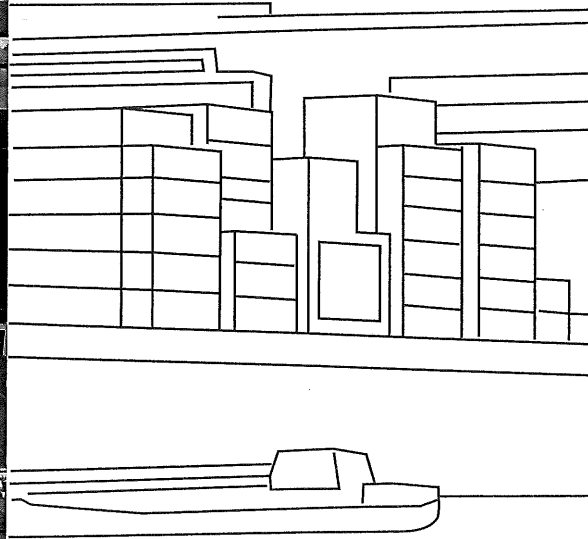


edited by
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current issues in the
cisg and arbitration



international commerce
and arbitration
volume 15

series editor
ingeborg schwenzer

eleven
international publishing

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7 INTERPRETATION AND GAP-FILLING UNDER THE CISG

Ingeborg Schwenzer*

7.1 INTRODUCTION

There is hardly any topic that has been as extensively discussed as interpretation and gap-filling under the Convention on Contracts for the International Sale of Goods (CISG or Convention). Many books have been devoted to this subject;¹ innovative theories such as the *global iuris consultorum* have been developed.²

The core provision for interpretation and gap-filling in the CISG is Article 7. It has been considered the most important provision in the CISG, and has even been considered the CISG's centrepiece.³ Provisions similar to Article 7 of the CISG can now be found in most international instruments, be they conventions, model laws or uniform projects.⁴ Besides Article 7, principles for interpretation and gap-filling may also be derived from the CISG's preamble.⁵

Article 7(1) of the CISG seeks to secure the autonomous interpretation of the CISG, while Article 7(2) provides for possible gap-filling. I will address these two fields in this article by emphasizing practical questions and mechanisms rather than theoretical and dogmatic particulars.

* All web pages were last accessed in November 2013.

1 See A. Janssen & O. Meyer (Eds.), *CISG Methodology*, Sellier, Munich, 2009; B. Zeller, *CISG and the Unification of International Trade Law*, Routledge-Cavendish, London, 2007; J. Felemegas (Ed.), *An International Approach to the Interpretation of the United Nations Convention on Contracts for the International Sale of Goods (1980) as Uniform Sales Law*, Cambridge University Press, Cambridge, 2007; Pace International Law Review (Ed.), *Review of the Convention on Contracts for the International Sale of Goods (CISG) 2005-2006*, Sellier, Munich, 2007.

2 See C.B. Andersen, *Uniform Application of the International Sales Law*, Kluwer Law International, the Netherlands, 2007, p. 46 *et seq.*

3 See P. Perales Viscasillas, in S. Kröll, L. Mistelis & P. Perales Viscasillas (Eds.), *UN Convention on Contracts for the International Sales of Goods (CISG)*, C.H. Beck, Munich, 2011, Art. 7, para. 21.

4 See I. Schwenzer & P. Hachem, in I. Schwenzer (Ed.), *Schlechtriem & Schwenzer Commentary on the Convention on the UN Convention on the International Sale of Goods (CISG)*, 3rd edn, Oxford University Press, Oxford, 2010, Art. 7, para. 6.

5 Schwenzer & Hachem, in Schwenzer Commentary 2010, Preamble, para. 3.

7.2 INTERPRETATION OF THE CISG

7.2.1 *Aims and Objectives*

Article 7(1) contains three guidelines for the interpretation of the CISG, which constitute aims rather than methods of interpretation⁶; regard is to be had to the CISG's international character, the need to promote uniformity and the observance of good faith in international trade. Principles laid down in the preamble mainly relate to the new international economic order and the development of international trade.

