The Exclusion of the Validity of the Contract from the CISG: Does it still Matter?

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Abstract

The United Nations Convention on Contracts for the International Sale of Goods (CISG) was created to provide a uniform sales law that would address the globalisation of world trade and business practices of parties in different contracting states. Despite this notable goal, the CISG excludes from its application highly important questions such as the validity of contract. As of the CISG's 35th birthday, contract validity proves to still be an issue. This article surveys various strategies to remedy the validity gap in the CISG. The article highlights the difficulties associated with a comprehensive approach to the question of contract validity and suggests the coverage of specific issues where the CISG would be augmented by other initiatives as a more feasible option.

Introduction

The United Nations Convention on Contracts for the International Sale of Goods (CISG) [1] was created to provide a uniform international sales law that would address the phenomenon of the globalisation of world trade and business practices of parties in different contracting states. The Convention is the result of legislative work initiated by the International Institute for the Unification of Private Law

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[1] United Nations Convention on Contracts for the International Sale of Goods, opened for signature 11 April 1980, 1489 U.N.T.S. 3 (entered into force 1 January 1988) (CISG).

(UNIDROIT) in the 1930s,[2] which has been taken over by the United Nations Commission on International Trade Law (UNCITRAL) following the Second World War.[3] These efforts culminated with the adoption of the CISG by a diplomatic conference in Vienna on 11 April 1980. The Convention entered into force on 1 January 1988 for its 11 original and diverse state parties, which included every geographical region, every stage of economic development and every major legal, social and economic system. As of May 2016, 85 states have ratified the CISG.[4]

The main purpose of the CISG is to bring about worldwide uniformity on the formation of international sales contracts and the legal rights and obligations of both the seller and the buyer.[5] Through "the development of international trade on the basis of equality and mutual benefit" the state parties to the CISG aim at "promoting friendly relations" among themselves.[6] This ultimate goal is to be achieved by

> "the adoption of uniform rules which govern contracts for the international sale of goods [that lie at the heart of all international trade transactions] and take into account the different social, economic and legal systems [which] would contribute to *the removal of legal barriers in international trade* and promote the development of international trade".[7]

A look at the Preamble to the Convention demonstrates that the drafters intended, "the adoption of *uniform* rules which govern contracts for the international sale of goods" and to

> "take into account the different social, economic and legal systems [which] would contribute to the removal of legal barriers in international trade and promote the development of international trade".[8]

Despite the Preamble's pledge the Convention explicitly excludes from its purview some highly important contractual issues, including the validity of the contract, which could significantly contribute to the fulfilment of the CISG's goals. Thus, instead of providing a declared unification of international sales law, the Convention undermines the unification purpose in relation to the contract validity as it exempts the concept from its scope of application, and yields it to the domestic sphere.[9] This exemption has been perceived to be a threat to the overall development and structural process of the CISG.[10]

A recent conference by the Swiss Association for International Law and UNCITRAL, held at the University of Basel on 29–30 January 2015, marked the

[2] International Institute for the Unification of Private Law, "History and overview" (29 July 2014) UNIDROIT 1, *http://www.unidroit.org/about-unidroit/overview* [Accessed 19 December 2016].

[3] UNCITRAL, United Nations Convention on Contracts for the International Sale of Goods (Vienna, 1980) (CISG), *http://www.uncitral.org/uncitral/en/uncitral_texts/sale_goods/1980CISG.html* [Accessed 12 December 2016].

[4] For the authoritative information on the status of the CISG, see the UNCITRAL and the UN Treaty Collection websites, *http://www.uncitral.org/uncitral/en/uncitral_texts/sale_goods/1980CISG_status.html*>; *http://treaties.un.org/* [Both accessed 12 December 2016].

[5] *http://www.uncitral.org/uncitral/en/uncitral_texts/sale_goods/1980CISG.html* [Accessed 12 December 2016].

[6] CISG, Preamble, Recital 2.

[7] CISG, Preamble, Recital 3 (emphasis added).

[8] CISG, Preamble, Recital 3.

[9] CISG art.4(a).

[10] H. E. Hartnell, "Rousing the Sleeping Dog: The Validity Exception to the Convention on Contracts for the International Sale of Goods" (1993) 18 *Yale Journal of International Law* 2, 2–4.

CISG's 35th anniversary.[11] The conference focused on the CISG's application, validity issues and the possibility of further harmonisation and unification of contract law.[12] The conference programme and discussion during the proceedings indicate that the substantive issue of contract validity is still an important topic and unresolved question.

The need to transform the CISG is the rationale behind this article. The article explores the question of how the contract validity could be best approached in international sales contracts governed by the Convention. The aim of this article is to highlight the factors underlying the validity exclusion, to draw attention to the consequences, and to recommend the prospective unification of the international sales law concerning contract validity. While all issues of contract validity deserve attention, owing to space constraints this article only considers mistake, fraud and unconscionability.

The article comprises four parts. The first part provides an introduction to the subject under examination. The second part concerns the effects of the absence of contract validity from the scope of the CISG. The third part surveys various methods on how to remedy the validity gap in the CISG and in particular addresses approaches to the process of unification taken at the European[13] and Asian[14] regional level, as well as endeavours made at the international level.[15] The fourth part suggests that in order to achieve harmonisation, the scope of inclusion of contract validity within the CISG should be considered in line with the efforts made at both regional and international level, and ultimately be balanced with the domestic laws.

The effects of the validity exception

Despite the CISG's large number of articles (101 articles), suggesting a comprehensive coverage of the issues relating to contracts for the international sale of goods, the scope of application of the Convention is in fact very limited. While a number of provisions specify the matters that do not fall within the scope of the CISG,[16] art.4 expressly determines the parameters of the Convention's application. Article 4 provides that:

> "This convention governs only the formation of the contract of sale and the rights and obligations of the seller and the buyer arising from such a contract. In particular, except as otherwise expressly provided in this convention, *it is not concerned with*:

[11] Swiss Association for International Law and UNCITRAL, "35 Years CISG and Beyond", University of Basel, Switzerland, 29–30 January 2015.

[12] Swiss Association for International Law and UNCITRAL, "35 Years CISG and Beyond", University of Basel, Switzerland, 29–30 January 2015.

[13] Commission on European Contract Law, "The Principles of European Contract Law (PECL), Trans-Lex", *http://www.trans-lex.org/400200*; EU, "The Principles of European Contract Law 2002 (Parts I, II, and II)", *http://www.jus.uio.no/lm/eu.contract.principles.parts.1.to.3.2002/* [Both accessed 12 December 2016].

[14] Principles of Asian Contract Law (PACL) (January 2011), *Fondation-droitcontinental*, *http://www.fondation-droitcontinental.org/en/document/the-pacl-principles-of-asian-civilcommercial-law-or-contract-law-in-east-and-southeast-asia/* [Accessed 12 December 2016].

[15] Proposal by Switzerland on possible future work by UNCITRAL in the area of international contract law, Note by the Secretariat—Possible future work in the area of international contract law, GA, UN GAOR, 45th sess., UN Doc. A/CN.9/758 (25 June – 6 July 2012) (*Swiss Proposal)*, pp.1, 2–4; *UNIDROIT Principles of International Commercial Contracts 2010 (PICC)* (1 August 2014), *http://www.unidroit.org/publications/513-unidroit-principles-of-international-commercial-contracts* [Accessed 12 December 2016].

[16] See, e.g., CISG arts 2, 3, 4 and 5.

(a) *the validity of the contract or of any of its provisions or of any usage*;
(b) the effect which the contract may have on the property in the goods sold."[17]

Pursuant to art.4, the Convention is only concerned with the formation of the contract of sale and with the rights and obligations of the seller and the buyer which arise from the contract. Unless expressly provided in the CISG, the Convention explicitly excludes from its purview "the validity of the contract or of any of its provisions or of any usage",[18] and "the effect which the contract may have on the property in the goods sold".[19] As far as issues of contract validity are concerned, they are relegated to the domestic realm, that is, the applicable domestic law. The proceeding part of this article considers the underlying reasons for the validity exception in view of the CISG's drafting history. Problems such as divergent interpretation and unpredictability are highlighted in order to show the effects of the validity exclusion, along with a brief discussion on specific factors, such as mistake, fraud and unconscionability being issues of contract validity currently consigned to the domestic fora.

