

## 26 UNIFORM SALES LAW – BRAZIL JOINING THE CISG FAMILY

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### 26.1 INTRODUCTION

The CISG community welcomes Brazil, the world's fifth largest economy, to finally become a member of what may now be called the most successful international Convention on substantive private law.

As most of you already know the CISG was concluded at the now famous Vienna Conference in 1980. It entered into force in January 1988 after the United States and China had decided to simultaneously accede to the Convention and thus fulfil the prerequisites for its entering into force in a combined effort. Today the CISG has eighty Member States.<sup>1</sup> Nine of the ten leading trade nations are CISG Member States, the United Kingdom being the sole exception.<sup>2</sup> Already today the CISG potentially covers more than 80% of the world trade.<sup>3</sup> Each month we are receiving encouraging news concerning the CISG, be it that Member States withdraw reservations they initially declared, such as China its reservation concerning freedom of form<sup>4</sup> or the Nordic countries concerning the applicability of the rules on formation of contract,<sup>5</sup> or that more and more smaller countries are joining, such as Bahrain or Madagascar and Costa Rica, the latter two not yet counted among the eighty Member States.

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1 See for the current status <[www.uncitral.org/uncitral/en/uncitral\\_texts/sale\\_goods/1980CISG\\_status.html](http://www.uncitral.org/uncitral/en/uncitral_texts/sale_goods/1980CISG_status.html)>.

2 See WORLD TRADE ORGANIZATION. International Trade Statistics 2013, p. 28. Available at: <[www.wto.org/english/res\\_e/statis\\_e/its2012\\_e/its2012\\_e.pdf](http://www.wto.org/english/res_e/statis_e/its2012_e/its2012_e.pdf)>.

3 P. Schlechtriem & I. Schwenzer, in I. Schwenzer (Ed.), *Schlechtriem & Schwenzer, Commentary on the Convention on the International Sale of Goods (CISG)* (3rd edn., Oxford University Press, Oxford, 2010) Introduction I.

4 Article 96 CISG. See CISG ADVISORY COUNCIL. Declaration No. 2, Use of Reservations under the CISG. Rapporteur: Professor Dr. Ulrich G. Schroeter. Beijing, 21 October 2013. p. 4. Available at: <[www.cisgac.com/default.php?ipkCat=128&ifkCat=227&sid=227](http://www.cisgac.com/default.php?ipkCat=128&ifkCat=227&sid=227)>.

5 Article 92 CISG. See CISG ADVISORY COUNCIL. Declaration No. 2, Use of Reservations under the CISG. Rapporteur: Professor Dr. Ulrich G. Schroeter. Beijing, 21 October 2013. p. 4. Available at: <[www.cisgac.com/default.php?ipkCat=128&ifkCat=227&sid=227](http://www.cisgac.com/default.php?ipkCat=128&ifkCat=227&sid=227)>.

Beyond the global unification of sales law, it is a well-known fact that the CISG has exerted influence on both the international as well as the domestic levels.<sup>6</sup> Thus, 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 remedy mechanism.<sup>7</sup> The same holds true for the Principles of European Contract Law (PECL) issued in 1999.<sup>8</sup> The EC Directive on certain aspects of the sale of consumer goods can also be mentioned in this context.<sup>9</sup> OHADA based its *Acte uniforme sur le droit commercial général* (AUDCG) primarily on the CISG.<sup>10</sup> Finally, the Draft Common Frame of Reference<sup>11</sup> published in 2009 and, based thereupon, the Draft Common European Sales Law<sup>12</sup> published in October 2011 and approved by the European Parliament in February 2014 are not much more than a continuation of all these different unification efforts based on the CISG.<sup>13</sup> Unification endeavours in South East Asia also follow this trend.<sup>14</sup>

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- 6 See P. Schlechtriem, '25 Years of the CISG: An International lingua franca for Drafting Uniform Laws, Legal Principles, Domestic Legislation and Transnational Contracts', in H. Flechtner, R. Brand & M.S. Walter (eds.), *Drafting Contracts Under the CISG* (Oxford University Press, Oxford, 2008) pp. 167-187, 174-178; P. Schlechtriem, 'Basic Structures and General Concepts of the CISG as Models for a Harmonisation of the Law of Obligations' (2005) 10 *Juridica International* pp. 27-34.
- 7 See UNIDROIT INTERNATIONAL INSTITUTE FOR THE UNIFICATION OF PRIVATE LAW. UNIDROIT Principles of International Commercial Contracts (PICC). 2010. Available at: <[www.unidroit.org/english/principles/contracts/principles2010/blackletter2010-english.pdf](http://www.unidroit.org/english/principles/contracts/principles2010/blackletter2010-english.pdf)>. See also M.J. Bonell, 'The CISG, European Contract Law and the Development of a World Contract Law' (2008) 56 *American Journal of Comparative Law* pp. 1-28, 16; I. Schwenzler, P. Hachem & C. Kee, *Global Sales and Contract Law* (Oxford University Press, Oxford, 2012) paras. 3.47-3.55.
- 8 See Principles of European Contract Law (PECL). 1999. Available at: <[http://frontpage.cbs.dk/law/commission\\_on\\_european\\_contract\\_law/PECL%20engelsk/engelsk\\_partI\\_og\\_II.htm](http://frontpage.cbs.dk/law/commission_on_european_contract_law/PECL%20engelsk/engelsk_partI_og_II.htm)>. See also O. Lando, 'CISG and Its Followers: A Proposal to Adopt Some International Principles of Contract Law' (2005) 53 *American Journal of Comparative Law* p. 379-401, 381; I. Schwenzler *et al.*, paras. 3.56-3.59.
- 9 Directive 1999/44/EC of the European Parliament and of the Council of 25 May 1999 on Certain Aspects of the Sale of Consumer Goods and Associated Guarantees, L 171/12. 7 July 1999. Available at: <[http://ec.europa.eu/consumers/policy/developments/guar/guar01\\_en.pdf](http://ec.europa.eu/consumers/policy/developments/guar/guar01_en.pdf)>.
- 10 See U.G. Schroeter, 'Das einheitliche Kaufrecht der afrikanischen OHADA-Staaten im Vergleich zum UN-Kaufrecht', *Recht in Afrika*, 2001, pp. 163-176, 166-167.
- 11 See C. Von Bar *et al.*, *Principles, Definitions and Model Rules of European Private Law, Draft Common Frame of Reference (DCFR)* (Sellier European Law Publishers, Munich, 2009).
- 12 Proposal for a Regulation of the European Parliament and of the Council on a Common European Sales Law. COM(2011) 635 final, 11 October 2011, Annex II. Available at: <<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2011:0635:FIN:en:PDF>>.
- 13 On the DCFR see Schlechtriem, 'Basic Structures', pp. 28-29; C. Von Bar, 'Working Together Toward a Common Frame of Reference' (2005) 10 *Juridica International* pp. 17-26, 22; Schwenzler *et al.*, paras. 3.60-3.68. On the CESL see I. Schwenzler, 'The Proposed Common European Sales Law and the Convention on the International Sale of Goods' (2012) 44 *Uniform Commercial Code Law Journal* pp. 457-481.
- 14 For further information on the Principles of Asian Contract Law (PACL) see S. Han, 'Principles of Asian Contract Law: An Endeavour of Regional Harmonization of Contract Law in East Asia' (2013) 58 *Villanova Law Review* pp. 589-599.

