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UNIFORMITY IN THE APPLICATION OF THE CISG

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ANALYSIS OF THE PROBLEM AND RECOMMENDATIONS FOR THE FUTURE

© BORIS PRAŠTALO

SUPERVISOR: MARKUS A. PETSCHE

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TO MY FAMILY

STATEMENT OF ORIGINALITY

I hereby declare that this thesis is an original work that contains no materials published previously, unless otherwise acknowledged in the form of a bibliographical reference, or submitted to any other institution of higher education.

s/Boris Praštalo

ABSTRACT

This doctoral thesis deals with the topic of uniform application of the CISG. More precisely, it argues that Article 7(1) of the CISG establishes a mandate that the Convention be applied in a highly uniform manner. However, this has not been attained in practice. After examining the causes and detrimental effects of non-uniformity in the application of the CISG, this thesis goes on to examine the tools that have been put in place in order to combat this phenomenon. After a careful analysis, the thesis concludes that the organization, reach, and mode of operation of these tools are, for the most part, in discord with the complexities that come with a high number of participating states (89 as of this writing). Accordingly, possible improvements are suggested. Furthermore, the thesis examines the tools that were proposed but so far have not been implemented, showing that the maneuvering room in this regard is rather limited.

LIST OF ABBREVIATIONS

ALI	American Law Institute
CISG	United Nations Convention on Contracts for the International Sale of Goods
CISG Digest	UNCITRAL Digest of Case Law on the United Nations Convention on Contracts for the International Sale of Goods
CISG Pace Database	Pace Law Albert H. Kritzer CISG Database
CLOUT	Case Law on UNCITRAL Texts
COMPROMEX	Mexican Committee for the Protection of Foreign Commerce
EU	European Union
ICC	International Chamber of Commerce
UCC	Uniform Commercial Code
UCP	Uniform Customs and Practice for Documentary Credits
ULF	Convention relating to a Uniform Law on the Formation of Contracts for the International Sale of Goods
ULIS	Convention relating to a Uniform Law on the International Sale of Goods
UN	United Nations
UNCITRAL	United Nations Commission on International Trade Law
UNIDROIT	International Institute for the Unification of Private Law
UNIDROIT Principles	Principles of International Commercial Contracts
UK	United Kingdom
ULC	National Conference of Commissioners on Uniform State Laws
US	United States
VLCT	Vienna Convention on the Law of Treaties

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INTRODUCTION

The United Nations Convention on Contracts for the International Sale of Goods (hereinafter 'CISG' or 'Convention') was adopted in 1980 under the auspices of the United Nations Commission on International Trade Law ('UNCITRAL'), and it came into effect in 1988.[1] It seeks "to reduce obstacles to international trade, particularly those associated with choice of law issues, by creating even-handed and modern substantive rules governing the rights and obligations of parties to international sales contracts."[2] The CISG has been lavished with praise in the scholarly literature. It has been referred to as "one of the success stories in the field of the international unification of private law."[3] Some have gone a step further, calling it "arguably the greatest […] legislative achievement aimed at harmonizing private commercial law."[4] Thus far, 89 countries have become signatories to the CISG,[5] and in the future, more are expected to join this truly international treaty.

The idea for a uniform sales law at the international level can be traced back to the 1920s, to the work of an Austrian-born scholar Ernst Rabel.[6] In 1928, Rabel suggested to the International

[1] "Status - United Nations Convention on Contracts for the International Sale of Goods (Vienna, 1980)," UNCITRAL, 2018, http://www.uncitral.org/uncitral/en/uncitral_texts/sale_goods/1980CISG_status.html.

[2] Harry M. Flechtner, "The United Nations Convention on Contracts for the International Sale of Goods," *United Nations Audiovisual Library of International Law*, 2009, 1.

[3] Peter Huber and Alastair Mullis, *The CISG: A New Textbook for Students and Practitioners* (Germany: sellier european law publishers, 2007), 1.

[4] Joseph M Lookofsky, "Loose Ends and Contorts in International Sales: Problems in the Harmonization of Private Law Rules," *The American Journal of Comparative Law* 39, no. 2 (1991): 403.

[5] "Status - United Nations Convention on Contracts for the International Sale of Goods (Vienna, 1980)" (see n. 1).

[6] Huber and Mullis, *The CISG: A New Textbook for Students and Practitioners*, 2 (see n. 3).

Institute for the Unification of Private Law ('UNIDROIT')[7] to take upon itself the project on unification of law in the area of international sale of goods.[8] The UNIDROIT accepted Rabel's proposal, with Rabel becoming personally involved in the preparation of the draft.[9] In 1934, the preliminary draft was finally ready.[10]

Rabel was very much personally convinced in the merit of the project:

> [T]he proposed international law is not meant as a substitute for the actual domestic law. The overwhelming majority of sales contracts remain under the same rules as they are at present. It intends to do no more than to take the place of the rules of the conflict of laws concerning sales and the legal norms called for by the conflict rules. The law thus to be applied now might be that of any foreign country, different in different cases, and difficult to apply. The proposed international law, on the other hand, would be uniform, kindred to the Sales Act, and at least intelligible. Whether it has other merits, we shall soon see.[11]

At the same time, Rabel was aware of the fact that nation states might have a difficult time digesting the idea of a uniform sales law for international sale of goods. He was especially concerned about the stance of the United States and Great Britain:

> Perhaps a lack of interest may be foreseen because of the general apprehension that no such law would ever be approved by Great Britain or the United States, no matter how great its merit might be, nor how much it might be based on common law thinking, nor what influence it might exercise in promoting

[7] At that time, UNIDROIT was operating under the auspices of the League of Nations, a forerunner of the United Nations.

[8] Huber and Mullis, *The CISG: A New Textbook for Students and Practitioners*, 2 (see n. 3).

[9] Ibid.

[10] Ibid.

[11] Ernst Rabel, "A Draft of an International Law of Sales," *The University of Chicago Law Review* 5, no. 4 (1938): 544.

international cooperation.[12]

Despite this, the work on the project continued, with the revised draft being adopted by UNIDROIT in 1939.[13] However, the whole endeavour came to a halt because of the Second World War.[14]

In the post-war period, the idea for a uniform law to govern international sale of goods was revived. The Government of the Netherlands convened a Conference in The Hague which, in turn, formed a Sales Commission.[15] Rabel took active part in the work of the Sales Commission until his death in 1955.[16] The end result of the Sales Commission's work were drafts of two legal instruments: (1) Convention relating to a Uniform Law on the International Sale of Goods ('ULIS') and (2) Convention relating to a Uniform Law on the Formation of Contracts for the International Sale of Goods ('ULF').[17] The rules on the parties' rights and duties were put forth in the former while the latter contained rules on contract formation.[18] In 1964, a Diplomatic Conference was convened in The Hague at which these two legal instruments were adopted.[19] They entered into force in 1972,[20] but have eventually come to be considered as failures.

[12] Ibid.

[13] Huber and Mullis, *The CISG: A New Textbook for Students and Practitioners*, 2 (see n. 3).

[14] Ibid., 3.

[15] Ibid.

[16] Ibid.

[17] Gyula Eörsi, "Problems of Unifying Law on the Formation of Contracts for the International Sale of Goods," *The American Journal of Comparative Law* 27, no. 2/3 (1979): 312.

[18] Ibid., 312. "[T]he reason given for segregating the two issues was to give States the possibility for separate ratification of the convention on the formation of sale and that on the rights and duties of the parties."

[19] Huber and Mullis, *The CISG: A New Textbook for Students and Practitioners*, 2 (see n. 3).

[20] Ibid.

Certain major Western trading powers abstained from adopting the ULIS and ULF, the most prominent example being the United States.[21] In addition to this, the countries from the socialist block were also sceptical about ULIS and ULF, claiming that numerous provisions were biased in favour of highly industrialised Western sellers.[22] Hence, they perceived the ULIS and ULF as being tools of the capitalist world. The same reason underlies the developing countries' decision to stay away from the newly created uniform law of sales.[23]

After it became clear that the ULIS and ULF were rather limited in their appeal to the states, the United Nations ('UN'), an inter-governmental organisation founded after the Second World War, began contemplating the possibility of becoming active in the field of "harmonization and unification of the law of international trade."[24] In 1966, a Report by the Secretary-General of the UN was issued, suggesting that the General Assembly of the UN ought to consider establishing a new commission that would take upon itself the task of pursuing "progressive harmonization and unification of the law of international trade."[25] The justification for this endeavour was put forth by the General Assembly of the UN by opining that "conflicts and divergences arising from the

[21] Dennis J. Rhodes, "The United Nations Convention on Contracts for the International Sale of Goods: Encouraging the Use of Uniform International Law," *The Transnational Lawyer* 5 (1992): 392. Citing Honnold and Landau: "During the years of work that went into the Hague Conventions, the U.S. was absent. [footnote omitted] Not until December 1963, four months before the convention at [T]he Hague, did the U.S. take an active interest in the proceedings. At this time, the State Department authorized a delegation to participate in [T]he Hague Convention drafts conference. [footnote omitted] However, by this point in the conference, the U.S. delegates did little more than make suggestions designed to include in the conventions elements of the common law and of the Uniform Commercial Code (UCC). [footnote omitted] Few of their suggestions were incorporated into the ULIS or the ULF since UNIDROIT had practically completed its work."

[22] Peter Schlechtriem, *Uniform Sales Law - The UN-Convention on Contracts for the International Sale of Goods* (Vienna: Manz, 1986), 18; Marie Stefanini Newman, "CISG Sources and Researching the CISG," in *International Sales Law: A Global Challenge* (New York: Cambridge University Press, 2014), 38.

[23] Ibid.

[24] "Progressive Development of the Law of International Trade: Report of the Secretary-General," *Yearbook of the United Nations Commission on International Trade Law* 1 (1970): 44.

[25] Ibid.

laws of different States in matters relating to international trade constitute an obstacle to the development of world trade."[26]

The suggestion given by the Secretary-General of the UN became a reality in 1966 when the United Nations General Assembly adopted a General Assembly Resolution 2205 which established UNCITRAL.[27] Upon beginning to discharge its mandate, UNCITRAL undertook to assess the ULIS and ULF.[28] The first step was to consult the UN Member States on these two legal instruments.[29] Quite expectedly, the feedback that was received mirrored the criticism which was already targeting the ULIS and ULF.[30] As a result, in 1968 the UNCITRAL opted to form a Working Group with the task of either modifying the ULIS and ULF or drafting a brand new convention which would govern the international sale of goods.[31]

Initially, the Working Group followed the Hague Conventions organisation by dividing the formation of the contract and the rights and obligations of the parties into two separate legal instruments.[32] The UNCITRAL Commission, however, decided in 1978 that this would not be advisable, and hence, it fused these two into one draft, calling it the Draft Convention on Contracts for International Sale of Goods.[33] In 1980, a Diplomatic Conference in Vienna was convened with

[26] Ibid., 21.

[27] United Nations General Assembly, Establishment of the United Nations Commission on International Trade Law, Agenda item 88, sess. 21St, 1966, A/6396, 99.

[28] Huber, *The CISG: A New Textbook for Students and Practitioners*, 3, (see n. 3).

[29] Ibid.

[30] Ibid.

[31] Ibid.

[32] "Summary of UNCITRAL Legislative History of the CISG," Albert H. Kritzer CISG Database, 1999, http://www.cisg.law.pace.edu/cisg/linkd.html.

[33] Ibid.

the purpose of reviewing and adopting the convention.[34] After extensive deliberations and several amendments, the CISG was finally adopted. It entered into force in 1988 after 11 countries had ratified it.[35]

An interesting thing to note is that the final text of the CISG was unanimously adopted.[36] This is quite a feat when one takes into account the cultural and legal differences that characterised the countries participating at the Vienna Conference. The main reason why the CISG became so widely embraced lies in the fact that many provisions of the CISG represented a form of compromise, mainly between the common law side and the civil law side.[37] Professor Honnold, who served as the Chief of the United Nations International Trade Law Branch and Secretary of UNCITRAL, opined that the compromise was reached so effectively due to the use of a particular method.[38] The authors of the CISG, in the course of drafting, would start with a hypothetical case, and then they would try to determine what kind of the result was desirable.[39] Interestingly, there were almost no disagreements as to what the end result ought to be. After determining what the outcome should be, there were no major stumbling blocks in the actual drafting of the provisions.[40]

[34] Huber, *The CISG: A New Textbook for Students and Practitioners*, 3, (see n. 3).

[35] Ibid.

[36] "Summary of UNCITRAL Legislative History of the CISG," (see n. 32).

[37] Sieg Eiselen, "The CISG as Bridge between Common and Civil Law," in *International Sales Law: A Global Challenge* (New York: Cambridge University Press, 2014), 628.

[38] Troy Keily, "Harmonisation and the United Nations Convention on Contracts for the International Sale of Goods," *Nordic Journal of Commercial Law of the University of Turku, Finland*, no. 1 (2003), https://www.cisg.law.pace.edu/cisg/biblio/keily3.html.

[39] Ibid.

[40] Ibid.

TOPIC OF THE THESIS

While the CISG is regularly lavished with praise, it has also endured a fair share of criticism.[41] One of the most frequent ones that has been directed at the Convention is that, in spite of achieving a uniform text, in practice this does not necessarily equate to uniform results. That is, textual uniformity is no guarantee of substantive uniformity. The drafters were very much aware of this danger, and have thus included Article 7(1) in the CISG which asks, among other things, that regard ought to be had to the need to promote uniformity in the Convention's application. In practice however, Article 7(1) has quite frequently not been heeded. This thesis will entertain this challenging issue; i.e. the issue of non-uniformity in the application of the CISG.

THESIS STATEMENT

It shall be argued in this thesis that Article 7(1) of the CISG formulates a mandate that the Convention ought to be applied in a highly uniform manner.[42] However, in spite of what Article 7(1) states, the CISG case law is still filled with numerous examples of non-uniform applications.[43] To promote uniformity in the application of the CISG, the judges and arbitrators would need to look towards the CISG case law from different jurisdictions.[44] For this to be a viable reality, two

[41] Gilles Cuniberti, "Is the CISG Benefiting Anybody?," *Vand. J. Transnat'l L.* 39 (2006): 1511; Christopher Sheaffer, "The Failure of the United Nations Convention on Contracts for the International Sale of Goods and a Proposal for a New Uniform Global Code in International Sales Law," *Cardozo J. Int'l & Comp. L.* 15 (2007): 461; John Felemegas, "The United Nations Convention on Contracts for the International Sale of Goods: Article 7 and Uniform Interpretation," in *Pace Review of the Convention on Contracts for the International Sale of Goods (CISG)* (Kluwer Law International, 2000), 115–265, http://www.cisg.law .pace.edu/cisg/biblio/felemegas.html.

[42] For a detailed discussion of the principle of uniformity as enshrined in Article 7(1) of the CISG, please refer to Chapter I.

[43] For a detailed discussion of examples of non-uniformity in the application of the Convention, please refer to Chapter II.

[44] Peter Schlechtriem and Ingeborg Schwenzer, *Commentary on the UN Convention on the International Sale of Goods (CISG)*, 3rd edition (Oxford: Oxford University Press, 2010), 124; Stefan Kröll, Loukas Mistelis, and Pilar

elements need to be present: (1) a "positive attitude of the judges [and arbitrators]" in "show[ing] a healthy respect for the decisions" on the CISG from different jurisdictions (and other CISG-related materials),[45] and (2) tools that could enable effective access for judges and arbitrators to CISG materials, and particularly case law from all the participating states.[46] In this day and age, however, neither of these is present, as will be illustrated in the coming chapters.

SCOPE AND LIMITATIONS OF RESEARCH

This doctoral thesis is focused on the CISG. Although many other legal instruments (including other international conventions and model laws) contain a provision that is similar in wording, or even a verbatim copy of Article 7(1) of the CISG,[47] the findings of this thesis cannot be deemed applicable *mutatis mutandis* in such instances. Each legal instrument could be characterised by specificities that could justify a departure from conclusions put forth in this thesis in regard to the CISG.

Perales Viscasillas, *UN Convention on Contracts for the International Sale of Goods (CISG) - Commentary* (Munich: C.H. Beck, 2011), 128.

[45] 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) Symposium - Ten Years of the United Nations Sales Convention," *Journal of Law and Commerce* 17 (1998 1997): 215.

[46] Effective access to case law and other CISG-related materials has long been recognised as a prime necessity, and efforts have been on-going since the end of the 1980s to ensure their collection and dissemination (i.e. CLOUT, CISG Pace Database, UNILEX, etc.). For a detailed discussion of this topic, please refer to Chapter V.

[47] UNCITRAL, *UNCITRAL Model Law on International Commercial Arbitration (1985), with Amendments as Adopted in 2006* (Vienna: United Nations, 2008), http://www.uncitral.org/pdf/ english/texts/arbitration/ml-arb/07-86998_Ebook.pdf. Article 2A: "In the interpretation of this Law, regard is to be had to its international origin and to the need to promote uniformity in its application […]."UNIDROIT, "UNIDROIT Convention on Substantive Rules for Intermediated Securities" (2009), https://www.unidroit.org/english/conventions/2009intermediatedsecurities/convention.pdf. Article 4: "In the implementation, interpretation and application of this Convention, regard is to be had to its purposes, the general principles on which it is based, its international character and the need to promote uniformity and predictability in its application."

Article 7(1), besides enshrining the principle of uniformity, contains two more interpretative principles: international character and good faith.[48] This thesis will only analyse them to an extent that that is needed to shed light on the meaning and scope of the principle of uniformity. Other than that, the thesis at hand is neither particularly focused on international character nor on good faith.

Lastly, this thesis will focus on offering recommendations as to how to improve the tools for the promotion of uniform application of the CISG. It will not hypothesise about the potential ways in which the attitudes of judges and arbitrators could be altered. This will remain a topic to be handled in the future.

METHODOLOGY

This thesis has resorted to the doctrinal analysis. As is to be expected, the primary piece of legislation analysed in the thesis is the CISG. The conclusions drawn in relation to Article 7(1) of the CISG are based on the plain reading of the text of the Convention, *travaux préparatoires*, case law, and scholarly materials. In assessing the case law made under the CISG, this thesis has used a comparative method to spot divergent approaches that could be classified as examples of non-uniform application. Note, however, that in employing the comparative law method, no attempt was made to limit the analysis to a set of particular jurisdictions. Namely, all cases rendered under the CISG, no matter their country of origin, are considered to form one pool of CISG case law. When the comparative law analysis is performed in this way, the results thus reached can be considered to be of universal application (more precisely, applicable to all CISG participating

[48] "Annotated Text of CISG Article 7," Pace Law Albert H. Kritzer CISG Database, 2014, https://cisgw3.law.pace.edu/cisg/text/e-text-07.html.

states). In contrast, if the focus had been on several specific jurisdictions, the findings would only be relevant for those jurisdictions.

Furthermore, where appropriate, the thesis seeks to employ the law and economics analysis. More precisely, where human behaviour of relevance for non-uniform application of the CISG is discussed, an assumption is made that people act so as to maximise their expected utility. And lastly, this thesis relies on an array of empirical data, some of which were obtained from the existing surveys and polls, and some from the databases and other materials dedicated to the CISG.

SIGNIFICANCE OF RESEARCH

The topic of non-uniformity in the application of the CISG is not a novel one. Plenty of scholars have entertained it.[49] However, it still remains a rather contentious issue.[50] A topic that has attracted close scrutiny of the scholarly community ought not to be considered as 'stale' for a doctoral thesis so long as it remains divisive, and there is room for novel contribution. This work indeed, as the reader will see in the ensuing pages, manages to put forth observations not found in the existing literature. For instance, in Chapter I a brand-new standard of uniformity is coined. And in Chapter VI, the tools for the promotion of uniform application of the CISG are analysed, among other things, from the perspective of the dichotomy between 'developed v. developing countries/Western v. non-Western countries.' Eventually, recommendations and observations about how to improve the organisation and mode of operation of these tools are given. Besides their potential to be a catalyst for a further debate among scholars, the recommendations and

[49]Anna Veneziano, "The Soft Law Approach to Unification of International Commercial Contract Law: Future Perspectives in Light of UNIDROIT's Experience," *Vill. L. Rev.* 58 (2013): 523. Citing the Commentary by Kröll, Mistelis, and Viscasillas: "The question of the uniform interpretation of the CISG has always been one of the most debated among scholars and has found its way even in case law applying the CISG"

[50] Ibid.

observations offered on the tools for the promotion of uniform application of the CISG in this thesis could have practical implications as well.

CHAPTER I
1. CISG PRINCIPLE OF UNIFORMITY: MEANING, SCOPE, AND PRACTICAL IMPLICATIONS

Chapter I embarks on a journey to analyse the principle of uniformity as put forth in Article 7(1) of the CISG:

> In the interpretation of this Convention, regard is to be had to its international character and to the need to promote uniformity in its application and the observance of good faith in international trade.[51]

It is generally understood that Article 7 of the CISG lays out the interpretative methodology of the Convention that is based on four distinct principles, with the principle of uniformity being one of them.[52] The other three are international character, *bona fide* or good faith, and gap-filling based on the general principles that underlie the Convention.[53] Since the central topic of this thesis is the uniform application of the CISG (or the lack thereof), it is only natural that the emphasis of the present analysis be on the principle of uniformity (and not on the remaining three interpretative principles). What does the principle of uniformity entail? How does it relate to the other interpretative principles? How should it operate in practice? These are some of the pressing questions to which the Chapter at hand will strive to provide answers.

[51] "Annotated Text of CISG Article 7," (see introduction, n. 48).

[52] Bruno Zeller, *CISG and the Unification of International Trade Law* (Routledge, 2008), 21; Flechtner, "The Several Texts of the CISG," 188 (see introduction, n. 45); James E. Bailey, "Facing the Truth: Seeing the Convention on Contracts for the International Sale of Goods as an Obstacle to a Uniform Law of International Sales," *Cornell International Law Journal* 32 (1999): 286.

[53] Bailey, "Facing the Truth," 286 (see n. 52). Article 7 of the CISG lays out four principles of interpretation. However, the first three (international character, uniformity in application, and good faith) are contained in Article 7(1) whereas the mandate that internal gaps be filled by resorting to the Convention's general principles is enshrined in the next paragraph, i.e. Article 7(2).

Article 7(1) of the CISG, as is evident from the wording, is directed at those who are expected to apply the Convention, i.e. judges and arbitrators.[54] For it is them who have been applying the CISG's provisions to the international sales disputes, and will continue to do so in the future. And while the mandate to promote uniformity in the application of the CISG seems to be quite a sensible one, transposing it to reality is nothing short of opening Pandora's Box. For Article 7(1) of the CISG neither defines the principle of uniformity nor does it set its limits. It is unsurprising then that a heated debate ensued, and is still ongoing, as to what the principle of uniformity means under the CISG and how it ought to be applied in practice.[55]

An important point of contention has been whether the mandate of uniform application is a mandate at all, or whether it simply requires the courts and arbitral tribunals to pay attention to the matter without a strictly defined aim.[56] Furthermore, it has been fervently discussed what standard ought to be used as a measure of uniformity in the application of the CISG (i.e. What

[54] Schlechtriem and Schwenzer, *Commentary on the UN Convention on the International Sale of Goods (CISG)*, 123 (see introduction, n. 44). "[…] explicit command directed at courts and arbitral tribunals applying the Convention." Anthony J. McMahon, "Differentiating between Internal and External Gaps in the U.N. Convention on Contracts for the International Sale of Goods: A Proposed Method for Determining Governed by in the Context of Article 7(2) Note," *Columbia Journal of Transnational Law* 44 (2006 2005): 999. "Article 7(1) facilitates the uniform application of the Convention by directing tribunals to interpret the Convention's provisions autonomously, thereby aiding the creation of a CISG -- specific jurisprudence. However, Article 7(1) also reminds tribunals of the Convention's political reality." Gyula Eörsi, "General Provisions," in *International Sales: The United Nations Convention on Contracts for the International Sale of Goods* (New York: Matthew Bender, 1984), 2*3. Eörsi acknowledges that it is the accepted approach to view Article 7 as being directed at courts, although he remarks that an argument could be made that it is directed at the parties as well because it is them who, at the end of the day, are required to comply with the CISG's provisions.

