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Herausgegeben von

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RA Prof. Dr. Rolf A. Schütze, Stuttgart; Prof. Dr. Ingeborg Schwenzer, Basel

Aufsätze

The Application of the CISG in Light of National Law

Prof. Dr. Ingeborg Schwenzer, LL.M., Basel / Switzerland*

I. Introduction

In recent times much has been said and written about the homeward trend by domestic courts when applying the CISG.¹ In general, this homeward trend is strongly criticised,² although a few select authors seem to support it by arguing it might prevent some parties from opting out of the Convention.³

The background of this discussion begins with Art. 7 CISG. It is the article which lays down the basic methods on interpretation of the Convention. Art. 7 CISG contains two rules that are simple in principle: first, Art. 7(1) CISG seeks to secure an autonomous interpretation of the provisions of the CISG and its general principles,⁴ i.e. an interpretation free from preconceptions of domestic laws,⁵ by focussing on the international character of the Convention, the need to promote uniformity in its application and the observance of good

et seq.; Reimann "The CISG in the United States: Why It Has Been Neglected and Why Europeans Should Care" *RabelsZ* 71 (2007) 115 et seq.

* Dr. iur. (Freiburg, Germany), LL.M. (Berkeley, USA), Professor for Private Law, University of Basel, Switzerland. The author is deeply indebted to lic. iur. *Alain F. Hosang*, research and teaching assistant, for his assistance in compiling the material for this article and editing the footnotes.

¹ See e.g. Di Matteo/Dhooge/Greene/Maurer/Pagnattaro "The Interpretive Turn in International Sales Law: An Analysis of Fifteen Years of CISG Jurisprudence" 24 *Nw. J. Int'l L. & Bus.* (2004) 299 et seq.; Ferrari "Homeward Trend: What, Why and Why Not" *IHR* 2009, 8 et seq. = in Janssen/Meyer (eds) *CISG Methodology* (Sellier, Munich, 2009) 171 et seq.; Ferrari "The CISG and its Impact on National Legal Systems – General Report" in Ferrari (ed) *The CISG and its Impact on National Legal Systems* (Sellier, Munich, 2008) 413 et seq.; Flechtner "Article 79 of the United Nations Convention on the International Sale of Goods (CISG) as a Rorschach Test: The Homeward Trend and Exemption for Delivering Non-Conforming Goods" 19 *Pace Int'l L. Rev.* (2007) 29

² Di Matteo et al., 24 *Nw. J. Int'l L. & Bus.* (2004) 299, 303; Ferrari, *IHR* 2009, 8, 11; Ferrari (fn. 1) 413, 458; Flechtner, 19 *Pace Int'l L. Rev.* (2007) 29, 31; Reimann, *RabelsZ* 71 (2007) 115, 124. Furthermore, see Mazzotta "Why Do Some of the American Courts Fail to get it Right?" 3 *Loy. U. Chi. Int'l L. Rev.* (2005) 85, 89; Nottage "Who's Afraid of the Vienna Sales Convention (CISG)? A New Zealander's View from Australia and Japan" 36 *VUWLR* (2005) 815, 838 et seq.

³ Cuniberti "Is the CISG Benefiting Anybody?" 39 *Vand. J. Transnat'l L.* (2006) 1511, 1540 et seq.; Cross "Parole Evidence Under the CISG: The 'Homeward Trend' Reconsidered" 68 *Ohio St. L. J.* (2007) 133 et seq.; Gillette/Scott "The Political Economy of International Sales Law" 25 *Int'l Rev. L. & Econ.* (2005) 446, 481; Walt "Novelty and the Risks of Uniform Sales Law" 39 *Va. J. Int'l L.* (1999) 671, 687 et seq.

⁴ Ferrari in Schlechtriem/Schwenzer (eds) *Kommentar zum Einheitlichen UN-Kaufrecht – CISG* – (C.H. Beck, Munich, 5th ed., 2008) Art. 7 para. 5; Lookofsky *Understanding the CISG* (Kluwer, Alphen aan den Rijn, 3rd ed., 2008) 33 et seq.; Magnus "Tracing Methodology in the CISG: Dogmatic Foundations" in Janssen/Meyer (eds) (fn. 1) 33, 39 et seq.; Schmid *Einheitliche Anwendung von internationalem Einheitsrecht* (Nomos, Baden-Baden, 2004) 36 et seq.

⁵ Ferrari in Schlechtriem/Schwenzer (eds) (fn. 4) *Kommentar*, Art. 7 para. 9; Flechtner "The Several Texts of the CISG in a Decentralized System: Observations on Translations, Reservations and other Challenges to the Uniformity Principle in Article 7(1)" 17 *J. L. & Com.* (1998) 187, 188; Honnold/Flechtner *Uniform Law for International Sales* (Kluwer, Alphen aan den Rijn, 4th ed., 2009) Art. 7 para. 87; Niemann *Einheitliche Anwendung des UN-Kaufrechts in italienischer und deutscher Rechtsprechung und Lehre – eine Untersuchung zur Einheitlichen Auslegung unbestimmter Rechtsbegriffe und in-*

faith in international trade;⁶ and second, Art. 7(2) CISG serves as a basis for gap-filling.⁷

Although the CISG has been in force now for more than 21 years and has 74 member states,⁸ thus potentially governing about 70-80 % of the world trade. However, it is still – or more and more it seems – extremely hard work to achieve even a basic level of uniformity in the application and interpretation of the CISG.⁹ That uniformity as our collective goal has already been decided by the mere fact of the Convention and its adoption by so many states. Thus, we should not debate the merits of uniformity but rather how it can be achieved.

This paper will first identify the main areas where problems with interpreting the CISG from a domestic view have so far arisen. It will then analyze the reasons for such a homeward trend and finally discuss possible remedies that could ensure a higher level of uniformity in the future.

II. Main areas of the homeward trend

1. General

The homeward trend may take different forms;¹⁰ the first is as simple as not applying the CISG where it should be applied; the second is interpreting the provisions of the CISG according to their existing or merely presumed domestic counterparts; and last undermining the CISG by resorting to concurring domestic remedies.

There are a number of countries that are accused of being especially prone to a homeward trend.¹¹ The first in line seems to be Common Law countries; especially Australia,¹² New Zealand¹³ as well as the United States.¹⁴ But French courts do not seem to do much better.¹⁵ And although there are German authors that emphasize the achievements of the German judiciary in uniform interpretation of the CISG,¹⁶ a closer examination of German decisions reveals that they, too, are much less international than would be expected.¹⁷ Finally, the high praise of Italian courts¹⁸ must, in the end, also be questioned. Although it is true that there are Italian decisions mentioning up to 40 foreign cases,¹⁹ the fact that in most cases this was just a formalistic exercise cannot be overlooked; for example the conclusion that the CISG applies if both parties have their places of business in Contracting States may simply be deducted from Art. 1(1)(a) CISG, relying on an abundant

terner Lückenfüllung im CISG (Peter Lang, Frankfurt a.M., 2007) 42; Witz in Witz/Salger/Lorenz (eds) *International Einheitliches Kaufrecht* (Verlag für Recht und Wirtschaft, Heidelberg, 2000) Art. 7 para. 8. See also Schwenzer/Hachem in Schlechtriem/Schwenzer (eds) *Commentary on the UN Convention on the International Sale of Goods (CISG)* (Oxford University Press, Oxford, 3rd ed., 2010) Art. 7 para. 6 et seq. for further references.

⁶ Magnus (fn. 4) 33, 42 et seq.; Zeller “The Observance of Good Faith in International Trade” in Janssen/Meyer (eds) (fn. 1) 133, 135 et seq.; Schwenzer/Hachem in Schlechtriem/Schwenzer (eds) (fn. 5) *Commentary*, Art. 7 para. 7; Witz in Witz/Salger/Lorenz (eds) (fn. 5) Art. 7 para. 12.

⁷ Janssen/Kiene “The CISG and Its General Principles” in Janssen/Meyer (eds) (fn. 1) 621, 626 et seq.; Magnus (fn. 4) 33, 44 et seq.; Schwenzer/Hachem in Schlechtriem/Schwenzer (eds) (fn. 5) *Commentary*, Art. 7 para. 27 et seq.; Witz in Witz/Salger/Lorenz (eds) (fn. 5) Art. 7 para. 26 et seq.

⁸ For a detailed list of the member states see http://www.uncitral.org/uncitral/en/uncitral_texts/sale_goods/1980CISG_status.html (last accessed 15 March 2010).

⁹ Schwenzer/Hachem in Schlechtriem/Schwenzer (eds) (fn. 5) *Commentary*, Art. 7 para. 10 et seq.; Lookofsky (fn. 4) 33; Hackney „Is the United Nations Convention on the International Sale of Goods Achieving Uniformity?“ 61 La. L. Rev. (2001) 473, 474.

¹⁰ See Flechtner, 17 J.L. & Com. (1998) 187, 199; Honnold/Flechtner (fn. 5) Art. 7 paras. 87, 92. See also Ferrari, IHR 2009, 8, 14 et seq.

¹¹ For a general overview see Ferrari, IHR 2009, 8 et seq.

¹² Spagnolo “The Last Outpost: An Australian Pre-History of the Convention on Contracts for the International Sale of Goods (CISG)” 10 Mel. J. Int’l L. (2009) 141 et seq.; Zeller “The UN-Convention on Contracts for the International Sale of Goods (CISG) – A Leap Forward Towards Unified International Sales Laws” 12 Pace Int’l L. Rev. (2000) 79, 80; Zeller “The CISG in Australia – An Overview” in Ferrari (ed) *Quo vadis CISG? – Celebrating the 25th anniversary of the United Nations Convention on the International Sale of Goods* (Bruylant, Bruxelles, 2005) 293, 294 et seq. Furthermore, see Spagnolo “A Glimpse Through the Kaleidoscope: choices of Law and the CISG (Kaleidoscope Part I)” 13 VJ Int’l Com. & Arb. (2009) 135 et seq.

¹³ Butler “New Zealand” in Ferrari (ed) (fn. 1) 251, 252.

