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The CISG—Successes and Pitfalls

The United Nations Convention on Contracts for the International Sale of Goods—the CISG—has now gained worldwide acceptance. Today the CISG has seventy-two member states; nine out of ten leading trade nations being member states. It can be estimated that about seventy to eighty percent of all international sales transactions are potentially governed by the CISG. The Article examines the role of the CISG in international trade practice as well as its influence as a role model for reforming sales law on an international as well as domestic level. It discusses why the CISG can be regarded superior to choosing any domestic sales law. Although the overall advantages of the CISG are now undisputable, there remain several criticisms regarding the application of the CISG to international commercial transactions which still seem to nourish a strong adverse view on the Convention in certain legal systems. Having a closer look at these criticisms, however, reveals that they are in part unfounded as they stem from general misunderstandings and in all other cases appropriate solutions can be developed. Especially, it will be proven that the CISG very well suits the necessities of modern trade, including commodity trade.

I. INTRODUCTION

"The United Nations Convention on Contracts for the International Sale of Goods (CISG) . . . has now gained worldwide acceptance."[1] With this statement, the late Professor Peter Schlechtriem described the result of the unification process of international sales law that began with the work of Ernst Rabel in the 1920s and has recently seen Japan become the seventy-first and Lebanon the seventy-second member state of the CISG.[2] It is indeed the story of a worldwide success that everyone had hoped for but most probably did

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1. Peter Schlechtriem, *Introduction sub. I, in* PETER SCHLECHTRIEM & INGEBORG SCHWENZER, COMMENTARY ON THE UN CONVENTION ON THE INTERNATIONAL SALE OF GOODS (CISG) (2d ed., 2005) (hereinafter Commentary).

2. The Japanese Parliament has voted for the accession to the CISG on June 19, 2008. The Convention was ratified on July 1, 2008 and will enter into force on Aug. 1,

not expect. Even though much has been written about the skepticism of commercial practice towards the Convention and of the CISG's allegedly minor role in the legal community, today this position may be regarded as by and large disproven.[3]

Approximately 2,500 published court decisions and arbitral awards, an abundant number of scholarly writings, numerous conferences, and last but not least the Annual Willem C. Vis International Commercial Arbitration Moot show the prominent role the CISG plays in practice, legal academia, and legal education. This is not even to mention the combined economic power of its member states and its influence on domestic legal systems as well as uniform law projects. Both of these latter points will be addressed in the course of this paper.

Even though the CISG's twenty-fifth anniversary was celebrated in 2005, its success is still a fragile one—despite the latest good news of Japan entering the CISG community. While the Convention has had a harmonizing effect on domestic contract laws, the dangers of importing old domestic preconceptions into the CISG are still present. In other words, a uniform understanding and thus a uniform interpretation and application as required by Article 7(1) CISG has not yet been achieved, and it is obvious that courts, arbitral tribunals, and legal scholars will have to make further efforts to live up to the mandate of that provision.

In this regard, the CISG community is lucky not to have to start from scratch. The extensive debate on Article 7(1) CISG in commentaries, case annotations, journal articles, and other kinds of publications shows that the problem has been identified and that we are now focusing on the central issues. Examples include questions concerning the authority of foreign court judgments; the interpretative value of uniform projects like the UNIDROIT Principles on International Commercial Contracts (PICC), the Principles of European Contract Law (PECL) or the Draft Common Frame of Reference (DCFR); their interplay with the Convention; and the methodology in uniform law and comparative studies as method of interpretation. So far, this discussion has resulted not only in an increased number of court decisions having regard to foreign cases but also in the establishment of the Advisory Council on the CISG in 2001—a private initiative of scholars from various legal systems, publishing opinions on central questions of the CISG.[4]

2009, see http://www.uncitral.org/uncitral/en/uncitral_texts/sale_goods/1980CISG_status.html.

3. More guardedly Justus Meyer, *UN-Kaufrecht in der deutschen Anwaltspraxis,* 69 RABELSZ 475, 486 (2005); Mathias Reimann, *The CISG in the United States,* 71 RABELSZ 129 (2007).

4. *See* http://www.cisgac.com.

In this paper, we will address the history of the Convention, its member states, its function as a role model for domestic legislators and uniform projects, its role in practice and, finally, some misunderstandings about, and dangers to, the level of uniformity that so far has been achieved.

II. History

The historical development of international sales law has often been reported and there is no need for another full account. Thus only the most important milestones need to be mentioned.

On September 3, 1926, the International Institute for the Unification of Private Law (UNIDROIT) was founded in Rome; it was inaugurated on May 30, 1928. In the same year, Ernst Rabel proposed to work towards a unification of international sales law. On February 21, 1929, Rabel submitted his preliminary report on the possibilities of sales law unification. On April 29, 1930, a committee consisting of representatives from different legal systems was founded. The first draft of a uniform sales law was published in 1935. In 1936, Rabel published the first volume of his seminal work *"Das Recht des Warenkaufs"* providing an analysis, the status quo of sales law on a broad comparative basis.[5] In 1937, however, Rabel was forced to emigrate from Berlin to the United States, and in the next couple of years, World War II interrupted any further unification efforts. These efforts were resumed in January 1951 when the Dutch government held a diplomatic conference on the unification of sales law in The Hague. The conference established a special commission to make further progress in the unification process. This commission met several times during the 1950s and presented a first draft on substantive sales law in 1956. In the same year, efforts to create a law applicable to the formation of international sales contracts were revived by UNIDROIT and a first draft was presented in 1958. Both drafts were distributed among governments. Their comments and suggestions concerning the 1958 draft were considered in the revised draft of 1963. The 1956 draft could not be revised in time before the 1964 Conference in The Hague.[6]

In 1964, the Uniform Law on the Formation of Contracts for the International Sale of Goods (ULFIS) and the Uniform Law on the International Sale of Goods (ULIS) were drafted and finalized at The

5. See on the later influence of this work Hannes Rösler, *Siebzig Jahre Recht des Warenkaufs von Ernst Rabel Werk- und Wirkgeschichte*, 70 RabelsZ 793 *et seq.* (2006).

6. See on the whole P Schlechtriem, *Bemerkungen zur Geschichte des Einheitskaufrechts, in* Einheitliches Kaufrecht und nationales Obligationenrecht, 28-30 (Peter Schlechtriem ed., 1987).

Hague.[7] However, these first uniform sales laws did not fulfill the high hopes and expectations widely shared at the time. Although their practical relevance should not be underestimated,[8] only nine countries became member states[9] while important economies like France and the United States did not participate.[10] Furthermore, socialist and developing countries perceived these uniform laws as favoring sellers from industrialized Western economies and thus stayed away from them as well.[11]

On December 17, 1966, the United Nations Commission on International Trade Law (UNCITRAL) was established. UNCITRAL continued the work on the unification of sales law from 1968 onwards, using the Hague Conventions as a basis. The first draft of a uniform law was finalized in January 1976. In 1978, UNCITRAL circulated a subsequent draft containing rules on contract formation as well as the substantive sales law among the governments of the UN members.[12]

Between March 10 and April 5, 1980, delegates from sixty-two nations deliberated the CISG at the now famous Vienna Conference. At its end, forty-two countries voted in favor of the Convention. On December 11, 1986, the necessary number of ten ratifications (Art. 99 CISG) was reached and the Convention entered into force on January 1, 1988. The official languages are Arabic, Chinese, French, English, Russian, and Spanish. Austria, Germany, and Switzerland agreed on a German translation in 1982 but could not, however, agree on the terminology in all respects.