The drafting history of CISG art.4

An examination of art.4(a) of the CISG in light of the drafting history can provide an understanding of the validity exclusion and the intentions behind it.[20] Efforts to harmonise the law on the international sale of goods stretch back to 1929 when Ernst Rabel initiated the drafting of an international uniform sales law.[21] Starting its work under the auspices of the League of Nations, the UNIDROIT eventually produced two conventions: the Uniform Law for the International Sale of Goods (ULIS)[22] and the Uniform Law on the Formation of Contracts for the International Sale of Goods (ULF),[23] both adopted at The Hague Conference on Uniform Law for International Sales in 1964.[24] For a plethora of reasons, UNIDROIT's efforts failed to receive substantial support.[25] This, however, did not prevent further work on unification of contract law, with UNCITRAL taking over the task to draft a uniform international law on contracts for the sale of goods. A working group comprising representatives from 15 Member States was appointed to this end and was instructed by the UNCITRAL to determine whether it was necessary to retain the existing text or to produce a new text for the same purpose.[26]

In terms of the validity exception, the Commission decided to request the Working Group "to consider the establishment of uniform rules governing the

[17] CISG art.4 (emphasis added).
[18] CISG art.4(a).
[19] CISG art.4(b).
[20] J.P. Quinn, "The Interpretation and Application of the United Nations Convention on Contracts for the International Sale of Goods" (2004) 9 *International Trade and Business Law Review* 221, 221–224.
[21] P. Schlechtriem, "Uniform Sales Law—The UN Convention on Contracts for the International Sale of Goods", Pace Law School (1986), p.16, *http://www.cisg.law.pace.edu/cisg/biblio/schlechtriem.html* [Accessed 12 December 2016].
[22] Convention Relating to a Uniform Law on the International Sale of Goods, 1 July 1964, 834 U.N.T.S. 107 (1972) (ULIS).
[23] Convention Relating to a Uniform Law on the Formation of Contracts for the International Sale of Goods, 1 July 1964, 834 U.N.T.S. 169 (1972) (UL).
[24] See, generally, *http://www.cisg.law.pace.edu/cisg/text/antecedents.html* [Accessed 5 January 2017].
[25] ULIS and ULF were ratified by nine states.
[26] J. Hannold, "The Draft Convention of Contract for the International Sale of Goods: An Overview" (1979) 27 *American Journal of Comparative Law* 223.

validity of contracts … on the basis of the UNIDROIT draft".[27] However, examination of the report by the Secretary-General reveals a recommendation that contract validity should not be extended to matters which "rarely arise in contracts for international sale of goods" and when "such events [do] occur, they can usually be handled [by] non-uniform national law".[28]

While CISG's predecessors, ULIS and ULF, did not attract worldwide ratification, they did serve as a basis for CISG provisions.[29] Article 4(a) of the CISG, which expressly excludes the issue of validity from international sale contracts governed by this convention, is based on, developed from and remains similar to art.8 of the final version of the ULIS (1964) (tracing back to art.11 of the 1939 draft ULIS[30] which contained the first form of exclusion). Examination of observations reprinted in the 1964 *Hague Conference Documents* reveals objections to the exclusion of validity from the ULIS. For example, in relation to art.12 of the 1956 draft ULIS (later ULIS art.8) the Hungarian delegation noted the following:

> "Leaving on one side the point that this Article deals with a question which — according to the sense of Article 12 — should have been left outside the draft, we do not find ourselves in agreement with the content of this Article."[31]

Similarly, the Federal Republic of Germany delegation expressed the opinion that the Uniform Law failed to live up to its name insofar as "its authors do not propose to achieve complete unification of the law" and left "questions of great importance, such as the validity of the contract to domestic law".[32] However, the German delegation accepted the exclusion owing to the "difficulty of unification of law" and since it considered that "if this unification is to be achieved, it will be only by stages".[33]

The drafting history of art.4(a) reveals the intent behind the consideration to "neither [disturb] the deeply ingrained notions of public policy … nor [to try] to legislate what public policy should be for all nations".[34] The debate on the validity exception was not resolved but rather avoided to allow for elasticity of differing national law jurisdictions.[35]

[27] *Report of the Secretary-General*, 8th sess., UN Doc A/CN.9/128/Annex II (4–14 January 1977).
[28] *Report of the Secretary-General*, 8th sess., UN Doc A/CN.9/128/Annex II (4–14 January 1977) paras 92–93.
[29] Hartnell, "Rousing the Sleeping Dog" (1993) 18 *Yale Journal of International Law* 2, 5.
[30] Draft of a Uniform Law on the International Sale of Corporeal Movables and Report (Revised Edition), UNIDROIT UPL 1939, Draft 1(2) (1939 Draft ULIS), which the UNIDROIT Governing Council approved on 29 May 1939. For an overview of the 1939 Draft ULIS see also E. E. Bergsten and A.J. Miler, "The Remedy of Reduction of Price" (1979) 27 *American Journal of Comparative Law* 255.
[31] Observations of the Hungarian Government on the 1956 Draft ULIS, reprinted in *Diplomatic Conference on the Unification of Law Governing the International Sale of Goods (Documents)*, The Hague, 2–25 April 1964 (1966) (Hague Conference Documents), p.122.
[32] Observations of Government of Federal German Republic on 1956 Draft ULIS, reprinted in *Hague Conference Documents* (1966), p.82.
[33] Observations of Government of Federal German Republic on 1956 Draft ULIS, reprinted in *Hague Conference Documents* (1966), p.82.
[34] B.B. Crawford, "Drafting Considerations under the 1980 United Nations Convention on Contracts for the International Sale of Goods" (1988) 8 *Journal of Law and Commerce* 187, 191.
[35] B. Zeller, *CISG and the Unification of International Trade Law* (Abingdon: Routledge, 2008).

Consequences of the validity exclusion

The validity exclusion foreshadows a range of problems with matters such as divergent interpretations and unpredictability.[36]

Divergent interpretations

In accordance with art.7, in interpreting the CISG, "regard is to be had to its *international character* and to the need to *promote uniformity* in its application and *the observance of good faith* in international trade".[37] The guidelines in art.7 emphasise that the CISG is a legal instrument that is "international" in character and thus needs to be interpreted independently from idiosyncratic national approaches. This suggests that autonomous interpretation must be made in consideration of the overall objective and purpose of the Convention rather than in accordance with domestic law.[38]

However, with no primary point of reference as to the interpretation of validity, different courts may give different "autonomous" interpretations, deviating from the Convention's purpose of promoting a set of uniform rules.[39] With international trade occurring on a day-to-day basis globally, the interpretation of validity in different countries entrenched with different cultures and legal backgrounds can lead to differing, even conflicting, results.[40]

The possibility of divergent interpretations is contrary to the purpose of the CISG to provide a "uniform" law. The requirement of art.7(1) that "regard is to be had to its *international* character" demands that judges move from rules and techniques promulgated for the interpretation of domestic legislation and adopt a

[36] In addition to excluding validity issues, the CISG, in accordance with art.6, also allows the contracting parties to exclude the operation of the Convention in its entirety, or exclude or amend any of its provisions, which also increases the use of declarations and/or reservations permitted under art.95. The uncertainties arising from the opting out clause and/or reservations, coupled with the already limited scope of the CISG on validity issues, as well as the lack of familiarity with the Convention, may result in a situation where parties are more comfortable to turn to their own (familiar) domestic law, thereby further hindering uniformity, predictability and the success of the *Convention*. See, e.g., J. Hannold, *Uniform Law for International Sales under the 1980 United Nations Convention*, 3rd edn (Kluwer Law International, 1999), p.39; P. L. Fitzgerald, "The International Contracting Practices Survey Project: An Empirical Study of the Value and Utility of the United Nations Convention on the International Sale of Goods (CISG) and the UNIDROIT Principles of International Commercial Contracts to Practitioners, Jurists, and Legal Academics in the United States" (2008) 27 *Journal of Law and Commerce* 1, 7–10.

