Simplification of the Commercial Process for the International Sale of Goods through the 1980 Vienna Sales Convention (CISG)

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The simplification of the cross-border commercial process has from the outset been an important goal of the 1980 United Nations Convention on the International Sale of Goods (CISG). Today, over 40 years after the Convention's adoption, its simplification effect continues to be a crucial argument whenever commercial parties consider the legal rules to be applied to their cross-border transactions, and when lawyers advise their clients in this regard. This article outlines how the CISG simplifies the negotiation and formation of international commercial contracts in practice, as well as the resolution of disputes arising from such contracts. In doing so, the article draws on case law and international experience that has developed over the past decades.

I. Introduction

The year 2020 marked a milestone in the life of the United Nations Convention on Contracts for the International Sale of Goods that was adopted in Vienna on 11 April 1980 (CISG): The CISG celebrated its 40th anniversary. For people, the 40th birthday can be the moment for a mid-life crisis that may involve emotional uncertainty, doubts about the lack of accomplishments in life, and the desire to restore youthfulness. The CISG, however, is mentally and emotionally in very good shape, and any doubts about its ongoing attractiveness are disproven by the new Contracting States that are joining its community, or are preparing to do so in the near future. In recent years, states as geographically,

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economically and politically varied as North Korea,[1] Liechtenstein,[2] Laos[3] and Guatemala[4] have acceded to the CISG, with the most recent one being Portugal in September 2020.[5]

Other recent developments confirm the CISG's recognized status and influence in the field of international commercial law. One was the Consultation on the Proposed Application of the CISG to Hong Kong[6] held between March and September 2020 that resulted in a pro-CISG outcome, the implementation of which is being awaited with interest both in Hong Kong and in the rest of the CISG world. Another one is the ongoing discussion about further withdrawals of the reservations that some CISG Contracting States made when joining the Convention, as each of these withdrawals enhances the scope of the CISG's applicability in practice.[7]

One of the most important goals pursued by the creation of the CISG and its adoption by different states is the

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[1]United Nations, Depositary Notification C.N.119.2019.TREATIES-X.10 of 29 March 2019.

[2]United Nations, Depositary Notification C.N.153.2019.TREATIES-X.10 of 2 May 2019.

[3]United Nations, Depositary Notification C.N.430.2019.TREATIES-X.10 of 24 September 2019.

[4]United Nations, Depositary Notification C.N.616.2019.TREATIES-X.10 of 11 December 2019.

[5]United Nations, Depositary Notification C.N.409.2020.TREATIES-X.10 of 23 September 2020.

[6]Department of Justice of Hong Kong, Consultation Paper: Proposed Application of The United Nations Convention on Contracts for the International Sale of Goods to the Hong Kong Special Administrative Region (2 March 2020).

[7]On the possible withdrawal of the U.S.'s Article 95 reservation, see Asa Markel, American, English and Japanese Warranty Law Compared: Should the U.S. Reconsider Her Article 95 Declaration to the CISG?, 21 Pace Int'l L. Rev. 163 (2009); Mazzotta, Reconsidering the CISG Article 95 reservation made by the United States of America, 17 Int'l Trade & Bus. L. Rev. 442 (2014); Winship, Should the United States Withdraw Its CISG Article 95 Declaration?, 50 Int'l L. 217 (2017); Zhen, China's Withdrawal of Article 96 of the CISG: A Roadmap for the United States and China to Reconsider Withdrawing the Article 95 Reservation, 25 U. Miami Bus. L. Rev. 141 (2016); on the withdrawal of reservations in general, *see* Ulrich G. Schroeter, The withdrawal of reservations under uniform private law conventions, 20 Uniform L. Rev. 1 (2015).

simplification of the commercial process in cross-border trade transactions. The CISG itself prominently refers to this goal in its Preamble, where it describes the adoption of uniform rules which govern contracts for the international sale of goods as a contribution "to the removal of legal barriers in international trade." Beyond the field of international sales, the simplification of commercial activities has early on been recognized as a central aim and purpose of the unification of commercial law in general. Writing in England in 1910, Lord Justice Kennedy expressed this thought more elegantly:[8]

> The certainty of enormous gain to civilised mankind from the unification of law needs no exposition. Conceive the security and the peace of mind of the shipowner, the banker, or the merchant who knows that in regard to his transactions in a foreign country the law of contract, of movable property, and of civil wrongs is practically identical with that of his own country. [. . .] I hope I am not in error in believing that in the commercial world it is the trader's sense of security from risk which is the requisite basis of all enterprise and extension of business.