Over the last two decades, the CISG has also proven to be a decisive role model for domestic legislators and not just on an international level.<sup>15</sup> Finland, Norway and Sweden took the coming into force of the CISG in their countries on 1 January 1989 as an opportunity to enact new domestic sale of goods acts, thereby heavily relying on the CISG.<sup>16</sup> With the end of the cold war and the collapse of the former Soviet Union, the young Eastern European states looked to the CISG when facing the task of formulating their new civil codes.<sup>17</sup> This holds true, on the one hand, with regard to the Commonwealth of Independent States (CIS)<sup>18</sup> as well as, on the other hand, the Baltic states,<sup>19</sup> amongst which Estonia is the most prominent exponent. Nowadays, China is of utmost importance for international trade. The contract law of the People's Republic of China of 1999 also closely follows the CISG.<sup>20</sup> Finally, the modernisation of the German Law of Obligations which began in the 1980s was, from the very beginning, strongly influenced by the CISG.<sup>21</sup> The latest revisions of the Civil Codes in the Republic of Korea as well as in Japan have also drawn heavily on the CISG.

Thus, the CISG may today be fairly called the lingua franca of sales law.<sup>22</sup> This is not at least due to its simple and easily understandable structure and its well-fitting solutions for international trade that are second to none domestic sales law. The following short introduction to the Convention will focus mainly on select topics of the sphere of application and scope of the CISG.

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15 The same had already been true, albeit to a lesser extent, of the Hague conventions on the sale of goods ULF and ULIS, which in turn served as a basis for the drafting of the CISG. For example, the Dutch *Burgerlijk Wetboek* of 1992 was drafted to closely follow the provisions of ULIS; see S.A. Kruisinga, 'The Impact of Uniform Law on National Law: Limits and Possibilities – CISG and Its Incidence in Dutch Law' (2009) 13 *Electronic Journal of Comparative Law* pp. 1-20, 2-3.

16 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 V. Hagström, 'CISG – Implementation in Norway, an Approach not Advisable' (2006) 6 *Internationales Handelsrecht* pp. 246-248. In 2007, a new Danish Sale of Goods Act was drafted.

17 See P. Schlechtriem, '25 Years of the CISG'. pp. 167-187, 177-178.

18 See R. Knieper, 'Celebrating Success by Accession to CISG' (2005) 25 *Journal of Law & Commerce* pp. 477-481, 477-478. The Commonwealth of Independent States is a supranational organization between states of the former Soviet Union. For further details see <[www.cisstat.com/eng/frame\\_cis.htm](http://www.cisstat.com/eng/frame_cis.htm)>.

19 See M. Käerdi, 'Die Neukodifikation des Privatrechts der baltischen Staaten in vergleichender Sicht', in H. Heiss (ed.), *Zivilrechtsreform im Baltikum* (Mohr Siebeck, Tübingen, 2006) pp. 19-25.

20 See only A.E. Butler, 'Contracts for the International Sale of Goods in China' (2006) 21 *International Litigation Quarterly* pp. 3-7, 4-5.

21 See P. Schlechtriem, 'International Einheitliches Kaufrecht und neues Schuldrecht', in B. Dauner-Lieb, H. Konzen & K. Schmidt (eds.), *Das neue Schuldrecht in der Praxis* (Heymanns, Cologne, 2002) pp. 71-86, 71-73.

22 See P. Schlechtriem, 'Requirements of Application and Sphere of Applicability of the CISG' (2005) 36 *Victoria University of Wellington Law Review* pp. 781-794, 782.

## 26.2 SPHERE OF APPLICATION

### 26.2.1 *General Requirements*

Article 1(1)(a) CISG simply requires that the parties have their places of business in different Contracting States of the CISG. With now eighty Member States most of the sales contracts of Brazilian businesses with foreign contract partners thus are governed by the Convention, especially those in Australasia, Europe, the US and Latin America.

