more expensive production procedures" – present the kind of situations that might invoke "impracticability" under U.C.C. § 2–615.[21] Although it is not clear whether the U.S. domestic law standard for relief (whether post-contract-formation events have rendered performance "impracticable") is identical to the standard for relief under the UNIDROIT hardship doctrine (whether events after the conclusion of the contract have "fundamentally" altered the "equilibrium" of the contract), the necessary vagueness of those standards renders this debate largely an academic exercise.

Furthermore, CISG Article 79 itself is usually read to be satisfied by "impediments" that render performance extremely more difficult even if performance has not been made literally impossible.[22] If this is accepted, defining the precise difference between the level of difficulty of performance that will trigger relief under CISG Article 79 and the standard for relief under domestic hardship provisions is, again, largely an academic exercise.

[21] Under the UNIDROIT Principles, "hardship" encompasses situations in which events occurring after the conclusion of the contract produce, not an extreme increase in the cost of a party's performance, but an extreme decrease in the value of the performance a party is entitled to receive. Under U.C.C. § 2 615, U.S. impracticability doctrine technically applies only to a seller's increased difficulty in performing, but exemption for an extreme diminishment in the value of the performance that a party (particularly a buyer) is to receive under a contract is possible either by analogical application of 2 615, or by invoking the U.S. common law doctrine of "frustration of purpose" (see Restatement of Contracts 2d § 265) to supplement the U.C.C. (see U.C.C. § 2 103(b)).

[22] See, e.g. I. Schwenzer, para. 30; Honnold, §432.2; Lindström, 2.

Whereas the "less-than-impossibility" standard for relief under hardship doctrine is not unfamiliar to a U.S. lawyer, the relief available for hardship under the UNIDROIT Principles is unfamiliar – indeed, almost shocking – to one trained in U.S. law. The long-held attitude of U.S courts is expressed in the traditional maxim that the job of courts is to enforce the contract the parties made, and that they should not "make a contract" for the parties. Some of the more extreme expressions of this attitude have been abandoned – in particular the idea that "an agreement to agree is unenforceable," which sometimes led U.S. courts to refuse enforcement of agreements with missing terms even though the parties clearly intended the agreement to be legally enforceable.[23] It remains almost inconceivable, however, that a U.S. court would overrule terms expressly agreed to by parties to a contract in favor of terms imposed by the court – the remedy expressly authorized by Article 6.2.3(4)(b) of the UNIDROIT Principles. The rejection of the remedial approach of Civil Law hardship doctrine in the domestic legal tradition of the U.S. (and in other Common Law systems) provides context for viewing the recent decision on hardship and the CISG by the Belgian Cassation Court, to which I now turn.

In the Belgian case, the buyer and seller had entered into contracts, governed by the Convention, for the sale of steel tubing to be used by the buyer to make scaffolding. After a severe (approximately 70%) increase in the cost of the steel used for producing such tubing, the seller stopped making deliveries and demanded an adjustment to the price in the existing contracts. When negotiations between the parties for an adjustment failed, the seller refused delivery unless the buyer agreed to pay an increased price set by the seller, and the buyer sought a court order requiring the seller to resume deliveries at the original price specified in the parties' contracts.

The court of first instance, the Rechtbank van Koophandel Tongeren,[24] held that, although situations of economic hardship could constitute an impediment triggering exemption under CISG Article 79, the possibility of the increased market prices that occurred in the case was something the seller should reasonably have taken into account at the time of the conclusion of the contracts; because the seller did not insist on a price adjustment clause in the contracts to address this possibility, the

[23] See, e.g., Official Comment 1 to § 2 305 (dealing with sales agreements lacking a price term) in the (U.S.) Uniform Commercial Code: "This section applies when the price term is left open on the making of an agreement which is nevertheless intended by the parties to be a binding agreement. This Article rejects in these instances the formula that 'an agreement to agree is unenforceable'. . . ."

[24] Rechtbank van Koophandel Tongeren, Belgium, 25 January 2005, English translation and editorial comments by Professor Siegfried Eiselen available at *http://cisgw3.law.pace.edu/cases/050125b1.html*.

Article 79 exemption was not available. The court also refused to apply the theory of *imprévision* as grounds to adjust or adapt the terms of the contract to restore its balance in light of the hardship caused by the seller's increased costs: the court cited authority suggesting that hardship theory was inconsistent with the provisions of the Convention, and noted that the Belgian courts have rejected the theory as a matter of Belgian domestic law. Invoking a general principal of equity, however, the court ruled that the buyer would have to pay half of the price increase demanded by the seller.

On appeal, the intermediate appeals court[25] ruled that the lower court had improperly rejected the possibility of adapting the contract to changed conditions pursuant to the theory of *imprévision*; that there was a gap in the Convention concerning the issue of adapting the terms of the contract under this theory; that to fill that gap, pursuant to Article 7(2), reference should be made to the law applicable under rules of private international law; that PIL rules led to the application of French law; and that French law, although it formally rejected the theory of *imprévision*, provided for adaptation of contractual terms in situations of hardship pursuant to the doctrine of good faith. The court applied the approach to hardship in French domestic law and held that the buyer was required to pay an additional € 450,000 beyond the original price in the parties' contracts.

I do not agree with this analysis. I believe that the legal effect of post-contract developments that render a party's performance more difficult, including more expensive, is fully addressed in the Convention's exemption provisions.[26] The Convention's provisions, in my view, preempt national domestic law on the question.[27] The fact that the CISG articles governing exemption do not authorize a tribunal to impose modified contract terms not agreed to by the parties does not create a "gap" in the Convention[28]; it merely reflects the Convention's rejection of the adaptation remedy, as reflected in the *travaux préparatoires*. By failing to recognize that there is no "gap" in the Convention's coverage that could

[25] Hof van Beroep Antwerp, Belgium, 29 June 2006 and 15 February 2007. Information concerning the interim appeals court opinion in this case is taken from the English translation of the decision by the Belgian Hof van Cassatie and the comments thereon by Professor Siegfried Eiselen: Hof van Cassatie, Belgium, 19 June 2009, English translation and Editorial Comments by Professor Siegfried Eiselen available at *http://cisgw3.law.pace.edu/cases/090619b1.html*.

[26] Accord. Stoll, Gruber, para. 31 (referring to "the history of Article 79 and its intent to exhaustively determine the limits of the promisor's performance guarantee").

[27] Honnold, §432.2. *Accord*, Rimke, 219. *Contra*, *e.g.*, J. Lookofsky, "Not Running Wild with the CISG", *J.L. & Comm.* 29/forthcoming, 2011; J. Lookofsky, "Walking the Article 7(2) Tightrope between CISG and Domestic Law", *J.L. & Comm.* 25/2005, 87, 99, available online at *http://www.cisg.law.pace.edu/cisg/biblio/lookofsky16.html*.

[28] Accord. id.; Lindström, 2.

be filled by applicable national domestic law, the intermediate appeals court undermines the utility and purposes of the Convention, which focuses on reducing the significance of choice-of-law issues in international sales transactions. The Convention cannot be extended beyond its intended scope with undermining its legitimacy, but where it does cover an issue, failing to properly recognize its full preemptive scope brings back into play domestic doctrines in a fashion that improperly re-elevates the importance of the choice-of-law issue.

At least the approach of the Belgian intermediate appellate court did not mandate that Civil Law approaches to "hardship" rejected in the Convention be applied in all CISG transactions: under this decision, tribunal-imposed adaptation of contract terms in the event of hardship would be required in CISG transactions only where PIL rules led to the application of "supplementary" domestic law that provided for that approach. Under the approach that emerged when the buyer appealed the intermediate appeals court decision to the Belgian Court of Cassation, however, such adaptation would be required in *every* transaction governed by the Convention, and by every tribunal hearing disputes in such transactions.

The Cassation Court affirmed the result in the intermediate appeals court, although on a significantly different basis than that adopted by the lower court.[29] The Cassation Court opined that a situation involving economic hardship could constitute an impediment under Article 79 of the CISG that would trigger exemption that provision.[30] The Cassation Court nevertheless agreed with the intermediate appeals court that the Convention's failure to provide, in the event of hardship, for an obligation to renegotiate or for the possibility for a court to adapt the terms of the contract constituted a "gap" in the Convention that should be addressed by means of the methodology described in Article 7(2) of the Convention.

Article 7(2), of course, provides that a question that is governed by the Convention but that is not expressly addressed therein should be resolved, first, by reference to the Convention's general principles; if the Convention contains no general principles adequate to resolve the issue, reference should be made to the law applicable under the principles of Private International Law ("PIL"), as the intermediate Belgian appeals court had done. The Cassation Court, however, determined that, pursuant to Article 7(2), the Convention itself, rather than applicable national law, required a court to adapt the terms of the parties' contracts in light of the

[29] Hof van Cassatie, Belgium, 19 June 2009, English translation and Editorial Comments by Professor Siegfried Eiselen available at *http://cisgw3.law.pace.edu/cases/090619b1.html*.

[30] "Changed circumstances that were not reasonably foreseeable at the time of the conclusion of the contract and that are unequivocally of a nature to increase the burden of performance of the contract in a disproportionate manner, can, under circumstances, form an impediment in the sense of this provision of the Convention." *Ibid.*

seller's hardship; on this basis, the Cassation Court affirmed the intermediate appeals court's order increasing the price buyer was obliged to pay by € 450,000.

The English translation of the reasoning that led the Belgian Cassation Court to find, within the CISG itself, a doctrine authorizing a tribunal to devise and impose "adapted" contract terms is worth quoting. After citing Article 7(2), the court stated: "Thus, to fill the gaps in a uniform manner, adhesion should be sought with the general principles which govern the law of international trade. Under these principles, as incorporated *inter alia* in the Unidroit Principles of International Commercial Contracts, the party who invokes changed circumstances that fundamentally disturb the contractual balance, as mentioned in paragraph 1, is also entitled to claim the renegotiation of the contract."

Assuming this English translation captures the court's statement with reasonable accuracy – and I certainly admit my inability to judge that – it offers a very interesting window into the court's reasoning. The mandate in Article 7(2) to resolve gaps by reference to the general principles upon which *the Convention* is based is transformed by the court into an obligation to refer to "the general principles which govern the law of international trade." The general principles of the Convention and the general principles governing the law of international trade certainly seem to me to be two quite different things. The difference is not hard to discern: the general principles on which the Convention is based are derived from the text of the CISG itself; the general principles governing the law of international trade could be found in many sources *outside* the Convention, including domestic laws to the extent they have been applied to international sales or any other international transaction.[31] Indeed, the court's linguistic sleight of hand immediately paves the way for the court to look outside the Convention for general principles to fill the posited "hardship gap" – to the UNIDROIT Principles of International Commercial Contracts, which by their express terms, attempt to be a compendium or restatement of internationally-recognized contract principles (not just sales law principles) derived from domestic and international legal sources from around the globe, including – but most certainly not limited to – the CISG.[32]

I admire the substance of the UNIDROIT Principles, as I have publically declared in the past.[33] But, as I have also publically declared, I do

[31] See H. M. Flechtner, "The CISG's Impact on International Unification Efforts: The UNIDROIT Principles of International Commercial Contracts and the Principles of European Contract Law", *The 1980 Uniform Sales Law: Old Issues Revisited in the Light of Recent Experiences* (ed. F. Ferrari), Verona 2003, 190.

[32] See *Introduction to the 1994 Edition* in UNIDROIT Principles of International Commercial Contracts (2004 edition). *See also* Flechtner, (2003), 170 74.

[33] See, e.g., the description of Article 7.2.2 of the Principles ("Performance of non monetary obligation") as "a carefully crafted and thoughtful provision that could well

not agree that they can legitimately used to supplement the CISG.[34] The Sales Convention – which is actual law, and on the basis of whose actual text the Contracting States bound themselves to it – specifies in Article 7(2) how it is to be supplemented when gaps in its coverage appear. The rule in Article 7(2) requires those applying the Convention to look within its provisions to determine *its* general principles, not to look outside the Convention to determine general international law principles, especially ones that, like the UNIDROIT Principles, are expressly based on sources beyond the CISG.

Furthermore, in my view, the claim that the UNIDROIT Principles can be used to supplement the CISG because the Principles declare the general principles on which the CISG is based,[35] at best, adds several additional and unnecessary steps to the Article 7(2) analysis: to use a UNIDROIT Principle to supplement the CISG in a legitimate fashion, one would have to determine if the Principle in question actually derives from the provisions of the CISG, as opposed to the many other sources on which the UNIDROIT Principles are based, and then determine whether the UNIDROIT Principles (which are not law, and whose drafters are not lawmakers nor authorized by CISG Contracting States as a source of supplementary principles) got the CISG general principles right. Why not just follow the methodology mandated by CISG Article 7(2) when filling gaps – determine directly what the general principles of the Convention are. Of course the UNIDROIT Principles can be consulted as a (non-authoritative) source of opinions about those general principles. Beyond their intrinsic persuasiveness, however, they do not possess any special

form the basis of a compromise between the common law and civil law positions" in Flechtner, (2003), 196.

[34] *Ibid.*., 189 93. For similar opinions see Slater, 253 60; U. Drobnig, *The Use of the UNIDROIT Principles by National and Supranational Courts* (paper presented at the colloquium on "les contrats commerciaux internationaux et les nouveaux Principles UNIDROIT: Une nouvelle lex mercatoria" in Paris, 20 21 October 1994), quoted in M. J. Bonell, "The UNIDROIT Principles of International Commercial Contracts and the Vienna Sales Convention Alternatives or Complementary Instruments?", *Uniform Law Review* 26/1996, 36. Compare J.S. Ziegel, "The UNIDROIT Contract Principles, CISG and National Law"*, Los principios de UNIDROIT: ¿Un derecho Común de los Contratos para las Américas?/ The UNIDROIT Principles: A Common Law of Contracts for the Americas? (Actas/Acts Congreso Interamerican/Inter American Congress Hacia un nuevo regimen para la contratación mercantil internacional: los Principios de UNIDROIT sobre los contratos comerciales internacionales/ A new approach to international commercial relations: the UNIDROIT Principles of International Commercial Contracts, Valencia, Venezuela (6 9 November 1996))*, (1998) 221, available at *http://www.cisg.law.pace.edu/cisg/biblio/ziegel2.html*. For contrary views see, e.g., M. J. Bonell, 34 37; A. M. Garro, "The Gap Filling Role of the UNDROIT Principles in International Sales Law: Some Comments on the Interplay between the Principles and the CISG", *Tulane Law Review* 69/1995, 1152.

[35] See the Preamble and Official Comment 5 thereto in UNIDROIT Principles (2004 edition), *supra* note 32.

authority to declare the general principles of the Convention for purposes of CISG Article 7(2).

In addition, the Principles often seem to me to favor the Civilian as opposed to the Common Law positions on controversial questions. Witness, for example, the very hardship provisions at issue in the Belgian case[36], the Principles' position on specific performance,[37] the approach to good faith,[38] and the treatment of pre-contractual liability.[39] As a result, incorporation of provisions of the UNIDROIT Principles into the CISG via gap-filling – particularly where those same approaches were proposed and rejected during the drafting of the CISG – can appear to be a backhanded way of imposing the approaches of the Civil Law on non-Civil Law states that never agreed to those approaches.

Frankly, however, the use of the UNIDROIT Principles by the Belgian Cassation Court is not the aspect of the opinion that, in my view, poses the greatest threat to the proper application of the CISG. More disturbing to me, by far, is the court's approach to determining whether there is a gap in the Convention's rules – although the court is hardly forthcoming or articulate on its approach to this issue. In order to invoke the UNIDROIT Principles "hardship" rules (as an expression, in the court's view, of the general principles that can be used to supplement the CISG), the court must of course have agreed with the intermediate appeals court that a gap existed in the Convention with respect to a matter "governed by this Convention." The Cassation Court, however, expressly found that "hardship" could constitute an "impediment" that would result in exemption under Article 79. In other words, the court found that situations falling short of impossibility – situations in which a party's performance would be possible, but entail "hardship" – were governed by Article 79. Because Article 79 provides only for the remedy of exemption from damages, however, – and not for adaptation of the terms of the contract by a court or arbitration tribunal – the Cassation Court found a "gap" that it could fill by reference to the UNIDROIT Principles, which does provide for such adaptation. In other words, the "gap" that the court must have found is the failure to the Convention to provide expressly for the particular remedy of tribunal-imposed adaptation (modification without the agreement of the parties) in the event of hardship .

Dear readers, please understand how this holding strikes one not from the Civil Law tradition. Although the Belgian Cassation Court found that CISG Article 79 provides a remedy for "hardship," it also posited a

[36] On the Civil Law basis for the hardship provisions of the UNIDROIT Principles, *see* Slater, 241.

[37] See UNIDROIT Principles Art. 7.2.2 and Official Comment 2 thereto.

[38] See UNIDROIT Principles Art. 1.7 and Official Comment 4 thereto.

[39] See UNIDROIT Principles Art. 2.1.15.

gap in the Convention because the treaty does not provide for a specific additional remedy from the Civil Law tradition – a remedy that is vehemently rejected in the Common Law tradition. The court then filled this supposed gap by a version of the Civil Law remedy found in a compendium of Principles that does not even purport to be based solely on the Convention, although Article 7(2) mandates that gaps be filled by reference to general principles on which *the Convention* is based. This court performs this rather perverse tour de force despite the fact that a provision to incorporate this very remedy was proposed *and rejected* during the drafting of the CISG – although the court gives no hint that it was aware of this history.

The Belgian court, of course, is by no means the first to hallucinate a gap in the Convention when it could not find a familiar domestic rule. I am reminded of a decision by a U.S. court ludicrously asserting that the Convention does not address disclaimers of the implied quality obligations imposed by CISG Article 35(2),[40] even though Article 35(2) itself expressly (and redundantly, given Article 6) states that its obligations apply "[e]xcept where the parties have agreed otherwise." You see, U.S. domestic sales law has quite elaborate rules governing attempts to disclaim quality obligations ("warranties") – an entire lengthy section of the Uniform Commercial Code, § 2–316, with four subsections, is devoted solely to warranty disclaimers. The U.S. court apparently just could not fathom that the CISG addressed the question in a simple seven-word phrase. Therefore, the court concluded, there must be a gap in the CISG concerning disclaimers of the Article 35(2) obligations – a view even more clearly the product of the distorting influence of the homeward trend than that of the Belgian Court of Cassation.

The Belgian Cassation Court invokes the value of uniformity articulated in CISG Article 7(1) to justify its approach. Its holding, however, is likely to have just the opposite effect: it is likely to seriously increase non-uniformity in the application of the Convention. I find it almost unimaginable that a U.S. court would follow the Belgian decision, given that it lacks any real support in the text or *travaux* of the Convention, that it contradicts deeply-held views on the proper role of courts, and that it is based on the UNIDROIT Principles, which have failed to gain any significant traction in the U.S. The fact that following the Belgian Court's lead would require U.S. courts to devise tribunal-imposed contract adaptations for which they have no experience and no developed decisional traditions further supports my prediction.

Indeed, I would encourage U.S. courts – and all other tribunals –to ignore this particular foreign precedent, just as I would urge tribunals not

[40] Supermicro Computer Inc. v. Digitechnic, S.A., 145 F. Supp. 2d 1147 (U.S. District Court of the Northern District of California, U.S.A., 30 January 2001, CLOUT case No. 617, full text available at *http://cisgw3.law.pace.edu/cases/010130u1.html*).

to follow the seriously misguided decisions of some U.S. courts that have applied the CISG.[41] The Belgian Cassation Court decision fails what I believe the most important criterion for determining how much deference should be paid to a particular decision on the CISG: the Belgian opinion does not itself comply with the mandate in Article 7(1) to interpret the Convention with regard for its *international* character.[42] In fact, the decision shows a clear parochial bias by assuming that the Convention's failure to include the Civil Law doctrines with which it is familiar must constitute a "gap" that should be filled with those familiar doctrines derived from sources outside the CISG. This is, in my view, the homeward trend at its corrosive worst. And in this instance the UNDROIT Principles acted as an enabler by providing cover for the court to fill its imaginary gap with the Civil Law oriented doctrines for which it apparently yearned.

Please understand – my objection is not that adaptation for hardship is not part of U.S. domestic law; my objection is that it is not part of the Convention, and is "found" by the Cassation Court within the Convention by a process that violates the express terms of Article 7(2) and runs counter to the implications of the Convention's drafting history. The fact that the remedy of court-devised modification of contract terms has been vigorously rejected in U.S. domestic law merely points up how seriously corrosive the Belgian Court's holding is to both uniform interpretation and the political legitimacy of the CISG – a political legitimacy based on the consent of States, including those in which court-imposed contract modifications have traditionally been viewed as fundamentally objectionable.

I have not hesitated to condemn the very serious violations of the methodologies mandated by CISG Article 7 (as well as the damage to the goals of the CISG caused thereby) when those violations were committed by U.S. courts.[43] In its opinion on the hardship question, the Belgium Cassation Court commits a violation of CISG Article 7 that is every bit as serious as the ludicrous proposition in U.S. decisions that U.S. domestic sales law should guide the interpretation of the CISG.[44] If tribunals find a "gap" in the Convention every time familiar domestic law approaches

[41] See Lookofsky, Flechtner, *supra* note 4.

[42] See H. M. Flechtner, "Recovering Attorneys' Fees as Damages Under the U.N. Sales Convention (CISG): The Role of Case Law in the New International Commercial Practice, with Comments on Zapata Hermanos v. Hearthside Baking", *Northwestern Journal of International Law and Business* 22/2002, 145 46. For further discussion of the problem of assessing the precedential weight to be accorded a CISG decision see J. Lookofsky, (forthcoming 2011); J. Lookofsky, *Understanding the CISG*, Worldwide, 2008[3], 35.

[43] See J. Lookofsky, H. M. Flechtner.

[44] See H. M. Flechtner, "The CISG in U.S. Courts: The Evolution (and Devolution) of the Methodology of Interpretation", *Quo Vadis CISG: Celebrating the 25th Anniversary*

do not appear in the Convention (even where those courts admit the Convention actually addresses the situation), there is little hope that the Convention can achieve its goal of creating a uniform international sales law. If Civil Law and Common Law courts engage in a competition to see which can incorporate more familiar traditional domestic approaches into decisions construing the CISG – which courts can more flagrantly engage in the homeward trend in interpreting the Convention –, then we should begin the process of analyzing why the Convention failed. At least then we can more quickly begin the process of starting over again – one hopes, with greater wisdom.

A number of years ago I speculated on the possibility that interpretation of the Convention would break down along regional lines – that non-uniform regional interpretations would develop.[45] I fear that this prediction may be coming true – except that the break-down is not along literal geographical lines (reflecting, e.g., trade patterns and the magnitude of trading volumes) as I speculated, but rather along the fault lines of mental geography. I underestimated the importance of legal ideology – the thought patterns ingrained by one's legal education. One split in interpretational patterns seems to be following, for example, the divide between the Civil Law and Common Law traditions. Decisions like that of the Belgian Cassation court, unfortunately, encourage the process of creating CISG subcultures. As Prof. Michael Bridge has eloquently stated: "The challenge facing the CISG is no less than the manufacture of a legal culture to envelope it before the centrifugal forces of nationalist tendency take over."[46]

Unfortunately, the centrifugal forces of nationalist (or, I would say, legal ideologist) tendencies may be winning, as evidenced by the decision of the Belgian Cassation Court. I freely admit that many decisions by U.S. courts are, in this regard, at least as bad. Unfortunately, bad decisions from tribunals in one tradition are not counter-balanced by bad decisions from tribunals in a different tradition: the "evil" is cumulative.

I have not, however, given up hope. A new generation of lawyers and judges, less imprisoned by those legal traditions and more aware of the alternative approaches of other traditions, is being educated in law schools around the world. They may yet save us from the disintegration of a globally coherent and consistent interpretation of the Convention,

*of the United Nations Convention on Contracts for the International Sale of Goods* (ed. F. Ferrari), Sellier European Law Publishers, 2005.

[45] H. M. Flechtner, "Another CISG Case in the U.S. Courts: Pitfalls for the Practitioner and the Potential for Regionalized Interpretations", *J.L. & Comm.* 15/1995, 127.

[46] M. R. Bridge, "The Bifocal World of International Sales: Vienna and Non Vien na"*, Making Commercial Law: Essays in Honour of Roy Goode* (ed. R. Cranston), 1997, 288.

provided we can hold on to basic shared understandings and agreements until this new generation takes over. And if the next generation cannot so save us, at least we will have a rich body of material to mine for lessons to help in the next attempt to create genuinely uniform international commercial law. Even in that event the CISG should not be considered a failure – just an interim experiment to build on. But the entrenchment of different approaches to interpreting the CISG by tribunals from different legal traditions would mean that the Convention's ultimate goals, the ambitious vision that inspired it, would not have been achieved. That would be a loss to the prosperity of the world. It would also be a serious setback to the process of developing a global legal culture – a process on which, I genuinely believe, the very survival of our species may depend. So let us at least make the attempt to listen to and understand each other.

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# REMARKS ON TRADE USAGES AND BUSINESS PRACTICES IN INTERNATIONAL SALES LAW*

*Trade usages and business practices play an important role in international commerce. Many international conventions and model law instruments refer to these notions, but they fail to provide for a unified definition thereof. The author therefore examines the place of trade usages and business practices in the Vienna Convention on Contracts for International Sale of Goods, from the perspective of the scope of its Article 9.*

Key words: *Trade usages. Business practices. CISG.*

## 1. INTRODUCTION

Trade usages and business practices are key elements of international commerce. In their day-to-day activities, traders and business people around the world constantly rely upon trade usages and business practices across a variety of industries. Usages and practices tend to be dignified by the business community with a status equivalent to that of actual law. As a matter of fact, many business persons often tend to regard trade usages and business practices as very powerful tools to ensure the stability of their bargain and, at times, transact business solely based on such usages and practices, without any written contract. Due to the importance of this subject, distinguished international legal commentators have often attempted to define trade usages and business practices and, in doing so,

* The opinions expressed in this article are the private views of the author, and are not to be construed as the official views of Freshfields Bruckhaus Deringer LLP. The author wishes to thank Professor Franco Ferrari for his guidance.

they have indeed succeeded at providing a substantial amount of theoretical ammunition for the benefit of the interpreter.[1] What is more challenging, in my opinion, is to understand the interplay (and the related legal and commercial consequences) arising from the application of trade usages and business practices alongside the black letter rules of international conventions and model law instruments, which often refer to usages and practices without defining them.

More specifically, the United Nations Convention on Contracts for the International Sale of Goods (hereinafter "CISG" or "Convention")[2] expressly deals with trade usages and business practices under Article 9

[1] The legal literature discussing trade usages and business practices is virtually endless. For selected articles concerning the meaning of usages and practices in the con text of the CISG, see W. A. Achilles, *Kommentar zum UN Kaufrechtsübereinkommen (CISG)*, Luchterhand, Neuwied 2000, para. 2; S. Bainbridge, "Trade Usages in Interna tional Sales of Goods: An Analysis of the 1964 and 1980 Sales Convention", *Virginia Journal of International Law* 24/1984, 619 et seq.; M. J. Bonell, "Article 9", *Commentary on the International Sales Law* (eds. C. M. Bianca, M. J. Bonell), Giuffre, Milan 1987, commentary 1.2; A. Farnsworth, "Unification and Comparative Law in Theory and Prac tice" *Liber amicorum Jean Georges Sauveplanne* Kluwer, Deventer 1984, 81 et seq.; F. Ferrari, *La rilevanza degli usi nella convenzione di Vienna sulla vendita internazionale di beni mobili, Contratto e Impresa*, 1994, 239 et seq.; F. Ferrari, "Relevant trade usage and practices under UN sales law", *The European Legal Forum* 2002, 273; F. Ferrari, "Trade Usage and Practices Established between the Parties under the CISG", *Revue de droit des affaires internationales/ International Business Law Journal* 2003, 576; C. P. Gillette, "Harmony and Stasis in Trade Usage for International Sales", *Virginia Journal of Interna tional Law* 39/1999, 707 741; A. Goldstajn, "Usages of Trade and Other Autonomous Rules of Trade According to the CISG", *Dubrovnik Lectures* (eds. Sarcevic, Volken), 1986, 55 et seq.; R. Herber, B. Czerwenka, *Internationales Kaufrecht, Kommentar zu dem Über einkommen der Vereinten Nationen vom 11. April 1980 über Verträge über den in ternationalen Warenkauf*, 1991, Article 9, para. 1; H. Holl, O. Keßler, "Selbstgeschaffenes Recht der Wirtschaft" und Einheitsrecht Die Stellung der Handelsbräuche und Gepflo genheiten im Wiener UN Kaufrecht", *RIW* 1995, 457 et seq.; J. O. Honnold, *Uniform Law for International Sales Under the 1980 United Nations Convention*, Kluwer, Deventer 1991[2], 175 et seq.; F. R. Honsell, W. Melis, *Kommentar zum UN Kaufrecht*, 1997, Article 9, para. 1; K. H. Neumayer, C. Ming, *Convention de Vienne sur les contrats de vente in ternationale de marchandises. Commentaire*, 1993, Article 9, commentary 1; C. Pambou kis, "The Concept and Function of Usages in the United Nations Convention on the Inter national Sale of Goods", *Conference Celebrating the 25th Anniversary of United Nations Convention on Contracts for the International Sale of Goods sponsored by UNCITRAL and the Vienna International Arbitration Centre (Vienna: 15 18 March 2005)*, *Journal of Law and Commerce* 25/2006, 107 131; H. T. Soergel et al., "Bürgerliches Gesetzbuch mit Einführungsgesetz und Nebengesetzen", *Übereinkommen der Vereinten Nationen über Verträge über den internationalen Warenkauf (CISG)* 13/2000; J. Staudinger, U. Magnus, *Kommentar zum Bürgerlichen Gesetzbuch mit Einführungsgesetz und Nebengesetzen, Wiener UN Kaufrecht (CISG)*, 1999[13], Article 9 CISG, para. 3; J. Walker, *Trade Usages and CISG: Defending the Appropriatness of Incorporating Custom into International Commercial Contracts*.

[2] This appears to be the most commonly used abbreviation; in this regard, see A. Flessner T. Kadner, "CISG? Zur Suche nach einer Abkürzung für das Wiener Überein kommen über Verträge über den internationalen Warenkauf", *ZEuP* 1995, 347 et seq.

CISG. Unfortunately, the case law interpreting this provision has only rarely dealt with the issue in an exhaustive and satisfactory manner. As pointed out by one leading commentator: "Only some aspects – albeit important ones – have actually been addressed in the various judgments [relating to Article 9 CISG]".[3]

The interpretation of international sale contracts governed by the CISG is therefore subject to the existence, application and interpretation of trade usages and commercial practices, which are powerful tools for the conduct and development of international commerce. The CISG does not, however, explain how to handle such tools and eventually the usages and practices may be found to conflict with the relevant provisions of this uniform treaty. This paper does not purport to address all the possible ramifications arising from the interplay between trade usages and business practices and the CISG, but rather intends to lay out an analysis of certain selected usages and practices which are commonly found to apply in the case law and have a practical impact on international sale transactions governed by the CISG.

## 2. DEFINING THE SCOPE OF ARTICLE 9 CISG

### 2.1. Trade Usages

The key provision for the analysis of trade usages and business practices under the CISG is Article 9, which states that:

"(1) The parties are bound by any usage to which they have agreed and by any practices which they have established between themselves.

(2) The parties are considered, unless otherwise agreed, to have impliedly made applicable to their contract or its formation a usage of which the parties knew or ought to have known and which in international trade is widely known to, and regularly observed by, parties to contracts of the type involved in the particular trade concerned."

It is a well known fact that this provision gave rise to much debate among the drafters during the Vienna Conference.[4] Article 9 sets out the framework for the interpretation of usages and practices applicable to the international sale contracts governed by the CISG.[5] In doing so, Article 9

[3] See, Ferrari, (2002), 273. See also Gillette, 715 ("Custom is inherently vague some call it fuzzy so that its formal elaboration by courts (as opposed to informal application through extralegal procedures") is often doomed to misstate the actual practice of transactors).

[4] See Official Records: Documents of the Conference and Summary Records of the Plenary Meetings and of the Meetings of the Main Committees (Vienna, 10 March 11 April 1980), U.N. Doc. A/Conf.97/19, New York (USA), 1981 (cited: O.R.) at 89, 262 et seq.; Bianca/Bonell, commentary 2.3.

[5] See Holl, Keßler, 457 et seq.

CISG makes a clear distinction between usages and practices. In a nutshell, on the one hand, when referring to usages, the Convention intends to deal with a broad concept that embraces at least those business conducts that are routinely adopted by a certain group or category of business players, taken as a whole. On the other hand, the concept of practices is narrower and by its nature relates to certain behaviours established among the same parties involved in specific series of transactions through repeated courses of dealings.

This being said, one cannot avoid noticing that the CISG does not define a "usage".[6] This prompts the interpreter to ensure that the concept of usages (similarly to many other concepts dealt with by the CISG) be autonomously interpreted[7], without recourse to specific concepts of national law or to particular national concepts or perceptions.[8] For instance, the concept of usage commonly used under Italian law requires that the parties believe that the usage is legally binding (the so-called *opinio iuris atque necessitatis*)[9]. This, however, is not necessary for the purposes of

[6] For this kind of remarks, see Bianca, Bonell, commentary 3.1; Diez Picazo et al., *La compraventa internacional de mercaderías. Comentario de la Convención de Viena*, 1998, Article 9, at 140; J. C. A. Goddard, *El Contrato de Compraventa Internacional*, 1994, 80; Goldstajn, 96; Honsell, Melis, Article 9, para. 1; H. Rudolph, *Kaufrecht der Export und Import Verträge, Kommentierung des UN Übereinkommens über Internationale Warenkaufverträge mit Hinweisen für die Vertragspraxis*, 1996, Article 9, para. 2; P. Schlechtriem, W. Junge, *Kommentar zum Einheitlichen UN Kaufrecht (CISG)*, 2000[3], Article 9, para. 8.

[7] See Bianca, Bonell, commentary 3.2; Bonell, 386; Diez Picazo, 140; F. Ferrari, *Vendita internazionale di beni mobili. Artt. 1 13. Ambito di applicazione. Disposizioni generali*, 1994, 187; Herber, Czerwenka, Article 9, para. 4; Honsell, Melis, Article 9, para. 3.

[8] See F. Ferrari, "Besprechung von Magnus, Wiener UN Kaufrecht", *IPRax* 1995, 64, 65; V. Heuzé, *La vente internationale de marchandises droit uniforme*, 2000[2], commentary 95; Honsell, Melis, Article 7, para. 5; P. Schlechtriem, *Internationales UN Kaufrecht*, 1996, para. 43; P. Torzilli, "The Aftermath of MCC Marble: Is This the Death Knell for the Parol Evidence Rule?", St. John's Law Review 74/2000, 859; in the case law, see OLG Karlsruhe (Germany) 25 June 1997 1 U 280/96, Unilex (stating that German legal terms such as mistake [*Fehler*] and "warranted characteristics" [*zugesicherte Eigenschaften*] are not transferable to the CISG); Gerichtspräsident Laufen, 7 May 1993, Unilex (stating that the CISG should be interpreted autonomously and not from the respective national law viewpoint held by the individual applying the law).

[9] See Galgano, *Diritto civile e commerciale*, Vol. I, 2004[4], 69 defining usages as a "fonte non scritta e non statuale di produzione di norme giuridiche: consistono nella pratica uniforme e costante di dati comportamenti seguita con la convinzione che quei comportamenti siano giuridicamente obbligatori (*opinio iuris atque necessitatis*)". As pointed out by Gillette, 707 there is "a compelling rationale on which to elevate custom to the status of legal rule. Requiring adherence to custom not only protects the expectations of parties who are aware of the practices of the trade and anticipate compliance by other in same trade; it also minimizes the risk related to judicial construction of contractual obligations or reliance on state supplied defaults that do not fit the needs of specific industries."

a usage under the CISG, since the parties may decide to comply with a usage on a customary basis even though they are aware that such usage is not legally binding upon them.[10]

Under Article 9(1) CISG the parties are bound by any usage to which they have agreed. As pointed out by Professor Ferrari: "it is not necessary that the agreement be made explicitly; the agreement by which the usages become relevant may also be implicit, as long as there is a real consent, which can also take place after conclusion of the contract."[11]

It should be noted, however, that so long as the parties have agreed to apply the usages to their transaction, in accordance with the party autonomy rule[12] any local, regional or national usages (and not just international usages) may come into play.[13]

Thus, there is no doubt that the usages agreed upon by the parties prevail over the provisions of the Convention, as confirmed by the case law.[14] Ultimately, commercial players often prefer to incorporate by reference in their agreements established trade usages with which they are familiar, rather than negotiating long and detailed contractual provisions that may achieve the same result.

Hence, if it is determined that the usages are applicable and that their choice by the parties is a valid agreement under the applicable national law,[15] the usages will prevail over the provisions of the CISG.[16]

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[10] See Schlechtriem, Junge, Article 9, para. 3, holding that it is not necessary for the purposes of Article 9 CISG that the relevant commercial circles believe that the us ages are binding.

[11] See Ferrari, (2002), 273.

[12] See, e.g., CIETAC Arbitration award 9 January 2008, available online at: *http:// cisgw3.law.pace.edu/cases/080109c1.html* holding that: "The parties agreed in the Con tract that Incoterms were applicable as international usages. The Tribunal notes that in accordance with the principle of autonomy, Incoterms applied to the present case."

[13] See Achilles, Article 9, para. 4. For this conclusion, see OGH (Austria) 21 March 2000 10 Ob 344/99g, Unilex, holding that usages under Article 9 do not need to be internationally applicable.

[14] See, e.g., OBH Saarbrücken (Germany), 21 March 2000, CLOUT Case no. 425; OLG Saarbrücken (Germany), 13 January 1992, Unilex.

[15] It is well known that the CISG does not govern issues of validity in respect of contract formation. Thus, under the CISG the validity of a contract must be assessed based on applicable domestic law, see Hartnell, "Rousing the Sleeping Dog: The Validity Exception to the Convention on Contracts for the International Sale of Goods", Yale Jour nal of International Law 18/1993, 45.

[16] See Goddard, 81; F. Enderlein et al., *Internationales Kaufrecht*, 1991, Article 9, para. 1.2; Ferrari (1994), 192; Herber, Czerwenka, Article 9, para. 6; Honsell, Melis, Ar ticle 9, para. 6; J. P. Plantard, "Un nouveau droit uniforme de la vente internationale: La Convention des Nations Unies du 11 avril 1980", *J.D.I.* 1988, 317; Rudolph, Article 9, para. 1; Schlechtriem, Junge, Article 9, para. 2; for the same view, expressly stated in case law, see OGH (Austria) 21 March 2000 10 Ob 344/99g, Unilex.

Article 9(2) adds further relevance to the application of usages to contracts governed by the CISG, since it enables such usages to apply even if the parties have not expressly incorporated them in their agreements.[17] This provision includes two prongs: (a) a subjective one and (b) an objective one. The subjective prong essentially states that, unless otherwise agreed, the parties are deemed to have impliedly made applicable to their contract or its formation a usage of which the parties knew or ought to have known.[18] This means that if the subjective test is met, both parties will be bound by the usage. The objective test requires that the usage be "widely known" [19] in international trade, and be regularly observed[20] by parties to contracts of the type involved in the particular trade concerned. Hence, the subjective and objective prongs essentially rely on the ability of the party that is invoking the existence of the binding usage to prove that such usage exists. Clearly, however, if a party invoking the usage cannot successfully prove its existence, it is unlikely that the usage will apply (unless under the applicable national law of the forum a judge will be entitled to apply the usages *ex officio*).

### 2.2. Practices Established between the Parties

Unlike usages, which typically possess general common features, practices tend to have a narrower scope, since they are the result of specific conducts arising from business relationships and bargains executed by the parties. For the purposes of Article 9(2) of the CISG, practices may relate to a particular commercial behaviour, such as the prompt delivery

[17] This view is confirmed by the case law. See *St. Paul Guardian Insurance Co. et al. v Neuromed Medical Systems & Support et al.*, 2002 U.S. Dist. Court Lexis 5096 (S.D.N.Y. 2002). According to M. Torsello, *Commercial Features of Uniform Commercial Law Conventions. A Comparative Study Beyond the 1980 Uniform Sales Law*, 2004, 335, at 35, the requirement that the parties knew or ought to have known of the usages is be wildering. "Indeed, it seems beyond doubt that whenever interpreting whether a party "ought to have known" about a usage, the interpreter will do nothing but investigate whether the usage is "widely known" and "regularly observed"."

[18] Ferrari, (1994), 195; Herber, Czerwenka, Article 9, para. 8; Gillette, 719; D. Maskow, "The Convention on the International Sale of Goods from the Perspective of the Socialist Countries", *La vendita internazionale. La convenzione di Vienna dell'11 aprile 1980*, 1981, at 39, 58; Neumayer, Ming, Article 9, commentary 3. In the case law, see ICC Arbitral Award No. 8324/1995, Unilex; ZG Kanton Basel Stadt (Switzerland) 21 Decem ber 1992 P4 1991/238, Unilex.

[19] The period of exercise of usages is irrelevant, insofar that usages are widely known and observed regularly; see Honnold, para. 120.1; Staudinger, Magnus, Article 9 CISG, para. 23. See OGH (Austria) 21 March 2000 10 Ob 344/99g, Unilex.

[20] See U.S. Dist. Court (W.D.W. 2006), Unilex (holding that the placement of oral orders for goods followed by invoices with sales terms was commonplace practice among the parties and therefore such behaviour was to be incorporated in the contract by way of Article 9(2) of the CISG).

of replacement machinery parts, which an ICC arbitral tribunal held had become normal practice among the parties.[21] Another example of an established practice based on the parties' prior dealings is the tolerance of a delayed performance, which according to an arbitral panel of the American Arbitration Association (AAA) was one of the reasons for which the late performance of a party had not amounted to fundamental breach.[22] As pointed out by various legal commentators, the individual business conduct established by the parties, rather than a general kind of commercial behaviour applicable in a given business sector, is the essential factor that characterises the practice[23]. This, however, implies that the business relationship has been carried out for a certain defined period of time and that the specific conduct giving rise to the practice has occurred in a number of repeat transactions (even though the CISG does not provide guidance as to how many transactions must have occurred to give rise to the practice).[24] The case law has stressed that a commercial practice cannot be established merely by way of the parties having entered into two contracts[25]. And clearly, no practice could be deemed to arise from one single delivery of goods between the parties.[26] Thus, as pointed out by Professor Ferrari, a judgment of the Austrian Supreme Court was met with some surprise,[27] as it stated that a party's perception from preliminary discussions (albeit not expressly agreed upon) could be deemed to

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[21] See ICC Arbitral Award No. 8611/ 1997, Unilex.

[22] See AAA, Interim Arbitral Award, 23 October 2007, available online at *http:// cisgw3.law.pace.edu/cases/071023a5.html* ("The lapse in time between the contractual shipment periods and the Romanian government's blockage of imports was a matter of weeks or days, depending upon the particular Contract. However, this delay in perform ance did not amount to a fundamental breach for several reasons. As explained below, first, the parties' prior course of dealing and industry practice allowed for some flexibility in the delivery date a flexibility that was shown in Buyer's responses here, at least at the onset of the delivery delay".).

[23] See Achilles, Article 9, para. 16; Bianca, Bonell, Article 9, commentary 2.1.1; Ferrari, (1994), 189; Herber, Czerwenka, Article 9, para. 3; Holl, Keßler, 457; Honsell, Melis, Article 9, para. 4; Neumayer, Ming, Article 9, commentary 1; Rudolph, Article 9, para. 4; Staudinger, Magnus, Article 9 CISG, para. 13.

[24] For this line of reasoning, see Schlechtriem, Junge, Article 9, para. 7; also refer to Schlechtriem, para. 60, who mentions the requirement of a certain continuity and dura tion of a practice (*eine gewisse Häufigkeit und Dauer einer Übung*).

[25] See ZG Kanton Basel Stadt (Switzerland) 3 December 1997 P4 1996/00448, Unilex; but see also AG Duisburg (Germany) 13 April 2000, IHR (2001) 114, 115, explic itly stating that a certain duration and continuity does not yet exist in the case of two previous deliveries.

[26] See LG Zwickau (Germany) 19 March 1999 3 HKO 67/98, CISG Online.

[27] See Ferrari, (2002), 275, referring to Austrian Supreme Court (Austria) 6 Feb ruary 1996 10 Ob 518/95, Unilex.

constitute "practices" within the meaning of Article 9, even if this occurred at the outset of the business relationship.

The fact that parties are bound by those practices that have originated between them in the course of extended business relations is consistent with the general principles of good faith underlying the CISG[28], as well as the prohibition of *venire contra factum proprium*.[29] A factual element of trust, which may not be frustrated, has come into existence between the parties.[30] Accordingly, for instance, a party cannot contend that the contract makes no specific requirements in respect of notification periods (with which the complaining party has not complied), if existing practices indicate the opposite. Regarding the relationship between commercial practices existing between the parties and any conflicting provisions of the CISG, it is commonly acknowledged that the practices will prevail over the Convention.[31] Moreover, it is generally accepted among the legal commentators that if the usages agreed upon by the parties were to contradict the practices established between the parties, the agreed upon usages should prevail.[32] This latter view, however, is not supported by a strong practical argument, since in my view the practices (if arisen through a process that accurately reflects the bargain struck by the parties) tend to be a true expression of the parties' autonomy and real intentions, whereas usages typically arise from general sets of conducts in a specific business sector which the parties may know, and yet not be willing to (fully) comply with.[33]

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[28] See Honsell, Melis, Article 9, para. 4; Schlechtriem, Junge, Article 9, para. 7.

[29] See Achilles, Article 9, para. 16; Diez Picazo, Article 9, at 137; Honnold, para. 116; Honsell, Melis, Article 9, para. 4; Rudolph, Article 9, para. 4; C. Witz et al., *Einheitliches Kaufrecht*, 2000, Article 9, para. 16.

[30] Herber, Czerwenka, Article 9, para. 3; Honnold, para. 116.

[31] Diez Picazo, 138; Rudolph, Article 9, para. 1; Staudinger, Magnus, Article 9 CISG, para. 12; Witz, Article 9, para. 1.

[32] See Achilles, Article 9, para. 8; Diez Picazo, Article 9, at 138; F. Ferrari, "What Sources of Law for Contracts for the International Sale of Goods? Why One Has to Look Beyond the CISG", *International Review of Law and Economics* 25/2005, at 335; A. Gar ro, L. Zuppi, *Compraventa internacional de mercaderías*, 1990, 62; B. Piltz, *Internation ales Kaufrecht*, 1993, § 2 para. 177; G. Reinhart, *UN Kaufrecht, Kommentar zum Über einkommen der Vereinten Nationen vom 11. April 1980 über Verträge über den internationalen Warenkauf*, 1991, Article 9 para. 2. See also Staudinger, Magnus, Article 9 CISG, para. 15 (proposing a case by case approach).

[33] For a decision consistent with this reasoning, see *Treibacher Industrie, A.G. v. Allegheny Technologies*, *Inc.*, U.S. Dist. Court (11th Cir. 2006), Unilex, holding that the meaning of a contract term resulting from practices established between the parties prevail over terms of common usage in the industry. Among the legal commentators, this view is supported by Enderlein, Maskow, Strohbach, Article 9, commentary 3 (holding the view that practices should take precedence).

## 3. APPLYING TRADE USAGES AND ESTABLISHED PRACTICES: THE BURDEN OF PROOF ISSUE

The issue of whether or not trade usages or established practices may apply to an international sales contract governed by the CISG is ultimately a matter of proof. Indeed, there are instances where the parties have expressly agreed to incorporate the trade usages or the practices in their contract, by expressly referring to them. Here, the applicability will not be a controversial issue. However, in litigation matters it is often the case that one party will have an interest in proving that the trade usage or the practice applies (for instance, when the relevant trade usages or practices are more favourable than the actual provisions of the CISG), whereas the other party will claim that it has never agreed to apply the usage, or it was not aware of it or that no practice had been established through repeated business conduct.[34] This is ultimately a question of fact that must be addressed on a case by case basis and the outcome of which is rather unpredictable. Therefore, it is required that the party willing to rely either on the practice or usage prove the existence thereof[35], also by means of oral witnesses, if permitted under the applicable local procedural rules.[36] As noted by paragraph 9 of the UNCITRAL Digest: "there is no difference in the allocation of burden of proof under article 9(1) and (2)".[37] This criterion has been supported by the case law interpreting the CISG,[38] which generally holds that the parties are not bound by any practices or usages that are not proved.[39] In this regard, it is worth noting,

[34] As pointed out in the UNCITRAL Digest, Digest of Article 9 case law, 4, available online at *http://daccess dds ny.un.org/doc/UNDOC/GEN/V04/547/68/PDF/V0454768.pdf?OpenElement*, "As for the burden of proof, several courts stated that it is the party alleging the existence of practices established between themselves or usages agreed upon that bears it.".

[35] Achilles, Article 9 para. 11; Herber, Czerwenka, Article 9, para. 19; Witz, Article 9, para. 11; L. DiMatteo et al., *Northwestern Journal of International Law & Business* (Winter 2004), 363 ("parties relying upon such provisions bear the burden of proof with respect to the custom or usage, its applicability to the trade at issue, and the intent of the parties to incorporate it in their agreement").

[36] See, *Geneva Pharmaceuticals Technology Corp. v. Barr Laboratories, Inc., et al.*, U.S. Dist. Court (S.D.N.Y. 2002) 98 Civ. 861, 99 Civ. 3607, Unilex, accepting oral evidence of an industry custom and holding that based on such industry custom the contract was sufficiently definite.

[37] See UNCITRAL Digest, Digest of Article 9 case law (*supra* note 34) id.

[38] On this issue, see for instance, Trib. Vigevano (Italy) 12 July 2000, Giur. it. (2001) 280, 286. For commentary on this landmark decision of the Italian case law on the CISG, see *Ferrari*, Tribunale di Vigevano: Specific Aspects of the CISG Uniformly Dealt With, 20 Journal of Law and Commerce (Spring 2001) 225 239; *Graffi*, Overview of recent Italian decisions on the CISG, European Legal Forum (2000/2001) 240 244.

[39] See, e.g, OLG Dresden (Germany) 9 July 1998 7 U 720/98, Unilex (party alleging that recipient's lack of response equals consent in the absence of a response to a

however, that various authors have rejected the view that the burden of proof is an issue regulated by the CISG and they have therefore suggested that national laws should apply to this issue.[40] However, the better view seems to be the contrary, since the allocation of the burden of proof is an issue that falls (at least implicitly) within the scope of the CISG and should rest upon the aggrieved party,[41] while it is undisputed that the issue of whether or not the evidence is satisfactory should remain within the boundaries of domestic procedural law.[42]

From a practical standpoint, providing evidence that the parties knew or ought to have known about the existence of a usage and that such usage is "widely known" and "regularly observed" in international trade (as required by Article 9(2)) may be somewhat difficult, especially since the tests surrounding the evaluation of actual knowledge or constructive knowledge are subjective tests, which vary from jurisdiction to jurisdiction. Moreover, establishing if a usage is "widely known" may not be straightforward, considering that in highly technical trade sectors few people tend to have an actual insight as to which usages are truly applicable in that trade and will be unlikely to witness to the existence of a "widely known" usage. Finally, national courts (unlike business people) tend to be ill equipped to identify trade usages specific to a particular business sector, as they often lack the necessary knowledge of the business and judges are likely to fail to grasp the underlying commercial drivers of the parties.[43]

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letter of confirmation was unable to establish that this was a valid international trade us age); ZG Basel Stadt (Switzerland) 3 December 1997 P4 1996/00448, Unilex (party alleging that existence of a binding international trade usage, according to which payment by means of direct transfer into the account of the seller is common in the import trade industry, need not prove this if the parties ought to have been aware of this practice.).

[40] To this effect, see, e.g., Bianca, Bonell, Article 2, commentary 3.2.

[41] For this type of reasoning, see, e.g., ICC Arbitral Award n. 8213/ 1995, Unilex ("For the claims based on breach of the Purchase Agreements, the Arbitrator has consid ered the burden of proof to be on Claimants and for the counterclaim, the burden is on Respondent").

[42] For this view, see F. Ferrari, *The Sphere of Application of the Vienna Sales Con vention*, 1995, 28; Ferrari, (2000) 665 670; Giovannucci Orlandi, "Procedural issues and uniform law conventions, in: International Uniform Law Conventions, Lex Mercatoria and UNIDROIT Principles". *Symposium held at Verona University (Italy), Faculty of Law, 4 6 November 1999, Uniform Law Review* 2000, 26 ("However, the final determination of whether or not the judge finds the evidence sufficiently convincing should continue to be based on the rules of the lex fori, which are also defined as strictly procedural rules").

[43] For similar remarks, see Gillette, id.; Pamboukis, 130, holding that the applica tion of trade usages and business practices under Article 9 CISG requires judges and arbi trators of high caliber, familiar with the international commercial environment; Walker, 267 ("Customs, by definition, derive their existence from particular actors in a particular context. However, determining how much of the context from which the custom arises to impute into ist definition provies to be less than clear for many courts.").

## 4. SELECTED TRADE USAGES AND BUSINESS PRACTICES INTERPRETED BY THE CISG CASE LAW

### 4.1. INCOTERMS and the CISG

INCOTERMS are probably the most widely known sources of codified trade usages. They are set out in a catalogue of rules compiled and periodically updated by the ICC.[44] These rules are accepted by governments, legal commentators, business players and practitioners worldwide for the interpretation of certain commonly used terms in international trade. The use of INCOTERMS promotes uniformity in international trade, in that it reduces altogether uncertainties arising from diverging interpretations of such terms in multiple jurisdictions. More specifically, INCOTERMS govern four main categories of issues arising from international sales: delivery of the goods, passage of risk, allocation of costs, and customs formalities.[45] It is well known that these terms may apply to an international sales contract under Article 9(1) CISG, if the parties have agreed to incorporate them by reference in their agreement.[46] INCOTERMS may also apply pursuant to Article 9(2), if the subjective and ob-

[44] For the official version of INCOTERMS 2000, see ICC Official Rules for the Interpretation of Trade Terms, ICC Publication No. 560 (2000). For reference to scholarly materials on INCOTERMS, see, among others, Debattista, "Incoterms and documentary practices, Incoterms 2000: A forum of experts", *ICC Publication No. 617* (2000), 63 89; Eisemann, *La pratique des incoterms: usages de la vente internationale*, 1988[3]. On the relationship between INCOTERMS and the CISG, see Bergami, "Incoterms 2000 as a Risk Management Tool for Importer", *The Vindobona Journal of International Commercial Law and Arbitration* 2006, 273 286; Derains, Ghestin, "La Convention de Vienne sur la vente internationale et les incoterms", *Actes du Colloque des 1er et 2 décembre 1989, Librairie Générale de Droit et de Jurisprudence* 1990, 171 et seq.; Gabriel, "The International Chamber of Commerce INCOTERMS 1990: A Guide to the Terms and Their Usage", *The Vindobona Journal of International Commercial Law and Arbitration* 1999, 61 70; Gabriel, "The International Chamber of Commerce INCOTERMS 2000: A Guide to their Terms and Usage", *The Vindobona Journal of International Commercial Law and Arbitration* 2001 41 73; J. Ramberg, *ICC Guide to INCOTERMS*, 2002; J. Ramberg, "CISG and INCOTERMS 2000 in Connection with International Commercial Transactions", *Sharing International Commercial Law across National Boundaries: Festschrift for Albert H. Kritzer on the Occasion of his Eightieth Birthday* (eds. C. Andersen, U Schroeter), 2008, 394 403; J. Ramberg, "To What Extent Do Incoterms 2000 vary Articles 67(2), 68 and 69?", *Conference Celebrating the 25th Anniversary of United Nations Convention on Contracts for the International Sale of Goods sponsored by UNCITRAL and the Vienna International Arbitration Centre (Vienna: 15 18 March 2005), 25 Journal of Law and Commerce* 2005/2006, 219 222.

[45] The 2000 version of the INCOTERMS provides for thirteen terms categorized into four groups: E Group: EXW; F Group: FCA, FAS, FOB; C Group: CFR, CIF, CPT, CIP; D Group: DAF, DES, DEQ, DDU, DDP. For a basic description of each term, see *http://www.iccwbo.org/incotermsrules/* Note also that the updates to INCOTERMS publications have continued with INCOTERMS 2010, which will come into effect on 1 January 2011.

[46] On this, see Honsell, Melis, Article 9, para. 7.

jective tests have been met. In *St. Paul Guardian*, the Federal District Court of the Southern District of New York[47] held that "INCOTERMS are incorporated into the Convention through Article 9(2)." Here, the court stated that, pursuant to Article 9(2), the INCOTERMS' definitions should be applied even though the contract did not contain an explicit reference to INCOTERMS. In a nutshell, the parties had made reference in their contract to a CIF term (without expressly mentioning the INCOTERMS). In the opinion of the court, the parties' choice plainly meant that they had intended to refer to the definition of CIF included in the INCOTERMS.[48] A year later, the same conclusion was reached by the Court of Appeals of the Fifth Circuit[49], which moved one step further in the analysis. In a controversy arising from a contract between BP Oil International and an Ecuadorian oil company relating to the sale of gasoline, the parties had included in their agreement reference to the fact that gasoline was to be delivered "CFR La Libertad, Ecuador". The Fifth Circuit held that since "CFR" is part of the 1990 INCOTERMS issued by the ICC and the CISG incorporates INCOTERMS through Article 9(2), even if the usage of INCOTERMS is not global, the fact that they are well known in international trade means that they are incorporated through Article 9(2). Similar conclusions have been reached by a Russian arbitral tribunal[50], as well as by a decision of the Court of Appeals of Genoa.[51] A recent decision of a Swiss court went so far to suggest that: "even when the Incoterms were not incorporated into the contract explicitly or implicitly, they are considered as rules of interpretation".[52] Along the same lines, in *China North Chemical Industries* the District Court of Texas[53] ruled that since the international sales contract included a reference to a "CIF" term for delivery of the cargo to Berwick, Louisiana, the CIF term was to be interpreted in accordance with Incoterms 1990, which were in effect when the parties made the contract. The above referenced decisions consistently take the view that a reference in a contract governed by the

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[47] See *St. Paul Guardian Insurance Co., et al.* v *Neuromed Medical Systems & Support, et al*., U.S. Dist. Court, Lexis 5096 (S.D.N.Y. 2002) (*supra* note 17).

[48] Ibid.

[49] See *BP Oil International and BP Exploration&Oil Inc. v. Empresa Estatal Pe troleos de Ecuador (PetroEcuador et al.*, U.S. Fifth Circuit, 11 June 2003, Unilex.

[50] See Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, Award 406/1998, Unilex.

[51] See Corte d'appello Genova (Italy), 24 March 1995, Unilex (the court inter preted a FOB clause by referring to the INCOTERMS even though the parties had not expressly referenced to the INCOTERMS).

[52] See Tribunal Cantonal du Valais (Switzerland), 28 January 2009, available on line at: *http://cisgw3.law.pace.edu/cases/090128s1.html*.

