The Languages of Contract: A Comparative Law Perspective with a Focus on the CISG

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Abstract

In nowaday's international trade, the contracting parties often come from a different linguistic background. As a consequence, the use of foreign languages in contractual relationships raises many issues the implications of which are often underestimated. They are thereby analysed in a comparative law perspective and with reference to the CISG experience.

Before invoking consent defects and invalidity, a central role must be devoted to the interpretation of contract. In particular, we have to mention the following criteria: the principle of good faith/fairness, the binding effects of agreed usages and established practice, the promotion of uniform languages and neutral terminologies with specific reference to business contracts. In the first Section, I briefly introduce the debate on language risk in contractual communication, discussing the implications of language barriers for the validity of the contract. Then, I outline the problem of legal constraints protecting offical languages that may significantly impact the choice of a foreign idiom in contractual relationships. The call for language uniformity in the international commercial framework and the prominent role of English, as a 'lingua franca', are also discussed. The last Section is devoted to the use of clauses aimed at preventing language inconsistencies in international contracts. Then I deepen the CISG experience by approaching the following key points: formation of contract, incorporation of standard terms, applicable law and foreign terms, non-conformity of the goods.

Keywords

Language, Contract, Validity, Interpretation, Official Languages, Sales of Goods, Good Faith, Lingua Franca, Legal English, Controlling Language Clauses

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Brutti, Nicola, 'The Languages of Contract: A Comparative Law Perspective with a Focus on the CISG'. *European Business Law Review* 33, no. 2 (2022): 243-266.

1. Language Risk and Contract Babelism in a Comparative Law Perspective

1.1. Language Risk and Contract Formation

The contractual text performs an essential semantic task which is to transmit information relating to the contract.[1] Such communicative function is essential for reaching a mutual consent between the contracting parties (meeting of the minds). To fulfill this task, the text needs to be written in a language that is in principle intelligible to both parties.[2]

The expression 'language risk' relates to the consequences of communication defects due to different idioms spoken by the parties, absent any ruling language.[3] In particular, the use of a certain language might in principle be established through a mutual consent. However if nothing of the kind has been provided, the use of a language, supposedly not known by one or both of the parties, may seriously impair the communication effectiveness, thus posing a threat to contract formation. Furthermore, the use of a foreign idiom in contractual communications may lead to language discrepancies and problems of interpretation even if the parties provided a translated version of the contract.

According to the *Vertragssprache* theory, German courts adfirmed that contractual statements expressed in an idiom that had not been previosly agreed on by the parties might be deemed legally irrelevant.[4] However in the German experience, the role of interpretation is often prioritised over the rules on mistake (*Auslegung vor Anfechtung*: Interpretation first, then avoidance).[5] The rule of avoidance for vitiated consent could be balanced by the intention of the mistaken party due to particular circumstances.[6] More specifically, whenever interpretation would lead to the correct content of the contract, the agreement is not affected. The same priority applies when the

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[1] See Peter Schlechtriem, *Das "Sprachrisiko"-ein neues Problem?* in Horst Ehmann, Wolfgang Hefermehl, Adolf Laufs (Eds)., *Privat-autonomie, Eigentum und Verantwortung, Festschrift für Hermann Weitnauer zum 70. Geburstag*, 129-143 (Berlin: Duncker & Humblot, 1980); Eckard Petzold, *Das Sprachrisiko im deutsch-italienischen Rechtsverkehr* in *Jahrbuch für italienisches Recht*, 2, 77-78 (Heidelberg: Müller, 1989); Thomas E. Carbonneau, *Linguistic Legislation and Transnational Commercial Activity: France and Belgium* 29 American Journal of Comparative Law 393-412 (1981); Ernesto Capobianco, *Il contratto. Dal testo alla regola*, 67-68 (Milano: Giuffré, 2006).

[2] Ibidem.

[3] See Franco Ferrari, *Concise Commentary of the Rome I Regulation*, 278 (Cambridge University Press, 2020) (to the extent that the issue is one of the "existence" of the contract, the *lex contractus* applies); P Schlechtriem, *'Das 'Sprachrisiko' – ein neues Problem?'*, 138 (see above note 1); Michael Kling, *Sprachrisiken im Privatrechtsverkehr. Die wertende Verteilung sprachenbedingter Verständnisrisiken im Vertragsrecht*, 5-7 (Tübingen: Mohr Siebeck, 2008).

[4] See Petzold (id.), 96; E Capobianco (id.), 71-72.

[5] See John Cartwright, Martin Schmidt-Kessel, *Defects in Consent: Mistake, Fraud, Threats, Unfair Exploitation* in Gerhard Dannemann, Stefan Vogenauer (Eds.), *The Common European Sales Law in Context: Interactions with English and German Law*, 414 (note 309) (OUP Oxford, 2013).

[6] Ibidem.

other party knows, or must have known, the true intention of the mistaken party (*falsa demonstratio non nocet*). This interpretation effort might also occur when a party claims a defective consent due to the use of a foreign language not previously agreed by the parties.[7] It was pointed out that the same ground of §§ 133 and 157 of the German Civil Code[8] may be traced in the CISG where it provides that "the meaning of the statements or other legally relevant conduct of the parties is to be determined by their actual intent (Article 8(1)). Of course, this intent must have been known by or, in any case, recognizable to the addressee. If this intent is neither known nor recognizable, then the understanding of a reasonable person in the situation of the addressee is the controlling standard (Article 8(2))."[9] The intent of a party or the understanding of a reasonable person depends on all of the facts and circumstances including those specially listed in the Convention, namely, negotiations, practices and usages, and any subsequent conduct of the parties (Article 8(3)*)*.[10] Therefore, it can be observed that in the German experience, the statement issued in a language different from that previosuly used by the parties would be considered irrelevant unless parties contradict such an outcome by subsequent conducts or statements.

The Italian's private law approach to the language issue is quite similar to the German model. Let's consider the article 1352 of the Italian civil code which leave the parties free to establish a formal requirement of the contract for the purpose of its validity. If a party's statement is in a language different from that previosly agreed on by parties, the statement might in principle be disregarded as totally irrelevant (art. 1352 c.c.).[11] On the other hand, if a party has agreed on a foreign language text, but subsequently realizes his lack of understanding of the content of a specific clause, he might plead ignorance about this. In such case, the contract may be considered at least voidable, but not void, on the basis of a mistake affecting the party's will. However, differences of language, per se, cannot be invoked by whoever has freely and consciously entered into a contract drafted in a foreign language.[12] The civil code also provides that the contract must be interpreted in the light of the join intent of the parties and due to good faith (fairness) and established practices of commerce (art. 1362, 1366, 1368 c.c.). These criteria must override the literal sense of the words (art. 1362.2 c.c.). So the judge may ascertain if the parties have expressly or impliedly accepted a foreign language text by checking their shared intentions according to the

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[7] Ibidem.

[8] See Ulrich Huber, *Der UNCITRAL-Entwurf eines übereinkommens über internationale warenkaufverträge* 43 Rabels Zeitschrift für ausländisches und internationales Privatrecht 431-526 (1979), at 429-430; Peter Schlechtriem, *Uniform Sales Law. The UN-Convention on Contracts for the International Sale of Goods*, 39-40 (Vienna: Manz, 1986).

[9] Ibidem.

[10] Ibidem.

[11] See Capobianco (id.), 71-72.

[12] See *Tribunale di Rimini*, 5/5/2005, n. 283/06 (inferring the common intention of the parties in the light of their overall and continuous conduct); Trib. Vallo della Lucania, 27/11/1997 (*Rivista trimestrale di diritto e procedura civile* 749 (1998)). See also Marcel Fontaine, Filip De Ly, *La redazione dei contratti internazionali. A partire dall'analisi delle clausole*, 208, note 117 (Milano: Giuffrè, 2008).

aforementioned criteria.[13] In cases of doubt, the interpretation which preserves the effects of the contract would be preferred (art. 1367 c.c.).