7.2.1.1 **International Character of the CISG**

The first reference is to the international character of the CISG. This primarily implies that the CISG must be interpreted autonomously.⁷ It was the explicit aim of the drafters of the Convention to develop their own legal concepts and terminology that must not be confused with similar domestic concepts or terms. Thus, the concept of avoidance for breach of contract must be distinguished not only as far as its prerequisites and consequences are concerned but also as to its distinct terminology. In interpreting the Convention, any homeward trend must be avoided.⁸ Relying on domestic legal solutions and relevant case law is not permitted. Thus, in each case, the meaning of the CISG must be established independently even if a certain term is equivalent or resembles a term used in a domestic legal system.

7.2.1.2 **Uniformity in Application**

Article 7(1) of the CISG further mentions the need to promote uniformity. Without uniform application and interpretation, the very aim of the CISG to internationally unify the core areas of sales law would be jeopardized.

The crucial question is how can we achieve a uniform application and interpretation of the CISG around the globe, among civil law and common law jurisdictions, among developed, developing and transition countries, across language and cultural barriers?

Unlike the European Communities or Organisation pour l'Harmonisation en Afrique du Droit des Affaires (Organization for the Harmonization of Business Law in Africa or

6 U. Magnus, "Tracing Methodology in the CISG: Dogmatic Foundations," in Janssen & Meyer, 2009, p. 40. See furthermore U. Magnus, in M. Martinek (Ed.), *Staudinger, Kommentar zum Bürgerlichen Gesetzbuch, Wiener UN-Kaufrecht (CISG)*, Sellier, Munich, 2005, Art. 7, para. 30.

7 Schwenzler & Hachem, in Schwenzler Commentary 2010, Art. 7, para. 8.

8 See, e.g., B. Piltz, *Internationales Kaufrecht*, 2nd edn, C.H. Beck, Munich, 2008, § 2, para. 185.

OHADA), the CISG has no single supreme court guarding the uniform interpretation of uniform or harmonized law, and this may be regarded as a severe deficit.⁹ However, there are other means to safeguard uniformity.

Allow me to briefly mention a few of them.¹⁰ First of all, in 1988, the United Nations Commission on International Trade Law (UNCITRAL) established the information system Case Law on UNCITRAL Texts (CLOUT)¹¹ that aims to enable the exchange of decisions concerning UNCITRAL Conventions. Reporting offices in the Member States collect all decisions on the CISG and transmit them to the Commission's Secretariat in Vienna, which in turn makes the original decisions available and subsequently publishes a translated abstract of each decision in all six United Nations (UN) working languages. Numerous other databases further alleviate the task of researching court decisions and arbitral awards. Finally, the UNCITRAL Digest on the CISG – the second edition having been published in March 2012¹² – offers compilations of selected cases on articles of the CISG. Since UNCITRAL is an administrative agency of the UN, however, it must refrain from any critical comments on domestic developments in Member States and thus is not able to give any valuable guidance on the future development of the CISG, especially in cases of divergent interpretation. The CISG Advisory Council (CISG-AC),¹³ which is a private initiative founded in 2001 and chartered in the United Kingdom, is not subject to such restrictions.¹⁴ It issues opinions on questions relating to the application and interpretation of the CISG that are more and more often being cited by courts and tribunals as persuasive authority. Finally, reference is to be made to truly international and comparative scholarly writing that can be found in commentaries, conference books and the like.

7.2.1.3 Observance of Good Faith

Finally, Article 7(1) of the CISG contains a reference to the observance of good faith in international trade. This introduction of the good faith principle into the CISG was very controversial at the Vienna Conference as its recognition in domestic legal systems varies considerably.¹⁵ Whereas English commercial law strongly favours certainty over fairness, many civil law legal systems tend to rely on notions of good faith and fair trade.¹⁶

9 Cf. L.A. DiMatteo & A. Janssen, 'Interpreting Uncertainty: Methodological Solutions for Interpreting the CISG', *Nederlands Tijdschrift voor Handelsrecht*, April 2012, p. 53.

10 See Schwenger & Hachem, in Schwenger Commentary 2010, Art. 7, para. 11.

11 Available at <www.uncitral.org/uncitral/en/case_law.html>.

12 Available at <www.uncitral.org/pdf/english/clout/CISG-digest-2012-e.pdf>.

13 See the official website of the CISG-AC, available at <www.cisgac.com>.

14 For further information on the CISG-AC, see I. Schwenger, 'The CISG Advisory Council', *Nederlands Tijdschrift voor Handelsrecht*, April 2012, pp. 46-51.

15 See M.J. Bonell, in C.M. Bianca & M.J. Bonell (Eds.), *Commentary on the International Sales Law*, Giuffrè, Milan, 1987, Art. 7, para. 1.7.