¹⁴ Honnold/Flechtner (fn. 5) Art. 7 para. 92; Flechtner “The CISG in U.S. Courts: The Evolution (and Devolution) of the Methodology of Interpretation” in Ferrari (ed) (fn. 12) 91, 92 et seq.; Levasseur “United States of America” in Ferrari (ed) (fn. 1) 313, 314 et seq.; Mazzotta, 3 Loy. U. Chi. Int’l L. Rev. (2005) 85 et seq.; Zeller, 12 Pace Int’l L. Rev. (2000) 79, 80 et seq.

¹⁵ Below para. II 2.

¹⁶ Magnus “CISG in the German Federal Civil Court” in Ferrari (ed) (fn. 12) 211, 233 et seq. arguing that the “[...] decisions [of the German Federal Civil Court] give good guidance and meet the necessary balance between certainty of law and justice in the case at hand. [...] A good number of cases are now internationally accepted leading cases concerning the interpretation and application of the CISG.”

¹⁷ Andersen “The Uniform International Sales Law and the Global Jurisconsultorium” 24 J.L. & Com. (2005) 159, 176; Flechtner, 19 Pace Int’l L. Rev. (2007) 29, 47; Niemann (fn. 5) 249.

¹⁸ Ferrari “Applying the CISG in a Truly Uniform Manner: Tribunale di Vigevano (Italy), 12 July 2000” 5 Unif. L. Rev. (2001) 203, 207, stating that “[...] the importance of the Tribunale di Vigevano decision is self-evident. [...] [T]he court referred to some 40 foreign court decisions and arbitral awards. In other words, the court has [...] taken into account the need to have regard to foreign case law in order to promote uniformity. [...]”

¹⁹ See e.g. Tribunale di Vigevano, 12 July 2000, CISG-online 493 = IHR 2001, 72 et seq.

²⁰ See also Tribunale Forlì, 11 December 2008, CISG-online 1788.

²¹ For a very interesting survey about the CISG and its non-application in the US see Gordon “Some Thoughts on the Receptiveness

number of foreign decisions to support this result seems at best to be superfluous.²⁰

2. Not applying the CISG where it should be applied

As mentioned above, the first form a homeward trend can take consists of simply disregarding the applicability of the CISG.²¹ Certainly, no numbers exist in how many cases courts did not apply the CISG despite it being applicable and not excluded by the parties. But there must be thousands. Take for example Australia. There the CISG formally entered into force as early as 1 April 1989.²² To this very day, however, there are only eight Australian cases which apply the CISG.²³ This may in part, or even to a great extent, be attributed to the fact that many Australian parties automatically exclude the CISG in their contracts.²⁴ But this fact alone – even if it is true – cannot explain the whole picture. The CISG has been in force in Australia now for more than 20 years and Australia's top five trading partners are all CISG member states; there certainly must have been more than these eight cases litigated before Australian courts where the CISG applied. It seems very likely that in many cases the parties, nor their counsel, nor the judges ever realized that they were pleading and deciding the case under the wrong law.²⁵ A similar picture is painted for New Zealand where the CISG entered into force on 1 October 1995.²⁶ The first true CISG case is now – in 2010 – pending before the Court of Appeal.²⁷ There are, however, quite a few CISG cases litigated and decided outside Australia and New Zealand involving Australian and New Zealand parties.²⁸ Notably there are many such CISG awards delivered under auspices of CIETAC, the China International Economic and Trade Arbitration Commission.²⁹

Another prominent example of circumventing the application of the CISG can be found in France.³⁰ In contrast to decisions from many other countries³¹ the Cour de cassation³²

of Contract Rules in the CISG and UNIDROIT Principles as Reflected in one State's (Florida) Experience of (1) Law School Faculty, (2) Members of the Bar With an International Practice, and (3) Judges" 46 Am. J. Comp. L. (1998) 361, 369 et seq. See also Kritzer "The Convention on Contracts for the International Sale of Goods: Scope, Interpretation and Resources" Rev. CISG (1995) 147, 163; Reimann, *RabelsZ* 71 (2007) 115, 120 et seq.

²² The Convention actually first appeared in Australian statute books in 1986 (NSW) and 1987 (Vic). It was similarly inserted into the legislation of other states of Australia at about the same time. Under Australia's Constitution trade is a State matter and thus it was necessary for the CISG be introduced at a State level. However, the state legislation contained a provision stating that the law would not become operative until the date Convention entered into force at a federal level.

²³ See Spagnolo, 10 Mel. J. Int'l L. (2009) 141, 159. These cases are *Vetzeria Etrusca Srl v. Kingston Estate Wines Pty Ltd* [2008] SASC 75 (Supreme Court of South Australia, 14 March 2008), CISG-online 1891; *Italian Imported Foods Pty Ltd v. Pucci SRL* [2006] NSWSC 1060 (Supreme Court of New South Wales, 13 October 2006), CISG-online 1494; *Summit Chemicals Pty Ltd v. Vetrotex Espana SA*

[2004] WASCA 109 (27 May 2004), CISG-online 860; *Playcorp Pty Ltd v. Taiyo Kogyo Ltd* [2003] VSC 108 (Supreme Court of Victoria, 24 April 2003), CISG-online 808; *Ginza Pte Ltd v. Vista Corp. Pty Ltd* [2003] WASCA 11 (Supreme Court of Western Australia, 17 January 2003), CISG-online 807; *Downs Investments Pty Ltd v. Perwaja Steel SDN BHD* [2002] 2 Qd R 462 (Queensland Court of Appeal, 12 October 2001), CISG-online 955; *Perry Engineering Pty Ltd v. Bernold AG* [2001] SASC 15 (Supreme Court of South Australia, 1 February 2001), CISG-online 806; *Roder Zelt- und Hallenkonstruktionen GmbH v. Rosedown Park Pty Ltd* (1995) 57 FCR 216 (Federal Court of Australia, 28 April 1995), CISG-online 218.

²⁴ Spagnolo, 10 Mel. J. Int'l L. (2009) 141, 160. For a detailed analysis why parties and lawyers tend to opt out of the CISG see Spagnolo, 13 VJ Int'l Com. & Arb. (2009) 135 et seq. See also Spagnolo "Rats in the Kaleidoscope: Rationality, Irrationality, and the Economics and Psychology of Opting In and Out of the CISG (Kaleidoscope Part II)" 13 VJ Int'l Com. & Arb. (2009) 157 et seq. for an economical and psychological analysis of the problem.

²⁵ See e.g. *Italian Imported Foods Pty Ltd v. Pucci SRL* [2006] NSWSC 1060 (Supreme Court of New South Wales, 13 October 2006), CISG-online 1494; Spagnolo, 10 Mel. J. Int'l L. (2009) 141, 212. See also Zeller "Downs Investment Pty Ltd v. Perwaja Steel SDN BHD [2000] QSC 421 (17 November 2000)" 5 VJ Int'l Com. & Arb. (2001) 124; Zeller "Downs Investments Pty Ltd (in liq) v. Perwaja Steel SDN BHD [2002] 2 Qd R 462" 9 VJ Int'l Com. & Arb. (2005) 43.

²⁶ See Butler "New Zealand" in Ferrari (ed) (fn. 1) 251, 254 et seq. arguing that "[...] in all the cases the CISG provisions are used to back up a court's interpretation of domestic law. [...]". Butler further notes that the New Zealand courts mentioned the CISG in only seven cases, see 251, 254 et seq. for further references. Furthermore, see *Hideo Yoshimoto v. Canterbury Golf International Ltd* [2001] 1 NZLR 523, CISG-online 1080.

²⁷ *International Housewares (NZ) Limited v. SEB S.A.* (High Court, Auckland, 31 March 2003), CISG-online 833.

²⁸ See e.g. Guangdong Province Higher Court, 11 January 2005, CISG-online 1610; CIETAC China International Economic & Trade Arbitration Commission, 19 January 2004, CISG-online 1804; CIETAC China International Economic & Trade Arbitration Commission, 8 April 1999, CISG-online 1114; *Helen Kaminski Pty. Ltd. v. Marketing Australian Products, Inc. d/b/a Fiona Waterstreet Hats* U.S. Dist. LEXIS 10630 (1997) (S.D. NY 1997), CISG-online 297.

²⁹ For a detailed list of the cases, see the CISG-online database on <http://www.globalsaleslaw.org/index.cfm?pageID=29> (last accessed 15 March 2010).

³⁰ De Ly "Opting Out: Some Observations on the Occasion of the CISG's 25th Anniversary" in Ferrari (ed) (fn. 12) 25, 32; Witz "France" in Ferrari (ed) (fn. 1) 129, 137. See also Heuzé *La vente internationale de marchandises – Droit uniforme* (L. G. D. J., Paris, 2000) para. 95 et seq.

³¹ For Italian decisions see e.g. Tribunale di Vigevano, 12 July 2000, CISG-online 493 = IHR 2001, 72 et seq. and Tribunale di Padova, 25 February 2004, CISG-online 819 = IHR 2005, 31 et seq., stating that the reference in the pleadings to the non-uniform domestic rule of a contracting State alone is not, by itself, sufficient to exclude the applicability of the Convention. Several German courts held that the parties' referring to German substantive law in the

held that pleading a case in court under French law amounted to a subsequent implicit exclusion of the CISG irrespective of whether the parties were aware or not that the CISG applied to their contract.³³

3. Interpreting CISG provisions in the light of domestic law

There are innumerable examples of national courts equating CISG concepts and provisions with the familiar domestic ones not realizing and probably not being interested in the fact that they are – at least sometimes – totally different. Let me highlight some of the most striking issues.