[53] See *China North Chemical Industries Corporation v. Beston Chemical Corpo ration*, Dist. Court (Texas 2006), available online at: *http://cisgw3.law.pace.edu/ cases/060207u1.html*.

CISG to certain standard clauses of international trade (such as CIF, FOB, EXW etc.) are to be deemed to constitute an automatic reference to the definition of such clauses under the INCOTERMS. Personally, I take the view that this implied construction of the meaning of such clauses is too simplistic and, as pointed out by certain leading legal commentators, the consent of the parties to the INCOTERMS is not self evident,[54] "in various countries abbreviations such as Fob, Cif, etc., do not always have the meaning ascribed to them by Incoterms".[55] As a matter of fact, the use by the parties of a CIF clause should not in all instances be construed as a reference to the same internationally accepted term under INCOTERMS, since if the parties have not referred to INCOTERMS, they may have established a practice between them of giving a specific local interpretation to CIF clauses, which diverges from the international meaning of CIF under INCOTERMS.

### 4.2. CIF Terms and Implicit Reference to INCOTERMS: A Practical Example

It is well known that shipments designated CIF[56] require the seller to procure and pay for the costs of transport and insurance of the goods to the destination port, but the transfer of the risk of loss to the buyer takes place once the goods pass the ship's rail at the port of shipment. Also, the INCOTERMS (including the CIF term) are not designed to resolve questions of title or other property rights of the seller and buyer, since these issues are to be resolved by the parties' agreement or by other substantive law that governs the agreement.[57] Under INCOTERMS 2000, the seller must provide insurance that shall be in accordance with minimum cover requirements. As pointed out by Professor Gabriel, "the minimum cover requirement reflects the common practice of subsequent sales of the goods in transit where it is impossible to know the actual insurance needs of every subsequent buyer."[58] In a sale of goods con-

[54] This is, correctly so, answered in the negative by Achilles, Article 9 para. 14; Witz, Article 9, para. 14; in the affirmative, Goddard, 85; Bianca, Bonell, Article 9, com mentary 3.5; Bonell, 42; Enderlein, Maskow, Strohbach, Article 9, commentary 11; Her ber, Czerwenka (*supra* note 1) Article 9, para. 16.

[55] For this kind of reasoning, see Ferrari, (2002), 576. Also holding this point of view, Gillette, 736 et seq.

[56] The following explanation is provided in the ICC Guide to INCOTERMS 2000, 65: "Cost, Insurance and Freight" means that the seller delivers when the goods pass the ship's rail at the point of shipment. The seller must pay the costs and freight necessary to bring the goods to the named port of destination but the risk of loss or damage to the goods, as well as any additional costs due to events occurring after the time of delivery, are transferred from the seller to the buyer. However, in CIF the seller also has to procure marine insurance against the buyer's risk of loss of or damage to the goods during the carriage.

[57] See Gabriel, footnote 3.

[58] See Gabriel, 56.

tract governed by a CIF INCOTERM clause, the minimum insurance made available by the seller to the buyer must cover the price of the goods sold, plus 10 per cent of such price (i.e., 110 per cent of the price of the goods sold).[59] The ICC Guide to INCOTERMS 2000 clarifies that the additional 10 per cent purports to cover the minimum resale profit anticipated by the buyer.[60] It is rather questionable, however, that if the parties merely referred in their contract to a generic "CIF" term, in the absence of any express reference to INCOTERMS, they actually intended to have an insurance coverage equal to 110 per cent of the price of the goods sold.[61] For instance, there may be instances where the CIF clause commonly adopted by shippers or sales people in a certain port of transit does not require (as the INCOTERMS do) that insurance should be provided by the seller with a marked up coverage exceeding by 10 per cent the price of the goods sold. Local usages, for instance, may provide for a CIF term that only requires insurance coverage up to the value of the goods sold. This practical example shows that the automatic reference to INCOTERMS when a CIF (or FOB or EXW) term is incorporated in a contract may not at all times be consistent with the parties' intention. Hence, the courts should not automatically apply INCOTERMS as a hard and fast rule whenever the parties have referred, say to a FOB or CIF term. Courts should instead ensure that there is sufficient evidence to support the argument that the parties truly intended to incorporate the INCOTERMS in their contract and, in lack of such evidence, should interpret the parties' true intentions.

### 4.3. UCP

The Uniform Customs and Practice for Documentary Credits (hereinafter, UCP) are a set of rules applicable to the issue and execution of letters of credit.[62] The UCP are widely adopted and, as pointed out by Professor Schmitthoff almost thirty years ago, "as banks in more than 170

[59] For a case specifically citing the usage requiring the insurance under CIF terms to cover 110% of the cost of the goods sold, see Tribunal of International Commercial Arbitration at the Russian Federation Chamber, 13 April 2006, available online at *http://cisgw3.law.pace.edu/cases/060413r1.html*.

[60] See ICC Guide to INCOTERMS 2000, 66.

[61] The affirmative view was held by the Tribunal of International Commercial Arbitration at the Russian Federation Chamber (*supra* note 59) id..

[62] For reference materials on letters of credit, Gutteridge, Megrah, *Gutteridge and Megrah's Law of Bankers' Commercial Credits*, 2001[8]; Jack et al., *Documentary Credits. The Law and Practice of Documentary Credits Including Standby Credits and Demand Guarantees*, 2001; Kurkela, *Letters of Credit and Bank Guarantees under International Trade Law*, 2007; Roeland, Bertrams, *Bank Guarantees in International Trade*, 2004[3]; C. Schmitthoff, *Schmitthoff's Export Trade: The Law and Practice of International Trade. The Law and Practice of International Trade*, 2007[11]; A. Tunc, "Réflexions générales sur la vente internationale et crédits documentaires", *European Transport Law, Belgium* 16/1981, 151 156; for a discussion of the implications of the UCP rules, see Bergami,

countries operate letters of credit under this document, the Uniform Customs and Practice for Documentary Credits has become world law".[63] UCP 600 are the latest revision of the Uniform Customs and Practice that govern the operation of letters of Credit and have come into effect on 1 July 2007.

The UCP gather a set of rules applicable to specific transactions in which documentary credits are employed as methods of payment between merchants. The wide use of documentary credits in international trade provides a strong indication of the fact that the principles underlying the UCP are widely known to, and regularly observed by, traders across the five continents. Like INCOTERMS, UCP are the result of long established usages in various industries and are bred in the commercial, not academic, world. In practice, however, it is difficult to understand if the international business community has embraced UCP in their entirety, or if, instead, merchants have become familiar with certain aspects of UCP and not with the entirety of the various complex granular provisions set forth therein. In my opinion, UCP should only apply to an international sales contract pursuant to Article 9(1) CISG if the parties have expressly referred to them. This view is consistent with and stems directly from the wording of Article 1 UCP, which states that: "*The Uniform Customs and Practice for Documentary Credits, 2007 Revision, ICC Publication no. 600 ("UCP") are rules that apply to any documentary credit ("credit") [.....] when the text of the credit expressly indicates that it is subject to these rules. [.....]*".

With respect to payment obligations, it is well known that under the CISG the buyer is required to pay the purchase price for the goods in accordance with the provisions of Articles 53 and 54. Article 54 CISG, provides that:

"*[t]he buyer's obligation to pay the price includes taking such steps and complying with such formalities as may be required under the contract or any laws and regulations to enable payment to be made*. "

On the other hand, in a documentary sales transaction the seller has the duty to hand over to the buyer any documents relating to the goods as set out in Articles 30 and 34 CISG. Article 34 of the CISG provides (in part) that:

"*[i]f the seller is bound to hand over documents relating to the goods, he must hand them over at the time and place and in the form required by the contract*."

"What Can UCP 600 Do for You?", *The Vindobona Journal of International Commercial Law and Arbitration* 2007, 1 10.

[63] See C. Schmitthoff, *Commercial Law in a Changing Economic Climate*, 1981[2], 28.

Although letters of credit are payment instruments which are typically deemed effective and enforceable regardless of any issues or claims arising from the underlying sales contract,[64] in international agreements governed by the CISG an interplay between the provisions of UCP and those of the CISG itself may often occur in practice. By way of example, the tender of strictly complying documents under clause 16 UCP is an essential requirement to make a payment under a letter of credit and, ultimately, to discharge the payment obligations under the sales contract. Accordingly, the bank is obliged to refuse to pay the price if the documents submitted to it by the buyer do not comply with the terms set out in the letter of credit. This, in turn, means that the seller must hand over to the buyer a complete and accurate set of documents that will enable the buyer to request payment from the bank. Depending on the circumstances of the case, the failure by the seller to comply with such an obligation (which ultimately has implications both under UCP and the CISG) may constitute a fundamental breach under the CISG.[65] Clearly, in a scenario where the conduct of the seller must be assessed in order to determine if a fundamental breach has in fact occurred, the express reference to the UCP in the contract will make the difference. Under clauses 14(a) and 14(b) UCP a bank must examine a presentation of documents relating to a letter of credit within five banking days and determine if the presentation is compliant with the terms of the letter of credit. Under clause 16 UCP a bank may refuse to honour the payment obligations if it finds that the documents were not compliant. This standard of review has lead Professor Schwenzer to consider that if the contract provides for payment by means of a letter of credit, this implies that the documents need to be 'clean' in every respect, otherwise the buyer can avoid the contract.[66] In other words, the reference to UCP implies that the seller's failure to pro-

[64] See, among others, Roeland, Bertrams, 199 (noting that it is fully accepted that the guarantee has a causa of its own, which is independent from the causa of the underly ing contract and that such former causa can be recognized in the will of the parties to provide security in a manner which is independent from the underlying relationship.).

[65] See UNCITRAL Digest, Digest of Article 34 case law, 3 available online at *http://daccess dds ny.un.org/doc/UNDOC/GEN/V04/551/57/PDF/V0455157. pdf?OpenElement* ("The handing over of non conforming documents constitutes a breach of contract to which the normal remedies apply. Provided the breach is of sufficient grav ity it can amount to a fundamental breach, thus permitting the buyer to declare the con tract avoided"). For a commentary on the concept of fundamental breach under article 25 of the CISG, see F. Ferrari, "Fundamental Breach of Contract under the UN Sales Con vention on Contracts for the International Sale of Goods 25 years article 25", *Revue de droit des affaires internationales / International Business Law Journal* 5/2005, 389 400; L. Graffi, "Case law on the concept of "fundamental breach" in the Vienna Sales Conven tion", *Revue de droit des affaires internationales/ International Business Law Journal* 2003, 338 349.

[66] See I. Schwenzer, "The Danger of Domestic Preconceived Views with Respect to the Uniform Interpretation of the CISG: The Question of Avoidance in the Case of

vide a complete and accurate set of documents will be subject to a stricter scrutiny than if the CISG alone were deemed to apply. Such kind of remark derives from the fact that the buyer may avoid the contract under article 25 CISG only if a fundamental breach has occurred. Hence, the incorporation by reference of the UCP into the contract means that the seller must comply with a specific set of rules governing documentary credits, which calls for strict compliance with documentary obligations. Article 30 CISG requires the seller to "deliver the goods [and] hand over any documents relating to them". This provision essentially recognises that the contract may impose separate obligations in relation to goods and documents. It is therefore self evident that in international sale contracts involving letter of credit transactions governed by UCP, the delivery of non-conforming documents can give rise to a fundamental breach, if the result of this breach is that the bank irrevocably refuses to pay the price for the goods.[67] This example shows the significance of the interplay between the provisions of UCP and Article 25 CISG and the importance of understanding the practical implications of the interpretation of trade usages under the CISG. As a potential mitigating factor, one must look at clause 16(b) of UCP, under which the issuing bank can decide in its sole judgment to approach the buyer to see if it deems fit to waive the document discrepancies.[68] Ultimately, if the buyer is satisfied with the delivery of the goods and the discrepancies are minor, he will have no interest in denying the waiver thereof, and such behaviour would be consistent with the principle of good faith underlying the CISG. Yet, the interplay between the provisions of UCP on strict document compliance and the breach under the CISG are worth paying a great deal of attention, since the consequences of the failure to meet the standards provided by UCP can be rather harsh.

### 4.4. Letters of confirmation: The Issue of Silence

An issue that frequently arises in the practice of international sales is that of whether or not silence in response to a letter of confirmation

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Nonconforming Goods and Documents", *Victoria University of Wellington Law Review* 4/2005, 805.

[67] For similar conclusions, see M. Bijl, "Fundamental Breach in Documentary Sales Contracts. The Doctrine of Strict Compliance with the Underlying Sales Contract", *European Journal of Commercial Contract Law* 1/2009, 28, holding that: "Letter of cred it practice strongly suggests that if the parties have agreed to payment by means of a letter of credit, they have simultaneously agreed to apply the strict compliance principle to the delivery of documents in the underlying sales contract."

[68] For a discussion of the issue of discrepancies in letters of credit, see R. Berga mi, "Discrepant documents and letters of credit: the banks' obligations under UCP500", *The Vindobona Journal of International Commercial Law and Arbitration* 2003, 105 120.

may be sufficient to reach an agreement. Traders and business people across the world do not often find practical to reply in writing to a letter of confirmation[69] and they may prefer to simply rely on prior usages or past commercial practices. It is therefore necessary to determine if under such circumstances silence may amount to consent. Commercial letters of confirmation have been the object of wide discussions among legal commentators and the case law of various European countries for more than a century.[70] By way of background, a commercial letter of confirmation is typically a document setting out the terms of a contract, which is sent by one party to another party in respect of a contract which has already been concluded orally (e.g., over the telephone) or which has not yet been concluded. As pointed out by Professor Ferrari: "It is safe to assume that the rules pertaining to this issue may be understood as usages within the (autonomous) meaning of the CISG"[71] and should not be construed in accordance with the meaning attributed to them under national laws. It is also worth noting that Article 18(1) CISG expressly provides that "*[....] Silence or inactivity does not in itself amount to acceptance*." This provision may, however, be derogated by an applicable usage or practice, so long as the parameters of either Article 9(1) or 9(2) of the CISG are met. Under Article 9(1), silence can be deemed a binding sign of a party's acceptance if it constitutes a usage to which the parties have agreed or a practice which the parties have established between themselves. In my view, it is rather unlikely that the parties have expressly agreed that silence will constitute a form of agreement, since silence is typically a form of acceptance that will occur in transactions that are not heavily regulat-

[69] For a detailed discussion of the issue of commercial letters of confirmation under the CISG, see M. Esser, "Commercial Letters of Confirmation in International Trade: Austrian, French, German and Swiss Law and Uniform Law Under the 1980 Sales Convention", *Georgia Journal of International and Comparative Law* 18/1988, 427 ("Confirmation letters are typically employed where the parties negotiate in different ways, for example, when they exchange letters, negotiate on the telephone, send telexes and fail to reduce their final agreement to writing."). For an example of a specific practice established among pharmaceutical companies, which did not find practical to reply in writing to a letter of confirmation, see *Geneva Pharmaceuticals Technology Corp. v. Barr Laboratories, Inc., et al.* (*supra* note 36), where plaintiffs alleged that it is a widespread practice throughout the pharmaceutical industry that a supplier providing a reference letter commits itself to providing commercial quantities of the raw material and that throughout the 1990's it was also practice to rely on informal oral arrangements, rather than written supply contracts (for example, more than 90% of the bulk pharmaceutical ingredients purchased by Barr, and the majority of bulk pharmaceuticals sold by ACIC/Brantford, did not involve written supply agreements).

[70] See Esser, ibid.

[71] See Ferrari, (2002), 575. To this effect, see also M. Esser, "Die letzte Glocke zum Geleit? Kaufmännische Bestätigungsschreiben im Internationalen Handel: Deutsches, Französisches, Österreichisches und Schweizerisches Recht und Einheitliches Recht unter der Kaufrechtskonvention von 1980", *ZfRvgl* 1988, 188 et seq.; Piltz, § 2 para. 178.

ed. It is also more frequent in practice that the parties will establish in their business dealings a practice of accepting contracts by way of silent or tacit acceptance.[72] The existence of the practice needs, however, to be proved by the party invoking it and evidence should be provided that a number of contracts have been concluded through silent acceptance.[73] If Article 9(1) does not apply, a party may still be in a position to argue that the silent acceptance constitutes a usage of which the parties knew or ought to have known and which in international trade is widely known to, and regularly observed in the relevant trade sector by, parties to contracts of the type involved in the specific transaction.[74] However, the majority of the legal commentators and the case law held that for the usage to be effective, the mere fact that the laws of the country in which the recipient has its place of business admit the silent acceptance of a contract may not be sufficient grounds to bind both parties under Article 9(2).[75] In a Swiss case precedent[76] where the parties had not entered into a written contract, but the seller had simply delivered a commercial letter to the buyer confirming that a certain quantity of textiles was going to be manufactured and supplied, a Swiss court found that the letters of confirmation sent by the seller and the subsequent failure by the buyer to react reflected a usage as to the formation of contracts in the sense of Article 9(2) CISG. According to the court, the parties had impliedly made that usage applicable to their contract, since they knew or ought to have known the binding nature of such confirmations, which are recognized under both laws

[72] See Civil Court of Basel (Switzerland), 21 December 1992, CLOUT case no. 95, where the court found that the exchange of confirmations was consistent with the practice which the parties had established between themselves.

[73] For similar remarks, see F. Ferrari, *The Draft UNCITRAL Digest and Beyond: Cases, Analysis and Unresolved Issues in the U.N. Sales Convention* (eds. F. Ferrari, H. M. Flechtner, R. Brand), 2004, 196. Regarding the need to give sufficient evidence of the existence of the usages, see, e.g., Dist. Court Landshut (Germany), 12 June 2008, available online at *http://cisgw3.law.pace.edu/cases/080612g2.html*, holding that in a sale of metallic slabs the seller would have had to substantiate that there is a specific trade usage in respect to the sale of metallic slabs between Germany and Italy, which contained the conferral of jurisdiction to the place where the supplier is domiciled or the acceptance of the principles on silence in respect to a commercial order confirmation, but the seller had failed to do so.

[74] See Achilles, Article 9, para. 4; Holl, Kessler, 459; Neumayer, Ming, Article 9, commentary 4; Schlechtriem, para. 62; Staudinger, Magnus, Article 9 CISG, para. 27.

[75] See Appellate Court of Frankfurt (Germany), 5 July 1995, available online at: *http://cisgw3.law.pace.edu/cases/950705g1.html*. Among the legal commentators, see Ferrari, (2002), 575; Herber, Czerwenka, Article 9 para. 12; for a different opinion, see C. Ebenroth, "Internationale Vertragsgestaltung im Spannungsverhältnis zwischen AGBG, IPR Gesetz und UN Kaufrecht", *ÖstJBl.* 1986, 688; for a diverging view, see, however, U. Huber, "Der UNCITRAL Entwurf eines Übereinkommens über internationale Warenkaufvertäge", *RabelsZ* 43/1979, 449, holding that if under the silent party's domestic law silence is recognized as a form of acceptance, than this law should control.

[76] See Civil Court of Basel (*supra* note 72).

of the countries in which the parties had their place of business (i.e., Austrian law and Swiss law).[77] Proving the existence of a trade usage or commercial practice capable of derogating from the rule set out in Article 18(1) CISG may, however, be a difficult task. In a 2007 decision,[78] a Dutch appellate court was called to interpret a dispute arising from a sale by a Belgian company of a certain machinery to a Dutch company. The invoice sent by the seller indicated that "the goods remain our property until complete payment has been received". The seller also used a set of general conditions, which further confirmed that "delivered goods remain the property of the seller until full payment has been received, meaning in particular that the buyer cannot resell the goods or give them as collateral". However, the purchasing agreement did not state anywhere that the purchase was subject to a reservation of property. The Dutch buyer did not agree to or object against the provision on the invoice reserving property to the Belgian company. However, the Dutch buyer failed to pay the entire purchase price and meanwhile sold the machinery to a third party, leasing it back from that same third party. The Belgian seller claimed that the Dutch buyer had violated the property reservation clause set out in the invoice and the general conditions. However, the Dutch appellate court noted (in my view correctly) that, since there was no evidence that the reservation of property was an established practice or usage by which the Dutch company would be bound and since the Dutch company could only have become aware of the reservation of property after receiving the invoice (regardless of whether the reference to the reservation of property was made on the front or the back thereof), the buyer could not be deemed to have consented to the reservation of property clause. A different position was taken in a case decided by the Court of Appeals of Paris,[79] in which the French judges ruled out the possibility that the buyer's silence to the confirmation order delivered by the seller and concerning the sale of 100,000 meters of fabric could be deemed to constitute an acceptance. Here, the Court of Appeals held that even though the seller and the buyer had previously developed a practice of transacting business based on confirmation orders silently accepted by the buyer, the new sale dealt with a

[77] *Ibid*. Note that according to Professor Ferrari, the decision of the Civil Court of Basel has failed to take notice of the fact that in one of the two states involved (namely Austria), the effect of such a letter of confirmation, i.e. the conclusion of a contract, has been ruled out [on Austrian law, see for instance, OGH (Austria) 26 June 1974, ÖstJBl. (1975) 89]) (see Ferrari, (2002), 575).

[78] See Appellate Court of Hertogenbosch (The Netherlands), 29 May 2007, CLOUT case No. 827. See also, Dist. Court Gera (Germany), 29 June 2006, available online at *http://cisgw3.law.pace.edu/cases/060629g1.html*, holding that a contract cannot be assumed on the basis of silence to a letter of acknowledgement as the court cannot establish such a practice at the seat of the buyer and as the seller failed to prove that there had been such a practice between the parties.

[79] See Court of Appeal of Paris (France), 10 September 2003, CLOUT case No. 490.

very different type of fabric (namely, a new lycra-type of fabric) and therefore the seller could not rely on the prior practice. As a result, the "confirmation of order" was regarded as an offer of sale of goods, which the buyer had not accepted. The position of the French court in the case at hand appears to be rather draconian, since the nature or kind of good sold should not be a key element in determining if a practice has been established among the parties. In other words, if the parties have repeatedly transacted business based on a silent acceptance of confirmation orders, so long as the trade practice and sector remains the same, the type of good sold should not be a decisive factor in determining whether or not the practice falls under Article 9 CISG. Furthermore, in the specific case the difference between the goods sold related only to a different type of fabric, not even to a different type of good overall.

## 5. CONCLUSIONS

Since the existence of a usage or practice largely depends upon the specific facts of the case, the issue of whether or not trade usages or practices established among the parties may apply to an international sales contract governed by the CISG pursuant to Article 9 becomes a matter of proof by the party invoking their application.[80] There are many instances in which the successful application of the usages or practices can provide benefits to a party. For example, a payment delay or a certain quantity of defective goods sold may be tolerated by a party under certain trade usages or business practices, whereas such delays or defects could be deemed to amount to a breach of contract under the applicable provisions of the CISG. It may be possible (at least in theory) that a judge applies trade usages or business practices *ex officio*, but this is rather unlikely to occur in practice, especially in the absence of specific evidence provided by a party of the transaction. As pointed out by leading commentators,[81] in arbitration proceedings there are higher chances that a specialized arbitrator may be aware of specific trade usages of a given business sector and decide to apply them on its own motion. To sum up, trade usages and business practices can be successfully invoked by a party, so long as adequate and persuasive evidence is made available to the judge or arbitrator regarding the existence and applicability of the usage or business

[80] See Pamboukis, 124, stating that: "As with the usages agreed upon by the par ties or the practices established between them, the party that alleges the existence of any binding usage has to prove it."

[81] See Bianca, Bonell, 112, holding that the application of usages by an arbitrator, by virtue of his office, through various rules of arbitration, is allowed and at times may even be required; Bout, *Trade Usages: Article 9 of the Convention on Contracts for the International Sale of Goods*, 1988, § II(G), available online at *http://www.cisg.law.pace.edu/cisg/biblio/bout.html*; Pamboukis, 124.

practice. Yet, it is difficult to predict how a court or arbitration panel will react, since the sufficiency and persuasiveness of evidence is a procedural issue that falls outside the scope of the CISG.[82] In my opinion, although business practices and usages are expressly made applicable to international sale contracts governed by the CISG pursuant to Article 9, in light of their peculiar features which vary from case to case, such usages and practices can undermine the uniform goals that the CISG purports to achieve.[83] This may perhaps explain why most of the uniform law conventions that have come into force after the CISG do not include provisions expressly dealing with usages.[84] Thus, in order to avoid unwanted conflicting interpretations between usages and provisions of the CISG, it is therefore advisable for courts and arbitrators to take a rather cautious approach to usages and practices and to determine the exact force of such rules vis-à-vis the uniform sales law provisions, especially when the application thereof may significantly depart from uniform and predictable rules set out in the CISG.[85]

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[82] For a discussion on procedural issues and the CISG, see H. M. Flechtner, "The U.N. Sales Convention (CISG) and MCC Marble Ceramic Center Inc. v. Ceramica Nuova D'Agostino, S.p.A.: The Eleventh Circuit Weighs in on Interpretation, Subjective Intent, Procedural Limits to the Convention's Scope, and the Parol Evidence Rule", *Journal of Law and Commerce* 18/1999, 259 287; Giovannucci Orlandi,26; La China, "La conven zione di Vienna sulla vendita internazionale di diritto uniforme. Profili processuali: la giurisdizione", *Rivista trimestrale di diritto e procedure civile* 44/1990, 769 783.

[83] For a contrary view, see, however, DiMatteo, 306 ("Some divergence in inter pretation is expected and acceptable given the difference in national legal systems and in the very nature of codes. This divergence is expected not only because of the codes multi jurisdictional application, but also because like the civil and commercial codes of Eu rope and the United States (UCC) the CISG is an evolving, living law. As such, it provides for the contextual input of the reasonable person, including the recognition of evolving trade usage, in the re formulation and application of its rules. The benefit of such a dynamic, contextual interpretive methodology is that the code consistently updates its provisions in response to novel cases and new trade usages.").

[84] For these remarks, see Torsello, 147 ("Notwithstanding the ever increasing rel evance of usages in the regulation of international trade, reflected in the number of arbi tral decisions based upon it, as well as in the creation of international uniform instruments other than Conventions, such as the Incoterms and the Unidroit Principles, international uniform commercial law Conventions seem to be reluctant to enhance the role of usage. This conclusion clearly emerges should one consider that most subsequent Conventions do not even mention usages among the possible sources of law governing the transaction, while the Agency Convention does nothing but reproduce, with the minimal necessary adaptation, the wording of the CISG").

[85] As pointed out by Ferrari, (2005), 335 ("What has been said in respect of Arti cle 9 CISG clearly shows that the rules governing an international contract for the sale of goods are not necessarily only those laid down by the CISG, even where the CISG itself applies. But it also shows that it is important to determine on what grounds one rule ap plies, as that rule's position in the hierarchy of sources of law for international sales contracts depends on those grounds.").

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# CISG ARTICLE 6 AND ISSUES OF FORMATION: THE PROBLEM OF CIRCULARITY

*CISG Article 6 broadly allows parties to exclude the application of the CISG or derogate from its provisions. The application of Article 6 is relatively straightfor ward when addressing the rights and obligations of the parties, but encounters a challenge of circularity when addressing issues of contract formation. How can the parties agree to exclude or derogate from the application of the CISG if it is not yet clear whether they have agreed to anything at all?*

*This article explores this narrow, but important question. Can the parties ef fectively exclude the application of the CISG or derogate from its provisions (i.e., "opt out") on contract formation within the agreement for which contract formation is at issue? The article begins with a brief elaboration on the nature of the problem, suggests a means of resolving this issue by looking to the general principles underly ing the CISG, and then applies those principles to a series of hypothetical formation problems.*

Key words: *Article 6. Opt out. Formation. Separability.*

## 1. INTRODUCTION

The United Nations Convention on Contracts for the International Sale of Goods (the "CISG") governs contracts for the sale of goods between parties from different CISG contracting states,[1] as well as contracts where the rules of private international law lead to the application of the law of a contracting state.[2] However, CISG Article 6 allows parties to

[1] United Nations Convention on Contracts for the International Sale of Goods (1980) (the "CISG") Article 1(1)(a).

[2] CISG Article 1(1)(b).

exclude the application of the CISG or derogate from any of its provisions.[3] The application of Article 6 to Part III of the CISG is relatively straightforward. Having concluded a contract, the parties may further agree that such contract will not be governed by some or all of the provisions of the CISG addressing: general provisions; obligations of the seller; obligations of the buyer; passing of risk; and provisions common to the obligations of the seller and of the buyer.[4] The application of Article 6 is not, however, quite so straightforward when addressing issues of contract formation under Part II of the CISG. The problem, of course, is one of circularity.[5] How can the parties agree to exclude or derogate from the application of the CISG if it is not yet clear whether they have agreed to anything at all?

This article explores this narrow, but important question. Can the parties effectively exclude the application of the CISG or derogate from its provisions (i.e., "opt out") on contract formation within the agreement for which contract formation is at issue? Which law governs the formation question—the CISG or the chosen law (that chosen in lieu of the CISG under Article 6)? The article begins with a brief elaboration on the nature of the problem (Part 2), suggests a means of resolving this issue by looking to the general principles underlying the CISG (Part 3), and then applies those principles to a series of hypothetical formation problems (Part 4).

## 2. THE NATURE OF THE PROBLEM

When addressing the rights and obligations of the parties, one is presuming the existence of a contract. Thus, a clear and unequivocal provision of the contract opting out of the CISG under Article 6 may be given effect without difficulty. In contrast, a contract provision attempting to opt out of the CISG on issues of formation, governed by Part II of the CISG, presents a problem of circularity. Which comes first, the proverbial "chicken or egg"? If one gives effect to the "opt out" provision,

[3] See CISG Article 6, which is limited only by Article 12, relating to certain state reservations of writing requirements.

[4] See CISG Articles 25 through 88.

[5] See J. Honnold, H. M. Flechtner, *Uniform Law for International Sales under the 1980 United Nations Convention*, 2009[4], 199. As Professor Flechtner explains, the problem is easily avoided by a "pre sale framework agreement" or any other agreement predating the one for which formation is at issue. However, if the provision attempting to exclude or derogate from the application of the CISG is contained within the very contract for which formation is at issue, the challenge of circularity is squarely presented. Profes sor Flechtner's thoughtful questions (both in person and in his treatise) served as the in spiration for this article. Any flaws in the analysis that follows are, however, entirely my own.

one must, at the very least, presume that a contract has been concluded in order to decide whether a contract has been concluded.[6] Moreover, if one decides that a contract was not concluded, what is left of the "opt out" provision? In contrast, if one decides the formation issue based on the CISG, then has not the parties' intent been ignored?

There is of course no issue when the "opt out" provision predates the contract for which formation is at issue, because it is not in any way dependent on the formation of the later agreement.[7] Contracting States may also avoid the application of Part II by making a reservation under CISG Article 92. Inasmuch as such a "reservation" becomes part of the background default law, and again pre-exists the agreement for which formation is at issue, there is no problem of circularity. Thus, the problem at hand is limited to provisions within the contract at issue attempting to "opt out" of the CISG on issues of contract formation.

The legislative history of the CISG also reflects concerns over this issue. There was no question that Article 6 applied to Part II of the CISG—as long as the agreement to "opt out" predated the formation issue in question. However, it was somewhat less clear whether parties could "opt out" in the same agreement subject to the formation dispute. The final text of the CISG came about through the consolidation of the draft convention on "Formation" and the draft convention on "Sales."[8] Opting out of the draft Sales Convention was a relatively simple matter, inasmuch as the Sales Convention presumed a contract had been concluded.[9] In contrast, opting out of the draft Formation Convention raised the potential issue of circularity described above. Article 2 of the Formation Convention provided that the parties may "'agree to' exclude, derogate from or vary" the Convention, which arguably required such agreement prior to any substantive formation negotiations at issue.[10] This language was excluded from CISG Article 6, because the drafters did not want to

[6] This is often characterized as "bootstrapping." Logic would suggest that, no matter how hard one might try, one cannot lift one's self by one's own bootstraps. But see R. E. Raspe, *The Surprising Adventures of Baron Munchausen*, 1785 (in which the hero pulls himself from the swamp by his own pigtail).

[7] For example, a manufacturer and distributor may conclude a "framework agree ment" governing their distribution relationship and "opting out" of the CISG with respect to individual agreements for the sale of specific goods.

[8] See J. Honnold, H. M. Flechtner, 7 8.

[9] See Report of the Secretary General: incorporation of the provisions of the draft Convention on the Formation of Contracts for the International Sale of Goods into the draft Convention on the International Sale of Goods, UNCITRAL, para 34, U.N. Doc. A/CN.9/145 (1978), reprinted in [1978] IX Y.B. U.N. Commission on International Trade Law 123 ("Convention Incorporation Report").

[10] See M. Van Alstine, *Consensus, Dissensus, and Contractual Obligation Through the Prism of Uniform International Sales Law*, *Virginia Journal of International Law* 37/1996, 148.

preclude implied exclusion, and it was arguably superfluous—the necessity of agreement being understood.[11]

The draft Formation Convention also provided for a more elaborate provision on opting out of the Convention, reflecting the circumstances of formation. The parties' agreement to opt out might, *inter alia*, "appear from the negotiations, the offer or the reply, ...".[12] There was strong support for the right of the offeror to limit any acceptance to the terms of the offer, including any provision opting out of the Convention. However, there was much less support for any unilateral right of the offeree to do so in a purported acceptance.[13] In view of these and other potential difficulties in applying the same set of "opt out" rules to issues of formation as one might apply to concluded contracts, it was suggested that two separate provisions might be preferable—one governing formation, and one governing all other attempts to opt out of the CISG.[14] However, it was ultimately decided to address the issue of excluding, derogating from, or varying the effects of the CISG in a single sentence,[15] leaving a simple and elegant statutory provision, but one that does not clearly and unequivocally answer the question at hand.

## 3. INTERPRETING CISG ARTICLE 6 BASED ON GENERAL PRINCIPLES

While Article 6 certainly governs the issue, its language does not directly answer whether parties may invoke its provisions in an agreement, itself subject to a question of formation. Inasmuch as the issue is one "governed," but not "expressly settled" by Article 6, CISG Article 7(2) directs us to examine the general principles upon which the Convention is based. In looking at the instant question, we find two relevant principles—the principle of the primacy of party autonomy (Part 3.1) and the principle of separability (Part 3.2). In formulating our approach to examining this issue under CISG Article 6, it may also be useful to consider the analogous principles of competence-competence and separability in arbitration (Part 3.3).

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[11] See Convention Incorporation Report, *supra* note 9, para. 35, at 123.

[12] Report of the United Nations Commission on International Trade Law on the work of its eleventh session (New York, 30 May 16 June 1978), Annex I, Summary of deliberations of the Commission on the draft Convention on the Formation of Contracts for the International Sale of Goods, UNCITRAL, para 7, U.N. Doc. A/33/17 (1978), re printed in [1978] IX Y.B. U.N. Commission on International Trade Law 32 ("Convention Incorporation Deliberations Summary").

[13] *Id*., para 8 and 9, at 32.

[14] See Convention Incorporation Report, *supra* note 9, para. 38 and 39, at 123.

[15] See Convention Incorporation Deliberations Summary, *supra* note 12, para. 16, at 32.

### 3.1. The Principle of the Primacy of Party Autonomy

The very nature of the CISG is one of default rules subject to the autonomous will of the parties. This general principle of party autonomy is expressed nowhere more clearly than in Article 6, itself.[16] With only a very few narrow exceptions,[17] the parties are free to craft their own rules to govern their relationship. As such, this general principle of the primacy of party autonomy provides strong support for the idea of giving effect to the parties' attempts to opt out of the CISG—wherever such attempts may be found. However, the principle of party autonomy does not answer the theoretical challenge presented when a purported agreement containing the "opt out" provision fails the formation analysis. For that, we must look to the principle of separability.

### 3.2. The Principle of Separability

The principle of separability is generally associated with arbitration agreements.[18] However, this same principle is also found within the CISG. Article 81 states that any provision for "resolution of disputes" survives the remedy of avoidance.[19] Provisions for resolution of disputes would "normally include choice of law clauses" among those surviving avoidance under Article 81,[20] and an "opt out" provision is, essentially, a "choice of law" provision. Thus, the general principle reflected in the survival of dispute resolution provisions under Article 81 suggests the idea that such dispute resolution provisions, including "opt out" provisions, should be treated as autonomous and separable from the agreement within which they are contained.

### 3.3. An Arbitration Analogy

A similar issue arises in the context of a disputed arbitration agreement. To some degree, one must presume an agreement if the parties are to avoid a preliminary detour to court for a determination of whether they agreed to arbitrate. The doctrine of competence-competence allows the arbitrators to decide their own jurisdiction, thus giving effect to the parties' likely intent.[21] Moreover, the doctrine of separability provides that an arbitral tribunal's authority to decide the merits of the parties' dispute

[16] See M. Van Alstine, 35 41.

[17] See, e.g., CISG Article 12.

[18] See, e.g., G. B. Born, *International Commercial Arbitration*, 2009, 311 312.

[19] Avoidance normally releases the parties from their remaining contract obligati ons, subject only to the narrow set of exceptions listed in Article 81.

[20] CISG Advisory Council Opinion No. 9, Consequences of Avoidance, 3.3 (2008).

[21] See, e.g., G. B. Born, 855 56.

will generally survive a negative decision on the validity of the primary contract in question. [22] By analogy, we should attempt to give effect to the parties' intent to "opt out" of the CISG on issues of formation by deciding the question in accordance with the parties' chosen law or rules of law, and a negative decision on formation of their primary contract should not affect the viability of that choice.

We can combine these two foregoing general principles, along with the arbitration analogy, as follows. We should attempt to give effect to party intent to "opt out" of the CISG and decide formation under rules other than those contained in Part II. To the extent we find such intent, we should treat an "opt out" provision as an autonomous and separable agreement. Thus, a failure to conclude the main contract should not affect the "opt out" provision, unless such failure is specifically caused by the act of adding the provision. Having formulated an approach to the problem, we can now turn to its application.

## 4. A FEW HYPOTHETICAL APPLICATIONS OF THESE PRINCIPLES

The variety of possible formation scenarios in which this problem might arise is endless, and any attempt to survey them all would go far beyond the scope of this brief article. However, one might reasonably attempt to organize this broad set of possibilities into three basic categories—traditional "offer and acceptance" based on discrete communications of each (Part 4.1), a more protracted and less discrete set of negotiations, during which contract terms evolve as part of the negotiation and formation process (Part 4.2), and the classic "battle of forms" formation scenario (Part 4.3). By organizing our hypothetical applications as such, we can attempt to develop our analytical model further based on its actual application. Before doing so, however, it's worth taking a more detailed look at the issue of "intent" and a few potential approaches to ascertaining that intent.

If both parties agree that they "opted out" of the CISG under Article 6, then the general principles of party autonomy and separability would suggest that a tribunal simply apply the parties' choice and give it effect—whatever the outcome. However, if the parties are disputing formation, they are also likely disputing whether they agreed to the "opt out" provision. How does one ascertain party intent with respect to an individual provision within a disputed contract—even if it is separable from the main contract? One easy answer might be simply to apply the interpretive rules of Articles 8 and 9. However, the parties might well have "opted out" of their application as well, and their use in addressing the

[22] See, e.g., *ibid.*, 313.

issue of formation seems inconsistent with the parties' attempt to "opt out" of the CISG with respect to that issue. Thus, we are left to search for broader principles that may be useful in our analysis.

One suggested approach would be to favor the intent of the offeror, as "master of the offer".[23] While the very nature of the process of contract formation will sometimes make it difficult to determine which party is the offeror and which the offeree, this offeror-centric approach may be useful in some circumstances. However, we may want to consider other possible approaches as well. We might look to one or more of the following in deciding whose intent should control:

- Favor the intent of the offeror
- Presume a mutual intent to "opt out" absent any objection to such a provision introduced by either party
- Favor application against the party introducing the "opt out" provision
- Favor the intent of the party asserting any agreement to "opt out"
- Favor the intent of the party challenging any agreement to "opt out"
- Apply a presumption in favor of or against formation of the main agreement

This article will not suggest that any of these presumptions be given dominant effect, but merely that each may influence our analysis to some extent, depending on the circumstances in which the issue arises. In short, the author will suggest that a single "bright line" rule is elusive, and a more circumstantial approach to this particular challenge is appropriate.

Finally, a hypothetical "opt out" choice must be selected. For the sake of simplicity, this hypothetical analysis will rely on a single body of law[24] as an alternative to the CISG—UCC Article 2, as supplemented by typical U.S. common law.[25] In contrast to the CISG, this substituted body of law:

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[23] See discussion *supra* Part 2, fn. 13; see also J. O. Honnold, H. M. Flechtner, 199 (generally suggesting a more favorable view of an offeror's attempt to "opt out" in the offer, as compared to any unilateral attempt by the offeree to "opt out" in any purpor ted acceptance).

[24] "Opting out" of the CISG does not of course rely on choosing an alternative body of law, as the parties may also simply agree to derogate from of vary the effects of the CISG by contract. This analysis, however, shall focus on the substitution of another body of law for the CISG.

[25] Unlike the CISG, most contract law in the United States is state law. For our purposes here, however, we can reasonably rely on the uniform version of UCC Article 2

– Assigns the risk of failed transmission to the offeror if acceptance is dispatched in the manner invited by the offer;[26]
– Allows for revocation of offers, unless very specific statutory requirements are met, including a requirement of a signed writing promising to keep the offer open;[27]
– Allows formation with an "open price term" and fills the gap with a reasonable price;[28]
– Requires a writing signed by the party against which enforcement is sought;[29] and
– Allows formation based on an acceptance containing material variances from the offer.[30]

These five legal principles will be employed in the analysis of the five factual hypotheticals that follow. In each hypothetical, the parties are from the U.S. and Germany, two CISG contracting states. Thus, the CISG would govern any issue of formation absent an effective agreement opting out of the CISG's provisions on formation pursuant to Article 6.

### 4.1. Attempted Formation Based on a Traditional Offer and Acceptance Paradigm

Two issues that often arise under the traditional offer and acceptance paradigm involve the actual receipt of any exchange of communications and the effect of an attempt by the offeror to revoke the offer. Here, we will analyze a purported acceptance lost in transmission (Part 4.1.1) and an attempted revocation contrary to an oral promise (Part 4.1.2).

#### *4.1.1. Acceptance Lost in Transmission*

A U.S. buyer mails an offer to a German seller, which includes a choice of UCC Article 2 (and associated state common law) to govern all issues, including formation. Seller mails an acceptance, which is lost in the mail and is never received by the U.S. buyer. Assuming that a tribunal believes that the seller actually dispatched the acceptance by mail, can the seller enforce?

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(without the 2003 amendments, which have been uniformly rejected by the states), as supplemented by a relatively uniform body of state common law on the issues addressed.

[26] See Restatement (Second) of Contracts § 63(a) (1980) (this is often referred to as the "mailbox rule"), supplementing UCC Article 2, as provided in UCC 1 103(b) (as revised 2001); *compare* CISG Article 18(2).

[27] See UCC 2 205; compare CISG Article 16(2).

[28] See UCC 2 305; compare CISG Article 14(1).

[29] See UCC 2 201; compare CISG Article 11.

[30] See UCC 2 207; compare CISG Article 19.

CISG Article 18(2) would answer this question in the negative, because seller's acceptance never reached the buyer. However, the U.S. common law "mailbox rule" would give effect to seller's acceptance dispatched in a reasonable manner under the circumstances (in the same manner as the mailed offer)—irrespective of the fact that it failed to arrive.[31] The U.S. law effectively places the risk of a failed transmission of the acceptance on the offeror under this circumstance and, therefore, would find that these parties concluded a contract.

Under these circumstances, it would seem quite reasonable to give effect to the choice of UCC Article 2 and associated common law. First, the buyer, who introduced the "opt out" provision, is clearly the offeror, so terms of the offer are respected. Second, the seller is simply enforcing against the buyer under the buyer's own choice of law provision, so each party has, at some point, consented to this provision. Finally, the "opt out" provision results in the enforcement of the contract within which the provision is contained, so there is no issue regarding the survival of this clause independent of the main contract.

### *4.1.2. Revocation Contrary to an Oral Promise*

A U.S. seller makes an oral telephone offer to a German buyer, promising to keep the offer open for ten days and further stating that the offer is governed by UCC Article 2. Three days later, the seller telephones the buyer and revokes. Immediately after the seller's purported revocation, the buyer purports to accept seller's offer. Can buyer enforce?

CISG Article 16(2)(a) would answer this question in the affirmative, because seller has indicated, by orally promising to keep the offer open for ten days, this the offer is irrevocable for that period. Thus, seller's purported revocation would be ineffective, and buyer's acceptance would conclude a contract. However, the U.S. common law provides that offers for the sale of goods are freely revocable, unless the strict standards of UCC 2–205 are met. These standards require a signed writing,[32] so seller's oral promise to keep the offer open has no effect on seller's common law right to revoke. Seller's revocation is, therefore, effective, and the parties have failed to conclude any agreement.

Like the example in Part 4.1.1 above, the application of the "opt out" choice again allows the offeror to retain mastery over its offer including the provision. However, this hypothetical presents two challenges not present in the earlier one. First, the seller is relying on its own "opt out" provision, so we cannot rely on the other party's current assertion of

[31] See Restatement (Second) of Contracts § 63(a) (1980).

[32] See UCC 2 205 ("[a]n offer ... in a signed writing which by its terms gives assurance that it will be held open ... is not revocable ...").

the provision for consent. However, the buyer's belated attempt to accept the offer made no attempt to vary from the terms of the offer, so the buyer has arguably agreed to have the effectiveness of any purported acceptance determined in accordance with the offeror's choice of Article 2. Second, this hypothetical requires us to resort to the concept of separability to insure the survival of the "opt out" provision. Inasmuch as the choice of Article 2 results in a failure to form the main contract, the "opt out" provision would, itself, be without effect absent our separate treatment of that provision. We, essentially, find agreement to the "opt out" provision and give it autonomous effect in finding a failure to form the main contract, the demise of which has no impact on the separable "opt out" provision.

### 4.2. Attempted Formation Through a Process of Negotiation of Contract Terms

In the context of protracted negotiations towards possible contract formation, two issues that will often arise are the questions of whether a contract may be concluded without express or implied agreement on essential terms and whether a contract may be concluded without certain formalities, such as a signed writing. Here, we analyze the potential conclusion of contracts with an open price term (Part 4.2.1) and without any signed writing (4.2.2).

#### *4.2.1. Contract with an Open Price Term*

A U.S. buyer sends a lengthy and detailed proposed contract to a German seller, including a provision opting out of only Part II of the CISG and, instead choosing Article 2 on issues of contract formation.[33] The seller marks up language of the buyer's original proposal and returns the "edited" contract proposal to the buyer. However, the seller does not change or comment upon the provision choosing Article 2. After a few additional exchanges of such "edits," the parties agree on all of the terms, except price, and orally agree to the "basic deal." The parties further agree to work out a final price at a later date. Can either party walk away at this point (prior to deciding on the price) without being bound to a contract?

The CISG would likely answer each of these questions affirmatively, finding that the parties have failed to conclude a contract under Article 14(1), which arguably requires that any offer "expressly or implicitly fix[] or make[ a] provision for determining . . . the price".[34] In

[33] In this particular hypothetical, the author does not wish to raise the issue of form, which is addressed in the next hypothetical.

[34] Admittedly, there are differing views as to whether Article 14(1)'s treatment of price represents a limitation or a safe harbor (if the former, a failure to provide for price

contrast, UCC 2–204 requires only bare agreement to contract,[35] and the lack of any requirement of an agreement on price is confirmed by UCC 2–305.[36] Thus, any application of UCC Article 2 to the question of formation would likely find the parties have concluded a contract based on their agreement to the "basic deal".[37]

In this sort of "back and forth" negotiation process, it is hard to identify either party as the offeror, so this factor may be somewhat less useful at first blush. However, to the extent we treat the "opt out" provision as separable and autonomous from the main agreement, we can in fact identify the U.S. buyer as the offeror of this specific provision. However, having separated the "opt out" provision from the main contract, one might arguably look for separate consent to this provision, which would likely require us to consider tacit or silent acceptance. While neither CISG Article 18(1), nor the U.S. common law[38] provide that silence, by itself, amounts to acceptance, such silence may amount to tacit acceptance if justified by the objective circumstances. In the context of the sort of detailed negotiations present here, each party has the opportunity to object to individual provisions with which it does not agree—and does so in a number of instances. Thus, a party's failure to object to the "opt out" provision can reasonably be treated as more than mere silence and as a tacit agreement to the term by failing to object to its inclusion. The application of the choice of Article 2 also seems to give effect most accu-

precludes formation, whereas the latter leaves the door open to the extent intent can other wise be established). *See* J. O. Honnold, H. M. Flechtner, 210 211 (suggesting a more "open ended" approach to the application of Article 14, but also noting the late Professor Schlechtriem's more traditional view of Article 14's price requirement as an absolute limit absent derogation under Article 6). This article takes no position on which of these views provides the most appropriate interpretation of CISG Article 14. However, for purposes of this particular example and its focus on "opting out" on issues of formation the author will adopt the view that Article 14 represents a limit on the parties' agreement to contract without providing a price. Thus, a failure to agree in some manner on a price would pre clude formation to the extent governed by CISG Part II.

[35] "A contract for sale of goods may be made in any manner sufficient to show agreement, including conduct by both parties which recognizes the existence of such a contract." UCC 2 204(1).

[36] "The parties if they so intend can conclude a contract for sale even though the price is not settled." UCC 2 305(1).

[37] While Article 2 would govern formation, the limited nature of the provision "opting out" of only Part II of the CISG would likely lead to the application of CISG Article 55 of supply a price based on "the price generally charged at the time of the con clusion of the contract for such goods sold under comparable circumstances in the trade concerned". Compare UCC 2 305(1)(b) (supplying a "reasonable price at the time of delivery" under these same circumstances).

[38] See Restatement (Second) of Contracts § 69 (1980) (providing for acceptance via silence only in limited circumstances).

rately to the parties' mutual intent to conclude a contract—notwithstanding their lack of an agreement on price.[39]

### *4.2.2. Contract without a Signed Writing*

A U.S. seller and German buyer negotiate terms of a possible contract at a trade show. During negotiations, the U.S. seller says Article 2 must fully govern any transaction, and German buyer says nothing in response to this statement. After lengthy negotiations, the parties reach an oral agreement on a sale of a specific quantity of specific goods at a price of $3,000. When they walk away, the buyer thinks they have a contract, while the seller does not. Assuming a tribunal believes that the parties formed a contract—whether governed by the CISG or Art 240— what is the effect of seller's apparent attempt to "opt out" of CISG Part I?

This hypothetical involves an attempt to "opt out" of CISG Part I instead of Part II, but nonetheless raises similar issues. CISG Article 11 provides that a contract may be concluded orally, so the lack of a writing signed by the parties would have no effect on their agreement. However, UCC Article 2 includes a "statute of frauds" precluding enforcement of this agreement in the absence of a writing signed by the party against who enforcement is sought[41]—in this case, the seller. Thus, Article 2 would preclude enforcement against seller, even if a tribunal determined that the parties had concluded a contract.

Much of the same analysis addressed in Part 4.2.1 would also apply here. However, the "opt out" clause leaves the parties without an enforceable contract—notwithstanding any objective manifestations suggesting a mutual intent to be bound. While the proper result here seems somewhat less clear than that in the prior example, the application of the form requirement of UCC Article 2 may yet be justified by virtue of its inclusion by the offeror of that specific separable, autonomous term. Having limited the offer to the requirements of Article 2, including its form requirements, the offeror indicated an unwillingness to be bound unless those requirements were met.[42] This fact, coupled with the offeror's sub-

[39] Moreover, giving effect to the parties' agreement to "opt out" of CISG Part II seems far more consistent with the language of Article 6 than any attempt to employ Ar ticle 55 to supply a price under circumstances in which formation is governed by CISG Article 14.

[40] Either the CISG or UCC Article 2 would seem to lead to a finding that these parties concluded an agreement, as long as the objective manifestations of the parties suggested they intended a contract whatever seller's subjective view to the contrary.

[41] UCC 2 201(1) (requiring such a signed writing with any transaction in goods for a price of $500 or more). UCC 2 201 also includes a plethora of exceptions in subsec tions (2) and (3); however, none are triggered by the facts presented here.

[42] The drafting history of Article 6 further supports this idea, suggesting that "as a minimum, an offeror should be able to stipulate that an acceptance must be in writing." See Convention Incorporation Deliberations Summary, *supra* note 12, para. 8, at 32.

jective belief that a contract had not been concluded,[43] would seem to support the resulting failure to bind the parties under UCC Article 2.

### 4.3. Attempted Acceptance of an Offer in Which the "Opt Out" provision is Included Only in One of the Two Parties' Communications

One of the most challenging formation issues in any legal system involves the issue of a purported acceptance that varies in some manner from the offer. Two issues typically arise in this "battle of forms" scenario. First, does the purported acceptance, which varies from the offer, effectively serve as an acceptance so as to conclude the parties' agreement? Second, if the parties do conclude an agreement, what are its terms? The issue of formation focuses on the former, and that is the primary focus of our analysis here. However, we will also need to address the latter, as explained below.

A German buyer sends an offer to a U.S. seller, which says nothing about choice of law. The seller sends a purported acceptance, which includes a provision choosing UCC Article 2. One party then wants out of the deal before any further communication or conduct, and so notifies the other party. Can buyer enforce if seller wants out? Can seller enforce if buyer wants out?

CISG Article 19 would answer both questions "no," neither party can enforce, because the seller's purported acceptance included the provision opting out of the CISG and choosing UCC Article 2. Such a provision is undoubtedly material under CISG Article 19(3)[44] and would therefore result in a counter-offer by the seller under Article 19(1)—not an acceptance. Without further conduct or communications, there would be no contract. In contrast, seller's acceptance would be given effect as such under UCC 2–207(1), and the parties would be bound to a contract. UCC 2–207(1) allows an expression of acceptance to function as such, even if it contains additional terms—irrespective of the materiality of those terms. The materiality of an additional term may determine whether that specific term is included in the parties' agreement,[45] but it has no effect on the conclusion of the agreement as a whole.[46] However, the determina-

[43] One of the notable exceptions to UCC 2 201, essentially, provides that a party cannot admit that it concluded a contract, while simultaneously attempting to assert a statute of frauds defense. *See* UCC 2 201(3)(b).

[44] The "non exclusive" list of "material" terms includes those relating to the "sett lement of disputes," which would certainly seem to include a provision opting out of the CISG as the law applicable to settlement of such disputes. *See supra* note 20 and accom panying text.

[45] See UCC 2 207(2)(b) (providing that a material additional term will not beco me part of the contract).

[46] See UCC 2 207(1).

tion of materiality in this case may yet have significance to the issue of formation, because if the "opt out" provision is material, then it cannot be deemed part of the parties' agreement.[47]

While CISG Article 19(3) provides significant guidance as to the "materiality" of an additional term in an offer, UCC 2–207 provides little guidance other than a standard involving unreasonable surprise or hardship,[48] which is largely a fact based inquiry. If a tribunal were to determine that "opting out" of the CISG was in fact a common practice,[49] then it might also find the term to be non-material.[50] If so, then it would be deemed part of the parties' agreement concluded by the seller's acceptance. As such, it would control the question of whether the contract had been concluded and would answer that question affirmatively.

This result seems correct if one applies the law chosen by the parties, and it seems intuitively correct as well to allow the German buyer to enforce an agreement arising from the U.S. seller's choice of UCC Article 2 to govern formation. However, there is something intuitively troubling about allowing the U.S. seller to invoke its own choice of law to enforce against the buyer who initially made an offer without any such choice. The buyer cannot simply argue an absence of consent, because UCC 2–207 actually purports to find consent to non-material terms absent a timely objection.[51] Thus, the offeror's intent, as determined by UCC 2–207, was to allow for conclusion of a contract under these circumstances. And yet, this standard of consent—one contrary to CISG Article 19—has seemingly been unilaterally imposed by the offeree, giving rise to the very concerns expressed during the drafting of CISG Article 6.[52] Perhaps one could define the offeror's intent, as "master of the offer" solely by reference to the offer itself, which of course would not allow for an acceptance containing a provision "opting out" of the CISG. The principle of separability may also shed some light on the issue presented here.

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[47] This issue is similar to the question of whether an "opt out" provision can sur vive a determination that the contract in which it was contained was never concluded. However, the basis of the exclusion of material terms under UCC 2 207(2)(b) focuses specifically on a lack of consent. Consent to non material terms is presumed, but material additional terms require actual consent. *See* UCC 2 207(2) and comments 2 and 3.

[48] See UCC 2 207 comments 4 and 5.

[49] Based on anecdotal evidence, this may in fact be true.

[50] This common practice need not rise to the level of a trade usage, but need only be sufficiently common that it would not be unreasonably surprising.

[51] See UCC 2 207 comment 6 (explaining that, with non material terms, "[i]f no answer is received within a reasonable time after additional terms are proposed, it is both fair and commercially sound to assume that their inclusion has been assented to").

[52] See Convention Incorporation Deliberations Summary, *supra* note 12, para. 9, 32.

The principle of separability would protect the validity of an "opt out" provision only from general formation defects of the main contract—not from defects relating specifically to the "opt out" provision itself.[53] The inclusion of the "opt out" provision is, in fact, the specific issue giving rise to the question of formation. In this instance, the "opt out" provision results in the formation of the main contract. However, if it did not, then the principle of separability would not preserve the "opt out" provision,[54] and the basis for the finding of non-formation would disappear. Again, there is something intuitively troubling about a the introduction of a provision that can change the outcome of a formation question in favor of formation, but cannot operate in the opposite direction lest the provision be lost in the process.

Perhaps the simplest answer is found by returning to the intent of the offeror, as determined pursuant to the offer itself, and ignoring the offeree's unilateral efforts to redefine that intent. As with many issues, however, the "battle of forms" scenario presents a particular challenging context in which to evaluate any attempt to "opt out" of the CISG on issues of formation.

## 5. CONCLUSION

As suggested at the outset of Part 4, this article does not purport to exhaust the possible circumstances in which the challenge of opting out of the CISG on issues of formation may arise. Nor does this article purport to identify a single "bright line" rule with respect to resolving this challenge. However, the general principles identified in Part 3, along with the variety of considerations listed in Part 4 may be useful in addressing the issue based on any given circumstance in which it arises, in much the same fashion as the analysis of the foregoing hypotheticals presented in Part 4. In particular, the principle of the separable autonomy of any "opt out" provision would seem to be essential in a proper analysis of this issue,[55] inasmuch as it may play an important role in analyzing both the

[53] See G. B. Born, 713 714 (explaining that an arbitration agreement may be ren dered substantively invalid on normal contract grounds to the extent the invalidity defense relates specifically to the arbitration agreement). In a similar vein, an "opt out" provision should not be saved by the principle of separability from a failure to form the main con tract when the failure was specifically caused by the addition of the "opt out" provision.

[54] For example, if an offeree attempted to "opt in" to the CISG in purporting to accept an offer otherwise governed by UCC Article 2 as a matter of private international law, the offeree's additional term choosing CISG Article 19 would, if given effect, lead to a failure to conclude the contract containing the "opt in" provision, and the failure would relate specifically to the "opt in" provision itself.

