3 Prospect, Benefits and Dangers of Expansion of the CISG – The Case Study of Prescription

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3.1 Introduction

The text of the CISG has remained unchanged since the time of its conclusion on 11 April 1980, and its coming into force on 1 January 1988. Nevertheless, the CISG's text should not be considered divorced from all other context. The CISG represents a key milestone along a much broader path towards the harmonization and unification of international sales law,[1] commonly understood to have its origins in the 1920s with the work of Ernst Rabel and the International Institute for the Unification of Private Law (UNIDROIT).[2] Furthermore, the CISG itself is subject to development even though its text remains unchanged. It is applied by courts and tribunals,[3] and is the subject of commentary[4] and

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1 J. Felemegas, 'The United Nations Convention on Contracts for the International Sale of Goods: Article 7 and Uniform Interpretation', *Pace International Law Review*, 2002, pp. 157-158.

2 I. Schwenzer, P. Hachem & C. Kee, *Global Sales and Contract Law*, Oxford University Press, Oxford, 2012, p. 35, para. 3.08; P. Schlechtriem & I. Schwenzer, 'Introduction', *in* I. Schwenzer (Ed.), *Schlechtriem & Schwenzer: Commentary on the UN Convention on the International Sale of Goods (CISG)*, 3rd edition, Oxford University Press, Oxford, 2010, p. 1.

3 *See*, *e.g.*, Pace Law School, *Country Case Schedule*, Albert H. Kritzer CISG Database, available at <http://www.cisg.law.pace.edu/cisg/text/casecit.html>; UNCITRAL, *Case Law on UNCITRAL Texts (CLOUT)*, available at <http://www.uncitral.org/uncitral/en/case_law.html>; Global Sales Law, *CISG-Online.ch*, available at <http://www.globalsaleslaw.org/index.cfm?pageID=28>; UNCITRAL, *Digest of Case Law on the United Nations Convention on Contracts for the International Sale of Goods*, 2012, available at <http://www.uncitral.org/pdf/english/clout/CISG-digest-2012-e.pdf>; UNILEX, *Cases on CISG*, available at <http://www.unilex.info/dynasite.cfm?dssid=2376&dsmid=13352>.

4 *See*, *e.g.*, Pace Law School, *Selected Archives: Full-Texts of Scholarly Writings on the CISG and the UNIDROIT Principles of International Commercial Contracts and the Principles of European Contract Law*, available at <http://www.cisg.law.pace.edu/cisg/biblio/bib2.html>; UNILEX, *Bibliography*, available at <http://www.unilex.info/dynasite.cfm?dssid=2376&dsmid=13357>. *See also* UNCITRAL, *Bibliography of Recent Writings Relating to the Work of UNCITRAL*, available at <http://www.uncitral.org/uncitral/en/ publications/bibliography_consolidated.html>.

other expert analysis,[5] all of which assist our understanding of this instrument's operation. In some cases, this development has successfully adapted the CISG to the changing times.[6] Transactions which could not have been foreseen at the time of its conclusion, such as the sale of software, have been dealt with under the CISG's existing text;[7] as has the conclusion of contracts through electronic communications.[8] In this sense, the CISG is (as described by Castellani) "a work in progress".[9] Though its own text is settled, its application (and thus the harmonization of private law) continues to develop and evolve.

On 2 May 2012, a further stage in that development was reached, with the Government of Switzerland submitting a proposal to the United Nations Commission on International Trade Law (UNCITRAL) ahead of its 45th session "in support of future work in the area of international contract law".[10] This proposal – soon to be known as the Swiss Proposal – raised the question as to whether the time may be right for UNCITRAL to consider further work in the harmonization of international contract law beyond that effected through the CISG.[11] The Swiss Proposal has generated significant scholarly analysis[12] – with strong views expressed in both directions[13] – and has also been discussed in the legal press.[14] And given its pedigree, it is worthy of that attention. Switzerland is a leading international

5 *See, e.g.*, CISG Advisory Council, *Welcome to the CISG Advisory Council*, available at <http://www.cisgac.com>. At the time of writing, the Council has 16 Opinions indexed on its website, alongside two Declarations, as well as four additional as-yet-unnumbered Opinions as part of its pending Schedule of Work.

6 *Compare* I. Schwenzer & P. Hachem, 'Article 7', *in* I. Schwenzer (Ed.), *Schlechtriem & Schwenzer: Commentary on the UN Convention on the International Sale of Goods (CISG)*, 3rd edition, Oxford University Press, Oxford, 2010, p. 122, para. 5.

7 *See*, Landgericht München I, Germany, 8 February 1995, HG 980472, available at <http://cisgw3.law.pace.edu/cases/950208g4.html>; Handelsgerich Zürich, Switzerland, 17 February 2000, available at <http://cisgw3.law.pace.edu/cases/000217s1.html>. *See also* I. Schwenzer & P. Hachem, 'Article 1', *in* I. Schwenzer (Ed.), *Schlechtriem & Schwenzer: Commentary on the UN Convention on the International Sale of Goods (CISG)*, 3rd edition, Oxford University Press, Oxford, 2010, pp. 35-36, para. 18.

8 Schlechtriem & Schwenzer, *supra* note 2, p. 5.

9 *See* L. Castellani, 'Foreword', *in* I. Schwenzer & L. Spagnolo (Eds.), *State of Play*, Eleven International Publishing, The Hague, 2011, p. x.

10 UNCITRAL Secretariat, *Possible Future Work in the Area of International Contract Law – Proposal by Switzerland on Possible Future Work by UNCITRAL in the Area of International Contract Law – Note by the Secretariat*, UN GAOR, 45th session, UN Doc. A/CN.9/758, 8 May 2012, p. 1, para. 1.

11 *Id.,* Ann. 1, p. 2.

12 *See, e.g.*, Symposium, 'Assessing the CISG and Other International Endeavours to Unify International Contract Law: Has the Time Come for a New Global Initiative to Harmonize and Unify International Trade?', *Villanova Law Review*, Vol. 58, 2013.

13 *See*, *e.g.*, I. Schwenzer, *Who Needs a Uniform Contract Law, and Why?*, paper presented at – NYSBA Hanoi Conference (24 October 2013), pp. 5-6. *Contra* K. Loken, 'A New Global Initiative on Contract Law in UNCITRAL: Right Project, Right Forum?', *Villanova Law Review*, Vol. 58, 2013, pp. 509-510; US Department of State, *Annual Meeting*, 11 October 2012, available at <http://www.state.gov/s/l/202742.htm>.

14 *See* 'Switzerland Proposes Future Work by UNCITRAL on International Contract Law', *European Private Law News*, 18 May 2012, available at <http://www.epln.law.ed.ac.uk/2012/05/18/switzerland-proposes-future-work-by-uncitral-on-international-contract-law>.

Electronic copy available at: http://ssrn.com/abstract=2802397

commercial law jurisdiction. It is world renowned as an attractive arbitral seat;[15] its private law is often the subject of party choice as a neutral law;[16] its private international law has influenced law reform processes around the world;[17] it is a key jurisdiction in the development of CISG jurisprudence;[18] and the University of Basel hosts the Chair of Professor Dr Schwenzer, the scope and value of whose contributions to the law of international sales need no elaboration.[19] The Swiss Proposal is also worthy of attention given that the harmonization and unification of private law is a task requiring enormous effort. This is well demonstrated by the extensive work underpinning the CISG and the UNIDROIT Principles, reflected within their legislative histories.[20]

The Swiss Proposal is another milestone along the same, longer road towards the harmonization and unification of private law, upon which the CISG also sits. The process is one of persistent, sometimes incremental, but continual growth.

3.2 Growing the CISG, and Expansion of the CISG

The CISG, with its as-yet-unchanged text, has the potential to be "grown" along several different dimensions. It can first be grown geographically, through its adoption by new Member States. The CISG has consistently grown in this respect since entering into force

15 G. Born, *International Commercial Arbitration*, 2nd edition, Kluwer Law International, The Hague, 2014, pp. 145-147; L. Mistelis, 'Arbitral Seats – Choices and Competition', *in* S. Kröll et al. (Eds.), *International Arbitration and International Commercial Law: Synergy, Convergence and Evolution*, Kluwer Law International, The Hague, 2011, p. 379. *See also* International Chamber of Commerce, '2012 Statistical Report', *ICC Bulletin*, Vol. 24, No. 1, 2013, p. 14; International Chamber of Commerce, '2011 Statistical Report', *ICC Bulletin*, Vol. 23, No. 1, 2012, p. 13.

16 International Chamber of Commerce, '2012 Statistical Report', *supra* note 15, p. 13; International Chamber of Commerce, '2011 Statistical Report', *supra* note 15, p. 14. *See*, *e.g.*, International Chamber of Commerce, Case No. 7565/1994, *ICC Bulletin*, Vol. 6, No. 2, 1995, p. 64. *See also* P. Ostendorf, *International Sales Terms*, 2nd edition, Hart Publishing, Oxford, 2014, pp. XIV-XV, 4, paras. 7, 5-6, 12-13. *Compare* C. Fountoulakis, 'The Parties' Choice of "Neutral Law" in International Sales Contracts', *European Journal of Law Reform*, Vol. 7, 2005, pp. 307-308, 311.

