MASTER THESIS

Titel der Master Thesis / Title of the Master's Thesis

"The inherent legal value of The United Nations Convention on Contracts for the International Sale of Goods (CISG) in the contemporary European Union and worldwide "

verfasst von / submitted by

JUDr. Mgr. Adam Pauček

angestrebter akademischer Grad / in partial fulfilment of the requirements for the degree of

Master of Laws (LL.M.)

Wien, 2020 / Vienna 2020

Studienkennzahl lt. Studienblatt / Postgraduate programme code as it appears on the student record sheet:	UA 992 548
Universitätslehrgang lt. Studienblatt / Postgraduate programme as it appears on the student record sheet:	Europäisches und Internationales Wirtschaftsrecht / European and International Business Law
Betreut von / Supervisor:	Dr. Stephanie Nitsch

Abstract

Abstract in English

The master thesis strives to undertake the analysis of the United Nations Convention on Contracts for the International Sale of Goods (CISG) and to delineate the interplay between it and the UNIDROIT Principles of International Commercial Contracts concisely. International trade permeates various strata of contemporary society and also affects the way the European Union operates; hence, its relevance should not be underestimated. To this end, the chronological approach to the issues related to international trade has been adopted. By way of elaboration, the pertinent articles of both the CISG and the UNIDROIT Principles mentioned above are clarified in a logical sequence, so that each chapter may conceivably complement the previous one. Nonetheless, the content of the master thesis in question is not curtailed by the respective articles themselves as it is supplemented by a variety of judgements to augment the commentary on the respective articles.

Keywords: the United Nations Convention on Contracts for the International Sale of Goods (CISG), the UNIDROIT Principles of International Commercial Contracts.

Die Kurzfassung auf Deutsch

Ziel der Masterarbeit ist, das Übereinkommen der Vereinten Nationen über Verträge des internationalen Warenkaufs (CISG) zu erforschen und den Zusammenhang mit den UNIDROIT-Prinzipien für internationale Handelsverträge prägnant darzustellen. Der internationale Handel dringt verschiedene Klassen der heutigen Gesellschaft durch und wirkt sich auch auf die Funktionsweise der Europäischen Union aus; daher sollte seine Bedeutung nicht unterschätzt werden. Zu diesem Zweck wurde die chronologische Herangehensweise an die damit verbundenen Fragen im Bezug auf den internationalen Handel gewählt. Im Rahmen der Ausarbeitung werden die einschlägigen Artikel sowohl der CISG als auch der oben erwähnten UNIDROIT-Prinzipien in einer logischen Abfolge erläutert, so dass jedes Kapitel das vorhergehende geeignet ergänzt. Dennoch wird der Inhalt der vorhandenen Masterarbeit nicht nur durch die jeweiligen (fachlichen) Artikel, sondern auch durch eine Vielzahl von den rechtsgültigen Urteilen ergänzt, die den Kommentar des Autors zu den Artikeln argumentieren.

Schlagwörter: das Übereinkommen der Vereinten Nationen über Verträge des internationalen Warenkaufs (CISG), die UNIDROIT-Prinzipien für internationale Handelsverträge.

Table of contents

Abstract **2**

List of abbreviations **4**

Acknowledgements **5**

1. Introduction **6**

2. United Nations Convention on Contracts for the International Sale of Goods (CISG) **9**

2.1. Introduction to the CISG **9**

2.2. Sphere of application of the CISG **12**

2.3. Sale of goods **15**

2.3.1. Contract formation 15

2.3.2. Performance obligations under the CISG 21

2.3.2.1. Exemption from performance 26

2.3.3. Conformity of goods 31

2.3.3.1. Passing of the risk 36

2.3.3.2. Remedies 39

2.4. Perspective of the CISG in Austria **43**

2.5. Perspective of the CISG in New Zealand **46**

3. Comparative analysis of the CISG and the UNIDROIT Principles of International Commercial Contracts **49**

3.1. Fundamentals of the UNIDROIT Principles of International Commercial Contracts **49**

3.2. Comparative analysis **51**

3.2.1. Party autonomy 51

3.2.2. Usages and practices 54

3.2.3. Fundamental breach 57

4. Reflections and conclusions **61**

5. Bibliography **63**

List of abbreviations

Article	Article of the CISG unless otherwise indicated
CISG	the United Nations Convention on Contracts for the International Sale of Goods
Contracting State	the State which has ratified the United Nations Convention on Contracts for the International Sale of Goods
Incoterms	the International Commercial Terms
ULIS	the Uniform Law for International Sales
ULF	the Uniform Law on the Formation of Contracts for International Sales
UNCITRAL	the United Nations Commission on International Trade Law
UNIDROIT	the International Institute for the Unification of Private Law
UPICC	the UNIDROIT Principles of International Commercial Contracts

Acknowledgements

I would like to express my gratitude to Dr. Stephanie Nitsch for reviewing this master thesis, and for her guidance and constructive comments. But for her help, the completion of this research would not be possible.

1. Introduction

First off, there is a widespread and predominant notion present around the world to which almost every legal body and nation subscribes, specifically that each commercial sale transacted should firmly be regulated and governed by a specific set of rules pertaining to such a transaction. Beyond all dispute, to facilitate business transactions, almost every country in the world must surely have enacted a diverse range of sector-specific trade regulations that assist and prop up businesses having their registered seats in these countries in the translation of their perspectives into practice. Nevertheless, just a morsel of these regulations is gradually coming to grips with the overwhelming magnitude of sales that are completed at the international stage on a daily basis, let alone during more extended periods of time. For this purpose, it would not be an overstatement to concede that it is beyond necessary that leaders in legislature dispose of all stifling red-tape related measures which may appear by any means to be constraining the fundamental freedom to conduct business as contained, for instance, in Article 16 of the Charter of Fundamental Rights of the European Union.[1]

Referring to the previous paragraph, it was demonstrated in the preceding years that there had been an ever-increasing need to bridge the gap between diverse national regulations in terms of the International Business Law, and in the same breath introduce a unified legal act outlining the sound regulation of the international sale of goods among undertakings. Undoubtedly, this task of supreme importance was paved with a great number of divergencies exacerbated by the mere fact that national regulatory regimes comprised and are still composed of a plethora of discrepant sales laws, to put it mildly. To reconcile various proposals and avert looming crisis stretching on the horizon, these could not possibly be overlooked and had to, at least implicitly, be transposed in that unified legal act. At long last, in the aftermath of long and strenuous discussions and negotiations, the United Nations Convention on Contracts for the International Sale of Goods (hereinafter referred to as the "CISG ") was introduced. Looking at this document through the practical lens, it ought to be asserted that its provisions which regulate a considerable fraction of international trade go a long way towards assuaging fears stemming from uncertainty and ambiguity which were commonplace in the past. Rather unsurprisingly, by dint of the fact that it incorporates the default and time-proven rules pertaining to commercial

[1] Charter of Fundamental Rights of the European Union, 2012/C, OJ C 326/391.

transactions (to exemplify, contact formation, remedies and others[2]) which do not diverge widely from those included in legislation of the Contracting States, it incidentally represents the quintessence of new international commercial rules. Correspondingly, it simultaneously alleviates the unnecessary and redundant monetary burden that bargaining parties had to bear prior to the existence of the CISG.[3]

Furthermore, the provisions of the CISG should not be construed rigidly and narrowly; however, they are meant to encompass a whole plethora of provisions, which represent an inherent part of almost every commercial contract. Therefore, it can, without a shadow of a doubt, be asserted that the CISG, coupled with the UNIDROIT Principles of International Commercial Contracts (hereinafter referred to as the "UPICC ") and other legal instruments not expressly mentioned in this thesis, constitute a firm bedrock of the International Commercial Law. As have been implied before, the CISG was adopted to furnish more clarity in international contractual relationships, and its main objective is vested in the fact it encompasses substantive legal provisions without rendering any ambiguity. As a consequence of the CISG being adopted, not only vagueness which enveloped the previous fragmented legal regimes was almost in entirety disposed of, but also the modernisation of the legal structure has been attained.[4] Testimonial to this assertion is the third paragraph of the Preamble to the CISG which reads as follows: "Being of the opinion that the adoption of uniform rules which govern contracts for the international sale of goods and take into account the different social, economic and legal systems would contribute to the removal of legal barriers in international trade and promote the development of international trade, (...) ".[5] Nonetheless, there has been a great deal of heated debate about the interaction between the CISG and the UPICC, which yields somewhat inconsistent results with usually no middle ground to either conciliate or reunite diverse opinions. Irrespective of this fact, the intent of this thesis is not to highlight these theoretical discrepancies in the first place. Contrary to this fact, the underlying significance of this paper is primarily embedded in elaborating and promoting those overarching provisions of the CISG, meaning not all of them are addressed, which are considered to be of inherent legal value and furthermore examine their applicability through the prism of selected states, namely

[2] Gillette, C., Walt, S. 2016. *The UN Convention on Contracts for the International Sale of Goods: Theory and Practice*. Cambridge: Cambridge University Press, 2016, pp. Xi-Xii (Preface).
[3] Gillette, C., Walt, S. 2016. *The UN Convention on Contracts for the International Sale of Goods: Theory and Practice*. Cambridge: Cambridge University Press, 2016, pp. Xi-Xii (Preface).
[4] Bianca, M., C., Bonell, M., J., eds. 1987. *Commentary on the International Sales Law*. Giuffrè: Milan, 1987, pp. 2-16.
[5] *See* the Preamble to the CISG.

Austria and New Zealand. Only subsequently, the weigh will be attached to the interface between the CISG and the UPICC; nevertheless, the importance will be placed on their possible roles as separate yet cooperating agents which might in symbiosis happen to erase the gap between the theoretical and practical commercial chasm.

Referring to the introductory paragraph, regard has to be had to the fact that many sales are conducted in the European Union. Consequently and unsurprisingly, the nature of such business must be in line and consistently adhere to explicitly or tacitly expressed principles, for instance, as those contained in the Treaty on the Functioning of the European Union.[6] Despite the fact that this is not and will not be a key tenet of this thesis, it would be considered a grave mistake to interpret the provisions of the CISG in an isolated and immobilised manner. To epitomise, at the European level, there is a veritable array of legal instruments relating to contractual relationships, notably the Regulation (EC) No 493/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I)[7] whereby a much broader legal framework for the formation of, for instance, contracts with cross-border elements has been introduced. Therefore, a contextual reference, however perfunctory, must at this point be made to these planks on which the European Private Law has consistently been building its foundations.

On a final note, this master thesis does not provide merely a theoretical compilation on pertinent Articles of the CISG or the UPICC. Conversely, the scope of the discourse in this paper, unlike more strenuously drafted thesis, aims to analyse the CISG in conjunction with the UPICC and their numerous nuances in a contextual structure; however, not as exhaustively as its significance would deserve. Therefore, for the sake of brevity, its main thrust does not aim to analyse their provisions to the extent of a comprehensive commentary, which is not possible within its scope, but it endeavours to probe the vested interests of the drafting parties of the CISG and in which manner they have been translated into practice. At the same time, it scrutinises the salutary legal impact both of the CISG and of the UPICC. Simultaneously, a succinct comparison between these two legal regulations is drawn. For this purpose, this thesis presents the core section, segmented according to the respective provisions of the CISG and

[6] Consolidated version of the Treaty on the Functioning of the European Union, 2012, OJ C326/47.
[7] Regulation (EC) No 493/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I), 2008, OJ L177/6.

followed by selected Articles of the UPICC, in order to identify and assess the fundamental purpose of these particular Articles of the UPICC.

2. United Nations Convention on Contracts for the International Sale of Goods (CISG)

2.1. Introduction to the CISG

First of all, the origins of the CISG stretch as far as the milestone years of the 1980s. This was the time when the CISG was promulgated by a separate legal body of the United Nations – the United Nations Commission on International Trade Law (hereinafter referred to as the "UNCITRAL"). Principally, the power vested in the UNCITRAL is that it creates a feasible legislative platform which conceives benchmark "model commercial laws for enactment as national law and conventions to be ratified as treaties."[8] Concentrating more on the CISG, this document was adopted not on the spur of the moment or with intention to satisfy whims of the various state legislature, but rather in response to a widening gap between diverging national sales laws.[9] Not incidentally, preceding the promulgation of the CISG, there had been some legal instruments in the field of the international unification of the International Commercial Law; however, of marginal or scant legal significance. Initially and prior to the 1980s, the International Institute for the Unification of Private Law (hereinafter referred to as the "UNIDROIT") had exerted itself and yielded a couple of commercial treaties, namely the Uniform Law for International Sales (hereinafter referred to as the "ULIS") and the Uniform Law on the Formation of Contracts for International Sales (hereinafter referred to as the "ULF"). Alas, neither of them was able to arouse and to sustain significant interest, and they both had, therefore, gradually atrophied into the background. Following this experience, it was arrived at the conclusion that both the ULIS and the ULF had to be revised and possibly a new treaty forged in closer cooperation with stales all over the map, meaning that the developed and developing countries (or alternatively, countries of different systems and backgrounds) alike would have a proper say.[10]

---

[8] Gillette, C., Walt, S. 2016. *The UN Convention on Contracts for the International Sale of Goods: Theory and Practice*. Cambridge: Cambridge University Press, 2016, p. 2.
[9] Honnold, O., J., Flechtner, M., H. 2009. *United Law for International Sales under the 1980 United Nations Convention*. 4th Edition. Kluwer Law International, 2009.
[10] The UNCITRAL Guide: Basic Facts About the United Nations Commission on International Trade Law, 2007, pp. 6-7.

Secondly, in respect of the creation of the CISG, this was adopted at the instigation of the UNCITRAL, which created an *ad hoc* Working Group and assigned it with the task to refine previously mentioned treaties. Ultimately, the conclusion was drawn that the preferred alternative to prevent an unnecessary legislative bifurcation would be to amalgamate and consolidate the ULIS and ULF into a document in which all relevant legal provisions would be interwoven. To this end and with a view of attaining this objecting, a special committee comprising as many as ten states was set up.[11] Eventually, the draft of what would later be the CISG had been completed by 1978, and following this, it was unanimously approved at the conference held in Vienna in 1980. The ambit of talks at this conference was intense and extensive, and many provisions were discussed in great detail to dispel any lingering doubts enveloping their precise meaning. Even though it was adopted unanimously and later approved by the Contracting States, what was initially thought to be a splendid signpost for the future, it turned somewhat sour. The prime reason being that, as is elaborated further, many of these provisions manifestly lack in "a precise standard for their application or, in some cases, any standard at all "[12] as they steer a middle course and gloss over certain interests of the businesses whose contracts are, or alternatively will be governed by the CISG.[13]

Thirdly, the CISG with its structure bears the hallmark of a traditional commercial treaty as it contains, for instance, thirteen introductory Articles which address the scope of application of the CISG. Interestingly enough, it is not beyond the realm of rationality that the CISG does not provide for the definition of the terms either "goods " or "sale "[14], and thus leaves, in this specific case, significant room for vagueness as for the sphere of its application. Nevertheless, the CISG is not an overarching legal framework, and, as is indicated at a later stage, there are certain exceptions to its application, for instance, the CISG does not concern with "the validity of the contract or of any of its provisions or of any usage ".[15] On the other hand, the CISG cherishes the party autonomy and provides for the possibility of the parties to abandon the utilisation of the CISG in its entirety or to digress from any of its provisions.[16] In a congruous manner, in the case *Ostroznik Savo v. La Faraona soc. coop. a.r.l.*, District Court Padova rendered

[11] Bianca, M., C., Bonell, M., J., eds. 1987. *Commentary on the International Sales Law*. Giuffrè: Milan, 1987, pp. 6.
[12] Gillette, C., Walt, S. 2016. *The UN Convention on Contracts for the International Sale of Goods: Theory and Practice*. Cambridge: Cambridge University Press, 2016, p. 7.
[13] Gillette, C., Walt, S. 2016. *The UN Convention on Contracts for the International Sale of Goods: Theory and Practice*. Cambridge: Cambridge University Press, 2016, p. 7.
[14] *See* Article 1, para. 1 of the CISG.
[15] *See* Article 4 (a) of the CISG.
[16] *See* Article 6 of the CISG.

a judgement in 2005 in which it underscored and foregrounded that the parties to a contract must not exclude those provisions relating to the Public International Law.[17] To continue, other parts of the CISG, which are predominantly discussed in a chronological sequence in this thesis are as follows: the contract formation, obligations of the parties of a contract with respect to one another, and lastly, "procedural issues for the CISG, such as the capacity of Contracting States to make declarations with respect to specific Articles, and the terms under which the CISG becomes effective among Contracting States. "[18]

Fourthly, if one were to maintain that the CISG should be considered one of the most definitive treaties pertaining to the International Commercial (or alternatively, Business) Law, it would not be far from conceivable (even in spite of what has been implied in this chapter). The reason is intrinsic yet straightforward in relation to the overall research – thus far, at upwards of ninety most representative trading nations (for instance, Austria or the United States of America) have ratified the CISG.[19] On the other hand, some countries (to take an example, the United Kingdom), despite being leading trading nations, diverge from this paradigm as they have not yet adopted the CISG. Consequently, the CISG has acceded to power and has assumed the position of the world's leading template governing the process of drafting business contracts since it "provides the default set of rules that govern contracts for the sale of goods between parties located in different Contracting States,[20] and, in some cases, where only one of the parties is located in a Contracting State. Where applicable, the CISG pre-empts contrary provisions of respective domestic sales law, such as Article 2 of the Uniform Commercial Code ("UCC") and other state contract law in the United States, and conflicting provisions of the German Civil Code ("BGB") or the French Civil Code. "[21] Overall, notwithstanding the endemic mishaps of the CISG, it has certainly all the makings of a superbly drafted commercial treaty which bodes well in terms of preventing deadlocks over critical issues relating to international trade.

[17] *See* the case *Ostroznik Savo v. La Faraona soc. coop. a.r.l.*, 2005, District Court Padova (Italy, 11 January 2005, available at: http://cisgw3.law.pace.edu/cases/050111i3.html).
[18] Gillette, C., Walt, S. 2016. *The UN Convention on Contracts for the International Sale of Goods: Theory and Practice*. Cambridge: Cambridge University Press, 2016, p. 9.
[19] Gillette, C., Walt, S. 2016. *The UN Convention on Contracts for the International Sale of Goods: Theory and Practice*. Cambridge: Cambridge University Press, 2016, p. 1.
[20] *See* the case *Microgem Corp. v. Homecast Co., Ltd.*, 2012 U.S. Dist. LEXIS 65166 (S.D.N.Y. April 26, 2012), in: Gillette, C., Walt, S. 2016. *The UN Convention on Contracts for the International Sale of Goods: Theory and Practice*. Cambridge: Cambridge University Press, 2016, p. 1.
[21] Gillette, C., Walt, S. 2016. *The UN Convention on Contracts for the International Sale of Goods: Theory and Practice*. Cambridge: Cambridge University Press, 2016, p. 1.

