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The United Nations Sale Convention: Delimitation, Influences, and Concurrent Application of Domestic Law

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THE UNITED NATIONS SALE CONVENTION: DELIMITATION, INFLUENCES, AND CONCURRENT APPLICATION OF DOMESTIC LAW

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ABSTRACT

The United Nations Convention on Contracts for the International Sale of Goods ("CISG" or "Convention") aims to create uniform international sales law to facilitate international trade. However, there are numerous sources of divergence in interpretation and application of the Convention in different jurisdictions. It is therefore possible that courts of different countries interpret the words of the Convention differently. This article investigates the major influences of domestic law on the Convention's interpretation and application. Notably, the so-called "homeward trend" of interpreters is discussed. Furthermore, the article scrutinizes the scope of Article 4 of the CISG in order to delimitate the Convention and domestic law. Thereafter, the author investigates the consequences of overlapping Convention law and domestic law, that is, whether a concurrent application is permissible as there is no provision in the Convention that expressly stipulates that the Convention has to be applied exclusively. The purpose of this article is to reveal that there is an intense interplay between the Convention and domestic law in various areas. The author aims to illustrate these interplays and to present different legal approaches on how to handle them.

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I. INTRODUCTION

It has been thirty years since the UN General Assembly adopted the United Nations Convention On Contracts for the International Sale of Goods (1980) ("CISG" or "Convention").[1] It is considered to be one of the most successful harmonisation efforts ever.[2] Seventy-six countries, including all major economic powers except the United Kingdom, have ratified the Convention.[3] The Convention has even influenced modern domestic law reforms, such as in China, where Chinese sellers are very often familiar with the CISG due to the

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[1] *See* United Nations Convention on Contracts for the International Sale of Goods, Apr. 11, 1980, 1489 U.N.T.S. 3, 19 I.L.M. 671 [hereinafter CISG].

[2] Orkun Akseli, *The CISG and Its Impact on National Legal Systems*, 6 J. BUS. L. 630, 630 (2009) (reviewing FRANCO FERRARI, THE CISG AND ITS IMPACT ON NATIONAL LEGAL SYSTEMS (2008)).

[3] *See* United Nations Convention on Contracts for the International Sale of Goods – Status, UNCITRAL Homepage, http://www.uncitral.org/uncitral/en/uncitral_texts/sale_goods/1980CISG_status.html (last visited Apr. 30, 2010).

unwillingness of many buyers to accept Chinese law as applicable law.[4]

The Convention's goal is to create uniform international sales law to facilitate international trade.[5] Therefore, uniformity forms the basis of the Convention's existence.[6] The Preamble states in its third paragraph that "the adoption of *uniform* rules which govern contracts for the international sale of goods . . . would contribute to the removal of legal barriers in international trade and promote the development of international trade."[7] Indeed, unifying sales law concepts and formulating them in six official languages makes it much easier for parties engaging in international trade to conclude contracts.[8] It simplifies matters greatly when parties are familiar with the legal basis of the contracts.[9] Enacting the Convention was only the first step to unification. As Felemegas put it:

> The adoption of the CISG is only the preliminary step towards the ultimate goal of unification of the law governing the international sale of goods. The area where the battle for international unification will be fought and won, or lost, is the interpretation of the CISG's provisions. Only if the CISG is interpreted in a consistent manner in all legal systems that have adopted it, will the effort put into its drafting be worth anything.[10]

II. THE PRIMACY OF THE UNIFORM APPLICATION OF THE CISG

As aforementioned, the purpose of the Convention is to create uniform international sales law.[11] Hence, the preferred interpretation and application of the Convention is one that is free from domestic influences. Article 7 provides a tool to do exactly that and thereby

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[4] Michael Bridge, *Reviews*, 72 MOD. L.R. 867, 869 (2009) (reviewing THE CISG AND ITS IMPACT ON NATIONAL LEGAL SYSTEMS (Franco Ferrari ed., 2008) and CISG METHODOLOGY (André Janssen & Olaf Meyer eds., 2009)).

[5] CAMILLA BAASCH ANDERSEN, UNIFORM APPLICATION OF THE INTERNATIONAL SALES LAW: UNDERSTANDING UNIFORMITY, THE GLOBAL JURISCONSULTORIUM AND EXAMINATION AND NOTIFICATION PROVISIONS OF THE CISG 29 (2007).

[6] *See id.*

[7] CISG, *supra* note 1, pmbl (emphasis added).

[8] *See* COMMENTARY ON THE UN CONVENTION ON THE INTERNATIONAL SALE OF GOODS (CISG) 14 (Peter Schlechtriem & Ingeborg Schwenzer eds., Oxford Univ. Press 2d ed. 2005) [hereinafter CISG COMMENTARY].

[9] *Id.*

[10] John Felemegas, *The United Nations Convention on Contracts for the International Sale of Goods: Article 7 and Uniform Interpretation*, *in* REVIEW OF THE CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS (CISG) 2000-2001 115, 147 (2002).

[11] BAASCH ANDERSEN, *supra* note 5, at 29.

prescribes the primacy of a uniform application of the Convention. Thus, Article 7 is a vital provision in achieving the uniformity of the Convention.[12]

A. Promoting Uniformity: Article 7 of the CISG

Article 7 of the CISG consists of two paragraphs which serve different purposes. Article 7(1) gives interpretation guidelines and 7(2) provides gap-filling instruments.[13] However, there is some overlap between them. For instance, both paragraphs may support the Convention in keeping up with technical and economic developments unforeseen by its drafters.[14] Nevertheless, there are important distinctions between gap-filling and interpretive guidelines, even though the borderline between the two is sometimes difficult to determine.[15]

1. Article 7(1): Interpretation Guidelines

Article 7(1) of the CISG stipulates that "regard is to be had to its international character and to the need to promote uniformity in its application."[16] It forms a general principle of interpretation, application, and gap-filling common to all uniform law.[17]

The purpose of Article 7(1) is to prevent the national laws of the Contracting States from absorbing the CISG. Therefore, it aims to preserve the Convention as international uniform law.[18]

The wording "regard is to be had to its international character and to the need to promote uniformity in its application" in Article 7(1) means that one should not use domestic law to interpret the Convention.[19] It is by contrast to be read in an "autonomous" manner.[20] That is, when interpreting terms of the convention, one should not use the meaning generally assigned to certain expressions within a particular legal system.[21] Therefore, a Swiss court pointed out in 1993:

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[12] *Id.* at 30.
[13] CISG COMMENTARY, *supra* note 8, at 94.
[14] *See id.* at 94.
[15] *See* BAASCH ANDERSEN, *supra* note 5, at 129.
[16] CISG, *supra* note 1, art. 7(1).
[17] *See* INTERNATIONAL SALES LAW 63 (Ingeborg Schwenzer & Christiana Fountoulakis eds., 2007).
[18] Michael Bridge, *Uniform and Harmonized Sales Law: Choice of Law Issues*, *in* JAMES J. FAWCETT, JONATHAN M. HARRIS, & MICHAEL BRIDGE, INTERNATIONAL SALE OF GOODS IN THE CONFLICT OF LAWS 905, 930 (2005).
[19] Franco Ferrari, *Do Courts Interpret the CISG Uniformly?*, *in* QUO VADIS CISG? CELEBRATING THE 25TH ANNIVERSARY OF THE UNITED NATIONS CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS 4-5 (Franco Ferrari ed., 2005).
[20] *Id.*
[21] *Id.*

> [The CISG] is supposed to be interpreted autonomously and not out of the perspective of the respective national law of the forum. Thus . . . it is generally not decisive whether the Convention is formally applied as particularly this or that national law, as it is to be interpreted autonomously and with regard to its international character.[22]

A non-autonomous interpretation, that is, a "domestic" interpretation, would complicate the settlement of disputes. Additionally, litigants would be encouraged to engage in forum shopping to apply the most favourable domestic interpretation for their case.[23] Such an approach would significantly subvert the Convention's goal to create uniformity in international trade.

In order to develop an autonomous and uniform interpretation, foreign court decisions, awards, and foreign literature have to be considered.[24] If a common interpretation has been developed in courts and literature, later decision should follow it.[25] This is particularly true for decisions of courts of last resort of a Contracting State.[26] These decisions usually have persuasive authority for other courts.[27] Legal practice in this regard is nevertheless considerably diverse in different countries.[28] Whereas some Italian courts excessively use a comparative law approach, U.S. courts are generally more reluctant to consult foreign case law.[29]

2. *Article 7(2): Gap-Filling*

Even though the Convention was drafted very thoroughly and the drafters took into account many aspects of contracting, there are still areas in the Convention which are not explicitly settled.[30] Article 7(2) is an important, albeit elusive, rule which is a useful tool for filling certain gaps in the Convention. It allows judges and arbitrators to stay within the scope of the Convention, as opposed to the use of do-

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[22] Laufen des Kantons Berne [RA] [District Court], May 7, 1993 (Switz.), *translated in* CISG-Online, http://cisgw3.law.pace.edu/cisg/wais/db/cases2/930507s1.html.