16 Cf. B. Zeller, 'The Observance of Good Faith in International Trade', in Janssen & Meyer, 2009, p. 133 *et seq.*

To this very day, it is disputed whether the good faith principle may also be directly applied to the parties' contractual relationship. German courts especially often rely on good faith, for example when obliging a party that is introducing standard terms in the negotiation process to make those standard terms available to the other party.¹⁷ However, the very wording of Article 7(1) of the CISG clearly shows that this was not intended. Further evidence for this position is provided by the fact that the International Institute for the Unification of Private Law (UNIDROIT) Principles contain an explicit provision obliging the parties to act in good faith.¹⁸ Thus, the scope of application of the principle of good faith must be restricted to the interpretation of the Convention and cannot be used as a general corrective tool, which is the way in which it functions in many civil law legal systems.¹⁹

7.2.1.4 New International Economic Order and Promotion of International Trade

Further objectives for interpretation of the CISG can be derived from the preamble. Among them are the new international economic order and the promotion of international trade. Although these principles seem to be rather vague, they may serve as valuable guidelines when it comes to questions of developing the CISG and adapting it to new concepts and the ever-changing necessities of international trade. Two examples shall be given here: the first concerns the growing awareness of ethical standards in international trade, and the second addresses all questions surrounding the digitalization of commerce and trade that was not and could not have been foreseen when drafting the Convention.

7.2.2 *Methods of Interpretation*

The CISG itself does not contain any explicit rules on the respective methods of interpretation. The Vienna Convention on the Law of Treaties 1969 (Vienna Convention)²⁰ does not help either, as it is primarily aimed at public international law treaties and the obligations of the contracting states. However, some cornerstones can be derived from the Vienna Convention that are also in line with most domestic concepts of the interpretation of statutes. In essence, these are wording, context, purpose and history. Special attention must be given to comparative law.

17 See, e.g., Federal Supreme Court of Germany (BGH), 31 October 2001, CISG-online No. 617, available at <www.cisg-online.ch>.

18 Art. 1.7 PICC.

19 See Magnus, 2009, p. 43.

20 Vienna Convention on the Law of Treaties 1969, available at <http://untreaty.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf>.

7.2.2.1 Wording, Context and Purpose

Like in all domestic legal systems, the starting point for interpretation of the CISG is its wording and the context within which a provision can be found in the Convention as well as its purpose.²¹ The CISG has been drawn up in the six languages of the UN: Arabic, Chinese, English, French, Russian and Spanish. All of these versions are authentic. Any other versions, such as the German or the Turkish ones, are unofficial translations that may not be relied upon. However, even among the six official versions, there are huge discrepancies. These discrepancies primarily relate to the Arabic, Chinese and Russian versions, which sometimes deviate considerably from the others. In such cases, it seems advisable to consider the English version because English was the main working language used by the drafting Committee and used at the Vienna Conference.²² Thus, the need to promote uniformity may lead to neglecting the different wording in another official language.

7.2.2.2 History

It is now recognized in both civil law and common law legal systems that recourse may be had to the *travaux préparatoires*.²³ Materials on the CISG are readily available in the form of the CISG official records, which can nowadays also be accessed via Internet websites.²⁴ However, the historic interpretation becomes less and less persuasive the longer the CISG is in force.²⁵ It may even contradict the aim of uniformity and especially that of promoting international trade. Let me just give you one example. There is an open contradiction between Articles 14 and 55 of the CISG as regards the possibility of an open price term: this contradiction has given rise to many scholarly writings.²⁶ Whereas sentence 2 of Article 14(1) of the CISG denies the existence of an offer when no price is fixed, Article 55 of the CISG acknowledges an existing contract even without such a price term and provides a mechanism for determining the relevant price in such a case. The history²⁷ reveals that the hostility towards open price terms was due to the then so-called 'socialist' countries as well as France. These socialist countries prevailed in the discussions on Article 14 of

21 G. Hager, 'Zur Auslegung des UN-Kaufrechts – Grundsätze und Methoden', in T. Baums & J. Wertenbruch (Eds.), *Festschrift für Ulrich Huber*, Mohr Siebeck, Tübingen, 2006, pp. 323-324.