III. Member States

Today the CISG has seventy-two member states.[13] This number has to be appreciated in light of some additional facts. Nine out of the ten leading trade nations in 2006 are member states, with the United

7. See on this conference Ernst vCaemmerer, *Die Haager Konferenz über die internationale Vereinheitlichung des Kaufrechts vom 2. bis 25. April 1964,* 29 RabelsZ 101-45 (1965).

8. See the collection of decisions by Peter Schlechtriem & Ulrich Magnus (eds.), *Internationale Rechtsprechung zu EKG und EAG, Eine Sammlung belgischer, deutscher, italienischer, israelischer und niederländischer Entscheidungen zu den Haager Einheitlichen Kaufgesetzen* (1987).

9. These states were Belgium, Gambia, Israel, Italy, Luxemburg, The Netherlands, San Marino, Great Britain, and Germany.

10. *See* Peter Schlechtriem, *Uniform Sales Law - The UN-Convention on Contracts for the International Sale of Goods,* 16, 17 (1986) (hereinafter Schlechtriem, Uniform Sales Law).

11. *See id.* at 17.

12. *See id.* at 18.

13. An updated status is *available at* http;//www.uncitral.org/uncitral/en/uncitral_texts/sale_goods/1980CISG_status.html.

Kingdom being the sole exception.[14] Similarly, in July 2008, eight out of the ten major trading partners of the United States were member states.[15] Within the ever increasing market of the European Union, twenty-three out of the twenty-seven members are also member states of the CISG.[16]

Having regard to the development of international trade, these figures become all the more impressive. In 2006, the worldwide merchandise export trade amounted to USD 11.783 billion and the import trade to USD 12.113 billion, about ten times as much as when the Convention was drafted.[17] This is not least due to the containerization that has revolutionized cargo shipping. As of 2005, some 18 million containers made over 200 million trips per year. There are ships that can carry 15.000 20-foot equivalent units.[18] It has been reported that today, it is cheaper to ship a bottle of wine from Australia to Hamburg than to bring it from Hamburg to Munich.[19]

IV. CISG AS ROLE MODEL

It is well known today that the CISG has exerted significant influence on an international as well as a domestic level.[20] When the first set of the UNIDROIT Principles of International Commercial Contracts (PICC) was launched in 1994, they closely followed the CISG not only in its systematic approach but also with respect to the mechanism of remedies.[21] The same holds true for the Principles of European Contract Law (PECL) published in 1999.[22] Furthermore, the EC Directive on Certain Aspects of the Sale of Consumer Goods

14. See the statistics of the World Trade Organisation, *available at* http;//www.wto.org/english/res_e/statis_e/its2007_e/its07_world_trade_dev_e.htm.

15. *See* http://ita.doc.gov/td/industry/otea/ttp/Top_Trade_Partners.pdf.

16. The missing countries are Ireland, Malta, Portugal, and the United Kingdom. However, Portugal is expected to become a member state in the near future.

17. See the WTO trade statistics for 2006, http://www.wto.org/english/res_e/statis_e/its2007_e/its07_world_trade_dev_e.pdf.

18. For example, the Danish Ship "Emma Maersk" launched in 2006 with a length of 396m and a width of 63m which can carry 15,000 containers or 123,200t.

19. *See* http://www.spiegel.de/wirtschaft/0,1518,466836,00.html (last visited Jan. 20, 2009).

20. *See* Peter Schlechtriem, *25 Years of the CISG: An International lingua franca for Drafting Uniform Laws, Legal Principles, Domestic Legislation and Transnational Contracts, in* DRAFTING CONTRACTS UNDER THE CISG 167, 174, 177 (Harry M. Flechtner et al. eds., 2008) (hereinafter Schlechtriem, 25 YEARS) and Peter Schlechtriem, *Basic Structures and General Concepts of the CISG as Models for a Harmonisation of the Law of Obligations,* 10 JURIDICA INTERNATIONAL 27 *et seq.* (2005) (hereinafter Schlechtriem, Basic Structures). For the influence of the CISG on some Eastern European Jursdictions, see Fryderyk Zoll, *The Impact of CISG on Polish Law,* 71 RABELSZ 81 *et seq.* (2007).

21. *See* Michael Joachim Bonell, *The CISG, European Contract Law and the Development of a World Contract Law,* 54 AM. J. COMP. L. 1, 16 (2008).

22. *See* Ole Lando, *CISG and Its Followers; A Proposal to Adopt Some International Principles of Contract Law*, 53 AM. J. COMP. L. 378, 381 (2005).

and Associated Guarantees must be mentioned in this context,[23] because it took its definition of conformity of goods from Article 35 CISG and thus introduced this concept into the domestic sales laws of the EU member states.[24] In Africa, the sixteen member states of the Organisation for the Harmonisation of Business Law in Africa, or in French, *l'Organisation pour l'harmonisation en Afrique du Droit des Affaires* (OHADA) have adopted the *Acte uniforme sur le droit commercial général* (AUDCG) which is also primarily based on the CISG.[25] Finally, the Draft Common Frame of Reference published in the beginning of 2008 is a continuation of all these different unification efforts which are heavily indebted to the CISG.[26] It uses the general concepts of the CISG in all aspects relevant to sales contracts, i.e., the obligations of the parties and the remedies available.

Three main features of the CISG have influenced all of these instruments. First, the drafters of the CISG endeavored to depart from domestic legal terms and concepts, instead seeking to employ an independent legal language.[27] They succeeded to a large extent. Likewise, the systems inherent in traditional domestic approaches have been discarded. Instead, the Convention features a transparent structure unfettered by any historical path dependencies.[28] Thus, for example, the sections on the obligations of the seller are followed by the section on remedies for breach of contract by the seller. The feature most influential on a substantive level, however, is the CISG's remedy mechanism. The Convention does not adopt the cause oriented approach of Roman heritage and prevalent in civil law countries but rather follows the breach of contract approach of common law descent.[29] In addition, peculiar features of the various systems have been put aside, making the CISG truly suitable for the international context.

Over the last two decades, the CISG has also proven to be a decisive role model not just on an international level but also for domestic legislators. Finland, Norway, and Sweden took the coming into force

23. EC Directive 1999/44/EC.

24. *Cf.*, for example, § 434 German Civil Code; Art. 922 Austrian Civil Code; Sec. 75A, 76 Danish Sale of Goods Act as of 6 June 2007; § 217 Estonian Law of Obligations Act; Sec. 17 Finnish Sale of Goods Act 1987; Art. 211 French Code of Consumption; Art. 7:17 Civil Code of The Netherlands.

25. *See* Ulrich G. Schroeter, *Das einheitliche Kaufrecht der afrikanischen OHADA-Staaten im Vergleich zum UN-Kaufrecht*, RECHT IN AFRIKA 163, 166 *et seq.* (2001).

26. *See* Schlechtriem, Basic Structures, *supra* note 20, 28; Christian von Bar, *Working Together Toward a Common Frame of Reference*, 10 JURIDICA INTERNATIONAL 17, 22 (2005).

27. *See* Franco Ferrari, *Art. 7, para. 9, in* SCHLECHTRIEM/SCHWENZER – KOMMENTAR ZUM EINHEITLICHEN UN-KAUFRECHT (Ingeborg Schwenzer ed., 2008) (hereinafter Ferrari, KOMMENTAR).

28. *See* PETER SCHLECHTRIEM, INTERNATIONALES UN-KAUFRECHT, para. 5 (4th ed 2007).