[55] Flechtner, "The Several Texts of the CISG," 205 (see introduction, n. 45); Harry M. Flechtner, "Uniformity and Politics: Interpreting and Filling Gaps in the CISG," in *Festschrift Für Ulrich Magnus: Zum 70. Geburtstag* (Sellier European Law Publishers, 2014), 193–208; Phanesh Koneru, "The International Interpretation of the UN Convention on Contracts for the International Sale of Goods: An Approach Based on General Principles," *Minnesota Journal of Global Trade* 6 (1997): 106; Felemegas, "The United Nations Convention on Contracts for the International Sale of Goods: Article 7 and Uniform Interpretation," (see n. 41).

[56] Flechtner, "The Several Texts of the CISG," 205 (see introduction, n. 45); Flechtner, "Uniformity and Politics: Interpreting and Filling Gaps in the CISG," 196 (see n. 55).

level of uniformity in its application the Convention should be expected to achieve?).[57] The reason why these issues need to be addressed in the thesis is, in essence, self-explanatory. Since the thesis at hand seeks to assess the problem of non-uniform application of the CISG and then endorse an approach that would best be suited to tackle it, it would be imprudent to do the latter without first addressing the ever-present controversy as to what kind of uniformity and what level of it the CISG mandates. Just like a repairperson has to know the measures before choosing the tools, the same applies to anyone who embarks on an endeavour to improve the level of uniformity in the application of the CISG.

Chapter I is divided into two sections. Section 1.1 seeks to unpack the meaning of the principle of uniformity as put forth in Article 7(1) of the CISG. Firstly, Section 1.1 looks at the historical background of the principle of uniformity in order to see whether any hints could be found there about its meaning and scope. Secondly, Section 1.1 proceeds to examine how the said principle was applied thus far in the CISG case law. Thirdly, Section 1.1 lays out and analyses the competing scholarly views on the principle of uniformity, and then goes on to examine its relationship with the other two interpretative principles from Article 7(1) of the CISG. Last but not least, Section 1.1 concludes that Article 7(1) of the CISG indeed puts forth the mandate that the Convention ought to be applied in a highly uniform manner.

Section 1.2 is concerned with the standard that is to be used to assess the uniformity in the application of the CISG. Namely, several standards have been proposed in this regard, including strict or absolute uniformity, relative uniformity, functional uniformity, and relative functional

[57] Larry A DiMatteo et al., "The Interpretive Turn in International Sales Law: An Analysis of Fifteen Years of CISG Jurisprudence," *Northwestern Journal of International Law & Business* 24 (2003): 309; Camilla Baasch Andersen, *Uniform Application of the International Sales Law: Understanding Uniformity, the Global Jurisconsultorium and Examination and Notification Provisions of the CISG* (Kluwer Law International, 2007), 34.

uniformity.[58] After discussing each of them individually, Section 1.2 finds neither of them appropriate, and proceeds by proposing a novel standard; national law standard. After Section 1.2, Chapter I offers concluding remarks.

1.1 PRINCIPLE OF UNIFORMITY

The CISG is an international legal instrument whose main endeavour is to create a uniform sales law for countries that decide to accede to it. While a high number of participating states is, without any doubt, a historic success,[59] it does come with some serious challenges. One of the major ones is how to ensure that the Convention is applied in a highly uniform manner across different jurisdictions. The adoption of a uniform text is not in and of itself a guarantee of uniform law.[60] In other words, substantive uniformity is not implicit in textual uniformity.[61]

The exclusive task to apply the CISG has befallen on domestic courts and arbitral tribunals.[62] Thus, it is them that are expected to construe its provisions and breathe life into the Convention. If we take into account that the CISG, as of this writing, has 89 participating states, it follows from this that virtually thousands of courts and arbitral tribunals are entrusted with the task

[58] Ibid.

[59] "Status - United Nations Convention on Contracts for the International Sale of Goods (Vienna, 1980)," (see introduction, n. 1). As of this writing, 89 states are adhering to the CISG.

[60] Lisa M. Ryan, "The Convention on Contracts for the International Sale of Goods: Divergent Interpretations," *Tulane Journal of International and Comparative Law* 4 (1996 1995): 100; Franco Ferrari, "CISG Case Law: A New Challenge for Interpreters," *International Business Law Journal*, 1998, 495; Daniel Fiedler, "The UCC or the CISG: Factors Affecting the Choice for Contracts between U.S. and South Korean Parties," *Currents: International Trade Law Journal* 20 (2012 2011): 4.

[61] Philip James Osborne, "Unification or Harmonisation: A Critical Analysis of the United Nations Convention on Contracts for the International Sale of Goods 1980," Pace Law Albert H. Kritzer CISG Database, 2006, http://www.cisg.law.pace.edu/cisg/biblio/osborne.html. It has also been argued that the CISG suffers partially from textual non-uniformity as well since six official versions of the Convention exist (written in six official UN languages).

[62] Fiedler, "The UCC or the CISG," 4 (see n. 60).

of deciding cases under the Convention. From early on it was noted that a situation may arise in which different courts and arbitral tribunals might assign different meanings to the concepts found in the CISG. In 1988, the year in which the CISG went into effect, Professor Honnold (considered by many as the 'father' of the CISG) wrote a witty response to all those "sad-faced realists," as he called them, who were entirely sceptical of the uniform sales law endeavour.[63] Professor Honnold acknowledged their criticism that a perfect uniform sales law is impossible to achieve ("[e]ven if you get uniform laws you won't get uniform results") as different countries and different legal systems have developed an array of legal concepts that are, in essence, "local mental inventions that lack [equivalents] in other legal systems."[64] However, perfection is not what is strived for, neither in uniform sales law, nor in any domestic legal system for that matter.[65] And, as Professor Honnold noted, "[t]here are antidotes even to legal diseases."[66]

A base for any antidote to the non-uniform application of the CISG has to be based on Article 7(1) of the CISG. For it is this particular article that is instrumental in keeping the CISG glued together by directing that regard must be had to "the need to promote uniformity in its application."[67] While this principle of uniformity has been hailed as a pivotal one for the survival and viability of the CISG, its meaning, application in practice and relationship with other components of Article 7(1) are a source of a never-ending controversy among scholars.[68] This

[63] John Honnold, "The Sales Convention in Action-Uniform International Words: Uniform Application," *Journal of Law and Commerce* 8 (1988): 207.

[64] Ibid.

[65] Ibid.

[66] Ibid, 208.

[67] "Annotated Text of CISG Article 7," (see introduction, n. 48).

[68] Flechtner, "Uniformity and Politics: Interpreting and Filling Gaps in the CISG," 196 (see n. 55).

Section of Chapter I embarks on an ambitious journey that will seek to settle this controversy, or at least substantially contribute to this cause. The first step towards this end is to examine the historical background of the principle of uniformity, and this is what ensues.

1.1.1 Historical Background

As already pointed out in the Introduction, the CISG was a follow-up to the less successful ULIS and ULF Conventions.[69] Once it became clear that very few countries would adhere to them , UNCITRAL decided that it was time to start working on a new uniform sales law project.[70] However, UNCITRAL did not start from scratch.[71] Instead, the starting point were the two failed Conventions, ULIS and ULF.[72] At the beginning, the discussions at UNCITRAL were to a large extent focused on which provisions of the failed ULIS and ULF should be transposed into the CISG.[73] Consequently, for the majority of the CISG articles one can pinpoint a match-up in either the ULIS or ULF, and occasionally, in both.[74]

Article 7 of the CISG has a corresponding match-up in the ULIS. The predecessors of Article 7 of the CISG are considered to be Articles 2 and 17 of the ULIS, the latter more than the

[69] Kröll, Mistelis, and Viscasillas, *UN Convention on Contracts for the International Sale of Goods (CISG) - Commentary*, 4 (see introduction, n. 44).

[70] Ibid.

[71] Ibid.

[72] Ibid.

[73] John O. Honnold, *Documentary History of the Uniform Law for International Sales* (Deventer: Kluwer Law and Taxation Publishers, 1989). This book compiles the majority of the documents and materials that were produced in the process of drafting and adopting the CISG.

[74] "CISG Annotated Table of Contents," Pace Law Albert H. Kritzer CISG Database, 2010, http://cisgw3.law.pace.edu/cisg/text/cisg-toc.html. The CISG Database maintained by Pace University provides an annotated text of the CISG, and for each individual article it pinpoints the relevant matchup or match-ups in the ULIS or ULF, or both where applicable.

former.[75] Article 2 of the ULIS barred the application of private international law except when prescribed otherwise.[76] Article 17 of the same convention called for gap-filling by resorting to general principles which were the basis of the ULIS.[77] However, neither of these contained a provision enshrining the principle of uniformity, at least not explicitly. [78] Therefore, the principle of uniformity was a novelty introduced in the CISG.[79]

Since Article 17 of the ULIS is a direct match-up with Article 7 of the CISG, it served as a starting point in the drafting process which led to the creation of Article 7 of the CISG.[80] Article 17 of the ULIS reads as follow:

> Questions concerning matters governed by the present Law which are not expressly settled therein shall be settled in conformity with the general principles on which the present Law is based.[81]

As one can see, there was no mention that the ULIS ought to be applied uniformly. The focus of Article 17 of the ULIS was entirely on how to proceed with the matters that are governed by the ULIS, but not expressly settled in it. The first time the uniformity principle was introduced was during the First Session of the UNCITRAL Working Group.[82] One of the delegates put forth the

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[75] Schlechtriem and Schwenzer, *Commentary on the UN Convention on the International Sale of Goods (CISG)*, 120 (see introduction, n. 44).

[76] Ibid.

[77] Ibid.

[78] Ibid.

[79] "Match-up of CISG Article 7 with ULIS Provisions," Pace Law Albert H. Kritzer CISG Database, 1998, http://cisgw3.law.pace.edu/cisg/text/matchup/matchup-u-07.html.

[80] Ibid.

[81] Ibid.

[82] John Honnold, "Report of the Working Group on the on the International Sale of Goods, First Session, 5-6 January 1970," in *Documentary History of the Uniform Law for International Sales* (Deventer: Kluwer Law and Taxation Publishers, 1989), 20.

following proposal:

> The present law shall be interpreted and applied so as to further its underlying principles and purposes, including the promotion of uniformity in the law of international sales.[83]

While the opposition to filling the gaps in the future sales convention by recourse to general principles was overwhelming, a detailed study presented by the French representatives favoured maintaining the essence of Article 17 of the ULIS.[84] They were of the opinion that any recourse to national law or private international law would "introduce an element of uncertainty."[85] In order to further combat this unwelcome element, they suggested that the future sales convention ought to be interpreted as harmoniously as possible.[86] Consequently, they were strongly in favour of taking the same approach in the future sales convention as the one which was already used by the ULIS, but also giving it an additional element.[87] More precisely, the French representatives argued for the inclusion of the proposal from the First Session, and its fusion with Article 17 of the ULIS.[88]

Second Session of the Working Group pushed for the deletion of Article 17 of the ULIS altogether.[89] Instead, members of the Working Group were contemplating the approach followed

[83] Ibid.

[84] John Honnold, "Analysis of Comments and Proposals Relating to Articles 1-17 of the Uniform Law on International Sale of Goods (ULIS) 1964: Note by the Secretary-General (A/CN.9/WG.2/WP.6)," in *Documentary History of the Uniform Law for International Sales* (Deventer: Kluwer Law and Taxation Publishers, 1989), 54.

[85] Ibid.

[86] Ibid.

[87] Ibid.

[88] Ibid.

[89] John Honnold, "Working Group on the International Sale of Goods; Report on the Work of the Second Session, 7-18 December 1970 (A/CN.9/52)," in *Documentary History of the Uniform Law for International Sales* (Deventer: Kluwer Law and Taxation Publishers, 1989), 68.

by the United Nations Conference on the Limitation Period in the International Sale of Goods.[90] The final product of this Conference was the Convention on the Limitation Period in the International Sale of Goods (hereinafter referred to as the 1974 Limitation Convention).[91] Its Article 7 provides as follows:

> In the interpretation and application of the provisions of this Convention, regard shall be had to its international character and to the need to promote uniformity.[92]

However, at the time the Second Session of the Working Group was taking place, the final text of the 1974 Limitation Convention was still not available as it was still in the drafting process. Hence, the UNCITRAL Working Group referred to the preliminary draft of the 1974 Limitation Convention, and decided to follow its pattern.[93] The essential features of Article 7 of the 1974 Limitation Convention were kept, and only stylistic changes were made to the text.[94] The proposal of the UNCITRAL Working Group was formulated in the following manner:

> In interpreting and applying the provisions of this law, regard shall be had to its international character, and to the need to promote uniformity (in its

[90] Ibid.

[91] UNCITRAL, "Commentary on the Convention on the Limitation Period in the International Sale of Goods, Done at New York, 14 June 1974 (A/CONF.63/17)" (United Nations, 1974), 154, http://www.uncitral.org/pdf/english/yearbooks/yb-1979-e/vol10-p145-173-e.pdf. Commentary on the 1974 Limitation Convention also emphasises the significance of uniform application of its text: "National rules on limitation (prescription) are subject to sharp divergences in approach and concept. Thus, it is especially important to avoid differing constructions of the provisions of this Convention by national courts, each dependent upon the varying concepts of the particular national law that it was applying. To this end, article 7 emphasizes the importance, in interpreting and applying the provisions of the Convention, of having due regard for the international character of the Convention and the need to promote uniformity."

[92] UNCITRAL, *Convention on the Limitation Period in the International Sale of Goods* (New York: United Nations, 2012), 6, http://www.uncitral.org/pdf/english/texts/sales/limit/limit_conv_E_Ebook.pdf.

[93] Honnold, "Working Group on the International Sale of Goods; Report on the Work of the Second Session, 7-18 December 1970 (A/CN.9/52)," 68 (see n. 89).

[94] Ibid.

interpretation and application).[95]

The words in brackets 'in its interpretation and application' were to be put for deliberation later on to determine whether they were unnecessarily repetitious or not.[96] Reference to general principles was initially omitted owing to the heavy criticism coming from certain delegates who perceived the general principles approach to be "vague and illusory."[97] Contrary to this negative perception of general principles, the principle of uniformity, together with the principle of international character, was quite warmly received in the Second Session of the Working Group:

> These considerations were emphasised since some courts might otherwise give local meanings to the language of the Law – an approach that would defeat the law's objective to produce uniformity. It was also suggested that the provision would contribute to uniformity by encouraging recourse to foreign materials, in the form of studies and court decisions, in constructing the Law.[98]

During its Sixth Session the Working Group opted to use the text as enshrined in Article 7 of the 1974 Limitation Convention which at that time was finally adopted. Hence, the words 'in its interpretation and application' were omitted, and the text was adopted as follows:

> In interpreting and applying the provisions of this law, regard shall be had to its international character, and to the need to promote uniformity[.]

In the ensuing deliberations, most of the energy was directed at other burning issues. Namely, the topic as to whether, and to what extent, the general principles ought to be used to fill the gaps in the Convention was reintroduced, and it remained quite a divisive one among the delegates. [99] Another very controversial issue was discussed. It was a question as to what role good

[95] Ibid.

[96] Ibid.

[97] Ibid.

[98] Ibid.

[99] Ibid.

faith should play in the future Convention.[100] This issue became so divisive that a Working Group had to be established regarding the role of good faith. While some delegates were in favour of imposing the duty of good faith and fair dealing on the parties, others vehemently opposed this. The Working Group sought to find the middle ground by incorporating the good faith principle as one of the interpretative principles of the Convention:

> In the interpretation and application of the provisions of this Convention, regard is to be had to its international character and to the need to promote uniformity and to observe good faith in international trade.[101]

While these two stumbling blocks (general principles as gap-fillers and good faith) were draining energy from the participants, the principle of uniformity, together with the principle of international character, did not pose a serious issue. The most serious criticism directed at these two came in relation to the 1977 draft of the future sales convention when several proposals were given to the Commission, arguing that the "proposed wording [of the provision dealing with the interpretation of the convention] was too general and lacked substance."[102] However, at that point in time, the Commission did not adopt any of these proposals.[103] Another milder criticism came from the Greek representative (Krispis) who at the Plenary Conference in Vienna opined that the first part was "unnecessary and of no practical use," and that a better place for them was the Preamble.[104] Bonell countered this line of argument, saying that

[100] Ibid.

[101] Ibid. "The first part of the proposal […] sought to require courts and arbitral tribunals to promote uniformity of interpretation of the Convention. The second part of the proposal was intended to direct the attention of the courts in resolving disputes to the fact that acts and omissions of the parties must be interpreted in the light of the principle that they observe good faith in international trade. The provision was intended to apply to both the rules on formation and the rules on sales."

[102] Ibid.

[103] Ibid.

[104] Ibid.

> "[this article] was particularly important for the Convention as a whole as it stated that uniform interpretation of the Convention was to be sought by all those called on to apply it, whether parties, arbitrators or courts of law. [A hope was that] paragraph 1 and above all the first portion of paragraph 2 would help such an interpretation in practice."[105]

Bonell was not alone in holding Article 7(1) of the CISG in high esteem, and especially the part that called for the uniform application of the Convention. If one takes a closer look at the abundance of materials that were produced in the process of drafting and adopting the CISG, one will notice that the leitmotif of uniform application and its major significance were emphasised several times.[106]

At the 6th plenary meeting the text of what is today Article 7 of the CISG was adopted by

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[105] Ibid.

[106] Honnold, "Report of the Working Group on the on the International Sale of Goods, First Session, 5-6 January 1970," 20 (see n. 82). "In support of this proposal, the delegate recalled the earlier discussion of the dangers of construing international uniform legislation in terms of local rules and understandings. This proposal did not authorize extension of the scope of the Uniform Law; it was concerned with the approach to solving problems falling within the law. This language could be useful to encourage an international and unifying (rather than local) approach to the law, and could encourage courts to consult legislative history of the Uniform Law and constructions of the law in other states." Honnold, "Analysis of Comments and Proposals Relating to Articles 1-17 of the Uniform Law on International Sale of Goods (ULIS) 1964: Note by the Secretary-General (A/CN.9/WG.2/WP.6)," 54 (see n. 84). "[T]he representative of France suggested in his study the addition to article 17 of the idea that the interpretation of the Uniform Law must be as harmonious as possible at the international level or, more specifically, that in interpreting the Uniform Law one should consider the interpretations placed it in other countries." John Honnold, "UNCITRAL: Review of 'Formation' Draft; The 1978 Draft Convention," in *Documentary History of the Uniform Law for International Sales* (Deventer: Kluwer Law and Taxation Publishers, 1989), 370. "Under one view, the Convention should not contain a provision on interpretation because, according to the constitutions of some countries, it was not possible for a legal text to instruct the courts on the manner in which it should be interpreted. It was also stated that the requirement to promote uniformity should be imposed on States and not upon courts and arbitral tribunals, since this requirement was contained in a public international law convention. However, the generally accepted view was that the provision was properly directed to courts and arbitral tribunals, since it was these bodies which would resolve disputes between the parties to an international trade transaction." John Honnold, "Commentary on the Draft Convention on Contracts for the International Sale of Goods, Prepared by the Secretariat," in *Documentary History of the Uniform Law for International Sales* (Deventer: Kluwer Law and Taxation Publishers, 1989), 407. "National rules on the law of sales of goods are subject to sharp divergences in approach and concept. Thus, it is especially important to avoid differing constructions of the provisions of this convention by national courts, each dependent upon the concepts used in the legal system of the country of the forum. To this end, article 6 emphasizes the importance, in the interpretation and application of the provisions of the Convention, of having due regard for the international character of the Convention and for the need to promote uniformity."

45 votes to none. As a result, both the principle of good faith and gap-filling based on general principles were lumped together with the principle of international character and uniformity. While each of them has been adopted with a specific goal in mind, applying them in practice has not been an easy task since the CISG, as already noted, does not provide guidance in this regard. The ensuing section examines how the principle of uniformity has been applied in practice.

1.1.2 Practical Application

A good starting point for examining the practical application of the principle of uniformity is the UNCITRAL Digest of Case Law on the CISG ('CISG Digest').[107] This publication has dedicated only two brief paragraphs to the principle of uniformity:

> 7. The mandate imposed by article 7(1) to have regard to the need to promote uniform application of the Convention has been construed by some tribunals to require fora interpreting the CISG to take into account foreign decisions that have applied the Convention. More and more courts refer to foreign court decisions.
>
> 8. Several courts have expressly stated that foreign court decisions have merely persuasive, non-binding authority.[108]

Before diving into discussion on Article 7(1) and its application in practice, a side-note is due here. Namely, UNCITRAL's major constraint is its emphasis on neutrality.[109] In other words, no state must be offended by anything UNCITRAL does, and, at worst, the lowest common denominator

[107] "Digests," UNCITRAL, 2018, http://www.uncitral.org/uncitral/en/case_law/digests.html. UNCITRAL Digest of Case Law on the United Nations Convention on Contracts for the International Sale of Goods presents the case law under the Convention on an article-by-article basis, and in an intuitive and succinct manner. For a more detailed discussion on this publication, please see Chapter V and Chapter VI.

[108] UNCITRAL, *UNCITRAL Digest of Case Law on the United Nations Convention on Contracts for the International Sale of Goods* (New York: United Nations, 2016), 42, http://www.uncitral.org/pdf/english/clout/CISG_Digest_2016.pdf.

[109] Joseph Lookofsky, "Walking the Article 7 (2) Tightrope between CISG and Domestic Law," *Journal of Law and Commerce* 25 (2005): 105.

in terms of feedback provoked by UNCITRAL's actions ought to be sheer indifference on the states' part. The two paragraphs handed to us by UNCITRAL in the CISG Digest are a quintessential example of this approach.

The CISG Digest states that "some tribunals" have interpreted the mandate of Article 7(1) on uniformity to mean that foreign decisions ought to be consulted.[110] On the whole, this statement is true. In practice, certain courts have indeed not only resorted to foreign case law, but have, in their dicta, made sweeping statements about the need to achieve uniform application of the CISG.[111] For example, Audiencia Provincial de Valencia in its decision dated 7 June 2003 has said that "[t[he spirit of the Convention is to achieve uniform law not only in regard to its text; courts should also apply it in a uniform manner."[112] Another illustration of an approach giving due regard to the uniformity principle comes from Tribunale di Padova, Sezione Distaccata di Este. This Italian court has stated the following:

> Although not binding, as the minority view wishes, however, the jurisprudence on the Convention must be very carefully considered in order to assure uniformity in the application of [CISG], as required by its Art. 7(1). In fact, the mere autonomous interpretation of [CISG] -- interpretation that does not refer to the meaning attributed to specific expressions by a particular national regulation -- is by itself inadequate to assure the uniformity to which [CISG] aims in order to promote the development of international trade.[113]

[110] UNCITRAL, *UNCITRAL Digest of Case Law on the United Nations Convention on Contracts for the International Sale of Goods*, 42 (see n. 108).

[111] "Taming the Dragons of Uniform Law Case Law: Sharing the Reasoning of Courts and Arbitral Tribunals," Albert H. Kritzer CISG Database, 2012, http://cisgw3.law.pace.edu/cisg/text/queenmary.html. On this particular page one can find several examples of courts looking towards foreign decisions on the CISG.

[112] Cherubino Valsangiacomo, S.A. v. American Juice Import, Inc., No. 142/2003 (Audiencia Provincial de Valencia June 7, 2003), http://cisgw3.law.pace.edu/cases/030607s4.html.

