

Thirty Years of CISG: International Sales, ‘Italian Style’

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Abstract

The ordering of international contracts has a natural inclination to break free from national systems and create a sort of *lingua franca* for trade law. This has not prevented international sales, ie the typical model of cross-borders transactions, from finding their main source in the ‘United Nations Convention on Contracts for the International Sale of Goods’ (CISG): a *lex* indeed, but incomplete and open to derogations, which does not hinder but supports the establishment of a global *lex mercatoria*. And with the contemporary crisis of European Private Law, the CISG gains ground, both as to the number of ratifying countries and to its ability to generate transnational case-law.

In Italy, the CISG celebrates its thirtieth birthday and time has come for a moment to ‘pause and reflect’. Just to use a motto: ‘little case-law but good’. Whatever reason lies behind such scarcity of case-law, its quality is surely high. After a few initial uncertainties, our court decisions appear mindful, compliant with autonomous interpretation and observant about foreign precedents. For instance, in dealing with international good faith, the formation of contract, the reasonable time for the notice of defects, our courts have substantially achieved the founding fathers’ ideals: uniformity, flexibility, filtration, practicability.

But it is a commonplace belief that the importance of the CISG depends upon much more than its mere being the law in force. It plays the role of a model-legislation. It has been the source of inspiration for new regulations, in Europe and elsewhere – among all, the Directive 1999/44/EC and the new Directive 2019/771/EU on the sale of consumer goods and associated guarantees – it provided guidance for the so-called soft law, it served as a first draft of the Common European Sales Law (CESL) and, even before, of the Draft Common Frame of Reference (DCFR). In a nutshell, it has become a cultural paradigm in the scholarly debate and has found there its paramount ground for legitimacy. Here comes the understanding that studying Italian precedents on the CISG – which are after all national case-law – also means studying how our domestic system is capable of opening the door to universally recognised principles and values.

I. CISG as a *Ratio Scripta* for International Contracts and a Model Law for New Legislation

1. The ‘Air-Bubble’ of International Trade: Order Without Law?

It is well-known that international contracts tend to escape from any territorial normative ‘habitat’: usually companies design such detailed clauses that they marginalise the law applicable according to private international law rules; this

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latter thus remains at the background, called up to fill in the few gaps left by party autonomy. Most of the time, international contracts also regulate jurisdiction, sometimes selecting the forum of a third country, more often deferring disputes to an arbitrator based in a country where none of the parties has its place of business, which entails the choice either of such national law or of the law more frequently applied by the arbitrator. At that stage, both the legislation and the natural judge are casted out.

What becomes evident in such a supra-national dimension is the levelling between legislation and contracting, their being two halves of the same whole.¹ This creates a sort of air-bubble, hanging above and outside the domain of national systems and the rules imposed by public powers.² One can recognise there a new legal order, the order of contracts and international trade.³

In this *private Rechtsordnung* contract is the very paramount source. But it would be too simplistic to conceive such rules as the unique and creative outcome of a free meeting of minds, unanchored from previous practices.⁴ To a considerable extent, contract is just a serial product of contracting, ie a drafting practice that mainly boasts technical legitimacy. Jurists access contracts' databases – is this a new *lex mercatoria*? –,⁵ draw from them a useful sample, reshape it according to the client's needs and provide it to the enterprise, which might be strong enough to impose it on the counterpart, most likely with minor amendments following the negotiation.⁶

¹ P. Femia, 'Desire for Text: Bridling the Divisional Strategy of Contract' *Law and Contemporary Problems*, 151, 157 (2013).

² Is everything ready for an irreversible opting out of the legal system? Among others, L. Bernstein, 'Opting out of the Legal System: Extralegal Contractual Relations in the Diamond Industry' *The Journal of Legal Studies*, 115 (1992); in a very different perspective, R.C. Ellickson, *Order Without Law* (Cambridge, Mass: Harvard University Press, 1991), *passim*.

³ The 'plurality of legal orders' has got a new lease on life: Santi Romano, *L'ordinamento giuridico* (Firenze: Sansoni, 1945), 55 (whose studies have been recently rediscovered by P. Grossi, *Ritorno al diritto* (Bari: Laterza, 2015), 8, 21, 34, 63, 77); see also, A. Musumeci, *Santi Romano un giurista tra due secoli*, in I. Birocchi and L. Loschiavo eds, *I giuristi e il fascino del regime (1918-1925)* (Roma: RomaTre-Press, 2015); W. Cesarini Sforza, *Il diritto dei privati* (Milano: Giuffrè, 1963), 21.

⁴ C.M. Bianca, 'Condizioni generali di contratto, usi negoziali e principio di effettività' *Condizioni generali di contratto e tutela del contraente debole. Atti della Tavola rotonda tenuta presso l'Istituto di diritto privato dell'Università di Catania (17-18 maggio 1969)* (Milano: Giuffrè, 1970), 31, who denounces the artificiality of recalling the idea of contract clause where practice witnesses the formation of constant and uniform rules for typical contractual relationships.

⁵ The forming of a *lex mercatoria* is a cyclic phenomenon: L. Mistelis, 'Is Harmonisation a Necessary Evil? The Future of Harmonisation and New Sources of International Trade Law', in I. Fletcher et al eds, *Foundations and Perspectives of International Trade Law* (London: Sweet & Maxwell, 2001), 3; in a critical perspective, P. Perlingieri, *Il diritto civile nella legalità costituzionale secondo il sistema italo-comunitario delle fonti* (Napoli: Edizioni Scientifiche Italiane, 2006), 314; G. Alpa, 'Paolo Grossi, alla ricerca di un ordine giuridico' *Contratto e impresa*, 399 (2016); and S. Delle Monache, 'Giudice, forum shopping, lex mercatoria', in S. Mazzamuto and L. Nivarra eds, *Giurisprudenza per principi e autonomia privata* (Torino: Giappichelli, 2016), 267-268.

⁶ For a recollection of some of the most recurring model clauses, above all Anglo-American,

There is also a sort of ‘practice positivism’: pre-drafted forms and boilerplate clauses become stratified in their use until they create a quasi-custom, which does not amount to a source of law only because it is not perceived as binding.⁷ In this light, the meeting of minds is not much aimed at setting the terms, most of which have already been drafted by the stronger party, but rather at making the agreement binding.⁸

Yet, the framework partially changes for international sales, because, in that field, the tendency of international contracts towards self-sufficiency and their disconnection from their home country, has taken a peculiar turn. In fact, the subject is regulated by the ‘United Nations Convention on Contracts for the International Sale of Goods’, adopted in Vienna on 11 April 1980, hereafter referred to as the ‘CISG’ (the English acronym for the Convention).⁹ As a source of uniform private international law, the Convention does not provide any useful criteria for identifying the applicable law. Instead, it sets forth material provisions aimed at regulating legal grounds and effects, at times through rules, at times through principles, all this in the spirit of flexibility and compromise. It looks far more like the modern soft law than like a code, but within its scope it governs sales contracts directly, except if the parties decided to avoid its application through an express or implied opting-out. In other words, CISG’s text is somehow optional – the parties can avoid its application – but cannot be downgraded to usages or *quasi/soft-law*.¹⁰

When CISG applies, the sales contract remains national-laws-resistant but falls under a uniform regulation. Therefore, one could make the gross mistake of drawing the following equivalence: general sales law-Civil Code, consumer sales law-consumer code, international sales law-CISG. After all, international sales are governed by their own *lex*. Yet, as soon as one goes into further details, things prove different. Unlike European codes, the Convention is not only an optional text but is also limited in scope and full of open-formulas. Most of all, it is a ‘fossilised’ regulation, the expression of an exhausted source that has no chance to renew or produce new rules.

Therefore, given the genetic characteristics of the CISG, its spreading in the

see E. Ferrante, *Der Einfluss des US-amerikanischen Rechts auf das “kontinental”-europäische Vertragsrecht: US-amerikanische Vertragspraxis im DCFR?*, in F. Ebke et al eds, *Das deutsche Wirtschaftsrecht unter dem Einfluss des US-amerikanischen Rechts* (Frankfurt a. M.: Verlag Recht und Wirtschaft GmbH, 2011), 131.

⁷ G. Alpa, ‘La prassi, Le fonti del diritto italiano 2: Le fonti non scritte e l’interpretazione’, in G. Alpa et al eds, *Trattato di diritto civile Sacco* (Torino: UTET, 1999), 97, 106.

⁸ P. Femia, ‘Autonomia e autolegislazione’, in S. Mazzamuto and L. Nivarra eds, *Giurisprudenza per principi* n 5 above, 37.

⁹ A. Flessner and T. Kader, ‘CISG? Zur Suche nach einer Abkürzung für das Wiener Übereinkommen über Verträge über den internationalen Warenkauf vom 11 April 1980’ *Zeitschrift für Europäisches Privatrecht*, 347 (1995).

¹⁰ M.J. Bonell, ‘Introduction to the Convention’, in C.M. Bianca and M.J. Bonell eds, *Commentary on the International Sales Law. The 1980 Vienna Sales Convention* (Milano: Giuffrè, 1987), 7.

trade practice does neither entail a return to territoriality, nor a new season of legalist positivism, if it is true that parties can easily do without it, that it requires an intense gap-filling process and that it does not seek to establish a set of new and alternative values. Certainly it ends up being the guideline for international trade, but this is just a 'factual' consequence of a spontaneous acceptance by its users.¹¹ Such spread of the CISG confirms – rather than denying it – the establishment of an autonomous order of international trade, where contracts now find a regulatory framework, not only in themselves, but also in the Vienna Convention, which further contributes to separate the contract from the *lex fori*.

What has just been outlined helps us guess how and why the Convention has been increasingly capable of stimulating intense and lively litigation. Traditional codes – and to a certain extent also sectoral ones, widespread in several countries – used to (and do) have the ambition of completeness, instrumental to a coherent organisation of private relationships; they skilfully balance rules and principles, but for this very reason tend to cover all circumstances, even through mandatory provisions. Their being anti-case-law is almost consequential. The myth of the judge as *bouche de la loi*, he who purely subsumes facts into legal patterns, originates from that pan-legalistic conception which has found its major expression in the codes.¹²

The Vienna Convention has nothing to do with that cultural universe and nothing that could approximate it to the model-code. It follows from a 'disordered' and fast growing case-law. This depends on several reasons: literal interpretation, here more than elsewhere, can be misleading or insufficient, even just for the shortness of the text, but above all for the absence of a unique underlying policy; moreover, matters dealt with by the Convention are few, and for the rest the judge serves as the glue between contracts and national laws, or he is supposed to extract from CISG principles, from time to time, useful gap-filling rules.¹³ Well, for these and other reasons the Convention encourages, rather than discouraging, the interpretative activism of judges.

¹¹ Again, M.J. Bonell, 'Introduction to the Convention' n 10 above, 14-16.

¹² Even if, free from that conception, the 1700s idea of the judge as *bouche de la loi* – synecdoche for '*bouche du droit*' – well perceives the essence of *jus dicere*: see, among others, L. Lombardi Vallauri, *Saggio sul diritto giurisprudenziale* (Milano: Giuffrè, 1967), 205; and G. Perlingieri, *Portalis e i 'miti' della certezza del diritto e della c.d. 'crisi' della fattispecie* (Napoli: Edizioni Scientifiche Italiane, 2018), 27, 41.

¹³ It applies here, *a fortiori*, what has been observed by a prominent expert of international sales law: '(...) la dottrina privatistica assume ad oggetto della sua analisi le proposizioni della legge scritta mentre gli operatori del diritto conoscono le norme filtrate nell'esperienza dell'ordinamento in azione: conoscono cioè le norme nel significato e nel contenuto che esse concretamente acquistano nella vita di relazione'; C.M. Bianca, 'Il principio di effettività come fondamento della norma di diritto positivo' *Estudios de derecho civil en honor del prof. Castan Tobeñas* (Pamplona: Ediciones Universidad de Navarra, 1969), II, 63-64.

2. Autonomous Interpretation, ‘Cross-Border’ Precedents and Living Constitution of the CISG

However, what strikes the observer’s eye is not much the volume of CISG case-law, remarkable as it may be, but rather its quality: in applying the Convention the judge is called upon to promote its uniformity, in compliance with its supra-national nature, as required by Art 7, para 1, the CISG and the principle of autonomous interpretation. He shall therefore break free from domestic bias and create norms capable of surviving in the world of international trade, rather than in their own territorial dimension. In other words, he shall avoid what Honnold called ‘homeward trend’,¹⁴ ie the bias to which he is exposed as a part of a local system governed by its own rules and values.¹⁵

Here is an example of how the Convention contributes to the ‘independence’ of international sales law: courts, which are after all national, should aim to internationally-oriented interpretations, and the main way for reaching this goal is to implement and reproduce precedents that have already engaged their battle against homeward trend. Contracts are cross-border and circulate across legal systems, and so does case-law; in other words, also precedents are meant for circulation and interaction, regardless of their home jurisdiction. Thus, for an Italian judge it is normal to quote the German BGH, and he does not neglect to mention foreign decisions, whether by Supreme Courts or lower courts. Even US or Chinese case-law is now opening to dialogue, and ‘Western’ judgments have not failed to reach Arabic countries. Certainly it is not an *èden*, but some kind of judicial egalitarianism is emerging, capable of overcoming hierarchies and barriers linked to the national systems, in the name of interpretative autonomy.

Actually, unlike European law and the Strasbourg Convention, whose disputes are respectively deferred to the EU Court of Justice and to the ECHR, the CISG is not provided with a supreme judge having (at least partially) exclusive jurisdiction.¹⁶ The creation of conventional provisions is left to the single judges of the contracting states (and also to the judges of non-contracting ones, just

¹⁴ J. Honnold, *Documentary History of the Uniform Law for International Sales* (Deventer and Boston: Kluwer Law & Taxation Publishers, 1989), passim; before: F.A. Mann, ‘The Interpretation of Uniform Statutes’ *Law Quarterly Review*, 278 (1946); W.F. Bayer, ‘Auslegung und Ergänzung vereinheitlichter Normen durch staatliche Gerichte’ *Rabels Zeitschrift*, 603 (1955); many papers collected in *Rapport sur les divergences d’interprétation du droit uniforme* (Roma: Unidroit, 1959); J. Esser, *Grundsatz und Norm in der richterlichen Fortbildung des Privatrechts* (Tübingen: Mohr Siebeck, 1964), 345; J.W.F. Sundberg, ‘A Uniform Interpretation of Uniform Law’ *Scandinavian Studies in Law*, 219 (1966); H.Vv. Hülsen, ‘Sinn und Methode der Rechtsvergleichung, insbesondere bei der Ermittlung übernationalen Zivilrechts’ *Juristen Zeitung*, 629 (1967); R.H. Graveson, ‘The International Unification of Law’ *American Journal of Comparative Law*, 4, 12 (1968); J. Kropholler, *Internationales Einheitsrecht* (Tübingen: Mohr Siebeck, 1975), 258.

¹⁵ M. Franzen, *Privatrechtsangleichung durch die Europäische Gemeinschaft* (Berlin: De Gruyter, 1999), 483.

¹⁶ And this was not disliked by the first commentators: M.J. Bonell, ‘Introduction to the Convention’ n 10 above, 19-20.

because the Convention applies also when the addressed court belongs to a third country). Such liquid and spread nomophylaky represents somehow a unique feature, but it seems effective, to the extent that it makes the law sufficiently knowable. It looks as if the absence of a supreme judge encourages the recourse to ‘active’ comparison – in the meaning of a comparative method applied to cases¹⁷ – and the interpretative self-sufficiency, far from erasing the past, becomes a synthesis and accomplishment of national experiences.

On the contrary, there is no evidence of competitiveness or antagonism among supreme judges, maybe because the dialogue among courts is not restricted to the highest jurisdictions or more simply because the CISG has no supreme court;¹⁸ but, if one pushes the reasoning to its extreme consequences, in this context there is no rigid (or semi-rigid) institutional framework comparable to the European one, not only provided with a supreme court, but also with a complete set of political and judicial institutions.¹⁹

Therefore, as a counterbalance to such fossilised rules, where the exhaustion of the source seems to mortify the *lex*, stands a judicial polycentrism that vitalises and brightens it, up to the establishment of an authentic living constitution. In the light of a petrified and scarcely forward-looking source, case-law becomes more than ever *viva vox legis*.²⁰ But a significant contribution to the birth of such a living constitution comes from an equally transnational scholarship, almost an interpreting community that predicts and inspires case-law.²¹

3. Can CISG Overcome the Crisis of European Private Law?

Yet, before dealing with our ‘thirty years of CISG’ and our ‘house style’ in the interpretation of the Treaty, a quick remark is worth on the position CISG has achieved among the other sources of private international law and private law *tout court*.²²

Now, CISG does have its drawbacks, it may not reach the goal of a uniform

¹⁷ G. Alpa, ‘Comparazione e diritto straniero nella giurisprudenza della Corte di Giustizia dell’Unione europea’ *Contratto e impresa*, 879 (2016).

¹⁸ P.G. Monateri, ‘Internazionalizzazione delle Corti e salvaguardia dell’ordine costituzionale’, in G. Iudica and G. Alpa eds, *Costituzione europea e interpretazione della Costituzione italiana* (Napoli: Edizioni Scientifiche Italiane, 2006), 213.

¹⁹ J. Smits, ‘The Future of Contract Law in Europe’, in C. Twigg-Flesner ed, *Research Handbook on EU Consumer and Contract Law* (Cheltenham: Elgar, 2016), 549, 554.

²⁰ In the words of T. Ascarelli, ‘Antigone e Porzia’, in Id ed, *Problemi giuridici* (Milano: Giuffrè, 1959), I, 14, the relationship between legislation and interpretation is not what stands between reality and a mirror, but what stands between a seed and a tree; so that interpretation is law creation, but it has the peculiarity of being a continuum with its object.

²¹ Among others, A. Procida Mirabelli di Lauro, ‘Quando la dottrina si fa giurisprudenza’, in S. Bagni et al eds, *Giureconsulti e giudici. L’influsso dei professori sulle sentenze, Le prassi delle Corti e le teorie degli studiosi* (Torino: Giappichelli, 2016), I, 113; and G. Amoroso, *La formazione del precedente nella giurisprudenza e l’apporto della dottrina*, ibid 178.

²² E. Ferrante, *La vendita nell’unità del sistema ordinamentale* (Napoli: Edizioni Scientifiche Italiane, 2018), 13.

international sales law, so dear to Rabel,²³ but it is an ascending parabola: member states are increasing in number and so are court decisions; scholars' interest in them is growing. In other words, both theory and practice cannot ignore CISG as a crucial regulating factor of international trade. And the most decisive evidence comes from the fact that it gradually acquired the role of a model-legislation. All the harmonisation attempts undertaken after 1980 have looked at the CISG as a natural and almost inevitable landmark – and that is the utmost form of legitimacy legislation could ever achieve, because it is independent from its practical success, from its effectiveness as the law in action.²⁴ Here it is: up to now, the paradigmatic meaning of CISG overcomes or precedes its applicative meaning. Perhaps, it is exaggerated to claim that every form of legislation is an experiment, but it is not so excessive to claim that every legislation, including the CISG, has a strong experimental component;²⁵ and here the experiment has been successful.