[55] This principle was employed in the examination and analysis of four of the five hypothetical fact scenarios provided herein.

question of mutual intent to "opt out," as well as the survival of such an "opt out" provision in the event of a failure to conclude the main contract. However, in some applications, such as the "battle of forms" scenario, opting out of CISG Article 6 on issues involving formation will continue to present an interesting challenge.

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# AGREED SUMS IN CISG CONTRACTS*

*This paper addresses penalty and liquidated damages clauses in contracts governed by the CISG. The Convention does not expressly deal with such clauses. The practical problems arising from this fact stem from the traditional differences in domestic legal systems. Contrary to Civil Law, penalty clauses are unenforceable in Common Law. As the CISG for questions of validity refers to the applicable domestic law, this causes divergent and unpredictable results. Based on comparative research a uniform treatment of such clauses can be found which is that where the CISG ap plies clauses are not unenforceable because they deter breach of contract.*

Key words: *Penalty. Liquidated Damages. CISG. Validity. Comparative Law.*

## 1. Introduction

The issue addressed in this paper and that is currently discussed also by the CISG Advisory Council is that of fixed or agreed sums in contracts governed by the CISG. When using the term 'agreed sum', of course this does not refer to the purchase price but to clauses that in traditional terminology are called penalty or liquidated damages clauses.

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* This paper was given as a presentation at the 'Uniform Sales Law Conference The CISG at its 30th Birthday A Conference in Memory of Albert H. Kritzer' on 13 November 2010. The style of the presentation was not changed, only some basic refer ences were added. My remarks are based on the research I did for my broader work P. Hachem, *Agreed Sums Payable upon Breach of an Obligation Rethinking Penalty and Liquidated Damages Clauses*, Eleven Publishing, The Hague 2011 where more extensive references are provided for the issues raised in this paper. See also P. Hachem, "Fixed Sums in CISG Contracts", *The Vindobona Journal of International Commercial Law and Arbitration* 13/2009, 217 et seq.

The CISG does not address this kind of clauses and yet the number of cases having dealt with such clauses under the CISG in itself demonstrates that clarification of how to approach these clauses is necessary.

This paper was given as a presentation at the 'Uniform Sales Law Conference – The CISG at its 30th Birthday – A Conference in Memory of Albert H. Kritzer' on 13 November 2010. The style of the presentation was not changed, only some basic references were added. My remarks are based on the research I did for my broader work P. Hachem, *Agreed Sums Payable upon Breach of an Obligation – Rethinking Penalty and Liquidated Damages Clauses*, Eleven Publishing, The Hague 2011 where more extensive references are provided for the issues raised in this paper.

Typically, such clauses are included where there is special interest in timely delivery of the goods or payment of the purchase price, adherence to a confidentiality or non-competition agreement. Furthermore, the law applicable – including the CISG – may not acknowledge certain detriments as "losses" and may therefore deny compensation for the breach of an obligation leading to such a detriment. This may, for instance, be the situation where chances are lost, reputation is damaged or legal costs are not compensated for. I should of course add that with regard to the first two types of detriments the CISG is far more advanced than domestic laws. Finally, the complexity of the contract may bring about serious problems in proving loss. In these cases, agreed sums reduce legal costs for producing evidence and the risk of losing litigation or arbitral proceedings due to the required standard of proof not being met.

These classic scenarios allow us to identify three essential functions of agreed sums, namely securing performance, compensation and liquidation of detriments incurred. Naturally, these functions overlap and the dividing line is not easily drawn.[1]

## 2. COMPARATIVE ANALYSIS

The starting point for the observations to be made here is the traditional difference between Common Law legal systems and Civil Law legal systems in approaching agreed sums.

### 2.1. Common Law

Building on developments originating in the 14th century Common Law legal systems do not accept agreed sums that they classify as penalties.[2] This means in traditional understanding that where an agreed sum

[1] See for details P. Hachem, supra (n. 1), 43 50.

[2] See for details P. Hachem, supra (n. 1), 34 38.

does not merely and genuinely pre-estimate the loss likely to occur upon breach, but where it is designed to deter the debtor from breach of contract, that clause will not be upheld.[3] In other words, where a clause functions as a mere means to secure performance and is not designed to compensate or liquidate detriments, it is inadmissible.

### 2.2. Civil Law, Mixed and Nordic Jurisdictions, International Instruments

On the other hand, building on Roman law heritage, Civil Law legal systems traditionally uphold all types of agreed sums independent of whether they are classified as penalty or liquidated damages.[4]

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[3] For details see P. Hachem, (2011), 37 et seq. The developments in England culminated in *Dunlop Pneumatic Tyre Company, Ltd v New Garage and Motor Company, Ltd* [1915] AC 79 (HL). In the USA *Banta v Stamford Motor Co*, Supreme Court of Errors Connecticut, 21 December 1914, 92 A 665 is considered the landmark decision in this context. The *Dunlop* case in particular provided guidance in other Common Law jurisdictions, see for Australia *Ringrow Pty Ltd v BP Australia Pty* [2005] HCA 71; Buthan see Sec 67(1) Commercial Sale of Goods Act; Ireland B. Doolan, *Principles of Irish Law*, Gill & MacMillan, Dublin 2003[6], 128; New Zealand J. Burrows, J. Finn, S. Todd, *Law of Contract in New Zealand*, LexisNexisNZ, Wellington 2007[3], para 21.2.6(a). A more guarded approach is taken by Canadian courts which require a certain element of oppressiveness to be present, see *Ontario Ltd v Torrey Springs II Associates Ltd Partnership*, Ontario Court of Appeals, 4 July 2005, 256 DLR (4th) 490. Exceptions to the general rule are Section 74 of the Indian and Pakistan Contracts Acts and Section 75 of the Malayan Contracts Act. However, the Malayan Supreme Court appears to interpret this provision as expressing the English rule, see *Selva Kumar A/L Murugiah v Thiagarajah A/L Retnasamy* [1995] 1 MLJ 817 harshly criticised by M. Mohd Danuri, M. Che Munaaim, L. Yen, "Liquidated Damages in the Malaysian Standard Forms of Construction Contract", *Construction Law Journal* 25, 103 et seq.

[4] See for Argentina Art 652 CC; Armenia Art 369 CC; Austria § 1336(1) CC; Belarus Art 311 CC; Belgium Art 1226 CC; Bolivia Art 532 CC; Brazil Art 408 CC; Bulgaria Section 92 OCA; Chile Art 1535 CC; China Art 114 Contract Law; Colombia Art 1592 CC; Costa Rica Art 708 CC; Croatia Art 350 Civil Obligations Act; Czech Republic § 544 CC; Ecuador Art 1578 CC; Egypt Art 223 CC; El Salvador Art 1406 CC; Georgia Art 417 CC; France Art 1226 CC; Germany § 339 CC; Greece Art 405 CC; Estonia § 158 Law of Obligations Act; France Art 1226 CC; Italy Art 1382 CC; Iraq Art 170 CC; Iran Art 230 CC; Japan Art 420 CC; Jordan Art 364 CC; Republic of Korea Art 398 CC; Latvia Art 1716 CC; Lebanon Art 266 Code of Obligations and Contracts; Lithuania Art 6.71 CC; Luxembourg Art 1226 CC; Macau Art 799 CC; Mexico Art 1841 CC; Moldova Art 624 CC; Mongolia Art 232 CC; the Netherlands Art 6.91 CC; Nicaragua Art 1985 CC; Panama Art 1039 CC; Paraguay Art 454 CC; Peru Art 1341 CC; Poland Art 481(1) CC; Portugal Art 812 CC; Romania Art 1066 CC; Russia Art 330 CC; Slovakia § 544 CC; South Korea Art 398 CC; Spain Art 1152 CC; Switzerland Art 160 CO; Syria Art 224 CC; Taiwan Art 250 CC; Uruguay Art 1363 CC; Uzbekistan Art 325 CC; Venezuela Art 1257 CC; Vietnam Art 422 CC; Yemen Art 348 CC. In Cambodia the 2008 draft for a Civil Code contains a provision on 'liquidated damages etc' in Article 403.

The Civil Law approach has also been adopted by the Mixed Jurisdictions[5] as well as by the Scandinavian legal systems. The same holds true for the UNIDROIT Principles of International Commercial Contracts,[6] the Principles of European Contract Law[7] and the Draft Common Frame of Reference prepared by the Study Group on a European Civil Code[8].

This liberal approach to agreed sums naturally is not unrestricted. All of the legal systems following this approach have established mechanisms to protect the debtor. Some of them, especially in Eastern Europe and Central Asia start out by establishing specific writing requirements for agreed sums.[9] A few legal systems, especially in the Ibero-American region, stipulate upper limits for agreed sums, for example, that a sum must not exceed 5% of the obligation to which it is attached.[10]

Far more prominent, however, is the mechanism employed by almost all of the legal systems upholding clauses independent of their type – which is the reduction of excessive sums.[11]

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[5] See for the Israel Art 15 Contracts (Remedies for Breach of Contract) Law (the draft of the Civil Code no longer uses the term 'liquidated damages' but in Articles 568, 569 only speaks of 'agreed upon compensation') Philippines Art 1229 CC; South Africa Arts 1, 3 Conventional Penalties Act (1962).

[6] See the respective Art 7.4.13 PICC 1994 and 2004.

[7] See Art 9:509 PECL.

[8] Art III. 3:712 DCFR.

[9] See for Armenia Art 370; Belarus Art 312(1) CC; Georgia Art 418(2); Lithuania Art 6.72 CC; Moldova Art 625(1) CC; Mongolia Art 232.3 CC; Russia Art 330 CC; Slovakia § 544(2) CC. Whether the new Civil Code of the Czech Republic will uphold this requirement currently contained in § 544(2) CC could not be confirmed at the time of writing.

[10] See for Bolivia Art 534 CC; Brazil Art 412 CC; Mexico Art 1843 CC; Portugal Art 811(3) CC.

[11] See for Argentina Art 656 CC; Armenia Art 372 CC; Austria § 1336(2) CC; Belarus Art 314 CC; Brazil Art 413 CC; Bulgaria Section 92 OCA; Chile Art 1539 CC; China Art 114 Contract Law; Colombia Art 1601 CC; Croatia Art 354 Civil Obligations Act; Ecuador Art 1587 CC; Egypt Art 224(2) CC; El Salvador Art 1415 CC; France Arts 1231, 1152 CC; Georgia Art 420 CC; Germany § 343 CC; Greece Art 409 CC; Estonia § 162 Law of Obligations Act; France Art 1152 CC; Italy Art 1384 CC; Iraq Art 171(2) CC; Iran Art 230 CC; Jordan Art 364(2) CC; Republic of Korea Art 398(2) CC; Lebanon Art 266(2) Code of Obligations and Contracts; Lithuania Art 6.73(2) CC; Luxembourg Arts 1231, 1152 CC; Macau Art 801 CC; Mexico Arts 1844, 1845 CC; Moldova Art 630(1) CC; Mongolia Art 232(8) CC; the Netherlands Art 6.94 CC; Panama Art 1041 CC; Paraguay Art 459 CC; Peru Art 1346 CC; Poland Art 484(2) CC; Portugal Art 812 CC; Romania Art 1070 CC; Russia Art 333 CC; South Korea Art 398(2) CC; Spain Art 1154 CC; Switzerland Art 163 CO; Syria Art 225(2) CC; Taiwan Art 252 CC; Uzbekistan Art 326 CC; Venezuela Art 1260 CC; Yemen Art 354 CC. An unusual rule can be found in Article 403(3) of the 2008 draft for a Cambodian Civil Code which first holds that the agreed amount of damages must not be modified but adds that this may be done where the damage sustained is grossly higher or lower than the amount fixed.

## 3. AGREED SUMS IN CISG CONTRACTS POSSIBLE SOLUTIONS

Against this background, it is the purpose of this paper to outline the model the author believes best suited to achieve a certain level of uniform treatment of agreed sums in contracts governed by the CISG despite the remaining differences amongst the individual legal systems or families.[12]

It should be noted that the author had the honour to report this model also to the CISG Advisory Council in November 2010[13] and naturally hopes that at the end of the discussion it will be looked upon favourably.

### 3.1. General

The starting point is acknowledging that the CISG does not address agreed sums. Indeed, in the drafting process a proposal to do so was rejected on the grounds that it was too difficult to find a solution.

It should, however, be noted that these difficulties seem to have mysteriously disappeared three years after the CISG was finalised. In 1983 UNCITRAL was able to publish the Uniform Rules on Contract Clauses for an Agreed Sum Due upon Failure of Performance.[14] The fact that these were not established as a Convention but as a recommendation to domestic legislators may explain a fair portion of why seemingly no greater difficulties were encountered in the drafting process.

In addition these rules not only overcame traditional domestic distinctions already about thirty years ago, but for their main part contain solutions that are still convincing and display a high degree of clarity. It is to be regretted that this work appears to not have been fully appreciated in the drafting of the UNIDROIT Principles of International Commercial Contracts, the Principles of European Contract Law and the Draft Common Frame of Reference. All of them contain only a fragment of the law of agreed sums and are in this respect quite disappointing seeing that UNCITRAL had provided them with at least arguable suggestions of how this area of the law could have been developed at the international level, which were neither confirmed nor rejected.

In any case, with regard to the CISG it is undisputed that Article 6 CISG allows for the incorporation of an agreed sum into the contract.[15] It

[12] Some of these aspects are briefly outlined in P. Hachem, (2009), 217 et seq. The comprehensive analysis is laid down in P. Hachem, (2011), Chapter VI.

[13] Meeting of the CISG Advisory Council on 10 November 2010, Belgrade.

[14] Full text available at *http://www.uncitral.org/pdf/english/texts/sales/contract/vol14 p272 273 e.pdf.*

[15] See instead of all Foreign Trade Court of Arbitration Attached to the Serbian Chamber of Commerce, 15 July 2008, CISG online 1795; I. Schwenzer, P. Hachem, "Art.

is also undisputed that the CISG governs the formation of agreed sums.[16] The remaining difficulties primarily pertain to the protection of the debtor.

## 3.2. Protection of the Debtor

### *3.2.1. General*

It is clear that by virtue of Article 4 sentence 2(a) CISG the Convention does not govern the validity of agreed sums. This raises the question whether from the perspective of the CISG the protection of the debtor is a question of validity. Straightforwardly put: Yes it is.

Independent of whether the debtor is protected by not upholding agreed sums classified as penalties, whether the debtor is protected by reducing excessive sums or whether the debtor is protected by fixed upper limits to agreed sums, the question is always, whether and to what extent an agreed sum is upheld. From the perspective of the CISG that is a matter of validity.

The domestic mechanisms for the protection of the debtor therefore remain applicable. The exception to this are domestic formal requirements for agreed sums which are pre-empted by Article 11 CISG.

### *3.2.2. Application of Domestic Tests to CISG Contracts*

The mere fact that domestic mechanisms on the protection of the debtor apply also to agreed sums in contracts governed by the CISG does not necessitate that the Convention is without influence on the way in which these domestic mechanisms are applied. It is well established in the field of standard terms that domestic mechanisms dealing with their validity must be applied in light of an international standard.[17] This standard is then to be derived from the policies embodied in the CISG. In my opinion it is unjustifiable to restrict this approach to standard terms. Rather, it must be used for all terms, including agreed sums.

To be clear on this point: It is submitted that the excessiveness of an agreed sum must not be determined by domestic policies but by the policies of the CISG. It is further submitted that whether a sum is a genuine pre-estimate of loss must not be determined by domestic policies but by the policies of the CISG.

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4", *Commentary on the UN Convention on the International Sale of Goods* (eds. P. Schlechtriem, I. Schwenzer), Oxford University Press, Oxford 2010[3], para 17.

[16] See instead of all *ibid.* citing references.

[17] See F. Ferrari, "Art. 4', *Kommentar zum Einheitlichen UN Kaufrecht* (eds. P. Schlechtriem, I. Schwenzer), C.H.Beck, Munich 2008[4], para 22; concurring I. Schwenzer, P. Hachem, para. 44; P. Hachem, (2009), 223.

#### 3.2.2.1. Policies of the CISG

To determine the policies of the CISG we must look to its provisions and interpret them as required by Article 7(1) CISG in a manner that is acceptable to different legal systems of different legal traditions.

The starting point is Article 6 CISG. According to the unanimous view, this provision embodies the general principle of freedom of contract,[18] which is even considered to be one of the principles upon which the entire Convention is based in the sense of Article 7(2) CISG. This means that we are to make sure that when applying domestic mechanisms, we must be dedicated to the fact that we are interfering with the intention of professional market actors operating on an international scale.

Moving on to Articles 46 and 62 CISG we see that both parties may claim specific performance under the Convention. This means that the Convention is familiar with the principle of *pacta sunt servanda*, that is that contracts must be kept.

Finally, we must look to Article 74 CISG, the general provision on the calculation of damages. Here, it is undisputed and confirmed by the CISG Advisory Council in Opinion No. 6 that the CISG provisions on damages express the general principle of full compensation.[19]

Thus, in summary, the application of domestic mechanisms for the protection of the debtor against agreed sums must respect as far as possible the will of the parties; it must respect the principle of *pacta sunt servanda* and it must respect party attempts to ensure full compensation by way of an agreed sum.

#### 3.2.2.2. Deterring Breach of Contract by Agreed Sums in CISG Contracts

It is at this point that we encounter the question whether parties may incorporate agreed sums that are designed to deter breach of contract and to compel the debtor to perform. You will remember that this is the dividing line between traditional Civil Law and Common Law approaches.

It is the author's position that agreed sums in contracts governed by the CISG do not fail any domestic mechanism simply because of the fact that they seek to induce performance by the debtor.

For the Civil Law legal systems it is easy to accept an international standard that vests the parties with the freedom to induce performance by

[18] See instead of all I. Schwenzer, P. Hachem, supra (n. 17), Art. 6, para. 8 citing references.

[19] See CISG AC, Opinion No. 6: *Calculation of Damages Under Article 74* (Rap porteur: Gotanda), Black Letter Rule 1.

way of an agreed sum. For Common Law legal systems drawing such an inference from the CISG for the practical application of their traditional genuine pre-estimate of loss test is less obvious. However, in my opinion, concerns of that nature today can be accommodated.

First of all, the traditional Common Law approach is increasingly challenged. For reasons of time I may simply present you a highlight reel of the statements made to that effect. For example, Lord DIPLOCK stated: "I will make no attempt, where so many others have failed, to rationalise this common law rule".[20] The well known American Court of Appeal Judge RICHARD POSNER is even more outspoken. In his view the traditional Common Law approach is an "anomaly",[21] its underlying ratio "mysterious"[22] and "one of the abiding mysteries of Common Law"[23] which turns out to be an "anachronism especially in cases in which commercial enterprises are on both sides of the contract"[24]. Other statements both in court decisions and scholarly writings speak of a blatant interference with the freedom of contract[25] or quite simply of an accident of legal history[26].

Second, the principle of *pacta sunt servanda* has seen increasing strengthening throughout the Common Law world. This finding in and of itself warrants a separate presentation, and it is hard for me to resist going into details now.[27] For present purposes, however, I shall only briefly draw your attention to the fact that the so called doctrine of efficient breach of contract has never found its way into practice and is by what I perceive to be the majority view rejected also in academia as the delusion that it is. Furthermore, the traditional disdain for the concept of specific performance has lessened at least in the United States and in Canada. And although in England it is only rarely granted, the discussion has been re-

[20] *Robophone Facilities Ltd. v. Blank* [1966] 1 WLR 1428 at 1446.

[21] See *XCO International, Inc v. Pacific Scientific Company*, US Court of Appeals (7th Cir), 24 May 2004, 369 F3d 998 at 1001: 'Courts don't review the other provisions of contracts for reasonableness; why this one?'

[22] See *XCO International, Inc v. Pacific Scientific Company*, US Court of Appeals (7th Cir), 24 May 2004, 369 F3d 998 at 1001.

[23] See *XCO International, Inc v. Pacific Scientific Company*, US Court of Appeals (7th Cir), 24 May 2004, 369 F3d 998 at 1001.

[24] See *XCO International, Inc v. Pacific Scientific Company*, US Court of Appeals (7th Cir), 24 May 2004, 369 F3d 998 at 1002. Already at p 1001 Judge Posner had point ed out that 'ironically, it is the larger firm, PacSci, that is crying 'penalty clause".

[25] *Elsley v. JG Collins Insurance Agencies Ltd.*, Supreme Court of Canada, 7 March 1978, [1978] 2 SCR 916 at 937 per Judge Dickinson.

[26] U. Mattei, "The Comparative Law and Economics of Penalty Clauses in Con tracts", *American Journal of Comparative Law* 43/1995, 433

[27] See for details on the modern tendencies in Common Law jurisdictions P. Hachem, (2011), 83 115.

vived in recent times also in England, in particular regarding long-term contractual relationships. In any case, all of the uniform projects acknowledge the availability of the claim for specific performance and this does not seem to have raised particular difficulties in the drafting process. For the United States specifically it is worth mentioning a 1990 survey of 1400 court decisions where the author concludes that granting specific performance tends to be the rule rather than the exception[28] – twenty years ago that is and the trend has not been reversed.

Third, the understanding of the principles underlying the law of damages has shifted from a pure economic perspective to one that focuses on the protection of performance.[29] In Canada punitive damages are now available in case of bad faith breach of contract independent of whether a tort has been committed.[30] In the United States such tendencies are discernible in the fields of insurance and employment law. In England a significant view anticipates this to be an at least inevitable if not welcome development of English law in the future.[31] Indicative of this development is the decision of the English House of Lords in *Attorney-General v. Blake*.[32] Indeed the facts of this case involving a side switching secret agent who made a profit by divulging internal information in his autobiography thereby breaching his confidentiality obligation are unusual. However, this does not change the fact that their Lordships stripped this "notorious self-confessed traitor"[33] of the profit he had derived from the breach although no loss had occurred.

In light of these three developments it is submitted that today it is acceptable for Common Law legal systems to infer from the CISG that it vests parties with the freedom of contract under Article 6 to strengthen the principle of *pacta sunt servanda* in Articles 46 and 62 by making use of an agreed sum that in the same way as Article 74 protects performance.

Hence, in the author's opinion an agreed sum in a contract governed by the CISG cannot be struck out by the genuine pre-estimate of

[28] D. Laycock, "The Death of the Irreparable Injury Rule", *Harvard Law Review* 103/1990, 689

[29] For details see P. Hachem, (2011), 89 101.

[30] The leading case is *Whiten v. Pilot Insurance Co*, Supreme Court of Canada, 22 February 2002, [2002] 1 SCR 595.

[31] See R. Cunnington, "Should Punitive Damages be Part of the Judicial Arsenal in Contract Actions?", *Legal Studies* 26/2006, 377; J. Edelman, "Exemplary Damages for Breach of Contract", *Law Quarterly Review* 117/2001, 539; A. Burrows, *Remedies for Torts and Breach of Contract*, Oxford University Press, Oxford 2003[3], 409 et seq.

[32] [2001] 1 AC 268 (HL).

[33] Quote from *Attorney General v. Blake* [2001] 1 AC 268 (HL) at 275 per Lord Nicholls of Birkenhead.

loss test on the sole grounds that it is designed to deter breach of contract and compel the debtor to perform.

The model suggested here in fact enables Common Law judges and arbitrators to escape domestic constraints in the context of international sales contracts without forcing them to abandon domestic structures. This takes care both of their concerns as to the present state of their domestic law as well as of their concern that they do not see themselves in the position to change the traditional domestic situation, as at least in the international sale of goods approximation to their preferred position is possible.

On a broader scale, the model advocated here promotes the harmonisation of the outcomes of validity questions relating to clauses that are standard features in sales contracts.

## 4. CONCLUSION

The model of dealing with agreed sums suggested here asks for strict approach to the uniform application of the CISG under Article 7(1) by maintaining the policies of the Convention also where it is necessary of have domestic law interfering. It further requires to be strict about the purpose of the Convention to help approximating, harmonising and converging domestic systems in the area of international sales.

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# TYPICALLY GERMAN? TWO CONTENTIOUS GERMAN CONTRIBUTIONS TO THE CISG

*The paper discusses two contentious German contributions to the CISG. The first issue is the so called reasonable use test which is applied as part of the funda mental breach doctrine. The second issue is an intricate doctrinal debate about the relationship between the right to avoid the contract and the right to claim damages for the performance interest.*

Key words: *CISG. – Fundamental breach. – Reasonable use. – Performance interest. – Avoidance. – Damages.*

## 1. Introduction

It is common knowledge that the UN Convention on the International Sale of Goods (CISG)[1] has been a success story. An impressive number of states have acceded to the Convention, there is a considerable body of case law (which is made accessible by fabulous websites such as Al Kritzer's Pace Database[2] or CISG Online,[3] and, last but not least, the amount of academic writing on the Convention is overwhelming. From the very beginning, German courts and academics have whole-heartedly embraced the new instrument, be it by applying it, be it by writing on it.

[1] The official English text of the UN Convention on the International Sale of Goods (1980) (CISG) can be found under *http://www.cisg.law.pace.edu/cisg/text/treaty. html*, 23 February 2011.

[2] Electronic Library on International Commercial Law and the CISG, *http://www. cisg.law.pace.edu*, 23 February 2011.

[3] CISG Online, *http://www.cisg online.ch*, 23 February 2011.

In doing so, they have brought a number of contentious doctrines to the Convention, for example the (former) strict interpretation of the inspection and notice periods in Art. 38, 39 CISG[4] or the restrictive approach towards the incorporation of standard terms.[5] The present paper aims at discussing two other German "contributions" to the CISG which both have to do with the structure of remedies under the Convention.

## 2. THE REASONABLE USE DOCTRINE

### 2.1. Short outline of the buyer's standard remedies

The buyer's standard[6] remedies under the CISG are set out in Art. 45 CISG: "If the seller fails to perform any of his obligations under the contract or this Convention, the buyer may: (a) exercise the rights provided in Art. 46 to 52 CISG; (b) claim damages as provided in Art. 74 to 77 CISG." This means that the buyer can resort to the following remedies, provided that their respective requirements are met: (1) performance, including substitute delivery and repair; (2) avoidance of the contract; (3) reduction of the purchase price; (4) damages. The most defining features of these provisions shall be shortly outlined in the following paragraphs.

#### *2.1.1. Performance*

Art. 46 CISG governs the buyer's right to claim performance from the seller. Art. 46(1) CISG deals with the general claim for performance. Art. 46(2) and (3) CISG provide specific rules for substitute delivery or repair in cases where the seller has delivered goods that do not conform with the contract. Repair is rather easy to get under the CISG: according to Art. 46(3) the buyer has the right to require the seller to remedy the lack of conformity by repair, unless this is unreasonable having regard to the circumstances. In contrast, the provision on substitute delivery (Art.

[4] ...about which a veritable song has been written..., see "The CISG Song by Professor Harry Flechtner" at *http://www.cisg.law.pace.edu*. For more detail on this issue, and in particular on the "noble month" rule suggested by Ingeborg Schwenzer, see I. Schwenzer, "National Preconceptions That Endanger Uniformity", *Pace International Law Review* 19/2007, 103 and I. Schwenzer, in: P. Schlechtriem, I. Schwenzer, *Commentary on the UN Convention on the International Sale of Goods*, Oxford University Press, Oxford, 2010³, Art. 39 para. 17.

[5] See (German) Bundesgerichtshof, 31 October 2001, *CISG Online* No. 617 and the critical discussion by M. Schmidt Kessel, in: P. Schlechtriem, I. Schwenzer, *Commentary on the UN Convention on the International Sale of Goods*, Oxford University Press, Oxford, 2010³, Art. 8 paras. 57 etc.

[6] In specific types of scenarios, e.g. partial delivery, excess delivery, anticipatory breach, instalment contracts, the CISG modifies or supplements these standard remedies in specific provisions, e.g. Art. 50, 51, 71 etc.

46(2) CISG is more restrictive: The buyer can only claim delivery of substitute goods if the lack of conformity constitutes a fundamental breach of contract (Art. 25 CISG), i.e. if the breach is particularly serious.

#### *2.1.2. Avoidance*

In principle Art. 49(1) CISG limits avoidance to cases of fundamental breach (lit. (a)). The only exception to that rule is Art. 49(1) lit. (b) CISG which allows the buyer to "upgrade" a non-fundamental breach to one which justifies avoidance by fixing an additional period of time for performance under Art. 47 CISG. This possibility is, however, limited to cases of non-delivery.[7] In other cases than non-delivery the Convention does not give the buyer the chance to upgrade a non-fundamental breach by using that mechanism, which is, based on its German roots, often called the "*Nachfrist*-procedure".

#### *2.1.3. Price reduction*

Art. 50 CISG gives the buyer the right to reduce the contract price if the goods do not conform to the contract. The provision explicitly provides that the seller's right to cure (Art. 48 CISG) takes priority over the buyer's right to reduce the price.

#### *2.1.4. Damages*

Any breach of contract by the seller will give the buyer a right to claim damages according to Art. 45(1) lit. (b) CISG. Further details of the damages claim are governed by the general rules in Art. 74 to 77 CISG.

Damages are not fault-based in the CISG. In principle, liability is strict, but there are certain grounds of exemption in Art. 79, 80 CISG (impediments beyond the seller's control, failure caused by the buyer himself). Art. 74 CISG contains a further limitation on claims for damages: Damages may not exceed the loss which the party in breach could have foreseen as a possible consequence of the breach (foreseeability rule or contemplation rule).

### 2.2. "Avoiding avoidance" and the fundamental breach doctrine

The most defining feature of the system of remedies in the CISG is that it aims at keeping the contract alive as long as possible in order to avoid the necessity to unwind the contract. The prime consequence of this

[7] Cf. (German) Oberlandesgericht Frankfurt, 18 January 1994, *CISG Online* No. 123; M. Müller Chen, "Art. 49", *Commentary on the UN Convention on the International Sale of Goods* (eds. P. Schlechtriem, I. Schwenzer), Oxford University Press, Oxford, 2010[3], para. 15.

is that avoidance of the contract will only be available as a remedy of last resort.[8]

In taking that approach the CISG is in line with (and actually a very important cause for) an international trend to deviate from the old traditions of the Aedilition remedies in Roman law which – as a general rule[9] – regarded termination for non-conformity as a rather easily available remedy. This modern trend has arisen during the 20th century.[10] Several modern sales laws (such as the new German law[11] or Scandinavian laws[12]) and international instruments (such as the Unidroit Principles[13] or the Principles of European Contract Law[14]) also regard the termination of the contract as a remedy of last resort.[15]

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[8] See for example (German) Bundesgerichtshof, 3 April 1996, *CISG Online* No. 135 ("...last possibility for the creditor..."); (Swiss) Bundesgericht, 28 October 1998, *CISG Online* No. 413; I. Schwenzer, "Art. 25", *Commentary on the UN Convention on the International Sale of Goods* (eds. P. Schlechtriem, I. Schwenzer), Oxford University Press, Oxford, 2010³, para. 21a; P. Huber, A. Mullis, *The CISG*, Sellier European Law Publishers, Munich 2007, 181 etc. See in more detail P. Huber, "CISG The structure of remedies", *Rabels Zeitschrift für ausländisches und internationales Privatrecht* (RabelsZ) 71/2007 13, 18 etc. It should be noted that the objective to save the contract and to avoid restitution may also have effects on other remedies such as claims for performance, claims for damages and the right to reduce the contract price. These issues will, however, not be discussed here.

[9] Under the ius commune, this was disputed; see R. Zimmermann, *The Law of Obligations, Roman Foundations of the Civilian Tradition*, Oxford University Press, Oxford 1996, 325 326, 329.

[10] For a comparative overview see: H. Sivesand, *The Buyer's Remedies for non conforming Goods*, Sellier European Law Publishers, Munich 2005, 68 etc.; M. Torsello, *Common Features of Commercial Uniform Commercial Law Conventions*, Sellier European Law Publishers, Munich 2004, 187 etc.; P. Huber, "Comparative Sales Law", *The Oxford Handbook of Comparative Law* (eds. M. Reimann, R. Zimmermann), Oxford University Press, Oxford 2006, 938, 960 etc.

[11] § 323 Bürgerliches Gesetzbuch (BGB) [cf. Gesetz zur Modernisierung des Schuldrechts vom 26.11.2001, Federal Law Gazette I No. 61/2001]. For more detail on these rules see R. Zimmermann, *The New German Law of Obligations*, Oxford University Press, Oxford 2005, 66 etc.

[12] Cf. J. Lookofsky, "The Scandinavian Experience", *The 1980 Uniform Sales Law, Old Issues Revisited in the Light of Recent Experiences* (ed. F. Ferrari), Sellier European Law Publishers, Munich 2003, 95, 113.

[13] Art. 7.3.1. UNIDROIT Principles.

For the English text of the Principles see UNIDROIT Principles of International Commercial Contracts 2004, *http://www.unidroit.org/english/principles/contracts/main.htm*, 23 February 2011.

[14] Art. 9:310 Principles of European Contract Law (PECL).

For the text of the PECL see Commission on European Contract Law: Principles of European Contract Law, *http://frontpage.cbs.dk/law/commission on european contract law/*, 23 February 2011.

[15] P. Huber, A. Mullis, 181 182.

In order to achieve that objective the CISG primarily relies on the fundamental breach doctrine. This is evidenced not only by the fact that avoidance generally (i.e. except in cases of non-delivery where the buyer has chosen the *Nachfrist* – mechanism) requires a fundamental breach, but also by the rule in Art. 46(2) CISG which states that the buyer can claim delivery of substitute goods only if the non-conformity of the originally delivered goods amounts to a fundamental breach.

This leads to the question when a breach is fundamental. At first glance, Art. 25 CISG seems to provide the answer by stating that a breach is fundamental "if it results in such detriment to the other party as to substantially 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". On closer analysis, however, it becomes clear that the formula in Art. 25 CISG needs to be concretized. And, indeed, there is an impressive body of case law on when a seller's breach is or is not fundamental.[16]

### 2.3. Three fundamental breach criteria

Based on the case law, it is submitted that there are at least three criteria which can (not necessarily must) be taken into account when deciding on whether or not the seller's breach is fundamental.

The first criterion is self-evident and generally accepted: The parties may in their contract define which of the requirements shall be fundamental in the sense that their breach will lead to a right of avoidance.[17]

The second criterion is the seriousness of the breach.[18] The fact that this factor should be taken into account, is probably beyond dispute. It is another question, however, how much weight one should attach to it. To put it differently: Does a serious breach as such justify avoidance? The answer probably is: No. There is – at least – one further factor which may come into the equation and prevent the breach from being fundamental, namely the seller's right to cure.

After a history of intense debate[19], the predominant opinion today effectively gives the seller a right to cure the non-conformity unless the buyer has a legitimate interest in immediate avoidance of the contract (for

[16] *Ibid.*, 216 etc.

[17] (German) Bundesgerichtshof, 3 April 1996, *CISG Online* No. 135; I. Schwenzer, para. 21a.

[18] See (German) Oberlandesgericht München, 2 March 1994, *CISG Online* No. 108; U.S. Court of Appeals, 2nd Circuit, 6 December 1995, *CISG Online* No. 140 ("Delchi vs. Rotorex").

[19] P. Huber, A. Mullis, 218 etc.

example because he had good reasons to lose his trust in the seller's ability to perform or because time was of the essence). As a consequence, even a serious breach will as a rule not be fundamental if the seller effectively (offers to and does) cure it under Art. 48 CISG.[20]

### 2.4. The reasonable use doctrine – a fourth criterion?

If one takes the example of non-conformity, on the basis of the three criteria outlined above, the seller's breach would be fundamental if the non-conformity is serious and cannot be cured (assuming that there is no contractual agreement on when a breach is fundamental).

In the famous cobalt sulphate case, however, the German Supreme Court in civil matters (*Bundesgerichtshof*) has applied a fourth factor which is often referred to as the reasonable-use-test.[21] A shortened and somewhat simplified version of the facts runs as follows: The seller had sold different quantities of cobalt sulphate to the buyer, a German company. It was agreed that the goods should be of British origin.[22] The buyer tried to avoid the contract on several grounds. One of the buyer's arguments was that the cobalt sulphate originated from South Africa and that this caused him serious difficulties, as he "primarily" exported to India and South East Asia where there was an embargo on South African products.

The court did not follow that line of argument because the buyer had neither been able to name potential buyers in those countries or to adduce evidence of earlier sales in these countries, nor had he even alleged that it would have been impossible or unreasonable to make another use of the goods in Germany or to export them into another country. The actual decision of the case thus is based on procedural reasons, namely on the lack of proof by the buyer.[23]

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[20] See for example (German) Oberlandesgericht Köln, 14 October 2002, *CISG Online* No. 709; (German) Oberlandesgericht Koblenz, 31 January 1997, *CISG Online* No. 256; (Swiss) Handelsgericht des Kantons Aargau, 5 November 2002, *CISG Online* No. 715; M. Müller Chen, para. 15; P. Huber, A. Mullis, 218 etc.

[21] (German) Bundesgerichtshof, 3 April 1996, *CISG Online* No. 135 ("cobalt sul phate"); cf. also (German) Oberlandesgericht Köln, 14 October 2002, *Internationales Handelsrecht* (IHR) 2003, 115, 116 CISG Online No. 709; (German) Oberlandesgericht Frankfurt, 18 January 1994, *Neue Juristische Wochenschrift* (NJW) 1994, 1013, 1014 *CISG Online* No. 123.

[22] The seller was also obliged to supply certificates of origin and of quality. The consequences of the breach of his documentary obligations will not be discussed here, however.

[23] The situation was the same in the case of (German) Oberlandesgericht Frank furt 18 January 1994, *NJW* 1994, 1013, 1014 CISG Online No. 123: A stock of shoes had been sold from Italy to Germany. The buyer refused to pay on the ground that he had avoided the contract because the goods did not conform to the contract. The court found against the buyer on the ground that he had not alleged and proven to a sufficiently de

It is, however, an interesting question what the court would have decided if the buyer actually had proven that he could not resell the goods in a considerable part of the world. In light of the reasoning adopted, it seems likely that the court would have told the buyer to look for a country where there was no embargo, sell the goods there (albeit for a lower price) and claim damages for the losses incurred by doing so (for instance for the price difference).

The facts of a case decided by the Swiss Bundesgericht in 1998 were more straightforward.[24] The contract was for the sale of frozen meat. The meat which was delivered did not live up to the agreed standards. As a consequence the value of the delivered goods was about 25 percent less than agreed. The Swiss Bundesgericht explicitly referred to the cobalt sulphate judgment of the German Bundesgerichtshof and held that there was no fundamental breach as the delivered meat could have been reasonably sold on by the buyer for a lower price (which might then have been compensated by a claim for damages).

Both the highest German[25] and Swiss[26] courts therefore attach attached considerable weight to the question whether the buyer can make some other reasonable use of the non-conforming goods. They have for example, refused the right to terminate the contract if it is possible and reasonable for the buyer to resell the goods in the ordinary course of business, albeit for a lower price.

It is, however, by no means certain that it will find world-wide support. There are judgments which regard the breach as fundamental without using the reasonable-use-criterion, the most well-known of which[27] is the American case of Delchi vs. Rotorex.[28] The parties had contracted for

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tailed extent that the goods were defective and that it would have been unreasonable to make some other use of them.

[24] (Swiss) Bundesgericht, 28 October 1998, *CISG Online* No. 413.

[25] (German) Bundesgerichtshof, 3 April 1996, *CISG Online* No. 135 ("cobalt sul phate"); cf. also (German) Oberlandesgericht Köln, 14 October 2002, *IHR* 2003, 115, 116 *CISG Online* No. 709; (German) Oberlandesgericht Frankfurt, 18 January 1994, *NJW* 1994, 1013, 1014 *CISG Online* No. 123.

[26] (Swiss) Bundesgericht 28 October 1998, CISG Online No.413.

[27] Another case is: (German) Oberlandesgericht Hamburg, 26 November 1999, *IHR* 2001, 19, 21 *CISG Online* No. 515. The position of the French courts is not clear yet: cf. (French) Cour de Cassation, 23 January 1996, *CISG Online* No. 159, where arti ficially sugared wine was regarded as a fundamental breach without examining the ques tion of whether it could have been resold (for instance for industrial purposes), but on the other hand stating that the wine was not suited for consumption thus virtually excluding the very use wine is made for; (French) Cour de Cassation, 26 Mai 1999, *CISG Online* No. 487, where the Court may have been indirectly influenced by the fact that the goods were not usable.

[28] U.S. Court of Appeals, 2nd Circuit, 6 December 1995, *CISG Online* No. 140 *UNILEX* E.1995 31 ("Rotorex Corp. v Delchi Carrier S.p.A".).

the sale of air conditioner compressors. The compressors delivered by the seller were less efficient than the sample model and had lower cooling capacity and consumed more energy than the specifications indicated. The Court of Appeals for the Second Circuit held that there was a fundamental breach by the seller because "the cooling power and energy consumption of an air conditioner compressor are important determinants of the product's value".[29] The court did not take into account whether the buyer could have reasonably expected to resell the defective goods or make any other use of them and claim damages or price reduction.

Delchi and cases like it do not necessarily mean that the reasonable use criterion should not be applied at all. It is possible to explain them on the basis that there was no other reasonable use to which the goods could have been put and that thus the court did not have to address directly the reasonable use issue. To date, therefore, no definite answer exists in the case law as to whether the reasonable-use-criterion will find general acceptance.[30]

It is submitted, however, that the reasonable use criterion is in accordance with the CISG objective of restricting the availability of avoidance as a remedy.[31] If the right to terminate the contract requires proof that the buyer has essentially lost what he was entitled to expect under the contract, then it does make sense not to allow him to avoid the contract where he still can make some reasonable use of the goods. In such a situation, the award of damages is an adequate remedy.[32]

It is further submitted, however, that the concept of reasonable use should be given a restrictive interpretation. Particular importance should be attached to the commercial background of the transaction which may lead to the result that there was no reasonable use for the buyer (or even to the conclusion that there should be no "reasonable use" analysis at all).[33]

Thus, where it appears from the commercial background of the contract that time and/or quality were of the essence of the contract, the delivery of non-conforming goods will amount to a fundamental breach from the outset and there will therefore be neither room nor justification for embarking on a "reasonable use" analysis.

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[29] U.S. Court of Appeals, 2nd Circuit, 6 December 1995, *CISG Online* No. 140 *UNILEX* E.1995 31 ("Rotorex Corp. v Delchi Carrier S.p.A.").

[30] P. Huber, A. Mullis, 230.

[31] See for further considerations for instance I. Schwenzer "CISG AC Opinion No. 5: The buyer's right to avoid the contract in case of non conforming goods or docu ments", *IHR* 1/2005, 35.

[32] P. Huber, A. Mullis, 230 etc.

[33] *Ibid.*

So too, where the buyer needs the goods for use in his production process it will often appear from the commercial background that he cannot reasonably use materials of a lower quality. The position may, however, be different if the buyer also produces goods of a lower quality so that he can simply use the delivered goods for that part of his business (provided of course that he has a need for the delivered materials there and that he will not create an overload of material on stock there). Where the buyer buys goods for resale similar criteria should apply. Here, much will turn on the question whether the buyer only sells high-quality goods or whether he also deals in goods of a lower quality and could use the goods delivered by the seller for that line of his business. Thus, the mere fact that the goods are resaleable by the buyer does not mean that there will be no fundamental breach. If for instance the buyer runs an exclusive boutique, it would not be reasonable to expect him to use part of his upmarket showroom for the sale of low-quality goods at discount prices. In this respect, considerable importance should be given to the issues of reputation, brand image and related matters. The reasonable use test should not lead to the result that the buyer is left with goods that he cannot sell on without risking damage to his reputation.[34]

## 3. THE LOVE OF INTRICATE DOCTRINAL EXERCISE

Another aspect which German scholars to a certain extent may have brought to the CISG is the love of intricate doctrinal exercise. German legal education and academia has always indulged in thorough systematic and doctrinal exercises. Sometimes this has led to remarkably elaborate codes, sometimes it has simply complicated matters where it was not necessary. Be that as it may, the fact that many German academics have whole-heartedly embraced the CISG from its very beginning and started to spend their (and their assistants') ample research time writing on it, has undoubtedly influenced the character of legal debate on the CISG. This can be exemplified by a discussion on a very specific issue which has its roots in certain particularities of the (former) German law of obligations and which has found its way into the CISG. This issue actually is a follow-up problem resulting from the *ultima-ratio* doctrine: if the CISG does not allow the buyer to avoid the contract (for example because the breach is not fundamental), may he nevertheless conduct a cover purchase and claim the price as damages under Art. 45(1)(b)?

Allowing the buyer to conduct a cover purchase seems to conflict with the specific policy considerations of the law of termination – in particular the fundamental breach requirement, but also the time limits provided for in Art. 49(2) CISG. If the buyer could conduct a cover purchase and claim the price as damages from the seller, so the argument goes, he

[34] *Ibid.*, 231 etc.

would be placed in the same position as if he had avoided the contract – although the buyer does not have a right to avoid the contract.[35] A strict approach therefore would be, not to allow a buyer to make use of Art. 75's formula, i.e., not to allow him to calculate his damages based on the costs of a cover purchase.

A closer look reveals that the answer needs to be more complex. Doubts are raised by the fact that under Art. 77 CISG the buyer is obliged to mitigate his damages. Imagine that the buyer would lose a 1 million € profit if his resale of the bought goods were cancelled as a result of the non-conformity of the goods his seller had delivered. Imagine further that it would cost him a mere 500,000 € to buy new goods in the market – i.e. that the costs of the cover purchase are lower than the amount of the expected loss. In such a scenario it seems to be reasonable – and to accord with the seller's interest – that the buyer conducts a cover purchase to mitigate his damages by € 500,000. In fact, the CISG even obliges the buyer to do so: According to Art. 77, the buyer "must take such measures as are reasonable in the circumstances to mitigate the loss, including loss of profit, resulting from the breach".

Against this background *Peter Schlechtriem* has advocated a more subtle approach to the issue.[36] In *Schlechtriem's* view the buyer should be able to conduct the cover purchase and to claim the costs of this cover purchase as damages. In order not to undermine the CISG's strict avoidance requirements *Schlechtriem* suggests that the buyer, as a general rule, should not be allowed to reject (or revoke his acceptance of) the non-conforming goods and to refuse to pay the purchase price, simply because

[35] See for concerns in this regard (Austrian) Oberster Gerichtshof, 6 February 1996, *CISG Online* No. 224; (Austrian) Oberster Gerichtshof, 14 January 2002, *CISG Online* No. 643; (German) OLG Bamberg, 13 January 1999, *CISG Online* No. 516; (German) AG Nordhorn, 14 June 1994, *CISG Online* 259; P. Mankowski, in: *Münchener Kommentar HGB*, C. H. Beck, Munich 2007², Art. 75 para. 3; M. Müller Chen, "Art. 45", *Commentary on the UN Convention on the International Sale of Goods* (eds. P. Schlechtriem, I. Schwenzer), Oxford University Press, Oxford, 2010³, para. 27; U. Magnus, in: *Staudinger, Kommentar zum Bürgerlichen Gesetzbuch*, Sellier & de Gruyter, Berlin 2005, Art. 45 para. 22; P. Huber, A. Mullis, 282; N. Schmidt Ahrendts, *Das Verhältnis von Erfüllung, Schadensersatz und Vertragsaufhebung im CISG*, Mohr Siebeck, Tübingen 2007, 152 etc.

[36] P. Schlechtriem, Damages, avoidance of the contract and performance interest under the CISG (available at the Pace Database: *http://www.cisg.law.pace.edu/cisg/biblio/schlechtriem21.html*, last visited 23 February 2011); similarly I. Schwenzer, "Art. 74", *Commentary on the UN Convention on the International Sale of Goods* (eds. P. Schlechtriem, I. Schwenzer), Oxford University Press, Oxford, 2010³, para. 22; (Austrian) Oberlandesgericht Graz, 29 July 2004, *CISG Online* No. 1627; Karollus, *UN Kaufrecht*, Springer, Wien 1991, 155; J. Honnold, H.M. Flechtner, *Uniform Law for International Sales under the 1980 United Nations Convention*, Kluwer International Law, Alphen an den Rijn 2009⁴, para. 410.2. differentiating N. Schmidt Ahrendts, 152 etc.

he does not have a right to avoid the contract under Art. 49 CISG.[37] This approach leaves a buyer who has conducted a cover purchase with both the seller's non-conforming goods and the cover goods. Obviously, when claiming the costs of the cover purchase as damages from the seller, the buyer must subtract the value of the non-conforming goods which will remain with him or at his disposition. [38] Otherwise he would be unjustly enriched: he would have bought two deliveries at the price of one.

Thus, at a first glance, *Schlechtriem* seems to take a position which is fundamentally different from the strict approach. While the latter would not allow the buyer (who is not entitled to avoid the contract) to claim the costs of the cover purchase as (direct) damages under Art. 74 CISG, *Schlechtriem* would do so.

On a closer analysis, however, the difference between the two positions seems to dwindle. In fact, in many cases both lines of thought will lead to identical results in practice, or rather: they should lead to identical results if properly applied. *Schlechtriem* in essence allows the buyer to liquidate the cover costs (minus the value of the non-conforming goods) as a direct damage under Art. 74 CISG. The strict approach, if correctly applied, would have to reach the same result by another route. In fact, it appears to be widely accepted in case law and legal writing that the buyer can claim reimbursement of the costs which he incurs in taking reasonable mitigation measures as required by Art. 77 CISG.[39] Thus, while the strict approach would not allow recovery of the cover costs under Art. 74 CISG as such, it would have to accept the cover costs in their "disguise" as mitigations costs, provided of course that cover was reasonable and

[37] P. Schlechtriem, *ibid.* at I. e) does, however, suggest modifications to this gen eral rule. Thus, in his view, the seller may be under an obligation to take the goods back and sell them otherwise, if this is economically reasonable, for example where the costs of restitution are lower than the costs that would accrue if the buyer had to dispose of the goods. A further modification of the general rule applies in cases of non delivery. Here, Schlechtriem suggests that a buyer who has already made a cover purchase should no longer be entitled to claim performance under Art. 46 CISG, although the contract has not (and cannot) be avoided under Art. 49 CISG. M. Karollus, *UN Kaufrecht*, Springer, Wien 1991, 155 even allows the buyer to reject delivery.

[38] P. Schlechtriem, *ibid*. at I. e); apparently contra: J. Gotanda "AC Opinion No 6: Calculation of damages under CISG Art. 74" *IHR* 6/2007, para. 8; cf. *infra* IV.

[39] (German) Bundesgerichtshof, 25 June 1997, *CISG Online* No. 277; P. Huber, "Art. 77", *Münchener Kommentar zum Bürgerliches Gesetzbuch* (W. Krüger et al.), C.H. Beck, Munich 2008[5], para. 12; U. Magnus, in: *Staudinger, Kommentar zum Bürgerlichen Gesetzbuch*, Sellier & de Gruyter, Berlin 2005, Art. 77 para. 20; V. Knapp, "Art. 77", *Commentary on the International Sales Law* (eds. C. M. Bianca, M. J. Bonell), Giuffrè, Milan 1987, note 2.6; F. Enderlein, D. Maskow, *International Sales Law*, Oceana Publica tions, New York 1992, Art. 77 note 2; I. Schwenzer, Art. 77 para. 11. Opinions seem to differ only in regard to the question whether the claim for reimbursement should be based on Art. 74 or Art. 77.

required under Art. 77 CISG and that the value of the non-conforming goods which remain with the buyer has to be subtracted. In the pumps-case this would mean that the buyer is required under Art. 77 CISG to acquire additional pumps as cover for USD 500.000 and that he could get them reimbursed as mitigation costs (minus the value of the non-conforming goods).

On that basis, one might be inclined to regard the above-mentioned controversy as a typical academic exercise with little practical relevance.[40] One might further inclined to call it a "typically" German debate, for two reasons: First, most of the actors in the debate are German academics or courts. Secondly, the debate probably has its roots in certain particularities of the former German law of obligations (i.e. the law before the fundamental reform of the law of obligations in 2002). Former German law contained the general rule that termination of the contract could not be combined with a claim for damages. As, obviously, the concrete results of such a rule could be harsh and inadequate, German law developed a technique to circumvent these adverse consequences. Without going into detail, and very broadly speaking, this technique consisted in trying to avoid to actually "terminate" the contract. Rather than formally declaring termination, the creditor simply claimed damages and calculated the damages on the assumption that the contract would no longer be performed. These so-called "damages for non-performance" or "damages in lieu of performance" more or less produced results which were similar to those that would have arisen if the creditor had first terminated the contract and then claimed damages (which, as said, he was not allowed to do). In the present author's opinion, this wide-spread technique has made German lawyers rather sensitive towards the fact that one can reach the results of a termination of the contract by simply "calling it damages" and calculating the damages on the assumption that the contract is no longer performed. This could explain why German authors have discussed the above-mentioned issue of the cover purchase under Art. 74 CISG in such detail.

[40] In fact, the issue of "cover under Art. 74 CISG" has certain facets which would seem to make it relevant in practice. These facets, however, will have to be discussed in another paper.

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# THE BURDEN OF PROOF FOR THE NON-CONFORMITY OF GOODS UNDER ART. 35 CISG

*The article deals with the controversial question of which parties bears the burden to proof the non conformity of the goods at the time the risk passes. It analy ses the various approaches adopted practice and the CISG literature and advocates a graded approach balancing the allocation of the burden of proof with evidentiary privileges at the preceding evidentiary stage.*

Key words: *Burden of proof. Non conformity of the goods. Presumption.*

## 1. INTRODUCTION

In international sales transactions governed by the CISG sellers are required to deliver goods which conform in relation to their quantity, quality, description and packaging to the contractually agreed standard or the standards imposed by Art. 35 (2) CISG. In practice, disputes about the conformity of the goods are probably the most frequent single cause for legal actions.[1]

These actions are often fact driven. The parties are more in disagreement about the underlying facts of the dispute, than about legal consequences following from the facts once established. To take one of the examples from case law discussed below, the issue is more to determine

[1] P. Schlechtriem,P. Butler, *CISG*, 2009, para. 132; S. Eiselen, in: A. Kritzer et al., *International Contract Manual*, 2008, Vol. 4 § 89:1; H. Flechtner, "Funky Mussels, a Stolen Car, and Decrepit Used Shoes: Non Conforming Goods and Notice thereof under the United Nations Sales Convention", *Boston University International Law Journal* 2008, 3.

the quantities of the goods delivered than about the question of whether this quantity results in the non-conformity of the goods. In a considerable number of such disputes the outcome of an action largely depends on who bears the burden of proof for the various factual requirements necessary for the success of a claim raised. As has been correctly stated by an American authority: 'A courts allocation of the burden of proof becomes as important as the substantive rule itself'.[2]

In proceedings to determine the seller's liability for non-conformity, the first issue where the question as to an allocation of the burden of proof arises concern the conformity of the goods as such, i.e. whether the goods delivered were in conformity with the relevant standard at the time when the risk passes. In addition, as the buyer may pursuant to Art. 39(1) CISG 'lose the rights to rely on a lack of conformity of the goods if he does not give notice to the seller...within a reasonable time', in numerous actions the additional question arises who bears to burden of proof for the compliance with the notice requirements. Last but not least it may have to be determined who has the burden of proof for an eventual actual or constructive knowledge of the seller about the non-conformity which would exclude any reliance on a belated notice pursuant to Art. 40.

The following article will concentrate on the first question, i.e. that of the conformity of the goods. It is the central issue in the majority of cases and the gateway for all further questions.

## 2. SELECTED EXAMPLES FROM CASE LAW

The issue of burden of proof may arise in a number of different scenarios. The two most important scenarios are well evidenced by the following three decisions coming from various jurisdictions which turned on the burden of proof.

### 2.1. The 'wire-and-cable' case of the Swiss Supreme Court

In a decision of 7 July 2004 the Swiss Supreme Court had to deal with the delivery of a larger amount of wire and cable from an Italian seller to a Swiss buyer. Both parties had a long standing business relationship. The goods were picked up by the independent carrier directly at the place of the seller's supplier in Italy on 2 May. The driver signed a receipt for the entire consignment without making any prior check with respect to the quantity of the goods. The goods were delivered to the seller's place of business in Switzerland on the next day. Again the documents

[2] L. DiMatteo et al., *International Sales Law A critical analysis of CISG juris prudence*, New York, 2005, 172.

were signed without any quantity check by the seller's side manager. Several days later, when the seller tried to resell part of the goods it was discovered that the whole consignment relating to a particular bill of delivery was missing. Despite extensive searches at the seller's and the buyer's premises it was not possible to clarify the fate of the missing part. The buyer made only partial payment and the seller brought an action for the remaining price in the Swiss Courts. The Court or Appeal in Bern rejected the claim, holding that the seller had not discharged his burden of proof concerning amounts of goods delivered. The Swiss Supreme Court reversed the judgment holding that with the acceptance of the goods the burden of proof for their non-conformity shifted to the buyer.

### 2.2. *Chicago Prime Packers Inc. v. Northam Food Trading (US Court of Appeal 7th Cir.)*

The second decision concerned the delivery of pork ribs from the US corporation Chicago Prime Packers to the Canadian buyer Northam Food Trading. Chicago Prime Packers bought the frozen ribs from its supplier which had stored it in several of its cold-storage facilities.

On 24 April 2001, the goods were picked up by the trucking company selected by the buyer and delivered directly to the buyer's customer where they arrived one day later. The trucking company signed a straight bill of lading which indicated, however, that the 'contents and condition of contents of packages [were] unknown' at the time of receipt. There had been no proper inspection before the picking up of the goods nor upon their arrival at the customer's place. Irrespective of this also the customer acknowledged in a bill of lading that the ribs were 'in apparent good order' except for '21 boxes [that] were gauged' and were the meat on those boxes showed 'signs of freezer burns'. Due to an internal oversight Northam failed to pay Chicago as agreed upon 1 May. On 4 May, when the buyer's customer started to process pork loin ribs they notice that some ribs appeared to be in an off-condition. Inspections by the US Department of Agriculture first led to a stop of the production process. Northam immediately informed Chicago Prime Packers about the problems with the goods. Upon closer examination the goods were declared to be non-usable and had to be destroyed. As a consequence Northam refused to pay the price and Chicago Prime Packers started court proceedings for payment of the purchase price. The Federal District Court of the Northern District of Illinois as well as the Court of Appeal (7th Cir.) ordered payment rejecting Northam's set-off defense based on the alleged non-conformity of the goods. The courts held that Northam bore the burden of proof for the fact that the goods were already defective at the time the risk passed, i.e. when they had been taken over at the cold-storage. They held that the report of the USDA-inspector upon which Northam

relied did not confirm that the ribs examined were actually the ribs delivered by Northam. Moreover, it did not establish that the goods were not damaged upon transport or after their arrival at the buyer's customer.

Like in the first example, the decision concerns an action by the seller for the purchase price in which the buyer refused payment alleging non-conformity of the goods.