To the very day many US American courts seem to be convinced that it is perfectly normal to interpret the CISG according to the UCC and the case law decided under it.³⁴ Thus even in 2008 two decisions in the District Court of the Southern District of New York³⁵ relied upon the UCC “to clarify the CISG” claiming that there was “virtually no American case law on the CISG” thus relying on a statement in the 1995 decision in *Delchi Carrier*;³⁶ and ignoring the already abundant US case law on the CISG.³⁷ If, however, a New York district court does not even consider case law from any other US State why should one expect it to consider any international developments.³⁸

Similar attitudes, however, can be found around the globe.³⁹ For example, Australian courts, too, interpret the CISG through comparisons with domestic legislation.⁴⁰ In Europe, the Austrian Supreme Court in order to justify the result that a notice of non-conformity to become effective under Art. 27 CISG has to be properly dispatched only refers to a Commentary on the Austrian Commercial Code.⁴¹

Although the German courts that are widely praised as interpreting the CISG in a truly international manner in general and not falling back on purely domestic law;⁴² still, they are only relying on German Commentaries on the CISG as well as German case law.⁴³ The same holds true for Austrian and

la Convention de Vienne” D. 2001, 3607 et seq.; Hager “Zur Auslegung des UN-Kaufrechts – Grundsätze und Methoden” in Baums/Lutter/Schmidt/Wertenbruch (eds) *Festschrift für Ulrich Huber zum siebzigsten Geburtstag* (Mohr Siebeck, Tübingen, 2006) 319, 326; Ferrari, IHR 2009, 8, 21.

³⁴ Cases where the CISG was interpreted according to specific provisions of the UCC are e.g. *Hilaturas Miel, S.L. v. Republic of Iraq* 573 F. Supp. 2d 781 (S.D. NY 2008), CISG-online 1777; *Macromex Srl. v. Globex International Inc.* 2008 WL 1752530 (S.D. NY 2008), CISG-online 1653; *TeeVee Toons, Inc. (d/b/a TVT Records) & Steve Gottlieb, Inc. (d/b/a Biobox) v. Gerhard Schubert GmbH* 2006 WL 2463537 (S.D. NY 2006), CISG-online 1272; *Chicago Prime Packers, Inc. v. Northam Food Trading Co.* 408 F. 3d 894 (7th Cir. 2005), CISG-online 1026; *Genpharm Inc. v. Pliva-Lachema A. S., Pliva d.d.* 361 F. Supp. 2d 49 (E.D. NY 2005), CISG-online 1006; *Raw Materials Inc. v. Manfred Forberich GmbH & Co., KG* 2004 WL 1535839 (N.D. IL 2004), CISG-online 925; *Chicago Prime Packers, Inc. v. Northam Food Trading Co.* 320 F. Supp. 2d 702 (N.D. IL 2004), CISG-online 851 = IHR 2004, 156 et seq.; *Ajax Tool Works, Inc. v. Can-Eng Manufacturing Ltd.* 2003 U.S. Dist. LEXIS 1306 (N.D. IL 2003), CISG-online 772; *Schmitz-Werke GmbH & Co. v. Rockland Industries, Inc.; Rockland International FSC, Inc.* 37 Fed. Appx. 687 (4th Cir. 2005), CISG-online 625 = IHR 2003, 292 et seq. For further references see the CISG-online database at <http://www.cisg-online.ch> (last accessed 15 March 2010). See also Honnold/Flechtner (fn. 5) Art. 7 para. 92; Levasseur (fn. 14) 313, 315 et seq.

³⁵ *Hilaturas Miel, S.L. v. Republic of Iraq* 573 F. Supp. 2d 781 (S.D. NY 2008), CISG-online 1777; *Macromex Srl. v. Globex International Inc.* 2008 WL 1752530 (S.D. NY 2008), CISG-online 1653.

³⁶ *Delchi Carrier, SpA v. Rotorex Corp.* 10 F. 3d 1024 (2nd Cir. 1995), CISG-online 140.

³⁷ According to the entries in the CISG-online database, in 2008, there were close to 100 cases decided by US courts that are dealing with the CISG. They are freely available at <http://www.cisg-online.ch> (last accessed 15 March 2010) and <http://www.cisg.law.pace.edu> (last accessed 15 March 2010).

³⁸ For a suggestion of how the homeward trend could be overcome in the US see Bailey “Facing the Truth: Seeing the Convention on Contracts for the International Sale of Goods as an Obstacle to Uniform Law of International Sales” 32 Cornell Int’l L. J. (1999) 273, 313 et seq.

³⁹ El-Saghir “The Interpretation of the CISG in the Arab World” in Janssen/Meyer (eds) (fn. 1) 355, 366. See also Cairo Chamber of Commerce and Industry, 3 October 1995, CISG-online 1289, where the arbitrator applied Egyptian law to interpret CISG. For China see Han “China” in Ferrari (ed) (fn. 1) 71, 78 et seq. stating that “[...] many courts did not distinguish where the CISG was applied and where domestic law was applied, but enumerated articles both of the CISG and domestic laws. [...]”. See also Li “The Interpretation of the CISG in China” in Janssen/Meyer (eds) (fn. 1) 343, 344 et seq. For Argentina see Nood Taquela “Argentina” in Ferrari (ed) (fn. 1) 3, 5 arguing that “[...] Argentine courts are not conscious enough of the mandate to interpret the CISG in the light of the international character and in general do not take into account the need to promote uniformity [...]”.

⁴⁰ Spagnolo, 10 Mel. J. Int’l L. (2009) 141, 177.

⁴¹ Oberster Gerichtshof, 24 May 2005, CISG-online 1046 = IHR 2005, 249 et seq.

choice of law clause also includes the CISG and therefore does not lead to an opting-out of the Convention, see Oberlandesgericht Stuttgart, 31 March 2008, CISG-online 1658 = IHR 2008, 102 et seq.; Landgericht Bamberg, 23 October 2006, CISG-online 1400 = IHR 2007, 113 et seq.; Oberlandesgericht Rostock, 10 October 2001, CISG-online 671 = IHR 2003, 17 et seq. For US decisions see e.g. *American Mint LLC, Goede Beteiligungsgesellschaft, and Michael Goede v. GOSoftware, Inc.* 2006 WL 42090 (M.D. PA 2006), CISG-online 1175 = IHR 2007, 243 et seq. For a Russian decision see e.g. Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, 5 November 2004, CISG-online 1360. See also Schwenzer/Hachem in Schlechtriem/Schwenzer (eds) (fn. 5) *Commentary*, Art. 6 para. 19; Ferrari, IHR 2009, 8, 21.

³² Cour de Cassation, 25 October 2005, CISG-online 1226; Cour de Cassation, 26 June 2001, CISG-online 598.

³³ For a detailed discussion about this matter see Witz “Vente internationale: l’office du juge face au pouvoir des plaideurs d’écarter le droit uniforme et jeu combiné de la Convention de Bruxelles et de

Swiss courts.⁴⁴ Thus all depends on the quality and internationality of the Commentaries written and published in German.

Let me give you some examples of areas that are especially prone to be interpreted from a domestic perspective.

a) *Examination and notice requirement,*

Arts. 38, 39 CISG

In domestic sales laws there is a great variety of views concerning the question whether a buyer has to inspect the goods and to give notice to the seller of a non-conformity thereby discovered.⁴⁵ Most domestic sales laws do not recognize any such obligation of the buyer at all.⁴⁶ Even in those countries whose domestic sales laws do contain such provisions, their function and interpretation varies greatly from a very rigid requirement to an instrument⁴⁷ designed to prevent fraud.⁴⁸ Thus, it does not come as a great surprise that diverging domestic preconceptions have heavily influenced the interpretation of the CISG provisions concerned.⁴⁹

Many if not most decisions especially in Common law countries do not mention the fact of when or even if the buyer had given notice of a non-conformity of the goods at all.⁵⁰ Probably neither parties, counsel nor courts realized the requirement of timely notice in these cases. If the issue of timely notice is discussed generous timeframes are usually allowed.⁵¹ Sometimes notice given several weeks or months after delivery of the goods is still deemed to be appropriate.⁵²

⁴² Magnus "Germany" in Ferrari (ed) (fn. 1) 143, 156; Magnus "CISG in the German Federal Civil Court" in Ferrari (ed) (fn. 12) 211, 233 et seq.; Karollus "Judicial Interpretation and Application of the CISG in Germany 1988-1994" Rev. CISG (1995) 51, 52.

⁴³ An analysis of the ten latest German cases published on the CISG-online database shows that none of German courts made reference to foreign case law or scholarly materials from outside of the Germanic legal system. See Oberlandesgericht Brandenburg, 18 November 2008, CISG-online 1734 = IHR 2009, 105 et seq.; Oberlandesgericht Jena, 27 August 2008, CISG-online 1820; Bundesgerichtshof, 9 July 2008, CISG-online 1717; Landgericht Landshut, 12 June 2008, CISG-online 1703; Oberlandesgericht Karlsruhe, 12 June 2008, CISG-online 1716; Oberlandesgericht Köln, 19 May 2008, CISG-online 1700; Oberlandesgericht München, 5 March 2008, CISG-online 1686 = IHR 2008, 253 et seq.; Oberlandesgericht Karlsruhe, 14 February 2008, CISG-online 1649 = IHR 2008, 53 et seq.; Oberlandesgericht Hamburg, 25 January 2008, CISG-online 1681 = IHR 2008, 98 et seq. Only Oberlandesgericht Stuttgart, 31 March 2008, CISG-online 1658 = IHR 2008, 102 et seq. made reference to a Dutch decision.

⁴⁴ For Switzerland see e.g. Schweizerisches Bundesgericht, 20 December 2006, CISG-online 1426 = IHR 2007, 127 et seq.; Schweizerisches Bundesgericht, 12 June 2006, CISG-online 1516; Schweizerisches Bundesgericht, 5 April 2005, CISG-online 1012 = IHR 2005, 204 et seq. For Austria see e.g. Oberster Gerichtshof, 19 December 2007, CISG-online 1628 = IHR 2008, 106 et seq.; Oberster Gerichtshof, 30 November 2006, CISG-online 1417 = IHR 2007, 74 et seq.; Oberster Gerichtshof, 12 September 2006, CISG-online 1364 = IHR 2007, 39 et seq.; Oberster Gerichtshof, 25 January 2006, CISG-online 1223.