[37] CISG art.7(1) (emphasis added).

[38] B. Zeller, "Penalty Clauses: Are They Governed by the CISG" (2011) 23 *Pace International Law Review* 1. For a discussion on uniformity see also J. Felemegas, "The United Nations Convention on Contracts for the International Sale of Goods: Article 7 and Uniform Interpretation" in *Pace International Law Review (ed.), Pace Review of the Convention on Contracts for the International Sale of Goods (CISG)* (Kluwer Law International, 2000–2001), pp.115–265; L. Spagnolo, "Opening Pandora's Box: Good Faith and Precontractual Liability in the CISG" (2008) 21 *Temple International and Comparative Law Journal* 161; P. Soni, "The Benefits of Uniformity in International Commercial Law with Special Reference to the United Nations Convention on Contracts for the International Sale of Goods (1980)" (Dissertation, 2012), *http://www.cisg.law.pace.edu/cisg/biblio/soni.html* [Accessed 5 January 2017].

[39] I. Schwenzer, C. Fountoulakis and M. Dimsey, *International Sales Law: A Guide to the CISG* (London: Bloomsbury Publishing, 2012).

[40] Insufficient familiarity with the CISG is another cause for divergent results. See, e.g., *Société Dig v Société Sup*, 05-13.538, 13 February 2007, reported in (2007) (concerning defective computer components, where Société Sup, the seller, was ordered to pay the buyer damages; the Paris Court of Appeal reversed the judgment on the basis that limitation clauses on guarantee and exemption of responsibility were matters valid under the CISG. The judgment was annulled as a breach of CISG art.4 and the parties returned to their respective positions before the judgment.). See also J.A. Spanogle and P. Winship, *International Sales Law: A Problem-Oriented Coursebook* (West Academic, 2000).

more flexible approach that considers the underlying purpose and policies of individual provisions as well as the Convention as a whole.[41]

The requirement of good faith referred to in art.7(1) is another issue. While the principle of good faith is upheld in many legal systems, its treatment may vary. For example, while some common law states apply the principle of good faith to contract performance only, civil law states apply good faith to contract formation and interpretation as well. This creates a situation where negotiations prior to the acceptance of a contract are subject to the requirement of good faith and a breach may raise a claim in *culpa in contrahendo*.[42]

In order to avoid divergent interpretations, national standards should be adopted only as far as they are comparative.[43] This may prove difficult since most domestic laws on sales and obligations are nearly 100 years old. Ernst Rabel was of the opinion that one of gains to be derived from uniform law is that it would avoid "awesome relics of the dead past that populate in amazing multitude the older codifications of sales law".[44] To achieve this, the CISG must generally be interpreted and applied uniformly.[45] With respect to the validity exception in particular, Professor Hartnell advises that the exclusion suggests the emergence of a functional view of validity, where validity issues refer to issues that render the adoption of a uniform law, or its uniform interpretation, difficult.[46]

The lack of definitive outlines to the validity exception gives rise to the risk of domestic governing laws determining the validity of a contract and, in turn, adding to the costs of international contracting.[47] This could be avoided by harmonising the international sales law by including provisions regarding contract validity in the CISG, whereby the states parties to the Convention would be able to avoid costs associated with familiarising themselves with the applicable foreign law, thereby reducing transactional costs.[48] Similarly, addressing the validity requirements for contracts would preclude courts from using their domestic laws as a point of reference,[49] promote unification of the laws for the international sale of goods and decrease the current legal unpredictability.

[41] N. Povrzenic, "Interpretation and Gap-Filling under the United Nations Convention on Contracts for the International Sale of Goods", Pace Law School (1998), *http://www.cisg.law.pace.edu/cisg/biblio/gap-fill.html* [Accessed 13 December 2016].

[42] Povrzenic, "Interpretation and Gap-Filling under the United Nations Convention on Contracts for the International Sale of Goods" (1998), *http://www.cisg.law.pace.edu/cisg/biblio/gap-fill.html* [Accessed 13 December 2016].

[43] Povrzenic, "Interpretation and Gap-Filling under the United Nations Convention on Contracts for the International Sale of Goods" (1998), *http://www.cisg.law.pace.edu/cisg/biblio/gap-fill.html* [Accessed 13 December 2016].

[44] Hannold, *Uniform Law for International Sales under the 1980 United Nations Convention* (1999), p.21.

[45] Hannold, *Uniform Law for International Sales under the 1980 United Nations Convention* (1999), p.21.

[46] Hartnell, "Rousing the Sleeping Dog" (1993) 18 *Yale Journal of International Law* 2, 31.

[47] G. Cuniberti, "Is the CISG benefiting anybody?" (2006) 39 *Vanderbilt University Journal of Transnational Law* 1511; I. Schwenzer, "Regional and Global Unification of Contract Law' (2011) 13 *European Journal of Law Reform* 39, 54; M. B. Lopez, "Resurrecting the Public Good: Amending the Validity Exception in the United Nations Convention on Contracts for the International Sale of Goods for the 21st Century" (2010) 10 *Journal of Business and Securities Law* 133, 164.

[48] Lopez, "Resurrecting the Public Good" (2010) 10 *Journal of Business and Securities Law* 133, 164.

[49] C. Sheaffer, "Failure of the United Nations Convention on Contracts for the International Sale of Goods and a Proposal for a New Uniform Global Code in International Sales Law" (2007) 15 *Cardozo Journal of International and Comparative Law* 461.

Unpredictability

The validity exclusion has resulted in inconsistency in the application of the CISG and in legal uncertainty.[50] The task of determining invalidity has been left to the domestic regulatory framework, omitting continuity in expectations by foreign parties. Without an applicable law in the CISG regarding contract validity, the difficult task is then to decide which law governs the contract and, furthermore, whether the law is precise enough.[51] Legal uncertainty ultimately undermines the Convention's purpose to provide a uniform set of laws governing international sales contracts, and detracts the willing participation and adoption by prospective states as a means to rely upon in their international transactions.[52]

An important factor impairing the predictability of the Convention is related to defining the very term "validity", the importance of the matter becoming apparent when considering the discrepancies observed between national courts' interpretation of the definition.[53] The drafters of the Convention did not define the term "validity".[54] Although the drafters did exchange views on whether certain issues fell within the ambit of the exclusion, and suggested issues to be excluded, the apparent lack of debate demonstrates that the drafters intended to keep the term ambiguous.[55] During the debates on the contradictions in the text of the uniform law (art.8 of the ULIS), the drafters rarely indicated why some issues are validity issues, but others are not, or explored the differences between issues of validity and issues of formation in great depth. The drafters, however, did indicate that the guiding principle behind the exclusion clause was closely tied to matter of "public policy and morality", and the need to protect certain categories of persons.[56] The drafting history of the CISG suggests that the drafters intended art.4(a) to serve as a loophole that would accommodate the various domestic legal systems in order to avoid residual issues under debate, circumventing a lack of agreement and substantial delays.[57] As a result, the validity debate was not resolved but rather deferred.[58]

In addition, although the exclusion of validity issues ultimately promoted the adoption of the CISG, the exclusion of validity issues is particularly disappointing in the context of the Convention's importance for the enhancement of developing economic systems. Regions such as Africa could look to the CISG as a neutral body of law to help facilitate growth for businesses that are unable to afford the high costs of research and litigation of foreign laws.[59]

In this respect, it needs to be kept in mind that the CISG is an international legal instrument committed to the overall purposes of the United Nations. The purpose