### 2.3. The 'powdered-milk case' of the German Supreme Court

The factual background underlying the third decision, rendered by the German Supreme Court on 9 January 2002, covers the second main scenario, where the buyer acts as claimant, trying to enforce his remedies for non-conformity. The dispute as such arose out of the purchase of powdered milk by a Dutch buyer from a German seller. Before sending the powdered milk to the buyer the seller carried out comprehensive sensory physical and microbiological examinations in line with the industry standard. The buyer also made several inspections through spot check without any special results. The powder was then shipped from the buyer to customers in Algeria and Aruba. The milk produced there from the powder had a rancid taste which, as it turned out later, was due to an infestation of the milk powder with inactive lipase, an enzyme. The problem was that inactive lipase can only be discovered through expensive test and not through the standard examination applied in the industry. According to the expert reports it could not be ruled out that the powdered milk was already infested by inactive lipase at the time when the risk passed. The seller, however, alleged that the infestation occurred during transportation which could also not be ruled out. Consequently the outcome of the case depended on the question of who bears the burden of proof. The German Supreme Court held that in principle the buyer had to prove that the good were non-conforming at the time of transfer of the risk. In the present case it assumed, however, a reversal of the burden of proof on the basis of non-harmonized German law, as the seller had in a previous letter acknowledged the non-conformity of the goods for at least a part of the powdered milk.

### 2.4. Characteristics of cases where the burden of proof potentially is relevant

The above mentioned decisions evidence that questions as to the burden of proof arise primarily in cases where the discovery of the non-conformity occurs a considerable time after the risk has passed. That applies obviously to hidden defects, which played a role in the German decision. More importantly, as evidenced by the Swiss and American decisions, also in most contracts involving carriage in the sense of Art. 31(1) (a) CISG the examination and eventual discovery of any defects occurs some time after the risk has passed. In these cases the risk passes at the

time the goods are handed over to the first carrier. The buyer, however, often gets its first chance to examine the goods for their conformity after their arrival at its place of business, following a more or less time consuming transport.[3]

A second but comparable category of cases, in which the allocation of the burden of proof may be crucial, is where the goods are used in combination with other products in a way that defects in the final product could have several different causes.[4]

In addition, questions as to the burden of proof – albeit in different form – may also arise where the alleged non-conformity of the goods is discovered directly at the time the risk passes. For example, the conformity of the goods may be dependent on whether the parties had agreed on a particular standard which may be higher or lower than the fall back standard in Art. 35(2)(a).

## 3. RELEVANT DISTINCTIONS: BURDEN OF PROOF, MEANS OF DISCHARGING THE BURDEN

Any meaningful discussion of the burden of proof requires first a definition what is understood by the concept and how it is distinguished from other concepts. The notion of 'burden of proof' has rightly been considered in one of the leading American textbooks on evidence to be one of the 'slipperiest members of the family of legal terms'.[5]

Leaving aside all national particularities which may influence the development and use of a certain terminology, two broad concepts can be distinguished which are sometimes jointly referred under the notion of 'burden of proof'. These are the burden of persuasion[6] on the one hand and the burden of adducing evidence[7]on the other hand. Or, as has been

[3] For a more detailed account of the proof problems arising from transportation see C. Antweiler, *Beweislastverteilung im UN Kaufrecht*, Insbesondere bei Vertragsverlet zungen des Verkäufers, Frankfurt 1994, 141 *et seq*.

[4] Audiencia Provincial de Barcelona (Spain), 20 June 1997 (dye for clothes), CISG Online 338 (Pace).

[5] *McCormick on Evidence*, West Group 1984[3], 965 (One ventures the assertion that 'presumption' is the slipperiest member of the family of legal terms, except its first cousin, 'burden of proof'); see also A. L. Linne, "Burden of Proof under Art. 35 CISG," *Pace International Law Review* 20/2008, 33, according to whom the content of the notion is also be influenced by the nature of the system in which it is used, whether it is an ad versarial system or whether it is an inquisitorial system.

[6] Other terms used include 'probative burden', 'the burden of proof on the plea dings' or 'the risk of non persuasion'; see *Phipson on Evidence*, London 2010[17], para. 6 02.

[7] Often also referred to referred to as 'evidential burden' see *Phipson on Evi dence,* para. 6 02.

stated by the Court of Appeal in Berne in the above mentioned 'wire and cable' case on the basis of the Germanic terminology:

> "In subjective terms, the party having the burden of proof bears the burden of factual substantiation: burden of proof in its objective sense means the risk of a party bearing the burden of facts not being sufficiently established".[8]

In civil cases, including disputes involving the CISG, the burden of proof, i.e. the burden of persuasion, and the burden of adducing evidence, i.e. the evidentiary burden, normally coincide.[9] That is, however, not necessarily the case[10] and since both terms refer to different stages of the evidentiary process they should be distinguished.

In any dispute involving in one way or another a seller's liability for non-conforming goods under Art. 35, the facts resulting in the non-conformity of the goods have to be pleaded to the court or arbitral tribunal and, if contested, have to be proven. In general, the claimant has to convince the court that upon the facts pleaded and assumed to be correct, its claim is justified. It is then for the defendant to contest either the correctness of Claimant's factual submissions or to plead additional facts which, if assumed to be correct, would justify a defense against the claim. If either party submits and relies for its case on facts which are contested by the other party, these facts have to be proven in an evidentiary process.

During this evidentiary process a party has to convince the court that its allegations of facts are true by adducing admissible evidence, relying on legal presumptions or other evidentiary means such as prima facie evidence. In all those cases, mentioned above, the parties may have considerable difficulties in proving positively that the goods either were or were not conforming at the time the risk passed. In some cases it may in the end even turn out to be impossible to prove the relevant facts with the required degree of probability or certainty imposed by the applicable standard of proof. This is the realm of the concept of burden of proof as understood in this contribution. It merely concerns the question of who should bear the consequences of a possible lack of evidence, i.e. the risk

[8] Appellationshof Bern (Appellate Court Bern, Switzerland) 11 February 2004 (wire and cable), *IHR* (2006), 149 (150), CISG Online 1191 at para. 3 (Pace).

[9] See for English Law, A. Zuckerman, *Zuckerman on Civil Procedure: Principles of Practice*, Sweet & Maxwell, London 2006[2], para. 21.39; for German and US law M. Henninger, *Die Frage der Beweislast im Rahmen des UN Kaufrechts*, Munich 1994, 29 *seq.*, 83 *seq.*, explaining also the different dependencies between the two concepts in both jurisdictions.

[10] For examples in the context of English law see A. Zuckerman, para. 21.36; for differences under German law which distinguishes between 'objektive Beweislast' (bur den of persuasion) and 'subjektive Beweislast' (burden of adducing evidence) where the 'konkrete subjektive Beweislast' may shift during the process and therefore differ from the burden of persuasion M. Henninger, 29 *seq.*

of error or non-persuasion.[11] How the burden of proof is allocated is in the end a moral and political decision.[12]

## 4. BURDEN OF PROOF AS A MATTER REGULATED BY THE CISG

### 4.1. Overview on the different views in practice

Art. 35 does not contain any express rule on the allocation of the burden of proof. Neither does it regulate explicitly who has to prove the relevant standard for conformity, nor who has to prove that the goods were not conforming to the applicable standard at the relevant time.

In light of that and other considerations, a number of commentators consider the burden of proof to be an issue which is beyond the CISG's scope of application and consequently be governed by the non-harmonized national law.[13] One of the main arguments for that view comes from the drafting history. It has been submitted that 'delegations speaking on the burden-of-proof were all quite definite hat it was not the intention to deal in the Convention with any questions concerning the burden-of-proof. The consensus was that any such questions must be left to the court as a matter of procedural law'.[14] In addition, these commentators rely on the rejection of a proposal including language allocating the burden of proof in relation to the nonconformity by the drafts as, as stated in the UNCITRAL report, 'it was considered inappropriate for the Convention, which relates to the international sale of goods, to deal with matters of evidence or procedure'.[15]

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[11] A. Zuckerman, para. 21.32; see also *Cross and Tapper on Evidence*, 2010[12], 120, which in this regard use the term 'burden of proof in the strict sense'.

[12] A. Zuckerman, para. 21.

[13] W. Khoo, "Art. 2", *Commentary on the International Sales Law: The 1980 Vi enna Sales Convention* (eds. C. M. Bianca, M. J. Bonell), Giuffre, Milan 1987, para.3.2; J. O. Honnold, H. M. Flechtner, *Uniform Law for International Sales under the 1980 United Nations Convention*, Kluwer 2009[4], Art. 4 para. 70.1; V. Heuzé, *Vente Internatio nale*, L.G.D.J., Paris 2000, para. 299; Arbitral Award, ICC 6653/1993, 26 March 1993 (steel bars) CISG Online 71(Pace).

[14] This is the main argument by W. Khoo, para. 3.2 (citing United Nations Confe rence on Contracts for the International Sale of Goods (Vienna, 10 March 11 April 1980), Official Records, New York 1981, at 295 298); see also H. M. Flechtner, "Selected Issues Relating to the CISG's Scope of Application", *Vindobona Journal of International Commercial Law and Arbitration* 13/2009, 102 (Pace).

[15] UNCITRAL, *Report of the Committee of the Whole relating to the draft Con vention on the International Sales of Goods* (1977), paras. 177 178, reprinted in O. J. Honnold, *Documentary History of the Uniform Law for International Sales*, Kluwer, De venter 1989, 330.

The prevailing view, and it is submitted also the preferable one, is that, despite the absence of any explicit regulation, the question of the burden of proof in general and in relation the non-conformity of the goods in particular is a matter governed by the CISG in the sense of Art. 7(2).[16] Notwithstanding the above referred statements, the drafting history is no conclusive argument against considering the burden of proof to be a matter governed by the CISG. Some of the proposals including explicit rules on the burden of proof were rejected with the arguments that such rules are superfluous as they merely state the obvious.[17] In addition, the burden of proof is characterized in a large number of legal systems, if not the majority, to be a matter of substantive law and not one of procedural law.[18]

The substantive argument of including the burden of proof into the CISG's scope of application is that it is so closely connected with the application of the substantive provisions that it would be impracticable to separate the two.[19] Allocation of the burden of proof is not a mere rule of procedure with no or only limited influence on material justice. Quite to the contrary it resolves about material considerations which are comparable to those underlying the substantive requirements for the creating and existence of rights.

Furthermore, the inclusion of the burden of proof into the CISG leads in practice to greater certainty. Harmonized rules on the burden of proof limit the incentives for forum shopping, as the outcome of a dispute may be less dependent on where the claim is brought.[20]

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[16] F. Ferrari, "Burden of Proof under the CISG", *Pace Review of the Convention on Contracts for the International Sale of Goods* (2000 2001), 1 *et seq.* (Pace); S. Krui singa, *(Non )Conformity in the 1980 UN Convention on Contracts for the International Sale of Goods: A Uniform Concept?*, Intersentia 2004, 157 86; I. Schwenzer, P. Hachem,"Art. 4", *Commentary on the UN Convention on the International Sale of Goods (CISG)* (eds. P. Schlechtriem, I. Schwenzer), Oxford University Press, Oxford 2010[3], para. 25 *seq.*; Bundesgerichtshof (Germany) 9 January 2002 (powdered milk), CISG On line 651 (Pace) at 2(b) with note P. Perales Viscasillas, "Battle of the Forms and the Burden of Proof: An Analysis of BGH 9 January 2002",*Vindobona Journal of Internatio nal Commercial Law and Arbitration* 6/2002, 227 (Pace); Bundesgericht (Switzerland) 13 November 2003 (used laundry machine), CISG Online 840 (Pace) at 5.3 with approving note Mohs, *IHR* (2004), 219 (220); see also the decisions in the following footnotes.

[17] See the detailed discussion of the drafting history by C. Antweiler, 46 *et seq.*; R. Jung, *Die Beweislastverteilung im UN Kaufrecht*, Frankfurt 1996, 24 *et seq.*

[18] A. Zuckerman, para. 21.39; also the European Conflict of Laws provisions in Regulation 593/2008 (Rome I), Art.18.

[19] T. M. Müller, *Ausgewählte Fragen der Beweislastverteilung im UN Kaufrecht im Lichte der aktuellen Rechtsprechung*, Sellier European Law Publishers, Munich 2005, 32.

[20] Hepting, Müller, "UN Kaufrecht Vor Art. 1", *Handbuch der Beweislast Bür gerliches Gesetzbuch, BT 1* (eds. Baumgärtel, Laumen, Prütting), Munich 2009[3], para. 12.

As a consequence the few provisions in the CISG which like Art. 79(1) either obviously address the burden of proof or at least do it implicitly, such as Art. 2(a) and Art. 25, are no exceptions which deal with a matter otherwise outside the scope of application of the CISG. They constitute clear signs that the burden of proof is a matter which is in principle governed by the CISG.

Some go even further and submit that the CISG also governs (or least should govern) the standard of proof[21] or even the way in which this burden can be discharged.[22] The prevailing view is, however, that national law governs both questions. What is necessary to discharge the burden of proof and by which means a party can do so, as well as other questions relating to the admissibility and weight of evidences are matters of procedural law which are normally considered to be outside the CISG's scope of application. Thus, whether the party may prove the non-conformity by submitting the report of a party-selected expert or whether the non-conformity can only be proven by court appointed experts has in practice generally be determined by reference to a particular national law.[23] The same applies for questions of the evidentiary value and consequences of admissions of non-conformity.[24]

### 4.2. Relevant principles

It follows from the above, that in absence of an explicit regulation in the CISG, the allocation of the burden of proof in relation to the various factual requirements relating the seller's liability for non-conforming goods has to be done primarily on the basis of the general principles underlying the CISG, as required by Art. 7(2) CISG.

These general principles are to be found first of all in the few provisions which explicitly address the question of burden of proof, in particular Art. 79(1). It states:

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[21] I. Schwenzer, "Art. 35", *Commentary on the UN Convention on the Internatio nal Sale of Goods (CISG)* (eds. P. Schlechtriem, I. Schwenzer), Oxford University Press, Oxford 2010[3], para. 56.

[22] L. DiMatteo et al.,"The Interpretive Turn in International Sales Law", *Northwe stern Journal of International Law & Business* 34/2004, 438 *seq*.

[23] See Tribunale di Vigevano (Italy), 12 July 2000 (sheets of vulcanized rubber used in manufacture of shoe soles), CISG Online 493 (Pace) where the evidence submit ted by the German buyer to prove the non conformity, *i.e.* the report and testimony of an expert appointed by the buyer, had been rejected under Italian procedural law; *cf.* Cámara Nacional de Apelacioines en lo Commercial (Argentina) 24 April 2000 (charcoal), CISG Online 699 (Pace) at III; Cámara Nacional de Apelacioines en lo Commercial (Argentina) 21 July 2002 (malt), CISG Online 803 (Pace) requesting proof of non conformity under Art. 476 Commercial Code by submission to independent expert arbitrators.

[24] Bundesgerichtshof (Germany) 9 January 2002 (powdered milk), CISG Online 651 (Pace).

> 'A party is not liable for a failure to perform any of his obligations if he proves that the failure was due to an impediment beyond his control and that he could not reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract or to have avoided or overcome it or its consequences.'

From this, as well as Arts 2(a) and 25 CISG it can be deduced that each party has to prove the factual prerequisites of the provisions upon which it wants to rely for its claim or defense. It is often referred to as 'rule and exception-principle' or using Roman terminology as the principle *ei incumbit probatio, qui dicit non qui negat* or *actori incumbit probatio*.[25]

This rule is supplemented or modified by considerations of equity according to which each party has to prove those facts which originate from its sphere. The basis for this principle proof proximity in the CISG is less clear and they few decisions which have relied on the principle of proof proximity are of little help. They are primarily from courts in civil law jurisdictions where, in the absence of wide reaching discovery opportunities, the principle is well established in the national law.[26] Consequently the courts have generally limited themselves in stating the existence of the principle without giving any further justification based directly on the CISG. The Swiss Supreme Court in the above mentioned 'wire and cable' case merely stated:

> 'As one of these principles, it must be taken into account how close each party is to the relevant facts at issue, i.e., a party's ability to gather and submit evidence for that point. Hence, if a buyer takes on a delivery without giving notice for any claimed deficiencies, thus establishing his exclusive possession of the goods, then he, the buyer, has to prove any claimed lack of conformity of the delivered goods.'[27]

Consequently, the reproach that the courts rely primarily on their national law and not the CISG in establishing the principle of proof proximity is not without merit.[28]

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[25] Appellationshof Bern (Appellate Court Bern, Switzerland) 11 February 2004 (wire and cable), CISG Online 1191 (Pace), in so far not overruled by the Bundesgericht, which had confirmed the principle in *Bundesgericht* (Switzerland) 13 November 2003 (used laundry machine), CISG Online 840 (Pace) at 5.3 with approving note Mohs, *IHR* (2004), 219 (220); sometimes this rule is broken down into two separate rules distinguis hing between the burden for a party raising a claim and a party claiming an exception or raising a defence; e.g. F. Ferrari, 1 et seq.

[26] See Bundesgerichtshof (Germany) 30 June 2004 (sweet paprika) CISG Online 874 (Pace) at para. II2b; by contrast proof proximity plays a much more limited role in jurisdictions such as the US which provide for far reaching discovery rights of the parties involved allowing them to get hold of evidence from the sphere of the other party; see M. Henninger, 92 *seq.*

[27] Bundesgericht (Switzerland) 7 July 2004 (cable drums), CISG Online 848 (Pace) at para. 3.3.

[28] H. M. Flechtner, (2009), 104 seq. (Pace).

Irrespective of this, the drafting history of the CISG allows to consider the principle of proof proximity to be one of the general principles underlying the CISG. Originally Art.25, which at the time was Art. 9 provided that a breach was fundamental if 'it results in a substantial detriment to the other party *and* the party in breach foresaw or had reason to foresee such a result'.

The 'and' was in the end replaced by the present 'unless' as it would be very difficult for the non-breaching party to prove that the breaching party did not foresee the result or could not have foreseen it. As the breaching party was much closer to the fact the burden of proof was imposed on it.[29]

## 5. OVERVIEW ON THE VARIOUS ALLOCATIONS OF THE BURDEN OF PROOF IN PRACTICE

Notwithstanding the broad consensus as to the existence and relevance of these two principles, completely divergent views exist as to their consequences in relation to the allocation of the burden of proof for the non-conformity of the goods at the time the risk passes. The various views are in part strongly influenced by the position taken under respective national laws.[30] In addition, it is not rare that the various statements by courts and tribunals or in the literature lack the necessary specificity and distinction to attribute them clearly to a particular view. Thus, the same authors and decisions are sometimes relied upon for different views.[31]

The Swiss courts want to allocate the burden of proof primarily on the basis of the *actori incumbit probatio* principle. Thus, the burden of proof is largely dependent on the position of the parties in the process, i.e. who invokes Art. 35 in its favour. In this respect the Swiss Supreme Court stated as follows:

> "According to the principle that a party has to prove the elements of a provision it wants to rely on, a *seller who demands the purchase price* must prove that delivery was effected in conformity with the contract and a *buyer who bases a defense* (e.g., for rescission of the contract or for a reduction of the price) on the lack of conformity of the goods must prove the lack of conformity. Thereby, according to the principle

[29] See for the drafting history in relation to Art. 25 C. Antweiler, 57 *et seq.*; for a further argument resulting from the drafting history of the provision in the ULIS which later became Art. 35(2)(c) see Hepting, Müller, para. 33.

[30] For a critical analysis of this in the German and French jurisprudence see *Gru ber*, in: *MünchKommBGB* (2008), Art. 35 CISG para.44.

[31] For a detailed discussion of the various positions and issues see the monographs by T. M. Müller, 36 *et seq.;* C. Antweiler, 141 *et seq*.; see also A. L. Linne, 31.

mentioned, *both parties bear the burden of proving conformity* with the contract, to the extent that they derive rights from the presence or lack of such conformity" (emphasis added).[32]

This statement, however, shows that in cases where the seller demands the purchase price and the buyer invokes in this action the defense of non-conforming goods problems arise. If it cannot be established with the required certainty that the goods are non-conforming, the burden of proof, i.e. the burden of persuasion, has to be allocated to one party. It cannot be borne by both parties. In such cases, due to the particularities of Art. 35, the application of the 'rule-exception' principle is fraught with uncertainties. Consequently, in most other jurisdictions, courts and literature pay, at best, lip-service to this rule. De facto the burden of proof is allocated largely independent from the procedural position of the relevant parties.

Some courts have held that the burden should generally lie with the seller.[33] Also, in the German literature, influenced by the situation in domestic law, the seller is in principle considered to bear the burden of proof that he properly performed his obligation.[34] In the view of others, the buyer should normally bear the burden of proof.[35]

The prevailing view in practice, however, allocates the burden of proof primarily on the basis of the proof proximity principle. Accordingly the burden shifts from the seller to the buyer in conjunction with the delivery of goods.[36]That means that the seller has to prove the conformity of the goods in cases where the buyer has not yet taken delivery or has

[32] Bundesgericht (Switzerland) 13 November 2003 (used laundry machine), CISG Online 840 (Pace) at 5.3 (in the case the principle is, however, *de facto* overridden by the 'proof proximity' principle); Bundesgericht (Switzerland) 13 January 2004 (menthol USP brand crystals), CISG Online 838 (Pace) (UNILEX) at E. 3.1. in two of the cases; in this direction also F. Ferrari, "Divergences in the application of the CISG's rules on non con formity of goods", *RabelsZ* (2004), 479; Neumann, "Features of Article 35 in the Vienna Convention; Equivalence, Burden of Proof and Awareness", *Vindobona Journal of Inter national Commercial Law and Arbitration* 11/2007, 81 at paras 16 *et seq.* (Pace).

[33] Rechtbank van Koophandel Kortrijk (Belgium) 6 October 1997 (crude yarn), CISG Online 532 (Pace); in this direction also Landgericht Berlin (Germany) 15 Septem ber 1994 (Shoes), CISG Online 399 (Pace) requiring, however, first a detailed complaint of the buyer.

[34] M. Henninger, 221.

[35] C. M. Bianca, "Art. 36", *Commentary* (eds. C. M. Bianca, M. J. Bonell), Giuf fre, Milan 1987, para. 3.1; *Mohs*, Case note (Bundesgericht 13 November 2003) IHR (2004) 219 (220); *U.S. Court of Appeals (7th Circuit)* (USA) 23 May 2005 Chicago Prime Packers, Inc. v. Northam Food Trading Co. (pork ribs), CISG Online 1026 (Pace), to a large extent *de facto* also *Bundesgericht* (Switzerland) 13 January 2004 (menthol USP brand crystals), CISG Online 838 (Pace) (UNILEX) at E. 3.1.

[36] See in particular Handelsgericht Zürich (Switzerland) 30 November 1998 (lambskincoats), CISG Online 415 (Pace); Piltz, *Internationales Kaufrecht*, 2008, para. 5 23; I. Schwenzer, para. 56; as well as the references in the following footnotes.

made reservations as to the conformity of the goods when taking delivery.[37] By contrast once the buyer has taken delivery of goods without any complaints or reservation as to their conformity the buyer has to prove that the goods were non-conforming at the time risk passes.[38] Different views exist, however, of what constitute 'taking delivery' in this context, i.e. at what exact time the burden shift. They range from the mere physical acceptance of the goods[39] over the expiry of a time to examine the goods in the sense of Art. 58(3)[40] to the expiry of the notification period under Art. 39[41]. It is argued that in compensation of the considerable protection afforded by Art. 39 to the seller, it is justifiable to impose the burden of proof on the seller at least until the notification period expires.

In addition, there have been a number of efforts to reduce de facto the importance of the burden of proof by granting the party who bears the burden alleviations during the evidentiary process. The primary tools in this context are presumptions or granting certain facts at least the status of prima facie evidence. Thus, according to one commentator a buyer which has proven that the goods are presently non-conforming can in general rely on a presumption in his favour that this non-conformity also existed at the time the risk passed. It is then for the seller to rebut such presumption by showing that the non-conformity is the consequence of a subsequent event.[42] Others want to limit that exception to the period between the dispatch of the goods by the seller and their arrival to the buy-

[37] Handelsgericht Zürich (Switzerland) 30 November 1998 (lambskin coats), CISG Online 415 (Pace); I. Schwenzer, para. 49.

[38] Bundesgericht (Switzerland) 13 November 2003 (used laundry machine), CISG Online 840 (Pace) at 5.3.; Bundesgericht (Switzerland)7 July 2004 (cable drums), CISG Online 848 (Pace) at 3.3; Bundesgerichtshof (Germany) 8 March 1995, CISG Online 144 (Pace) (mussels) at II 1(b)(aa); Bundesgerichtshof (Germany) 9 January 2002, CISG On line 651 (Pace) (milkpowder) at 2(a); less explicit also Cour de cassation(France) 24 Sep tember 2003, *Aluminium and Light Industries Company v. Saint Bernard Miroiterie Vitre tie*, CISG Online 791 (Pace).

[39] Bundesgericht (Switzerland) 13 November 2003 (used laundry machine), CISG Online 840 (Pace) at 5.3.

[40] Benicke, in: Schmidt (ed.), *MünchKommHGB* (2007), Art. 36 para. 8; Mohs, "Case note (Bundesgericht 13 November 2003)", *IHR* (2004), 219 (220); I. Schwenzer, "Art. 35", *Kommentar* (German ed.) (eds. P. Schlechtreim, I. Schwenzer), 2008, para. 52 note 213.

[41] C. Antweiler, 162 *et seq.*; M. Henninger*,* 221 *et seq*.; J. Daun, "Öffentlichrecht liche 'Vorgaben' im Käuferland und Vertragsmäßigkeit der Ware nach UN Kaufrecht", *NJW* 1996, 30; see also the earlier Swiss jurisprudence, Handelsgericht Zürich (Switzer land) 30 November 1998 (lambskincoats), CISG Online 415 (Pace); Obergericht Luzern (Switzerland) 12 May 2003 (used textile cleaning machine), CISG Online 846**;** Appella tionshof Bern (Switzerland) 11 February 2004 (wire and cable), CISG Online 1191 (Pace), which has, however, been overruled by the Bundesgericht *supra* note 39.

[42] Magnus, in: *Staudinger Kommentar* (2005), Art. 36 CISG para. 25.

er in cases of contracts including carriage and based on C-Incoterms.[43] One author suggests a three step approach according to which the seller carries an initial burden of establishing a prima facie case of conformity, for example by inspection certificates or routine business practices. Upon fulfillment of this burden, the buyer would then have to establish a case of non-conformity and that this was not caused by the buyer. If the buyer meets that burden of proof, the burden would shift back to the seller to explain why he should not be liable for the non-conformity.[44]

## 6. SUGGESTED APPROACH FOR AN ALLOCATION OF THE BURDEN OF PROOF

A proper allocation of the burden of proof, i.e. the burden of persuasion, in the context of the seller's liability for non-conforming goods cannot be done in an all or nothing approach which sometimes appears to be adopted in practice. It is by no means necessary that one party has to bear the burden of proof for all factual requirements. Quite to the contrary, in general the burden has to be allocated separately for every particular factual requirement.[45]

Consequently, in addition to the above mentioned distinction between burden of proof and burden of presenting evidence, three closely related but still separable questions have to be distinguished in allocating the former. In determining whether the seller has complied with its obligation to deliver conforming goods one has first to determine the applicable standard. The second step relates to the determination of whether the goods are presently in conformity with this standard while at the third step the question arises whether such conformity already existed at the time when the risk passes.

### 6.1. Burden of proof for the relevant standard

The burden of proof for the determination of the relevant standard is governed by the *actori incumbit probatio* principle. The starting point for determining who has to be the burden of proof is the default standard in Art. 35(2)(a). Whenever the conformity or non-conformity of the goods has to be determined against this standard, the buyer bears the burden of proof for the facts relevant to determine what constitute the 'ordinary purpose'.[46] Notwithstanding that the delivery of non-conforming goods

[43] Piltz, para.5 23.

[44] A. L. Linne, 42 *et seq*.

[45] A. Zuckermann, para. 21.34.

[46] Hepting, Müller, para. 4.

constitutes a breach of contract, the seller's entitlement to payment is not dependent that he proves the delivery of conforming goods.

Whenever a party tries to rely in its favour on a different standard, it has to prove this higher or lower standard. That applies to the subjective standard in Art. 35(1) as well as to the two other objective standards in Art. 35(2)(b)(c). Consequently, a seller who has delivered goods, which are conforming to an alleged contractual standard under Art. 35(1) but which would not meet the 'ordinary purpose' standard of Art. 35(2)(a), has to prove the agreement on the alleged contractual standard to the exclusion of the standard of Art. 35(2)(a). On the other hand, a buyer who alleges that certain further reaching requirements as to conformity have been agreed bears the burden of proof for that.[47]

In this context the question as to who bears the burden of proof must be clearly distinguished from the question by which means this burden can be discharged and how certain proven facts are to be interpreted. In various jurisdictions the existence of a written contractual document limits a possible reliance on antecedent negotiations proven by witnesses.[48] Whether a buyer may rely on witnesses to prove an alleged information about an extraordinary use of the goods requiring a particular packaging where the standard terms included into the contract provide for 'normal packaging' is foremost a question of interpreting the parties agreement in the sense of Art. 8 but no one of burden of proof.

In connection with the standard in Art. 35(2)(b), the burden of proof for the different requirements is even split between the parties. A buyer trying to invoke the non-conformity of the goods with the standard imposed by Art. 35(2)(b) has to proof that the particular purpose was made known to the seller.[49] The seller then bears the burden of proof for the fact that the buyer did not rely upon the seller's skill and judgment or that it was unreasonable for him to do so.[50]

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[47] Oberlandesgericht Zweibrücken (Germany) 2 February 2004 (milling equip ment), CISG Online 877 (Pace) origin of goods; Landgericht Hamburg(Germany) 6 Sep tember 2004 (containers), CISG Online 1085 (Pace) year of production**.**

[48] On that topic see F. Ferrari, "Remarks concerning the implementation of the CISG by the Courts (the Seller's Performance and Article 35)", *Journal of Law and Com merce* 25/2005 06, 234 *et seq*.

[49] Bundesgericht (Switzerland) 13 January 2004 (menthol USP brand crystals), CISG Online 838 (Pace) (UNILEX) at E. 3.1; Neumann,, 81 at paras 38 *et seq.*(Pace).

[50] I. Schwenzer, (2010) para. 54; Magnus, in: *Staudinger Kommentar* (2005), Art. 35 para.56; Maley, "The Limits to the Conformity of Goods", *International Trade & Busi ness Law Review* 12/2009, 118 *et seq.* (Pace); hesitant in relation to the reliance require ment Hyland, "Conformity of Goods", *Einheitliches Kaufrecht und nationales Obligatio nenrecht* (ed. P. Schlechtriem), 1987, 322.

### 6.2. Burden of proof for the non-conformity of the goods with the standard

Contrary to the above, the allocation of the burden of proof for the second question, that of whether or not the goods are presently in conformity with the applicable standard, should primarily be governed by the principles of proof proximity.[51] Whoever is in possession of the goods is, in principle, in the most appropriate position to take the necessary evidence to prove their conformity or non-conformity. Thus, until the goods have been delivered, the seller has to prove that the goods are conforming. By contrast, once the buyer has taken delivery of the goods without any complaints or reservations as to their conformity, he has to prove that the goods were non-conforming at the time risk passes.[52]

In cases where the buyer has accepted delivery only with complaints or reservations the burden of proof remains with the seller, irrespective of the fact, that the possession of the goods has been transferred to the buyer. That is justified as the seller was still in possession of the goods at the time when the complaint or reservation was declared. Thus, the seller was able to verify the justification of any complaint and, if necessary, take a sample to prove the conformity of the goods. A shift of the burden of proof in such cases would de facto punish the buyer for accepting defective goods with reservations. That would run contrary to the general objective of the CISG to avoid the macroeconomic costs associated with returning goods which have already been delivered. It is rare that the non-conformity of the goods reaches the threshold of fundamental breach, which would justify an avoidance pursuant to Art. 49(1)(a).

This allocation of the burden of proof, however, applies only to cases where the reservation or complaint was declared upon delivery. It is not to be extended until the end of the inspection period under Art. 58(3). This additional period merely plays a role at the third stage, i.e. for the determination of whether a proven present non-conformity existed already at the time the risk passed. By contrast for the allocation of the burden of proof for the present non-conformity of the goods only the buyer's possession remains relevant.

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[51] For the primary relevance of the principle see also Benicke, in: Schmidt (ed.), *MünchKommHGB*(2007), Art. 36 para. 8; *cf.* Bundesgericht (Switzerland) 7 July 2004 (cable drums), CISG Online 848 (Pace) at 3.3.

[52] Bundesgericht (Switzerland) 13 November 2003 (used laundry machine), CISG Online 840 (Pace) at 5.3; Bundesgericht (Switzerland) 7 July 2004 (cable drums), CISG Online 848 (Pace) at 3.3; Tribunale di Vigevano (Italy), 12 July 2000 (sheets of vulcani zed rubber used in manufacture of shoe soles), CISG Online 493 (Pace); Bundesgerichtshof (Germany) 8 March 1995 (mussels), CISG Online 144 (Pace) at II 1(b)(aa); Bundesgerichtshof (Germany) 9 January 2002 (Milk powder), CISG Online 651 (Pace) at 2 (a).

### 6.3. Burden of proof for the existence of the non-conformity at the time the risk passes

The third, and in practice often crucial issue, is the allocation of the burden of proof for the question whether an established non-conformity of the goods already existed at the time risk passed, or has at least its origin in circumstances which already existed at that time. As the above mentioned examples show, in practice it is often no problem to establish that the present status of the goods is not in compliance with the applicable standard. What cannot be determined with the necessary certainty is whether the present status of the goods is due to events which occurred after the risk has passed or not.

It has been suggested to impose the burden of proof upon the seller where the buyer gives notice of the non-conformity of the goods within the notification period of Art. 39.[53] Such an allocation of the burden of proof, however, does not give sufficient weight to the principle of proof proximity. In light of the possible length of the notification period in Art. 39, the seller would be faced with considerable problems fulfilling an obligation to prove that the goods were conforming at the time risk passed. Unlike the buyer, the seller normally has no information about the treatment of the goods during the time between delivery and the notification of the non-conformity.[54] Notwithstanding that the need to secure evidence also plays a role for the notification requirement in Art. 39, the latter also serves additional purposes. Consequently, the allocation of the burden of proof or a possible shift should not be directly linked to the expiry of the notification requirement.[55]

The guiding principle for the allocation should again be the *actori incumbit probatio* principle. Thus, the buyer, as the party invoking the seller's liability for the delivery of non-conforming goods, has in the end to prove that the non-conformity existed already at the time when the risk passed. As a consequence, a buyer in an *ex works* contract, where the risk passes with the handing over of the goods to the carrier, has not met his burden of proof for non-conformity if it cannot be established whether defects result from manufacturing or from transportation.[56] The same ap-

[53] . Antweiler, 162 *et seq.*; M. Henninger*,* 221 *et seq.*; J. Daun, 30.

[54] Bundesgericht (Switzerland) 13 November 2003 (used laundry machine), CISG Online 840 (Pace) at 5.3 with approving note Mohs, *IHR* (2004) 219 (220); Schwenzer, in: Schlechtriem, Schwenzer, *Kommentar* (German ed. 2008), Art. 35 para. 52, giving up an earlier support for extending the period.

[55] See Benicke, in: Schmidt (ed.), *MünchKommHGB* (2007), Art. 36 para.8, who fears that a linkage of both could lead to pressures to shorten the time for notification endangering a uniform interpretation of the CISG.

[56] Cour de cassation (France) 24 September 2003, *Aluminium and Light Industries Company v. Saint Bernard Miroiterie Vitretie*, CISG Online 791 (Pace).

plies for FOB contracts, where the buyer has to establish that the non-conformity already existed at the time the risk passed at the mentioned place.[57]

However, this allocation of the burden to the buyer should at least to a certain extent be counterbalanced at the preceding evidentiary stage. To what extent the burden of proof becomes decisive for the decision of the case depends to a large extent upon what is required from that party at the evidentiary stage to convince a court or tribunal with the necessary degree of certainty about the relevant facts. For a party bearing the burden of proof it is much easier to discharge it, if the relevant standard is merely a preponderance of probability and not a high degree of probability or even the degree of reasonable certainty. Equally, it may be of considerable help for a party in discharging its burden if it can rely on presumptions or *prima facie* evidence.

The latter should play a role in the context of a seller's liability pursuant to Arts 35 and 36. A buyer who has given notice about the non-conformity of the goods within the time period foreseen in Art. 58(3) should normally be considered to have presented at least *prima facie* evidence for the fact that the goods were already non-conforming at the time the risk passed. In so far at least the burden of presenting evidence should shift to the seller to destroy this impression.

That may in particular be done by presenting documents issued in relation to the goods which appear to show that the goods have been conforming at the time of risk passing. Examples are clean bills of lading, packing lists and invoices which may constitute prima facie evidence of the facts described in them.[58] In particular, inspection certificates issued by third parties can be of crucial relevance in determining the conformity of the goods. They loose, however, their evidentiary value if there is a considerable time between the inspection and the passing of the risk, during which the goods may have deteriorated or have been exchanged.[59]

## 7. CONCLUSION

Taking into account that allocating the burden of proof is in the end a 'political' decision relating to the attribution of risks, the approach sug-

[57] See the example in O. J. Honnold, H. M. Flechtner, para. 242 example 36A.

[58] Landgericht Tübingen (Germany) 18 June 2003 (computers and accessories), CISG Online 784 (Pace) relating to a shortfall in delivery, assumes a great likelihood 'that the customers received exactly the goods that were ordered and for which the invoice was sent'.

[59] Tribunale d'Appello Ticino (Switzerland) 15 January 1998 (cocoa beans), CISG Online 417 (Pace), SGS inspection certificate issued three weeks before shipment largely disregarded in determining the conformity of the goods.

gested above tries to allocate the risks associated with such a burden in a balanced way. The differentiation between the various questions and the separate allocation of the burden for each question has the advantage that it allows for a graded approach. That is even more so if one counterbalances the allocation of the burden on one party with evidentiary privileges for this party at the preceding evidentiary stage. Granting a party who bears the burden in particular for the crucial third issue the benefits of presumptions or prima facie evidence or even lowering the standard of proof reduces the importance of the burden of proof.

That raises at the same time the question of whether the traditional view, that the national procedural law determines the relevant standard of proof and not the CISG, is justified. The obvious connection between the standard of proof and the importance of the burden of proof provides good arguments that they should not be regulated completely independent from each other.[60]

[60] In this direction I. Schwenzer, para. 56.

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# SELECTED CRITICAL ISSUES REGARDING THE SPHERE OF APPLICATION OF THE CISG

*This contribution offers an analysis of the main rules and principles of the Vienna Sales Convention (CISG) on its application ratione materiae in the light of the criteria set out in Articles 1 and 3 of the Convention. This analysis calls for the examination of applicability of the CISG to contracts for goods to be manufactured and mixed contracts, distribution contracts, barter transactions, financial leasing as well as for the interpretation of notion of "goods" under the CISG. The analysis brings the author to the conclusion that divergences in interpretation of the CISG rules relevant for its application to certain types of contracts still exist, what may cause many problems in practice. In the perspective of these problems, the author suggests that the contracting parties solve all the questions of the Convention's ap plicability in their contract, in order to avoid the uncertainties which the application ratione materiae of the CISG usually imply in international commerce.*

Key words: *Contract. International sale. CISG. Interpretation. Applica tion. applicability.*

## 1. INTRODUCTORY REMARKS

The UN Convention on Contracts for the International Sale of Goods (CISG) is one of the most important international uniform law instruments, as evidenced both by number of Contracting States (76) and number of cases in which it was applied worldwide. The CISG has been the centre of a tremendous interest in legal writing and has drawn the attention of domestic and international legislators. Thus, the understanding of the main rules regarding the sphere of application of the CISG is of great importance for the parties in international commerce and for the courts all over the world.

The sphere of application of the CISG is defined by Articles 1 – 6. The CISG governs the contract of sale of goods (application *ratione materiae*) between the parties whose places of business are in different States (application *ratione personae*) when the states are Contracting States (direct application) or when the rules of private international law lead to the application of the law of a Contracting state (indirect application). These basic requirements for application of the CISG are defined by Article 1. On the other hand, Article 2 excludes certain types of sales from the scope of the CISG and Article 3 establishes additional requirements for the application of the CISG to contracts for goods to be manufactured and mixed contracts. Furthermore, the extent to which sales transactions are governed by the CISG is determined by Articles 4 and 5. Finally, Article 6 precises that the CISG applies subject to contrary agreement by the parties ("opting–out" approach).

This article will focus on the practical problems which usually arise with respect to the application *ratione materiae* of the CISG in terms of Articles 1 and 3 of the CISG, in order to offer the optimal solutions for preventing the uncertainties which the divergences in interpretation of the CISG usually imply in international commerce.

## 2. CONTRACT OF SALE

### 2.1. Basic requirements

For the application of the CISG, first of all, the requirements concerning the contract of sale must be satisfied. The CISG does not expressly define the contract of sale. However, this definition can be established indirectly from the provisions regulating the obligations of the seller (Article 30) and of the buyer (Article 53). According to those provisions, the contract of sale is a contract in which the seller is obliged to deliver the goods, to hand over the documents relating to them and to transfer the property in the goods, and the buyer is obliged to pay the price for the goods and to take delivery of them as required by the contract. In that respect, it can be noted that the meaning of the contract of sale in the CISG does not differ from the relevant definitions of the national codes[1] and that the CISG governs most kinds of sales[2] in international commerce[3].

[1] This is a classic definition of sale. See B. Audit, *La vente internationale de marchandises Convention des Nations Unies du 11 avril 1980,* L.G.D.J, Paris 1990, 25; C.Witz, *Les premières applications jurisprudentielles du droit uniforme de la vente inter nationale Convention des Nations Unies du 11 avril 1980,* L.G.D.J, Paris 1995, 32; K.H. Neumayer, C. Ming, *Convention de Vienne sur les contrats de vente internationale de marchandises Commentaire,* Cedidac, Lausanne 1993, 38. See also V. Heuzé, *La vente internationale de marchandises, Droit uniforme, Traité des contrats sous la direction de Jacques Ghestin,* L.G.D.J, Paris 2000, 75. For the comparison with the elevant definition of the Serbian Code of Obligations, J. Perović, *Bitna povreda ugovora*, Belgrade 2004.

### 2.2. Additional requirements

The application of the CISG may be doubtful in case of contracts for goods to be manufactured and mixed contracts since they do not fall into the scope of the "classic" definition of contract of sale. Therefore, the CISG establishes additional requirements for its application to those types of contracts (Article 3).

#### *2.2.1. Contracts for goods to be manufactured.*

Under Article 3.1, contracts for the supply of goods to be manufactured or produced are to be considered sales unless the party who orders the goods undertakes to supply a substantial part of the materials necessary for such manufacture or production.[4] In terms of this rule, the CISG in principle applies to contract for goods to be manufactured or produced[5] since such contract is basically treated as a contract of sale.[6] Only the cases where the party ordering the goods supplies a "substantial part" of the materials for manufacture or production of the goods are excluded from the application of the CISG.[7]

Exclusion from the application of the CISG on the basis Article 3.1 is not difficult in cases where the entire material necessary for manufacture or production is supplied by the party ordering the goods. This view was expressed for instance in the decision of Austrian Supreme Court where the Court found the CISG inapplicable to a contract for brooms

[2] See the view expressed by I. Schwenzer, P. Hachem, *"*Art.1", *Commentary on the UN Convention on the International Sale of Goods (CISG)* (eds. P. Schlechtriem, I. Schwenzer), Oxford University Press, Oxford 2010[3], 32, according to which "*Not ex pressly mentioned but regularly encompassed by the Convention are furthermore sales under conditions including the retention of title or time limits as well as contracts provid ing for the direct delivery of the goods to the customer or the buyer. The same hold true for contracts containing pre emptive options or rights to re purchase, buy back sales, counter purchases and offsets"*.

[3] Under Article 1.3 CISG neither the nationality of the parties nor the civil or commercial character of the parties of the contract is to be taken into consideration in determining the application of the CISG. In that resepect, one may conclude that, as a general rule, it is irrelevant whether the contract of sale is of civil or commercial nature. However, the exclusion of goods bought for personal, family or household use in terms of Article 2 limits the sphere of application of the CISG to commercial sales.

[4] Comp. Article 3.1 CISG with relevant solutions of ULIS (Article 6) and ULF (Articel 1(7).

[5] K. H. Neumayer, C. Ming, 61; V. Heuzé, 76; B. Audit, 25.

[6] I. Schwenzer, P. Hachem, *"*Art. 3",*Commentary on the UN Convention on the International Sale of Goods (CISG)* (eds. P. Schlechtriem, I. Schwenzer), Oxford Univer sity Press, Oxford 2010[3], 62.

[7] P. Schlechtriem, *"*Art. 3",*Commentary on the UN Convention on the Interna tional Sale of Goods (CISG)* (eds. P. Schlechtriem, I. Schwenzer), Oxford University Press, Oxford 2005[2], 54.

and brushes produced by the party from Yugoslavia from material supplied by the other party from Austria.[8]

However, in cases where *both* parties supply materials, the problems concerning the application of the CISG in the light of Article 3.1 usually arise since the nature of such contracts could be doubtful. In these cases, a dividing line between the sales and processing could be very flexible and uncertain having in mind the controversial formulation of the relevant test in the text of Article 3.1 CISG.[9] The main difficulties arise from the differences in languages. In that regard, ULIS (Article 6) used the formulation "essential and substantial part" but in the English version of the CISG the reference to "essential" was deleted. On the other hand, the French version of the CISG uses the term "*une part essentielle*" while the Spanish version states "*una parte sustancial*".[10]

Consequently, the courts in certain cases apply domestic law criteria in determining the distinction between sales and processing.[11] That approach was, for instance, adopted in the decision of *Cour d'appel de Chambéry*,[12] in case where the French company undertook the obligation to produce and deliver connection parts to the Italian company on the basis of the schemes and standards supplied by the Italian company. The Court held that the respective contract cannot be qualified as a contract for international sale of goods in terms of the CISG which is inapplicable in case where the party who orders the goods undertakes to supply a substantial part of the materials necessary for such manufacture. In view of the Court, the fact that connecting parts were produced on the basis of schemes and standards supplied by the client was the decisive criterion for interpretation of the term "*part essentielle*" and consequently, for the exclusion of the application of the CISG. This decision was severely criticized in French doctrine as an example of misapplication of Article 3.1 CISG by simple transposition of the domestic law criteria to the distinction between "*la vente*" and "*le contrat d'entreprise*".[13] However, the opposite view was expressed in the decision of *OLG Frankfurt* where the

[8] OGH, 27 October 1994, *Zeitschrift für Rechtsvergleichung,* 1995, 159 note V. Heuzé, 76. Also available on CISG online 133.

[9] See I. Schwenzer, P. Hachem, 64; P. Schlechtriem, 55.

[10] See J.O. Honnold, *Uniform Law For International Sales,* Kluwer Law International, The Hague 1999[3], 59.

[11] See the comment of C.Witz, 34, stating: "*Le juriste français devra ainsi veiller à ne pas étendre à la vente internationale des critères de distinction entre la vente et le contrat d'entreprise, auxquels il est habitué en droit interne*".

[12] Chambéry, 25.05.1993, *Bull. Inf. C. Cass.* 01.10.1993, 35, *Rev. jurispr. com*, juin 1995, note C.Witz, 34.

[13] See C. Witz, ibidem, stating: "*C'est dans ce piège que la Cour d'Appel de Chambéry est tombée*". In the comment of this decision, the author also refers to Article 42.2.b CISG; V. Heuzé, 77.

Court found the CISG applicable to a contract for delivery of shoes produced for the German buyer in accordance with indications provided by him.[14] The Court correctly held that the fact that producer, according to the contract, follows the technical instructions of the client for production of goods ordered by the client cannot justify the exclusion of that contract from the sphere of application of the CISG.[15]

Having in mind the mentioned problems of interpretation of Article 3.1, doctrine and case law use three main tests for determining the precise meaning of the term "substantial part": economic value test, volume test and the test based on the importance of the respective contribution for the end-product (essential test) as well as the approach of decision making on a case-by-case basis. These tests are used either individually or cumulatively or successively.[16] The prevailing criterion seems to be the economic value[17] at the time of formation of contract,[18] taking into consideration that the contributions of the parties should be compared with each other and not with the value of the end product.[19] In the view of the commentators of the CISG, adoption of the economic value test as a general rule "will regularly lead to appropriate results and in practice often be the sole test available"[20]. Furthermore, this test will secure a wide and uniform application of the CISG.[21] Nevertheless, one should note that: 1. the economic value test should be applied in the light of the relevant circumstances of each particular case; 2. the economic value test itself raises dilemmas such as, for instance, the question of calculation of the value – how big a proportion of the value of all the materials is substantial?[22] In that regard, one court may determine that 15% constitutes a substantial part while some other court may define that it is 50% and more; 3. although the majority of authors favour the economic value test, it is difficult to predict which criteria will be used by the courts in each particular case. In order to avoid uncertainties with respect to the application of Article 3.1, it would be advisable for the parties to solve the question of applicability of the CISG in the contract.[23]

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[14] OLG Frankfurt, 17.09.1991, *Recht der Internationalen Wirtschaft (RIW)* 1991, 950, note C. Witz, 35.

[15] See V. Heuzé, ibidem.

[16] I. Schwenzer, P. Hachem, 65; P. Schlechtriem, 56.

[17] CISG AC; V. Heuzé, 76; I. Schwenzer, P. Hachem, 65; K.H. Neumayer, C. Ming, 62; J. O. Honnold, 59.

[18] See P. Schlechtriem, 56, stating "*later decreases or increases in value should not decide the applicability of the Convention*".

[19] I. Schwenzer, P. Hachem, 65.

[20] *Ibid.*, 66.

[21] P. Schlechtriem, 57.

[22] J. O. Honnold, 59.

[23] In that sense *ibid.*

### *1.1.2. Mixed contracts.*

Under Article 3.2, the CISG does not apply to contracts in which the preponderant part of the obligations of the party who furnishes the goods consists in the supply of labour or other services. This rule applies only when the parties deal with both goods and services in a *single* contract. In other words, Article 3.2 excludes from the scope of the CISG the mixed contract by which the party who delivers the goods undertakes by the same contract also the obligation to provide services, if providing services constitutes the preponderant part of the obligations.

If there are two separate contracts, the CISG is to be applied to the contract of sale and domestic law to the contract of services.[24] However, domestic law cannot decide whether a transaction involving both goods and services is one contract governed by the CISG or is to be treated as separate agreements.[25] Therefore, in determining whether the respective transaction constitutes one single contract or two separate agreements, application of Article 8 (intention of the parties)[26] and Article 7.1 (interpretation of the Convention)[27] seems to be the optimal solution. Where it is considered that the parties concluded one single contract, the question is whether the CISG rules (created for the needs of international sale) are suitable for the breach of service obligation. In that respect particularly important is the question whether the breach of a service obligation justifies the avoidance of the entire contract. In that regard most commentators advocate for the application of the CISG as a single set of rules to the breach of service obligations as well, and when necessary, the gap-filling mechanism envisaged in Article 7.2 should be applied, particularly regarding the remedy of avoidance.[28]

In case where there is one single contract the key problem is the interpretation of the term "preponderant part" i.e. the criteria for evaluation whether the service obligation is of greater importance than the delivery obligation. In that regard, the prevailing opinion in doctrine and

[24] P. Schlechtriem, 60. But see the comment in I. Schwenzer, P. Hachem, 69: "*...it will be a rare exception that parties intend to have two possibly very different laws applied to agreements which may be separate but nevertheless relate to the same circum stances*".

[25] See J. O. Honnold, 59, stating. "*If a Contracting State applies domestic rules on "severability" that ignore the effective application of the Convention to a transaction that combines goods and services that State would scarcely be honoring its obligation to give full effect to the rules governing international sales or to the mandate of Article 7(1)*".

[26] In that sense P. Schlechtriem, 59; I. Schwenzer, P. Hachem, 68.

[27] See K. H. Neumayer, C. Ming, 64 advocating application of Article 7.1.

[28] J. O. Honnold, 59; I. Schwenzer, P. Hachem, 70; P. Schlechtriem, 60. K.H. Neumayer, C. Ming, 64 express certain reserve: "*...la Convention s'applique à la totalité des obligations, dans la mesure où elle s'adapte à la prestation de services*". Similar view, B. Audit, 26 27.

case law is that a starting point should be a comparison of the economic value of the goods and of the services on the basis of the prices that could have been obtained if there were separate contracts, taking into consideration the weight the parties themselves have attributed to each obligation.[29]

The economic value test in the context of Article 3.2 was, for instance, applied in one ICC award concerning a contract providing for delivery and installation of material for the construction of the hotel. The seller contested the applicability of the CISG stressing that he undertook the obligation to install the material. The arbitrator, however, applied the CISG to the respective contract since in his view it was a contract of sale. In the commentary of this Award it was noted that the price for installation of material was of the secondary importance comparing with the price of material itself. [30]

Concerning the economic evaluation of "preponderant part" of the obligations, the opinions expressed in the doctrine are divergent. While some authors consider that the service part of the contract has to amount only to more than 50% in order to be qualified as the preponderant part, some others advocate that the value of the services must significantly exceed 50%, so that the prognosis on the applicability of the CISG would be facilitated.[31] In any case, one should take into account that the value of the services has to be compared with the value of the whole contract and not with the price of the goods only.[32]

Having in mind the mentioned difficulties in application of Article 3.2 the parties should be advised to precise in the contract all the questions relevant for the application of the CISG.[33]

## 2. APPLICABILITY OF THE CISG TO INTERNATIONAL DISTRIBUTION CONTRACT

With regard to distribution contract, one has to distinguish between the framework distribution contract on the one side, and the individual contracts of sale concluded between the supplier and the distributor on the basis of the framework contract on the other side. The framework

[29] See detailed review of these opinions in I. Schwenzer, P. Hachem, 70 71.

[30] ICC no 7153, 1992, commented in J. J. Arnaldes, Y. Derains, D. Hacher, *Col lection of ICC Arbitral Awards 1991 1995,* Kluwer, 1997, 443 447.See also decision of *CA Grenoble*, 26.04.1995, *Recueil de jurisprudence concernant les textes de la CNUDCI*, no151, note V. Heuzé, 77.

[31] I. Schwenzer, P. Hachem, 70.

[32] See P. Schlechtriem, 61.

[33] See the recommendation in K. H. Neumayer, C. Ming, 66.

distribution contract which regulates the long-term relationship between the parties, which is mainly related to the rights and obligations of the parties arising from the *distribution* relation, in prevailing opinion is not governed by the CISG.[34] Contrary to that, the *individual sales contracts* which parties conclude each time when the goods are supposed to be supplied to the distributor, may fall under the CISG, if the other requirements for application are met.[35] Consequently, the international distribution contract is generally submitted to the different legal regimes.[36]

For instance, in the case of the District Court's Gravenhage[37], a Dutch company and a Swiss company concluded a framework agreement for the non exclusive distribution of certain products. The agreement contained no choice of law clause. On the same day, the parties concluded a sales contract for the same products. That contract was to be governed by Swiss law. The sales contract contained elements of distribution as for instance the clause on non-exclusivity. The buyer claimed that the seller did not fulfil its obligations deriving from the distribution agreement and therefore refused to make payment for the sale. The seller sued for payment. In counterclaim, the buyer asked for the setting aside of the distribution agreement. The court ruled that the CISG does not apply to distribution agreements. The framework contract could not be regarded as a sale because the most important elements of the sale contract were in fact laid down in the sale contract itself. The seller's claim was rejected under the applicable domestic law.

Similar was the ICC case where a German seller and a Spanish buyer concluded an agreement pursuant to which the buyer was to be the exclusive distributor in Spain of industrial equipment produced in Germany.[38] Several individual sales contracts were then concluded between the parties. Four years later the German company informed the Spanish buyer that, due to the insufficiency of the buyer's sales, it would sell its products in Spain through another company. Thereafter, upon the buyer's refusal to pay for some of deliveries, the seller started arbitral proceedings. The buyer counterclaimed damages arising from breach of the exclusive distributorship agreement as well as from lack of conformity of certain products. The sole arbitrator held that the CISG was not applica-

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[34] V. Heuzé, 75; C.Witz, 32. See the view expressed in F. Ferrari, *La compraventa internacional Aplicabilidad y aplicaciones de la Convención de Vienna de 1980,* Valencia 1999, 129

[35] P. Schlechtriem, *"*Art.1",*Commentary on the UN Convention on the Interna tional Sale of Goods (CISG)* (eds. P. Schlechtriem, I. Schwenzer), Oxford University Press, Oxford 2005[2], 27.

[36] See J. Perovic, "Applicability of the CISG to International Distribution Agree ment"*, Pravni život 12/2007, Vol. IV*, 359 369.

[37] Decision of 02.07.1997, CISG online.

[38] 23.01.1997. 8611/HV/JK

ble to the distribution agreement as such but to the individual sales contracts concluded pursuant to the distribution agreement.[39]

However, the problem could arise from the fact that the borderline between the framework distribution contract and the sales contracts may be uncertain if the framework contract already contains most of the typical obligations of a seller and a buyer (precisely formulated), so it is only up to the distributor to require delivery at a certain date, in a specified quantity, and just to confirm the seller's obligations which are already provided by the framework contract.[40] It is for this reason that some authors do not exclude possibility of application of the CISG rules relevant to the entire framework agreement, if such rules arise from the general rules of the law of obligations (i.e., if they are not specially adapted to the contract of sale).[41] In that regard, Professor Schlechtriem noted that the parties can also choose to make the CISG applicable to all obligations created by the distribution contract, such as service obligation of the supplier to provide advertising and merchandising, to abstain from direct sales in the distributor's country or region, and the distributor's obligations to stock spare parts, to promote the goods and the seller's brand name, etc.[42]

Application of the CISG to the framework distribution contract can be found in the case law.

For instance, in the case of the Italian *Corte di Cassazione* (14 December 1999),[43] an Italian company and a British company entered into an agreement providing for sale and the distribution of goods. The Italian company sued the British company claiming contract avoidance. The decision of the Italian Supreme Court relied on the assumption that the CISG is applicable not only to sales, but also to distribution agreements, provided that these can be construed as accessory clauses to the sale contract. Similar was the case of the Arbitral Tribunal Hamburg (21 June 1996).

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[39] The same views concerning this question were expressed in the decision of District Appeal Court of Amsterdam (16 July 1992) concerning exclusive distribution contract for the resale of shower cabinets, decision of the United States District Court in the case Viva Vino Import Corporation v. Farnese Vini (29 August 2000), decision of the Metropolitan Court of Budapest regarding the exclusive distribution of Swiss instruments in Hungary (19 March 1996), decision of the Appellate Court of Düsseldorf relating to an exclusive distribution of German engines for lawn mowers in Italy (11 July 1996), etc., CISG online.

[40] P. Schlechtriem, 27.

[41] See for example F. Visher, L. Huber, D. Oser, *Internationales Vertragsrecht*, Bern 2000$^2$, § 356.

[42] P. Schlechtriem, 28.

[43] Imperial Bathroom Company v. Sanitari Possi S.p.A., source: CISG online 895.