In Europe and Italy the CISG is likely to gain more and more space and supporters, along with the flaring up of the European private law crisis.²⁶ It is from the very CISG that the EU legislator has drawn Directive 1999/44/UE on warranties in consumer sales law²⁷ and later the draft *on a Common European*

²³ E. Rabel, *Das Recht des Warenkaufs. Eine rechtsvergleichende Darstellung* (Tübingen-Berlin: De Gruyter, 1936), passim.

²⁴ Corte di Cassazione 5 October 2009 no 21191, *Giustizia civile*, I, 60 (2010), *Responsabilità civile e previdenza*, 453 (2010). The Vienna Convention is intended as a set of provisions used by the communitarian legislator himself as a model regulation, given its broad sharing at an international level and its capability to offer autonomous and uniform interpretative solutions.

²⁵ R. David, 'The Methods of Unification' *American Journal of Comparative Law* (1968), 13, 27; more recently P. Perlingieri, 'Quella di Hugh Collins sul "codice civile europeo" non è la via da seguire' *Rassegna di diritto civile*, 1208, 1215, 1220 (2014).

²⁶ P. Dupichot, 'Vom Brexit zum Europäischen Wirtschaftsgesetzbuch' *Zeitschrift für Europäisches Privatrecht*, 245 (2017); R. Schulze, 'Towards a European Business Code?' *Contratto e impresa/Europa*, 413 (2016).

²⁷ Directive 1999/44/EC of the European Parliament and of the Council of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees, in OJ L 171, 7 July 1999. Regarding the relationship between this directive and the current status of European private law, see T. Zerres, *Die Bedeutung der Verbrauchsgüterkaufrichtlinie für die Europäisierung des Vertragsrechts* (München: Sellier, 2007), passim. The debate has been intense especially in Germany: U. Huber, *Das geplante Recht der Leistungsstörungen*, in W. Ernst and R. Zimmermann eds, *Zivilrechtswissenschaft und Schuldrechtsreform* (Tübingen: Mohr Siebeck, 2001), 31; B. Gsell, 'Kaufrechtsrichtlinie und Schuldrechtsmodernisierung' *Juristen Zeitung*, 65 (2001); H. Honsell, 'Die EU-Richtlinie über den Verbrauchsgüterkauf und ihre Umsetzung ins BGB' *ibid* 278 (2001); S. Grundmann, 'Verbraucherrecht, Unternehmensrecht, Privatrecht – warum sind sich UN-Kaufrecht und EU-Kaufrechts-Richtlinie so ähnlich?' *Archiv für die civilistische Praxis*, 40 (2002); P. Westermann, 'Das neue Kaufrecht' *Neue Juristische Wochenschrift*, 241 (2002); I. Saenger, 'I fondamenti della nuova vendita tedesca' *Contratto e impresa/Europa*, 834 (2004); but also elsewhere, S.A. Krusinga, 'What do consumer and commercial sales law have in common? A comparison of EC Directive on consumer sales law and the UN Convention on contracts of international sale of goods' *European Review of Private Law*, 177 (2001); D. Corapi, 'La direttiva 99/44/CE e la convenzione di Vienna sulla vendita internazionale: verso un nuovo diritto comune della vendita?' *Europa e diritto privato*, 655 (2002).

Sales Law (CESL).²⁸ Yet, the first, still inspired by the idea of minimum harmonisation, has given rise to divergent and fairly ineffective implementations by national laws, thus leading to poor litigation, above all in Italy. The other one – after endless debates,²⁹ and despite its being a serious attempt of founding a common European sales law³⁰ – at first has fallen into the Council’s swamp of anti-Europeism, then has been withdrawn and replaced by temporary drafts of minor significance.³¹ Recently CISG has also inspired the new Directive

²⁸ COM (2011) 635 def., 11 October 2011, also in *Contratto impresa/Europa*, 847 (2011); the CESL undertook the ordinary legislative procedure and the EU Parliament, called up under Art 294, para 3, Treaty FUE, adopted the ‘Legislative Resolution (...) of 26 February 2014 on the EU Parliament and Council’s draft on a common European sales law (COM [2011] 0635 – C7-0329/2011 – 2011/0284 [COD])’, classified as ‘P7_TA-PROV(2014)0159’, with the 264 amendments to the draft sent by the EU Commission (See on this point, P. Svoboda, ‘The Common European Sales Law – Will the Phoenix rise from the Ashes again?’ *Zeitschrift für Europäisches Privatrecht*, 689 (2015); H.P. Mayer and J. Lindemann, ‘Zu den aktuellen Entwicklungen um das Gemeinsame Europäische Kaufrecht auf EU-Ebene’, *ibid* 1 (2014); and S. Groß, ‘Kaufrecht: Zustimmung des Parlaments zum Kommissionsvorschlag für ein Europäisches Kaufrecht’ *Europäische Zeitschrift für Wirtschaftsrecht*, 204 (2014). About the CESL, more generally: the hole no 1/2012 (‘Numero speciale’) of *Contratto e impresa/Europa*; *ibid*, the two ‘dibattiti’ in no 2/2013; the *Special Issue 2013* of *The Common Market Law Review*; and then, P. Sirena, ‘Il contratto alieno del diritto comune europeo della vendita’ *La Nuova giurisprudenza civile commentata*, II, 608 (2013); R. Schulze, *Common European Sales Law (CESL). Commentary* (Baden-Baden: Nomos, 2012); M. Schmidt-Kessel, *Ein einheitliches europäisches Kaufrecht?* (München: Sellier, 2012); B. Gsell, *Der Verordnungsentwurf für ein Gemeinsames Europäisches Kaufrecht und die Problematik seiner Lücken*, in O. Remien et al eds, *Gemeinsames Europäisches Kaufrecht für die EU* (München: Beck, 2012), 145; G. Alpa, G. Conte, U. Perfetti and M. Graf v. Westphalen, *The Proposed Common European Sales Law – The Lawyers’ View* (München: Sellier, 2013); G. D’Amico, ‘Direttiva sui diritti dei consumatori e Regolamento sul Diritto comune europeo della vendita: quale strategia dell’Unione europea in materia di armonizzazione?’ *Contratti*, 611 (2012); P. Stanzione, ‘Il regolamento di diritto comune europeo della vendita’, *ibid* 624; G. Pongelli, ‘La proposta di regolamento sulla vendita nel processo di creazione del diritto privato europeo’ *La nuova giurisprudenza civile commentata*, II, 665 (2012); G. Donadio, ‘Diritto contrattuale comunitario e “optional instrument”: una valutazione preventiva’ *Contratto e impresa/Europa*, 649 (2011); A. Rocco, ‘L’istituzione di uno strumento opzionale di diritto contrattuale europeo’ *Contratto e impresa/Europa*, 798 (2011); F.P. Patti, ‘Le clausole abusive e l’“optional instrument” nel percorso dell’armonizzazione in Europa’ *Contratto e impresa/Europa*, 662 (2011).

²⁹ Among others, G. Alpa, ‘Towards a European Contract Law’ *Contratto e impresa/Europa*, 124 (2012); and R. Zimmermann, ‘Diritto privato europeo: “Smarrimenti, disordini”’ *ibid* 33 (2012).

³⁰ F. Galgano, ‘Dai Principi Unidroit al Regolamento europeo sulla vendita’ *Contratto e impresa/Europa*, 5-6 (2012); see also, O. Lando, ‘CESL or CISG? Should the proposed EU Regulation on a Common European Sales Law (CESL) replace the United Nations Convention on International Sales (CISG)?’, in O. Remien et al eds, *Gemeinsames Europäisches n 28* above, 15 et seq; U. Magnus, ‘CESL vs CISG’, in U. Magnus ed, *CISG vs Regional Sales Law Unification* (München: Sellier, 2012), 97.

³¹ See the ‘Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. Commission Work Programme 2015. A New Start’, COM (2014) 910 final, 16 December 2014, Annex II, no 60. A failure for the very proposing institution: R. Canavan, *Contracts of sale*, in C. Twigg-Flesner ed, *Research Handbook n 19* above, 281.

2019/771/EU.³²

In this *impasse*, CISG is ‘little’ but it is still ‘something’. Far from losing ground, it earns it everywhere, a stronghold of a harmonising idea that, with no imperialism or authoritarianism, believes in a uniform regulation for international contract law.³³ And, should a re-codification of *lex mercatoria* become appealing again, it remains the model-legislation.³⁴

It is in light of such a temporary assessment and uncertain predictions that the following *résumé*, which will look at the ‘Italian difference’ in handling the CISG, must be read.

II. The Beginnings: Inter-Temporal Issues, Methodology and National Bias

1. Prehistoric CISG

The CISG was signed by the Italian Republic on 30 September 1981, ratified with legge no 11 December 1988 no 765 and, in accordance with Art 99, para 1, CISG, entered into force on 1 January 1988 (the same day as in the other eight countries that had first adopted it).³⁵ Given that the ratification took place

³² Directive 2019/771/EU of the European Parliament and of the Council of 20 May 2019 on certain aspects of the sale of consumer goods, amending Regulation (EU) 2017/2394 and Directive 2009/22/EC, and repealing Directive 1999/44/EC, in OJ L 136, 22 May 2019 (see E. Ferrante, ‘Primi appunti sulla nuova dir. 19/771/UE in materia di vendita al consumo’, in A. D’Angelo et V. Roppo eds, *Annuario del contratto 2018* (Torino: Giappichelli, 2019), forthcoming). On this general topic see R. Schulze, ‘Europäisches Privatrecht im Gegenwind’ *Zeitschrift für Europäisches Privatrecht*, 691 (2014). The times of eirenic and apologetic are far away: V. Roppo, *Il contratto del duemila* (Torino: Giappichelli, 2011), 35; before, R.C. Van Caenegem, *European Law in the Past and in the Future* (Cambridge, UK: Cambridge University Press, 2002), 36-37; T.M.J. Möllers, *Die Rolle des Rechts im Rahmen der europäischen Integration* (Tübingen: Mohr Siebeck, 1999), 47.

³³ Among others, U. Magnus, ‘UN-Kaufrecht – Konsolidierung und Ausbau nach innen und gleichzeitig Erodierung von außen? Aktuelles zum CISG’ *Zeitschrift für Europäisches Privatrecht*, 178 (2015); S. Patti, ‘Relazione di sintesi’ *Contratto e impresa/Europa*, 672 (2013); R. Schulze, ‘The CESL’s Innovative Features – a Brief Overview’, *ibid* 485 (2013); I. Caggiano, ‘L’uniformazione del diritto contrattuale europeo. *American and European Perspectives*’, *ibid* 13 (2013); M. Loos and H. Schelhaas, ‘Commercial Sales: The Common European Sales Law Compared to the Vienna Sales Convention’ *European Review of Private Law*, 105 (2013); R. Peleggi, ‘Il futuro diritto comune europeo della vendita (“CESL”): reale competitore o (mero) doppiante della Convenzione di Vienna?’ *Diritto del commercio internazionale*, 983 (2013); already before, R. Zimmermann, ‘Lo *jus commune* e i Principi di diritto europeo dei contratti: rivisitazione moderna di un’antica idea’ *Contratto e impresa/Europa*, 127-128 (2009).

³⁴ L. DiMatteo, ‘How Innovative is the Common European Sales Law? Using the CISG as a Benchmark’ *Contratto e impresa/Europa*, 513 (2013); and U. Magnus, ‘UN-Kaufrecht – Aktuelles zum CISG’ *Zeitschrift für Europäisches Privatrecht*, 140 (2017).

³⁵ That is to say Argentina, China, Egypt, France, Hungary, Lesotho, Syria and the U.S.A.; up until 15 July 2018 the CISG has been adopted by eighty-nine countries; the complete list of the contracting States is available at <https://tinyurl.com/585fw5> (last visited 28 May 2019). See F. Ferrari, *The CISG and its Impact on National Legal Systems* (München: Sellier, 2008);

without reservations, the Convention is entirely applicable in Italian law.³⁶

As Italy was already a party to the two Hague Conventions dating back to 1 July 1964 – one concerning a ‘Uniform Law on the Formation of Contracts for the International Sales of Goods’ (LUFC), the other relating to a ‘Uniform Law on the International Sales of Goods’ (LUVI or ULIS)³⁷ – the CISG could not come into effect until the denunciations of both these Conventions had themselves become effective (as happened on 31 December 1987), in accordance with Art 99, paras 3 and 6, CISG.

Therefore, unsurprisingly, the first court decisions are about inter-temporal issues, linked with the transition from the Hague Conventions to the CISG (the first two applicable until 31 December 1987, the latter since 1 January 1988) or, broadly speaking, with the chronological requirements under Art 1, para 1, CISG.³⁸ Such issues are only relevant retrospectively, as they are unlikely to be raised after almost thirty years from the first enactment of the Convention.

Nevertheless, there is one case which is worth a brief comment: *Nuova Fucinati v Fondmetall International*, decided by the Tribunal of Monza.³⁹ As far as the applicability of the Convention, in accordance with Art 1 CISG, is concerned, the Tribunal highlighted two main aspects.

First of all, the buyer’s place of business was in Sweden, a contracting State

Id, *Quo vadis CISG?* (München: Sellier, 2005); O. Lando, ‘CISG and its Followers: A Proposal to Adopt Some International Principles of Contract Law’ *American Journal of Comparative Law*, 379 (2005); M.J. Bonell, ‘The CISG, European Contract Law and the Development of a World Contract Law’, *ibid* 1 (2008); and two important collective books, ie L. DiMatteo et al eds, *International Sales Law* (Baden-Baden: Nomos, 2016); L. DiMatteo, *International Sales Law* (New York: Cambridge University Press, 2014).

³⁶ See, among others, M. Torsello, ‘Reservations to international uniform commercial law conventions’ *Uniform Law Review*, 35 (2000).

³⁷ Both Conventions were ratified by Italy with legge 21 June 1971 no 816, and entered into force on 1 January 1972; only nine countries decided to ratify them and put them into effect in their legal system (besides Italy, Belgium, Zambia, Israel, Luxemburg, the Netherlands, Germany and San Marino), so that diplomatic negotiations were re-opened soon after their adoption: see N. Boschiero, ‘Le convenzioni internazionali in tema di vendita’, in P. Rescigno ed, *Trattato di diritto privato* (Torino: UTET, 1987), XXI, 262; previously, E.V. Caemmerer, ‘Die Haager Konferenz über die internationale Vereinheitlichung des Kaufrechts vom 2 bis 25 April 1964’ *Rabels Zeitschrift*, 101 (1965); G. Longo, ‘La Convenzione dell’Aja sulla formazione dei contratti di vendita internazionale, banco di prova di un incontro fra ordinamenti “romanzi” e “common law”. Un nuovo progetto di studi’ *Rivista di diritto commerciale*, I, 96 (1966); G. Bernini, ‘Le Convenzioni dell’Aja del 1964 sulla formazione e disciplina del contratto di vendita internazionale di beni mobili’ *Rivista di diritto civile*, II, 626 (1969).

³⁸ Corte di Cassazione 24 October 1988 no 5739, *Foro italiano*, I, 2878 (1989), *Giustizia civile*, I, 1888 (1989), *Uniform Law Review*, 857 (1989).

³⁹ Tribunale di Monza 14 January 1993, *Giurisprudenza italiana*, 149 (1994), *Foro italiano*, I, 916 (1994), *I Contratti*, 580 (1993), *Rivista di diritto internazionale privato e processuale*, 367 (1994); see on this judgement, F. Ferrari, ‘Diritto uniforme della vendita internazionale: questioni di applicabilità e diritto internazionale privato’ *Rivista di diritto civile*, II, 669 (1995); and V. Maglio, ‘I criteri di applicazione della convenzione di Vienna sulla vendita internazionale: una sentenza italiana non persuasiva e l’insegnamento della giurisprudenza tedesca’ *Contratto e impresa/Europa*, 29 (1996).

in which the CISG would enter into force on 1 January 1989, that is to say, after the contract proposal was made as per Art 100 CISG⁴⁰ (instead, the place of business of the seller was in Italy, where the CISG had been in force since 1 January 1988). Given that a State, in order to be qualified as ‘contracting’, must not only ratify but also put the Convention into force, at that time Sweden did not meet the required conditions.

Secondly, the parties expressly agreed upon the choice of Italian law, which would prevent the applicability of the CISG, also in accordance with Art 1, para 1, letter *b*), because the conflict of laws provisions do not apply when the applicable law is the result of an agreement. That said, the Tribunal decided on the non-applicability of the CISG.

However, the Tribunal failed to consider that, if the parties make a valid choice as to the law of a contracting State where the CISG has already entered into force at the time of the proposal, (as required by Art 100 CISG), there is no reason why the applicability of the Convention should be excluded under Art 1, para 1, letter *b*). In fact, the *professio juris*, if admissible, is not alternative to the rules on the conflict of laws but is, rather, the criterion which determines the applicable law.⁴¹ Not only does it not prevent the application of Art 1, para 1, letter *b*), CISG,⁴² but it also clarifies the meaning of that provision, unless we believe – but this was not the Tribunal’s view –⁴³ that the CISG should not be qualified as ‘Italian law’ and that when the parties choose ‘Italian law’ they mean to exclude the CISG as per Art 6.

This conclusion must be rejected in principle – the CISG is indeed ‘Italian

⁴⁰ S. Carbone, ‘Art 100’ *Nuove leggi civili commentate*, 349 (1989).

⁴¹ In that sense both Arts 2-3 of the Hague Convention of 15 June 1955 (‘on the applicable law to the international sale of goods’), which is actually in force, and Art 3 European Parliament and Council Regulation (EC) 2008/593 of 17 June 2008 on the law applicable to contractual obligations (Rome I) (2008) OJ L177/6, which reproduces Art 3 Rome Convention of 19 June 1980 (‘on the applicable law to contractual obligations’) are applicable; about these texts also, below, para 2; on *professio juris* as the main linking criterion in the recent international and EU legislation see, among others, S. Sendmeyer, ‘The Freedom of Choice in European Private International Law. An Analysis of Party Autonomy in the Rome I and Rome II Regulation’ *Contratto e impresa/Europa*, 792 (2009); and more recently M.P. Weller, N. Benz and C. Thomale, ‘Rechtsgeschäftsähnliche Parteiautonomie’ *Zeitschrift für Europäisches Privatrecht*, 250 (2017).