In English law, a test of interpretation of the communications between the parties in the formation of the contract may override a party's subjective mistake.[14] If the contract have not provided for the language risk, it would be assessed whether one or the other party had expressly or impliedly undertaken the risk of mistake. Moreover, when it may be deduced that the party has implicitly accepted the use of a foreign language, the defect may be also corrected by interpretation. In an old case a ship's master who spoke very little English and could not read English at all was considered still bound to the terms of document he signed.[15]

Although a basic element of any contract is the mutual assent between the parties, courts have a major role in determining whether the parties' minds have met in accordance to the way in which the intent is communicated in their words or acts.[16] Even if the intent of the relevant obligor legitimize the contractual relationship, it must be also borne in mind that the obligor's intent, once it is communicated, leaves the sphere of its formulation to connect with the other party.[17] In order to enter into a binding agreement, each party must therefore define its respective intent in accordance with the limitations of communication.[18] The same reasoning applies in the case of a mistake where the other party knows the true intention of the mistaken party: the content of the contract is then determined by that intention.[19.] It may in principle be observed that the contract formation is likely to be at risk when a reciprocal understanding between the parties is clearly impaired by language barriers, and not when knowledge of the language, in itself, is lacking. Therefore, the possibility to attach any effect to a foreign language statement does not depend only on the language knowledge, nor on the language previosuly adopted by the parties, but it rather depends on the interpretation of the parties intent in the light of subsequent factual circumstances.[20]

1.2. Legal Constraints Regarding the Use of Foreign Idioms

We have seen how, according to a general principle, the choice of a foreign idiom rises to an expression of contractual freedom. The parties' intention to adopt a foreign language in contractual communications may also be deduced by way of interpretation under the abovementioned criteria. However, it should also be borne in mind that domestic law may impose up to a certain extent the obligation to translate contractual

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[13] See Capobianco (id.) 72; Carlo Cicala, *Lingua straniera e testo contrattuale*, 152 (Milano: Giuffrè, 2003).

[14] See Cartwright, Schmidt-Kessel (id.), 414 (note 309).

[15] Ibidem, quoting the case *The Luna [1920] P22, Adm.*

[16] Darryll M. Halcomb Lewis, *Contracting with Foreigners: The Potential Absence of Mutuality of Assent* 16 Journal of Legal Studies in Business 127-128 (2010).

[17] See Cartwright, Schmidt-Kessel (id.), 413.

[18] Ibidem: "There is a particular interface issue here in relation to mistake as a defect in consent".

[19] Id., 414, note 309.

[20] See Capobianco (id.), 67.

texts into the official language of the state, thus disregarding the foreign language version for the purposes of public policy.[21] Such a restriction may in fact be justified by the need to protect a public interest which is expected to prevail over party autonomy.

The protection of official languages by modern states has been conceived as a mean to further political and administrative transparency and thus to facilitate the relationship between citizens and public institutions.[22] The French experience about language unification during the Age of Enlightment is paradigmatic, as testified by the historical role played by Henry Gregoire and his *Rapport sur la nécessité et les moyens d'anéantir les patois et d'universaliser l'usage de la langue française* (1794).[23] Since many states have engaged in such policy over time, it has also produced strong criticisms especially in those situations where minority groups had come to claim for their ethnical identity and separatism.[24] This is a very debated issue because such linguistic rules might also clash to a certain extent with the freedom of expression protected by the European Convention on Human Rights (art. 10).[25] They might also be in contrast with the European Union's principles prohibiting discriminations towards citizens of other Member States (art. 45 TFEU) and measures having restrictive effects on the freedom of movement of goods (art. 35 TFEU).

With specific reference to the use of Dutch, as one of the official languages of the Kingdom of Belgium, the European Court of Justice ruled that "Article 45 TFEU must be interpreted as precluding legislation of a federated entity of a Member State, such as that in issue in the main proceedings, which requires all employers whose established place of business is located in that entity's territory to draft cross-border employment contracts exclusively in the official language of that federated entity, failing which the contracts are to be declared null and void by the national courts of their own motion".[26] Even if the objective of promoting and encouraging the use of a Member State official language constitutes a legitimate interest which, in principle, justifies a restriction on the obligations imposed by Article 45 TFEU, such restriction should be proportionate to its objective.[27]The court analyzed also the Flemish language

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[21] Thomas E. Carbonneau (id.) 393-394.

[22] See Fernand de Varennes, *Langues Officielles Versus Droits Linguistiques : l'un exclut-il l'autre ?* 63 Droit et Cultures, 41-58 (2012), par. 15; Priskila Pratita Penasthika, *The Mandatory Use of National Language in Indonesia and Belgium: An Obstacle to International Contracting?* 9 (2) Indonesia Law Review 83–132 (2017); Tomasz Kamusella, *Language as an Instrument of Nationalism in Central Europe* 7 (2) Nations and Nationalism 236 (2001).

[23] De Varennes (id.).

[24] Id., par. 26.

[25] Id., par. 50 (discussing the category of linguistic rights in the light of freedom of speech and related case law).

[26] See *European Court of Justice*, *Anton Las v. PSA Antwerp NV* (Case C 202/11),see <https://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX:62011CJ0202>. See also Gilles Cuniberti, *ECJ Strikes Down Mandatory Use of Language in Contracts*, Conflict of Laws.net: Views and News in Private International Law, 1-2 (24 April 2013) see <https://conflictoflaws.net/2013/ecj-strikes-down-mandatory-use-of-language-in-contracts/>.

[27] Ibidem.

requirements on cross-border invoicing, prohibiting them as a restriction falling within the scope of article 35 TFEU.[28]

On the other hand, some EU Directives allow Member States to maintain or introduce in their national law linguistic requirements regarding contractual information and contract terms in order to protect consumers.[29] Although the EU is quite prudent in intervening in the use of language in contractual relations, such Directives have strong cross-border implications.[30] It is worth mentioning that according to the Rome I Regulation,[31] in the case of consumer contracts it is the law of the country in which the consumer is resident which applies. The French legal system which is a remarkable example of legislation in favour of the national language where the so-called Loi Toubon (1994)[32] provides an obligation to use French for agreements for contracting out public services with the French administrative authorities as well as in other areas like labor relations and consumer contracts.[33] In particular, according to the Loi Toubon, consumer contracts and related communications must be drawn up in French.[34]

On the other hand, a contract concluded by two undertakings, even if both French, is not affected by any language constraint, because it is assumed that the professional parties can decide for themselves whether to adopt a different language.[35] However, a translation into French will be required for the registration of agreements before authorities and administration. Moreover, the Court of Cassation stated that French courts must require an official translation of the contracts into French before examining any document drawn up in a foreign language.[36]

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[28] See *European Court of Justice*, *New Valmar BVBA v. Global Pharmacies Partner Health Srl* (Case C-15/15) The ECJ determined that even if the language legislation only concerns the language of the invoice and not the content of the underlying contractual relationship, it still creates restrictive effects which are likely to deter the initiation or continuation of a contractual relationship with a company established in the Dutch-speaking region of Belgium.

[29] See recital (15) of the preamble of the Directive on consumer rights (Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights) integrating the Directive on distance contracts and the Directive on contracts negotiated away from business premises (the Directive will not harmonise language requirements applicable to consumer contracts in order to leave room for Member States' statutory restrictions). Although the Directive on unfair contract terms (Council Directive 93/13/EEC of 5 April on unfair contract terms) is silent on the use of language, Member States remain free to foresee special provisions on language of the contract, according to the subsidiarity principle. For a more detailed analysis, see: European Commission, *Studies on translation and multilingualism Language and Translation in International Law and EU Law*, 6/2012, 85-87.

[30] Ibidem.

[31] Regulation 593/2008/EC of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations.

[32] Law No 94-665 of 4 August 1994.

[33] Commission d'Examen des Pratiques Commerciales, *Avis numéro 16-10 relatif à une demande d'avis d'un professionnel sur l'emploi de la langue française dans les documents contractuels*, in *Rapport annuel d'activité* (2016), 67-68.

[34] Ibidem.

[35] Ibidem.