What counts is the place of business; nationality of the parties or their domestic qualification as merchants is irrelevant.<sup>23</sup> However, B2C contracts generally are excluded.<sup>24</sup>

Although most contracts are governed by the CISG because both parties have their places of business in two Contracting States there is still another possibility to apply the CISG if this prerequisite is not fulfilled. According to Article 1(1)(b) CISG, the CISG is also applicable if the parties have their places of business in different countries – not necessarily Member States of the CISG – and the rules of private international law lead to the application of the law of a Contracting State. However, it is possible to make a reservation against this mechanism for the application of the Convention.<sup>25</sup> Most notably, such a reservation has been made by the US and by China;<sup>26</sup> fortunately, Brazil refrained from declaring such a reservation. In practice, for the application of the CISG in Brazil the fact that some states have made this reservation is not important.<sup>27</sup>

### 26.2.2 *Opting Out and Opting In*

The CISG is firmly based on the principle of freedom of contract. First, this entails that in principle the CISG does not contain any mandatory rules, the parties are entirely free to shape their contract as they think fit.<sup>28</sup> Secondly, the parties may opt out from the CISG altogether according Article 6 CISG.

However, opting out should not be assumed easily. If the parties have chosen the law of a Contracting State, for example Swiss law, this in itself does not amount to a valid

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23 See Article 1(3) CISG.

24 See Article 2(a) CISG.

25 Article 95 CISG.

26 See for the current status <[www.uncitral.org/uncitral/en/uncitral\\_texts/sale\\_goods/1980CISG\\_status.html](http://www.uncitral.org/uncitral/en/uncitral_texts/sale_goods/1980CISG_status.html)>.

27 For further information on the effects of a reservation under Article 95 CISG see Schwenger & Hachem, in *Schlechtriem & Schwenger Commentary*, Article 1, paras. 36-38; Schlechtriem, 'Requirements of Application', pp. 783-784.

28 Article 6 CISG.

exclusion of the CISG.<sup>29</sup> The CISG is part of Swiss law;<sup>30</sup> it is actually *the* Swiss law that governs international contracts for the sale of goods.<sup>31</sup> To validly opt out from the CISG further language is required, such as “Swiss law to the exclusion of the CISG” or “the Swiss Code of Obligations”.<sup>32</sup>

Still, opting out is certainly not advisable for Brazilian parties. Imagine a sales contract between a Chinese and a Brazilian party. Should the parties choose domestic Swiss law in connection with arbitration – as up to now was frequently provided for – they face major difficulties when a dispute arises. First, there is the language problem. The parties must investigate a foreign law in a foreign language. As probably the language of the arbitration will be English, all legal materials – statutes, case law, scholarly writing – must be translated. Legal experts are required to prove the content of the law. Needless to say the procedures can be very expensive and may be prohibitive for a party who does not have the necessary economic power to invest these monies in the first place. Second, and most importantly, the law chosen is designed for domestic cases and – which is true for many domestic sales laws – still firmly rooted in the nineteenth century and not suitable to international contracts. Finally, the outcome of the case under the domestic law chosen may be highly unpredictable.<sup>33</sup>

Another question is whether parties may opt into the CISG in cases where the prerequisites for its applicability are not fulfilled. For Brazilian parties now coming from a CISG Member State this could be especially interesting for mixed contracts where the service part prevails – for example licensing agreements or pure construction contracts, so-called turnkey contracts as well as framework contracts such as a distributorship agreement. The CISG certainly does not exclude such an opting-in.<sup>34</sup> However, at least in court litigation

29 See F. Ferrari, in I. Schwenzer (ed.), *Schlechtriem & Schwenzer, Kommentar zum Einheitlichen UN-Kaufrecht (CISG)* (6th edn., C.H. Beck, Munich, 2013) Art. 6, para. 22 with further references. I. Schwenzer & P. Hachem, in *Schlechtriem & Schwenzer Commentary* Art. 6, paras. 13-18 with further references; UNCITRAL, UNCITRAL Digest of case law on the United Nations Convention on the International Sale of Goods, 2012, Art. 6, para. 11 with further references.

30 See, for example, ICC International Court of Arbitration, Case No. 9187, June 1999, CISG-online No. 705; ICC International Court of Arbitration, Case No. 7565/1994, CISG-online No. 566; Hamburg Chamber of Commerce Court of Arbitration, 30 August 1996; U. Magnus, in J. Von Staudinger, *J. von Staudingers Kommentar zum Bürgerlichen Gesetzbuch, Wiener UN-Kaufrecht (CISG)* (Sellier de Gruyter, Berlin, 2013), Article 6, para. 24.

31 See, for example, Hamburg Chamber of Commerce Court of Arbitration, Interim award, 30 August 1996.

32 Magnus, in *Staudingers Kommentar* Article 6, para. 30; Schwenzer & Hachem, in *Schlechtriem & Schwenzer Commentary* Article 6, para. 17 with further references; UNCITRAL Digest 2012, Article 6, para. 11 with further references.

33 For further elaboration see I. Schwenzer, ‘Who Needs a Uniform Contract Law, and Why?’ (2013) 58 *Villanova Law Review* pp. 723-732, 724-727.

34 Ferrari, in *Schlechtriem & Schwenzer Kommentar*, Article 6, para. 39; Schwenzer & Hachem, in *Schlechtriem & Schwenzer Commentary*, Article 6, para. 31.

the applicable international private law must be consulted.<sup>35</sup> It may prohibit any choice of law<sup>36</sup> or at least the choice of a so-called a-national law.<sup>37</sup> This is of special importance for Brazilian parties if they envisage litigation in Brazilian courts.<sup>38</sup> If they want to opt into the CISG it seems advisable that they combine such a choice of law clause with an arbitration clause.