[50] I. Schwenzer and P. Hachem, "The CISG—Successes and Pitfalls" (2009) 57 *American Journal of Comparative Law* 457, 471–472.
[51] D.V. Vorobey, "CISG and Arbitration Clauses: Issues of Intent and Validity" (2013) 31 *Journal of Law and Commerce* 135, 159–161.
[52] Hartnell, "Rousing the Sleeping Dog" (1993) 18 *Yale Journal of International Law* 2.
[53] F. Ferrari, "PIL and CISG: Friends or Foes" (2012) 31 *Journal of Law and Commerce* 45.
[54] Hartnell, "Rousing the Sleeping Dog" (1993) 18 *Yale Journal of International Law* 2, 20.
[55] Hartnell, "Rousing the Sleeping Dog" (1993) 18 *Yale Journal of International Law* 2, 20
[56] See, e.g., Observations of the Governments of Finland, Sweden and Norway Submitted before the Opening of the Diplomatic Conference, UN Docs. V/Prep./9, 10 and 13, reprinted in *Hague Conference Documents* (1966), pp.268–269.
[57] Hartnell, "Rousing the Sleeping Dog" (1993) 18 *Yale Journal of International Law* 2, 21.
[58] Hartnell, "Rousing the Sleeping Dog" (1993) 18 *Yale Journal of International Law* 2, 21.
[59] Lopez, "Resurrecting the Public Good" (2010) 10 *Journal of Business and Securities Law* 133, 152.

of the CISG therefore should not be isolated from other international legal instruments. One of the purposes of the UN is

> "[t]o achieve international cooperation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion".[60]

The exclusion of validity issues from the CISG counteracts this core purpose of the UN since, as a result, the CISG fails to address issues relating to public policy and fairness.[61]

Some validity factors considered

Despite the varying definitions of the term "validity" at the domestic level, and the associated difficulties regarding its definition at the international level,[62] there is international consensus that certain issues, such as mistake, fraud and unconscionability, do fall under the umbrella of "validity".[63] This section juxtaposes the consequences of the validity exclusion from the CISG against these three validity factors.

Mistake

Mistake refers to an erroneous belief upon which the contract was made.[64] The doctrine of mistake has been an important development for contract law, granting parties the ability to prevent or relieve themselves from a contract where basic assumptions held at the time of contracting vital to the agreement were incorrect.[65] Considering the vast number of scenarios involved in mistake, it has already been hard enough for domestic laws to ensure uniformity of decisions that comply with the CISG.[66] For example, in *Smith v Hughes*,[67] under the English law jurisdiction, after receiving samples of oats the defendant entered a contract for what he thought were "old oats". The court held that no mistake per se existed since the condition was neither a stated term of the contract nor a mere contractual assumption. In contrast, in *Scriven Bros v Hindley*,[68] also under English law, where the defendant made a bid at an auction for two lots believing they were both hemp, and where in fact, the second lot was tow, owing to which the defendant declined to pay, the court found that since the mistake was due to the labelling of goods by the plaintiff,

[60] Charter of the United Nations, signed on 26 June 1945 59 Stat, 1031; TS 993; 3 Bevans 1153 (entered into force 24 October 1945) art.1(3).

[61] Lopez, "Resurrecting the Public Good" (2010) 10 *Journal of Business and Securities Law* 133, 153–154.

[62] M. Bridge, "Law for International Sale of Goods" (2007) 37 *Hong Kong Law Journal* 17, 24.

[63] Lopez, "Resurrecting the Public Good" (2010) 10 *Journal of Business and Securities Law* 133, 144; J. Lookofsky, *Understanding the CISG*, 4th edn (Kluwer Law International, 2012); H.M. Flechtner, "More US Decisions on the UN Sales Convention: Scope, Parol Evidence, Validity and Reduction of Price under Article 50" (1994) 14 *Journal of Law and Commerce* 153, 164–168.

[64] I. Ayres and A. Schwartz, "The No-Reading Problem in Consumer Contract Law" (2014) 66 *Stanford Law Review* 545, 558.

[65] C. MacMillan, *Mistakes in Contract Law* (London: Bloomsbury Publishing, 2010), pp.205, 206.

[66] F. Ferrari, "Have the Dragons of Uniform Sales Law been Tamed? Ruminations on the CISG's Autonomous Interpretation by Courts" in C. Baasch Andersen and U. G. Schrowter (eds), *Sharing International Commercial Law across National Boundaries: Festschrift for Albert H. Kritzer on the Occasion of his Eightieth Birthday* (Wildy, Simmonds and Hill, 2008), p.134 at pp.139–141.

[67] *Smith v Hughes* (1871) L.R. 6 Q.B. 597.

[68] *Scriven Bros & Co v Hindley & Co* [1913] 3 K.B. 564.

the contract was void.[69] These two cases are the examples that involve similar factual situations with different outcomes vis-à-vis validity, demonstrating that divergent results could arise even in the same legal system.

Fraud

The concept of fraud in the context of a sale contract refers to the illegal act of misrepresentation, where one party to the contract intentionally presents material facts that are deceitful, misleading or incorrect.[70] In the case of *Nobel Co Ltd v ADI Co Ltd, Long Yuan Co Ltd and Huadian Co Ltd*,[71] under Chinese law, the plaintiff signed an agreement with the defendants that entitled the plaintiff to an exclusive right to Marketing Printer Okipage-4w, a product of OKI Printing Solutions, in the Chinese market. The authorisation agreement was not recognised by OKI since Nobel "failed to achieve the sales data stipulated under the agreement".[72] The court held that since the defendants concealed the truth and deceived the plaintiff, the agreement was invalid. In *Krysa v Payne*,[73] decided in Missouri, US, where the plaintiff was induced by information supplied by the defendant to purchase a car, although the vehicle had multiple owners instead of the one as claimed, and further inspection also revealed several additional problems, the court held that the contract was void on the basis that Payne was aware of the damages to the truck, and continued to take steps to mislead Krysa. There was a clear intention of fraud in both cases, rendering the contracts void in two different jurisdictions. By contrast to the above-mentioned cases, in *Discount Records v Barclays Bank*,[74] decided in the UK, where the plaintiff sought a pre-trial injunction to restrain the bank from paying since the plaintiff was made aware that only half the shipment sent was filled with goods and the other half was filled with rubbish, the court rejected the plaintiff's argument on the grounds that fraud had been alleged, however, not yet proven.[75] This case demonstrates a more complex perspective on fraud. The difference in requirements highlights the importance of contract validity, which occurs in day-to-day contracts of sale, and ultimately underlines the necessity of a uniform contract law.[76]

Unconscionability

Unconscionability, or gross disparity in the context of international trade, refers to the disadvantage caused to a party that is in a weak bargaining position.[77] The 1989 UNIDROIT *Validity Study* emphasises that unconscionability can be shown

[69] R. Sefton-Green, *Mistake, Fraud and Duties to Inform in European Contract Law* (Cambridge University Press, 2005) 67–72.
[70] J. Rivera, "Legal Match, What is Contract Fraud?", *http://www.legalmatch.com/law-library/article/what-is-contract-fraud.html* [Accessed 13 December 2016].
[71] *Nobel Co Ltd v ADI Co Ltd, Long Yuan Co Ltd and Huadian Co Ltd* (2000).
[72] *Nobel Co Ltd v ADI Co Ltd, Long Yuan Co Ltd and Huadian Co Ltd* (2000) at [11].
[73] *Krysa v Payne* 176 SW 3d 150 (Mo. Ct App. 2005).
[74] *Discount Records v Barclays Bank* [1975] 1 All E.R. 1071 Ch D.
[75] *Discount Records v Barclays Bank* [1975] 1 All E.R. 1071.
[76] I. Schwenzer, "Who Needs a Uniform Contract Law, and Why?" (2013) 58 *Villanova Law Review* 723, 729.
[77] Hartnell, "Rousing the Sleeping Dog" (1993) 18 *Yale Journal of International Law* 2, 81.

where there is "gross disparity between the obligations of the parties" or "contract clauses grossly upsetting the contractual equilibrium".[78]

The exclusion of validity issues from the scope of the Convention results in a situation where issues relating to unconscionability are heard before and determined by domestic laws with different rules, which could lead to inconsistencies and divergent results. This is particularly troubling owing to the large use of standard forms and waivers in commercial transactions. Ziegel and Samson report that the exclusion of validity issues from the scope of the Convention would be