The similar view was expressed in the case of the Arbitral Tribunal Hamburg where the seller, a Hong Kong company, and the buyer, a German company, had concluded a general agreement for the exclusive delivery and distribution of Chinese goods.[44] Under this agreement, the seller was responsible for the business relations with Chinese producers while the buyer was responsible for the distribution of the goods in Europe. On this basis, the parties concluded separate sale contracts. Due to financial difficulties, a Chinese producer could not deliver the ordered goods to the seller, who consequently could not perform its contractual obligation to the buyer. The seller demanded payment of the sum due resulting from previously delivered goods. The buyer set off against the claim a damage claim for lost profit and refused to pay. The arbitral tribunal in this case applied the CISG as the relevant German law under Article 1.1.b. CISG and upheld the seller's demand for payment.[45]

In the light of the mentioned problems, one can note that the CISG is applicable to the individual sales contracts concluded between the supplier and the distributor on the basis of the framework distribution contract if the general conditions for the application of the CISG are met. On the other hand, regarding the applicability of the CISG to the *framework* distribution contract, certain reserve can be expressed. The CISG is created for the needs of international sale. It means that: a. it does not contain the rules adequate for the rights and obligations of the parties arising strictly from the distributorship (e.g. the distributor's obligation to promote the goods and the seller's brand name or the obligation of the supplier to provide advertising and merchandising); b. regarding the rights and obligations of the supplier and distributor arising from sale, the CISG rules could be inadequate in particular case since they do not take into consideration the specific characteristics of the distribution relation, like for instance the *intuitu personae* nature and the economic objectives to be achieved. On the other hand, the CISG rules which are of a "more general nature" like the one related to interpretation of the contract usages, formation of the contract, etc. could perfectly fit the distribution contract.

In sum, one may conclude that problems of applicability of the CISG to the international distribution contract are to be solved on the basis of the facts of each particular transaction and not under a general rule specifying *a priori* whether it is possible to apply the CISG or not. In case the dispute arises from the rights and obligations of *sale*, the judge/arbitrator may apply CISG, taking into consideration all relevant circum-

[44] 21.06.1996, CISG online

[45] The same view as about the applicability of the CISG to distribution agreement was expressed in the decision of the US District Court (17 May 1999) in case *Medical Marketing International* v. *Internazionale Medico Scientifica*, note P. Schlechtriem, 28, as well as in the decision of the OLG Koblenz (17 September 1993), CISG online 2 U 1230/91.

stances of the case. Contrary to that, if the dispute is related strictly to the *distributorship*, the application of the CISG could be inappropriate. Thus, in order to avoid uncertain situations, the parties should, by choice of law clause, precisely solve the question of applicable law to the framework contract as well as to the individual sale contracts.

## 3. APPLICABILITY OF THE CISG TO INTERNATIONAL BARTER

With regard to the applicability of the CISG to barter contract, doctrine and case law express controversial views. According to some highly respected opinions, barter contract is excluded from the CISG, as the CISG requires sales contracts to be an exchange of goods against money.[46] That view was also expressed in the Award of the Arbitration of Russian Federation regarding barter contract concluded between the party from Russia and the party from Lichtenstein, where the Tribunal found that "where there was a barter contract, which was governed by Russian substantive law in accordance with the parties' agreement, and where such contract did not involve any monetary payments between the parties, the CISG was inapplicable".[47] On the other hand, there are many opinions in favour of applicability of the CISG to barter contracts, starting from the point that the term "price" as used in the relevant CISG provisions is not restricted to money, so that both parties can be treated as sellers in regard to goods they deliver and as buyers to the goods they receive.[48] The application of the CISG to a barter contract could be found for instance in another Award of the Arbitration of Russian Federation where, concerning a barter transaction concluded between the party from Russia and the party form Cyprus, the Tribunal found the CISG applicable to the relation of the parties.[49]

In the context of applicability of the CISG to international barter contract, one may conclude that the CISG does not state any restriction as to the price. In other words, the term price as used in relevant articles of the CISG is not restricted to money[50] and in that respect one can note,

[46] See P. Schlechtriem, 28. expressly stating: "*Barter contracts are not covered by the CISG*".

[47] Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, 09.03.2004, 91/2003, CISG online 1184.

[48] I. Schwenzer, P. Hachem, 33; B. Audit, 137; V. Heuzé, 76. With reserve K. H. Neumayer, C. Ming, 38; J. O. Honnold, 53.

[49] Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry,17 June 2004, 186/2003, CISG online 1240.

[50] One should also take into consideration that most of the domestic laws equate barter contracts with sales contracts.

taking into consideration interpretation of the CISG in terms of Article 7.1, that barter contracts should not be excluded from the scope of the CISG subject to contrary agreement by the parties.[51] Nevertheless, it is difficult to predict the view of the courts in each particular case as it can be concluded from the completely opposite approaches in two indicated Awards relating to very similar cases. Therefore, if the parties wish their barter contract to be governed by the CISG, they should expressly provide for the application of the CISG.[52]

## 4. APPLICABILITY OF THE CISG TO INTERNATIONAL FINANCIAL LEASING

Application of the CISG to financial leasing transaction is doubtful. The main reason is the nature of financial leasing – the financing part of the leasing contract and its regulation of the possession and use of the equipment by the lessee regularly are of greater importance than the sale part of the transaction. In terms of Article 3.2, the CISG does not apply if the preponderant part of the obligations relates to financing and use of the goods available to the lessee. On the other hand, the rules of the CISG in most cases would be inappropriate for the rights and obligations of the parties with respect to the financial part of leasing contract.[53] The second reason lays in the fact that specific rules for financial leasing have been developed on international level, as for instance the 1988 UNIDROIT Convention on International Financial Leasing (Ottawa).[54]

However, one should note that financial leasing transaction includes three parties – the lessor, the lessee and the supplier, and two contracts – the supply contract and the leasing contract. The lessor enters into an agreement with the supplier under which the lessor acquires the equipment on terms approved by the lessee so far as they concern its interests (the supply contract). On the other hand, the lessor enters into an agreement with the lessee, granting to the lessee the right to use the equipment in return for the payment of rentals (the leasing contract).[55] In the frame

[51] J. O. Honnold, 53.

[52] See I. Schwenzer, P. Hachem, 33.

[53] See P. Schlechtriem, 27; I. Schwenzer, P. Hachem, 33, stating "*Operating and financial leasing contracts will save for exceptional circumstances in a particular case regularly be excluded from the CISG...*". But see V. Heuzé, 75.

[54] There are also more and more domestic rules regulating financial leasing. For instance, in Serbia, the Law on financial leasing is adopted on 2003. See J. Perović, *Ko mentar Zakona o finansijskom lizingu,* Beograd 2003.

[55] See Article 1 of the 1988 UNIDROIT Convention on International Financial Leasing.

of this transaction, the supply contract between the lessor and the supplier may be governed by the CISG since it is basically a contract of sale.[56] With regard to the leasing contract, two general rules constitute the main distinction between leasing and sale: 1. the rentals payable under the leasing contract are calculated so as to take into account in particular the amortisation of the whole or a substantial part of the cost of the equipment and 2. when the leasing contract comes to an end the lessee, unless exercising a right to buy the equipment or to hold the equipment on lease for a further period, shall return the equipment to the lessor (the result of the leasing contract is not the final acquisition of the equipment by the lessee unless otherwise agreed by the parties).[57] In the light of these and other specific characteristics of a leasing contract,[58] one should conclude that this type of contract generally does not fall into the scope of the CISG. Finally, one may note that, although there is no contract between the lessee and the supplier, the lessee in certain cases may be entitled to claim directly the supplier on the basis of the general rule that duties of the supplier under the supply contract shall also be owed to the lessee as if it were a party to that contract and as if the equipment were to be supplied directly to the lessee.[59] In that case, the problem of the applicability of the CISG may arise as well. Therefore, probably the safest solution would be to expressly stipulate the applicable law both in the leasing contract concluded between the lessor and the lessee and in the supply contract concluded between the lessor and the supplier where the lessee approves the terms so far as they concern its interests.

## 5. GOODS

The CISG applies to contracts of "sale of goods". Although the Convention does not define "goods",[60] it is undisputed that under the CISG "goods" are basically moveable, tangible objects.[61] The commentators of the CISG underline that the interpretation of the notion of goods has to be made autonomously and in the light of the CISG rules on non-

[56] See I. Schwenzer, P. Hachem, 33.

[57] See Articles 1.2.c and 9.2 of the 1988 UNIDROIT Convention on International Financial Leasing.

[58] See J. Perović, (2003), 20 27.

[59] See Article 10 of the 1988 UNIDROIT Convention on International Financial Leasing.

[60] Whilst the English text of both ULIS and the CISG uses the term "goods", the French term in the CISG "*marchandises*" differs from the relevant term used in ULIS "*objets mobiliers*".

[61] J. O. Honnold, 53; V. Heuzé, 75; K. H. Neumayer, C. Ming, 38; P. Schlechtriem, 28.

conformity[62] in order to understand this notion as widely as possible so as to cover all objects which form the subject-matter of commercial sales contracts,[63] with exception of items excluded by Article 2 CISG.[64]

The goods must be moveable at the time of delivery. Any possible doubt in respect of land is excluded[65] by many of the CISG provisions that are inapplicable to transactions with land.[66] Nevertheless, with regard to immovables in general, it is sufficient for them to become moveable as a result of the sale.[67] Although goods must be moveable, it is not necessary that goods are corporal. For instance, the classification of computer software had led to controversy.[68] It is suggested in that regard that if software is permanently transferred to the other party in all respects except for the copyright and restriction to its use by third parties and becoming part of the other party's property, it can be considered as "goods" in terms of Article 1 CISG. Contrary to that, mere agreements on temporary use against payment of royalties do not fall into the scope of the CISG.[69] In the context of software, LG München for instance expressed the view that the CISG is applicable to a standard software.[70] The sale of "know-how" that is not incorporated in the physical object,[71] the sale of a complete business undertaking[72] and the contract for scientific research[73] are excluded from the scope of the CISG.

## 6. CONCLUSION

The analysis of the rules on the application *ratione materiae* of the CISG brings to the conclusion that divergences in their interpretation still

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62 I. Schwenzer, P. Hachem, 34.

63 P. Schlechtriem, 28.

64 Even the items which are *extre commercium* remain "goods" in terms of Article 1 CISG. See I. Schwenzer, P. Hachem, 34.

65 J. O.Honnold, 53.

66 For example quality and packing (Article 35), shipment and damage during transit (Articles 67 69) delivery by installments (Article 73), etc.

67 See I. Schwenzer, P. Hachem, 35.

68 J. O. Honnold, 53.

69 I. Schwenzer, P. Hachem, 35.

70 *LG München*, 08.02.1995, CISG online 203. See also *OLG Koblenz*, 17.09.1993, CISG online 91.

71 I. Schwenzer, P. Hachem, 35; F. Ferrari, 149. But see G. de Nova, "L'ambito di applicazione "ratione materiae" della Convenzione di Vienna", *Rivista trimestrale di dir itto e procedura civile*, 1990, 752.

72 B. Piltz, *Internationales Kaufrecht. Das UN Kaufrecht (Wiener Übereinkommen von 1980) in praxisorientierter Darstellung*, C.H.Beck, München 1993, 46

73 See for instance *OLG Köln,* 26.08.1994, CISG online 132. Commented in C.Witz, 32 33.

exist, which may cause problems and uncertainties in international commerce. With regard to contracts for goods to be manufactured, in cases where both parties supply materials, the courts in certain cases apply domestic law criteria in determining the distinction between sales and processing. On the other hand, the prevailing economic value test itself raises certain dilemmas, such as, for instance, how big a proportion of the value of all the materials is "substantial". The mixed contracts cause difficulties in determining whether the respective transaction constitutes one single contract or two separate agreements; where there is one single contract the further problem lays is the interpretation of the term "preponderant part". Concerning distribution contracts, the courts take different approaches to the applicability of the CISG to the framework distribution contract in cases where the borderline between the framework contract and the sales concluded on the basis of the framework contract is flexible and uncertain. Controversial views were expressed with respect to barter transactions as well: while some authors find barter contract excluded from the CISG, the majority seems to favour the applicability of the CISG to this type of contract. With regard to financial leasing, one should note that although the leasing contract does not fall into the scope of the CISG, the supply contract may be governed by the CISG, in which case the unified financial leasing transaction would be submitted to different legal regimes. Finally, the interpretation of notion of "goods" under the CISG had led to controversy with respect to certain types of items.

In the context of these problems, one could suggest that the contracting parties should be aware that, despite the efforts to achieve the uniform and autonomous interpretation of the CISG, the courts still may express discrepancies in interpretation of the rules on the application of the CISG. Therefore, the parties should be advised to solve the question of the Convention's applicability in their contract in order to achieve certainty of law, one of the most important requests for international commerce.

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# DUTY TO EXAMINE THE GOODS IN INTERNATIONAL LAW OF SALES

*The duty to examine the goods in the international law of sales is regulated by Article 38 of the 1980 UN Convention on Contracts for the International Sale of Goods. The Convention explicitly provides that the buyer has the duty to examine the goods and sets out the time frame in which the examination should take place. The place of the examination may be deduced from the Convention. However, the Con vention does not address the method and scope of the examination nor who should bear the costs of the examination.*

*This paper analyzes some aspects of the duty to examine the goods. The im portance of the duty to examine the goods, its purpose, relationship to the duty to notify the seller of the lack of conformity of the goods and its legal nature are dis cussed at the outset. Subjects effecting the examination and method and scope of the examination are analyzed in the second part of this paper.*

Key words: *Contract of Sale. Examination of the Goods. Method of Examina tion. Conformity of the Goods. CISG.*

## 1. INTRODUCTION

Pursuant to the 1980 UN Convention on Contracts for the International Sale of Goods (CISG), the buyer has the duty to examine the delivered goods and to notify the seller on possible non-conformities properly and in a timely manner. In such a case, the buyer's omission has serious legal consequences. The seller's obligation to deliver the goods is deemed to be performed and the buyer has to pay the purchase price. Consequently, the buyer loses the right to rely on a lack of conformity of the goods and to claim damages.

In international sales, the duty to examine the goods is of great theoretical and practical importance. Article 38 of the CISG explicitly provides that the buyer has the duty to examine the goods and regulates the time frame in which the examination should take place. The place of the examination may be deduced from the Convention. However, the CISG does not address the method and intensity of the examination nor who should bear the costs of the examination.

The duty to examine the goods is governed by Article 38 of the CISG, in Chapter II – Obligations of the Seller. However, it is important to stress that this provision defines the buyer's duty to inspect the goods and, therefore, *de facto* is not the obligation of the seller.

The legislative history shows that provisions governing the buyer's duty to examine the goods and to notify the seller regarding a disclosed non-conformity were broadly disputed. The diverging views on this point were due to the substantial differences existing in domestic laws of sales. Generally, domestic legal systems can be divided into two main groups. The first group includes domestic laws of sales in which the examination of the goods and proper and timely notification of non-conformity are preconditions for the buyer to exercise his rights arising out of non-conformity of the delivered goods. In that respect, there are countries in which the time-frame for the examination is short and those which allow the examination to take place in a reasonable time. In contrast, there are legal systems in which examination and notification are required only when the buyer wants to avoid the contract, while for the claim of damages, the buyer does not need to examine the goods and to notify the seller.

The implementation and interpretation of the provisions regulating the examination of the goods and notice of non-conformity have generated numerous problems and perplexities. Moreover, these issues were among the most litigated matters in the CISG. Despite the fact that these issues concern international sales, case law is influenced by the domestic laws of sales and reflects the legal importance of notification of the seller in specific countries. Accordingly, there are only a few decisions and awards from countries in which notification of the seller is not necessary for the claim of damages. Similarly, there are relatively few decisions in countries where the domestic law of sales requires the notice to be given in a reasonable period of time.[1] Logically, the majority of decisions stem from countries where the domestic laws provide strict rules regarding the examination of the goods and non-conformity notice.[2]

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[1] *CISG AC Opinion no.2, Examination of the Goods and Notice of Non Conformity: Articles 38 and 39*, 7 June 2004, para. 5.1, available at *http://www.cisg.law.pace.edu/cisg/CISG AC op2.html*, last visited February 2011.

[2] See more *CISG AC Opinion no.2, Examination of the Goods and Notice of Non Conformity: Articles 38 and 39*, 7 June 2004, para. 5.1, available at *http://www.cisg.law.pace.edu/cisg/CISG AC op2.html*, last visited February 2011.

In the practical application of the CISG, it should be noted that the duty to examine the goods and the duty to notify the seller of non-conformity of the goods are established in the seller's favor, while being an additional burden on the buyer. In the international law of sales it is, therefore, of essential importance not to impose overly harsh requirements on the buyer because the risk of non-conformity of the goods would thereby be shifted to the buyer. Further, it is important to stress that the criteria established under the domestic laws of sales are not applicable in the international sale of goods. The necessity of providing an autonomous interpretation of the CISG becomes especially prominent in cases where the domestic laws of sales contain rules that are substantially similar to Article 38 of the CISG.

## 2. SCOPE OF ARTICLE 38 OF THE CISG

The buyer must examine the goods, or cause them to be examined, within as short a period as is practicable in the circumstances.[3] The buyer has the duty to examine the goods for every lack of conformity within the meaning of Article 35 of the CISG. The examination should reveal every material defect of the goods, departures from the quantity and description of the goods (an *aliud*) and defects in packaging.

When the sale of goods contract is concluded on the basis of a sample or model, the buyer has to begin with the examination of the sample or model itself and to notify the seller of possible defects. Afterwards, the buyer is nevertheless required to examine the main delivery even though the sample or model was free of defects.[4]

Article 38 of the CISG applies not only to the original delivery, but to subsequent deliveries as well, i.e. the delivery of the lacking goods in case of partial delivery and the delivery of the substitute or repaired goods.

In case of a contract for the delivery of the goods by installments, the buyer must examine each individual consignment.[5] When the buyer does not comply with his duty to examine each individual consignment and therefore does not inform the seller of the defects, he loses his right to rely

[3] Article 38(1) CISG.

[4] See more I. Schwenzer in: P. Schlechtriem, I. Schwenzer (ed.), *Commentary on the UN Convention of the International Sale of Goods (CISG)*, New York 2005², Art. 38, para. 9.

[5] See Article 73 CISG. See also Netherlands, *Rechtbank Rotterdam*, 20 January 2000, available at *www.unilex.info*; Austria, *Oberster Gerichtshof*, 27 August 1999, avail able at *www.unilex.info*; CISG online 1813, Netherlands, *Rectbank Arnhem* (*Tree case*), 11 February 2009.

on a lack of conformity.[6] On the other hand, the buyer retains his rights in respect to posterior non-conforming deliveries.[7] The buyer's duty to examine each individual consignment is assessed in relation to the circumstances of each particular case. If successive deliveries are functionally connected (e.g. successive deliveries of parts of complex machinery whose non-conformity can be established only after installation and test work), then the duty to examine does not *de facto* exist for a single delivery.

Article 38 of the CISG places a duty on the buyer to examine the goods in order to establish any possible lack of conformity. In contrast, provisions governing the liability of the seller for defects in title and third party rights, based on industrial property and other intellectual property, do not require the buyer to examine the goods, but only to notify the seller.[8]

In theory, it is widely accepted that Article 38 of the CISG should have analogous application to documents.[9] Although the Convention does not provide explicit rules, different interpretations would undermine the seller's right to cure the non-conformity. In the author's opinion, the principle of good faith (Art. 7(1) CISG) requires the examination of documents.

The seller is bound to hand over documents relating to the goods.[10] The Convention does not explicitly determine which documents are *documents relating to the goods* referred to in Article 34 of the CISG. Quite frequently, one may find provisions in contracts setting out the documents that the seller is obligated to hand over to the buyer. When the application of the INCOTERMS is stipulated, they contain detailed rules on documents that should be handed over by the seller. Also, the mode of payment (e.g. clean payment, documentary credit) may generally determine the documents that should be handed over to the buyer. Irrespective of the type of documents, the buyer should examine them in order to establish their accuracy and to be able to notify the seller in due time.

Article 38 of the CISG is of secondary importance. It applies only if the parties have not agreed otherwise.[11] Since the elective nature of the

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[6] CISG online 1813, Netherlands, *Rechtbank Arnhem* (*Tree case*), 11. February 2009.

[7] See more I. Schwenzer in: P. Schlechtriem, I. Schwenzer (ed.), Art. 38, para. 9.

[8] See Article 41 43 CISG.

[9] See C. Benicke in: K. Schmidt (Hrsg.), *Münchener Kommentar zum Handelsge setzbuch*, München 2004, Vor Art. 38, 39, para 4; I. Schwenzer in: P. Schlechtriem, I. Schwenzer (ed.), Art. 38, para. 7; U. Magnus in: H. Honsell (Hrsg.), *Kommentar zum UN Kaufrecht*, Berlin, Heidelberg 2010, Art. 38, para 8. Opposite position, W.A. Achilles, *Kom mentar zum UN Kaufrechtsübereinkommen (CISG)*, Luchterhand 2000, Art. 38, para 2.

[10] See Article 30 and Article 34 CISG.

[11] See Article 6 CISG.

examination is not in accordance with the needs of international trade, the duty to examine is often stipulated in standard form contracts and usages.[12] Furthermore, trade usages to which parties have agreed or impliedly made them applicable to their contract and practices which they have established between themselves supersede Article 38 of the CISG[13].

## 3 LEGAL NATURE AND PURPOSE OF THE DUTY TO EXAMINE

Examination of the goods is not a legal obligation, but is, by its legal nature, a duty (*die Obliegenheit*).[14] The duty represents "an obligation to oneself"[15] and not to the other party in a contract. Thus, the examination of the goods is an additional burden on the buyer. Failure to comply with this burden does not constitute a breach of a contract and, accordingly, the seller can neither require the examination nor can non-performance of the examination represent a ground for claim for damages.

The duty to examine the goods should not be confused with the buyer's right (Art. 58(3) of the CISG) to examine the goods before payment of the purchase price.[16]

The main purpose of the examination is to determine whether or not the goods are in conformity with the contract, i.e. to reveal defects in quality, quantity, description and packaging.

The duty to examine the goods is closely connected with the duty to notify the seller. Namely, the seller will be liable for the non-conformity of the delivered goods only if the buyer gives him notice pursuant to Article 39 of the CISG. The examination usually precedes the non-conformity

[12] See more M. Draškić, *Obaveze prodavca prema unifikovanim pravilima o međunarodnoj kupoprodaji* [The Seller's Obligations According to the Unified Law of International Purchase Sale], Beograd 1966, 93; B. T. Blagojević, V. Krulj (ed.), *Komen tar Zakona o obligacionim odnosima* [Commentary on the Law of Obligations], Book I, Beograd 1980, 975.

[13] See Article 9(1) and (2) CISG.

[14] U. Magnus, *J. von Staudingers Kommentar zum Burgerlichen Gesetzbuch: Wie ner UN Kaufrecht (CISG)*, Sellier de Gruyter, Berlin 2005, 388; I. Schwenzer in: P. Schlechtriem, I. Schwenzer (ed.), Art. 38, para 5; C. Benicke in: K. Schmidt (Hrsg.), Vor Art. 38, 39, para 1; U.P. Gruber in: W. Krüger, H.P. Westermann (Hrsg.), *Münchener Kommentar zum Bürgerlichen Gesetzbuch*, Band 3, 4. Auflage, München, 2004, Art. 38, para 3; I. Saenger in: H.G. Bamberger, H. Roth (Hrsg.), *Kommentar zum Bürgerlichen Gesetzbuch*, C.H. Beck, München 2003, Art. 38, para 1.

[15] M. Hutter, *Die Haftung des Verkäufers für Nichtlieferung bzw. Lieferung ver tragswidriger Ware nach dem Wiener UNCITRAL Übereinkommen über internationale Warenkaufverträge vom 11. April 1980*, Allgäu 1988, 70.

[16] W. A. Achilles, Art. 38, para 1; I. Schwenzer in: P. Schlectriem, I. Schwenzer (ed.), Art. 38, para 3.

notice and serves for its preparation. However, the examination of the goods is not a precondition for proper notification. In other words, with the fulfillment of conditions set out in Article 39(1) of the CISG, notice of the buyer will have a legal effect even where the buyer has either not examined the goods sufficiently or at all. Furthermore, failure to examine the goods and to give notice of the lack of conformity is not detrimental to the buyer whenever the defect is latent, that is, if the non-conformity could not have been recognized upon an appropriate examination of the goods.[17] Finally, the seller is not entitled to rely on the provision of Art. 38 of the CISG if he acted in bad faith, i.e. if the lack of conformity relates to the facts he knew or could not have been unaware of, and which he did not disclose to the buyer,[18] and when the buyer has a reasonable excuse for his failure to give the notice of non-conformity[19].

The essential difference between the duty to examine the goods and the duty to notify the seller of the lack of conformity lies in the fact that the buyer does not suffer any sanctions for failing to examine the goods. Nevertheless, in such a case, he bears the risk of the existence of the non-conformity, i.e. the risk that his notification could end in failure. If defects are recognized too late due to failure to examine the goods (after the deadline set for giving the notice of non-conformity), the buyer will *de facto* not be in a position to notify the seller of the non-conformity and will lose the right to rely on it. Consequently, the observation of the duty to examine the goods is in the buyer's own interest. In contrast, failure to inform the seller of the defects leads to the loss of remedies.

The primary function of the examination is to recognize defects and prepare the notice of non-conformity. Additionally, the examination of the goods should determine when, in the absence of the examination, the buyer *ought to have* discovered the lack of conformity and, from that moment, the reasonable time for giving the notice of non-conformity starts to run. Finally, pursuant to Art. 49(2)(b)(i) of the CISG, the buyer

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[17] "Es kann nicht dem Käufer zum Nachteil gereichen, wenn er die Untersuchung unterlassen hat, wenn eine normale Untersuchung den Mangel nicht hätte aufdecken können." Quoted from R. Herber, B. Czerwenka, *Internationales Kaufrecht Kommentar zu dem Übereinkommen der Vereinten Nationen vom 11. April 1980 über Verträge über den Internationalen Warenkauf*, München 1991, Art. 38, para 2.

See also C. Brunner, *UN Kaufrecht CISG Kommentar zum Übereinkommen der Vereinten Nationen über Verträge über den internationalen Warenkauf von 1980 Unter Berücksichtigung der Schnittstellen zum internen Scweizer Recht,* Bern 2004, Art. 38, para 2; U. Magnus in: H. Honsell (Hrsg.), Art. 38, para 4; I. Schwenzer in: P. Schlechtriem, I. Schwenzer (ed.), Art. 38, para 5; C. Benicke in: K. Schmidt (Hrsg.), Vor Art. 38, 39, para 1; I. Saenger in: H.G. Bamberger, H. Roth (Hrsg.), Art. 38, para 1.

See also Finland, *Helsinki Court of Appeal* (*Steel plates case*), 29 January 1998, *http://cisgw3.law.pace.edu/cases/980129f5.html*, last visited February 2011.

[18] See Article 40 CISG.

[19] See Article 44 CISG.

loses the right to declare the contract avoided unless he does so within a reasonable time after he knew or *ought to have known* of the breach.

## 4. EXAMINATION BY THE BUYER OR A THIRD PARTY

Pursuant to Article 38(1) of the CISG, the buyer must examine the goods, or cause them to be examined, within as short a period as is practicable in the circumstances. Contracts of international sale usually contain detailed rules regulating subjects effecting the examination of the goods. Sometimes this issue can be determined by usages or previous practice established between parties.

It is conceivable for parties to agree to examine the goods together. However, that will not often be the case because of the distant character of international sales.

By stating that the buyer must either examine the goods or "cause them to be examined", Article 38(1) implies that the buyer need not personally carry out the examination.[20] In other words, the examination can be carried out by the buyer, his employees, as well as third persons acting in accordance with the buyer's instructions (e.g. expert[21] in specific field or his customer). These persons should be treated as the buyer's assistants and the buyer is liable for their work, i.e. the buyer will have to bear the consequences of inadequate examination.

According to the agreement the buyer can be obligated to entrust the examination with the third independent party. It is possible for the examination to be carried out by impartial controlling organizations, as well as by official bodies.

The examination of the goods by controlling organization is very common in international trade practice. In contracts of sale, however, parties must explicitly provide for this. Even though appointing an impartial controlling organization raises costs of transaction, the parties usually opt

[20] Digest of Article 38 case law, 2008 UNCITRAL Digest of case law on the United Nations Convention on the International Sale of Goods, *http://www.cisg.law.pace.edu/cisg/text/digest art 38.html*, last visited February 2011.

"The buyer is obliged to examine the goods itself as a middleman or have them examined by the third person." Austria, *Oberster Gerichtshof*, 27 August 1999, *http://www.unilex.info/case.cfm?pid 1&do case&id 480&step Abstract*, last visited Febru ary 2011.

[21] Serbia, *Foreign Trade Court of Arbitration attached to the Yugoslav Chamber of Commerce* (*"Wet blue" leather case*), 12 February 2001, *http://cisgw3.law.pace.edu/cases/010212sb.html* (expert specialist for leather chosen and sent by the buyer); Nether lands, *Rechtbank Rotterdam*, 20 January 2000, available at *www.unilex.info* (buyer's qual ity inspector in the seller's place); CISG online No. 47, Germany, *Bundesgerichtshof,* 3 November 1999 (expert appointed by the buyer to examine the goods).

for this due to the distant character of international sales. Quite often, the examination by third person is a necessity because parties are neither proficient nor have the equipment required for specialized operations. Finally, after the examination, the controlling organization issues a certificate of quality that informs the buyer of the condition of the goods before arrival at their destination. It is important to distinguish two situations that can directly influence the liability of the parties. In other words, a distinction should be made between cases where the parties agree on third impartial persons or where the seller insists on the appointment of the controlling organization and where the buyer chooses the person carrying out the examination. In the first case, the buyer is not liable for the third person's work and does not have to bear the consequences of inadequate examination and the duty to examine the goods is fulfilled by giving necessary instructions. In the second case, the third person acts as the buyer's assistant and the buyer is liable for his work. It is commonly accepted that the buyer is not responsible for the consequences of an improper examination effected by official bodies[22].

Finally, there is a possibility for the duty to examine to be shifted to the customer in cases of the sale of goods in transit.[23] When the buyer, for example, resells and redispatches the goods before having had a reasonable opportunity to examine them, the goods must be examined by the new buyer.[24]

## 5. METHOD AND INTENSITY OF EXAMINATION OF THE GOODS

The method of examination represents the factual acts undertaken in order to ascertain the condition of the delivered goods, while the intensity and scope of the examination determine how extensive those factual acts should be. The method and scope of the examination are generally regulated by the contract of sale, in particular where the goods are complex machinery or equipment. Additionally, the method and intensity of examination can arise from usages and/or previous course of dealings.

On the other hand, the CISG is silent about the method and scope of examination. However, the answer to that question may be deduced from the general principles underlying the CISG, as well as from comprehensive case law.

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[22] See I. Schwenzer in: P. Schlechtriem, I. Schwenzer (ed.), Art. 38, para 10.

[23] CISG online 570, Germany, *OLG Koblenz*, 18 November 1999; CISG online 918, Germany, *OLG Düselldorf*, 23 January 2004

[24] C.M. Bianca in: C.M. Bianca, M.J. Bonell (ed.), *Commentary on the International Sales Law The 1980 Vienna Sales Convention,* Milan 1987, Art. 38, para 2.2.

Whenever the method and scope of the examination are not specified, the examination has to be appropriate in the given circumstances and has to enable non-conformity to be revealed within a short period of time. It is widely accepted in theory that the nature and scope of the examination should be determined in accordance with *general principle of reasonableness*.[25] In other words, the examination required is one which is reasonable in all the circumstances, and not the one which would reveal every possible defect.[26] In any case, customary methods of examination that have emerged for certain branches of trade have to be observed (e.g. individual examination, spot checks, chemical analysis...).[27]

The method and intensity of examination are determined by its purpose. Inspection should serve as a preparation for adequate and thorough notification of non-conformity. Consequently, the examination should detect any possible lack of conformity and its nature, since the buyer, under Article 39(1) of the CISG, has to give notice to the seller specifying the nature of the lack of conformity.

Due to their complexity, issues of method and scope of examination should be analyzed separately.

### 5.1. Method of examination

The CISG does not expressly define the methods of examination of the goods. On the contrary, pursuant to the Article 38(4) of the ULIS, the

[25] See C.M. Bianca in: C.M. Bianca, M.J. Bonell (ed.), Art. 38, para 2.3.; M.J. Bonell, F. Liquori, "The UN Convention on the International Sale of Goods: a Critical Analysis of Current International Case Law (Part II)", *Uniform Law Review,* 2/1996, 359; U. Magnus in: H. Honsell (Hrsg.), Art. 38, para 15; UN DOC. A/CONF. 97/5, *Secretariat Commentary*, Official Records, 34.

"Der Käufer müsse die Ware entsprechend ihrer Art, ihrer Menge, ihrer Verpackung und unter Berücksichtigung aller weiteren Umstände in angemessener Weise untersuchen." CISG online 1889, Austria, *Oberster Gerichtshof*, 2 April 2009.

[26] H. Bernstein, J. Lookofsky, *Understanding the CISG in Europe A Compact Guide to the 1980 United Nations Convention on Contracts for the International Sale of Goods,* Dordrecht 1997, 62.

"The defective composition of the PVC could only be discovered by virtue of special chemical analyses, which the buyer was not bound to have made." Germany, *Landgericht Paderborn*, 25 June 1996, *http://www.unilex.info/case.cfm?pid 1&do case&id 191 &step Abstract*, last visited February 2011.

[27] F. Enderlein, D. Maskow, *International Sales Law,* Oceana Publications, New York 1992, 155.

"The Court stated that in case of sale of wine, unless there are some particular reasons to do so, the buyer is not bound to have the wine examined with respect to possible water additions, since this kind of examination is not included among the ones generally undertaken in the wine branch." Germany, *Landgericht Trier*, 12 October 1995, *http://www.unilex.info/case.cfm?pid 1&do case&id 185&step Abstract,* last visited February 2011.

methods of examination shall be governed by the agreement of the parties or, in the absence of such agreement, by the law or usage of the place where the examination is to be effected. This provision is problematic when existing law or usage of the place of the examination does not impose the duty to examine the goods and to notify the seller of lack of conformity. It should be noted that Article 38(4) of the ULIS could not exonerate the buyer from examination[28] because this article cannot derogate Article 38(1) of the ULIS, but would affect the way in which the examination is to be carried out. Accordingly, Article 38(4) of the ULIS made sense only when the place of the examination was in the country whose domestic law of sales required inspection of the goods. In practice, however, the parties from these countries generally resolved the issue of examination in their contract. The main difficulty arising from the Article 38(4) of the ULIS is somewhat different. If the method and scope of the examination were to be governed by the law and usages of the place of the examination, then the examination of the same goods could potentially be completely different in industrially developed and developing countries. Therefore, Article 38(4) of the ULIS did not sufficiently take into consideration the international character of the transaction. This provision has been criticized and left out of the CISG, so that the method of the examination can be determined according to the international character of the transaction and international usages.

However, it does not necessarily mean that the application of usages of the place of examination is always excluded. Namely, the usages will be relevant when parties reach such agreement, when it results from express or tacit application of the general terms and conditions or when the basis for their application lies in Article 9 of the CISG.

The examination must be objectively suitable for disclosing recognizable defects[29] in the given circumstances. The goods must be examined with care and skill.[30] The examination with care does not necessarily imply the use of an expert, but it means that the person examining the goods is obliged to act with due diligence.

Generally, the method of the examination is determined by the relevant circumstances. This depends on the nature of the goods, their quantity, packaging, complexity, as well as on the time in which the examination is to be effected. If the existence of the defects can be relatively

[28] See different opinion C.M. Bianca in: C.M. Bianca, M.J. Bonell (ed.), Art. 38, para 2.3.

[29] While the CISG does not explicitly distinguish visible (apparent) and latent (hidden) defects, it can be deduced from the rule under Article 39 of the CISG that a dis tinction is made between visible and latent non conformity.

[30] See more R. Herber, B. Czerwenka, Art. 38, para 5.

easily established or if, in cases of perishable goods, the examination has to be effected in a quick manner, a simple examination would be sufficient, especially viewing, smelling, cutting open individual fruits and/or counting, weighting etc.[31] If the examination is used to identify the composition of the goods or their chemical or physical characteristics, it would be necessary to conduct a chemical or laboratory analysis or specific expert inspection.[32] In cases where the lack of the conformity of the goods can be ascertained through operation and performance tests, the examination purports trial runs.[33] Examination of cloth material should include a test of shrinkage by carrying out washing and ironing tests on all sorts and colours, at least a simple test of colour fastness, as well as dyeing on a trial basis.[34] However, pieces of clothing do not have to be randomly washed in order to test their tendency to shrink.[35] The examination of delivered sticky foil consists of sticking attempts.[36]

Based on the abovementioned, it follows that the method of the examination is primarily determined by using objective criteria. Exceptionally, subjective factors influencing the buyer's position may be taken into consideration (e.g. the buyer's lack of experience) if they were known to the seller or if he should have been aware of them at the time of the conclusion of the contract.[37] Accepting a broader interpretation and acknowledging other subjective factors (e.g. the buyer's illness, difficulties in conducting a business, confiscation of the goods in accordance with the decision of the official body...) would be erroneous and contrary to the purpose of Article 44 of the CISG.

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[31] See more W.A. Achilles, Art. 38, para 4; I. Schwenzer in: P. Schlechtriem, I. Schwenzer (ed.), Art. 38, para 14. Netherlands, *Arrondissementsrechtbank Zwolle*, 5 March 1997 (perishable food products), available at *www.unilex.info*.

[32] See more W.A. Achilles, Art. 38, para 4.

[33] "The Court stated that in a sale concerning a machine or other complicated technical device, the proper examination of the goods according to Art. 38(1) must in volve a testing of the functions of the machine." Germany, *Oberlandesgericht Oldenburg*, 5 December 2000, *http://www.unilex.info/case.cfm?pid 1&do case&id 500&step Abstract*, last visited February 2011.

[34] I. Schwenzer in: P. Schlechtriem, I. Schwenzer (ed.), Art. 38, para. 14.

"In the opinion of the Court, even if in the case at hand the defects could only be detected once the cloth had been dyed, the buyer should have dyed a sample of the cloth shortly after delivery." Germany, *Landgericht Berlin,* 21 March 2003, *http://www.unilex.info/case.cfm?pid 1&do case&id 921&step Abstract*, last visited February 2011.

[35] I. Schwenzer in: P. Schlechtriem, I. Schwenzer (ed.), Art. 38, para. 14. *See also* I. Saenger in: H.G. Bamberger, H. Roth (Hrsg.), Art. 38, para 4.

[36] See more I. Saenger in: H.G. Bamberger, H. Roth (Hrsg.), Art. 38, para 4.

[37] I. Schwenzer in: P. Schlechtriem, I. Schwenzer (ed.), Art. 38, para. 13. See also U.P. Gruber in: W. Krüger, H.P. Westermann (Hrsg.), Art. 38, para 23.

Finally, the person examining the goods is precluded from performing forbidden acts of manipulation on the goods (e.g. adding water to wine).[38]

### 5.2. Scope and intensity of examination

The nature of defects that have to be discovered through the examination, i.e. how intense the examination should be, is a very important issue. The scope and intensity of the examination should be such to, as quickly as possible, accomplish the goal of ascertaining the lack of conformity of the delivered goods.[39] The examination is sufficient when it is suitable to reveal possible defects. In other words, it is not necessary to perform chemical analysis if the lack of conformity can be established by observation.

The examination does not have to be of such an intensity to reveal every imaginable lack of conformity.[40] The inspection of technical goods (e.g. machinery, cars) should prove their functionality, i.e. that they function correctly. On the other hand, it is not necessary to effect the examination that would detect the cause of the non-conformity.[41]

The scope of the examination depends on the circumstances of each individual case. In particular, it is firstly influenced by the type of the goods. In the case of perishable goods, the buyer has to react promptly and reasons of urgency cannot justify a time consuming and complex examination. In contrast, durable goods may be examined in a manner that is more intensive and lasts longer.

Secondly, the quantity of the goods and their packaging affect the scope of examination. Whenever possible, the buyer should examine all the goods. When the goods are too complex or too numerous the buyer is neither bound to undertake a thorough examination of every single good nor of every single part.[42] In case of large quantities, the buyer should perform a reasonable number of random spot checks (*die Stichprobe*).[43] In other words, for large quantities, it should be considered reasonable to

[38] See more I. Saenger in: H.G. Bamberger, H. Roth (Hrsg.), Art. 38, para 4; W.A. Achilles, Art. 38, para 6; I. Schwenzer in: P. Schlechtriem, I. Schwenzer (ed.), Art. 38, para 13.

[39] See more R. Herber, B. Czerwenka, Art. 38, para 5; C. Brunner, Art. 38, para 12.

[40] Germany, *Landgericht Paderborn*, 25 June 1996, available at *www.unilex.info*.

[41] See more C. Brunner, Art. 38, para 12.

[42] C.M. Bianca in: C.M. Bianca, M.J. Bonell (ed.), Art. 38, para. 2.3.

[43] U. Magnus in: H. Honsell (Hrsg.), Art. 38, para 16; C. Brunner, Art. 38, para 13; I. Schwenzer in: P. Schlechtriem, I. Schwenzer (ed.), Art. 38, para 14.

take random samples, instead of examining all the delivered goods.[44] In order to be considered representative, random samples should be taken from different parts of the goods. Spot checks will not be suitable whenever the costs of a single check are too high in comparison to the value of the delivered goods.[45] If random sampling renders the goods unsaleable, the examination has to be performed but should be less extensive. It is arguable whether the same principle is applicable to the goods in original packaging, which are precluded from further sale after opening and examination (e.g. canned fruits, sterile medical equipment). It is commonly accepted in international sales law theory that in this case the buyer is required to perform a small number of spot checks.[46] Namely, the damage caused by the opening of the original packaging dictates the scope of the examination to be limited to what is needed. Furthermore, examined goods do not have to represent an average sample in a strict sense, considered the entire amount of goods, unless the condition of the goods does not induce doubts.[47] In that case, the buyer will not be deprived of the right to rely on the lack of conformity later, even when it was possible to disclose the non-conformity with a more detailed examination. In our opinion, it would be more suitable for the examination of the goods in original packaging to be restricted only to the exterior packaging, while possible lack of conformity of the goods should be treated as a latent defect. This conception seems to be more appropriate because a limited number of spot checks cannot provide an objective impression of the actual condition of the goods.

Thirdly, the intensity of the examination is influenced by the buyer's capabilities. If at the place of the inspection the buyer does not have technical equipment that is required for the specific type of the examination, the buyer is not bound to perform it, even if this scope of the examination is common in other places.[48] This position could be arguable and one should be very careful when evaluating the capability of the buyer.

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[44] Germany, *Oberlandesgericht Düsseldorf*, 10. February 1994 "The buyer failed to examine the goods on delivery. The court held that the notice of lack of conformity (sent two months after delivery) has not been sent in a good time as the buyer could have (and therefore ought to have) immediately examined at least a sample of the goods re ceived." Quoted from M.J. Bonell, F. Liguori, "The UN Convention on the International Sale of Goods: a Critical Analysis of Current International Case Law (Part II)", *Uniform Law Review,* 2/1996, 360.

[45] See more C. Brunner, Art. 38, para 13.

[46] C. Brunner, Art. 38, para 13; I. Schwenzer in: P. Schlechtriem, I. Schwenzer (ed.), Art. 38, para 14.

[47] See more W.A. Achilles, Art. 38, para 5.

[48] See more C. Brunner, Art. 38, para 12; U. Magnus in: H. Honsell (Hrsg.), Art. 38, para 17.

Fourthly, the costs of the examination and time needed for its completion also have to be considered. The costs should be reasonable in comparison to the expected results. Sometimes, the buyer will examine the goods in a simple manner (e.g. limited number of random samples) because more expensive methods are not at his disposal.

Fifthly, the probability of defects is also important (non-conformity of previous deliveries, damaged packaging...). Sometimes, there is no need for a particularly intensive inspection if the buyer can rely on the seller's statements and if he believes that the goods have specific characteristics (e.g. when the goods are purchased on the basis of express evidence of examination or of measurement of quantity).[49] The same applies when specific distinctive features of the goods are agreed upon and when the buyer is assured that the goods have already been checked (e.g. the goods are in compliance with specific standards: ISO, HACCP, HALAL, TÜV...). If the parties have a long-standing business relationship and if previous deliveries were in conformity with the contract, the buyer's trust should not preclude his duty to examine the goods.[50] According to case law, the lack of conformity of previously delivered goods, or the non-conformity of the goods ascertained by random sampling requires the buyer to act with more care and to effect the examination in a more detailed manner.[51] The aforementioned position is too harsh and it does not justify imposing any additional and stricter obligations on the buyer due to the seller's breach of contract.[52]

Finally, the intensity of the examination also depends on potential losses caused by undisclosed defects.[53] If there is a risk of ultimately large consequential losses, the examination must be more thorough than in a normal case[54].

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[49] See more W.A. Achilles, Art. 38, para 4.

[50] W.A. Achilles, Art. 38, para 4.

[51] See more U. Magnus in: H. Honsell (Hrsg.), Art. 38, para 18.

"With respect to the examination of the goods the court found that the buyer should have examined all the pairs of shoes from the second order and not only a few of them, having been forewarned by customer complaints concerning the first delivery." Germany, *Landgericht Stuttgart*, 31 August 1989, *http://www.unilex.info/case.cfm?pid 1&do case &id 1&step Abstract,* last visited February 2011.

[52] Opossite opinion B. Piltz, *UN Kaufrecht: Gestaltung von Export und Import verträgen; Wegweiser für die Praxis,* para 243; I. Schwenzer in: P. Schlechtriem, I. Schwenzer (ed.), Art. 38, para 13; W.A. Achilles, Art. 38, para 4.

[53] W.A. Achilles, Art. 38, para 3; U.P. Gruber in: W. Krüger, H.P. Westermann (Hrsg.), Art. 38, para 26.

[54] I. Schwenzer in: P. Schlechtriem, I. Schwenzer (ed.), Art. 38, para. 13.

## 6. CONCLUSION

On the basis of the studied literature, the interpretation of the abovementioned provisions of the CISG and relevant case law, there would seem to be several important conclusions. The buyer must examine the goods in order to establish every possible lack of conformity. The inspection of the goods serves for the preparation of the notice of non-conformity. The examination of the goods is, by its nature, a duty. The requirements imposed on the buyer in relation to the inspection of the goods should not be too strict because the risk of non-conformity of the goods would thereby be shifted to the buyer.

Secondly, the CISG explicitly provides that the buyer has the duty to examine the goods, but is silent on the method and the scope of examination. However, according to the generally accepted opinion, it is to be assumed that those issues are governed by the CISG. It is of essential importance not to apply the criteria established in domestic laws of sales to the examination in the international sale of goods. Therefore, in assessing the nature of the examination, one should have in mind the need of an autonomous interpretation of the CISG and the need to promote uniformity in its application.

Finally, the main principle underlying the method and scope of the examination is the principle of reasonableness. In other words, the examination has to be reasonable in the given circumstances and has to enable non-conformity to be revealed within a short period.

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# CISG AND ARBITRATION

*The paper identifies common principles, values and ideas of the CISG and Arbitration and focuses on the complementary character of the two concepts repre sented by these terms. The author proceeds in five steps. He identifies obvious differ ences between the CISG and Arbitration; indicates how often the CISG is applied by tribunals by relying on data available in the public domain as well as data provided by the ICC; illustrates where the CISG and Arbitration may interface namely re garding the questions how arbitrators decide to apply the CISG and whether arbitra tion agreements are governed by the CISG; highlights common features of the CISG and Arbitration; and, in a fifth and final step, identifies a number of potential bene fits which the CISG might provide for Arbitration and, vice versa, Arbitration might provide for the CISG.*

Key words: *CISG. Arbitration. Substantive validity. Conflict of laws.*

## 1. INTRODUCTION

The title of this paper *CISG and Arbitration* may appear surprising. The terms "CISG" and "Arbitration" stand for two different legal concepts. At first sight, these concepts have little in common, other than forming the legal background of the world's largest law student competition, the Willem C. Vis International Commercial Arbitration Moot[1].

However, a second look reveals that these concepts are less alien than they appear. The purpose of this paper is to identify common princi-

[1] In this moot, the students are asked to represent a party in a mock arbitration case in which the CISG applies as the law applicable to the substance of the dispute. For more information: *http://www.cisg.law.pace.edu/vis*.html, last visited on 31 December 2010.

ples, values and ideas of the CISG and Arbitration and to show that, at least to some extent, the two concepts are complementary.

In order not to put the cart before the horse, I will first identify some obvious differences between the CISG and Arbitration (I). Second, I will indicate how often the CISG is applied by tribunals (II). Third, I will illustrate where the CISG and Arbitration may interface (III). Fourth, I will highlight common features of the CISG and Arbitration (IV). Finally, I will indentify potential benefits which the CISG might provide for Arbitration and, *vice versa*, Arbitration might provide for the CISG (V).

## 2. OBVIOUS DIFFERENCES

### 2.1. The CISG

The CISG, the United Nations Convention on Contracts for the International Sale of Goods, is a an international treaty. The CISG was developed by the United Nations Commission on International Trade Law (UNCITRAL) and signed in 1980. As of 31 December 2010, has been ratified by 76 countries. These countries account for a significant proportion of world trade, rendering the CISG the most successful international uniform law project of the last century[2]. The CISG only applies to "*contracts of sale of goods*". Thus, it does not apply to contracts which either cannot be qualified as contracts of sale or do not cover the sale of goods[3]. Further, the CISG only governs the parties' substantive rights and obligations and does not address procedural issues. For example, the CISG does not provide for rules of evidence[4]. Finally, the CISG – at least in theory – applies in the same manner regardless of the judges' or the arbitrators' nationality. Indeed, it is one of the main goals of the CISG to provide for rules which do not favor the principles and values of one national legal system over another.

### 2.2. Arbitration

Arbitration, by contrast, is neither a statute, nor a single convention. On the contrary, it is a method of dispute resolution based on various international and national conventions, statutes, rules and principles. Arbitration as a means of dispute settlement is not only used to settle dis-

[2] See, *http://www.uncitral.org/uncitral/en/uncitral texts/sale goods/1980CISG status.html*, showing the full list of member states, last visited on 31 December 2010.

[3] Articles 2 5 CISG further define (narrow) the CISG's scope of application.

[4] For the related question regarding the extent to which the CISG governs the issue of burden of proof, see the article of Dr. S. Kröll "The burden of proof for the non conformity of goods" (also published in this issue).

putes over sales contract, but also other types of commercial disputes. For example, arbitration is also used to settle post M&A, joint venture, construction, investment and sport disputes[5]. Arbitration laws and rules govern the parties' procedural rights and obligations. They do not govern the parties' substantive rights. Further, despite continuing efforts to harmonize arbitration rules and laws, arbitration proceedings are conducted differently depending on the place of arbitration and/or the nationality of the arbitrators, the parties and their counsel.

Given these differences, one may legitimately ask what the CISG has to do at all with Arbitration and why both concepts should be addressed in one and the same paper.

## 3. STATISTICS

One answer is that the CISG is commonly applied by tribunals instead of by national courts and, *vice versa*, arbitration disputes are frequently governed by the CISG.

The homepages of "Pace"[6], "CISG-online"[7] and "Unilex"[8] suggest that approximately 25% of CISG cases are decided by tribunals[9]. Arguably, the actual percentage rate of cases may be significantly higher since a large number of awards are not published. *Vice versa*, an inquiry with a counsel from the Secretariat of the ICC Court of Arbitration has disclosed that in 155 out of 3000 cases randomly selected from a certain period of time, the CISG was applied. At first sight, this number may appear rather small. Yet, considering that the 3000 cases involved all kind of disputes and not only commodity disputes the number is actually surprisingly high.

## 4. ISSUES OF INTERFERENCE

At times, the provisions of the CISG and those of the applicable arbitration rules and laws may overlap. In this paper, I will focus on two

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[5] N. Schmidt Ahrendts, M. Schmitt, "Einführung ins Schiedsverfahrensrecht", *Juristische Ausbildung* 7/2010, 520.

[6] *http://www.cisg.law.pace.edu*, last visited on 31 December 2010.

[7] *http://www.globalsaleslaw.org/index.cfm?pageID 28*, last visited on 31 December 2010.

[8] *http://www.unilex.info*, last visited on 31 December 2010.

[9] The same conclusion is reached by Professor Loukas Mistelis for awards rendered prior to 2008 in his article "CISG and Arbitration", *CISG Methodology* (eds. A. Janssen, O. Meyer), Sellier European Law Publishers, Munich 2009, 387 388. Professor Mistelis also suggests that since only a very small percentage of arbitral awards are published, one may assume that up to 70% of CISG cases are decided by arbitral tribunals.

examples: the first one is best described by the question how arbitrators decide to apply the CISG; the second one by the question whether arbitration agreements are governed by the CISG.

### 4.1. . How do Arbitrators decide to apply the CISG?

The question which conflict of law rules tribunals follow to decide whether to apply the CISG is subject to debate. Some scholars are of the view that if the place of arbitration is in a contracting state, arbitrators, similar to state court judges, are bound to directly apply the conflict of law rules contained in Article 1 CISG. They argue that Article 1 CISG forms part of the *lex loci arbitri*[10]. Relying on Article 1 (1) (a) CISG, also tribunals have applied the CISG simply because both parties had their places of business in contracting states[11].

In my view, the better approach is that tribunals, regardless whether the place of arbitration lies in a contracting or a non-contracting state, are not bound to directly apply Article 1 CISG. They are primarily bound by the conflict of law rules contained in the applicable arbitration rules or laws[12]. Tribunals are not an organ of the state of the place of arbitration. Thus, regardless of whether or not the place of arbitration lies in a state which has signed and ratified the CISG, a tribunal is not under a (international public law) duty to apply the CISG. Tribunals primarily have to apply the conflict of law rules set forth in the applicable institutional or ad-hoc arbitration rules. If the parties have not agreed on such rules, tribunals have to apply the conflict of law rules contained in the applicable national law on arbitration, the *lex loci arbitri*.

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[10] C. Brunner, *UN Kaufrecht CISG*, Stämpfli Verlag AG, Bern 2004, Article 1, 1; F. Ferrari, "Article 1", *Kommentar zum Einheitlichen UN Kaufrecht* (ed. I. Schwenzer), C.H. Beck, Munich 2008, para. 2 and U. Magnus, *Staudingers Kommentar zum Bürgerli chen Gesetzbuch mit Einführungsgesetz und Nebengesetzen Wiener UN Kaufrecht*, Sel lier European Law Publishers, Munich 2005, Article 1, para 120.

[11] ICC Award 8962, 1 September 1997, CISG online No. 1300; Hungarian Cham ber of Commerce and Industry Court of Arbitration Award VB 99144, 1 January 2000, CISG online No. 1613 and Serbian FTCA Awards Nos. T 18/07 (15 October 2008), T 13/05 (5 January 2007) and T 22/03 (19 January 2004). See also: ICC Award 11333, 1 January 2002, CISG online No. 1420 and ICC Award 8324, 1 January 1995, CISG online No. 569. In these awards, the tribunal directly relied on Article 1 (1) (a) CISG, but held that its requirements were not met.

[12] I. Schwenzer, P. Hachem, "Article 1", *Commentary on the UN Convention on the International Sale of Goods (CISG)* (ed. I. Schwenzer), Oxford University Press, Ox ford 2010[3], para. 11; V. Pavić, M. Djordjević, "Application of the CISG before the For eign Trade Court of Arbitration at the Serbian Chamber of Commerce Looking back at the latest 100 cases", *Journal of Law and Commerce* 1/2009, 15; P. Mayer, "L'application par l'arbitre des conventions internationales de droit privé", *L'internationalisation du droit: Mélanges en l' honneur de Yvon Loussouarn*, Dalloz, Paris 1994, 287; A. Mourre, "Application of the Vienna International Sales Convention in Arbitration", *ICC Interna tional Court of Arbitration Court Bulletin* 1/2006, 43 44.

Although the exact wording of the conflict of law rules set forth in the applicable arbitration rules or law may differ, it is safe to say that the CISG may apply either because of the parties' choice of law or due to the tribunal's determination of the law applicable[13]:

In the first scenario, *i.e.*, where the parties have agreed on the law, the CISG may apply either because the parties have specifically chosen the CISG[14] or because the parties have chosen the law of a contracting state. The choice of the law of a contracting state leads to the application of the CISG. At least in principle, it may not be interpreted as an (implied) exclusion of the CISG[15]. The CISG applies because it (i) forms part of the law chosen by the parties and (ii) supersedes domestic sales law. While if the parties have specifically chosen the CISG it is irrelevant whether the requirements of Article 1 CISG are met, such requirements have indeed to be met if the parties have chosen the law of a contracting state. In this regard, tribunals have correctly pointed out that the applicable arbitration rules and/or laws constitute "*rules of international private law*" within the meaning of Article 1 (1) (b) CISG[16].

In the second scenario, *i.e.*, where the parties have not agreed on the law to apply, the tribunal has to determine the law applicable. While some arbitration rules and law provide that the tribunal shall first determine the conflict of law rule (*voie indirecte*)[17], most modern arbitration

[13] All modern arbitral rules and laws provide that arbitral tribunals primarily have to apply the law chosen by the parties. If no such choice was made, they shall employ other objective criteria to determine the law applicable.

[14] Netherlands Arbitration Institute Award 2319, 15 October 2002, CISG online No. 740; ICC Award 8644, 1 April 1997, CISG online No. 904; Award 226/1999 of the International Commercial Arbitration Court at the Chamber of Commerce and Industry of the Russian Federation, 11 February 2000, CISG online No. 1345. There is agreement that the CISG may be chosen either as a "non state law" at the level of conflict of law (if the applicable arbitration rules allow for such choice) or as a "set of substantive rules" at the level of substantive law. In the latter case, the rights and obligations set forth in the CISG will become part of the parties' contract, but the arbitrators will still have to determine the law applicable to that contract.

[15] Bundesgerichtshof Germany, Case No. VIII ZR 259/97, 25 November 1998, CISG online No. 353; Cour de Cassation France, Case No. Y 95 20.273, 17 December 1996, CISG online No. 220; ICC Award 9187, 1 June 1999, CISG online No. 705. Natu rally, the CISG does not apply if the parties have expressly excluded the CISG. Further, it also does not apply if it is otherwise clear from the facts that the parties intended to have their contract governed by domestic provisions.

[16] ICC Award 8611, 23 January 1997, CISG online 236; Award 97/2002 of the International Commercial Arbitration Court at the Chamber of Commerce and Industry of the Russian Federation, 6 June 2003, CISG online No. 1345 available at *http://www.uni lex.info/case.cfm?pid 1&id 1043&do case*, last visited on 31 December 2010.