⁴⁵ CISG-AC Opinion No. 2, Examination of the Goods and Notice of Non-Conformity: Articles 38 and 39, 7 June 2004, Rapporteur: Professor Eric Bergsten, available at <http://www.cisgac.com/default.php?ipkCat=128&ifkCat=144&sid=144> (last accessed 15 March 2010), Comment 2.1. et seq.; Schwenzer/Hachem "The CISG – Successes and Pitfalls" 57 Am. J. Comp. L. (2009) 457, 469; Schwenzer "National Preconceptions that Endanger Uniformity" 19 Pace Int'l L. Rev. (2007) 103, 105 et seq.; Schwenzer "Buyer's Remedies in the Case of Non-conforming Goods: Some Problems in a Core Area of the CISG" in American Society of International Law (ASIL) (ed) *Proceedings of the 101st Annual Meeting – The Future of International Law* (ASIL, Washington D. C., 2007) 416, 417 et seq.; Schwenzer "The Noble Month (Articles 38, 39 CISG) – The Story Behind the Scenery" 7 EJLR (2005) 353, 354 et seq.; Schwenzer in Schlechtriem/Schwenzer (eds) (fn. 5) *Commentary*, Art. 39 para. 4.

⁴⁶ Among the exceptions are the domestic sales laws of Germany, Austria and Switzerland which all know an express duty of the buyer to examine the goods and to give notice of any lack of conformity, see §§ 377, 378 German Handelsgesetzbuch (HGB), § 377 Austrian Unternehmensgesetzbuch (UGB) and Art. 201 Swiss Code of Obligations (OR). Further exceptions are e.g. the US, see § 2-607(3)(a) UCC, Italy, see Art. 1667(2) Italian Codice Civile (CC), the Netherlands, see Art. 7:23.1 Dutch Burgerlijk Wetboek (BW) and Portugal, see Art. 471 Código de Commercio (Ccom). For further information see Schwenzer/Hachem, 57 Am. J. Comp. L. (2009) 457, 469; Schwenzer, 19 Pace Int'l L. Rev. (2007) 103, 106 et seq.; Schwenzer (fn. 45) 416, 417; Schwenzer, 7 EJLR (2005) 353, 354.

⁴⁷ An example of a country dealing with the examination of the goods and the notice of non-conformity in a very rigid manner is Germany, see § 377 HGB. For a detailed analysis of § 377 HGB see Schlechtriem *Schuldrecht Besonderer Teil* (J. C. B. Mohr, Tübingen, 6th ed., 2003) para. 70; Grunewald in Schmidt (ed) *Münchener Kommentar zum Handelsgesetzbuch* (C. H. Beck, Munich, 2nd ed., 2007) § 377 para. 3 et seq. Furthermore see Honnold/Flechtner (fn. 5) Arts. 39, 40, 44, para. 258; Schwenzer/Hachem, 57 Am. J. Comp. L. (2009) 457, 469; Schwenzer (fn. 45) 416, 417; Schwenzer, 7 EJLR (2005) 353, 354; Schwenzer in Schlechtriem/Schwenzer (eds) (fn. 4) *Kommentar*, Art. 39 para. 4; Schwenzer in Schlechtriem/Schwenzer (eds) (fn. 5) *Commentary*, Art. 39 para. 4.

⁴⁸ For the meaning of "reasonable time" under the UCC see White/Summers *Uniform Commercial Code* (West Group, St. Paul, 5th ed., 2000) 418 et seq. with further references to US case law.

⁴⁹ See Flechtner "Funky Mussels, a Stolen Car, and Decrepit Used Shoes: Non-Conforming Goods and Notice Thereof Under the United Nations Sales Convention ('CISG')" 26 B. U. Int'l L. J. (2008) 1, 15 et seq.; Honnold/Flechtner (fn. 5) Arts. 39, 40, 44, para. 257.1; Lookofsky (fn. 4) 87; Schwenzer (fn. 45) 416, 417; Schwenzer, 7 EJLR (2005) 353, 354.

⁵⁰ For Australia see Spagnolo, 10 Mel. J. Int'l L. (2009) 141, 197 et seq. referring to e.g. *Italian Imported Foods Pty Ltd v Pucci SRL* [2006] NSWSC 1060 (Supreme Court of New South Wales, 13 October 2006), CISG-online 1494. For the US see e.g. *BP Oil International v. Empresa Estatal Petroleos de Ecuador* 332 F. 3d 333 (5th Cir. 2003), CISG-online 730 = IHR 2003, 189 et seq. Although some recent US-decisions do in fact mention Art. 39 CISG and the requirement of timely notice of the non-conformity of the goods, they do not elaborate on the reasonableness, see e.g. *TeeVee Toons, Inc. (d/b/a*

However, interestingly Art. 39 CISG was recently relied upon by a US American District Court⁵³ in a manner for which it was not at all designed. It was applied by analogy to a case of alleged late delivery of the goods – Art. 39 CISG only relates to non-conformity – its para 2 being interpreted as a statute of limitation. The CISG, however, does not deal with the prescription of actions whatsoever.⁵⁴ There is a separate UN Limitation Convention to which the USA is also a party.⁵⁵

At the other end of the spectrum are the decisions from the Germanic legal systems. As German, Austrian and Swiss domestic sales laws know or at least ought to have known very rigid notice obligations⁵⁶ parties and courts regularly thoroughly investigate the question whether timely notice of any non-conformity was given. When the CISG first came into force German courts merely relied on the interpretation of the respective domestic provisions, consequently allowing buyers only a few days for inspection of the goods and giving notice.⁵⁷ Over time the German⁵⁸ as well as the Swiss Supreme Court⁵⁹ were convinced by comparative scholarly writing⁶⁰ that this was not at all in line with an international interpretation of the Convention.⁶¹ In general case law from both countries now allows the buyer one month for giving notice.⁶² However, the Austrian Supreme Court still stubbornly favors an overall period of a fortnight to inspect and notify.⁶³ It was inspired to do so exclusively by Austrian scholars who negatively com-

TVT Records) & Steve Gottlieb, Inc. (d/b/a Biobox) v. Gerhard Schubert GmbH 2006 WL 2463537 (S.D. NY 2006), CISG-online 1272; *Chicago Prime Packers, Inc. v. Northam Food Trading Co.* 320 F. Supp. 2d 702 (N.D. IL 2004), CISG-online 851 = IHR 2004, 156 et seq. Furthermore, see Schwenzer, 19 Pace Int'l L. Rev. (2007) 103, 118 et seq.; Schwenzer (fn. 45) 416, 419; Schwenzer, 7 EJLR (2005) 353, 362 et seq.

⁵¹ *Shuttle Packaging Systems, L. L. C. v. Jacob Tsonakis, INA S. A. and INA Plastics Corporation* 2001 U. S. Dist. LEXIS 21 630 (W. D. MI 2001), CISG-online 773, stating that "[...] it will not be practicable to require notification in a matter of a few weeks. [...]"

⁵² See e.g. *TeeVee Toons, Inc. (d/b/a TVT Records) & Steve Gottlieb, Inc. (d/b/a Biobox) v. Gerhard Schubert GmbH* 2006 WL 2463537 (S. D. NY 2006), CISG-online 1272 ["two months"]. See also Schwenzer (fn. 45) 416, 419; Schwenzer, 19 Pace Int'l L. Rev. (2007) 103, 118 et seq.; Schwenzer, 7 EJLR (2005) 353, 363.

⁵³ *Sky Cast, Inc. v. Global Direct Distribution LLC* 2008 WL 754734 (E.D. KY 2008), CISG-online 1652 = IHR 2009, 24 et seq.

⁵⁴ Honnold/Flechtner (fn. 5) Arts. 39, 40, 44 para. 254.2; Magnus in *J. von Staudingers Kommentar zum Bürgerlichen Kommentar zum Bürgerlichen Gesetzbuch mit Einführungsgesetz und Nebengesetzen, Wiener UN-Kaufrecht (CISG)* (Sellier/de Gruyter, Berlin, 15th ed., 2005) Art. 4, para. 38; Schwenzer/Hachem in Schlechtriem/Schwenzer (eds) (fn. 5) *Commentary*, Art. 4 para. 50.

⁵⁵ United Nations Convention on the Limitation Period in the International Sale of Goods (New York, 14 June 1974), available at http://www.uncitral.org/uncitral/en/uncitral_texts/sale_goods/1974Convention_limitation_period.html (last accessed 15 March 2010). See also Honnold/Flechtner (fn. 5) Arts. 39, 40, 44, para. 261.1; Schwenzer in Schlechtriem/Schwenzer (eds) (fn. 5) *Commentary*, Art. 39 para. 28; Schwenzer in Schlechtriem/Schwenzer (eds) (fn. 4) *Kommentar*, Art. 39 para. 28.

⁵⁶ For Germany see § 377 HGB, for Switzerland see Art. 201 OR. Austria recently changed the provision regarding the timely notice of non-conformity of the goods (§ 377 HGB) from "unverzüglich" (without undue delay) to "binnen angemessener Frist" (within reasonable time) in order to adjust the domestic law to the CISG, see § 377 UGB. See also CISG-AC Opinion No. 2 (fn. 45), Comment 5.1.; Flechtner, 26 B. U. Int'l L. J. (2008) 1, 16; Schwenzer in Schlechtriem/Schwenzer (eds) (fn. 4) *Kommentar*, Art. 39 para. 4.

⁵⁷ See e.g. Landgericht Stuttgart, 31 August 1989, CISG-online 11; Oberlandesgericht Düsseldorf, 8 January 1993, CISG-online 76; Oberlandesgericht Düsseldorf, 12 March 1993, CISG-online 82; Oberlandesgericht Saarbrücken, 13 January 1993, CISG-online 83; Oberlandesgericht Düsseldorf, 10 February 1994, CISG-online 116; Oberlandesgericht München, 8 February 1995, CISG-online 142. See also Honnold/Flechtner (fn. 5) Arts. 38, 39, 44, para. 257.1; Niemann (fn. 5) 161 et seq.

⁵⁸ Bundesgerichtshof, 3 November 1999, CISG-online 475, referring to Bundesgerichtshof, 8 March 1995, CISG-online 144.

⁵⁹ Schweizerisches Bundesgericht, 10 October 2005, CISG-online 1353.