Against this background, the present article's topic is the simplification of the commercial process for the international sale of goods through the CISG.[9] It will be addressed in two parts, with the first focusing on the resulting simplification of contract formation in the field of international sales (part II), and the second, somewhat briefer, on the simplification of dispute resolution in this area (part III). A third and last part offers a brief conclusion (part IV).

II. Simplification of Contract Formation in the Field of International Sales

1. Simplification through a neutral fall-back sales law regime

When starting with the simplification of a commercial bargain—or, writing from a lawyer's perspective, contract formation—it may be helpful to begin with the nature of the

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[8] Kennedy, The Unification of Law, 10 J. Soc'y Comp. Legis. 212, 214–15 (1910).

[9] Citations to international case law on the CISG made in this article refer to "CISG-online," an academic internet platform on the CISG run by the University of Basel (www.cisg-online.org).

problem. In this regard, the challenge lies in the rather different perspectives, of lawyers on one hand and commerce on the other, on the role of the applicable contract law within the contractual process.

As lawyers, particularly those drafting standard conditions of sale or purchase for their clients and the boilerplate choice-of-law clause therein, our approach is typically similar no matter where on earth we practice law: we are certain that the domestic law of our home jurisdiction offers a reliable, trusted and time-tested set of rules, which we know inside-out and have extensive experience in applying. Accordingly, in our mind, there can be no reasonable doubt that this law should not only govern our client's domestic contracts, but also its international transactions,[10] and that is what we write into our client's standard terms.[11]

What this familiar narrative leaves aside is an additional "conflict of laws 101" requirement that every international lawyer knows (or should know): there is only a choice of law where *both* parties agree on it, and it is the *other party*'s consent to one's own domestic law that is the difficult part in commercial practice.[12]

Of course, there are some contracts that are extensively negotiated between the parties. In that context, parties may agree to the application of one party's domestic home law. Not surprisingly, a careful approach of this type occurs notably in large transactions that justify the involvement of the parties' lawyers in the negotiation. However, sales of movable goods are routine commercial transactions that come in very different shapes and sizes, and many of these transac-

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[10]Gary Kenji Nakata, Filanto S.p.A. v. Chilewich Int'l Corp.: Sounds of Silence Bellow Forth Under the CISG's International Battle of Forms, 7 Transnat'l Law. 141, 143 (1994); Ulrich G. Schroeter, Has the UN Sales Convention Achieved its Key Purpose(s)?, in Research Handbook on International and Comparative Sale of Goods Law 59, 66 (Djakhongir Saidov ed., Edward Elgar Publishing 2019); Ziegel, Commentary on Party Autonomy and Statutory Regulation: Sale of Goods, 6 J. Cont. L. 123, 124 (1993).

[11]For empirical evidence on this point, *see* Stefan Vogenauer, Regulatory Competition through Choice of Contract Law and Choice of Forum in Europe: Theory and Evidence, 21 Eur. Rev. Priv. L. 13–78 (2013).

[12]Schroeter, *supra* n. 10, at 66-67.

tions are average-sized or recurring orders that are handled with no lawyer in sight. In such cases, commercial actors often make no effort to agree on the applicable law, because none of them even thinks of it.

By way of example, three common scenarios can be mentioned in which the boilerplate choice of law clause in one party's standard terms does not save the day. The first is the rather frequent case in which only "commercially important" terms (like the goods and their technical details, the price, and the delivery terms and times) are discussed between the parties, before the deal is agreed upon on the phone or made on a handshake. As the applicable law is typically not regarded as "important" by commercial parties, it is not mentioned in such cases, and no choice of law is agreed upon. To a lawyer, it is nothing short of amazing how many deals fall into this category, including transactions of a significant value.