[17] For example, Article 28 (2) UNCITRAL Model Law: "*Failing any designation by the parties, the arbitral tribunal shall apply the law determined by the conflict of laws rules which it considers applicable*".

rules and law require the tribunal to directly determine the substantive law (*voie directe*)[18]. In either scenario, *voie indirect* or *voie directe*, the arbitrators may find that the CISG applies "*per se*" or that it applies as part of the law of a contracting state. In the *voie indirecte* scenario, the conflict of law rules chosen by the tribunal will usually lead to the CISG via the law of a contracting state[19]. However, the applicable conflict of law rule may also lead directly to the CISG. For example, the arbitrator may decide to apply Article 1 (1) (a) CISG as a "*unilateral*" conflict of law rule and to apply the CISG on this basis[20]. Likewise, in the *voie directe* scenario, the tribunal may find that the law of a contracting state is the "*appropriate*" law. However, the tribunal may also find that the CISG *per se* is the "*appropriate*" law.

### 1.2. Applicability of the CISG to Arbitration Agreements

The question regarding which law applies to arbitration agreements is subject to substantial controversy. The question is complex since one must distinguish between different aspects of the arbitration agreement, including, *inter alia*, substantive validity, formal validity, arbitrability, capacity and authority[21]. Each of these aspects might be governed by a different law. This paper merely focuses on the aspect of substantive validity, i.e., on the formation and interpretation of the arbitration agreement. This focus is warranted since the fact that the CISG does not apply to questions of arbitrability, capacity and authority is beyond any doubt. Further, it has been convincingly argued that the CISG does not govern questions of formal validity, i.e., whether the agreement has to be concluded in writing, either[22].

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[18] For example, Article 17 (1) s. 2 ICC Rules: "*In the absence of such agreement, the Arbitral Tribunal shall apply the rules of law which it determines to be appropriate*". See also: Article 22.3 LCIA Rules, Art. 28 (1) AAA Rules, Article 24 (1) SCC Rules, Article 24 (2) Vienna Rules; and Article 33 Swiss Rules.

[19] ICC Award 7197, 1 January 1992, CISG online No. 36; Award 406/1998 of the International Commercial Arbitration Court at the Chamber of Commerce and Industry of the Russian Federation, 6 June 2000, CISG online No. 1249.

[20] K. Bell, "The Sphere of Application of the Vienna Convention on Contracts for the International Sale of Goods", *Pace International Law Review* 8/1996, 236 247.

[21] For example: M. Blessing, "The Law Applicable to the Arbitration Clause", *Improving the Efficiency of Arbitration Agreements and Awards: 40 Years of Application of the New York Convention*" (ed. A. van den Berg), ICCA Congress Series No. 9, 1999, 168; O. Chukwumerije, *Choice of Law in International Commercial Arbitration*, Quorum Books, Westport 1994; E. Gaillard, J. Savage, *Fouchard Gaillard Goldman on Interna tional Commercial Arbitration*, Kluwer Law International, Alphen aan den Rijn 1999, 385 741; J. Lew, L. Mistelis, S. Kröll, *Comparative International Commercial Arbitra tion*, Kluwer Law International, Alphen aan den Rijn 2003, paras. 6 1 to 6 74; A. Red fern, M. Hunter, *Law and Practice of International Commercial Arbitration*, Sweet & Maxwell, London 2004, paras. 2 85 to 2 94.

[22] R. Koch, "The CISG as the Law Applicable to Arbitration Agreements", *Shar ing International Commercial Law Across National Boundaries: Festschrift for Albert H.*

The question regarding which law governs the substantive validity of an arbitration agreement is also far from being settled. An accurate overview of the opinions expressed by scholars, tribunals and courts would exceed the scope of this paper[23].

A significant number of state courts[24] and scholars[25] have expressed the view that the substantive validity of arbitration agreements may be governed by the CISG. Others have rejected such view relying on the doctrine of severability according to which the sales contract is a separate and distinct contract from the arbitration agreement[26].

Of course, the CISG applies to an arbitration agreement if the parties have expressly agreed on the application of the CISG. However, as far as my research has revealed, this has never been the case and, thus, appears to be a rather theoretical scenario. Indeed, parties rarely ever agree at all on a choice of law clause specifically applicable to the arbitra-

*Kritzer on the Occasion of his Eightieth Birthday* (eds. C. B. Andersen, U. G. Schroeter), Wildy, Simmonds & Hill Publishing, London 2008, 267 286; U.G. Schroeter, "Intro to Articles 14 24", *Commentary on the UN Convention on the International Sale of Goods (CISG)* (ed. I. Schwenzer), Oxford University Press, Oxford 2010[3], 18; U. Magnus, *Staudingers Kommentar zum Bürgerlichen Gesetzbuch mit Einführungsgesetz und Nebengesetzen Wiener UN Kaufrecht*, Sellier European Law Publishers, Munich 2005, Article 11, 7; U.G. Schroeter, *UN Kaufrecht und Europäisches Gemeinschaftsrecht: Verhältnis und Wechselwirkungen*, Sellier European Law Publishers, Munich 2005, § 6, 37; KG Zug, 11 December 2003, CISG online No. 958. The opposite view taken by Auto Tribunal Supremo, 17 February 1998, CISG online No. 1333 and *Chateau des Charmes Wines Ltd* vs. *Sabaté USA Inc*., *Sabaté S.A*., U.S. Court of Appeals, 9th Circuit, 5 May 2003, CISG online No. 767 and J. Walker, "Agreeing to Disagree: Can We Just Have Words? CISG Article 11 and the Model Law Writing Requirement", available at *http://www.cisg.law.edu/cisg/biblio/walker1.html*, last visited on 31 December 2010 fails to convince.

[23] For an excellent overview, see G. Born, *International Commercial Arbitration*, Wolters Kluwer Law & Business, The Netherlands 2009, 407 563. See also, M. Blessing, "The Law Applicable to the Arbitration Clause", *Improving the Efficiency of Arbitration Agreements and Awards: 40 Years of Application of the New York Convention* (ed. A. van den Berg), ICCA Congress Series No. 9, 1999, 168.

[24] Netherland Arbitration Institute, 10 February 2005, CISG online No. 1621; Auto Tribunal Supremo, 17 February 1998, CISG online No. 1333; *Chateau des Charmes Wines Ltd* vs. *Sabaté USA Inc*., *Sabaté S.A*., U.S. Court of Appeals, 9th Circuit, 5 May 2003, CISG online No. 767; OLG Frankfurt, 26 June 2006, CISG online No. 1385; OLG Stuttgart, 15 May 2006, CISG online No. 1414 and LG Hamburg, 19 June 1997, CISG online No. 283.

[25] U.G. Schroeter, (2010), 18; C. Brunner, (2004), para. 39; P. Schlosser, "*Europäisches Zivilprozess und Kollisionsrecht*", Sellier European Law Publisher, Munich 2010, Article 23 EuGVVO, para. 19; J. Walker, "Agreeing to Disagree: Can We Just Have Words? CISG Article 11 and the Model Law Writing Requirement", available at *http://www.cisg.law.edu/cisg/biblio/walker1.html*, last visited on 31 December 2010); B. Piltz, *Internationales Kaufrecht*, C. H. Beck, Munich 1993, 106; U. G. Schroeter, § 6, para. 37.

[26] S. Kröll, "Selected Problems Concerning the CISG's Scope of Application", available at *http://www.cisg.law.edu/cisg/biblio/kroll.html*, last visited on 31 December 2010.

tion agreement but usually rather on a choice of law clause which applies to the main contract[27].

Considering factual scenarios which are more likely to occur, in my view, the CISG may govern an arbitration agreement if (i) the arbitration clause is either contained in or intrinsically connected to a sales contract; (ii) the sales contract is governed by the CISG; and (iii) in addition one of the following scenarios is met (a) the CISG was specifically chosen by the parties and there is evidence of the parties' will to have the arbitration agreement governed by the CISG; (b) the competent authority employs the *lex contractus* approach and applies the same law to the arbitration agreement as to the main contract; (c) the competent authority employs the *substantive rules of the lex arbitri* approach and the CISG forms part of these law; or (d) the competent authority employs the validation principle approach and the application of the CISG renders the arbitration agreement effective.

If for one reason or the other the CISG is found applicable to the substantive validity of the arbitration agreement, the question arises regarding which aspects of the arbitration agreement are covered by the term "substantive validity" and are potentially governed by the CISG.

The CISG applies to issues of contract formation, *i.e.,* to the question whether the arbitration agreement was formed by virtue of a meeting of the minds[28]. Further, the CISG (Article 8) applies to issues of contract interpretation[29]. A question which, as far as my research has revealed, has not yet been addressed is whether a party may claim damages under the CISG if the other party has breached the arbitration agreement.

The most obvious breach of an arbitration agreement is for a party to initiate state court proceedings. Here, the question arises whether the non-breaching party may claim damages under the CISG for its costs incurred in the state court proceedings (if these costs are not recoverable in full under the applicable procedural rules before the state court). A related matter was subject to series of decisions by U.S. courts: The courts had to decide whether a Mexican seller was entitled to recover its legal fees under Article 74 CISG although such fees were not recoverable under the applicable U.S. rules of procedure. While the competent U.S. Federal District Court had awarded damages to the Mexican seller, the U.S. Court of Appeals presided by Judge Posner overruled this decision stressing that

[27] G. Born, 444.

[28] R. Koch, (2008), 267 286.

[29] *Chateau des Charmes Wines Ltd* vs. *Sbata USA Inc*., *Sabata S.A*., U.S. Court of Appeals, 9th Circuit, 5 May 2003, CISG online No. 767; OLG Stuttgart, 15 May 2006, CISG online No. 1414; OLG Düsseldorf, 30 January 2004, CISG online No. 821; M. Schmidt Kessel, "Article 8", *Kommentar zum Einheitlichen UN Kaufrecht* (ed. I. Schwenzer), C.H. Beck, Munich 2008, para. 5.

"*the Convention is about contracts, not about procedure*"[30]. While some authors have supported both the result and the reasoning of Judge Posner[31], the CISG Advisory Council in its opinion No. 6 stamped the substance-procedure decision as "*outdated and unproductive*"[32].

However, there are also other ways an arbitration agreement may be breached. One example would be that either the agreement itself or the arbitration rules agreed upon oblige the parties to keep the proceedings confidential and one of the parties ignores this obligation[33].

Here as well, the question may arise whether the non-breaching party may claim damages under Article 74 CISG for loss of reputation or profit. In my view, if the arbitration agreement is governed by the CISG, there is no reason why a party should not rely on Article 74 CISG when claiming damages for breach of the arbitration agreement. Article 74 CISG suggests that all kinds of "*loss, including loss of profit*" suffered by one party due to the other party's breach are recoverable. This also includes loss of reputation[34]. Further, there is also no reason why the recoverable loss should not include legal fees. In particular such view is not disproved by the reasoning of Judge Posner in the Zapata case. The decisive difference is that in Zapata, the non-breaching party sought reimbursement of legal fees incurred in the U.S. court proceedings themselves. In the present scenario, the non-breaching party would merely seek reimbursement of legal fees incurred in the state court proceedings, not for those incurred during the arbitration.

## 5. COMMON FEATURES

Contrary to what was suggested in the beginning of this paper, the CISG and Arbitration share quite a variety of common features:

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[30] *Zapata Hermanos Sucesores, S.A. v. Hearthside Baking Co.*, U.S. Court of Ap peals, 7th Circuit, CISG online 684.

[31] For a complete and rather humorous summary of the case history and the ensu ing academic discussion see, J. Lookofsky, H. Fletchner, "Zapata Retold: Attorney's Fees are (still) not governed by the CISG Reloaded", available at http://jlc.law.edu/articles/26/ Lookofsky Fletchner.pdf, last visited on 31 December 2010.

[32] CISG Advisory Council Opinion No. 6, Calculation of Damages under CISG Article 74, heading 5 (2006) available at *http://cisg.law.pace.edu/cisg/CISG AC op6.html*, last visited on 31 December 2010.

[33] A similar scenario is subject to this year's "problem" of the Willem C. Vis Ar bitration Moot which may be downloaded at *http://www.cisg.law.pace.edu/cisg/moot/ Problem with clarifications.pdf*.

[34] M. Bridge, *The International Sale of Goods: Law and Practice*, Oxford Univer sity Press, Oxford 2007, 590.

Both the CISG and Arbitration aim at the promotion and facilitation of international trade. The CISG does so by minimizing the risk of commercial disputes and arbitration by swiftly settling commercial disputes once they have arisen[35]. Moreover, the CISG and Arbitration are both based on the concept of good faith and party autonomy[36]. Further, the CISG and Arbitration share the same standard of interpretation. In theory, sales contracts subject to the CISG and arbitration agreements shall primarily be interpreted in accordance with the parties' actual intent. However, since such intent is in most cases almost impossible to establish, in practice, sales contract and arbitration agreements are frequently interpreted in accordance with the understanding of a reasonable third person[37].

Finally, both the CISG and Arbitration aim at the unification of law. As regards the CISG, UNCITRAL decided to create a single uniform law. This law was ratified by the contracting states and incorporated into their national law. As a result, as of today approximately 80 % of international sales contracts fall within the ambit of a uniform law which – at least in theory – is applied in one and the same manner by national courts and tribunals worldwide. The arbitration community, by contrast, took a different approach to "unification". It decided to rely on a mix of (i) international treaties (for example, the 1958 United Nations Conventions on the Recognition and Enforcement of Foreign Arbitral Awards[38]), model laws (for example the 1985 UNCITRAL Model Law on International Commercial Arbitration[39]) and non-binding soft laws (for example the

[35] The complementary function of the CISG and Arbitration is best described by Professor Waincymer in "The CISG and International Commercial Arbitration: promoting a Complementary Relationship between Substance and Procedure", *Sharing International Commercial law across National Boundaries: Festschrift for Albert H. Kritzer on the Oc casion of his Eightieth Birthday* (eds. C. B. Andersen, U. G. Schroeter), Wildy, Simmonds & Hill Publishing, London 2008, 582 599. He points out that the CISG "*promotes clarity and reasonableness*" and, thus, "*operates to prevent disputes arising between traders from different legal and political cultures*". At the same time he stresses that "*disputes inevita bly arise in international trade owing to the increased physical and legal risks accompa nying cross border trade*". Thus, the true value of the CISG "*depends to a significant degree on the fairness and efficiency of the procedural dispute resolution model underly ing the* [parties'] *relationship*".

[36] J. Waincymer, 582 599.

[37] See, Article 8 (1) and (2) CISG. My research has not revealed a single national or international law on arbitration which expressly sets forth rules of interpretation for an arbitration agreement. The Swiss PILA, for example, merely refers to the rules of inter pretation set forth in the Swiss Code of Obligations. Yet, the primacy of actual intent and the factual prevalence of the standard of reasonableness are common ground.

[38] *http://www.uncitral.org/pdf/english/texts/arbitration/NY conv/1958 NYC CTC e.pdf*, last visited on 31 December 2010.

[39] *http://www.uncitral.org/pdf/english/texts/arbitration/ml arb/07 86998 Ebook. pdf*, last visited on 31 December 2010.

IBA Rules on the Taking of Evidence in International Arbitration[40]). In addition, the arbitration community actively sought to develop so-called "standards of best practice" to promote uniformity. As a result, also arbitration proceedings have become more and more standardized and streamlined.

## 6. JOINT OPPORTUNITIES

I am convinced that the CISG may benefit from being applied in arbitration proceedings instead of in state court proceedings. This is mainly for two reasons:

First, arbitration proceedings may foster and promote uniform legal interpretation and application of the CISG[41]. It is common ground that the CISG requires uniform legal interpretation and application[42]. Article 7 (1) CISG requires that "*in the interpretation of this Convention, regard is to be had to its international character and to the need to promote uniformity in its application*". According to Professor Lookofsky this provision compels scholars and courts to take into account the "*international view*" when applying and interpreting the CISG[43]. The duty to consider foreign sources or precedents is also commonly accepted[44]. However, despite numerous proposals, as of today no judicial body exists which would ensure a uniform interpretation and application of the CISG[45]. In particu-

[40] *http://www.ibanet.org/LPD/Dispute Resolution Section/Arbitration/IBA Rules Evidence/Publications.aspx*, last visited on 31 December 2010.

[41] The need for a uniform interpretation and application of the CISG and how this goal may be achieved was addressed in more detail by Professor Rogers in "The Estab lishment of a Global Jurisconsultorium for the CISG" (also published in this issue).

[42] C.B. Andersen, "The Global Jurisconsultorium of the CISG Revisited", *Vindo bona Journal of International Commercial Law & Arbitration* 1/2009, 43 70; J.O. Hon nold, "Uniform Words and Uniform Application. The 1980 Sales Convention and Interna tional Juridical Practice", in P. Schlechtriem (ed.), *Einheitliches Kaufrecht und Nationales Obligationenrecht*, Nomos, Baden Baden 1987, 146 147; H. Fletchner, "The Several Texts of the CISG in a Decentralized System: "Observations on Translations, Reserva tions and other Challenges to the Uniformity Principle in Article 7(1)", *Journal of Law and Commerce*, 1998, 187.

[43] J. Lookofsky, *Understanding the CISG*, Kluwer Law International, 2008, 35.

[44] P. Schlechtriem, "Uniform Sales Law The Experience with Uniform Sales Law in the Federal Republic of Germany", available at *http://cisg3.law.pace.edu/cisg/bib lio/schlech2.html*, last visited on 31 December 2010; F. Ferrari, "CISG Case Law: A New Challenge for Interpreters?", *Journal of Law and Commerce*, 1999, 26; B. Zeller, "Tra versing international waters: With the growth of international trade, lawyers must become familiar with the terms of the Convention on Contracts for the International sale of Goods", *Law Institute Journal*, Victoria 2004, 52.

[45] L. Sohn, "Uniform Laws Require Uniform Application: Proposals for an Inter national Tribunal to Interpret Uniform Legal Texts", *Uniform Commercial Law in the*

lar, there is no "CISG Supreme Court", comparable, for example, to the European Court of Justice. Further, although deplorable, state courts continue to often rely on national preconceptions when applying the CISG. On a positive note, recent decisions have shown that some national courts have made substantial efforts in ensuring that their decisions are in line with decisions of courts from other jurisdictions[46]. My submission is that tribunals – which in international proceedings are usually composed of arbitrators from different jurisdictions – are particularly apt to achieve uniform interpretation and application of the CISG. A tribunal composed of scholars and practitioners from different jurisdictions will not rely on national preconceptions. Rather, it will favor an interpretation of the CISG which is truly international. If one of the arbitrators were to apply the CISG in a manner which was particular to his jurisdiction, chances are high that the other arbitrators would simply overrule this arbitrator. Further, for arbitrators who speak different languages, the resources (case law and scholarly contributions) available are greater than those for national courts.

Second, arbitration proceedings may foster and promote factual diversity. In order to fully develop a law, it is important to have a significant body of cases and factual scenarios to which this law is applied. It is not sufficient to have scholars writing on the law and imagining factual scenarios. Regardless of how inventive scholars may be, the factual diversity presented by international trade will never be fully matched by the scholar's imagination. In addition, it is equally important that the person applying the law to the factual scenarios have the requisite knowledge of the affected business sector. Otherwise, their decision risks not meeting the expectations and requirements of the respective business community. A decision which does not meet such expectations often provokes criticism not only of the decision itself but also of the law applied in such decision. Thus, it is of particular importance that the person making the decision has at his command either the requisite knowledge or the requisite resources to obtain such knowledge. My submission is that arbitrators are more likely to have the requisite knowledge than state court judges. Arbitrators may either stem from (company representatives or technical experts) or focus exclusively on the respective sector (lawyers). This is not possible for a state court judge. Further, arbitrators usually have available more time and greater financial resources than state court judges.

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*Twenty First Century: proceedings of the Congress of the United nations Commission on International Trade Law*, 18 22 May 1992, 50 54; F. de Ly "Uniform Interpretation: What is being Done? Official Efforts" *The 1980 Uniform Sales Law* (ed. F. Ferrari), Sell ier European Law Publishers, Munich 2003, 346.

[46] The most recent and complete overview of case law where judges have used a "practical jurisconsultorium" is provided by Dr. Camilla Andersen in "The Global Juris consultorium of the CISG Revisited", *Vindobona Journal of International Commercial Law & Arbitration* 1/2009, 43 70.

On the other hand, I am also convinced that Arbitration may benefit from the application of the CISG (instead of a national law on contract of sales).

Different than national laws on contract of sales, the CISG is available in several languages. Further, scholarly contributions and case law on the CISG are easily accessible[47], and a large number of these contributions are written in the world's *lingua franca*: English. Moreover, the CISG is neutral. It does not favor any nationality or the buyer or the seller. The CISG's application at least significantly reduces the risk of complex disputes over conflict of law rules[48]. As a consequence, decisions which are made on the basis of the CISG are more predictable than decisions rendered on the basis of a national law which may be unfamiliar to parties, counsel and arbitrators alike[49]. Further, the CISG also facilitates the appointment of tribunals. The applicability of the CISG instead of a national law significantly enlarges the pool of suitable arbitrators. Most importantly, it expands the number of countries from which arbitrators can be selected. Therefore, institutions such as the ICC welcome the application of the CISG in arbitration proceedings. Finally, the CISG may support the young arbitration generation: It is no secret that parties and institutions alike are reluctant to appoint young and naturally less experienced arbitrators if the amount in dispute is large. However, CISG commodity cases, unlike M&A, construction or investment cases frequently, include small amounts in dispute, *i.e.*, amounts significantly below one million or even below 100,000 EURO. These cases provide an ideal opportunity for the young generation of arbitrators to gather their first experience.

[47] See the cases and scholarly contributions available at: *http://www.cisg.law.pace.edu*; *http://www.unilex.info* and *http://www.globalsaleslaw.org*, all visited on 30 December 2010.

[48] Of course, conflict of law rules continue to play an important role in cases where a sales contract is not covered by (Article 2 CISG) or excluded from (Arti cle 3 CISG) the Convention or where certain issues are not covered by the Convention (Articles 4 and 5 CISG). In addition, they may have to be used to determine the domestic laws used to fill gaps in matters covered by the Convention (Article 7 (2) CISG).

[49] It is all but unusual that parties agree on the applicability of a national law that they are not familiar with, simply because this law is neutral. Further, it is also not uncom mon that the arbitrators have no particular knowledge of the national law applicable to the dispute, but have been chosen for other reasons such as their experience in arbitration, nationality or knowledge of the business sector.

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# NATION BUILDING: FAVOURING MULTICULTURALISM THROUGH FEDERALISM?

*The paper analyses chances and paradoxes of federalism as a strategy to sustain nation building in multicultural societies, in particular those in post ethnic war situations. The major hypothesis will be that there is no one to one relationship between federalism and communal peace, the latter being a condition sine qua non for nation building. The reasons lie in key challenges and paradoxes of federalism as a conflict management device in the societies coming out of ethnic wars: Mistrust and intolerance intrinsically belong to identity conflicts; on the other hand, federal ism as part and parcel of conflict transformation should be instrumental in building up trust and tolerance that are paradoxically a condition sine qua non for effec tive federal designs. Multicultural federalism can work only if it succeeds in demo cratically commanding a loyalty that would transcend cultural cleavages, i.e., if it democratically reconciles cultural and political pluralism. Such reconciliation is structurally unfeasible within a consequently liberal democratic set up.*

*What constitutive principles and institutional set up of the federal polity can sustain the viability of nation building in multicultural societies? How can demo cratic reconciliation of political and cultural (ethnic, religious, linguistic) pluralism be achieved? These are major issues of multicultural federalism. Consequently, federalism can democratically meet multicultural challenge only if it is not imposed and becomes an intrinsic part of democracy; i.e., if not only unity, but also diversity becomes a constitutive principle of democracy. If that is not the case, federalism fails to meet its major challenge: Not to radicalize the differences to which it was sup posed to be a solution; notably, to address and accommodate structural causes of mistrust and intolerance in a given society (for instance, constitutional conflicts as per se ethnic conflicts). This is why multicultural federalism has an immanently built in paradox: Multicultural federalism starts with a low level of legitimacy due to the lack of trust and tolerance. Multicultural federalism has in fact to create its own preconditions.*

Key words: *Federalism. Nation Building. Multiculturalism. Post Conflict Transformation.*

## 1. MAPPING THE CONTEXT AND ISSUES

John Stuart Mill left no doubts about classical liberal understanding of democracy: In order to work, it must build on cultural homogeneity. According to him, "free institutions are next to impossible in societies with different nationalities". This "catch-all" argument of the coryphaeus of classic liberalism has been firmly imbedded in both civic nations (US and France) and culturally defined "belated nations" (Germany and Italy). In the last two decades, a major shift from a nation-state as mono-national has been taking place both in constitutional politics of many states world-wide, particularly multinational federations, and in the largely embraced communitarian scholarship (the theory of multicultural citizenship). The trend of the nation-state's evolution into multicultural state has already become an issue addressed within international settings outside academic debates, notably in Council of Europe.

Viewed from the perspective of prevailing liberal nation-concepts, ethnicity influences upon nationhood remained "stretched out" between assimilation-model-citizenship without nationalities and civic state for a majority nationality, on one side (civic and ethno-civic concepts nations), and the integration model of citizenship out of democratically integrated nationalities/ pluralist democracies, on the other (Swiss Willensnation). Last but not least, post-modern identity politics became a critical battlefront in the struggle with a key by-product of the modernisation process itself, migrant ethnic minorities. For them, unlike in the case of national minorities, a "rupture" occurred between territory and cultural identity. All these tendencies take place within a global paradox of two processes running parallel in the post-modern politics: those of "nation-building" and "breaking of nations".

Equally relevant for the context of our theme is a historical development of federalism understood as a normative political theory. Federalism indeed emerged together with modern-state concepts. However, from the very beginning it offered an alternative to a centralised modern-state concept (Althuisus and Pufendorf), and also introduced peace as its objective (Kant). Contemporary debates over federal citizenship in multicultural democracies mean in this sense a come-back to the roots – federalism inherently has a linkage to multicultural societies with identity cleavages.

The stage was set for "political use" of federalism as critical to nation-building in multiethnic societies, particularly those in post-ethnic-war situations. American type of constitutionalist federalism as a form of vertical checks-and-balances cannot fulfil this task. It represents a paradigmatic example of *monistic federalism* and remains "intrinsically suspect" to ethnic, religious, and linguistic group identities. In order to sus-

tain the viability of nation-building in multicultural societies a federal polity embraces different constitutive principles and also a considerably different institutional set-up, those of *pluralist federalism*. This type of federalism is designated to accommodate given multicultural cleavages, be it of ethnic, religious or linguistic nature, and to promote identity politics. Its subtypes – *multicultural* and *ethnic federalism* – differ in terms of the scope and focus in diversity accommodation, constitutional status of the rights of self-determination, and the role which the territory plays in identity politics. For example, Switzerland, India and Canada are multicultural federations, whereas Ethiopia and ex-communist federations represent the cases of ethnic federalism.

Pluralist federalism accepts political recognition and accommodation of existing ethnic, religious, or linguistic group diversities as legitimate, as well as the desirability of maintaining these legitimate diversities. That goes against a modern democratic principle of political liberty as an absolute political equality. It also puts into question majority as a sole legitimate representative expression of popular government. Federalism has at the same time correlated to the modern statehood and remained an immanent challenge to this statehood as that of democratic republic. The very idea of "group liberty" as a value in itself also principally questions individualist underpinning of human rights as another major pillar of liberal constitutional democracy. On the other side, a structural tension between democracy and human rights will remain immanent to modern polity despite a familiar argument that democratic rights are justified only to the extent that they safeguard others, more fundamental rights. C. Offe shows that both individual liberty and democracy are structurally related to two major civic virtues or values – those of tolerance and trust respectively. Together with solidarity, these two moral resources, sometimes referred to as a "political culture", are viable only against a powerful background of citizenship/nationhood that is constitutive to political community.[1] Also for W. Kymlicka, besides certain virtues needed in virtually any political order (courage and law-abidingness, as well as economic virtues), there are the virtues distinctive to liberal democracy: public spiritedness, sense of justice, civility and tolerance, and a shared sense of solidarity and loyalty.[2]

Such eminently liberal virtues either do not exist or they are not forceful enough in the cases of segmented multicultural societies. Mis-

[1] Claus Offe, "Political Liberalism, Group Rights, and the Politics of Fear and Trust", in: *Democratic Transition and Consolidation in Central and Eastern Europe* (ed. Lidija R. Basta Fleiner Edward Swiderski), PIFF and Helbing&Lichenhahn, Basel Ge neva Munich 2001, 8 9.

[2] Will Kymlicka, Politics in the Vernacular. Nationalism, Multiculturalism and Citizenship, Oxford University Press, Oxford 2001, 295 296.

trust and intolerance are inherent in identity conflicts; and federalism as part and parcel of conflict transformation should be instrumental in building up trust and tolerance that are a sine qua non for solidarity. In consequence, an important point to investigate is whether federal arrangements at all, and if so, under what conditions (liberal or others), can address structural causes for mistrust and intolerance in a given multicultural environment and thus critically contribute to both state making and nation building?

The paper will address structural causes for the lack of trust and tolerance in the cases where a federal design of some kind is expected to mitigate cultural cleavages, especially as a part of conflict transformation strategy in state-reconstructing and nation-building post-war processes. It will further argue that a major paradox of federalism aimed at accommodating diversities (be it ethnic or multicultural) lies in the fact that it should create trust and tolerance, which in fact are its own preconditions. The experience of all three dissolved ex-communist federations and even of Ethiopia today show that challenges are by far bigger by purely ethnic federalism. (Two major lessons learnt cut across and go beyond the Ethiopian case. First, the constitutionalisation of the right to ethnic self-determination as the right to secession – may be an effective way to discourage secession, and in this sense can further guarantee stability of the federal order. Constitutional secession becomes a constitutional instrument in managing inter-community conflicts, and a strategy to make the common state legitimate for all its community. Hence the centrality of constitutional safeguards against secession in the procedure provided for secession demands. Second, building on ethnic lines may very well mean ignoring heterogeneity within ethnic groups.) Generally, pluralist federalism as such can work only if it succeeds in democratically commanding a loyalty transcending cleavages that caused the conflicts, i.e., if they democratically reconciles cultural and political pluralism as the only feasible strategy to nation-building. Such identity politics remains its major aim and the only strategy to viable communal peace. The paper will also argue that reconciliation as an important part of nation-building is systemically unfeasible within a consequently liberal democratic set up. Last but not least, a new role of key international players in facilitating and brokering constitutional federal arrangements as part of post-war state-reconstructing and nation-building will be discussed, with a view on a pivotal role of constitution-making and territorial accommodation in such cases.

## 2. FEDERALISM AS A STRATEGY TO SUSTAIN NATION BUILDING IN MULTICULTURAL SOCIETIES

### 2.1. Civic nationhood challenged – how "inclusive" is democratic citizenship under liberal terms?

A trusting and tolerant citizen and a government that is trustworthy because it is accepted by the majority of its people, and because it effectively protects human rights – this is what liberal democracy is about. So defined, a sine qua non testifies of a structural ambivalence within both liberty and democracy. A legally guaranteed liberty of an individual protects an individual from state power, but leaves her/him nonetheless exposed to the liberty of others. She/he is prepared to *tolerate* other's liberty because the values and identity principles that they all commonly share prevail. On the contrary, if a common denominator does not exist, which is exactly the case with segmented multicultural societies, no tolerance is viable in terms of a major pattern of behaviour. Claus Offe rightly says that "the step from liberty to democratic rights follows the same ambivalence", which made the entire early history of democratic political thought – from Rousseau to John S. Mill – advocate democracy while at the same time preventing its destructive potentials.[3] This immanent tension between desirable and frightening aspects of popular sovereignty is resolved by trust. The fact that majority decisions are principally accepted also by those who disagree, is due to trust in the reasonableness and good intention of fellow citizens. Someone accepts some amount of risk for potential harm in exchange for the benefit of co-operation.

In the end, it is trust which fundamentally matters, since tolerance is also contingent upon the presence of trust. However, trust also has a paradoxical place within democracy, given that politics as such would seem to throw the very conditions of trust into question. *Political* relationships are about conflicts over goods and power. This is why trust complements and supports deliberative resolutions of political conflicts. At the same time a deliberative approach to political conflict can generate trust, among both individuals and among groups, as well as between individuals and groups, and the institutions.[4]

The interrelationship between democracy and trust has altered an "ethos of democratic theory", moving it away from strictly egalitarian concepts of the responsibilities of individual citizens and towards a "pluralized egalitarianism". In consequence, trust raises the question as to the means and mechanisms through which such a pluralized concept might become more operative. Another argument of M. Warren is here perti-

[3] C. Offe, 9.

[4] Mark E. Warren," Democratic Theory and Trust", in: *Democracy and Trust* (ed. M. Warren), Cambridge University Press, Cambridge 1999, 311 360.

nent: The process of deliberation and opinion formation that precedes voting is critically important for building up trust within multicultural societies. A "vote-centric" majoritarian democracy has proven to be one of the decisive reasons for mistrust between majority and minority, where the cleavages run along ethnic, religious or linguistic lines.[5] Violent elections and refusal to accept the results coming out of democratic procedure, or even a refusal to take part in the elections, remains one of the major paradoxes of majoritarian democracies in multicultural societies. Without entering into the debate whether a community-driven multiculturalism, once accommodated within public sphere as well, still remains faithful to authentic liberalism, hardly anyone today would doubt a form of consensual democracy as instrumental and supportive of imbibing trust in segmented multicultural societies.

Paradoxically enough, trust can also be broken by federal power-sharing arrangements that provide a veto possibility for each group against policies that it would find particularly harmful for its interest. Impartial institutions, including those to protect minorities without unduly offending majority concepts of fairness, are a necessary but not sufficient condition for the perception of fairness. Consensus-driven democracy is based on a premise that functioning of a given society depends not only on justice of its institutions or constitution, but also on the virtues, identities, and practices of its citizens, including their ability to co-operate, deliberate, and feel solidarity with those who belong to different ethnic and religious groups.[6]

Here, it is worth reminding of what Will Kymlicka sees as major fears about citizenship in the face of minority rights, namely: loss of equal citizenship status, fragmentation or weakening of citizenship identities, erosion of civic virtues and participation, as well as weakening of social cohesion and political unity. He also shows where to look for the reasons.[7] In fact, these fears Kymlicka convincingly show that the inclusiveness of liberal state relies indeed on a "thin" conception of nationhood. In other words, a normative basis of liberal theory of justice is too "tight" to include minorities as a state building element without at the same time putting into question the promotion of responsible democratic citizenship *under liberal terms*.

This is of course the conclusion Kymlicka himself would never draw out of his own arguments.[8] I would nonetheless claim that any plau-

[5] *Ibid.*

[6] Margaret Levi, *A State of Trust*, European Institute Florence, *Working Paper* RSC 1996/23.

[7] *Citizenship in Diverse Societies* (ed. W. Kymlicka W. Norman), Oxford Uni versity Press, Oxford 2000, 30 41.

[8] Will Kymlicka, Mu*lticultural Citizenship*, *A Liberal Theory of Minority Rights*. Oxford University Press, Oxford 1995.

sible nation building within segmented multicultural societies has to redefine the very fundamentals of liberal nationhood, in order to provide a proper framework for building trust and tolerance. A negative value standing towards ethnic concepts of nationhood is consequently liberal and, as such, immanent.[9] Although the liberals admit that in terms of logic ethnic nationhood is not causally linked to the phenomenon of intolerance and hatred toward "others", they nevertheless draw a conclusion that there is much greater probability that a society of a civic nationalist type i.e. "a society anchored in a culture of individual rights and liberties"; even if it ran, for the moment, off the road of tolerance, "is more easily returned to the practice of toleration than one where social allegiance is invested in ethnicity".[10]

Liberal tolerance is that of individual freedom, absolute formal equality and justice as equal distribution of rights. On the other hand, federalism as a conflict management device for multicultural cleavages can work only if tolerance as part of responsible citizenship goes much further, beyond co-existence and even beyond respect, and takes the shape of a value-driven tolerance, which would accept and promote main cultural diversities (ethnic, religious and linguistic) as an intrinsic value.

One of the first and key questions in this context reads as follows: What role pluralist federal arrangements could play in generating tolerance with "so much substance"? At the outset I already said that a major paradox of pluralist federalism lies in the fact that it should create trust and tolerance, which in fact should make this same federal design viable. I also related this paradox to constitutive features of liberal democracy, which have always been challenged by federalism and since two decades have also been challenged by multiculturalism. Now I shall explain how I understand these challenges (2. 2) and what would be major reasons that federal arrangements cannot work as conflict transformation strategy in all those cases where (new) state building and nation making are supposed to take place (2. 3).

### 2.2. Pluralist federalism: a systemic negation of liberalism

A reminder: federalism puts in question and aims at redefining an absolute political equality as political liberty –the latter being a consequence of the liberal principle of formal equality, which reduces justice to equal distribution of rights. Federalism has always questioned two pillars

[9] Lidija Basta Fleiner, "Trust and Tolerance as State Making Values in Multicul tural Societies", in: *Sovereignty and Diversity* (ed. M. A. Jovanovic K. Henrard), Eleven International Publishing, Utrecht 2008, 73 84.

[10] Michael Ignatieff, "Nationalism and Toleration", in: *Europe`s New Nationalism States and Minorities in Conflict* (ed. R. Caplan J. Feffer), Oxford University Press, New York Oxford 1996.

of the modern liberal state – those of democratic sovereignty and procedural legitimacy:

*Firstly*. Federalism denies to the national majority the claim to be the (only) legitimate expression of the sovereignty of the people. Besides, federation replaces sovereignty with more diffuse sovereign powers of the federal state, on the one hand, and of its constitutive entities, on the other. In other words, by its inherent response to group liberty, federalism redefines democratic sovereignty both as a legitimacy basis and as *suprema potestas.*

*Secondly*. Pluralist/multicultural federalism also substantialises a modern procedural legitimacy formula in all those cases in which the federal institutional set-up represents a strategy of diversity accommodation through public recognition of the latter within a given multiethnic/ multicultural society. Consented procedure is not of itself democratic and thus legitimate. In order to be democratic, the procedure has to guarantee that majority shall not overrule minority on constitutive state-and-nation issues.

A procedural design of secession of three northern Catholic and French speaking districts from the canton of Bern and the creation of the new canton of Jury in 1978 can be indeed invoked as a paradigmatic example for giving substance to the modern procedural legitimacy formula. A cascade system of popular votes within the Jura region, composed of three downward levels – the Jura region, districts, communes – transparently testifies of the basic element to give validity to the Swiss federation: /cultural/ *minorities cannot be overruled on constitutive issues, because these affect state legitimacy itself*. Had the procedure been strictly majoritarian, it would have complied with the procedural democracy formula. Under the principles of procedural legitimacy, strictly taken, the separation process would have been valid by the very fact that the Bernese authorities decided first to establish a constitutional framework and the procedure under which the majority – at the level of the whole canton of Bern only! – could have arrived at a consensus. However, the Bernese people did not vote on secession procedure merely to make secession procedurally legitimate, i.e., valid for the majority. The procedure simultaneously took into consideration a founding tenet of Swiss federalist political culture – multiple and decentralised loyalty: minority issue was addressed as the issue of political integration already at the constitutive phase of the new canton. By being given the possibility to decide against majority, *minority also democratically legitimised the creation of the new canton.* The Protestant French speaking population, who wanted to stay within the canton of Bern, were themselves vested with the same right to territorial self-determination as the separatist majority.

Federalism emerged as a possible conflict-management device of inter-ethnic conflicts precisely because of such illiberal underpinnings. In

many cases until now, however, it radicalised the problem to which it was supposed to be a solution. Why? Simply because of its immanent premodern elements, which have to "fit in" a liberal paradigm! Because the main problem of multicultural federalism could be summed up as follows: How to provide political solutions to cultural conflicts, which are in liberal terms politically irelevant? Ethnic, religious, linguistic demands should instead be translated into multicultural civic principles and designs. However, in immanently liberal terms, multicultural citizenship is a contradiction *in adiecto*.

Like federalism, multiculturalism persists as an endemic, anti-liberal challenge to constitutional democracy. Together with federalism, it calls for the revision of the major liberal democratic principle, namely, that majority as such is the legitimate expression of the sovereign will of the people. This has been done in a two-fold manner: *First*. Multiculturalism questions the intrinsic premise behind the modern nation state, namely, that only a society homogenized in (one) identity can lead to political consensus as democratic consensus. *Second.* The communitarian demand that ethnic, religious, cultural dientities should *publicly* matter makes an epochal departure from *the* constitutive principle of modern politics, that of neutrality of public sphere against ethnic, cultural and religious group identities. This break-through from the demand of equal individual rights to the rights of people*s* to be respected as equal in their diversities is notorious for the communtarian debate. The latter sometimes tries, not always convincingly, to argue with liberal arguments.[11] Habermas is right to say that a democratic constitutional state cannot accept identity politics as constitutional politics without abandoning liberalism.[12]

The case multiculturalism makes for positive collective freedom also contests constitutional democracy on the issue of how far the "politics of differences" should be placed on state-building level. Given the individualist and majoritarian underpinning of liberal constitutional democracy, the latter cannot of itself accept the politics of group differences on a state-and-nation-building level and therefore is structurally incapable of meeting multiculturalism claims on the values of diversities and collective rights as such. It remains defensive towards the multiculturalism argument that formal equal rights alone cannot guarantee equality, as long as the rights to be equal in respective differences do not gain constitutional status and in some cases also territorial autonomy. The liberal democratic defence of diversity is based upon a universalistic rather than a

[11] Charles Taylor, "The Politics of Recognition", in: *Multiculturalism* (ed. A. Gut man), Princeton University Press, Princeton NJ 1994, 25 73.

[12] Jürgen Habermas, "Struggles for Recognition in the Democratic Constitutional State", in: *Multiculturalism* (ed. A. Gutman), Princeton University Press, Princeton NJ 1994, 107 148.

particularistic perspective. This explains why some teleological reinterpretations of modern constitution, which try to re-legitimise a political symbolism of human rights, principally question the very liberal leitmotiv of the French Revolution as (merely) *Liberté – Egalité – Fraternité* (Liberty – Equality –Fraternity), and articulate instead an alternative syntagm of *Securité – Diversité –Solidarité*.[13]

Given that multiculturalism understands equality as the right to diversity, it logically implies that the formalism of the liberal equality, based upon ontological individualism, is to be transcended. To put it in a more straight forward manner: There has emerged a need for *substantialization* of human rights based *also* upon ethnic, religious and cultural diversities. This appears to be a clear-cut consequence of putting forward the thesis that man's dignity has to be regarded as an open concept.[14] As already said, multicultural tolerance cannot be reduced to the receptiveness of diversities merely on the individual level, but has to do with diversities on group level, too. The common good starts to be pursued along co-existence of differences, where also group identity is immanently imbedded into the constitutionally defined nationhood of a given society. When so interpreted, the principle of tolerance renounces "eurocentrism" which underlies modernity as such. At the same time it makes democratic principles of constitution for a given polity more receptive for basically community-driven, as opposed to individualist social organisation and nation-building.

Kymlicka highlights nine differences between liberal and illiberal nation building, and claims these are a matter of "degree", in order to argue that, "what distinguishes liberal nation-building from illiberal nationalism is not the absence of any concern with language, culture, and national identity, but rather the content, scope, and inclusiveness of this national culture, and the modes of incorporation into it".[15] However, there are convincing empirical arguments to claim the differences are not the matter of degree, but of substance instead. An authentically liberal nation-state principally failed to accommodate cultural diversities and proved a fallacy for national minorities, be it constituted upon ethnic or civic understanding of nationhood as citizenship. Modern concepts of nation were precisely *the* attempt to answer the question on the legitimate bearer of the constitution-making power. At the same time, they all, with different underlying principles in mind, tried to cover-up one and the same thing,

[13] Erhard Denninger, *Menschenrechte und Grundgesetz*, Beltz, Athenàum, Wein heim 1994.

[14] E. Denninger, 33 36.

[15] Will Kymlicka, "Western Political Theory and Ethnic Relations in Eastern Eu rope", in: *Can Liberal Pluralism be Exported* (ed. W. Kymlicka M. Opalski), Oxford 2001, 13 107.

namely that citizenship, as the major founding principle of the modern state, symbolises the *universality* of a democratic political community within a *particular* nation-state. The problem arises once the given concept of nation is no more inclusive and "universal" for internal minorities but rather exclusive within one and the same nation-state: more in particular, when (ethno)-*nation* and *demos* no more coincide.

Minority rights as (not only) individual but also collective rights have cast a new light on citizenship as the principle to symbolize universality within a particular nation-state. Minorities do not fit in the constitutive principles of modern polity as (through majority defined) democratic polity. The two basically different concepts of nation,[16] which underlie the citizenship of contemporary Western constitutional democracies, could be qualified as those of *democratic civism without/against multiculturality* (American and French respectively) and *democratic civism out of monoculturality* (the German model). Both civic and cultural understanding of nation fell short of bringing viable solutions to ethnic, religious, linguistic and the like minorities. In either case minorities *as groups* – principally – have nothing to say on fundamental constitutional issues. In consequence, minorities cannot participate in the citizenship they have not consented to. They have been sending a message that universality of the modern polity does not work for them, since, for them, it is an "exclusive" universality.

A fundamental, indeed systemic ambivalence underlies this problem, as demonstrate the ongoing debates within Council of Europe in the last three years. The PACE Resolution 1735/2006 on multicultural citizenship calls for further developing this element of democratic participatory governance as critically conducive to fundamental, universal nature of minority rights. The Framework Convention on the Protection of National Minorities represents the first formal recognition by international hard-law human-rights document of a political dimension as legitimate in minority demands. Nevertheless, the FCNM still builds on liberal foundations of tolerance, which is eminently that of individual freedom. On the other hand, individual freedom has been simultaneously flagged and challenged – it is the participation rights which should mediate between individual and a group. The "founding fathers" of the FCNM decided to ignore this ambivalence by putting it aside, since no consensus within the international setting seemed feasible in near future. As a consequence, the Explanatory Report draws a clear line, almost in a manner of antinomy, between individual and collective rights. The underpinning complexities and contradictions here are far from being merely scholarly conceptual in terms of a scholarship debate. Minority rights as fundamental do not be-

[16] Roger Brubaker, *Citizenship and Nationhood in France and Germany*, Harvard University Press, Cambridge MA London 1992; Liah Greenfeld, *Nationalism. Five Roads to Modernity*, Harvard University Press, Cambridge MA 1994.

long to the reserved domain of the states. According to the PACE Recommendation 1623 (2003), "the states parties do not have an unconditional rights to decide which groups within their territories qualify as national minorities in the sense of the framework convention". Nevertheless, states practically remain sovereign in deciding whom they will guarantee minority protection. Why? Minority rights are in most cases conditioned by citizenship. The states jealously keep for themselves the discretion to decide who will be the member of polity. This is a constitutive principle of modern nation-states. Furthermore, if radicalised, minority problem can hardly be accommodated only with a human rights strategy, let alone individual human rights.

No doubt, structural tenets of liberally grounded universality have to be reconsidered and redefined. In terms of constitution making and nation building, this means that the problems of design of *pouvoir constituant* and of citizenship have to be revisited. A new answer is needed for a critical question on legitimacy foundations: *Whose* is the state? A democratic integration of multicultural societies as a new type of corporative societies is a structural pre-condition for the viability of a human rights policy. For example, a communitarian concept of citizenship, which prevails in the new constitutions of Central and Eastern Europe, certainly testifies to a deficit in the identity and homogeneity of the new polities still *in statu nascendi*. The fact that this concept is much more concerned with civic duties turns it into a promising integrative force. However, the major underlying principle, namely, that it is the community which is constitutive of the individual's identity, ran counter real-existing communit*ies* within what is constitutionally laid down, i. e. positivated as a (supposedly one) community. "Ethnification" of polities and politics in Eastern Europe shows that ethnic communitarian concept of citizenship remains an intrinsic obstacle for an authentic communitarianism. Protective state policy vis-à-vis all its citizens surrender to a systematically invasive state policy against certain ethnic groups of citizens.

Accordingly, the major questions are as follows: *W*hat would be the sources of democratic unity in a multinational state? What role can constitution making/constitutional consensus play in a democratic inclusion of cultural diversities? Is "citizenship out of democratically integrated ethnicities" possible, and if so, within which constitutive and constitutional framework?

Only if pluralist/multicultural federalism succeeds in providing viable answers to these questions it can prove instrumental to building trust and tolerance as state-and-nation-building values. Swiss multicultural federalism is a proof that it is possible, however, at the cost of liberalism. The Swiss federal polity is first of all a democracy of institutionalised cultural differences and its nationhood is that of democratically integrated cultural diversities. Here, federalism has been introduced as a structural

principle of democracy. Whereas United States is a *democratic federation*, Switzerland should be understood as a *federalized democracy.* Here, communal civism has embraced *participatory democracy as a federalist element* to protect interests of historical minorities within a given multicultural society. Swiss consensus-driven democracy has made an abstract principle of people's sovereignty more concrete and operational through traditional Swiss instruments of democratic decentralisation, those of municipal self-government and of direct democracy.

### 2.3. Federalism and Post-Conflict Nation-Building: International Community as a New "Pouvoir Constituant"

There are hardly better examples to sustain the argument on structural paradoxes of pluralist federalism as a conflict management device than those related to state reconstruction and nation-building after ethnic or religious wars. The involvement of the international community, however legitimate it may be in terms of peace-keeping or even peace-enforcement, opens additional dilemmas, especially in the cases where the international community facilitates constitution-making. The "transfer" of pouvoir constitutiant from a polity *in statu nascendi* to major international players cannot but make a legitimacy paradox of multicultural federalism even more complicated. A post-sovereign constitution making not only demonstrates an absence of a critical level of democratic legitimacy; it instead directly goes against nation building and – in consequence – against democratic legitimacy, since nation building and nation sustainability are inherent in democratic legitimation. We witness at the same time *a come-back of constitution-making and withering away of its democratic nature.* This is how a rupture between constitution-making and nation – building has happened. Suffice to remind that without democratically legitimate constitution-making, pluralist federalism loses one of its critical conditions to effectively contribute to nation-building.

All major federal arrangements in general and federations in particular, share something in common. In order to be legitimate, a consensus underlying such arrangements needs not only a qualified majority or even referendum support, but also a federal consensus. Constitution as a federal compact defines the terms of federal loyalty, i.e., the terms of federal trust embodied in loyalty to a common state. Therefore, the centrality of the interrelationship between constitution making and nation building is notorious: various federal arrangements are always a constitutionally established balance between self-rule and shared rule. Constitutional negotiations and constitutional legitimacy are a critical initial step for a viable pluralist federalism, since only a legitimate federal compact makes majoritarian and con-federal rule function together. Ex-communist multi-ethnic federations inevitably failed after the fall of communism,

since federal trust in particular was missing. Constitution-making became one of main instruments to dissolve a common state. No trust could be viable within constitutive foundations of communist politics. Socialist constitutions were means to simulate legitimacy foundations and provide party decisions with a facade of constitutionality.

Notably in post-conflict situations an absence of tolerance and trust as necessary conditions for peaceful and democratic society is evident already at a symbolic level. A profoundly different reading of key causes of a conflict as well as a fully contradicting assessment of present situation is often at hand. In consequence, it is almost impossible to reach agreement on the constitutive nature of the future common state framework as a stepping stone in a nation– building process. There is not enough political will to understand the other side. The role of the elite becomes in consequence critical. Paradoxically enough, the positions of the elites cannot be democratically verified. International community has to negotiate with elites, which offers the latter a comfortable position in trading constitutional solutions for own political survival. This is how – instead of state building – a real politics in its dirtiest meaning is taking place. There is no better way to effectively destroy democratic nation-building and a positive role that federalism might play in it.

Under such conditions and in cases of accommodation of minorities through territorial autonomy, minorities start focusing on external rights for their territorial entities. This shows that they even take negotiated solutions as somehow "transitory". In the "internationalisation" of their position they see a "manoeuvring space" to sometimes again open up their issue. Moreover, although territorially based federal solutions would be in many cases desirable, it is exactly the conflict over territory, which makes ethnic demands end up as irreversible and thus categorical. Ne of crucial problems paradox of federalism as a conflict-management device for multiethnic societies lies in "hidden potentials" of the correlation between territory on one side, and ethnic-driven constitutional solutions in a given multiethnic federation, on the other. The major challenge that any multicultural federalism has to face in such a situation, moreover the "trap" with sometimes-fatal consequences for inner peace remains as to how to avoid that – due to constitutional foundations and established decision-making process at a federal level – every constitutional conflict turns into ethnic conflict. It is indeed a paradox that the ex-communist federations "share" this experience with the decentralisation reform in Macedonia under Ohrid Agreement, mediated by the EU and United States. Re-drawing municipalities' lines prevailingly along ethnic lines was a strategy to accommodate minority. However, for both ethnic Albanians and ethnic Macedonians, another far-reaching message got across: In order to enjoy your rights, one ethnic group has to fully "control "its own" territory!

Equally indispensable is that, whatever institutional designs may be pursued, they do not leave space for "re-opening" and re-negotiating constitutive foundations of the common state on an almost day-to-day basis, when differences occur between the elites representing different communities. Such contested issues directly question the long-term viability of reconciliation between unity and diversity since in multicultural societies nation building takes a form of a "daily plebiscite". The state organisation and its functioning are a sensitive element to sustain or menace the balance between unity and diversity.

A systemic ambivalence of the involvement of the international community in designing federal solutions as part and parcel of conflict transformation strategy has to do with the following reasons:

First and foremost, there is a principal shift in the objective of constitution making which of itself makes an authentic constitutional consensus obsolete. The international community operates under geo-strategic terms of reference, and these usually have nothing to do with internal viability, i.e., inside legitimacy of the proposed solution. Not common identity, but geo-strategic stability in the region is of major concern, and internationally negotiated, in a way imposed framework for the solutions remains in principle non-negotiable (Bosnia, the former Serbia and Montenegro, Cyprus, East Timor, Iraq...). This is how "putting-together" federalism turned into "enforcing-together" federalism.

Not surprisingly, the results until now have not been very convincing and negative effects for the nation building process have been in some cases dramatic: Iraq, for example. Nation-building processes also form from the inside power relations beyond a toppled regime, which the foreign interventions can only distort. In addition, this is also the reason why foreign pressure usually proves ineffective: power relations are distorted and there are no reliable actors to respond to the pressure. Moreover, internationally facilitated or negotiated constitutional arrangements inevitably fail to fulfil three important conditions for constitution –making and nation-building in multicultural societies: a/ the process should ensure that the constitution is legitimate and legal; b/ it should guarantee inclusion as a proof of the respect for diversity; and c/ the process should promote a direct participation of the public in constitution making.[17]

Here additionally lies one of the reasons why "international constitution making" often imposes unviable solutions, and cannot deliver effective guarantees for international rule of law. Federal arrangements in such cases are discredited, since – in the end – federalism *is* about constitutionally defined and respected rules of the game. Western democracies

[17] Nicolas Haysom, "Constitution Making and Nation Building", in: *Federalism in a Changing World Learning from Each Other* (ed. R. Blindenbacher A. Koller), McGill's Queen's University Press, Montreal 2003, 261 298.

build upon an inherent identity between legality and legitimacy. More importantly for democratic constitutionalism, legality as such is immanently legitimate only under two, equally indispensable conditions: a/ that legality relies upon a consensus of those concerned (government by consent), and b/ that it is "universalisible", i.e. generally applied (legal security and equality before the law). I have tried to show why these conditions have not been and cannot be fulfilled by "international constitution making".

It is therefore appropriate to caution against too much enthusiasm for constitutional patriotism as a commitment to the values of democratic constitutionalism and human rights, so forcefully argued by J. Habermas as an alternative to (ethno) nationalism in the nineties. Today, poor results of a strong involvement of international community in post-conflict constitution making and nation building are empirically known. One can easily understand why such constitutional settlements hardly found "patriots" among those directly concerned, be it Iraq or Bosnia and Herzegovina of the Dayton Agreement, or the first proposed agreement for Cyprus, or the Union of Serbia and Montenegro. These federal settlements were not directly negotiated by conflicting parties; they were instead accommodating the interests of directly concerned powerful international actors for regional stabilisation. A sharp polarisation over federalism in Iraq today testifies at best that the constitution making process and imposed federal design went against nation building and sustainable democratic state-reconstruction.

To conclude with Weiller, although in a context fundamentally differing from the EU: These are telling examples of a supra-national constitutionalism without "constitutional demos" and federalism without constitutionalism.[18] Managed constitution-making, like "managed democracy", has "a soft representation and hard manipulation". Like in democracy's doubles the distinctive feature of these new constitutional constructs is that they bring "not so much hope but the sense of betrayal".[19]

## 3. CONCLUSION: CONDITIONS THAT FEDERALISM WORKS AS A NATION-BUILDING STRATEGY

The issue cutting across this paper was the following: How, and under what conditions can federalism become conducive to nation-build-

[18] Josef Halewi Horowitz Weiler, "Federalism without Constitutionalism: Europe's Sonderweg", in: *The Federal Vision. Legitimacy and Levels of Governance in the United States and the European Union* (ed. R. Howse K. Nicolaidis), Oxford University Press, Oxford 2001.

[19] Ivan Krastev, "Democracy Doubles", *Journal of Democracy* 17/2006, 52–62 **(***muse.jhu.edu/journals/journal of democracy/v017/17.2krastev.html*).

ing by reconciling unity and diversity and accommodating deep differences? One of undisputable conditions sine qua non faces a fundamental problem: Political and constitutional accommodation of all relevant groups in a given society can be sustainable provided one group or another does not use its presence in power sharing only to bring down a common state. Does exclusion become legitimate in such cases? Definitely not; it is only here that the issue of striking a viable balance between unity and diversity starts. Federalism cannot be imposed and must remain open for re-negotiations, however far-reaching the outcomes might be in some cases. However, it must posses a critical level of multicultural democratic legitimacy in order to be self-sustaining.

The paper argued that pluralist federalism is not a "magic tool" for nation-building. Nevertheless, pluralist federalism may nonetheless work under the following conditions:

a) a federal compact makes part and parcel of a multicultural democratic consensus;

b) common state is across community lines non-negotiable on a day-to-day basis;;

c) any design for a common state, even with strong con-federal elements can function as long as it is self-sustaining; it means that common bodies can guarantee effective decision-making within a restrictive sphere of their powers;

d) the international community should play important but constructive role; it should help building trust and tolerance as state-and-nation-building values.

By supporting legitimate constitutional settlements, the international community should prevent that the major paradox of pluralist federalism perpetuates: a necessity to create trust and tolerance, which are also its own preconditions.