[113] Alessandro Rizzieri, SO. M. AGRI s.a.s di Ardina Alessandro & C. v. Erzeugerorganisation

However, the CISG Digest does not say whether a majority of courts has followed this approach, or whether it is only a tiny minority espousing willingness to look to foreign decisions. Moreover, one should notice at this point that the CISG Digest does not disclose what other courts have done in lieu of this. Of course, most of them showed unwillingness to look towards foreign jurisdictions and their decisions under the CISG. Stating this explicitly in any way in the CISG Digest would be in total discord with the UNCITRAL's strong policy of neutrality.

The reality is that not many courts and arbitral tribunals have tested Article 7(1) of the CISG in their decisions and arbitral awards. This is quite astonishing as Article 7(1), as already pointed out, lays out three out of four interpretative principles of the Convention. Therefore, it would only be natural that Article 7(1) of the CISG be one of (if not the most) cited one in the Convention's case law.[114] However, if one uses the search option of the Pace Law Albert H. Kritzer CISG Database ('CISG Pace Database') and seeks that only those cases that refer to Article 7(1) be displayed, the search engine returns only 62 cases. This figure can only be qualified as disappointing since a simple use of the search engine produces more than 4000 results, some of it, however, being repetitions.

A quintessential example of a jurisdiction which is utterly unwilling to look to the case law of others is, without any doubt, the United States.[115] One glimpse into a case *Eldesouky v. Aziz*

Marchfeldgemüse GmbH & Co. KG (Tribunale di Padova 2004), http://cisgw3.law.pace.edu/cases/040225i3.html.

[114] Kröll, Mistelis, and Viscasillas, *UN Convention on Contracts for the International Sale of Goods (CISG) – Commentary*, 112 (see introduction, n. 44). This is especially so when one takes into account the scholarly position that perceives Article 7 as "the most important provision within CISG since the Convention's success depends upon the direction taken by courts and arbitral tribunals with respect to interpretation and gap-filling."

[115] Franco Ferrari, "Have the Dragons of Uniform Sales Law Been Tamed? Ruminations on the CISG's Autonomous Interpretation by Courts," in *Sharing International Commercial Law across National Boundaries: Festschrift for Albert H. Kritzer on the Occasion of His Eightieth Birthday* (London: Wildy, Simmonds & Hill, 2008), 159.

decided relatively recently by the District Court for the Southern District of New York suffices to illustrate just how the courts of the United States remain stubborn in their reluctance to look towards foreign case law.[116] One may even be led to think that almost each time a US court is forced to decide a question under or related to the CISG, it enters into a time capsule and makes a journey to 1990 when the case law on the CISG was indeed scarce. In 2015, the court's following reasoning is certainly out of touch with reality:

> [B]ecause there is so little case law applying the CISG, courts often look to Article 2 of the Uniform Commercial Code ("UCC") for guidance, even though the UCC is not "*per se* applicable" to the CISG.[117]

This US court, it should be noted, is not a lone wolf in this kind of approach. Examples from other countries could be cited in abundance. The CISG Digest states that "[m]ore and more courts refer to foreign court decisions."[118] However, while more courts are favouring this approach, we are far from having a situation in which everyone is jumping on the bandwagon. The majority of courts, still, unfortunately, decide to overlook foreign decisions, and Article 7(1) of the CISG as a whole.[119]

Hence, the courts and arbitral tribunals have dedicated some, albeit very limited attention to Article 7(1) of the CISG, and to the mandate that they ought to promote uniform application of the Convention. This begs the question: Have the courts and arbitral tribunals failed to act in accordance with Article 7(1) of the CISG, or can their actions (or inactions) be construed as being

[116] Hesham Zaghloul Eldesouky, et al. v. Hatem Abdel Aziz, et al., No. 11- CV- 6986 (JLC) (U.S. District Court for the Southern District Court of New York 2015), http://cisgw3.law.pace.edu/cases/150408u1.html.

[117] Ibid.

[118] UNCITRAL, *UNCITRAL Digest of Case Law on the United Nations Convention on Contracts for the International Sale of Goods*, 42 (see n. 108).

[119] Camilla Baasch Andersen, "The CISG in National Courts," in *International Sales Law: A Global Challenge* (New York: Cambridge University Press, 2014), 73.

in line with the text and the spirit of the said Article? The scholarly position seems to indicate that it is the former, and not the latter situation that we currently have in place, and it is the scholarly stance that will be discussed next.

1.1.3 Scholarly Position: Unified on One Front, Split on Another

Most scholars would agree that Article 7(1) of the CISG seeks that courts and arbitral tribunals look to the case law from other jurisdictions when applying the Convention.[120] Their positions do take, however, different turns in relation to the practical operation of the principle of uniformity. Is it a mandate that requires full and utter dedication on the part of the courts and arbitral tribunals when applying the CISG? Or is it a softer proposition that only asks the courts and arbitral tribunals to pay attention to the matter of uniform application? In the scholarly realm one can find support for both viewpoints.

Some scholars fervently support the idea that the principle of uniformity as enshrined in Article 7(1) of the CISG is a strong mandate that is to be actively pursued by the courts and arbitral tribunals. More precisely, they see uniformity as an aspect of the CISG which, if not properly promoted, will be the CISG's undoing. For instance, Phanesh Koneru says the following:

> To promote uniformity of interpretation, Article 7 of the Convention itself undertakes the formidable task of guiding judges. This article is arguably the

[120] Schlechtriem and Schwenzer, *Commentary on the UN Convention on the International Sale of Goods (CISG)*, 124 (see introduction, n. 44). "It has been clear from the beginning that the uniform application of the CISG presupposes that decisions and awards from courts in one Contracting State and arbitral tribunals are available to courts in other States and other arbitral tribunals." Kröll, Mistelis, and Viscasillas, *UN Convention on Contracts for the International Sale of Goods (CISG) – Commentary*, 128 (see introduction, n. 44). "Case law should be considered as one of the primary sources [footnote omitted] of the interpretation of the convention and one of the main tools to achieve consistency among the decisions rendered under the CISG."

> single most important provision in ensuring the future success of the Convention.[121]

Felemegas very much follows this line of thought. He opines as follows:

> 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.[122]

The approach described by Koneru and Felemegas is not without its critics. For instance, Flechtner has argued that one has to take into account the fact that Article 7(1) of the CISG contains three interpretative principles of the Convention, and that "there is no indication that the other two are of lesser importance."[123] Flechtner has levied criticism at those scholars who, in his view, are pursuing the "uniformity-before-all-else" approach.[124] In doing so, he argues that they are misreading Article 7(1) of the CISG which, according to him, does not mandate uniform application.[125] His view is that uniformity is just one of the factors to be considered when applying the CISG.[126] The basis for this line of argument comes from the plain language of Article 7(1) of the CISG:

[121] Koneru, "The International Interpretation of the UN Convention on Contracts for the International Sale of Goods: An Approach Based on General Principles," 106 (see n. 55).

[122] Felemegas, "The United Nations Convention on Contracts for the International Sale of Goods: Article 7 and Uniform Interpretation," (see introduction, n. 41).

[123] Flechtner, "Uniformity and Politics," 197 (see n. 55).

[124] Ibid., 196.

[125] Ibid., 197.

[126] Ibid.

> In the interpretation of this Convention, **regard** is to be had to its international character and to the need to promote uniformity in its application and the observance of good faith in international trade.[127] [emphasis added by me]

The word 'regard,' according to Flechtner, denotes that the promotion of uniformity is not an absolute requirement, but rather a much "softer preposition:"

> [T]he mandate here is not for the interpreter to achieve a result (uniform interpretation) but to go through an analytical process in which the importance of uniform interpretation is merely a factor to consider. And not the exclusive factor.[128]

Flechtner's point that the uniformity in the application of the Convention is only one of the factors to be considered is indeed a thought-provoking one. Evidently, Article 7(1) of the CISG puts forth not one, but three interpretative principles. Furthermore, the uniform application of the CISG cannot be perceived as the ultimate goal in and of itself, but it is merely a tool in service of the underlying aims that are enumerated in the Convention's Preamble. Nevertheless, while it is true that the principle of uniformity is lumped together with two other interpretative principles under the umbrella of Article 7(1) of the CISG, it is doubtful if these three are on par with each other. While it is true that all three need to be employed in the interpretation of the CISG, there are several indications that suggest that the principle of uniformity ought to play a more important role in the life of the Convention than the remaining two. In order to shed light on this issue, what ensues is the discussion of the relationship that exists between the principle of uniformity and other constituent parts of Article 7(1) of the CISG.

[127] "Annotated Text of CISG Article 7," (see introduction, n. 48).

[128] Flechtner, "Uniformity and Politics." 197 (see n. 55).

1.1.4 Relationship between the Principle of Uniformity and Other Article 7(1) Components

Article 7(1) of the CISG, as already stated, lays down three interpretative principles of the Convention in the following order: (1) international character, (2) uniformity in application, and (3) good faith. An argument will be put forth here that, while all three of the interpretative principles found in Article 7(1) of the CISG are very significant for the Convention, a stronger emphasis ought to be put on the principle of uniformity. A support for this stance can be generated from the plain wording of Article 7(1), legislative history of the CISG, interplay between the principles of international character and uniformity, and from the underlying nature of the Convention itself.

1.1.4.1 Plain Wording of Article 7(1): There is a Need to Promote Uniform Application

As indicated previously, Flechtner opines that the three interpretative principle of the CISG as enshrined in Article 7(1) of the Convention ought to be considered equally in the process of interpretation.[129] His view on this matter, as already pointed out, is grounded in the wording of Article 7(1) of the CISG. While it is true that the expression 'to have regard' solely requires that only attention be paid to the three interpretative principles, the principle of uniformity is somewhat different from the other two in this sense. If one attentively examines Article 7(1) of the CISG, it will be observed that the softer proposition in the form of the word 'regard' is elevated to a much higher level with the word 'need' in relation to the principle of uniformity. 'To have regard' is defined by the Oxford Dictionary as "[c]are in doing something; close attention to some principle, process, or method" while 'need' is described as "[n]ecessity for a particular action or course of

[129] Ibid.

action arising from the facts or circumstances of a situation."[130] In relation to the principles of international character and good faith Flechtner's position remains unrattled as Article 7(1) calls for "regard […] to be had to [the CISG's] international character and […] observance of good faith in international trade."[131] However, when it comes to the principle of uniformity, Flechtner's position is challenged based on the wording of Article 7(1) of the CISG as it asks that "regard is to be had to the need to promote uniformity in [the Convention's] application."[132]

Article 7(1) of the CISG, in relation to the principles of international character and good faith, solely talks about having regard to them. In relation to the principle of uniformity, it specifically acknowledges that there is a need to promote uniformity. And if there is a need to promote uniformity, then it would be contradictory to conclude that the issue of uniformity only ought to be taken in regard. Instead, uniformity ought to be actively pursued by those interpreting and applying the CISG. Furthermore, legislative history of the Convention further supports the view that the three principles found in Article 7(1) of the CISG cannot be perceived as all being on par with each other. This is discussed next.

1.1.4.2 Travaux Préparatoires: No Indication of Equality of Article 7(1) Interpretative Principles

There is no indication in the *travaux préparatoires* of the CISG that the three interpretative principles found in Article 7(1) of the Convention are of equal importance. Namely, the drafters of the CISG did not set out on a journey to design the interpretative principles of the Convention and place them in one article. Quite the opposite; Article 7 as a whole was a product of a hard-fought

[130] "To Have Regard To," Oxford English Dictionary, 2018, http://www.oed.com/; "Need," Oxford English Dictionary, 2018, http://www.oed.com/.

[131] "Annotated Text of CISG Article 7," (see introduction, n. 48).

[132] Ibid.

compromise.[133] What role should good faith play in the existence of the CISG? And should the gaps be filled by resorting to the rules of private international law, the law of the seller, or based on the general principles that underlie the Convention? Where should they be placed in the Convention? These were very divisive and controversial issues, and it was only after gruelling negotiations that they were all lumped together in what is now Article 7 of the CISG.[134]

In the Article 7(1) context, the role of good faith, as already discussed, was a major stumbling block.[135] While some delegates were opining that the duty to act in good faith must be imposed on the parties themselves, others were strongly opposing this line of thinking, seeking to exclude the good faith in totality.[136] A middle ground was found, and as stated previously, that was to have good faith as one of the interpretative principles.[137] According to Eörsi, this was equivalent of "consigning [good faith] to a ghetto and giving it an honorable burial."[138] In contrast, the principles of uniformity and international character were not a catalyst for such a contentious debate, and throughout the discussions leading up to the adoption of the CISG, the importance of uniform application was emphasised several times.[139] Hence, it is quite hard to support Flechtner's view from the *travaux préparatoires* perspective; that all three interpretative principles found in

[133] Troy Keily, "Good Faith & the Vienna Convention on Contracts for the International Sale of Goods," *Vindobona Journal of International Commercial Law and Arbitration* 3, no. 1 (1999): 17. This article cites Prof. Farnsworth stating that Article 7(1) of the CISG was a "statesman like compromise."

[134] Honnold, "Working Group on the International Sale of Goods; Report on the Work of the Second Session, 7-18 December 1970 (A/CN.9/52)," 68 (see n. 89).

[135] Ibid.

[136] Ibid.

[137] Ibid.

[138] Eörsi, "General Provisions," 2*7 (see n. 54)

[139] Honnold, "Report of the Working Group on the on the International Sale of Goods, First Session, 5-6 January 1970," 20 (see n. 82); Honnold, "Analysis of Comments and Proposals Relating to Articles 1-17 of the Uniform Law on International Sale of Goods (ULIS) 1964: Note by the Secretary-General (A/CN.9/WG.2/WP.6)," 54 (see n. 84); Honnold, "UNCITRAL: Review of 'Formation' Draft; The 1978 Draft Convention," 370 (see n. 106).

Article 7(1) of the CISG stand on equal footing.

It has to be noted, however, that the *travaux préparatoires* cannot be conclusive in supporting the standpoint that the principle of uniformity ought to play a more important role in the interpretative process than the other two that are contained in Article 7(1) of the Convention. It is only in combination with other indications (e.g. wording of Article 7(1) of the CISG, discussed previously) that such a conclusion can be reached. Furthermore, the *travaux préparatoires* only signals that the principle of good faith is to take back seat in relation to the principle of uniformity. It shows no such sign for the principle of international character. As a result, what ensues is the discussion of the relationship between the principle of uniformity and the principle of international character.

1.1.4.3 The Ultimate Face Off: Principle of Uniformity Vis-à-Vis International Character

While the interpretative principles of uniform application and international character are closely related, they are, still, quite distinct. Having regard to the international character of the CISG means that those interpreting and applying the CISG ought not to view the provisions and concepts put forth by the CISG through the lenses of their national laws.[140] A concept used in the CISG, even if formulated in the same manner as in the domestic law, does not necessarily correspond in meaning to that particular domestic legal concept. The underlying idea behind the international character principle is that the interpretation of the CISG ought to be carried out divorced from any perceptions coming from the domestic legal background, i.e. internationally acceptable interpretation ought to be sought.[141]

[140] Ferrari, "Have the Dragons of Uniform Sales Law Been Tamed? Ruminations on the CISG's Autonomous Interpretation by Courts," 139 (see n. 115).

[141] John Felemegas, "Introduction," in *An International Approach to the Interpretation of the United Nations*

The principle of uniformity, on the other hand, seeks that the CISG be applied in the same manner across different jurisdictions.[142] More precisely, one identical set of facts to which the CISG applies ought to lead to the same result both in France and Argentina, for example. It is possible, therefore, due to distinctness of these two principles, that one of them is followed with the other one being neglected. For example, it may happen that one provision of the CISG yields two or more interpretations, with all of them being divorced from perceptions of national laws on sales. Let us assume that several interpretations exist of a random CISG provision, and that all of them have sprung up without any influence from the national sales laws. Let us now assume that a court (or an arbitral tribunal), in addition to the existing interpretations of that random CISG provision, produces an additional one that is overall less convincing, but is also international in character. If such a situation arises, then the court's decision (or an arbitral tribunal's award) is in line with the principle of international character, but is in discord with the principle of uniformity.

The opposite can be true as well. One could, theoretically, observe a situation in which the uniformity is promoted, and international character of the CISG is neglected. For instance, it may happen that a particular concept in the CISG is interpreted purely on the basis of an approach that characterises one of the national legal systems. Furthermore, for whatever reason, it could occur that that particular interpretation gets widely adopted across the CISG participating countries. In that scenario, the uniform application of the Convention gets advanced, but at the expense of the

Convention on Contracts for the International Sale of Goods (1980) as Uniform Sales Law (Cambridge University Press, 2007), 11. "To have regard to the international character of the Convention means that its interpreter must understand that, although the CISG has been formally incorporated into many different national legal systems, the special nature of the CISG as a piece of legislation prepared and agreed upon at an international level helps it retain its independence from any domestic legal system."

[142] Marianne Roth and Richard Happ, "Interpretation of the CISG According to Principles of International Law," *International Trade and Business Law Annual* 4 (1999): 1. "[CISG] may only fulfil [its] function if [its] provisions are applied uniformly in all contracting states."

principle of international character.

The two examples presented in the previous two paragraphs raise an intriguing question: Provided that such situations do arise, which one would be more problematic; the one in which the principle of international character is observed while the principle of uniformity is neglected, or vice versa, the one in which the principle of international character is ignored, and the principle of uniformity is heeded? While it might be difficult to give a well-supported and direct answer to this question (as both of these interpretative principles are immensely important for the Convention), it is nevertheless possible to argue that the former situation would be at least marginally more problematic than the latter. Firstly, it has to be noted that in practice the former situation is more likely to arise than the latter. Namely, the CISG, as will be discussed in greater detail in Chapter III, is rich in open-ended standards that are to be given palpable meaning through their application.[143] Therefore, it is likely that even courts and arbitral tribunals that seek to heed both the principle of international character and uniformity might produce varying interpretations that are divorced from the perceptions of national legal systems, but are, at the same time, non-uniform. In contrast, it is improbable that a reverse situation might occur; that a random concept in the CISG will be interpreted in accordance with the principle of uniformity but in discord with the principle of international character. This is so because, in the era of nation states, it would be naïve to expect that an ethnocentric interpretation of a certain provision of a legal instrument such as the CISG will be uniformly, or even widely embraced. Therefore, in terms of sheer volume of potential occurrences, the situation in which the principle of international character is observed while the

[143] Louis Kaplow, "Rules Versus Standards: An Economic Analysis," *Duke Law Journal* 42, no. 3 (1992): 557–629; Clayton P Gillette and Robert E Scott, "The Political Economy of International Sales Law," *International Review of Law and Economics* 25, no. 3 (2005): 446–486; H. Allen Blair, "Hard Cases Under the Convention on the International Sale of Goods: A Proposed Taxonomy of Interpretative Challenges," *Duke Journal of Comparative & International Law* 21, no. 2 (2011): 270.

principle of uniformity is not heeded ought to be classified as (at least marginally) more problematic as compared to the situation when we have vice versa; when the principle of international character is disregarded and the principle of uniformity is duly applied. And secondly, it is the underlying nature of the CISG and the expected mode of operation that also pinpoint in the same direction. What is more, they indicate that the principle of uniformity ought to play a more important role in the life of the Convention than the other two interpretative principles found in Article 7(1) of the CISG. To this end, it is also quite indicative that we do not use the expressions 'international character law' or the 'good faith law' as synonyms for the CISG, but we do resort to the construction 'uniform sales law' to refer to it. The discussion of the underlying nature of the CISG and how it hints at the high importance of uniform application of the Convention's provisions is what will be discussed next.

1.1.4.4 Underlying Nature of the CISG: A Strong Case for a Higher Importance of the Principle of Uniformity

The CISG is an international sales law that was adopted in the form of a convention. It is the mode to turn to when the highest level of uniformity is envisioned.[144] If one wishes to simply lessen the differences that exist between various jurisdictions, tools other than a convention ought

[144] UNCITRAL, *A Guide to UNCITRAL - Basic Facts about the United Nations Commission on International Trade Law* (Vienna: United Nations, 2013), 13, http://www.uncitral.org/pdf/english/texts/general/12-57491-Guide-to-UNCITRAL-e.pdf. Conventions are used when a high level of uniformity is desirable in a particular field of law. They are usually prepared under the auspices of international or intergovernmental organisations such as the UNCITRAL or the UNIDROIT. Since conventions are binding international treaties and are quite intrusive in the sense of displacing the domestic law, there has to be a strong political will behind the endeavour to use a convention to bring about uniformity. Conventions, unlike other techniques for bringing about uniformity, tend to be very inflexible in terms of allowing deviations from the agreed upon provisions. Hence, if there are strong indications that the states might be reluctant to have their domestic laws meddled with, then it is advisable to opt for some other technique instead of resorting to the convention model. A quintessential example of a convention aiming to unify law is the CISG, which does this in the area of sales law.

to be considered. For instance, these would include, among others, model laws,[145] legislative guides,[146] model provisions,[147] and contractual techniques.[148] Therefore, it is the mere choice of the form that, in and of itself, indicates that the CISG is expected to achieve a high level of uniformity. As previously discussed, textual uniformity is not a guarantee of substantive uniformity.[149] If the text is the same, but it produces substantially different results in different jurisdictions when applied to virtually the same set of facts, then one can only talk about uniformity that is, in essence, cosmetic. When only textual uniformity gets achieved without achieving a high

[145] Ibid., 14. Model laws are legislative texts adopted by organisations such as the UNCITRAL or the UNIDROIT which serve as the benchmark models for reform of domestic laws. More precisely, these model laws are recommended to be adopted by the states in order to harmonise their differing laws. However, the states are under no obligation to do so. They may proceed with the adoption of the model law, they may reject it in total, or they may adopt it, but with certain changes and adaptations. Hence, model laws, unlike conventions, tend to be more flexible, and are more suitable for areas of law in which a high level of uniformity is either undesirable or unachievable due to political constraints. One of the prominent examples of a model law would be the UNCITRAL Model Law on International Commercial Arbitration.

[146] Ibid., 16. Legislative guides are developed and put forth when it is inadvisable to try to come up with the unification or harmonisation process in a particular area of law. This may be due to the highly different approaches that states have in that area of law, or simply the consensus lacks as to how exactly the unification or harmonisation process ought to proceed. In that case, it may be advisable not to yield specific uniform rules, but an array of possible solutions in the form of legislative recommendations or a set of general principles for the national legislative bodies to take into account. An example of a legislative guide would be the UNCITRAL Recommendations to Governments and International Organisations Concerning the Legal Value of Computer Records.

[147] Ibid., 17. Model provisions are used in instances when there are conflicting conventions governing the same set of issues. At some point in time, these conventions will have to be either amended or replaced. Model provisions attempt to reconcile the differences in those conventions by putting forth suggestions which ought to be used as amendments or as provisions in a brand new convention, or in a set of new conventions. An example of this technique would be the UNCITRAL's formulation of a model provision which sought to establish "a universal unit of account of constant value that could be used, in particular, in international transport and liability conventions."

[148] Ibid., 18. Contractual techniques are used in areas where the party autonomy enables the parties to change the default rules through the contract and adjust them to suit their needs. However, sometimes it is not sensible for the parties to negotiate and draft themselves clauses which would deal with these matters. The solution put forth by international and intergovernmental organisations was quite simple. They undertook upon themselves to draft standard or uniform clauses which are then incorporated into the parties' contract by reference. These clauses are drafted in a way so that they reflect the needs of the parties and the developments in that particular area of law. An example of contractual techniques would be the International Commercial Terms ('INCOTERMS') drafted and published by the International Chamber of Commerce.