17 For example, the concept of characteristic performance – *see* Art. 4(2) Rome Convention; Arts. 4(1) and (2)(b) Rome I Regulation; M. Giuliano & P. Lagarde, 'Report on the Convention on the Law Applicable to Contractual Obligations', *OJC*, 1980, pp. 20, paras. 3, 46, n. 38; L. Collins (Ed.), *Dicey, Morris and Collins on the Conflict of Laws*, 15th edition, Sweet & Maxwell, London, 2012, pp. 1822-1823, para. 32-076.

18 *See, generally*, Pace Law School, *supra* note 3, recording 212 Swiss decisions.

19 *See*, *e.g.*, Schwenzer et al., *supra* note 2; Schlechtriem & Schwenzer, *supra* note 2.

20 For just one of many examples with respect to each – UNCITRAL Secretary-General, *Analysis of Comments and Proposals by Governments and International Organizations on the Draft Convention on Contracts for the International Sale of Goods, and on Draft Provisions Concerning Implementation, Reservations and Other Final Clauses* (21 February 1980), para. II.A.2.a, available at <http://www.cisg.law.pace.edu/cisg/Fdraft.html>; UNIDROIT Secretariat, *Working Group for the Preparation of Principles of International Commercial Contracts – Summary Records of the Meeting Held in Rome – 4 to 7 June 2001*, p. 1, paras. 1-2.

on 1 January 1988.[21] 25 years after entering into force, in 2013, Brazil and Bahrain both joined the community of Contracting States with the CISG taking effect in those jurisdictions on 1 April 2014 and 1 October 2014 respectively.[22] The United Kingdom's position is the subject of ongoing analysis,[23] and is discussed in this volume in the chapter contributed by Professor Dr Andersen. Other jurisdictions of interest in the CISG's geographical growth include Vietnam, the Philippines and the Hong Kong Special Administrative Region of the People's Republic of China – all of which are also the subject of contributions in this volume.

CISG growth can secondly be achieved by its uptake in industry sectors where its full potential may not previously have been realized. Article 6 CISG enshrines, subject to only minimal limitations,[24] parties' rights to derogate from, vary, or exclude the CISG's effect. Professor Dr Zeller's contribution considers commodities trade as an area of potential growth; the CISG's appropriateness to govern commodity sales historically being a matter of debate.

These two dimensions of growth both result in expansion of the CISG's operation, on the basis of a text that itself remains stable. A third dimension of growth, directly implicated by the Swiss Proposal, would expand the CISG through expanding its text and in particular expanding the legal subject-matters with which that text is concerned. It is this dimension of growth, and this conceptualisation of expansion, which is the primary concern of this chapter.

In particular, in addressing this dimension of growth, this chapter's focus is on the *feasibility* of reform from a primarily legal perspective. Attention is given to the prospect, benefits and dangers of expanding the CISG's subject-matter scope, and these three categories of consideration are used as an organising framework. This chapter is not concerned with assessing matters of *need* or *demand*. Some consideration has already been given to these issues elsewhere[25] and moreover any assessment of demand must necessarily be based on data rather than guesswork or assumptions.[26] While matters of need and demand are undoubtedly important considerations – international commercial law being a tool designed

21 *See, generally,* UNCITRAL, *Status – United Nations Convention on Contracts for the International Sale of Goods (Vienna, 1980)*, 2015, available at <http://www.uncitral.org/uncitral/en/uncitral_texts/sale_goods/1980CISG_status.html>. *See also* Castellani, *supra* note 9, p. viii.

22 UNCITRAL, *supra* note 21.

23 *See, e.g.*, E. Simos, 'The CISG: A Lost Cause in the UK?', *Vindobona Journal of International Commercial Law & Arbitration*, Vol. 16, 2012; S. Moss, 'Why the United Kingdom Has Not Ratified the CISG', *Journal of Law & Commerce*, Vol. 25, 2005-2006.

24 *See* Arts. 12 and 96 CISG. *See also* U. Schroeter, 'Freedom of Contract: Comparison Between Provisions of the CISG (Article 6) and Counterpart Provisions of the PECL', *Vindobona Journal of International Commercial Law & Arbitration*, Vol. 6, 2002, p. 261.

25 *See*, *e.g.*, Loken, *supra* note 13, p. 510.

26 M. Doris, 'Promising Options, Dead Ends and the Reform of Australian Contract Law', *Legal Studies*, Vol. 34, 2014, pp. 25, 28-29.

to serve commercial parties[27] – they are not within the scope of the analysis conducted on this occasion.

3.3 Prospect, Benefits and Dangers Illustrated – The Case Study of Prescription

This paper's analysis of expanding or "growing" the CISG by the inclusion of new legal subject-matters is organized around the case study of prescription. While different terminology is used in different legal systems, and while sometimes that different terminology reflects actual differences in the law,[28] this chapter uses "prescription" as a term synonymous with "time bars", "the limitation of actions", "statutes of limitation" and "limitation periods". Acknowledging that this terminology is being used at a relatively high level of generalisation, the essence of prescription is taken to be the setting of an identified period of time within which proceedings for a particular cause of action must be commenced.[29] Prescription has been identified as a key component of the harmonization of international sales law, essential to that harmonization becoming "truly complete".[30] The reason why prescription is a particularly interesting case study for the purposes of this chapter is that this single subject-matter is a very good illustration of several implications which might arise from an expansion of the CISG's subject-matter scope. While these implications are not exhaustive and are not necessarily even representative, the implications illustrated by the prescription case study combine to give an interesting insight into the prospect, benefits and dangers of expanding the CISG in this way.

This chapter's case study is also concerned only with prescription "proper", and not other kinds of time limit rules falling under the umbrella of *déchéance*. These rules are distinct from prescription[31] and concern time limits for the giving of various kinds of notice. Prescription, being concerned with the institution of proceedings, necessarily implicates its own particular policy considerations.[32] Examples of *déchéance* can include

27 E. Brödermann, 'The Growing Importance of the UNIDROIT Principles in Europe – A Review in Light of Market Needs, the Role of Law and the 2005 Rome I Proposal', *Uniform Law Review*, Vol. 11, 2006, pp. 749, 756-757. *See also* Castellani, *supra* note 9, p. ix.

28 K. Sono, *The Limitation Convention: The Forerunner to Establish UNCITRAL Credibility*, Albert H. Kritzer CISG Database, 2003, para. I.A, available at <http://www.cisg.law.pace.edu/cisg/biblio/sono3.html>. *See, e.g.*, *McKain v. RW Miller & Co (South Australia) Pty Ltd* (1991) 174 CLR 1, High Court, Australia, 19 December 1991, p. 41.

29 B. Garner (Ed.), *Black's Law Dictionary*, West Publishing Company, St. Paul, 2009, p. 1302.

30 Sono, *supra* note 28, para. V.

31 *See*, *e.g.*, I. Schwenzer, 'Article 39', *in* I. Schwenzer (Ed.), *Schlechtriem & Schwenzer: Commentary on the UN Convention on the International Sale of Goods (CISG)*, 3rd edition, Oxford University Press, Oxford, 2010, p. 637, para. 28.

32 *See*, *generally*, Singapore Academy of Law, 'Report of the Law Reform Committee on Limitation Periods in Private International Law', 2011, pp. 15-16, para. 47; South African Law Reform Commission, *Prescription*

time limits for giving notice of defects or notice of termination,[33] and such requirements may come from an applicable law or the parties' agreement.[34] As they have a distinct legal character, "more aptly dealt with in relation to the rights and claims arising from a sales contract",[35] they are not dealt with by existing international instruments regulating prescription.[36] They are similarly not within the scope of the analysis in this chapter.

3.3.1 The Prospect of Change – The (Still) Uncertain Boundaries of the CISG

The first implication raised by the case study of prescription – considered by this paper as a matter of potential change – are the (still) uncertain boundaries of the CISG.

It is a well-established and uncontroversial feature of the CISG that the instrument is not a comprehensive code that regulates all legal issues that might possibly arise out of an international sale of goods.[37] That was never the drafters' intentions;[38] instead the CISG's subject-matter scope was intentionally limited.[39] It is thus said to embrace an eclectic model of regulation, having non-monopolistic pretensions[40] – the CISG governs those matters within its subject-matter scope, leaving other issues to be determined according to the otherwise applicable law.[41]

This feature of the CISG is effected in practice by three aspects of its architecture – the rules set out in Articles 4, 5 and 7(2) CISG. These provisions collectively establish the

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Periods – Discussion Paper No. 126 – Project 125, 2011, pp. 11-13, paras. 3.1-3.10; Note, 'Developments in the Law – Statutes of Limitations', *Harvard Law Review*, Vol. 63, 1949-1950, pp. 1185-1186; *Brisbane South Regional Health Authority v. Taylor* (1996) 186 CLR 541, High Court, Australia, 2 October 1996, pp. 551-553.