[23] *See* Alexander S. Komarov, *Internationality, Uniformity and Observance of Good Faith as Criteria in Interpretation of CISG: Some Remarks on Article 7(1),* 25 J.L. & COM.75, 80 (2006).

[24] *See* INTERNATIONAL SALES LAW, *supra* note 17, at 65.

[25] *Id.*

[26] *Id.*

[27] *Id.*

[28] *Id.*

[29] *Id.*

[30] *See* BAASCH ANDERSEN, *supra* note 5, at 125.

mestic law, which is usually a less appealing alternative.[31] The provision prescribes a two-tier gap-filling method.[32] Primarily, if a matter is governed by the Convention but not expressly settled, then the gap has to be filled in conformity with general principles on which the Convention is based.[33] Hence, it allows gap-filling both by analogy and based on broader principles.[34] If there are no general principles settling the matter, then the issue has to be settled in conformity with the rules of private international law, that is, domestic law.[35]

The general principles referred to in Article 7(2) emerge from the text of the Convention as a whole. In a sense, they constitute the spirit of the Convention.[36] Courts and scholars have developed vast literature on general principles, some of which are more controversial than others.[37] A point of criticism is that they do not provide practitioners with a given set of rules governing interpretation.[38] Rather, they allow "a choice at a buffet of options," often enabling its user to apply his domestic pre-conceived view on legal notions or issues.[39]

B. Obstacles to Uniformity

Even though the tools to attain uniformity are included in the Convention, there are some obstacles to its achievement that come along with its international character. A major problem is that there is no court of ultimate resort when it comes to the application of the CISG.[40] It is hardly possible to adjudge to the courts of one nation greater persuasive value than to courts of another.[41] One can even

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[31] Joseph Lookofsky, *Walking the Article 7(2) Tightrope Between CISG and Domestic Law*, 25 J.L. & COM. 87, 88 (2005).

[32] *See* BAASCH ANDERSEN, *supra* note 5, at 125.

[33] CISG, *supra* note 1, art. 7(2).

[34] *Id.* at 89.

[35] *See id.*

[36] Bridge, *supra* note 18, at 937.

[37] *See, e.g*, Ulrich Magnus, *General Principles of UN-Sales Law*, 59 RABELS ZEITSCHRIFT 469 (1995), *available at* http://cisgw3.law.pace.edu/cisg/biblio/magnus.html; *see also* CISG COMMENTARY, *supra* note 8, at 104; Bridge, *supra* note 18, at 938-940.

[38] BAASCH ANDERSEN, *supra* note 5, at 130.

[39] *Id.*

[40] *See* INTERNATIONAL SALES LAW, *supra* note 17, at 65.

[41] One could argue, however, that the courts of certain countries generally provide a more detailed reasoning in their judgment as opposed to others. One example is certainly German courts. These courts do de facto have greater persuasive value. It would however be wrong to grant them greater persuasive value merely because of their "nationality."

less advocate a doctrine of "supranational stare decisis"[42] as there is a lack of a rigid hierarchical structure of the various countries' court systems on an international level.[43] Some authors advocate that "only decisions of the highest court in any court hierarchy should be confidently used to create persuasive precedents."[44] In addition, arbitral courts do not easily fit into any hierarchy.

Therefore, the Tribunale di Vigevano reached the conclusion that "foreign case law, contrary to what a minority of authorities have argued, is not binding on this [Tribunal]. It must nevertheless be considered in order to assure and to promote uniform enforcement of the United Nations Convention, according to its article 7(1)."[45]

The difficulties that arise out of the lack of an international court of last resort are softened by several factors. In 2004, UNCITRAL published the Digest.[46] It contains summaries of relevant CISG case law on each provision of the CISG.[47] Furthermore, the Advisory Council of the CISG was created in 2001. The Advisory Council is a private body consisting of scholars from all over the world who take an independent, critical, and innovative approach on controversial, unresolved issues.[48] The Advisory Council also addresses issues not previously dealt with by courts or arbitrators.[49]

Another difficulty in interpreting the CISG is that there are six official language versions: Arabic, Chinese, English, French, Russian, and Spanish.[50] Each of the texts is equally authentic.[51] In addition, there are additional language versions for those countries whose language is not the same as one of the six official versions. One example is the German translation commissioned by the governments of Austria,

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[42] Larry A. DiMatteo, *The CISG and the Presumption of Enforceability: Unintended Contractual Liability in International Business Dealings*, 22 YALE J. INT'L L. 111, 133 (1997).

[43] Ferrari, *supra* note 19, at 21.

[44] BRUNO ZELLER, CISG AND THE UNIFICATION OF INTERNATIONAL TRADE LAW 35 (2007).

[45] Trib., 12 July 2000, n.405, Giur. It. 213, *translated in* CISG-Online, http://cisgw3.law.pace.edu/cases/000712i3.html.

[46] INTERNATIONAL SALES LAW, *supra* note 17, at 66.

[47] *Id.* One must however be careful when assessing the persuasiveness of foreign case law summarised in the Digest as the Digest only offers a "sound bite" of the case, which might not reflect the case in its entirety. *See* Lookofsky, *supra* note 31, at 90.

[48] INTERNATIONAL SALES LAW, *supra* note 17, at 66.

[49] Id.

[50] Harry M. Flechtner, *The Several Texts of the CISG in a Decentralized System: Observations on Translations, Reservations and Other Challenges to the Uniformity Principle in Article 7(1)*, 17 J.L. & COM. 187, 189 (1998).

[51] *Id.*

Germany, and Switzerland.[52] Even though these translations may be unofficial, they certainly are the main source of the Convention provisions for courts, arbitrators, and practitioners in those countries.[53] The different language versions of the CISG do not always completely correspond as slight inaccuracies in translation are unavoidable.[54] One could however argue – albeit rather formalistically – that Article 7(1) of the CISG does not prescribe the *Convention* as being uniform, but only that in its *application* regard is to be had for uniformity.[55]

III. Influences of Domestic Law on the Application of the CISG

The primacy of an autonomous interpretation of the Convention means that domestic influences should be minimised as much as possible. A total exclusion of domestic influences is nevertheless impossible (and not even envisaged). The Convention tries to diminish their importance by the above described techniques, namely by providing alternative interpretation and gap-filling methods.[56] The role of domestic law is therefore only a secondary one. Nonetheless, there is a reference to private international law in Article 7(2) of the CISG in the case of an absence of general principles.

A. Reference to Private International Law in Article 7(2)

Article 7(2) of the CISG stipulates:

> Questions concerning matters governed by this Convention which are not expressly settled in it are to be settled . . . in the absence of [general] principles, in conformity with the law applicable by virtue of the rules of private international law.[57]

There is agreement that the expression "private international law" has to be interpreted "domestically."[58] The CISG does not itself determine private international law rules.[59] The reference has "to be understood as a reference to the private international law of the fo-

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[52] *Id.* at 190.

[53] *Id.* at 192-193.

[54] *Id.* at 192.

[55] Baasch Andersen, *supra* note 5, at 29.

[56] *See* CISG, *supra* note 1, art. 7.

[57] *Id.* art. 7(2).

[58] *See* Ferrari, *supra* note 19, at 10. Another example for a term that has to be interpreted "domestically" is the term "party."

[59] *Id.*

rum."[60] The application of the private international law will ultimately lead to the application of domestic law and thereby break the uniformity of international sales. Nevertheless, the major threat to uniformity comes from a different angle.