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# SOME REMARKS CONCERNING THE RECEPTION OF BYZANTINE LAW IN MEDIAEVAL SERBIA

*Roman law was not introduced into Slavic countries directly by the activity of lawyers educated in Bologna or somewhere else, but indirectly through Byzantine law. Essentially Serbian legal compilations are strict tranlations of the Byzantine ones, but in several cases one can find some variations that change the sense of the text. Sometimes provisions of Byzantine law were not in accordance with Serbian customary law, so that Serbian lawyers had to add some explications. In this paper the author exposes some of the most interesting examples.*

Key words: *Byzantine law. Gaius. Nomos. Will. Marriage. Procheiron. Syntagma. Tzar Dushan's Code.*

It is well known that Roman Law, one of the most important legacies of Antiquity, was not introduced into the Slavic countries directly by the activity of lawyers educated in Bologna or somewhere else, but indirectly through Byzantine law. This specific reception of Roman Law in Serbia began in the thirteenth century through its inclusion into the Nomokanon of St. Sava, receiving its final shape in the middle of the fourteenth century with Tzar Dushan's legislation. But even today it is not completely clear what was the exact degree of application of Byzantine Law in Slavic countries, including Serbia, and whether it was merely a means for the obtainment of a reputation for emerging Slavic states or their rulers. Such intent is obvious enough in Tzar Dushan's Charter, probably issued in 1346, termed by Stojan Novaković *The Order of Tsar Stephan on the Legislation* (*цара Стефана наредба о законодавној радњи*). The Tsar here states that now, after having ascended to the throne together with his wife and son, "we should make the kind of laws one

should have" (*закони поставити іакожє подобаєть имєти*).[1] Thus, Roman (i. e. Byzantine) laws were to be introduced to the State, as otherwise the Empire would enjoy no reputation.[2]

Essentially Serbian legal compilations are more or less strict translations of the Byzantine ones, but in several cases one can find some variations that change the sense of the text. Sometimes, provisions of Byzantine law were not in accordance with Serbian customary law, so that Serbian lawyers had to add some explications. In this paper we shall expose some of the most interesing examples.

## I

The first book of Justinian's *Digest* begins with the chapter entitled *De iustitia et iure*. It mentions there the famous fragment of Ulpian, taken from the first book of his *Institutions*. *Ulpianus libro primo institutionum: iuri operam daturum prius nosse oportet, unde nomen iuris descendat. Est autem a iustitia appelatum; nam, ut eleganter Celsus definit, ius est ars boni et aequi.*[3] It is obvious that Ulpian thought that law (*ius*) was derived from justice since law (*ius*) is the art of good and equality. The editors of the *Basilica* translated this as follows: 'Ο νόμος άπό τῆς δικαιοσύνης ὠνόμασται˙ έστί γάρ νόμος τέχνη τοῦ καλοῦ καί ίσου.[4] Thus *ius* is replaced by νόμος[5] with the result that Ulpian's play on *ius – iustitia* is lost. It would not be like this if the editors of *Basilica* had traslated Roman word *ius,* with Greek δίκη: in Greek translation δίκη – δικαιοσύνη would be more convincing. In fact, the Byzantines had no general concept of law. The conception of *ius* as the body of legal rules forming the law (*droit, diritto, Recht*), inherited from the classical Roman tradition, had already been rejected in Justinian's time. The most important and

[1] S. Novaković, *Zakonik Stefana Dušana, cara srpskog 1349 i 1354 [Code of Stephan Dushan, Serbian Tzar, of 1349 and 1354],* Beograd 1898, 5 (hereinafter referred to as "ed. Novaković"); N. Radojčić, *Zakonik cara Stefana Dušana 1349 i 1354 [Code of Tzar Stephan Dushan 1349 and 1354],* Beograd 1960, 86. Although this text is preserved only in a late Rakovac manuscript from 1700, Radojčić, *Zakonik,* 145 162, proved its authenticity. S. Ćirković recently pointed out the importance of this charter in the context of Serbian Byzantine relations, see. S. Ćirković, *Between Empire and Kingdom: Dušan's State (1346 1355) Reconcidered, "Byzantium and Serbia in the 14th Century",* Athenes 1996, 115 116.

[2] Cf. T. Taranovski, "Pravo države na zakonodavstvo [Right of the state to legis lation]"*, Šišićev zbornik,* Zagreb 1929, 370 378.

[3] D. I, 1,1.

[4] Bas. II, 1,1. *Basilicorum Libri LX, series A, volumen I, textus librorum I VIII,* ed. H. J. Scheltema et N. Van der Wal, Groningen 1955, 15.

[5] The Byzantine editors used the term νόμος to translate the Latin word *lex* as well. Cf. D. I, 3,1 Bas. II, 1,13; D. I, 3,36 Bas. II,1,36.

central legal concept is that of νόμος, which means law in the sense of *lex,* behind which the imperial legislator (νομοθέτης) is always present.[6]

Matheas Blastar took in his *Syntagma* Ulpian's text, following the translation from the *Basilica,* so that Latin term *ius* became νόμος. When Serbian lawyers translated *Syntagma,* they, of course, did not compare Greek and Latin text, and in the Serbian version Ulpian's term *ius* became *законь* (zakon, νόμος, lex, la loi, la legge, das Gesetz), instead of *правo* (pravo, δίκη, ius, droit, diritto, Recht).[7] *Pravo* would be more convincing, because *pravo – pravda* (δικαιοσύνη, iustitia, justice, giustizia Gerechgtikeit) is much more similar to Ulpian's ius – iustitia.

## II

"The main distinction in the law of persons," says Gaius, "is that all men are either free or slaves" (*Et quidem summa divisio de iure personarum haec est quod omnes homines aut liberi sunt aut servi*).[8] Gaius' text also found its way in *Epanagoge/Eisagoge,* the Greek text being as follows: Τῶν προσώπων άκρα διαίρεσις αύτή ότι μέν άνθρώπων οί μέν είσίν έλεύθεροι, οί δέ δοῦλοι.[9] The fragment from *Epanagoge/Eisagoge* was taken by Matheas Blastar and it can be found in his *Syntagma* (Δ – 11).[10] In the Serbian translation this would be: Ієжє лиць краинієє раздєлієнїє, сє ієсть іако оть чловєкь овы оубо соуть свобод'ны, овы жє рабы.[11]

The definition exposes Roman concept of man (*homo*), because all men are considered either free or slaves. However, this distinction, taken from Roman lawyer Gaius, had a more declarative character: legal sourc-

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[6] D. Simon, "Zakon i običaj u Vizantiji [Law and Customs in Byzantium]", *Ana li Pravnog fakulteta u Beogradu [Annals of the Faculty of Law in Belgrade]* 2/1987, 145.

[7] *Matije Vlastara Sintagmat,* ed. S. Novaković, Beograd 1907, 421; Законь оть правды имєнова сє, їєсть бо хытрость добромоу и равномоу. For more details see S. Šarkić, "Νόμος et 'zakon' dans les textes juridiques du XIVe siècle", *Byzantium and Ser bia in the 14th Century,* Athenes 1996, 257 266.

[8] Gaius, *Inst.* I, 9. The definition was taken by the compilers of Justinian: *Iust. Inst.* I, 3; *D.* I, 5,3.

9 *Epanagoge legis* XXXVII, 1, ed. J. et P. Zepos, *Ius Graecoromanum II,* Athenis 1931, reprint Darmstadt 1964, 347. Although very small, the difference be tween Latin and Greek texts exist. Gaius speeks on "the main distinction in the law of Persons" (*summa division de iure personarum*), while the Greek text says that "the main distinction of Person such is..." (τω ˜ ν προσώπων άκρα διαίρεσις αύτή...).

[10] Γ. Α. Ράλλης Μ. Ποτλής, *Μαθαίου τοῦ Βλαστάρεος Σύνταγμα καὶα Στοιχεῖον,* Athenai 1859, 236.

[11] Ed. Novaković, 249. Serbian text is the strict translation of the Greek frag ment.

es in mediaeval Serbia do not allow for the conclusion that the population was divided into free persons and slaves. Speaking on distinction of all persons, Serbian legal sources oppose the privileged class – *vlastela* (noblemen) to all other men (чловекь, plural = людиє). So, the expression чловекь (man), used by Serbian translators of *Syntagma* as the exact equivalent for Latin word *homo* and Greek άνθρωπος, in Serbian mediaeval law designates dependent person whose legal status was immutable and who does not belong to the noblemen class. That can be clearly seen from several articles of Tzar Dushan's Law Code. Article 2 speaks on *vlastele i proči ljudi* (*Lords and other people*...) and in the article 136, among other things, it is said: *My Imperial writ may not be disobeyed, to whomsoever it be sent, be it to the Lady Tsaritsa, or to the King, or to the lords, great or small, or to any man* (*Knjiga carstva mi da se ne presluša gde prihodi, ili ka gospoždi carici, ili ka kralju, ili ka vlastelom, velikim i malim, i vsakomu človeku*).[12]

In the Serbian translation of Matheas Blastar's Syntagma one can find another distinction of free men. However it is very hard to say if Matheas Blastar was conscious of whether or not the above mentioned distinction of free men corresponded to the social circumstances of the fourteenth century Serbia. At the beginning of the chapter Y, in penal-law provision cocerning the punishment of those who have insulted someone, we read: οί τοιοῦτοι, ή πρὸς καιρὸν έξορίζονται, ή τινος κωλύονται πράγματος έντιμοι όντες εί δὲ έλεύθεροι μὲν εῖεν, εύτελεῖς δὲ, ροπαλιζονται εὶ δὲ δοῦλοι φραγγελιζόμενοι, τῶ δεσπότη άποδιδονται.[13]

The fragment says that among those who are free exists a clear distinction between the privileged class called *počteni* (noble, gentle, honest, in Greek text έντιμοι) and *sebri,* in the meaning of *common, vulgar, low, base* (εύτελεῖς in the Greek original).[14] Such a division of the

[12] The English text is quoted according to the translation of Malcolm Burr, "The Code of Stephan Dušan, Tsar and Autocrat of The Serbs and Greeks", *The Slavonic (and East European) Review*, London 28/1849 50, 524; The Serbian text is quoted according to S. Novaković, 103, 227.

[13] Ed. Ράλλης Ποτλης, 481. Old Serbian text is (ed. Novaković, 509 510): Такови или на врємє ζатакають сє, или нєкьыє вьζбранiають сє вєшти, почтєн'ни соуштє; аштє ли свободни оубо боудоуть, сєбри жє палицами да биієны боудоуть; аштє ли раби, бичєви биіємы господиноу да отдають сє. Cf. T. Taranovski, "Političke i pravne ideje u Sintagmatu Vlastara [Political and legal ideas in the Blastar's Syntagma", *Letopis Matice srpske* 317/1928, 166.

[14] On the different meanings of the word *sebar* (себрь), see S. Novaković, "Die Ausdrücke себрь, поч'тень und мьроп'шина in der altserbischen Übersetzung des Syn tagma von M. Blastares", *Archiv für slavische Philologie* 9/1886, 521 523; V. Mažuranić, *Prinosi za hrvatski pravno povjestni rječnik [Contributions to Croatian vocabulary of legal history],,* Zagreb 1908 1922 (fototipia Zagreb 1975), 1295 1296; P. Skok, *Eti mologijski rječnik hrvatskoga ili srpskoga jezika [Etymological Vocabulary of Croatian or Serbian language],* the new edition prepared by M. Deanović, Lj. Jonke and V. Putanec, book III, Zagreb 1973, 210. See also the article *Sebar* (Себар), in "*Leksikon srpskog*

free population was a reflection of social relations in mediaeval Serbia and was present in Serbian legal sources. Several articles of Dushan's Law Code (art. 53, 55, 85, 94, 106) oppose *sebar* (commoner, εύτελής) to nobleman, but such a division could be perfectly seen in the article 85, which proscribes penalties for Bogomilian propaganda, saying:...*if he be noble let him pay one hundred perpers: and if he be not noble, let him pay twelve perpers and be flogged with sticks* (*...ako bude vlastelin, da plati 100 perpera, ako li bude sebar da plati 12 perper i da se bije stapi*).[15]

The expression *slave* (*rab,* in modern Serbian *rob*), which was opposed in Gaius' definition of a free man, was rearly used in Serbian legal sources. This term completely disappeared from the texts of the fourteenth and fifteenth centuries.[16]

## III

The heading of the Πρόχειρος Νόμος (*Procheiron*) Chapter 32 is Περὶ φαλκιδίου.[17] The Greek term φαλκίδιος originates from the *lex Falcidia,* promulgated in 40 BC, providing for a maximum of three quarters of a person's estate to be bestowed as a legacy, entitling an heir to at least a quarter of the inheritance.[18] Justinian's *Novella* XVIII, 1, issued in 536, provided that this part had to be one third of the inheritance if a testator had up to four children, and half, if a testator had more than four children. Nevertheless, the term φαλκίδιος was not discarded.

St. Sava adopted the complete text of the Πρόχειρος Νόμος (Законь градьски in Slavonic; Chapter 55 of the Nomokanon), but Serbian lawyers translated Chapter 32 as ω раздѣлєнии (On division).[19] They cor-

*srednjeg veka"* [The Lexicon of Serbian Middle Ages], eds. S. Ćirković and R. Mihaljčić, Beograd 1999, 659 660 (R. Mihaljčić).

[15] Burr, 214; N. Radojčić, 59, 113. Only in the manuscript from Prizren we read *and if he be not noble* (*ako li ne bude vlastelin*) instead of *if he was commoner* (*ako li bude sebar*). See S. Novaković, 67, 197.

[16] See S. Šarkić, "Divisione Gaiana delle persone nel diritto medievale serbo*", Zbornik radova Pravnog fakulteta u Splitu*, 43, 3 4/ 2006, 355 360.

[17] *Proch.* XXXII, ed. J. et P. Zepos, *Ius Graecoromanum, vol. II,* Athenis 1931 (reprint Aalen 1962), 188 189. The Chapter contains four paragraphs.

[18] Gaius, *Inst.* II, 227: *Lata est itaque lex Falcidia, qua cautum est, ne plus ei le gare liceat quam dodrantem, itaque necesse est, ut heres quartam partem hereditatis ha beat.*

[19] Nićifor Dučić, *Književni radovi [Literary papers],* vol. 4, Beograd 1895, 345; M. Petrović, *Zakonopravilo ili Nomokanon Svetoga Save, Ilovički rukopis iz 1262 [Nomo canon of St. Sava, The Ilovica Manuscript from 1262], fototipia,* Gornji Milanovac 1991, 305 b.

rectly understood the contents of the Chapter 32 (division of inheritance) and they changed the Greek heading Περὶ φαλκιδίου into Serbian as ω раздєлєнии (On division). This way the personal name of the law proposer (Roman tribune Falcidius), by intermediary reception of Roman law, became the synonym for division of inheritance.[20]

## IV

The definition of marriage was given by famous Roman lawyer Modestinus in the first book of his *Regulae* (*libro primo regularum*) and *Digest* editors placed it at the very beginning of Chapter II of Book XXIII under the title *De ritu nuptiarum.* The said definition is as follows: *Nuptiae sunt coniuctio maris et feminae et consortium omnis vitae, divini et humani iuris communicatio,* i.e. *marriage is a conjunction of a man and woman, a lifelog union, an institution of divine and human law.*[21] In Justinian's *Institutions* there is a similar definition: *Nuptiae autem sive matrimonium est viri et mulieris coniunctio, individuam consuetudinem vitae continens,* i. e. *marriage is a conjunction of a husband and a wife, created to last for life.*[22] The definition of Ulpianus found in Book L of *Digest*, Chapter XVII entitled *De diversis regulis iuris antiqui,* also demonstrates the Roman idea of marriage: *Nuptias non concubitus, sed consensus facit,* i. e. *the essence of marriage is not sexual relation but consent* [to live in matrimony].[23]

Πρόχειρος Νόμος accepted Modestinus' definition and translated it into Greek: Γάμος έστὶν άνδρὸς καὶ γιναικὸς συνάφεια καὶ συγκλήρωσις πάσης ζωῆς, θείου τε καὶ άνθρωπίνου δικαίου κοινωνία.[24] As we can see the text is literally translated and fully corresponds to the Roman concept, that marriage is a social fact, not a civil-law relation. It is interesting that neither *Procheiron* nor *Ecloga*, that preceded it, insisted on the formal proceedings of a wedding as the exclusive requirement for marriage,

[20] Cf. S. Šarkić, "The Concept of the Will in Roman, Byzantine and Serbian Me dieval Law", *Forschungen zur byzantinischen Rechtsgeschichte, Fontes minores XI* (hrsg. L. Burgmann), Frankfurt am Main 2005, 427 433.

[21] D. XXIII, 2,1.

[22] Iust. *Inst.* I, 9,1. In the text we find *nuptiae autem sive matrimonium*. Editors used two terms for marriage (*nuptiae* or *matrimonium*).

[23] D. L, 17,30.

[24] *Proch.* IV, 1, ed. Zepos, 124. Πρόχειρος Νόμος accepted the forementioned definition of Ulpianus (IV, 17, ed. Zepos, 126) as well as some legal requirements for the validity of marriage: mutual consent of spouses, the age of puberty marriage able age (14 in case of male and 12 in the case of female), consent of the parents in case either party is in *potestas* (ύπεξουσίοι, in Serbian translation podvlastni), while it was not re quired for persons with independent status, and public wedding ceremony (IV, 2, 3, 12, 27, ed. Zepos, 125 128.

which one could have considered as usual in Orthodox Byzantium.[25] But later on, laws that were passed during the rule of Macedonian dynasty introduced innovations and inserted what was "omitted" by editors of *Procheiron*. Editors of *Epanagoge/Eisagoge* amended Modestinus' definition of marriage by omitting the wording θείου τε καὶ ἀνθρωπίνου δικαίου κοινωνία, and by inserting the words είτε δι' εύλογίας είτε δὶα στεφανωματος ή δὶα συμβολαίου, meaning that the marriage is to be effected either by a wedding ceremony, or a blessing or literal contract.[26] So, a wedding ceremony, blessing and secular contract were considered equal. Leo VI proceeded one step forward and his *Novel* 89 (issued 893) prescribed Church benediction (ἐυλογία) as an obligatory form of entering into such a contract.[27]

The editors of Serbian legal miscellanies accepted Byzantine translations of Roman definitions of marriage. *Nomokanon* of St. Sava incorporated Modestinus' definition of marriage, which had been taken from *Procheiron* (like the other provisions about marriage). Here is the Serbian original: *Brak jest muževi i žene sčetanie i sbitije v vsei žizni. Božestviježe i človečeskije pravdi obštenie.*[28] Matheas Blastar, like the translators of his *Syntagma* into the Serbian language, took a modified Modestinus' definition of marriage from *Epanagoge/Eisagoge,* which is in Serbian as follows: *Brak jest muža i ženi svekupljenije i snasledie v vsei žizni, božestvenije že i človečeskije pravini priobštenije, ljubo blagoslovenijem, ljubo venčanijem, ljubo s zapisanijem.*[29] The definition from the 9th century, which equalised a laic contract with blessing and marriage, was considered obsolete by the 14th century. Neither Matheas Blastar nor his Serbian translators incorporated in *Syntagma* Novels of Byzantine Emperors that required religious rites for marriage. The editors of the Law Code of

[25] Chapter two of Ecloga entitled Περὶ γάμων έπιτετραμμένων καὶ κεκωλυμένων, πρώτου καὶ δευτέρου, έγγράφου καὶ άγγραφου, καὶ λύσεως αύτῶν (On allowed marriages and marriage impediments, first and second, literal and without a chart, and on their dis solution) starts with following words: Συνίσταται γάμος χριστιανῶν, εἴτε έγγράφως εἴτε άγραφως, μεταξὺ άνδρὸς καὶ γυναικὸς τοῦ εἶναι τὴν ἡλικίαν πρὸς συνάφειαν ἡρμοσμένην, τοῦ μὲν άνδρὸς άπὸ πεντεκαιδεκαετοῦς χρόνου, τῆς δὲ γυναικοὸς άποὸ τρισκαιδεκαετοῦς χρόνου, άμφοτέρων θελόντων μετὰ τῆς τῶν γονέων συναινέσεως (Marriage for Christians is either in written or in unwritten form, it is between a male and a female when they both reach the age of puberty, i.e. male from 15 and female from 13, with their acceptance and consent of parents). *Ecloga* II, 1, ed. L. Burgmann, *Ecloga, das Gesetzbuch Leons III und Konstantinos V, Forschungen zur byzantinischen Rechtsgeshichte,* Band 10*,* Frankfurt am Main 1983, 170. It is obvious that among the requirement for marriage neither formal proceedings of the wedding, nor religious ceremony were mentioned.

[26] *Epanagoge legis* XVI, 1, ed. Zepos, vol . II, 274.

[27] P. Noaille, A. Dain, *Les Novelles de Léon VI le Sage,* Paris 1944, 295 297.

[28] Ed. Dučić, 256; ed. Petrović, 270 b.

[29] Ed. Novaković, 160. Although Matheas Blastar took over definition of Modes tinus from *Epanagoge/Eisagoge,* he did not omit words θείου τε καὶ άνθρωπίνου δικαίου κοινωνία, which was done by the editors of *Epanagoge/Eisagoge.*

Stefan Dushan corrected Blastars' "mistake" by putting articles 2 and 3 of the Code into full conformity with the Novels of Byzantine Emperors and with religious practice. We are going to quote them in a whole:

Article 2: *Lords and other people may not marry witout the blessing of their own archpriest or of such cleric as the archpriest shall appoint.* (*Vlastele i proči ljudi da se ne žene ne blagoslovivši se u svojega arhijereja, ali u teh-zi da se blagoslove koje su izbrali duhovniki arhijereji*).

Article 3: *No Wedding may take place without the crowning, and if it be done without the blessing and permission of the Church, then let it be dissolved* (*I nijedna svadba da se ne učini bez venčanija; ako li se učini bez blagoslovenija i uprošenija crkve, takovi da se razluče*).[30]

The old Roman concept of marriage as a laic contract finally disappeared by those articles of Dushan's Law Code, and the Christian concept of marriage as a religious secret prevailed and was fully accepted.

[30] M. Burr, 198; ed. Novaković, 8, 152. Cf. S. Šarkić, "The Concept of Marriage in Roman, Byzantine and Serbian Mediaeval Law", *Zbornik radova Vizantološkog insti tuta [Collection of Papers of the Institute of Byzantology]* 41/2004, 99 103.

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# "ON THE SCIENTIFIC ELABORATION OF THE HISTORY OF SLAVIC LAW" NOW AND THEN*

*Having been hired as the professor of History of Slavic Law at the Novoros siysk Faculty of Law in Odessa, famous legal historian and Monetenegrinian law maker Valtazar Bogišić held his accession lecture in 1870, later published under the title "On the Scientific Elaboration of the History of Slavic Law". In order to present the future of the new scholarly discipline he elaborates the origins, achievements, but also failings of the Historical School of Law. He points out the basic paths legal historians should follow and steps that legal history as a science should take in order to strengthen itself and remedy some of the weaknesses of the Historical School. This article compares the circumstances that Bogišić was describing to the modern ones, pointing out that some of his recommendations might have indeed been heeded a long time ago, but that some are certainly still applicable. Moreover, although con sidering the opinion that legal history's days are numbered in the era of globalisation and fast legal changes is extant and widespread, the author claims that position and goals of legal historians are greatly similar to the conditions of Savigny's and Bogišić's time. The historical approach to law, the connecting of historical and posi tivist disciplines, and the ever increasing number of ways of using the achievements and methods of legal history not only in academia, but also in the creation of law, are all indicators of favourable winds for legal history once again. Of course, legal his torians should not take that for granted, but must always strive for perfection, listen ing both to the new voices that the future brings and the reliable counsels of the past, the like of which Bogišić presented in his work.*

Key words: *Valtazar Bogišić. Historical School of Law. Legal History. Comparative Legal Traditions.*

* This is an adapted English version of the text (in Serbian *"O naučnoj obradi istorije slovenskoga prava" nekad i sad*) submitted to the *Festschrift Bogišić*, scheduled for the end of 2011 as an edition of the Institute for Comparative Law in Belgrade.

## 1. INTRODUCTION

On March 3, 1870 in Odessa, at the Novorossiysk Faculty of Law, where he had been hired as professor of the History of Slavic Law, Valtazar Bogišić held his accession lecture remarking upon many contemporary problems of this subject, but also of legal history in general.[1] The text of the lecture was published in June 1870 in the Russian slavophile magazine *Заря* [*Dawn*][2], and its' Serbian translation has later been published as *O naučnoj obradi istorije slovenskoga prava* [*On the Scientific Elaboration of the History of Slavic Law*].[3] At that time, both the academic subject and the scholarly discipline from which it arose were still in their infancy. Thus, Bogišić said: "A duty befell me to give lectures in a new science, a young science that is, so to speak, acquiring its citizenship among the other sciences before our very eyes. Before me is the task to teach a subject that, it needs to be emphasised, has not yet attained sufficiently firm foundations, that is characterised by incompleteness of material, partiality and insufficient elaboration of truths in examination".[4]

The main part of the lecture contains a short review of the origins, methods and achievements of the Historical School of Law, to which Bogišić belonged himself. However, the text is not in praise – Bogišić remarks that this school had not fully succeeded in its task and that it has been suffering a crisis for some years already, in theory and literature as well as in practice.[5] He further points out the basic orientation he believes legal historians should assume, the results that the Historical School had achieved and errors it had made, as well as the steps that legal history as a science should take in the future.[6] In his conclusion he comments upon the future of the History of Slavic Law itself, pointing out the examples of institutions with which it could enrich the legal history of the world, concluding that it faces "the broadest field of research, with a rich reserve of new phenomena barely touched by scientific research".[7]

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[1] See Valtazar Bogišić, *Izabrana djela, tom I: Opšti imovinski zakonik za Knjaževinu Crnu Goru* [*Selected Works, book I: The General Property Code for Montene gro*], Beograd Podgorica 2004a, foreword by Branko Pavićević, X XII.

[2] This journal dealt mainly with literature, but also with political matters, and it had been published for almost four years, from 1869 to 1872. The works of many famous Russian writers and poets such as Tolstoy, Dostoyevski, Tyutchev, Fet, Maykov and others were published therein, and also numerous slavophile and panslavic scholarly and political articles, including Danilevsky's famous text *Russia and Europe*. See Хронос: *Заря*, *http://www.hrono.ru/organ/rossiya/1869zarya.html*, last visited 15.09.2010.

[3] V. Bogišić, "O naučnoj obradi istorije slovenskoga prava", *Izabrana djela, tom IV: Studije i članci* ["On the Scientific Elaboration of the History of Slavic Law", *Selected Works, book IV: Studies and Articles*], Beograd Podgorica 2004d, 269.

[4] *Ibid.*

[5] See more closely *ibid*., 270 275.

[6] *Ibid.*, 277 and further.

[7] *Ibid.*, 290.

Seemingly, this text presents nothing but interesting material to a modern legal historian – information about Bogišić's life and work, the activity of the Historical School in Serbia and abroad – and not instructions to be followed today. The ideas of this school are obsolete, and the discipline that it had created in the Slavic world – History of Slavic Law – is no longer developing. However, is that the full meaning of that text? The goal of this paper is to compare today's situation in the field of legal history with the one Bogišić wrote about almost a century and a half ago (albeit briefly and with some generalization) and to analyse how much has this science corrected the mistakes that he had pointed out, and how much it should still follow his advice.

## 2. THE HERITAGE OF THE HISTORICAL SCHOOL OF LAW

No self-regarding legal historian would omit to point out the achievements and the legacy of the Historical School of Law, and not only because it was the first to found legal history as a separate scientific discipline.[8] Namely, a large number of European peoples owe their "national awakening" in the field of law in the XIX century, which held great importance both for legal science and political history, to this school.[9] Without it and Savigny's idea of the "national spirit" (*Volksgeist*) there would not have been any study of the gradual development of law, and it is quite possible that legislation would have also developed differently. For as much as the adherents of this school were opposed to the idea of codification,[10] they still suggested an evolution of law at the moment when most of Europe, *nolens-volens*, practically acknowledged *Code Civil* as the unchanging *ratio scripta*. Thus this school was also opposed to legal dogmatism, opening the way for a much more thorough scientific study of law. Still, most of the aforementioned historians of today would

[8] The School of Elegant Jurisprudence had previously created a discipline called *antiquitates iuris*, but it was still far from modern legal history.

[9] Especially in Germany, where the school was founded, but also in other countries that accepted its achievements. See more Radmila Vasić, "Istorijska škola prava" [Historical School of Law], *Anali Pravnog fakulteta u Beogradu* [*Annals of the Faculty of Law in Belgrade*] 1 3/1991, particularly 62 64.

[10] Although not conceptually, but rather pointing out that conditions for the creation of a correct codification, which would take into account the peculiarities of the (customary) law of its people and reflect its national spirit, still have not been met, *ibid.*, 41 108, especially 47 52. However, one must take into account that Bogišić himself did not adhere to this opinion during the creation of the General Property Code, that he "saw no necessity to wait for the folk law of Montenegro to be processed by legal science and thus ripen for codification, but codified that folk law directly, in order to stabilize it and preserve it in its original shape", Teodor Taranovski, "Valtazar Bogišić (1834 1908), Povodom stogodišnjice njegovog rođenja *in memoriam*", *Arhiv za pravne i društvene nauke*, [*Archive for Legal and Political Sciences*] 6/1934, 453.

also opine that the basic idea of this school – the "national spirit" as the only source and moving force of national laws and thus their complete autochthony – has long since been obsolete, and that most modern theories are based on its exact opposite – the mutual connections and influence of all the societies and states in the world, including all the national laws and legal systems.

If that would be directly applied to the aforementioned question, one might conclude that the modern times are truly so different from the era of the Historical School that any implication that advice from that time might still (or again) be applicable is *a priori* wrong. Many scholars – not only lawyers –consider today that the influence of this school has been only a temporary result of the romantic zeal of the XIX century, and that law and other social sciences have "attained the greatest heights and achievements when they overcame the historical orientation".[11] If that view were completely accepted, further discussion of the propriety of adhering to the advice in Bogišić's article would be futile.

Still, one can find a link between these eras that would exist not as much in the ideology and theoretical foundations of the Historical School, as much as in its *position* and the role of legal historians. As focused as this school was on the study of legal history, it did so always with conscious reference to the legal present and positive law, thus propagating a historical approach to the study of law. Savigny and the school's other followers, including Bogišić, were lawyers first, and historians only after that; they were *legal historians*,[12] but not historians who had chosen law as a subject of their study, or even lawyers dedicated solely to history. They were lawyers who devoted themselves to the history of their discipline without losing trace of the connection between the past and the present. The primary area of their professional interest might have been history, but they perceived its doctrinary development as an essential part of the development of legal science in general. Accordingly, the job of a legal historian was not strictly segregated from a positivist's job: on the contrary, historians observed it as a duty of their vocation to transmit the lessons of the past into the future. Hence their great interest in modern legislature – from Savigny's writings of Germany's (un)preparedness for codification and the conditions it would have to meet, to Bogišić's detailed and hard work on the General Property Code of Montenegro, per-

[11] Sima Ćirković, "Istorija i društvene nauke", *O istoriografiji i metodologiji*, ["History and social sciences", *On historiography and methodology*] Beograd 2007, 269.

[12] Bogišić criticizes those of his colleagues who allow the purely descriptive ap proach to prevail in their works. He does also reprimand the new generation of legal his torians for going into the other extreme and "overly appreciating their legal knowledge and neglecting the way of thinking of the people and its separate strata", but that matter is outside the scope of this argument. See V. Bogišić, 2004d, 280.

formed completely in accordance and the spirit of the ideas of the Historical School.[13]

At first sight, modern (positive) law and legal history no longer coexist in such a way. For most of contemporary lawyers scientific work and practice are two separate roads as it is, and only truly great experts can walk both paths, combining a successful academic career and a legal practice, even if they are dealing in the same area of positive law in both cases. At least equally rare are those who work both in history and positive law, separately and taking turns between the two, but solely in the academic field; even they frequently have one dominant area, working in the other only from time to time. Combining efforts both in legal history and positive law practice – either in application or creation of law – or touching both subjects in one's works simultaneously and interconnectedly is almost unimaginable for today's average lawyer. Furthermore, legal history is increasingly – even in law schools! – considered a secondary, auxiliary and "introductory" discipline to be gradually marginalized in the education of future lawyers. With the development of law becoming ever faster, new branches of law being created and practically daily changes in the legal order, this seems to be inevitable.

Latest tendencies, however, show traces of change. Science has started recognising that, as much as the trend of internationalisation and unification of law favours the aforementioned factors, it certainly leaves space for the work of legal historians – work in the field where current and previous law, legal practice and legal history overlap. In order to assure the efficiency and use of future international or supranational law, it must take into consideration the national laws of the states that should apply it as much as possible. To pay attention only to their positive law – frequently borrowed from other systems as it is, still unfounded in practice and tradition and easily altered – is merely to stay on the surface of the problem. To achieve reliable results, legal history and tradition of those states must be studied thoroughly,[14] which is a task that lawyers

[13] However, as much work and energy Bogišić might have invested in the creation of the Code, his primary activity had always been scientific work. That is proven by a letter that he wrote to Stojan Novaković (as the Minister of Education of Serbia) in 1880, refus ing to teach at the Law Faculty of the Great School in Belgrade due to his commitments in working on the Code. "I know very well that the ordered codification has distanced me for a long time from my professional work, which is my dearest doing, so thus my deepest desire is to return to it as soon as possible and devote my time, work and ambition solely to it"., Državni arhiv NR Srbije, odeljenje Ministarstva prosvete [State Archive of Serbia, Department of the Ministry of Education], F 1,33/1881; Vladimir Grujić, "O jednom pokušaju da Valtazar Bogišić postane profesor Pravnog fakulteta Velike škole u Beogradu" ["On an attempt to make Valtazar Bogišić a professor of the Law Faculty of the Great School in Belgrade"], *Anali Pravnog fakulteta u Beogradu* 3 4/1960, 366.

[14] History is, thus, "divination of the present by way of the past", see Obrad Stanojević, "O mestu istorije i rimskog prava u novom nastavnom programu" ["On the

who do not deal with history are not qualified for, at least methodologically. Thus Reinhard Zimmermann, one of today's leading experts in the area of Roman Law, but also an expert in comparative and European law asserts (with multiple references to Savigny) that an age of abandonment of the narrow and comfortable limitations of national law and the creation of a new *ius commune* is at hand, but that its construction requires the cooperation of practicing lawyers and legal scholars, which will have to focus on both national and common legal history and tradition.[15] Explaining the necessity of a view into the past and a historical scientific approach, he says: "It may help us to map out, and to become aware of, the common ground still existing between our national legal systems as a result of common tradition, of independent but parallel developments, and of instances of intellectual stimulation or the reception of legal rules or concepts. At the same time, it will be able to explain discrepancies on the level of specific result, general approach, and doctrinal nuance. It is this kind of comprehension that paves the way for rational criticism and organic development of the law".[16]

In addition to history, legal tradition is also a key concept for understanding this opinion.[17] Increasingly present in legal science, especially comparative,[18] it joins history and practice, past and present. In a laconic yet complex manner, Patrick Glenn defines tradition as "the changing presence of the past".[19] According to Glenn, the necessary elements of this concept are the so-called "pastness" of tradition[20] (meaning that it must last for a certain while before one can speak of the existence of a tradition[21]) and its existence in the present, manifested via different ways

place of history and Roman law in the new curriculum"], *Anali Pravnog fakulteta u Be ogradu* 4/1974, 504 505.

[15] Reinhard Zimmermann, *Roman Law, Contemporary Law, Common Law: The Civilian Tradition Today*, Oxford University Press, New York 2004, 107 110.

[16] *Ibid.*, 110.

[17] Other terms, although less prominent, are also in use such as legal culture or even legal ideology, though the latter might not be able to cover a broader range of phe nomena. See e.g. David Nelken, "Legal culture", *Elgar Encyclopedia of Comparative Law* (ed. by J. M. Smits), Edward Elgar Publishing, Inc., Cheltenham 2006, 373 375, especially 374, and Roger Cotterrell, "Law and Culture: Inside and Beyond the Nation State", *Queen Mary School of Law Legal Studies* Research Paper No. 4/2009; *Retfærd: Nordisk Juridisk Tidsskrift*, vol. 31, 123/2008, 23 36 (*http://ssrn.com/abstract 1330001*), 2 4.

[18] Both comparative legal *history* and modern comparative law.

[19] H. Patrick Glenn, *Legal Traditions of the World: Sustainable Diversity in Law*, Oxford University Press, New York, 2000, 1 3 and further.

[20] Glenn uses this unusual term, created by the poet T. S. Eliot, considering it more appropriate than "age" or "history", see *ibid*., 4 5.

[21] *Ibid.*, 5 6. Of course, the author does not set any "minimal lasting" for the birth of a tradition, but rather remarks that such a thing must be determined in the analysis of every particular case.

of transmitting knowledge – from oldest oral tradition to modern information technology.[22] Still, for the concept to be complete, one must renounce the obsolete opinion that tradition is a static image of the past[23] and accept that it can and must change if it is to be considered alive.[24] Seen that way, tradition is not just a bridge connecting the past and the present, but also a road that leads their common values to the future – based on notions confirmed by the passing of time, but capable of adapting to the demands of the modern age. As Glenn says, "the past is mobilized to invent a future".[25]

For today's average lawyer, this may seem like a complete novelty, but is this concept that is starting to maintain a sure foothold so much different from the situation that existed in the time of Savigny and Bogišić?

Both yes and no. Just as the concept of tradition, today's state contains both elements of the past and novelties carried on by the coming era. The increasingly active process of globalisation[26] and the tendency towards the uniformisation of law on both the global and regional levels lead to new needs, discovering new dimensions of comparative legal research of both legal history and positive law – or, better, without drawing artificial boundaries between them,[27] of the law of all the countries of the world. But the main approach – both in ideas and methodological – is not new. On the contrary, as said before, it was none other than Savigny who first advocated the historical approach in law.

Of course, one cannot claim there is any direct influence of the Historical School on today's development: it is certainly primarily a reaction to the demands of the modern age. However, one also cannot deny that the experience of this school is there to serve as a model for those

[22] See *ibid.*, 6 11.

[23] Though, of course, there are still those who consider that "*the past is different and should not be confused with the present*", and that history is only necessary as a *mag istra vitae* with whose help we can make sure not to repeat the mistakes of our ancestors. See Jonathan Rose, "Studying the Past: The Nature and Development of Legal History as an Academic Discipline", *Journal of Legal History*, forthcoming April 30, 2010 (*http:// ssrn.com/abstract 1674024*), 1 2.

[24] P. H. Glenn, 21 22.

[25] *Ibid.*, 22.

[26] Or, as Glenn says, globalisation*s*; see *ibid.*, 47 50.

[27] Of course, whatever one might say of tradition, a certain boundary will always exist. Those drafting a statute or some other legal act will always care most about harmo nizing it with the existing positive law, while history and tradition, no matter how much attention is paid to them, will always remain secondary. That is not the issue discussed here. The necessity of observing the legal system of a country as a whole that contains both positive law and the tradition based on its legal history (i.e. former legal regulations and practise) is.

lawyers who acknowledge the necessity of the historical approach today. As every good model, it shows both the good and the bad sides of this school's product, thus enabling the new generations to inherit all the meaningful results attained by their predecessors, adapting them to their needs and at the same time to learn from their mistakes.

## 3. CRITIQUE BY BOGIŠIĆ

### 3.1. The goals of legal historians

Bogišić considers that the Historical School has failed in its task and that it omitted to "point out to science all the uses that one might rightfully expect from it".[28] He concludes that primarily from the state that legal science in Germany and Europe in general is in – pushed aside and its significance denied by practicing lawyers – which he attributes to insufficient efforts of the Historical School. Drawing a parallel with linguistics (which gained its scientific foundations at a similar time, and was frequently compared by Savigny to legal science), Bogišić determines three directions which legal historians should (in his opinion) adopt in addition to the simple publication of legal monuments.[29] According to him, historians must:

"I. Critically select source material, in whatever shape it may appear, and develop legal dogmatism.

II. Explore the elements of specific legal institutions, determine their mutual relations and relations towards other aspects of life of the people.

III. Find, through scientific comparison and critical analysis, laws in accordance with which law is born, lives, according to which it changes and dies".[30]

These tasks certainly stand before legal historians today as well. The first two have long since become the standard of work in this area: anyone would qualify the lack of a critical approach to source material as unprofessional, while the analysis and contextualisation of certain institutions is, more or less, the subject of every serious scientific work that concerns legal history. The determination of general laws according to which law develops may not be in the regular "job description" of legal historians, but it certainly falls into the areas they work in, especially if one turns their attention to the more significant achievements in compara-

[28] V. Bogišić, 2004d, 274.

[29] *Ibid.*, 276 277.

[30] *Ibid.*, 277.

tive history.[31] Thus, Bogišić's recommendation is not obsolete;[32] what, then, of the reproach that he brought upon his colleagues from his era?

### 3.2. The neglect of history and customary law

In the area of the first direction, Bogišić points out as a mistake of the Historical School "that its whole subject is observed almost solely from one, jurisprudential point of view",[33] as a result of which it seems that the historian is "sacrificing himself for the sake of the lawyer – instead of both elements, the legal and the historical, flowing at an equal pace and in harmony".[34] There he, above all, objects to allowing oneself to be a slave of, as he says, the fiction that every legal act automatically enters the life of the people upon publication, i.e. is acknowledged by those whom it binds and applied in practice. Bogišić claims that this fiction is useful, even necessary, to legal practitioners and theoreticians, but that to a historian "it can be very dangerous and harmful if he accepts it absolutely, because in that case even history itself appears to him as a fiction and, so to speak, a documentary lie".[35] He further supports his opinion with examples, pointing out the circumstances that a legal historian should pay particular attention to.[36] He especially emphasizes the cases of what is later to be named legal transplants – the reception of foreign statutes and other legal acts – and the problems which might arise when introducing such norms to legal life, particularly if the reception was performed carelessly and without taking into account the peculiarities of the territory they are transplanted onto. It is there that one can see that these remarks are not so obsolete. Perhaps contemporary legal historians do not

[31] One can certainly include there the aforementioned works of Glenn and Zimmermann regardless of the fact that they do not contain *solely* historical subjects as well as the increasingly popular, but somewhat controversial legal transplants theory of Alan Watson; see Alan Watson, *Legal Transplants: An Approach to Comparative Law*, Athens London 1993; A. Watson, *The Evolution of Western Private Law*, Baltimore 2001, especially 193 233.

[32] The most one can say is that some parts of it are implied today.

[33] V. Bogišić, 2004d, *ibid.*

[34] *Ibid.*

[35] *Ibid.* Still, one might be less strict and replace the term *fiction* in this (historical) context with the word *presumption*. For a legal practitioner (or a theorist speaking of positive law) has to be aware that it is impossible for an act to be carved into the minds and legal understanding of the people right upon publication, but rightfully accepts such a fiction, because he expects it to happen sooner or later. When a historian is viewing a source of learning about law, the question is frequently whether it had reached the legal consciousness of the people and practical application *at all*. The dangers of accepting such a *presumption* aside, calling such an opinion a *fiction* would mean that the historian *a priori* accepts that this and consequently any source *had not* "come to life" in practice, but that, despite that, he takes its life as a fact for academic purposes, which would certainly be absurd and, if it were to be true, somewhat frightening.

[36] *Ibid.*, 277 279.

take the practical application of the acts they are studying for granted,[37] but it is obvious that lawyers lack a historical approach in the field of reception of foreign rules – which is more and more frequent in the modern world. Particularly when it comes to harmonizing domestic law with the international standards in some area, entire "packages" of legal rules are being taken over – frequently without any processing other than translation – without considering the circumstances under which those rules were first made and functioned in the countries that originally created them, the experience of other countries that accepted them in the meantime or the difference in the conditions under which they will have to function in the legal system of the receiving country.

Bogišić's second remark in this area is that insufficient attention is being paid to customary law. He points out that even the material that is published "represents customs written down in centuries past",[38] while nobody collects or studies modern, living legal customs.[39] That is exactly what Bogišić made his task, devoting a lot of efforts and many years of his life to compiling and distributing his questionnaire, processing and systematising the received answers in order to finally publish an anthology of living customs, customary law still applied by the people. The impressive results of these efforts – above all the *Anthology of Today's Legal Customs of Southern Slavs* [*Zbornik sadašnjih pravnih običaja u Južnih Slovena*], or *Material in the Answers from Various Areas of the Slavic South* [*Građa u odgovorima iz različnih krajeva slovenskog juga*], first published in 1874,[40] but also the simultaneously constructed, yet never completed, separate anthology *Legal Customs in Montenegro, Hercegovina and Albania* [*Pravni običaji u Crnoj Gori, Hercegovini i Albaniji*][41] – contain priceless material for numerous legal historians even today.[42] However, as Mihailo Konstantinović remarks about Bogišić's

[37] Although the opposite tendency is interesting extreme scepticism towards a particular source's life in practice of its time unless data is preserved about it. Almost as if every act is considered unapplied in practice until proven otherwise.

[38] *Ibid.*, 280.

[39] Bogišić again makes a comparison with linguistics, that uses new, living words to explain old forms of the language, but also the behaviour of mythologists, "who reveal traces of belief from prechristian times in modern customs", *ibid.*

[40] See V. Bogišić, *Izabrana djela, tom II: Građa u odgovorima iz različnih krajeva slovenskog juga* [*Selected Works, book II: Material in the Answers from Various Areas of the Slavic South*], Beograd Podgorica 2004b, VI.

[41] Despite its incompleteness, this collection has been published many times, un der different titles, after Bogišić's death. See V. Bogišić, *Izabrana djela, tom III: Pravni običaji u Crnoj Gori, Hercegovini i Albaniji* [*Selected Works, book III: Legal Customs in Montenegro, Hercegovina and Albania*], Beograd Podgorica 2004c, the foreword by Tomica Nikčević, particularly XII XIV and XX XXI.

[42] Apart from research devoted to Bogišić's time, for which the collected legal customs can doubtlessly be considered living and active, these collections are also very useful for the research of earlier periods, from which these customs originate.

work on recording customs "in this regard he was a forerunner amongst us – but a forerunner that almost no-one followed".[43] Indeed, Bogišić's endeavour did not inspire others to follow his lead even in his time – so how could one expect something like that much later, when the ideas of the Historical School have themselves "become history", and its love towards customary law an issue of the past?

Or, without stopping at recording and publishing legal customs – can it even be spoken of the significance of customary law today? Maybe the growing convergence of legal systems does open new fields for the work of legal historians (or opens old ones in a new way), but will not they, even in such circumstances, deal primarily with the development of written, state-made law? Is there any place for the development of customary law in the modern time of the ever faster proliferation of normative acts?

One must consider several matters at this point. Firstly, a scholar must not be swayed by the process of globalization and unification of law and equate (even approximately) legal systems that certainly have their differences because of it. The position of customary law in the modern countries of Western Europe is by no means the same as in some countries, for example, in Africa, where it is acknowledged as one of the leading sources of law, and it is still dominant in the fields of marriage, family, inheritance and even real property law.[44] In India the validity of legal customs in many areas of law has been confirmed by many acts since the time of British rule,[45] and the 1950 Constitution of India (last revised in 2006) acknowledges the validity of all laws that had come into power before it, meaning by that "any Ordinance, order, bye-law, rule, regulation, notification, custom or usage having in the territory of India the force of law".[46]

Apart from that, regardless of the level of general development of the society and country they are located in, there are still many communities throughout the world where customary law plays a greater role then

[43] Mihailo Konstantinović, "Ideje Valtazara Bogišića o narodnom i zakonskom pravu" ["The Ideas of Valtazar Bogišić about Folk and Statute Law"], *Anali Pravnog fakulteta u Beogradu* 3 4/1982, 422.

[44] See John Miles, "Customary and Islamic Law and its Development in Africa", *African Development Bank Law for Development Review*, Vol. 1, p. 81, 2006 (*http://ssrn.com/abstract 1015783*), 102 103.

[45] For a review of the position of customary law in the normative acts of India see Nidhi Srivastava, "Customary Law and the Protection of Indigenous Knowledge in India", *Gene Campaign Research Project on Protection of Indigenous Knowledge of Biodiversity Briefing Paper 2*, November 2004 (*http://ssrn.com/abstract 1105672*), 3 7.

[46] Part III, Article. 13.3.a of *The Constitution of India, as modified up to the 1st December, 2007*, Government of India Ministry of Law and Justice, New Delhi 2007 (*http://lawmin.nic.in/coi/coiason29july08.pdf*, 31.01.2011), 6.

in the rest of the system. It is true that those are mostly (comparatively) undeveloped communities, still on the level of tribal organisation – whose tradition Glenn calls chthonic[47] – but they should not be neglected because of that, for frequently it is they who act as guardians of old traditions abandoned by the modern society.[48] Although their customs – including, but not limited to, the legal ones – are more frequently studied by ethnologists than lawyers, they still have much to offer in the field of study of customary law. Although they are frequently *praeter* or even *contra legem*, in some states they are acknowledged by the positive law, thus increasing their significance.[49] Such practise is frequently viewed as a step in the preservation of the cultural and ethnic identity of those communities, or the equation of their legal status with that of the rest of the population. Still, in some places – although still more in legal science than practise – one can find a different, practical motivation for acknowledging the binding power of customary law, in situations where it is considered to be more efficient than state written law in certain areas. That is particularly the case in various matters relating to ecological law and environmental preservation – a problem of the modern age, but one for the solving of which the traditional "chthonic" communities are quite well equipped because of their uninterrupted harmonious relationship with nature and the environment.[50] Furthermore, there are opinions that acknowl-

[47] See P. H. Glenn, 56 58 and further. This term meant to signify the connection of those communities to nature originates from the Greek word *χθών*, earth, and the derived adjective *χθόνιος*, which signifies something located within or beneath the earth. It is interesting to remark, however, that *χθών* signifies the earth in the sense of its inte rior, and that the notion in ancient Greece had been related not only to fertility and abun dance, but also to the underworld and its deities, so in a way it signifies the connection between life and death.

[48] See *ibid.*, 319 and further.

[49] See for example *Canada Constitution Acts, 1867 to 1982***,** Constitution Act 1982, Part II, article 35*, http://laws.justice.gc.ca/eng/Const/9.html*, last visited 10.12.2010.

[50] In the aforementioned research conducted in India, the author remarks that the "sustainable use of natural resources is amply reflected in the customs of most local com munities", explains it on the examples of various rules of customary law, mostly related to the treatment of certain rare plant and animal species, and then concludes: "It is natu rally imperative that local bodies and customary law be empowered, since by protecting biodiversity they contribute to the protection of IK [indigenous knowledge aut. rem.]. As a corollary, it needs to be emphasized that the extinction of local customs can thwart any attempt to restore sustainability into the modern development paradigm. National and international laws and policies, even if they do not promote, should at least refrain from adversely affecting customary laws and practices", N. Srivastava, 1.

An article from 2008 that considers the problem of environmental protection in maritime areas of the Southern Pacific suggests that the regime of use of the areas in ques tion and the resources inside them is left to the local customary law, which would be strengthened by governmental recognition, due to its superiority when it comes to practi cal efficiency. "Similarly it is unhelpful to look at the effectiveness of 'customary laws' as a measure of their validity because state based laws themselves often do not succeed at

edging the power of customary law via legislation is not enough for achieving the aforementioned goals, but that it would require constituting a pluralist legal system in which customary and statutory law would be equal sources. "Understood in this context, customary law is not necessarily always subordinate in the process of 'reconciling' two systems of law but rather is an equal system of law that may also challenge the legitimacy of aspects of the dominant legal system", suggest Donna Craig and Elizabeth Gachenga, recognizing the introduction of such a system as a possible solution for the water resource management problem in Australia, but also many other problems on the international level.[51] Still, they admit that most modern governments do not yet see this necessity and the potential value of such an approach.[52]

The above should by no means lead to a conclusion that customary law today is reserved only for underdeveloped societies – even with acknowledging that it can solve modern problems in them. Even among the economically strongest countries there are those whose legal systems recognize it – of course, as a source of law subsidiary to statutes, but still not *de facto* irrelevant. Thus, Article 1 of the Swiss Civil Code – written at the beginning of the XX century, but still in power – directs the judge to apply customary law[53] if there is no solution for a particular case in the Code.[54] It plays a very significant role in the Scandinavian countries, too. For example, customary law has always been one of the main sources of law in Norway. Even today, when legislation is undoubtedly (at least quantitatively) dominant, it contains not only rules from various areas of law, but also "the rules of statutory interpretation and the rules as to the application of judicial precedents",[55] thus significantly affecting legal

achieving much of what they aim to do. In the South Pacific there is much evidence of customary laws being more effective than state based laws specifically in the area of natural resource management; and perhaps definitional issues of what is and what is not customary law are less important than a consideration of what practices are working. There is little point in debating whether a custom is technically law or not in circum stances where it is being broadly recognised and applied by society", Erika J. Techera, "Supporting the Role of Customary Law in Community Based Conservation", *Macquarie Law WP* 2008 26 (*http://ssrn.com/abstract 1275603*), 6 7.

[51] Donna Craig, Elizabeth Gachenga, "The Recognition of Indigenous Customary Law in Water Resource Management", *Water Law*, vol. 20, 5 6/2010 (*http://ssrn.com/abstract 1675996*), 280. The article contains a suggestion of the legal reform that should be performed with this goal in mind.

[52] See *ibid.*, 283 284.

[53] Article 1 of *The Swiss Civil Code of December 10, 1907 (Effective January 1, 1912)*, translated by Robert P. Shick, The Comparative Law Bureau of the American Bar Association, Boston 1915, 1.

[54] Which must have been rather frequently, considering the number of *lacunae iuris* in the Code.

[55] Lester B. Orfield, *The Growth of Scandinavian Law*, foreword by Benjamin F. Boyer, Union, New Jersey 2002, 170.

practice even in those areas that are completely covered by written law. Some other countries, like Sweden, act similarly to Switzerland and limit the use of customary law only to the cases of legal vacuum in statutory law.[56]

The legal customs of specific communities – national or territorial – or states, however, are not the only relevant ones. They also play a very significant role in international law – in which they have long been the main, and even the only source.[57] Even today, according to the Statute of the International Court of Justice, the first source that this Court recognises are general or particular international conventions; immediately after comes "international custom, as evidence of a general practice accepted as law".[58] Be it the ancient and all-binding *pacta sunt servanda* or a new rule of customary law created during the past decade in the diplomatic relations between two bordering countries, the rules of international customary law are applied on a daily basis, and their authority is greater than the one of their "cousins" inside any particular country. Of course, there are disagreements here as well – as anywhere in legal practice or science – so some authors think that its days as a source of international law are numbered, and that it should be eliminated due to its lack of authoritativeness, coherency and democracy.[59] Others still believe that it is one of the key factors of contemporary international law and is even necessary for the understanding of law in general.[60] Thus, the situation may

[56] *Ibid.*, 257.

[57] Today, of course, the primary significance belongs to international contracts, but that does not mean that customary law does not regulate a large number of matters. Peculiarly, some authors believe these sources to be closer that it may first appear and that they can be subject to the same interpretation rules, see Emmanuel Voyiakis, "A Theory of Customary International Law", SSRN working paper, January 25, 2008 (*http://ssrn. com/abstract 895462*.), 36 53, particularly 46 52. As the author concludes, "[j]ust as the acts and intentions of parties to a treaty provide the first materials of its interpretation but do not necessarily determine the correct interpretive result, the acts and intentions of par ticipants to a customary practice are central to but do not exhaust the meaning of that practice. And just as international agents can be mistaken about the object and purpose of their written undertakings and commitments, they can be mistaken about the value and purpose of the customary international practices their acts contribute to", *ibid.*, 65.

[58] Chapter II, Article 38.1.b of the *Statute of the International Court of Justice*, *http://www.icj cij.org/documents/index.php?p1 4&p2 2&p3 0*, last visited 31.01.2011.

[59] Meaning by the latter the problem of the obligatory character of the general rules of international customary law for all the countries, although only some of them actually took part in their formation, see J. Patrick Kelly, "The Twilight of Customary International Law", *Virginia Journal of International Law*, vol. 40, 2/2000 (*http://ssrn. com/abstract 1116367*), 452 453 and further.

[60] "Neglect of the phenomenon called customary law has, I think, done great dam age to our thinking about law generally. Even if we accept the rather casual analysis of the subject offered by the treatises, it still remains true that a proper understanding of custom ary law is of capital importance in the world of today... much of international law, and

not be on a level that Bogišić would consider desirable, but it is obvious that there is still some room for devoting attention to customary law.

Bogišić's last objection made to legal historians in this area, related to the problem of neglect of the customary law, is the aforementioned exaggeration of the significance of legal knowledge and consequential neglect of the ways of thinking of other social classes and the people in general. He believes the mistake to be caused by Savigny's opinion that at a certain degree of development of culture and society people's activities separate so that the law, which was once the subject of the knowledge of the entire community is now left in the hands of lawyers as a separate stratum.[61] Bogišić remarks that such an attitude is too strict, for it does not necessarily follow from the fact that lawyers are "a separate stratum of knowers of jurisprudence", that they also "have an exclusive right to the very cognition of legal relations",[62] but that it is eminently logical that they must address members of other professions for matters concerning their fields of expertise.[63]

Although, unfortunately, one can always find examples of the opposite, it can still be claimed that the participation of experts in writing statutes concerning their field has become a regular practice today. Contrary (understandably) to Savigny's opinion, the reason for this is the ever further development of society: the increasing number of specific and strictly professional areas in modern daily life leads to the creation and branching of new legal disciplines that require the participation of non-lawyers in their regulation. If that was necessary for commercial and bill law in Bogišić's time, what is left to say today about the regulation of health care, intellectual property, the position of individuals on the Internet or space law?

### 3.3. Overdescriptiveness

Inside the second recommended direction Bogišić points out that legal historians "limit their task overmuch, go no further than a simple exposition and description of the facts, and do so at the time when the needs of historical science, at the start of this century, have surpassed

perhaps the most vital part of it, is essentially customary law", Nicole Roughan, "Concep tions of Custom in International Law", (*http://ssrn.com/abstract 1072965*), 1.

[61] V. Bogišić, 2004d, 280.

[62] "Otherwise one would have to acknowledge that they know best about all the various relations of life in their full abundance, with all the microcosmical peculiarities", *ibid.*, 281.

[63] As a positive example that overturns Savigny's claim, Bogišić mentions the writing of the Commercial and Bill Code in Germany, in which members of the mercan tile class took part along with lawyers, and whose votes had a significant influence on the decisions of the commission, *ibid.*

those limits".[64] He reproaches them for not paying enough attention to Savigny's opinion that the essence of law is founded in the life of the people and that it does not exist for itself, but also "to the very character of their subject".[65] According to Bogišić, a legal historian must, apart from strictly legal facts, devote great attention to the relation of law "and all other aspects of folk life",[66] as that is the only way to explain the evolution of specific legal institutions. Bogišić offers several examples[67] of how the understanding of the development or a concrete form of an institution requires the knowledge of other facts related to the social[68] or natural circumstances that had existed in the relevant area at the time of its creation. In the end he concludes that it is obvious "that this side of historical study of law is not only waiting for the earlier works to continue, but also needs a completely new activity".[69]

One might say that this attitude comprises a logical whole with Bogišić's opinion on consulting the members of other vocations in the lawmaking process: both are a reflection of the inseparable connection of the legal system to other areas of social life.[70] Just as lawyers need the knowledge from the areas that they are regulating in order to do it successfully, so do the facts from the non-legal life, so to speak, affect the face of the legal order both through the normative process itself and through various external influences. A historian overlooking this interdependence could never completely explain the genesis of even a single legal rule, let alone analyse the evolution of a branch of law or an entire legal system.