2.2. Sphere of application of the CISG

Firstly, it would be an overestimation to concede that the CISG applies to all areas of international sales. In stark contrast, according to Article 1, para. 1, it shall be applicable "to contracts of sale of goods between parties whose places of business are in different States: (a) when the States are Contracting States; or (b) when the rules of private international law lead to the application of the law of a Contracting State."[22] Importantly, it must not be omitted to articulate that the whole CISG successfully evades defining in what manner should the term "the parties to the contract" be interpreted. In this respect, Article 4 serves as the last redoubt since it makes a veiled reference to the denominations "the seller" and the "buyer"[23]; nevertheless, the precise definition of these theoretical concepts is virtually non-existent in all of the CISG.[24] The same applies to the meaning of the term "sale"; nevertheless, the essence of its concept may be derived from the joint interpretation of Articles 30[25] and 53[26] – the inference being, that, these Articles amply demonstrate that the term "sale" implies, at least subliminally, the change of title from the subject who is in possession of the object being transferred. Additionally, inferring from the foregoing, it might be resolved that Article 1 not only determines the scope of application of the CISG but serves as a bellwether for the selection of applicable law as well. Taking Article 1, para. 1 (a) first, this Article itself might be regarded as a conflict rule so long as the parties to a contract have their places of business in the different Contracting States – primarily, this is exemplified in a way that this paragraph decides for the applicable law to the contract once it has firmly been established that the CISG regulates the contract. The trend is partly reversed with the following subparagraph – Article 1, para. 1 (b), under which the application of the CISG is contingent on the situation in which the applicable conflict rules choose the law of the one of the Contracting States.[27]

[22] *See* Article 1 (1) of the CISG.
[23] *See* Article 4 of the CISG under which: "This Convention governs only the formation of the contract of sale and the rights and obligations of the seller and the buyer arising from such a contract. In particular, except as otherwise expressly provided in this Convention, it is not concerned with: (...)."
[24] *See* the case *Beth Schiffer Fine Photographic Arts, Inc. v. Colex Imaging*, 2012 U.S. Dist. LEXIS 36695 (D.N.J. March 19, 2012).
[25] *See* Article 30 of the CISG under which: "The seller must deliver the goods, hand over any documents relating to them and transfer the property in the goods, as required by the contract and this Convention."
[26] *See* Article 53 of the CISG under which: "The buyer must pay the price for the goods and take delivery of them as required by the contract and this Convention."
[27] Gillette, C., Walt, S. 2016. *The UN Convention on Contracts for the International Sale of Goods: Theory and Practice*. Cambridge: Cambridge University Press, 2016, p. 25-26.

More specifically in respect of the application of the CISG, both paragraphs 1 (a) and (b) of Article 1 require for them to be trigged that there is a commercial transaction (the sale of goods) between two or more parties which crosses borders of a single Contracting State – meaning the sale in question must be international. As far as the condition of the place of business is concerned, Article 1, para. 3 of the CISG is of utmost significance as it reads as follows: "Neither the nationality of the parties nor the civil or commercial character of the parties or of the contract is to be taken into consideration in determining the application of this Convention." This paragraph encompasses the negative catalogue, which stipulates that neither the nationality nor the place of incorporation is of any significance, and thereby gives prominence in the process of determination of the application of the CISG to the precise address of the place of businesses of respective parties. Nonetheless, this is only true as long as places of business are established in the Contracting States. Rather unsurprisingly, not a single provision of the CISG furnishes the definition of the "place of business". Correspondingly, seldom does the meaning of the "place of business" cause any legal hindrances; on the other hand, pinpointing the exact place of business with the unmistakeable precision might conceivably and under specific, isolated circumstances pose additional impediments to the application of the CISG. To take an example, in the rented-property scenario, the company established and located in Argentina purveys goods to the Czech Republic via the offices and warehouses rented in the Czech Republic for the purpose of marketing and selling their products made in Argentina. Thus, a question worth answering in this respect is where is the place of business of the company residing in Argentina should it decide to cease their European ventures? In this respect, a number of judicial decisions held, while obeying the sense of logic, that the "place of business" was to be construed as the place where a company conducts its business on a stable and permanent basis[28]; hence, in the case mentioned above, the place of business is in Argentina rather than in the Czech Republic.

Additionally, Article 1, para. 2, reads as follows: "The fact that the parties have their places of business in different States is to be disregarded whenever this fact does not appear either from the contract or from any dealings between, or from information disclosed by, the parties at any time before or at the conclusion of the contract." This Article of the CISG by its wording ("disregarded") stretches and somewhat explicitly bypasses the rule contained in the previous paragraph, meaning the first, and thus renders it, under specific circumstances contained

[28] *See* the case *Al Palazzo S.r.l. v. Bernardaud di Limoges S.A.*, 2002, District Court Rimini (Italy, 26 November 2002, available at: http://cisgw3.law.pace.edu/cases/021126i3.html).

therein, inapplicable. The underlying rationale behind the incorporation of this provision in the CISG is that allows respective national laws to govern the sales contract when parties are of the mind that there is not one iota of credible evidence to substantiate the claim that the sale in question is international. Nevertheless, there is yet a considerable quantity of vacillation and indecisions as to with whom lies the burden of proving that international nuances have not been present in that particular case.[29] Several authors are more inclined to side with the view that the very party who claims the benefits of certain provisions, shall be in the position such as to prove its applicability; nevertheless, the others depart from this line of argumentation.[30]

Turning attention to the territorial limits of Article 1 of the CISG, under Article 93, para. 1, thereof: "If a Contracting State has two or more territorial units in which, according to its constitution, different systems of law are applicable in relation to the matters dealt with in this Convention, it may, at the time of signature, ratification, acceptance, approval or accession, declare that this Convention is to extend to all its territorial units or only to one or more of them, and may amend its declaration by submitting another declaration at any time." Admittedly, a considerable degree of leeway is given to the Contracting States in terms of curbing the effect of the CISG on some of their independent territorial units which are, for instance, at the liberty to operate unmolested and free from any unwarranted interferences from the Contracting State.[31] Taking refuge in the fourth paragraph of this Article ("If a Contracting State makes no declaration under paragraph (1) of this article, the Convention is to extend to all territorial units of that State"), the measure under the respective Article only takes effect once the Contracting State has made a declaration under the first paragraph of this Article. In the reverse order, the Contracting State and all of its territorial units are covered and governed by the CISG unless this State expressly and unambiguously has submitted the reservation in writing under Article 93, para. 2, seeking non-applicability of the CISG in relation to some of its units. An example includes New Zealand, which has taken advantage of this provision.

[29] Ferrari, F. 2000-2001. *Burden of Proof under the CISG*, in: Review of the Convention on Contracts for the International Sale of Goods (CISG) 1-8, Pace Int'l L. Rev. ed., 2000-2001.
[30] Khoo, W. 1987. *Exclusions from the Convention*, in: Bianca, M., C., Bonell, M., J., eds. 1987. *Commentary on the International Sales Law*. Giuffrè: Milan, 1987, pp. 34 – 39.
[31] Evans, M. 1987. *Federal States*, in: Bianca, M., C., Bonell, M., J., eds. 1987. *Commentary on the International Sales Law*. Giuffrè: Milan, 1987, pp. 645 – 648.

2.3. Sale of goods

2.3.1. Contract formation

Whilst several national laws entertain the notion that any contract of sales must be in writing, the CISG moderates this rather fossilised and unbending stance on the issue to a significant degree. In essence, the substance of this would-be nonconformity is firmly vested in its Article 11 (the so-called freedom of form principle) pursuant to which: "A contract of sale need not be concluded in or evidenced by writing and is not subject to any other requirement as to form. It may be proved by any means, including witnesses." This provision effectively and virtually removes any additional administrative burden and other redundancies which would unnecessarily hamper efforts of the parties to evidence their willingness to conclude a contract orally. Even though the Contracting States appreciate the intrinsic advantages of this Article, its very wording had proven to be perfectly fertile ground for disputes going forward. This undesirable status quo was underlain by the fact that some countries (for instance, in common law jurisdiction) could not come to terms with the fact that contracts may be concluded in the absence of written formalities delineating their structure yet be valid.[32] To clear the way, in the countries where communism was present, the records of transactions had to be maintained in writing for the purpose of adhering to the framework of a planned economy.[33] To forestall controversy, a welcome restorative – Article 96 ("A Contracting State whose legislation requires contracts of sale to be concluded in or evidenced by writing may at any time make a declaration in accordance with article 12 that any provision of article 11, article 29, or Part II of this Convention, that allows a contract of sale or its modification or termination by agreement or any offer, acceptance, or other indication of intention to be made in any form other than in writing, does not apply where any party has his place of business in that State."), has been incorporated in the CISG.[34] From what has been presented, one might well conclude that this compromise in terms of the degree of the formality is abundantly clear and detectable, as opposed to other concessions (for example, Article 16), as it has been incorporated into the

[32] Schlechtriem, P. 1986. *Uniform Sales Law: The UN-Convention on Contracts for the International Sale of Goods*. Mainz, 1986, pp. 43-44.
[33] David, R., Brierley, E., C., J. 1978. *Major legal systems in the world today*. 2nd Edition. Free Press, 1978, pp. 273-280.
[34] Gillette, C., Walt, S. 2016. *The UN Convention on Contracts for the International Sale of Goods: Theory and Practice*. Cambridge: Cambridge University Press, 2016, p. 83-84.

CISG in the form of a reservation[35] (*per analogiam* Article 2, para. 1(d) of the Vienna Convention on the Law of Treaties[36]).

Furthermore, it is one of the most substantial principles of law that a contract is valid and effective supposing the prior offer made by the offeror has been accepted - the mirror of this plank is Article 23 of the CISG[37]. Having regard to the foregoing it might be recognised that the contract formation under the CISG encapsulates two essential steps, namely an offer and an acceptance. Taking the former first, this is defined in Article 14 of the CISG which reads as follows: "A proposal for concluding a contract addressed to one or more specific persons constitutes an offer if it is sufficiently definite and indicates the intention of the offeror to be bound in case of acceptance. A proposal is sufficiently definite if it indicates the goods and expressly or implicitly fixes or makes provision for determining the quantity and the price." Perusing this Article diligently, it might tentatively be maintained that for an offer to be effective and in line with the CISG's requirements, it not only must be unambiguous to the degree that its content will not delude the receiving party, but it also has to be clear beyond any equivocation from an offer that the offeror, should it be effectively accepted by the offeree, is resolute in his being bound by the respective obligation arising therefrom. By way of reiteration, "According to Article 14 CISG, a contract is concluded by two corresponding declarations of intent, that is, the offer of one party and the acceptance of the other party, and the contract of sale does not have to be in writing nor is it subject to any other form requirements (Article 11 CISG). The offer, which must be sufficiently definite in that it indicates the goods, the quantity and the price (the latter two must be at least determinable), is interpreted according to the offeror's intent where the offeree could not have been unaware of such intent."[38] With this in mind, it is not a foregone conclusion to concede the offer itself does not bind the offeree unless it has not effectively been delivered (the CISG employs the term to "reach") to it. To exemplify, the offer may reach counterparty either by uttering the offer orally or by delivering the offer to

[35] Eörsi, G. 1983. *A Propos the 1980 Vienna Convention on Contracts for the International Sale of Goods*, in: *The American Journal of Comparative Law*, Volume 31, Issue 2, Spring, 1983, pp. 352-353.

[36] *See* Article 2, para. 1(d) of the Vienna Convention on the Law of Treaties under which: "“reservation” means a unilateral statement, however phrased or named, made by a State, when signing, ratifying, accepting, approving or acceding to a treaty, whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State; "

[37] *See* Article 23 of the CISG under which: "A contract is concluded at the moment when an acceptance of an offer becomes effective in accordance with the provisions of this Convention. "

[38] *See* the case *Propane case*, 1996, Supreme Court (Austria, 6 February 1996, available at: http://cisgw3.law.pace.edu/cases/960206a3.html).

the address of, for instance, its place of business (Article 24 provides for this avenue).[39] What is of utmost significance in this context is the issue that, under Article 15, para. 2, "An offer, even if it is irrevocable, may be withdrawn if the withdrawal reaches the offeree before or at the same time as the offer." Not exceptionally, under this particular paragraph, the effect of the offer (its content notwithstanding) is rendered void once the offeror has manifestly demonstrated the intention to withdraw this offer and this withdrawal is delivered to the offeree prior or, at the latest, simultaneously with the respective offer. Nonetheless, in case the offer is not withdrawn as envisaged by Article 15, it may conceivably be revoked on condition the "the revocation reaches the offeree before he has dispatched an acceptance."[40]

Returning to the substance of this chapter, for acceptance to be both effective and valid, the CISG prescribes a somewhat rigid set of rules in its Articles 18 through 22 from which, however, parties might depart or preclude its application at all.[41] Following the offer and its delivery, it must unequivocally and without reservations be accepted by the offeree – it must unconditionally assent to the offer in a way that it does not give rise to any doubts whatsoever as to their true intent to be bound by the offer in question. All the more, under Article 18, para. 1, "A statement made by or other conduct of the offeree indicating assent to an offer is an acceptance. Silence or inactivity does not in itself amount to acceptance." As might be perceived from the abovementioned, acceptance signals consensual intent on the side of the offeree to be bound by a presented offer. In spite of the fact that silence or passivity do not constitute acceptance, this is not invariably true – on the other hand, mere inactivity might likely be considered to be valid acceptance once it is established that there has been such a usage (Articles 8 and 9 of the CISG) between the parties to the contract prior to that respective acceptance[42] - this might be demonstrated by dispatching the goods or payment of the price (Article 18, para. 3 of the CISG). By way of explanation, it was held that: "no contract had been concluded by means of a letter of confirmation followed by silence. Although there is an established trade usage which recognizes such a conclusion of contract by silence in the jurisdiction of the recipient's place of business, due to the international character of the CISG,

---

[39] Gillette, C., Walt, S. 2016. *The UN Convention on Contracts for the International Sale of Goods: Theory and Practice*. Cambridge: Cambridge University Press, 2016, p. 88-89.
[40] *See* Article 16, para. 1 of the CISG under which: "Until a contract is concluded an offer may be revoked if the revocation reaches the offeree before he has dispatched an acceptance. ".
[41] Ferrari, F., Kieninger, E., M., Mankowsi, K., O., Saenger, I., Schulze, G., Staudinger, A., eds. 2012. *Internationales Vertragsrecht*. 2nd Edition. Munich: Beck, 2012.
[42] *See* the case *Lindegie case*, 2010, Appellate Court Dresden (Germany, 30 November 2010, available at: http://cisgw3.law.pace.edu/cases/101130g2.html).

regard is to be given only to trade usages that are known to the law both in the jurisdiction of the offeror and in the jurisdiction of the recipient (Art. 9(2) CISG). Moreover, the legal effects of the trade usage have to be known to both parties."[43] Moreover, there are the same invariable principles which are applicable to the delivery of the acceptance and to the offer as well – the uppermost ones being, the assent in the acceptance must be indicated clearly leaving no room for its misconstruing and must be delivered with a reasonable time period unless stipulated otherwise. Conversely, the CISG requires for an offer proffered verbally to be valid only if it is immediately accepted; nevertheless, this is valid as long as circumstances indicate otherwise.[44] Another point worth elaboration in this regard is that no other person than the offeree itself is entitled to communicate their acceptance – in other words; only the offeree may give its assent to the offer. The actual means of the acceptance are as diverse as a simple oral statement[45] or may well be ascertained on the basis of the offeror's behaviour itself[46]. To put it crudely, the offeree itself must in no uncertain terms venture its opinion either showing unequivocally a willingness to be bound by the substantive provisions of a purported offer or profusely demonstrate whether it would like to amend certain parts thereof or reject it outright. In the former case (a counter-offer scenario[47]), Article 19, para. 2, furnishes a clear step-by-step explanation as it reads as follows: "However, a reply to an offer which purports to be an acceptance but contains additional or different terms which do not materially alter the terms of the offer constitutes an acceptance, unless the offeror, without undue delay, objects orally to the discrepancy or dispatches a notice to that effect. If he does not so object, the terms of the contract are the terms of the offer with the modifications contained in the acceptance." Contrary to this paragraph, the modification of substantive terms (the monetary compensation, the quantity of goods and others) is deemed, under Article 19, para. 3, to alter the previous terms materially.

---

[43] *See* the case *Marble slabs case*, 1995, Appellate Court Graz (Austria, 9 November 1995, available at: http://cisgw3.law.pace.edu/cases/951109a3.html).

[44] See Article 18, para. 2 of the CISG under which: "An acceptance of an offer becomes effective at the moment the indication of assent reaches the offeror. An acceptance is not effective if the indication of assent does not reach the offeror within the time he has fixed or, if no time is fixed, within a reasonable time, due account being taken of the circumstances of the transaction, including the rapidity of the means of communication employed by the offeror. An oral offer must be accepted immediately unless the circumstances indicate otherwise. ".

[45] *See* the case *Internationale Jute Maatschappij v. Marín Palomares*, 2000, Supreme Court (Spain, 28 January 2000, available at: http://cisgw3.law.pace.edu/cases/000128s4.html).

[46] *See* the case *Shoes case*, 1995, Appellate Court Frankfurt (Germany, 23 May 1995, available at: https://cisgw3.law.pace.edu/cases/950523g1.html).

[47] *See* Article 19, para. 1 of the CISG which defines a counter-offer in the following manner: "A reply to an offer which purports to be an acceptance but contains additions, limitations or other modifications is a rejection of the offer and constitutes a counter-offer. ".

With respect to the forms of acceptance, as has been previously insinuated, the demeanour of the party itself may be sufficient enough to prove ample evidence of its intention to be engaged in the contractual relationship.[48] Most importantly, it must be conclusively established from the offeror's conduct that it is resolved and inclined to enter the respective contractual relationship.[49] To this end, the actual performance in the form of the remittance of the purchase price to the seller or the dispatch of goods in question may be indicative of that intent.[50] For all this, it is still essential to assess and critically examine such conduct through the wording of Articles 8 and 9[51] - this is in line with Article 18, para. 3. To regurgitate the previous facts, this provision stipulates that: "However, if, by virtue of the offer or as a result of practices which the parties have established between themselves or of usage, the offeree may indicate assent by performing an act, such as one relating to the dispatch of the goods or payment of the price, without notice to the offeror, the acceptance is effective at the moment the act is performed, provided that the act is performed within the period of time laid down in the preceding paragraph." Inferring from the aforementioned wording, the rule contained therein merely reiterates and interprets the essence of Article 9, para. 1, under which: "The parties are bound by any usage to which they have agreed and by any practices which they have established between themselves.". Thereby, these practices and usages are on account of the effect provided to them by the literal wording of Article 9 given prominence to the regulatory framework of the CISG.[52]

In greater detail, several allusions to the fact that the passivity of the offeree does not amount to acceptance have been made throughout this chapter. To expatiate on this issue in more detail, even though that omission may be susceptible to various connotations, Article 18, para. 1, curbs its legal effect in a way that: "Silence or inactivity does not in itself amount to acceptance." It might with some reservation be conceded that to remove and avoid any ambiguity regarding the denotation of the acceptance is the vested interest of this clause. Likewise, this provision cannot be circumnavigated nor stretched to the point that the offeree would unilaterally adopt an approach to the contrary, meaning that it might decide to tacitly intimate its willingness in

---

[48] *See* the case *Shoes case*, 1995, Appellate Court Frankfurt (Germany, 23 May 1995, available at: https://cisgw3.law.pace.edu/cases/950523g1.html).

[49] Ostendorf, P., Kluth, P. 2013. *Internationale Wirtschaftsverträge*. Munich: Beck, 2013, p. 576.

[50] *See* the case *Instulating material case*, 2012, Supreme Court (Austria, 13 December 2012, available at: http://cisgw3.law.pace.edu/cases/121213a3.html).

[51] Ferrari, F., Kieninger, E., M., Mankowsi, K., O., Saenger, I., Schulze, G., Staudinger, A., eds. 2012. *Internationales Vertragsrecht*. 2nd Edition. Munich: Beck, 2012, p. 501.

[52] Walker, G. 2005. *Trade Usages and the CISG: Defending the Appropriateness of Incorporating Custom into International Commercial Contracts*, in: 24 Journal of Law and Commerce, 2005, p. 263.

the very offer to be bound by silence. Serving as a buffer against unsolicited offers, an assertion of the offeror to the effect that the offer is deemed to be accepted unless expressly rejected within the given period is manifestly lacking in conformity with Article 18, para. 1, and thus is null and void.[53] Brought back from dormancy by virtue of Article 9, para. 1, there is a handful of occurrences, incidental though, where tacitly indicated assent might eventually amount to a proper acceptance. Granted that parties to a contract established between them a set of mutually accepted and acceptable practices, as it were, to which they adhere, it might not be far from inconceivable that the contracting parties coincided on the fact that inactivity should constitute a valid acceptance.[54] In this factual scenario, such conduct would not be considered an encroachment on the principles revolving around the CISG.