22 Schwenzer & Hachem, in Schwenzer Commentary 2010, Art. 7, para. 21.

23 See, e.g., J.O. Honnold & H.M. Flechtner, *Uniform Law for International Sales under the 1980 United Nations Convention*, 4th edn, Kluwer Law International, the Netherlands, 2009, Art. 7, para. 88 *et seq.*

24 Available at <www.cisg.law.pace.edu/cisg/conference.html>.

25 Schwenzer & Hachem, in Schwenzer Commentary 2010, Art. 7, para. 22.

26 See U. Schroeter, in Schwenzer Commentary 2010, Art. 17, para. 19, nn. 78-84 with further references.

27 For details, see E. Hondius, 'Comparative Law in the Court-Room: Europe and America Compared', in A. Büchler & M. Müller-Chen (Eds.), *Private Law National – Global – Comparative*, *Festschrift für Ingeborg Schwenzer zum 60. Geburtstag*, Stämpfli Verlag, Bern, 2011, pp. 772-773.

the CISG but not in those regarding Article 55 of the CISG. Now that the former socialist countries no longer control trade as they did in 1980, and now that even the French Supreme Court has, under domestic law, attenuated the concept of *pretium certum*, it is clearly preferable to discard the historic interpretation and to give prevalence to Article 55 of the CISG that supports the principle of *favor contractus* and thus the promotion of international trade.

7.2.2.3 Comparative Law

The value of the comparative law method for the interpretation of the CISG cannot be overestimated.²⁸ Uniform application and interpretation of the CISG, as it is called for under Article 7(1), requires solutions that are acceptable to lawyers from different legal backgrounds, with different conceptions of sales and contract law. Let me again give you one example.²⁹ According to Articles 38 and 39 of the CISG, the buyer has to examine the goods and give notice of any non-conformity within a reasonable time. Whereas some domestic legal systems do not know any such duty, others provide for a very strict notice requirement allowing the buyer only some days.³⁰ Any solution under the CISG has to bear in mind this comparative background and must strike a balance between the seemingly irreconcilable approaches in order to be acceptable to lawyers from all Member States. This is the only way to secure a uniform interpretation of the CISG provisions. Although courts and tribunals can rarely be expected to engage in comprehensive comparative research, this task has to be undertaken by legal scholars. The results of such an endeavour must be made available to the larger CISG community in today's *lingua franca*, that is, in English.³¹

7.3 GAP-FILLING

7.3.1 General Remarks

Whereas Article 7(1) of the CISG sets the scene for interpreting the Convention, Article 7(2) of the CISG relates to gap-filling. Although it may be easy to distinguish between interpretation and gap-filling on a theoretical basis, in practice the borderline between the

28 Schwenger & Hachem, *in* Schwenger Commentary 2010, Art. 7, para. 24.

29 For details, see I. Schwenger, 'The Noble Month (Articles 38, 39 CISG) – The Story behind the Scenery', *European Journal of Law Reform*, Vol. 7, Nos. 3/4, 2005, pp. 353-366. See, for further examples, Schwenger & Hachem, *in* Schwenger Commentary 2010, Art. 7, para. 24.

30 For an overview, see I. Schwenger, P. Hachem & C. Kee, *Global Sales and Contract Law*, Oxford University Press, Oxford, 2012, para. 34.42 *et seq.*, para. 34.61 *et seq.*

31 *Id.*, para. 5.37.

two is often blurred. For example, does the term ‘impediment’ in Article 79 of the CISG encompass economic impediment and thus hardship – a matter of interpretation – or is there a gap in the CISG concerning hardship that must be filled according to the principles set out in Article 7(2) of the CISG?

Article 7(2) of the CISG provides for a two-step procedure.³² In the first place, it must be determined whether there is a question ‘concerning matters governed by this Convention’. These gaps are usually referred to as ‘internal gaps’ whereas matters that are outside the Convention are so-called ‘external gaps’. According to Article 7(2) of the CISG, internal gaps in the first place ‘are to be settled in conformity with the general principles on which’ the Convention is based. Only if such general principles cannot be discerned may recourse be had to domestic law determined by the applicable conflict of laws rules.³³

7.3.2 *Matters Governed by the CISG*

The matters that the Convention governs are primarily set out in Article 4 of the CISG. According to this provision, the CISG governs “the formation of the contract of sale and the rights and obligations of the seller and the buyer arising from such a contract”. However, it explicitly states that questions of validity and property issues are outside the Convention. There are other areas of contract law that are certainly not covered by the CISG, such as questions of agency,³⁴ multiple parties or limitation of actions. The latter is dealt with by the CISG’s sister Convention on Limitation.³⁵