⁴² In the same direction OLG Düsseldorf 8 January 1993, *Recht der internationalen Wirtschaft*, 325 (1993); OLG Koblenz 17 September 1993, *Recht der internationalen Wirtschaft*, 934 (1993); more recently BGH 28 May 2014, *Internationales Handelsrecht*, 184 (2014). On this topic see G. Sacerdoti, ‘I criteri di applicazione della Convenzione di Vienna sulla vendita internazionale: diritto uniforme, diritto internazionale privato e autonomia dei contraenti’ *Rivista trimestrale di diritto e procedura civile*, 733 (1990).

⁴³ The judgment states: ‘Now it is true that the law applicable to the contract is Italian law, by virtue of the explicit provision inserted in the order confirmation (‘law: Italian law to apply’); and it is also true that, because the Vienna Convention at this time was in force in the national system, it must be considered a law like any other law of this State’. In the same direction, Chamber of National and International Arbitration of Milan 28 September 2001, available at cisgw3.law.pace.edu/cases/010928i3.html (last visited 28 May 2019).

law' and choosing Italian law is equivalent to choosing the CISG⁴⁴ but in some cases a *professio juris*, although in favour of the law of a certain contracting State, could nevertheless be interpreted as an opt-out clause (also in accordance with Art 8 CISG): what should the conclusion be, for instance, when the parties declare that they choose the 'Italian Civil Code'⁴⁵ or 'Italian law exclusively',⁴⁶ rather than simply 'Italian law'? Could it still be considered as a confirmation of their intention to apply the CISG? Would it not rather represent an exclusion clause?⁴⁷

Aprioristic answers in one or the other direction would sound ideological. The equivalence between national law and the Convention, though formally correct, might not meet the parties' will, which has been, after all, expressed in a *professio juris*; and even when such clause is embodied in a standard form, its

⁴⁴ Among others, LG Landshut 5 April 1995, available at <https://tinyurl.com/yygr5qvv> (English translation at <https://tinyurl.com/y6lve9xo>) (last visited 28 May 2019); OLG München 9 July 1997, available at <https://tinyurl.com/y3xfmbbb> (last visited 28 May 2019) overruling the previous LG München 29 May 1995, available at <https://tinyurl.com/y3tfyf64> (English translation at <https://tinyurl.com/y5gomrud>) (last visited 28 May 2019); OLG Hamburg 5 October 1998, available at <https://tinyurl.com/y5nbl8pc> (English translation at <https://tinyurl.com/y4hnlb7m>) (last visited 28 May 2019); BGH 25 November 1998, available at <https://tinyurl.com/y2uxtorp> (English translation, abstracts and comments available at <https://tinyurl.com/y6duxbzz>) (last visited 28 May 2019); OLG Frankfurt 30 August 2000, *Recht der internationalen Wirtschaft*, 383-384 (2001), also available at <https://tinyurl.com/y4caldgt> (last visited 28 May 2019); BGH 16 September 2015, *Internationales Handelsrecht*, 25 (2016). *Contra* F. Ferrari, 'La vendita internazionale', in F. Galgano ed, *Trattato di diritto commerciale e di diritto pubblico dell'economia* (Padova: CEDAM, 2nd ed, 2006), 214.

⁴⁵ OLG Frankfurt 30 August 2000, n 44 above.

⁴⁶ This latter expression used by the contracting parties in the case decided by the Florence Court of Arbitration 19 April 1994, *Diritto del commercio internazionale*, 861 (1994), where the applicability of the CISG has been excluded by the dissenting opinion of an arbitrator: certainly the expression is not so appropriate from the point of view of editing and can raise more than one doubt, but is not choosing 'Italian law exclusively' equivalent to choosing simply 'Italian law'? Yet, we could not admit without a doubt that two parties, who declare to choose Italian law 'exclusively', are willing to apply the CISG. Under Tribunale di Forlì 6 March 2012, available (only in English translation) at <https://tinyurl.com/yxe5dvph> (last visited 28 May 2019), '(...) to show that the parties wanted to exclude the Convention in favor of Italian domestic law, an express choice in favor of the "Italian Civil Code", the "Italian domestic law" or the "purely domestic law" would have been necessary'. Still, the question remains unsolved.

⁴⁷ In this latter sense, though *obiter*, Tribunale di Padova 11 January 2005, *Rivista di diritto internazionale privato e processuale*, 791 (2005), according to which the choice of applying the regulations of the International Chamber of Commerce in Paris would not mean an implied exclusion of the Convention, given that 'the reference to the laws and regulations of the International Chamber of Commerce of Paris cannot be considered a 'choice of law' according to the rules of international private law that – at least under the Italian perspective – do not admit the selection of a non-national set of rules (...). Which is to say that Art 7 of the contract is not a choice of law under the rules of international private law, and so it is not capable of having the selected rules prevail over the mandatory rules otherwise applicable (the same would have happened if the parties opted for the *lex mercatoria*, the Unidroit Principles or for the same UN Convention in the event it would have not been applicable). For the same reasons, the parties' choice does not amount to an implied exclusion of the Convention'; see F. Ferrari, 'La vendita internazionale' n 11 above, 214.

incorporation and interpretation shall be carefully assessed.

It is equally worth reminding that, in the case at issue, the solution to the problem must be found in the law applicable according to uniform private international law, and not in Art 8 CISG.⁴⁸ In fact, the Convention does allow an opting-out (Art 6 CISG), but provides no express or implied rules on its formal or substantive requirements. If the opting-out aims at excluding the CISG, it would be illogical to defer its regulation to this latter source. The choice expressed through it cannot fall within the formation of contract or the recognition of essential requirements or the other matters covered by the Convention.

Now, if the parties select Italian law, like in *Nuova Fucinati v Fondmetall*, the possible exclusionary meaning of that choice will be assessed in light of Art 1362 et seq Italian Civil Code. But, if the exclusionary clause, under the form of a *professio iuris* in favour of Italian law, is embodied in a set of fixed terms, the judge must pre-emptively reconstruct its meaning and only then investigate its enforceability (according to the law applicable law or, as seems preferable, to the Convention, given that the matter falls within the formation of contract).⁴⁹ In that context a paramount role will be played by the *contra proferentem* rule under Art 1370 Italian Civil Code, a provision capable of drawing a renewed attention both on scholarly debate and on case-law applications.⁵⁰

2. Italian Language and Mentality

In this first phase of application of the CISG another defect can be found out, later gradually overcome: the judges, despite being aware that these rules are alternative and prevailing over domestic ones, nevertheless tend to base their decisions on the civil code or national law in general.⁵¹ It seems like earlier

⁴⁸ *Contra* M.J. Bonell, 'Art 6', in C.M. Bianca and M.J. Bonell eds, *Commentary* n 10 above, 55-56; U. Magnus, 'UN-Kaufrecht – Aktuelles zum CISG' n 34 above, 147 (2017).

⁴⁹ Among others, OLG Hamm 19 May 2015, *Internationales Handelsrecht*, 30 (2016); *contra* U. Magnus, 'UN-Kaufrecht – Aktuelles zum CISG' n 34 above, 154.

⁵⁰ E. Ferrante, 'Transparency of Standard Terms as a Fundamental Right of European Law', in B. Heiderhoff et al eds, *EU-Grundrechte und Privatrecht* (Baden-Baden: Nomos, 2016), 115.

⁵¹ Pretura Tribunale di Parma-Fidenza 24 November 1989, *Diritto del commercio internazionale*, 441 (1995), even if the translation tends to hide the problem: 'We focus our attention on the seller's partial performance (see Art 1455 Italian Civil Code). The seller's non-performance is a fundamental breach of contract according to Art 49, para 1, letter a) of legge 27 December 1995 no 765 (legge no 765/1995 is the law approving the CISG as the domestic law of Italy); exactly the same happened in Tribunale di Padova 11 January 2005 n 47 above; and in Corte di Cassazione 9 June 1995 no 6499, *Giustizia civile*, I, 2065 (1996): 'The issues converge in this sense under either the criteria followed in the application of the rules of the Civil code or the criteria expounded in Art 3 of the Convention on Contracts for the International Sale of Goods'; Pretura Tribunale di Torino 30 January 1997, *Giurisprudenza italiana*, 982 (1998), in which the Court, after claiming the applicability of the CISG, in dealing with the burden of proof, bases its arguments *tout court* on Art 2697 Italian Civil Code, without even asking itself if that issue is included in the substantive scope of the Convention; subsequent case-law affirmed this: see for example BGH 9 January 2002, *Neue Juristische Wochenschrift*, 1651 (2002), *Recht der internationalen Wirtschaft*, 396 (2002), *Wertpapier Mitteilungen*, 1022

decisions were perceived as incomplete or weaker without a few references to ‘traditional’ Italian law, even if the applicability of the CISG was unquestioned. It is, however, normal that this trend towards eclecticism has lost its appeal: most of all the pressure of EU law, being the main driving factor in European private law,⁵² has forced also Italian judges to be receptive to transnational norms, principles and values, and to be more confident in making reference to case-law. An increasingly conscious and firm application of uniform international law has followed: recent judgments have no longer felt the need to write *obiters* based on the Italian Civil Code or other domestic provisions when CISG applies.⁵³

Methodology is worth a further comment: since the first decisions, courts have tended to use, instead of the original text itself, Italian translations, which are undoubtedly not equally authentic, as specified under Art 101, para 2, CISG.⁵⁴ Given that Italian is not one of the official languages of the CISG – unlike Arabic, Chinese, English, French, Russian and Spanish – to refer to an informal translation as a ground for the applicability of the Convention, not only implies a violation of Art 101, para 2, CISG, but also makes the aims under Art 7, para 1, CISG more difficult to achieve. And that means undermining autonomous interpretation.⁵⁵ In fact, if multilingualism is already in itself a critical factor for a coherent application – and European jurists know the difficulties of ‘trans-’ or ‘meta’-linguistics in EU law very well⁵⁶ – to interpret a text in its non-authentic version is misleading. Strictly speaking, it would mean the application of a text which has no legal value. Even after separating the official languages from mere translations, we would anyway have to take into account that in practice the English version has prevailed, being considered as ‘the’ text *par excellence* of the CISG. There is no reason to

(2002), *Zeitschrift für Insolvenzpraxis*, 672 (2002); see P. Perales Viscasillas, ‘Battle of the Forms and the Burden of Proof: An Analysis of BGH 9 January 2002’ *Vindobona Journal for International Commercial Law and Arbitration*, 217 (2002).

⁵² M. Bin, ‘Per un dialogo con il futuro legislatore dell’attuazione: ripensare l’intera disciplina della non conformità dei beni nella vendita alla luce della direttiva comunitaria’ *Contratto e impresa/Europa*, 403 (2000).

⁵³ A different approach can be noted since Corte di Appello di Milano 11 December 1998, *Rivista di diritto internazionale privato e processuale*, 112 (1999); though a certain eclecticism emerges then in Corte di Cassazione 14 December 1999 no 895, *Giustizia civile*, I, 2333 (2000), case-note by F. Ferrari; as well as in the recent Tribunale di Modena 19 February 2014, available at <https://tinyurl.com/y28rz9gp> (last visited 28 May 2019), in particular para 7; yet crystal-clear, for the prevailing approach, Chamber of National and International Arbitration of Milan 30 July 2007, available with *abstract* at <https://tinyurl.com/yxjdbfjs> (last visited 28 May 2019).

⁵⁴ This is even true for recent judgements, such as Trib. Reggio Emilia 12 aprile 2011, available in English translation at <https://tinyurl.com/y5xd9b3w> (last visited 28 May 2019). About this problem, C.M. Germain, ‘Language and Translation Issues’, in L. DiMatteo et al eds, *International Sales Law* n 35 above, 21- 30; Id, ‘Reducing Legal Babelism’, in L. DiMatteo ed, *International Sales Law*, n 35 above, 52-53.

⁵⁵ See also below, para 5; and Tribunale di Padova 11 January 2005, n 47 above.

⁵⁶ Academics have not always paid attention to such crucial issues: S.M. Carbone, ‘Interpretazione e integrazione degli strumenti di *hard* e *soft law* relativi al commercio internazionale’ *Contratto e impresa/Europa*, 870 (2012).

use versions other than the English one, even though they are official and better suit non-English speaking parties. Conversely, the use of non-authentic versions amounts to a violation of the Convention.

III. Sources of International Sales Law: Conflict and Uniform Substantive Rules

1. Uniform Law First

While the denunciation of the two Hague Conventions of 1964 (LUFC and LUVI) was necessary for the CISG to become effective, such denunciation was neither required by the CISG, nor made by Italy with regard to the Hague Convention of 15 June 1955 ‘on the law applicable to the international sales of goods’.⁵⁷ This latter, despite its practical failure,⁵⁸ is undoubtedly in force⁵⁹ and prevails over Regulation EC 593/2008 (‘on the law applicable to contractual obligations’), under Art 25,⁶⁰ as well as over the Rome Convention of 19 June 1980 (‘on the law applicable to contractual obligations’),⁶¹ under Art 21.⁶² It is quite strange that four judgments by the Italian Supreme Court (Joint Divisions) have made no comment on it, and have ruled on jurisdiction without even

⁵⁷ The Hague Convention of 1955 was ratified with legge 4 February 1958 no 50, and entered into force in Italy on 1 September 1964; see G. Cassoni, ‘La compravendita nelle convenzioni e nel diritto internazionale privato italiano’ *Rivista di diritto internazionale privato e processuale*, 429 (1982).

⁵⁸ The contracting States are Belgium, Denmark, Finland, France, Italy, Niger, Norway, Sweden and Switzerland; see F. Padovini, ‘La vendita internazionale dalle Convenzioni dell’Aja alle Convenzioni di Vienna’ *Rivista di diritto internazionale privato e processuale*, 47 (1987).

⁵⁹ The second Hague Convention ‘on the applicable law to the contracts of international sale of goods’ was adopted on 31 October 1985, but it never entered into force due to the fact that the minimum number of ratifications (five, as per Art 21) was not reached; the version of the Convention which is in force is therefore the one of 1955; see N. Boschiero, ‘Le convenzioni internazionali’ n 37 above, 214, 251; A. Luminoso, *La compravendita* (Torino: Giappichelli, 7th ed, 2011), 498-500.

⁶⁰ In particular, there is no inconsistency with Art 25, para 2, Regulation EC 593/2008: in fact, also countries which are not members of the EU have signed the Hague Convention of 1955, so there is no reason to refuse the prevalence over EU law to the mentioned-above provision. See doubtfully, A. Frignani and M. Torsello, *Il contratto internazionale* (Padova: CEDAM, 2010), 438.

⁶¹ The Rome Convention of 19 June 1980, ratified with legge 18 December 1984 no 975, entered into force on 1 April 1991, and was transposed into EU law with Regulation EC 593/2008, where Art 24, para 1, restricts, without excluding, its effectiveness; both the Rome Convention of 1980, though within the limits of Art 24, para 1, Regulation EC 593/2008, and this latter Regulation are still applicable outside the subjective and objective sphere of the Hague Convention of 1955, as per Art 4, para 1, letters a) and c), Regulation EC 593/2008, but obviously under the condition that they are not excluded by the CISG. Clearly, as a consequence, the research and coordination of the sources are quite complex tasks.

⁶² *A fortiori* the Hague Convention of 1955 – which, for now, has not yet been replaced by the one of 1985 – prevails over legge 31 May 1995 no 218 (‘Reform of the Italian system of international private law’), where Art 57 refers to the Rome Convention of 1980, that is to say now to Regulation EC 593/2008, in accordance with Art 24, para 2, of the latter.

mentioning the Hague Convention of 1955.⁶³

In any case, the above-summarised normative framework raises a fundamental problem of international private law: in Italy there are two Conventions on sales which are simultaneously in force,⁶⁴ the first, the Hague Convention of 1955, which provides the rules on the conflict of laws aimed at selecting the applicable law, the other, the CISG, establishing uniform provisions aimed at regulating the issue directly; the question is therefore, which of these two conventions should be primarily applicable, even though the result might not change.⁶⁵

According to an earlier opinion, sales which present one or more foreign elements should be qualified first of all by means of the rules on the conflict of laws. These may provide the criterion to establish the applicable law: so, if such law pertains to a contracting State of the CISG, it prevails over the remaining domestic law.

A notable example is offered by the judgment of the Italian Supreme Court (Joint Divisions) in *Premier Steel Service v Oscam*:⁶⁶

‘For the international sales of goods (...), the rules of international private law are established by the Hague Convention of 15 June 1955 (...), which has an international nature (Art 7) and prevails over the Rome Convention of 19 June 1980 (...), to which Art 57 of Statute no 218/1995 refers (this prevalence can be deduced both from the final part of Art 57, and from Art 21 of the Rome Convention). The Hague Convention of 1955, in contrast with what was argued by the *resistente* (the party against whom a second-level appeal has been filed), cannot be considered as abrogated by the Vienna Convention of 11 April 1980 (...), because this latter Convention

⁶³ Corte di Cassazione 1 February 1999 no 6, available at <https://tinyurl.com/y3shqu09> (last visited 28 May 2019); Corte di Cassazione 14 December 1999 no 895 n 53 above; Corte di Cassazione 6 June 2002 no 8224, available at <https://tinyurl.com/y548gbef> (last visited 28 May 2019); Corte di Cassazione 20 June 2007 no 14300, *Rivista di diritto internazionale privato e processuale*, 511 (2008); but already before, Corte di Cassazione 8 February 1990 no 859, *ibid* 138 (1994), where the CISG is quoted through an *obiter*; contrastingly, among others, Corte di Cassazione 9 June 1992 no 7073, *ibid* 408 (1994), where the CISG is quoted again *obiter*; Tribunale di Pavia 29 December 1999, *Corriere giuridico*, 932 (2000).

⁶⁴ The framework of international conventions signed by Italy on the subject of sale is even more complicated, and includes, moreover, the two Hague Conventions of 15 April 1958, the New York Convention of 14 June 1974 and the Geneva Convention of 1983: but none of these conventions is actually into force, due to the fact that the minimum number of ratifications to be achieved has not been reached; for further information see N. Boschiero, ‘Le convenzioni internazionali’ n 37 above, 233, 263.

⁶⁵ The problem would not be solved if the Hague Convention of 1955 could not be applicable due to the lack of the subjective and objective requirements, and had to be replaced by the Regulation EC 593/2008 or – but it is now very rare – by the Rome Convention of 1980. See in particular N. Boschiero, *Il coordinamento delle norme in materia di vendita internazionale* (Padova: CEDAM, 1990), *passim*.