To restate, supposing the acceptance entails the indication of assent in a discernible manner, it is deemed effective and valid once it has reached the offeror, and thereby results in the binding contract being concluded. As shown above and in line with Article 22, "An acceptance may be withdrawn if the withdrawal reaches the offeror before or at the same time as the acceptance would have become effective." If Article 22 has not been invoked, the legally binding contract is concluded pursuant to Article 23. In this manner, it is of utmost significance to accurately identify the very moment when the receipt of acceptance is purveyed to the offeror.[55] Resorting to Article 24, it lays down the following: "For the purposes of this Part of the Convention, an offer, declaration of acceptance or any other indication of intention "reaches" the addressee when it is made orally to him or delivered by any other means to him personally, to his place of business or mailing address or, if he does not have a place of business or mailing address, to his habitual residence." Principally, under the landmark rule expounded in Article 24, the acceptance is effective, providing the offeror is in the position in which it might easily acquaint itself with the content of such acceptance – the possibility of familiarising with the contents of acceptance, not actual knowledge of what is entailed therein, matters.[56] By way of elaboration, Article 24 recognises that acceptance might conceivably be made orally or delivered by any other means. While the term "orally" encompasses a diverse spectrum of communication means

[53] Farnsworth, A. 1987. *Federal States*, in: Bianca, M., C., Bonell, M., J., eds. 1987. *Commentary on the International Sales Law*. Giuffrè: Milan, 1987, pp. 163-174.
[54] *See* the case *Calzados Magnanni v. Shoes General International*, 1999, Appellate Court Grenoble (France, 21 October 1999, available at: http://cisgw3.law.pace.edu/cases/991021f1.html).
[55] Schwenzer I., Mohs, F. 2006. *Old Habits Die Hard: Traditional Contract Formation in a Modern World*. Internationales Handelsrecht, 2006, pp. 239 – 246.
[56] Eiselen S. 1999. *Electronic Commerce and the U.N. Convention on Contracts for the International Sale of Goods (CISG)*, in: 6 EDI Law Review, 1999, p. 29.

ranging from personal communication to a plentiful array of electronic gadgets. What is breeding ground for ambiguity in this respect is pinpointing the particular moment in which an acceptance enters the hypothetical realm of the offeror where it may gain a knowledge of its content. Thus far, in terms of an electronically addressed acceptance, it has been resolved that the acceptance is effective in the precise moment of it entering the electronic information system of the offeror. To clarify, a shining example would include an acceptance sent via e-mail from where it can be easily accessed by the offeror. Nevertheless, this is heavily reliant on the fact of whether or not the offeror has acquiesced to such a method to be employed.[57]

On a final examination, it has been stated but must nonetheless be acknowledged at this place one more time. Under Article 18, para. 2: "An oral offer must be accepted immediately unless the circumstances indicate otherwise." Referring to the previous address, the term "orally" embraces disparate possibilities of conveyance of information, for instance, communication via the telephone or the Internet conducted in real-time. Owing to the fact that these means offer the same instantaneous platform for communication, they are on par with verbal communication.[58] In that fashion, regard must be had to the fact under these circumstances, unless stipulated otherwise, such a verbally implied offer must be accepted forthwith.

2.3.2. Performance obligations under the CISG

By way of introduction, rules for performance as contained in the CISG are drafted in a simple yet intricate way – nevertheless, they are of more than marginal interest to this master thesis. Straightforward though they may seem, it is rare for the respective contracting parties to evade misinterpretation, and consequently needless friction. Typified in Articles 30 through 59, the CISG exhaustively elucidates both the contractual obligations of the buyer and the seller, though, the definition of these terms is as elusive as ever. For the sake of brevity, in the course of this chapter, several conflated issues are fused together in order to paint the whole colourful picture – admittedly, it has never been a secret agenda of this thesis to bar anybody from seeing the forest for the trees.

[57] Leete, B. 1992. *Contract Formation under the United Nations Convention on Contracts for the International Sale of Goods and the Uniform Commercial ode: Pitfalls for the Unwary*, in: 6 Temple International and Comparative Law Journal, 1992, pp. 193, 207.
[58] Eiselen S. 1999. *Electronic Commerce and the U.N. Convention on Contracts for the International Sale of Goods (CISG)*, in: 6 EDI Law Review, 1999, pp. 21-46.

The first foundation stone of this chapter is the issue of delivery which is consumed by a much broader term "performance" and is of intrinsic value. Invariably, when seeking an answer to the nagging question of what delivery denotes, we need to scrutinise Article 30 on its merits closely, which reads as follows: "The seller must deliver the goods, hand over any documents relating to them and transfer the property in the goods, as required by the contract and this Convention." By inference, the trademark of this legal concept is that it is a rather convoluted process which entails a whole plethora of steps – the dispatch and delivery of goods, relinquishing the proper documentation in favour of the buyer, and consequently the transfer of title. With attention drawn to this issue, Article 31 lays down a number of procedural rules that are of vital interest when determining the time of the delivery. As shown in the respective Article itself, "If the seller is not bound to deliver the goods at any other particular place, his obligation to deliver consists (a) if the contract of sale involves carriage of the goods—in handing the goods over to the first carrier for transmission to the buyer; (...)" – this sequence of words conjures up the conclusion that in this case, delivery "occurs when the goods are handed over to the first carrier for transmission to the buyer."[59] In simple terms, upon the successful "hand-over", the selling party is relieved of any further duties pertaining to the delivery[60]; however, numerous endemic exemptions to this paradigm are commonplace. Furthermore, the time for delivery may be determined in a way that the precise date of the delivery is specified (hence, the obliged party must deliver goods in question on this exact day)[61] or a time period for the delivery is given (e.g. within ten days as of the conclusion of a contract). In light of this information, the payment for the goods in question takes place where it is agreed upon in the sales contract, or by default Article 57, para. 1(b), is triggered ("if the payment is to be made against the handing over of the goods or of documents, at the place where the handing over takes place.").

Equally important, an inherent part of the performance under the CISG is the examination of goods for possible nonconformity. The CISG sets great store by the fact that most deviations from the agreed quality should be detected at the time of the inspection. Nonetheless, it would be somewhere in the region of pure surmise if I were to concede that such an inspection should strive to discover all nonconformities – even those that are moreor less intangible (i.e. concealed

---

[59] Gillette, C., Walt, S. 2016. *The UN Convention on Contracts for the International Sale of Goods: Theory and Practice*. Cambridge: Cambridge University Press, 2016, p. 155.
[60] *See* the case *Art books case*, 1999, Commercial Court Zürich (Switzerland, 10 February 1999, available at: http://cisgw3.law.pace.edu/cases/990210s1.html).
[61] *See* the case *Printed work case*, 2012, District Court Köln (Germany 29 May 2012, available at: http://cisgw3.law.pace.edu/cases/120529g1.html).

or latent malfunctions and others).[62] In effect, the primary cause for this cursory examination is to identify those defects which may pose imminent and looming problems to the negotiated deal; nevertheless, the extent to which this should be conducted is in the discretion of the buyer who would eventually accrue additional expenses were it to decide to subject the goods to a more exhaustive check. For this purpose, Article 38 breaks down rules in this respect as under its first paragraph: "The buyer must examine the goods, or cause them to be examined, within as short a period as is practicable in the circumstances." As per usual, what is the significance of the term "as short a period as is practicable" is left to interpretation, and thus inevitably serves as a double-edged sword. Nevertheless, "The buyer is not bound to pay the price until he has had an opportunity to examine the goods, unless the procedures for delivery or payment agreed upon by the parties are inconsistent with his having such an opportunity."[63] Those pieces of information notwithstanding, despite the fact that Article 38 mandates that there be an inspection of the delivered goods, does not include any legal "reprisal" should the buyer disobey the obligation of inspection. Therefore, if we were to draw a parallel situation, we would probably need to examine this Article through the perspective of the subsequent Article, meaning Article 39, under the first paragraph of which: "The buyer loses the right to rely on a lack of conformity of the goods if he does not give notice to the seller specifying the nature of the lack of conformity within a reasonable time after he has discovered it or ought to have discovered it." Interpreting these two provisions in concert, it might well seem to an uninitiated reader that unless a close examination has been conducted, it curtails to a significant degree the ability of the buyer to give notice to the seller specifying the nature of the lack of conformity.[64] Overall, in spite of the fact that the CISG is patently devoid of any substantial definition of the term "practicability" in terms of an inspection, as a rule of thumb, time limits are conditioned by the very substance of what is delivered – to exemplify, degradable goods (e.g., fruit, vegetables) warrant an immediate need for the scrutiny.[65]

In the event of nonconformity of goods being revealed, the procedural instructions in Article 39 should be followed. Under the first paragraph of this Article, the notice of defects must be

---

[62] *See* the case *Wine case*, 1995, District Court Trier (Germany, 12 October 1995, available at: https://cisgw3.law.pace.edu/cases/951012g1.html).

[63] *See* Article 58, para. 3 of the CISG under which: "The buyer is not bound to pay the price until he has had an opportunity to examine the goods, unless the procedures for delivery or payment agreed upon by the parties are inconsistent with his having such an opportunity."

[64] Gillette, C., Walt, S. 2016. *The UN Convention on Contracts for the International Sale of Goods: Theory and Practice*. Cambridge: Cambridge University Press, 2016, pp. 163 - 164.

[65] *See* the case *Margarine case*, 2012, Las Palmas Canary Islands, (Spain, 16 February 2012, available at: http://cisgw3.law.pace.edu/cases/120216s4.html).

furnished by the buyer to the seller "within a reasonable time after he has discovered it or ought to have discovered it", otherwise, "the buyer loses the right to rely on a lack of conformity of the goods if he does not give the seller notice thereof at the latest within a period of two years from the date on which the goods were actually handed over to the buyer, unless this time limit is inconsistent with a contractual period of guarantee." (Article 39, para. 2). Obviously, by putting the time ceiling on the notice being produced by the buyer, the principle of "*vigilantibus iura scripta sunt*" is translated into practice. Form-wise, the notice may be produced in any fashion, meaning via the Internet or by telephone, so long as it can conclusively be proven and verified that it has reached the seller.[66] As far as the content of the notification is concerned, this must be composed of a proper specification of what constitutes the alleged lack of conformity – in other words, upon the description itself the seller must be able to picture for itself what kind of a defect has supposedly been detected. To put it clearly, "Notice must be specific inasmuch as it specifies the lack of conformity. Sweeping statements and general complaints are in this respect not sufficient to meet the content requirements demanded for notice, so that the seller is put in a position to be able to reasonably react. According to prevailing opinion, it must nevertheless be sufficient if the seller is informed of the essential result of a proper inspection, so that the seller can form an idea of possible defects."[67] On the other hand, a notice drafted vaguely may bring about a deleterious effect to the buyer itself as the seller would not conceivably have the conception of what should be remedied, and ultimately may be deemed inconsistent with the expectations of a court of law should any legal proceeding be initiated.[68]

To elaborate in more detail, should the buyer fail to notify the lack of conformity in a timely manner, it may well affect its overall position adversely. Consequently, these adverse consequences manifest in a way that under Article 39, the buyer loses the right to rely on a lack of conformity, and the writing is clearly on the wall. Correspondingly, the buyer is unable to exert its rights under Article 45, for instance, it is not in the position such as to "require performance by the seller of his obligations unless the buyer has resorted to a remedy which is inconsistent with this requirement." (Article 46, para. 1). By way of exception, Article 40 which

[66] *See* the case *Volmari Wener v Isocab NV*, 2008, Appellate Court Ghent (Belgium, 14 November 2008, available at: http://cisgw3.law.pace.edu/cases/081114b1.html).
[67] *See* the case *Cooling system case*, 2002, Supreme Court (Austria, 14 January 2002, available at: http://cisgw3.law.pace.edu/cases/020114a3.html).
[68] *See* the case *Rheinland Versicherungen v. Atlarex*, 2000, District Court Vigevano (Italy, 12 July 2000, available at: http://cisgw3.law.pace.edu/cases/000712i3.html).

reads as follows: "The seller is not entitled to rely on the provisions of articles 38 and 39 if the lack of conformity relates to facts of which he knew or could not have been unaware and which he did not disclose to the buyer." provides, in a manner of speaking, for a safeguard on which the buyer may ultimately rely. Looking at this Article through a magnifying glass, it can easily be observed that mere knowledge of defects on the side of the buyer forecloses its chances to invoke Articles 38 and 39 successfully. However much this seems to be producing salutary effects for the buyer, what ignites controversy is that sometimes it is not possible to demonstrate conclusively whether or not the seller had the knowledge of alleged defect prior to the sale in question.[69] By the same token, another definition that goes hand in hand with vagueness and imprecision is "could not have been unaware". Admittedly, researchers are on a collision course regarding the exact meaning of the employment of this terminology. Whereas it would not be without factual substantiation to espouse the view that this term goes beyond negligence in identifying non-compliant features on the seller's side, others may be disinclined to advocate this conception. As to the bar which has to be satisfied in respect of negligence, it has not been conclusively resolved yet – this fact notwithstanding, several courts have rendered judgements in which severe or gross negligence was required[70][71]; nevertheless, this standard is not a uniform guideline.[72]

Moreover, there are particular precautionary mechanisms aimed at reducing possible breaches within the confines of the CISG. Irrespective of the fact that remedies themselves are dealt with at a later stage, it is essential to touch upon this issue briefly. Unsurprisingly, there is always a considerable likelihood that one party shirks from its responsibilities resulting in grave dereliction of its duty to perform on time and in line with the concluded contract. To prevent being in deadlock and under the circumstances mentioned above, the termination of contract by the non-defaulting party is not a foregone conclusion. For this purpose, through the incorporation of Article 72, what is called by commentators as the "anticipatory repudiation " has been introduced to the CISG. Under the first paragraph of this Article: "If prior to the date for performance of the contract it is clear that one of the parties will commit a fundamental

[69] Gillette, C., Walt, S. 2016. *The UN Convention on Contracts for the International Sale of Goods: Theory and Practice*. Cambridge: Cambridge University Press, 2016, pp. 179.
[70] *See* the case *Dat-Schaub International a/s v. Kipco Damaco N.V.*, 2007, Appellate Court Ghent (Belgium, 16 April 2007, available at: http://cisgw3.law.pace.edu/cases/070416b1.html).
[71] *See* the case *Paprika case*, 2004, Supreme Court (Germany, 30 June 2004, available at: http://cisgw3.law.pace.edu/cases/040630g1.html).
[72] Gillette, C., Walt, S. 2016. *The UN Convention on Contracts for the International Sale of Goods: Theory and Practice*. Cambridge: Cambridge University Press, 2016, pp. 180.

breach of contract, the other party may declare the contract avoided." Principally, this Article signifies that the party which is not in contravention of its duty may avoid the contract providing that the other party commits a fundamental breach, –a breach of contract resulting "in such detriment to the other party as substantially to deprive him of what he is entitled to expect under the contract, unless the party in breach did not foresee and a reasonable person of the same kind in the same circumstances would not have foreseen such a result." (Article 25 of the CISG). What amounts to a fundamental breach is commonly open to conjecture; nevertheless, unwillingness to compensate for the goods prior to their dispatch may be a damning indictment for a breach with "fundamental " connotations.[73] To state the obvious, avoidance of a contract is nothing more than a sugar coated expression for its termination on the basis of the breach committed by the other party. Inevitably, there are specific implications that come into play following the avoidance of a contract. Obviously, any ongoing contractual obligations of the parties to the contract are rendered invalid as there is no legal basis whatsoever for them to build on anymore. The parties must be all square after the contract has been avoided, and this implies that any remuneration paid has to be repaid back or might conceivably be recovered in a court of law. Similarly, the goods shipped account for unjust enrichment and must be returned to the seller. On the contrary, in case the contract has not been terminated, all obligations of the parties survive, which means that they must perform. Returning to avoidance, "If the contract is avoided and if, in a reasonable manner and within a reasonable time after avoidance, the buyer has bought goods in replacement or the seller has resold the goods, the party claiming damages may recover the difference between the contract price and the price in the substitute transaction as well as any further damages recoverable under article 74." (Article 75). In respect of damages, it has been alluded in the previous sentence – the party that has avoided contract is liable to claim damages under Article 74 providing it is able to prove the loss irrefutably and produce sufficient irrefutable evidence to this effect.[74]

2.3.2.1. Exemption from performance

To begin with, under Article 79, para. 1: "A party is not liable for a failure to perform any of his obligations if he proves that the failure was due to an impediment beyond his control and that he could not reasonably be expected to have taken the impediment into account at the time

[73] *See* the case *Doolim Corp. v. R Doll, LLC*, 2009 U.S. Dist. LEXIS 45366 (S.D.N.Y. May 29, 2009).
[74] Gillette, C., Walt, S. 2016. *The UN Convention on Contracts for the International Sale of Goods: Theory and Practice*. Cambridge: Cambridge University Press, 2016, pp. 183, 193.

of the conclusion of the contract or to have avoided or overcome it, or its consequences." As is customary, this provision does not fall short of expectations as it is perfectly aligned with the CISG's trademark, which is indistinctness of some of its phrases. To put it bluntly, the terminology (e.g. an impediment beyond the control) which lays the groundwork for this provision is somewhat shrouded in ambiguity and thus is food for various misinterpretations. In this chapter, therefore, the weight will be attached to those explanations of these expressions that are considered to be of a greater or lesser extent uniform.

From the lexicological standpoint, an impediment is delineated as something that hampers or stops the progress completely. The conclusion in this matter has not been reached yet, and some tend to side with the view that an impediment represents an agent which objectively makes further performance futile or inconceivable.[75] Others, on the other hand, consider this opinion too severe and rigorous as this would by definition preclude the possibility to subsume the situation in which the goods have been delivered worthless along the way under the same heading with the term "impediment"[76]. Considering the overall situation, in order not to curb a salutary effect which is undoubtedly meant by this Article, it is of utmost significance to come to grips with the fact that an impediment should be construed as any setback, the loss or substantial damage of goods, even if it were to happen during the time prior to their dispatch.[77] To rub salt into the wound, the whole situation concerning legal certainty is compounded by reason of the fact that there is no proper identification of what "beyond his control " connotes. To fill the interpretative vacuum, it would not be detached from reality if it were asserted that this phrase defines the situation in which a party could not influence the external factors; nevertheless, this definition is superficial and comes with strings attached – it is indeed necessary always meticulously examine the particulars of the case (e.g. possible negligence[78]) before arriving at a conclusion.

In addition, under Article 79, para. 1, only an impediment which could not be envisaged at the time of the conclusion of the contract makes the exemption under this Article feasible. The

[75] Flambouras, D. P. 2002. *Comparative Remarks on CISG Article 79 & PECL Articles 6:111, 8:108*, 2002, available at: http://cisgw3.law.pace.edu/cisg/text/peclcomp79.html#er).

[76] Gillette, C., Walt, S. 2016. *The UN Convention on Contracts for the International Sale of Goods: Theory and Practice*. Cambridge: Cambridge University Press, 2016, pp. 183, 295.

[77] Honnold, O. 1989. *Documentary History of the Uniform Law for International Sales:The Studies, Deliberations and Decisions That Led to the 1980 United Nations Convention with Introductions and Explanations*. 1st Edition, Springer, 1989, p. 445.