33 K. Sono, 'Commentary on the Convention on the Limitation Period in the International Sale of Goods, Done at New York 14 June 1974 (A/CONF.63/17)', *Yearbook of the United Nations Commission on International Trade Law*, Vol. X, 1979, p. 149, para. 8.

34 Sono, *supra* note 28, para. IV.A. *See also* P. Winship, 'The Convention on the Limitation Period in the International Sale of Goods: The United States Adopts UNCITRAL's Firstborn', *International Lawyer*, Vol. 28, 1994, pp. 1078-1079.

35 Sono, *supra* note 28, para. IV.A.

36 Regarding the Limitation Period Convention – Art. 1(2) Limitation Period Convention; Sono, *supra* note 33, p. 149, para. 8; Winship, *supra* note 34, p. 1079; Sono, *supra* note 28, para. IV.A. Regarding the UNIDROIT Principles 2010 – Art. 10.1(2) UNIDROIT Principles 2010; Art. 10.1 Commentary UNIDROIT Principles 2010, para. 2.

37 I. Schwenzer & P. Hachem, 'Article 4', *in* I. Schwenzer (Ed.), *Schlechtriem & Schwenzer: Commentary on the UN Convention on the International Sale of Goods (CISG)*, 3rd edition, Oxford University Press, Oxford, 2010, p. 75, para. 2.

38 UNCITRAL Secretariat, 'Commentary on the Draft Convention on Contracts for the International Sale of Goods' UN Doc A/CONF.97/5 (14 March 1979), Art. 4, para. 1.

39 F. De Ly, 'Sources of International Sales Law: An Eclectic Model', *Journal of Law & Commerce*, Vol. 25, 2005-2006, pp. 2-3.

40 *Id.,* p. 3.

41 *See*, *e.g.*, CIETAC, September 2004, Award 0291-1/2004, paras. 13.3, 16.16.2-16.16.3, available at <http://www.unilex.info/case.cfm?pid=2&do=case&id=1441&step=FullText>.

CISG's subject-matter boundaries, and also the (differing) methodologies for resolving disputes over the legal rules applicable for matters sitting on either side of those boundaries.

Article 5 CISG limits the subject-matters with which the Convention deals by providing that it "does not apply to the liability of the seller for death or personal injury caused by the goods to any person". Article 4 CISG, described as the Convention's "table of contents"[42] and the "guide-post" to its application,[43] further identifies the outer boundary of the CISG.[44] It identifies that the formation of contracts, and the rights and obligations of the parties, are the matters with which the CISG deals. It also expressly identifies a number of issues that are not governed, unless dealt with expressly by its provisions, being the validity of contracts, and the contract's effect on the passage of property.[45] However, by implication, this list is illustrative only rather than exhaustive and it is in fact all matters not characterized as formation or rights / obligations issues that are outside the CISG's scope[46] (unless, as noted in Article 4 CISG, the CISG otherwise provides).[47]

There is no particular rule contained in the CISG for identifying the law governing matters outside this Article 4 CISG subject-matter scope. However, as explained by the late Professor Dr Schlechtriem (in whose honour this contribution is made), it is necessarily the case that this law be identified by the rules of private international law applied by the state court resolving a particular case.[48] In the case of arbitration, the relevant private international law methodology would be set out in the parties' chosen arbitration rules[49] or otherwise the seat's *lex arbitri*.[50] For matters inside the Article 4 CISG subject-matter scope but not the subject of a particular rule, Article 7(2) CISG provides that private international law is only resorted to in the second instance, after one first searches for a

42 A. Kazimierska, 'The Remedy of Avoidance Under the Vienna Convention on the International Sale of Goods', *in* Pace International Law Review (Ed.), *Pace Review of the Convention on Contracts for the International Sale of Goods 1999 – 2000*, Kluwer Law International, The Hague, 2000, p. 156.

43 W. Khoo, 'Article 4', *in* C.M. Bianca & M.J. Bonell (Eds.), *Commentary on the International Sales Law*, Giuffrè, Milan, 1987, p. 46, para. 3.1.

44 Kazimierska, *supra* note 42, p. 156.

45 Arts. 4(a) and (b) CISG.

46 Schwenzer & Hachem, *supra* note 37, pp. 75-76, para. 3; H. Flechtner, 'Selected Issues Relating to the CISG's Scope of Application', *Vindobona Journal of International Commercial Law & Arbitration*, Vol. 13, 2009, p. 99. *See also* Khoo, *supra* note 43, p. 45, para. 2.4.

47 *See*, *e.g.*, Schwenzer & Hachem, *supra* note 37, pp. 75, para. 2, 88 para. 29.

48 P. Schlechtriem, 'Requirements of Application and Sphere of Applicability of the CISG', *Victoria University of Wellington Law Review*, Vol. 36, 2005, p. 788. *See also* Schwenzer & Hachem, *supra* note 37, p. 77, para. 6; Khoo, *supra* note 43, p. 46, para. 3.1.

49 *See*, *e.g.*, Art. 33(1) Swiss Rules of International Arbitration 2012 – the closest connection test; Art. 21(1) ICC Rules 2012 – the *voie directe*. *Contra* Paris Rules 2013 – no relevant provision.

50 *See*, *e.g.*, Art. 187(1) Swiss Private International Law Act 1987 – the closest connection test; Art. 1511 French Arbitration Law 2011 – the *voie directe*; Art. 28(2) Model Law 2006 – the *voie indirecte*. *Contra* Swedish Arbitration Act 1999 – no relevant provision.

solution based on the CISG's general principles.[51] The literature and case law has identified a number of those general principles,[52] though some are noted as controversial.[53] The literature reflects these two different methodologies, applicable to the rules sought to be identified on either side of the Article 4 CISG perimeter, through the language of "external gaps" and "internal gaps" (respectively).[54]

These propositions are simple enough to state.[55] However, if one is to put aside the question as to exactly which principles qualify as general principles for the purposes of Article 7(2) CISG, there are still today some fundamental questions remaining over the precise point at which the Article 4 CISG line between external gaps and internal gaps is drawn.[56] This is not merely an academic point, as the side of this "tightrope"[57] that a matter falls upon will determine the methodology that the CISG requires to be applied in finding the solution. Matters that have been the subject of debate include penalty clauses,[58] and the award of attorneys' fees.[59] Another particularly interesting area of analysis is whether the CISG's subject-matter scope would include arbitration agreements,[60] treated at law as

51 J. Lookofsky, 'Walking the Article 7(2) Tightrope between CISG and Domestic Law', *Journal of Law & Commerce*, Vol. 25, 2005-2006, pp. 88-90. *See*, *e.g.*, Foreign Trade Court of Arbitration attached to the Serbian Chamber of Commerce, 19 October 2009, T-6/08, para. VI.3.2, available at <http://cisgw3.law.pace.edu/cases/091019sb.html>.

52 *See*, *e.g.*, Schwenzer & Hachem, *supra* note 6, pp. 135-139, paras. 31-36.

53 *See*, *e.g.*, Lookofsky, *supra* note 51, p. 89, regarding estoppel.

54 *See*, *e.g.*, Flechtner, *supra* note 46, p. 93.

55 Schwenzer & Hachem, *supra* note 6, p. 134, para. 28. *See also* Khoo, *supra* note 43, p. 45, para. 2.1.

56 Schwenzer & Hachem, *supra* note 6, p. 134, para. 28; Lookofsky, *supra* note 51, p. 90. *See also* Khoo, *supra* note 43, p. 46, para. 3.2.

57 Lookofsky, *supra* note 51, p. 90.

58 F. Mohs & B. Zeller, 'Penalty and Liquidated Damages Clauses in CISG Contracts Revisited', *Mealey's International Arbitration Report*, Vol. 21, No. 6, 2006, pp. 1-2; P. Koneru, 'The International Interpretation of the UN Convention on Contracts for the International Sale of Goods: An Approach Based on General Principles', *Minn J Global Trade*, Vol. 6, 1997, pp. 141-145. *See also* P. Hachem, 'Fixed Sums in CISG Contracts', *Vindobona Journal of International Commercial Law & Arbitration*, Vol. 13, 2009, pp. 219-220, 222-228.

59 Schwenzer & Hachem, *supra* note 37, pp. 94-95, para. 48. *See, generally*, B. Zeller, 'Attorneys' Fees – Last Ditch Stand?', *Vill LR*, Vol. 58, 2013. *See also* Schlechtriem & Schwenzer, *supra* note 2, pp. 7-8, para. 1; Flechtner, *supra* note 46, pp. 107-108; CISG Advisory Council, 'Opinion No. 6 – Calculation of Damages Under CISG Article 74', 2006, Rapporteur: Professor John Y. Gotanda, paras. 5, 5.1-5.4; *Zapata Hermanos Sucesores SA v. Hearthside Baking Company Inc*, Court of Appeals for the Seventh Circuit, United States of America, 19 November 2002, available at <http://cisgw3.law.pace.edu/cases/021119u1.html>.