B. *Domestic Pre-Conceived Views of CISG Notions: The Homeward Trend*

The principal goal of enacting an international convention is to create uniform rules for State parties.[61] However, enacting uniform rules is only the first step towards uniformity.[62] Uniform rules alone do not guarantee uniform application.[63] By contrast, it is almost inevitable that different countries interpret the words of the convention differently.[64] True uniformity can therefore only be achieved if courts interpret the "provisions of an instrument in accordance with the object and purpose as set forth in their Preamble and regard is to be had to their international character.[65] The principle of uniformity thus demands that recourse to domestic law is only made in situations expressly stipulated in the convention.[66] In case of the CISG, domestic law is used only when filling external gaps.[67]

However, when the phrasing of the Convention is similar to domestic rules, courts are naturally tempted to take advantage of such similarity.[68] Honnold labelled that phenomenon the "homeward trend" and described it eloquently as follows:

> The Convention, *faute de mieux*, will often be applied by tribunals (judges or arbitrators) who will be intimately familiar only with their own domestic law. These tribunals, regardless of their merit, will be subject to a natural tendency to read the international rules in light of the legal ideas that have been imbedded at the core of

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[60] Ferrari, *supra note*19, at 10. *See also* Trib., sez. este, 25 Feb. 2004, n.40552, Giur. It., *translated in* CISG-Online, http://cisgw3.law.pace.edu/cases/040225i3.html.

[61] R. J. C. Munday, *The Uniform Interpretation of International Conventions*, 27 INT'L & COMP. L.Q. 450, 450-51 (1978).

[62] *See* Felemegas, *supra* note 10, at 147.

[63] Munday, *supra* note 61, at 450.

[64] *Id.* at 450-51.

[65] *See* Akseli, *supra* note 2, at 630.

[66] ZELLER, *supra* note 44, at 30.

[67] *Id.*

[68] Komarov, *supra* note 23, at 78.

> their intellectual formation. The mind sees what the mind has means of seeing.[69]

The biggest obstacle to uniformity is therefore the homeward trend of interpreters.[70] A strong homeward trend would probably be as detrimental to the purpose of the Convention as the simple failure of many nations to ratify it at all.[71] Well-informed parties, especially large corporations, would presumably either opt out of the Convention or remain under the CISG in a favourable forum.[72]

The issue of the "homeward trend" is difficult to address as courts often fall into comfortable patterns of domestic legal thinking.[73] Thus, it does not only manifest in an express matter but even more likely at the "level of unarticulated and even unconscious background suppositions."[74] Even when the drafters of the Convention agreed on certain notions, they probably had different legal understandings of them that reflected their own domestic legal background.[75] The problem of varying legal ideologies is in a sense "built into the very text of the CISG."[76]

Some courts and authors are nonetheless of the opinion that legal concepts relating to domestic law might be consulted when the wording of the Convention and the domestic provisions are the same or very similar. U.S. courts are often tempted to have recourse to U.S. case law when interpreting provisions of the CISG, whose language tracks that of Article 2 of the Uniform Commercial Code ("UCC").[77] In *Raw Materials Inc. v. Manfred Forberich GmbH & Co. KG*, a U.S. District Court stated that "case law interpreting analogous provisions of Article 2 of the Uniform Commercial Code . . . may also inform a court where the language of the relevant CISG provisions tracks that of the UCC."[78]

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[69] JOHN HONNOLD, 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 1 (1989).

[70] *See* ZELLER, *supra* note 44, at 76.

[71] Timothy N. Tuggey, *The 1980 United Nations Convention on Contracts for the International Sale of Goods: Will a Homeward Trend Emerge?*, 21 TEX. INT'L L.J. 540, 554 (1986).

[72] *Id.*

[73] *See* Bridge, *supra* note 4, at 871.

[74] Flechtner, *supra* note 50, at 204.

[75] *Id.*

[76] *Id.*

[77] *See* Raw Materials Inc. v. Manfred Forberich GmbH & Co., KG, 2004 U.S. Dist. LEXIS 12510, at *12 (N.D. Ill. 2004).

[78] *Id.* (quoting Delchi Carrier SpA v. Rotorex Corp., 71 F.3d 1024, 1028 (2d Cir. 1995)); Chicago Prime Packers, Inc. v. Northam Food Trading Co., 2003 U.S. Dist. LEXIS 9122 (N.D. Ill. 2003).

Ferrari, however, argues that such an approach contradicts the wording of Article 7(1) and even "violates the very rationale behind the creation of the CISG: if all courts were to adopt this nationalistic approach, the uniformity the drafters of the CISG aimed at could never be achieved."[79] Referring specifically to Article 2 of the UCC, he argues that "it is impossible and even perilous to assert that the . . . sets of rules [of the UCC and the CISG] are similar in content, or, even worse, that they are 'sufficiently compatible to support claims of overall consistency.'"[80] He is supported by the U.S. court decision *St. Paul Guardian Insurance Co. v. Neuromed Medical Systems & Support GmbH*, where the court stated that "[t]he CISG aims to bring uniformity to international business transactions, using simple, non-nation specific language."[81] Furthermore, the court stated in *MCC-Marble Ceramic Center, Inc. v. Ceramica Nuova D'Agostino, S.p.A.* that "[c]ourts applying the CISG cannot . . . substitut[e] familiar principles of domestic law when the Convention requires a different result."[82]

Other authors take an intermediary approach and argue that having recourse to domestic law conceptions is only permissible in cases where a term or a solution in the Convention was clearly influenced by that legal system. For example, some argue that the requirement in Article 74 that damages be foreseeable to be remunerable is based on the "foreseeability test," which can be traced back to the common law doctrine that was established in *Hadley v. Baxendale*.[83] Accordingly, it was argued that the relating legal materials may be consulted when interpreting Article 74.[84] Schlechtriem, however, argued that even in these cases "individual provisions should not be interpreted against the background of, and as understood in, the legal system from which they have been taken."[85]

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[79] *See* Ferrari, *supra* note 19, at 6-7.

[80] Franco Ferrari, *The Relationship Between the UCC and the CISG and the Construction of Uniform Law* 29 LOY. L.A. L. REV. 1021, 1023 (1996) (quoting Elizabeth H. Patterson, *United Nations Convention on Contracts for the International Sale of Goods: Unification and the Tension Between Compromise and Domination*, 22 STAN. J. INT'L L. 263, 275 (1986)).

[81] St. Paul Guardian Ins. Co. v. Neuromed Medical Systems & Support, GmbH, 2002 U.S. Dist. LEXIS 5096 , at *7 (S.D.N.Y. 2002).

[82] MCC-Marble Ceramic Center Inc. v. Ceramica Nuova D'Agostino, 144 F.3d 1384, at *21 (11th Cir. 1998).

[83] Hadley v. Baxendale, (1854) 156 Eng. Rep. 145 (L.R. Exch.); INTERNATIONAL SALES LAW, *supra* note 17, at 63.

[84] INTERNATIONAL SALES LAW, *supra* note 17, at 63.

[85] CISG COMMENTARY, *supra* note 8, at 14; *see also* Ferrari, *supra* note 19, at 9-10. Ferrari argues that even if the expressions in the CISG are textually identical, they must be interpreted autonomously. Ferrari, *supra* note 19, at 9-10. They must be considered to be independent from domestic concepts since international

It is the author's opinion that a complete renouncement of domestic conceptions of legal notions—albeit difficult to realize in practice——is the best and right way to interpret the Convention. This does not necessarily mean that the results of an autonomous and a "domestic" interpretation have to be different. It is only the progression to the result and the reasoning that makes the difference.

IV. Delimitation of the CISG and Domestic Law

In order to determine the delimitation of the CISG and domestic law, it is critical to define the scope of the Convention. Everything that falls out of the scope of the Convention is evidently dealt with by domestic law. In contrast to domestic sales law, CISG is not integrated in any body of uniform contract law, allowing gap-filling in this body of law to fill gaps or to run on from its margins of application. The determination of the Convention's scope is, however, a complicated matter, and the mere coverage of topics does not necessarily determine where the outer limits of the Convention lie.[86]

A. Defining the Scope of the Convention

It is generally important to apply the Convention as widely as possible in order to promote it as an effective uniform sales law.[87] Therefore, the application of domestic private international law should be minimized and Article 7(2) applied in a creative manner.[88] However, although Article 7(2) is a powerful and useful tool to adapt the scope of the Convention to matters unexpected by its drafters, it still has its limitations. Article 7(2) is only applicable to matters that "are governed" but "not expressly settled" by the Convention.[89] Matters that are "governed" and "expressly settled" as well as matters that are "not governed" therefore fall outside the application area of Article 7(2).[90] There are several reasons why a matter might not be governed by the Convention. First and most obvious, the drafter of the Convention intended that this provision specifically exclude a matter from the

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conventions are intended to be neutral. *Id.* Moreover, he argues, the choice for one expression rather than another is the result of a compromise and does not correspond to any specific domestic law. *Id.*

[86] Bridge, *supra* note 18, at 932.

[87] *Id.* at 937.

[88] *Id.*

[89] CISG, *supra* note 1, art. 7(2); *see also* Lookofsky, *supra* note 31, at 89.