[78] *See* Decision of Appellate Court Lyon (France, 27 March 2014, available at: http://cisgw3.law.pace.edu/cases/140327f1.html).

representative of such an impediment may be an irregular occurrence caused by exogenous elements for which allowances could not have been made at the time of the contract being negotiated. Contrary to this fact, any other setback or hindrance that could have been foreseen but was not fails signally in meeting this criterion – and therefore "The underlying assumption of the requirement is that if the intervening event was foreseeable, then the adversely affected party had an opportunity to contract out of liability, or to demand a price for assuming liability, should the event materialise.".[79] Despite the fact that the concept of "foreseeability" is an elusive theoretical structure that is challenging to determine, certain aspects must be considered in this respect: the likelihood of such an unforeseeable event or its incidence. Therefore, if the buyers were to buy goods in bulk from Canada sometime during winter months and this would require the delivery by sea, one could not possibly justify delays caused by frozen rivers or ports when it is common knowledge that winters in Canada are freezing cold. Consequently, a plastic argument elaborating the premise that this could not have been anticipated probably would not hold water[80] – nonetheless, this was only a trivial example to demonstrate the principle of the "foreseeability " and which would without a shadow of doubt require more thoroughgoing analysis into the subject matter.[81]

Another issue worth mentioning in relation to Article 79, is the second paragraph which reads as follows: "If the party's failure is due to the failure by a third person whom he has engaged to perform the whole or a part of the contract, that party is exempt from liability only if: (a) he is exempt under the preceding paragraph; and (b) the person whom he has so engaged would be so exempt if the provisions of that paragraph were applied to him." In this paragraph, the situation in which the obligation to perform has been frustrated by the action of an intermediary is exemplified. In terms of the terminology utilised, it has been shown that it is not preferable that the word the "third party" be construed in a loose manner. By way of illustration, an employee of a business should not be deemed to be a third party[82], nor suppliers, for which the party who chooses them assumes the risk, fall within the boundaries of this legal paradigm.[83]

[79] Gillette, C., Walt, S. 2016. *The UN Convention on Contracts for the International Sale of Goods: Theory and Practice*. Cambridge: Cambridge University Press, 2016, p. 320.
[80] *See* the case *Raw Materials Inc. v. Manfred Forberich GmbH & Co., KG*, 2004 U.S. Dist. LEXIS 12510 (N.D. Ill. July 6, 2004).
[81] Mazzotta, F., G. 2005. *Why Do Some American Courts Fail to Get It Right?*, in: 3 Loy. U. Chi. Int'l L. Rev. 85, 2005.
[82] *See* the case *Modular wall partitions case*, 2003, Appellate Court Lugano, Cantone del Ticino (Switzerland, 29 October 2003, available at: http://cisgw3.law.pace.edu/cases/031029s1.html).
[83] *See* the case *Iron molybdenum case*, 1997, Appellate Court Hamburg (Germany, 28 February 1997, available at: http://cisgw3.law.pace.edu/cases/970228g1.html).

On the other hand, a person who has directly been assigned to perform the task may be designated as a third party (e.g. the assigned carrier)[84], and therefore, if, for instance, the goods were demolished as a direct consequence of an unanticipated incident during the course of the transport, it would not be not out of the ordinary that the carrier would likely come within the scope of the second paragraph of Article 79. Consequently, the party who has outsourced the completion of the job may qualify for the exemption under Article 79, para. 1.[85] To complement, it is not impossible to prevent being held culpable for such a failure, yet the conditions for an exemption are stringent. To clarify, not only the party must be able to prove definitively that the conditions of Article 79, para. 1, are satisfied in relation to it, the intermediary (or the third party) must also meet these criteria. On a cursory observation, it might be conceded that this "double" positive test incentivises the party seeking exemption not to abrogate its duties in case a third party had been engaged to perform the contract instead of it. Thereby, "It prevents the seller from contending that the default of some third party on whom the seller was relying in order to perform its own contract with the buyer itself constitutes an impediment that qualifies the seller for an exemption. Instead, the seller must demonstrate that, in every respect, that third party would be eligible for an exemption if the criteria of Article 79(1) were applied to it."[86] In this regard, it is not far from incomprehensible that in spite of the fact that the buyer strains every nerve to get the deal clinched, an unpredicted happening arises only to stand in the way of this. To draw a parallel, in a high-profile transaction, a bridging loan was successfully negotiated to get the deal done. Nonetheless, the transaction went awry as the bank hit the shallow waters by dint of the fact that it was in the middle of the financial meltdown. Generally, in a similar situation in the past, it has been resolved that such a situation does not sufficiently qualify to be considered an impediment beyond one's control.[87]

Additionally, at no point throughout this chapter did I address the implication of what ensues if a sufficient impediment activates the rule contained in Article 79. On the basis of its fifth paragraph, "Nothing in this Article prevents either party from exercising any right other than to claim damages under this Convention." More importantly, should the party be unable to carry

[84] *See* the case *Modular wall partitions case*, 2003, Appellate Court Lugano, Cantone del Ticino (Switzerland, 29 October 2003, available at: http://cisgw3.law.pace.edu/cases/031029s1.html).
[85] Gillette, C., Walt, S. 2016. *The UN Convention on Contracts for the International Sale of Goods: Theory and Practice*. Cambridge: Cambridge University Press, 2016, p. 330.
[86] Gillette, C., Walt, S. 2016. *The UN Convention on Contracts for the International Sale of Goods: Theory and Practice*. Cambridge: Cambridge University Press, 2016, p. 328.
[87] *See* the case The case no. 269/1997 before the Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, 1998 (Russia, 6 October 1998).

out the obligations under a valid contract, it is considered that it is in contravention of the respective contractual relationship. Referring to my previous narration on the issue of breach of contract, the contract may presumably be avoided by the party which has not sought exemption under Article 79 supposing it can be evidenced that the breach amounts to a fundamental one. In this way, this very party is no longer obliged to execute the contract as the obligations have legally been discharged. To supplement, under Article 79, para. 5, either party retains the right to claim remedies other than damages. Inferring from the wording, it seems that any party's right to request performance, for example, under Article 46 ("The buyer may require performance by the seller of his obligations unless the buyer has resorted to a remedy which is inconsistent with this requirement.") or under other pertinent Articles is preserved. Nevertheless, what does not completely add up and flies in the face of this argumentation is that demanding specific performance would be completely unfeasible and futile if, for example, the goods had been demolished.[88] What is more, Article 28 which is of utmost significant in this respect ("If, in accordance with the provisions of this Convention, one party is entitled to require performance of any obligation by the other party, a court is not bound to enter a judgement for specific performance unless the court would do so under its own law in respect of similar contracts of sale not governed by this Convention.") should form a firm legal basis for a court to reject a specific performance as national laws may not necessarily attach additional obligations to the exempted party.[89] In the same breath, the mere application of Article 79, para. 1, itself should foil such an attempt. On a final note, the legal effects of Article 79 may be rendered inapplicable by dint of Article 6, which reads as follows: "The parties may exclude the application of this Convention or, subject to article 12, derogate from or vary the effect of any of its provisions." Principally, the parties may voluntarily decide to depart from the protective umbrella of Article 79, which makes abundant sense in relation to the incorporation of a force majeure clause into the contract. Providing that Article 79 has not explicitly been ruled out by the parties, inclusion of this specific provision might be indicative of the fact that the parties wish to have Article 79 coupled with the clearly defined situations in the clause. Besides, this might well signify the intention to constrain the effect of Article 79 to the situation listed explicitly in the respective clause, and indirectly derogate from Article in question.[90]

[88] Honnold, O., J., Flechtner, M., H. 2009. *United Law for International Sales under the 1980 United Nations Convention*. 4th Edition. Kluwer Law International, 2009, p. 641.
[89] Lookofsky, J. 2012. *Understanding the CISG (Worldwide) ed*. Kluwer Law International, 2012, p. 139.
[90] Gillette, C., Walt, S. 2016. *The UN Convention on Contracts for the International Sale of Goods: Theory and Practice*. Cambridge: Cambridge University Press, 2016, p. 336.

2.3.3. Conformity of goods

By way of introduction, an insinuation has been made to the fact that goods must conform to specific standards when being subject to commercial transactions. This line of reasoning is mirrored in Article 35, according to which: "The seller must deliver goods which are of the quantity, quality and description required by the contract and which are contained or packaged in the manner required by the contract.", and whereby the pressure is exerted on the seller to prevent non-compliance. This Article in question expounds at length on various requirements of the goods as stipulated in the contract that must be satisfied, so the buyer is protected, to say nothing of the fact that it is essential not to deviate from the conditions in the subsequent paragraph. The obligation in Article 35 para. 2 is an inherent part of a contract through the application of the CISG, and thus not explicitly incorporating it in the contract does not mean it is not applicable.[91] On the face value, the seller runs the risk of dire legal repercussions supposing the goods delivered do not meet the listed compliance criteria. Testimonial to this fact is the following Article pursuant to which: "The seller is liable in accordance with the contract and this Convention for any lack of conformity which exists at the time when the risk passes to the buyer, even though the lack of conformity becomes apparent only after that time." (Article 36). Another thick layer of a shielding cushion is vested in Articles 41 and 42 which elaborate on further reasons why is a certain type of the seller's conduct is not synonymous with the word "compliance".

Subsequently, a whole host of contractual terms in Article 35 (e.g. quantity, quality, or description) that the seller must fulfil lay the legal basis for what is named a warranty. Rather than being implied as in the second paragraph, this respective Article expressly warrants conformity. The underlying rationale for this is simple yet inherently intrinsic for the over context – as a rule, the buyer's lack of sufficient knowledge about the transferred goods makes it susceptible to being beguiled by savvy businessmen who may not be too keen to divulge relevant information. All issues being equal, this Article serving as a buffer against the mutual disproportion between the vendor and the customer, sways the balance more in favour of the purchaser. The incorporation of a wide plethora of characteristics seems straightforward; nonetheless, the significance of the respective terms may occasionally be indistinct as, in

[91] Gillette, C., Walt, S. 2016. *The UN Convention on Contracts for the International Sale of Goods: Theory and Practice*. Cambridge: Cambridge University Press, 2016, p. 211.

practice, the denominations "description" and "quality" may be used interchangeably.[92] Obviously, a number of physical characteristics meet both of these criteria – e.g. wood. By way of clarification, when ascertaining, for instance, the quality of the goods, the benchmark for this measurement is, as can be perceived from the wording of the first paragraph of Article 35, the contract delineating deal-specific terms. Accordingly, everything that does not correspond with the requirements specified in the agreement, even by a razor-thin margin, is tantamount to nonconformity in spite of the fact it may presumably be for the benefit of the buyer (e.g. a larger quantity of goods than specified).[93] To reiterate, as has been mentioned, it is completely inconsequential how diminutive, or conversely, immense the inconsistency is to reach a conclusion of the alleged nonconformity – nonetheless, the extent of these disparities is critical for the determination of a satisfactory remedy.

Turning to Article 35, para. 2, as opposed to the preceding paragraph, this particular one encompasses a catalogue of implied warranties. First of all, Article 35, para. 2 (a) mandates that goods have to be "fit for the purposes for which goods of the same description would ordinarily be used." It would be no surmise to maintain that by incorporating this implied condition, the balance is repeatedly redressed in favour of the buyer who may not be sensible of particularities of some novel or unfamiliar products. Through the allocation of more responsibilities, the possible losses incurred because of fraudulent conduct are shifted away from the purchaser onto the vendor.[94] In contrast to the condition in Article 35, para. 2 (b), this condition utilises different terminology; namely, it requires the particular purpose instead of the ordinary purpose – the difference underlying this diverging terminology is that while the former requires examination with a more personal approach, the latter revolves more or less around the purpose used by the public at large. Taking Article 35, para. 2 (b) next, under this provision goods have to be: "fit for any particular purpose expressly or impliedly made known to the seller at the time of the conclusion of the contract, except where the circumstances show that the buyer did not rely, or that it was unreasonable for him to rely, on the seller's skill and judgment." In effect, "Article 35(2)(b) deals with the situation where the buyer has superior information about its particular purpose for the good while the seller has superior information about the qualities of

[92] Henschel, R. F. 2005. *The Conformity of Goods in International Sales: An Analysis of Article 35 in the United Nations Convention on Contracts for the International Sale of Goods*, 2005, p. 159.
[93] *See* the case *Acrylic blankets case*, 1997, Appellate Court Koblenz (Germany, 31 January 1997, available at: https://cisgw3.law.pace.edu/cases/970131g1.html).
[94] Gillette, C., Walt, S. 2016. *The UN Convention on Contracts for the International Sale of Goods: Theory and Practice*. Cambridge: Cambridge University Press, 2016, p. 222.

the good at issue and thus of the suitability of the good for the proposed use."[95] Nevertheless, it is plain beyond any equivocation that this Article is challenging to decipher. In simple terms, it could with some degree of justification be concluded that the fundamental principle of Article 35, para. 2 (b), is to signal the client of the seller that it is in its best interest of the merchant to pass all relevant information about the purpose of the purchase to it. Consequently, this might prove to be beneficial for the seller itself as a more than significant margin could reduce its expenditure. This "preliminary" sharing of information may also incentivise the buyer to acquire a different product, possibly higher-priced, therefore generating additional monetary gains for the seller. In this manner, any false representation may reflect badly and rebound on the vendor – after all, the liability under Article 35, para. 2 (b), should present enough stimuli, not to prey on not-well-versed customers. Beyond what has been mentioned, representations may not only be made through explicit communication channels but may also be tacitly channelled. In the latter case, there is no further requirement to duplicate the purpose in the concluded sales contract.[96] Observing this provision through a rear-view mirror, the scales would be reversed if the buyer with an intimate knowledge of merchandise did not base its decision on the recommendation of the selling person – in this situation, there is no intrinsic significance to hold the seller accountable. With reference to Article 35 para. 1 it is not improbable that the once stated purpose under Article 35 para. 2 (b) will be considered a description anticipated by the prior paragraph going forward.[97] To emphasise one more time, it has been said that the parties may apply Article 6 to their contract whereby it would also be possible to depart from individual provisions of the CISG. Thus, it is not beyond comprehension that parties derogate from the utilisation of Article 35 and consequently disclaim obligation arising therefrom. The very wording of Article 35 bears witness to that assertion as it contains: "Except where the parties have agreed otherwise (...)".

On top of what has been mentioned, under Article 35 para. 3: "The seller is not liable under subparagraphs (a) to (d) of the preceding paragraph for any lack of conformity of the goods if, at the time of the conclusion of the contract, the buyer knew or could not have been unaware of such lack of conformity." As can be perceived, by virtue of this last paragraph, the risk

[95] Gillette, C., Walt, S. 2016. *The UN Convention on Contracts for the International Sale of Goods: Theory and Practice*. Cambridge: Cambridge University Press, 2016, p. 233.
[96] *See* the case *Globes case*, 2002, District Court München (Germany, 27 February 2002, available at: http://cisgw3.law.pace.edu/cases/020227g1.html).
[97] Honnold, O., J., Flechtner, M., H. 2009. *United Law for International Sales under the 1980 United Nations Convention*. 4th Edition. Kluwer Law International, 2009, p. 336.

allocation is shifted back onto the buyer since it is presumed that if the customer knew or could not have been unaware of the lack of conformity, the formerly mentioned deprivation of information is dispelled. As it is customary, the debate is ongoing regarding the meaning of some of the terms contained in this exemption. In respect of the meaning of "could not have been unaware", this theoretical construct which is in essence nothing short of double negative is, on the one hand, deemed in academia to be satisfied supposing the buying party is in remiss of its duty to transact the sale with due care[98]; other academicians would, on the other hand, maintain that mere negligence is not a sufficient bar to gauge the limitations of the term "could not have been unaware" and a more stringent level (e.g. the proof evidencing the presence of a fault) should be applied nonetheless.[99] Beyond the realm of this ivory tower, in the judgement handed down in the not-to-distant past, the former alternative has been upheld.[100]

Another aspect worth expatiation upon is Article 41 under which: "The seller must deliver goods which are free from any right or claim of a third party unless the buyer agreed to take the goods subject to that right or claim. However, if such right or claim is based on industrial property or other intellectual property, the seller's obligation is governed by article 42." In substance, Article 41 provides that the goods rendered must not be unencumbered by any rights or claims of a third party (for instance, a lien) which would consequently unduly interfere with the buyer's right to enjoy the goods.[101] The nature of the title to the goods is in the most part determined and recognised by respective nationals law as the CISG does not make allowances to this "recognition process ". In parallel with other implicit warranties as mentioned earlier, in spite of the fact that it is not stated expressis verbis in this Article, an implied warranty is granted to the buyer through this Article. The Article at hand subtly bifurcates between rights and claims and considers them to be isolated, separate categories. While a right is built on the legal basis, it may seem because of this overt diversification that under the term "claim" a veritable cornucopia of claims which foundations are not vested in legal interests might also with some added justification be subsumed. To reinforce the legal protection embedded in Article 41, a propping pillow is contained in Article 42 as it offers an additional cushion against the possible claims arising, for instance, from intellectual property rights. The liability contained

[98] Henschel, R. F. 2005. *The Conformity of Goods in International Sales: An Analysis of Article 35 in the United Nations Convention on Contracts for the International Sale of Goods*. 2005, pp. 293 – 295.
[99] Schwenzer I. 2010. *Schlechtriem & Schwenzer: Commentary on the Convention on the International Sale of Goods (CISG)*. 3rd Edition. Oxford University Press, 2010, p. 586.
[100] *See* the case *Used car case*, 1996, Appellate Court Köln (Germany, 21 May 1996, available at: http://cisgw3.law.pace.edu/cases/960521g1.html).
[101] *See* Article 4 of the CISG.

therein is not as broad as in the prior Article, meaning that it can only be applied if the seller "knew or could not have been unaware" of these rights at the moment of the contract formation. To go even further, accountability for any such claims is limited to the degree that only in case these rights are exercised "under the law of the State where the goods will be resold or otherwise used, if it was contemplated by the parties at the time of the conclusion of the contract that the goods would be resold or otherwise used in that State" or "in any other case, under the law of the State where the buyer has his place of business." Beyond certainty, this territorial limitation not contained in the previous Article curtails the liability the seller bears should any intellectual property related dispute arise by a considerable margin.[102] Moreover, according to Article 43: "The buyer loses the right to rely on the provisions of article 41 or article 42 if he does not give notice to the seller specifying the nature of the right or claim of the third party within a reasonable time after he has become aware or ought to have become aware of the right or claim." As far as the nature of notice is concerned, the specific right or claim appertaining to a third party must be specified therein; otherwise, it might be contested, it is vague. Additionally, the criterion of a "reasonable time" must be observed to satisfy the conditions of proper notice. In the event of outside-of-control factors, Article 44 stipulates that: "Notwithstanding the provisions of paragraph (1) of article 39 and paragraph (1) of article 43, the buyer may reduce the price in accordance with article 50 or claim damages, except for loss of profit, if he has a reasonable excuse for his failure to give the required notice." In effect, the liability of the buyer is capped by on the condition it can be proven that there was an exogenous factor which adversely affected its ability to give notice in a timely manner.

In the final sequence of this chapter, it has been referred to the fact that once the nonconformity of the goods has been established, there are a plethora of rights that may be asserted. Granted, to be even able to exert these rights, the evidence must exist to substantiate the existence of the discrepancy. When subjected to judicial review, there were cases in which courts made used of respective national laws to determine the allocation of the burden of proof.[103] Nevertheless, under Article 4: "This Convention governs only the formation of the contract of sale and the rights and obligations of the seller and the buyer arising from such a contract. In particular, except as otherwise expressly provided in this Convention, it is not concerned with: (...)". On

[102] Gillette, C., Walt, S. 2016. *The UN Convention on Contracts for the International Sale of Goods: Theory and Practice*. Cambridge: Cambridge University Press, 2016, p. 256.
[103] The case *Powdered milk case*, 2002, Supreme Court (Germany, 9 January 2002, available at: http://cisgw3.law.pace.edu/cases/020109g1.html).

a more thorough probe into the matter, the term "obligations" which are expounded in this Article may defy the notion that the CISG does not address this issue at all. Conceivably, under the umbrella of the obligations of the buyer might easily be included the burden of proof. Reading this Article in conjunction with Article 7, the conclusion that the burden of proof lies with the buying party might plausibly be sustained. On the obverse side of the coin, the CISG clearly indicates that it governs only the contract of sales which, as distinct from national procedural rules, should in an ordinary course of events not attach procedural rules to the concerned parties. Resorting to what has been said before, it is reasonable to contend that the allocation of burden-of-proof obligations rests with the respective legislation of the Contracting State.[104]

2.3.3.1. Passing of the risk

To begin with, it is quite common that the goods that are shipped, for instance by sea, are lost or devalued somewhere in transit. For this purpose, Article 66 makes allowances for this factual scenario as it reads as follows: "Loss of or damage to the goods after the risk has passed to the buyer does not discharge him from his obligation to pay the price, unless the loss or damage is due to an act or omission of the seller." The passage of risk which is elaborated therein in principle means that the buyer's obligation to pay the purchase price is preserved even if the goods have been lost on the condition that the risk has been shifted onto him. Prior to the moment of passing and in case of any, for instance, damage, the buyer is relieved of its obligation to pay the price under Article 53 and will not be in arrears. It would be unlike the CISG if there were not any exceptions – talking about this, Article 66 diverges from its meaning as it states the following: "unless the loss or damage is due to an act or omission of the seller". From the literal meaning of this sentence, it can be assumed that proviso, for instance, the vendor acted in breach of its duty to provide a sufficient layer of packing to the goods, and consequently, the goods would be depreciated in value, this would beyond all dispute prefigure the satisfaction of the formerly mentioned exclusion. Irrespective of this model case, it is essential to realise in this regards that the insufficient-packing scenario is covered by implied terms, namely Article 35, para. 2 (d). Granted there were any deviations from this duty, the liability in the following Article, alluding to Article 36, would be brought into effect.