⁶⁶ Corte di Cassazione 19 June 2000 no 448, *Giurisprudenza italiana*, 233 (2001), *Foro italiano*, I, 527 (2001), *Corriere giuridico*, 369 (2002).

contains substantive uniform rules, rather than international private law rules, given that the former provide substantive law whose purpose is to substitute domestic law, rather than to determine the law applicable to the contract of sale, which must be identified on the basis of the Hague Convention. According to Art 3 of this latter Convention, in default of a law declared applicable by the parties, a sale shall be governed by Italian law, as it is the country in which the purchaser has his habitual residence (...). The *locus destinatae solutionis* (...) must therefore be determined on the basis of Italian law. Nonetheless, given that Italy has signed the above-mentioned Vienna Convention (...), Italian law has been replaced by the provisions of that Convention (Art 1, para 1, letter b)).⁶⁷

Actually, such a complex interpretation would lead to the non-application *a priori* of Art 1, para 1, letter a), CISG, as if the article consisted only of letter b): the result may not change, but there is no need to waste time with further discussions if the applicability of the Convention originates from the provision of letter a) itself. It is a matter of method, regardless of any normative implications: if a convention, which has become part of domestic law, regulates the issue directly, through substantive rules, it is *lex specialis* by nature, compared to the provisions of the conflict of laws. These latter, in fact, only govern the choice of law and qualify the issue indirectly. If the issue concerns international sales, the closer and more 'specialised' source is the CISG, which contains uniform substantive provisions, rather than the Hague Convention of 1955, which establishes mere linking criteria for the identification of the applicable law.

After overcoming some initial uncertainties,⁶⁸ judges adopted this second solution on 29 December 1999, when the Tribunal of Pavia in *Tessile 21 v Ixela*, balancing the relationship between the CISG and the Hague Convention of 1955, held:

'(...) the reference to provisions of uniform substantive law (established by international conventions), which prevail over the conflict of laws provisions due to their specific nature, must be preferred over the reference

⁶⁷ In the same direction Corte di Appello di Milano 20 March 1998, *Rivista di diritto internazionale privato e processuale*, 170 (1998), *Diritto del commercio internazionale*, 455 (1999); and the already mentioned Corte di Cassazione 1 February 1999 no 6 n 63 above; Corte di Cassazione 14 December 1999 no 895 n 53 above; Corte di Cassazione 6 June 2002 no 8224 n 63 above, which ignore the Hague Convention of 1955, but permit the application of CISG through the filter of the conflict of laws provisions, rather than by virtue of its nature of *lex specialis* which directly regulates international sale (a peculiar opinion can be found especially in Corte di Cassazione 6 June 2002 no 8224, where, despite the fact that the contract *sub judice* has been qualified as a sale, the Court does not apply either the Hague Convention of 1955, or the CISG; the motivation is too short to draw from it the exact rule applied).

⁶⁸ On this point see, among others, T. Treves, 'Il labirinto della vendita internazionale' *Politica del diritto*, 97 (1973); M. Lopez De Gonzalo, 'Vendita internazionale' *Contratto e impresa*, 267 (1988).

to international private law'.⁶⁹

This opinion was confirmed by the Supreme Court.⁷⁰

Therefore, in reconstructing the rules governing international sales, Italian legal operators will have to verify the applicability of the CISG first; then, if necessary, the applicability of the Hague Convention of 1955; and finally, if the latter is entirely or partially non-applicable, the applicability of Regulation EC 593/2008 (or of the Rome Convention of 1980, if still pertaining to the sale in question).⁷¹

Nevertheless, this hierarchy of sources must not be evaluated in a mechanical way: in fact, if there is a trend towards the pre-eminence of uniform law conventions over conflict of law ones – ie a prevalence of the CISG over the Hague Convention of 1955 –, it is impossible not to remark the fact that the provisions on the conflict of laws normally entail the applicability of uniform law. Thus, if the requirement under Art 1, para 1, letter *a*), CISG, is not met – one of the two parties is not a contracting State –, letter *b* requires an assessment of the applicable law in accordance with the conflict of laws provisions,

⁶⁹ Tribunale di Pavia 29 December 1999, n 63 above; Tribunale di Vigevano 12 luglio 2000, *Giurisprudenza italiana*, 280 (2001), *Rivista di diritto internazionale privato e processuale*, 143 (2001) (on this judgement see F. Ferrari, 'Applying the CISG in a truly uniform manner: Tribunale di Vigevano (Italy), 12 July 2000' *Uniform Law Review*, 206 (2001); Id, 'Tribunale di Vigevano: Specific Aspects of the CISG Uniformly Dealt With' *Journal of Law & Commerce*, 225 (2001)); Corte di Appello di Milano 23 January 2001, *Rivista di diritto internazionale privato e processuale*, 1008 (2001); Tribunale di Rimini 26 November 2002, *Giurisprudenza italiana*, 896 (2003) (on this decision see F. Ferrari, 'International Sales Law and the Inevitability of Forum Shopping: A Comment on Tribunale di Rimini' *Vindobona Journal of International Commercial Law and Arbitration*, 1 (2004)); Tribunale di Padova 25 February 2004, *Giurisprudenza italiana*, 1402 (2004) (also L. Graffi, 'L'interpretazione autonoma della Convenzione di Vienna: rilevanza del precedente straniero e disciplina delle lacune' *Giurisprudenza di merito*, 867 (2004)); Tribunale di Padova 31 March 2004, *Giurisprudenza di merito*, 1065 (2004); Tribunale di Padova 11 January 2005 n 47 above; Tribunale di Rovereto 21 November 2007, available in English translation at <https://tinyurl.com/yy3xst39> (last visited 28 May 2019); Tribunale di Forlì 9 December 2008, available at <https://tinyurl.com/yxl2gf7c> (last visited 28 May 2019); Tribunale di Forlì 16 February 2009, (English translation at <https://tinyurl.com/y2vrmuj6>) (last visited 28 May 2019); Tribunale di Forlì 26 March 2009, available at <https://tinyurl.com/y2kjjww8o> (last visited 28 May 2019); and Tribunale di Forlì 6 March 2012 n 46 above.

⁷⁰ Corte di Cassazione 5 October 2009 no 21191 n 24 above; Corte di Cassazione 20 June 2007 no 14299, n 63 above, which fails to consider the Hague Convention of 1955, but affirms, however, the prevalence of the CISG over the provisions on conflict of laws, wrongly identified in those of the Rome Convention of 1980; Corte di Cassazione 20 April 2004 no 7503, *Rivista di diritto internazionale privato e processuale*, 111 (2005), which fails to verify the applicability of the Hague Convention of 1955; and subsequently Corte di Cassazione 20 September 2004 no 18902, available in English translation at <https://tinyurl.com/yydnemck> (last visited 28 May 2019).

⁷¹ The legge 31 May 1995 no 218, in accordance with Art 2, para 1, and more specifically Art 57, is in the background of the normative framework of international and EU law (Tribunale di Reggio Emilia 3 July 2000, available in English translation <https://tinyurl.com/y3rpdv5> (last visited 28 May 2019); see also Tribunale di Modena 19 February 2014, n 53 above, in particular para 6).

which means in accordance with the Hague Convention of 1955. The application of this latter, even if uncommon, can lead to an exclusion of the CISG, through an ‘interlocking puzzle’ which first confirms (under letter *a*), but then smoothens (under letter *b*) the hierarchy of sources.⁷²

2. Incomplete CISG

Despite being number one in the hierarchy of sources, the CISG does not provide an exhaustive regulation of international sales: just think of the wide variety of (unexpressed) external gaps and the provisions of Art 4 CISG. On the contrary, due to its limited substantive sphere of application, the Vienna Convention necessarily competes with other ‘non-specialised’ sources, such as private international law and international conventions on the conflict of laws pertaining to the case at issue. This not to mention the even more radical competition, of a different kind, between the CISG rules and those provided by the parties’ free will⁷³ or by *lex mercatoria*,⁷⁴ to which Arts 6 and 9 CISG refer. Therefore, in Italy, as well as in many other countries, the CISG appears to be insufficient for a full harmonisation and coordination, even supposing that these are realistic aims.⁷⁵

Yet, jurists have become familiar with non-self-sufficient statutes. European jurists, for instance, have been dealing for decades with an inevitably sectoral communitarian legislation that, combined to domestic one, results in a *Stufenbau* which is hard to unify.⁷⁶ They are required to make a further effort: it may be untrue that in the first half of the 1900 the national systems were nearly as complete and coherent as the ‘code ideology’ pretended them to be, but undoubtedly the current level of complexity is unprecedented in the history of contemporary law.⁷⁷ Supporting evidence seems to come right from international

⁷² The ‘interlocking puzzle’ is clear in the judgment of Tribunale di Reggio Emilia 3 July 2000 n 71 above.

⁷³ Nevertheless, freedom – in its private international meaning – is not unlimited, mainly as far as the mandatory national provisions are concerned: M. Lopez De Gonzalo, ‘Vendita internazionale’ n 68 above, 268-270.

⁷⁴ Fundamental, M.J. Bonell, *Le regole oggettive del commercio internazionale* (Milano: Giuffrè, 1976); F. Galgano, *La globalizzazione nello specchio del diritto* (Bologna: il Mulino, 2005); Id and F. Marrella, ‘Commercio internazionale’, in F. Galgano ed, *Trattato di diritto commerciale e di diritto pubblico dell’economia* (Padova: CEDAM, 2010), 432; A. Frignani and M. Torsello, ‘Gli usi nella Convenzione di Vienna sulla vendita internazionale di beni mobili’ *Contratto e impresa/Europa*, 407 (2013).

⁷⁵ Italian academics are doubtful in this respect, L. Mengoni, ‘L’Europa dei codici o un codice per l’Europa?’ *Rivista critica del diritto privato*, 515 (1992); *contra* M.J. Bonell, ‘La Convenzione di Vienna sulla vendita internazionale: origini, scelte e principi fondamentali’ *Rivista di diritto internazionale privato e processuale*, 715 (1990).

⁷⁶ Lately, M.W. Hesselink, ‘Contract theory and EU contract law’, in C. Twigg-Flesner ed, *Research Handbook* n 19 above, 508.

⁷⁷ A. Ruggeri, ‘Sistema integrato di fonti, tecniche interpretative, tutela dei diritti fondamentali’ *Politica del diritto*, 3 (2010). And in the light of such complexity, one perceives the inadequacy of the traditional criteria for antinomies’ resolution, when considered in their cold formal logic: *lex superior*, *lex posterior* and *lex specialis* still «exist», but nobody would think of using them

sales and ‘their own’ law.

The Vienna Convention itself is repeatedly concerned with highlighting its incompleteness; it does that by omitting some aspects which might be, after all, inferred *ratione materiae* (take Art 17 CISG, where nothing is said about the withdrawal of the offer); it does that by openly declaring its material incompetence (eg, Arts 4-5 CISG). Yet, even at a first glance, it is evident that between the matters expressly included and the matters expressly excluded lies a wide ‘grey zone’. Likewise, a first glance reveals that the borders of the covered and uncovered areas are blurred, with the usual non-conceptual and fairly colloquial approach. Expressions like formation of contract – a container rather than a portion of contract law – or rights and obligations listed in a quite *naïf* manner, or validity and effect (...) on the property, facilitate a dialogue, unite instead of dividing. The right expression is hard to find, but it looks like there is something nontechnical in the wording.

Though, one point must be considered uncontroversial. Given that a pure literal interpretation is impossible, the border between what is in and what is out of the Convention must be drawn according to the equivalence or the functional divergence of grounds and remedies, rather than their *nomen iuris* or their various local shapes.⁷⁸

Here as somewhere else, it feels like, in front of such a fossilised regulation as the CISG, the interpreter’s duty is to pursue an interpretative policy. A daring one could include in the scope of the Convention matters that are just mentioned or even implied; a cautious one may exclude all that is not regulated in detail, thus making it necessary to refer a large amount of unsolved questions to national law. When dealing with a light normative framework, to widen or narrow, strengthen or weaken, the role of the Convention in the current status of international trade is a matter of approach.⁷⁹

mathematically, as it was instead common at the times of statalist legalism: P. Perlingieri, *Diritto comunitario e legalità costituzionale. Per un sistema italo-comunitario delle fonti* (Napoli: Edizioni Scientifiche Italiane, 1992), 133; Id, ‘Una rivoluzione nel sistema delle fonti’, in N. Lipari ed, *Diritto privato europeo e categorie civilistiche* (Napoli: Edizioni Scientifiche Italiane, 1998), 49; Id, *Il diritto civile nella legalità costituzionale* n 5 above, 284, 592; recently Id, ‘I principi giuridici tra pregiudizi, diffidenza e conservatorismo’ *Annali SISDiC*, 1 (2017); G. Perlingieri, *Profili applicativi della ragionevolezza nel diritto civile* (Napoli: Edizioni Scientifiche Italiane, 2015), 96-97; P. Schlesinger, ‘La grande dicotomia’, in Id et al, *Studi in onore di G. Cian* (Padova: CEDAM, 2010), II, 2307.

⁷⁸ In the same sense, F. Ferrari, ‘The Interaction between the United Nations Conventions on Contracts for the International Sale of Goods and Domestic Remedies (Rescission for Mistake and Remedies in Tort Law)’ *Rechts Zeitschrift*, 52, 65 (2007); M. Tesaro, ‘Il concorso tra i rimedi contrattuali di cui alla Convenzione di Vienna sulla vendita internazionale di beni mobili (CISG) e i rimedi domestici’ *Contratto e impresa/Europa*, 319, 337 (2007).

⁷⁹ The system as a knowledge process, a product of applied hermeneutics: P. Perlingieri, ‘Interpretazione e applicazione: profili dell’individuazione normativa’ *Diritto e giurisprudenza*, 826 (1975).

IV. The Lack of Italian Case-Law

As the CISG has been part of the Italian legal system since 1 January 1988 and prevails over any other treaty on the subject of sales, one would expect a relevant number of cases, proportional to its age and preponderance in the framework of international sales. Actually such expectations are disappointed. From a quantitative point of view, there are fewer than fifty Italian judgments, and the analysis of the scarce material available increases a feeling of inadequacy, given that many of the judgments only deal with jurisdiction or the choice of the applicable law, without interpreting directly the provisions of the Convention.⁸⁰

This lack of cases may well appear to be inconsistent with the volume of Italian foreign trade, which perhaps is not comparable to that of other developed countries, but is still relevant both to exports and imports.⁸¹ On this point one can only make some assumptions, none of which is sufficient to explain the phenomenon. Nevertheless, altogether, such assumptions are capable of revealing the main reasons behind the lack of litigation.

First of all, it is well known that the normal practice in business-to-business contracts, with a particular focus on general terms and conditions for transnational business, mainly tends to exclude the application of the Convention, as per Art 6 CISG, and to choose the drafter's domestic law.⁸²

The influence of this practice seems to be even greater if we consider that, according to the *obiter dicta* of some Italian judgments – which have been confirmed in other countries – the exclusion of the CISG can be established not only expressly by an oral or written clause, but also by conduct, that is to say, through a certain behaviour, either simultaneous or subsequent to the contract formation, showing tacit consent.⁸³ It is superfluous to remark what a negative

⁸⁰ L. DiMatteo, 'The CISG across National Legal Systems', in Id, *International Sales* n 35 above, 594-595.

⁸¹ As an example, we can compare the amount of Italian cases to that of German cases: very close business partners give rise to a disproportioned number of cases, which cannot be merely explained by the greater dynamism or export trends of the German economy (see the report of S. Kröll and S. Kiene, 'Germany', in L. DiMatteo ed, *International Sales Law* n 35 above, 361, 377).

⁸² M.J. Bonell, 'Art 6' *Nuove leggi civili commentate*, 16 (1989); more recently, P. Mankowski, 'Artikel 6 CISG und Abbedingung der CISG' *Festschrift für Magnus* (München: Sellier, 2014), 255; U. Schroeter, 'Empirical Evidence of Courts' and Counsels' Approach to the CISG (with Some Remarks on Professional Liability)', in L. DiMatteo ed, *International Sales Law* n 35 above, 649; C. Giesecke, *Interessengerechte Rechtswahl im Kaufrecht* (Frankfurt a. M.: Nomos, 2014), *passim*. In the case law, BGH 4 December 1996, available at <https://tinyurl.com/y6o3pjcg> (English translation available at <https://tinyurl.com/yy24u9qy>) (last visited 28 May 2019).

⁸³ Tribunale di Vigevano 12 July 2000 n 69 above; Tribunale di Rimini 26 November 2002 n 69 above; Tribunale di Padova 25 February 2004 n 69 above; Tribunale di Padova 31 March 2004 n 69 above; Tribunale di Padova 11 January 2005, n 47 above; Tribunale di Forlì 9 December 2008 n 69 above; Tribunale di Forlì 16 February 2009 n 69 above; and S. Patti, 'Silenzio, inerzia e comportamento concludente nella Convenzione di Vienna sui contratti di vendita internazionale di beni mobili' *Rivista di diritto commerciale*, I, 135 (1991); similar questions are raised by the applicability of Art 11 CISG to the arbitration clause, which is not

impact would future case-law have on the identification of the applicable law if it ever took such an *obiter* as the *ratio decidendi*. In fact, such identification would depend upon conducts that cannot be unequivocally reconstructed and interpreted, especially when they are subsequent to the conclusion of the contract or to the rise of a dispute.

Nevertheless, according to this view, the exclusion does not depend upon the mere circumstance that the parties, in drafting procedural acts or during court hearings, have neglected to base their arguments on the CISG.⁸⁴ This is logical because no opt-out, even by conduct, can ever disregard the real intention of the parties to exclude the CISG⁸⁵ but those *obiter dicta*, favourable to the idea of an informal opt-out, appear not to be persuasive as a matter of method, and anyway irrelevant to the establishment of a general rule. It is true that Art 11 CISG makes freedom of form a basic principle of the Convention, in accordance with Art 7, para 2, CISG;⁸⁶ but it is also true that the opt-out, expressed or implied, does not belong to the subjects dealt with by the Convention (as the provisions of Art 6 CISG alone are irrelevant to that effect). Given that the Convention allows but does not regulate the opt-out – in other words, an external rather than internal gap – this latter does not fall under the general principles set by Art 7, para 2, CISG, but is left to the applicable law; and such law does not necessarily permit freedom of form.

Those *obiters* too, even though unconvincing, may have contributed to the lack of disputes. Undoubtedly, as a concurrent factor one can mention the general trend towards the exclusion of the CISG from business-to-business relationships, which drastically decreases the number of cases that can be decided on the

itself a subject dealt with by the Convention; further details in A. Janssen and M. Spilker, 'The relationship between the CISG and international arbitration: a love with obstacles?' *Contratto e impresa/Europa*, 44 (2015).

⁸⁴ Among others, very clearly, Tribunale di Padova 25 February 2004, n 69 above.