29. *See* Peter Schlechtriem, Commentary, Introduction, sub. II.

of the CISG in their countries on January 1, 1989 as an opportunity to enact new domestic sale of goods acts which rely heavily on the CISG, albeit without its Part II (i.e., the provisions on formation of contracts).[30] With the end of the cold war and the collapse of the former Soviet Union, the young Eastern European states also looked to the CISG when formulating their new civil codes.[31] This holds true not only with regard to the Commonwealth of Independent States (CIS)[32] but also for the Baltic states among which Estonia is the most prominent example. Nowadays, China is of course hugely important for international trade, and the contract law of the People's Republic of China of March 15, 1999, also follows the CISG closely. Finally, the modernization of the German Law of Obligations was strongly influenced by the CISG from its very beginnings in the 1980s.[33] Although the final legislation that entered into force on January 1, 2002 had lost much of that initial spirit, it still betrays the influences of the basic concepts of the CISG.[34]

V. THE CISG IN PRACTICE

It certainly is clear that today, the existence of the CISG is generally known among lawyers working in international trade. Yet, there still seems to be a tendency to recommend the exclusion of the Convention, especially in the commodities trade.[35] Three main reasons are usually given for this strategy. First, even though the CISG is commonly known, the degree of familiarity with its application and

30. Of course the method of implementation of the CISG differed. While Finland and Sweden introduced the CISG alongside their domestic sales laws, Norway enacted one single sales law for international and domestic sales contracts. See, for criticism, Viggo Hagstrøm, *CISG - Implementation in Norway, an approach not advisable*, Internationales Handelsrecht 246 *et seq.* (2006). Lately, a new Danish Sale of Goods Act has been drafted, see http://www.sprog.asb.dk/sn/cisg.

31. *See* Schlechtriem, 25 YEARS, supra note 20, 177 *et seq.*

32. *See* Rolf Knieper, *Celebrating Success by Accession to CISG*, 25 J.L. & COM. 477 (2005-06).

33. *See* Peter Schlechtriem, *International Einheitliches Kaufrecht und neues Schuldrecht, in* DAS NEUE SCHULDRECHT IN DER PRAXIS 71 (Barbara Dauner-Lieb et al. eds., 2002) (hereinafter Schlechtriem, NEUES SCHULDRECHT).

34. Unfortunately the shift of the remedy system from cause approach to breach of contract approach has not been followed through but is now trapped between both.

35. So far, no reliable figures are available and the surveys that have been conducted to this date only provide limited insight and vary themselves. See, for such surveys, Martin Koehler, *Survey regarding the relevance of the United Nations Convention for the International Sale of Goods (CISG) in legal practice and the exclusion of its application (2006), available at* http://www.cisg.law.pace.edu/cisg/biblio/koehler.html, states that 70.8% of participants from the United States and 72.2% of participants from Germany regularly excluded the CISG while Meyer, *supra* note 3, 371, arrives at 42% for Germany. For Switzerland, see the survey conducted by Corinne Widmer & Pascal Hachem, *The CISG in Switzerland, in* THE CISG AND ITS IMPACT ON NATIONAL CONTRACT LAW, 281, 285 (Franco Ferrari ed. 2008), where 62% of the participants have stated to regularly exclude the CISG.

functioning in practice is still very low.[36] Lawyers continue to prefer their own domestic law and seem to stick to the saying "you can't teach an old dog new tricks." The second reason follows from the first: whenever the position of a party in the market allows that party to retain its own domestic law in a contract, it prefers to do so. Third, the parties are not yet convinced of the advantages of the CISG compared to domestic sales laws. Finally, the witness clause holding all six official languages equally authoritative has given rise to criticism. These arguments, however, are unconvincing for several reasons.

Although it is now generally accepted in western, industrialized countries that at least business parties are free to choose the law applicable to their contract, this is not true in all parts of the world. The fear of giving western businesses too many advantages still leads many developing and transition countries to refuse the recognition of choice of law clauses. The most prominent example is Brazil where the validity of choice of law clauses is highly controversial.[37] Thus, an American buyer acquiring goods from a Brazilian seller and having confidently contracted on the basis of the Uniform Commercial Code, may find itself in a very precarious position when trying to sue the seller in Brazilian courts[38] applying domestic Brazilian law to the sales contract.[39] This may very well lead to a situation where a party is confronted with a law that was hardly foreseeable and is not really understandable or even truly accessible.

But even if a choice of law clause is recognized, a party insisting on its own domestic law may still encounter serious difficulties when litigating before the courts of a foreign country. First of all, the respective law has to be proven in court. This implies not only the need to translate statutes as well as other legal texts, such as court decisions and scholarly writings, into the language of the court but usually also requires the procurement of expert opinions. In some countries the experts may be appointed by the court, in others each party will have to present its own, and often several experts may be needed. Needless to say, all this can be very expensive. The consequences may be particularly harsh in a procedural system where each party bears its own costs regardless of the outcome of the litiga-

36. Again, the figures provided by surveys vary. Yet, the general rule among practitioners is that they work with the CISG where it is relevant: Koehler, *supra* note 35, provides 29% for the United States and 69% for Germany. Widmer & Hachem, *supra* note 35, 285, provide 66% for Switzerland. Both surveys also show that university education is the primary source of knowledge of the CISG.

37. See, for comparison to U.S. conflict of laws rules, Dana Stringer, *Choice of Law and Choice of Forum in Brazilian International Commercial Contracts,* 44 COLUM. J. TRANSNAT'L L. 959, 960 *et seq.* (2005-06).

38. It should be noted that Brazilian courts do not consistently enforce forum selection clauses, see *id.* at 960.

39. *Id.* at 960, states that "the resulting legal uncertainty makes it difficult for U.S. lawyers accustomed to working within a party autonomy framework to manage risk while negotiating commercial contracts with Brazilian counterparties."

tion, as is the case particularly under the so-called "American Rule."[40] To make matters worse, even if a party is willing to bear all these costs to prove a foreign law in court, it will still face a high degree of unpredictability regarding the interpretation and application of this law by the foreign court and a disconcertingly high margin of error.

It is true, of course, that today, more and more international sales law disputes are not litigated before national courts but are rather resolved by international commercial arbitration. Still, the problem of proving domestic law remains and translations are still necessary where this law is not accessible in English. Furthermore, it often remains uncertain, even in this context, how arbitrators, who often come from different legal backgrounds, will apply domestic law.[41]

In many cases, parties seek to solve these problems by resorting to what they believe is a "neutral law," although they often confuse political neutrality with suitability of the chosen law for international transactions.[42] This seems to be particularly true for Swiss law. If the parties choose such a third (neutral) law, they may be even worse off than if they had chosen one of their home laws. To begin with, they have to investigate this foreign law. Furthermore, the trouble and costs in proving it are even more burdensome. Last, but not least, especially Swiss domestic sales law can be unpredictable and not suitable to international contracts in some core regards. Two examples illustrate this problem. First, if the seller does not deliver goods in conformity with the contract, the Swiss Supreme Court distinguishes between *peius* (inferior goods) and *aliud* (different goods).[43] In case of the former, the buyer must give prompt notice to the seller (according to Article 201 of the Swiss Code of Obligations (CO)) to preserve any remedies for breach of contract with a one year limitation period (Art. 210 CO); in case of the latter, the buyer can demand performance for ten years after the conclusion of the contract regardless whether it gave notice of nonperformance or not. And it can be extremely difficult to predict where the line between *peius* and *aliud* will be drawn in a particular case.[44] The second example is the compensation for consequential losses. According to Art. 208(2) CO upon

40. A comparative overview of how the recovery of attorneys' fees is dealt with is given by John Y. Gotanda, *Awarding Costs and Attorneys' Fees in International Commercial Arbitrations,* 21 MICH. J. INT'L L. 1, 4 *et seq.* (1999); Ingeborg Schwenzer, *Rechtsverfolgungskosten als Schaden?, in* MÉLANGES EN L'HONNEUR DE PIERRE TERCIER 417, 418 *et seq.* (Peter Gauch et al. eds., 2008).