In the second, probably somewhat less common scenario, the parties do negotiate over the applicable law, but fail to reach an agreement. This is not surprising where both parties insist on their respective domestic home law, which in international transactions is obviously not the same law.[13] In cases of equal bargaining strength, it will then be difficult to reach a consensus on a domestic law.[14] Nevertheless, as few commercial actors will allow the applicable law issue to stop a profitable deal, the transaction more often than not is given the go-ahead in such cases, although no choice of law agreement has been reached.

The third scenario lies somewhere between the two that were just mentioned. It covers the frequent cases in which the applicable law was not addressed when the deal was closed, but in which boilerplate choice of law clauses appear for the first time on one or more documents sent during the

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[13]John O. Honnold, Uniform Law for International Sales Under the 1980 United Nations Convention para. 32 (Kluwer Law International, 3rd ed., 1999); Sandra Saiegh, The Business Lawyer's Perspective, in Drafting Contracts Under the CISG 253, 257 (Harry M. Flechtner, Ronald A. Brand and Mark S. Walter eds., Oxford University Press 2008).

[14]Babiak, Defining "Fundamental Breach" under the United Nations Convention on Contracts for the International Sale of Goods, 6 Temp. Int'l & Comp. L.J. 113, 114 (1992).

performance of the contract, as on invoices or delivery sheets. This late in the day, such a clause may (at most) qualify as an offer to modify (Article 29(1) of the CISG) the conditions of a contract that has already been mostly performed,[15] and courts have generally been reluctant to accept such an interpretation.[16] Even more importantly, such a belated choice of law attempt would require the other party to agree to the proposed contract modification,[17] and this component is almost always lacking in practice.[18]

The scenarios just described are an important reminder that for business entities, the applicable law is often a rather esoteric issue that is simply not viewed as commercially important. The drafters of CISG recognized this and sought to simplify the matter through the CISG's design as a fall-back regime. This is why in cases in which the parties remain passive or cannot agree on the applicable law, the CISG determines its own applicability, with the basic rule being that the Convention applies to a contract if the parties involved are residing in different CISG Contracting States (Article 1(1)(a) of the CISG). Put differently, the Convention has intentionally been designed as an "opt out" instrument,

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[15]Ulrich G. Schroeter, Article 29, in Schlechtriem & Schwenzer Commentary on the UN Convention on the International Sale of Goods (CISG) paras. 9-10 (Ingeborg Schwenzer ed., 4th ed., Oxford University Press 2016).

[16]Oberlandesgericht Jena (Germany), 10 November 2010, CISG-online 2216, Internationales Handelsrecht 79, 81 (2011); Rechtbank Kortrijk (Netherlands), 8 December 2004, CISG-online 1511, Internationales Handelsrecht 114, 115 (2005); Landgericht Aachen (Germany), 22 June 2010, CISG-online 2162, Internationales Handelsrecht 82, 85 (2011); Fritz Enderlein & Dietrich Maskow, International Sales Law, Art. 29, note 1.2. (Oceana 1992).

[17]Schroeter, *supra* n. 15, para. 11.

[18]*See* Solae, LLC v. Hershey Canada, Inc., 557 F. Supp. 2d 452, 457, 1 A.L.R. Int'l 849 (D. Del. 2008): "Nothing in the Convention suggests that the failure to object to a party's unilateral attempt to alter materially the terms of an otherwise valid agreement is an 'agreement' within the terms of Art. 29"; *see also* 9 May 2008, CISG-online 1769; Macromex Srl v. Globex International Inc., AAA Award, 23 October 2007, CISG-online 1645: "The failure to object to a unilateral attempt to modify a contract is not an agreement to modify a contract"; Supreme Court Slovak Republic, 19 June 2008, CISG-online 1875.

not an "opt in" instrument.[19] Wherever commercial actors are less interested in choice-of-law as their advising lawyers would like them to be, the Convention—very pragmatically—makes the necessary choice for them.