[36] *Cour de Cassation, 1ère chambre civile, 12 juillet 2001, n° de pourvoi 99-15285* and also *Cour d'appel de Paris, 13 octobre 2006, n° 06/05490*: « seules les pièces rédigées ou traduites en langue française doivent être soumises au juge, peu important que les parties maîtrisent toutes deux parfaitement

In general, no specific language requirements are needed for the execution of contracts under Italian law, except a few cases. In particular, pursuant to Article 9 of Legislative Decree no. 206 of 6 September 2005, all information intended for consumers and users must be made in Italian.[37] Moreover, Article 72 adds that consumer contracts must be drafted in Italian and in one of the languages of the state of the EU of which consumer is resident or citizen according to his choice, as long as they are official languages of the EU.

Furthermore, the calls of tenders, the tenders and all related documents of government procurement procedures must be written (or translated) in Italian (artt. 72.3 and 130.3, D.lgs. 18 April 2016, n. 50). Despite this, a court recently stated that an annex consisting in a booklet drawn up in English does not determine the invalidity of the offer, because English is a widespread language. As a result, the public administration is at least allowed to require an Italian translation of such document.[38] It's worth to underline that the language of the agreements examined in judicial proceedings does not necessarily need to be Italian. Indeed, pursuant to Article 123 of the Italian Code of Civil Procedure, the judge has the faculty, but not the duty, to request the related Italian translation. On the contrary, the deeds of the process (such as summons) have to be drafted in Italian.[39]

For our purposes, the abovementioned legal constraints must be carefully taken into account because they might at least partially restrict the language option. This could therefore be considered an external legal constraint (*lex specialis*) with respect to the general law of contract principles and, more specifically, to party autonomy.

Before choosing the language of the contract, it would be necessary to assess its congruence with the choice of applicable law and jurisdiction. It's important to note that in several countries (like France) translating contractual documents in the official language might be mandatory, especially when a case is brought before the court.[40]. As a consequence, the costs and uncertainties of litigation increase, primarily because interpreters are needed and then because the variables of a mandatory translation (or of a court-appointed translator) leaves much room in terms of control of the interpretation and drafting of the contract.[41]

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la langue anglaise qu'elles ont employée pour communiquer entre elles». See Commission d'Examen des Pratiques Commerciales, (id.), 67-68.

[37] See EY Consumer Products and Retail Sector Legal Team across the globe, *EY Global Legal Commercial Terms Handbook*, 121 (October 2020).

[38] *Consiglio di Giustizia Amministrativa Regione Sicilia* n. 785/2019 (attaching an English booklet to the offer is not such as to affect the validity of the entire procedure because it constitutes a minor fault). See also Roberto Donati, *Mancata traduzione tecnica dall'inglese. Non determina esclusione* in Giurisprudenzappalti (6/9/2019) (available at www.giurispriudenzappalti.it).

[39] *EY Global Legal Commercial Terms Handbook* (id.)

[40] See Didier Lamèthe, Olivier Moréteau, *L'interprétation des termes juridiques rédigés dans plus d'une langue* 2 Revue International de Droit Comparé 348 (2006); Commission d'Examen des Pratiques Commerciales, (id.), 67-68.

[41] See Cynthia A. Brown, David T. Ackerman, *Abating the Bounds of Commerce: A Quantitative Analysis of Transnational Contract Formation* 15 Journal of International Business and Law 183 (2016).

1.3. The Call for Language Uniformity in the International Commercial Framework

It is worth to mention that as the economy and trade have become increasingly globalised, very often the parties to the contract do not speak the same language and, consequently, a 'lingua franca' such as English play an ever larger role.[42] However, in a multilingual market, the relationship between interpretation and defective consent becomes even more important.[43]

Beyond the difficulties of translating from one language to another, the translation of legal concepts could be even more difficult. The classical approach to legal translation is aimed at achieving an approximate equivalence between the concepts of different legal systems.[44] The strict intertwining of languages and legal systems deeply influences translation and interpretation issues. This approach could be reconsidered in the light of globalization and several attempts to unify legal provisions. In this sense, it is no longer true that legal translation only refers to two distinct legal systems and the conceptual frame in which they operate.[45]

Legal translation is however in itself a complex process and is strongly influenced by various factors, such as the nature of the legal text to be translated, the purpose of the translation and the identity of the source and the target language.[46] In particular, the kind of English used in international contexts has growth on independently from the proper common law framework,[47] since the former has been largely shaped by the international needs of mediating between different legal cultures. This could be also the case when contracts are ruled by an international convention, like the CISG, or

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[42] Martina Künnecke, *English as Common Legal Language: Its Expansion and the Effects on Civil Law and Common Law Lawyers* 5 European Review of Private Law 733–758 (2016).

[43] See Cartwright, Schmidt-Kessel, (id.), 414 (noting that in the international markets " interpretation and avoidance are the main instruments of risk distribution, whereas national legal systems are usually not very familiar with the distribution of language risks").

[44] Gerard-René De Groot, *Rechtsvergleichung als Kerntätigkeit bei der Übersetzung juristischer Terminologie* in Ulrike Hass-Zumkehr (ed.), *Sprache und Recht*, 228 (Jahrbuch des Instituts für Deutsche Sprache, Berlin, New York: De Gruyter, 2002); Ádám Fuglinszky, Réka Somssich, *Language-Bound Terms—Term-Bound Languages:The Difficulties of Translating a National Civil Code into a Lingua Franca* 33 International Journal of Semiotics and Law 755-757 (2020).

[45] Ibidem.

[46] Ibidem.

[47] As pointed out by Roy Goode, *Rule, Practice, and Pragmatism in Transnational Commercial Law* 54 (3) The International and Comparative Law Quarterly 581 (2005): "The dominance of New York and London as world finan- cial centres, coupled with the emergence of China, India and Japan as major trading nations, has led to the displacement of the Eurocentric model of inter- national law-making and a much broader basis for agreement on international instruments, albeit with a strong shift towards the use of the English language as the lingua franca and to common law principles of laissez-faire."

according to a *lex mercatoria*[48] like the UNIDROIT principles.[49] The Draft Common Frame of Reference may be cited as a further attempt to adopt a uniform set of rules for European Private Law using a Europeanised Legal English.[50] Although different in nature, such experiences share a similar aim, that is to set a neutral language[51] in order to avoid common law or civil law terms.[52]

As critically suggested by Scheaffer, the CISG has suffered from language difficulties depending on the six official language versions that 'greatly complicate the goal of uniformity'.[53] In the case of ambiguity in the wording, a court stated that reference is to be made to the original versions, whereby the English version, and, secondarily, the French version have a higher significance.[54]

It was pointed out that the intention of the CISG drafters was to explain concepts using terms not normally found in domestic law or in a way clearly distinguishable from their domestic law use.[55] In fact, such terms may not exist, or be interpreted dif-

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[48] Lex Mercatoria is an attempt to create a separate and self-sufficient legal system- in the sense that it does not require the intervention of public authorities and of national laws- since international business contracts operate, generally, without a specific national substantive law as reference. See Vincenzo Zeno-Zencovich, *Comparative Legal Systems. A Short and Illustrated Introduction,* 88-89 (Roma Tre Press, 2019).

[49] Unlike UNIDROIT principles, deeemed as the most important *Lex Mercatoria*, the CISG is a treaty the rules of which are thus governing, regardless of the choice of both parties, if both parties' respective 'home country' is a signatory to the CISG. As a result, it can't be considered a *Lex Mercatoria*, but rather an applicable state law. See Gilles Cuniberti, *La Lex Mercatoria au XXIe siècle. Une analyse empirique et èconomique* 3 Journal du Droit International 769 (2016).