41. *Cf.* Christiana Fountoulakis, *The Parties' Choice of 'Neutral Law' in International Sales Contracts,* 7 EUROPEAN JOURNAL OF LAW REFORM 303, 307 (2006).

42. On this issue, see *id.* at 306 *et seq.*

43. A famous case is the so called Hubstaplerfall, see BGer, 5 December 2005, BGE 121 III 453.

44. *See* Fountoulakis, *supra* note 41, 308 *et seq.*

unwinding the contract the seller is liable for damages directly incurred by the buyer due to the defective goods. In this respect, fault is not required. However, whether "direct loss" also encompasses consequential loss is made dependent on the number of links in the chain of causation.[45] Extremely short periods for giving notice of defects[46] as well as a limitation period of one year in case of a *peius*[47] also militate against choosing domestic Swiss law for the international context.[48]

All these shortcomings of domestic laws are avoided by applying the CISG. The text of the CISG is not only available in six authoritative languages, it also has been translated into numerous others. Court decisions, arbitral awards as well as scholarly writings, are either written or at least translated into today's *lingua franca* of international trade, namely English. They are readily accessible not only in various books and journals but also on several websites.[49] The abundant number of legal materials available makes it reasonable to expect that judges and arbitrators have access to the requisite information and will be able to apply the CISG in a predictable fashion.

This last argument is not undermined by the fact that the CISG has been adopted in six official languages which—according to the witness clause—are of equal authority. First of all, the rich body of court decisions in German speaking countries, which was mainly developed using the non-authoritative German translation of the CISG,

45. See the recent decision of the Swiss Federal Supreme Court, BGer, 28 November 2006, BGE 133 III 257, para. 2.5.4.

46. Article 201 OR speaks of "immediately." This requirement is interpreted very narrowly, *cf.* the still authoritative decision BGer, 27 June 1950, BGE 76 II 221 at 225 (four days sufficient as these included a Sunday). Even the minority view only advocates an average period of seven days, see Hannes Zehnder, *Die Mängelrüge im Kauf-, Werkvertrags- und Mietrecht,* 96 SCHWEIZERISCHE JURISTENZEITUNG 545, 548 (2000). The Swiss Federal Supreme Court itself has stated that the notice requirement within Swiss law is harsher than that of Germany and Austria which have similar rules in § 377 of their respective commercial codes, see BGer, 28 May 2002, CISG-online 676, para. 2.1.2. This is all the more true with regard to the CISG.

47. *Cf.* Article 210 OR.

48. *See* Fountoulakis, *supra* note 41, at 311. But see for the contrary view, Sebastian Brachert & Andreas Dietzel, *Deutsche AGB-Rechtsprechung und Flucht ins Schweizer Recht,* ZEITSCHRIFT FÜR DAS GESAMTE SCHULDRECHT 441 (2005), recommending the choice of domestic Swiss law as this provided appropriate solutions for B2B contracts especially in transnational contracts.

49. Most prominently UNCITRAL has initiated the Case Law on UNCITRAL Texts (CLOUT) database, *available at* http://www.uncitral.org/uncitral/en/case_law.html, which contains court decisions and arbitral awards to increase international awareness of UNCITRAL texts and to facilitate their uniform interpretation and application. Further databases have since been established, see, e.g., http://www.cisg.law.pace.edu/ run at Pace University, New York, U.S.A., containing numerous materials, scholarly writings, court decisions, and arbitral awards; http://www.cisg-online.ch/ run by Professor Ingeborg Schwenzer at the University of Basel, Switzerland, containing selected articles and numerous court decisions and arbitral awards; http://www.unilex.info/ run by Professor Michael Joachim Bonell containing materials, court decisions, and arbitral awards on the CISG as well as the UNIDROIT Principles of International Commercial Contracts 2004.

so far has not revealed any serious problems in court practice. Where inconsistencies were detected, these were easily resolved by interpretation of the relevant provision in light of the authoritative versions as well as the drafting history and the purpose of the provision.

Moreover, the legal position of parties is not weakened by the different versions of the CISG. As all language versions are to be treated equally and thus are directly applicable in court, American lawyers may, e.g., always rely on the English version. Furthermore, today it seems universally accepted[50] that in case of doubt the English version of the CISG is to be given prevalence as English—together with French—had been the language of the preparatory works on the CISG as well as at the 1980 Vienna Conference.[51]

In summary, better accessibility of the CISG saves time and costs, and it makes the outcome of cases more predictable. These are the main advantages of the CISG when compared to the application of domestic law.

VI. Criticism

Although the overall advantages of the CISG are now undisputable, criticism regarding the application of the CISG to international commercial transactions remains, and it seems to nourish a strongly adverse view on the Convention in certain legal systems. Having a closer look at this criticism, however, reveals that it is in part unfounded because it results from general misunderstandings; even where it has some merit, appropriate solutions can be developed.

A. *General Problems in the Application of Uniform Law*

The first set of arguments relate to the general problems one faces with uniform law—namely questions of uniform interpretation as well as the relationship between the application of uniform law and possibly concurrent domestic law remedies.

1. Uniform Interpretation

One of the first and main criticisms has always been the problem of uniform interpretation of the CISG. In particular, the CISG is blamed for its imprecision and vague terms such as "reasonable" and for the use of general clauses such as the provision on fundamental

50. With the exception of one—American—author, see Harry M. Flechtner, *The Several Texts of the CISG in a Decentralized System: Observations on Translations, Reservations and other Challenges to the Uniformity Principle in Article 7(1)*, 17 J.L. & Com. 208 (1998).

51. *See* Peter Schlechtriem, Commentary, Intro to Arts. 1-6, para 29. The vast majority even gives priority to the English version, see Ferrari, Kommentar, *supra* note 27, Vor Artt 1-6, para. 15, with numerous references.

breach (Article 25).[52] This criticism is especially advanced by lawyers with a common law background.[53] For centuries, they have been accustomed to extremely detailed statutes. This is in part due to the delicate relationship between the judiciary and the legislature. In order to restrict the room for interpretation, extensive catalogues of definitions[54] as well as meticulous instructions for the construction and interpretation of contracts[55] are often provided. Admittedly, in this respect the CISG indeed does not follow common law tradition but has instead been greatly inspired by the continental civil codes. It may, however, also draw on the continental experience with the interpretation of legal text. Given that the UCC contains terms similar to those of the CISG, American lawyers are also, at least to some extent, familiar with this approach.

Unlike the European Communities or OHADA, the CISG member states have no common supreme court guarding the interpretation of uniform or harmonized law; this may be regarded as a severe deficit. Yet, there are other means to safeguard uniformity. It is now common ground that uniform law has to be interpreted autonomously and regard is to be had to its international character. In this respect the comparative legal method has proven most adequate and successful. Part of this method involves giving due consideration to foreign court decisions and arbitral awards which are therefore becoming more and more important on the international level. Whatever the situation in a domestic legal system may be, there can be no doubt that foreign decisions do not have a binding effect upon national courts.[56] Still, their potential persuasive authority is widely and justly recognized today.