In this context, the CISG furthermore provides not only a simple, but also a commercially reasonable and fair, fallback solution.[20] This is so because the Convention is neutral in two different respects: first, it is neutral in content, because the CISG's provisions are generally accepted as striking a fair balance between the interests of buyers and of sellers.[21] And second, the CISG is neutral as far as its accessibility to parties and lawyers from different jurisdictions is concerned, because it does not give one of the parties the legal advantage of working with their own domestic law.[22]

2. Simplification through a set of rules specifically designed for international commercial transactions

Where the CISG applies, the commercial process is simplified because the CISG's provisions were specifically designed with cross-border commercial sales transactions in mind. This is in significant contrast to many domestic contract laws that often were primarily developed for local sales. Frequently, domestic laws contain outdated provisions or ap-

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[19]Ulrich Magnus, Art. 6 CISG, in Staudinger Kommentar zum Bürgerlichen Gesetzbuch para. 8 (Sellier de Gruyter 2018); Schroeter, Gegenwart und Zukunft des Einheitskaufrechts, 81 Rabel J. Comp. & Int'l Priv. L. 32, 42 (2017); Schroeter, *supra* n. 10, at 65.

[20]Saiegh, *supra* n. 13, at 256.

[21]Enderlein & Maskow, *supra* n. 16, at 17; Stefan Kröll, Loukas Mistelis and Pilar Perales Viscasillas, Introduction to the CISG, in UN Convention on the International Sales of Goods (CISG) 1-17 (Stefan Kröll, Loukas Mistelis and Pilar Perales Viscasillas, eds., C.H. Beck 2011); Joseph Lookofsky, Understanding the CISG 2 (5th ed., Wolters Kluwer 2017); Ulrich Magnus, CISG, in Staudinger Kommentar zum Bürgerlichen Gesetzbuch para. 8 (Sellier de Gruyter 2018); Ingeborg Schwenzer, The CISG—A fair balance of the interests of the seller and the buyer, in CISG and Latin America: Regional and Global Perspectives 79 (Ingeborg Schwenzer, Cesar Pereira & Leandro Tripodi eds., Eleven International Publishing 2016); Schwenzer & Hachem, The CISG—Successes and Pitfalls, 57 Am. J. Comp. L. 457, 476 (2009).

[22]Babiak, *supra* n. 14, at 114; Lookofsky, *supra* n. 21, at 2; Schroeter, *supra* n. 10, at 67.

proaches in case law that are ill-suited for international transactions, which are often performed over long distances.

John Honnold, who was the first common-law author to publish a comprehensive commentary on the CISG soon after the Convention was adopted,[23] noted "the outdated legal formulae that still complicate domestic sales law,"[24] and reasoned: "One may delight in legal antiques and in the patina of ingenious circumlocutions that have had to substitute for fundamental reform - but these aesthetic values may not be appreciated by a modern merchant and, more especially, by his trading partner from a different legal tradition."[25] The drafters of the CISG therefore took care to reject anachronisms that complicate domestic laws, and instead produced a statutory text that is relatively straightforward and uncluttered with technical detail. They were conscious of the value simply of eliminating technical rules that divert attention from the transaction and its commercial setting,[26] and did so with a particular focus on the international, cross-border situation in which CISG contracts are negotiated and executed.[27]

With respect to some of the difficulties that typically arise under international trade contracts, the combined experience and comparative law wisdom that the Convention's drafters fed into their work on the CISG resulted in solutions that are arguably superior to some of the approaches reflected in domestic laws. As an example, one may quote from the recent decision in *Rock Advertising Limited v. MWB*

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[23]The first edition of his seminal commentary was John O. Honnold, Uniform Law for International Sales Under the 1980 United Nations Convention (Kluwer Law International 1982).

[24]Honnold, *supra* n. 13, para. 30.

[25]Honnold, *supra* n. 13, para. 30.

[26]*See* Honnold, *supra* n. 13, para. 33.