[90] *Id.*

scope of the Convention.[91] One example is "validity" in Article 4.[92] Another reason is that changes in business methods lead to gaps.[93]

However, it is sometimes difficult to assess whether the drafters of the Convention deliberately left certain matters open. If they did, the question must be settled in conformity with the applicable domestic law.[94] Matters are complicated further because the Convention contains almost no general principles that are expressly described as such.[95]

Significantly, questions surrounding what is *included* in the Convention are equally as important as questions regarding what has been *excluded*.[96] Therefore, a uniform approach must apply to both the inclusive and the exclusive rules.[97] True uniformity of the scope of the Convention can only be achieved if such a "dual approach" is taken.[98]

The Convention includes a provision that describes its scope in general terms. Article 4 states:

> 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: (a) the validity of the contract or of any of its provisions or of any usage; (b) the effect which the contract may have on the property in the goods sold.[99]

The problem (or as some would argue, the merit) of Article 4 is that it is very general and vague. It defines the scope of the Convention as matters of contract formation and the "rights and obligations of the seller and buyer arising from such a contract."[100] In addition, the exclusions from its scope, especially "validity," are not described in detail. The wording therefore leaves room for extensive interpretation.

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[91] ZELLER, *supra* note 44, at 33.

[92] CISG, *supra* note 1, art. 4.

[93] *Id.*

[94] INTERNATIONAL SALES LAW, *supra* note 17, at 72.

[95] *Id.*

[96] ZELLER, *supra* note 44, at 64.

[97] *Id.*

[98] *Id.*

[99] CISG, *supra* note 1, art. 4.

[100] *Id.*

B. Controversial Cases

It is thus unsurprising that the determination of the scope of the Convention and namely the interpretation of Article 4 raise some very controversial issues.

1. The Scope of "Validity"

The first problem that immediately arises is that the Convention does not exclude validity per se from its scope but only "except as otherwise expressly provided."[101] Consequently, the Convention is concerned with some validity issues.[102] Examples include the Article 11 non-requirement of a particular form for a contract and Article 29, which provides that a contract may be modified merely by agreement.[103] Therefore, if one comes to the conclusion that a matter is a "validity" issue, then one has to determine first if the matter is not expressly dealt with in the Convention. The matter is excluded according to Article 4(a) only if it is not.[104]

More importantly, although the CISG generally excludes matters of validity from its scope, the Convention does not define the term "validity."[105] It is thus unclear and controversial what the term actually means. The approach of an autonomous interpretation requires not simply basing the definition on domestic law. The lack of a definition of validity is hence a gap in the Convention itself, and needs to be filled in accordance with the principles in Article 7(2). In doing so, "validity" must not be defined expansively because this would counter the Convention's purpose of creating a uniform sales law.[106] But even with the help of Article 7(2), it remains very difficult to define "validity" because the Convention provides no textual assistance.[107]

Critics of an autonomous interpretation of validity express that such an interpretation would lack flexibility in regards to matters evolving from (domestic) public policy. However, one must recall that the CISG is an international convention. Domestic legislation does not apply to the CISG, but any changes would require an international conference and a ratification of the amended version.[108] Hence, public policy that addresses validity is only permissible if the matter is not

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[101] *Id.*

[102] ZELLER, *supra* note 44, at 69.

[103] CISG, *supra* note 1, arts. 11, 29; HERBERT BERNSTEIN & JOSEPH LOOKOFSKY, UNDERSTANDING THE CISG IN EUROPE 23 (2d ed. 2003).

[104] *See* CISG, *supra* note 1, art. 4(a).

[105] *See* Bridge, *supra* note 18, at 942.

[106] *Id.* at 941-42.

[107] *Id.* at 942.

[108] ZELLER, *supra* note 44, at 75.

already governed by the Convention.[109] If a matter is within the scope of the Convention, it remains there despite the presence of domestic legislation.[110]

The exact reach of validity therefore remains unclear. Nonetheless, commentators generally agree that issues of illegality, fraud, unconscionability, capacity to contract, duress, and agents' authority are beyond the scope of the Convention.[111]

2. Exclusion Clauses

Exclusion and penalty clauses are closely related to the "validity issue."[112] Many legal systems subject exclusion and penalty clauses to legislative control.[113] The extent of permissibility varies from legal system to legal system.[114] Depending on the legal system, these clauses may be without restrictions, permissible within limits, or unlawful in general.[115] Thus, the question arises whether the express exclusion of matters of validity in Article 4 embraces exclusion and penalty clauses.[116]

In the United States, for example, UCC Section 2-316 deals with exclusion clauses as validity matters.[117] Such clauses are ineffective unless certain words or types of words are used.[118] A court looking at exclusion clauses could therefore come to the conclusion that exclusion clauses are matters of validity, and are thus outside the scope of the Convention according to Article 4(a) of the CISG.[119] Domestic rules would thus be applicable.[120] Zeller, however, argues that the Convention deals with the matter of exclusion clauses, therefore rendering Article 4(a) inapplicable.[121] His argument is that exclusion clauses are addressed by the Convention by general principles. He states:

> [T]he CISG deals with matters of disclaimers not in an express fashion but by recourse to general principles. . . .

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[109] *Id.*
[110] *Id.*
[111] BERNSTEIN & LOOKOFSKY, *supra* note 103, at 23; HENRY DEEB GABRIEL, CONTRACTS FOR THE SALE OF GOODS: A COMPARISON OF DOMESTIC AND INTERNATIONAL LAW 38-39 (2004); Flechtner, *supra* note 50, at 198.
[112] Bridge, *supra* note 18, at 940-41.
[113] *Id.* at 941.
[114] *Id.*
[115] *Id.*
[116] Bridge, *supra* note 18, at 941.
[117] UCC § 2-316.
[118] *Id.*
[119] ZELLER, *supra* note 44, at 71.
[120] *Id.*
[121] *Id.*

> [A]rticle 8 . . . takes the party's objective as well as subjective intent into consideration. Simply put, if the parties intended that a disclaimer will limit the buyer's remedies then a court or tribunal will give effect to that intent. The advantage of the CISG in this case is that the matter does not rest on some legalistic issue, whether certain words or types of words are used, as it is the case in § 2-316 of the UCC, but whether the parties either objectively or subjectively agreed that a disclaimer will govern the contractual relationship between buyer and seller.[122]

The author respectfully disagrees with Zeller's argument. Firstly, Zeller argues that the validity-exclusion in Article 4(a) of the CISG is inapplicable as the Convention is concerned with exclusion clauses by general principles.[123] What Zeller omits is that Article 4(a) stipulates that the Convention is not applicable to validity unless "expressly provided in the Convention."[124] It is hardly arguable that a general principle which was deducted from Article 8 complies with this requirement. Secondly, Zeller confuses cause and effect when he argues that the Convention's approach on dealing with exclusion clauses is "more advantageous" than the UCC approach, and the Convention should therefore be applicable. Although it is arguable that the UCC approach to condition the validity of exclusion clauses on the use of certain words is overly formalistic, one cannot argue that this is a strong case to treat them as non-validity matters in the Convention's context.

Therefore, there are a considerable number of authors who are of the opinion that exclusion clauses are a matter of validity and hence not governed by the Convention. Bernstein and Lookofsky state that "the CISG was not designed to 'police' international sales agreements for unfairness: the CISG drafters made no attempt whatsoever to prescribe the legal effect of . . . an allegedly unreasonable disclaimer or limitation of liability, a 'penalty' clause, etc."[125]According to that point of view, exclusion and penalty clauses lie outside the scope of the Convention and are to be settled by domestic law. It is therefore arguable that exclusion clauses are a matter of validity.

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[122] *Id.*
[123] *Id.*
[124] CISG, *supra* note 1, art. 4(a).
[125] BERNSTEIN & LOOKOFSKY, *supra* note 103, at 24.