60 *See, generally*, I. Schwenzer & D. Tebel, 'The Word is Not Enough – Arbitration, Choice of Forum and Choice of Law Clauses Under the CISG', *ASA Bull*, Vol. 31, 2013. *See also* P. Perales Viscasillas & D. Ramos Muñoz, 'CISG & Arbitration', *in* A. Büchler & M. Müller-Chen (Eds.), *Private Law: National – Global – Comparative*, *Festschrift für Ingeborg Schwenzer zum 60 Gerburtstag*, 2011, pp. 1360-1369, 1373.

independent contracts pursuant to the doctrine variously known as separability, severability or autonomy[61] and which is said to form "part of the very alphabet of arbitration law".[62]

The CISG's boundaries are implicated by this chapter's prescription case study as a matter of prospective change because the weight of authority treating the matter as outside the CISG's scope is so heavy that the *Schlechtriem & Schwenzer Commentary* describes the view as "unanimously held".[63] The very existence of UNCITRAL's "firstborn",[64] the Limitation Period Convention, is evidence of this – and in particular, Article 39 CISG is an example of *déchéance* rather than prescription.[65] Nevertheless, a very small selection of authorities do not share this view. In *Traction Levage SA v. Drako Drahtseilerei Gustav Kocks GmbH*,[66] an English language abstract of which is reported as *CLOUT Case No. 482*, it was held that prescription is governed by but not settled in the CISG, and private international law was then applied by the *cour d'appel Paris* through Article 7(2) CISG to seek a solution. If an internal gap methodology is applied, the first stage of enquiry pursuant to Article 7(2) CISG must be to seek an answer through an application of the CISG's general principles. At least one commentator has argued that a solution to prescription internal to the CISG might be derived on this basis.[67] This alternative (though minority) view raises a matter of prospect for the CISG's expansion to include express rules on prescription. The way in which a legislative solution might be sought out (based on the CISG's existing internal and external gap architecture established by Articles 4 and 7(2) CISG) would differ depending on the point of departure. On the majority view – the task involves negotiating international law reform to create a new harmonized solution. On the minority alternative view – it might first involve an attempt to articulate a uniform solution already inherent (but remaining unexpressed) within the CISG's general principles.

61 E. Gaillard & J. Savage (Eds.), *Fouchard, Gaillard, Goldman on International Commercial Arbitration*, Kluwer Law International, The Hague, 1999, p. 198, para. 389; P. Landolt, 'The Inconvenience of Principle: Separability and Kompetenz-Kompetenz', *Journal of International Arbitration*, Vol. 30, 2013, p. 513.

62 *Lesotho Highlands Development Authority v. Impregilo SpA* [2005] UKHL 43, House of Lords, United Kingdom, 30 June 2005, p. 232, para. 21.

63 Schwenzer & Hachem, *supra* note 37, pp. 95, para. 50. *See also* Schwenzer, *supra* note 31, pp. 637-638, paras. 28-29.

64 Winship, *supra* note 34, p. 1072.

65 *Id.,* p. 1079; Sono, *supra* note 28, para. IV.A. *See, generally,* CISG Advisory Council, 'Opinion No. 2 – Examination of the Goods and Notice of Non-Conformity – Articles 38 and 39', 2004, Rapporteur: Professor Eric E. Bergsten,

66 Cour d'appel Paris, France, 6 November 2001, *Traction Levage SA v. Drako Drahtseilerei Gustav Kocks GmbH*, available at <http://cisgw3.law.pace.edu/cases/011106f1.html>.

67 A. Williams, 'Limitations on Uniformity in International Sales Law: A Reasoned Argument for the Application of a Standard Limitation Period Under the Provisions of the CISG', *Vindobona Journal of International Commercial Law & Arbitration*, Vol. 10, 2006, pp. 244-259.

3.3.2 *The Prospect of Change – The Widely Diverging State Laws on Prescription*

A second implication raised by the prescription case study is the way in which expansion of the CISG's subject-matter scope might be achieved in the face of widely diverging state laws. As noted by Paulsson, it might seem a "disabused quip", but there is truth in the observation that treaties are "disagreement[s] reduced to writing".[68] Existing state law represents the *status quo* from which harmonized law is constructed; the CISG's existing text is said to balance common law and civil law perspectives[69] within a framework of neutral[70] and readily understood terminology.[71] Existing state law also represents the non-harmonized solution eventually displaced by an expanded CISG. Prescription is "a complex subject"[72] and there are well-documented and significant differences between state laws.[73] These are reflected in conflict of laws disputes that state court judges and arbitrators alike have been required to resolve.

The length of time permitted for the bringing of an action is the most obvious aspect of existing prescription laws that might differ between states. It can differ within states, with Swiss law providing an example of different prescription periods applying to different types of contractual claim.[74] It can even differ between separate provinces inside a single state, with all (internal) states and territories of Australia adopting six year prescription periods for contract claims[75] except for the Northern Territory, which has adopted a three year statute.[76] It is not infrequently observed in the literature that the times permitted amongst various jurisdictions range from six months to thirty years,[77] with the *Conconut*

68 J. Paulsson, 'Scholarship as Law', *in* M. Arsanjani et al. (Eds.), *Looking to the Future – Essays on International Law in Honor of W. Michael Reisman*, Martinus Nijhoff, Leiden, 2011, p. 186. *See also* C. Lamb, 'International Treaties and Conventions', *AMPLA Bull*, Vol. 15, 1996, pp. 23-27.

69 Schlechtriem & Schwenzer, *supra* note 2, p. 6.

70 J. Felemegas, 'Introduction', *in* J. Felemegas (Ed.), *An International Approach to the Interpretation of the United Nations Convention on Contracts for the International Sale of Goods (1980) as Uniform Sales Law*, Cambridge University Press, Cambridge, 2007, pp. 20-22. *Compare* Schwenzer & Hachem, *supra* note 6, p. 123, para 8.

71 UNCITRAL Secretariat, 'Explanatory Note by the UNCITRAL Secretariat on the United Nations Convention on Contracts for the International Sale of Goods', 2010, para.13. *Compare* Castellani, *supra* note 9, p. ix.

72 N.H. Andrews, 'Reform of Limitation of Actions: The Quest for Sound Policy', *Cambridge Law Journal*, Vol. 57, 1998, p. 589. *See also* Sono, *supra* note 28, para. V.

73 Sono, *supra* note 33, pp. 146, paras. 2, 154; Sono, *supra* note 28, para. I.A.

74 Ostendorf, *supra* note 16, pp. 32-33, paras. 90-91, 94.

75 *See, e.g.*, s 5(1)(a) Limitation of Actions Act 1958 (Vic)(Australia).

76 s 12(1)(a) Limitation Act (NT)(Australia).

77 Sono, *supra* note 33, p. 146, para 2; Y. Sugiura, 'Japan after Acceding to the CISG – Should We Consider Ratifying the Limitation Convention Next?', *in* I. Schwenzer & L. Spagnolo (Eds.), *Towards Uniformity*, Eleven International Publishing, The Hague, 2011, p. 229. *See also* Art. 10.2 Commentary UNIDROIT Principles 2010, para. 1. *Compare* Ostendorf, *supra* note 16, p. 110 n 510; I. Schwenzer & S. Manner, '"The Claim is Time-Barred": The Proper Limitation Regime for International Sales Contracts in International Commercial Arbitration', *Arbitration International*, Vol. 23, 2007, pp. 297-298.

case[78] a good example of a dispute where a comparatively lengthy (15 year) prescription period was part of the governing law, and the *Noma* case[79] (applying a one year period) being illustrative of the other end of the spectrum. In some cases a state's law might not enforce any prescription period at all.[80] An example here is given by *ICC Case No. 7375/1996*,[81] where the government of Iran argued that Iranian law applied and that Iranian law did not impose a limitation period on its claims.[82]

This aspect of divergence has been contested in practice in conflict of laws disputes before both state courts and arbitral tribunals. In some cases, it has been found that differences in the potentially applicable state prescription periods would not have affected the outcome of a case. This was so in ICC Case No. 5460/1987,[83] where none of the potentially applicable prescription periods in issue had expired. Likewise this was true in the *Farm Machines* case,[84] where a defaulting buyer's argument based on prescription was rejected. The real issue was whether the buyer could substantiate its claim that a part payment had been made; which it could not do on the evidence. In other instances, differing state prescription periods stood to directly affect the outcome of a case.[85] In ICC Case No. 7375/1996[86] – a sales dispute – the four year USA State of Maryland prescription period would have barred the claim while Iranian law did not impose any period and would have allowed the Iranian government's claim to proceed.[87] In the English case of *Zebrarise Ltd v. De Nieffe*[88] – concerning a loan contract – the claim was held to be governed by English law and barred by the applicable prescription period,[89] though Havelock-Allan J also explained in *obiter dicta* that Belgian law (the other possibly applicable law) would not have precluded the claim.[90]

78 Appellate Court Valencia, Spain, 13 March 2007, Recurso No. 493/2006, available at <http://cisgw3.law.pace.edu/cases/070313s4.html>.