[50] *Principles, Defnitions and Model Rules of European Private Law Draft Common Frame of Reference (DCFR)* (Outline Edition, 2009); Christian Von Bar, *Die Study Group on a European Civil Code. Festschrift Dieter Henrich*, 1-12 (Bielefeld: Gieseking, 2000); Jurgen Basedow, *Codification of Private Law in the European Union: The Making of a Hybrid* 9 (1) European Review of Private Law 35-49 (2000). For a critical approach, see among others: Pierre Legrand, *Antivonbar* 1 Journal of Comparative Law 13 (2006), at 12-40; Tony Weir, *Die Sprachen des europäischen Rechts: Eine skeptische Betrachtung* 3 Zeitschrift für Europäisches Privatrecht 368 (1995); Hugh Collins, *European Private Law and the Cultural Identity of States* 3 European Review of Private Law 353-365 (1995).

[51] "In general, the CISG employs neutral language for which a common understanding should be ideally reached. Even in situations where the CISG has employed terms or concepts peculiar to one or more domestic legal systems (e.g. the foreseeability rule in Article 74), the concept is to be interpreted autonomously considering its function within the context of the Convention" (CISG-AC Opinion No. 17, *Limitation and Exclusion Clauses in CISG Contracts, Rapporteur: Prof. Lauro Gama Jr., Pontifical Catholic University of Rio de Janeiro, Brazil. Adopted by the CISG-AC followingits 21st meeting in Bogotá, Colombia, on 16 October 2015*, 21). About the EU terminology, see also Barbara Pozzo, *Looking for a Consistent Terminology in European Contract Law* 7 Lingue Culture Mediazioni Journal 108-109 (2020).

[52] *UNCITRAL Digest of Case Law on the United Nations Convention on the Contracts for the International Sale of Goods* (2016 edition), Notes by the Secretariat (hereinafter UNCITRAL Digest), p. XI, note 5.

[53] Christopher Scheaffer, *The Failure of the United Nations Convention on Contracts for the International Sale of Goods and a Proposal for a New Uniform Code in International Sales Law* 15(2) Cardozo Journal of International and Comparative Law 474 (2007).

[54] *CLOUT case No. 885 [Bundesgericht, Switzerland, 13 November 2003].* See UNCITRAL Digest, 42, 46.

[55] See Scheaffer, (id.), 474.

ferently, if transposed in different languages or different jurisdictions.[56] Furthermore legal concepts belong to a special language and thus they are not always easily translated into ordinary language. As a result, if there are conceptual difficulties within the same language, such difficulties would be accentuated when foreign language is used.[57] Finally, to the ordinary intricacies of legal language we have to add all the interpretation uncertainties deriving from the non-coincidence of legal terms belonging to different legal systems.[58]

For example, the term 'withdrawal' might have different meanings depending on whether it is used in the context of the common law or within the scope of the CISG.[59] Even with all of the strides aimed at creating a uniform legal terminology in international contracts, culture and custom continue to play a crucial role in the formation, interpretation, and enforcement of contracts.[60]

1.4. Clauses on Language

International commercial contracts often come with clauses setting the language to be used during the contractual relationship. It would also be recommended to provide that only one version prevails, in order to avoid misunderstandings due to the translation of the contract.

In order to limit and equally distributing the risk of language inconsistencies related to contract interpretation, the parties might expressly agree on a single language (choice of language clause, sprachklausel).[61] Therefore a specific clause should be implemented in order to set the language which should be officially used in all the comunications between the parties. The choice of the ruling language could fall on one party's mother tongue or on a neutral language ('lingua franca'). The bilingual solution owns the advantages of making both parties feel comfortable with the relationship, although it might work as a multiplier of potential errors and abuses during the contract. However deciding to choose the one party's mother tongue at the expense of the other may result in an imbalance of power thus creating more problems than it

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[56] Ibidem.

[57] See Heikki E. S. Mattila, *Comparative Legal Linguistics*, 4 (Aldershot: Ashgate, 2006).

[58] Ibidem.

[59] In particular, article 16 of the CISG distinguishes between 'withdrawal' and 'revocation'. The word used changes depending on whether the offer has been received: an offer "can be 'withdrawn' before it has been received by the offeree, but, once received, and before acceptance, the offer can, subject to some exceptions, be 'revoked'." Contrary to the CISG, under English law, the word 'withdrawal' is used for situations up to the acceptance of the offer: whether the offer has been received or not does not influence the word used. See Christopher Kee, Edgardo Muñoz, *In Defence of the CISG* 14 Deakin Law Review 106-107 (2009): the classic English authority that an offer can be withdrawn at any time prior to acceptance is *Offord v Davies* (1862) 12 CB NS 748. For more recent authority see *Scammell v Dicker* (2001) 1 WLR 631 and *Flynn v Scougall* [2004] EWCA Civ 873 [18]).

[60] See Brown, Ackerman, (id.), 183.

[61] Henry P. de Vries, *Choice of Language in International Contracts* in Willis L. M. Reese (ed), *International Contracts: Choice of Law and Language*, 14-15 (New York: Oceana Pub., 1962).

solves. The choice of a 'lingua franca' such as English is the most suitable in order to reduce/avoid conflicts especially when the parties' languages are the lesser known while the 'lingua franca' is usually the current language in the international commerce arena.

When the parties leave open the possibility of using two or more idioms in the contract relationship, it would be better to specify which is the governing one in case of dispute (ruling language clause, controlling language clause).[62] For example, requiring that all documents exchanged by the parties, including judicial notices, be provided in English might lead to conflicts whenever the arbitration procedure, set out in another clause, is to be carried out in Chinese. In the case CEEG v Lumos, the parties (Lumos and CEEG) entered into a master agreement containing an arbitration clause and a choice of language provision, but later on the sales agreement gave rise to a defective product lawsuit.[63] In particular, Lumos received a notice of arbitration written in Chinese pursuant to the China International Economic and Trade Arbitration Commission rules (CIETAC). Given that the overall governing contract contained a choice of language provision requiring all notices to be "drawn up in the English language" and the parties had always communicated in English, the 10th Circuit confirmed that CEEG's failure to provide notice of the arbitration to Lumos in English was contrary to the agreed procedures between the parties and resulted in Lumos being deprived of the opportunity to participate in selection of the arbitration panel.[64] As a result, Lumos "did not receive notice reasonably calculated to apprise it of the pendency of the arbitration and allow it a meaningful opportunity to be heard, as required to satisfy due process." [65] In this sense, the contract would provide that a single language is adopted in all communications during the contract fulfillment by specifying that the same language shall be used in any trial or arbitration procedure. In fact, a convergent solution might be highly recommended in order to avoid misunderstandings at the varous stages of the contractual relationship.[66]

The international contract practice has developed several models of language clauses each one intended to address specific needs. Here I shall only mention just a few of the most common ones. A first solution is to opt for an official language of the contract, albeit with a translated version issued exclusively for mutual understanding purposes. In multilingual jurisdictions such as Canada, Belgium or Switzerland the contract might provide a 'choice of language' in addition to a bilingual translation:

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[62] See Marcel Fontaine, Filip De Ly, *Drafting International Contracts. An Analysis of Contract Clauses*, 185 (New York: Brill Nijhoff, 2006), noting that "The bargaining positions of the parties are, to a large extent, reflected in the clauses that were the subject of the analysis. However, the language clauses may be too unqualified".

[63] See *CEEG (Shanghai) Solar Science & Tech. Co. v. LUMOS LLC, No. 15-1256* (10th Cir. Jul. 19, 2016), affirming No. 14-cv-03118 (D. Colo. 29 May 2015).

[64] Ibidem.

[65] Ibidem.

[66] See Ilias Bantekas, *Language*, in Ilias Bantekas et al., *UNCITRAL Model Law on International Commercial Arbitration: A Commentary ,* 611-627 (Cambridge: Cambridge University Press, 2020); Ilias Bantekas, *Receipt of Written Communications*, in Id., 50-70.

"The Parties have expressly required that this Agreement and all documents and notices relating hereto be drafted in English. Les parties aux presentes ont expressement exige que la presente convention et tous les documents et avis qui y sont afferents soient rediges en langue anglaise."[67] It implies that only English would be the official language in ruling the entire contract relationship.

In the following example, both versions control: "This Agreement is signed in two sets of original copy in both English and Chinese. Each Party shall retain one set of original copy. Each copy will have the same legal validity."[68] Notwithstanding such clause may reflect the bargaining positions of the parties, it doesn't address the question of the eventual discrepancies between the two different versions.