### 26.2.3 *Sale of Goods*

The CISG applies to contracts for the sale of goods. From a more traditional point of view goods are moveable, tangibles objects. Today, however, this means too narrowly consider reality. Books, music and the like nowadays are downloaded from the internet without using any tangible media any longer. Many everyday objects – like car, refrigerator, television set – are software controlled, let alone high complex machinery or production lines. It is, therefore, decisive that the notion of goods under the CISG is very flexible and open to embrace all these new technological developments.<sup>39</sup>

This leads us to another feature that distinguishes the CISG from many domestic laws. A contract for goods to be manufactured by work and materials of the supplier is a contract for the sale of goods under the CISG.<sup>40</sup> It does not matter whether the goods to be manufactured are generic goods or specific, customized goods or whether they are intended to be attached to the buyer's real estate.<sup>41</sup> Thus, contracts involving a sewage plant, a power plant or an ammunition factory would be all covered by the CISG.

Mixed contracts, *i.e.* where only part of the contract consists of the delivery of goods and the other part contains service obligations such as supervision of installation and

35 Ferrari, in *Schlechtriem & Schwenger Kommentar* Article 6, para. 42; Schlechtriem, Requirements, p. 785; Schwenger & Hachem, in *Schlechtriem & Schwenger Commentary*, Article 6, para. 31.

36 This is the case for, for example, in Brazil (Article 9 Law of Introduction to the Civil Code), Saudi Arabia (there are no conflict of law rules in Shari'a, Saudi Arabia's principal source of law, leading to the application of a foreign law upon the choice of the parties) and Uruguay (Article 2403 Civil Code).

37 See, for example, on the controversy under the Rome I Regulation U.G. Schroeter, *Internationales UN-Kaufrecht* (5th edn., Mohr Siebeck, Tübingen, 2013) para. 60 with further references.

38 For more information on the situation in Brazil see N. de Araújo & F.I.G.C. Saldanha. 'Recent Developments and Current Trends on Brazilian Private International Law Concerning International Contracts' (2013) 1 *Panorama of Brazilian Law*, pp. 73-83; D. Stringer. 'Choice of Law and Choice of Forum in Brazilian International Commercial Contracts: Party Autonomy, International Jurisdiction, and the Emerging New Way' (2005-2006) 44 *Columbia Journal of Transnational Law* pp. 959-991.

39 See, for example, regarding software Schwenger & Hachem, in *Schlechtriem & Schwenger Commentary* Article 1, para. 18.

40 Article 3(1) CISG.

41 CISG ADVISORY COUNCIL. Opinion No. 4, Contracts for the Sale of Goods to Be Manufactured or Produced and Mixed Contracts (Article 3 CISG). Rapporteur: Professor Pilar Perales Viscasillas. Madrid, 24 October 2004. Opinion Rule 6. Available at: <[www.cisgac.com/default.php?ipkCat=128&riffk-Cat=146&sid=146](http://www.cisgac.com/default.php?ipkCat=128&riffk-Cat=146&sid=146)>; Schwenger & Hachem, in *Schlechtriem & Schwenger Commentary* Article 3, para. 3.

training of the buyer's personnel, are in principle also covered by the CISG.<sup>42</sup> This again, is a considerable facilitation as compared to many domestic laws. Only, if the service obligation constitutes the preponderant part, the CISG does not apply. Although, it might seem difficult to define what amounts to the 'preponderant part' of the obligations, decades of legal practice have proven that this distinction is a workable one.<sup>43</sup>

#### 26.2.4 CISG in Arbitration

Arbitration disputes are frequently governed by the CISG.<sup>44</sup> According to most arbitration laws and rules the arbitral tribunal applies the law chosen by the parties.<sup>45</sup> Thus, the CISG is to be applied whenever parties have chosen it explicitly are by way of choosing the law of a Contracting State. Without an explicit choice of law clause arbitral tribunals are often called to apply the most appropriate law which then may be directly the CISG or the CISG via the law of a Contracting State (*voie directe* or *voie indirecte*).<sup>46</sup> Any restrictions domestic courts may be facing through their own private international law rules in principle do not apply to arbitral tribunals. No wonder that in international arbitration today the CISG certainly is the preferential choice.

42 Article 3(2) CISG.

43 CISG ADVISORY COUNCIL. Opinion No. 4, Contracts for the Sale of Goods to Be Manufactured or Produced and Mixed Contracts (Article 3 CISG). Rapporteur: Professor Pilar Perales Viscasillas. Madrid, 24 October 2004. Comments 3.2-3.4. Available at: <[www.cisgac.com/default.php?ipkCat=128&ifk-Cat=146&sid=146](http://www.cisgac.com/default.php?ipkCat=128&ifk-Cat=146&sid=146)>; Ferrari, in *Schlechtriem / Schwenger Kommentar* Article 3, paras. 13-15; Schwenger & Hachem, in *Schlechtriem & Schwenger Commentary* Article 3, paras. 18-20 with further references.

44 Nils Schmidt-Ahrendts reports that according to the databases Pace, CISG-online and UNILEX approximately 25% of CISG cases are decided by arbitral tribunals, the actual percentage rate probably being significantly higher given that a large number of arbitral awards are not published. Likewise, in 155 out of 3000 ICC cases randomly selected and involving all kinds of disputes the CISG was applied. N. Schmidt-Ahrendts, 'CISG and Arbitration' (2011) 3 *Belgrade Law Review* pp. 211-223, 213.

45 See, for example, Article 187(1) IPRG (Switzerland); § 1051(1) ZPO (Germany); Article 47(2) CIETAC Arbitration Rules 2012; § 28(1) DIS Arbitration Rules 1998; Article 21(1) ICC Arbitration Rules 2012; Article 22(3) LCIA Arbitration Rules 1998; Article 33(1) Swiss Arbitration Rules 2012; Article 28(1) UNCITRAL Model Law 2006.

46 See, for example, Article 47(2) CIETAC Arbitration Rules 2012; Article 21(1) ICC Arbitration Rules 2012; Article 22(3) LCIA Arbitration Rules 1998; Article 28(2) UNCITRAL Model Law 2006.