> "of particular importance where the contract contains a disclaimer clause restricting or excluding liability for breach of warranty or other obligation imposed on the seller under the *Convention* and the buyer invokes the doctrine of "fundamental breach" or impeaches the clause on grounds of unconscionability".[79]

As with other validity issues, different legal systems approach the concept of unconscionability differently. For example, in the US, while under the Uniform Commercial Code (UCC) the courts would examine both procedural unconscionability and substantive unconscionability, under Japanese law there are no statutory provisions dealing with unconscionability. Instead, issues of unconscionability are merely addressed against public policy, the doctrine of good faith, abuse of rights or tort.[80] The exclusion of validity issues from the CISG also leads to challenges for authors of waivers themselves. A main challenge is matching the disclaimer to the variety of possible applicable laws with different requirements.[81]

Summary

After much consideration of the effects of the validity exclusion, the reason why it is still excluded remains unclear. Although 2015 marked the CISG's 35th anniversary, the fact that contract validity proved to be one of the main subjects for discussion at the Basel Conference implies that the apparent success of the Convention is fragile.[82] Despite the overall success of the CISG, hesitation still exists, which is illustrated by reported findings that in the US, for example, between 55 and 57 per cent of lawyers typically opt out from the CISG owing to both unfamiliarity and lack of certainty.[83] The situation is also alarming in other states.[84]

[78] UNIDROIT 1989 *Validity Study*, L: Doc 43 (1989), pp.11–13. See generally, Study L - Principles of International Commercial Contracts - Preparatory Work, *http://www.unidroit.org/preparatory-work-principles-1994* [Accessed 5 January 2017].

[79] J.S. Ziegel and C. Samson, *Report to the Uniform Law Conference on Canada on [the] Convention on Contracts for the International Sale of Goods* (July 1981), p.42.

[80] A. Newhouse and T. Tsuneyoshi, "CSOG—A Tool for Globalization (1): American and Japanese Perspectives" (2012) 29 *Ritsumeikan Law Review* 28.

[81] Newhouse and Tsuneyoshi, "CSOG—A Tool for Globalization (1): American and Japanese Perspectives" (2012) 29 *Ritsumeikan Law Review* 28, 31.

[82] Swiss Association for International Law and UNCITRAL, "35 Years CISG and Beyond", University of Basel (January 2015).

[83] Fitzgerald, "The International Contracting Practices Survey Project" (2008) 27 *Journal of Law and Commerce* 1, 64.

[84] See, e.g., L. Spagnolo, "Law Wars: Australian Contract Law Reform v CISG v CESL" (2013) 58 *Villanova Law Review* 623; F. Aghili, "A Critical Analysis of the CISG as Australian Law" (December 2007 — February 2008) 21 *Commercial Law Quarterly*. For discussion about the "neglect" of the CISG, see generally J.E. Murray Jr, "The Neglect of CISG: A Workable Solution" (1998) 17 *Journal of Law and Commerce* 365; M. Kilian, "CISG and the Problem with Common Law Jurisdictions" (2001) 10 *Transnational Law and Policy* 217.

Perhaps because the worldwide success story of the CISG depends very little on the issue of contract validity, the Convention's overall ability to function is not at stake or questioned entirely.[85] Nevertheless, it has been suggested that the use of the CISG may decrease and eventually fade in favour of more cost-effective, business-friendly models of international trade law.[86] Given the growing number of state parties and their desire for a uniform regime of trade law, however, this appears unlikely. Then again, the impediments presented by the CISG as an incomplete body of law omitting important issues such as validity, coupled with the absence of an international adjudicatory body capable of producing binding internationalised decisions, support the contention that the CISG may, in time, become less relevant unless changes are made.[87]

Reconsidering the validity exception

Establishing the CISG as the governing law on contract validity is significant to the practice of international business transactions and the promotion of legal uniformity.[88] The preceding part of this article addressed the consequences of the validity exclusion. This part discusses the suggested route to the integration of the concept within the ambit of the CISG, with the aim to strike a balance in contractual validity laws. The Preamble to the CISG clearly states that "the development of international trade on the basis of equality and mutual benefit is an important element in promoting friendly relations among States".[89] Having that issues concerning public policy, unconscionability, fraud and mistake, also concern societal benefits and equality, the CISG's failure to address these issues by excluding the validity of the contract, and its subsequent reliance on varied domestic legal forums, results in a frustration of the Convention.[90]

An array of strategies could be utilised to minimise this frustration. One option could be to adopt a protocol to the CISG that defines validity and provides a non-exhaustive list of validity issues, which would provide guidance while still maintaining jurisdictional autonomy. In addition, various initiatives to harmonise contract law, including regional initiatives in Asia and Europe, could be considered.[91] Equally worthy of consideration are international attempts to fill in the gaps in the CISG.

[85] Schwenzer and Hachem, "The CISG—Successes and Pitfalls" (2009) 57 *American Journal of Comparative Law* 457.

[86] See, e.g., A. Janssen and O. Mayer, *CISG Methodology* (Munich: Sellier, European Law Publishers, 2009), p.58.

[87] Lopez, "Resurrecting the Public Good" (2010) 10 *Journal of Business and Securities Law* 133, 166.

[88] M. del Pilar Perales Viscasillas, "Battle of the Forms under the 1980 United Nations Convention on Contracts for the International Sale of Goods: A Comparison with Section 2-207 UCC and the UNIDROIT Principles" (1998) 10 *Pace International Law Review* 97.

[89] CISG, Preamble, Recital 3.

[90] Lopez, "Resurrecting the Public Good" (2010) 10 *Journal of Business and Securities Law* 133, 166, 167–168.

[91] According to the World Trade Organization *Merchant Report* issued in October 2014 for 2013, Europe-Asia combined merchandise trade amounted to 66% of world trade. See World Trade Organization, *World Region Report on Merchandise Trade* (October 2014), p.1. In addition to PACL and PECL there have been other regional initiatives to harmonise contract law, including Africa. See Acte Uniforme portant sur le Droit commercial general (Uniform Act on General Commercial Law) (15 December 2010), Organization Pour L'Harmonisation en Afrique du Droit des Affaires (Organisation for the Harmonisation of Business Law in Africa) (OHADA), *http://www.ohada.org /presentation-generale-de-lacte-uniforme/telechargements.html*.

Regional model law initiatives

The Principles of Asian Contract Law

The Principles of Asian Contract Law (PACL) is a private initiative aiming to promote worldwide contract compatibility, including contract validity.[92] The need for harmonisation within the East Asia region reflects the changing world since the birth of the CISG. The PACL, designed by Asian scholars, is the regional model law without any binding force of law.[93] It is still being developed.[94]

The PACL consists of two books. Book 1 covers general provisions. Book 2 comprises six substantive chapters, each being prepared by different drafters. Chapter 4 of Book 2, drafted by Japan, is focused on the validity of contracts and is relatively simple compared with other provisions.[95] Section 1of Ch.4 specifies the grounds for invalidity and s.2 of Ch.4 addresses the effects of invalidity. Section 1 specifically states the scope of the section, mandatory provisions and addresses specific issues such as mistake, fraud and unfair exploitation. Unlike the CISG, which leaves validity issues to the realm of diverse domestic legal jurisdictions, the PACL provides guidance on specific validity issues and is thus likely to promote uniformity and reduce uncertainty if states in the region reach a consensus. Section 2 provides clear guidance on the effects of invalidity.

Varied cultural and ideological milieus in Asia imply that the implementation of the PACL may be difficult. Nevertheless, Professor Ka argues that while it is unlikely that cultural and ideological differences would dominate the area of contract law, if such cultural differences should be reflected in the PACL they would not hinder but rather enrich the PACL.[96] Another advantage of the PACL is that it aims to address both common law and civil law principles.[97] This is particularly relevant in view of the different legal rules and, hence, interpretations of the CISG, in common law and civil law jurisdictions. Still, unlike the existing European regional project (discussed below), on which it is modelled, and which enjoyed the support of the EU, the "PACL does not have the privilege of support from the regional political community"[98]—a factor that might also impact on its implementation.