It has to be emphasized that it is entirely up to the CISG itself to define autonomously which matters are governed and which ones fall outside the Convention and thus are left to the applicable domestic law.³⁶ Recourse may thereby be had firstly to the original intentions of the drafters of the Convention. Furthermore, in pursuing the aim of uniform interpretation and the promotion of international trade areas that originally may have been perceived to fall outside the Convention may now be considered to be mere internal gaps to be filled by general principles. The very definition of internal gaps and gap-filling is therefore a powerful instrument for developing the Convention and adjusting it to modern needs of trade and commerce.³⁷ Let me give you some important examples in this regard.

32 Schwenzer & Hachem, *in* Schwenzer Commentary 2010, Art. 7, para. 27.

33 *See* Magnus, 2009, p. 44.

34 Honnold & Flechtner, 2009, Art. 7, para. 98.

35 The 1974 Convention on the Limitation Period in the International Sale of Goods as amended in 1980, available at <www.uncitral.org/pdf/english/texts/sales/limit/limit_conv_E_Ebook.pdf>.

36 Magnus, *in* Staudinger 2005, Art. 7, para. 38.

37 Schwenzer & Hachem, *in* Schwenzer 2010, Art. 7, para. 30.

The determination of what a question of validity is has to be decided by the CISG. Thus, domestic rules may provide for the invalidity of a contract in cases of initial impossibility, and regard this question as being one of the validity; under the CISG, however, this is not a validity issue as can be shown by the rules on risk of loss in such cases. Likewise, the initial inability on the part of one party to perform its obligations under the contract is exclusively dealt with under the CISG and may not give rise to concurrent remedies under the otherwise applicable domestic law.³⁸ Incorporation of standard terms is to be decided under the CISG. Among other terms, this includes questions of transparency even if they may be considered to be validity issues under certain domestic legal systems.³⁹

Burden of proof is nowadays almost unanimously considered to be governed by the CISG and not by domestic law. But recently, and even more and more, the opinion that the standard of proof must also be taken from the CISG itself and should not be left to the applicable domestic procedural law gains ground.⁴⁰

Finally, in 1980, a matter still clearly outside the scope of the Convention was the applicable interest rate under Article 78 of the CISG. This has given rise to disparate decisions on the question of jeopardizing uniformity.⁴¹ The CISG-AC has therefore ventured into this area and will soon be producing an opinion on the applicable interest rate under Article 78 of the CISG, treating this question as an internal gap and developing a uniform solution.

7.3.3 *General Principles Underlying the CISG*

Once an internal gap is established, this is to be filled primarily by relying on the general principles underlying the Convention. The list of general principles is steadily growing and it seems worth mentioning that finding a general principle in itself makes it easier to treat a gap as an internal rather than an external one.

Authors and courts from civil law legal systems, first of all, rely on the principle of good faith and fair dealing as an overriding general principle of the CISG. It has been shown that this approach is hardly tenable and jeopardizes uniform application and interpretation as well as predictability under the CISG. However, there are numerous concepts undoubtedly underlying the CISG as general principles that – at least from the perspective of a civil law lawyer – themselves emanate from the general notion of good faith. These include party autonomy, estoppel or the prohibition of contradictory behaviour (*venire*

38 Cf. Schwenger & Hachem, *in* Schwenger Commentary 2010, Art. 4, para. 33.

39 Schroeter, *in* Schwenger Commentary 2010, Intro Arts. 14-24, paras. 5-6.

40 CISG-AC Opinion No. 6, Calculation of Damages under CISG Article 74. Rapporteur: Professor John Y. Gotanda, Villanova University School of Law, Villanova, Pennsylvania, USA, para. 2.1, available at <www.cisgac.com/default.php?ipkCat=128&ifkCat=148&sid=148>.

41 See K. Bacher, *in* Schwenger Commentary 2010, Art. 78, para. 27 *et seq.* with further references.

contra factum proprium), freedom of form, equality of the parties, *favor contractus*, full compensation, the right to withhold performance, set-off and many others.⁴²

7.3.4 Recourse to Domestic Law

If no general principles underlying the CISG can be found, internal gaps must be filled by resorting to the domestic law designated by states' respective conflict of laws rules. However, recourse to domestic law in any case must be an *ultima ratio*, or a last resort.⁴³ As more and more general principles are developed under the CISG, it can be expected that one day in the future, having recourse to domestic law will prove superfluous.