[104] Gillette, C., Walt, S. 2016. *The UN Convention on Contracts for the International Sale of Goods: Theory and Practice*. Cambridge: Cambridge University Press, 2016, p. 263.

In respect of the passing of risk, it is vital to ascertain the exact moment when the risk of loss passes – this has a considerable bearing on effects vested in Article 66. To facilitate this identification, the answers are incorporated in Articles 67 through 69. For instance, under Article 67, para. 1: "If the contract of sale involves carriage of the goods and the seller is not bound to hand them over at a particular place, the risk passes to the buyer when the goods are handed over to the first carrier for transmission to the buyer in accordance with the contract of sale. If the seller is bound to hand the goods over to a carrier at a particular place, the risk does not pass to the buyer until the goods are handed over to the carrier at that place. The fact that the seller is authorised to retain documents controlling the disposition of the goods does not affect the passage of the risk." Perceiving from the foregoing, the determination of the precise time should not pose any significant stumbling block although this might become easily more involved should the parties retreat to Article 6 and derogate from the rules elaborated in the CISG. Under these circumstances, it is indispensable to supplement those default rules as contained in the CISG by another set of provisions which would serve the purpose. In order to attain this objective, it would not be unconventional if the contracting parties were to opt for the implementation of the International Commercial Terms, subtly named the Incoterms which regulate profusion of commercial issues habitually present in business contracts.[105] The underlying rationale of these terms rests with the fact that they form an established class of rules to which it is adhered in the business-orientated environment where goods are usually conveyed across borders. In brief, these terms grant certain rights which are differentiated and lumped into several designations (e.g. CIF or DAT), and these are further diversified into two separate groups depending on the type of a vehicle carrying out the transport (i.e. by sea and the others). In practice, the interplay between the CISG and the Incoterms has been subject to judicial review with the result being that providing these terms are an inherent part of an international sales contract it may either supersede those provisions of the CISG regulating the comparable question or it may merely supplement it[106]. All in all, the outcome is that some parts of the CISG are strayed away from entirely or, inversely, others are augmented. Interestingly enough, it does not have to be explicitly stated that the term used in the contract is one of the Incoterms – if the wording of it takes after any of the Incoterms, courts would usually refer to them when

[105] Gillette, C., Walt, S. 2016. *The UN Convention on Contracts for the International Sale of Goods: Theory and Practice*. Cambridge: Cambridge University Press, 2016, p. 276.

[106] *See* the case *Bedial v. Müggenburg*, 1995, Appellate Court (Argentina, 31 October 1995, available at: http://cisgw3.law.pace.edu/cases/951031a1.html).

trying to construe the essence of the agreement in question[107] as pursuant to the second paragraph of Article 9: "The parties are considered, unless otherwise agreed, to have impliedly made applicable to their contract or its formation a usage of which the parties knew or ought to have known and which in international trade is widely known to, and regularly observed by, parties to contracts of the type involved in the particular trade concerned." Being firmly grounded in the postulate that the provisions in the contract are interpreted in accordance with usages in international trade, then the reference to the Incoterms in this regard would not be far-fetched.[108]

By way of complementing the former address, Article 69, para. 1, mandates that: "In cases not within articles 67 and 68, the risk passes to the buyer when he takes over the goods or, if he does not do so in due time, from the time when the goods are placed at his disposal and he commits a breach of contract by failing to take delivery." This Article puts flesh on the bones of the principles governing the passage of the risk as it stipulates additional conditions supposing the criteria for the application of the previous Articles, meaning Articles 67 and 68, have not been met. In substantiation of this argumentation, this is even more true when it has been negotiated and decided that the buying party has taken upon itself to collect the goods from the selling party. In this factual scenario and in line with Article 69, the risk passes as soon as the goods have been retrieved by the purchasing person – this naturally means that the buyer has to be in possession of these goods. In essence, not until the goods will leave the real sphere of the seller's authority, is the risk of loss shifted onto the purchaser. The following paragraph (i.e. Article 69) goes further and deals with a "buyer-is-bound-to-take-over-the-goods-at-a-place-other-than-a-place-of-business-of-the-seller" situation – for instance; the goods are delivered to the buyer by the vendor itself. Thus, in order to wipe the slate clean, as it were, this Article allocates the risk in a different manner – in this instance, "the risk passes when delivery is due and the buyer is aware of the fact that the goods are placed at his disposal at that place." (Article 69 para. 2). By this judicious selection of the words contained in this paragraph, the situation in which the goods are deposited with a third party from the vendor is covered.[109]

---

[107] *See* the case *Autoservicio Mayorista La Loma S.A. v. Quiebra v. Incidente de Verificacion (Cosvega SL)*, Juzgado Comercial [Commercial Court] Buenos Aires, (Argentina, April 2003, available at: http://cisgw3.law.pace.edu/cases/030400a1.html).
[108] *See* the case *BP Oil Int'l Ltd. v. Empresa Estatal Petroleos de Ecuador*, 332 F.3d 333 (5th Cir. 2003).
[109] Bianca, M., C., Bonell, M., J., eds. 1987. *Commentary on the International Sales Law*. Giuffrè: Milan, 1987, Art. 69, para. 2.4.

2.3.3.2. Remedies

To introduce the topic, the concept of remedies in the CISG has slightly been touched in the context of previous chapters. Against this backdrop, it is of paramount importance to address the matter in great detail in order to portray a panorama of various set of remedies contained in the CISG – and indeed, this chocolate-box comprises different flavours. This wide spectrum of remedies embraces as diverse a range of corrective measures as avoidance or price reduction. In this respect, it is noteworthy to mention that whereas specific remedies may only be claimed in a court of law (e.g. this mainly applies to damages as their amount must be determined by the court), the reverse is true for the others (e.g. the price reduction falls within the definition of this bracket) which might be obtained single-handedly through the intervention of the party which is not in contravention of its contractual obligations.

Secondly, under Article 74: "Damages for breach of contract by one party consist of a sum equal to the loss, including loss of profit, suffered by the other party as a consequence of the breach. Such damages may not exceed the loss which the party in breach foresaw or ought to have foreseen at the time of the conclusion of the contract, in the light of the facts and matters of which he then knew or ought to have known, as a possible consequence of the breach of contract." Deducing from the aforementioned, under this Article it is conceivable to claim damages which comprise: "a sum equal to the loss, including loss of profit, suffered by the other party as a consequence of the breach." After breaking down this Article into smaller fragments, it is patently obvious that it provides for full compensation, more specifically to achieve the state the party would have been in had the breach never materialised – in other words, it is presumed that through the provision of full compensation, the status of the aggrieved party would have been the same as if the obligations under the contract had been fulfilled.[110] The concept of full compensation also comprises incidental and consequential damages ("a consequence of the breach"), and therefore serves as full-fledged legal protection for the injured party[111]; nevertheless, punitive damages are not available under the CISG and may presumably be awarded under the respective national laws of the Contracting States. Even though this Article has undoubtedly a beneficial effect, at no point does this provision prescribe how to

[110] Gillette, C., Walt, S. 2016. *The UN Convention on Contracts for the International Sale of Goods: Theory and Practice*. Cambridge: Cambridge University Press, 2016, p. 339.
[111] *See* the case *Skid chains and adaptors case*, 2008, Appellate Court St. Gallen (Switzerland, 13 May 2008, available at: http://cisgw3.law.pace.edu/cases/080513s1.html).

evaluate the extent of the loss. This becomes more intricate as it is coupled with the fact that no criteria for the application of Article 74 are elaborated therein. Looking at these issues from a much broader perspective, it may with justification be asserted that the rule contained in Article 74 represents general principle whereby the injured party may lay its legal claims. In substantiation of this argumentation, other provisions of the CISG provide for a more detailed outline of the conditions that are overlooked by the wording of Article 74, for instance, under Article 61 "if the buyer fails to perform any of his obligations under the contract or this Convention, the seller may: (a) exercise the rights provided in articles 62 to 65; (b) claim damages as provided in articles 74 to 77." Admittedly, the following Articles 75 and 76 delineate the calculation of damages; nonetheless, this method is only applicable in the event of the contract avoidance.[112]

Another point of interest, pursuant to Article 50 it is possible to have the purchase price decreased, which is a rather common form of relief in continental jurisdictions.[113] The rationale behind the price reduction is vested in the reasoning that it is essential to offset, and thus reduce the disproportion between the performance that should have been provided under the valid contract and the performance that has actually been rendered. Alternatively, in some cases, it is contingent on the party's decision whether it would like to pursue the price reduction or claim damages as, for instance, Article 45 bifurcates between a reduction in price and damages. By inference, since it could clearly be demonstrated that a price reduction and damages are two separate forms of remedies, it must be noted that, for example, in spite of the fact that the party may not be liable under Article 79, the damaged party may still require a price reduction as pursuant the fifth paragraph of this Article: "Nothing in this article prevents either party from exercising any right other than to claim damages under this Convention." More interestingly, there is nothing in the CISG that would prevent the aggrieved party from claiming damages, and simultaneously from exercising the right to reduction of price. Additionally, Article 45, para. 2, upholds this notion as it provides for the cumulation of various remedies. Nonetheless, to prevent overlapping claims, it is not unfeasible to substantiate the entitlement to both damages and a reduction in price on the very same legal basis (e.g. on the non-compliance of

[112] Gillette, C., Walt, S. 2016. *The UN Convention on Contracts for the International Sale of Goods: Theory and Practice*. Cambridge: Cambridge University Press, 2016, p. 340.
[113] Zimmerman. R. 1990. *The Law of Obligations: Roman Foundations of the Civilian Tradition*. Cape Town: Juta, 1990, pp. 327 – 329.

goods with the specifications) – this would eventually result in a situation that the injured party would receive a sum of money for the identical breach twice.[114]

Over and above that, pursuant to Article 62: "The seller may require the buyer to pay the price, take delivery or perform his other obligations, unless the seller has resorted to a remedy which is inconsistent with this requirement." Upon the examination of the language of this Article, it might be concluded that the seller itself, not through the intervention of a law court, is at liberty to demand a specific relief (e.g. the payment of the price) under this Article. For the reason that specific relief under this Article is not tantamount to damages, the application of mitigation as provided for by Article 77 in damages situations, is not possible here.[115] The justification vested in this paragraph is that it makes an effort to oblige the breaching party to carry out its obligations under the concluded contract. Irrespective of what has been mentioned, this is only true so long as the seller has not put to use other provisions containing different remedies which would by nature displace the application of this Article. To take an example, once the party has managed to avoid the contract, it is not viable and even doable to ask for specific performance. Referring to the previous address, avoidance is a euphemism for the termination of a contract – in other words, the moment the party has avoided the contract marks its very demise. Thereby, there would be no use of enforcing it through the application of a specific relief when the contractual relationship has already ceased to exist; similarly, the same underlying reasoning applies to a price reduction for the dereliction of some the seller's obligations. "Specific performance would force the seller to perform an obligation, even though it already has compensated the buyer for the failure to perform. On the other hand, an injured buyer who has not acted to avoid the contract or reduce the price has not “resorted” to a remedy at all. Accordingly, Article 46(1) does not prevent the buyer from requesting specific performance as an alternative to avoidance or a price reduction."[116] On the other hand, what could be consistent with this Article in question is damages recovery whereby merely the compensation for loss incurred following the particular breach is rendered.[117]

---

[114] Gillette, C., Walt, S. 2016. *The UN Convention on Contracts for the International Sale of Goods: Theory and Practice*. Cambridge: Cambridge University Press, 2016, p. 360.
[115] Honnold, O., J., Flechtner, M., H. 2009. *United Law for International Sales under the 1980 United Nations Convention*. 4th Edition. Kluwer Law International, 2009, p. 598.
[116] Gillette, C., Walt, S. 2016. *The UN Convention on Contracts for the International Sale of Goods: Theory and Practice*. Cambridge: Cambridge University Press, 2016, p. 370.
[117] Honnold, O. 1989. *Documentary History of the Uniform Law for International Sales:The Studies, Deliberations and Decisions That Led to the 1980 United Nations Convention with Introductions and Explanations*. 1st Edition, Springer, 1989, p. 426.

Resuming the narration on damages, Article 75 provides for a substitute-performance calculation of damages which comprises "the difference between the contract price and the price in the substitute transaction as well as any further damages recoverable under article 74." Furthermore, along with damages under this Article, it is possible to claim additional damages which arise, for instance, in relation to the substitute transaction in question and this is covered by the reference to Article 74. The requirements for the satisfaction of the conditions contained in this Article are not undemanding, in any case. It might be justifiable to assert that the concept of a "reasonable manner" as contained in the CISG makes insinuations to the fact that reselling does not conform to the terms of the sales contract to the letter; nevertheless, the limitations are examined on a case-by-case basis. For example, if the goods were resold for a substantially lower price, this might signal nonconformity of this conduct in relation to the criteria stipulated by Article 75.[118] Likewise, time constraints mandated by this provision have to be interpreted in respect of specific market conditions. "If, for example, a buyer believes that market prices will decline after the breach, the buyer may wait before entering into a cover transaction in the expectation that it will be able to obtain the same goods at a price lower than the contract price. If prices do in fact decline, the buyer will be quite pleased that the seller breached. If prices increase, however, the buyer bears no risk because it is entitled to recover the difference between the contract price and the cover price from the breaching seller. In effect, the buyer is gambling with the seller's money. The "reasonable time " requirement constrains the ability of the buyer (or the seller) to act in that manner. The concept of "reasonable time" therefore should be construed in light of its objective of reducing strategic behaviour by the aggrieved party. That is, what constitutes a reasonable time in any case should depend at least in part on the volatility of prices in the relevant market."[119] On top of this, it stands to reason that supposing a proper substitute transaction has not materialised in compliance with the expectations of Article 75; it is plausible that the damages be measured under Article 76, which delineates the market-based analysis. Therefore, the terminology utilised therein ("the current price") should be construed in light of prices that are "prevailing at the place where delivery of the goods should have been made or, if there is no current price at that place, the price at such other place as serves as a reasonable substitute, making due allowance for differences in the cost of transporting the goods." (Article 76 para. 2). However, this comes with strings attached as

[118] *See* the case *Frozen bacon case*, Appellate Court Hamm (Germany, 22 September 1992, available at: http://cisgw3.law.pace.edu/cases/920922g1.html).
[119] Gillette, C., Walt, S. 2016. *The UN Convention on Contracts for the International Sale of Goods: Theory and Practice*. Cambridge: Cambridge University Press, 2016, p. 381.

goods must be evaluable so that the market price may be set;[120] if not, Article 76 is off-limits and Articles 74 and 75 come instead. In conjunction with Article 74, it is also possible to recover, for instance, consequential damages.[121]

2.4. Perspective of the CISG in Austria

As an introduction, I have chosen to elaborate on the application of the CISG in Austria due to the abundance of case law it provides. This perfectly complements the previous more or less theoretical approach delineating core principles and provisions contained in this legal vehicle. Moreover, it lays the basic foundation of what might be the manner in which the CISG is applied in the European Union. Admittedly, there is a wide array of different countries in the European Union providing for a number of case law; however, for the sake of brevity, it would run counter to the underlying strategy of this thesis to introduce all the relevant case throughout the European Union. Hence, to epitomise this case-law pattern, it has been opted for the Austrian approach.

Furthermore, there is no consistent approach to the CISG among the practitioners in Austria. While some of them are quite resolute in not implementing its provisions to their contracts by contracting it out, others do not follow suit and make the CISG applicable to their contracts.[122] In contrast to these observations, the Austrian courts have rendered a considerable number of judgements in the CISG-related matters. As could be perceived, the CISG employs a multitude of flexible terms which are in most part not defined in the CISG precisely at all or the CISG offers only a cursory examination into their plausible meaning, for instance, the word "fundamental breach". Having referred to this, it is of significance to point out that this poses various difficulties in relation to the determination of their meaning at national level, Austrian courts included. Actually, more preferable would be a situation in which there were specific hints of their application, as opposed to a considerable degree of latitude when it comes to applying the CISG.[123] Nonetheless, the recent development has conclusively proven

---

[120] *See* the case *Russian coal case*, 1996 (ICC Arbitration Case No. 8740 of October 1996, available at: http://cisgw3.law.pace.edu/cases/968740i1.html).

[121] Gillette, C., Walt, S. 2016. *The UN Convention on Contracts for the International Sale of Goods: Theory and Practice*. Cambridge: Cambridge University Press, 2016, p. 384.

[122] Meyer, J. 2008. *UN-Kaufrecht in der osterreichischen Anwaltspraxis*, in: 63 Osterreichische Juristen- Zeitung 792, 2008, pp. 795–7.

[123] Kerschner, F. 2010. *Zivilrecht VIII – Internationales Privatrecht*. 3rd Edition. Vienna: LexisNexis, 2010, p. 59.

competence and an aptitude of the Austrian courts for laying the foundation for the utilisation of the CISG's principles.

In respect of case law relating to the CISG in Austria, namely the formation of a contract, the notion that an acceptance which materially changes the conditions of the previous offer is considered to be a counter-offer within the meaning of Article 19 has been upheld.[124] Following this, it was found that this exact rule is somewhat elastic, meaning that every and each case should be examined on their own merits before the conclusion about a material alternation is arrived at.[125] Correspondingly, when the modification of the terms pertains, for instance, to the volume of goods that are shipped, it is essential that this be addressed individually as in specific cases this may not constitute a material modification, let alone the case in which such a change is clearly in the interest of the offering party. In the latter case, it would amount to accepting the offer rather than the proposition of a different offer under Article 19.[126]

Thirdly, it has been stated in this thesis that in its Articles 38 and 39 the CISG comprises rules that oblige the purchaser to inspect the goods for any lack of non-compliance with the contractual terms. The Austrian courts have, in this regard, resolved that the examination must be conducted in accordance with the agreement. Should this provision not be included in the contract, the established practices are to be applied to establish the manner whereby the inspection is to be conducted. Another salient fact is that in high-profile cases where great amounts of goods are transported, advice of specialists might be warranted.[127] As regards the time limit allocated for the scrutiny, this is greatly conditional upon a deluge of variables which must be seized up in the mutual interaction. While the period for the examination would definitely be shorter in cases of fruits and vegetables where food spoilage is imminent in next to no time, the different consideration would be if the case concerned goods consisting of, for instance, more durable material. The same is invariably true for cases where there is a great discrepancy between the quantity of freight.[128]

---

[124] *See* the case *Roofing material case*, 2000, Supreme Court (Austria, 9 March 2000, available at: http://cisgw3.law.pace.edu/cases/000309a3.html).
[125] *See* the case *Mono ammonium phosphate case*, 1997, Supreme Court (Austria, 20 March 1997, available at: http://cisgw3.law.pace.edu/cases/970320a3.html).
[126] *See* the case *Mono ammonium phosphate case*, 1997, Supreme Court (Austria, 20 March 1997, available at: http://cisgw3.law.pace.edu/cases/970320a3.html).
[127] *See* the case *Trekking shoes case*, 1999, Supreme Court (Austria, 27 August 1999, available at: https://cisgw3.law.pace.edu/cases/990827a3.html).
[128] *See* the case *Timber case*, 1998, Supreme Court (Austria, 15 October 1998, available at: http://cisgw3.law.pace.edu/cases/981015a3.html).