79 *Noma BVBA v. Misa Sud Refrigerazione SpA*, Hof van Beroep Ghent, Belgium, 17 May 2004, para. 6.2, available at <http://cisgw3.law.pace.edu/cases/040517b1.html>.

80 Sono, *supra* note 28, para. I.A. *Compare* Art. 10.1 Commentary UNIDROIT Principles 2010, para. 1.

81 International Chamber of Commerce, 1996, Case No. 7375/1996, *Mealey's International Arbitration Report,* Vol. 11, No. 12, p. A-1.

82 *Id.,* p. A-29, para. 218.

83 International Chamber of Commerce, 1988, Case No. 5460/1987, *XIII YCA*, pp. 106-108, paras. 4-8.

84 Kantonsgericht Nidwalden, Switzerland, 23 May 2005, ZK 04 26, paras. 3.2-3.3 and 5, available at <http://cisgw3.law.pace.edu/cases/050523s1.html>.

85 *See*, *generally*, C. Croft, C. Kee & J. Waincymer, *A Guide to the UNCITRAL Arbitration Rules*, Cambridge University Press, Cambridge, 2013, p. 397, para. 35.6; P. Binder, *International Commercial Arbitration and Conciliation in UNCITRAL Model Law Jurisdictions*, 3rd edition, Sweet & Maxwell, London, 2010, p. 336, para. 6-011. *See also* M. Blessing, 'Choice of Substantive Law in International Arbitration', *Journal of International Arbitration*, Vol. 14, No. 2, 1997, pp. 48-49.

86 ICC Case No. 7375/1996, *supra* note 81.

87 *Id.,* p. A-29, para. 218.

88 *Zebrarise Ltd v. De Nieffe* [2004] EWHC 1842, High Court, England and Wales, 21 July 2004.

89 *Id.,* para. 36.

90 *Id.,* para. 43.

Though time is the most obvious point of difference, state prescription laws also diverge on many matters other than the length of the prescription period they permit. There are different approaches to setting the point at which the time period starts to run[91] – on the cause of action's accrual or on the basis of a discoverability test,[92] or a "two-tier" test that incorporates elements of both.[93] The optimal choice between these tests could be influenced by policy considerations, such as the expectation in *commerce* that *traders* will "look after their interests prudently", and thus may be context-dependent.[94] There are differences in the way prescription is characterized by legal systems – as substantive law, as procedural law, or as a combination of the two.[95] The approach taken to this question even within a single legal system may differ over time.[96] Different tracks can be taken where proceedings terminate without an actual decision being rendered on the merits (such as for lack of jurisdiction), and as to whether the applicable prescription period is suspended, continues running, or continues running subject to a fixed grace period where this would otherwise lead to prejudice.[97] Still other differences in approach are evident concerning rules for recommencement of the time period,[98] extension of the period,[99] and whether parties are given the autonomy to modify the period of prescription by agreement or not.[100] Aside from the way in which the technical aspects of a prescription period operate, even further differences arise regarding the consequence of its expiry – specifically, whether it is a matter that must be affirmatively invoked as a defence or whether it can be considered *ex officio*,[101] and whether expiry of the permitted time positively extinguishes a party's rights or alternatively operates as a bar to their enforcement.[102]

These differences challenge the prospect of a harmonized solution where the matter is brought within the scope of an expanded CISG, which would need to provide an effective resolution to all dimensions of difference. The way in which this resolution might be

91 Sugiura, *supra* note 77, p. 231; Schwenzer & Manner, *supra* note 77, p. 298.
92 Andrews, *supra* note 72, pp. 598-600.
93 Sugiura, *supra* note 77, p. 232. *See also* Art. 10.2 Commentary UNIDROIT Principles 2010, paras. 3-4 and 9.
94 Andrews, *supra* note 72, p. 601.
95 Sono, *supra* note 33, pp. 147, paras. 4, 151, para. 5; Sono, *supra* note 28, para. I.A. *See also* Schwenzer & Manner, *supra* note 77, pp. 296-297.
96 *See, e.g.*, *McKain v. RW Miller & Co (South Australia) Pty Ltd*, *supra* note 28, p. 41; reversed *John Pfeiffer Pty Ltd v. Rogerson* (2000) 203 CLR 503, High Court, Australia, 21 June 2000. *See also* s 5 Choice of Law (Limitation Periods) Act 1993 (Vic)(Australia) – and equivalent provisions in the other Australian States and territories.
97 Sugiura, *supra* note 77, pp. 232-233.
98 *Id.,* p. 233.
99 *Id.,* pp. 234-235.
100 *Id.,* pp. 235-236. *See also* Art. 10.3 Commentary UNIDROIT Principles 2010, para. 1.
101 Sugiura, *supra* note 77, p. 236.
102 *Id.,* pp. 236-237; Art. 10.1 Commentary UNIDROIT Principles 2010, para. 1.

achieved, perhaps through developing a sense of the international average as an appropriate "arithmetical compromise",[103] could be a matter for possible future negotiation.

3.3.3 *Benefit – The Harmonization Potential of Uniform Law*

A third implication of the prescription case study considered by this chapter are the benefits that might accrue from harmonization in this area of the law. In the face of widely diverging state laws on prescription, a harmonized solution brought within the scope of the CISG may stand to generate very real gains for the cause of uniform law, and for international traders and international trade. It was the divergence between state laws on prescription that led to the Limitation Period Convention's "detailed rules" given that differing state laws offered a solution that was not considered optimal.[104] The "consensus" reached in relation to the existing Limitation Period Convention was in this regard described as the instrument's "most remarkable achievement".[105]

The rationale for harmonized or uniform law for international commercial matters lies in transaction costs. The starting point is the belief that international traders desire certainty.[106] This is said to be the case with respect to dispute resolution procedures[107] (though procedural flexibility is recognized as a hallmark feature of international commercial arbitration)[108] but is particularly said to be so regarding the substantive law governing the parties' rights and obligations.[109] Differences, and uncertainties, create costs for parties[110] – at the time of contracting, and also at the time of dispute resolution. Uniformity is believed to reduce both of these types of transaction costs,[111] thereby promoting interna-

103 Sugiura, *supra* note 77, pp. 229-230, regarding the four year time period set out under Art. 8 Limitation Period Convention.

104 Winship, *supra* note 34, pp. 1075-1076.

105 Sugiura, *supra* note 77, p. 231; *compare* p. 238. *See also* Sono, *supra* note 28, para. V.

106 Felemegas, *supra* note 1, pp. 130-131.

107 *Compare* P. Karrer, 'Freedom of an Arbitral Tribunal to Conduct Proceedings', *ICC Bulletin*, Vol. 10, No. 1, 1999, p. 23, para. 13.4.2.

108 Born, *supra* note 15, pp. 84-86. *See* School of International Arbitration, *International Arbitration: Corporate Attitudes and Practices 2006*, 2006, available at <http://www.arbitration.qmul.ac.uk/docs/123295.pdf>; School of International Arbitration, *International Arbitration: Corporate Attitudes and Practices 2008*, 2008, available at <http://www.arbitration.qmul.ac.uk/docs/123294.pdf>. *Compare* School of International Arbitration, *Corporate Choices in International Arbitration: Industry Perspectives*, 2013, available at <http://www.arbitration.qmul.ac.uk/docs/123282.pdf>.

109 *See*, *e.g.*, S. Greenberg, 'The Law Applicable to the Merits in International Arbitration', *Vindobona Journal of International Commercial Law & Arbitration*, Vol. 8, 2004, p. 335.

110 L. Castellani, 'The Contribution of Uniform Trade Law to Economic Development and Regional Integration in East Asia and the Pacific: A View from UNCITRAL', *Dong-A Journal of International Business Transactions Law*, Vol. 8, 2012, p. 31.

111 Schlechtriem & Schwenzer, *supra* note 2, p. 6.

tional trade and more broadly promoting international economic wellbeing.[112] This line of reasoning underpins the CISG, as reflected in its Preamble.[113] It is also the rationale underpinning other harmonization initiatives relating to international commercial law[114] including the Limitation Period Convention.[115]

It is hard to quantify, in economic terms, the true value of harmonization. It is also not irrelevant to acknowledge that some authorities have critiqued the value of the CISG's harmonization efforts[116] on the basis of alleged uncertainties in the instrument,[117] and choice of law patterns revealed by surveys of the case law.[118]

The view underpinning the existence of UNCITRAL,[119] and therefore the very view sitting behind the CISG,[120] is that harmonization is beneficial for international trade. This chapter does not seek to settle the division of opinion on this matter. Instead, assuming that the theories given to justify uniform international commercial law are valid, it can be observed for the purposes of this chapter that growing the CISG by the inclusion of new legal subject-matters furthers those uniformity goals. Extending the CISG's subject-matter scope to include prescription, in light of the currently widely diverging state laws on prescription, may be a particularly ripe area for the realisation of the gains of harmonization. The realisation of such gains is subject, though, to the interaction that the CISG already has with the Limitation Period Convention, addressed in Section 3.5 below.