An even stricter 'ruling language clause' would be the following one: "Authentic text Should the text of this Agreement exist in other languages than the English one, the present English version shall prevail over all other language versions." or "The official language of this Agreement is English, and the American usage thereof shall control the interpretation and construction of it and of all other writings between S and B. In the event of a discrepancy in translation of this Agreement, the English language version shall be controlling."[69]

However, contract drafters should consider language clauses stating that the different language versions of the contract are mutually explanatory and that one version controls only if after interpretation the conflict persists.[70] So, a more nuanced solution is to maintain both idioms in control during the contractual performance, excepting the case of a potential dispute. And so does the following clause: "this agreement shall be executed in both the English and the Spanish language. The English and Spanish texts shall both be valid, provided that in the event of any discrepancy and the resolution of a dispute the English text shall prevail."[71] The clause provide that the ruling language only prevails in case of a conflict between the two versions.

Further variations might give insights as to the reason why one language version controls the other one or why a bilingual version was issued. For example: "The translation of these general terms of sale has been made for Buyer's facility; in case of dispute concerning the interpretation of these terms, only the enclosed French text is valid." and "The bilingual version of this contract is made only for Buyer's facility". This may be deemed to constitute a more 'diplomatic' sample of controlling language clause. Such intermediate solutions may also reduce tension between language clauses and national laws, primarily those based on the objective theory that

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[67] Ibidem.

[68] See Fontaine, De Ly, *Drafting International Contracts*, (id.), 156-157.

[69] Ibidem.

[70] Id., 185.

[71] Id., 158, noting that some clauses also give insights as to the reason why one language version controls the other one: "The translation of these general terms of sale has been made for Buyer's facility; in case of dispute concerning the interpretation of these terms, only the enclosed French text is valid.". See also Brown, Ackerman, (id.), 183.

may be tempted to intervene in the interpretation process by using the non-ruling language in contravention of the language clause.[72]

It's important to keep in mind that the drafting of controlling language clauses can't be separated from the issue of the governing law. Language choice provisions must be designed so as to avoid errors and false friends due to the outstanding inconsistencies between the chosen language and the applicable law. In this respect the parties may agree (completely or partly) to exclude the application of the Convention, according to the Art. 6 of the CISG. They may take advantage from this provision to keep such foreign expressions adherent to the level of domestic law. This possibility stands on "the principle according to which the primary source of the rules governing international sales contracts is party autonomy".[73] However it's worth to underline that the party who claims the exclusion of the CISG will bear the burden of proof.[74]

Due to the multilingual feature of the specific business, the parties may also be faced with more complex issues such as the need to except certain foreign terms to the controlling language clause. Thus they may negotiate specific provisions in order to clarify their intent that is including exceptions so that a particular foreign term shall prevail for the scope of the interpretation, nevertheless the controlling language is different. The parties' success in achieving such goal would largely be influenced by their bargaining power.

Since a term may change its meaning according to each jurisdiction it is highly recommended to define as many terms as possible in the contract, and to state the term in the original language for the avoidance of doubts.[75]

2. The Case of the CISG

As the CISG doesn't expressly deal with the problem of language discrepancies, it needs to be addressed with the available provisions.[76] A different approach is adopted by both the UNIDROIT principles and the Principles of European Contract Law (PECL), which provide that where a contract is drawn up in two or more language versions, there is, in case of discrepancy between the versions, a preference for the

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[72] In this sense, the experience of muItilinguistic jurisdictions such as Belgium, Canada and Switzerland provides useful solutions in interpreting legal texts in different languages. See Fontaine, De Ly, *Drafting International Contracts*, (id.), 158-159.

[73] Franco Ferrari, *Remarks on the UNCITRAL Digest's Comments on Article 6 CISG* 25 Journal of Law and Commerce 13, 16 (2005-2006).

[74] Sonja A. Kruisinga, *Contracts for the International Sale of Goods Recent Developments at the International and European Level* 2 The Dovenschmidt Quarterly 59 (October 2014).

[75] See *EY Global Legal Commercial Terms Handbook*, (id.), 82.

[76] See Felix Lautenschlager, *Current Problems Regarding the Interpretation of Statements and Party Conduct under the CISG – The Reasonable Third Person, Language Problems and Standard Terms and Conditions* 11(2) Vindobona Journal of International Commercial Law & Arbitration 268 (2007).

interpretation according to a version in which the contract was originally drawn up.[77] However, some suitable principles can be found out in the Convention, in particular those concerning the communications between the contracting parties and the contract formation.

The draft UNCITRAL Digest illustrates court decisions which often show conflicting views. It is therefore worthwhile to outline the main principles and the related cases in order to discuss the aforementioned differences.[78]

2.1. Contract Formation and Communication Language

As a preliminary remark, it should be pointed out that, if a party accepts to use an unknown language, one could reasonably expect that party to obtain the necessary translation before concluding the contract. However in case the accepting party does not properly understand contract clauses written in a foreign language, he may be entitled to assert mistake under the applicable domestic law.[79] Defects in consent based on error, fraud, duress or unfair advantage concern the substantive validity of the contract.[80]

Although the CISG does not contain explicit rules about defective consent- mistake or error- of the contracting parties,[81] it deals with the contract formation and with the rights and obligations of the parties.[82] More specifically, "the question of whether or not the contract may be annulled based on error does not fall into the scope of application of the CISG. Rather it is a question for the domestic law determined by the applicable conflict of law rules."[83] In fact, that duty is left to the individual state or nation.[84] And this lead to the question of the scope of that convention and its priority over national law.[85]

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[77] See respectively: *Art. 4.7: Linguistic Discrepancies* (Art. 1.6(2) UNIDROIT Principles 2016, 147) and *Art. 5.107: Linguistic Discrepancies* (O Lando, H Bale, *Principles of European Contract Law, Parts I and II, prepared by the* Commission on European Contract Law. P. XXVII (2000)).

[78] See Franco Ferrari, *Interpretation of Statements: Article 8,* in F Ferrari et al., *The Draft UNCITRAL Digest and Beyond: Cases Analysis and Unresolved Issues in the U.N. Sales Convention: Papers of the Pittsburgh Conference Organized by the Center for International Legal Education (CILE),* 190 (Sellier. European Law Publ., 2004) ("although the draft Digest is useful, it should not be read acritically").

[79] Christoph Brunner, Thomas Murmann, Marius Jan Stucki, *Article 4* in Christoph Brunner, Benjamin Gottlieb (eds.), *Commentary on the UN Sales Law (CISG)*, note 255 (Kluwer Law International, 2019). See also Thomas Koller, *AGB-Kontrolle* und *UN-Kaufrecht (CISG) – Probleme aus schweizerischer Sicht* in Friedrich Harrer, Wolfgang Portmann, Roger Zäch (eds.), *Besonderes Vertragsrecht – aktuelle Probleme, Festschrift für Heinrich Honsell zum 65. Geburtstag,* 237 (Zürich: Schulthess, 2002).

[80] Brunner, Murmann, Stucki, (id.), par. 10.

[81] Brown, Ackerman, (id.), 183 (the CISG does not deal with the validity of the contract).

[82] Cartwright, Schmidt-Kessel, (id.), 415.

[83] Ibidem.

[84] Brown, Ackerman, (id.), 183.

[85] Ibidem. Martin Schmidt-Kessel, *Commentary on Article 8* in Peter Schlechtriem, Ingeborg Schwenzer, *Commentary on the UN Convention on the International Sale of Goods (CISG)*, paragraphs 6-7 (Third (English) Edition, Oxford University Press, 2010).