[149] Ryan, "The Convention on Contracts for the International Sale of Goods," 100 (see n. 60); Ferrari, "CISG Case Law: A New Challenge for Interpreters," 495 (see n. 60); Fiedler, "The UCC or the CISG," 4 (see n. 60).

level of substantive uniformity, the prospective benefits from having a uniform sales law across various jurisdictions will be severely minimised.[150] In the words of Viscount Simonds, writing for the House of Lords in *Scruttons Ltd v Midland Silicones*,

> [i]t is (to put it no higher) very desirable that the same conclusions should be reached in whatever jurisdiction the question arises. It would be deplorable if the nations should after protracted negotiations reach agreement […] and that their several courts should then disagree as to the meaning of what they appeared to agree upon[.][151]

As noted by Baasch Andersen, the CISG makes a reference to uniformity only once in the entire document (other than in the Preamble), and that is in Article 7(1).[152] Nevertheless, the CISG became synonymous with the expression 'uniform sales law.'[153] And rightfully so since that is exactly what the drafters were aiming the CISG to be; a set of uniform rules shared by jurisdictions that decide to accede to it. The underlying idea put forth to justify the adoption of the CISG was that it would decrease the transaction costs of cross-border sales.[154] More precisely, the view was that (and is still held by many) that differing national laws often times constitute a disincentive for private parties to engage in cross-border sales.[155] However, in the absence of a high level of

[150] For a detailed discussion on how benefits of uniform laws get minimized through their non-uniform application, please refer to Chapter IV.

[151] Scruttons Ltd v Midland Silicones, No. UKHL 4 (House of Lords of the United Kingdom 1962).

[152] Andersen, *Uniform Application of the International Sales Law*, 29 (see n. 57).

[153] Ibid.

[154] "United Nations Convention on Contracts for the International Sale of Goods (Vienna, 1980) (CISG)," UNCITRAL, 2018, http://www.uncitral.org/uncitral/en/uncitral_texts/sale_goods/1980CISG.html. "The purpose of the CISG is to provide a modern, uniform and fair regime for contracts for the international sale of goods. Thus, the CISG contributes significantly to introducing certainty in commercial exchanges and decreasing transaction costs."

[155] Communication from the Commission to the European Parliament and the Council - A More Coherent European Contract Law - An Action Plan," (EUR-Lex, 2003), https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=celex:52003DC0068.

uniform application, the jurisdictions that have adhered to the CISG may share the same text of the law, but in essence, it is the varied application of the same provisions that render it significantly non-uniform. Therefore, lack of a high level of uniform application restores the situation that was in place before the adoption of the uniform law text.[156] This undoubtedly points towards the higher importance of the principle of uniformity, and thus to the necessity that the CISG be applied in a highly uniform manner. Together with the arguments based on the plain wording of Article 7(1), *travaux préparatoires*, and the interplay between the principles of international character and uniformity, the underlying nature of the CISG points towards the stance that the CISG mandates the courts and arbitral tribunals to actively pursue uniformity in its application.

Up until now, it was stressed that the CISG must achieve a high level of uniform application of its provisions. This choice of terminology was not accidental. Namely, in a perfect world we would expect the CISG to achieve complete uniformity in its application. However, we do not have the prerogative to live in such a world, and uniform application of laws is not achieved even within the most compact national legal systems. Hence, we cannot speak of uniform application of the CISG, but only of high level of uniformity in the Convention's application. But how do we measure something as abstract as uniformity in the application of a uniform law instrument such as the CISG? Next section will delve into this controversial issue.

[156] "Proposal for a Regulation of the European Parliament and of the Council on a Common European Sales Law" (EUR-Lex, 2011), https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52011PC0635. In an attempt to justify the now-failed Common European Sales Law (CESL), the following line of reasoning was offered in the explanatory memorandum: "Differences in contract law between Member States hinder traders and consumers who want to engage in cross-border trade within the internal market. The obstacles which stem from these differences dissuade traders, small and medium-sized enterprises (SME) in particular, from entering cross border trade or expanding to new Member States' markets."

1.2 STANDARD OF UNIFORMITY MANDATED BY THE CISG

The scholars have offered a range of standards to be used as a yardstick for assessing the uniformity in the application of the CISG. How to give a palpable, measurable meaning to the principle of uniformity? Four possible answers to this question have emerged. Firstly, it could be argued that the CISG mandates 'strict' or 'absolute uniformity.'[157] Secondly, some have opined that the CISG simply requires that 'relative uniformity' be reached, perceiving the absolute uniformity as being out of touch with reality.[158] Thirdly, there are those who formulate the standard of uniformity by asking if the CISG has become a 'functional law' and if it contributes to overcoming the impediments to international sales.[159] And last but not least, a combination of the previous two standards has been offered, and has been termed as the 'relative functional uniformity.'[160]

This Section will, after briefly examining those four alternatives, deem them as inadequate. Consequently, it will propose a brand-new standard which, in a nutshell, requires that the uniformity in application that ought to be sought in relation to the CISG ought to be the same level of uniformity that is on average reached by national sales laws that are frequently chosen to govern international transactions.

1.2.1 Strict Uniformity

It could be argued that the CISG requires that a strict or absolute uniformity be reached in

[157] DiMatteo et al., "The Interpretive Turn in International Sales Law: An Analysis of Fifteen Years of CISG Jurisprudence," 310 (see n. 57).

[158] Ibid.

[159] Ibid.

[160] Andersen, *Uniform Application of the International Sales Law*, 36 (see n. 57).

its application.[161] This standard, while very attractive in theory, has little to no chance of ever being fulfilled in practice. Requiring a strict or absolute standard of uniformity would mean that the bar for the CISG has been set higher than for any national sales law. Discrepancies in opinion as to what a particular provision means and how it ought to be applied in practice arise all the time within domestic legal systems, and in relation to their national laws. These discrepancies, however, are held under control and are eventually remedied either by the supreme judicial authority or by legislature that has the ability to amend the controversial provision and make it clearer. Neither of these are available in regard to the CISG. As a result, it would be absurd, imprudent, and simply impossible to impose such an unreasonable standard upon the CISG. Consequently, other alternatives ought to be sought.

1.2.2 Relative Uniformity

As an alternative, relative uniformity has been suggested,[162] and Flechtner has sought to shed light on this concept:

> Complying with the Article 7(1) mandate to consider the need to promote uniform application when interpreting the Convention is unlikely to result in the strict and absolute uniformity of international sales rules that some seek. It should, however, permit those applying the CISG an opportunity to identify and avoid unintended and undesirable non-uniformity, and will thus facilitate progress toward the ideal of a uniform system of general rules with sufficient flexibility to accommodate the extraordinarily diverse types and conditions of international sales transactions. What Article 7(1) envisions is relative, not

[161] DiMatteo et al., "The Interpretive Turn in International Sales Law: An Analysis of Fifteen Years of CISG Jurisprudence," 310 (see n. 57).

[162] Ibid.

absolute, uniformity.[163]

The problem with this standard is that it is simply too vague. What is relative uniformity? How is it to be defined? How can we determine whether the CISG has achieved the relative level of uniformity? And in relation to what the uniformity in the application of the CISG is to be assessed? No satisfactory answers have been given to these questions so as to make the standard of relative uniformity a viable one. Furthermore, to reiterate, Article 7(1) talks about the "need to promote uniformity in [the] application [of the CISG]."[164] While absolute uniformity, as explained above, is definitely not mandated by the CISG, it also cannot be said that there exists a mandate to only achieve something as vague as relative uniformity. Hence, another alternative ought to be sought.

1.2.3 Functional Uniformity

In addition to those described previously, the standard of functional uniformity was suggested as well.[165] One way to formulate it is in the form of questions:

> Has the CISG become a functional […][law]? Have functional default rules developed through the application of CISG's general principles? Has it resulted in at least a manageable level of uniform application to have decreased the legal impediments to international sales? Finally, what is the likelihood of greater uniformity of application in the future?[166]

Baasch Andersen has sought to further clarify this standard:

[163] Flechtner, "The Several Texts of the CISG;" 214 (see introduction, n. 45).

[164] "Annotated Text of CISG Article 7," (see introduction, n. 48).

[165] Andersen, *Uniform Application of the International Sales Law*, 34 (see n. 57).

[166] DiMatteo et al., "The Interpretive Turn in International Sales Law: An Analysis of Fifteen Years of CISG Jurisprudence," 309 (see n. 57).

> So, if we […] say that the function of the CISG is to **enable** international sales in a **clear, flexible, modern and fair** way, we have a yardstick for examining this concept of the CISG's uniformity. A common understanding of sales law is necessarily a prerequisite for this enabling, and the establishment of such common understanding, spanning numerous jurisdictions, is a difficult task to accomplish. However, the level of uniformity (similarity in effect) does not have to be great for parties to meet on common ground to enable contracting or clarity in negotiation. In addition, the concept of the CISG as a flexible enabler leads us to think that the level of uniformity in question is relatively low, as the flexibility means dissimilar results are to some extent permissible. Hence, if we operate with the concept of 'functional uniformity[,]' this will mean that, as long as parties can communicate in contract negotiating on essentially similar terms, the function is met. This would appear to be a very low standard of uniformity, albeit a realistic one.[167]

Baasch Andersen is certainly right in pointing out that functional uniformity would be too low of a standard, and this is especially true when one takes into account the fact that the CISG was adopted in the form of a convention, i.e. the uniform law form that envisions the highest level of uniformity.[168] Requiring the CISG that it merely satisfies the standard of functional uniformity would, in effect, equate it with one of the uniform law forms that purposefully do not seek a high level of uniformity. In essence, this would be an approach of a defeatist who simply sees the high level of uniformity in the application of the CISG as an unattainable aim, and thus is satisfied with less. This is an undesirable solution as it would severely limit the impact of the CISG on international trade. In other words, while it might create a minimum common ground for the parties to negotiate their international contracts, it is questionable to what extent the parties would be

[167] Andersen, *Uniform Application of the International Sales Law*, 35 (see n. 57).

[168] UNCITRAL, *A Guide to UNCITRAL - Basic Facts about the United Nations Commission on International Trade Law*, 13 (see n. 144).

willing to use such an unpredictable ground for their contracting process. It might just push them back into the arms of national sales laws (and/or reinforce the parties' commitment to use national sales laws instead of the CISG) that are not fraught with the problem of insufficient level of uniformity in their application. Consequently, it would be advisable to consider other potential standards for assessing the uniform application of the CISG.

1.2.4 Relative Functional Uniformity

Baasch Andersen has argued that the CISG requires a combination of relative and functional uniformity.[169] However, this approach is also founded on the notion that the high level of uniformity in the application of the CISG is unattainable. She has even sought to put forth general definitions of 'uniformity' and 'uniform laws' that reflect this stance. According to her, the uniformity can be defined as follows:

> […] the varying degree of similar effects on a phenomenon across boundaries of different jurisdictions resulting from the application of deliberate efforts to create specific shared rules in some form.[170]

As for Baasch Andersen's definition of uniform laws, she framed it in the following manner:

> […] specific legal rules or instruments of some form […] deliberately designed to be voluntarily shared across boundaries of different jurisdictions which, when applied, result in varying degrees of similar effects on a legal phenomenon.[171]

It is certainly tempting to simply accept the current situation (Baash Andersen's definitions are grounded in current practical application of uniform laws, and not in normative expectations)

[169] Andersen, *Uniform Application of the International Sales Law*, 36 (see n. 57).

[170] Ibid., 6.

[171] Ibid., 7.

and perceive uniform laws as instruments that are only supposed to produce similarity, and not a high level of uniformity. However, this approach is unwise, and so is expecting the uniform laws such as the CISG to only achieve a combination of relative and functional uniformity. For even when relative and functional uniformity get combined into one standard, the difficulties that arise individually in relation to them (described previously in the text) still persist. If this were to be embraced as the mainstream approach, the CISG would run the risk of being irreversibly confined to the secondary role in relation to the national sales laws in the realm of international trade (these still govern the majority of world trade).[172] In contrast, choosing a higher standard that is not reflected in practice today opens the door for it to be reached in the future. From the standards put for thus far, only the strict or absolute uniformity standard seeks to have the bar set high. But since it actually sets the bar unrealistically high, it is advisable to look for an alternative. This thesis, among other things, strives to provide just that; to formulate a viable standard of uniformity of the CISG which asks that a high level of uniformity in the application of the Convention be reached, and it is the discussion of this brand-new standard of uniformity that ensues.

1.2.5 National Law Standard

A standard for assessing the uniformity in the application of the CISG offered here will be termed 'national law standard.' Before presenting it in detail, a few background notes will be put forth. Namely, the CISG has been devised as a legal instrument intended to govern (certain) international sales of goods. However, it was never meant to be an exclusive law for these sorts of

[172] Gilles Cuniberti, "Three Theories of Lex Mercatoria," Columbia Journal of Transnational Law 52 (2013): 389; Sandeep Gopalan, "Demandeur-Centricity in Transnational Commercial Law," in *Theory and Practice of Harmonisation* (Edward Elgar Publishing, 2012), 168; Qi Zhou, "The CISG and English Sales Law: An Unfair Competition," in *International Sales Law: A Global Challenge* (New York: Cambridge University Press, 2014), 670. The prevalent view is that the CISG is frequently excluded by the private parties themselves in accordance with Article 6 of the Convention, and that they resort to national laws to govern their sales transactions.

transactions, but a default one. Article 1(1)(a) of the CISG creates the default position by providing that the Convention will apply to those contracts for the sale of goods that are entered into by the parties whose places of business are in different CISG participating states.[173] The parties then can alter this default position in accordance with Article 6 of the CISG which enables the parties to "[…]exclude the application of [the] Convention or, subject to article 12, derogate from or vary the effect of any of its provisions."[174]

In practice, the majority of the parties make use of Article 6 and exclude the application of the Convention.[175] Instead of the CISG, the parties to an international sales transaction will, more often than not, opt to have one of the national laws govern their transaction.[176] They frequently will not invest their faith in either the seller's or the buyer's respective national sales laws. Rather they will opt for the national sales law that they perceive to be neutral.[177] For example, a substantial number of international sales transactions is governed by Swiss law.[178] And sometimes a particular national law can come to epitomise certain types of transactions, as is the case with English law in the area of commodities.[179]

[173] "Annotated Text of CISG Article 1," Pace Law Albert H. Kritzer CISG Database, 2014, https://cisgw3.law.pace.edu/cisg/text/e-text-01.html.

[174] "Annotated Text of CISG Article 6," Pace Law Albert H. Kritzer CISG Database, 2014, https://cisgw3.law.pace.edu/cisg/text/e-text-06.html.

[175] Cuniberti, "Three Theories of Lex Mercatoria," 389 (see n. 172); Gopalan, "Demandeur-Centricity in Transnational Commercial Law," 168 (see n. 172); Zhou, "The CISG and English Sales Law: An Unfair Competition," 670 (see n. 172).

[176] Cuniberti, "Three Theories of Lex Mercatoria," 389 (see n. 172).

[177] Ingeborg Schwenzer and Pascal Hachem, "The CISG—Successes and Pitfalls," *The American Journal of Comparative Law* 57, no. 2 (2009): 465.

[178] Ibid

[179] Katrina Winsor, "The Applicability of the CISG to Govern Sales of Commodity Type Goods," *Vindobona Journal of International Commercial Law and Arbitration* 14 (2014): 84.

The reasons for the exclusion of the CISG in favour of national sales laws present a complex issue, and numerous explanations have been put forth. One of them is the insufficient uniformity in the application of the CISG. There is sufficient empirical and speculative evidence to confirm this. For example, a questionnaire carried out in Hungary has shown that a lack of a high level of uniform application of the CISG is a culprit for the reluctance of some Hungarian lawyers to advise the use of the Convention.[180] Other surveys, polls and questionnaires, carried out elsewhere, also suggest that there is a nexus between the non-uniform application of the CISG and the decision of lawyers and their clients to exclude the application of the Convention.[181] It is against this background that the standard of uniform application of the CISG must be formulated.

The CISG was designed so as to be used by traders engaging in cross-border trade. If they regularly exclude the CISG, basing their decision on the fact that the Convention is not applied with sufficient uniformity, then one has no choice but to assume that the national laws the traders frequently resort to do fulfil this criterion. For it is to them that the majority of traders will turn to after excluding the CISG.[182] This implies that in this day and age the CISG ought to be expected to match the success of its national counterparts regarding the uniformity level in its application. For that is the level that is sought by the business community that engages in cross-border sales. The title given to this standard in Chapter I of this thesis is 'national law standard.'

However, using any particular national sales law as the benchmark for the CISG in this

[180] Judit Glavanits, "CISG and Arbitration in the Hungarian Legal Practice" (First Brno Arbitration Conference 2017 - Current Issues of International Commercial Arbitration, Brno, 2017), 55.

[181] For a detailed discussion of surveys, polls and questionnaires examining the contractual exclusion of the CISG by the parties, see Chapter IV.

[182] Martin F Koehler and Guo Yujun, "The Acceptance of the Unified Sales Law (CISG) in Different Legal Systems," *Pace Int'l L. Rev.* 20 (2008): 49; Qi Zhou, "CISG Versus English Sales Law: An Unfair Competition," in *International Sale Law: A Global Challenge* (New York: Cambridge University Press, 2014), 670 (see n. 172); Cuniberti, "Three Theories of Lex Mercatoria," 389 (see n. 172).

regard would, in the opinion of this author, be inappropriate as well as impractical. No particular national law enjoys a clear monopoly in governing the transactions for which the default governing law is the CISG.[183] While there are exceptions to this (e.g. English law in the area of commodities), the mainstream approach should aim to reflect that the parties avoiding the CISG may choose from an array of national sales laws that they see as fit in terms of their uniform application. Thus, the best approach would be to formulate the national law standard in average terms; i.e. the CISG ought to be expected to reach that level of uniformity in its application that is on average achieved by those national laws that are frequently chosen by traders to govern their sales transactions.

It is important to note, however, that the uniformity level in the application of any legal instrument, be it national or international, is impossible to measure with exact precision. Examples of non-uniform application can be identified with ease, but this does not make it possible that a scale or a measuring device be created that would assign numbers to the achieved (or underachieved) levels of uniformity. Then, how would we know that the CISG has managed to satisfy the national law standard that has been proposed in this thesis?

It would not be impossible to determine if the CISG has managed to satisfy the national law standard. As will be shown in Chapter IV of this thesis, there is a nexus between the non-uniform application of the CISG and the decision of the parties and their lawyers to exclude its application and make one of the national sales laws applicable to their transaction instead. Evidently, non-uniformity in the application of the CISG is not the sole reason that is cited to justify the exclusion of the CISG.[184] However, at a point when the exclusion of the CISG is no longer justified by its non-uniform application, this could serve as a reliable indication that the

[183] Gilles Cuniberti, "The International Market for Contracts: The Most Attractive Contract Laws," *Nw. J. Int'l L. & Bus.* 34 (2013): 459.

[184] For a detailed discussion of exclusion of the CISG by commercial parties, please refer to Chapter IV.

CISG has finally managed to be on par with the national laws that frequently govern international sales in terms of uniform application.

It is a more precise nature and relevance of the national law standard that make it a much more suitable choice than other standards that have been offered thus far. One caveat is due here; it is not the intent of this author to present the national law standard as a standard set in stone. It is simply a standard that best describes the needs of the business community of today. If these needs were to change in the future, and a new standard of uniformity in the application of the CISG were to be needed, then this would justify abandoning the national law standard in favour of other, more appropriate alternatives. However, at this point in time, and for the foreseeable future, the national law standard will remain relevant. And any efforts designed to increase the uniform application of the CISG should perceive the national law standard as a target to aim at.

SUMMARY OF CHAPTER I

Chapter I has dealt with the concept of uniformity under the CISG. It has explored the meaning of the concept and its scope, concluding that the CISG, in essence, does mandate that the high level of uniformity be achieved. However, implying that the level of uniform application of the CISG ought to be high is very abstract and has little practical importance. Consequently, Chapter I has then proceeded to examine specific standards that can potentially be used to be the tool of assessment for the uniformity mandate. After examining several potential standards, Chapter I has concluded on a note that the most appropriate standard for such assessment ought to be the national law standard; i.e. the standard that expects the CISG's level of uniformity in its application to be equivalent to the uniformity that is on average attained by national laws that the transacting parties themselves choose over the CISG to govern their transaction. Next, we turn to

Chapter II where an examination of the CISG case law will be conducted with the aim of presenting examples of non-uniformity in the application of the Convention.

CHAPTER II
2. CASE LAW EXAMPLES OF NON-UNIFORM APPLICATION OF THE CISG

Chapter I concluded on a note that Article 7(1) of the CISG mandates a high level of uniformity in the Convention's application. The present Chapter (i.e. Chapter II) proceeds to show that the said mandate has not been fulfilled in practice. This issue has been touched upon in the previous Chapter, but only briefly. Here, in Chapter II, more in-depth illustrations of non-uniformity in the application of the CISG will be put forth by examining the case law.

Chapter II is divided into four sections. Section 2.1 notes that there are two ways in which the non-uniformity in the application of the CISG manifests itself. More precisely, courts and arbitral tribunals may reach diverging conclusions (1) as to the scope of application of the CISG and/or (2) in relation to the application of the CISG's provisions. Furthermore, Section 2.1 briefly enumerates some of the examples for both categories.

Section 2.2 proceeds by dedicating its attention to three specific issues that comprehensively illustrate the existence of divergent applications under the CISG across different jurisdictions. More precisely, Section 2.2 focuses first on Article 19 of the CISG, with the emphasis being on the issue known as the battle of forms. Then, Section 2.2 considers Article 39 and the concept of reasonable time within which the notice of non-conformity ought to be sent. And lastly, Section 2.2 explores the concept of impediment as enshrined in Article 79.

Why have these three particular issues been chosen? Firstly, there is enough case law available from different jurisdictions so that, in relation to them, non-uniformity in the application of the Convention can be undoubtedly established. Secondly, the divisions in case law on these

matters began surfacing as early as in the 1990s.[185] Thus, if one shows for these three issues that they are dealt with in a manifestly different way from jurisdiction to jurisdiction, this is a clear indication of the pervasiveness and persistence of the problem.

Moreover, the CISG was a result of a hard-fought compromise, primarily between civil law and common law interests.[186] To mitigate differences between these two categories of legal systems, and to make the CISG politically acceptable, the drafters opted to use neutral language as often as possible.[187] Where deemed necessary, they sought solutions that would reflect both civil law and common law traditions.[188] The neutral language of many of the CISG provisions, coupled with its heavy reliance on open-ended standards instead of clear-cut rules, has represented a challenge for judges and arbitrators in terms of assigning uniform meanings to these brand new concepts.[189] Therefore, if one successfully illustrates that three articles of the CISG with these characteristics are not being applied uniformly across different jurisdictions, then it would be

[185] For all three issues, some of the cases cited go back to the 1990s. For a detailed discussion, please refer to Section 2.2, Section 2.3, and Section 2.4 of this Chapter.

[186] Larry A. DiMatteo and Daniel T. Ostas, "Comparative Efficiency in International Sales Law," *American University International Law Review* 26 (2010): 372. "When civil and common law rules coincide, the CISG typically adopts the convergent view. [footnote omitted] When they differ, the CISG sometimes adopts one approach and sometimes the other. In certain instances, the CISG creates alternative rules assumed to be the result of negotiation and compromise among the drafting nations. [footnote omitted] In other instances, the drafting nations failed to reach consensus resulting in gaps in the CISG that expressly exclude specific areas of law [footnote omitted] or amount to implicit delegation."

[187] UNCITRAL, *UNCITRAL Digest of Case Law on the United Nations Convention on Contracts for the International Sale of Goods*, xi (see chap. 1, n. 108). "One reason for the wide acceptance of the Convention stems from its flexibility. The drafters of the Convention achieved this flexibility through the use of different techniques, and, in particular, by adopting a neutral terminology[.]"