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52. *See* Alastair Mullis, *Avoidance for Breach under the Vienna Convention; A Critical Analysis of Some of the Early Cases, in* ANGLO-SWEDISH STUDIES IN LAW 338, 339 (M. Andreas & N. Jarborg eds., 1998); Koji Takahashi, *Right to Terminate (Avoid) International Sales of Commodities,* J. BUS. L. 102, 124 (2003): "The CISG rules do not provide a high degree of legal certainty and predictability, inasmuch as they rely upon ambiguous concepts such as 'fundamental breach' and 'reasonable length'."

53. See, for example, Clayton P Gillette & Robert E Scott, *The Political Economy of International Sales Law,* 25 INTERNATIONAL LAW AND ECONOMICS 446, 473 (2005): "Uncertainty results not only from the many vague standards, but also from the use of ambiguous language that may have different meanings in different cultures." 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, 275 (1999): "[T]he CISG's rules on interpretation are so obscure that the treaty's own guidelines for producing consistent interpretations fail to promote uniformity."

54. See, for example, § 1-201 UCC.

55. See, for example, Sec. 6 Interpretation Act 1978: "In any act, unless the contrary intention appears, (a) words importing the masculine gender include the feminine; (b) words including the feminine include the masculine; (c) words in the singular include the plural and words in the plural include the singular."

56. Today this can be viewed as common opinion, see instead of all Peter Schlechtriem, Commentary, Art. 7, para. 14.

Naturally, this method presupposes the accessibility and availability of foreign legal materials. Luckily, today this goal has been widely achieved, thanks to the endeavors of UNCITRAL[57] and other extensive international databases and to English translation programs of foreign decisions and awards. The international development of the CISG is closely followed and analyzed by a rich variety of commentaries stemming from the German legal tradition, but published in English. Finally, the CISG Advisory Council issues opinions and provides guidelines for uniform interpretation of the Convention in crucial areas of possibly diverging approaches.

Realistically speaking, every uniform law has to rely on a certain imprecision. If a law is intended to be flexible enough to adapt to new factual and legal developments in decades to come, it has to leave room for interpretation.[58] Unlike domestic law which may be changed and adapted rather easily by the legislator, it would be illusionary to believe it possible to bring seventy-two nations together on a regular basis in order to make adjustments to the wording of the CISG.[59]

The problems and possible solutions addressed here may be illustrated by the debate revolving around the interpretation of Articles 38 and 39 CISG. These are the provisions on examination of the goods and notification of the seller in case of non-conforming goods. Most domestic legal systems do not recognize any such obligation of the buyer at all. Thus, it does not come as a great surprise that periods of more than a month were held to be still reasonable by courts from some countries. In contrast, especially German speaking courts, viewing the issue against their own historical background, have required notice to be given in a few days. Prompted by comparative scholarly writings, the different, formerly irreconcilable, attitudes are finally converging. A rule requiring an average period of one month for giving notice is now gaining ground in most legal systems.[60]

57. See the CLOUT case digests, *available at* http://www.uncitral.org/uncitral/en/case_law/digests/cisg.html.

58. The criticism advanced by Gillette & Scott, *supra* note 53, 480, 481—"the incapacity to adapt the CISG to changing conditions suggests that it will necessarily evolve as an inferior alternative to the more adaptable sales law rules of individual states—is therefore unfounded and hardly fits with their earlier criticism of the CISG using too vague a language.

59. With regard to the 1958 Convention on Recognition and Enforcement of Foreign Arbitral Awards, UNCITRAL in 2006 started to make recommendations as to the interpretation of its provisions, *cf.* the recommendation, *available at* http://www.uncitral.org/pdf/english/texts/arbitration/NY-conv/A2E.pdf.

60. See for Germany BGH, 8 March 1995, CISG-online 144; BGH, 3 November 1999, CISG-online 475; *see also* BGH, 30 June 2004, CISG-online 847 (more than two months considered unreasonable). For Switzerland, see BGer, 13 November 2003, CISG-online 840 expressly upholding the judgment of the Court of Appeal Lucerne (Switzerland), 12 May 2003, CISG-online 846. *See also* Court of Appeal Lucerne (Switzerland), 8 January 1997, CISG-online 228. An exception has to be made with

2. Concurrent Remedies

Another urgent problem jeopardizing uniformity may arise in the field of concurring remedies. The CISG is exclusively concerned with the contractual relationship between the seller and the buyer. However, under most legal systems the mere existence of contractual remedies does not preclude a party from relying on other remedies, particularly those based on tort. The crucial question then arises whether a party under a CISG sales contract can assert concurring remedies pursuant to domestic law, even though they may result in outcomes contrary to those reached under the CISG.[61]

This is a problem particularly with regard to remedies for non-conformity of goods. Can a buyer rely on domestic concepts such as *culpa in contrahendo*, mistake or negligent misrepresentation? Can it recover purely economic loss caused by a defective product or property damages, especially in legal systems that recognize a tort claim for damage to the chattel itself? Can the buyer rely on these claims in cases where it is precluded from relying on the non-conformity of the goods under the CISG; if damages were not within the contemplation of the parties; or if avoidance under the CISG is not possible because the breach does not amount to a fundamental one?

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regard to Austria where the Federal Supreme Court still sticks to an overall period for examination of the goods and notification of defect of fourteen days, see OGH, 15 October 1998, CISG-online 380; OGH, 27 August 1999, CISG-online 485; OGH, 14 January 2002, CISG-online 643. Outside Germanic legal systems courts have long before been more liberal in this respect, see Shuttle Packaging Systems, L. L. C. v. Jacob Tsonakis, INA S. A. and INA Plastics Corporation, U. S. Dist. Ct. (W. D. Mich.), 17 December 2001, CISG-online 773 = 2001 U. S. Dist. LEXIS 21 630: In case of complex machines, the buyer cannot be expected to notify the seller within a few weeks; TeeVee Toons, Inc. (d/b/a TVT Records) & Steve Gottlieb, Inc. (d/b/a Biobox) v. Gerhard Schubert GmbH, U.S. Dist. Ct. (S.D.N.Y.), 23 August 2006, CISG-online 1272 (approx. two months considered reasonable without further explanation). For an example from Chinese arbitration see CIETAC, 3 June 2003, CISG-online 1451 ("it is only nine months"). *See also* Court of Appeal Colmar (France), 24 October 2000, CISG-online 578 (adhesive foil: approx. six weeks), and comment by Claude Witz, D. 2002, Somm. 393; Court of Appeal Versailles (France), 29 January 1998, CISG-online 337 (six to eleven months). In contrast, two months or longer were considered unreasonable, see Court of Appeal Paris (France), 6 November 2001, CISG-online 677 = D. 2002, 2795, with comment by Claude Witz, Court of Appeal Aix-en-Provence (France), 1 July 2005, CISG-online 1096 (more than two months), Court of Appeal Gent (Belgium), 4 October 2004, CISG-online 985 (nine months); District Court Veurne (Belgium), 15 January 2003, CISG-online 1056 (nearly three months); District Court Rimini (Italy), 26 November 2002, CISG-online 737 (six months); Court of Appeal La Coruña (Spain), 21 June 2002, CISG-online 1049 (two and a half months); District Court Hasselt (Belgium), 6 March 2002, CISG-online 623 (two months); Maritime Commercial Court (Denmark), 31 January 2002, CISG-online 868 (seven months); District Appeal Court Arnhem (Netherlands), 27 April 1999, CISG-online 741 (two years).