In the light of the CISG, a specific attention has been paid to the effectivity of party's request, notice or communication related to contractual arrangements.[86] Even if Article 27 does not explicitly deal with how the language of a communication impacts its appropriateness, it deals with how language can influence the effectiveness of a communication. It might be observed that a communication should be issued in the language the parties have explicitly chosen, or that has previously been used among them, or that the receiving party understands or has communicated that it understands.[87] In particular, a lack of language uniformity could directly affect the formation of contract. The so-called 'battle of forms' might occur when a buyer submits a purchase order attaching its standard terms and conditions and the seller replies with its acceptance and its own standard terms and conditions. In particular, the CISG follows the principle also known as the 'mirror-image' rule, according to which a reply to an offer which purports to be an acceptance but contains additions, limitations or other modifications is a rejection of the offer and constitutes a counter-offer (Art. 19, CISG).[88] In fact, according to the parties' information and cooperation duties in an international trade context, it would be inadequate to impose on the offeree the obligation to actively obtain awareness of the standard terms.[89]

However, according to art. 19.2 of the CISG, if the additional or different terms do not materially alter the terms of the offer, such reply constitutes an acceptance, unless the offeror, without undue delay, objects orally to the discrepancy or dispatches a notice to that effect. If he does not so object, the terms of the contract are the terms of the offer with the modifications contained in the acceptance. Art. 19.3 concludes that: "Additional or different terms relating, among other things, to the price, payment, quality and quantity of the goods, place and time of delivery, extent of one party's liability to the other or the settlement of disputes are considered to alter the terms of the offer materially". Therefore, a substantial difference between the terms of the acceptance and the terms of the offer is likely to prevent the contract conclusion.[90] In particular, an acceptance written in another language might be considered a material change to the offer when such idiom is unknown to the offeror or, although theoretically known, the acceptance may give rise to relevant differences in construction between such two versions.[91]

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[86] Art. 27: Unless otherwise expressly provided in this Part of the Convention, if any notice, request or other communication is given or made by a party in accordance with this Part and by means appropriate in the circumstances, a delay or error in the transmission of the communication or its failure to arrive does not deprive that party of the right to rely on the communication.

[87] *CLOUT case No. 132 [Oberlandesgericht Hamm, Germany, 8 February 1995]; Amtsgericht Kehl, Germany, 6 October 1995, Unilex; CLOUT case No. 409 [Landgericht Kassel, Germany, 15 February 1996]*. See UNCITRAL Digest, 121, note 5.

[88] *Miami Valley Paper, LLC v. Lebbing Engineering & Consulting GmbH,* U.S. District Court, Southern District of Ohio, United States, 26 March 2009 (asserting in general that CISG follows the 'mirror-image' rule), available on the Internet at www.cisg.law.pace.edu.

[89] Brunner, Murmann, Stucki, (id.), par. 39.

[90] Id., par. 41.

[91] "The language factor may also play an important role in the context of international transactions. If the standard terms are drafted in a foreign language it cannot be excluded that some of its terms,

In particular, it has been noted that also "the offeror can only be bound by standard terms issued in the language usually used by him or in the language of the contract or the contract negotiations".[92] According to such opinion, the arguments in favour of certain languages as "world languages", which may be used independent of the specific circumstances of the contract, should be disregarded.[93]

However, it's important to add that a counter-offer might be accepted by performance of the contract and this is also the common law in the U.S. ('last shot' rule). Under the 'last shot' rule it will be the terms of the acceptance of the counter-offer that control. The situation is quite patchworked under the CISG domain, showing a wide range of solutions. In fact, several decisions give to the parties' performance the value of an enforceable contract, notwithstanding partial contradiction between their standard terms. In applying the 'knock-out' rule,[94] they include those terms on which the parties substantially agreed, and replace those standard terms with the default rules of the CISG. On the contrary, other decisions establish that the standard terms of the last person can amount to an offer or counter-offer that is then deemed accepted by subsequent performance by the other party (last-shot rule).[95] Finally another "decision refused to give effect to the standard terms of either party: the seller was not bound by the buyer's terms on the back of the order form in the absence of a reference to them on the front of the form, while the seller's terms—included in a confirmation letter sent after the contract was concluded—were not accepted by the buyer's silence."[96]

Such interpretation uncertainties have raised criticisms on the CISG, thus arguing in favour of the UCC solution on what constitute acceptance.[97] As a result, the express

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although fairly clear in themselves, will turn out to be surprising for the adhering party who could not reasonably have been expected fully to appreciate all their implications" (UNIDROIT art. 1.6 (2), 2010, 69). In this sense, "regard is to be had not so much to the formulation or presentation commonly used in the type of standard terms involved, but more to the professional skill and experience of persons of the same kind as the adhering party." (Id.). See also Maria del Pilar Perales Viscasillas, *"Battle of the Forms" Under the 1980 United Nations Convention on Contracts for the International Sale of Goods: A Comparison with Section 2-207 UCC and the UNIDROIT Principles* 10 Pace International Law Review 97 (1998), note 83.

[92] Brunner, Murmann, Stucki, (id.), sub par. 39.

[93] Ibidem.

[94] See UNCITRAL Digest, 99-101, *Bundesgerichtshof, Germany, 9 January 2002*, English translation available on the Internet at www.cisg.law.pace.edu; *Landgericht Kehl, Germany, 6 October 1995*, Unilex (enforcing only standard terms that the parties had in common); *Oberlandesgericht Düsseldorf, Germany, 25 July 2003*, English translation available on the Internet at www.cisg.law.pace.edu (reaching the same result by applying the last-shot rule).

[95] See UNCITRAL Digest, 99.

[96] Ibidem.

[97] The American Bar Association stated that: "Where exchanged forms do not match, application of the Convention will lead to fewer enforceable contracts because the terms of an acceptance must conform to those of the offer except where alterations are not material (Art.19). Although United Sates law is more flexible in these matters (UCC 2-207), in international trade where parties are dealing with each other at a distance, the Convention´s greater conceptualism is arguably desirable because it will force parties to produce more evidence of a concluded agreement." See Albert H. Kritzer, *Guide*

exclusion of the CISG in favour of the UCC will determine the more predictable application of the 'knock-out' rule which allows the contract formation unless the responding offeree specifically states that there will be no contract until the original offeror expressly accepts the second set of terms.[98]

It's important to note that art. 8 of the CISG lays down the "reasonable person" standard for interpreting statements or conducts of the contracting parties. More specifically, a court held that, according to article 8 (2) and article 8 (3), the question of the effectiveness of a notice, written in a language other than the language in which the contract was made or the language of the addressee, must be evaluated from the perspective of a reasonable person, giving due consideration to usages and practices observed in international trade.[99]

An attentive focus should also be devoted to art. 9 concerning the role of usages and practices in assessing the contractual statements and conducts. That is about "rules of conduct which are not acknowledged generally, but only between the parties themselves (individual practice established between the parties). The prerequisite is a certain duration of the commercial relationship, or a number of contracts concluded, so that it appears justified for one party to rely on a particular conduct as being usual."[100] The case in point is wether to allow the adoption of a foreign language throughout the contractual relationship without the express written consent of the other party. The mere fact that a notice is in a language that is neither that of the contract nor that of the addressee doesn't not necessarily undermine the notice effects: the notice language might be one normally used in the pertinent trade sector, and thus potentially binding on the parties under article 9; or, as in the case before the court, the recipient might reasonably have been expected to request from the sender explanations or a translation.[101] For example, a communication in the English language sent by a French seller to a German buyer was interpreted by the court as expressing the seller's intent to be bound pursuant to art. 14 of the CISG.[102] The communication contained the following expressions: "We can only propose you"; "First truck could be delivered".[103]

Another court asserted that, if a party accepts statements relating to the contract in a language different from the one used for the contract, the party is bound by the contents of such statements; in fact, it is the party's responsibility to acquaint itself

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to Practical Applications of the United Nations Convention on Contracts for the International Sale of Goods, 117 (Kluwer Law International, 1989).

[98] See Thomas J. McCarthy, *Ending the "Battle of the Forms" a Symposium on the Revision of Section 2-207 of the Uniform Commercial Code* 41 Business Law 1019, 1063 (1994): "The UCC adopts the theory that business people rarely read the boilerplate language on purchase forms and that both parties are relying on the existence of a contract despite their clashing forms."

[99] See CLOUT case No. 132 [*Oberlandesgericht Hamm, Germany, 8 February 1995*].