[188] DiMatteo and Ostas, "Comparative Efficiency in International Sales Law," 372 (see n. 186).

[189] Gillette and Scott, "The Political Economy of International Sales Law," 474, (see chap. 1, n. 143). "[V]ague standards pervade the CISG." Djakhongir Saidov, *The Law of Damages in International Sales: The CISG and Other International Instruments* (Oxford and Portland: Bloomsbury Publishing, 2008), 3. "[A] number of [CISG's] provisions are based on general, and some would say vague standards and rules such as reasonableness and fundamental breach[.]"

relatively safe to assume that other articles possessing these same characteristics have the potential to suffer from the same ailment.

To reinforce the findings in the previous sections, Section 2.3 summarises the observations of authors who have analysed the state of application of the CISG in their respective jurisdictions or regions. As will be shown, some of these authors have only pointed out examples of non-uniform application of the Convention in jurisdictions covered by their studies. Some, however, have gone a step further, giving negative assessments as to their jurisdiction's ability to contribute to the uniformity endeavour.

Lastly, Section 2.4 will assess the examples of non-uniform application vis-à-vis the standard of uniformity coined in the previous Chapter – the national law standard. In the end, the present Chapter will put forth the only viable conclusion; i.e. that the CISG is not being applied in a sufficiently uniform manner. If accepting that the CISG mandates a high level of uniformity as argued in Chapter I, frequent and long-lasting divisions that exist in the Convention's case law then simply cannot be perceived as satisfying this requirement.

2.1 TWO TYPES OF NON-UNIFORM APPLICATION OF THE CISG

Examples of non-uniform application of the CISG can be divided into two general categories: (1) different understandings as to the scope of the CISG and (2) different interpretations of the CISG's provisions and assignment of different meanings to the concepts found in the Convention.[190] Occasionally, these two categories might intertwine as whether a particular matter

[190] Andersen, *Uniform Application of the International Sales Law*, 37 (see n. 57).

will fall within the scope of the CISG will sometimes depend on the meaning given to a concept found in the CISG.[191]

2.1.1 Non-Uniformity as to the Scope of the Application of the CISG

Kröll in his article *Selected Problems Concerning the CISG's Scope of Application* has, among other things, identified several issues where conflicting decisions exist regarding the Convention's scope.[192] For instance, should the formation of an arbitration agreement contained in the general contract be governed by the CISG when the latter is governed by the Convention?[193] While convincing arguments have been put forth against having the CISG govern the formation of the arbitration agreement (e.g. the arbitration agreement, even if contained in the general contract, is still considered as a separate agreement), examples in the Convention's case law have surfaced where the opposite conclusion was reached.[194] Thus, in *Filanto v. Chilewich*, a first instance US federal court opined that an arbitration agreement was indeed entered into by the parties by applying the provisions of the CISG.[195]

Other issues related to the scope of the CISG analysed by Kröll include burden of proof and set-off. The courts have yielded diametrically opposed decisions as to whether these two matters fall within the scope of the Convention. Namely, at least two courts have applied the

[191] Ibid.

[192] Stefan Kröll, "Selected Problems Concerning the CISG's Scope of Application," *Journal of Law and Commerce* 25 (2005): 39.

[193] Ibid., 43.

[194] Ibid.

[195] Ibid; Filanto S.p.A. v. Chilewich International Corp., No. 92 Civ. 3253 (CLB) (U.S. District Court, Southern District of New York 1992), https://www.cisg.law.pace.edu/cases/920414u1.html.

domestic rules to determine who has to bear the burden of proving a particular matter under the CISG.[196] The reason why these courts turned to domestic solutions was because the CISG does not provide explicit rules on burden of proof.[197] However, just because the CISG lacks provisions dealing explicitly with a certain matter does not necessarily mean that that matter falls outside of the scope of the Convention. When it comes to the issue of burden of proof, some courts have attempted (and rather successfully) to extract the relevant rules from the general principles on which the Convention is based.[198] In Kröll's view, this is "[t]he prevailing and correct view".[199] An example of such as approach can be spotted in *Rheinland Versicherungen v. Atlarex*, a decision coming from the Italian Tribunale di Vigevano in which the following principle was deduced: "[T]he party that wants to rely on a provision must prove the existence of the factual prerequisites of the provision".[200]

As for the set-off, this is another issue for which there is no consensus whether it is governed or not by the CISG. The approach of the majority has been to put forth an answer in the negative; the issue of set-off lies outside of the scope of the Convention.[201] Thus, the question of whether or not a set-off can be declared is generally answered by employing the relevant domestic law.[202] However, some courts (primarily in Germany) have perceived the issue of set-off as falling

[196] Kröll, "Selected Problems Concerning the CISG's Scope of Application," 47 (see n. 192).

[197] Ibid.

[198] Ibid., 48.

[199] Ibid.

[200] Ibid; Rheinland Versicherungen v. S.r.l. Atlarex and Allianz Subalpina S.p.A., No. 405 (Tribunale di Vigevano 2000), http://cisgw3.law.pace.edu/cases/000712i3.html.

[201] Kröll, "Selected Problems Concerning the CISG's Scope of Application," 51 (see n. 192).

[202] Ibid.

within the CISG's scope.[203] While diametrically opposed examples can be located in the CISG case law concerning set-off, they still have one thing in common; both camps have not put forth any particular reasons for their decisions but have simply referred to previous court decisions or scholarly writings.[204]

In addition to the issues discussed by Kröll, there exist others that have as well provoked differing decisions as to whether they are covered by the CISG or not. These include software agreements,[205] estoppel issues,[206] currency of payment,[207] turn-key contracts,[208] place of payment of monetary obligations,[209] interest rate,[210] etc.

2.1.2 Non-Uniformity as to the Application of the CISG's Provisions

Often times the courts and arbitral tribunals, when interpreting the CISG, construe its provisions differently from one jurisdiction to another. That is, the matter is considered to be within the scope of the CISG, but gets treated differently by different courts and arbitral tribunals. For instance, conflicting positions and varying understandings have been exhibited regarding basic

[203] Ibid.

[204] Ibid.

[205] UNCITRAL, *UNCITRAL Digest of Case Law on the United Nations Convention on Contracts for the International Sale of Goods*, 7 (see chap. 1, n. 108).

[206] UNCITRAL, *UNCITRAL Digest of Case Law on the United Nations Convention on Contracts for the International Sale of Goods*, 25 (see chap. 1, n. 108).

[207] Ibid.

[208] UNCITRAL, *UNCITRAL Digest of Case Law on the United Nations Convention on Contracts for the International Sale of Goods*, 21 (see chap. 1, n. 108).

[209] UNCITRAL, *UNCITRAL Digest of Case Law on the United Nations Convention on Contracts for the International Sale of Goods*, 44 (see chap. 1, n. 108).

[210] Ibid., 45.

issues such as fundamental breach,[211] reasonable time within which the goods ought to be inspected by the buyer,[212] damages,[213] battle of forms, notice of non-conformity, the concept of impediment, etc. The last three will be analysed in great detail in the ensuing section.

2.2 SELECTED EXAMPLES OF NON-UNIFORMITY IN THE APPLICATION OF THE CISG

2.2.1 Battle of Forms

'Battle of forms' is a situation that arises when each party seeks to enter into an agreement by exchanging their own standard, pre-printed terms.[214] For example, a buyer decides to send an offer to a seller to purchase a certain quantity of laptops. The offer contains, usually on the reverse side, a list of standard contract terms that are mostly favourable to the buyer. The seller decides to accept the offer, but does so by replying on his own pre-printed form. This form, as one would expect, contains standard terms that are advantageous for the seller. Very often these standard terms will conflict. In most instances, the parties do not pay attention to these differing terms, and the transaction is executed smoothly. However, when a dispute arises, two issues routinely come

[211] Nicholas Whittington, "Comment on Professor Schwenzer's Paper," *Victoria U. Wellington L. Rev.* 36 (2005): 811; Gerhard Lubbe, "Fundamental Breach under the GISG: A Source of Fundamentally Divergent Results," *Rabels Zeitschrift Für Ausländisches Und Internationales Privatrecht / The Rabel Journal of Comparative and International Private Law* 68, no. 3 (2004): 445.

[212] UNCITRAL, *UNCITRAL Digest of Case Law on the United Nations Convention on Contracts for the International Sale of Goods*, 158 (see n. 108).

[213] John Y. Gotanda, "Using the UNIDROIT Principles to Fill Gaps in the CISG," in *Contract Damages - Domestic and International Perspectives* (Oxford and Portland: Hart Publishing, 2008), 108.

[214] Giesela Rühl, "The Battle of the Forms: Comparative and Economic Observations," *University of Pennsylvania Journal of International Law* 24 (2014): 189; Ulrich Magnus, "Last Shot vs. Knock Out–Still Battle over the Battle of Forms under the CISG," in *Commercial Law Challenges in the 21st Century* (Uppsala: Iustus, 2007), 185–200, http://www.cisg.law.pace.edu/cisg/biblio/magnus4.html; Schlechtriem and Schwenzer, *Commentary on the UN Convention on the International Sale of Goods (CISG)*, 347 (see introduction, n. 44).

into the spotlight: (1) whether the parties concluded a contract in the first place, and (2) provided that the answer to the previous question is in the positive, what are the terms that form part of the agreement.[215]

Several solutions have been proposed for the 'battle of forms' situations arising as part of the transactions governed by the CISG.[216] Some have argued that this issue is outside of the scope of the Convention, and that, as a result, it would be appropriate to resort to the rules of private international law and thus resolve the matter by applying the relevant domestic law.[217] Others have advanced the view that 'battle of forms' ought to be resolved by resorting to the general principles on which the CISG is based.[218] Then, there have been those who have advocated that the exchange of conflicting standard terms between the parties amounts to a tacit exclusion of Article 19 of the CISG.[219] Neither of the previously enumerated approaches has managed to gain foothold in the CISG case law. This brings us to the positive side of things; the solutions to the 'battle of forms' have mostly been sought in the CISG itself through Article 19, as evidenced by the case law. The

[215] Andrea Fejös, "Battle of Forms under the Convention on Contracts for the International Sale of Goods (CISG): A Uniform Solution?," *Vindobona Journal of International Commercial Law & Arbitration* 11 (2007): 114, https://www.cisg.law.pace.edu/cisg/biblio/fejos2.html; Rühl, "The Battle of the Forms: Comparative and Economic Observations," 189 (see n. 214); Maria Pilar Perales Viscasillas, "'Battle of the Forms' Under the 1980 United Nations Convention on Contracts for the International Sale of Goods: A Comparison with Section 2-207 UCC and the UNIDROIT Principles," *Pace International Law Review* 10 (1998): 107.

[216] Kaia Wildner, "Art. 19 CISG: The German Approach to the Battle of the Forms in International Contract Law: The Decision of the Federal Supreme Court of Germany of 9 January 2002," *Pace International Law Review* 20, no. 1 (April 1, 2008): 4; Kröll, Mistelis, and Viscasillas, *UN Convention on Contracts for the International Sale of Goods (CISG) - Commentary*, 288 (see introduction, n. 44).

[217] Schlechtriem and Schwenzer, *Commentary on the UN Convention on the International Sale of Goods (CISG)*, 350 (see introduction, n. 44); Wildner, "Art. 19 CISG," 4 (see n. 216); Viscasillas, "Battle of the Forms under the 1980 United Nations Convention on Contracts for the International Sale of Goods: A Comparison with Section 2-207 UCC and the UNIDROIT Principles," 138 (see n. 215).

[218] Viscasillas, "Battle of the Forms under the 1980 United Nations Convention on Contracts for the International Sale of Goods: A Comparison with Section 2-207 UCC and the UNIDROIT Principles," 140 (see n. 215).

[219] Ibid., 142.

negative aspect has been the fact that even when solutions were sought inside the CISG, non-uniform approaches have still surfaced.[220] Firstly, the courts have struggled with formulating a clear reasoning to support the finding that the parties actually formed the contract. And secondly, there has been a divide in terms of deciding which terms get to form part of the contract, with some jurisdictions preferring the so-called last shot rule and some opting to utilise the knock-out rule. Furthermore, even some alternative approaches (e.g. first shot rule) can sporadically be spotted in the CISG case law. But before delving into the process of illustrating all these different approaches in the CISG case law, we shall first outline Article 19 of the CISG.

2.2.1.1 Article 19

Article 19 of the CISG provides as follows:

> (1) A reply to an offer which purports to be an acceptance but contains additions, limitations or other modifications is a rejection of the offer and constitutes a counter-offer.
>
> (2) However, a reply to an offer which purports to be an acceptance but contains additional or different terms which do not materially alter the terms of the offer constitutes an acceptance, unless the offeror, without undue delay, objects orally to the discrepancy or dispatches a notice to that effect. If he does not so object, the terms of the contract are the terms of the offer with the modifications contained in the acceptance.
>
> (3) Additional or different terms relating, among other things, to the price, payment, quality and quantity of the goods, place and time of delivery, extent

[220] Giulia Sambugaro, "Incorporation of Standard Contract Terms and the Battle of Forms under the 1980 Vienna Sales Convention (CISG)," *International Business Law Journal*, 2009, 73. "Unfortunately, however, there is no consent among commentators and courts as to how to apply art.19 [in relation to battle of forms], [footnote omitted] especially in the case where the standard contract terms of the offeree alter in a material way those of the offeror." Peter Winship, "The Hague Principles, the CISG, and the Battle of Forms," *Penn State Journal of Law and International Affairs* 4 (2015): 151. "[I]t is more difficult to identify a trend in the decisions of judges and arbitrators [under the CISG concerning the battle of forms.]"

> of one party's liability to the other or the settlement of disputes are considered to alter the terms of the offer materially.[221]

Article 19(1) adopts the mirror-image approach to contract formation.[222] Consequently, the acceptance has to reflect entirely the offer, otherwise it will be transformed into a counter-offer. Article 19(2) lessens this strict and inherently common-law approach.[223] It provides that a strictly non-matching acceptance need not be fatal for the conclusion of a contract if the additional or different terms contained in the acceptance do not materially alter the contents of the offer. Article 19(3) proceeds to give a non-exhaustive list of additional or different terms that can be considered not to materially alter the offer.[224] However, the list provided in Article 19(3) has the effect of almost completely reinstating the mirror-image approach as it encompasses the majority of matters over which additional or different terms might be sought to be included in the agreement.

In relation to the issue of 'battle of forms,' Article 19 may be perceived to be inadequate as it was not specifically tailored to address it. As a matter of fact, Article 19 was designed with the conventional offer/acceptance mechanism in mind. The prevailing view nowadays in the international context is that the conventional approach is unsuitable for dealing with complexities that arise when parties engage in the 'battle of forms.' Consequently, instruments such as the UNIDROIT Principles and PECL have mechanisms conceived to specifically address the intricacies of the parties' conflicting attempts to have their own standard terms govern the

[221] "Annotated Text of CISG Article 19," Pace Law Albert H. Kritzer CISG Database, 2014, http://www.cisg.law.pace.edu/cisg/text/e-text-19.html.

[222] Kröll, Mistelis, and Viscasillas, *UN Convention on Contracts for the International Sale of Goods (CISG) – Commentary*, 280 (see introduction, n. 44); Viscasillas, "Battle of the Forms under the 1980 United Nations Convention on Contracts for the International Sale of Goods: A Comparison with Section 2-207 UCC and the UNIDROIT Principles," 137 (see n. 215).

[223] "Annotated Text of CISG Article 19," (see n. 221).

[224] Ibid.

transaction.[225] In spite of the potential inadequacy of Article 19 of the CISG to yield a satisfactory solution to 'battle of forms,' it is still the most appropriate mechanism that the Convention offers in this regard. And as already indicated, the courts have shown utmost willingness in resolving the 'battle of forms' disputes through Article 19. The first step in doing that is almost always the question: Was the contract formed? The courts, as shall be seen in the ensuing discussion, have struggled to formulate a clear reasoning in order to justify the notion that the contract indeed came into existence.[226]

2.2.1.2 Was the Contract Formed?

Article 19(1) of the CISG, as already noted, adopts a rigid mirror-image rule, according to which the contract is only concluded if the offeree accepts the offer as is, without attempting to alter it.[227] If Article 19(1) were to be strictly applied in relation to 'battle of forms,' it would not be complicated to pinpoint the stage at which the contract was actually formed. While the courts' and arbitral tribunals' task would then be made much simpler, the unfortunate consequence of this would be that, if a dispute arises, almost all 'battle of forms' exchanges would be deemed as falling short of creating an enforceable contract. Only when forms whose additional or different terms do

[225] "Article 2.1.22 (Battle of Forms)," in *UNIDROIT Principles of International Commercial Contracts 2016* (Rome: International Institute for the Unification of Private Law (UNIDROIT), 2016), 72. Article 2.1.22 of the UNIDROIT Principles provides as follows: "Where both parties use standard terms and reach agreement except on those terms, a contract is concluded on the basis of the agreed terms and of any standard terms which are common in substance unless one party clearly indicates in advance, or later and without undue delay informs the other party, that it does not intend to be bound by such a contract."

[226] Schlechtriem and Schwenzer, *Commentary on the UN Convention on the International Sale of Goods (CISG)*, 335 (see introduction, n. 44). "The court decisions in [Article 19] cases are often neither convincing in their results nor in their reasoning."

[227] Kröll, Mistelis, and Viscasillas, *UN Convention on Contracts for the International Sale of Goods (CISG) – Commentary*, 280 (see introduction, n. 44); Viscasillas, "Battle of the Forms under the 1980 United Nations Convention on Contracts for the International Sale of Goods: A Comparison with Section 2-207 UCC and the UNIDROIT Principles," 155 (see n. 215).

not materially alter the offer are ping-ponged between the parties (and no objections are raised) would Article 19(2) lessen the mirror-image approach, and enable formation of the contract. Article 19(3), however, severely undermines the mitigation found in Article 19(2) with its broad list of additional or different terms that are to be considered as making material alteration to the offer.

While utilising the strict application of Article 19 in relation to 'battle of forms' would undoubtedly be convenient from the judges' and arbitrators' perspective, it is the situation on the ground that speaks against such a line of action. Namely, in numerous transactions around the globe parties exchange conflicting standard terms on a daily basis, but they still end up executing their transactions.[228] No problems are encountered, and the sellers ships the goods while the buyers accept them. Their forms might have contained different or additional terms, but this was irrelevant as the whole transaction was executed smoothly, and there was no need to resort to any of those terms at all. What is more, the parties may not even scrutinise each other's standard forms when exchanging them, and may only do so if there is a dispute. Therefore, a finding under the strict application of Article 19 of the CISG that no contract is formed would certainly not be in line with how the parties act in real life.

In order to avoid this undesirable result, the decision-makers showcased willingness to find an enforceable contract when, in addition to exchanging forms, the parties acted, or refrained from acting, in the manner which indicated that mutual assent was present.[229] So, for example, if, after the exchange of forms, the seller delivered the goods, and the buyer accepted them, the court or

[228] Viscasillas, "Battle of the Forms under the 1980 United Nations Convention on Contracts for the International Sale of Goods: A Comparison with Section 2-207 UCC and the UNIDROIT Principles," 106 (see n. 215).

[229] Fejös, "Battle of Forms under the Convention on Contracts for the International Sale of Goods (CISG): A Uniform Solution?," 117 (see n. 215).

arbitral tribunal would usually find that the contract had been concluded.[230] From the standpoint of uniform application of the CISG, determining whether or not a contract was formed has not been a cause for major worry so far. The only discord was in the line of reasoning. Certain decisions treat the last form as a counter-offer, and then complete or partial performance of the other party is treated as an acceptance, thus forming an enforceable contract.[231] Other decisions simply conclude that the contract is formed without any palpable discussion.[232] Finally, in some decisions it is opined that the contract is formed on the basis of *essentialia negotii* on which the parties evidently agree.[233] What ensues are the case law examples of these reasonings.

2.2.1.2.1 Contract Is Formed: Counter-Offer Plus Complete or Partial Performance

The most frequent approach to establishing whether the parties formed a contract or not treats the last form as a counter-offer, and then views the other party's indication of mutual assent as a binding force which creates an enforceable contract between the parties.[234] This indication of mutual assent usually comes in the form of complete or partial performance.[235] For example, if the buyer sends the last form, the contract will be formed if the seller dispatches the goods. If, however, the seller sends the last form, and with it also the goods, the contract will be formed if the buyer accepts the goods in question.

[230] Ibid.

[231] Ibid.

[232] Ibid.

[233] Ibid.

[234] Ibid.

[235] Ibid.

An example of this type of reasoning can be found in *Magellan International Corporation v. Salzgitter Handel GMBH*.[236] In this case, a buyer from the United States began negotiating with a seller from Germany to purchase steel bars. The buyer sent purchase orders to the seller, along with its general terms and conditions. The seller accepted, but asked that the buyer agree to two price adjustments. The buyer agreed, and then promised that it would soon dispatch the relevant order confirmations. These order confirmations contained the buyer's general terms and conditions. The two sets of general terms and conditions, one coming from the seller's side and the other from the buyer's, differed in relation to dispute resolution, choice of law and loading conditions. The parties could not agree as to how to remedy these differences, so they continued to negotiate. At one point, the seller began exerting pressure on the buyer to open a letter of credit in its favour, although the differences between them were yet to be settled. Eventually, the buyer opened a letter of credit, but then the parties could not agree on its contents. The dispute arose, and the case was tried before the court.

The court, among other things, was called upon to decide whether the parties had entered into a contract in the first place. According to the court, the parties had indeed formed a contract.[237] It qualified the buyer's order as an offer, to which the seller attempted to convey its acceptance.[238] However, this purported acceptance contained price adjustment proposals, and thus could only be perceived as a counter-offer in the light of Article 19(1) of the CISG. Following this, the parties, in the court's view, kept exchanging offers and counter-offers until "the requisite contractual joinder could reasonably be viewed by a factfinder as having jelled" at the point in time when the

[236] Magellan International Corporation v. Salzgitter Handel GmbH, 76 Federal Supplement (U.S. District Court, Northern District of Illinois, Eastern Division 1999), http://www.cisg.law.pace.edu/cases/991207u1.html.

[237] Ibid.

[238] Ibid.

buyer opened a letter of credit.[239] Therefore, the court viewed opening the letter of credit as conduct on the part of the buyer that had amounted to acceptance.

2.2.1.2.2 Contract is formed: the court provides no particular justification

Some courts simply do not dwell on the issue whether the parties concluded the contract in the first place or not.[240] They simply assume that the contract was formed without any meaningful discussion to corroborate their finding.[241] In the *Powdered milk case*, a buyer from the Netherlands ordered powdered milk from a German seller.[242] The details of the transaction were first discussed in a telephone call, and afterwards the agreement was reduced to writing. Subsequently, both parties sent a letter of confirmation to one another, with both letters attempting to include standards terms. Eventually, the buyer initiated proceedings against the seller, alleging that the delivered goods did not conform to the contract. The court gave a very laconic statement as to whether the parties concluded a contract in the first place by simply noting that

> […] the fact that the mutual general terms and conditions partially contradicted each other did not prevent the existence of the sales contracts because the parties did not view this contradiction as an obstacle to the execution of the contracts.[243]

[239] Ibid.

[240] Fejös, "Battle of Forms under the Convention on Contracts for the International Sale of Goods (CISG): A Uniform Solution?," 117 (see n. 215).

[241] Ibid.

[242] Powdered milk case, No. VIII ZR 304/00 (Bundesgerichtshof 2002), http://cisgw3.law.pace.edu/cases/020109g1.html.

[243] Ibid.