61. SONJA A KRUISINGA, (NON-)CONFORMITY IN THE 1980 UN CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS; A UNIFORM CONCEPT? (2004).

The answers to these questions are highly controversial with civil lawyers favoring a pro-convention approach[62] whereas Anglo-American scholars[63] seem to adopt a different stance. If one seeks to achieve the greatest level of uniformity, it cannot be left to individual states to apply their domestic laws, whether contractual or based on tort. Therefore, the need to promote uniformity as it is laid down in Article 7(1) CISG requires that, as the late John Honnold put it, the CISG displaces any domestic rules if the facts that invoke such rules are the same that invoke the Convention.[64] In other words, wherever concurring domestic remedies are only concerned with the non-conformity of the goods—such as negligence in delivering non-conforming goods, negligent misrepresentation of their qualities, or mistake as to their substance—such remedies must be pre-empted by the CISG.[65] The CISG, however, does not deal with fraud or safety requirements under a product liability approach, thus leaving room for national concepts such as fraudulent misrepresentation or product liability in case of damage to property other than the goods sold.

Similar problems arise in the borderland of substantive and procedural law. Procedural questions are not addressed by the CISG. Thus, one may ask whether issues such as the burden and standard of proof, which may often determine the outcome of a case, are to be decided autonomously. In this context, compensation for legal costs has recently enjoyed great attention.[66]

Today it is more and more accepted that national conceptions of line-drawing between procedural and substantive law cannot be decisive. Relying upon such a categorical distinction is outdated and

62. *See, in particular,* Rolf Herber, *Mangelfolgeschäden nach dem CISG und nationales Deliktsrecht – Zugleich Besprechung von Dirk Schneider, UN-Kaufrecht und Produktehaftpflicht* INTERNATIONALES HANDELSRECHT 187-90 (2001); Rolf Herber, *Zum Verhältnis von UN-Kaufrechtsübereinkommen und deliktischer Haftung, in* FESTSCHRIFT FÜR PETER SCHLECHTRIEM ZUM 70. GEBURTSTAG 207, *et seq.* (Ingeborg Schwenzer & Günter Hager eds., 2003).

63. *See, in particular,* Joseph M. Lookofsky, *In Dubio pro Conventione? Some Thoughts About Opt-Outs, Computer Programs and Pre-emption under the 1980 Vienna Sales Convention (CISG),* 13 DUKE J. COMP. & INT'L L. 263, 285 (2003); Miami Valley Paper, LLC v. Lebbing Eng'g GmbH, U. S. Dist. Ct. (S. D. Ohio), 10 October 2006, CISG-online 1362; *cf. also* Peter Schlechtriem, Commentary, Art. 4, para. 23a.

64. *See* JOHN O. HONNOLD, UNIFORM LAW FOR INTERNATIONAL SALES UNDER THE 1980 UNITED NATIONS CONVENTION para. 65 (3d ed. 1999).

65. *See* Peter Huber, *Art. 45, para. 27, in* MÜNCHENER KOMMENTAR ZUM BÜRGERLICHEN GESETZBUCH, VOL. 3 (Kurt Rebmann et al. eds., 5th ed, 2008); Franco Ferrari, *The CISG and Domestic Remedies,* 71 RABELSZ 76 (2007).

66. *See* Zapata Hermanos Sucesores, S. A. v. Hearthside Baking Company, Inc. d/b/a Maurice Lenell Cooky Company, U. S. Ct. App. (7th Cir.), 19 November 2002; John Y. Gotanda, *Awarding Costs and Attorneys' Fees in International Commercial Arbitrations,* 21 MICH. J. INT'L L. 1 *et seq.* (1999); Schwenzer, *supra* note 40, 417 *et seq.*; Harry M. Flechtner & Joseph M. Lookofsky, *Viva Zapata! American Procedure and CISG in a U.S. Circuit Court of Appeals,* 7 THE VINDOBONA JOURNAL OF INTERNATIONAL COMMERCIAL LAW AND ARBITRATION 93 *et seq.* (2003); Peter Schlechtriem, *Verfahrenskosten als Schaden in Anwendung des UN Kaufrechts,* INTERNATIONALES HANDELSRECHT 49 *et seq.* (2006).

unproductive.[67] Instead, the analysis should focus on the general principles of the Convention, such as the principle of full compensation on the one hand and the equality between the parties on the other.[68] As a result, the burden and standard of proof are to be derived from the Convention itself while the question of compensation for legal costs is to be decided by the respective domestic procedural law.[69]

All this shows that even the swamp of concurrent domestic remedies can be forded safely today.

B. Incompleteness of the CISG

1. Issues of Validity

A further fundamental criticism relates to the incompleteness of the CISG.[70] According to Article 4, the scope of the CISG encompasses the formation of contracts and the rights and obligations of the parties. The CISG is not concerned, however, with the validity of the contract or of any of its provisions. Some authors criticize primarily that the meaning of the term "validity" is unclear,[71] thus leading to an inconsistent application of the Convention, resulting in legal uncertainty. This argument may easily be rejected. The very term "validity" has to be determined autonomously.[72] This means that any question dealt with by the CISG or the general principles underlying the Convention can no longer be defined as being a validity issue. For example, it is clear that a contract relating to non-existent goods is valid notwithstanding the position of otherwise applicable domestic law.[73] This is because the CISG provides for the risk of loss in cases where at the time of the conclusion of the contract the goods had al-

67. *See* CISG-AC, Op. 6 (*Gotanda*), Comment 5.2, *available at* http://www.cisg-online.ch/cisg/docs/AC-Opinion%206.pdf.

68. In particular, the latter point has been addressed by Justice Richard Posner in Zapata Hermanos Sucesores, S. A. v. Hearthside Baking Company, Inc. d/b/a Maurice Lenell Cooky Company, U. S. Ct. App. (7th Cir.), 19 November 2002, CISG-online 684 where he pointed out that a successful defendant could not recover legal costs under the CISG as there was no breach of contract on the side of the claimant. Insofar concurring, Ingeborg Schwenzer & Pascal Hachem, *The Scope of the CISG Provisions on Damages, in Contract Damages: Domestic and International Perspectives,* 104 (Djakhongir Saidov & Ralph Cunnington eds., 2008).

69. *See id.* at 98, 99, 103; Schwenzer, *supra* note 40, 425.

70. See, on this issue, Reimann, *supra* note 3, 125.

71. *See* Michael Bridge, *A Law for International Sales,* HONG KONG LAW REVIEW 17, 23 (2007).

72. Prevailing opinion, see instead of many Peter Schlechtriem, Commentary, Art. 4, para. 7; Ferrari, KOMMENTAR, *supra* note 27, art. 4, para. 15; J.O. Honnold, para. 65.

73. Some domestic laws still provide for the invalidity of a sales contract in case of initial impossibility, *cf.* for example Art. 20 Swiss Law of Obligations. The same approach was taken by § 306 of the German Civil Code before its modernization in 2002. Today § 311a(1) BGB expressly states that initial impossibility does not lead to the invalidity of the contract.

ready been lost or damaged (Article 68 sentence 3). The same holds true for the sale of goods that the seller does not own at the time of the conclusion of the contract.[74]

Likewise, errors in expression that are only recognized as relevant in a few legal systems[75] do not qualify as a matter of validity to be resolved by domestic law.[76] From the general principles of the CISG[77] it can first of all be inferred that, where the party receiving a declaration was aware or could not have been unaware of the real intent of the party making the declaration (Article 8(1) CISG), the receiving party bears the risk that the declaration has not been expressed correctly.[78] The same holds true where a reasonable third party in the shoes of the receiving party would have recognized the real intention of the party which has made the declaration. Finally, Article 27 shows that the risk of errors in the transmission of a declaration also has to be borne by the receiving party. In all other cases, however, the risk of an error in expression has to be borne by the author of the communication.