⁶⁰ Honnold/Flechtner (fn. 5) Arts. 38, 39, 44, para. 257.1; Schwenzer, 19 Pace Int'l L. Rev. (2007) 103, 115 et seq.; Schwenzer, 7 EJLR (2005) 353, 361. See furthermore e.g. Andersen "Reasonable Time in Article 39(1) of the CISG – Is Article 39(1) Truly a uniform provision?" available at <http://www.cisg.law.pace.edu/cisg/biblio/andersen.html> (last accessed 15 March 2010); Di Matteo et al., 24 Nw. J. Int'l L. & Bus. (2004) 299, 364 et seq.

⁶¹ The German literature and case law has been met with criticism, see Witz *Les premières applications du droit uniforme de la vente internationale (Convention des Nations Unies du 11 avril 1980)* (L.G.D.J., Paris, 1995) 90 et seq.; Lookofsky (fn. 4) 87; Witz "A Raw Nerve in Disputes Relating to the Vienna Sales Convention: The Reasonable Time for the Buyer to Give Notice of a Lack of Conformity" 11 ICC Int'l Ct. Arb. Bull. (2000) 15, 20. See also Schwenzer in Schlechtriem/Schwenzer (eds) (fn. 4) *Kommentar*, Art. 39 para. 17.

⁶² Recent decisions where German courts explicitly relied on the one month period are e.g. Oberlandesgericht Koblenz, 19 October 2006, CISG-online 1407 = IHR 2007, 35 et seq.; Landgericht Bamberg, 23 October 2006, CISG-online 1400 = IHR 2007, 113 et seq.; Landgericht Hamburg, 6 September 2004, CISG-online 1085. But see Oberlandesgericht Köln, 19 May 2008, CISG-online 1700 and Landgericht Tübingen, 18 June 2003, CISG-online 784 = IHR 2003, 236 et seq., wrongly assuming a standard period of two weeks. Furthermore, see Oberlandesgericht Düsseldorf, 23 January 2004, CISG-online 918, where the court did not make reference to any standard period at all. For Switzerland see e.g. Schweizerisches Bundesgericht, 13 November 2003, CISG-online 840 = IHR 2004, 215 et seq.; Obergericht Luzern, 12 May 2003, CISG-online 846; Handelsgericht St. Gallen, 11 February 2003, CISG-online 960; Obergericht Luzern, 8 January 1997, CISG-online 228. See also Flechtner, 26 B. U. Int'l L. J. (2008) 1, 17 et seq.; Schwenzer in Schlechtriem/Schwenzer (eds) (fn. 4) *Kommentar*, Art. 39 para. 17.

⁶³ See Oberster Gerichtshof, 14 January 2002, CISG-online 643 = IHR 2002, 76 et seq.; Oberster Gerichtshof, 27 August 1999, CISG-online 485 = IHR 2001, 81 et seq.; Oberster Gerichtshof, 15 October 1998, CISG-online 380. See also Lookofsky (fn. 4) 87. See also Magnus in Staudinger (fn. 54) Art. 39 para. 49; Piltz *Internationales Kaufrecht* (C. H. Beck, Munich, 2nd ed., 2008) 5-65;

mented on the shift by the German Supreme Court towards more internationality.⁶⁴

Consequently, Arts. 38, 39 CISG are an area where national preconceptions heavily influence the interpretation of the Convention.

b) Other areas of divergent interpretation

Numerous other areas of domestically influenced divergent interpretations of the CISG could be mentioned here; the main areas being the provisions on damages (Art. 74 CISG)⁶⁵ and exemption (Art. 79 CISG)⁶⁶ as well as – again a special problem in the US – the parol evidence rule.⁶⁷

4. Narrowing the scope of the Convention

Another facet of the homeward trend can be seen in endeavors to narrow the scope of the Convention, be it by applying concurrent domestic law remedies or by relying on rules that are defined as concerning issues of validity or as being procedural in nature.

a) Concurring domestic law remedies

A special form of homeward trend is the application of concurrent domestic law remedies.⁶⁸ The CISG and its uniform interpretation can be severely undermined in this way, too.⁶⁹ Again, US American courts⁷⁰ with the support of at least some US American scholars⁷¹ seem to be especially prone to this form of a homeward trend. The main device to circumvent

Schwenzer, 19 Pace Int'l L. Rev. (2007) 103, 116; Schwenzer, 7 EJLR (2005) 353, 361.

⁶⁴ Karollus "UN-KR: Anwendungsbereich, Holzhandelsusancen, Mängelrüge" JBl 1999, 318, 321 et seq.; Kramer "Rechtzeitige Untersuchung und Mängelanzeige bei Sachmängeln nach Art. 38 und 39 UN-Kaufrecht – eine Zwischenbilanz" in Kramer/Koppensteiner/Schuhmacher (eds) *Beiträge zum Unternehmensrecht: Festschrift für Hans-Georg Koppensteiner zum 65. Geburtstag* (Orac, Vienna, 2001) 617, 627 et seq.; Magnus in Staudinger (fn. 54) Art. 39 para. 49. See also Schwenzer, 19 Pace Int'l L. Rev. (2007) 103, 116; Schwenzer, 7 EJLR (2005) 353, 361.

⁶⁵ CISG-AC Opinion No. 6, Calculation of Damages under CISG Article 74, Spring 2006, Rapporteur: Professor John Gotanda, available at <http://www.cisgac.com/default.php?ipkCat=128&ifkCat=148&sid=148> (last accessed 15 March 2010), Comments 2.5. and 9.5.; Cook "The U.N. Convention on Contracts for the International Sale of Goods: A Mandate to Abandon Legal Ethnocentricity" 16 J.L. & Com. (1997) 257 et seq.; Di Matteo et al., 24 Nw. J. Int'l L. & Bus. (2004) 299, 420; Ferrari, IHR 2009, 8, 14; Flechtner (fn. 14) 91, 105; Heuzé (fn. 30) 400 et seq. See also Schwenzer in Schlechtriem/Schwenzer (eds) (fn. 5) *Commentary*, Art. 74 para. 1 et seq.; Schwenzer in Schlechtriem/Schwenzer (eds) (fn. 4) *Kommentar*, Art. 74 para. 3 et seq. for further references.

⁶⁶ CISG-AC Opinion No. 7, Exemption of Liability for Damages under Article 79 of the CISG, 12 October 2007, Rapporteur: Professor Alejandro Garro, available at <http://www.cisgac.com/default.php?ipkCat=128&ifkCat=148&sid=169> (last accessed 15 March 2010), Comment 26. et seq.; Flechtner (fn. 1) 29, 31; Flechtner (fn. 14)

91, 106 et seq.; Honnold/Flechtner (fn. 5) Art 79 para. 427 et seq.; Lookofsky (fn. 4) 129 et seq.; Lookofsky/Flechtner "Nominating Manfred Forberich: The Worst CISG Decision in 25 Years?" 9 VJ Int'l Com. & Arb. (2005) 199, 202 et seq. See also Schwenzer in Schlechtriem/Schwenzer (fn. 5) *Commentary*, Art. 79 para. 1 et seq.; Schwenzer in Schlechtriem/Schwenzer (eds) (fn. 4) *Kommentar*, Art. 79 para. 5 et seq. for further references.

⁶⁷ CISG-AC Opinion No. 3, Parol Evidence Rule, Plain Meaning Rule, Contractual Merger Clause and the CISG, 23 October 2004, Rapporteur: Professor Richard Hyland, available at <http://www.cisgac.com/default.php?ipkCat=128&ifkCat=145&sid=145> (last accessed 15 March 2010), Comment 1.2.; Andreason "MCC-Marble Ceramic Center: The Parol Evidence Rule and Other Domestic Law Under the Convention on Contracts for the International Sale of Goods" 24 BYU L. Rev. (1999) 351, 353 et seq.; Flechtner, 17 J.L. & Com. (1998) 187, 201; Flechtner "More US Decisions on the U.N. Sales Convention: Scope, Parol Evidence, 'Validity' and Reduction of Price Under Article 50" 50 J.L. & Com. (1995) 153, 156; Hager, FS Huber (fn. 33) 319, 327 et seq.; Kilian "CISG and the Problem with Common Law Policy" 10 Transnat'l L. & Pol'y (2001) 217, 231; Lookofsky (fn. 4) 42 et seq.; McQuillen "The Development of a Federal CISG Common Law in the US Courts: Patterns of Interpretation and Citation" 61 U. Miami L. Rev. (2007) 509, 520; Torzilli "The Aftermath of MCC-Marble: Is This the Death Knell for the Parol Evidence Rule?" 4 St. John's L. Rev. (2000) 843, 855. See also Schmidt-Kessel in Schlechtriem/Schwenzer (eds) (fn. 5) *Commentary*, Art. 8 para. 33 et seq.; Schmidt-Kessel in Schlechtriem/Schwenzer (eds) (fn. 4) *Kommentar*, Art. 8 para. 34.

⁶⁸ See the seminal article about this issue by Schlechtriem "The Borderland of Tort and Contract – Opening a New Frontier?" 21 Cornell Int'l L. J. (1988) 467 et seq. See also Ferrari "The Interaction Between the United Nations Convention for the International Sale of Goods and Domestic Remedies" *RabelsZ* 71 (2007) 52, 70 et seq.; Hartnell "Rousing the Sleeping Dog: The Validity Exception to the Convention on Contracts for the International Sale of Goods" 18 Yale J Int'l L. (1993) 1, 72; Huber "Some Introductory Remarks on the CISG" IHR 2006, 228, 231; Lookofsky "In Dubio pro Convention? Some Thoughts About Opt-Outs, Computer Programs and Preemption Under the 1980 Vienna Sales Convention (CISG)" 13 Duke J. Comp. & Int'l L. (2003) 263, 283; Lookofsky "Loose Ends and Contorts in International Sales: Problems in the Harmonization of Private Law Rules" 39 Am. J. Comp. L. (1991) 403 et seq.; Schwenzer/Hachem, 57 Am. J. Comp. L. (2009) 457, 470 et seq.; Schwenzer (fn. 45) 416, 419 et seq.

⁶⁹ Hager, FS Huber (fn. 32) 319, 320 et seq.; Flechtner (fn. 14) 91, 97; Kilian, 10 Transnat'l L. & Pol'y (2001) 217, 228; Lookofsky, 13 Duke J. Comp. & Int'l L. (2003) 263, 266; Schwenzer/Hachem, 57 Am. J. Comp. L. (2009) 457, 471; Schwenzer (fn. 45) 416, 421; Spagnolo, 10 Mel. J. Int'l L. (2009) 141, 166.