A similar approach was taken by the Spanish Tribunal Supremo. After referring to Article 18 and Article 19 of the CISG, it simply noted that the parties entered into a sales contract as this was evidenced by an existence of a copy of a sales invoice.[244]

2.2.1.2.3 Contract is formed: essentialia negotii are present

Some courts find that the contract is formed when the *essentialia negotii* of an agreement are present.[245] An illustrative example of this approach can be found in the *Knitwear case*.[246] The court stated that, provided that the seller from Italy had replied to the German buyer with its own set of standard terms, this would have constituted a counter-offer in the sense of Article 19 of the CISG. However, the court found this to be irrelevant as it opined that, through performance, the parties indicated that they had reached an agreement on *essentialia negotii*, and thus they had either waived their standard terms or had derogated from Article 19 of the CISG.[247]

2.2.1.3 Terms of the Contract

After determining that the contract exists, the next step for the court or arbitral tribunal in the 'battle of forms' case is to establish which terms constitute part of the agreement, and which fall outside of its scope. In practice, different rules have been employed towards this end. Some

[244] Nordgemüse Wilhelm Krogmann v. Javier Vierto, No. 3516/1997 (Tribunal Supremo de España 1998), http://cisgw3.law.pace.edu/cases/980526s4.html.

[245] Fejös, "Battle of Forms under the Convention on Contracts for the International Sale of Goods (CISG): A Uniform Solution?," 118 (see n. 215); Predrag Cvetkovic, "The Characteristics of an Offer in CISG and PECL," *Pace International Law Review* 14 (2002): 123. "*essentialia negotii* (terms without which the contract would have no sense)" and "*essentialia negotii* (the fundamental terms of the contract)."

[246] Knitwear case, No. 102 O 59/97 (Landgericht Berlin 1998), http://cisgw3.law.pace.edu/cases/980324g1.html.

[247] Ibid.

decision-makers have relied on the so-called last shot rule, some have applied the knock-out rule, and some have resorted to alternative solutions.[248]

2.2.1.3.1 Last shot rule

Some have opined that the last shot rule (the so-called 'theory of the last word') ought to be used in order to determine which terms constitute part of the agreement.[249] According to the last shot rule, the party whose terms are the last in line, i.e. the ones which are fired last, get to be incorporated into the contract.[250] Even if the terms contained in the last form contain additional or different terms that materially alter the contents of the preceding form, as per the last shot rule, they can still come to constitute the terms of the contract. For this to happen, the other party must conduct itself in a manner which can be interpreted as amounting to acceptance of the terms contained in the last form.[251] Usually, the mode of acceptance will be through performance (whether complete or partial) of the party who received the last form.[252]

[248] Fejös, "Battle of Forms under the Convention on Contracts for the International Sale of Goods (CISG): A Uniform Solution?," 118 (see n. 215); Kröll, Mistelis, and Viscasillas, *UN Convention on Contracts for the International Sale of Goods (CISG) – Commentary*, 289 (see introduction, n. 44); Schlechtriem and Schwenzer, *Commentary on the UN Convention on the International Sale of Goods (CISG)*, 348 (see introduction, n. 44); UNCITRAL, *UNCITRAL Digest of Case Law on the United Nations Convention on Contracts for the International Sale of Goods*, 99 (see chap. 1, n. 108).

[249] Ibid.

[250] Kröll, Mistelis, and Viscasillas, *UN Convention on Contracts for the International Sale of Goods (CISG) – Commentary*, 290 (see introduction, n. 44); Schlechtriem and Schwenzer, *Commentary on the UN Convention on the International Sale of Goods (CISG)*, 348 (see introduction, n. 44).

[251] Schlechtriem and Schwenzer, *Commentary on the UN Convention on the International Sale of Goods (CISG)*, 349 (see introduction, n. 44).

[252] Wildner, "Art. 19 CISG," 5 (see n. 216).

To illustrate this approach, one can turn to the *Cashmere sweaters case*.[253] A seller from Italy made several deliveries of cashmere sweaters to a buyer from Germany. The buyer's orders provided that the Standard Conditions of the German Textile and Clothing Industry would be incorporated into the agreement. All of the seller's order confirmations had its General Sale and Delivery Conditions in the Contractual Relationship with Foreign Customers attached to them. The seller sued the buyer for non-payment whereas the buyer sought to set-off the seller's claim for non-payment by arguing that it had suffered damages as a result of the sweaters' non-conformity. The seller was categorically against set-off, citing the Standard Conditions of the German Textile and Clothing Industry. These contained a provision prohibiting the contracting parties to exercise set-off. The court sided with the seller, opining that the buyer had accepted the Standard Conditions of the German Textile and Clothing Industry "by carrying through with the contract."[254] The *Cashmere sweaters case* is certainly not a lone wolf as there are other courts (and arbitral tribunals) that have expressed their support for the last shot rule.[255]

[253] Cashmere sweaters case, No. 7 U 4427/97 (Oberlandesgericht München 1998), https://cisgw3.law.pace.edu/cases/980311g1.html.

[254] Ibid.

[255] Norfolk Southern Railway Company v. Power Source Supply, Inc., No. 07-140- JJf (U.S. District Court for the Western District of Pennsylvania 2008), http://cisgw3.law.pace.edu/cases/080725u1.html; Roser Technologies, Inc. v. Carl Schreiber GmbH, No. 11cv302 ERIE (United States District Court, Western District of Pennsylvania 2013), http://cisgw3.law.pace.edu/cases/130910u1.html; Arbitral award No. 8611 (Arbitration Court of the International Chamber of Commerce 1997), http://www.unilex.info/case.cfm?pid=1&do=case&id=229&step=FullText.

2.2.1.3.2 Knock-out rule

Some have come to advocate the so-called knock-out rule.[256] In essence, when this rule gets applied, the conflicting terms get ousted, and the agreement is formed on the basis of terms on which the consensus exists.[257] Instead of conflicting terms, relevant provisions of the applicable sales law are used to fill the void.[258] Since the CISG does not provide for a knock-out rule, it has been a challenge for the decision-making authorities to provide satisfactory line of reasoning which would justify their conclusion.[259]

Les Verreries de Saint Gobain v. Martinswerk, a decision from the French Court of Cassation, can be used as a quintessential example of the knock-out approach.[260] A buyer from France ordered aluminia from a German seller. Its general conditions of purchase were enclosed with the order, and they provided that, in case of a dispute, the French courts would have jurisdiction. The seller dispatched a confirmation of order, which, in turn, contained a forum selection clause, stating that the German courts would have jurisdiction in case of a dispute. The court, relying on Article 18 and Article 19, held that the parties made no enforceable forum selection clause, and hence jurisdiction had to be determined in accordance with the European Community Convention on Jurisdiction and the Enforcement of Judgments in Civil and

[256] Kröll, Mistelis, and Viscasillas, *UN Convention on Contracts for the International Sale of Goods (CISG) – Commentary*, 289 (see introduction, n. 44); Schlechtriem and Schwenzer, *Commentary on the UN Convention on the International Sale of Goods (CISG)*, 349 (see introduction, n. 44).

[257] Wildner, "Art. 19 CISG," 7 (see n. 216).

[258] Ibid.

[259] Schlechtriem and Schwenzer, Commentary on the UN Convention on the International Sale of Goods (CISG), 350 (see introduction, n. 44).

[260] Société Les Verreries de Saint Gobain, SA v. Martinswerk GmbH, No. J 96-11.984 (Cour de Cassation 1998), http://cisgw3.law.pace.edu/cases/980716f1.html.

Commercial Matters.[261] However, although characterising the purported acceptance as a counter-offer in the sense of Article 19, the court still upheld the contract between the parties, i.e. it simply knocked out the conflicting forum selection clauses.[262] In addition to *Les Verreries de Saint Gobain v. Martinswerk*, there is a growing pool of cases favouring the knock-out rule.[263]

2.2.1.3.3 Alternative approaches

In addition to the traditional solutions discussed in the previous sections, other approaches have been advanced in practice as well.[264] An example of a court relying on a non-traditional approach can be observed in the *ICT v. Princen Automatisiering Oss* case.[265] A seller from the Netherlands and a buyer from Germany entered into an oral contract for the sale of computer software. Several days later, the buyer confirmed the agreement through a written order which provided that a German court would have jurisdiction in case of a dispute. The seller proceeded to confirm the written order by sending a fax to this end. The fax, among other things, stated that the seller's general terms would apply in relation to all the matters not addressed in the buyer's written order. After the dispute arose, the seller attempted to enforce its own forum selection clause. The Dutch court, however, held that it did not have jurisdiction because, in its view, the seller had assented to the terms found in the buyer's written order. Although the seller's purported acceptance

[261] Ibid.

[262] Ibid.

[263] Powdered milk case (see n. 242); Rubber sealing parts case, No. 17 U 22/03 (Oberlandesgericht Düsseldorf 2003), http://cisgw3.law.pace.edu/cases/030725g1.html; Printed goods case, No. 26 Sch 28/05 (Oberlandesgericht Frankfurt 2006), http://cisgw3.law.pace.edu/cases/060626g1.html.

[264] Fejös, "Battle of Forms under the Convention on Contracts for the International Sale of Goods (CISG): A Uniform Solution?," 122 (see n. 215); "Article 19," 99.

[265] ICT GmbH v. Princen Automatisiering Oss BV, No. 770/95/HE (Gerechtshof 's-Hertogenbosch 1996), http://cisgw3.law.pace.edu/cases/961119n1.html.

did not mirror the terms of the offer as it contained material alterations, the court still found that that the buyer's terms would be part of the agreement, plus the seller's terms which do not conflict with the buyer's terms.[266] Legal scholarship has described the approach taken by the court in the case at hand as a first shot rule.[267]

In *ISEA Industrie v. Lu*, a decision handed down by the Court of Appeal of Paris, the terms of both parties were ignored.[268] The terms that were on the backside of the order form did not bound the seller, with the court justifying this result by noting that the front side of the said form did not include a reference to the terms found on the back.[269] By the same token, the seller's terms that were part of the confirmation letter also were not heeded as the mere silence on the part of the buyer, in the court's view, could not amount to acceptance.[270]

As shown by the examples put forth above, the CISG case law suffers from inconsistency and non-uniformity in relation to the so-called 'battle of forms' issue. The courts (as well as arbitral tribunals) have not been able to formulate solutions under Article 19 of the CISG that would resonate in all jurisdictions in which the Convention has been adopted. While change in the approach is not unimaginable (e.g. Germany changed its approach to the 'battle of forms' issue from the 'last shot rule' to the 'knock-out rule' in its domestic law),[271] there is no sign in the available CISG case law that the convergence of positions is on-going. The divisions described

[266] Ibid.

[267] Fejös, "Battle of Forms under the Convention on Contracts for the International Sale of Goods (CISG): A Uniform Solution?," 122 (see n. 215).

[268] Sté ISEA Industrie S.p.A./Compagnie d'Assurances Generali v. Lu S.A./ et al., No. 95–018179 (Cour d'appel de Paris 1995).

[269] Ibid.

[270] Ibid.

[271] Wildner, "Art. 19 CISG," 10 (see n. 216).

above in relation to the 'battle of forms' issue have been present in the 1990s, and have persisted ever since.[272] The 'battle of forms' is far from being the only divisive topic in the CISG case law. We turn now to another equally divisive matter, which is the concept of reasonable time as put forth in Article 39(1) of the Convention.

2.2.2 Reasonable Time and Notice of Non-Conformity

Article 39(1) of the CISG states as follows:

> The buyer loses the right to rely on a lack of conformity of the goods if he does not give notice to the seller specifying the nature of the lack of conformity within a reasonable time after he has discovered it or ought to have discovered it.[273]

This provision of the CISG can prevent the buyer from exercising its rights stemming from the seller's failure to deliver the goods that conform to the contract. This situation will ensue if the buyer does not give notice to the seller in which the non-conformity is specified. Furthermore, the buyer has to give the said notice "within a reasonable time after he has discovered it or ought to have discovered it."[274]

Article 39(1) does not specify the time within which the notice ought to be sent, except for framing it within the notion of reasonableness. Furthermore, Article 39(1) lacks any mechanism which would allow the court or an arbitral tribunal to precisely calculate the said period of time. Instead, the starting point for the decision-makers is the concept of reasonable time. In abstract,

[272] Different approaches to the issue of conflicting standard terms ('battle of forms') can be spotted in the CISG case law from the 1990s that was cited in this Chapter, as well as in case law that came after the year 2000.

[273] "Annotated Text of CISG Article 39," Pace Law Albert H. Kritzer CISG Database, 2014, https://cisgw3.law.pace.edu/cisg/text/e-text-39.html.

[274] Ibid.

requiring that the notice containing the description of non-conformity be sent within a reasonable amount of time may seem sensible, but applying this requirement in practice has proven to be quite challenging. What constitutes reasonable time? Is it three days, one week, two weeks, or one month? How can one, even on a case-by-case basis, draw a precise dividing line between the period that is to be considered as being reasonable for the purposes of sending the notice of non-conformity, and the period that does not fall within this category? For even reasonable minds with similar viewpoints will often times disagree as to what constitutes a reasonable action, and let alone courts and arbitral tribunals dispersed all over the globe. It is no wonder that some scholars have characterised the standards such as reasonable time in the CISG as being vague.[275]

In practice, the concept of reasonable time as espoused under Article 39(1) has been subject to substantially differing interpretations in the CISG case law. Some have proceeded to assign a fixed period of time with the possibility of altering it if the circumstances of the case provide a satisfactory justification.[276] Others have not relied on any fixed time period as a starting point, but have made determinations on a strictly case-by-case basis.[277] It has also been noted in the scholarly writings that the meanings assigned to the concept of reasonable time in Article 39(1) of the CISG largely correspond to meanings found in the respective courts' national laws.[278] All in all, the end result has been non-uniformity in the application of Article 39(1) of the CISG, with the ensuing examples illustrating some of the different approaches that have surfaced in the case law.

[275] Gillette and Scott, "The Political Economy of International Sales Law," 474 (see chap. 1, n. 143).

[276] Ingeborg Schwenzer, Christiana Fountoulakis, and Mariel Dimsey, *International Sales Law: A Guide to the CISG* (Hart Publishing, 2012), 312-323.

[277] Ibid.

[278] Ibid. "[…]Article 39 CISG has also suffered from the tendency of national courts to interpret the notification requirements in accordance with the understanding under their domestic legal systems."

2.2.2.1 Reasonable Time as a Fixed Period of Time

A German scholar Ingeborg Schwenzer suggested that the concept of reasonable time as enshrined in Article 39(1) ought to be interpreted in a way so as to bridge the differences between the national counterparts of the same concept.[279] In essence, she noted that certain jurisdictions, such as Germany and Austria, follow a very strict approach in relation to giving notice for non-conformity.[280] Other jurisdictions, such as France and the United States, have a far more lenient position on the issue of providing notice for non-conformity as they allow longer time periods to pass before stripping the buyer off his rights that he or she has when the seller delivers non-conforming goods.[281] Schwenzer suggested that the inherent difference between different jurisdictions could be overcome by adopting a fixed time period which could then be adapted, if necessary.[282] She suggested that one month in international transactions would suffice, and this came to be known as the noble month approach.[283]

Several jurisdictions, especially Germanic ones, have shown sympathy towards this approach. In the *New Zealand mussels* case, a German buyer purchased New Zealand mussels from a Swiss seller.[284] The transaction took place in January, with the invoice dated 15 January. After an examination by the buyer, it turned out that the mussels had a high cadmium content. On

[279] Ingeborg Schwenzer, "Noble Month (Articles 38, 39 CISG) - The Story behind the Scenery," *European Journal of Law Reform* 7 (2005): 358; Daniel Girsberger, "The Time Limits of Article 39 CISG," *Journal of Law and Commerce* 25 (2005): 241.

[280] Ibid.

[281] Ibid.

[282] Ibid.

[283] Ibid.

[284] New Zealand mussels case, No. VIII ZR 159/94 (Bundesgerichtshof 1995), http://cisgw3.law.pace.edu/cases/950308g3.html.

7 February, the buyer informed the seller, but made no mention of the inadequate packaging. On 3 March, the buyer notified the seller of its intention to return the goods at the seller's expense, and only on this date did the buyer notify the seller about the inadequate packaging. Germany's Bundesgerichtshof held that the buyer could have ascertained that the packaging was inadequate within the first working week after receiving the goods.[285] Then, the court proceeded to note that, even if the noble month was to be given to the buyer, the notice would still fall outside of the one-month period.[286]

In the *Machine for producing hygienic tissues case*, the Bundesgerichtshof openly resorted to the noble month approach.[287] A German manufacturer purchased a paper machine from X. The machine was to be used for producing moist tissues. After dispatching semi-finished moist tissues to its purchaser, the purchaser notified the manufacturer that the tissues were covered in stains. Afterwards, the machine broke down on 26 April whereas the buyer notified the seller of non-conformity on 14 June. The German manufacturer assigned its claim against X to the purchaser of the non-conforming tissues, and the assignee, in turn, initiated proceedings against X. Among other things, at issue before the court was whether the notice sent by the buyer was timely. The court answered in the positive, opining that giving a notice seven weeks after a total loss of the machine in this particular case was not untimely.[288] Seven days were needed to determine how to proceed

[285] Ibid.

[286] Ibid.

[287] Machine for producing hygienic tissues case, No. VIII ZR 287/98 (Bundesgerichtshof 1999), http://cisgw3.law.pace.edu/cases/991103g1.html.

[288] Ibid.

further (e.g. whether to hire an expert to assess the situation, which expert to hire, etc.), plus two weeks for the expert's assessment, followed by a "regular one-month notice period."[289]

Switzerland's Bundesgericht has also shown support for the noble month approach. This can be observed in its *Used laundry machine case*.[290] A seller from Switzerland sold a used laundry machine to a German buyer. The delivery took place in July in 1996. In August and September of the same year, the buyer informed the seller of several defects that the machine had, but the seller failed to remedy them. The buyer, citing defects, did not pay the purchase price. Consequently, the seller turned to the court, asking that it be paid for the machine. While the focus of the case was on the specificity of notice for non-conformity and on the burden of proof, the court did touch upon briefly on the issue of reasonable time within which the notice ought to be sent.[291] In essence, the court approved the application of the "noble month" period – i.e. one week for examination of the goods, and then one month for giving notice.[292]

In Austria, an even shorter period than one month was put forth as a starting point in assessing the reasonable time concept as enshrined in Article 39(1) of the CISG. Namely, in the *Trekking shoes case*, a buyer from Austria entered into a contract with an Italian seller for the purchase of trekking shoes.[293] These were delivered in installments. Approximately three weeks after the last batch of shoes was delivered, the buyer notified the seller that the goods did not conform to the contract. The seller asked the buyer to pay the purchase price. The buyer, however,

[289] Ibid.

[290] Used laundry machine case, No. 4C.198/2003/grl (Bundesgericht 2003), http://cisgw3.law.pace.edu/cases/ 031113s1.html.

[291] Ibid.

[292] Ibid.

[293] Trekking shoes case, No. 1 Ob 223/99x (Oberster Gerichtshof 1999), http://cisgw3.law.pace.edu/cases/990827a3.html.

insisted that the seller take the goods back. The Austrian Supreme Court of Justice, while first noting that the CISG's requirements on the inspection of goods and giving notice of non-conformity are more lenient than their Austrian counterparts, still proceeded to give a narrow interpretation of Article 39:

> The reasonable period pursuant to Art. 39 CISG has to be adapted according to the circumstances. Insofar as no specific -- above mentioned -- circumstances speak for a shorter or longer period, one in fact must assume a total period of approximately 14 days for the examination and the notice.[294]

It is interesting to note that the Austrian court does not distinguish between the examination period, which is regulated by Article 38, and the notice period, which is regulated by Article 39, but it lumps them together.[295] This means that, as per the approach in the *Trekking shoes case*, the time period within which the buyer ought to send a notice of non-conformity is even shorter than two weeks.

2.2.2.2 Reasonable Time as an Open-Ended Standard

Some jurisdictions, however, were reluctant to adopt the so-called noble month approach, or to resort to any sort of fixed time period as a starting point. Instead, they continued to treat the reasonable time requirement under Article 39 as an open-ended standard. Examples of these jurisdictions include France and the United States.[296] Two cases will be put forth as an illustration.

[294] Ibid.

[295] Ibid.

[296] Ibid.

To showcase the French approach, a telling example is the case of *Schreiber v. Thermo Dynamique*.[297] A seller from Germany sold rolled metal sheets to a French company. The parties contemplated that the transaction would be carried out in installments. The first part of the order took place on 28 October while the last delivery was planned for 4 December. The initial tests to examine the goods were conducted on 9 and 11 November. Around twenty days later, the buyer notified the seller of non-conformity, stating that it decided to avoid the contract. Two weeks after that, the buyer sought to obtain the declaration of avoidance of the contract. The court of first instance dismissed the buyer's claim. Court of Appeal, however, reversed the lower court's decision, stating that the

> […] chronology of facts shows that the buyer had inspected the goods which it had received within a quick and normal period of time, bearing in mind the heavy handling of the plates called for, and some incompressible periods of time which the inspection required, and had warned its seller of the non-conformities that it deemed unacceptable, within a period sufficiently reasonable so that no forfeiture clause could be opposed to it.[298]

The Court of Cassation affirmed the decision of the appellate court, noting that

> […] the Court of Appeals only used its sovereign discretion in maintaining, after having recalled the chronology of the facts, that the buyer had inspected the goods in a prompt and normal period of time, bearing in mind the handling that the [goods] required and that [buyer] had alerted [seller] of the non-conformities within a reasonable time in the meaning of Article 39(1) CISG.[299]

[297] Société Karl Schreiber GmbH v. Société Thermo Dynamique Service et autres, No. P 97-14.315, Arrêt no. 994 D (Cour de Cassation 1999), http://cisgw3.law.pace.edu/cases/990526f1.html.

[298] Société Karl Schreiber GmbH v. Société Thermo Dynamique Service et autres, No. 94/18531 (Cour d'appel d'Aix-en-Provence 1996), http://cisgw3.law.pace.edu/cases/961121f1.html.

[299] Société Karl Schreiber GmbH v. Société Thermo Dynamique Service et autres (Cour de Cassation 1999) (see n. 297).

The United States courts have also been reluctant to assign any specific period to the concept of reasonable time as put forth by Article 39 of the CISG. For example, in *Shuttle Packaging Systems v. Tsonakis et al.*, the court noted the following:

> The wording of the Convention reveals an intent that buyers examine goods promptly and give notice of defects to sellers promptly. However, it is also clear from the statute that on occasion it will not be practicable to require notification in a matter of a few weeks. For this reason, the outer limit of two years is set for the purpose of barring late notices. In this case, there was ample reason for a delayed notification. The machinery was complicated, unique, delivered in installments and subject to training and on-going repairs. The Plaintiff's employees lacked the expertise to inspect the goods and needed to rely on Defendants' engineers even to use the equipment.[300]

On the whole, whether the courts in different jurisdictions have sought to look at the Article 39(1) reasonable time concept as a fixed period of time that can then be adjusted when circumstances of individual cases so justify, or whether they have simply perceived it as an open-ended standard, the overall application has been, to say the least, non-uniform.[301] As can be seen from the discussed cases, and from the literature, the range of the reasonable time for sending the

[300] Shuttle Packaging Systems, L.L.C. v. Jacob Tsonakis, INA S.A and INA Plastics Corporation, No. 1:01-CV–691 (U.S. District Court, Western District of Michigan, Southern Division 2001). http://cisgw3.law.pace.edu/cases/011217u1.html.