All of the cases mentioned above demonstrate the primary importance of preventing particular domestic preconceptions from undermining uniformity. Justifiable reliance on the existence of a contract, which is recognized by the vast majority of legal systems, also needs to be protected in international trade.

One final special problem needs to be addressed, i.e., the validity of general conditions or standard business terms. It cannot be doubted that the incorporation of standard terms is clearly regulated by the provisions of the CISG on the formation of contract.[79] This concerns issues such as accessibility, language, transparency, battle of forms, as well as interpretation. However, in light of the plain wording of Article 4 sentence 2 lit. a) CISG the substantive validity of clauses has to be determined by the otherwise applicable domestic law.

Still, even here some general standards can be derived from the CISG itself. To begin with, a party may not disclaim liability for its own intentional or grossly negligent conduct. This follows from several provisions within the CISG which preclude a party from relying on certain facts which it knew or could not have been unaware of. An

74. Despite Article 1599 French Code Civil. PETER SCHLECHTRIEM & CLAUDE WITZ, CONTRATS DU VENTE INTERNATIONAL para. 55 (2008).

75. See the comparative analysis by Ernst A. Kramer & Thomas Probst, *Defects in the Contracting Process, in* INTERNATIONAL ENCYCLOPEDIA OF COMPARATIVE LAW, VOL. VII, CH. 11, paras. 67 *et seq.*, 35 *et seq.* (Arthur T. von Mehren ed. 2001).

76. *See* Martin Schmidt-Kessel, KOMMENTAR, Art. 8, para. 6.

77. *Cf.* Articles 8, 16, 19, 27 CISG.

78. *See* Martin Schmidt-Kessel, KOMMENTAR, Art. 8, para. 6.

79. Today this can be considered to be common opinion, see instead of all Peter Schlechtriem & Ulrich G. Schroeter, KOMMENTAR, Art. 14, para. 32 with numerous references.

example can be found in Article 40 CISG which prevents the seller from relying on the buyer having failed to give notice of a defect in accordance with Article 39 CISG, if it knew or could not have been unaware of the non-conformity of the goods delivered. Consequently, it is more than appropriate to apply the same principle to liability for conduct. This position is reinforced by a comparative perspective which shows that domestic legal systems restrict the ability of parties to limit their liability in contracts in relation to negligence only.[80] Furthermore, the CISG provisions on damages evince the principle that at minimum, some adequate remedy must be preserved. This means for example that the buyer of totally worthless goods must at least be able to reclaim the purchase price. Therefore, clauses excluding all remedies will never be enforceable under the CISG.

2. Hardship

Several authors have complained about another perceived *lacuna* of the CISG, i.e., the absence of rules pertaining to a severe change of circumstances and the lack of an express provision on hardship, *rebus sic stantibus* or *Wegfall der Geschäftsgrundlage*.[81] They point to other uniform projects[82] or domestic laws,[83] which have introduced such provisions, and thus advocate the applicability of the remedies laid down in these rules to CISG cases. They emphasize in particular the duty to renegotiate and the possibility that a court may adjust the contractual obligations to the changed circumstances.

As has been argued elsewhere,[84] the CISG itself, however, is even better suited for a practical solution of the problem of change of circumstances. Although taken at face value, Article 79 CISG deals primarily with exemption in cases of *force majeure*, a change of cir-

80. Uniform projects do not allow to rely on clauses limiting liability for non-performance where it would be grossly unfair to do so, Art. 7.1.6 PICC, or contrary to good faith and fair dealing, Art. 8:109 PECL, Art. III.-3:105(2) DCFR. The given illustrations show that this is considered to be the case where the obligee is left with no remedies at all or only marginal compensation, see Art. 7.1.6 PICC, Illustrations 4,5; Art. 8:109 PECL, Comment D and Notes for a comparative overview. Fault based liability systems prohibit exclusion of liability for gross negligence or intentional acts, see for Germany § 276(3) BGB; for Switzerland Art. 100(1) OR; for France Art. 1150 CC and—based on Art. 1131 CC—Cass. com 30 May 2006, Bull. Civ. IV, No. 132; Cass. com. 18 December 2007, Dalloz 2008, p. 154, obs. X Delpech and note by Denis Mazeaud; for Egypt Art. 217(2) CC; for Kuwait Art. 296 CC or in case of defective goods even completely prohibit limitation of liability, see for Lithuania Art. 6.334(4) CC. Strict liability systems use the concept of unconscionability, see e.g. for the United States Art. 2-719(3) UCC. The examples given for unconscionable clauses include limiting the buyer's remedies to repair and replacement of non-conforming goods or to liquidated damages in a small amount, see E. ALLAN FARNSWORTH, CONTRACTS 336 (2d ed. 1990).

81. Schlechtriem, NEUES SCHULDRECHT, *supra* note 33, 76.

82. Art. 6.2.3 PICC 2004; Art. 6:111 PECL 2000; Art. III. – 1:110 DCFR.

83. *Cf.* § 313 of the German Civil Code.

84. Schwenzer, KOMMENTAR, Art. 79, para. 54.

cumstances can also amount to an impediment in the sense of this provision. This is all the more true today when most subsequent events do not render performance completely impossible and thus do not constitute a veritable impediment in the sense of Art. 79 CISG; they just render performance more or less onerous for the obligor. Thus it seems preferable to deal with both situations under the same heading, establishing the same prerequisites, and imposing the same consequences.

With regard to the remedies available in case of hardship, the CISG mechanism is flexible enough to reach just and equitable results. On the one hand, its provisions guarantee legal certainty, on the other hand, they contribute to implementing good faith and fair dealing in international sales law. If the obligor who is faced with a change of circumstances suggests proceeding with the contract albeit on different terms, the obligee may not avoid the contract. A fundamental breach of contract (Article 25 CISG) must be denied if it is just and reasonable under the circumstances of the case to accept the different terms.[85] This approach allows for an indirect implementation of the duty to renegotiate and to adapt the contract to the changed circumstances.

C. *Content*

A further fundamental criticism has been advanced against the very principles and solutions of the Convention. Three points need to be specifically addressed: first, while some commentators argue that the CISG is too seller friendly, others contend that the CISG favors the buyer too much; second, it is still argued that the default system of the CISG conflicts with international practice and widely used trade terms; third, the suitability of the CISG to govern commodity trade is contested.

1. Lack of Neutrality Between the Parties

Primarily, representatives of developing countries have argued that the CISG is too seller friendly. This allegation focuses mainly on the obligation of the buyer to examine the goods and give notice of any non-conformity.[86] At the Vienna Conference, this position was also supported by the delegates from other countries whose legal systems did not provide for any notice requirement. The well known

85. *See* Schwenzer, KOMMENTAR, Art. 79, para. 54.