The Austrian Supreme Court supported this view in 2000, but added a further component.[126] The Court argued that the validity of an exclusion clause is generally to be determined by domestic law.[127] However, domestic provisions that are contrary to the core values of the Convention should be disregarded.[128] For example, if a domestic law excluded the right to declare a contract void, the exclusion should be disregarded. The right to terminate a contract could, however, be excluded if the loyal party's right to claim compensatory damages would be preserved.[129] The Austrian Supreme Court thus argued that the question of validity of exclusion clauses is left to domestic law.[130] Nevertheless, the CISG imposes certain limits on the applicable domestic law. If the national law goes beyond these limits it is void under the CISG.[131]

There is also another conceivable approach on the topic. It is arguable that even if exclusion clauses are a matter of validity, it would not necessarily mean that the Convention is not applicable to them. Article 6 of the CISG allows the parties to modify or exclude any of the Convention's provisions, including Article 4.[132] The parties are therefore entitled to derogate Article 4 in a way that it does not include exclusion clauses, thereby rendering the Convention applicable to them.[133] Such derogation from Article 4 does not have to be expressly stated, but can be agreed upon implicitly.[134]

3. *Penalty Clauses*

The problem with penalty clauses is similar to exclusion clauses. According to Article 4, the first question that must be asked is whether or not penalty clauses are part of "the rights and obligations of the seller and the buyer," and therefore fall within the scope of the Convention.[135] One must argue that the right of a buyer to claim the payment of a penalty and the liability of a seller to comply constitute "rights and obligations of the seller and the buyer."[136]

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[126] Oberster Gerichtshof [OGH] [Supreme Court] Sept. 7, 2000, 8 Ob 22/00v, Österreichisches Recht der Wirtschaft [RdW] No. 9 (Austria), *available at* http://cisgw3.law.pace.edu/cases/000907a3.html.

[127] *Id.*

[128] *Id.*

[129] *Id.*

[130] *Id.*

[131] *Id.*

[132] CISG, *supra* note 1, art. 6.

[133] Bridge, *supra* note 18, at 942-943.

[134] *Id.* at 945.

[135] CISG, *supra* note 1, art. 4.

[136] Bridge, *supra* note 18, at 944.

The next step is determining if penalty clauses are part of the matter of "validity," meaning they would be excluded from the scope of the Convention under Article 4(a).[137] Arguably, the components of validity should have some uniformity on an international level.[138] An approach that is too liberal would mean that the Convention is narrowed too rigorously. Penalty clauses, however, are by no matter universally treated as a matter of validity. A number of countries do not condemn or regulate them.[139] As a useful expedient, recourse can be made to the Unidroit Principles.[140] Chapter three of the Unidroit Principles, which deals with validity, does not include any reference to penalty clauses.[141] By contrast, they do include a reference in the Chapter on Non-Performance.[142] Assuming that the Unidroit Principles are a legitimate source of general principles and supplementation to the Convention, they support the view that penalty clauses do not fall within the scope of validity.

An "isolated" application of Article 7(2) of the CISG seems to lead to the same result. Although it is correct that Article 74 generally links the amount of damages to the effective loss suffered by the injured party, it is arguable that this is not a fixed principle. First, the Convention provides support for self-help, which includes the freedom of parties to set the proper instrument to assess the amount of damages an injured party is allowed to claim.[143] Second, the parties are entitled to deviate from any provision of the Convention according to Article 6.[144] This allows parties to agree on penalty clauses.[145]

Overall, it is the author's opinion that there are convincing arguments that the Convention is applicable to penalty and exclusion clauses. Nevertheless, these arguments do not answer the question of how to deal with them. According to Article 7(2) of the CISG, this issue should be settled in conformity with the general principles of the Convention.[146] The very different solutions found in pertinent case law and arbitral awards render it difficult to determine such general

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[137] *Id.* at 945.

[138] *See id.*

[139] *See id.*

[140] *Id.* at 945. *See* International Institute for Unification and Private Law, UNIDROIT Principles of International Commercial Contracts (1994), *available at* http://www.unidroit.org/english/principles/contracts/principles2004/blackletter2004.pdf [hereinafter UNIDROIT Principles].

[141] UNIDROIT Principles, *supra* note 140, arts. 3.1-3.16.

[142] *Id.*, art. 7.4.13.

[143] Bridge, *supra* note 18, at 945.

[144] *Id.*

[145] *Id.* at 945.

[146] CISG, *supra* note 1, art. 7(2).

principles.[147] Solutions vary from recourse to private international law principles to upholding clauses simply because they do not contradict the Convention.[148] Unfortunately, there is not yet a systematic and convincing attempt to evaluate the relevant general principles.[149]

4. Set-Off

The difficulties in determining the scope of the Convention go beyond validity, as Article 4 states that the Convention governs the "rights and obligations of the seller and the buyer arising from [a sales] contract."[150] The delimitation of the Convention's boundaries is therefore not only complicated by the issue of validity but also by the difficulty in determining whether an issue falls within the rights and obligations of the seller arising from the contract.[151] Set-off is an example for such a latter case. It is arguable that a set-off does not have any direct link to the sales contract, but forms part of another contract.[152]

Nevertheless, Magnus argues that set-off is within the scope of the Convention and finds the appropriate principle in Article 84(2) of the CISG.[153] This provision stipulates that "[t]he buyer must account to the seller for all benefits which he has derived from the goods."[154] In other words, any benefit may be set-off against the buyer's claim for refund of the price paid. Arguably, Magnus' solution has the benefit of practicality, as it "makes the sometimes cumbersome conflict of laws process obsolete."[155]

However, it remains unclear where the details of set-off come from.[156] Many of the details of set-off diverge in domestic laws, such as the "date of extinction of claims set-off, the qualifying connection between the claims . . . and the procedural pre-requisites to raising set-off as a defence and its operation."[157] These details would have to be developed autonomously without any guidance from the provisions of the Convention.[158] It is therefore more persuasive to assume that

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[147] *See* Bridge, *supra* note 18, at 946.
[148] *Id.*
[149] *Id.* at 946.
[150] CISG, *supra* note 1, art. 4.
[151] *See* ZELLER, *supra* note 44, at 71.
[152] *Id.*
[153] Magnus, *supra* note 37, at 469.
[154] CISG, *supra* note 1, art. 84(2).
[155] Stefan Kröll, *Selected Problems Concerning the CISG's Scope of Application,* 25 J. L. & COM. 39, 52-53 (2005).
[156] CISG COMMENTARY, *supra* note 8, at 72-73, 103.
[157] *Id.* at 73.
[158] *Id.*

set-off cannot be categorised as a matter governed by the Convention, but must be settled according to domestic law.[159]

5. Lawyer's Fees

Another topic of frequent discussion is whether the Convention rules on damages for breach govern the matter of whether the winning party in sales litigation is entitled to claim compensation for its lawyer's fees from the defeated party.[160] If this matter is governed, is there a general principle to settle the matter?[161]

A prominent case on that subject matter is *Zapata Hermanos Sucesores v. Hearthside Baking Co* ("*Zapata*").[162] In *Zapata*, the successful CISG claimant argued that he should be reimbursed for its attorney's fees as part of the damages he suffered as a consequence of the buyer's breach.[163] Several previous European court decisions granted such a claim under Article 74 of the CISG as an injured party is generally entitled to full compensation.[164]

These courts reasoned that Article 74 permits an aggrieved party to recover damages "equal to the loss . . . suffered . . . as a consequence of the breach."[165] One can, therefore, plausibly argue that legal expenses incurred by a party who succeeds in proving that the opposing party has breached a sales contract governed by the CISG are recoverable damages under Article 74 because they constitute "a loss suffered as a consequence of the breach."[166] Such a loss would also have been foreseeable at the time the contract was formed.[167]

In *Zapata*, the court decided that the Convention does not implicitly overturn the U.S. domestic rule that the litigation parties have to bear their own legal expenses.[168] Judge Posner decided that the matter is *governed* by the Convention but *not expressly settled*.[169] He pointed out that "[t]he Convention is about contracts, not about proce-

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[159] Heinz Georg Bamberger & Herbert Roth, eds., Beck'scher Online-Kommentar BGB (16th ed., C.H. Beck, München, 2010); CISG Article 4 para 19.

[160] Lookofsky, *supra* note 31, at 95.

[161] *Id.*

[162] Zapata Hermanos Sucesores v. Hearthside Baking Co., 313 F.3d 385 (7th Cir. 2002).

[163] *Id.* at 387.

[164] Lookofsky, *supra* note 31, at 95-96.

[165] CISG, *supra* note 1, art. 74.

[166] *Id.*

[167] Harry M. Flechtner, *Recovering Attorney's Fees as Damages Under the U.N. Sales Convention (CISG): The Role of Case Law in the New International Commercial Practice, with Comments on Zapata Hermanos v. Hearthside Baking*, 22 Nw. J. INT'L L. & BUS. 121, 126 (2002).

[168] *Zapata*, 313 F.3d at 388.