What does Bogišić refer to when mentioning a "completely new activity"? Certainly not the constitution of a new scientific discipline – but, most probably, a cooperation not unlike the one that he advocated in

[64] *Ibid.*, 282. He supports his opinion with Jhering's attitude that one should reject the positivist approach in the study of Roman Law, give a complete historic critique of this law and understand the causes of its' evolution; he reproaches Savigny for devoting attention to a "lifeless" subject the study of Roman Law in the Middle Ages which has affected the views and the method of his followers.

[65] *Ibid.*, 283.

[66] *Ibid.*

[67] In particular, on the examples of acceptance of the *Lex Rhodia de iactu* in Roman law, the absence of classical forms of slavery among the Slavs, as well as the peculiarities of the family community (*zadruga*) and the understanding of property in the Slavic tribes. See *ibid.*, 283 284.

[68] Including, of course, other connected legal institutions whose forms could have affected the development of the one considered.

[69] *Ibid.*, 284.

[70] One merely views it from a positivist point of view (more specifically, the point of view of the process of creation of law), and the other from a historical one, focused on the explanation of reasons for the creation and functioning of specific legal institutions or areas.

the legislative process: the use of auxiliary disciplines in legal historical research. Whether it is performed by the experts from those areas cooperating with lawyers (again, similarly to the solution for legislation) in conducting research, by legal historians being trained, to a necessary extent, in those sciences and skills required for their work, or by merely using the results of other scientists' research, it is necessary for realisation of the aforementioned goals. General (political) history has been using these disciplines for quite some time already, acknowledging the usefulness of the "auxiliary knowledge" even in the Middle Ages,[71] and its necessity during the Renaissance,[72] while it was the German historical (not only legal!) science of the XIX century that developed the whole methodological apparatus for the use of auxiliary sciences.[73] The time has certainly come for legal history to use them for completion, explanation and systematization of its research.

Today one practically cannot imagine a serious work in the area of legal history without the use of numerous auxiliary sciences,[74] even if most of that use comes down to using the knowledge that they had separately attained. Regardless, overcoming the descriptive level has become the standard of every science, including legal history: any writing that merely presents facts, no matter how detailed and well-systematised, cannot be considered a serious *scientific* work, but, at best, one of summary or encyclopaedic nature. Let it not be said that science does not need such works: their existence makes study, obtaining information or staying "up to date" with scholarly achievements easier to everyone, from enthusiasts and hobbyists, across students and young scholars, to renowned experts – but they do not represent a *contribution* to it.[75] That would require the work to contain an interpretation of the facts that is new at least in some respect, or to present new arguments that could additionally confirm or refute a previously stated opinion.

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[71] See Ernst Brajzah, *Istoriografija: stari vek, srednji vek, novo doba* [*Historiography: Ancient, Medieval & Modern*], Beograd 2009, 202 212, particularly 206 207.

[72] *Ibid.*, 264 266.

[73] *Ibid.*, 356 358, 362 363.

[74] From the ones more closely connected to law and legal history, such as (general) history, diplomatics, legal anthropology or epigraphics, to those that have a broader or separate area of study, but frequently relevant to legal history, such as archaeology, geography, cartography, biology, medicine, etc. Even those sciences that one would not say are (always) relevant to legal historians, lice economics and statistics, are more and more present. See Daniel M. Klerman, "Statistical and Economic Approaches to Legal History", *University of Illinois Law Review* 4/2002 (*http://ssrn.com/abstract 337500*), 102 107, especially 102 104.

[75] With the due exception of source research works that present certain facts to the scientific public *for the first time*; they undoubtedly make their contribution to science, even if they contain no interpretation of that data, because they represent a basis for future scientific works that will deal with the explanation of the newly found facts and their placement into the scientific system.

### 3.4. Too narrow a field of research

The last task which Bogišić – also following the example of other social sciences, mostly linguistics – notices lying before legal history is the discovery of general laws and regularities. "It must not be allowed for legal history to be condemned to an eternal impossibility of abandoning the suffocating pile of details and various coincidences. It must not be allowed for its task to be limited only to the borders of a given people and it never being able to cross that Rubicon", he says.[76] He obviously believes that only the discovery of general laws can lead legal history to the desired state of orderliness and systematization – and that can not be achieved if it stays solely inside national confines.[77] So Bogišić says that, in order to understand individual legal systems and discover the general truths inside them, one must: "1) *Expand* the field of legal-historical research; 2) Use *scientific* method to compare individual legal institutions."[78]

Regarding the first he mentions that legal historians have "very rarely been able to ascend to the realisation that individual institutions of special law, in its scientific interest, should be compared to the institutions of all related and neighbouring peoples", regardless of their degrees of social development.[79] He reproaches German legal historians for seriously comparing their law only to Roman law, while observing other (neighbouring) systems only through searching them for possible traces of influence of received German law.[80] Again, Bogišić makes a comparison with linguistics, which has studied and compared all related languages, regardless of whether they are neighbouring, how widespread they are and how developed the society that uses them is, and suggests that the success of linguistics in this field should inspire legal history to use the same comparative methodology.[81] He criticises the previous use of the comparative method in legal history for being akin to the old etymological research – for institutions were compared only by their outside char-

[76] V. Bogišić, 2004d, 284. He again voices Jhering's opinion, this time one how the knowledge about the essence of Roman law increases "in the extent in which the teaching of the *nature of law* is perfected in *legally philosophical* and *empirically com parative* ways and the extent in which it is enriched with new understandings and atti tudes".

[77] As Mortimer Sellers says, "No one can really understand her or his own legal system without leaving it first, and looking back from the outside", Mortimer N. S. Sell ers, *Republican Legal Theory: The History, Constitution and Purposes of Law in a Free State*, New York 2003, 99.

[78] V. Bogišić, *ibid.*

[79] *Ibid.*, 285.

[80] Of course, led by the idea of the National spirit.

[81] *Ibid.*

acteristics, without reaching "their inner nature" – which is superficial and insufficient for attaining the desired scientific goals.[82] He then remarks that the method should be applied in the History of Slavic Law, pointing out examples of what slavic laws could do to "enrich the science", i.e. their differentiating traits.[83]

Bogišić's exposition, without a doubt, presents an invitation for the use of serious comparative method, although without going so far as to serve as a basis for forming Comparative Legal History as a discipline. One should not disregard the fact that he propagates the use of this method *in favour of national laws*, i.e. as a tool with which to create general laws, which would primarily be used to advance national legal history and understand institutions of the national law in a comparative context.

But what was actually happening? It was Hegel's idea of the "World spirit" [*Weltgeist*], followed by the birth of World History as a discipline, that paved the way for the study of general legal history. But Hegel's world history is the embodiment of the judgement of reason, the freedom of the (world) spirit, where all that is particular – including Savigny's national spirit – is present only as an ideal.[84] Peoples may have their own guiding ideas and principles that are incorporated into the absolute idea of the World spirit, and thus gain their place in history and the realisation of their goals within it,[85] but the focus is still on the development of mankind as a whole. General legal history, born under this influence, did not become a means to systematise national legal histories; on the contrary, it viewed them only as a part of the world legal evolution.[86] This might seem opposite to what Bogišić advocated, but it is only an idea that has gone a step further. For, despite it not being its only goal, general legal history and the laws that it discovers can be highly useful to national histories, except that there is another dimension to it – legal history from the perspective of the world as a whole.

Although it has had its ups and downs, General Legal History – albeit not unmodified – lives to see its renaissance in the globalization era as Comparative Legal Tradition, a discipline that joins the elements of the old General Legal History and (positive) comparative law. As it has been said already, the reasons for this are both academic and practical, and although one might object that they sometimes tend to hamper each other,

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[82] *Ibid.*, 285 286.

[83] *Ibid.*, 287 290.

[84] Georg W. F. Hegel, *Elements of the Philosophy of Right*, edited by A. W. Wood, Cambridge University Press, Cambridge 1991, 372.

[85] See *ibid.*, 372 375.

[86] Sima Avramović, "From General Legal History Towards Comparative Legal Traditions", *Annals of the Faculty of Law in Belgrade Belgrade Law Review* 3/2010, 12.

it is the synthesis that gives this new discipline additional strength.[87] Although the change of name is more than just terminological – because the word "tradition", unlike "history", implies a lasting process[88] – one should not think this discipline to be less "historical" in nature because of it. Tradition is history that goes on, the traces and consequences of which we can still see in living legal systems.[89] The former General Legal History *is* essentially changed now, but only by adding the aforementioned element of continuity, and *not* by subtracting or reducing its historical quality.

Apart from that, comparative law and legal history have more in common than one might say if observing the first as a positivistic, and the latter as a historical science. "Legal history is comparative law without travel. Historical comparisons give lawyers and legislators the distance that they need to reform and to understand the law, without the distortions of contemporary partisan conflicts, which sometimes trouble other students of comparative law," says Sellers, explaining the relations between these two disciplines.[90] Indeed, even the classical historical approach contains a dose of comparison, particularly if one analyses not a certain point in the past, but, for example, the evolution of a certain institution in time.[91] That is another argument in favour of using historical approach – and not just comparative analysis – in the study and improvement of positive law: "Legal history gives special insights into legal institutions that other comparisons cannot, because so many legal structures survive over time, put to different uses, and half-understood, but preserving fragments of previous cultures embedded like fossils in everyday legal practice".[92] Even without the use of the term "tradition", this reflects its essence – the presence and preservation of the living parts of the past in today's reality.[93]

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[87] See *ibid.*, 13 20.

[88] For the definition of tradition used here see *supra*, n. 21.

[89] *Ibid.*, 16 17.

[90] M. N. S. Sellers, *ibid.*.

[91] In any case, as much as the rules of the historical method might order objectivity and forbid the historian to transpose modern attitudes into the period that he is studying, a *comparison* with similar institutions that are familiar to him still cannot be avoided and those will, in the lack of comparative historical knowledge, be the institutions of modern national law.

[92] *Ibid.*

[93] Sellers, however, takes this one step further, saying: "Legal history is a special form of comparative law, because of its unique connection to the status quo. All comparisons challenge the dominant cultural consensus, but historical comparisons do this best, because they often consider the very same institutions that exist today, as once they were, when they served different masters, with different means and purposes", *ibid.*, 100 101. Although a certain similarity in approach, that causes the aforementioned consequences,

It must again be emphasised that the modern situation is highly similar to the one that existed during the period of the Historical School's activity, except that present-day science tends to formalize and classify what used to be on the level of free academic thinking, and frequently resorts to narrow profiling in order to adapt to the demands of this era. Whether this is good or bad, time will tell.

This science – meaning both its old and new incarnations – has certainly made significant methodological progress since Bogišić's time: the connections between institutions and legal systems are being determined according to much deeper and more detailed criteria than simple outside similarity, and are not limited only to the cases of direct reception of foreign law. Unfortunately, scholars still frequently make the same mistake that Bogišić reproached them for, characteristic for the comparative approach in general – drawing conclusions that a connection exists between certain systems or institutions based only on similarity.[94] Related to that one – if nothing else, by its usual causes – is another mistake that Bogišić might not have explicitly noticed or foreseen, but that is still against his methodological recommendations: the wrong application of discovered general tendencies or regularities to those systems that cannot be subsumed within them.[95]

Although Bogišić speaks of the discovery of general *laws*, this term has been intentionally omitted in the explanation above. It has long since been proven that social sciences – including law and history – cannot

cannot be denied, this opinion is too one sided, since it negates all the differences that exist between these disciplines except the temporal, i.e. the period that they study. Legal history has, to start with, long been affirmed as an independent science, while there are still debates whether comparative law is a separate science or just a method that can be used within other legal sciences. For thoughts on this subject see Borislav Blagojević, "Uporedno pravo metod ili nauka" ["Comparative Law a Method or Science?"], *Ana li Pravnog fakulteta u Beogradu* 1/1953, especially 12 16, and A. Watson, (1993), 1 20, particularly 1 9. (A more detailed review of this matter would mean abandonment of the subject of this article). Watson has a far more moderate view: he believes comparative law to be "very different from legal history", *ibid*., 102, but unimaginable without it, and also able to offer much in return, which means that these two disciplines are essentially differ ent, but interconnected. For more details see *ibid.*, 102 106. Another fine opinion is "that legal history and comparative law are matching subjects, providing all lawyers with deep er insight into legal solutions in time or in geographical settings." Eltjo Schrage, Viola Heutger, "Legal history and comparative law", *Elgar Encyclopedia of Comparative Law* (edited by J.M. Smits), Edward Elgar Publishing, Inc., Cheltenham 2006, 405. Still, there is also the opinion that even the comparative method is not a separate method, but merely "either the dogmatic or the causal explanatory method applied to two or more laws at the same time", Radomir Lukić, "Metodi izučavanja prava" ["Methods of the Study of Law"], *Anali Pravnog fakulteta u Beogradu* 1 2/1965, 44.

[94] Sometimes such conclusions are supported by misinformation about other cir cumstances that could be taken as proof of such a connection.

[95] For more details see A. Watson, (1993) 12 15.

contain laws of the type that exist in natural sciences,[96] but only more or less probable and frequent causal connections, tendencies of development, statistical generalisations, regularities, etc. Still, this neither changes the meaning nor decreases the value of Bogišić's words. The term that he used does not mean that he believed that firm and unexceptional laws, such as those in physics or chemistry, will be found in legal history – no matter how much it may broaden its field and use the comparative method – but merely that he expected that in this way sufficient information about similar institutions and other phenomena in law may be gathered in order to uncover general regularities that would further help scholars conduct research in legal history. Whether they are called laws today or not is a matter of modern scholarly terminology and makes no substantial difference.

## 4. CONCLUSION

The Historical School may not have been active for quite some time, but the latest tendencies in law and society show that a great part of its legacy, the ideas for which its creators fought, are still – or again – alive. The historical approach in law, connecting historical and positivistic disciplines and the increasing number of suggestions to use the knowledge and methods of legal history not only in the study, but also in the making of law, all indicate favourable winds in the sails of legal history once more. Of course, good wishes and individual assessments of its usefulness are not enough for it to successfully navigate these new waters. If it wants to keep gaining strength as a discipline, it must take with it – as always when history is concerned – something new and something old: the useful innovations of the present, but also the preserved values from the past.

The first consists in accepting the achievements of modern science critically, but without prejudice. It would be equally harmful for legal history to reject the notion of tradition and the positive novelties that it brings to its field,[97] and to wholeheartedly accept everything that positivists say about it and thus soon merge into the notion of comparative law as one of its aspects, surrendering the lead to the younger – and far less developed – discipline. It must accept the tasks that are laid before it today, although some might deem them unconventional, but not at the price of neglecting – let alone forgetting – its nature and essence.

[96] See Max Weber, *The Methodology of the Social Sciences*, Glencoe 1949, 72 76 and further.

[97] Meaning primarily the continuity between the past and present that it contains, which strengthens the bond between legal history and positive law.

With that goal legal historians should keep in mind the famous classical saying that refers to history in general (*historia est magistra vitae*), take to heart the lessons of the past and learn both from the positive characteristics and the mistakes of their predecessors. As seen above, some of the mistakes of the Historical School that Bogišić had pointed out have been corrected and overcome in modern legal history, which is logical but nevertheless worthy of praise. Given the pace and direction of development of both the discipline itself and its subject, it is reasonable to assume that those mistakes will not be repeated.

Still, it was observed that this is not the case in some areas. That is primarily obvious when it comes to the attention which legal historians devote to customary law – the significance of which cannot be neglected even today – and insufficient historical analysis (frequently none) in the process of change of positive law, and especially the reception of foreign law. Bogišić's remarks are still quite valid here.

Perhaps one might say that these remarks are less relevant, and that legal history since Bogišić's time has managed to deal with all the serious flaws that he had mentioned. Even if it were so – and it is not the aim of this article to negate the significant evolution of legal history in the meantime – it would still not be a valid reason to ignore the rest of the objections or consider them irrelevant.[98] However, the question is whether one can at all claim something like that. It is dangerous to get involved in the assessment of the long-term[99] significance of any aspects of a certain science during the time in which it is being considered: that would result in the decrease of objectivity and the clouding of the broader image by ephemeral details of everyday events. It is far safer and more conscientious to make sure to remove all the observed flaws and accept all constructive advice, and let history be the judge of the results and the significance of individual actions.

[98] If nothing else, the increase of quality in the functioning of a discipline should also signify the raising of standards for further scientific work.

[99] And the short term cannot be relevant, *especially* for legal history.

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# THE FIRST REGIONAL CONFERENCE OF THE CIVIL LAW FORUM FOR SOUTH EAST EUROPE

The Civil Law Forum for South East Europe (CLFSEE) is a regional initiative sponsored by the German *Gesselschaft für Technische Zusammenarbeit (GTZ)*, since recently renamed in *Gesselschaft für Internationale Zusammenarbeit (GIZ),* consisting of leading experts in the fields of civil and commercial law from Albania, Bosnia-Herzegovina, Croatia, Former Yugoslav Republic of Macedonia, Montenegro and Serbia, and two prominent German experts, both from the Max Planck Institute for Comparative and Private International Law from Hamburg as support.[1] The regional members were elected in a unique democratic way, based upon their scientific reputation – the members from each state were, in principle, elected by legal scholars from other states of the region. The aim of the CLFSEE is "to develop proposals and opinions for the reform and harmonization of the national legislations in the fields of civil and commercial law in the participating countries, and to monitor the reform measures in those countries from an academic and professional point of view".[2]

The first of the CLFSEE activities was organization of a regional conference dedicated to subjects defined by the Forum. In order to successfully organize such conference, apart from its permanent members,

[1] The members are: Nada Dollani (Tirana), Gale Galev (Skoplje), Arsen Janevski (Skoplje), Tatjana Josipović (Zagreb), Branko Morait (Banja Luka), Ardian Nuni (Tirana), Miodrag Orlić (Belgrade), Slobodan Perović (Belgrade), Meliha Povlakić (Sarajevo), Zo ran Rašović (Podgorica), Petar Simonetti (Rijeka), Mihajlo Velimirović (Podgorica), Ulri ch Drobnig (Hamburg) and Christa Jessel Holst (Hamburg).

[2] See Mike Falke, "Introduction", in: *Civil Law Forum For South East Europe*, *Collection of studies and analyses, First Regional Conference* (*Cavtat 2010*), Vol. I, GTZ, Belgrade 2010, 5.

the CLFSEE also gathered relatively younger legal scientists who participated in legal research in the fields designated by the permanent members. This gave the younger generation an opportunity to get to know their counterparts from the region, both personally and from the point of view of their scientific interests, to exchange views and experiences and to publish works in a bi-lingual and regionally distributed collection of papers. This presentation shall, on the one hand, present the proceedings of the conference held in Cavtat, Croatia, on 28/29 October 2010, and on the other hand, present the contents of the collection of studies and analyses published as conference materials.

The CLFSEE has identified seven topics as priority fields of legal reforms and research in the region:

1) Extra-legal influences on legal systems;
2) Recent developments in the Law of Obligations;
3) Recent developments in the field of land ownership and construction land;
4) Security rights in movables;
5) Security rights in immovables;
6) Modern types of contracts;
7) EU Consumer Contract Law.

The proceeds of the Cavtat conference were organized in line with this choice of topics, so that after the initial panel discussion the work was divided into presentations of the research done by the seven Working groups, each dedicated to a specific topic. Given the relatively short time of the conference, though, only the first Working group, dedicated to extra-legal influences on legal systems, could present the results of its research in a plenary session. The remaining six Working groups presented their research two at a time, in two different rooms, so that recent developments in the Law of Obligations were presented at the same time as EU Consumer Contract Law, recent developments in the field of land ownership and construction land at the same time as security rights in immovables and security rights in movables at the same time as modern types of contracts. This forced the conference participants to choose only three of the six presentations, which made some of them unhappy. As for the contents off the presentations, they shall be presented through the presentation of the publication. However, it is well worth noting that the discussions at the Working group for recent developments in the Law of Obligations was especially interesting, for it showed the relatively low level of understanding of the purposes and techniques of the EU law in this area, making some of the distinguished older professors to even compare the European Union, Commission and Directives with another Union, which

also used to have Commissions and issued Directives – the Soviet Union, even though it is obvious that the comparison is in no way adequate. The presentation of Michèle Schmiegelow on the methods of comparing the quality of different legal systems was also received especially well, for it seems to have articulated a frustration shared by the lawyers across the region of SEE and beyond, which seems to be caused by the methods of comparison that seem to always result in supremacy of common law and Anglo-Saxon legal concepts in general. At the end, the closing panel discussion took place and a Declaration of Cavtat was adopted by the CLF-SEE permanent members. The Declaration stressed the importance of the exchange of views and ideas at a regional level, and emphasized that the regional co-operation between legal scholars and practitioners is a precondition for a successful EU integration of South East Europe. It also contained a summary of recommendations adopted by each Working group.

One would certainly fall short of one's duty to present the conference completely and accurately if the good and friendly atmosphere in which it took place would not be mentioned. The older scholars revisited their memories from the era of former Yugoslavia, and the younger ones used the opportunity to get to know their colleagues across the region. The Albanian colleagues, despite of not sharing the same language and the same former country, fitted in quite nicely. The beautiful surroundings in Cavtat and an excursion to nearby Dubrovnik facilitated the good mood of the conference participants.

One of the specific outcomes of the CLFSEE and its first conference is also an impressive bilingual publication of reports prepared by the conference participants in English and Serbian (i.e. Croatian, Bosnian, Montenegrin). The research which led to the conference lasted for almost two years, and the reports amounted to three ample volumes, having a bit over 2100 pages altogether.

The first volume contains the papers of the first three Working groups – on extra-legal influences on legal systems (WG 1), recent developments in the Law of Obligations (WG 2) and recent developments in the field of land ownership and construction land (WG 3). The first Working group published four papers: *Extra-legal factors and legal order universal values and cultural identity*, by academician Slobodan Perović of Belgrade, *Economic analysis of the transfer of inheritance matters from courts to notaries in the Republic of Slovenia*, by Tomaš Keresteš of Maribor, *Economic theories on the law in market relations*, by Rolf Knieper of Bremen and *Interdisciplinary approaches to comparing the quality of common law and civil law*, by Michèle Schmiegelow of Louvain. The second Working group published five papers: *Challenges to civil law harmonization by way of directives*, by Tatjana Josipović of Zagreb, *Viola-*

*tions of personal rights as a requirement for responsibility for compensation of non-material damage*, by Branko Morait of Banja Luka, *Tort liability and EC directives*, by Ardian Nuni and Evgjeni Bashari of Tirana, *Delictual liability based on fault in Serbian law*, by Miodrag Orlić of Belgrade and *Objective liability for damage* by Slobodan Perović of Belgrade. The third Working group published six papers: *Right of ownership of building land*, by Ilija Babić of Novi Sad, *Regulation of land ownership under the Albanian legislation*, by Nada Dollani of Tirana, *Legal regime of developed construction land in Montenegro*, by Zoran Rašović of Podgorica, *Establishment of right of ownership of socially/state-owned developed construction land in the Republic of Croatia and in Bosnia and Herzegovina*, by Petar Simonetti of Rijeka, *Establishment of property right and the right of long-term leasing of developed building land owned by the Republic of Macedonia*, by Rodna Živkovska and Tina Prželska of Skopje and a comparative overview *Establishment of the right of ownership of developed construction land that used to be socially-owned or state-owned in countries of Southeast Europe*, prepared by Petar Simonetti of Rijeka.

The second volume contains the papers prepared by the following two Working groups, on security rights in movables (WG 4) and security rights in immovables (WG 5). These groups had a bit different methodology than the first three (and acted more as a team than as a simple group of individual researchers), so that they published six national reports each (for movables prepared by: Arsen Janevski and Tatjana Zoroska – Kamilovska for Macedonia, Hano Ernst for Croatia, Meliha Povlakić for Bosnia-Herzegovina, Nenad Tešić for Serbia, Erald Topi for Albania and Draginja Vuksanović for Montenegro; for immovables prepared by Erald Topi for Albania, Darja Softić for Bosnia-Herzegovina, Hano Ernst for Croatia, Rodna Živkoviska and Tina Prželska for Macedonia, Zoran Rašović for Montenegro and Miloš Živković for Serbia), followed by six papers containing comparative reports on particular topics presented in national reports.

The third volume contains the papers prepared by the last two Working groups, on modern types of contracts (WG 6) and on EU Consumer Contract Law (WG 7). The papers of WG 6 are organized in the same way as the papers presented in the previous two groups (WG 4 and 5, published in the second volume) – six national reports on franchising, factoring and financial leasing (prepared by: Ana Keglević for Croatia, Goran Koevski for Macedonia, Jelena Perović for Serbia, Eimir Salihović for Bosnia-Herzegovina, Aneta Spaić for Montenegro and Asim Vokshi for Albania), structured along the outlines set forth in a common questionnaire, are followed by six comparative analyses (two for each examined contract). Lastly, it seems that the WG 7 was the most integrated

group, because its paper consists not only of short country reports on legislative techniques of each respective state (prepared by Nada Dollani for Albania, Zlatan Meškić for Bosnia-Herzegovina, Emilija Čikara for Croatia, Jadranka Dabović Anastasovska, Neda Zdraveva and Nenad Gavrilović for Macedonia, Zvezdan Čađenović for Montenegro and Marija Karanikić Mirić for Serbia), but also of the part explaining the transposition of each of the four relevant EU directives in national legislation, the part on the future of consumer protection law both in EU and in participating countries and the part containing the abbreviations list and bibliography, which were all prepared as a collective effort. It seems that the seventh Working group was the nearest one to the idea of collaboration that CLFSEE was established to promote.

The three volumes contain valuable materials for legal scholars within the region about the legal systems of their neighbors, and for foreign legal scholars for the situation in the region as a whole. Then fact that the papers are also published in English, irrespective of the sometimes faulty or imperfect translation, enables a far bigger audience to familiarize itself with the examined topics. Therefore it is by no means premature to conclude that the presented publication is amongst the (academically) most important publications in the area of civil law in the SEE region in the last few decades.

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# VIENNA WORKSHOP ON LEGAL SYSTEMS IN THE SOUTH-EASTERN EUROPEAN COUNTRIES AFTER THE END OF THE OTTOMAN REIGN

The Max Planck Institute in Frankfurt am Main and the University of Vienna (Department of Legal and Constitutional History) are developing a joint project which focuses on the formation of new legal systems in the South-eastern European countries after the end of the Ottoman rule. At the same time the project seeks to envisage the previous situation, that is to say the legal order within the Ottoman Empire itself. Shortly, the main focus of the project is transition from the Ottoman to the "national" legal systems. Aim of this project is to bring together a number of single case studies contained within the general topic. As the project is quite huge, it is divided into sections. The Vienna workshop was held on February 25–26, 2011 and got together a number of selected scholars from the region, together with the organizers, to expose their initial research goals and coordinate the efforts. Contributions are expected to consist of about 50 pages concerning the topic outlined, and to be finished until June 2012. They will be published in a separate edition by the Max Planck Institute.

The Max Planck Institute was represented at the workshop by one of the most prestigious German legal historians, Michael Stolleis, from the Johann Wolfgang Goethe-Universität Frankfurt am Main, who was nearly twenty years Director of the *Max-Planck-Instituts für europäische Rechtsgeschichte* (1991–2009). Also, Zoran Pokrovac, professor at the University of Split Faculty of Law, took part as a coordinator of the project and associate of the Max Planck Institute. The session was presided by Thomas Simon from the University of Vienna Faculty of Law, who is a distinguished professor and authority in Comparative Constitu-

tional History, while the meeting was greeted by Wilhelm Brauneder, Head of the Department of Legal and Constitutional History at the University of Vienna Faculty of Law.

As it was rightly observed within the project description, the region of Southeast Europe is characterised by an exceptional diversity of normative systems. The legal landscape of Southeast Europe shows a highly differentiated picture. Therefore, at this junction of Catholic West and Orthodox East – where Christianity and Islam meet at the same time – various directions of legal development can be found. Favoured by a very late transition to the "nation state" and a delayed modernisation towards Occidental capitalism, a colourful mosaic of effective norms of diverse origin, which often overlapped regionally, influencing each other, emerged in Southeast Europe. One of the focal points of this project lies in this "poly-normativity". Spatial frames of reference will be primarily today's Bosnia and Serbia, which were both part of the Ottoman Empire in the first half of the 19th century. After the decline of the Ottoman Empire South-eastern Europe enters a phase of accelerated change. The post-Ottoman era – marked by the division of the Balkans between emerging national states and the expanding Austro-Hungarian monarchy – is distinguished by a mingling of old and new law. The older layer of traditional norms is joined by another of newer norms from the west, consisting predominantly of law absorbed from Austria. Old and new law interfere with each other in complex ways. This change in the legal systems will be exemplified on the basis of the developments in Serbia and Bosnia-Herzegovina. In Serbia, this change ties into the birth of the nation state, while in Bosnia it is jumpstarted through the occupation and annexation of the country by Austria-Hungary.

The project combines question from Austrian legal history with those of the history of the Balkans, namely those of constitutional as well as civil and criminal law history. It covers two areas of questions: On one hand there is the Ottoman law effective in the aforementioned countries. A central aspect will be the "poly-normativity" of the legal system. What role did the Ottoman law play in these countries and how did it tie into the regional and local legal tradition? Another focus will be the transformation of legal systems in Serbia and Bosnia-Herzegovina after the end of Ottoman rule. These transformation processes shall be reconstructed in the field of constitutional and civil and criminal law. How do the process of enacting a constitution and the construction of a modern civil and criminal law work? What is the role of Austrian legal models? Under what circumstances does this "intended legal transfer" happen and in what way is this new law implemented and legitimized? In what way are the Austrian models adapted to the new context, into which they are implanted? And finally: Does the Ottoman heritage remain present in the post-Ottoman legal order?

The "Serbian team" selected by the Max Planck Institute has encompassed in Vienna Dragoljub Popović, former professor of the University of Belgrade Faculty of Law, now the Serbian judge at the European Court of Human Rights, who will research "Human Rights Developments (1835–51) – An Outline of Serbian Constitutional History". Srđan Šarkić, professor of legal history from the University of Novi Sad Faculty of Law has selected "The beginnings of Serbian Constitutionality and Constitutional acts promulgated during the First Uprising 1804–1813" as his topic. Sima Avramović from the Faculty of Law in Belgrade, actually President of the University of Belgrade Council, researches "Serbian Civil Code of 1844 and Legal Transplants", posing the question if is it more or less a copy of the Austrian Civil Code (ABGB), as usually perceived, or a bit more original modern codification, and announced a possibility to finish his translation of the Serbian Civil Code in English until June 2012, as he is working on it for many years. The remaining two Serbian professors are also coming from the University of Belgrade Faculty of Law: Žika Bujuklić will explore "The Doctrinary Reception of the Roman Law Tradition in Modern Serbia", while Zoran Mirković will focus on "The Penal System in Serbia until Criminal Code of 1860". Finally, the youngest member is an assistant from the University of Novi Sad Faculty of Law, Uroš Stanković, who will examine "Criminal Procedure in Serbia from 1815 to Code of Criminal Procedure (1865)".

Scholars from Bosnia and Herzegovina will mainly focus upon issues of sharia law and its influence. Fikret Karcic, professor of Comparative Legal History and Islamic Law at the University of Sarajevo Faculty of Law, who acquired his PhD from the University of Belgrade Faculty of Law many years ago, will research "Survival of the Ottoman laws in post-Ottoman times in Bosnia and Herzegovina" Prof. Enes Durmišević from the same Faculty explores "Sharia courts in Bosnia and Hercegovina in the second half of the nineteenth century" with a review about the experts on sharia law in Bosnia and Herzegovina during the Austro-Hungarian rule. Also, Harun Karčić, who is basically an international lawyer and graduate researcher at the Bologna Roberto Ruffili Faculty of Political Science, deals with a bit more actual topic "Islamic norms in a secular state: the case of Bosnia and Herzegovina between 1946–1990". Finally, assistant Mehmed Bečić from the University of Sarajevo Faculty of Law is working on "Private Law in Bosnia and Herzegovina under the Austro-Hungarian rule".

Expected research results are multifaceted. This project can and will contribute more than a national legal history of Serbia and Bosnia and Herzegovina, which is not very well recognized to the wider academic and scholarly public in Europe. Nevertheless, among the first important goals the project aims is to get closer to them the historical background of legal development of those turbulent regions, contributing in

that way to a more proper understanding of actual challenges in their European integration processes. In addition, the project seeks to follow up on the discussions led primarily in comparative law, legal theory and legal anthropology on the problem of the adoption of foreign law in a culturally and structurally new context. The issue of legal transplants, diffusion of law and legal cultures is in the very core of the project, having much more general significance. In view of legal pluralism, the confined space of Southeast Europe has a lot in common with the new global "world society". It is therefore a very promising task with, hopefully, expected fruitful results that the Max Plank Institute and the University of Vienna seek to achieve.

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Dragoljub Popović, *Protecting Property in European Human Rights Law*, Eleven International Publishing, Utrecht 2009, p. 158

The author of the book is the Serbian judge at the European Court of Human Rights (ECHR) who used to be a professor of law and a legal practitioner before coming to Strasbourg to serve as a judge. His topic in this book is the system of protection of property as one of the human rights granted by the European Convention on Human Rights (Convention). The provisions on the protection of property are actually laid down by the First Additional Protocol to the Convention, which was adopted in 1952, only sixteen months after the adoption of the Convention main text.

There are human rights lawyers who do not consider the property to be among the most important human rights. Therefore it is worth noting at the very beginning what was rightly remarked by the author of the preface to this book, Vojin Dimitrijević, Director of the Belgrade Center for Human Rights and a Member of the International Law Institute. He stressed the fact that the transition countries "had to solve many problems inherited from the times of communist rule, when private property was not only denied as a human right but even considered to be the source of all social evils". The protection of property as a human right, as the author showed in this book, played a significant role in overcoming the authoritarian past.

The book consists of three parts. Part One (pp. 1–65) explains the "Mechanism of protecting property" under the Convention. Part Two (pp. 65–123) exposes on the "Developments" of that mechanism and Part Three (pp. 123–149) is consecrated to its "Prospects".

The functioning of the mechanism of protecting property is explained by the author in three chapters, which treat its emergence, characteristic features and the State interference with property. The author in-

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sists on the autonomous character of the concept of property in the European Law of Human Rights. That concept can be understood only if one is to research and follow the case-law of the ECHR.

The State can interfere with property in various ways and the author of the book took account of all of them in Chapter 3 of the book, which concludes Part One. The State interference with property has its typical form, being the deprivation of property, or in other words expropriation. It usually consists of a formal act, but the ECHR jurisprudence has also dealt with other patterns of this concept, namely the so called *de facto* expropriation, as well as the indirect one, which exists in some member states of the Convention. The author also exposed on the conditions required for a State interference with property. Among these the lawfulness, the legitimate aim and the striking of fair balance between various interests are to be found.

Part One deals with concepts and legal institutions, which have already been subject to comments and research in manuals on human rights for years. They can be described as "classic" notions of the relevant legal literature and doctrine.

On the contrary, Part Two of the book treats what the author calls developments of the protection of property as a human right, which makes this part probably the most interesting one in the whole volume.

In three chapters the author exposes in this part on restitution cases, pilot judgments and bank deposits. None of these topics were on the agenda at the time of drafting the First Additional Protocol to the Convention, back in the 1950-ies. They concern new problems that have emerged throughout the years of implementation of the Convention. The problems are mostly connected with transition countries, but they are also to be found elsewhere. Dealing with such problems, as performed by the ECHR practice, have led to the introduction of some new techniques and legal institutions. Among these are the pilot judgments. Their origin is in the area of the protection of property, but they have spread to other sectors of protection of human rights under the Convention.

For readers in Serbia the chapters on restitution cases and bank deposits will certainly be the most interesting of all. It is well known that Serbia is one of the few countries in Europe that have not managed to overcome the heritage of the previous regime by adopting legislation on restitution. The problem is still waiting for a proper solution in Serbian law and the readers of this book will therefore find valuable information on the ECHR case-law on the subject. The relevant case-law could at the same time serve as a source of inspiration for drafting Serbian new legislation in this field, which must be made effective. It is to be underlined that Serbia does not only need legislation on restitution of property, but rather the enforcement of such legislation in practice.

As far as the bank accounts and frozen assets are at stake the author tackled some specific topics, concerning Successor-States of former Yugoslavia. This is also a problem which remains open in the international law. The Successor-States of former Yugoslavia have to reach an agreement on many points, which they have failed to achieve so far. It may therefore affect the efforts of ex-Yugoslav republics in approaching the EU.

Finally, Part Three of the book is the shortest of the three, but it is worth attention for various reasons. Firstly, it shows how the protecting mechanism advanced in the course of developments of the ECHR jurisprudence. Secondly, it addresses certain dilemmas and challenges currently showing up in the field and being of great interest, and thirdly it provides conclusions to the whole book.

The author is of opinion that two main approaches emerged in the ECHR practice as far as the protection of property is concerned. The first is the rise of positive obligations. Originally the Convention system of protection of human rights was laid down on the existence of a negative obligation of a State. The State was not to interfere with the enjoyment of human rights in general and among these also not to interfere with property. From that concept the ECHR turned to the concept of positive obligation, which was developed in its case-law. The State is nowadays considered not only to be upon obligation not to interfere with property of an individual, but also "to secure the effective exercise of the rights" guaranteed under the Convention system. In the field of the protection of property this implies the physical protection of property, but the obligation to recover as well. Procedural guarantees under Article 6 of the Convention have also reference in the area of property protection. These guarantees have emerged in the course of most recent developments of the ECHR jurisprudence. The author says that obligation is now incumbent upon the State – Party to the Convention "to introduce remedies within the national legal system that would enable effective protection of property".

Exposing on dilemmas and challenges in the protection of property the author tackled concepts of continuing violations and of social rights. The author is in favour of recognising the effect of continuing violations of human rights in the protection of property. In spite of his taking sides at this point with one trend in the case-law of the ECHR, he also exposed the opposite opinion, which is also rooted in somewhat contradictory jurisprudence of the Court of Strasbourg.

The social rights are not recognised in the Convention system and the author remains sceptical in respect of their future within the ECHR practice, because they are not envisaged by the provisions of the Convention and its additional protocols. Unless the texts were to face changes and substantial amendments the social rights could not be protected. The

amendments of the Convention and the additional protocols in this regard are however not likely to occur.

The author's conclusions are drawn along the lines of developments of the protection of property exposed in the text of the book. The author is of opinion that the system of protection of property has reached a fair amount of stability, although it can still be subject to changes and further developments. He stresses the fact that the protection of property, which had been set up in the years of the Cold War, served in the times of transition as "a specific tool aiming at restitution and redressing breaches of human rights, which had occurred in the past".

One of the author's main conclusions is that the system of protection of property in the European Human Rights Law had originally been designed "to follow a liberal pattern of preventing the State to interfere with individuals' possessions". The jurisprudence of the ECHR has transformed the original pattern so that the State is nowadays perceived as "a body having positive obligations towards individuals in respect of property and its protection". At this point it should be noted that the author of the book had started his carreer as academic teaching Legal History at the Belgrade University Faculty of Law. His conclusions show his sensibility towards that discipline in the sense that his main efforts went in the direction to research and display to readers how the system of property protection developed in the ECHR jurisprudence.

The book provides a table of cases cited in the text, as well as a bibliography, consisting of numerous volumes and articles, covering discussions among academics and practitioners of the topics the book is concerned with. Therefore it can be used both as a scientific contribution and a practitioner's manual.

Dr Vladan Petrov*

Slobodan Milacic, *De l'âge idéologique à l'âge politique – l'Europe post-communiste vers la démocratie pluraliste,* Bruylant, Bruxelles 2010, p. 475.

Two years ago the book *Mélanges en l'honneur de Slobodan Milacic – Démocratie et liberté: tension, dialogue, confrontation* was reviewed in this journal.[1] This year a brand new book by the distinguished professor of the Faculty of Law in Bordeaux deserves our attention, titled: *De l'âge idéologique à l'âge politique – l'Europe post-communiste vers la démocratie pluraliste* (*From the ideological age to the political age – Post-Communist Europe toward a Pluralistic Democracy*). Aside from the renowned Belgian publisher *Bryallant*, common denominators for both these books are the persona and work of Slobodan Milacic. The first book was written by numerous authors (reputable European constitutionalists and politicologists), treating the subject matters which Milacic dealt with, whilst the other part contains some papers by Milacic himself. The new Milacic's book is a well incorporated mosaic of the author's reflections on law, politics and culture, and their mutual effects in the process of democratization in post-communist countries. It is a multilayered work, equally interesting for constitutionalists, political scholars and other experts of the social sciences.

At least three tiers are easily observed in this book. The first contains a comprehensive analysis of the democratic transition process in post-communist countries. The second, a criticism directed at numerous politicologists and analysts who, driven by the consensual post-communist euphoria ("l'euphorie consesuelle du post-communisme", p. 53), analyzed the democratic transition in the East in a uniform manner, superficially, non-historically, as if it was not a matter of a complex, open and long-term process, but a model established *a priori*. "Post-communism

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[1] *Annals of the Faculty of Law in Belgrade Belgrade Law Review* 3/2009, review by this author.

was not analyzed as an open process of change, but as a completed transition" (p. 67). The third tier involves the search for a response to the question what is the purpose of a democratic legal state (*l' État de droit, pour quoi faire?*). Milacic does not only discuss the problems of developing a democratic legal state (*Rechtsstaat*) in post-communist societies, he also deals with the relations of democracy and freedom, in general. A democratic legal state is a complex and dynamic amalgam of the legal, political and cultural, and not a universal and static creation in which one of the aforementioned elements has predominance over the others. Legal state and liberal democracy are in "un marriage de raison" (marriage of reason), which unites freedom and equality, law and politics, the citizen and the state (*Introduction*, p. xvii). "Legal state guarantees freedoms and the exercise thereof. Democracy gives it, not only a soul, but content. And finally, how unjust would freedom be without equality and how somber equality without freedom?" (p. xvii).

The book is made up of an *Introduction*, which discusses the constituent elements of a democratic legal state, and three sections. The first one bears the title *Epistemological questions – a necessary return to history* (*Questions d' épistémologie –le nécessaire retour à l'histoire)*, pp. 3–119; the second: *Questions about the regime – legal, political and cultural search for synchronized articulation (Le juridique, le politique et le culturel à la recherche d'une articulation synchronisée),* pp. 121–289, and the third: *Questions about the State – fragmentation of states following system breakup (Questions sur l'État – la fragmentation des états après la dislocation du système),* pp. 293–462.

Development and preservation of a democratic legal state is a complex process, which is continuous and never complete, but instead has its ups and downs. That process begins with a radical breakup with an authoritative past and the establishment of an institutional framework of a new system. That is the first phase, followed by great expectations and a belief in universal values, such as separation of powers and human rights. However, it is also always characterized by a fall in optimism which arises with the first serious difficulties in the building of a pluralistic democracy. Quickly, it becomes apparent that it is not sufficient to just "inherit" a Constitution from abroad (like the Constitution of the French Fifth Republic from 1958, which because of the flexibility of its system has shown to be very attractive for post-communist countries), to establish "democratic" institutions and to proclaim principles of free economy. It is necessary to create a democratic political culture, but for that "a number of generations" are required. For the purpose of creating such a culture, it is necessary to return to history and not consider it superficially and linearly. "History and culture are analytically conjoint... history is to a certain extent the creator of history." (p. 3). History must be "a source of recycla-

ble energy" and "optimism... for a democratic legal state on the Balkans, and the East in general" (p. 24). A blatant example can be seen in Serbia's 19th century constitutionality. That constitutionality confirms that Serbia was open to European experiences and the European spirit. It succeeded, during a span of fifty years (1835–1888), in conditions of great hardship, "to establish the basic elements necessary for the development and modernization of parliamentary democracy" (p. 23). Instead of becoming a stable parliamentary democracy in the 20th century though, Serbia ceased its constitutional evolution as a result of unfavorable external circumstances and geopolitical situation.

It would be wrong to say that Milacic relativizes or even belittles the significance of law in the creation of a democratic society. Yet, the law, on its own, is not sufficient, as legal state is not its own purpose. For the law to be efficient it must be quintessentially endogenous (*esentiellement endogène*), that is, it must be founded on deeper social consensus, which cannot be achieved without the free competition of arguments and ideas in a concrete society. Law taken from "abroad", which was created in accordance with the suggestions of foreign experts ("experts for 'institutional engineering' who disremembered that the constitution is first and foremost a political and only thereafter a scientific work", p. 189), which dogmatically treats distribution of power and human rights, not only cannot contribute to the building of a pluralistic democracy, but in fact very quickly exhibits contra-effects. The best examples are offered by the first post-communist constitutions. Instead of their being "transitional", predemocratic (*prédémocratiques*), "specifically post-communist" (p. 91), it seems like they are written for advanced democracies (*des démocraties avancées*); they are "hyperbolic constitutions" (enriched with norms on human rights, p. 153). Such constitutions could not serve their main purpose (regulatory, constitutionalizing functions), because their symbolic function was overemphasized. As Milacic stresses, that was the continuation of the ideological culture (*la culture idéocratique*) by alternate means. The political party cult was replaced by the cult of legal norms.

The development of a democratic legal state is not only hindered by unfavorable internal factors (authoritative past, strong ideological remnants in all social spheres, etc.). As a serious analyst, Milacic does not avoid directing his criticisms at the international decision makers who had in the past, and continue to do so now (example in the case of Serbia, *V. P.*), used as a guide ideological and geopolitical factors, and not measures of objective law and legal standards. Their declaratively legal requirements were more often, than not, political requirements interpreted in different ways when dealing with so called "good" and "bad students" of democratic transition, "powerful countries (like Russia) and small ones (like Serbia)" (pp.151–152).

The "light motive" of this book is Milacic's thesis that the law, politics and culture are tightly knit, perhaps now more than ever. In this complex relationship between the law, the political and the cultural, Milacic places particular emphasis on culture. While political and legal revolutions are possible, a cultural revolution is not. "Culture is changed... but not by way of decrees and not on a daily basis" (p. 156). For a transition from a monistic to a pluralistic culture, from dogmatism to pragmatism, time and experience are required (pp. 443–444). For democratic political culture to be adopted, it is necessary to establish the foundations of a legal state and political pluralism. On the other hand, legal state and democratic pluralism cannot be effectuated in the true sense without democratic political culture. That "magic" of mutual action of the law, the political and the cultural has not been fully captivated anywhere thus far. However it is better "governed" by countries of developed democracy, although it is being acquired by post-communist countries, but with great resistance. There is no doubt, "culture will remain the last fight of the transition, the decisive one, but also the most difficult of them" (p. 177).

When faced with the question, where in the process of democratic transition is Serbia now and what its democratic perspectives are, Slobodan Milacic, French professor with Serbian roots, does not give an explicit response. However, Serbia is very much present in his reflections. Thus, the answer to the road which Serbia must take to becoming a democratic legal state can be perceived with careful analysis this book.

However, detailed inspection of this book also reveals certain contestable parts which in fact deal with Serbia or the events which took place in the former Yugoslavia. For example, Milacic states that "sometimes a state is born with post-communism" (p. 250), and in the footnote he gives as examples Macedonia, Belorussia and Kosovo (?!). Furthermore, he alleges that in the former Yugoslavia many states expressed interest in becoming "Great" (Serbia, Croatia, Albania, p. 399). In that sense, he emphasizes that Slobodan Milosevic, who was President at the time, wanted all Serbs in one state, by uniting the territories where Serbs were the majority ("everywhere where there are Serbian graves"). Evidently, he considers this statement uncontestable, as he does not give any references or literature which would confirm this. Finally, Milacic discusses the Constitutional reform of 1991, in which the President at the time, Slobodan Milosevic "deprives (*enlève*) Kosovo and Vojvodina of their provincial status" (p. 383). There was no Constitutional reform executed in Serbia in 1991 and the Constitution of Serbia was adopted in 1990. According to this Constitution, "The Republic of Serbia includes the Autonomous Province of Vojovodina and the Autonomous Province of Kosovo and Metohia, these being the forms of territorial autonomy" (The Constitution of Serbia from 1990, Article 6). Therefore, there was

no “deprivation” of the status of Autonomous Province to neither Kosovo and Metohia or Vojvodina, by way of Constitutional reform.

Nevertheless, the aforementioned factual discrepancies cannot significantly weaken the very positive opinion one forms about this book and its author. With this book Milacic reaffirms his reputation as one of the best West-European experts in democratic transition in the East. He is a serious scholar, political scientist and constitutionalist, who has also significantly contributed to more objective analysis of the political processes in the former Yugoslavia with numerous works, including this book. We remain with hope that this book review will influence Serbian authors, legal experts and politicologist to get better acquainted with the works of Milacic. In that respect, a translation of this book into the Serbian language should be considered. It would be a nice confirmation that the spiritual bridges between the French and the Serbian people, have not been nor can they be destroyed.

Maja Lukić, LLM*

Sima Avramović, Dušan Rakitić, Mirjana Menković, Vojislav Vasić, Aleksandra Fulgosi, Branko Jokić, *The Predicament of Serbian Orthodox Holy Places in Kosovo and Metohia – Elements for a Historical, Legal and Conservational Understanding*, University of Belgrade Faculty of Law, Belgade 2010, p. 112.

The fact that the conflict in Kosovo and Metohia has so far failed to attract substantial interest of academic literature in Serbia as a subject may appear surprizing only to a naive or inexperienced spectator. This particular subject possesses many features capable of scaring off writers not bold enough to face prospect of uncertainty of how their approach to it would be looked upon in the future, once the present situation becomes less open-ended and the conflict abates. Relative scarcity of comparative works in the field surely makes *The Predicament of Serbian Orthodox Holy Places in Kosovo and Metohia* an outstanding study, but it may be regarded so also due to a reason related to its substance.

Besides due to having appeared in a field characterized by high levels of political scrutiny and a low number of published studies, the monograph may be regarded as exceptional due to a highly complex interdisciplinary approach that it takes. Its full title denotes main components of this unique feature: historical, legal and conservational. The structural complexity of the text, however, goes beyond this trichotomy, since the legal analysis unifies several perspectives – those of religious freedom, international human rights, property and international law. The principal theoretical part of the book is coupled with a series of 16 case studies of endangered holy places, to which the conceptual framework it proposes has been applied.

The Kosovo and Metohia conflict has taken many dimensions in recent decades, during which time it has been continuously evolving. Its vast complexity encompasses ethnic substance, historical origins, religious fabric, unsettled consequences both in international relations and in

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international law etc. Having this in mind, the interdisciplinary approach of the book at hand becomes not only understandable, but starts appearing necessary for any attempt to conceptualize the issue and offer practical conclusions for the future. This may very well be the third reason to look upon this book as an outstanding one, for its complex conceptual framework, in addition to achieving intrinsical value of theoretical insights, is rather precisely focused on offering and substantiating elements for improving the existing framework of international law in the way that would most directly improve protection of endangered holy places in Kosovo and Metohia. Thus although the book grounds a better part of its analysis in history, but overall it is firmly oriented towards contributing to the conflict's abatement and resolution in the future.

The spearhead of the study is the concept of a holy place as not only a monument bearing artistic and spiritual importance, but as a "facility" intrinsically related to performance of religious freedom, not only by individuals but by a community and in a community, entailing the needs for security, economic sustainability, property rights of such a place as well. The extreme extent to which all these dimensions have been negated to the holy places of the Serbian Orthodox Church in Kosovo and Metohia, especially during the past decade, makes it that case ideal background for the authors to develop the subject concept of holy places.

The approach that insists on the importance of a holy place as a setting for a living religious community has a particular importance for Serbian academic literature, because it marks a pronounced departure from academic works that appeared in times of communist rule and have prevailed since, and which were characterized by limiting academic and scientific interest, and consequently affording a right to legal/international protection, only to the physical form of a holy place as an artifact of value to the history of arts, with a total disregard for its importance for the contemporaneous religious community.

Introductory sections of the book are followed by a chapter titled "Historical Context", in which the ties between the Serbian ethnicity and statehood on one hand and Kosovo and Metohia on the other are presented concisely and objectively, in the form of a chronological overview starting with the settlement of Slavic tribes in the Balkans and ending with the fall of the Berlin wall.

A presentation of factual findings relevant for the study ensues in the next large chapter, titled "Results". The text encompasses profiling of the holy places based on their most important religious functions, a breakdown of various infringements of property rights related to the holy places, reports on the lack of free access to the holy places and of basic security, an assessment of extra-territoriality the holy places have achieved so far, as well as a report on how the holy places are set in the context of

their relations with the surrounding Albanian communities and with the provisional international authorities. Although in this part the immediate chronological scope of factual findings is limited to the period since after the 1999 armed conflict, and the resulting change of control over the province, to date, in several instances it is obvious that the study regards the past seven decades, i.e. the period that started with the outbreak of World War II and has lasted since, as a continuum of violence directed at the Serbian Orthodox holy places in Kosovo and Metohia.

The third major part of the monograph entails a description of the present international legal framework that would is applicable for the purpose of protection of holy places, an assessment of why such framework may not be deemed sufficient, substantiated by examples from the present-day reality of Kosovo and Metohia, and, most importantly, the principles for improving the existing set of international rules. As already described, a synthetic concept of a holy place is proposed, one that would entail the need of protecting not only the artistic value of a particular part of world heritage, but also the religious freedom, property rights, life and security of the community to which a holy place belongs. Special emphasys is put on achieving and securing sustainability of endangered holy places.

Finally, the second half of the book encompasses 16 case studies of most paradigmatic Serbian Orthodox holy places in Kosovo and Metohia: the town center of Prizren, Sredačka Župa, Velika Hoča, the Church of the Mother of God in Vaganeš, the Church of the Mother of God in Mušutište, the Church of the Presentation of the Mother of God in Lipljan, the Church of Saints Healers Cosmas and Damian in Podgrađe, the Church of St. George in Rečane near Suva Reka, the Church of St. Nicholas in Gnjilane, Budisavci Monastery, Devič Monastery, Gorioč Monastery, Gračanica Monastery, the Monastery of Saints Healers Cosmas and Damian in Zočište, the Monastery of the Presentation of the Mother of God in Dolac near Klina, and Visoki Dečani Monastery. Each case study entails factual findings on the present-day situation and developments since the change of control over the territory in 1999.

While firmly relying on the history of Kosovo and Metohia and Serbian Orthodox holy places in it, as is necessary for any purposeful understanding of the conflicts related to this area, the book offers a sober and concise assessment, by way of a specially assembled set of criteria, of the situation in which Serbian Orthodox holy places in Kosovo and Metohia are today. Moreover, it also presents a forward-looking proposal for the directions in which means for protecting the Serbian Orthodox holy places in Kosovo and Metohia should be looked for, as well as for the principles along which the global international legal framework should be improved.

Marko Jovanović, LLM*

Dušan Popović, *Le droit communautaire de la concurrence et les communications électroniques*, L.G.D.J., Paris 2009, p. 330.

The sector of communications has tremendously evolved over the last decades. The technological development had to be followed by setting up an appropriate legal framework for telecommunication services, since new and improved tools and methods of communications naturally required adequate systems of regulation. Surprisingly, in spite of proliferation of rules on electronic communications, scholarly writings in this field are rather scarce. The present study attempts to fill in this gap.

*Le droit communautaire de la concurrence et les communications électroniques* is based on the doctoral thesis prepared and defended with the highest marks by Dušan Popović at the University of Paris Nanterre in December 2007. The research of Dr. Popović was dedicated to the analysis of a highly delicate topic which stands at the intersection of technology, economics and law – the regulation of electronic communications markets. Therefore, the work on this study required a vast knowledge and profound understanding of organizational, economic and regulatory specificities of the telecommunications sector. Despite the complexity of this matter, the book before us combines the discussion of difficult theoretical issues with analyses of practical problems in an easy-to-grasp manner.

Pursuant to the requirements of French methodology of legal writing, the book has a bipartite structure. The first part analyzes the characteristics of the markets of electronic communications from the standpoint of competition rules and standards, while the second part examines the practices of the operators in these markets.

The author begins his study by explaining the genesis of the regulation of telecommunications and depicting the transformation of the telecommunications sector from state monopoly to an open market of services. This change of concept came as a result of the measures aimed at liberalization and harmonization of the telecommunications sector, intro-

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duced on the basis of Articles 86 and 95 of the Treaty establishing the European Community. However, the lack of coordination between the Member States and the resistance of deep-rooted practices of protectionism and favoring certain operators caused difficulties in achieving the proclaimed goals, so the European Community had to conceive new regulatory measures. After having analyzed these measures in detail, Dr. Popović concludes that their aim – the self-regulation of the telecommunications markets – seems difficult to be reached and that the performance of certain services must be imposed by the pertinent legislation.

In order to perform a comprehensive analysis of the telecommunications markets, the author moves on to define relevant markets both in terms of standards of the European regulatory framework for electronic communications and in terms of competition rules. This task appears to be particularly challenging, due to the specific nature of this sector of services and the interdependence of relations among the providers on one hand, and between the providers and consumers on the other.

The analysis of the markets of electronic communications would not have been complete without the examination of the practices of operators. In first place, the concept of significant market power had to be adapted to the particularities of the markets of electronic communications. The analysis of the regulatory framework and case-law of the Court of First Instance and the European Court of Justice led the author to the conclusion that there is an identity between the concept of significant market power in the electronic communications sector, the concept of dominance assessed from a prospective point of view and the absence of effective competition. Even though the understanding of dominant position may be enlarged by the concepts of collective dominant position and connected markets, Dr. Popović suggests that these notions should not be construed too widely so that they do not lose their inherent flexibility.

However, the existence of sector-specific rules in this field does not exclude the application of EU competition rules in the matter. A particular attention is given to the application of competition rules with respect to the infrastructure sharing agreements, standard roaming agreements, predatory pricing and merger control. In case of anti-competitive behaviour, operators of electronic communications may be subjected to corrective measures, which, again, show some particularities due to the specific field in which they are applied. These measures may be imposed both by general competition law and electronic communications law.

The conclusions made by Dr. Popović show that the regulation of electronic communications markets in the European Union is still an undergoing project. The evolution of the regulatory framework must follow the constant technological development in this sector and respect the specificities of this domain. It is particularly worth mentioning that some of

the ideas developed by Dr. Popović have already seen the daylight, as they appeared in the modifications of the regulatory framework introduced after the publication of this book. *Le droit communautaire de la concurrence et les communications électroniques* therefore represents a valuable contribution to the research of principles and mechanism of regulation of electronic communications markets.

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1.1. If a book has more than one edition, the number of the edition can be stated in superscript (for example: $1997^2$).

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Example: J. Raz, "Dworkin: A New Link in the Chain", *California Law Review* 3/1995, 65.

3. If there is more than one author of a book or article (three at most), their names should be separated by commas.

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If there are more than three authors, only the first name should be cited, followed by abbreviation *et alia* (*et al.*) in verso.

Example: L. Favoreu *et al*., *Droit constitutionnel*, Dalloz, Paris 1999.

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Example: J. Raz, 65.

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Example: W. Kymlicka, (1988a), 182.

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Example: H.L.A. Hart, 238–276.

Example: H.L.A. Hart, 244 etc.

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Example: *Ibid.*

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Example: *Ibid.*, 69.

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Example: Personal Data Protection Act, *Official Gazette of the Republic of Serbia*, No. 97/08.

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11. Citations of the web pages, websites or e-books should include the title of the text, source address (URL) and the date most recently accessed.

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