[27]Schroeter, *supra* n. 10, at 71; Ingeborg Schwenzer and Pascal Hachem, Article 6, in Schlechtriem & Schwenzer Commentary on the UN Convention on the International Sale of Goods (CISG) para. 11 (Ingeborg Schwenzer ed., 4th ed., Oxford University Press 2016); *but see* 2 Jan Dalhuisen, Dalhuisen on Transnational Comparative Commercial, Financial and Trade Law 231 (6th ed., Hart 2016).

Business Exchange Centres Limited[28] rendered by the Supreme Court of the United Kingdom, a country that has remained in "splendid isolation" from the Sales Convention[29] by not acceding to it.[30] In this decision, the Supreme Court tackled a "truly fundamental issue in the law of contract,"[31] namely whether contractual terms prescribing that an agreement may not be amended save in writing (so-called "No Oral Modification" clauses that are also quite prevalent in international sales contracts) are legally effective. Writing for the majority, Lord Sumption observed:

> The reasons advanced in the case law for disregarding [the No Oral Modification clauses] are entirely conceptual. The argument is that it is conceptually impossible for the parties to agree not to vary their contract by word of mouth because any such agreement would automatically be destroyed upon their doing so. The difficulty about this is that if it is conceptually impossible, then it cannot be done, short of an overriding rule of law (presumably statutory) requiring writing as a condition of formal validity. Yet it is plain that it can. There are legal systems which have squared this particular circle. They impose no formal requirements for the validity of a commercial contract, and yet give effect to No Oral Modification clauses. The Vienna Convention on Contracts for the International Sale of Goods (1980) has been ratified by 89 states, not including the United Kingdom. It provides by article 11 that a contract of sale "need not be concluded in or evidenced by writing and is not subject to any other requirement as to form." Nonetheless, article 29(2) provides: [. . .].

Rock Advertising Limited, UKSC 24 [13].

After additionally citing Articles 1.2 and 2.1.18 of the UNIDROIT Principles of International Commercial Contracts—provisions that happen to be almost verbatim copies

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[28]Rock Advertising Limited v. MWB Business Exchange Centres Limited [2018] UKSC 24.

[29]*See* Barry Nicholas, The United Kingdom and the Vienna Sales Convention: Another Case of Splendid Isolation? (Centro di Studi e Ricerche di Diritto Comparato e Straniero 1993).

[30]*See* in more detail Hayward, Zeller & Andersen, The CISG and the United Kingdom—exploring coherency and private international law, 67 Int'l & Comp. L. Q. 607 (2018).

[31]Rock Advertising Limited, UKSC 24 [1].

of Articles 11 and 29(2) of the CISG[32]—Lord Sumption referred to both international instruments as "widely used codes."[33] If these statements allow the conclusion that the Convention today ranks as a widely-used code that has managed to square circles that some domestic laws have yet to square, this could be read as an endorsement of the CISG.

Commercial practice under the CISG provides further evidence that the Convention's drafters achieved the goal of designing a state-of-the-art set of rules for international sales transactions, because we see an increasing number of cases in which parties specifically agree in their contract that the CISG shall govern their transaction.[34] While such clauses are not strictly necessary, given that the Convention determines its own applicability in its Articles 1 through 5, they indicate that such parties regarded the CISG as better suited to their cross-border contract than domestic law, and expressly made this clear.

3. Simplification through standardisation

We next turn to an advantage offered by the CISG that may be referred to as "simplification through standardization." What does that mean?

One well-known difficulty in commercial practice arises

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[32]Stefan Vogenauer, Article 2.1.18, in Commentary on the UNIDROIT Principles of International Commercial Contracts (PICC) para. 1 (Stefan Vogenauer ed., 2nd ed., Oxford University Press 2015).

[33]Rock Advertising Limited, UKSC 24 [13].