[169] *See id.*

dure."[170] The court reasoned that the question of fee-shifting is usually part of procedural law and therefore not part of a substantive body of law, such as contract law.[171] It reasoned that for example the "American rule" (no fee-shifting) and the "English rule" (fee-shifting) were rules of general applicability and lie within procedural law.[172] The court considered Article 7(2) of the CISG and addressed whether there were any general principles that settle the matter.[173] Judge Posner came to the conclusion that there were no such principles. He pointed out:

> [N]ot only is the question of attorneys' fees not "expressly settled" in the Convention, it is not even mentioned. And there are no "principles" that can be drawn out of the provisions of the Convention for determining whether "loss" [in Article 74] includes attorneys' fees; so by the terms of the Convention itself the matter must be left to domestic law.[174]

Nonetheless, the *Zapata* decision is controversial. Schlechtriem commented that:

> If national courts simply qualify the recoverability of litigation costs and lawyers' fees as a procedural matter to be decided under their own *lex fori*, thereby circumventing Art 74[,] . . . there will soon be more enclaves of domestic law, which for the deciding judge may seem to be self-evident and which conform to his or her convictions, formed by historic rules and precedents.[175]

It is indeed questionable if the fee-shifting question must necessarily be qualified as a procedural matter. By no means do all legal systems qualify it as a pure procedural matter.[176] In fact, under German law, at least pre-litigation legal expenditures are compensable as incidental damages and are not part of procedural law.[177]

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[170] *Id.*
[171] *Id.*
[172] *Id.*
[173] *Id.*
[174] *Zapata*, 313 F.3d at 388.
[175] CISG COMMENTARY, *supra* note 8, at 7.
[176] Even in *Zapata*, the court admitted that "[t]here are, however, numerous exceptions to the principle that provisions regarding attorneys' fees are part of general procedure law. For example, federal antidiscrimination, antitrust, copyright, pension, and securities laws all contain field-specific provisions modifying the American rule (as do many other field-specific statutes)."
[177] Burgerliches Gesetzbuch [BGB] [Civil Code] Aug. 18, 1896, Reichsgesetzblatt [RGBl] 195, §§ 280, 286, 437. This opinion seems to be plausible to Judge Posner in the *Zapata* too. He stated that "certain pre-litigation legal expenditures, for

Therefore, even if one assumes that litigation costs are not compensable because they are part of the procedural law, it is still questionable if the same is also true for pre-litigation costs. The question of whether "extra-judicial costs incurred in pursuing rights may be claimed as separate loss within the meaning of Article 74 is controversially discussed."[178] These costs are difficult to separate from general mitigating damages costs.[179] It is hence debatable that the reimbursement of such costs falls within the Convention's scope. Naturally, the recoverable amount is limited to the amount needed for a normal and appropriate reaction to the other party's breach.[180] In the author's opinion, there is no persuasive argument against treating pre-litigation costs as part of the recoverable incidental damages under Article 74. He would, however, not rule out that his opinion in this case is influenced by his pre-conceived domestic view on this topic.

6. Interest Rates

One of the most obvious unresolved issues in the Convention is the lack of a detailed provision determining the rates of interest. Article 78 of the CISG states that "[i]f a party fails to pay the price or any other sum that is in arrears, the other party is entitled to interest on it, without prejudice to any claim for damages recoverable under article 74."[181] Thus, the legal basis for awarding interest is clearly given in Article 78. However, the provision does not stipulate the rates of interest or how these rates are to be determined. It is controversial whether the interest rate is a matter that is governed by the Convention too or if the drafters deliberately excluded it from the scope of the Convention.[182] If it is governed by the Convention, are there any applicable general principles?

The interest issue has therefore become one of the most controversial CISG subjects. A U.S. District Court stated in *Chicago Prime Packers, Inc. v. Northam Food Trading Company* ("*Chicago Prime Packers*") that, according to its research, the interest issue has been the subject of up to thirty percent of total CISG cases worldwide.[183] To discuss this issue to its full extent, notably to present all of the different suggested solutions, is beyond the scope of this paper.

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example expenditures designed to mitigate the plaintiff's damages, would probably be covered as 'incidental' damages." *Zapata*, 313 F.3d at 388.

[178] CISG COMMENTARY, *supra* note 8, at 757.

[179] *Id.*

[180] *Id.*

[181] CISG, *supra* note 1, art. 74.

[182] BAASCH ANDERSEN, *supra* note 5, at 126.

[183] Chi. Prime Packers, Inc. v. Northern Food Trading Co., 320 F. Supp. 2d 702, 715 (7th Cir. 2004).

The District Court in *Chicago Prime Packers* noted that because of the vast discussions about the topic and the great controversy, no single approach used by all courts can be determined.[184] The court therefore decided that – even though the interest rate issue is within the Scope of the Convention – there is no general principle settling the matter and had recourse to domestic law.[185]

However, the ICC International Court of Arbitration came to a different result. Similar to the court in *Chicago Prime Packers*, it acknowledged that the interest rate is not explicitly settled in the Convention and that therefore recourse is to be taken to general principles.[186] In contrast to the *Chicago Prime Packers* decision, it assumed that general principles to determine the interest rate can be found in the Unidroit Principles and in the Principles of European Contract Law ("PECL").[187] Article 7.4.9(2) of the Unidroit Principles stipulates that the interest rate corresponds to the average bank short-term lending rate to prime borrowers.[188] A corresponding rule is found in Article 9.508(1) of the PECL.[189] The arbitrator considered these two identical rules to constitute general principles in the sense of Article 7(2). Thus, he applied an interest rate LIBOR[190] plus two percent, which corresponded to the bank short-term lending rate to companies.[191]

But it is also arguable that the decision of the Convention drafters not to determine the interest rate in the text means that it is outside the scope of the Convention. The Tribunal of International Commercial Arbitration at the Russian Federation thus concluded

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[184] *Id.* at 716.

[185] *Id.*

[186] Chemical Fertilizer (Austria v. Switz.), Int'l Comm. Arb. Awards 8128 (1995), *reprinted in* 123 J. DU DROIT INT'L 1024 (1996), *translated in* CISG-Online, http://www.cisg.law.pace.edu/cases/958128i1.hrml#cx.

[187] *Id.*

[188] UNIDROIT Principles, *supra* note 140, art. 7.4.9(2).

[189] Principles of European Contract Law, art. 9.508(1), *available at* http://frontpage.cbs.dk/law/commission_on_european_contract_law/PECL%20engelsk/engelsk_partI_og_II.htm.

[190] The London Interbank Offered Rate ("LIBOR") is a daily reference rate based on the interest rates at which banks borrow unsecured funds from other banks in the London interbank market.

[191] Chemical Fertilizer (Austria v. Switz.), Int'l Comm. Arb. Awards 8128 (1995), *reprinted in* 123 J. DU DROIT INT'L 1024 (1996), *translated in* CISG-Online, http://www.cisg.law.pace.edu/cases/958128i1.hrml#cx.

that the interest rate would have to be calculated according to domestic law.[192]

These three examples demonstrate that there seems to be no uniform criterion for the interest rate that is internationally acceptable. Even proponents of a uniform approach do not agree on which interest rate should be applied.[193] In addition, every attempt of legal scholars needs to be treated with caution as the drafters of the Convention could not solve this task either.[194]

Interestingly, the interest issue, although heavily debated in theory, seems to be much less controversial in practice. According to Baasch Andersen, an overwhelming majority of practitioners considers it to be outside of the scope of the CISG.[195]

V. Concurrent Application of Overlapping CISG Law and Domestic Law

Defining the scope of the Convention's inclusions and exclusions is only the first step in determining its relation to domestic law. If one comes to the conclusion that a certain aspect lies within the scope of the Convention, one has still to elaborate whether domestic law is nevertheless applicable concurrently. There is no provision in the Convention that expressly stipulates that the Convention must always be applied exclusively.

A. Tort Law

The greatest chance for an overlapping of the Convention with domestic law is in the area of tort law. Parallel claims under contract law and tort law are a common phenomenon in many legal systems. Under domestic law, the claimant usually has the choice of whether he claims damages under contract or tort law.[196] However, some domestic legal systems grant contract law priority over tort law rendering tort

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[192] Tribunal of International Commercial Arbitration at the Russian Federation (2000) Award No. 340, CISG-Online 1084 <http://www.unilex.info/case.cfm?pid=1&do=case&id=876&step=FullText> (at 6 May 2010).

[193] CISG Commentary, *supra* note 8, at 800.

[194] *Id.*

[195] Baasch Andersen, *supra* note 5, at 126; *see also* Volker Behr, *The Sales Convention in Europe: From Problems in Drafting to Problems in Practice*, 17 J.L. & Com. 263 (1998).