3.3.4 Danger – The CISG's Relationship with the lex mercatoria

Moving past matters of prospect and potential benefits, the fourth implication raised by this chapter's prescription case study introduces danger – the danger posed to the CISG (by its expansion) to its relationship with the *lex mercatoria*.

112 'Preamble', *in* 'Establishment of the United Nations Commission on International Trade Law', *GA Res. 2205 (XXI)*, 17 December 1966, paras. 4-5.
113 Preamble, para. 3, CISG.
114 *See, e.g.*, Preamble, para. 2, Rotterdam Rules.
115 Preamble, para. 2, Limitation Period Convention; Winship, *supra* note 34, pp. 1074, 1081.
116 *Compare* Castellani, *supra* note 9, p. vii.
117 *Compare* Schlechtriem & Schwenzer, *supra* note 2, p. 4.
118 *See, generally*, G. Cuniberti, 'Is the CISG Benefiting Anybody?', *Vanderbilt Journal of Transnational Law*, Vol. 39, 2006.
119 'Preamble', *in* 'Establishment of the United Nations Commission on International Trade Law', *GA Res. 2205 (XXI)*, 17 December 1966, paras. 3-5 and 8- 9. *See also* Felemegas, *supra* note 1, pp. 124-125.
120 Preamble, para. 3, CISG.

The "modern"[121] or "new"[122] *lex mercatoria* is a highly controversial topic. The literature addressing the *lex mercatoria* is described as "very extensive", and controversy surrounds its existence, nature and merits.[123] The polarising nature of the debate is articulated well by Craig, Park and Paulsson who explain:

> Proponents of *lex mercatoria* have the disconcerting habit of announcing the existence of an entire planet on little more evidence than blips on the radar screen, while detractors have adopted what one might call a posture of aggressive ignorance. The non-specialist, recoiling instantly from something which he recognizes as complicated and far removed from his every-day concerns, perhaps notes the catch-words for possible future reference, and goes on his way.[124]

Putting these matters to one side, it can be observed that the *lex mercatoria* is comparatively less controversial when addressed in the context of its codifications (rather than as the *lex mercatoria* at large). Apart from its ordinary application in state court proceedings and by arbitral tribunals through operation of the Articles 1(1)(a) and 1(1)(b) CISG application criteria, the CISG is also recognized as reflecting the *lex mercatoria*.[125] Growing the CISG by expanding its subject-matter scope, particularly in areas like prescription where state laws vary so widely around the world, brings into question the CISG's continued recognition as reflecting the *lex mercatoria*, or at least the *extent* to which it remains so recognized. This is a matter of some importance given that the CISG has a recognized special application in arbitration,[126] and arbitration is a particularly suitable forum for the application of the *lex mercatoria*. The former is evidenced (despite only fleeting references to arbitration in the CISG's text)[127] by 335 of the 432 Chinese CISG cases recorded in the Albert H. Kritzer

121 A. Goldštajn, 'Usages of Trade and Other Autonomous Rules of International Trade According to the UN (1980) Sales Convention', *in* P. Šarčević & P. Volken (Eds.), *International Sale of Goods – Dubrovnik Lectures*, Oceana Publications, New York, 1987, p. 59.

122 M. Mustill, 'Arbitration: History and Background', *Journal of International Arbitration*, Vol. 6, No. 2, 1989, p. 52.

123 ICC Case No. 7375/1996, *supra* note 81, p. A-39, para. 294.

124 W. Laurence Craig, W.W. Park & J. Paulsson, *International Chamber of Commerce Arbitration*, Oceana Publications, New York, 2000, pp. 625-626.

125 *See*, *e.g.*, International Chamber of Commerce, 1995, Case No. 7331/1994, *ICC Bull*, Vol. 6, No. 2, pp. 74-75; Goldštajn, *supra* note 121, p. 99. *See also* International Chamber of Commerce, 1995, Case No. 6149/1990, *XX YCA*, p. 56, para. 53; *but see* pp. 56-57, para. 55. *Compare* Schlechtriem & Schwenzer, *supra* note 2, pp. 10-11, para. 4; G. Petrochilos, 'Arbitration Conflict-of-Laws Rules and the 1980 International Sales Convention', *Revue Hellenique De Droit International*, Vol. 52, 1999, pp. 212-218; M. Davidson, *The Lex Mercatoria in Transnational Arbitration: An Analytical Survey of the 2001 Kluwer International Arbitration Database*, Albert H. Kritzer CISG Database, 2002, available at <http://www.cisg.law.pace.edu/cisg/biblio/davidson.html>.

126 G. Bell, 'Harmonisation of Contract Law in Asia – Harmonising Regionally or Adopting Global Harmonisations – The Example of the CISG', *Singapore Journal of Legal Studies*, 2005, p. 371.

127 Viscasillas & Muñoz, *supra* note 60, pp. 1355-1356.

CISG Database as being rendered by CIETAC tribunals.[128] The latter is evidenced by the widespread recognition of "rules of law" in arbitral laws and rules[129] which are words accepted by "coded reference" to include the *lex* in addition to ordinary national sources of law.[130]

There is precedent for the view that a *lex-mercatoria*-of-prescription might exist. In ICC Case No. 7375/1996[131] the majority opinion held that the parties had implicitly chosen the *lex mercatoria* after an implied negative choice of their own home state laws.[132] Prescription was a live issue in dispute; after identifying that the *lex mercatoria* applied, the resolution of what the *lex mercatoria's* contents were regarding prescription was left to a later stage of the proceedings[133] and was thus not reported as part of the Award on Preliminary Issues of 5 June 1996. It would certainly be interesting, in light of the present discussion, to know how chairman Blessing and arbitrators Movahed and Bernardini ultimately decided this issue – particularly given that the then-relevant first edition UNIDROIT Principles 1994 did not yet include a prescription chapter.

What can be said, on the basis of the current state of the law, is that expansion of the CISG's subject-matter scope creates a genuine danger that the CISG (or at least parts of it) might no longer be considered to reflect the *lex mercatoria*. There are specific parts of the UNIDROIT Principles, such as its hardship provisions,[134] that are considered not to reflect the *lex mercatoria*, and for that instrument the case law tends to take a case-by-case approach as to whether this characterization should apply to particular provisions that arise for consideration.[135]

128 *See, generally,* Pace Law School, *supra* note 3 – confirming a total count of 432 Chinese cases. A search of the database using the 'CIETAC' search term within the 'Tribunal' field yields 335 results.

129 *See*, *e.g.*, Art. 1511 French Arbitration Law 2011; Art. 187(1) Swiss Private International Law Act 1987; Art. 21(1) ICC Rules 2012; Art. 33(1) Swiss Rules of International Arbitration 2012; Art. 35(1) HKIAC Rules 2013; Arts. 27(1) & (2) VIAC Rules 2013; Art. 33(1) ICDR Rules 2014; Art. 22(1) SCC Rules 2010. *Compare* Arts. 3-4 and Preamble, para. 13, Rome I Regulation.

130 N. Blackaby et al., *Redfern and Hunter on International Arbitration*, 6th edition, Oxford University Press, Oxford, 2015, para. 3.189.

131 ICC Case No. 7375/1996, *supra* note 81.

132 *Id.,* pp. A-36, para. 283, A-37-A-38, paras. 289-290.

133 *Id.*, pp. A-45-A-47, paras. 343-344 and 348.

134 Arts. 6.2.1-6.2.3 UNIDROIT Principles 2010. *See*, *e.g.*, International Chamber of Commerce, 2004, Case No. 12446/2004, available at <http://www.unilex.info/case.cfm?pid=1&do=case&id=1424&step=FullText>, citing E. Jolivet, 'L'harmonisation du Droit OHADA des Contrats: L'influence des Principles d'UNIDROIT en Matière de Practique Contractuelle d'Arbitrage', *Uniform Law Review,* Vol. 13, 2008, pp. 145-146, n. 44.

135 *See*, *e.g.*, ICC Case No. 7375/1996, *supra* note 81, p. A-42, paras. 312 and 314.

3.3.5 Danger – The CISG's Relationship with Other International Instruments

On the subject of the CISG's external relationships, a further danger of growing the CISG through an expanded subject-matter scope lies in its interaction with other international instruments. This is an implication of the CISG's growth raised by this chapter's prescription case study, but is also implicated through any other expansion of the CISG's subject-matter scope where an international instrument exists governing those same subject-matter areas already.