⁷⁰ *Usinor Industeel v. Leeco Steel Products, Inc.* 209 F. Supp. 2d 880 (N.D. IL 2002), CISG-online 1326 = IHR 2003, 237 et seq.; *Chicago Prime Packers, Inc. v. Northam Food Trading Co.* 320 F. Supp. 2d 702 (N.D. IL 2004), CISG-online 851 = IHR 2004, 156 et seq.; *Ajax Tool Works, Inc. v. Can-Eng Manufacturing Ltd.* 2003 U. S. Dist. LEXIS 1306 (N.D. IL 2003), CISG-online 772.

⁷¹ Cuniberti, 39 Vand. J. Transnat'l L. (2006) 1511, 1546; Gillette/Scott, 25 Int'l Rev. L. & Econ. (2005) 446, 447. See also the non-

the CISG seems to be negligent misrepresentation.⁷² As negligent misrepresentation is conceived as sounding in tort it is not regarded as being excluded by the CISG – which allegedly only deals with the contractual obligations of the parties.⁷³ However, the mere fact that there is hardly any case in which a buyer complaining about non-conformity of the goods under a sales contract is not simultaneously relying on negligent misrepresentation clearly shows how the two fields are overlapping. Allowing concurring domestic remedies undermines the CISG in a core area, namely seller's liability for non-conformity of the goods. Unification is thus highly endangered. Therefore, the only answer to this question is the one already given by the late John Honnold,⁷⁴ that the CISG displaces any domestic rules – whether based on contract or tort – if the facts that invoke such rules are the same facts that invoke the Convention.⁷⁵

b) Issues of validity

A further field open to homeward trend are questions of validity.⁷⁶ According to Art. 4 sent. 2(a) CISG, the Convention is not concerned with the validity of the contract and any of its clauses. There are numerous examples of court decisions relying on domestic concepts of validity not realizing that the very term "validity" has to be interpreted autonomously.⁷⁷ This may very well yield actually bizarre results. Thus, a US District Court⁷⁸ has recently discussed a clause disclaiming liability for non-conformity pursuant to Art. 35(2) CISG under Sec. 2-316(2) UCC. The court highlighted the word "merchantability" without having regard to the fact that this is not a concept under the CISG.⁷⁹

c) The "substantive" – "procedure" divide

Finally, drawing the line between so called "substantive" and "procedural" law issues often may lead to familiar domestic law.⁸⁰ Procedural questions are not dealt with by the CISG.⁸¹ Thus, it may be questionable, whether such issues as burden and standard of proof (which may often decide the outcome of a case) are to be decided autonomously.⁸² Recently in this context compensation for legal costs has also been given considerable attention.⁸³

US American scholars Huber/Mullis *The CISG – A new Textbook for Students and Practitioners* (Sellier, Munich, 2007) 26 et seq.; Lookofsky (fn. 4) 23.

⁷² See *Sky Cast, Inc. v. Global Direct Distribution LLC* 2008 WL 754734 (E.D. KY 2008), CISG-online 1652 = IHR 2009, 24 et seq.; *Miami Valley Paper, LLC v. Lebbing Engineering & Consulting GmbH* 2006 WL 2924779 (S.D. OH 2006), CISG-online 1326; *Geneva Pharmaceuticals Tech. Corp. v. Barr Labs. Inc.* 201 F. Supp. 2d 236 (S.D. NY 2002), CISG-online 653. See also Honnold/Flechtner (fn. 5) Art. 5 para. 73; Lookofsky (fn. 4) 25 et seq.; Schwenzer in Schlechtriem/Schwenzer (eds) (fn. 5) *Commentary*, Art. 35 para. 48; Schwenzer/Hachem, 57 Am. J. Comp. L. (2009) 457, 471; Schwenzer (fn. 45) 416, 420. For a basic description of the concept of negligent misrepresentation under the US-American law see Calamari/Perillo *Calamari and Perillo on Contracts* (Thomson West, St. Paul, 5th ed., 2003) 336 et seq.

⁷³ *Viva Vino Import Corp. v. Franese Vini S.r.l.* 2000 U. S. Dist. LEXIS 12347 (E. D. PA 2000), CISG-online 675 = IHR 2002, 28; Lookofsky (fn. 4) 25. For further details see Schwenzer/Hachem, 57 Am. J. Comp. L. (2009) 457, 471; Schwenzer (fn. 45) 416, 419 et seq.

⁷⁴ Honnold/Flechtner (fn. 5) Art. 35 para. 240.

⁷⁵ Schlechtriem, 21 Cornell Int'l L. J. (1988) 467, 475; Ferrari, *RabelsZ* 71 (2007) 52, 75; Schwenzer/Hachem, 57 Am. J. Comp. L. (2009) 457, 471; Schwenzer (fn. 45) 416, 421.

⁷⁶ For a detailed analysis of the problem see Leyens "CISG and Mistake: Uniform Law vs. Domestic Law, The Interpretative Challenge of Mistake and the Validity Loophole" *Rev. CISG* (2003 – 2004) 3, 14 et seq. See also Ferrari, *RabelsZ* 71 (2007) 52, 59 et seq.; Ferrari in Schlechtriem/Schwenzer (eds) (fn. 4) *Kommentar*, Art. 4 para. 16; Lookofsky (fn. 4) 23; Schwenzer/Hachem in Schlechtriem/Schwenzer (eds) (fn. 5) *Commentary*, Art. 4 para. 30 et seq.; Schwenzer/Hachem, 57 Am. J. Comp. L. (2009) 457, 472 et seq.

⁷⁷ See e.g. *Norfolk Southern Railway Company v. Power Source Supply, Inc.* 2008 U.S. Dist. LEXIS 56942 (W.D. PA 2008), CISG-online 1776; *Barbara Berry, S. A. de C. V. v. Ken M. Spooner Farms, Inc.* 2007 WL 4039341 (9th Cir. 2007), CISG-online 1603; *Geneva Pharmaceuticals Tech. Corp. v. Barr Labs. Inc.* 201 F. Supp. 2d 236 (S.D. NY 2002), CISG-online 653. See also Flechtner, 50 J. L. & Com. (1995) 153, 165 et seq. Ferrari in Schlechtriem/Schwenzer (eds) (fn. 4) *Kommentar*, Art. 4 para. 16; Schwenzer/Hachem, 57 Am. J. Comp. L. (2009) 457, 472 et seq. See for contra e.g. Lookofsky (fn. 4) 22 et seq.

⁷⁸ *Norfolk Southern Railway Company v. Power Source Supply, Inc.* 2008 U.S. Dist. LEXIS 56942 (W.D. PA 2008), CISG-online 1776.

⁷⁹ See Honnold/Flechtner (fn. 5) Art. 35 para. 225.

⁸⁰ Honnold/Flechtner (fn. 5). Art. 4 para. 70.1; Kröll "Selected Problems Concerning the CISG's Scope of Application" 25 J. L. & Com. (2005) 39, 47 et seq.; Schwenzer/Hachem in Schlechtriem/Schwenzer (eds) (fn. 5) *Commentary*, Art. 4 para. 5.

⁸¹ Honnold/Flechtner (fn. 5) Art. 4 para. 70.1; Schwenzer/Hachem in Schlechtriem/Schwenzer (eds) (fn. 5) *Commentary*, Art. 4 para. 5; Siehr in Honsell (ed) *Kommentar zum UN-Kaufrecht* (Springer, Berlin, 1997) Art. 4 para. 29.

⁸² This is a highly debated issue, see CISG-AC Opinion No. 6 (fn. 65), Comment 2. et seq. Scholars in favor of the CISG governing the burden of proof in a standard sense are e.g. Achilles *Kommentar zum UN-Kaufrechtsübereinkommen* (CISG) (Hermann Luchterhand, Berlin, 2000) Art. 4 para. 15; Audit *La vente internationale de marchandises, Convention des Nations-Unies du 11 avril 1980* (L.G.D.J., Paris, 1990) 100; Heuzé (fn. 30) 260; Kröll, 25 J. L. & Com. (2005) 39, 47; Magnus in Staudinger (fn. 54) Art. 4 para. 63; Neumayer/Ming in Dessemontet (ed) *Convention de Vienne sur les contrats de vente internationale de marchandises, Commentaire* (CEDIDAC, Lausanne, 1993) Art. 4 para. 13; Ferrari in Schlechtriem/Schwenzer (eds) (fn. 4) *Kommentar*, Art. 4 para. 8 et seq.; Schwenzer/Hachem in Schlechtriem/Schwenzer (eds) (fn. 5) *Commentary*, Art. 4 para. 25 et seq.; Veneziano „Mancanza di conformità delle merci ed onere della prova nella vendita internazionale: un esempio di interpretazione autonoma del diritto uniforme alla luce dei precedenti stranieri“ *Dir. com. int.* (2001) 509, 515 et seq. Also affirming this position Oberlandesgericht Köln, 14 January 2008, CISG-online 1730; Schweizerisches Bundesgericht, 13 November 2003, CISG-online 840 = IHR 2004, 215 et seq. But for criticism, see e.g. Honnold/Flechtner (fn. 5) Art. 4 para. 70.1.

Although the view that national conceptions of drawing the line between procedural and substantive law cannot be decisive is becoming more and more accepted, there are still voices advocating the necessity of relying on this distinction.⁸⁴ Modern trends that regard such a distinction as being outdated and unproductive⁸⁵ are too often discarded. Leaving questions such as burden and standard of proof to domestic law is nothing more than a clear expression of the homeward trend.

III. Reasons for the homeward trend

Why are courts prone to fall back on their own domestic law? What are the reasons that impede the uniform interpretation of the CISG that is called for in its Art. 7(1)?