[34]Buyer (Taiwan) v. Seller (Germany), ICC Final Award Case No. 18671, CISG-online 3055, XLII Yearbook Commercial Arbitration 204, 217 (2017); Coutinho & Ferrostaal GmbH v. Tracomex (Canada) Ltd, Supreme Court of British Columbia, 13 May 2015—S116044, S120939, S122034, CISG-online 2734, 2015 BCSC 787 para. 48; Oberlandesgericht Hamm (Germany), 9 July 2013—21 U 16/13, German Arbitration Journal 38, 39 (2014); Quarella SpA v. Scelta Marble Australia Pty Ltd, Singapore High Court, 14 August 2012, CISG-online 2725, [2012] SGHC 166 para. 8; Distributor Z (US) v. Company A (Mexico), Subsidiary B (US), ICC Arbitral Award 13184/2011, CISG-online 2724, XXXVI Yearbook Commercial Arbitration 96, 100 (2011); Handelsgericht Zurich (Switzerland), 22 November 2010 - HG070223/U/dz, CISG-online 2160, Internationales Handelsrecht 151 (2011); Oberlandesgericht Koblenz (Germany), 22 April 2010—2 U 352/09, CISG-online 2163, Internationales Handelsrecht 255 (2010); ICC Arbitral Award 7585/1994, CISG-online 105, 122 Journal du droit international 105 (1995).

from the fact that many commercial actors maintain business relations with partners from a variety of different countries. The result can be that different laws apply to each of these relationships, thereby making it challenging for a company to develop uniform practices in concluding and performing its various sales transactions because these practices would have to comply with various different laws, depending on the location of a contracting partner. The CISG makes it easy to standardise commercial practices, because its rules apply identically between so many countries. It suffices to mention two everyday examples.

First, imagine a buyer based in Hong Kong who is buying goods from sellers in various countries. As far as different contract laws apply to these transactions, the Hong Kong buyer's staff has to follow different requirements when ordering goods from sellers in different countries, and observe different standards regarding, say, the inspection of the goods once they have been delivered. The CISG greatly simplifies this, as the same legal rules will apply to all purchases made from sellers who reside in one of the currently 94 CISG Contracting States, so that the Hong Kong buyer can standardize its business practices.

Second, a slightly different standardization effect applies in cases in which a merchant trades goods through, by buying them in one jurisdiction and selling them on to another. A simple example is a Hong Kong company buying goods in mainland China and selling them to the U.S. Without the CISG, both links in this chain of transactions may be governed by a different domestic contract law, because in the first transaction the Hong Kong merchant is the buyer, while in the second it is the seller. Accordingly, different rules may apply as far as the standard of care, available remedies or applicable time frames are concerned, and these differences may well cause difficulties for the merchant in the middle. Where the CISG applies, these difficulties disappear, as the same rules govern both links in the chain. And in such a scenario, the court may even be able to leave open whether the Hong Kong middle-man acted as a buyer and seller, or only

as an agent of either the upstream or the downstream party,[35] because the CISG would equally apply if the sales contract was a direct one between the mainland Chinese seller and the U.S. buyer.

4. Simplification by preserving existing contractual frameworks and practices

The points addressed up until now focused on the advantages that the CISG offers when compared with the practical challenges of agreeing on a domestic law. However, it is also well known that in commercial practice, many companies have developed well-functioning arrangements with some of their business partners that work under a domestic law, and where they customarily conclude and perform their sales transactions under this law. Sometimes such arrangements have been formalized through framework agreements, master sales agreements or the like, while in other cases it is merely a well-working course of dealing. Does the CISG interfere with such arrangements, so that its simplifying effect disturbs existing practices that have already made the commercial process simple?

Luckily, it does not. Article 6 of the CISG provides that parties may freely exclude the CISG's application,[36] and the only thing required is the parties' agreement, irrespective of any form.[37] The Convention therefore respects any existing commercial frameworks and allows them to continue untouched.

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[35]For examples of similar constellations from international CISG case law, see Ulrich G. Schroeter, Article 14, in Schlechtriem & Schwenzer Commentary on the UN Convention on the International Sale of Goods (CISG) para. 4 (Ingeborg Schwenzer ed., 4th ed., Oxford University Press 2016).

[36]Regarding Article 6 of the CISG, see the comprehensive discussion in CISG Advisory Council Opinion No. 16 Exclusion of the CISG under Article 6 (Rapporteur: Lisa Spagnolo) (30 May 2014).