⁸⁵ See Tribunale di Vigevano 12 July 2000, n 69 above; in Germany, KG Berlin 24 January 1994, available at <https://tinyurl.com/y5yeocb6> (English translation at <https://tinyurl.com/yywa82pb>) (last visited 28 May 2019); OLG München, 9 July 1997 n 11 above; OLG Dresden 27 December 1999, available at <https://tinyurl.com/y5skokqe> (English translation at <https://tinyurl.com/y6dwdmd6>) (last visited 28 May 2019). *Contra*, OLG Saarbrücken 13 January 1993, available at <https://tinyurl.com/yxkq65tj> (last visited 28 May 2019); LG Landshut 5 April 1995, n 44 above; OLG Koblenz 20 January 2016, available at <https://tinyurl.com/y2r2ntbb> (last visited 28 May 2019). In any case, could all this happen through conduct, also? Could what is expressed through mere conduct rather than with words be really unambiguous? Caution is due, above all because once the application of the CISG has been excluded, it is not a forgone conclusion that the rules on conflict of laws allow the free choice by the parties of the applicable law; and anyway, this choice could not be implied through conduct: it is true that, according to the criticised thesis, the exclusion of the CISG could be implicit, but the eventual *professio juris* could not (provided that it is consistent with the rules on conflict of laws and the parties reach an agreement on that point).

⁸⁶ Corte di Cassazione 16 May 2007 no 1126, available at <https://tinyurl.com/y4n5cnkz> (last visited 28 May 2019); Corte di Cassazione 13 October 2006 no 22023, available at <https://tinyurl.com/y6x5v8wn> (last visited 28 May 2019). See also S. Patti, 'Art 11' *Nuove leggi civili commentate*, 44 (1989).

basis of the Convention.

Another question – which would go far beyond the scope of this essay – is why such mistrust still persists towards the CISG, as witnessed by the wide use of exclusions by conduct: certainly the reasons lie neither in the substance of the Convention nor in any negative remark on its quality, but rather in the fact that companies, not recruiting specialised personnel with specific legal and language skills, are not familiar with such rules. Further difficulties arise for small or medium-sized companies, which hold in Italy significant shares of the import and export markets.⁸⁷

It remains therefore more convenient and cheaper to choose domestic law, provided that the company, at the end of negotiations or in the act of setting general terms and conditions, is able to impose its choice on the other party; otherwise, mistrust towards the CISG could even lead to a missed agreement if one party, who might be in favour of the Convention, does not wish to be bound by the other party's domestic law.

It is also well-known that in business-to-business contracts, especially when the contracting companies are large and based in different countries, a wide use of arbitration clauses is made, by means of which any disputes or interpretative issues connected with the performance of the contract are transferred from domestic jurisdiction to (domestic or international) arbitration,⁸⁸ actually the most advanced case-law databases, and certainly those on the CISG, may register a considerable number of decisions, including domestic and international arbitration awards. Yet, for the same privacy concerns that make arbitration appealing in international disputes, an arbitration award is likely to remain secret indefinitely. Another portion of case-law could thus remain unknown to any official source, above all to the legal databases that control the market of juridical information.⁸⁹

Finally – still hypothetically speaking – a relevant role may be played by forum selection clauses, ie agreements on the derogation (or prorogation) of jurisdiction, as per Art 4, para 2, *legge* no 218/1995. Regardless of the law applied, whether it is the CISG or not, a case can be qualified as 'Italian' only if it was an Italian judge who decided it; if the parties excluded Italian jurisdiction in favour of the German or the Swiss one, the case would no longer be 'Italian'. This might explain, at least partially, the large number of cases decided in neighbouring countries, where Italian companies have more frequent trade relationships, for example Germany. The total number of cases under the CISG obviously does not change; what changes is the percentage of 'Italian' ones.

⁸⁷ O. Meyer, 'The CISG: Divergences between Success-Scarcity and Theory-Practice', in L. DiMatteo ed, *International Sales Law* n 35 above, 23.

⁸⁸ A. Janssen and M. Spilker, 'The relationship' n 83 above, 44; U. Draetta, 'La Convenzione delle Nazioni Unite del 1980 sui contratti di vendita internazionale di beni mobili e l'arbitrato' *Contratto e impresa/Europa*, 393 (2015).

⁸⁹ M.S. Newman, 'CISG Sources and Researching the CISG', in L. DiMatteo ed, *International Sales Law* n 35 above, 43.

Conversely, the lack of disputes is unlikely to depend on the little expertise of lawyers and judges:⁹⁰ exceptions are always possible, but, apart from them, it is hardly believable that the CISG is neglected in Italy because those who should apply it ignore its existence and decide on disputes that are regulated by the Convention in accordance with domestic law.⁹¹ But if this were true, scholars should undoubtedly feel responsible for having failed to make such provisions, which are in force and have a paramount importance for the Italian economy, better known and more widely applied.

V. Towards Supranational *Stare Decisis*?

1. ‘... Although not Binding ...’

If on one hand, the amount of cases is on the whole small, on the other hand the quality of the decisions interpreting and applying substantive provisions of the Convention can be considered high.⁹² First of all one can remark a proper use of autonomous interpretation, in accordance with the principles established by Art 7 CISG.⁹³

As far as method is concerned, the few Italian judgments highlight the importance of foreign case-law and its international reception, as an irreplaceable

⁹⁰ *Contra* M. Torsello, ‘Italy’, in F. Ferrari ed, *The CISG and its Impact on National Legal Systems* (München: Sellier, 2008), 215; and F. Ferrari, *The CISG and its Impact on National Legal Systems – General Report*, *ibid.*, 421.

⁹¹ Among others, U. Schroeter, *Empirical Evidence* n 82 above, 663.

⁹² It has been confirmed by foreign observers: C. Baasch Andersen, ‘The CISG in National Courts’, in L. DiMatteo ed, *International Sales Law* n 35 above, 72-73.

⁹³ As an example Tribunale di Padova 25 February 2004 n 69 above could be mentioned: ‘On the substantive side, it is necessary that the contract is a contract of sale, whose definition is not provided by (the CISG). However, the lack of an express definition should not lead to turning to a national definition, eg, as provided in Art 1470 Italian Civil Code. On the other hand, as with most of the concepts used in the (CISG) (among which that of ‘place of business’, ‘domicile’, and ‘goods’ but not the concept of ‘private international law’, which instead corresponds to the private international law of the forum), the concept of ‘sale’ has to be identified autonomously, without referring to any domestic definition’; in the same direction, among others, Tribunale di Padova 11 January 2005 n 47 above; Tribunale di Modena 9 December 2005, available at <https://tinyurl.com/yymwzncf> (last visited 28 May 2019); Tribunale di Forlì 9 December 2008 n 69 above; Tribunale di Forlì 16 February 2009 n 69 above; about these latter judgements, F. Ferrari, ‘Do Courts Interpret the CISG Uniformly?’, in F. Ferrari ed, *Quo Vadis CISG?* (München: Sellier, 2005), 3; and Tribunale di Forlì 6 March 2012 n 46 above. About Art 7 CISG, beyond the ‘historic’ M.J. Bonell, ‘Art. 7’, in C.M. Bianca and M.J. Bonell eds, *Commentary* n 10 above, 65; Id, ‘Art. 7 *Nuove leggi civili commentate*, 20 (1989); L. DiMatteo, ‘An International Contract Law Formula: The Informality of International Business Transactions Plus the Internationalization of Contract Law Equals Unexpected Contract Liability’ *Syracuse Journal of International Law and Commerce*, 79 (1997); Id, ‘Case Law Precedent and Legal Writing’, in A. Janssen and O. Meyer eds, *CISG Methodology* (München: Sellier, 2009), 113; F. Ferrari, *Homeward Trend: What, Why and Why Not*, *ibid.*, 171; Id, ‘Interpretation of the Convention and Gap-filling: Article 7’, in F. Ferrari, H.M. Flechtner and Brand eds, *The Draft Uncitral Digest and Beyond: Cases, Analysis and Unresolved Issues in the U.N. Sales Convention* (München: Beck, 2004), 138.

tool for ensuring uniformity and restricting ‘forum shopping’;⁹⁴ this is a point worth emphasising, as foreign precedents are not only mentioned but also applied in deciding cases.⁹⁵ This implies the undertaking of a real active or case-based comparative evaluation,⁹⁶ which is not a mere comparative argumentation,⁹⁷

⁹⁴ However, Tribunale di Rimini 26 November 2002 n 69 above, does not hide the difficulties of the battle against *forum shopping* in the application of uniform international law; and, as far as international sale is concerned, we cannot ignore that the CISG offers a wide-reaching but not exhaustive statute, so that there is a strong interest connected with several substantive and procedural aspects to choose the more ‘convenient’ jurisdiction.

⁹⁵ A leading example is Tribunale di Cuneo 31 January 1996, *Diritto del commercio internazionale*, 653 (1996). This decision is also interesting for the absence of *obiter dicta*, which are, on the contrary, very frequent in the other Italian CISG-related judgments. More recently, Tribunale di Forlì 26 March 2009 n 69 above and Tribunale di Reggio Emilia 12 April 2011 n 54 above.

⁹⁶ G. Alpa, ‘Comparazione e diritto straniero nella giurisprudenza della Corte di Giustizia dell’Unione europea’ *Contratto e impresa*, 879 (2016).

⁹⁷ Recently, U. Kischel, *Rechtsvergleichung* (München: Beck, 2015), 77. About the so-called ‘fifth’ method, ie the comparative one, among others: P. Häberle, ‘Grundrechtsgeltung und Grundrechtsinterpretation im Verfassungsstaat – Zugleich zur Rechtsvergleichung als ‘fünfter’ Auslegungsmethode’ *Juristen Zeitung*, 913-916 (1989); I. Zaitay, ‘Die Rezeption fremder Rechte und die Rechtsvergleichung’ *Archiv für die civilistische Praxis*, 361 (1957); B. Aubin, ‘Die rechtsvergleichende Interpretation autonom-internen Rechts in der deutschen Rechtsprechung’ *Rabels Zeitschrift*, 463-478, 458 (1970); B. Großfeld, ‘Vom Beitrag der Rechtsvergleichung zum deutschen Recht’ *Archiv für die civilistische Praxis*, 289, 303 (1984); U. Drobnig, ‘Rechtsvergleichung in der deutschen Rechtsprechung’ *Rabels Zeitschrift*, 621-624, 610 (1986); P. Volken, ‘The Vienna Convention: Scope, Interpretation and Gap-Filling’, in Id and P. Sarcevic eds, *International Sale of Goods. Dubrovnik Lectures* (New York: Oceana, 1986), 38; U. Everling, ‘Rechtsvereinheitlichung durch Richterrecht in der Europäischen Gemeinschaft’ *Rabels Zeitschrift*, 193 (1986); H. Kötz, ‘Alternativen zur legislatorischen Rechtsvereinheitlichung’, *ibid*, 218 (1992); M. Storme, ‘Rechtsvereinheitlichung in Europa’, *ibid*, 296 (1992); B. Markesinis, ‘Il ruolo della giurisprudenza nella comparazione giuridica’ *Contratto e impresa*, 1356 (1992); Id, ‘Judge, Jurist and the study and use of foreign law’ *Law Quarterly Review*, 622 (1993); W. Odorsky, ‘Harmonisierende Auslegung und europäische Rechtskultur’ *Zeitschrift für Europäisches Privatrecht*, 1 (1994); R. Legeais, ‘L’utilisation du droit comparé par les tribunaux’ *Revue internationale de droit comparé*, 347 (1994); C. v. Bar, ‘Vereinheitlichung und Angleichung von Deliktsrecht in der Europäischen Union’ *Zeitschrift für Rechtsvergleichung*, 230-231 (1994); U. Drobnig, ‘The Use of Foreign Law by German Courts’, in Id and S. van Erp eds, *The Use of Comparative Law by Courts* (The Hague: Kluwer Law International, 1999), 127; A. Somma, *L’uso giurisprudenziale della comparazione nel diritto interno e comunitario* (Milano: Giuffrè, 2001), 258; R. Calvo, ‘Il valore del precedente extrastatuale nell’interpretazione della disciplina interna sulle vendite al consumo’ *Contratto e impresa/Europa*, 289-292 (2007); Id, ‘Il precedente extrastatuale tra fonti comunitarie e unitarietà del sistema giuridico: spunti per un dibattito’ *Contratto e impresa/Europa*, 3 (2008); Id, ‘La giurisprudenza come fonte del diritto comune moderno?’ *Contratto e impresa/Europa*, 1 (2009); C. Baldus, ‘Il valore del precedente extrastatuale nell’applicazione del diritto interno: un punto di vista tedesco di diritto privato comunitario’ *Contratto e impresa/Europa*, 4 (2008); M. Gebauer, ‘Il valore del precedente extrastatuale nell’applicazione del diritto interno: un (altro e diverso) punto di vista tedesco di diritto privato comunitario’ *Contratto e impresa/Europa*, 14 (2008); G. Hirsch, ‘Das Netzwerk der Präsidenten der obersten Gerichte der Europäischen Union’ *Zeitschrift für Europäisches Privatrecht*, 1 (2009); M.R. Ferrarese, ‘Il diritto comparato e le sfide della globalizzazione. Oltre la forbice differenze/ somiglianze’ *Rivista critica del diritto privato*, 369, 388 (2013); M. Andenas and D. Fairgrieve eds, *Courts and Comparative*

but a carefully reasoned use of foreign precedents.

In spite of this, the judgments clarify that foreign case-law, even though worthy of consideration, ‘is not binding’. It seems rather like a stock phrase by which they do weaken – or pretend to – the value of the foreign binding precedent; an almost fixed formula follows:

‘(...) foreign case-law (...), which, *although not binding*, is however to be taken into consideration as required by Art 7, para 1, of the UN Convention’ (emphasis added).⁹⁸

But the expression ‘although not binding’ sounds so little genuine that it raises doubts on its substance. Italian judges have rejected the idea of an internationally binding precedent, but actually they uphold it every time they apply the CISG and comply with the principles established by foreign courts.⁹⁹

If it is so, we should not overrate the expression ‘although not binding’: the internal or foreign precedent will not be considered when the factual requirements are not met – common law courts have elaborated highly refined techniques in the article of distinguishing¹⁰⁰ or when an error *in iudicando* or *in procedendo* occurs; but these derogations to the binding force of the precedent are quite obvious, even to the common law judicial tradition. No one, anywhere in the world, would think of following a precedent which does not apply to the current facts or is vitiated by procedural or substantive errors.

Beyond such cases, on the other hand, there is no reason to reject the authority of internal or foreign precedents applying the CISG;¹⁰¹ and it is right

Law (Oxford: Oxford University Press, 2015); M.P. Mantovani, ‘Usò dell’argomento comparativo a fini ermeneutici’ *Contratto e impresa/Europa*, 550 (2016).

⁹⁸ Tribunale di Pavia 29 December 1999 n 63 above; the formula occurs, nearly unchanged, in Tribunale di Vigevano 12 July 2000 n 69 above; Tribunale di Rimini 26 November 2002 n 69 above; Tribunale di Padova 25 February 2004 n 69 above; Id 10 January 2006, *Giurisprudenza italiana*, 1016 (2006), *Giurisprudenza di merito*, 1408 (2006), *Rivista di diritto internazionale privato e processuale*, 147 (2007); in Tribunale di Forlì 6 March 2012 n 46 above; but not in Tribunale di Padova 11 January 2005 n 47 above.

⁹⁹ C. Baasch Andersen, ‘Uniformity in the CISG in the First Decade of its Application’, in I. Fletcher, L. Mistelis and M. Cremona eds, *Foundations and Perspectives* n 5 above, 295-297.

¹⁰⁰ M. Bin, *Il precedente giudiziario* (Padova: CEDAM, 1995), 41; the topic is extremely wide: G. Gorla, ‘Precedente giudiziale’ *Enciclopedia Giuridica* (Roma: Treccani, 1990), XXIII, 4-5; D. Freda, *Una dispotica creazione* (Torino: Giappichelli, 2012); M. Serio, ‘Il valore del precedente tra tradizione continentale e common law: due sistemi ancora distanti?’ *Rivista di diritto civile (Supplemento annuale di studi e ricerche)*, 109 (2008); M. Croce, ‘Precedente giudiziale e giurisprudenza costituzionale’ *Contratto e impresa*, 1117 (2006); B. Markesinis, ‘Studying Judicial Decisions in the Common Law and the Civil Law: A Good Way of Discovering Some of the Most Interesting Similarities and Differences that exist Between these Legal Families’, in M. Van Hoecke and F. Ost eds, *The Harmonisation of European Private Law* (Oxford: Hart Publishing, 2000), 117; the ‘Italian’ F. Wieacker, ‘Legge e arte giudiziale’, in Id et al, *Studi in memoria di Lorenzo Mossa* (Padova: CEDAM, 1961), III, 628.

¹⁰¹ Again, L. DiMatteo, ‘An International Contract Law Formula’ n 93 above, 79; Id, *Case Law Precedent* n 93 above, 113. *Contra*, among others, H. Kronke, ‘Ziele-Methoden, Kosten-

in Art 7, para 1, CISG that the legal and rational basis of this supranational *stare decisis* are to be found. In the context of conventional interpretation the binding force of precedent is instrumental to an international harmonisation of *res judicata*, which mirrors the uniformity of the applicable contract law.¹⁰²

2. Detractors

The majority view, according to which foreign precedents have no binding force, regardless of Art 7, para 1, CISG, is based essentially on two arguments, one practical, the other technical: as to the former, requiring a national judge to possess perfect knowledge of the case-law of the whole world would mean exceeding his knowledge and skills, as he should collect and study a huge amount of cases in foreign languages; as to the second, a supranational *stare decisis* would require an equally supranational judicial system supervised by a supreme judge with the power of ensuring uniform application of the Convention.¹⁰³

These two arguments can be easily refuted. The amount of material to be collected and studied may be large, but whether it is averagely larger than the one needed to decide a domestic case, where the influence of foreign precedents remains marginal, one can hardly tell; on the other hand, CISG databases are very functional, they improve accessibility to the sources by making them easily available in English, also remotely. The practical problem does not seem to frustrate any ambitions towards an international uniformity of case-law.¹⁰⁴

As to the lack of a supreme judge with a so-called ‘nomophylactic’ function, the creation of another international judicial body does not appear fundamental: would the supreme judges of the single states not be sufficient? If a domestic decision infringes Art 7, para 1, CISG for having disregarded a foreign precedent without motivating, would it not be enough to address the Court of Appeals or the national Supreme Court? The crucial point is the need to enhance the mandatory nature of Art 7, para 1, CISG (the same nature which pertains to Art 2, para 2, legge no 218/1995): the uniform supranational application of the Convention is not a general trend of legislative policy, a *minus quam perfecta* recommendation, but a legal rule with a binding nature; if this is so, the decision unduly neglecting a foreign precedent also infringes Art 7, para 1, CISG. Should

Nutzen: Perspektiven der Privatrechts-harmonisierung nach 75 Jahren UNIDROIT’ *Juristen Zeitung*, 1152 (2001); U. Magnus, ‘Wiener UN-Kaufrecht (CISG)’ *Staudingers Kommentar zum BGB* (Berlin: Sellier, De Gruyter, 2013), 194-195; M. Torsello, ‘Il valore del precedente extrastatuale nell’applicazione del diritto interno: circolazione del formante giurisprudenziale e uso della giurisprudenza straniera nelle corti italiane’ *Contratto e impresa/Europa*, 26, 31 (2009).