1. Lack of knowledge

The first and probably the most important reason for the deplorable application of the CISG by national courts seems to be sheer lack of knowledge.⁸⁶ Although the CISG itself should by now be commonly known to exist, the degree of familiarity with the CISG is still very low. This seems to be reinforced by prejudices being nourished especially by US scholars. There are numerous articles in many different American law journals that blame the CISG for being unpredictable, imprecise, not being suited for the needs of (American) international trade, in short; being clearly inferior to the Uniform Commercial Code.⁸⁷

And it is not only a lack of knowledge of the CISG. It is even worse; it is a lack of knowledge that there can ever be another dogmatic solution to a legal problem than the one that oneself has learned and practiced for a long time. Can many Common law lawyers imagine that a legal system can do without the doctrine of consideration? How difficult is it for a German lawyer to acknowledge that special abstract rules for legal acts apart from those for contracts may be unnecessary and simply stem from historical whimsicalities? Will a French lawyer easily find a substitute concept for that of *cause*? Thus, simply speaking, for many lawyers, counsel and judges alike, there is just no legal world elsewhere. Having this in mind it is perfectly understandable why – if the CISG is applied at all – this is mostly done through domestic lenses. Many of those applying the CISG just do not have any other lenses.

2. Language barriers

A truly international application and interpretation is still frustrated by language barriers. This applies despite the fact that nowadays many CISG court decisions and arbitral awards are translated into English and are freely accessible via websites around the globe.⁸⁸ More and more scholarly articles are published in English and also made available on websites.⁸⁹ The reasons why these materials still are not widely utilized differ for the English speaking legal community on the one side and the rest of the world on the other.

Let me address the latter group first. Although, at least for internationally acting lawyers, English has nowadays become the *lingua franca* this does not hold true for many if not most domestic judges in French, Germanic and Ibero-American legal systems. Even if English as a language may be widely spoken in these societies – at least in academic circles – the command of legal English is still very low. Only very recently and with a different pace are at least some law classes taught in English. With more classes taught in law schools in English this picture may hopefully change in a couple of years. Furthermore, in many countries judges are working under severe time constraints. When dealing with their daily domestic cases they are used to consulting one or – if at all – certain handbooks and commentaries. They exclusively rely on one – domestic – database that is provided for by the justice admin-

⁸³ Flechtner "Recovering Attorneys' Fees as Damages under the U.N. Sales Convention: A Case Study on the New International Commercial Practice and the Role of Case Law in CISG Jurisprudence, with Comments on *Zapata Hermanos Sucesores, S.A. v. Hearthside Baking Co.*" 22 Nw. J. Int'l L. & Bus. (2002) 121, 127; Keily "How Does the Cookie Crumble? Legal Costs Under a Uniform Interpretation of the United Nations Convention on Contracts for the International Sale of Goods" Nordic Journal of Commercial Law 1/2003, available at http://www.njcl.fi/1_2003/commentary2.pdf (last accessed 15 March 2010) 1, 2 et seq.; Lookofsky / Flechtner "Zapata Retold: Attorneys' Fees Are (Still) Not Governed by the CISG" 26 J.L. & Com. (2006) 1, 2 et seq.; Lookofsky / Flechtner "Viva Zapata! American Procedure and CISG Substance in a U.S. Circuit Court of Appeal" 7 VJ Int'l Com. & Arb. (2003) 93, 94 et seq.; Schwenzer "Rechtsverfolgungskosten als Schaden?" in Gauch / Werro / Pichonnaz (eds) *Mélanges en l'honneur d Pierre Tercier* (Schulthess, Geneva, 2008) 417, 422 et seq.

⁸⁴ Orlandi "Procedural Law Issues and Law Conventions" 5 Unif. L. Rev. (2000) 23, 25 et seq. with further references.

⁸⁵ See CISG-AC, Opinion No. 6 (fn. 65), Comment 5.2.

⁸⁶ Andersen, 24 J.L. & Com. (2005) 159, 177. For a detailed analysis of the reasons for the lack of familiarity with the CISG see Spagnolo, 13 VJ Int'l Com. & Arb. (2009) 135, 137 et seq. See also Spagnolo, 13 VJ Int'l Com. & Arb. (2009) 157 et seq.

⁸⁷ Cohen "Achieving a Uniform Law-Governing International Sales: Conforming the Damages Provisions of the United Nations Convention on Contracts for the International Sale of Goods and the Uniform Commercial Code" 26 U. Pa. J. Int'l Econ. L. (2005) 601, 610 et seq.; Cuniberti, 39 Vand. J. Transnat'l L. (2006) 1511, 1549; Gillette / Scott, 25 Int'l Rev. L. & Econ. (2005) 446, 479, suggesting a "competition for laws", where the CISG "[...] ultimately will lose out in competition with alternative legal regimes. [...]". See also Stephan "The Futility of Unification and Harmonization in International Commercial Law" 39 Va. J. Int'l L. (1999) 743, 779 et seq.

⁸⁸ See the database of the Pace Law School available at <http://www.cisg.law.pace.edu> (last accessed 15 March 2010). Furthermore see <http://www.cisg-online.ch> (last accessed 15 March 2010) and <http://www.unilex.info> (last accessed 15 March 2010).

⁸⁹ See the extensive online collection of scholarly writings (more than 1'200 texts) at the Pace database, available at <http://www.cisg.law.pace.edu/cisg/biblio/bib2.html> (last accessed 15 March 2010).

istration. Expecting these judges to consider foreign decisions, to access foreign databases if once in a year or even less they are confronted with a CISG case is asking too much of them. They just do not have the necessary time to do so let alone to learn doing it on the job.

For English speaking lawyers the picture is different. They may not rely on the excuse of not being able to access the relevant materials in their own language. Many Common Law lawyers are very happy with the Common Law and just do not want to have it substituted by any set of rules with which they are not familiar. This seems to be especially the case for parties, lawyers and judges in Australia and New Zealand. Furthermore, many Common Law lawyers are just not accustomed to consulting case law outside their own jurisdiction. And – one may add – even if they did so they might for example not understand a translated decision of the Supreme Court of France because they are not familiar with the peculiarities of structuring a judgment in France.

3. Relevant cases are arbitrated

Finally, the number of international sales law cases being litigated in domestic courts should not be overestimated. Having a closer look at the facts of the cases being decided by domestic courts reveals the relative insignificance of these cases at least from a global trade perspective.⁹⁰ A random look at the 50 most recent cases from all over the world reveals the following picture. The parties involved in these cases are typically small to medium sized businesses. In a majority of cases the goods sold are agricultural products – fruits,⁹¹ trees,⁹² cherries,⁹³ potatoes,⁹⁴ rice,⁹⁵ watermelons,⁹⁶ and poppy seeds⁹⁷ – or other foodstuffs such as beer,⁹⁸ crabs⁹⁹ and shrimps.¹⁰⁰ A second group comprises textiles, including yarn,¹⁰¹ leather,¹⁰² shoes¹⁰³ and the like, as well as small and medium sized machinery such as heating,¹⁰⁴ motor vehicle parts¹⁰⁵ or locomotives.¹⁰⁶ Most notable are the respective amounts in controversy. The vast majority of cases involve amounts well under 100.000 USD;¹⁰⁷ in only one out of the 50 most recent cases the claim amounted to more than 1 million USD.¹⁰⁸

The reason why only more or less marginal cases are treated by domestic courts thus keeping the overall number and possible experiences with CISG cases relatively low is self evident; sophisticated parties with contract values well above 1 million USD regularly submit their disputes to arbitration and not to domestic courts. Additionally only sophisticated parties have the money necessary to employ sophisticated lawyers knowledgeable in international trade. This is a vicious circle from which escape seems hardly possible.

IV. Homeward trend – how can it be changed?

The reasons for the homeward trend inherently show us at least some ways to turn it around.

1. Comparative research

First, there must be a quest for truly comparative research in the field of the law of sales in general.¹⁰⁹ This has to be emphasized despite the fact that the literature on the CISG by now is abundant. The international sales law bibliography counts more than 8000 references.¹¹⁰ However, a closer look reveals that many – too many – publications circle around questions of scope of applicability, gap filling, uniform interpretation and methodology in general often culminating in the lamentation that the uniformity that has been so desperately hoped for has not been achieved or is again jeopardized.

⁹⁰ For a detailed analysis of the commonness of application of the CISG in international commercial arbitration see Mistelis "CISG and Arbitration" in Janssen/Meyer (eds) (fn. 1) 375, 388.

⁹¹ Handelsgericht des Kantons Aargau, 26 November 2008, CISG-online 1739.

⁹² Landgericht Bamberg, 23 October 2006, CISG-online 1400 = IHR 2007, 113 et seq.

⁹³ *Hannaford (trading as Torrens Valley Orchards) v. Australian Farmlink Pty Ltd* [2008] FCA 1591 (24 October 2008), CISG-online 1743.

⁹⁴ Cour de Cassation, 16 September 2008, CISG-online 1821; Rechtbank Maastricht, 9 July 2008, CISG-online 1748; Oberlandesgericht Köln, 14 August 2006, CISG-online 1405 = IHR 2007, 68 et seq.

⁹⁵ *The Rice Corporation v. Grain Board of Iraq* 2008 U. S. Dist. LEXIS40204 (E.D. CA 2008), CISG-online 1770.

⁹⁶ Rechtbank Breda, 16 January 2009, CISG-online 1789.

⁹⁷ Oberster Gerichtshof, 8 May 2008, CISG-online 1784.

⁹⁸ Oberlandesgericht Brandenburg, 18 November 2008, CISG-online 1734 = IHR 2009, 105 et seq.

⁹⁹ Rechtbank Rotterdam, 5 November 2008, CISG-online 1817.

¹⁰⁰ Oberlandesgericht Rostock, 25 September 2002, CISG-online 671 = IHR 2003, 17 et seq.

¹⁰¹ Oberlandesgericht Düsseldorf, 21 April 2004, CISG-online 913.

¹⁰² Corta Suprema Chile, 22 September 2008, CISG-online 1787.

¹⁰³ Tribunale di Forlì, 11 December 2008, CISG-online 1788.

¹⁰⁴ *Brown & Root Services Corp. v. Aerotech Herman Nelson Inc.* 2002 MBQB 229 [Court of Queen's Bench of Manitoba], CISG-online 1327.