Given that the CISG is not (and was never intended to be) a comprehensive code, it sits alongside and interacts with a wide variety of other substantive and procedural law international instruments. It also sits alongside the supplementary application of state law, as described in Section 3.1 above. The CISG's expansion does not present particular difficulties in the latter sense, given it is well established that the CISG displaces non-harmonized state law to the extent of its scope.[136] However, the CISG's relationships with other international instruments are not resolved on the basis of a single, simple, hard-and-fast rule. Rather, analysing how those relationships work in practice requires an analysis of the CISG's terms as well as the terms of those other instruments.[137] International conventions are more akin to contracts between states rather than centrally imposed legislation;[138] thus it is for the international community of states to itself determine the way in which international instruments (including the CISG and other relevant instruments) interact.[139] Though in some cases these kinds of provisions operate on a general level, in others they specifically implicate the matter of prescription – particularly in instruments addressing private international law.[140]

The CISG's relationships with other international instruments is currently regulated by specific provisions in the CISG itself as well as those various other instruments, based

136 L. Spagnolo, 'The Last Outpost: Automatic CISG Opt Outs, Misapplications and the Costs of Ignoring the Vienna Sales Convention for Australian Lawyers', *Melbourne Journal of International Law*, Vol. 10, 2009, pp. 190-191. *See also* Schwenzer et al., *supra* note 2, p. 38, para. 3.23; I. Schwenzer & P. Hachem, 'Introduction to Articles 1 – 6', *in* I. Schwenzer (Ed.), *Schlechtriem & Schwenzer: Commentary on the UN Convention on the International Sale of Goods (CISG)*, 3rd edition, Oxford University Press, Oxford, 2010, p. 19, para. 3. *Contra* s 87 Goods Act 1958 (Vic)(Australia); *Playcorp Pty Ltd v. Taiyo Kogyo Ltd*, Supreme Court of Victoria, Australia, 24 April 2003, para. 235, available at <http://cisgw3.law.pace.edu/cases/030424a2.html>.

137 *See*, *e.g.*, Schwenzer & Hachem, *supra* note 136, pp. 20-21, para. 6.

138 *Compare* Q. Wright, 'The Interpretation of Multilateral Treaties', *AJIL*, Vol. 23, 1929, pp. 98-104.

139 For two recent examples – *see* Preamble, para. 3 and Arts. 1(3), 2(2), 3, 8, 9 and 11 Hague Principles on Choice of Law in International Commercial Contracts; Arts. 3, 6, 7, 8(1), 11 and 13 Common European Sales Law Regulation (at the time of writing, not yet in force).

140 *See*, *e.g.*, Art. 12(1)(d) Rome I Regulation; Art. 10(1)(d) Rome Convention. *See also* Art. 9(1)(d) Hague Principles on Choice of Law in International Commercial Contracts; Art. 12(g) Hague Convention 1986 (at the time of writing, not yet in force). *Compare* Art. 15(h) Rome II Regulation, concerning the law applicable to non-contractual obligations.

on the CISG's subject-matter scope as presently articulated by Article 4 CISG. The reason why this implication arises from possible expansion of the CISG is that growth in the CISG's subject-matter scope alters the way in which these presently existing interactions are balanced. In the case of prescription, these alterations would be particularly pronounced.

The reason for this is that the existing UNCITRAL instrument regulating prescription in the international sale of goods – the Limitation Period Convention – contains a provision establishing that this Convention "shall not prevail" over international agreements concerning prescription that were already existing, *or which may later come into existence*.[141] It is a rule which has automatic operation, and does not rely on Member States making any kind of declaration.[142] To the extent that state membership of an expanded CISG and the Limitation Period Convention might overlap, including prescription within the CISG would render the Limitation Period Convention otiose. This is in a context where significant efforts (including use of an Amending Protocol) were directed towards ensuring the compatibility of the CISG and the Limitation Period Convention[143] – they are "sister convention[s]".[144] Additionally, although the Limitation Period Convention is sometimes thought to be "neglected",[145] it has recently been "attracting attention (and treaty actions)"[146] and at the 2nd Annual MAA Schlechtriem CISG Conference it was the subject of a call to arms by Professor Sugiura, particularly addressed to states in the East Asian region.[147]

The alteration of this balance would also be pronounced so far as the CISG's relationship with the UNIDROIT Principles is concerned. Chapter 10, addressing prescription, was added to the UNIDROIT Principles in 2004 and remains unchanged in the (current) UNIDROIT Principles 2010. The UNIDROIT Principles envisage their use in particular contexts, as set out in their Preamble.[148] While prescription remains outside the boundaries set by Article 4 CISG, the UNIDROIT Principles 2010 might usefully be used to "supplement" the Convention through the specific application of their Chapter 10 prescription rules.[149] Should the CISG be expanded to include rules on prescription, the role of the UNIDROIT Principles 2010 in this kind of case could only amount to one of assistance in the applicable CISG provisions' interpretation.[150]

Expanding the CISG's subject-matter scope would add further complexity to the interaction issue because it would not only raise issues as to how an expanded CISG would

141 Art. 37 Limitation Period Convention.
142 Sono, *supra* note 33, p. 171, para. 3.
143 Winship, *supra* note 34, pp. 1072-1073, 1078. *Compare* Sugiura, *supra* note 77, p. 229.
144 Sono, *supra* note 28, para. I.A. *See also* Sugiura, *supra* note 77, p. 227.
145 R. Sorieul, 'Foreword', *in* I. Schwenzer & L. Spagnolo (Eds.), *Towards Uniformity*, Eleven International Publishing, The Hague, 2011, p. 10.
146 Castellani, *supra* note 9, p. ix.
147 Sugiura, *supra* note 77, p. 238.
148 *See* Preamble, paras. 2-6, UNIDROIT Principles 2010.
149 *Id.,* para. 5.
150 *Id.,* para. 5.

"fit" into existing interaction regimes. It would also raise questions as to how an expanded CISG would itself regulate those interactions. In particular, it gives rise to a need to consider how an expanded CISG would deal with the thorny issue of reservations, or other treaty options.[151]

Due to the availability of a limited number of reservations under the CISG[152] – and only those reservations[153] – there are different "versions" of the CISG in existence.[154] The existence of reservations leads to non-uniformity; however they are "a bittersweet pill to swallow in that context" as the CISG's reservation provisions were necessary to initially *secure* uniformity through the overall CISG agreement.[155]

The trend with respect to the CISG as it presently stands has been towards the withdrawal of existing reservations[156] and this is consistent with the recommendations of the CISG Advisory Council in its recent Declaration No. 2, for which Professor Dr Schroeter was the *rapporteur*.[157] As the Council notes, the CISG's existing reservations scheme was developed on the basis of particular concerns raised by particular states at the time of the CISG's original adoption, and thus there is a "weakening (or altogether vanished) need for the reservations in Articles 92 – 96 CISG".[158] Should the CISG be expanded to include new subject-matters within its scope, however, the issue of the availability of and provision for reservations – with respect to an expanded CISG's (new) "growth provisions" – would again resurface as part of any (new) negotiations.

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151 *See*, *generally*, J. Galbraith, 'Treaty Options: Towards a Behavioral Understanding of Treaty Design', *Va J Int'l L*, Vol. 53, 2013. *See also* Arts. 2(1)(d) and 19-23 Vienna Convention on the Law of Treaties.

152 *See* Arts. 92-96 CISG. *See also* Art. 97 CISG.

153 Art. 98 CISG.

154 C. Andersen, 'Reservations Under the CISG: Regional Trends and Developments', *in* I. Schwenzer & L. Spagnolo (Eds.), *Globalization Versus Regionalization*, Eleven International Publishing, The Hague, 2013, p. 1.

155 *Id.,* p. 1.

156 For full discussion, *see* Chapter 1 by Andersen in this volume. *See, e.g.,* specific withdrawals in countries such as Lithuania, China, Latvia, Sweden and other nations – United Nations Information Service, *Lithuania Withdraws 'Written Form' Declaration Under the United Nations Convention on Contracts for the International Sale of Goods (CISG),* 4 November 2013, available at <http://www.unis.unvienna.org/unis/pressrels/2013/unisl192.html>; United Nations Information Service, *China Withdraws 'Written Form' Declaration Under the United Nations Convention on Contracts for the International Sale of Goods (CISG)*, 18 January 2013, available at <http://www.unis. unvienna.org/unis/pressrels/2013/unisl180.html>; United Nations Information Service, *Latvia Withdraws 'Written Form' Declaration Under the United Nations Convention on Contracts for the International Sale of Goods (CISG)*, 15 November 2012, available at <http://www.unis.unvienna.org/unis/pressrels/2012/unisl177.html>; United Nations Information Service, *Sweden Becomes a Party to Part II (Formation of the Contract) of the United Nations Convention on Contracts for the International Sale of Goods (CISG)*, 1 June 2012, available at <http://www.unis.unvienna.org/unis/pressrels/2012/unisl164.html>.