Moreover, it is an indisputable fact that the notion of fundamental breach is one of note. Irrespective of this fact, it seems that a paucity of judgements relating to this concept does not tie loose ends and leaves its certain aspects dangling freely in the legal vacuum. In one of these sparse cases, the Austrian Court advocates the hypothesis that it is up to the parties themselves to establish in their contracts the parts to be deemed of fundamental value. This ruling went all the way beyond to add that a fundamental breach is also established provided the performance of one of the parties cannot come into effect.[129] Nonetheless, it is highly debatable whether or not this can be considered an unbending legal interpretation of this Article which would without exclusions be followed in the cases to follow. To elaborate, in another case which dealt with the flawed goods delivered to the customer and these defects could not be removed for a considerable period of time prior to the moment when this proceedings was initiated before the court. Since the goods could not be resold as they might be detrimental to persons who would subsequently have used it, it was resolved that this merchandise was of substandard quality as the defects could not effectively be removed. Thus, owing to the flaws of the goods being as regular as clockwork, it was found that this amalgamation of various factors affected the buyer adversely as the goods could not be used as anticipated by the contract, and thereby, constituted a fundamental breach.[130]

With reference to a price reduction, the notable ruling of the Supreme Court of Austria concluded that the remedy in the form of a reduction in price is by no means subordinate to the avoidance of a contract as contained in Article 49. Consequently, the issue of the reduction of price to zero was raised, and it was settled that this is likely on account of measures vested in Article 50.[131] Turning attention to the avoidance of a contract, it was adjudicated that to avoid the contract it is necessary that the party availing itself of this right address a unilateral declaration[132] to the party in breach of its obligations – so the breaching party has every possibility to familiarise with it. Therefore, addressing this declaration to any other person may

[129] *See* the case *Software case*, 2005, Supreme Court (Austria, 21 June 2005, available at: http://cisgw3.law.pace.edu/cases/050621a3.html).
[130] *See* the case *Auto case*, 2006, Oberlandesgericht [Appellate Court] Linz (Austria, 23 January 2006, available at: http://cisgw3.law.pace.edu/cases/060123a3.html).
[131] *See* the case *Coffee machines case*, 2005, Supreme Court (Austria, 23 May 2005, available at: http://cisgw3.law.pace.edu/cases/050523a3.html).
[132] *See* the case *Construction equipment case*, 2004, *Oberlandesgericht* [Appellate Court] Graz (Austria, 29 July 2004, available at: http://cisgw3.law.pace.edu/cases/040729a3.html).

be regarded as inadequate.[133] In addition, when construing the concept of damages under the CISG, the conclusion was reached that it is based on full compensation whereby interests of the obligee are safeguarded as it is not suitable that it should sustain any harm in relation to its goods once the contract has been breached and, on the other hand, the consideration was attached to the interest of the counterparty, more specifically that it has, by all means, the right to enjoy the performance specified in the agreement.[134]

2.5. Perspective of the CISG in New Zealand

Referring to the previous chapter and the overall denomination of this thesis, there was a need to select a country which would delineate a more worldwide approach to the implementation of the CISG. For this purpose, New Zealand, mainly by reason of its location and the lesser amount of research centred around this country, has been the choice. In comparison to Austria, not only it is a different legal system, but the utilisation of the CISG there is not as abundant as in other countries. Therefore, the examination of the CISG application in the common law jurisdiction and the "nascent" phase of its employment in New Zealand seems to be a fertile ground to survey these interplays which might possibly lend a fresh perspective and augment the overall meaning of this thesis.

Moreover, it is an irrefutable fact that the economy of New Zealand is one of those thriving with exports constituting just around a third of its gross domestic product. While the CISG has been incorporated into the law of this Contracting State in the early 1990s in the form of a separate legal instrument – the Sale of Goods Acts 1994 to prop up the national exports, transactions limited and not crossing the boundaries of this state are governed by way of an individual act, particularly by the Sale of Goods Act 1908. Diverse as they are, it has not been subject to reviews that would strive to synchronise their values into a comprehensive legal concept; nonetheless, it has attracted the attention of some people which endeavour to address their interplay.[135] Indeed, it is a weighty topic as another Contracting State; more specifically, Australia is one of the countries with which New Zealand carries out most of its trades. Nevertheless, the CISG is considered a useful instrument when construing the law of New

---

[133] *See* the case *Auto case*, 2006, Oberlandesgericht [Appellate Court] Linz (Austria, 23 January 2006, available at: http://cisgw3.law.pace.edu/cases/060123a3.html).
[134] *See* the case *Cooling system case*, 2002, Supreme Court (Austria, 14 January 2002, available at: http://cisgw3.law.pace.edu/cases/020114a3.html).
[135] Whittington, N. 2006. *Reconsidering Domestic Sale of Goods Remedies in Light of the CISG*, in: Victoria University of Wellington Law Review, [S.l.], v. 37, n. 3, 2006, p. 421-450.

Zealand and in light of judgements discussing in this chapter, an observation might be made that there is a growing recognition of its existence.

Secondly, disregarding what has been implied above, there are particular cases concerning the global trade that merit special attention, nonetheless. Despite the fact that the cases are not directly related to the CISG, their inherent value is vested in the fact that they were by way of analogy applied to contracts of sales. One of these cases concerned the interpretation of the agreement on the basis of the behaviour of its parties following the conclusion of the contract. Even though the conclusive answer has not been presented in this case, the Court, by reference to Article 8 para. 3 of the CISG foregrounded the fact that practices established between the parties might be used when the interpretation of the contract is warranted. By way of elaboration, the very same Article also provides for the conduct of the parties to form the complementary interpretative basis for the respective contract.[136] Staying with the interpretation of contracts, another case tackled the issue of construing a specific clause contained in the business agreement. Initially, it was held that the meaning of this provision should be inferred from its words which have a plain meaning. Nevertheless, this decision was subject to the judicial review by a higher court which firmly stated that the concept of a plain meaning highlighted at first instance is somewhat impaired by the objective pursued by the contract and its context; in addition, this was supplemented by external factors which suggested that this opinion was not far-fetched. Thus, the conclusion was drawn that when establishing the intention of the parties, the contract at large, and in particular, its purpose should be examined. In this regard, the reference was made to Article 8 of the CISG.[137]

Whilst in the abovementioned cases the CISG was used in a tangential manner, in the case RJ & AM Smallmon v. Transport Sales Ltd.[138], the potential of the CISG was given full rein - the CISG was employed as the substantive law. This decision is a watershed in the history of the CISG application in New Zealand as it has been the first-of-kind ruling in which the CISG was applied as the stand-alone mandatory law and consequently provided an in-depth probe into the explanation of Article 35. By the same token, the fact that sales contracts between Australia and New Zealand are regulated by the CISG was underscored in this decision. By way of

[136] *See* the case *Attorney-General v. Dreux Holdings Ltd*. 1996. 7 TCLR 617, 1996.
[137] *See* the case *Yoshimoto v. Canterbury Golf International Ltd*. 2001. 1 NZLR 523, 2001.
[138] *See* the case *RJ & AM Smallmon v Transport Sales Limited*. 2010. HC Christchurch, CIV-2009–409–000363. July 30, 2010. The decision on appeal was rendered in 2011.

elaboration, the case dealt with the commercial transaction of vehicles between an Australian company and a New Zealand company. Asserting the application of Article 35 of the CISG, the Australian enterprise which acquired these truck argued that on account of the inability to register them with competent authorities legally it was impossible to use them, and thereby they did not serve the ordinary purpose. The application of the CISG was based on the argument that both countries in question have incorporated it, and thus forms a part of their national legislation. In determining the conditions of Article 35, the Court resorted to the application of principles, among others: "As a general rule, the seller is not responsible for compliance with the regulatory provisions or standards of the importing country . . . unless: . . . (c) the seller knew or should have known of the requirements because of special circumstances."[139] Additionally, it was held that the recourse to domestic authorities was not allowed under Article 7. Consequently, the claim based on loss of profits was dismissed due to the fact "there was no express contractual warranty as to the ability to register the trucks upon arrival in Australia, and because there was no breach of Article 35(2) of the CISG."[140] On appeal, it was found that: "unless the Smallmons could show that there were particular circumstances demonstrating that the respondent knew or ought to have known of those regulatory provisions, the claim under Article 35(2) would fail. Such circumstances could include whether the seller had previously exported trucks to Australia."[141] Additionally, the homeward-trend was dismissed as it was stated that regard should not be given to domestic authorities since it is more appropriate to construe the CISG on its own merits with respect to the interpretation proposed by other international institutions dealing with the CISG – "the international authorities support the proposition that the seller will not be liable for goods that do not conform to the regulatory provisions or standards of the buyer's country unless the seller knew or ought to have known of the requirements because of special circumstances."[142] Consequently, the claim of the purchasing party was not granted as it was found that the selling party should not be held accountable for non-compliance arising from the regulatory provisions of the purchaser's

[139] *See* the case *RJ & AM Smallmon v Transport Sales Limited*. 2010. HC Christchurch, CIV-2009–409–000363. July 30, 2010, [83].
[140] DiMatteo, L., ed. 2014. *International Sales Law: A Global Challenge*. Cambridge: Cambridge University Press, 2014, p. 545.
[141] DiMatteo, L., ed. 2014. *International Sales Law: A Global Challenge*. Cambridge: Cambridge University Press, 2014, p. 545.
[142] *See* the case *RJ & AM Smallmon v Transport Sales Limited*. 2010. HC Christchurch, CIV-2009–409–000363. July 30, 2010, [46].

country, not to mention the fact that in this particular case the parties contractually negotiated that the buyer was liable for the respective conformity.[143]

3. Comparative analysis of the CISG and the UNIDROIT Principles of International Commercial Contracts

3.1. Fundamentals of the UNIDROIT Principles of International Commercial Contracts

First of all, the UPICC were devised by the UNIDROIT and were aimed at establishing a set of generally accepted rules pertaining to international trade and, in particular, to international sales contracts. Inferring from the name itself, it might eventually be said that its underlying purpose is to facilitate the unification of a great number of diverging national laws.[144] Testimonial to this fact is the statement in the introduction to the original UPICC of 1994 according to which: "For the most part the UNIDROIT Principles reflect concepts to be found in many, if not all, legal systems. Since however the Principles are intended to provide a system of rules especially tailored to the needs of international commercial transactions, they also embody what are perceived to be the best solutions, even if still not yet generally adopted."[145] The agenda behind the adoption of these principles is simple yet inherently valuable to contextualise the overall concept of this thesis – to serve as a complementary instrument in relation to the CISG. Accordingly, some of the rules as contained and elaborated in the CISG are mirrored in the UPICC, and thus provide a supplementary substance for the CISG. Interestingly enough, the drafter of the UPICC steered clear from using any terminology that is normally used at the national level and favoured the international terminology instead.[146] Thereby, the non-national character of these Principles was attached to them.

Secondly, the objective of this set of rules is conclusively demonstrated and laid down in the Preamble to them according to which: "These Principles set forth general rules for international commercial contracts. They shall be applied when the parties have agreed that their contract be

---

143 *See* the case *RJ & AM Smallmon v Transport Sales Limited*. 2010. HC Christchurch, CIV-2009–409–000363. July 30, 2010, [76].
144 Letterman, G., G. 2001. *Unidroit´s Rules in Practice: Standard International Contracts and Applicable Rules*. 1st Edition. Kluwer Law International, 2001, p. 65.
145 *See* the UNIDROIT Principles of International Commercial Contracts 1994.
146 Letterman, G., G. 2001. *Unidroit´s Rules in Practice: Standard International Contracts and Applicable Rules*. 1st Edition. Kluwer Law International, 2001, p. 67.

governed by them.(*[147]) They may be applied when the parties have agreed that their contract be governed by general principles of law, the lex mercatoria or the like. They may be applied when the parties have not chosen any law to govern their contract. They may be used to interpret or supplement international uniform law instruments. They may be used to interpret or supplement domestic law. They may serve as a model for national and international legislators."[148] Having regard to the foregoing, it might be said that the goal of these principles is to lay the firm foundations for the universally applicable rules that would be employed all around the world notwithstanding the discrepancies in the respective state laws.[149] The introduction to the UPICC enacted in 1994, which reads as follows: "The objective of the UNIDROIT Principles is to establish a balanced set of rules designed for use throughout the world irrespective of the legal traditions and the economic and political conditions of the countries in which they are to be applied. This goal is reflected both in their formal presentation and in the general policy underlying them."[150], bears witness to the foregoing.

Thirdly, the UPICC are, in essence, utilised to fill the possible interpretative lacunae that might arise if the parties opt, for example, for the CISG to be applicable to their international contract of sales.[151] Despite the fact that they are meant to be soft law, meaning they are not a binding set of legal provisions, it should be specifically noted that the contracting parties might make use of these rules and apply them to their contracts; nevertheless, the regard must be had to the limitation from within which is contained in Article 1.4 of the UPICC: "Nothing in these Principles shall restrict the application of mandatory rules, whether of national, international or supranational origin, which are applicable in accordance with the relevant rules of private international law."

---

[147] "Parties wishing to provide that their agreement be governed by the Principles might use one of the Model Clauses for the Use of the UNIDROIT Principles of International Commercial Contracts (see www.unidroit.org/instruments/commercialcontracts/upicc-model-clauses). ", in: the Preamble to the UNIDROIT Principles of International Commercial Contracts 2016.

[148] *See* the Preamble to the UNIDROIT Principles of International Commercial Contracts 2016.

[149] Letterman, G. G. 2001. *Unidroit´s Rules in Practice: Standard International Contracts and Applicable Rules*. 1st Edition. Kluwer Law International, 2001, p. 66.

[150] *See* the Introduction to the UNIDROIT Principles of International Commercial Contracts 1994.

[151] Letterman, G. G. 2001. *Unidroit´s Rules in Practice: Standard International Contracts and Applicable Rules*. 1st Edition. Kluwer Law International, 2001, p. 68.

3.2. Comparative analysis

3.2.1. Party autonomy

From the beginning, it has been abundantly expatiated upon in this thesis that the parties to a contract may by reason of Article 6 derogate from the CISG and demonstrate their party autonomy which is a principle deeply embedded in a more general guarantee – freedom of contract. "The basic objective of party autonomy is not the exclusion of the uniform law, but the exercise of the freedom of the contracting parties to choose the law applicable to their contractual relationship. In this connection, what is important is the extent of the contracting parties' freedom of choice."[152] In essence, a similar legal plank is also entrenched in the UPICC, namely in Articles 1.1 ("The parties are free to enter into a contract and to determine its content") and 1.5 ("The parties may exclude the application of these Principles or derogate from or vary the effect of any of their provisions, except as otherwise provided in the Principles."). It seems that this tenet of the Commercial Law as clarified by the UPICC may be a useful aid in furthering the interpretation of the CISG. Similarly, neither the CISG nor the UPICC do in certain terms delineate the way in which the applicable law to contracts should be defined. On the other hand, the synergy might be found in the fact that they both provide for the option either of a complete exclusion or of a derogation from specific provisions.[153] Nonetheless, the discretion of the parties in relation to the application of freedom of contracts is not unconstrained since it is limited from within – the CISG and the UPICC give regard to this fact. If parties take a decision not to make use of the CISG or the PICC whatsoever, there are no inherent limitations[154]; however, mandatory domestic provisions governing the contract should be observed in that case.[155] Conversely, in case of the exclusion of some of their parts, it is disallowed to displace those provisions of the CISG which are deemed mandatory[156] or mandatory provisions of the law which shall regulate the contract in the event the parties have

[152] Felemegas, J. Ed. 2007. *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: Cambridge University Press, 2007, p. 43.
[153] *See* the case *SA P. v. AWS*, 2002, District Court Namur (Belgium, 15 January 2002, available at: http://cisgw3.law.pace.edu/cases/020115b1.html)
[154] Ferrari, F. 1995. *Specific Topics of the Cisg in the Light of Judicial Application and Scholarly Writing*, in: 15 Journal of Law and Commerce, 1995.
[155] Schlechtriem, P. 1986. *Uniform Sales Law: The UN-Convention on Contracts for the International Sale of Goods*. Mainz, 1986.
[156] *See* Article 12 of the CISG according to which: "Any provision of article 11, article 29 or Part II of this Convention that allows a contract of sale or its modification or termination by agreement or any offer, acceptance or other indication of intention to be made in any form other than in writing does not apply where any party has his place of business in a Contracting State which has made a declaration under article 96 of this Convention. The parties may not derogate from or vary the effect of this article. "

not taken advantage of the abovementioned autonomy.[157] As far as the CISG is concerned, only with Article 12, it is abundantly clear that the parties may not exclude this provision should they decide to apply the CISG to their sales contract.[158]

Secondly, there is still a considerable proportion of diverging opinions with one side of the argument claiming that only an express derogation under Article 6 conforms to its condition[159]; whilst the others claim to the contrary – they endorse the notion that also an implied derogation is possible under Article 6.[160][161] To elaborate, there are two lines of reasoning in relation to the explicit derogation from the CISG; while the first understates the fact that only an expressly given statement regarding the derogation from Article 6 ensures the uniformity of application of the CISG, the second one grounds its reasoning in Article 7 as in this Article the principle of fairness is vested. As a consequence, this principle denotes that both contracting parties should be equal in their rights.

Thirdly, the proponents of the second view – that Article 6 may be effected implicitly[162] would allude to the overall meaning of Article 6 and advocate the notion that had there been the determination to exclude an implicit-exclusion provision; this very Article would have been drafted in a different manner. By inference, it might therefore tentatively be concluded that providing Article 6 does not prohibit an implicit exclusion; the reverse must inevitably be allowed.[163] In more detail, the next argument supporting this line of argumentation is that it is a well-established practice in the international trade under which not only an explicit statement but also an implied one serves this particular purpose.[164] Practically speaking, the CISG could

[157] Schlechtriem, P. 1986. *Uniform Sales Law: The UN-Convention on Contracts for the International Sale of Goods*. Mainz, 1986.
[158] Enderlein, F., Maskow, D. 1992. *International Sales Law: United Nations Convention on Contract for the International Sale of Goods*. Oceana Publications, 1992.
[159] Murphy, M., T. 1998. *United Nations Convention for the International Sale of Goods: Creating Uniformity in International Sales Law*, in: 12 Fordham Int'l. L.J, 1998, pp. 727–750.
[160] Schlechtriem, P. 1991/1992. *Uniform Sales Law-The Experience with Uniform Sales Laws in the Federal Republic of Germany*, in: Juridikrift Tidskrift 1–28, 1991/92.
[161] *See* the case *Sizing machine case*, 2002, Commercial Court St. Gallen, (Switzerland, 3 December 2002, available at: http://cisgw3.law.pace.edu/cases/021203s1.html).
[162] *See* Official Comments of the UNIDROIT Principles on Article 1.5 under which: "The exclusion or modification of the Principles by the parties may be either express or implied. There is an implied exclusion or modification when the parties expressly agree on contract terms which are inconsistent with provisions of the Principles and it is in this context irrelevant whether the terms in question have been negotiated individually or form part of standard terms incorporated by the parties in their contract. ", p. 14, available at: https://www.unidroit.org/english/principles/contracts/principles2016/principles2016-e.pdf.
[163] Murphy, M., T. 1998. *United Nations Convention for the International Sale of Goods: Creating Uniformity in International Sales Law*, in: 12 Fordham Int'l. L.J., 1998, pp. 727–750.
[164] Murphy, M., T. 1998. *United Nations Convention for the International Sale of Goods: Creating Uniformity in International Sales Law*, in: 12 Fordham Int'l. L.J., 1998, pp. 727–750.

be excluded, for instance, by the incorporation of such diverging contractual terms in the agreement that it is patently evident that the underlying aim of such an action is to exclude the CISG and opt for different applicable law. To reiterate, the CISG is only applicable between the Contracting State, and therefore the moment the parties opt for the law of a not Contracting State, the application of the CISG is by definition ruled out.[165] However intricate it might seem, the situation could possibly be more opaque should the parties decide to opt for the law of the Contracting State (whose law system also inherently incorporates the CISG), but the direct reference to this law is not made.[166] Interestingly though it might sound, supposing the parties wish to resort to the domestic law of the Contracting State instead of the CISG, it is essential that this choice be made explicitly as this has the effect tantamount to an implicit exclusion of the CISG.[167] In the event of the complete exclusion without the indication that the recourse to the domestic law is made, it is recognised that the provisions of the Private International Law will determine the applicable law instead.[168] The same is ineluctably true supposing the parties opt for a partial exclusion; however, distinct from the UPICC under which: "If the parties expressly agree to the application of some only of the Chapters of the Principles (e.g. "As far as the performance and nonperformance of this contract is concerned, the UNIDROIT Principles shall apply"), it is presumed that the Chapters concerned will be applied together with the general provisions of Chapter 1."[169]; nonetheless, this is not the case of the CISG due to the diverse character of these two legal instruments. As opposed to the CISG, which becomes part of the substantive law of the Contracting States and is directly applicable through its first Article, for the UPICC to apply, the parties' assent to them is warranted. Evidence to the latter

---

[165] Bonell, M., J., Liguori F. 1997. *The UN Convention on the International Sale of Goods: A Critical Analysis of Current International Case Law*, in: Uniform Law Review, Volume 2, Issue 2, April 1997, 1997, p. 385 – 395.