[100] See Christoph Brunner, Christoph Hurni, Michael Kissling, *Art 8* in Christoph Brunner, Benjamin Gottlieb (Eds.), *Commentary on the UN Sales Law (CISG)*, sub. par. 3 (Kluwer Law International, 2019),.

[101] UNCITRAL Digest, 2016, 57.

[102] Id., 86. *Oberlandesgericht Hamburg, Germany, 4 July 1997*, Unilex.

[103] Ibidem.

with those contents.[104] Furthermore, a party who negotiates or accepts an offer in a foreign language must bear the risk of understanding the intricacies of the meaning of the foreign language (article 8): a court stated that if the offeree is uncertain of the meaning of an offer in a foreign language, the offeree must raise objections in order to get sufficient certainty, make further inquiries, or use a professional translation.[105]

2.2. Incorporation of Standard Terms

The issue of whether standard terms become part of the contract is governed by the Convention's rules on interpretation rather than by domestic law.[106]

The question was often dealth with by several Courts by invoking the Article 8 of the CISG.[107] It was stated that whether a party's standard contract terms are part of its offer must be determined by reference to how a "reasonable person of the same kind as the other party" would have understood the offer; under this criterion standard terms become part of an offer only if the offeree is able "to become aware of them in a reasonable manner".[108]

The case in point is that the standard terms could be drafted in a language different from that used in the contract. According to a first view, the incorporation of standard term cannot be regarded as being of a different nature than 'normal' contract clauses as the CISG does not define 'standard terms'[109]. So the seller should give the buyer a translation without which such standard terms can't become part of the contract.[110] Similarly it was stated that standard contract terms written in a language different from that of the contract do not bind the other party.[111] In a further decision, seller's

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[104] CLOUT case No. 409 [*Landgericht Kassel, Germany, 15 February 1996*], also Unilex (quoted by UNCITRAL Digest, 2016, 62, note 89).

[105] See *Landgericht Kassel, Germany, 15 February 1996*, in UNCITRAL Digest, 95, note 9.

[106] The question of whether standard terms become part of a contract for international sale of goods is to be assessed in accordance with the CISG and not with the national law determined by international private law. See Koller, (id.), 236.

[107] UNCITRAL Digest, 2016, 57. See also *S. District Court, Maryland, United States, 8 February 2011*, available on the Internet at www.cisg.law.pace.edu; *Oberlandesgericht Celle, Germany, 24 July 2009*; CLOUT case No. 1202 [*Rechtbank Utrecht, the Netherlands, 21 January 2009*]; *Oberlandesgericht München, Germany, 14 January 2009*, English translation available on the Internet at www.cisg.law.pace.edu.

[108] UNCITRAL Digest, 57.

[109] See Lautenschlager, (id.), 275.

[110] CLOUT case No. 345 [*Landgericht Heilbronn, Germany, 15 September 1997*] (stating that in a transaction between German seller and Italian buyer, seller's standard terms in German language should not be incorporated in contract and the validity of those in Italian language is to be determined by German law as the law applicable by virtue of the forum's private international law rules); *Amtsgericht Kehl, Germany, 6 October 1995*, Unilex (about standard terms in German language only sent by a German buyer to an Italian seller); CLOUT Case No. 490, *Cour d'appel de Paris, France, 10 September 2003*, stating that standard terms in German language should not become part of the contract because of buyer's ignorance of the German language. See UNCITRAL Digest, 80 (in notes).

[111] *Oberlandesgericht Düsseldorf, Germany, 21 April 2004*, (where contract is in English, general conditions in German are not included unless it can be proven that the addressee understands German);

terms, which required notice within 24 hours of delivery of perishable goods (tomatoes), were not deemed part of contract because they were barely legible and in a language foreign to buyer.[112]

On the other hand, it was asserted that for the standard contract terms to become part of the contract, they have to be drafted "either in the language of the contract, or in that of the opposing party or a language that the opposing party knows".[113] Further expanding this view, another decision has more widely acknowledged that for the standard contract terms to become part of the offer it is sufficient that they be drafted in a common language.[114] Arguments such as the "potential knowledge" of the recipient or the "world language" are even more wide-ranging. Another decision, based on article 24[115], discussed who has to bear the language risk, concluding that standard terms do not "reach" the addressee unless in a language agreed to by the parties, used by the parties in their prior dealings, or customary in the trade.[116]

According to the arguments favourable to the so-called "world languages", a duty to translate the general terms might be excluded when the terms are in English. In a contract between a German seller and an Italian buyer, the validity of the agreement deemed not frustrated by the fact that the general terms and conditions were written in English rather than the language of the negotiations; it was irrelevant whether the other party spoke that language.[117] The same conclusion applies when circumstances require a party to procure a translation himself or to request that a translation be supplied to him.[118] In a further case, it was stated that standard contract terms "are only

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Oberstergerichtshof, Austria, 29 November 2005 (general conditions in German, same language as the negotiations). See UNCITRAL Digest, 84, note 38.

[112] *Rechtbank van Koophandel Mechelen, Belgium, 18 January 2002* (*N.V. G. v. N.V. H.P.*), Unilex. See UNCITRAL Digest, 183, note 62.

[113] CLOUT case No. 1189 [*Tribunale di Rovereto, Italy, 21 November 2007*].

[114] UNCITRAL Digest, 2016, 57 and 62, note 90: *Oberlandesgericht Innsbruck, Austria, 1 February 2005*; CLOUT case No. 534 [*Oberster Gerichtshof, Austria, 17 December 2003*].

[115] See UNCITRAL Digest, 107: "Article 24 does not expressly address whether a communication in a language that the addressee is unable to understand "reaches" the addressee. Under paragraphs (1) and (2) of article 8, a party's communication is to be interpreted in accordance with the common understanding of the parties or, absent such a common understanding, in accordance with the understanding that a reasonable person of the same kind as the other party would have had in the same circumstances".

[116] CLOUT case No. 132 [*Oberlandesgericht Hamm, Germany, 8 February 1995*]. See UNCITRAL Digest, 62, note 88.

[117] Oberlandesgericht München, Germany, 14 January 2009. For decisions considering German, as well as English and French, as international languages: Oberlandesgericht Linz, Austria, 8 August 2005 (in a case where the parties where from Italy and Germany, and the general conditions where in German, which was also the language of the negotiation of the contract). See UNCITRAL Digest, 84, note 39.

[118] CLOUT case No. 750 [*Oberster Gerichtshof, Austria, 31 August 2005*] (general terms and conditions were in German and not in the language of the contract (English); in analyzing whether terms were included into the contract, the court took into account the duration, intensity, and importance of the business relationship and the extent of use of the language in the relevant cultural area. The preceding decision followed: CLOUT case No. 534 [*Oberster Gerichtshof, Austria, 17 December 2003*] (two circumstances were taken into account: the buyer on several occasions referred in English to its

incorporated if the other contracting party is given sufficient opportunity to take note of them, either in the language of negotiations or in its native language."[119]

2.3. Further Issues

A specific attention should devoted to the language of instructions booklets, that, if unknown to the recipient, might affect the conformity of the goods supplied (art. 35, 2 (a)). However, such a negative outcome could be prevented, if the parties have specially agreed upon the different language, or in the event that the goods have not been specifically produced for that market.[120] In a case decided by a German court, a Swiss purchaser of video recorders complained that the German seller had only supplied instruction booklets in German and not in the other languages spoken in Switzerland. The court rejected the argument because the recorders had not been produced specially for the Swiss market and the buyer had failed to stipulate for instruction booklets in other languages.[121]

Furthermore it's worth trying to figure out if a buyer, who decides to bear in the first instance the costs of translating such foreign instructions in order to mitigate his losses, can claim for reimbursement of expenditures. In connection with this question, an aggrieved buyer was denied recovery for the costs of translating a manual to accompany the goods when the buyer resold them because he failed to notify the seller, which was a multinational company that would already have had manuals in the language into which the manual was translated.[122]

Language barriers might affect contractual communications also in determining whether a buyer has "a reasonable excuse" for its late notice of lack of conformity under articles 39 (1) or 43 (1). Since a 'reasonable excuse' cannot be based on general allegations, a court held that the buyer failed to prove that a "complicated set of circumstances with reference to three different legal systems" as well as "language complications" justified the extra time it took buyer to give notice.[123]

The CISG will apply if both states where the buyer and seller have their respective places of business are Contracting States (Art. 1(1)(a) CISG).[124] It should also be noted that the knowledge by the parties that their places of business are located in

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German written standard terms printed on the backside of its documents, and the economic importance of the contract); *Oberlandesgericht Innsbruck,* 1 February 2005. See UNCITRAL Digest, 84, note 40.