[37]Oberster Gerichtshof (Austria), 4 July 2007 - 2 Ob 95/06v, Internationales Handelsrecht 237, 239 (2007); Tribunale di Vigevano (Italy), 12 July 2000 - 405/2000, Internationales Handelsrecht 72, 73 (2001); Michael Joachim Bonell, Article 6 in Commentary on the International Sales Law: The 1980 Vienna Sales Convention note 3.1 (Cesare Massimo Bianca & Michael Joachim Bonell eds., Giuffrè 1987); Magnus, *supra* n. 19, para. 20; Schroeter, *supra* n. 10, at 63; Schwenzer & Hachem, *supra* n. 27, para 21.

III. Simplification of Dispute Resolution in the Field of International Sales

Finally, a few remarks are in order on how the CISG contributes to the simplification of the commercial process in the context of dispute resolution. Dispute resolution proceedings are, of course, not the original goal for which sales transactions are entered into; but they are part and parcel of commercial reality: every once in a while, a dispute between merchants cannot be resolved through negotiation, and the lawyers step in.

Furthermore, in this context, the CISG simplifies matters, and therefore saves time and money for the parties involved. Three points may be mentioned in this regard.

1. Easy accessibility of the CISG's content in many languages

First, the content of the rules that the parties' counsel will have to plead, and that the judges or arbitrators will need to apply, are easily accessible in case of the CISG.[38] The Convention's text comes in six authentic languages (Arabic, Chinese, English, French, Russian and Spanish) and has been translated into many others, and numerous commentaries, textbooks and articles in various languages explain in detail its provisions.

Again, it is important to remember that the CISG mostly comes into play where the parties have not (or not clearly) chosen a particular law. In such a scenario, the alternative to the CISG is the application of private international law or conflict of laws, an area of law that once was famously described as "a dismal swamp, filled with quaking quagmires, and inhabited by learned but eccentric professors who theorize about mysterious matters in a strange and incom-

[38]Burghard Piltz, Internationales Kaufrecht para. 1-34 (2nd ed., CH Beck 2008); Schwenzer & Hachem, supra n. 27, para. 11; Kazuaki Sono, The Vienna Sales Convention: History and Perspective, in International Sale of Goods: Dubrovnik Lectures 1, 15 (Petar Sarcevic & Paul Volken eds., Oceana 1986).

prehensible jargon. The ordinary court, or lawyer, is quite lost when engulfed and entangled in it."[39]

And even if one has managed to cross the dismal conflict of laws swamp[40] (possibly with the help of an eccentric law professor and his expert opinion[41]), there is a fair statistical chance that on the other side of the swamp there will be a foreign domestic sales law. Such a situation then leaves the Hong Kong counsel with the less-than-attractive task of researching the content of, say, Danish sales law, either with the help of court decisions and law books that are written in Danish or by involving a Danish law firm.

It is therefore not entirely surprising that in cross-border cases, commercial judges and arbitrators are generally more comfortable with applying the CISG than with applying a domestic law that is foreign to them, because they face the same practical challenges. This may be one of the reasons why courts around the world fairly uniformly apply strict standards to attempt to exclude the Convention under Article 6 of the CISG, by requiring "clear language indicating that both contracting parties intended to opt out of the CISG"[42] or clauses that "without any doubt" aim at excluding the Convention's application.[43]

Practically speaking, the relative ease of the CISG's accessibility translates as a greater foreseeability of the applicable law, and as less effort in preparing legal briefs, court judgments and arbitral awards for the lawyers involved. For the

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[39]William L. Prosser, Interstate publication, 51 Mich. L. Rev. 959, 971 (1953).

[40]The uncertainties inherent in the application of private international law have often been stressed; *see* Dalhuisen, *supra* n. 27, at 231; Clayton P. Gillette & Stephen D. Walt, The UN Convention on Contracts for the International Sale of Goods: Theory and Practice 24-5 (2nd ed., Cambridge University Press 2016); Piltz, *supra* n. 39, para 1-33; Ziegel, *supra* n. 10, at 124.