¹⁰² W. Odersky, ‘Harmonisierende Auslegung’ n 97 above, 1; H. Kötz, ‘Alternativen’ n 97 above, 218; C. v. Bar, ‘Vereinheitlichung’ n 97 above, 230-231; and M. Storme, ‘Rechtsvereinheitlichung’ n 97 above, 296.

¹⁰³ In this direction, among Italian scholars, M. Torsello, ‘Il valore del precedente extrastatuale’ n 101 above, 19.

¹⁰⁴ Tribunale di Rimini 26 November 2002 n 69 above.

this violation not be considered equivalent to any other violation of a mandatory provision, with all the related consequences under domestic procedural and substantive law?

But if the problem lies in the word 'binding' or the expression '*stare decisis*', it would probably be enough to use other expressions without, however, changing the substance. The substance is that, despite the words used, the courts follow foreign precedents and consider Art 7 CISG as a mandatory provision. The expression 'although not binding' is therefore superfluous and misleading.

VI. Topics Based on Real Cases: Good Faith and *Venire Contra Factum*

1. CISG *ex Fide Bona*

It is above all in interpreting and applying general clauses that lie the risk of a 'homeward trend'. Actually, while general clauses grant that flexibility being essential for the survival of the system, the loose way in which they have been used, for instance in the DCFR and in the CESL draft, is far from convincing. It feels like such a loose attitude has been imposed by the need to overlook matters where a better compromise could not be reached, rather than by the intent to smoothen and complete analytic rules, which are rigid and characterising by nature. Such was the essence of general clauses in the Italian Civil Code of '42.¹⁰⁵ That is exactly what happened during the drafting of the Vienna Convention, when divergences began to blaze among the various delegations. There is really no need of so many 'empty boxes',¹⁰⁶ 'a danger to the law and the state'.¹⁰⁷

Furthermore, in the context of CISG an extra difficulty arises: concretisation (or *Konkretisierung*) must be undertaken on the basis of a text that has proven lacking and artificial from the beginning, which is in need of a gap-filling rather than ready to fill, itself, other gaps.¹⁰⁸ On one hand, general clauses were born to refer to the judge matters that remained intentionally or inevitably unsolved at a legislative stage, but on the other hand, at least, traditional codes provided a

¹⁰⁵ S. Rodotà, 'Il tempo delle clausole generali' *Rivista critica del diritto privato*, 728 (1987); P. Rescigno, 'Appunti sulle «clausole generali»' *Rivista di diritto commerciale*, I, 1 (1998); G. Teubner, 'Legal Irritants: Good Faith in British Law or How Unifying Law Ends Up in New Divergences' *Modern Law Review*, 11 (1998); L. Lombardi Vallauri, 'Norme vaghe e teoria generale del diritto' *Jus*, 25 (1999); L. Mengoni, 'Autonomia privata e costituzione', in C. Castronovo, A. Albanese and A. Nicolussi eds, *Scritti*, I, *Metodo e teoria giuridica* (Milano: Giuffrè, 2011), 110.

¹⁰⁶ P. Perlingieri, 'Obbligazioni e contratti' *Annuario del contratto 2016* (Torino: Giappichelli, 2017), 213.

¹⁰⁷ J.W. Hedemann, *Die Flucht in die Generalklauseln* (Tübingen: Mohr, 1933); G. Teubner, *Standards und Direktiven in Generalklauseln* (Frankfurt a. M.: Athenaeum, 1971), 115.

¹⁰⁸ Among others, M. Franzen, *Privatrechtsangleichung* n 15 above, 504, 536; and M. Pennasilico, *Metodo e valori nell'interpretazione dei contratti. Per un'ermeneutica contrattuale rinnovata* (Napoli: Edizioni Scientifiche Italiane, 2011), 61, 110.

well-grounded framework for giving meaning to legislative formulas; whereas a recollection of partial and scarcely cohesive rules is not the best guideline for the judge.¹⁰⁹ In such a context he is likely to resort to domestic law, which he perceives as more familiar and structured for problem solving, rather than to uniform international law.¹¹⁰ Therefore, the risk arises that general clauses even more than norms, above all when numerous and located in crucial points, lead to a revival of a wide interpretative regionalism.¹¹¹

The judgment by the Tribunal of Padova in *So.m.agri v Erzeugerorganisation Marchfeldgemüse* seems influenced by domestic law.¹¹² The Austrian seller of agricultural products, after waiting around six months for the payment of the agreed price, filed a lawsuit against the Italian buyer, without previously sending him a warning or giving him a deadline for performance. The Tribunal (after pointing out that if the buyer is not bound by agreement or usage to pay at any other specific time, he must pay within the time established by Art 58 CISG),¹¹³ notes that the expiry of the time limit automatically implies that the buyer falls into arrears without requiring any formal notification, as per Art 59 CISG.¹¹⁴ It is true that Art 63, para 1, CISG allows the seller to give the buyer a *Nachfrist* of performance (and this must be of a reasonable length of time to allow late payment); but it is not compulsory for the seller to set a final deadline by which the contract must be performed to avoid its termination. We cannot apply the rule according to which the seller is entitled to a remedy on condition that he previously established a deadline for performance. Nevertheless, the time set by Art 58 CISG cannot be identified with the same accuracy by both parties: the buyer may not know the exact moment from which the goods are at his disposal. Therefore, whenever the seller had not even ascertained the expiry of the payment deadline, a claim for termination would be against the principle of good faith. And

¹⁰⁹ S. Rodotà, 'Le clausole generali nel tempo del diritto flessibile', in A. Orestano ed, *Lezioni sul contratto* (Torino: Giappichelli, 2009), passim; Id, 'Il tempo delle clausole generali' n 105 above, 721; Id, *Le fonti di integrazione del contratto* (Milano: Giuffrè, 1969), 150; P. Perlingieri, 'Interpretazione assiologica e diritto civile' *Le Corti salernitane*, 478 (2013); R. Zimmermann and S. Whittaker eds, *Good Faith in European Contract Law* (Cambridge, UK: Cambridge University Press, 2000), passim; F.D. Busnelli, 'Note in tema di buona fede ed equità' *Rivista di diritto civile*, I, 537 (2001); M. Pennasilico, 'Legalità costituzionale e diritto civile' *Rassegna di diritto civile*, 840 (2011); E. Navarretta, 'Good Faith and Reasonableness in European Contract Law', in J. Rutgers and P. Sirena eds, *Rules and Principles in European Contract Law* (Cambridge, UK: Intersentia, 2015), 135.

¹¹⁰ S. Grundmann and D. Mazeaud eds, *General Clauses and Standards in European Contract Law* (The Hague: Kluwer Law International, 2006), passim.

¹¹¹ R. Zimmermann, 'The Present State of European Private Law' *American Journal of Comparative Law*, 479 (2009).

¹¹² Tribunale di Padova 25 February 2004 n 69 above.

¹¹³ In the same direction Tribunale di Padova 31 March 2004 n 69 above.

¹¹⁴ Yet again Tribunale di Padova 31 March 2004 n 69 above confirmed this opinion; see also G. Cottino, 'Artt 57-59' *Le nuove leggi civili commentate*, 261 (1989).

‘the conduct of the contracting parties must be pursuant to the principle of good faith which – since it is one of the general principles on which (the CISG) is based (...) – must not only influence the entire regulation of the international sale (...), but also supplies an essential standard for the interpretation of the rules set forth in the CISG’.¹¹⁵

First, the Tribunal pointed out in *obiter* the following: as the lawsuit of the Austrian seller was filed approximately six months after the expiry of the payment deadline and the Italian buyer had had every opportunity to make amends, the alleged violation of good faith for recklessness of remedy is inconsistent with the facts and was mentioned only as an example.¹¹⁶ Secondly, the consideration seems to be the result of a heteronomous interpretation of Art 7, para 1, CISG, which does mention good faith, but as a rule for the interpretation of the Convention, rather than for the performance of the contract; the modification of good faith from a rule for the interpretation to a rule for contract performance appears to be due to the variety of meanings that it carries in continental Europe – above all in Germany and in Italy –¹¹⁷ but finds only a weak basis in the Convention itself.¹¹⁸

This argument is therefore the result of a ‘homeward trend’, unless we clarify which of the Convention’s principles is implied and its source.¹¹⁹ In any case, we should go beyond Art 7, para 1, CISG, which does not appear adequate

¹¹⁵ On this specific point see G. Eörsi, ‘General Provisions’, in N.M. Galston and H. Smit eds, *International Sales: The United Nations Convention on Contracts for the International Sale of Goods* (Chicago: Bender, 1984), para 2.03; F. Dienes, ‘La bonne foi, la coopération et la raisonnable dans la Convention des Nations Unies relative à la vente internationale de merchandise (CVIM)’ *Journal de droit international*, I, 82 (2002).

¹¹⁶ A reference to good faith appears in Tribunale di Busto Arsizio 13 December 2001 *Rivista di diritto internazionale privato e processuale*, 150 (2003); but not only is it *obiter*, it is also useless as to the corroboration of the opinion.

¹¹⁷ F. Wieacker, *Zur rechtstheoretischen Präzisierung des § 242 BGB* (Tübingen: Mohr, 1956), passim; J.P. Dawson, ‘The general clauses, viewed from a distance’ *Rabels Zeitschrift*, 441 (1977); K. Larenz, *Lehrbuch des Schuldrechts, I, Allgemeiner Teil* (München: Beck, 1987), 125; A. Guarneri, ‘Le clausole generali’, in G. Alpa et al eds, *Le fonti del diritto italiano, 2, Le fonti non scritte e l’interpretazione*, in *Trattato di diritto civile-Sacco* (Torino: UTET, 1999), 137; V. Roppo, ‘Il contratto’ *Trattato di diritto privato-Iudica and Zatti* (Milano, 1st ed: Giuffrè, 2001), 493; M.W. Hesselink, ‘The Concept of Good Faith’, in A.S. Hartkamp et al eds, *Towards a European Civil Code* (Alphen aan den Rijn: Kluwer Law International, 2011), 619; F.D. Busnelli, ‘Idee-forza costituzionali e nuovi principi: sussidiarietà, autodeterminazione, ragionevolezza’ *Studi in onore di G. Iudica* (Milano: Giuffrè, 2014), 241; F. Piraino, *La buona fede in senso oggettivo* (Torino: Giappichelli, 2015), 147; C. Schubert, ‘§ 242’ *Münchener Kommentar zum BGB* (München: Beck, 2016), 72.

¹¹⁸ F.G. Mazzotta, ‘Good Faith Principle: Vexata Quaestio’, in L. DiMatteo ed, *International Sales* n 35 above, 120, 129; P.J. Powers, ‘Defining the Undefinable: Good Faith and the United Nations Convention on Contracts for the International Sale of Goods’ *Journal of Law & Commerce*, 333 (1999).

¹¹⁹ Similarly Tribunale di Rovereto 21 November 2007 n 69 above; but here too the claim is not grounded on any provisions on good faith in its continental meaning, as a fundamental principle of the Convention.

for the purpose, and ask ourselves what are the potentials of Art 9, para 2, CISG, where the Convention qualifies international trade usage as a source of law; however, would not this simple operation also represent a symptom of ‘homeward trend’? In any case, Art 9, para 2, CISG should be more rooted in Italian case-law.¹²⁰

2. No *Contra Factum* when CISG Applies

In *Scatolificio La Perla v M. Frischdienst*, similar to the case mentioned above, the Tribunal of Padova invoked the prohibition of *venire contra factum proprium* as a fundamental principle of the Convention.¹²¹ The German seller, in placing the goods at the Italian buyer’s disposal, gave him extended payment terms – around fifty days from the delivery date. Despite the fact that the parties had not agreed otherwise and Art 58 CISG provides that the payment has to be made at the very moment of placing the goods at the buyer’s disposal, in the case at issue the buyer could have fallen into arrears only at the expiry of the fixed time, and not at the expiry of the time which would otherwise follow from Art 58 CISG. In fact, the seller did not offer to the buyer a *Nachfrist* – up to that moment there had been no breach of contract –, but merely a delay. The Tribunal refers to the prohibition of *venire contra factum proprium*, which is evidently close to the ‘continental’ good faith. There is nevertheless some ‘homeward trend’ in referring this prohibition to the ‘principles of the Convention’ without specifying what the principle at issue is and where we should identify its basis in the Convention; it is as if the experience gained in dealing with domestic law had made that research superfluous. In this case too, as already underlined, Art 9 CISG may help.¹²²

Provisions like Art 9 CISG cast light, even in the field of the Vienna Convention, on a phenomenon which is among the most remarkable in the trade practice and consequently in the very general theory: what could be defined as the prevalence of contracting over contract, of the activity over the result. Contracting means something more than one single outcome of the contractual activity,¹²³ and in business-to-business contracts a deal-by-deal regulation tends to be replaced

¹²⁰ F. Galgano and F. Marrella, *Commercio* n 74 above, 432.

¹²¹ Tribunale di Padova 31 March 2004 n 69 above; see F. Astone, *Venire contra factum proprium* (Napoli: Edizioni Scientifiche Italiane, 2006); and F. Festi, *Il divieto di ‘venire contro il fatto proprio’* (Milano: Giuffrè, 2007).

¹²² B. Zeller, ‘The Observance of Good Faith in International Trade’, in A. Janssen and O. Meyer eds, *CISG Methodology* n 93 above, 133; U. Magnus, *Wiener UN-Kaufrecht* n 101 above, 190-191, 196, 217; about Art 9 CISG, in the Italian case-law, Corte di Appello di Genova 24 March 1995 *Diritto del commercio internazionale*, 734 (1997), and (in English translation) at <https://tinyurl.com/y3zlfes6> (last visited 28 May 2019); among Italian scholars, M.J. Bonell, ‘Art 9’, in C.M. Bianca and M.J. Bonell eds, *Commentary* n 10 above, 103; Id, ‘Art 9’ *Le nuove leggi civili commentate*, 37 (1989).

¹²³ P. Femia, ‘Nomenclatura del contratto o istituzione del contrarre? Per una teoria giuridica della contrattazione’, in G. Gitti and G. Villa eds, *Il terzo contratto* (Bologna: il Mulino, 2008), 271.

by some kind of ‘umbrella agreement’.¹²⁴ Its formation begins with the first meeting of minds but, once the connection is created, rights and obligations converge in a *continuum* that transcends all subsequent moments.

This deals neither with duration relationships nor with linked contracts. The point is rather the creation of an unplanned *continuum* resulting from a sequence of contracts which, taken individually, are instantaneous-performance (performance can be deferred but is neither continuous nor periodical). Here is another sign of the impossibility to reduce the relationship within the meshes of the contract; and the ‘*prius*’ influences the ‘*posterius*’, the past marks the future. Agreed usages and established practices are like the case-law of the relationship, which – just to push the metaphor further – is not made up by the isolated precedent but by the gradual consolidation of precedents, by the progressive repetition of conducts (regardless if material or legal), and therefore by the mutual reliance that all of this entails and guards.

In this light, the meagre wording of Art 9, para 1, CISG acquires a deep-seated meaning, not because it is embodied in a regulation, but because it mirrors what traders normally think and how they normally act.¹²⁵

Therefore, the fact that continental good faith has a weak basis in the Convention does not mean that this latter neglects some aspects, even relevant ones, which German or Italian jurists are accustomed to include under that general clause.¹²⁶ That might sound a forgone assumption, yet it reveals helpful in smoothening the debate (and the frequent reluctance of operators and commentators with an American background). Very often the conventional *humus* is useful to the purpose, as it encourages looking beyond exteriority, following the method taught by the very best comparative theory.

VII. Formation of the Contract and Battle of Forms

In *Takap v Europlay*, ruled by the Tribunal of Rovereto,¹²⁷ a dispute arose between the parties on a forum selection clause in favour of the Dutch jurisdiction. Although the Italian seller, to obtain a payment injunction, addressed the Italian judge, the Dutch buyer counterclaimed that the jurisdiction belonged to Dutch courts pursuant to a forum selection clause which was incorporated into the contract as per Art 23 letter *b* of the Regulation EC 44/2001 (then replaced by

¹²⁴ C. Mak, ‘The Role of Trade Usages in the CESL’ *European Contract Law Review*, 64 (2014).

¹²⁵ What has been neglected by BGH 24 September 2014, *BGHZ*, 202, 258; also available at <https://tinyurl.com/y6cd2mvj> (last visited 28 May 2019) (see U. Magnus, ‘UN-Kaufrecht – Aktuelles’ n 34 above, 148-149).

¹²⁶ The same should be said about Art 77 CISG: U. Magnus, ‘Remedies: Damages, Price Reduction, Avoidance, Mitigation, and Preservation’, in L. DiMatteo ed, *International Sales* n 35 above, 279-281.

¹²⁷ Tribunale di Rovereto 21 November 2007 n 69 above.

Regulation (UE) no 1215/2012);¹²⁸ the question was whether the clause was a term of the contract agreed upon by the parties or not.

The Tribunal, after having decided for the applicability of the EC Regulation, had to verify the fulfilment of the requirements established by Art 23, para 1, letters *a*, *b* and *c*, as to the validity and effectiveness of the forum selection clause, but first of all, it had to ascertain if the clause had been properly agreed upon, given that it had not been negotiated, but simply included in the form drafted by the purchaser.

The question is a key point in the CISG and in the history of every national legal system: how are standard terms and conditions incorporated into the contract without having been individually negotiated or accepted (technically speaking) by the other party?¹²⁹ In this case too, there is a high risk of ‘homeward trend’, as the issue, due to the relevant interpretative matters, gives rise to a heated debate in all legal systems. This leads to extremely different solutions, all aimed at balancing opposing interests.

If the CISG were to be applied – as the case deals with the formation of the agreement, a matter covered by the Convention –¹³⁰ the internal gap would have to be filled with a rule which cannot be inferred from a literal interpretation, but only from general principles under Art 7 CISG.¹³¹

In the case at issue, the buyer claimed that he had always sent the other party written offers, expressly mentioned in the body of the document embodying general terms and conditions: this way of bringing the conditions to the other party’s notice would have allowed their incorporation into the contract, as they were immediately accessible to the offeree, who could accept them or not. The same cannot be said for the other standard clauses. These latter should have

¹²⁸ See below, para III.