[166] Leete, B. 1992. *Contract Formation under the United Nations Convention on Contracts for the International Sale of Goods and the Uniform Commercial ode: Pitfalls for the Unwary*, in: 6 Temple International and Comparative Law Journal, 1992, pp. 193–215.

[167] Felemegas, J. Ed. 2007. *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: Cambridge University Press, 2007, p. 42.

[168] Ferrari, F. 1995. *Specific Topics of the Cisg in the Light of Judicial Application and Scholarly Writing*, in: 15 Journal of Law and Commerce, 1995, pp. 1-126.

[169] *See* Official Comments of the UNIDROIT Principles on Article 1.5, Comment 2: Exclusion or modification may be express or implied, p. 14, available at: https://www.unidroit.org/english/principles/contracts/principles2016/principles2016-e.pdf.

premise bears the Preamble to the UPICC ("They shall be applied when the parties have agreed that their contract be governed by them. (*[170])").[171]

3.2.2. Usages and practices

Firstly, both the CISG and the UPICC recognise the concept of established practices and agreed usages (this alludes to contractual freedom tacitly), which are principally a set of behavioural rules that are obeyed, for instance, by businessmen during the course of the contract performance.[172] Their inherent value might have a considerable bearing on the whole contractual relationship as they supplant the provisions of both the CISG[173] and of the UPICC[174]; however, the contractual terms which oppose or negate them will eventually prevail. While the former incorporates them in Article 9[175], the latter contains a counterpart provision in Article 1.9.[176] Perusing the wording of these Articles meticulously, it might be surmised that neither the CISG nor the CIPP disregard the normative value of practices and usages between the contracting parties – along the same lines, the contractual relationship may be governed by contractually agreed usages and those practices that are well-grounded in the behaviour of the parties to a contract. Thus, it might well be observed that prior to establishing these practices, there has to be some regular conventional pattern in their behaviour that gives them the obligatory form pro future.[177] On the other hand, under Article 8 para. 3 of the CISG and Article 4.3 (b), (e), and (f) usages and practices play a different role – an interpretative one. At this

[170] "Parties wishing to provide that their agreement be governed by the Principles might use one of the Model Clauses for the Use of the UNIDROIT Principles of International Commercial Contracts (see www.unidroit.org/instruments/commercialcontracts/upicc-model-clauses). ", in: the Preamble to the UNIDROIT Principles of International Commercial Contracts 2016.
[171] *See* the Preamble to the UNIDROIT Principles of International Commercial Contracts 2016.
[172] Felemegas, J. Ed. 2007. *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: Cambridge University Press, 2007, p. 53.
[173] Felemegas, J. Ed. 2007. *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: Cambridge University Press, 2007, p. 58.
[174] *See* Official Comments of the UNIDROIT Principles on Article 1.9, p. 26, available at: https://www.unidroit.org/english/principles/contracts/principles2016/principles2016-e.pdf.
[175] *See* Artice 9 of the CISG: "(1) The parties are bound by any usage to which they have agreed and by any practices which they have established between themselves. (2) The parties are considered, unless otherwise agreed, to have impliedly made applicable to their contract or its formation a usage of which the parties knew or ought to have known and which in international trade is widely known to, and regularly observed by, parties to contracts of the type involved in the particular trade concerned. "
[176] *See* Article 1.9 of the UPICC: "(1) The parties are bound by any usage to which they have agreed and by any practices which they have established between themselves. (2) The parties are bound by a usage that is widely known to and regularly observed in international trade by parties in the particular trade concerned except where the application of such a usage would be unreasonable. "
[177] Perales Viscasillas, M. del P. 1996. *La formacion del contrato en la compraventa internacional de mercaderías*. Valencia: Tirant Lo Blanch, 1996, p. 81.

point, regard must be made to the fact that both practices and usages may be agreed upon implicitly or explicitly.[178] By way of illustration, "A, a supplier, has repeatedly accepted claims from B, a customer, for quantitative or qualitative defects in the goods as much as two weeks after their delivery. When B gives another notice of defects after a fortnight, A cannot object that it is too late since the two-weeks' notice amounts to a practice established between A and B which will as such be binding on A."[179]

Secondly, Article 9, para. 2 of the CISG and Article 1.9, para. 2 of the UPICC both refer to a different breed – international usages related, for instance, international transport.[180] Article 9 para. 2 of the CISG has been firmly grounded in the reasoning that usages of which the parties knew or ought to have known and which in international trade is widely known to, and regularly observed by parties to contracts, are applicable to their contracts. The term "widely" must be construed as being well-known in certain areas, even regional[181] or local[182] on the proviso that they have implications for international trade (or, alternatively, are followed by foreign merchants) – conversely, any usages unrelated to international commerce may well be dismissed as being of no significance for this purpose. To illustrate, "A, a real estate agent, invokes a particular usage of the profession in its country vis-à-vis B, a foreign customer. B is not bound by such a usage if that usage is of a local nature and relates to a trade which is predominantly domestic in character."[183] Additionally, an amalgamation of two theories might be observed within the lines mentioned above – the subjective theory and the objective one ("knew or ought to have known"). On the one hand, the respective Article of the CISG implies that despite the fact that parties might not have a conception of usages ("ought to have known") they are nonetheless applicable to their contract – this tenet is an objective one. On the other hand, "According to the subjective theory, usages unknown to either party are not applicable.

---

[178] Carlsen, A. 2002. *Remarks on the manner in which the PECL may be used to interpret or supplement Article 9 CISG*, 2002, available at: http://cisgw3.law.pace.edu/cisg/text/peclcomp9.html#er.

[179] *See* Official Comments of the UNIDROIT Principles on Article 1.9, p. 24, available at: https://www.unidroit.org/english/principles/contracts/principles2016/principles2016-e.pdf.

[180] *See* the case *BP Oil International v. Empresa Estatal Petroleos de Ecuador*, 2003, Federal Appellate Court [5th Circuit] (United States, 11 June 2003, available at: http://cisgw3.law.pace.edu/cases/030611u1.html) pursuant to which: "The CISG incorporates Incoterms through article 9(2), [. . .] Even if the usage of Incoterms is not global, the fact that they are well known in international trade means that they are incorporated through article 9(2). "

[181] Perales Viscasillas, M. del P. 1996. *La formacion del contrato en la compraventa internacional de mercaderías*. Valencia: Tirant Lo Blanch, 1996, p. 84.

[182] *See* the case *Wood case*, 2000, Supreme Court (Austria, 21 March 2000, available at: http://cisgw3.law.pace.edu/cases/000321a3.html).

[183] *See* Official Comments of the UNIDROIT Principles on Article 1.9, p. 24, available at: https://www.unidroit.org/english/principles/contracts/principles2016/principles2016-e.pdf.

Contrary hereto is the objective theory, whereby usages are applicable if they represent a legal norm. According to the objective theory, usages unknown to both parties may be applicable to an agreement. Both theories agree that the usage must be so widespread and widely recognized that businesspersons knew or ought to have known of it."[184] In a slightly opposite way, the UPICC do not imply the fact that the prerequisite of previous knowledge is of the essence here – it merely condenses the CISG's wording in simple terms as it reads as follows:"(...) a usage that is widely known to and regularly observed in international trade by parties (...)."[185] "That is because the UNIDROIT Principles adopt an approach in which usages that are widely known and observed in trade acquire juridical value independently of the degree of knowledge of the parties to the contract; because of the widespread observance of such usages, the participants in international trade are assumed to know of them. The objective parameter used to determine the existence of such custom or widely observed usages in the particular trade is the fact that they are observed widely and regularly by the participants in international trade."[186] In addition, it must be affirmed that, as opposed to its counterpart in the CISG, the principle of reasonableness forms an indispensable part of this Article of the UPICC and the utilisation of usages is heavily reliant on this thesis. As an illustration, "A usage exists in a commodity trade sector according to which the purchaser may not rely on defects in the goods if they are not duly certified by an internationally recognised inspection agency. When A, a buyer, takes over the goods at the port of destination, the only internationally recognised inspection agency operating in that port is on strike and to call another from the nearest port would be excessively costly. The application of the usage in this case would be unreasonable and A may rely on the defects it has discovered even though they have not been certified by an internationally recognised inspection agency."[187] In a final account, compared to the CISG, the UPICC provide for a much broader concept of international usages in a way that it is not inherently limited by two theories elaborated above, but it could just be maintained that it adds a touch of restrictiveness – the principle of reasonableness; nonetheless, this is also found in the CISG[188] as they both attached the weight to their normative value.

[184] Carlsen, A. 2002. *Remarks on the manner in which the PECL may be used to interpret or supplement Article 9 CISG*. 2002, available at: http://cisgw3.law.pace.edu/cisg/text/peclcomp9.html#er.
[185] *See* Article 1.8 of the UPICC.
[186] Felemegas, J. Ed. 2007. *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: Cambridge University Press, 2007, p. 56.
[187] *See* Official Comments of the UNIDROIT Principles on Article 1.9, p. 21, available at: https://www.unidroit.org/english/principles/contracts/principles2016/principles2016-e.pdf.
[188] Kritzer, A. H. *Overview Comments on Reasonableness – A General Principle of the Cisg*", available at: http://cisgw3.law.pace.edu/cisg/text/reason.html#overv.

3.2.3. Fundamental breach

By way of introduction, it is an indisputable fact that the concept of fundamental breach as elaborated in this thesis is of particular note for the CISG when dealing with remedies. The counterpart of Article 25 of the CISG[189] might also be found in the UPICC, more specifically in Article 7.3.1 para. 2 (among other provisions); however, named differently as "fundamental non-performance". On a cursory examination, it might be observed that in contrast to the CISG, fundamental non-performance under the UPICC relates to the right to terminate the contract. If we break down Article 25, we might find ourselves analysing a couple of defining terms which are detriment, deprivation and lastly, foreseeability. Taking the term detriment first, "It seems that the detriment element serves as a mere filter for those cases in which breach of a fundamental obligation occurred but has caused no injury."[190] As far as the substantial deprivation is concerned, this is, as can be inferred from the wording of Article 25, benchmarked against the contractual terms – both explicit and implicit, meaning that the criterion for gauging the magnitude of the breach of a contract is the contract itself. Drawing attention to the concept of foreseeability, the language of Article 25 upholds the notion that foreseeability encompasses the fact that regard must be had to the knowledge of the party which is in contravention of its contractual obligations and foreseeability of the implication that arise in the wake of the breach in question in order to pin down whether or not the respective breach is fundamental or not – upon which it is possible to establish the gravity of the respective breach. In essence, the very knowledge to which it was referred above is of particular note when considering the value of contractual term which has been breached for the injured party[191] and thus curtails the rights of this non-breaching party providing it has been established that the aggrieving party did not have the foresight of those ramifications.[192] Therefore, it might with some justification be proffered that while the breach is fundamental when the magnitude of the breach is in excess of a certain level and can be subsumed under the heading of "substantial

---

[189] *See* Article 25 of the CISG under which: "A breach of contract committed by one of the parties is fundamental if it results in such detriment to the other party as substantially to deprive him of what he is entitled to expect under the contract, unless the party in breach did not foresee and a reasonable person of the same kind in the same circumstances would not have foreseen such a result. "

[190] Felemegas, J. Ed. 2007. *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: Cambridge University Press, 2007, p. 126.

[191] Schlechtriem, P., ed. 1998. *Commentary on the U.N. Convention on the International Sale of Goods*. Oxford: Clarendon Press, 1998, Commentary on Article 25 of the CISG.

[192] Enderlein, F., Maskow, D. 1992. *International Sales Law: United Nations Convention on Contract for the International Sale of Goods*. Oceana Publications. 1992, Commentary on Article 25 of the CISG.

deprivation ", foreseeability, on the other hand, might serve as an extenuating factor leading to the conclusion that the breaching party may not under certain circumstance be held accountable for the breach in question.[193] Additionally, the terminology employed ("a reasonable person of the same kind in the same circumstances would not have foreseen such a result.") adds a touch of objectivity to the overall concept as "the party in breach is considered to have been able to foresee the consequences of the breach if, when objectively viewed, it is determined that he could or should have known them."[194]

Secondly, the principle of fundamental non-performance is expatiated upon in Article 7.3.1, para. 2 of the UPICC, which is not dissimilar to the formerly addressed Article in the CISG, with additional factors constituting fundamental non-performance. For instance, under Article 7.3.1 para. 2 (b) when assessing a fundamental non-performance regard shall be had, in particular, to whether: "strict compliance with the obligation which has not been performed is of essence under the contract;". However, looking at this Article from a broader perspective, it can be presumed that this Article is elaborated more comprehensively compared to the CISG as the extent of what can be subsumed under fundamental non-performance is determined in more detail. On a thorough examination, it might be conceded that when doing the weighting exercise in relation to the possible existence of fundamental non-performance (in other words, determining whether or not the non-performance is or is not fundamental), the issue whether or not it might be cured must be factored into this equation[195] pursuant to Article 7.1.4, para. 2 of the UPICC. While it is yet not conclusively settled on the ground, it might be asserted that under Article 25 of the CISG consideration of curability is "a limiting factor in determining fundamental breach, in view of its present definition, is only permissible if one argues that, where cure of a breach is feasible and the breaching party is willing to cure, the aggrieved party is not substantially deprived of his expectations under the contract."[196]; nonetheless, this is applicable should there be no provision concerning the right to cure valuable defective goods

---

[193] Babiak, A. 1992. *Defining "Fundamental Breach" Under the United Nations Convention on Contracts for the International Sale of Goods*, in: 6 Temple International and Comparative Law Journal, 1992, p. 118.

[194] Felemegas, J. Ed. 2007. *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: Cambridge University Press, 2007, p. 127.

[195] Koch, R. 1999.*The Concept of Fundamental Breach of Contract under the United Nations Convention on Contracts for the International Sale of Goods (Cisg)*, in: Pace Review of the Convention on Contracts for the International Sale of Goods (Cisg) 1998. Kluwer Law International, 1999, p. 232.

[196] Felemegas, J. Ed. 2007. *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: Cambridge University Press, 2007, p. 131.

by the seller, which would render the use of the UPICC principles inapplicable.[197] Another point of interest is that this argumentation would probably not be in line with the intention of Article 48 para. 1 of the CISG, as this would unduly interfere with buyer's right to avoid the contract.[198] "Another argument against the determination of fundamental breach in light of an offer to cure can be found in the text of Article 50 CISG, where it is expressly stated that the seller's right to cure prevails over the buyer's right to reduce the price."[199] On substance, this supports the notion that the right to avoid the contract is superior to the right to cure as Articles 48 and 49 could have been written in a similar fashion as Article 50, but have not been.[200] In practice and irrespective of the foregoing, it seems that Article 25 endorses the concept of curability when endeavouring to determine fundamental breach as in some of the cases judgement was rendered to this effect that: "The remedy of avoidance shall only be available to the seller as the last resort to react to a breach of contract by the other party, which is so fundamental that it essentially deprives it of its positive interest (German Federal Supreme Court [3 April 1996] NJW [*] 1996, 2364 = MDR [*] 1996, 778; Swiss Federal Supreme Court [15 September 2000 (4C.105/2000)], TranspR-IHR [*] 2000, 14; Lurger IHR [*] 2001, 91, 96). Therefore, not only the weight of the defect, but also the preparedness of the seller to cure the defect without unacceptable delay and burden to the buyer is of importance. Even a serious defect is not a fundamental breach of contract if the seller is prepared to replace the goods without unacceptable burden to the buyer (OLG Koblenz [31 January 1997], OLGR 1997, 37; Lurger, *id*. p. 98; Schlechtriem/Huber, CISG, 3rd ed., � 49 No. 12 *et seq*.; Staudinger/Magnus, BGB, revision 1999, Art. 49 CISG No. 14 with further references)."[201] Additionally, as the right to cure is not explicitly disregarded by Article 25, it would be plausible to apply the postulates in the UPICC to complement the CISG.

[197] Felemegas, J. Ed. 2007. *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: Cambridge University Press, 2007, p. 131.

[198] Williams, A. E. 2000-2001. *Forecasting the Potential Impact of the Vienna Sales Convention on International Sales Law in the United Kingdom*, in: Pace Review of the Convention on Contracts for the International Sale of Goods (Cisg), Kluwer Law International, 2000–2001, p. 9.

[199] Felemegas, J. Ed. 2007. *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: Cambridge University Press, 2007, p. 132.

[200] Koch, R. 1999.*The Concept of Fundamental Breach of Contract under the United Nations Convention on Contracts for the International Sale of Goods (Cisg)*, in: Pace Review of the Convention on Contracts for the International Sale of Goods (Cisg) 1998. Kluwer Law International, 1999, p. 323.

[201] *See* the case *Designer clothes case*, 2002, Appellate Court Köln (Germany, 14 October 2002, available at: http://cisgw3.law.pace.edu/cases/021014g1.html).

Thirdly, taking refuge in Article 7 para. 1 of the CISG, it is possible to complement the interpretation of the CISG by virtue of the UPICC supposing they address the similar issues in nature[202] which is in a certain aspect of no gainsaying when examining for this purpose Article 25 of the CISG and Article 7.3.1 of the UPICC. Consequently, and as an illustration, Article 7.2.1 para. 2 (b) and (d) might be used when establishing fundamental breach as they refer to the same concepts – to elaborate, under Article 25 of the CISG the wording employed ("to expect under the contract") suggests that the principles regarding the character of obligations arising from the agreement and future performance might be made of use.[203] Conversely, the condition elaborated in Article 7.3.1 para. 2 (c) cannot be used to supplement the construal of Article 25 of the CISG as "Although it is true that the wording of Article 25 CISG does not prevent the determination of the fundamental nature of a breach by taking into account the breaching party's intent or conduct, it should be noted that under the CISG, "fault" is not generally a prerequisite to a finding of contractual liability. In addition, this principle is as true with respect to the right to avoid the contract as it is to the right to require substitute delivery or to claim damages. Neither remedy depends on "fault" in the sense of deliberate or negligent wrongdoing."[204] The same is invariably correct for the condition under Article 7.3.1(2)(e) of the PICC. "First, the language of Article 25 CISG does not allow consideration of the consequences for the breaching party when the breach is treated as fundamental. Second, it is not clear under which circumstances a breaching party's loss becomes significant. Any determination of fundamental breach would therefore be arbitrary and cause uncertainty. Third, the UNIDROIT factor is aimed at limiting the exercise of the right of avoidance, not at determining fundamental breach."[205]

[202] Felemegas, J. 2000-2001. *The United Nations Convention on Contracts for the International Sale of Goods: Article 7 and Uniform Interpretation*, in: Pace Review of the Convention on Contracts for the International Sale of Goods (Cisg). Kluwer Law International, 2000–2001, pp. 115–265.

[203] Koch, R. 1999.*The Concept of Fundamental Breach of Contract under the United Nations Convention on Contracts for the International Sale of Goods (Cisg)*, in: Pace Review of the Convention on Contracts for the International Sale of Goods (Cisg) 1998. Kluwer Law International, 1999, p. 266-267.

[204] Felemegas, J. Ed. 2007. *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: Cambridge University Press, 2007, p. 130.

[205] Felemegas, J. Ed. 2007. *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: Cambridge University Press, 2007, p. 130.