The principles of European contract law

The Principles of European Contract Law (PECL) is the European regional model contract law containing rules drawn up by leading European scholars in the field.[99] These principles reflect the requirements of the European domestic trade. They are designed to "provide maximum flexibility and thus accommodate future

[92] PACL (January 2011), *Fondation-droitcontinental*, *http://www.fondation-droitcontinental.org/en/document/the-pacl-principles-of-asian-civilcommercial-law-or-contract-law-in-east-and-southeast-asia/* [Accessed 12 December 2016]. See also S. Han, "Principles of Asian Contract Law: An Endeavor of Regional Harmonization of Contract Law in East Asia" (2013) 58 *Villanova Law Review* 589, 592.
[93] Han, "Principles of Asian Contract Law" (2013) 58 *Villanova Law Review* 589, 592.
[94] J. Ka, "Introduction to PACL" (2013) 17 *Comparative Law Journal of the Pacific* 55, 55.
[95] Ka, "Introduction to PACL" (2013) 17 *Comparative Law Journal of the Pacific* 55, 55.
[96] Ka, "Introduction to PACL" (2013) 17 *Comparative Law Journal of the Pacific* 55, 63.
[97] Ka, "Introduction to PACL" (2013) 17 *Comparative Law Journal of the Pacific* 55, 65.
[98] Ka, "Introduction to PACL" (2013) 17 *Comparative Law Journal of the Pacific* 55, 55.
[99] PECL, *Trans-Lex*, *http://www.trans-lex.org/400200* [Accessed 12 December 2016].

development in legal thinking in the field of contract law".[100] The PECL comprises three parts: Pt 1, published in 1995; Pt 2, finalised in 1999; and Pt 3, completed in 2002.[101] Matters relating to validity are set out in Ch.4 of Pts 1 and 2 to include, inter alia, mistake, fraud and unconscionability (excessive benefit or unfair advantage).

Where there is fraud, for example,

> "a party may avoid a contract when it has been led to conclude it by the other party's fraudulent representation whether by words or conduct, or fraudulent non-disclosure of any information which in accordance with good faith and fair dealing it should have disclosed".[102]

In the case of mistake, a party may avoid a contract on the basis of the information given, where the other party knew or ought to have known of the mistake and left the mistaken party in error, and where both parties made the same mistake.[103] A party may also avoid a contract owing to unconscionability where, at the time of the conclusion of the contract, the innocent party suffered a disadvantage (economic distress, urgent needs, improvidence, ignorance, inexperience or lack of bargaining skills) and the other party knew of the disadvantage and took advantage of the disadvantage to their own benefit.[104]

It is important to note, however, that although inspired by the CISG, the PECL, like PACL, and similar initiatives, such as the American Restatement of the Law of Contract, to which the PECL has been compared,[105] are a so-called soft law, meaning that its rules are not enforced on behalf of the state.

International efforts

Efforts to unify the laws for the sale of goods, including contract validity, have also been made at the international level.[106] The Swiss Proposal to the UNCITRAL General Assembly and the UNIDROIT Principles of International Commercial Contracts (PICC) are noteworthy examples.

The Swiss Proposal

The Swiss Proposal was made in preparation for the 25 June 2012 UNCITRAL meeting in New York. This proposal highlighted the potential for future work by UNICITRAL to reconsider questions that are currently excluded from the CISG and thus left to domestic laws and also to address the work which has been done

[100] L. Ole and B. Hugh, *Principles of European Contract Law, Parts I and II, prepared by the Commission on European Contract Law* (2000), p.xxvii.

[101] See, e.g., The Commission on European Contract Law, "Introduction to the Principles of European Contract Law", *http://www.cisg.law.pace.edu/cisg/text/peclcomments.html* [Accessed 12 December 2016].

[102] PECL art.4:107(1)2.

[103] PECL art.4:103.

[104] PECL art.4:109. Considering that the PACL is based on the PECL as a key inspiration model and guideline, it would be reasonable to infer that similar provisions regarding mistake, fraud and unconscionability will be integrated into the PACL. See Ka, "Introduction to PACL" (2013) 17 *Comparative Law Journal of the Pacific* 55, 57.

[105] The Commission on European Contract Law, "Introduction to the Principles of European Contract Law"*http://www.cisg.law.pace.edu/cisg/text/peclcomments.html* [Accessed 12 December 2016].

[106] The Commission on European Contract Law, "Introduction to the Principles of European Contract Law"*http://www.cisg.law.pace.edu/cisg/text/peclcomments.html* [Accessed 12 December 2016].

at the regional level in order to harmonise contract law.[107] In particular, Switzerland proposed that the UNICITRAL would assess the CISG and its practicalities alongside the question of whether further work is desirable and feasible in a global context.[108]

The Swiss Proposal acknowledged the success of the CISG, noting that the Convention governs some 80 per cent of international sales contracts. It also emphasised its influence on subsequent attempts to harmonise and reform contract laws at both regional and national level.[109]

Despite the CISG's strong influence on regional endeavours to harmonise and unify general contract law, the Swiss Proposal contends that regional efforts cannot adequately meet the needs of international trade. Instead, "UNCITRAL is the most appropriate forum for further work on international contract law for business-to-business transactions".[110] The Proposal suggests that UNCITRAL's work should cover a range of topics, including "validity, among others: mistake, fraud, duress, gross disparity, unfair terms, illegality".[111] Based on the Swiss Proposal, UNCITRAL should first identify the areas where UNCITRAL work would be complementary to existing instruments, and then discuss what particular form UNCITRAL's future work on general contract law might take.[112] These are undoubtedly complex tasks requiring time and effort to be invested before they yield practical results.

Notwithstanding the possible hurdles, it has been argued that, for a range of reasons, there is "the urgent need to further harmonise, if not unify, general contract law".[113] While praising the work that has been completed by the UNIDROIT, namely, the PICC, and cautioning that "any duplication of efforts must be prevented",[114] Professor Schwenzer reminds us that

> "there are certain contradictions between CISG and PICC that need to be eliminated [and that] in other areas the possible acceptance of PICC rules at a global level must be carefully scrutinized and discussed".[115]

[107] The Commission on European Contract Law, "Introduction to the Principles of European Contract Law"*http://www.cisg.law.pace.edu/cisg/text/peclcomments.html* [Accessed 12 December 2016]. See also Swiss Proposal (25 June – 6 July 2012); "Switzerland proposes future work by UNCITRAL on international contract law" (18 May 2012), *European Private Law News*, *http://www.epln.law.ed.ac.uk/2012/05/18/switzerland-proposes-future-work-by-uncitr...* [Accessed 13 December 2016].

[108] Swiss Proposal (25 June – 6 July 2012).

[109] "Switzerland proposes future work by UNCITRAL on international contract law", (18 May 2012), para.6, *European Private Law News*, *http://www.epln.law.ed.ac.uk/2012/05/18/switzerland-proposes-future-work-by-uncitr...* [Accessed 13 December 2016].

[110] Switzerland proposes future work by UNCITRAL on international contract law", (18 May 2012), para.8, *European Private Law News*, *http://www.epln.law.ed.ac.uk/2012/05/18/switzerland-proposes-future-work-by-uncitr...* [Accessed 13 December 2016].

[111] "Switzerland proposes future work by UNCITRAL on international contract law", (18 May 2012), para.9, *European Private Law News*, *http://www.epln.law.ed.ac.uk/2012/05/18/switzerland-proposes-future-work-by-uncitr...* [Accessed 13 December 2016].

[112] "Switzerland proposes future work by UNCITRAL on international contract law", (18 May 2012), para.11, *European Private Law News*, *http://www.epln.law.ed.ac.uk/2012/05/18/switzerland-proposes-future-work-by-uncitr...* [Accessed 13 December 2016].

[113] Schwenzer, "Who needs a Uniform Contract Law, and Why?" (2013) 58 *Villanova Law Review* 723, 727.