## 26.3 SCOPE OF THE CONVENTION

### 26.3.1 *Formation and Rights and Obligations of the Parties*

According to Article 4, sentence 1 CISG, the Convention governs “the formation of the contract of sale” as well as “the rights and obligations [of the parties] arising from such a contract”.

Formation of the contract primarily relates to the offer-acceptance mechanism that leads to the conclusion of the contract. The CISG does not explicitly address the issue of standard terms. However, it is almost unanimously held that the CISG rules on contract formation also apply to questions of incorporation of standard terms including the issue of the so-called battle of forms that is highly debated in many domestic jurisdictions.<sup>47</sup> Again, the rules of the CISG are flexible enough to yield internationally satisfactory results.

The CISG rules on contract formation not only govern the conclusion of the contract of sale as such but – at least according to the nowadays internationally prevailing view – are also applied to an arbitration agreement that is part of the CISG contract.<sup>48</sup> At least this is true as regards the question whether the arbitration agreement was formed by a meeting of the minds of the parties.<sup>49</sup>

Article 11 CISG embodies the very important principle of freedom of form. Under the CISG a contract of sale need not be concluded or evidenced in writing and may be proven by any means, including witnesses. This provision explicitly excludes domestic rules still found in many domestic jurisdictions that contain indirect form requirements according to which a contract over a certain amount of money will not be admitted as evidence by a court unless it is in writing (statute of frauds).<sup>50</sup> It must be emphasized, however, that form requirements for arbitration clauses are not displaced by Article 11 CISG.<sup>51</sup> Although

47 Schwenger & Hachem, in *Schlechtriem & Schwenger Commentary* Article 4, para. 12; on the battle of forms instead of many and for the numerous contributions made on this issue see U.G. Schroeter, in *Schlechtriem & Schwenger Commentary* Article 19, paras. 31-51.

48 C. Brunner, *UN-Kaufrecht – CISG, Kommentar zum Übereinkommen der Vereinten Nationen über Verträge über den internationalen Warenkauf von 1980* (Stämpfli, Bern, 2004) Article 4, para. 39; Magnus, in *Staudingers Kommentar* Article 90, para. 11; Schmidt-Ahrendts, p. 218; Schroeter, *Internationales UN-Kaufrecht* para. 208; Schroeter, in *Schlechtriem & Schwenger Commentary* Intro to Arts. 14-24, paras. 16-23; Schwenger & Hachem, in *Schlechtriem & Schwenger Commentary* Article 4, para. 11; I. Schwenger & D. Tebel, ‘The Word is not Enough – Arbitration, Choice of Forum and Choice of Law Clauses Under the CISG’ (2013) 31 *ASA Bulletin* pp. 740-755, 745-748.

49 Schmidt-Ahrendts, p. 218.

50 Schlechtriem, Requirements, p. 788.

51 Brunner, Article 11, para. 1; R. Koch, ‘The CISG as the Law Applicable to Arbitration Agreements?’, in C.B. Andersen & U.G. Schroeter (eds.), *Sharing International Commercial Law across National Boundaries: Festschrift for Albert H. Kritzer on the Occasion of his Eightieth Birthday* (Wildy, Simmonds & Hill Publishing, London, 2008) pp. 267-286, 276-286; Magnus, in *Staudingers Kommentar* Article. 90, para. 11; Schmidt-Ahrendts, p. 216; Schwenger & Tebel, p. 750; Schroeter, in *Schlechtriem & Schwenger Commentary* Intro to



many if not most international contracts of sale initially are concluded in writing the principle of freedom of form is utterly important as it also relates to any modification of the contract (Article 29(1) CISG). In practice, often parties modify their contract orally.

However, from the outset the principle of freedom of form under the CISG was very much disputed. State-trading countries, especially the former Soviet Union and China insisted on a requirement for writing.<sup>52</sup> As a compromise a reservation was included that allows States to exclude freedom of form and continue to rely on their domestic form requirements.<sup>53</sup> The former Soviet Union has made use of this reservation as well as China. However, China no longer requiring a domestic contract of sale to be in writing withdrew the reservation in 2013. Of special interest for Brazilian parties is the fact that Argentina, Chile and Paraguay also made use of the reservation.<sup>54</sup> Brazil rightly and fortunately refrained from doing so. The burden associated with the writing requirement is however alleviated in two ways; first, the CISG itself defines what is meant by ‘in writing’.<sup>55</sup> It is agreed nowadays that electronic communication such as email is enough to fulfil the writing requirement.<sup>56</sup> Second, the writing requirement of a Reservation State only applies if the rules of private international law lead to the application of the law of the Reservation State.<sup>57</sup> Thus, if a Brazilian court finds that in a contract between a Brazilian and a Chilean party Brazilian private international law designates Brazilian law as being subsidiarily applicable, the principle of freedom of form prevails despite Chile having made the reservation.

It is further noteworthy that the CISG covers questions of interpretation of the contract and of the parties’ declarations and behaviour.<sup>58</sup> This is of special importance as the Common Law and the Civil Law approaches to interpretation differ considerably. In most Civil Law legal systems the starting point for the interpretation of statements and contracts is a subjective one.<sup>59</sup> By contrast, Common Law jurisdictions adopt an objective under-

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Arts. 14-24, para. 18 with further references; U.G. Schroeter, in *Schlechtriem & Schwenzler Kommentar Vor Artt. 14-24*, para. 11 with further references.

52 P. Schlechtriem & M. Schmidt-Kessel, in *Schlechtriem & Schwenzler Commentary*, Article 11, para. 1 with numerous references relating to the drafting history.

53 Arts. 12, 96 CISG.

54 For a current list of the states that have declared a reservation see [www.uncitral.org/uncitral/en/uncitral\\_texts/sale\\_goods/1980CISG\\_status.html](http://www.uncitral.org/uncitral/en/uncitral_texts/sale_goods/1980CISG_status.html).