4. Reflections and conclusions

First of all, in this master thesis I have endeavoured to provide introspection into the principles enveloped by the CISG along with the interplay between it and the UPICC without describing them with broad brushstrokes and unnecessary flowery expressions. For this purpose, the following issues were addressed: the sphere of application of the CISG, sale of goods under the CISG including the formation of contracts, performance and exceptions to it, conformity of goods, the system of remedies, the overview of the application of the CISG in Austria and New Zealand and lastly, succinct analysis of the selected Articles of the CISG and the UPICC. The principal reason for such a sequence to be adopted in this thesis was that these provisions are of paramount significance; however, several hints were made to other articles, mainly in order to contextualise the previously mentioned paragraphs. The order of respective chapters has been chosen with consideration to their overall purpose, and thus, each chapter ought to complement the previous one. In this regard, I have one personal reflection, namely that the CISG is and has been subject to comprehensive research which often results in publishing long monographies, sometimes of no less than a few hundred pages. Conversely, for the sake of clarity and conciseness, I have adopted a different approach which strives to condense as much relevant information as possible within the extent of this master thesis. With this intention in mind, each chapter deals with different and relevant Article of the CISG, but as has been previously mentioned, its content is not limited to the respective Article itself. Hence, many factual examples and cases are included to augment the commentary on the Articles in question. To contextualise the narration, two specific countries were analysed, namely Austria and New Zealand. Undoubtedly, there is a wide array of countries in which the application of the CISG might be more prolific and demonstrative; nevertheless, the goal of this thesis was to delineate the application of the CISG in the European Union and worldwide in a succinct yet comprehensive way. For this purpose, it would not be viable to subject many countries to this research due to a limited framework. Hence, these two countries – one from civil law jurisdiction and the other one from common law jurisdiction, have been chosen to represent the manner in which the CISG is utilised both in the European Union and in the world.

Secondly, the CISG cannot be conceptualised as a series of merely descriptive Articles. In contrast, the underlying value of the CISG, both in the European Union and worldwide, is based on the freedom of contractual relationships and this principle echoes throughout its entire content. Thus, it surely can be asserted that this set of rules embodied in the CISG constitute a major innovation and leap forward toward the unification of the International Commercial Law. By no stretch of imagination, the concept of extended freedom of contract introduced by the CISG coupled with the UPICC would be possible were it not for these pieces of legislation. Nonetheless, with the benefit of hindsight and given the prevailing voices in the theoretical field, it must also be noted that the CISG is assuredly not as impeccable as it may seem. What has been considered a significant shortcoming in relation to the CISG is, for instance, that this regulation does not furnish the definitions which might be required for its interpretation. In spite of this fact and considering a wider picture, the CISG nevertheless represents an indispensable element towards a full harmonisation of rules regulating commercial contractual relationships. Thirdly, the general conclusion that conceivably may be reached by the previous assumptions elaborated at length or implied in this thesis is that the intention of legislative bodies which drafted the CISG has almost been attained. In respect of this fact, it must also be added that no law is flawless. This is also true in case of the CISG which contains many interpretative imperfections which may pose a further hurdle to its application.

Overall, rarely do people realise the underlying rationale of the CISG, which was adopted to eliminate legal uncertainty and to promote freedom of contractual relationships at the international level – and therefore, both within the boundaries of the European Union and beyond. As a result of this endeavour, a significant and desirable degree of autonomy and predictability is ensured in contractual relationships. Were it not for this particular regulation, contractual relationships with foreign elements might have long ago been plunged into an abyss of chaos.

5. Bibliography

A. Literature

- Babiak, A. 1992. *Defining "Fundamental Breach" Under the United Nations Convention on Contracts for the International Sale of Goods*, in: 6 Temple International and Comparative Law Journal, 1992.
- Bianca, M., C., Bonell, M., J., eds. 1987. *Commentary on the International Sales Law*. Giuffrè: Milan, 1987.
- Bonell, M., J., Liguori F. 1997. *The UN Convention on the International Sale of Goods: A Critical Analysis of Current International Case Law*, in: Uniform Law Review, Volume 2, Issue 2, April 1997, 1997.
- Carlsen, A. 2002. *Remarks on the manner in which the PECL may be used to interpret or supplement Article 9 CISG*, 2002, available at: http://cisgw3.law.pace.edu/cisg/text/peclcomp9.html#er.
- David, R., Brierley, E., C., J. 1978. *Major legal systems in the world today*. 2nd Edition. Free Press, 1978.
- DiMatteo, L., ed. 2014. *International Sales Law: A Global Challenge*. Cambridge: Cambridge University Press, 2014.
- Enderlein, F., Maskow, D. 1992. *International Sales Law: United Nations Convention on Contract for the International Sale of Goods*. Oceana Publications, 1992.
- Eiselen S. 1999. *Electronic Commerce and the U.N. Convention on Contracts for the International Sale of Goods (CISG)*, in: 6 EDI Law Review, 1999.
- Eörsi, G. 1983. *A Propos the 1980 Vienna Convention on Contracts for the International Sale of Goods*, in: *The American Journal of Comparative Law*, Volume 31, Issue 2, Spring, 1983.
- Evans, M. 1987. *Federal States*, in: Bianca, M., C., Bonell, M., J., eds. 1987. *Commentary on the International Sales Law*. Giuffrè: Milan, 1987.
- Farnsworth, A. 1987. *Federal States*, in: Bianca, M., C., Bonell, M., J., eds. 1987. *Commentary on the International Sales Law*. Giuffrè: Milan, 1987.
- Ferrari, F. 2000-2001. *Burden of Proof under the CISG*, in: Review of the Convention on Contracts for the International Sale of Goods (CISG) 1-8, Pace Int'l L. Rev. ed., 2000-2001.

- Ferrari, F. 1995. *Specific Topics of the Cisg in the Light of Judicial Application and Scholarly Writing*, in: 15 Journal of Law and Commerce, 1995.
- Ferrari, F., Kieninger, E., M., Mankowsi, K., O., Saenger, I., Schulze, G., Staudinger, A., eds. 2012. *Internationales Vertragsrecht*. 2nd Edition. Munich: Beck, 2012.
- Felemegas, J. Ed. 2007. *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: Cambridge University Press, 2007.
- Felemegas, J. 2000-2001. *The United Nations Convention on Contracts for the International Sale of Goods: Article 7 and Uniform Interpretation*, in: Pace Review of the Convention on Contracts for the International Sale of Goods (Cisg). Kluwer Law International, 2000–2001.
- Flambouras, D. P. 2002. *Comparative Remarks on CISG Article 79 & PECL Articles 6:111, 8:108*, 2002, available at: http://cisgw3.law.pace.edu/cisg/text/peclcomp79.html#er).
- Gillette, C., Walt, S. 2016. *The UN Convention on Contracts for the International Sale of Goods: Theory and Practice*. Cambridge: Cambridge University Press, 2016.
- Henschel, R. F. 2005. *The Conformity of Goods in International Sales: An Analysis of Article 35 in the United Nations Convention on Contracts for the International Sale of Goods*, 2005.
- Honnold, O. 1989. *Documentary History of the Uniform Law for International Sales:The Studies, Deliberations and Decisions That Led to the 1980 United Nations Convention with Introductions and Explanations*. 1st Edition. Springer, 1989.
- Honnold, O., J., Flechtner, M., H. 2009. *United Law for International Sales under the 1980 United Nations Convention*. 4th Edition. Kluwer Law International, 2009.
- Kerschner, F. 2010. *Zivilrecht VIII – Internationales Privatrecht*. 3rd Edition. Vienna: LexisNexis, 2010.
- Khoo, W. 1987. *Exclusions from the Convention*, in: Bianca, M., C., Bonell, M., J., eds. 1987. *Commentary on the International Sales Law*. Giuffrè: Milan, 1987.
- Koch, R. 1999. *The Concept of Fundamental Breach of Contract under the United Nations Convention on Contracts for the International Sale of Goods (Cisg)*, in: Pace Review of the Convention on Contracts for the International Sale of Goods (Cisg) 1998. Kluwer Law International, 1999.
- Kritzer, A. H. *Overview Comments on Reasonableness – A General Principle of the Cisg*”, available at: http://cisgw3.law.pace.edu/cisg/text/reason.html#overv.

- Leete, B. 1992. *Contract Formation under the United Nations Convention on Contracts for the International Sale of Goods and the Uniform Commercial ode: Pitfalls for the Unwary*, in: 6 Temple International and Comparative Law Journal, 1992.
- Letterman, G., G. 2001. *Unidroit´s Rules in Practice: Standard International Contracts and Applicable Rules*. 1st Edition. Kluwer Law International. 2001.
- Lookofsky, J. 2012. *Understanding the CISG (Worldwide) ed*. Kluwer Law International, 2012.
- Mazzotta, F., G. 2005. *Why Do Some American Courts Fail to Get It Right?*, in: 3 Loy. U. Chi. Int'l L. Rev. 85, 2005.
- Meyer, J. 2008. *UN-Kaufrecht in der osterreichischen Anwaltspraxis*, in: 63 Osterreichische Juristen- Zeitung 792, 2008.
- Murphy, M. T. 1998. *United Nations Convention for the International Sale of Goods: Creating Uniformity in International Sales Law*, in: 12 Fordham Int'l. L.J., 1998.
- Official Comments of the UNIDROIT Principles (available at: https://www.unidroit.org/english/principles/contracts/principles2016/principles2016-e.pdf).
- Ostendorf, P., Kluth, P. 2013. *Internationale Wirtschaftsverträge*. Munich: Beck, 2013.
- Perales Viscasillas, M. del P. 1996. *La formacion del contrato en la compraventa internacional de mercaderías*. Valencia: Tirant Lo Blanch, 1996.
- Schlechtriem, P. 1986. *Uniform Sales Law: The UN-Convention on Contracts for the International Sale of Goods*. Mainz, 1986.
- Schlechtriem, P. 1991/1992. *Uniform Sales Law-The Experience with Uniform Sales Laws in the Federal Republic of Germany*, in: Juridikrift Tidskrift 1–28, 1991/92.
- Schlechtriem, P., ed. 1998. *Commentary on the U.N. Convention on the International Sale of Goods*. Oxford: Clarendon Press, 1998.
- Schwenzer I., Mohs, F. 2006. *Old Habits Die Hard: Traditional Contract Formation in a Modern World*. Internationales Handelsrecht, 2006.
- Schwenzer I. 2010. *Schlechtriem & Schwenzer: Commentary on the Convention on the International Sale of Goods (CISG)*. 3rd Edition. Oxford University Press, 2010.
- The UNCITRAL Guide: Basic Facts About the United Nations Commission on International Trade Law, 2007.
- Walker, G. 2005. *Trade Usages and the CISG: Defending the Appropriateness of Incorporating Custom into International Commercial Contracts*, in: 24 Journal of Law and Commerce, 2005.

- Whittington, N. 2006. *Reconsidering Domestic Sale of Goods Remedies in Light of the CISG*, in: **Victoria University of Wellington Law Review,** [S.l.], v. 37, n. 3, 2006.
- Williams, A. E. 2000-2001. *Forecasting the Potential Impact of the Vienna Sales Convention on International Sales Law in the United Kingdom*, in: Pace Review of the Convention on Contracts for the International Sale of Goods (Cisg), Kluwer Law International, 2000–2001.
- Zimmerman. R. 1990. *The Law of Obligations: Roman Foundations of the Civilian Tradition*. Cape Town: Juta, 1990.

B. Legal instruments

- Consolidated version of the Treaty on the Functioning of the European Union, 2012, OJ C326/47.
- Charter of Fundamental Rights of the European Union, 2012/C, OJ C 326/391.
- Regulation (EC) No 493/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I), 2008, OJ L177/6.
- UNIDROIT Principles of International Commercial Contracts 1994.
- UNIDROIT Principles of International Commercial Contracts 2016.
- United Nations Convention on Contracts for the International Sale of Goods (Vienna, 1980) (CISG).
- Vienna Convention on the Law of Treaties.

C. Case Law

- *Acrylic blankets case*, 1997, Appellate Court Koblenz (Germany, 31 January 1997, available at: https://cisgw3.law.pace.edu/cases/970131g1.html).
- *Al Palazzo S.r.l. v. Bernardaud di Limoges S.A.*, 2002, District Court Rimini (Italy, 26 November 2002, available at: http://cisgw3.law.pace.edu/cases/021126i3.html).
- *Art books case*, 1999, Commercial Court Zürich (Switzerland, 10 February 1999, available at: http://cisgw3.law.pace.edu/cases/990210s1.html).
- *Attorney-General v. Dreux Holdings Ltd*. 1996. 7 TCLR 617, 1996.
- *Auto case*, 2006, Oberlandesgericht [Appellate Court] Linz (Austria, 23 January 2006, available at: http://cisgw3.law.pace.edu/cases/060123a3.html).

- *Autoservicio Mayorista La Loma S.A. v. Quiebra v. Incidente de Verificacion (Cosvega SL*), Juzgado Comercial [Commercial Court] Buenos Aires, (Argentina, April 2003, available at: http://cisgw3.law.pace.edu/cases/030400a1.html).
- *Bedial v. Müggenburg*, 1995, Appellate Court (Argentina, 31 October 1995, available at: http://cisgw3.law.pace.edu/cases/951031a1.html).
- *Beth Schiffer Fine Photographic Arts, Inc. v. Colex Imaging*, 2012 U.S. Dist. LEXIS 36695 (D.N.J. March 19, 2012).
- *BP Oil Int'l Ltd. v. Empresa Estatal Petroleos de Ecuador*, 332 F.3d 333 (5th Cir. 2003).
- *BP Oil International v. Empresa Estatal Petroleos de Ecuador*, 2003, Federal Appellate Court [5th Circuit] (United States, 11 June 2003, available at: http://cisgw3.law.pace.edu/cases/030611u1.html).
- *Calzados Magnanni v. Shoes General International*, 1999, Appellate Court Grenoble (France, 21 October 1999, available at: http://cisgw3.law.pace.edu/cases/991021f1.html).
- *Coffee machines case*, 2005, Supreme Court (Austria, 23 May 2005, available at: http://cisgw3.law.pace.edu/cases/050523a3.html).
- *Construction equipment case*, 2004, *Oberlandesgericht* [Appellate Court] Graz (Austria, 29 July 2004, available at: http://cisgw3.law.pace.edu/cases/040729a3.html).
- *Cooling system case*, 2002, Supreme Court (Austria, 14 January 2002, available at: http://cisgw3.law.pace.edu/cases/020114a3.html).
- *Dat-Schaub International a/s v. Kipco Damaco N.V.*, 2007, Appellate Court Ghent (Belgium, 16 April 2007, available at: http://cisgw3.law.pace.edu/cases/070416b1.html).
- Decision of Appellate Court Lyon (France, 27 March 2014, available at: http://cisgw3.law.pace.edu/cases/140327f1.html).
- *Designer clothes case*, 2002, Appellate Court Köln (Germany, 14 October 2002, available at: http://cisgw3.law.pace.edu/cases/021014g1.html).
- *Doolim Corp. v. R Doll, LLC*, 2009 U.S. Dist. LEXIS 45366 (S.D.N.Y. May 29, 2009).
- *Frozen bacon case*, Appellate Court Hamm (Germany, 22 September 1992, available at: http://cisgw3.law.pace.edu/cases/920922g1.html).
- *Globes case*, 2002, District Court München (Germany, 27 February 2002, available at: http://cisgw3.law.pace.edu/cases/020227g1.html).
- *Internationale Jute Maatschappij v. Marín Palomares*, 2000, Supreme Court (Spain, 28 January 2000, available at: http://cisgw3.law.pace.edu/cases/000128s4.html).

- *Instulating material case*, 2012, Supreme Court (Austria, 13 December 2012, available at: http://cisgw3.law.pace.edu/cases/121213a3.html).
- *Iron molybdenum case*, 1997, Appellate Court Hamburg (Germany, 28 February 1997, available at: http://cisgw3.law.pace.edu/cases/970228g1.html).
- *Lindegie case*, 2010, Appellate Court Dresden (Germany, 30 November 2010, available at: http://cisgw3.law.pace.edu/cases/101130g2.html).
- *Marble slabs case*, 1995, Appellate Court Graz (Austria, 9 November 1995, available at: http://cisgw3.law.pace.edu/cases/951109a3.html).
- *Margarine case*, 2012, Las Palmas Canary Islands, (Spain, 16 February 2012, available at: http://cisgw3.law.pace.edu/cases/120216s4.html).
- *Microgem Corp. v. Homecast Co., Ltd.*, 2012 U.S. Dist. LEXIS 65166 (S.D.N.Y. April 26, 2012).
- *Modular wall partitions case*, 2003, Appellate Court Lugano, Cantone del Ticino (Switzerland, 29 October 2003, available at: http://cisgw3.law.pace.edu/cases/031029s1.html).
- *Mono ammonium phosphate case*, 1997, Supreme Court (Austria, 20 March 1997, available at: http://cisgw3.law.pace.edu/cases/970320a3.html).
- *Ostroznik Savo v. La Faraona soc. coop. a.r.l.*, 2005, District Court Padova (Italy, 11 January 2005, available at: http://cisgw3.law.pace.edu/cases/050111i3.html).
- *Paprika case*, 2004, Supreme Court (Germany, 30 June 2004, available at: http://cisgw3.law.pace.edu/cases/040630g1.html).
- *Powdered milk case*, 2002, Supreme Court (Germany, 9 January 2002, available at: http://cisgw3.law.pace.edu/cases/020109g1.html).
- *Printed work case*, 2012, District Court Köln (Germany 29 May 2012, available at: http://cisgw3.law.pace.edu/cases/120529g1.html).
- *Propane case*, 1996, Supreme Court (Austria, 6 February 1996, available at: http://cisgw3.law.pace.edu/cases/960206a3.html).
- *Raw Materials Inc. v. Manfred Forberich GmbH & Co., KG*, 2004 U.S. Dist. LEXIS 12510 (N.D. Ill. July 6, 2004).
- *RJ & AM Smallmon v Transport Sales Limited*. 2010. HC Christchurch, CIV-2009–409–000363. July 30, 2010.
- *Rheinland Versicherungen v. Atlarex*, 2000, District Court Vigevano (Italy, 12 July 2000, available at: http://cisgw3.law.pace.edu/cases/000712i3.html).

- *Roofing material case*, 2000, Supreme Court (Austria, 9 March 2000, available at: http://cisgw3.law.pace.edu/cases/000309a3.html).
- *Russian coal case*, 1996 (ICC Arbitration Case No. 8740 of October 1996, available at: http://cisgw3.law.pace.edu/cases/968740i1.html).
- *SA P. v. AWS*, 2002, District Court Namur (Belgium, 15 January 2002, available at: http://cisgw3.law.pace.edu/cases/020115b1.html).
- *Sizing machine case*, 2002, Commercial Court St. Gallen, (Switzerland, 3 December 2002, available at: http://cisgw3.law.pace.edu/cases/021203s1.html).
- *Shoes case*, 1995, Appellate Court Frankfurt (Germany, 23 May 1995, available at: https://cisgw3.law.pace.edu/cases/950523g1.html).
- *Software case*, 2005, Supreme Court (Austria, 21 June 2005, available at: http://cisgw3.law.pace.edu/cases/050621a3.html).
- *Skid chains and adaptors case*, 2008, Appellate Court St. Gallen (Switzerland, 13 May 2008, available at: http://cisgw3.law.pace.edu/cases/080513s1.html).
- The case no. 269/1997 before the Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, 1998 (Russia, 6 October 1998).
- *Timber case*, 1998, Supreme Court (Austria, 15 October 1998, available at: http://cisgw3.law.pace.edu/cases/981015a3.html).
- *Trekking shoes case, 1999,* Supreme Court (Austria, 27 August 1999, available at: https://cisgw3.law.pace.edu/cases/990827a3.html).
- *Used car case*, 1996, Appellate Court Köln (Germany, 21 May 1996, available at: http://cisgw3.law.pace.edu/cases/960521g1.html).
- *Volmari Wener v Isocab NV*, 2008, Appellate Court Ghent (Belgium, 14 November 2008, available at: http://cisgw3.law.pace.edu/cases/081114b1.html).
- *Wine case*, 1995, District Court Trier (Germany, 12 October 1995, available at: https://cisgw3.law.pace.edu/cases/951012g1.html).
- *Wood case*, 2000, Supreme Court (Austria, 21 March 2000, available at: http://cisgw3.law.pace.edu/cases/000321a3.html).
- *Yoshimoto v. Canterbury Golf International Ltd*. 2001. 1 NZLR 523, 2001.