[114] Schwenzer, "Who needs a Uniform Contract Law, and Why?" (2013) 58 *Villanova Law Review* 723, 723.

[115] Schwenzer, "Who needs a Uniform Contract Law, and Why?" (2013) 58 *Villanova Law Review* 723, 723. For a comparison of the CISG and PICC see, e.g., M.J. Bonell, "UNIDROIT Principles of International Commercial Contracts and the United Nations Convention on Contracts for the International Sale of Goods—Alternatives or Complementary Instruments?" [2000] *Business Law International* 91, 94–96.

However, the Swiss Proposal has been met with opposition, with a future direction yet to be confirmed.[116]

The Principles of International Commercial Contracts

The Principles of International Commercial Contracts (PICC) of 2010 is a document drawn up by UNIDROIT, intended to provide a harmonised set of guidelines on international commercial contracts.[117] Like the PACL and PECL, the PICC is a "private codification" prepared by eminent jurists in the field. These principles were compiled to reflect the laws of different legal systems, irrespective of traditions and conditions.[118]

The PICC devotes an entire Ch.3 to the validity of the contract. Article 3.1.1 provides that a "contract is concluded, modified or terminated by the mere agreement of the parties, without any further requirement". In accordance with art.3.1.4, provisions on certain validity factors, including fraud, are mandatory. Section 2 of this chapter deals with the grounds for avoidance, wherein it covers various validity issues including mistake,[119] fraud[120] and gross disparity.[121]

According to the PICC, avoidance for mistake occurs where there is mutual mistake and the mistake was of such importance that a reasonable person in the same situation as the party in error would only have concluded the contract on different terms, or not at all, if the true nature of the mistake had been known.[122] Fraud avoidance occurs where a party has been led to conclude a contract owing to fraudulent misrepresentation, by language or practice.[123] Avoidance for unconscionability (gross disparity) occurs where either the contract or a term of the contract gave a party excessive advantage. Regard must be given to the fact that the party took advantage of the other party's dependence, economic distress, urgent needs, improvidence, ignorance, inexperience or lack of bargaining skill. Regard must also be given to the purpose of the contract.[124]

The above-mentioned requirements reflect a strong resemblance to the corresponding provisions of the PECL discussed previously. For example, both art.3.2.5(1) of the PICC and art.4(107) of the PECL allow for avoidance for misrepresentation on the basis of misleading words or conduct that induced a party to contract.[125] It would therefore seem reasonable to allow for the adoption of the PICC in case of the validity exception. However, despite the international nature

[116] Spagnolo, "Law Wars" (2013) 58 *Villanova Law Review* 623. See also K. Loken, "A New Global Initiative on Contract Law in UNCITRAL: Right Project, Right Forum?" (2013) 58 *Villanova Law Review* 509 (noting that despite a prevailing view during the 45th UNCITRAL meeting (2012) in support of the Swiss Proposal, a number of delegations, including the US delegation, expressed strong reservations about undertaking further work in the area of international contract law).

[117] UNIDROIT PICC, pp.vii–viii. The first edition of the PICC was published in 1994; the second enlarged edition was published in 2004; and the third edition was published in 2010. See PICC (1 August 2014).

[118] UNIDROIT PICC, p.xxiii.

[119] UNIDROIT PICC art.3.2.1.

[120] UNIDROIT PICC art.3.2.5.

[121] UNIDROIT PICC art.3.2.7.

[122] UNIDROIT PICC art.3.2.2(1).

[123] UNIDROIT PICC art.3.2.5(1).

[124] UNIDROIT PICC art.3.2.7(1).

[125] UNIDROIT PICC art.3.2.5(1) and PECL art.4(107).

of the PICC, there has been minimal usage by jurisdictions, and therefore limited development of case law, making it a rare choice in the context of contract law.[126]

Notwithstanding this, the CISG could be revised using the PICC as a point of reference. However, this would take up too much time and hence affect the overall development of the Convention.[127] The more viable option is to use the UNIDROIT principles as a backdrop to both the CISG and domestic laws.[128] Considering that the PICC reflects 14 years of research and discussion, it provides an in-depth analysis on the similar solutions found in many legal systems[129] and fosters an already unified understanding on contract validity.[130]

Importantly, s.2 of Ch.3 of the PICC provides not only a list of validity issues, but it also specifies the criteria for establishing a cause of action and lists the available remedies. Provisions relating to fraud, threat, gross disparity and illegality are mandatory, while provisions relating to mere agreement, impossibility and mistake are not.[131] The PICC also includes comments explaining the concepts/logic behind its provisions, thereby providing useful guidance as well as promoting an understanding of the principles guiding its provisions. Since the PICC's role is one of restatement and as a non-binding set of principles, it would follow that these principles do not strive for enforceability, but rather a global background doctrine.[132] Therefore, while providing guidance, the PICC maintains the freedom of the parties to contract, prompting the PICC to an advantageous path to reform the CISG. The implication for contractual validity relies on the complexity of the method, with the most workable solution to govern the validity of contracts being flexibility between the CISG and the PICC. However, augmenting the CISG with the PICC, in addition to the already existing role of national laws on matters of validity, and possibly some regional agreements, may result in increasing complexity and confusion, which may hinder unification, harmony and predictability.

Future prospects

In the view of the CISG Advisory Council, "[a] key attribute of uniformity and harmonisation is also simplicity".[133] The Council observes that:

> "Increasing legal plurality detracts from that virtue and introduces fragmentation, which is the very thing that uniformity and harmonisation seek to avoid. There is, furthermore, the likelihood that regional initiatives would not produce better solutions and, moreover, that those solutions would

[126] R. Michaels, "The Unidroit Principles as Global Background Law" (2014) 19 *Uniform Law Review -Revue de droit uniforme* 643.
[127] Michaels, "The Unidroit Principles as Global Background Law" (2014) 19 *Uniform Law Review -Revue de droit uniforme* 643.
[128] Michaels, "The Unidroit Principles as Global Background Law" (2014) 19 *Uniform Law Review -Revue de droit uniforme* 643.
[129] Hans van Houtte, "The UNIDROIT Principles of International Commercial Contracts" (1995) 11 *Arbitration International* 373, 373–390.
[130] UNIDROIT PICC, p.xxiii.
[131] UNIDROIT PICC art.3.1.4.
[132] UNIDROIT PICC art.3.1.4.
[133] CISG-AC Declaration No.1, "The CISG and Regional Harmonisation", Rapporteur: Professor Michael Bridge, London School of Economics, London, UK, adopted by the CISG-AC following its 16th meeting in Wellington, New Zealand (3 August 2012), *http://www.cisg.law.pace.edu/cisg/CISG-AC-dec1.html* [Accessed 13 December 2016].

> not have been subject to the same searching inquiry, from delegates drawn from many different countries, as occurred in the case of the CISG."[134]

While regional initiatives are a valuable contribution to the harmonisation of commercial law, so far as they vary, they do not promote the cause of harmonisation and as such thus pose a danger in a sense that

> "States may become entrenched behind regional instruments at the expense of participating in the work of *increasing* harmonisation of global contract law that has yet to be done to carry forward the achievements of the CISG".[135]

Future work needs to be focused on the areas of global contract law falling outside the CISG. As far as the validity exception to the CISG, as one such area, is concerned, the above-discussed approaches could be combined in order to be incorporated into the CISG, so that they provide for a comprehensive coverage of this issue. Alternatively, only specific concepts of contract validity could be considered.