[119] *Landgericht Memmingen, Germany, 13 September 2000*. See UNCITRAL Digest, 62, note 88.

[120] According to art. 35 2(a), the conformity of the goods with the contract might depend on whether they are fit for the purposes for which goods of the same description would ordinarily be used, except where the parties have agreed otherwise.

[121] Compare CLOUT case No. 343 [*Landgericht Darmstadt, Germany, 9 May 2000*]. See UNCITRAL Digest, 147.

[122] Ibidem. See UNCITRAL Digest, 357.

[123] See CLOUT case No. 822 [*Bundesgerichtshof, Germany, 11 January 2006*], UNCITRAL Digest, 214-216.

[124] See Kruisinga, (id.), 59. The CISG will also apply when the rules of private international law lead to the application of the law of a Contracting State (Article 1(1)(b) CISG). The contracting parties may agree to (completely or partly) exclude the application of the CISG (Article 6 CISG).

different States can be deducted from the contract itself or from any dealing between, or from information disclosed by, the parties.[125]

On the other hand, if a party has more than one place of business, the place of business is that which has the closest relationship to the contract and its performance, having regard to the circumstances known to or contemplated by the parties at any time before or at the conclusion of the contract (Art. 10 (a)).[126] In this respect, the foreign language used by the other party might be an objective element that reflects the international character of the contract of sale of goods and, as a result, it may be deemed relevant in deciding if the convention applies and which place of business has the closest relationship to the contract and its performance (if a party has more than one place of business).[127] At this respect, a Court stated that since the invoice was sent to the buyer's Belgian place of business and since it was in Dutch (a language known only at the buyer's Belgian offices), the Belgian place of business was most closely connected to the contract and its performance; the Convention therefore applied.[128] The court also added that, because the Convention was in force in the United States of America, the Convention would apply even if the buyer's relevant place of business was in that country.[129]

In general translating specific legal terms might raise concerns about conceptual discrepancies, because the correct understanding of foreign legal terms allegedly implies their interpretation in the light of the corresponding legal system of origin.[130] Take the French translation of the Common Law term "Hardship clause", as an example. As has been observed "the expression *clause de sauvegarde* is sometimes used as a translation for hardship clause, but this can create confusion. Safeguard clauses in public international law are those that enable a party to waive, temporarily, some or all of the provisions of a treaty, owing to momentary difficulties, which need not necessarily have the characteristics of unavoidability and unforeseeability, common to *force majeure* and *imprevision*."[131]

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[125] Amin Dawwas, *The Applicability of the CISG to the Arab World* 16 (4) Uniform Law Review 820 (2011). See also Rolf Herber, *Commentary on CISG Preamble, Arts. 1-7, 10, 89-101* in Ernst von Caemmerer, Peter Schlechtriem (eds.), *Kommentar zum Einheitlichen UN-Kaufrecht – CISG*, 57 (2nd ed., Beck, München, 1995).

[126] See Art. 10 of the CISG, UNCITRAL Digest, 69.

[127] Ibidem.

[128] *Rechtbank Koophandel Hasselt, Belgium, 2 June 1999*, available on the Internet at www.law.kuleuven.be.

[129] UNCITRAL Digest, 69.

[130] See Paul Ricoeur, *Le paradigme de la traduction* [1998], *Le Juste 2*, 125-140 (Esprit, 2001); Olivier Moreteau, *Les frontières de la langue et du droit : vers une méthodologie de la traduction juridique* 61(4) Revue Internationale de Droit Comparé 695-713 (2009); Tecla Mazzarese, *Legal Language and Translation. Six Main Sorts of Problems* in Barbara Lewandowska-Tomaszczyk, Marcel Thelen (eds.), *Translation and Meaning*, Part 4 (Maastricht: Zuyd University, Maastricht School of International Communication, Department of Translation and Interpreting, 1996).

[131] See Fontaine, De Ly, *Drafting International Contracts* (id.), 458, and also Aleth Manin, *À propos des clauses de sauvegarde* 1 Revue Trimestrielle de Droit Européen 1-42 (1970), and especially pp. 7-12.

Criticisms may arise in deciding whether a foreign term should be interpreted in correspondence with a foreign law, although the contract is governed by the CISG. In such cases, not always it is possible to find a suitable solution within the Convention's neutral terminology. Therefore, a foreign law might sometimes be deemed relevant for interpreting a foreign term used by the seller in his contractual documents, even without having provided a specific clause in advance. Normally such solution would be prevented in the case that the specific idiom is unknown to the addressee and not previously used in the contract. However, it may be viable under specific circumstances, namely that the term was issued in the language of the buyer. For example, a German court interpreted a trade term ("frei Haus") set out in a French seller's general business conditions, in accordance with German law because the seller had used a clause common in German commerce, drafted in the German language, and the buyer was German.[132]

3. Final Remarks

The decision to draft contracts in a foreign language still belongs to the sphere of party autonomy and so the related risks. However, when assessing the parties' awareness of potential language inconsistencies and mistakes, many variables must be taken into account such as the common intention of the parties, the existence of legal restrictions about the use of a foreign language, the quality of the contracting parties (e.g. consumer or business), the complexity of the contract and the related charateristic of being a contract of adhesion, the party's conduct capable of inducing the other party to rely on her consent.[133] In addition, a duty to translate might be imposed upon the addressee by way of interpretation, according to the specific circumstances such as the volume of the transaction, or the degree of usage of certain languages or multilingualism in the respective branch of trade.[134]

We have seen how the parties may attach a crucial value to the foreign terms by inserting tailor-made clauses into the contract. The targeted use of foreign terms is the thoughtful result both of balance of bargaining power and language risk allocation. So, in resolving the issue of misinterpretation concerning such terms by taylor-made rules the parties improve legal predictability, thus ultimately reducing costly litigation.

Therefore, the question of language risk in contracts poorly fits strict rules and requires an approach capable of adapting legal standards to the specific needs. This very feature of the issue might also suggest that, before invoking consent defects and

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[132] CLOUT case No. 317 [*Oberlandesgericht Karlsruhe, Germany, 20 November 1992*]. See UNCITRAL Digest, 306, note 21.

[133] See above, par. 2.

[134] See Lautenschlager, (id.), 274.

invalidity, a central role must be devoted to the interpretation of contract in the light of the particular circumstances.[135]

Although the language issue might be addressed under a case-by-case approach, the fundamental principle of good faith is pivotal to every case.[136] It's worthwhile to point out that the above mentioned principle is determinative not just for the interpretation of the CISG, but also for the interpretation of the parties' statements.[137] In particular, it also determines whether a party that does not understand a statement made in a language different from that expressly or impliedly agreed upon (or designated by Art. 9) has an obligation to request clarification or translation.[138] In addition to the aforementioned principle of good faith, the Convention provides a remarkable flexibility through the use of different techniques such as the promotion of a neutral terminology and the binding effects of agreed usages and established practice.[139]

[135] See Cartwright, Schmidt-Kessel, (id.), 413: "It seems quite clear that, as a matter of logic, interpretation must be the step prior to the application of the rules on defective consent".

[136] Brunner, Hurni, Kissling, (id.), sub par. 15.

[137] On the principle of good faith, see Artt. 7-8, CISG. See also Brunner, Hurni, Kissling, (id.), sub par. 15.

[138] Ibidem.

[139] See UNCITRAL Digest, XI.