55 Article 13 CISG. See Brunner, Article 13, para. 1; Magnus, in *Staudingers Kommentar*, Article 13, para. 8; I. Saenger, in Ferrari, Franco *et al.*, *Internationales Vertragsrecht* (2nd edn., C.H. Beck, Munich, 2012). Article 13, para. 3; Schlechtriem & Schmidt-Kessel, in *Schlechtriem & Schwenzler Commentary*, Article 13, para. 4; M. Schmidt-Kessel, in *Schlechtriem & Schwenzler Kommentar*, Article 13, para. 4.

56 Brunner, Article 13, para. 2; Magnus, in *Staudingers Kommentar*, Article 13, para. 5; Schroeter, *Internationales UN-Kaufrecht* para. 238.

57 Brunner, Article 12, para. 1; Magnus, in *Staudingers Kommentar*, Article 12, para. 8; Schlechtriem & Schmidt-Kessel, in *Schlechtriem & Schwenzler Commentary*, Article 12, para. 2; Schmidt-Kessel, in *Schlechtriem & Schwenzler Kommentar*, Article 12, para. 2.

58 Article 8 CISG.

59 See Schwenzler *et al.*, paras. 26.08-26.09.

standing of the intentions of the parties as they expressed them.<sup>60</sup> As in many other areas, the CISG has tried to strike a balance between the two different starting points. Although displaying a strong tendency to favour the objective approach, according to Article 8(3) CISG due consideration is to be given to all relevant circumstances of the case including prior and subsequent conduct of the parties. This clearly excludes the so-called parol evidence rule as well as the plain meaning rule of Common Law descent.<sup>61</sup>

### 26.3.2 *Issues Not Governed by the CISG*

Unfortunately, there are many issues of general contract law not covered by the CISG. Most importantly, the validity of the contract and any of its provisions is outside the scope of the Convention (Article 4, sentence 2(a) CISG). This includes a wide range of areas, such as capacity of persons and companies, agency, mistake, fraud, duress and the like, and most of all questions of illegality and unconscionability.<sup>62</sup> Thus, the consequences of an embargo or the restriction of certain sales such as of cultural objects must be decided according to the otherwise applicable domestic law.<sup>63</sup> Likewise, whether a limitation of liability clause or a fixed sum – in Civil law terminology a ‘penalty clause’ – is valid is in principle not within the scope of the CISG.<sup>64</sup>

However, the CISG itself decides what amounts to an issue of validity in the sense of Article 4, sentence 2(a) CISG and is therefore left to domestic law.<sup>65</sup> For example, the backbone of the CISG are the provisions on conformity of the goods with a detailed remedy mechanism in case of non-conformity. If a domestic law were to allow avoidance of the contract because of a mistake in relation to non-conformity, any uniformity in this core area of sales law would be lost. Therefore, any possibly concurring domestic remedies must be pre-empted by the CISG.<sup>66</sup> Likewise, impliedly the CISG acknowledges the validity of a contract even if the goods did not or no longer exist at the time of the conclusion of the

60 See Schwenger *et al.*, paras. 26.10-26.12.

61 CISG ADVISORY COUNCIL. Opinion No. 3, Parol Evidence Rule, Plain Meaning Rule, Contractual Merger Clauses and the CISG. Rapporteur: Professor Richard Hyland. Madrid, 23 October 2004. Available at: <[www.cisgac.com/default.php?ipkCat=128&ifkCat=145&sid=145](http://www.cisgac.com/default.php?ipkCat=128&ifkCat=145&sid=145)>; Schlechtriem & Schmidt-Kessel, in *Slechtriem & Schwenger Commentary*, Article 8, paras. 33-35; Schmidt-Kessel, in *Slechtriem & Schwenger Kommentar*, Article 8, paras. 32-34.

62 For more information on this see Schwenger & Hachem, in *Slechtriem & Schwenger Commentary*, Article 4, paras. 30-45.

63 Schlechtriem, Requirements, pp. 788-789.

64 Schwenger & Hachem, in *Slechtriem & Schwenger Commentary*, Article 4, paras. 43-44.

65 See instead of many Ferrari, in *Slechtriem & Schwenger Kommentar*, Article 4, para. 16 with further references.

66 On this see Schwenger & Hachem, in *Slechtriem & Schwenger Commentary*, Article 4, para. 36.

contract. Domestic solutions still relying on the old and nowadays outdated Roman law principle “*impossibilia nulla obligatio est*” are thus excluded.<sup>67</sup>

Article 4, sentence 2(b) CISG excludes another important area from the scope of application of the Convention; namely all issues relating to the transfer of property. Thus, under the CISG it is the seller’s obligation to transfer property in the goods to the buyer, but the questions how this transfer occurs or if a *bona fide* purchaser is protected when acquiring from a non-owner are governed by the applicable domestic property law.<sup>68</sup> Likewise, the consequences of a retention of title clause must be determined according to domestic law.<sup>69</sup>

### 26.3.3 Interpretation and Gap-Filling

Like the individual contract must be interpreted so must the CISG itself. There is hardly any topic that has attracted as many scholars as interpretation and gap-filling. Entire books have been devoted to this subject;<sup>70</sup> innovative theories such as the *global iuris consultorum* have been developed.<sup>71</sup>

The core provision for interpretation and gap-filling is Article 7 CISG. Article 7(1) CISG seeks to secure the autonomous interpretation of the CISG, Article 7(2) CISG provides for possible gap-filling.

Article 7(1) CISG contains three guidelines for interpretation; regard is to be had to its international character, the need to promote uniformity and the observance of good faith in international trade.