[301] Camilla B Andersen, "Article 39 of the CISG and Its Noble Month for Notice-Giving; A (Gracefully) Ageing Doctrine?," *Journal of Law and Commerce* 30 (2012): 185. "I think it fair to say that a certain timidity has dominated the subject in recent years in academia, and that case law has fragmented itself into regional approaches which belie the uniform nature of the CISG as it was intended." Ingeborg Schwenzer, "National Preconceptions That Endanger Uniformity," *Pace International Law Review* 19 (2007): 103. In this article Schwenzer focuses on Articles 38 and 39 of the CISG. She notes that the area they regulate is "a core area of the uniform law on international sales in which ensuring uniform interpretation has proven challenging." While there has been some evidence indicating the caution approximation of the CISG case law towards the 'noble month' approach, this has, in turn, "prompted a reaction from some Common Law representatives, for whom such a pre-determined period seemed utterly unacceptable."

notice of non-conformity has ranged from less than two weeks to four months, and sometimes even longer.[302]

It has to be noted that Article 39(1) of the CISG was never designed to yield uniform time periods for all the possible transactions; there can never be 'one size fits all' approach as not all goods are of the same nature, and not all defects are same. For instance, it has been argued that the reasonable time for sending a notice in relation to perishable goods ought to be immediate upon examination (which also needs to be performed immediately upon delivery).[303] Furthermore, if the defect is obvious and easily noticeable, this would justify a short notice period in comparison to a situation where non-conformity can only be established through a complex series of expert evaluations.[304] However, what is extremely problematic is the tendency of the courts to perceive the Article 39(1) reasonable time concept through the lenses of their respective domestic sales laws.[305] Thus, the reasonable time for them is that time that is in line with the tenets of their national sales laws approaches. When this happens, what we end up with is compartmentalisation of the CISG that requires studying different jurisdictions to see what type of a result can be expected there.

[302] Camilla Baasch Andersen, "The CISG in National Courts," 68 (see chap. 1, n. 119).

[303] Joseph Lookofsky, "The 1980 United Nations Convention on Contracts for the International Sale of Goods," in *International Encyclopaedia of Laws - Contracts* (The Hague: Kluwer Law International, 2000), 105, http://cisgw3.law.pace.edu/cisg/biblio/loo39.html.

[304] UNCITRAL, *UNCITRAL Digest of Case Law on the United Nations Convention on Contracts for the International Sale of Goods*, 177 (see chap. 1, n. 108).

[305] Schwenzer, Fountoulakis, and Dimsey, *International Sales Law*, 312 (see n. 276). "[…] Article 39 CISG has also suffered from the tendency of national courts to interpret the notification requirements in accordance with the understanding under their domestic legal systems."

Thus far two detailed examples of non-uniform application of the CISG have been discussed. What ensues is the elaboration of the third example; the concept of impediment beyond one's control as enshrined in Article 79(1) of the CISG.

2.2.3 Impediment Beyond the Party's Control

Article 79(1) of the CISG provides as follows:

> A party is not liable for a failure to perform any of its obligations if he proves that the failure was due to an impediment beyond his control and that he could not reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract or to have avoided or overcome it or its consequences.[306]

Therefore, when the conditions enumerated in Article 79(1) are met, the existence of an impediment will exclude the non-performing party from liability. The CISG, however, does not define the term impediment. It has been, therefore, the task of courts and arbitral tribunals to give it a specific, practical meaning. The outcome of this, at least thus far, has been far from uniform.[307] The main point of contention has been centered on the issue of whether the concept of impediment is virtually equivalent to impossibility or force majeure, or if it encompasses situations when the performance of the contract becomes overly burdensome as well.[308] Furthermore, for some the

[306] "Annotated Text of CISG Article 99," Pace Law Albert H. Kritzer CISG Database, 2014, http://cisgw3.law.pace.edu/cisg/text/e-text-79.html.

[307] Brandon Nagy, "Unreliable Excuses: How Do Differing Persuasive Interpretations of CISG Article 79 Affect Its Goal of Harmony?," *New York International Law Review* 26, no. 2 (2013), reprinted and available at https://web.law.asu.edu/Portals/31/Proof%20Draft%20CISG%2079%20Nagy.pdf. "Despite years of scholarship and court and arbitral decisions purportedly interpreting Article 79 without respect to the domestic legal doctrines it displaced, contradictions exist. Business transactions governed by the CISG must manage the uncertainties created by non-uniform treatment of several issues: what, exactly, constitutes an impediment; whether or not delivering non-conforming goods may be ever be excused; and when non-performance can be attributed to the actions of a third party."

[308] UNCITRAL, *UNCITRAL Digest of Case Law on the United Nations Convention on Contracts for the International Sale of Goods*, 374 (see chap. 1, n. 108).

emphasis is on the issue of whether a party relying on Article 79(1) has assumed the risk of the impediment, whether explicitly or implicitly.[309] Case law examples of these varying approaches will be presented next.

2.2.3.1 Impediment as a Concept Equivalent to Impossibility or Force Majeure

Some decisions have interpreted the concept of impediment as being essentially equivalent to impossibility or force majeure.[310] In the *Tomato concentrate case*, a seller from France sent a fax to a German buyer, seeking to ensure a sale of twenty truckloads of tomato concentrate.[311] The buyer proceeded by accepting the offer. However, the seller failed to deliver the promised number of truckloads, citing Article 79 and heavy rainfall as an excuse. The court did not accept the seller's arguments, noting that, in order to be excused under Article 79, the impediment to performance ought to satisfy the standard of impossibility.[312] While acknowledging the fact that the heavy rainfall did cause irreparable damage to the crops, and thus it reduced the crop yield, this still did not render the performance impossible.[313] In the court's view, this was so because the heavy rainfall did not destroy the entire crop, but it simply brought about the reduction in the crop output. Hence, the impediment was of such nature that the seller could have overcome it.[314]

[309] Ibid., 375.

[310] Vital Berry Marketing NV v. Dira-Frost NV, No. A.R. 1849/94, 4205/94 (Rechtbank van Koophandel Hasselt 1995), http://cisgw3.law.pace.edu/cases/950502b1.html; Iron molybdenum case, No. 1 U 167/95 (Oberlandesgericht Hamburg 1997), http://cisgw3.law.pace. edu/cases/970228g1.html;

[311] Tomato concentrate case, No. 1 U 143/95 and 410 O 21/95 (Oberlandesgericht Hamburg 1997), http://cisgw3.law.pace.edu/cases/970704g1.html.

[312] Ibid.

[313] Ibid.

[314] Ibid.

In *Nuova Fucinati v. Fondmetall International*, a seller from Italy and a Swedish buyer entered into a contract for the sale of ferrochrome.[315] The seller then refused to perform, and it sought to avoid the contract on the ground of economic hardship, i.e. the price of ferrochrome has increased by 30 percent. While the court found that the CISG was not applicable to the dispute at hand, it still did, in the *obiter dictum*, provide its view on what the result would be under the CISG:

> "[Article 79,] however, governs a different case - release from a duty made impossible by a supervening impediment not ascribable to a party, according to a rule similar to Article 1463 of the Civil Code."[316]

Therefore, the court interpreted Article 79 as virtually being equivalent to force majeure. Thus, it excluded concepts such as hardship which would, in essence, excuse the party for non-performance in cases of changed circumstances making the performance severely burdensome, but not impossible.[317] However, examples of interpreting the CISG as encompassing hardship are present in the Convention's case law, as will be shown next.

2.2.3.2 Impediment as a Concept Encompassing Hardship

A decision coming from the Belgian Court of Cassation, *Scafom v. Lorraine Tubes*, has managed to cause quite a stir, both in the world of academia and among the practitioners.[318] A buyer from the Netherlands concluded a series of contracts for the sale of steel tubes with the

[315] Nuova Fucinati S.p.A. v. Fondmetall International A.B., No. R.G. 4267/88 (Tribunale Civile di Monza 1993), http://cisgw3.law.pace.edu/cases/930114i3.html.

[316] Ibid.

[317] Ibid.

[318] Markus Petsche, "Hardship under the UN Convention on the International Sale of Goods," *Vindobona Journal of International Commercial Law & Arbitration* 19, no. 2 (2015): 147–70; Flechtner, "Uniformity and Politics," 200 (see. chap. 1, n. 55) "[…] a decision that represents the most aggressive and far-reaching use of this gap-filling methodology by a court to date."

French seller.[319] Following the conclusion of the contract, the market price of the steel tubes skyrocketed, increasing by approximately 70 percent.[320] The parties did not regulate the matter of sudden price fluctuations in their agreement.[321] The seller wanted to renegotiate the contract so that the price would reflect the current market trends while the buyer insisted that the goods be sold at the originally agreed upon price.[322]

The Court of Appeal of Antwerp got to entertain the case before it reached the Court of Cassation of Belgium.[323] The seller from France relied on the concept of hardship, citing it as a basis for renegotiation of the contract price. The applicable substantive law was the CISG, but the court found that the hardship was not settled in the CISG. Apparently, the court did not attempt to follow the mandate of Article 7(2) and solve the matter on the basis of general principles of the CISG.[324] Instead, it simply found that the issue of hardship in the case at hand ought to be governed by French law.[325] Although French law takes a very adverse stance towards the concept of hardship, the court still found that the parties ought to renegotiate the price. In the court's view, this conclusion was justified on the basis of the principle of good faith.[326]

[319] Scafom International BV v. Lorraine Tubes S.A.S., No. C.07.0289.N (Hof van Cassatie 2009), http://cisgw3.law.pace.edu/cases/090619b1.html.

[320] Ibid.

[321] Ibid.

[322] Ibid.

[323] Scafom International BV v. Lorraine Tubes S.A.S. (Hof van Beroep Antwerp 2007).

[324] Petsche, "Hardship under the UN Convention on the International Sale of Goods," (see n. 318).

[325] Scafom International BV v. Lorraine Tubes S.A.S, (see n. 323).

[326] Ibid.

The Court of Cassation of Belgium, while in essence yielding the same outcome, it changed the reasoning leading up to the final result.[327] It began its evaluation by noting that

> [c]hanged circumstances that were not reasonably foreseeable at the time of the conclusion of the contract and that are unequivocally of a nature to increase the burden of performance of the contract in a disproportionate manner, can, under circumstances, form an impediment in the sense of this provision of the treaty.[328]

The Court then found that, prior to resorting to any domestic sales law, an attempt should be made to first resolve the dispute on the basis of principles on which the CISG is based.[329] It proclaimed that these principles are contained in the Principles of International Commercial Contracts (better known as the UNIDROIT Principles).[330] Unlike the CISG, the UNIDROIT Principles have provisions that deal explicitly with hardship.[331] In instances where hardship is proven under the UNIDROIT Principles, the party in the disadvantageous position is entitled to seek renegotiations of the contract.[332] And the Court of Cassation of Belgium, by relying on the UNIDROIT Principles,

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[327] Scafom International BV v. Lorraine Tubes S.A.S., (see n. 319).

[328] Ibid.

[329] Ibid.

[330] Ibid.

[331] "Section 2: Hardship," in *UNIDROIT Principles of International Commercial Contracts 2016* (Rome: International Institute for the Unification of Private Law (UNIDROIT), 2016), 217. The 2016 version of the UNIDROIT Principles defines hardship in the same manner as the version from 2004 (that was available at the time the *Scafom* decision was rendered):

> "There is hardship where the occurrence of events fundamentally alters the equilibrium of the contract either because the cost of a party's performance has increased or because the value of the performance a party receives has diminished, and (a) the events occur or become known to the disadvantaged party after the conclusion of the contract; (b) the events could not reasonably have been taken into account by the disadvantaged party at the time of the conclusion of the contract; (c) the events are beyond the control of the disadvantaged party; and (d) the risk of the events was not assumed by the disadvantaged party."

[332] "Article 6.2.3," in *UNIDROIT Principles of International Commercial Contracts 2016* (Rome: International Institute for the Unification of Private Law (UNIDROIT), 2016), 223. As provided in the 2016 version of the UNIDROIT Principles, "[i]n case of hardship the disadvantaged party is entitled to request renegotiations."

found that the seller did have a right to request the renegotiation of the price under the CISG.[333] Consequently, this decision stands in stark contrast with the decisions discussed previously; those that hold that the CISG does not excuse the party from performing its obligations under the contract when there has been a change in circumstances making the performance extremely onerous.

Section 2.3, Section 2.4, and Section 2.5 have detailed three examples of non-uniform application of the CISG. Next, common observation regarding this threesome are put forth.

2.2.4 Some Observations Common to the Three Issues Discussed

On the whole, the assessment undertaken here of the CISG case law produced under Article 79(1) serves as yet another example of non-uniformity in the application of the Convention. In addition to the differing understandings of the concept of impediment, the courts and arbitral tribunals have struggled to stand in unison in relation to the issues of 'battle of forms' and the notion of reasonable time for sending a notice of non-conformity, as illustrated previously in this Chapter. However, these are not the only examples that one could give of non-uniform application of the CISG across different jurisdictions. Differing views on the Convention's other provisions could also be presented in greater detail. However, this endeavor would require dozens of pages to be filled. Ultimately, it is not the primary aim of this thesis to pinpoint instances of non-uniform application of the CISG, but to go several steps further; i.e. determine what is causing it, inquire if it is having negative consequences, and endorse potential tools for tackling it. Hence, it suffices if this Chapter only shows that non-uniformity in the application of the Convention is present.

The Chapter at hand has indeed succeeded in establishing what is perhaps obvious to some; i.e. that the CISG case law is fraught with instances of non-uniform application across different

[333] Scafom International BV v. Lorraine Tubes S.A.S., (see n. 319).

jurisdictions. The three examples presented here in detail can be used as an indication of a wider problem within the Convention. Namely, the CISG, as pointed out previously, relies quite extensively on open-ended standards that some portray as being vague.[334] Gillette and Scott, basing their observations on Van Alstine's article *Dynamic Treaty Interpretation,* have counted at least thirty one such instances; i.e. when the CISG puts forth a non-defined standard that is to be given practical meaning through application by courts and arbitral tribunals.[335] Van Alstine finds that "[i]n a number of individual provisions, the Convention nonetheless variously measures the parties' conduct from the perspective of a ['']reasonable person,['] [footnote omitted] defines rights or obligations with reference to what is ['']reasonable['] or ['']unreasonable,['] [footnote omitted] and requires certain actions or notices within a ['']reasonable" time.['']"[336]

One out of three examples of non-uniform application of the CISG presented in this Chapter has involved precisely what Van Alstine has described; Article 39(1) says that the party wishing to raise the non-conformity of the delivered goods must notify the other side about the nature of such non-conformity within a reasonable time. Moreover, the third example of non-uniform application of the CISG - the concept of impediment as enshrined in Article 79(1) - is as equally non-defined and imprecise as any measure of the parties' conduct based on reasonableness. Professor Honnold has viewed Article 79 as a whole in the following manner:

> In spite of strenuous efforts of legislators and scholars we face the likelihood that Article 79 may be the Convention's least successful part of the half-century of work towards international uniformity. This prospect calls for careful, detailed contract drafting to provide solutions to fit the commercial

[334] Gillette and Scott, "The Political Economy of International Sales Law," 474 (see chap. 1, n. 143).

[335] Ibid.

[336] Michael P Van Alstine, "Dynamic Treaty Interpretation," *University of Pennsylvania Law Review* 146, no. 3 (1998): 751.

> situation at hand. […] Those who are not able to solve the problem by contract must await the process of mutual criticism and adjustment by tribunals and scholars in the various jurisdictions.[337]

And as for the first example of non-uniform application of the CISG, while it does not involve open-ended standards, it still illustrates an issue for which the Convention allows room for differing solutions; i.e. the issue popularly known as the 'battle of forms.' Some matters, including the 'battle of forms,' were simply too divisive to be resolved directly in the Convention.[338] While the 'battle of forms' was not excluded from the scope of the application of the CISG, it was also not addressed head on in its provisions. Hence, it is simply one of those issues that is in the limbo; i.e. different arguments, all plausible under the Convention, can be advanced as to how one ought to deal with the 'battle of forms.' And variation of approaches, if employed by the courts and arbitral tribunals, inevitably, equates to non-uniform application.

Therefore, the three examples of non-uniformity in the application of the CISG discussed at length here can indeed serve as proof of non-uniform application of the Convention on their own. This is so because numerous other provisions of the CISG share the same traits as the ones analysed in the Chapter at hand. More precisely, just like the solutions to the 'battle of forms' have been sought through Article 19 of the CISG – which is not specifically designed to address it – so have several other issues been approached in the same manner. For example, there have been instances in the CISG case law where Article 7(1), albeit designed to manoeuvre the interpretation of the Convention, was used as a starting point to impose the duty to act in good faith on the parties

[337] John Honnold, *Uniform Law for International Sales under the 1980 United Nations Convention*, 3rd edition (The Hague: Kluwer Law International, 1999), 484, http://www.cisg.law.pace.edu/cisg/biblio/honnold.html.

[338] Winship, "The Hague Principles, the CISG, and the Battle of Forms," 154 (see n. 220).

themselves.[339] And just like reasonableness and impediment are open-ended (some would even say vague) concepts that have the potential to produce varying interpretations, so are many others that are found in the CISG.[340] Thus, it seems that the CISG has an in-built capacity to be applied in a non-uniform manner, especially in light of the fact that there is no final authority that can take on the divisive issues and favour a particular approach.

The findings reached thus far are reinforced when one examines the state of application of the CISG in specific jurisdictions. As will be shown, several authors, in examining the application of the Convention in their respective regions, have been vocal about adverse contributions to the uniformity endeavour. This will be discussed next.

2.3 STATE OF APPLICATION OF THE CISG IN SPECIFIC JURISDICTIONS

Some authors, in analysing the CISG case law of specific jurisdictions, have made comments about the state of affairs regarding the uniformity in the application of the Convention in those jurisdictions. A word of caution is due here. Singling out those jurisdictions here by no means denotes that they are the worst-performing ones. They are simply jurisdictions to which authors (often times themselves coming from those jurisdictions) have dedicated their time and energy in order to assess the quality of their courts' application of the CISG. Hence, these jurisdictions are to be treated simply as examples of a problem that is widespread and that is plaguing many other jurisdictions as well.

[339] Mushrooms case, No. Vb 94124 (Arbitration Court of the Chamber of Commerce and Industry of Budapest 1995), http://cisgw3.law.pace.edu/cases/951117h1.html.

[340] Gillette and Scott, "The Political Economy of International Sales Law," 474 (see chap. 1, n. 143).

One such jurisdiction is the United States. Namely, as mentioned in the previous Chapter, instances of courts in the United States that in this day and age are proclaiming that the CISG case law is scarce are still surfacing.[341] Moreover, where the language of the CISG tracks that of the UCC, it has been opined that the latter's case law can be used as an informative tool in the application of the former.[342] These views of the US courts have been severely criticised. For instance, Levasseur notes that "[m]ost of the federal courts' decisions have actually hidden behind the 'false' excuse that there is little CISG caselaw outside the U.S. caselaw on the CISG."[343] Moreover, Flechtner and Lookofsky were much stricter in their criticism when analyzing *Raw Materials v. Manfred Forberich*.[344] In this US decision the court, after acknowledging that the CISG was the governing law of the transaction by virtue of the parties' agreement, proceeded to analyse the defendant's *force majeure* defence through the lenses of the UCC.[345] The court justified this approach by siding with the plaintiff's position that, since Article 79 of the Convention (applicable when a *force mejure* defence is raised under the CISG) is similar in wording to its UCC counterpart §2-615, the latter can be of informative value to the former.[346] However, the court was not merely seeking inspiration in the UCC §2-615, but it was entirely ignoring the CISG and was

[341] Hesham Zaghloul Eldesouky, et al. v. Hatem Abdel Aziz, et al., No. 11- CV- 6986 (JLC), (see chap. 1, n. 116).

[342] Delchi Carrier, S.p.A. v. Rotorex Corp., No. Nos. 185, 717, Dockets 95-7182, 95-7186 (U.S. Circuit Court of Appeals (Second Circuit) 1995) http://cisgw3.law.pace.edu/cases/940909u1.html; Raw Materials Inc. v. Manfred Forberich GmbH & Co., KG, No. 03 C 1154 (U.S. District Court, Northern District of Illinois, Eastern Division 2004), http://cisgw3.law.pace.edu/cases/040706u1.html.

[343] Alain A. Levasseur, "United States of America," in *The CISG and Its Impact on National Legal Systems* (Munich: sellier european law publishers, 2008), 313.

[344] Harry M. Flechtner and Lookofsky Lookofsky, "Nominating Manfred Forberich: The Worst CISG Decision in 25 Years?," *The Vindobona Journal of International Commercial Law & Arbitration* 9 (2005): 199.

[345] Ibid., 203; Raw Materials Inc. v. Manfred Forberich GmbH & Co., KG., (see n. 342).

[346] Ibid.

basing its reasoning on the UCC and its case law.[347] Flechtner and Lookofsky vehemently disapproved this approach:

> The patently improper approach to interpreting and applying the ClSG taken by the U.S. District Court in *Manfred Forberich* is a depressing development that tends to bring international disrepute on the ClSG jurisprudence of U.S. courts. We sincerely hope the case is soon buried and forgotten, except perhaps as an example of an interpretational methodology to be avoided at all costs. Perhaps our nomination for the ClSG Silver Anniversary 'Razzie' will help further that goal.[348]

Besides the United States, for several other jurisdictions one can find works of reputable authors lamenting the state of affairs regarding the consistent and uniform application of the CISG. For example, Mazzacano has been very critical of the Canadian courts by stating the following:

> Instead of recognizing the Convention's "international character" and promoting uniformity, Canadian courts have reflexively invoked common law language and concepts that will only contribute to other conflicting interpretations of the Convention's rules. These interpretations are antithetical to purposes and general principles of the CISG. Should such a trend continue on a broader scale among signatory states, the purpose of the CISG would ultimately be defeated.[349]

And in Chile, as noted by Vargas Weil, the courts seem to be oblivious to the Convention:

> The Chilean courts seem to barely identify the CISG as the default law governing the international sales of goods, and when they do, they have had trouble establishing its applicability and demonstrate a poor understanding of

[347] Flechtner and Lookofsky, "Nominating Manfred Forberich: The Worst CISG Decision in 25 Years?" 204 (see n. 344); Raw Materials Inc. v. Manfred Forberich GmbH & Co., KG., (see n. 342).

[348] Flechtner and Lookofsky, "Nominating Manfred Forberich: The Worst CISG Decision in 25 Years?" 208 (see n. 344).

[349] Peter J. Mazzacano, "Canadian Jurisprudence and the Uniform Application of the U.N. Convention on Contracts for the International Sale of Goods," in *Review of the Convention on Contracts for the International Sale of Goods (CISG) 2005-2006* (Munich: sellier european law publishers, 2006), 91.

> its content. […] [U]nless an explicit valid choice of law is made, parties to international sales agreements litigating before Chilean domestic courts are exposed to an important level of uncertainty regarding the law that will govern their relation and the way it will be applied. Hence, it seems that parties involved in international trade can hardly rely on a sound autonomous and uniform application of the CISG in Chile, and, as a result, they have been deprived, in practice, from the benefits that uniform law aims to provide to transnational commerce where it is in force.[350]

Đorđević and Pavić have undertaken to examine the CISG case law of the following Balkan states: Bosnia and Herzegovina, Bulgaria, Croatia, Greece, FYR Macedonia, Montenegro, Romania, Serbia and Slovenia.[351] The emphasis of their work was on the scope and applicability of the CISG, with the aim being to determine "whether the uniform law of sales in the Balkans is really uniform, or remains so only on the paper".[352] In doing so, they have reached the following conclusion:

> As expected, some courts and arbitral tribunals […] applied domestic legislation where CISG should have been applied. Sometimes they disregarded the CISG completely. On other occasions its scope of application was unduly restricted, which paved way for some domestic provisions to creep in. Overall, the frequency of such mistakes was not surprising and was comparable to the picture one gets from studying case law of other regions worldwide.[353]

Overall, no matter whether one examines the state of application of the CISG by focusing on specific legal issues, or whether one confines the analysis to a specific jurisdiction (or a group of jurisdictions), it is evident that instances of non-uniformity in the application of the Convention

[350] Ernesto Vargas Weil, "Chilean High Courts Evidence a Lack of Familiarity with the CISG by Neglecting Its Application in an International Sale of Goods Case," *Uniform Law Review* 21, no. 1 (March 1, 2016): 143.