¹²⁹ L. Raiser, *Das Recht der allgemeinen Geschäftsbedingungen* (Bad Homburg: 1935, reprint 1961), 59–64, 109, 237, 281–283, 324, 502; F. Kessler, ‘Contracts of adhesion – Some Thoughts About Freedom of Contract’ *Columbia Law Review*, 629, 640 (1943); T.D. Rakoff, ‘Contracts of Adhesion: An Essay in Reconstruction’ *Harvard Law Review*, 1173 (1982–1983). But also, T. Wilhelmsson, ‘Standard Form Conditions’, in A.S. Hartkamp et al eds, *Towards a European Civil Code* n 118 above, 571; A.M. Garro, ‘Rule-Setting by Private Organisations, Standardisation of Contracts and the Harmonisation of International Sales Law’, in I. Fletcher, L. Mistelis and M. Cremona eds, *Foundations and Perspectives* n 5 above, 310.

¹³⁰ The assumption is unchallenged, even if, strictly speaking, the incorporation of standard terms is not even mentioned in the CISG: W.A. Achilles, ‘Art 14’, in J. Ensthaler ed, *Gemeinschaftskommentar zum Handelsgesetzbuch mit UN-Kaufrecht* (München: Beck, 2015), § 6; U. Schroeter, ‘Art 14’, in P. Schlechtriem and I. Schwenzer eds, *Kommentar zum einheitlichen UN-Kaufrecht – CISG* (München: Beck, 2013), § 33; and F. Ferrari, ‘Art 14’, in S. Kröll, L. Mistelis and P. Perales Viscasillas eds, *UN Convention on Contracts for the International Sale of Goods (CISG)* (München: Beck, 2011), § 38; U. Magnus, ‘Incorporation of Standard Terms’, in L. DiMatteo et al eds, *International Sales* n 35 above, 246.

¹³¹ All this needs to be updated and maybe rethought in light of the more recent techniques for distance contracting: M. Zachariasiewicz, ‘Inclusion of Standard Terms in Electronic Form under the CISG’, in I. Schwenzer and L. Spagnolo eds, *The Electronic CISG* (The Hague: Kluwer Law International, 2017), 95.

been brought to the other party's notice in addition to the clauses contained in the offer, and the law cannot require the other party to make efforts to become aware of them.¹³²

No evidence of such incorporation was produced in court and, moreover, evidence was given that the buyer had replied to the offers with letters of acceptance in which his own standard terms and conditions were written and countersigned.

At this point, two overlapping lines of argument remain: if the form drafted by the buyer was neither knowable nor known to the seller – as emerged from the enquiries – also the forum selection clause in favour of the Dutch courts could not be considered valid, as there had been no agreement. The fact that the seller had shown an intention to incorporate his own form in the contract, which had no forum selection clauses, is irrelevant: such form would have been the only one to be incorporated in the contract without affecting jurisdiction.

Conversely, if the forms of both parties had fulfilled the minimum 'noticeability' requirement for incorporation, a battle of forms would have arisen. The Tribunal mentioned it, but it was clearly *obiter*, because evidence was produced that the buyer's form had not been incorporated into the contract. In any case, the seller's form, embodied in the letter of confirmation subsequently countersigned by the buyer, would have prevailed over the one drafted by the buyer. In fact, the buyer's form materially modifying the offer in line with Art 19, para 3, CISG, would have qualified the letter of confirmation as a new offer, then accepted by the original offeror upon signing the confirmation. In the end, if there had been a battle of forms, the prevalence of the seller's form would have prevented the application of the forum selection clause.

The *obiter* can be criticised as it includes the battle of forms in the scope of Art 19 CISG – which instead refers to individual negotiations –¹³³ but cannot be considered the product of regional 'bad' influences, representing on the contrary an open application of CISG rules and principles. The fact that Art 19 CISG bears a similarity to Art 1326, mainly in its para 5, Civil Code, is coincidental.

It is not appropriate to talk about 'homeward trend' when dealing with the judgment of the Tribunal of Rovereto in *Euroflash v Arconvert*:¹³⁴ as in *Takap v Europlay* (a more recent case), the problem was the effectiveness of a forum selection clause embodied in the (Italian) seller's form, which the (French) buyer alleged not to have agreed upon; the whole form had been written at the bottom of the order confirmation by which the seller had declared his acceptance of the

¹³² For an even more formalist approach, see Cour d'Appel de Paris 13 December 1995, available at <https://tinyurl.com/y2scz6rc> (last visited 28 May 2019).

¹³³ For this opinion, see E. Ferrante, 'Battle of Forms and the 1980 United Nations Convention on Contracts for the International Sale of Goods (CISG). A note on the BGH (German Supreme Court) decision of 9 January 2002' *Uniform Law Review*, 977-978 (2003).

¹³⁴ Tribunale di Rovereto 24 August 2006, available at <https://tinyurl.com/yyzyr3bc> (last visited 28 May 2019).

seller's offer: in this way the form was brought to the buyer's notice, but there was no evidence that he had specifically accepted it and, moreover, no commercial or normative usage could allow an interpretation of the buyer's conduct as an acceptance.

In the Tribunal's view the acceptance was not compliant with the offer and therefore amounted to a counter-offer which needed a new acceptance by the original offeror. Given that the original offeror had not declared anything and there was no usage between the parties which permitted acceptance by conduct, the forum selection clause could not be considered as accepted and could not establish jurisdiction in favour of Italian courts, which was in itself excluded by Regulation EC 44/2001.

The decision is peculiar in three respects: first of all, the opinion according to which general terms and conditions require actual acceptance, similar to the one required for the other terms of the offer, as if the distinction between unilateral clauses and negotiated clauses would fade (and such a rule could neither apply to Art 14 et seq. CISG, nor to Art 1326 et seq. Italian Civil Code); secondly, if the opinion is reliable, the Tribunal should have drawn the conclusion that not only the forum selection clause, but the whole agreement was void (which can be deduced both from Art 19, paras 1 and 3, CISG, and from the 'mirror image rule' of Art 1326, para 5, Italian Civil Code); finally, it is clear that the solution adopted – according to which the forum selection clause is void for lack of consent, while the contract itself remains valid – is inconsistent both with the CISG (especially with Art 19, para 3) and with the Italian Civil Code, which has no similar provision. In any case, regardless of the positive or negative remarks, the decision is not the result of a 'homeward trend'.

VIII. Reasonable Time for the Notice of Lack of Conformity

It is well known that another crucial issue concerns Art 39 CISG, and in particular the meaning of reasonable time for giving notice of the lack of conformity.¹³⁵ Regarding this issue, in order to evaluate the free interpretation of the Italian judge deciding international cases, a preliminary remark needs to be made: while the CISG relies on the general clause of reasonable time,¹³⁶ Art 1495, para 1, Italian Civil Code fixes a time limit of merely eight days. The reasonableness of time, therefore, is ascertained by a judge who is accustomed to applying a very short time limit. Actually, it is not just an opposition between

¹³⁵ On this point, see A. Janssen, 'La durata dei termini d'ispezione e di denuncia di non conformità dei beni nella Convenzione di Vienna: la giurisprudenza dei giudici nazionali a confronto' *Contratto e impresa/Europa*, 1321 (2003); already before, F. Frattini, 'Art 39' *Le nuove leggi civili commentate*, 176 (1989); and K. Sono, 'Art 39', in C.M. Bianca and M.J. Bonell eds, *Commentary* n 10 above, 303.

¹³⁶ The formula of reasonable time has been expressly qualified as a 'general clause' by Pretura di Torino 30 January 1997 n 51 above.

a long and a short period of time, but a final cut between a normative technique aimed at flexibility and another aimed at rigidity, between a widely and a narrowly discretionary solution.

In *Sport D'Hiver v Ets Louys et Fils* the Tribunal of Cuneo,¹³⁷ given that the flexibility of the general clause 'will have to be measured on the basis of a case-by-case approach', established that a delay of twenty-three days in giving notice of lack of conformity of the goods sold (clothes) was not reasonable, and that the buyer had lost the right to rely on this provision.

Besides the strict observance of foreign case-law, two implied criteria of evaluation emerge from this decision: first of all, the measure of reasonableness should depend on the facts, rather than on systematic needs or analogy;¹³⁸ secondly, it could consist of an extension of the time limits fixed by the Italian Civil Code – a period longer than eight days can indeed be reasonable – but we should not lose sight of balance: eight days as well as twenty-three can be a reasonable time but, evidently, somewhere in-between would be more desirable.

Less relevant than it appears is the case *C. & M. v Bakintzopoulos*, where the Pretura of Turin,¹³⁹ in deciding on a notice which had been given seven months after the delivery of the goods (cotton fabrics), held that the reasonable time had expired and the buyer had lost his right to rely on it. Similarly, in *Rheinland Versicherungen v Atlarex*, the Tribunal of Vigevano,¹⁴⁰ after emphasising the need to consider the nature of the goods sold, excluded the reasonableness of a notice given four months after the delivery of the goods (rubber plates). The smaller degree of relevance of these latter cases depends on the fact that, in both, the notice was given quite a long time after delivery, so that it was clear from the beginning and *prima facie* that the buyer had lost his right to rely on the lack of conformity.

The same remarks apply to *Officine Maraldi v Intesa BCI*, decided by the Tribunal of Forlì,¹⁴¹ where the notice was given more than thirteen months after delivery, despite the non-perishable nature of the goods (petrol tanks), clearly leading to the loss of the right to rely on the lack of conformity; and similarly for *Zintix v Olitalia*, decided by the same Tribunal, where the notice was given after about fifteen months.¹⁴²

¹³⁷ Tribunale di Cuneo 31 January 1996 n 95 above.

¹³⁸ G. Alpa, 'L'analogia', in G. Alpa et al eds, 'Le fonti del diritto italiano, 2, Le fonti non scritte e l'interpretazione' *Trattato di diritto civile Sacco* (Torino: UTET, 1999), 297, 330.

¹³⁹ Pretura di Torino 30 January 1997 n 51 above.

¹⁴⁰ Tribunale di Vigevano 12 July 2000 n 69 above. Restricting our analysis to the reasonable time of notice, in the judgment at issue all the observations on the relevance of contractual freedom, on the *dies a quo* in case of hidden defects and on the burden of proof are out of the *ratio decidendi*, given that the buyer had lost his right to rely on the lack of conformity. Anyway, here there was no agreement between the parties on fixing the time limits (see instead, Tribunale di Foggia 21 June (*rectius*, 3 July) 2013, available at <https://tinyurl.com/y5xae264> (last visited 28 May 2019)) and the judge believed that the nature of the defect had not been proved.

¹⁴¹ Tribunale di Forlì 16 February 2009 n 69 above.

¹⁴² Tribunale di Forlì 26 March 2009 n 69 above, which, actually, refuses the idea, drawn from foreign case-law, that, for the purposes of Art 39 CISG, reasonable time means one

Yet, against such trend stands the Tribunale di Bolzano in *Ecogen Holding v Isolcell Italia*:¹⁴³

‘With regard to the reasonable time (sometimes defined as a ‘general clause’), the (Italian) courts have held that it shall be determined on a case by case basis, thus by taking into consideration the circumstances of the case, and the nature of the contracted goods. For instance, the reasonable time for a notification referring to perishable goods is shorter than the one related to non-perishable goods. In the case at hand the parties contracted for the sale of industrial machines, and therefore the reasonable time period shall not be interpreted narrowly. This court is of the opinion that in this case, the four months period preceding the notification is a reasonable period of time’.

The opposition between the abovementioned decision and *Rheinland Versicherungen v Atlarex* is evident, as in that case (rubber plates) a notice given after four months was considered untimely. The distinction between perishable and non-perishable goods may be illustrative – the delay appears more excusable in the first case – but does not prevent the judge from more tailor-made assessments within one or the other category. Regardless of such *tranchant* classifications, goods can be more or less perishable and justify longer or shorter periods for the notice. Actually, according to our case-law industrial machineries are less perishable than rubber plates, so four months must be considered reasonable in the first case but not in the second one; or rather, instead of the major or minor perishability, one must distinguish between goods for which it is easier to ascertain the defect, where a short time-limit sounds convincing, and goods for which it is more difficult and thus a longer time-limit is more suitable.

The judgment by Tribunale di Bolzano is relevant also under another aspect. The seller attempted to invoke the applicability of Art 1495, para 3 Italian Civil Code, which fixes a time limitation of one year from the delivery. It is clear that such argument implied the exclusion of time limitation from the matters covered by the Convention and the consequential need to identify the applicable law (in that case, Italian law).

The Tribunal, though, denies such exclusion from the scope of the CISG – it will thus be only an apparent or literal gap – but, in spite of that, recognises that a possible annual time limitation is inconsistent with Art 39, para 2, CISG. This latter, in fact, qualifies as untimely ‘in any event’ the notice given after more

month: in fact, such a ‘generalisation’ would end up in a sort of presumption, which, once stratified in the precedents, would determine a permanent inversion of the burden of proof (as a result of such reasoning it would be up to the seller to prove that the notice exceeded the time limits). In the same direction, Id 6 March 2012 n 46 above.

¹⁴³ Tribunale di Bolzano 27 January 2009, *Giurisprudenza italiana*, 2436 (2009), case-note by Reinstadler, also available in English translation at <https://tinyurl.com/yy95ylzz> (last visited 28 May 2019) (where the following sentences appear).

than two years from the delivery and such time limit, the expire of which makes the buyer loose 'the right to rely on a lack of conformity of the goods', cannot but prevail over any other. A system which permits to give notice of the defects after two years from the delivery but prevents legal action after one year would be unconceivable. Well, the inclusion of time limitation in the scope of the Convention remains questionable – to tell the truth, the opposite view is prevailing¹⁴⁴ –, but in any case the possible hetero-supplementation by the applicable law must lead to harmonising outcomes.

The most recent Italian case-law on reasonable time shows a stronger compliance with foreign precedents: in *Kiessling v Serenissima CIR* the Tribunale di Reggio Emilia held that

'(...) with regard to the reasonable time period indicated in Art 39 of the CISG the prevailing case-law indicates that a period of one month (or a maximum of two months under specific conditions, that are not met in the present case) from the time when the buyer could (or should) have examined the goods can be considered adequate'.¹⁴⁵

In *Expoplast v Reg Mac* the Tribunal of Busto Arsizio needed to concentrate on the *dies a quo* (regarding the discovery of the defect) and the requirement of specificity – 'specifying the nature of the lack of conformity' – established as per Art 39, para 1, CISG, rather than on the reasonableness of time.¹⁴⁶ As far as the first point is concerned, after confirming the need for a case-by-case approach that takes into account the nature and type of the lack of conformity,¹⁴⁷ the exact fixing of the *dies a quo* was said to depend on the exteriority of the defect. If an examination is necessary to discover it, as in the case at issue, the time for the notice cannot run from the delivery, but only from the results of the examination, bearing in mind the limit of two years established by Art 39, para 2, CISG. This is a common argument in Italian case-law, where the very short time limits fixed for domestic sale by Art 1495, para 1, Italian Civil Code – the already-mentioned eight days – have led to a heated debate on the *dies a quo*, which is not expressed in such narrow terms. Nevertheless, the decision of the Tribunal seems to be free from national prejudice, given that also Art 38, para 1, CISG permits a minimum delay for a further examination of the goods, which is not feasible on delivery.¹⁴⁸

As far as the profile of specificity is concerned, the judgment tends to mediate between two opposing needs: on one hand, the need not to worsen excessively

¹⁴⁴ U. Magnus, *Wiener UN-Kaufrecht* n 101 above, 141-142, 203; and F. Ferrari, 'Art 4', in P. Schlechtriem and I. Schwenzer eds, *Kommentar* n 131 above, 118-119.

¹⁴⁵ Again, Tribunale di Reggio Emilia 12 aprile 2011 n 54 above; that translation is to be found at <https://tinyurl.com/y5xd9b3w> (last visited 28 May 2019).

¹⁴⁶ Tribunale di Busto Arsizio 13 December 2001 n 116 above.

¹⁴⁷ In the same direction, as already said, Tribunale di Cuneo 31 January 1996 n 95 above.

¹⁴⁸ F. Frattini, 'Art 38' *Le nuove leggi civili commentate*, 171 (1989).

the buyer's position, by requiring notice with detailed and motivated content similar to expert evidence; on the other, the need to prevent the seller from being at the mercy of the buyer's complaints and give him the opportunity to amend the lack of conformity depending on specifically identified defects. Also here the nature of the goods sold plays a relevant role, because examining clothes¹⁴⁹ or fabrics¹⁵⁰ is different from examining rubber plates¹⁵¹ or, as in the case in question, complicated machinery for industrial production. A trade-off formula follows:

'(...) the burden of proof on the timely notice of the lack of conformity as it appears is on the buyer, but he is not required to prove also the specific cause of it'.

Notice is itself an extrinsic act, so it does not require an explanation of the reasons on which the alleged lack of conformity is based; we should bear in mind that notice neither amounts to a lawsuit, nor requires the buyer to identify a breach on the other party's side.

In *Al Palazzo v Bernardaud* the Tribunal of Rimini,¹⁵² having referred to the principles already established by previous decisions, nonetheless specified that the buyer only needs to give notice within a reasonable time in order not to lose his right to rely on the lack of conformity, while the requirement to examine the goods within as short a period as is practicable is merely secondary and accessory. It must be said that, if the reasonable time is respected – and the buyer is entitled to all the remedies provided for by the Convention – what might the consequence of a late examination be? Logic prevails over practical needs: if the short time-limit for the examination aims to ensure the reasonableness of the time-limit for notice, but this latter is in practice respected, it follows that the examination must be considered timely as well. However, this latter could be absolutely superfluous and therefore omitted by the buyer if the lack of conformity is immediately noticeable without any examination.

In the case in question, the Tribunal unsurprisingly excluded the timeliness of notice, once it was proven that it had been given six months after delivery of the goods, a period of time which can hardly raise doubts as to the non-reasonableness of the delay (despite the buyer's attempt to allege the circumstances provided by Arts 40 and 44 CISG, without succeeding in proving the factual elements).

Among the several *obiters* found throughout the judgment, one of them is worth noticing, even though irrelevant to the decision itself: in recalling the criterion of reasonableness in fixing the time as per Art 39 CISG, the Tribunal –

¹⁴⁹ Tribunale di Cuneo 31 January 1996 n 95 above.

¹⁵⁰ Pretura di Torino 30 January 1997 n 51 above.

¹⁵¹ Tribunale di Vigevano 12 July 2000 n 69 above.