67 On this see Schwenger & Hachem, in *Schlechtriem & Schwenger Commentary*, Article 4, para. 33.

68 Ferrari, in *Schlechtriem & Schwenger Kommentar*, Article 4, paras. 29-30; J.O. Honnold & H. Flechtner, *Uniform Law for International Sales under the 1980 United Nations Convention* (4th edn., Kluwer Law International, Netherlands, 2009) para. 70; Schwenger & Hachem, in *Schlechtriem & Schwenger Commentary*, Article 4, para. 46; GERMANY. Regional Court Freiburg. Case No. 8 O 75/02. 22 August 2002. CISG-online No. 711.

69 Brunner, Article 4, para. 17; Ferrari, in *Schlechtriem & Schwenger Kommentar*. Article 4, para. 30; Schwenger & Hachem, in *Schlechtriem & Schwenger Commentary*. Article 4, para. 47; AUSTRALIA. Federal Court, South Australian District, Adelaide. Appellant: Roder Zelt- und Hallenkonstruktionen GmbH. Respondent: Rosedown Park Pty. Ltd. and Reginald R. Eustace. 28 April 1995. CISG-online No. 218; GERMANY. Regional Court of Appeals Koblenz. Case No. 5 U 534/91. 16 October 1992. CISG-online No. 47.

70 See A. Janssen & O. Meyer (eds.), *CISG Methodology* (Sellier European Law Publishers, Munich, 2009); 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 European Law Publishers, Munich, 2007); B. Zeller, *CISG and the Unification of International Trade Law* (Routledge-Cavendish, London, 2007).

71 See C.B. Andersen, *Uniform Application of the International Sales Law: Understanding Uniformity, the Global Jurisconsultorium and Examination* (Kluwer Law International, Netherlands, 2007) pp. 45-83.

The first reference is to the international character of the CISG. This primarily implies that the CISG must be interpreted autonomously.<sup>72</sup> 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 not only be distinguished 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.<sup>73</sup> 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.<sup>74</sup>

Article 7(1) 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 OHADA, the CISG has no single supreme court guarding the uniform interpretation of uniform or harmonized law and some authors consider this as a severe deficit.<sup>75</sup> However, there are many other means to safeguard uniformity.

Allow me to briefly mention a few of them.<sup>76</sup> First of all, in 1988, UNCITRAL established the information system 'CLOUT' (Case Law on UNCITRAL Texts)<sup>77</sup> which 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 UN working languages including Spanish, albeit not Portuguese. Numerous other databases further alleviate the task of researching court decisions and arbitral awards.<sup>78</sup> The website CISG Brasil is already online.<sup>79</sup> All in all we can count today more than 3000 court and arbitral tribunal decisions freely accessible via the internet. Finally, the UNCITRAL Digest on the CISG – the second

72 Schwenger & Hachem, in *Schlechtriem & Schwenger Commentary*, Article 4, para. 8.

73 See, for example B. Piltz, *Internationales Kaufrecht* (2nd edn., C.H. Beck, 2008) paras. 2, 185.

74 Ferrari, in *Schlechtriem & Schwenger Kommentar*, Article 7, para. 9 with numerous references; Schwenger & Hachem, in *Schlechtriem & Schwenger Commentary*, Article 7, para. 8.

75 See L.A. Di Matteo & A. Janssen, 'Interpretive Uncertainty: Methodological Solutions for Interpreting the CISG' (2012) *Nederlands Tijdschrift voor Handelsrecht* pp. 52-69, 53.

76 Schwenger & Hachem, in *Schlechtriem & Schwenger Commentary*, Article 7, paras. 10-15.

77 Available at: <[www.uncitral.org/uncitral/en/case\\_law.html](http://www.uncitral.org/uncitral/en/case_law.html)>.

78 See in particular the Pace Law School CISG database, available at: <[www.cisg.law.pace.edu/](http://www.cisg.law.pace.edu/)>, CISG-online, available at: <[www.cisg-online.ch](http://www.cisg-online.ch)> and UNILEX, available at: <[www.unilex.info/](http://www.unilex.info/)>.

79 Available at <[www.cisg-brasil.net/](http://www.cisg-brasil.net/)>.

edition having been published in March 2012 and being also available freely on the internet<sup>80</sup> – 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,<sup>81</sup> which is a private initiative founded in 2001, is not subject to such restrictions.<sup>82</sup> 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,<sup>83</sup> conference books and the like; many of them are already available in Portuguese eagerly awaiting the coming into force of the CISG here in Brazil. They will all be of special help for courts and practitioners while acquainting with the CISG.

Finally, Article 7(1) 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.<sup>84</sup> 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.<sup>85</sup>

To this very day it is disputed whether the good faith principle may also be directly applied to the parties' contractual relationship.<sup>86</sup> Especially German courts often rely on good faith, for example when obliging a party introducing standard terms in the negotiation process to make them available to the other party.<sup>87</sup> However, the very wording of Article 7(1) CISG clearly shows that this was not intended.<sup>88</sup> Further evidence for this position is provided by the fact that the UNIDROIT Principles contain an explicit provision obliging the parties to act in good faith.<sup>89</sup> Thus, the scope of application of the principle of good

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80 UNCITRAL Digest of Case Law on the United Nations Convention on Contracts for the International Sale of Goods (2012). Available at: <[www.uncitral.org/pdf/english/clout/CISG-digest-2012-e.pdf](http://www.uncitral.org/pdf/english/clout/CISG-digest-2012-e.pdf)>.

81 See the official website of the CISG Advisory Council <[www.cisgac.com](http://www.cisgac.com)>.

82 For further information on the CISG Advisory Council see I. Schwenzer, 'The CISG Advisory Council' (2012) *Nederlands Tijdschrift voor Handelsrecht* pp. 46-51.

83 I. Schwenzer et al. (eds.), *Schlechtriem & Schwenzer, Comentários à Convenção das Nações Unidas Sobre Contratos de Compra e Venda Internacional de Mercadorias* (Thomson Reuters, São Paulo, 2014).