The comprehensive approach

One way to change the status quo would be to adopt a protocol to the CISG. A protocol defining validity and providing a non-exhaustive list of validity issues would make the CISG more comprehensive and relevant, as well as reduce the level of complexities arising from the exclusion. Defining the term "validity" would not only widen the scope of the CISG, and its capacity to resolve disputes, but it would also diminish the divergent results and uncertainties that arise from disparate decisions in different legal jurisdictions subject to different laws and interpretations. A uniform definition would provide a uniform law, lessen the impact of forum-shopping, reduce the costs of legal research and promote certainty and public policy. The inclusion of a non-exhaustive list of validity issues would provide adjudicators with the understanding and tools necessary for more uniform resolution, and ultimately promote unification and harmonisation.[136] A more comprehensive CISG that addresses validity issues would also contribute toward the development of appropriate commercial law regimes in developing states, as well as enable adjudicators in such states to consider public policy issues at the international level and, hence, promote equal treatment for developing states.[137]

Michael Lopez has proposed a sample of a revised art.4 of the CISG.[138] His proposal provides for a non-exhaustive list of the validity issues in art.4 of the CISG. This proposal also highlights the international character of the CISG and the principles espoused by the United Nations Charter and the International Bill

[134] CISG-AC Declaration No.1, "The CISG and Regional Harmonisation" (3 August 2012), para.4.

[135] CISG-AC Declaration No.1, "The CISG and Regional Harmonisation" (3 August 2012), para.4 (emphasis in original) and para.5 (observing that "only three States that are parties to the OHADA law are also CISG Contracting States").

[136] Lopez, "Resurrecting the Public Good" (2010) 10 *Journal of Business and Securities Law* 133, 166. See also U. Magnus, "CISG v CESL" in U. Magnus (ed.), *CISG v Regional Sales Law: With a Focus on the New Common European Sales Law* (Munich: Sellier, 2012), p.97 at p.122.

[137] Lopez, "Resurrecting the Public Good" (2010) 10 *Journal of Business and Securities Law* 133, 166–167.

[138] Lopez, "Resurrecting the Public Good" (2010) 10 *Journal of Business and Securities Law* 133, 168. For a discussion on the subject of amending the CISG see also, D. Sim, "The Scope and Application of Good Faith in the Vienna Convention on CISG" in Pace International Law Review (ed.), *Review of the Convention on Contracts for the International Sale of Goods 2002–2003* (Kluwer Law International, 2004), p.19.

of Rights that inform the CISG and its workings.[139] Lopez explains that "courts should be on notice that public policy *is* an issue that informs the CISG and validity findings under its auspices",[140] and that moreover there are relevant tools to be applied, as well as other relevant international legal instruments to be taken into account.[141]

The specific concept approach

The incorporation of contract validity in its entirety into the CISG could take up considerable time and resources. Professor Eiselen suggests that it would be more feasible to identify significant areas of law that require attention (as discussed at the CISG Basel Conference).[142] For example, common grounds for rescinding a contract fall under mistake and fraud.[143] Rescinding a contract on the ground of unconscionability has been adopted by French law and the UNIDROIT PICC.[144]

Contract avoidance, fraudulent misrepresentation and mistake in domestic laws are said to overlap with the CISG's avoidance rule,[145] set out in art.49(1), pursuant to which a fundamental breach may result in contract avoidance.[146] Nevertheless, the concept of mistake under certain national laws still allows for avoidance for "*any* mistake in relation to the quality of goods", which is contrary to the fundamental breach rule in the CISG,[147] and hence can be seen as undermining the avoidance rule within the CISG.[148] It has also been noted that arbitrators' restraint to exercise domestic validity rules is mainly concerned with upholding the uniform Convention and the remedial solutions in it.[149] In order to avoid divergent outcomes (due to the various laws of domestic legal jurisdictions), arbitrators must exercise restraint and look to the CISG. This, however, does not mean that adjudicators should allow the CISG to dismiss domestic laws designed to prevent unfairness.[150] Balancing between the two would be a stepping-stone towards the harmonisation of the international law governing contracts for the sale of goods.

Summary

The absence of validity from the scope of the CISG has prompted efforts by different regions of the world, and by individual state parties to the CISG, to fill the gap. In particular, Asia and Europe, sharing the highest percentage in

[139] Lopez, "Resurrecting the Public Good" (2010) 10 *Journal of Business and Securities Law* 133, 168.
[140] Lopez, "Resurrecting the Public Good" (2010) 10 *Journal of Business and Securities Law* 133, 168 (emphasis in original).
[141] Lopez, "Resurrecting the Public Good" (2010) 10 *Journal of Business and Securities Law* 133, 168.
[142] S. Eiselen, "Control of Unfair Standard Terms in International Sales", Paper presented at the Basel Conference on the 35th anniversary of the CISG (2015), pp.11–12, *http://www.cisgbasel2015.com/index_html_files/13_ppt_Sieg%Eiselen.pdf* [Accessed 23 Novemebr 2015].
[143] K. Saare, K. Sein and M.-A. Simovart, "Differentiation of Mistake and Fraud as Grounds for Rescission of Transaction" (2007) 7 *Juridica International Law Review* 142, 142–149.
[144] L. O'Mahony, J. Devenney and M. Kenny, *Unconscionability in European Private Financial Transactions Protecting the Vulnerable* (Cambridge: Cambridge University Press, 2010), p.140.
[145] Lookofsky, *Understanding the CISG* (2012).
[146] CISG art.49(1).
[147] S. Kroll, "Selected Problems concerning the CISG's Scope of Application" (2005) 25 *Journal of Law and Commerce* 25, 39.
[148] J. Fawcett, J. Harris and M. Bridge, *International Sale of Goods in the Conflict of Laws* (Oxford: Oxford University Press, 2005), pp.906, 947.
[149] Lookofsky, *Understanding the CISG* (2012), pp.41–42.
[150] Lookofsky, *Understanding the CISG* (2012), p.43. See also L. Graffi, "Case Law on the Concept of 'Fundamental Breach' in the Vienna Sales Convention" [2003] *International Business Law Journal* 338.

merchandise trade, have generated and introduced uniform model laws for their respective regions.[151] The PACL and the PECL are private initiatives aimed at reforming matters outside the scope of the CISG in order to promote consistency and uniformity at the regional level. The drive for uniform laws within both regions demonstrates a strong move towards a uniform law text, currently only partially achieved by the CISG. Although the model laws have no direct impact on the CISG, these initiatives imply the desirability of the gap-filling guidelines vis-à-vis the CISG. This is further reinforced by endeavours at the international level to harmonise contract law.

While a comprehensive revision of contract validity would be ideal, such an approach has been dismissed. It has been argued that specific concepts of contract validity should be adopted as a more feasible option whereby the CISG would be complemented, inter alia, by the UNIDROIT PICC. To avoid duplication of efforts, further research is required regarding the working relationship between UNCITRAL and UNIDROIT, as well as other players concerned with the harmonisation of contract law, as contractual validity is said to be a substantive carve-out to the CISG, an issue that cannot be readily addressed immediately.

Conclusion

The CISG proclaims uniform rules to govern contracts for the international sale of goods. However, the exclusion of contract validity appears to have undermined the purported purpose of the Convention. Significant validity issues have been relegated to the domestic sphere, which has resulted in divergent decisions reached by adjudicators, thereby leading to inconsistencies and legal unpredictability. The lack of predictability impairs the development of the Convention and repels states' interest in ratifying it.[152]

While it has been claimed that the CISG will continue to lead as one of the major success stories in the field of unification of international private law,[153] there are, nevertheless, issues that warrant attention. Contractual validity is one such issue—still an important gap that needs to be addressed[154]—as evidenced by a serious discussion in Panel Four at the recent Basel Conference.[155] It can be safely concluded that on the CISG's 35th birthday, much-needed harmonisation has only been partly achieved. A key solution to the problem is to reconsider the validity exclusion.

[151] WTO, *World Region Report on Merchandise Trade* (October 2014).
[152] Its current status (85 State Parties) suggests that the CISG is still far away from universal acceptance.
[153] P. Huber, "Some Introductory Remarks on the CISG" (2006) *Internationales Handelsrecht* 228, 228.
[154] Huber, "Some Introductory Remarks on the CISG" (2006) *Internationales Handelsrecht* 228, 228.
[155] M. Wellar, Conference Report CISG Basel Conference, 29 and 30 January 2015, University of Basel (17 February 2015), *Conflict of Laws.net: News and Views in Private International Law*, *http://conflictoflaws.net/2015/conference-report-cisg-basel-conference-29-and-30-january-2015-university-of-basel/* [Accessed 13 December 2016].