[41]*See* Rabel, A Draft of an International Law of Sales, 5 U. Chi. L. Rev. 543, 545 (1938).

[42]Asante Technologies, Inc. v. PMC-Sierra, Inc., 164 F. Supp. 2d 1142 (N.D. Cal. 2001), CISG-online 616 at para. 25.

[43]Electronic electricity meters case, Swiss Federal Supreme Court, 28 May 2019—4A_543/2018, CISG-online 4463 at para. 27 ("klar und unzweideutig").

commercial parties to a dispute, this may well mean a more certain outcome at lower legal costs,[44] thus creating a "win-win" situation.

2. International CISG case law enhances predictability

Second, the international case law that has developed under the CISG over the last 32 years enhances the predictability of its application. It is easy to see that under the Convention which applies in 94 countries, many more international sales cases are decided than under one domestic sales law, in particular if it is the law of a smaller jurisdiction. The wealth of persuasive precedents available under the CISG—today, over 5,500 CISG court decisions and arbitral awards have been published—potentially makes it simpler for counsels to track down case law that supports their client's position, and simpler for judges and arbitrators to find and consult precedents than under a domestic law that may be foreign to them. Again, such simplification may save time and money.

3. No risk of both parties being "trapped" in the CISG's application

Finally, it may be helpful to address an argument occasionally raised by sceptics, namely the fear that commercial parties will be "surprised by" and find themselves "trapped" under the Convention.[45] Luckily, the Convention itself provides for a very simple solution to this perceived problem: according to Article 6 of the CISG, the parties can at any time agree to exclude the Convention's application to their contract, even after the contract has been executed or after

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[44]Dalhuisen, *supra* n. 27, at 231; Schwenzer & Hachem, *supra* n. 21, at 464; Johan Steyn, A Kind of Esperanto?, in 2 The Frontiers of Liability 11, 17 (Peter H.B. Birks ed., Oxford University Press 1994).

[45]*See*, e.g., James E. Bailey, Facing the Truth: Seeing the Convention on Contracts for the International Sale of Goods as an Obstacle to a Uniform Law of International Sales, 32 Cornell Int'l L. J. 273, 317 (1999); Coyle, The Role of the CISG in U.S. Contract Practice: An Empirical Study, 32 U. Pa. J. Int'l L. 195, 239 (2016); Gillette & Walt, *supra* n. 41, at 2; Reimann, The CISG in the United States: Why It Has Been Neglected and Why Europeans Should Care, 71 Rabel J. Comp. Int'l Priv. L. 115, 123-24 (2007).

court or arbitral proceedings have been commenced.[46] So, if *both* parties are really surprised and want to escape the Convention, Article 6 of the CISG ensures that they always can.[47]

If, however, only *one* of the parties wants to exclude the Convention, then the problem in truth is not the CISG's surprising nature, but the fact that the parties at hand cannot agree which domestic law they want to apply in its place. And in such cases, it is both fair and appropriate that the CISG's fall-back rules apply.

IV. Conclusion

As this article has shown, the CISG's uniform rules for international sales contracts may contribute significantly to the desirable simplification of the commercial process for cross-border sales transactions, both at the contract formation stage and during a possible later dispute resolution process. In doing so, the CISG not only contributes to "the development of international trade on the basis of equality and mutual benefit," which its Preamble describes as "an important element in promoting friendly relations among States," but, at the same time, also provides a pragmatic legal infrastructure[48] that is suitable for everyday commercial practice. It therefore lends itself to adoption by those states and territories of the world that currently are outside its reach.

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[46]*See* Peter Schlechtriem & Ulrich G. Schroeter, Internationales UN-Kaufrecht para. 56 (6th ed., Mohr Siebeck 2016).

[47]Schroeter, *supra* n. 10, at 69.

[48]*See* Schroeter, Does the 1980 Vienna Sales Convention Reflect Universal Values? The Use of the CISG as a Model for Law Reform and Regional Specificities, 41 Loy. L.A. Int'l & Comp. L. Rev. 1, 24 (2018).