86. Today the AUDCG in force in the member states of OHADA is even more restrictive than the CISG. While Article 228 requires notification of defect within reasonable time, as does Article 39(1) CISG, Article 229 provides for a cut-off period of one year whereas Article 39(2) CISG contains a period of two years. Schroeter, *supra* note 25, 170, rightly describes this as "surprising."

compromise[87] can now be found in Article 44 CISG.[88] Furthermore, an interpretation of Articles 38, 39 CISG invalidates such criticism, as has been previously shown.

On the other hand, especially practitioners with a German-speaking background fear that the CISG is too buyer friendly. They point specifically to the Anglo-American concept of "strict liability" as well as—somewhat ironically—to the attenuation of the notice requirement. Yet, in practice, the differences between the liability systems are really negligible.[89] The opposition here reveals mainly a general and irrational fear of the hitherto unknown legal concepts and outside influences.

All in all it seems fair to conclude that if one side is criticizing the seller friendliness while the other side fears buyer friendliness, these arguments neutralize each other. This, in turn, strongly suggests that the CISG actually achieves fair and reasonable results for both parties.

2. The CISG and the Necessities of Trade

In countries which have not yet ratified the CISG, such as the United Kingdom and India, it is often suggested that the CISG does not suit the needs of trade. This criticism focuses on two points: on the relationship between the CISG provisions on risk of loss and the INCOTERMS, and on the specific needs of commodity trading.

These arguments are undermined if one looks to the drafting process of the Convention. The drafters took into account not only contributions of academics, practitioners, and governments, but most notably also those of the International Chamber of Commerce (ICC).[90] In return, the ICC itself demonstrated its full support and appreciation of the CISG when adopting provisions of the CISG as ICC model terms, such as the force majeure-clause 2003.

Concerning the CISG provisions pertaining to risk of loss, it has been claimed "that they do not accommodate well understood delivery terms such as FOB and CIF and do not mesh well with Incoterms" so that they fail "to capture the central ground of sales practice."[91] This

87. Speaking against any notice requirement were Kenya, Pakistan, China, Nigeria, Mexico, Singapore, Libya (O. R., pp 321 *et seq.*, paras. 42, 46, 47, 48, 50, 51, 59) as well as the United Kingdom (O. R., pp 321 *et seq.*, para. 49). In favor of the requirement were the Netherlands, South Korea, Switzerland, Sweden, Bulgaria, Denmark, Austria, Australia, Japan, Federal Republic of Germany, Belgium, Spain (O. R., pp 321 *et seq.*, paras. 43, 44, 45, 52, 53, 55, 58, 60, 61, 62, 66, 68).

88. *Cf.* Ingaborg Schwenzer, Commentary, Art. 44, para. 2.

89. *See* SCHLECHTRIEM, *supra* note 28, para. 288.

90. *See* Schlechtriem, 25 YEARS, *supra* note 20, 169.

91. Michael Bridge, *The Transfer of Risk under the UN Sales Convention 1980 (CISG), in* SHARING INTERNATIONAL COMMERCIAL LAW ACROSS NATIONAL BOUNDARIES FESTSCHRIFT FOR ALBERT H KRITZER ON THE OCCASION OF HIS EIGHTIETH BIRTHDAY 77, 105 (Camilla Baasch Andersen & Ulrich G. Schroeter eds., 2008).

criticism is based on a fundamental misunderstanding of the relationship between contract terms, including INCOTERMS, and the default system of the CISG. As the very name suggests, the default system comes into play only if the parties have not made provisions for a specific issue in their contract themselves. It is the virtue of a default system to give enough leeway to the parties to tailor their contract to their individual needs. To require the default system to mirror the vast majority of contracts would make it unsuitable for a much wider range of markets. As the CISG stands today, it yields fair and just results for all kinds of sales contracts in very different markets. As Jan Ramberg has pointed out,[92] the CISG provisions on risk of loss as a default system are perfectly compatible with the INCOTERMS 2000 as contractual terms. The CISG serves as a general background; the INCOTERMS that are being revised every ten years are responsible for the fine-tuning.

Finally, UK authors constantly allege that although the CISG may be suitable for the sale of manufactured goods it does not satisfy the needs of the commodity trade.[93] Apart from the objection concerning risk of loss, this criticism targets the rules on fundamental breach as well as on cure.[94] Yet, as has been shown elsewhere, the provisions of the CISG can easily be adapted to the peculiarities of the commodity trade.[95] In those parts of the commodity market where string transactions prevail or prices are subject to considerable fluctuation,[96] special standards have to be applied in determining whether there is a fundamental breach. In such circumstances, timely delivery by handing over of clean documents—that can be resold in the normal course of business—is always essential to the contract.[97] If the parties do not stipulate its importance by respective clauses, it can be derived from the circumstances by an interpretation of the contract pursuant to Article 8(2), (3) CISG.[98] As a result, in practice, the seller's general option to remedy a defect in the documents that is normally provided by the CISG does not exist in the commodities trade. Thus, in this specific trade branch, the solution under the

92. Jan Ramberg, *To What Extent do INCOTERMS 2000 Vary Articles 67(2), 68 and 69?*, 25 J.L. & COM. 219-22 (2005-06).

93. *See* Bridge, *supra* note 71, 38; Alastair Mullis, *Twenty-Five Years On - The United Kingdom, Damages and the Vienna Sales Convention,* 71 RABELSZ 36 *et seq.* (2007).

94. On fundamental breach, see Mullis, *supra* note 52, 344 *et seq.*; on cure, see Bridge, *supra* note 71, 29 *et seq.*

95. *See* Peter Huber, *CISG - The Structure of Remedies,* 71 RABELSZ 32 (2007).

96. *See* CISG-AC, Op. 5 (Schwenzer), Comment 4.17, *available at* http://www.cisg-online.ch/cisg/docs/CISG-AC_Op_no_5.pdf.

97. *See* CISG-AC, *id.*, Comment 4.17.

98. *See* CISG-AC, *supra* note 96, Comment 4.17.

CISG is quite similar to that under the perfect tender rule of the Common Law.[99]

VII. Conclusion

All in all the story of the CISG has been one of worldwide success. Criticism that has been put forward can largely be either rejected as unfounded to begin with or met by a correct interpretation of the Convention.

Most importantly, the success of the CISG shows that pursuing the unification of laws is the right way forward. The harmonizing effect the Convention has had on domestic legal systems, as well as its influence on other uniform instruments and projects, prove the superiority of the CISG. At the same time, these developments disprove the argument that the competition of domestic legal systems[100] alone offers a viable perspective for the future of commercial law. Reducing transaction costs for commercial parties will only be possible by further harmonization and unification of commercial law. The CISG has significantly contributed to this goal.[101] It not only helps resolving disputes, its common language and common understanding of key concepts also facilitate negotiating and drafting sales contracts.[102] In striving for the best solution in uniform instruments, competition among legal systems may provide ideas, but it will not eliminate the need to put them into action in a uniform fashion.

At the end of the day, most criticism boils down to the reluctance of old dogs to learn new tricks.[103] Yet, a new generation of lawyers is already waiting at the doorstep to take over business—a generation trained in the CISG and mindful of its advantages as well as a generation full of curiosity about the world beyond national law.

99. *But see* Michael Bridge, The International Sale of Goods para. 12.26 (2d ed., 2007), who believes that it is unlikely that such results will be achieved through Articles 6, 9 CISG.

100. This argument is in particular advanced by Gillette & Scott, *supra* note 53, 49 *et seq.*

101. Schlechtriem, 25 Years CISG, 167, 187.

102. Schlechtriem, 25 Years CISG, 167, 187.

103. Similarly Reimann, *supra* note 3, 127.