7.4 THE CISG AND THE PICC

It is highly debated whether the UNIDROIT Principles of International Commercial Contracts (PICC) may be used to interpret and supplement the CISG. The preamble of the PICC itself states that “[t]hey may be used to interpret or supplement international uniform law instruments”. Scholars and also some tribunals rely on the PICC in different ways. They are used to interpret the CISG under Article 7(1), they are regarded to express general principles in the sense of Article 7(2) of the CISG and finally, they are resorted to as a genuine gap-filler replacing any recourse to domestic law if no general principles under the CISG can be found.⁴⁴

However, these endeavours have been met with skepticism. The first obstacle is the fact that the PICC are so-called *soft law* drafted by UNIDROIT and in no way related to the CISG.⁴⁵ The first version of the PICC was only launched in 1994,⁴⁶ that is, 14 years after the Vienna Conference. The drafters of the CISG certainly did not have the PICC in mind as an instrument for interpretation and gap-filling. The CISG has to be interpreted autonomously; the mere expression that the PICC themselves were written to be applied in this context certainly is not convincing. Moreover and even more importantly, although in many areas the PICC reflect the modern approaches of international contract law, they do not do so in all areas. Some provisions have been heavily influenced by civil law legal thinking, some even by an exclusive French legal tradition, which makes them hardly

42 Cf. Schwenger & Hachem, in Schwenger 2010, Art. 7, para. 32.

43 See only Magnus, in Staudinger 2005, Art. 7, para. 58.

44 See Schwenger & Hachem, in Schwenger 2010, Art. 7, paras. 26, 36.

45 See further Schwenger *et al.*, 2012, paras. 3.54-3.55.

46 Later versions have been launched in 2004, available at <www.unidroit.org/english/principles/contracts/principles2004/integralversionprinciples2004-e.pdf> and 2010, available at <www.unidroit.org/english/principles/contracts/principles2010/integralversionprinciples2010-e.pdf>.

acceptable for international trade. One striking example is the *astreinte*, a private penalty to be paid to the obligee that can be ordered by the court or tribunal.⁴⁷ Furthermore, the PICC contain solutions that squarely contradict the CISG like the distinction between *obligations de résultat* and *obligations de moyens*,⁴⁸ which easily undermine the principle of strict liability that can be found in the CISG.⁴⁹ It is suggested here that – just as in comparative law – the PICC may serve as an illustration of modern international developments merely on a case-by-case basis. They should not be attributed any preponderant weight for the interpretation and gap-filling of the CISG. Again, it has to be emphasized; primarily, uniform solutions must be developed from inside the CISG itself without having recourse to any external sources.

7.5 CONCLUSION

The future of the CISG depends upon its interpretation and gap-filling. If uniform interpretation cannot be achieved, the very purpose of the Convention – to facilitate international trade by providing predictable results – is jeopardized. The same applies to the development of the CISG. It will never be possible to gather the now 80 Member States⁵⁰ of the CISG – and more to come – to modernize the Convention. If the CISG is not adjusted to the ever-changing demands of international trade, this role will be assumed by domestic laws, which again undermines uniformity.

The requirement established by Article 7(1) of the CISG that solutions are to be found which are acceptable in different legal systems with different legal traditions not only requires taking into account what courts and tribunals decide in interpreting the CISG itself, but also requires carving out common ground in the whole field of international trade law through comparative research. It is conceded that this difficult task can hardly be performed by domestic courts. Instead, it is the duty of legal scholars around the world to make these results available in different languages, and it is up to university teaching and continuing legal education to make practising lawyers familiar with the CISG and convince them of the CISG's superiority in international trade issues as compared to any domestic legal system.

47 Art. 7.2.4 PICC.

48 Art. 5.1.4 PICC; see criticism S. Vogenauer, in S. Vogenauer & J. Kleinheisterkamp (Eds.), *Commentary on the Unidroit Principles of International Commercial Contracts (PICC)*, Oxford University Press, Oxford, 2009, Art. 5.1.4, para. 5.

49 See M. Schmidt-Kessel, 'Haftungsstandards im internationalen Warenkauf', in Böhler & Müller-Chen, 2011, p. 1526, who even favours this distinction under the CISG.

50 See <www.uncitral.org/uncitral/en/uncitral_texts/sale_goods/1980CISG_status.html>.