¹⁵² Tribunale di Rimini 26 November 2002 n 69 above.

in addition to the parties' agreement,¹⁵³ the circumstances of the case¹⁵⁴ and the nature of the goods¹⁵⁵ – refers to any usage agreed upon and any practices established as per Art 9 CISG. Further elaborating on the Tribunal's decision, we could ask ourselves whether any previous conduct of mutual tolerance – which proves not so rare in the case-law available – necessarily entails an extension of the reasonable time whenever one party relied on the other party's conduct and collaborative attitude. Such reliance on the other party's good disposition towards out-of-court arrangements might lead to delays in giving notice, or to notice whose reasonableness would not be held if not by virtue of the previous fiduciary relationship between the parties.

Finally, in *Mitias v Solidea* the Tribunal of Forlì,¹⁵⁶ confirming the solutions found in the previous case-law, specified that if the seller, as a consequence of the buyer's complaints, offers a remedy to amend the lack of conformity, the complaints amount to a timely notice: the seller's admissions would be equivalent to attesting the reasonableness of the time period of notice. It would have been much easier to apply Art 40 CISG directly, which fully resolves the question.¹⁵⁷

This leads us back to the premises: a judge who, in the conventional system, is supposed to spell out the reasonable time requirement under Art 39 CISG, in the domestic one is required to 'coldly' apply the eight days' time limit provided by Art 1495, para 1, Italian Civil Code; and it appears now evident, in the light of the abovementioned case law on international sales, that a time limit of eight days for the notice of defects is all but reasonable, and the status of sales contracts regulated by the code is not acceptable anymore.¹⁵⁸

Then, the remedy is neither trying to postpone the *dies a quo*,¹⁵⁹ nor excessively

¹⁵³ Again Tribunale di Vigevano 12 July 2000 n 69 above.

¹⁵⁴ Tribunale di Cuneo 31 January 1996 n 95 above; Tribunale di Busto Arsizio 13 December 2001 n 116 above.

¹⁵⁵ Pretura di Torino 30 January 1997 n 51 above; but also, Tribunale di Vigevano 12 July 2000 n 69 above.

¹⁵⁶ Tribunale di Forlì 9 December 2008 n 69 above.

¹⁵⁷ See also Cour de Cassation 4 November 2014, available at <https://tinyurl.com/y497ejkw> (last visited 28 May 2019). Among Italian scholars, F. Frattini, 'Art 40' *Le nuove leggi civili commentate*, 183 (1989). The decision by Tribunale di Forlì 9 December 2008 n 69 above is also remarkable as it confirms that within the system of values of the CISG, the remedy of avoidance is *extrema ratio*, as it is always subdued to the fundamental breach and it implies the breaking-off of the relationship, and the entitlement to restitutionary remedies; despite the fact that Art 1455 Italian Civil Code uses the expression 'of non-scarce importance', which appears to be something less severe than the fundamental breach, Tribunale di Padova 11 January 2005 n 47 above claimed that there is a 'correspondence of meanings' between the two formulas, which promotes a harmonic interpretation of the CISG together with domestic law.

¹⁵⁸ Uniform private international law therefore amounts to a normative expression of reasonableness, emergence point of values and principles whose application is cross-context (G. Perlingieri, *Profili applicativi della ragionevolezza* n 77 above, 22 n 49). This can and must lead, if that is the case, to a rethinking of the system as a whole (G. Alpa, *Diritto privato europeo* (Milano: Giuffrè, 2016), 69).

¹⁵⁹ D. Rubino, 'La compravendita' *Trattato di diritto civile e commerciale Cicu-Messineo-Mengoni-Schlesinger* (Milano: Giuffrè, 1971), 831; C.M. Bianca, 'La vendita e la permuta' *Trattato*

widening the concepts of ‘recognition’ or ‘concealment of the defect’ under Art 1495, para 2, Civil Code.¹⁶⁰ Instead, the solution lies in acknowledging that, in light of the hints coming from uniform international law – and of the related need for a certain unity of the system despite the stratification of sources¹⁶¹ – Art 1495, para 1, Italian Civil Code is – or ‘has become’ – unconstitutional. In fact, this latter provision is against Art 3 Cost on the grounds of an unreasonable use of legislative discretion,¹⁶² and contradicts what Art 24, paras 1 and 2 Cost and Art

di diritto civile Vassalli (Torino: UTET, 1993), 1027. See also Corte di Cassazione 30 August 2000 no 11452, *Giurisprudenza italiana*, 1133 (2001); Corte di Cassazione 14 May 1990 no 4116, available at www.dejure.it; Corte di Cassazione 14 February 1994 no 1458, *Repertorio del Foro italiano*, 1994 entry *Vendita* no 61, but also available at www.dejure.it; in the same direction, before, Corte di Cassazione 8 July 1995 no 7541, *Guida al diritto*, 39 (1995).

¹⁶⁰ Again D. Rubino, *La compravendita* n 160 above, 838, 840; C.M. Bianca, *La vendita* n 160 above, 1034, 1040. About the Italian case-law, Corte di Cassazione 15 March 2004 no 5251, available at www.dejure.it (*contra*, the ‘ancient’ Tribunale di Napoli, 20 August 1946, *Monitore dei Tribunali*, 585 (1946)); Corte di Cassazione 12 June 1991 no 6365, available at www.dejure.it; before, Corte di Cassazione 24 July 1968 no 2678, *Massimario del Foro italiano* (1968); Corte di Appello di Napoli 17 January 1974, *Diritto e giurisprudenza*, 129 (1975); see also, Corte di Cassazione 20 April 2012 no 6263, *Notariato*, 366 (2012); and Corte di Cassazione 13 January 1995 no 381, *Corriere giuridico*, 607 (1995) (*contra* Corte di Cassazione 21 April 2005 no 13294, *Giustizia civile*, I, 2955 (2005); more case-law in A. Cerulo, ‘Riconoscimento dei vizi della cosa venduta e novazione dell’obbligazione’ *La Nuova giurisprudenza civile commentata*, II, 425 (2006)).

¹⁶¹ P. Perlingieri, ‘Nuovi profili del contratto’, in Id, *Il diritto dei contratti tra persona e mercato. Problemi del diritto civile* (Napoli: Edizioni Scientifiche Italiane, 2003), 421; Id, *L’ordinamento vigente e i suoi valori. Problemi del diritto civile* (Napoli: Edizioni Scientifiche Italiane, 2006), 327; Id, *Il diritto civile nella legalità costituzionale* n 5 above, 198; in the same direction, G. Perlingieri, ‘Invalidità delle disposizioni «mortis causa» e unitarietà della disciplina degli atti di autonomia’ *Diritto delle successioni e della famiglia*, 145-146 (2016).

¹⁶² About reasonableness as a constitutional standard, G. Perlingieri, *Profili applicativi della ragionevolezza* n 77 above, 29, 44, 56; G. D’Amico, *Clausole generali e ragionevolezza*, in Id et al, *I rapporti civilistici nell’interpretazione della Corte costituzionale. La Corte costituzionale nella costruzione dell’ordinamento attuale. Principi fondamentali* (Napoli: Edizioni Scientifiche Italiane, 2007), I, 429; A. Ruggeri, ‘Interpretazione costituzionale e ragionevolezza’, in Id et al, *I rapporti civilistici nell’interpretazione della Corte Costituzionale* (Napoli: Edizioni Scientifiche Italiane, 2007), II, 215; O. Clarizia, ‘*Tertium comparationis*, norma eccezionale e incostituzionalità con effetto estensivo’, in P. Femia ed, *Interpretazione a fini applicativi e legittimità costituzionale* (Napoli: Edizioni Scientifiche Italiane, 2006), 171; more generally, L. Paladin, ‘Corte costituzionale e principio generale d’eguaglianza’ *Giurisprudenza costituzionale*, I, 222 (1984); A. Pizzorusso, ‘Clausole generali e controllo di costituzionalità delle leggi’ *Politica del diritto*, 655 (1988); A. Cerri, ‘Ragionevolezza delle leggi’ *Enciclopedia del diritto* (Roma: Treccani, 1994), XXV, 2; A. Morrone, *Il custode della ragionevolezza* (Milano: Giuffrè, 2001), *passim*; L. D’Andrea, *Ragionevolezza e legittimazione del sistema* (Milano: Giuffrè, 2005), *passim*; F. Modugno, *La ragionevolezza nella giustizia costituzionale* (Napoli: Edizioni Scientifiche Italiane, 2007), 12; in the North-American world, among others, G.P. Fletcher, ‘The Right and the Reasonable’ *Harvard Law Review*, 949 (1985). And while the reach of reasonableness goes beyond the constitutional parameter of Art 3 Constitution (F. Sorrentino, *Le fonti del diritto italiano* (Padova: CEDAM, 2009), 131), it nevertheless finds in such parameter its highest expression (G. Scaccia, *Gli «strumenti» della ragionevolezza nel giudizio costituzionale* (Milano: Giuffrè, 2000), 14; and H. Hanau, *Der Grundsatz der Verhältnismäßigkeit als Schranke privater Gestaltungsmacht* (Tübingen: Mohr Siebeck, 2004), 93).

47 EU Charter provide as to the right to an effective remedy.¹⁶³

Consequently, given both the unconstitutional formula of Art 1495, para 1, Civil Code and the impossibility of a constitutionally-oriented interpretation,¹⁶⁴ a ruling by the Italian Constitutional Court would be indispensable.

IX. The CISG as a ‘Tool Box’ (Towards a CISG-Based Judicial Review?)

Also in Italy the Convention plays a role which goes far beyond its sphere of application and normative value. As stated from the beginning, it has gradually increased its cultural and paradigmatic function, which represents after all its highest form of legitimacy.¹⁶⁵ First of all, there is evidence that the CISG is a tool for interpreting other international Conventions and EU acts in force. In particular, Italian case-law has made a wide use of the Convention to clarify the meaning, first, of Art 5, no 1, of the Brussels Convention of 1968 (‘on the jurisdiction and enforcement of judgments in civil and commercial matters’, ratified by legge no 804 of 21 April 1971), and then of Art 5, no 1, Reg EC 44/2001 (‘on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters’), which has transposed the provisions of the Convention and replaced it ‘among the member-States’ (as follows from Art 68, para 1, Regulation EC 44/2001). Something similar is certainly to happen with the more recent Regulation EC 1215/2012, of which Art 7, no 1, reproduces Art 5, no 1, Regulation EC 44/2001.

Just to consider the most recent judgments issued on the basis of this Regulation EC 44/2001, rather than of the ‘old’ Brussels 1968, a controversial matter concerns the operational requirements of the special jurisdiction provided by Art 5, especially no 1, letter *b*, Regulation EC 44/2001: as we are dealing with sales, the exception to the general jurisdiction established by Art 2, para 1, Regulation EC 44/2001 is possible when the judge has jurisdiction in ‘the place (...), situated in a member-State, where the goods have been or should have

¹⁶³ At a European level see, Joined Cases C-402/05 and C-415/05 *Kadi/Al Barakaat Intern. Found. v Council/Commission*, [2008] ECR I-6351; Case C-47/07, *Masdar v Commission*, [2008] ECR I-9761; and Case C-432/05, *Unibet v Justitiekanslern*, [2007] ECR I-2271.

¹⁶⁴ Per tutti, P. Perlingieri, ‘Giustizia secondo Costituzione ed ermeneutica. L’interpretazione c.d. adeguatrice’, in P. Femia ed, *Interpretazione a fini applicativi* n 163 above, 3, 60; Id, *L’ordinamento vigente* n 161 above, 371.

¹⁶⁵ For the sake of brevity we omit any reference to other para-normative values of the CISG: in European law – and, consequently, in Italian law – the Convention has repeatedly operated as a ‘tool box’ even *de jure condendo*; it is well known that a large part of the *acquis communautaire*, at least in contract law, has been built on the model of the CISG, which has provided not only a huge background of ideas, but also provisions which have been literally copied and transposed into the EU legislative acts; we are especially thinking about the important EU Directive 1999/44/EC and – just to quote a modern example – the recent proposal for a ‘Common European Sales Law’, that is to say COM(2011) 635 final.

been delivered', that is to say, the place where the obligation has or should have been performed (*forum destinatae solutionis*). If the contract does not say anything on this point – which is rather common – we must adopt some criteria to clearly identify the legal place of delivery (also when delivery has not taken place and represents the controversial issue). In doing this, the judges, despite some dissenting opinions,¹⁶⁶ rely on Art 31 CISG, which incorporates detailed and comprehensive provisions.¹⁶⁷

In this case, the CISG is used as a real argument for interpretation: provisions are interpreted according to the meaning suggested by one or more CISG rules, which are respected as a 'cultural paradigm' rather than for their being applicable to the case at stake.

The paradigmatic meaning and value of the CISG is so strong that Italian case-law has used some of its provisions to interpret even domestic law: the Italian Constitutional Court, called upon to rule on the constitutionality of Art 1510, para 2, Italian civil code, which in relation to sales including transport provides that 'the seller is discharged from the obligation to deliver when he hands the goods to the carrier', confirmed that it is consistent with the Constitution because it is consistent with Arts 31 and 67 CISG.¹⁶⁸

In *F.A.S. Italiana v Ti.Emme* the subject-matter of the referral was the alleged inequality of treatment between the seller's liability in case of 'sales & shipping' and the ordinary seller's vicarious liability. In fact, in the first case,

¹⁶⁶ See Tribunale di Rovereto 28 August 2004, available at <https://tinyurl.com/y6pp76v5> (last visited 28 May 2019); Tribunale di Rovereto 24 August 2006 n 134 above, but also Corte di Cassazione 5 October 2009 no 21191 n 24 above; and, more recently, Corte di Cassazione 10 February 2017 no 3558, available at <https://tinyurl.com/yxpkuvzd> (last visited 28 May 2019).

¹⁶⁷ Corte di Cassazione 24 June 2007 no 13891, available at www.dejure.it, also available (but only per abstract) at <https://tinyurl.com/y6sf9u2f>; Corte di Cassazione 3 January 2007 no 20436, *Rivista di diritto internazionale privato e processuale*, 1105 (2007) (English translation available at <https://tinyurl.com/y4a3txp2>) (last visited 28 May 2019); Corte di Cassazione 27 September 2006 no 20887, *Giustizia civile*, I, 1393 (2007); Tribunale di Padova 10 January 2006 n 98 above; Tribunale di Verona 21 December 2006, available at <https://tinyurl.com/y3zvba80> (last visited 28 May 2019); but also Corte di Cassazione 18 October 2002 no 14837, available at www.dejure.it, available (per abstract) at <https://tinyurl.com/yxvserpc> (last visited 28 May 2019); Corte di Cassazione 10 March 2000 no 14837, *Foro Italiano*, I, 2226 (2000), *Rivista di diritto internazionale privato e processuale*, 773 (2000); Corte di Cassazione 5 November 1998 no 11088, available at www.dejure.it, available (in English translation) at <https://tinyurl.com/yxvg2bev> (last visited 28 May 2019); Corte di Cassazione 7 August 1998 no 7759, available at www.dejure.it, available at <http://www.unilex.info/cisg/case/348> (last visited 28 May 2019) and (in English, per abstract) at <https://tinyurl.com/y6jq8pg5> (last visited 28 May 2019); Corte di Cassazione 8 May 1998 no 4668, *Rivista di diritto internazionale privato e processuale*, 290-294 (1999), also available at <https://tinyurl.com/y4exp6c> (last visited 28 May 2019); in a different sense, as already reported, Corte di Cassazione 5 October 2009 no 21191 n 24 above; and Corte di Cassazione 10 February 2017 no 3558 n 166 above.

¹⁶⁸ Corte Costituzionale 19 November 1992 no 465, *Giurisprudenza costituzionale*, 4191 (1992); *Foro italiano*, I, 3201 (1992); *Giustizia civile*, I, 313 (1993); *Diritto del commercio internazionale*, 446 (1995). See on that decision, L. DiMatteo, 'The CISG across National Legal Systems', in Id, *International Sales* n 35 above, 602.

thanks to the referred provision, the seller is relieved from liability as soon as he delivers the goods to the shipper or the carrier, while in the second case, by virtue of Art 1228 Italian Civil Code, the seller is always liable for the intentional or negligent conduct of its auxiliaries. In the referring judge's opinion, it would be irrational and unreasonable to treat the two situations differently, as shippers and carriers are, after all, auxiliaries; and the parameter adduced by the judge is Art 3 Cost. The Court adopted an opposite view and, on the grounds of the symmetry existing between the controversial provision and the uniform international sales law, rejected the referral.¹⁶⁹

Such an intrusion of CISG into domestic case-law, where the quotation of foreign precedents or legislation is on the whole rare and the very comparative argument not so common, appears to be considerably significant. Yet, maybe the resort to the Vienna Convention has wider margins of success compared to the import of foreign law: in fact, the CISG enshrines rules and principles that, filtered by the lively experience of trade and merged to various extent in the communitarian legislation as well as in the soft law, provide a map of universally acknowledged mental schemes; therefore a prominent map, but also a map ready to be used, as moulded by practice. This contributes to ensure the compliance of the Italian Civil Code with the Constitution, by expressing shared and internationally-recognised values and principles.¹⁷⁰

The battle against 'homeward trend' in the interpretation of the Convention could now be replaced by the battle for 'CISG-trend' in the interpretation of domestic law: would it be too premature to envisage a CISG-based judicial review? Maybe yes, but that could be the fullest and ultimate sense of the thirtieth birthday of CISG in Italy.

¹⁶⁹ (...) it was not properly pleaded for, as element of comparison of the rule that the remitting judge [a quo] hypothesises unreasonably different, the principle of the debtor's (buyer's) liability, who in carrying out his duties avails of third parties performances (Art 1228 Cc), if one considers that the returning of the goods to the carrier already fulfils the seller's obligation of delivery. This latter principle is in force in the legal systems of other countries with legal traditions close to ours. Also, it finds a clear legislative expression in any systems where sales contracts have, instead, only obligatory effects (§ 447 of the German Civil Code), and not real effects as is the case in the Italian legal framework provided by the Civil Code. The transfer of risk from the seller to the buyer upon the delivery of the goods to the carrier responds also to a principle, previously affirmed in Art 19 of the Convention on the Uniform Laws on the International Sale of Moveable Goods (ULIS) (adopted in The Hague 1 July 1964 and ratified with the L. 21 June 1971, n. 816), which has been confirmed by Arts 31 and 67 of the United Nations Convention on Contracts for the International Sale of Goods (adopted in Vienna 11 April 1980, ratified with the L. 11 December 1985, n. 765, which entered into force on 1 January 1988) (translation available at <https://tinyurl.com/y3hasyyd>) (last visited 28 May 2019).

¹⁷⁰ The exact correspondence between the rules of the Convention and the code's provisions excludes from the beginning the suspect of 'homeward trend': see Corte di Cassazione 3 January 2007 no 20436 n 167 above.