[196] Under German law, for example, claims under tort law and contract law can be alleged concurrently. Burgerliches Gesetzbuch [BGB] [Civil Code] Aug. 18, 1896, Reichsgesetzblatt [RGBl] 195, §§ 823, 280(1), 433.

law inapplicable.[197] Therefore, the question arises what the consequences of concurrent damages claims under the CISG and domestic tort law are.

Article 5 of the Convention includes a provision that concerns the overlapping of domestic law and the CISG.[198] It expresses that the "Convention does not apply to the liability of the seller for death or personal injury caused by the goods to any person."[199] Article 5 thus reduces the scope of the Convention as part of the applicable contract law in certain cases. However, Article 5 is only applicable to the liability of the seller for death or personal injury.[200] That implies that it is not applicable to property damages and financial loss. Hence, the Convention is applicable in these cases.

An easily conceivable point of collision of concurrent claims under tort law and the CISG comes with respect to Article 39. Specifically, Article 39(1) requires the buyer to "give notice to the seller specifying the nature of the lack of conformity within a reasonable time."[201] If a buyer fails to give such notice, he "loses the right to rely on a lack of conformity."[202] Therefore, the buyer might be deprived of damages claims under the Convention. However, under domestic tort law, there may be a concurrent damage claim not requiring such a notice. The question now is if the CISG provision demanding such a notice is simply "bypassed" by having recourse on domestic tort law.[203] The question then arises whether the Convention is applicable concurrently or exclusively to domestic tort law.

Some authors believe that the Convention's remedial rules should be construed as "occupying the entire non-conformity field," hence denying access to alternative domestic law remedies.[204]

The author has a different opinion. The Convention was not designed to deal with cases of unfair or culpable conduct and there is no reason to assume that it pre-empts relevant domestic rules.[205] Contractual and delictual remedies coexist in many States for good reasons, and the concept of an independent duty of care in tort and contract is common to many legal systems and should pose no difficul-

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[197] One example is the French rule of *non cumule*, which states that where there is a contract, an action can only be brought under contract law and when there is no contract an action can only be brought under tort law.

[198] CISG, *supra* note 1, art. 5

[199] *Id.*

[200] *Id.*

[201] CISG, *supra* note 1, art. 39.

[202] *Id.* art. 39(1).

[203] Bridge, *supra* note 18, at 950.

[204] JOSEPH LOOKOFSKY, UNDERSTANDING THE CISG IN THE USA 72 (Kluwer Law Int'l, 2d ed. 2004).

[205] BERNSTEIN & LOOKOFSKY, *supra* note 103, at 81.

ties.[206] Furthermore, the ratification of the CISG does not mean that a State intended to merge its contract law and tort law. The CISG should thus remain applicable for what it was intended: the contractual side only.[207] As a result, it seems clear that the Convention does not aim to reach into national law.[208]

In addition, if the Convention would apply exclusively with its prerequisites and limit of damage claims – such as Article 39 – the conclusion of an international sales contract would partially disclaim tort liability.[209] A part of the public order would hence be rendered inoperative since injuries caused by defective goods often only appear years after purchase.[210] Ultimately, in cases of a chain of distribution with manufacturers and distributors the loss would eventually fall randomly on those in the chain who bought under a CISG contract.[211] Therefore, national tort law and the provisions of the CISG are applicable concurrently if the *domestic law* does not provide otherwise.

B. Law on Misrepresentation

The concurrent application of domestic laws of misrepresentation and the Convention presents another problematic case. First, it is already controversial whether innocent misrepresentation is outside the scope of the CISG. If misrepresentation is deemed to be part of validity, then it would be excluded from the scope of the CISG by Article 4(a), and the matter would be governed by domestic law only.[212] Second, if misrepresentation is outside the scope of the Convention, should the applicable CISG avoidance-remedy nonetheless pre-empt the domestic law on misrepresentation?

There would otherwise be a risk that the provisions on fundamental breach in Articles 49(1)(a) and 25 would be undermined. Article 49(1)(a) stipulates that a buyer may only avoid a contract in case of a "fundamental breach."[213] The definition of a fundamental breach is provided by Article 25.[214] The purpose of these provisions is to render it difficult to avoid a contract. However, in many legal systems, the requirements for rescinding a contract because of innocent misrepresentation are less stringent than those of Article 25.[215] Although

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[206] *Id.* at 82.
[207] Id.
[208] Bridge, *supra* note 18, at 951.
[209] CISG COMMENTARY, *supra* note 8, at 79.
[210] *See id.*
[211] CISG COMMENTARY, *supra* note 8, 79.
[212] CISG, *supra* note 1, art. 4(a).
[213] *Id.*, art. 49(1)(a).
[214] *Id.*, art. 25.
[215] *See* Bridge, *supra* note 18, at 947.

avoiding and rescinding a contract is not the same, both means ultimately serve to evade the contract.[216]

A further point of collision comes with Article 35. Conceivably, there are cases where the "description required by the contract"[217] or another express term of the contract overlaps with a statement that serves under national law as a misrepresentation. In such a case, Article 39 would require the buyer to give notice of the lack of conformity if he does not want to lose his remedies.[218]

The first question to answer is whether misrepresentation falls within "the rights and obligations of the seller and the buyer arising from such a contract."[219] If a contract is rescinded because of misrepresentation, then the rights and obligations do not emerge from the contract but from the conditions preceding that contract.[220] Thus, innocent misrepresentation is arguably outside the scope of the Convention.

The second question is whether domestic law on innocent misrepresentation is concurrently applied to the Convention rules on avoidance. The situation is very similar to the case of overlapping tort law with the CISG.[221] It is thus not surprising that the consequence is the same. The mere fact that domestic rules on misrepresentation sometimes differ and might be seen as a threat to "uniform" CISG interpretation does not warrant the conclusion that domestic remedies are pre-empted whenever the operative facts of the case are covered by a CISG rule. The Convention was not designed to police against one party's unfair conduct. In addition, the Convention drafters themselves refused to include a rule in the Convention that limited recourse to domestic law.[222] Therefore, there are no good reasons for shrinking the application of domestic law of misrepresentation. Moreover, domestic laws commonly require notice of rescission within a very short period so the "risk" of falling afoul of Article 39 while retaining a right to rescind is considerably reduced.[223] Thus, domestic laws on representation are applicable, even if they compete with Convention rules.

C. Article 5 CISG and Product Liability Law

A very interesting provision of the CISG relating to the concurrent application of domestic law and Convention rules is Article 5 of

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[216] *Id.*
[217] CISG, *supra* note 1, art. 35.
[218] *Id.* art. 39.
[219] *Id.* art. 4.
[220] Bridge, *supra* note 13, at 947.
[221] *Id.* at 952.
[222] BERNSTEIN & LOOKOFSKY, *supra* note 103, at 25.
[223] Bridge, *supra* note 18, at 952-53.

the CISG.[224] The issue is: What is the effect of Article 5, which deals with product liability law, on the relationship of the Convention to domestic law?

Article 5 excludes losses arising from death or personal injury from the scope of the Convention.[225] It therefore constitutes an exception of the general rule in Article 74 that all direct losses are compensable under the Convention.[226] The reasoning behind Article 5 is that the Convention should not compete with domestic product liability rules.[227] Or, in the words of Schlechtriem, "domestic rules on product liability are not supposed to be 'disturbed' by the Convention."[228]

The Convention does not deal with product liability law and therefore does not intend to supersede domestic law in that area.[229] The provision was mainly required because some legal systems categorise product liability law as contractual law.[230] Article 5 aims to ensure that these domestic contractual claims would still apply when the Convention is enacted.[231] Thus, domestic law remains applicable to matters covered by Article 5.[232]

The phrasing "caused by the goods" in Article 5 contains a limitation of its scope. Therefore, if a seller injures the buyer when delivering the goods with his transport vehicle, Article 5 would not exclude claims under the Convention.[233] However, some argue that those ancillary duties of care should be exceptions under the Convention and therefore implied only rarely in international sales contracts.[234]

Overall, there are two main areas of discussion when it comes to the interpretation of Article 5:

- Can a buyer who had to indemnify sub-purchasers for death or personal injury under domestic law hold the original seller liable?
- Are Injuries to *property* and the resulting damages exclusively governed by the Convention?

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[224] CISG, *supra* note 1, art. 5.

[225] *Id.* art. 5.

[226] *Id.* art. 74.

[227] INTERNATIONAL SALES LAW, *supra* note 17, at 55.

[228] Peter Schlechtriem, Commentary on Oberlandesgericht Düsseldorf 2 July 1993 (1994) *available at* http://cisgw3.law.pace.edu/cases/930702g1.html.

[229] INTERNATIONAL SALES LAW, *supra* note 17, at 55.