¹⁰⁵ *Valeo Sistemas Electricos S. A. de C. V. v. CIF Licensing, LLC d/b/a GE Licensing v. Stmicroelectronic* 2008 U.S. Dist. LEXIS 53058 (D. DE 2008), CISG-online 1775.

¹⁰⁶ *Norfolk Southern Railway Company v. Power Source Supply, Inc.* 2008 U.S. Dist. LEXIS 56942 (W.D. PA 2008), CISG-online 1776.

¹⁰⁷ One of the rare cases where the amount in dispute exceeded 100.000 USD is *Schweizerisches Bundesgericht*, 16 December 2008, CISG-online 1800.

¹⁰⁸ Appellationsgericht Basel-Stadt, 26 September 2008, CISG-online 1732.

¹⁰⁹ The challenge of producing a comprehensive work on sales law encompassing all legal systems and taking into account present day problems has recently been resumed by the Global Sales Law Project, see <http://www.globalsaleslaw.org> (last accessed 15 March 2010).

¹¹⁰ This bibliography contains most of the references to scholarly writing related to the CISG and is available at <http://www.cisg.law.pace.edu/cisg/biblio/biblio.html> (15 March 2010).

Truly thorough comparative research of genuine sales law issues is lacking to a great extent. In saying so, I mean research applying the functional approach and embracing more than just one or two legal systems and comparing it to the CISG. Since the times of Rabel's seminal work on *Das Recht des Warenkaufs*,¹¹¹ the two volume book on sale of goods that established the basis for all sales law unification more than 50 years ago there has been no such endeavor any more. We just do not know how sales law functions on a global level. But exactly this is needed desperately. The requirement established by Art. 7(1) CISG that solutions are to be found which are acceptable in different legal systems with different legal traditions requires carving out common grounds in the field of international trade.¹¹² This has recently become particularly visible with regard to the general understanding of the law of damages where the principles underlying this area of the law have moved to the center of academic debate around the world and new solutions to new challenges have been developed.¹¹³ Let me give you some further examples. In order to solve the respective issues under the CISG we need detailed research on the substantive-procedure divide in the different legal systems involved; questions of validity of unfair contract terms may easily be decided under the CISG once we have a clear overview of the different approaches by domestic legal systems in controlling contract terms.

Leaning back and arguing that it was not the intention of the drafters of the CISG to cover certain issues and that therefore we should leave the question to be decided by domestic law in the long run dooms the CISG to insignificance.

2. Language

The next step must be to address the problem of language barriers. Although certainly this basic comparative research has to be carried out in English in order to be accessible for the whole interested CISG community there must be a transfer into other languages. The best way to do this seems via comprehensive Commentaries that discuss the relevant CISG provision from a comparative perspective thus enabling the domestic practitioner to understand how to reconcile its domestic perspective with the uniform solution. Only few of the Commentaries currently available on the market are living up to these high standards. For example, most of the very numerous German Commentaries more or less content themselves with references to other German sources. The same applies to the existing French and US Commentaries.

3. CISG as genuine contract law

Furthermore, the CISG has yet to arrive at the core of contract law. Although it has been pointed out that for example some textbooks on contract law in the US nowadays refer to the CISG in one way or the other¹¹⁴ it is obvious that there are not many leading contract scholars in their respective countries who are dedicated to the CISG. In many countries the CISG is left to lecturers or scholars engaged in other exotic (and pos-

sibly optional) subjects such as International Business Transactions or Conflicts of Laws. Frequently these academics are excellent scholars but the relative importance of the subjects they teach does not provide them with the profiles they deserve. On the other side, when teaching Contracts many eminent scholars still focus on the hardcore dogmatic domestic issues such as contract formation, consideration and mistake not even touching upon the domestic law of remedies.

4. CISG in education and legal practice

This leads us directly to the role of the CISG in legal education. Whether a substantive number of students study the CISG exclusively depends upon whether it is part of a final exam – if such a final exam exists at all.¹¹⁵ Setting the CISG as a subject for a bar exam has proven to be very effective. At this stage of their careers young lawyers are firstly able to acknowledge the considerable advantages of the CISG over their domestic sales law and secondly, close enough to real world practice such that they will not forget those advantages and actually make use of them. Bar associations must be persuaded to support the dissemination of knowledge of the CISG in this way. Still, it will certainly take quite a while until genuine familiarity with the CISG will be achieved with young lawyers in a significant number of countries.

Thus, it is important to make the CISG a subject of continuing education of lawyers, too. Much dread among practitioners could be removed by teaching them contract drafting and litigating especially under the CISG. Furthermore, they should be told that not considering the CISG in advising a client either in contracting or in litigating may easily lead to a case of professional liability. If nothing else, at least the threatening liability issue might spur some further interest in the CISG.

V. Conclusion

The homeward trend certainly is a phenomenon that has to be taken seriously in jeopardizing uniformity in international sales law. Although some countries are more prone to the homeward trend than others it can be found among all member states of the CISG.

The reasons for the homeward trend are manifold. Lack of knowledge, language barriers and the fact that the big cases go

¹¹¹ Rabel *Das Recht des Warenkaufs: eine Rechtsvergleichende Darstellung* (De Gruyter, Berlin, 1956/1973).

¹¹² Schwenzer/Hachem in Schlechtriem/Schwenzer (eds) (fn. 5) *Commentary*, Art. 7 para. 24.

¹¹³ For further references see Schwenzer/Hachem "The Scope of the CISG Provisions on Damages" in Saidov/Cunnington (eds) *Contract Damages: Domestic and International Perspectives* (Hart Publishing, Oxford, 2008) 91 et seq.

¹¹⁴ Reimann, *RebelsZ* 71 (2007) 115, 120.

¹¹⁵ Widmer/Hachem "Switzerland" in Ferrari (ed) (fn. 1) 281, 288.

to arbitration instead of domestic courts are just the most important ones.

Overcoming the homeward trend necessitates genuine comparative research with corresponding translations in dif-

ferent languages and most of all the CISG needs to be taken seriously by leading scholars in contracts as well as in university teaching as well as in continuing education.

Maritime Law Problems under a Sale Contract Overseas

Dr. Johannes Trappe, Hamburg*

As known, commercial men follow the customs of their trade, which must be observed also in their legal relations. These are the so-called trade terms.¹ Since they may in certain respects differ from one country to another, the International Chamber of Commerce, years ago, has introduced internationally unified trade terms, called INCOTERMS, which from time to time are amended according to the development of the trade, the last time in 2000.² In addition to them, parties very often agree in their sale contracts on what they are used to call "Maritime Terms" or "Marine Terms".

The transaction considered in this paper – the international sale contract – covers two aspects, sale and transportation. Thus, two contracts usually exist, the sale contract and the transportation contract. When a small cargo needs being carried, the latter contract usually is evidenced by a Bill of Lading. The Hamburg Waren-Verein arbitration³ deals with disputes arising there under (with 114 arbitration cases within the last three years, ending with 2008). Bigger quantities of cargo usually are carried under a voyage charter party, as for instance in a recent Cairo arbitration,⁴ where 150.000 tons were sold and subsequently transported by 9 vessels, and where dispute had arisen under a contract CIF about which party to the sale contract owed discharging port demurrage to its contractual partner, and how much. What is being considered in this paper are transports under a charter party.

As seen, two contracts regulate the commercial relations between three parties. In principle, these two contracts are, legally speaking, independent of each other. Usually, no divergence of views exists on that on the legal field.⁵ Practice, however, shows that, when the sale contract is concluded, the contract of carriage has not been agreed upon yet. No wonder, since it is the sale contract which provides as to who, seller or buyer, has to take care of the transportation. The sale contract, e.g., by the CIF INCOTERMS, states that the buyer is obliged to bear the discharging port demurrage. But it does not (because usually it cannot) specify the demurrage rate, and it also does not provide as to how the discharging time is calculated. Here help can be brought by what the practice is used to call "Maritime Terms" or "Marine Terms". These terms, sometimes, are rather short. Big trading houses, however, often agree with their partners on very detailed such terms.

Nevertheless, despite INCOTERMS and despite "maritime terms", often disputes arise. In this paper, numerous court decisions and arbitration awards are being discussed from various countries.

Before coming to such disputed issues, some examples of "maritime terms" may be mentioned:

"Demurrage as per charter-party" without any further maritime details.

"Demurrage as per charter-party" together with further details concerning the calculation of demurrage.

"All maritime terms as by governing charter-party including demurrage. Demurrage calculation to be presented and settled within 60 days after completion of discharging".

Let us now consider some of the cases where disputes were decided regarding maritime terms!

In the recent Cairo award,⁶ just mentioned, the maritime terms read, inter alia: "Demurrage", followed by a colon and, after that, by a free space in the contract document. The tribunal hinted to the fact that nine vessels had to carry the sold merchandise and that that merchandise had been sold before the vessels were fixed, so that, consequently, the demurrage rates were still unknown when the contracts of carriage were agreed upon. Thus, the tribunal held the quoted term to mean that the demurrage rates did apply mentioned in the various charter parties.

If in the sale contract a certain demurrage rate is specified, dispute may arise over the fact that this rate is higher than the one later found in the charter-party. Since, as seen, sale contract and contract of carriage are independent of each other, it follows that the demurrage rate of the sale contract may indeed be higher than the charter rate. This was held in the English Houlder case (1908):⁷

* Paper read at ICMA XVII, Hamburg 6th October 2009.

¹ This topic is in detail dealt with by Haage, *Das Abladegeschäft*, 4th edition, 1958.

² Cf. Ramberg, *ICC Guide to INCOTERMS 2000, Understanding and Practical Use*.

³ www.waren-verein.de.

⁴ Award of the Cairo Regional Centre for International Commercial Arbitration, Nos. 521 and 522/2006, *German Arbitration Journal* 2008, 251, 253.

⁵ For instance *Chambre Arbitrale Maritime de Paris* awards Nos. 439 and 440; DMF 1982, 630; and *The Devon* (2004) 2 *Lloyd's Rep.* 284 (C.A.). The English courts in most cases deal with GAFTA awards. Under German law, as may be submitted, the situation is alike.

⁶ See fn. 4.

⁷ *Houlder Bros. v. Commissioner of Public Works* (1908) A.C. 276.