157 CISG Advisory Council, 'Declaration No. 2 – Use of Reservations Under the CISG', 2013, Rapporteur: Professor Ulrich G. Schroeter. *See* Recommendation [b]. *See also* Art. 97(4) CISG; Arts. 22-23 Vienna Convention on the Law of Treaties.

158 CISG Advisory Council, *supra* note 157, para. 1.

3.3.6 *Danger – The Limitations of Treaties as Instruments for the Harmonization of International Commercial Law*

The final implication raised by this paper's prescription case study is pragmatic. The CISG is a treaty,[159] and expansions to its subject-matter scope could therefore be effected in treaty form. Treaties are often seen as an ideal form for the unification of private law, though all of the various forms used for effecting harmonization at the international level have their own particular advantages and disadvantages, and there are limitations to treaty making.[160] Growing the CISG highlights the dangers that might arise from use of the treaty form. This is once again particularly well illustrated by this chapter's prescription case study.

One particular danger raised by the treaty form is the difficulty in amending a treaty's text. Even outside the amendment context, developing uniform law is difficult;[161] the CISG is a compromise and matters omitted were often omitted for good reason.[162] Ironically, the more successful a treaty (as measured by the number of Contracting States), the greater difficulty in then effecting change – a point well illustrated by the suggestion that the New York Convention (with its 156 State Parties)[163] is in-practice-unalterable.[164] Even where the agreement necessary to effect treaty amendment is secured, the uniform implementation of that amendment is not guaranteed. This is illustrated well by the existing Limitation Period Convention. Despite its Amending Protocol being concluded on 11 April 1980 – before the Limitation Period Convention itself came into force; and despite the Convention and the Amending Protocol then both coming into force on the very same day; there is still inconsistency in their adoption. There are currently 22 State Parties to both the Convention along with its Amending Protocol, but 29 State Parties to just the Limitation Period Convention as originally concluded.[165]

Though the CISG's state membership (at 83 parties)[166] is not as extensive as the New York Convention's 156 Contracting States, it is similarly recognized as a significant inter-

159 1980 United Nations Convention on Contracts for the International Sale of Goods, 1489 UNTS 3. *See also* Art. 2(1)(a) Vienna Convention on the Law of Treaties.

160 E. Bergsten, 'Implementation of the UNCITRAL Model Law on International Commercial Arbitration into National Legislation', *Croatian Arbitration Yearbook*, Vol. 10, 2013, p. 104; Paulsson, *supra* note 68, p. 185.

161 B. Audit, 'The Vienna Sales Convention and the Lex Mercatoria', *in* T. Carbonneau (Ed.), *Lex Mercatoria and Arbitration*, Kluwer Law International, Boston, 1998, p. 174.

162 A. Rosett, 'Critical Reflections on the United Nations Convention on Contracts for the International Sale of Goods', *Ohio SLJ*, Vol. 45, 1984, pp. 281-282.

163 UNCITRAL, *Status – Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958)*, 2015, available at <http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html>.

164 M. Kerr, 'Concord and Conflict in International Arbitration', *Arbitration International*, Vol. 13, 1997, p. 143.

165 UNCITRAL, *Status – Convention on the Limitation Period in the International Sale of Goods (New York, 1974)*, 2015, available at <http://www.uncitral.org/uncitral/en/uncitral_texts/sale_goods/1974Convention_status.html>.

166 UNCITRAL, *supra* note 21.

national commercial law success story[167] and would be subject to similar difficulty in amendment. This danger is aggravated in the context of prescription as it is a subject-matter recognized as "seem[ing] constantly to be going awry"[168] and that ideally its regulation should be subject to "regular" review.[169] The danger should not be overstated – the kind of interpretative reviews previously advocated in the United Kingdom, which it was suggested should involve "regular restatements, made by statutory instrument, which provide authoritative interpretation of the limitation statute",[170] could possibly find an analogue in the Opinions or Declarations (or other hypothetical future kinds of activity) of the CISG Advisory Council.[171] Nevertheless, the danger that new prescription provisions "will quickly silt up" after an expanded CISG has "dredged [prescription's] channels"[172] does remain present. To add to the complexity of this identified danger, it can be recalled (as discussed in Section 3.2) that existing state prescription laws differ widely, on a number of measures. Though the policies at issue are broadly consistent between jurisdictions,[173] these differences reflect the reality that particular jurisdictions' laws might have "struck a different balance"[174] in resolving competing policy claims.

Another danger arising from the use of the treaty form is one already familiar to CISG experience – the risk of a homeward trend interpretation. Despite the interpretative directives of Article 7(1) CISG,[175] cases can be readily identified which equate interpretation of the CISG with (displaced) domestic principles[176] and the homeward trend has been the subject of sustained academic analysis.[177] The *Secretariat's Commentary to the Limitation Period Convention*, in its analysis of the Convention's equivalent interpretative provision,[178] noted the importance of "avoid[ing] different constructions" given the widely differing approaches taken in non-harmonized state laws.[179] Though the Article 7(1) CISG interpre-

167 Schlechtriem & Schwenzer, *supra* note 2, p. 1. *See also* M. Van Alstine, 'Dynamic Treaty Interpretation', *U Pa LR*, Vol. 146, 1997-1998, p. 697.
168 Andrews, *supra* note 72, p. 607.
169 *Id.*, pp. 608-609.
170 *Id.*, p. 610, para. 11.
171 *See, generally,* Art. II CISG Advisory Council Bylaws 2013.
172 *Compare* Andrews, *supra* note 72, p. 607.
173 *See, generally*, Singapore Academy of Law, *supra* note 32, pp. 15-16, para. 47; South African Law Reform Commission, *supra* note 32, pp. 11-13, paras. 3.1-3.10; Note, *supra* note 32, pp. 1185-1186; *Brisbane South Regional Health Authority v. Taylor*, *supra* note 32, pp. 551-553. For an international perspective – *see* Sono, *supra* note 33, p. 146, para. 2.
174 *Compare* Singapore Academy of Law, *supra* note 32, p. 16, para. 47. *See also* Andrews, *supra* note 72, p. 595.
175 *See, generally*, Schwenzer & Hachem, *supra* note 6, pp. 122-133, paras. 5-26.
176 *See*, *e.g.*, *Castel Electronics Pty Ltd v. Toshiba Singapore Pte Ltd*, Full Federal Court, Australia, 20 April 2011, available at <http://cisgw3.law.pace.edu/cases/110420a2.html>.
177 *See*, *e.g.*, F. Ferrari, 'Homeward Trend and Lex Forism Despite Uniform Sales Law', *Vindobona Journal of International Commercial Law & Arbitration*, Vol. 13, 2009.
178 Art. 7 Limitation Period Convention.
179 Sono, *supra* note 33, p. 154.

tative directives exist to mitigate homeward trend risks, experience with the CISG to date demonstrates their operation is not always effective.

3.4 Conclusion

The CISG is sometimes referred to in scholarly writing as having been "concluded in 1980"[180] or as having "entered into force in 1988".[181] Both phrases are entirely accurate. However, at the same time, the CISG is not a static instrument and is also not isolated from the wider context of which it forms part. Its text, though at present unchanged since its inception, is subject to development through interpretation by state courts and arbitral tribunals, and analysis in scholarly commentaries and other forums. It also sits along a continuum of efforts spanning nearly a century, directed at the harmonization and unification of private law. Prescription also has a place in that wider harmonization context.[182] The CISG is "a work in progress", and its broader development within this context helps it progress.[183]

Against the context of the Swiss Proposal,[184] and also the idea that the CISG might be grown by the expansion of its subject-matter scope, this chapter has used the case study of prescription to assess the prospects, benefits and dangers associated with such expansion. This analysis has considered six implications evident within the single subject-matter of prescription. These are not exhaustive, and may not be representative. However, the implications raised by prescription provide examples of all three of an expansion program's prospect, benefits and dangers. For this reason, the case study of prescription is a useful example upon which to reflect, when considering the CISG's growth in general (including also its adoption by new Member States and its usage in particular industry sectors).

The CISG's text remains, to date, unchanged. However as the contributions made in this volume in honour of Professor Dr Schlechtriem show, it is nevertheless a dynamic, evolving and relevant instrument whose "growth" is eminently deserving of attention, considered analysis and debate.

180 *See, e.g.,* A. Drettmann, *Would English Law on Trade Usages Benefit from Adopting a More Formal Approach Such as Seen in Other Jurisdictions as Well as in International Conventions?*, Albert H. Kritzer CISG Database, 2009, available at <http://www.cisg.law.pace.edu/cisg/biblio/drettmann.html>.

181 *See, e.g.,* M. Shulman & L. Singh, 'China's Implementation of the UN Sales Convention Through Arbitral Tribunals', *Columbia Journal of Transnational Law*, Vol. 48, 2010, p. 270.

182 Sono, *supra* note 28, para. V.

183 Castellani, *supra* note 9, p. x.

184 UNCITRAL Secretariat, *supra* note 10, Ann. 1.