[230] According to the above elaborations, product liability law would be applied concurrently so long as it is characterised as tort law. Article 5, therefore, merely states the obvious. INTERNATIONAL SALES LAW, *supra* note 12, at 55.

[231] INTERNATIONAL SALES LAW, *supra* note 17, at 55.

[232] CISG COMMENTARY, *supra* note 8, at 77.

[233] *Id.*

[234] *Id.*

1. Recourse of the Buyer for his Liability to Sub-Purchasers

Some authors believe that Article 5 includes both the buyer's claims based on death or personal injury suffered by the buyer himself and claims based on the death or personal injury of customers.[235] It is argued that Article 5 leaves all contractual liability claims untouched. This includes claims following the chain of sale back to its origin, namely the producer of the goods.[236] Arguably, the words "any person" of Article 5 cover injuries or death of third parties. Furthermore, in many domestic legal systems, product liability has developed into a system with special recourse actions for passing on liability from the seller through the chain of distribution to the responsible manufacturer.[237] Moreover, if the Convention applies, the buyer's claims could be barred by Article 39 of the CISG for a lack of notice, and he would have to recourse to domestic law anyway.[238]

However, it is the author's opinion that these arguments are not persuasive. The strength and effectiveness of domestic product liability law should not bar the application of the Convention where it is non-exclusive. A non-application of Article 5 would only mean that the buyer has an additional claim under the Convention.[239] Whether his domestic claim is easier to enforce or more comprehensive should not have any impact. For the same reasons, the weaknesses or limitations of the Conventions, such as Article 39 of the CISG, should not be an argument against its application either. In addition, it is not said that domestic law does not have the same or even greater restrictions than the Convention. Concerning the textual argument, one has to admit that it is convincing at first glance. However, a buyer does not allege damages for death or injury when he claims consequential damages resulting from his liability for personal injury or death resulting from defective goods sold by him to sub-purchasers. Instead, he claims *pecuniary* damages as *his* injury is a pure financial one. He is enforcing his own claim rather than that of the sub-purchasers. This situation must be distinguished from the case where the sub-purchaser himself takes proceedings against the manufacturer.

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[235] *See, e.g.*, CISG COMMENTARY, *supra* note 8, at 77; INTERNATIONAL SALES LAW, *supra* note 17, at 55.

[236] INTERNATIONAL SALES LAW, *supra* note 17, at 55.

[237] CISG COMMENTARY, *supra* note 8, at 78.

[238] *Id.*

[239] That is admittedly not true in cases where domestic law grants contract law priority over tort law. In these cases, an "additional" Convention claim with its severe prerequisites would turn out to be a disadvantage to the buyer because it would bar his domestic tort claim, which might have less stringent conditions. In the author's opinion this problem should be addressed by the domestic legislator, who, in an attempt to preserve its strict product liability tort laws, should provide for an exceptional allowance of concurrent claims.

All pecuniary losses should be dealt with equally under the principle of full compensation pursuant to Article 74 of the CISG. Article 74 is very particular in addressing monetary losses and allows a party to claim damages caused by a breach of the contract.[240] These losses can occur in the form of direct losses, incidental losses, or other losses consequential upon the breach.[241] Overall, there is no need to create the situation of a so-called "dépecage" where it is not necessary.[242]

2. Are Injuries to Property and the Resulting Damages Exclusively Governed by the CISG?

Even though liability for death and personal injury is without a doubt the most important domain of product liability, there are also other fields. Article 5 does not exclude liability for injuries to property.[243] The drafters of the Convention considered using a broader term like "claims based on product liability."[244] However, delegates could not agree to what extent the Convention should apply to property damage caused by defective goods.[245] Article 5 can also not be applied by analogy in these cases.[246] Hence, the Convention is applicable in cases of injuries to property. The question then arises as to whether it applies concurrently or exclusively to domestic law and most notably tort law.

Some authors argue that the Convention governs exclusively. It is argued that in cases where the domestic rules and the Convention rules turn on the same facts, the Convention must displace the domestic law. Any other result would destroy the main aim of the Convention, that is, to create uniform rules.[247] It is furthermore argued that if the drafters of the Convention would have wanted domestic law to be applicable, they would have included a similar provision to Article 4 of the CISG for this case. Moreover, the fair balance between buyers and sellers that was achieved with the Convention would be jeopardized if the claimant has an additional domestic claim.[248]

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[240] CISG, *supra* note 1, art. 74.

[241] ZELLER, *supra* note 44, at 66.

[242] Black's Law Dictionary defines "dépecage" as "[a] court's application of different state laws to different issues in a legal dispute; choice of law on an issue-by-issue basis." BLACK'S LAW DICTIONARY (9th ed. 2009).

[243] CISG COMMENTARY, *supra* note 8, at 76.

[244] INTERNATIONAL SALES LAW, *supra* note 17, at 55-56.

[245] *Id.*

[246] CISG COMMENTARY, *supra* note 8, at 77.

[247] JOHN H. HONNOLD, UNIFORM LAW FOR INTERNATIONAL SALES UNDER THE 1980 UNITED NATIONS CONVENTION 121-22 (2d ed., Law and Taxation Pubs, 1991).

[248] *Id.* at 124.

However, numerous authors – including the present author – believe that damages to property are non-exclusively regulated by the Convention. Damages to property caused by the product are consequential damages and are recoverable under Article 74 of the CISG if they were foreseeable.[249] Whether a concurrent claim in tort law is applicable is a question decided by domestic law.[250] A buyer can therefore revert to domestic claims if his claims under the Convention are, for example, barred by Article 39 of the CISG.

Another question is whether domestic contractual claims are applicable concurrently with the Convention. One could draw a distinction between injuries to property and purely economic interests. If the rights or remedies are ultimately based on injury to property, the domestic claims, whether they are contractual, quasi-contractual, or extra-contractual, remain applicable. If the buyer's interest is a purely economic one created only by the sales contract, then the CISG should apply exclusively.[251]

VI. CONCLUSION

The drafters of the Convention included the necessary provisions to allow a uniform application of the Convention. Article 7(1) enshrines the primacy of an autonomous interpretation in the Convention's text and Article 7(2) allows filling its gaps in a uniform manner.

Nonetheless, the lack of an ultimate court of last resort indicatess that the Convention will never be applied entirely uniformly on an international level. Domestic conceptions of law still influence the interpretation of the Convention. As Honnold said, "[t]he mind sees what the mind has means of seeing."[252] That timeless statement is unlikely to be completely revoked and the "homeward trend" continues to be the main obstacle to uniformity. In addition, the concurrent application of domestic law – although entirely justified in the author's opinion – renders the choice of the correct forum an important one. It is thus still vital to know about the applicable domestic laws and how the Convention is applied in the forum. However, courts increasingly attempt to reach an autonomous interpretation that is consistent with court decisions in other jurisdictions. The situation is therefore improving.

The domain of delimitation of the Convention and domestic law remains highly controversial. True uniformity would require agree-

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[249] CISG, *supra* note 1, art. 74.

[250] *See, e.g.*, CISG COMMENTARY, *supra* note 8, at 78-79; INTERNATIONAL SALES LAW, *supra* note 17, at 56.

[251] CISG COMMENTARY, *supra* note 8, at 81.

[252] HONNOLD, *supra* note 69, at 1.

ment on both what is included in and what is excluded from the scope of the Convention. Therefore, it is advisable to parties to a CISG contract to include respective contractual provisions ruling the most controversial issues, notably interest rates and lawyers' fees.

Overall, total uniform application of the Convention has not been achieved (yet) and the influences of domestic law on international sales and on the application of the Convention are still considerable. That does not mean, however, that the Convention is a failure. Honnold already remarked in 1988:

> Throughout the work of uniform laws realists have told us: Even if you get uniform laws you won't get uniform results. . . . As our sad-faced realists predicted, international unification *is* impossible. But before we despair, perhaps we should consider the alternatives: "conflicts" rules that are unclear and vary from *forum to forum*; national systems of substantive law expressed in doctrines and languages that, for many of us, are impenetrable. The relevant question is surely this: Is it possible to make law for international trade a bit more accessible and predictable?[253]

Referring to Honnold's above stated question, it is the author's opinion that the answer is "yes." The Convention may not be applied uniformly everywhere and further legal research and discussion is required. However, it has helped greatly to facilitate international trade. It is better to make one step in the right direction than to remain standing still and waiting for a perfect solution that may never come.

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[253] John Honnold *The Sales Convention in Action – Uniform International Words: Uniform Application?* 8 J.L. & COM. 207, 207-208 (1988).