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

85 See B. Zeller, 'The Observance of Good Faith in International Trade', in *CISG Methodology* pp. 133-149.

86 See Schwenzer & Hachem, in *Schlechtriem & Schwenzer Commentary*, Article 7, para. 17.

87 See, for example, GERMANY. Federal Supreme Court. Case No. VIII ZR 60/01. 31 October 2001. CISG-online No. 617.

88 See also Magnus, in *Staudingers Kommentar*, Article 7, para. 25; Schwenzer & Hachem, in *Schlechtriem & Schwenzer Commentary*, Article 7, para. 17.

89 Article 1.7 PICC.

faith must be restricted to the interpretation of the Convention and cannot be used as a general corrective tool as it functions in many civil law legal systems.<sup>90</sup>

Whereas Article 7(1) CISG sets the scene for interpreting the Convention, Article 7(2) 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 two is often blurred. For example; does the term impediment in Article 79 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) CISG?<sup>91</sup>

Article 7(2) CISG provides for a two-step procedure.<sup>92</sup> 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) 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 recourse may be had to domestic law determined by the applicable conflict of laws rules.<sup>93</sup>

Once an internal gap is established this is to be filled primarily by relying on 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.<sup>94</sup>

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 the 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. Such are; party autonomy, estoppel or the prohibition of contradictory behaviour (*venire contra factum proprium*), freedom of form, equality of the parties, *favor contractus*, full compensation, the right to withhold performance, set-off and many others.<sup>95</sup>

If no general principles underlying the CISG can be found, internal gaps must be filled by resorting to the domestic law designated by the respective conflict of laws rules. However,

90 U. Magnus, ‘Tracing Methodology in the CISG: Dogmatic Foundations’, in *CISG Methodology* pp. 33-59, 43.

91 See on this I. Schwenger, ‘Force Majeure and Hardship in International Sales Contracts’ (2008-2009) 39 *Victoria University Wellington Law Review* pp. 709-725, 712-713 with further references.

92 Schwenger & Hachem, in *Schlechtriem & Schwenger Commentary*, Article 7, para. 27.

93 See Magnus, *Tracing Methodology in the CISG* p. 44.

94 See for a list of these principles Ferrari, in *Schlechtriem & Schwenger Kommentar*, Article 7, paras. 48-56; Schwenger & Hachem, in *Schlechtriem & Schwenger Commentary*, Article 7, paras. 31-35.

95 Schwenger & Hachem, in *Schlechtriem & Schwenger Commentary*, Article 7, para. 32.

recourse to domestic law in any case must be an *ultima ratio* that means a last resort.<sup>96</sup> It can be expected as more and more general principles will be developed under the CISG that in the future one day making recourse to domestic law will prove superfluous.

#### 26.3.4 Basic Structure

Before concluding let me briefly mention some of the main features of the CISG that certainly have considerably contributed to its worldwide success.

In many core areas of contract law, the CISG has achieved bridging the often cited Common Law – Civil Law divide. It is a successful – not a foul – compromise between very different approaches to legal problems of sales law. Furthermore, the CISG balances the interests of seller and buyer in a better way than any domestic legal system. The very fact that some people call it too seller friendly and others too buyer friendly is ample proof for this.<sup>97</sup> Finally, the CISG has a simple and lucid structure that makes it easily understandable to anyone. Thus, it is even reported that the CISG is used in Africa to teach traders the basics of contract law.<sup>98</sup>

This is especially true as regards the remedy mechanism.<sup>99</sup> In still most of the Civil law legal systems the area of remedies is one of the most complicated ones throughout the whole law of obligations as it still is firmly rooted in Roman law.<sup>100</sup> The trilogy of impossibility, late performance and defective performance and its subtle and often crucial differences are not suited to today's international business needs.<sup>101</sup> The CISG instead follows the breach of contract approach of Common law descent<sup>102</sup> without, however, preserving the intricacies that can be found in these countries. Rather, the CISG develops a remedy system of its own with clear rules being perfectly suited for international trade. The provisions on duties of the seller are immediately followed by the buyer's remedies in case of breach of contract by the seller.<sup>103</sup> Likewise the duties of the buyer are followed by the seller's remedies.<sup>104</sup> Avoidance, in general, requires a fundamental breach of contract.<sup>105</sup>

96 See only Magnus, in *Staudingers Kommentar*, Article 7, para. 58.

97 I. Schwenzer & P. Hachem, 'The CISG – Successes and Pitfalls' (2009) 57 *American Journal of Comparative Law* pp. 457-478, 475-476.

98 Schwenzer *et al.*, para. 3.21.

99 For a comparison of the remedy systems in Civil Law, Common Law and the CISG see I. Schwenzer & L. Ali, 'The Emergence of Global Standards in Private Law' (Forthcoming 2014) *Vindobona Journal of International Commercial Law and Arbitration*.

100 Schwenzer *et al.*, paras. 41.05-41.08.

101 Schwenzer *et al.*, paras. 41.09-41.33.

102 Schwenzer *et al.*, paras. 41.34-41.44.

103 Chapter II CISG.

104 Chapter III CISG.

105 Article 49(1)(a) CISG.

There is no fault requirement if one party seeks damages but there is the possibility of an exemption in case of an impediment beyond the sphere of risk of the breaching party.<sup>106</sup>

Let me stop here. It is fascinating to watch such an important economy as Brazil becoming a Member State of the CISG. I am hoping that traders and their lawyers will welcome the CISG as a means of facilitating international sales transactions and that any transition period during which the CISG is excluded mainly because of an attitude of “you cannot teach an old dog new tricks” will soon be overcome. The CISG family will certainly gladly support any endeavours to actively promote the CISG in Brazil.

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106 Article 79 CISG.