[351] Vladimir Pavić and Milena Đorđević, "The Scope and Sphere of Application of the CISG in the Balkans," in *Festschrift Für Helmut Rüßmann* (Saarbrücken: Juris, 2013), 887.

[352] Ibid., 888.

[353] Ibid., 916.

can always be swiftly located. But can this be used as a clear-cut indication that the mandate of Article 7(1) of the CISG has not been met? The answer to this question depends on the standard of uniformity against which the uniform application of the CISG is measured.[354] If one takes the standard of relative uniformity as a relevant benchmark, it is plausible to argue that the current state of affairs is satisfactory.[355] However, as discussed in the previous Chapter, this thesis will view the national law standard (that has been coined in this thesis) as the one towards which the CISG ought to strive for. Hence, it is only appropriate to test the instances of non-uniform application of the CISG discussed previously in this Chapter vis-à-vis the national law standard. And it is this analysis that ensues next.

2.4 CURRENT STATE OF UNIFORM APPLICATION OF THE CISG VIS-À-VIS THE NATIONAL LAW STANDARD

It would be impossible to argue that the current state of application of the CISG is such that it has reached the threshold required by the national law standard. To reiterate, the national law standard of uniformity asks that the CISG matches the level of uniformity that is on average achieved by the national laws the parties opt for to govern their transactions after excluding the application of the Convention.[356] Whether or not the CISG can ever reach this benchmark cannot be answered conclusively at this point in time. However, by setting the target this high, a pressure is exerted on those in charge of applying the Convention to dedicate more efforts towards its consistent application. Thus, one can expect that the level of uniformity in the application of the

[354] For a detailed discussion on the proposed standards of uniformity in the application of the CISG, please refer to Chapter I.

[355] Ibid.

[356] For a discussion on the national law standard, please refer to Chapter I.

CISG will be higher if a more demanding standard of uniformity is accepted as compared to a more lenient one (e.g. relative uniformity).

The three examples of non-uniform application of the CISG discussed in detail in the Chapter at hand ('battle of forms,' reasonable time within which the notice of non-conformity must be sent to the seller, and the concept of impediment) can also be used to show just how the CISG is lagging behind with the uniform application as compared to its national counterparts. Namely, while the solutions to legal problems espoused under the national sales laws may not always be the most appropriate ones for international transactions, they will generally not produce as many diverging views as the ones found under the CISG. For example, several approaches to the 'battle of forms' issue have been offered and applied under the Convention (i.e. last shot rule, knock-out rule, and alternative approaches).[357] While some commentators have proclaimed the knock-out rule as starting to emerge as victorious from the clash, we are still far away from being able to deem it as the general approach under the Convention.[358] In contrast, the national sales laws have been much more consistent in their treatment of the issue. Thus, in Germany the prevailing solution to the 'battle of forms' is the knock-out rule.[359] In the United States, the UCC also enshrines the knock-out rule.[360] The same applies for France while in the Netherlands the preferred way of

[357] For a discussion on various approaches to the 'battle of forms' issue, please refer to Section 2.1 of the present Chapter.

[358] Schlechtriem and Schwenzer, *Commentary on the UN Convention on the International Sale of Goods (CISG)*, 350 (see introduction, n. 44).

[359] Wildner, "Art. 19 CISG," 10 (see n. 216). "[S]ince the 1970s, the German Federal Supreme Court has no longer held on to the Last Shot Doctrine, but has followed the Knock Out Rule."

[360] Kevin C Stemp, "A Comparative Analysis of the Battle of the Forms," *Transnational Law & Contemporary Problems* 15 (2005): 245.

dealing with the 'battle of forms' is the first shot rule.[361] Naturally, this is not to say that in these jurisdictions their respective general approaches will always be blindly heeded. Exceptions will occur.[362] But normally, there will be no long-lasting divisions as found in the CISG case law.[363]

Similar observations can be made for the reasonable time within which the notice of non-conformity must be sent to the seller and for the concept of impediment. The corresponding rules in national sales laws that tackle these issues do not provoke as many differing views as are found in the CISG case law.[364] Thus, it seems that national sales laws, while often times being imperfect

[361] Rühl, "The Battle of the Forms: Comparative and Economic Observations," 199 (see n. 214); Louise Vytopil, "Contractual Control and Labour-Related CSR Norms in the Supply Chain: Dutch Best Practices," *Utrecht Law Review* 8 (2012): 162.

[362] Rühl, "The Battle of the Forms: Comparative and Economic Observations," 206 (see n. 214). "[I]t should be noted that the French Supreme Court itself departed from the knock-out rule in two cases."

[363] Stemp, "A Comparative Analysis of the Battle of the Forms," 244 (see n. 360). It must be noted that the UCC § 2-207 (Additional Terms in Acceptance or Confirmation) has been interpreted inconsistently across different jurisdictions in the US. The said section provides as follows:

> (1) A definite and seasonable expression of acceptance or a written confirmation which is sent within a reasonable time operates as an acceptance even though it states terms additional to or different from those offered or agreed upon, unless acceptance is expressly made conditional on assent to the additional or different terms.
> (2) The additional terms are to be construed as proposals for addition to the contract. Between merchants such terms become part of the contract unless: (a) the offer expressly limits acceptance to the terms of the offer; (b) they materially alter it; or (c) notification of objection to them has already been given or is given within a reasonable time after notice of them is received.
> (3) Conduct by both parties which recognizes the existence of a contract is sufficient to establish a contract for sale although the writings of the parties do not otherwise establish a contract. In such case the terms of the particular contract consist of those terms on which the writings of the parties agree, together with any supplementary terms incorporated under any other provisions of this Act.

However, the main culprit for the confusion surrounding the UCC § 2-207 lies in its poor drafting: "While Section 2-207(1) specifically references [‘]additional or different terms,[‘] Section 2-207(2) does not. Read literally, Section 2-207(2) only refers to [‘]additional terms[‘] stating that the additional terms in the acceptance are to be treated as proposals for addition to the contract, and that between merchants, such proposals will become part of the contract unless: (a) the offer expressly limits acceptance to its own terms; (b) the proposals would materially alter the contract; or (c) the offeror objects to the proposed terms. If (a), (b), or (c) is satisfied, the *additional* terms are stricken from the contract. What if the variant terms are not [‘]additional[‘] but [‘]different[‘]?[citation omitted] This is where the confusion and controversy begin."

[364] Schwenzer, Fountoulakis, and Dimsey, International Sales Law, 312 (see n. 276). "[…] Article 39 CISG has also suffered from the tendency of national courts to interpret the notification requirements in accordance with the understanding under their domestic legal system," thus making solutions under Article 39 far more varied than the ones found in domestic laws. Joern Rimke, "Force Majeure and Hardship: Application in International Trade Practice with Specific Regard to the CISG and the UNIDROIT Principles of International Commercial Contracts," in *Pace*

to govern international transactions, can offer a greater degree of uniform application of their provisions as compared to the CISG. All this serves as an indication of what is perhaps obvious to some; the current state of application of the CISG cannot be viewed as fulfilling the national law standard.

SUMMARY OF CHAPTER II

This Chapter has sought to put forth examples of non-uniform application of the CISG in order to illustrate that the Convention is not being applied in a sufficiently uniform manner. Section 2.1 noted that non-uniformity in the application of the Convention arises in two ways: (1) as to the scope of application of the CISG and/or (2) in relation to the application of the CISG's provisions. Section 2.2 focused on three select articles of the CISG, with an emphasis on three specific issues. Firstly, Article 19 and the issue that has come to be known as 'battle of forms' were entertained. Secondly, Section 2.2 focused on Article 39(1) and the concept of reasonable time within which the buyer ought to notify the seller that the delivered goods are non-conforming. And thirdly, Section 2.2 looked into Article 79(1) and the concept of impediment. In all three instances, it has been shown that the diverging interpretations of the Convention abound.

Section 2.3 examined the works of authors from different parts of the globe who have pinpointed applications of the CISG in their respective regions that are in discord with the principle of uniformity. Lastly, Section 2.4 turned to the national law standard, a benchmark suggested in Chapter I that would be appropriate for measuring the level of uniformity of the CISG. Section 2.4 noted that, while it may be true that national sales laws can in many instances be unsuitable for international transactions, they still have one major advantage over the CISG; they do not suffer

Review of the Convention on Contracts for the International Sale of Goods (Kluwer, 1999), 197-243, https://www.cisg.law.pace.edu/cisg/biblio/rimke.html.

from inconsistent and non-uniform application of its provisions as much as that is the case with the Convention.

Thus, one can only conclude the present Chapter on the following note; the mandate of Article 7(1) of the CISG formulated as the need to promote uniformity in its application has not been met thus far in the Convention's case law. But what are the causes of this situation? This Chapter has dealt with this issue only in the passing by noting that the CISG contains numerous open-ended standards that can potentially be subject (and have indeed been so) to varied interpretations. But this is not the only cause. The reasons why the CISG has not reached a high level of uniform application are many, and it is the next Chapter (i.e. Chapter III) that will seek to explain them.

CHAPTER III
3. CAUSES OF NON-UNIFORM APPLICATION OF THE CISG

Chapter II has put forth various examples from the CISG case law of non-uniform and inconsistent application of the Convention's provisions, showing that they are indeed pervasive. This state of affairs leads us to two important questions: (1) What are the causes of non-uniform application of the CISG? and (2) Is the non-uniform application of the CISG that is unfolding before our eyes simply a harmless anomaly, or an undesirable phenomenon with adverse consequences? The Chapter at hand will entertain the former question while Chapter IV will deal with the latter.

The causes of non-uniform application of the CISG will be divided into two categories. The causes listed under the first category can be labelled as 'internal causes,' i.e. those stemming from the design of the uniform sales law system. Therefore, their principal common trait is mirrored in the fact that they all stem from the inherent characteristics of the CISG and of the instruments and tools that are necessary for the Convention's functioning. The causes listed under the second category can be termed as 'external causes.' These causes do not produce non-uniform application of the CISG because of the way the uniform sales regime was designed. They do so because of the factors that exist separately from the design of the CISG system, and mainly involve the human factor. However, it has to be noted that the causes of non-uniform application of the CISG rarely act independently. Most of the times for instances of non-uniformity in the application of the Convention one can pinpoint to at least one or more causes.

Chapter III consists of three sections. Section 3.1 will explain what is meant by the expression 'design of the uniform sales law system.' This discussion is aimed to facilitate a better understanding of Section 3.2 which then will enumerate and analyse the internal causes of non-

uniform application of the CISG (i.e. those that are brought about as a result of the design of the uniform sales law system). This is followed by Section 3.3 which will lay out and examine the external causes of non-uniform application of the CISG. Lastly, Chapter III will offer concluding remarks.

3.1 DESIGN OF THE UNIFORM SALES LAW SYSTEM

With the creation of the CISG, not only were the substantive rules created to govern international sales, but in a way, a whole legal framework for international sales emerged. The term 'system' is used in this regard to convey the idea that the sales agreement to which the CISG applies is subject to a mechanism that will eventually lead to a decision on the dispute arising out of such an agreement. That mechanism comprises a network of rules on the (limited) scope of application of the CISG, substantive sales rules, interpretative rules, and procedural and enforcement aspects. Furthermore, one of the traits of the uniform sales law system is the fact that the path to amending it is immensely difficult, if not impossible.

3.1.1 Limited Scope of Application

The starting point of the CISG system are the rules on its scope of application. While the CISG itself does not put forth the definitions of the terms 'contract of sale' and 'goods,' the meaning of these terms can be deduced from several articles (i.e. the meaning of the term 'contract of sale' from Article 30 and Article 53; [365] the meaning of the term 'goods' from Articles 35 *et seq*[366]). As is evident from the rules governing its scope, the CISG is characterised by its limited

[365] Schlechtriem and Schwenzer, *Commentary on the UN Convention on the International Sale of Goods (CISG)*, 31 (see introduction, n. 44). "The general obligations arising under contracts envisaged by the Convention are established in Articles 30, 53 […]."

sphere of application. The Convention delineates to which types of sales it shall apply, and to which its reach shall not extend. It clarifies that it will apply to transactions in goods involving parties from different CISG contracting states, or in the alternative, when the rules of private international law lead to its application.[367] The foreign element of the sales contract must be observable "either from the contract or from any dealings between, or from information disclosed by, the parties at any time before or at the conclusion of the contract," otherwise the CISG will not apply.[368] The nationality of the parties or their civil or commercial character is not to be taken into consideration when deciding on the applicability of the CISG.[369] As per Article 2, certain sales are explicitly excluded from the CISG's scope[370] while in accordance with Article 4 and Article 5 certain matters fall outside of the CISG's sphere of application.[371] If the matter under the sales

[366] Ibid., 34. "In determining the scope of [the term 'goods] it is suggested that the interpretation of the [said concept] has to be made autonomously and the suitability of the rules on non-conformity (Articles 35 *et seq*) has to be the decisive criterion."

[367] "Annotated Text of CISG Article 1," (see chap. 1, n. 173). "(1) This Convention applies to contracts of sale of goods between parties whose places of business are in different States: (a) when the States are Contracting States; or (b) when the rules of private international law lead to the application of the law of a Contracting State. (2) The fact that the parties have their places of business in different States is to be disregarded whenever this fact does not appear either from the contract or from any dealings between, or from information disclosed by, the parties at any time before or at the conclusion of the contract. (3) Neither the nationality of the parties nor the civil or commercial character of the parties or of the contract is to be taken into consideration in determining the application of this Convention."

[368] Ibid.

[369] Ibid.

[370] "Annotated Text of CISG Article 2," Pace Law Albert H. Kritzer CISG Database, 2014, https://www.cisg.law.pace.edu/cisg/text/e-text-02.html. "This Convention does not apply to sales: (a) of goods bought for personal, family or household use, unless the seller, at any time before or at the conclusion of the contract, neither knew nor ought to have known that the goods were bought for any such use; (b) by auction; (c) on execution or otherwise by authority of law; (d) of stocks, shares, investment securities, negotiable instruments or money; (e) of ships, vessels, hovercraft or aircraft; (f) of electricity."

[371] "Annotated Text of CISG Article 4," Pace Law Albert H. Kritzer CISG Database, 2014, https://www.cisg.law.pace.edu/cisg/text/e-text-04.html. "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." "Annotated Text of CISG Article 5," Pace Law Albert H. Kritzer CISG Database, 2014, https://www.cisg.law.pace.edu/cisg/text/e-text-

contract falls within the CISG's scope of application, the decision-maker can proceed by applying the Convention's substantive rules.

3.1.2 Substantive Rules

Part II and Part III of the CISG contain the substantive rules for international sales contracts.[372] Part II is concerned with the formation of the contract while Part III puts forth the rules applicable to the post-formation period; i.e. obligations of the seller and of the buyer, passing of risk, etc.[373] Naturally, all rules, including the substantive ones, are subject to interpretation, which in turn requires its own rules. The CISG, to a certain extent, does contain interpretative rules as well.

3.1.3 Interpretative Rules

In order for the substantive rules to be practically applied, the CISG provides for interpretative rules. More precisely, while Article 7 states how the substantive rules of the CISG ought to be applied and interpreted,[374] Article 8 and Article 9 direct the decision-maker as to how to ascertain the contents of the sales contract. Article 8 stipulates that the statements and conduct of a party to a sales contract are to be viewed in accordance with the intent of that party.[375] If no

05.html. "This Convention does not apply to the liability of the seller for death or personal injury caused by the goods to any person."

[372] "United Nations Convention on Contracts for the International Sale of Goods," (see n. 154).

[373] Ibid.

[374] For a detailed discussion of Article 7 of the CISG, please refer to Chapter I.

[375] "Annotated Text of CISG Article 8," Pace Law Albert H. Kritzer CISG Database, 2014, https://www.cisg.law.pace.edu/cisg/text/e-text-08.html. "(1) For the purposes of this Convention statements made by and other conduct of a party are to be interpreted according to his intent where the other party knew or could not have been unaware what that intent was. (2) If the preceding paragraph is not applicable, statements made by and other conduct of a party are to be interpreted according to the understanding that a reasonable person of the same kind as the other party would

intent can be established, then the decision-maker has to apply the reasonable person standard in order to evaluate the party's statements and conduct.[376] As for Article 9, it guides the decision-maker in determining to what extent the parties are bound by the previous usage and practices that they had established amongst themselves.[377] It also enables the decision-maker to deem incorporated into the contract the usage that is relevant and prevalent in the parties' field of trade.[378]

3.1.4 Procedural Rules and Enforcement Aspects

In terms of procedural rules and enforcement aspects, these are naturally not provided for in the CISG. The CISG is primarily concerned with putting forth the substantive rules. However, an important aspect of the CISG system is the fact that it is the national courts[379] and arbitral tribunals[380] that get to apply the CISG's provisions. In the process of doing that, the courts are bound to apply the procedural rules of the forum while the arbitral tribunals will apply the relevant

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have had in the same circumstances. (3) In determining the intent of a party or the understanding a reasonable person would have had, due consideration is to be given to all relevant circumstances of the case including the negotiations, any practices which the parties have established between themselves, usages and any subsequent conduct of the parties."

[376] Ibid.

[377] "Annotated Text of CISG Article 9," Pace Law Albert H. Kritzer CISG Database, 2014, https://www.cisg.law.pace.edu/cisg/text/e-text-09.html. "(1) The parties are bound by any usage to which they have agreed and by any practices which they have established between themselves. (2) The parties are considered, unless otherwise agreed, to have impliedly made applicable to their contract or its formation a usage of which the parties knew or ought to have known and which in international trade is widely known to, and regularly observed by, parties to contracts of the type involved in the particular trade concerned."

[378] Ibid.

[379] Schlechtriem and Schwenzer, *Commentary on the UN Convention on the International Sale of Goods (CISG)*, 19 (see introduction, n. 44). "Upon the entry into force of the CISG Contracting States are bound by public international law to apply its provisions within the anticipated sphere of the Convention. [footnote omitted] State courts within Contracting States therefore do not apply the CISG as foreign law or international law but as unified State law."

[380] Ibid., 23. "[T]he CISG may be applicable in arbitral proceedings either by choice of the parties or by choice of the arbitral tribunal."

arbitration rules. Since the courts and arbitral tribunals, together with their procedural rules, constitute a pivotal link in transposing the provisions of the CISG from the abstract into the concrete, they all form part of the CISG system.

3.1.5 The (Impossible) Path to Amending the CISG

The design of the uniform sales law system, as will be seen in the ensuing Section, yields several causes of the non-uniform application of the CISG. However, it would be futile to argue that the problem lies in the central element of the system – which is the CISG itself - and that, consequently, changes in the CISG would be necessary. This line of reasoning could only be viable if one could show that a better-functioning convention could have been created instead, or that a more effective replacement could be instituted today. With the economic, political and cultural constraints that existed at the time of its drafting and adoption, the CISG was the optimal outcome that could have been achieved.[381] Thirty-eight years later on, the situation is still not ripe for any kind of revision of the CISG. One could only argue that the environment for any endeavour relating to a binding international sales law is less favourable than it was four decades ago. This is evidenced by a strong opposition from the US and other countries to the Swiss proposal put forth at the 45th session of UNCITRAL.[382] The said proposal called for the assessment of the CISG's performance and a possibility of further unification and harmonisation of contract law.[383]

[381] Honnold, *Documentary History of the Uniform Law for International Sales*, (see chap. 1, n. 73). The bulk of the CISG's *travaux préparatoires* has been organised by Prof. Honnold in this book, and it shows just how divisive and gruelling the deliberations were leading up to the adoption of the CISG.

[382] Michael J. Dennis, "Modernizing and Harmonizing International Contract Law: The CISG and the UNIDROIT Principles Continue to Provide the Best Way Forward," *Uniform Law Review* 19, no. 1 (2014): 114.

[383] "Possible Future Work in the Area of International Contract Law - Proposal by Switzerland on Possible Future Work by UNCITRAL in the Area of International Contract Law," United Nations Commission on International Trade Law Forty-Fifth Session (New York, July 25, 2012), 1-8.

Therefore, as no political will exists (and it will most probably lack in the foreseeable future as well) either for revision of the CISG or for a comprehensive replacement with another uniform law instrument, it would be futile to argue that causes of non-uniform application stemming from the design of the CISG ought to be remedied by altering the central element of that design. Instead, a viable option is to explore options that would not require amending or replacing the CISG. This issue will be explored in detail in Chapter VI of this thesis. What ensues next is a discussion of the causes of non-uniform application of the CISG that stem from the design of the uniform sales law system; i.e. the internal causes.

3.2 INTERNAL CAUSES OF NON-UNIFORM APPLICATION OF THE CISG

The causes of non-uniform application of the CISG that stem from the design of the uniform sales law system (i.e. internal causes) include the following: (1) exclusion of certain matters from the CISG's scope of application, (2) lack of uniform interpretative methodology, (3) official and unofficial translations of the CISG, (4) increased reliance on legal standards, (5) reservations and (6) lack of a final authority.

3.2.1 Exclusion of Certain Matters from the CISG

The aim of the uniform sales law project was never intended to create a comprehensive and all-encompassing sales law.[384] This, both during the time when the drafting of the CISG took place and in today's time, would be an unimaginable feat.[385] The nation states still very jealously protect

[384] Harry M. Flechtner, "The U.S. Experience with the UCC and the CISG: Some Insights for the Proposed CESL," in *CISG Vs. Regional Sales Law Unification: With a Focus on the New Common European Sales Law* (Munich: sellier european law publishers, 2012), 21.

[385] Ibid.

their national laws as a direct expression of their culture and identity.[386] Any kind of meddling with the national laws, be it a delegation of the law-making power to a supranational entity or strive to create uniform laws that would replace or supplement the national laws, carries with it the danger of being met with fervent resistance and scepticism from the states. It is in the light of this reality that the CISG has managed to achieve the almost unimaginable result; i.e. to create uniform sales rules applicable across an array of jurisdictions.

However, in the light of that same reality, the uniform sales law project behind the CISG could not have as its goal the creation of a uniform instrument that would comprehensively and exhaustively deal with all the aspects that arise out of a sales agreement. Consequently, the rules put forth by the CISG cover only certain sales matters while leaving others to be dealt with usually by using the relevant national laws.

Some matters are expressly excluded from the CISG's scope. As already pointed out, Article 2 of the CISG explicitly states that consumer sales, auction sales, sales on execution or otherwise by authority of law, sales of stocks, shares, investment securities, negotiable instruments and money, sales of ships and aircraft, and sales of electricity are all excluded from the CISG's scope of application.[387] When the substantial part of the materials that the seller needs to manufacture goods for the buyer are actually supplied by the latter, then such a transaction will not

[386] Souichirou Kozuka, "The Economic Implications of Uniformity in Law," *Uniform Law Review* 12, no. 4 (2007): 683. Kozuka notes that "[a]lthough some of [the uniform law] instruments have been ['']successful['] (in that they are adhered to by many States [footnote omitted]) most of them have attracted only a small number of States. The conclusion that can be drawn is that – contrary to the popular notion held in the nineteenth century – States have failed to take much interest in the unification of law." Emanuela Carbonara and Francesco Parisi, "The Paradox of Legal Harmonization," *Public Choice* 132, no. 3 (2007): 369. "[C]ountries seem to lag behind in the process of legal harmonization and unification. Legal systems remain substantially different in space. Countries are attached to their legal traditions, which are perceived to reflect the norms and accepted usages of their citizens, guaranteeing a stable environment where economic agents could produce and trade with other national partners."

[387] "Annotated Text of CISG Article 2," (see n. 370).

be considered as sale under the CISG.[388] Thus, it will fall outside of the CISG's scope of application. The CISG will also not apply to a contract which in its preponderance regulates services, with the sale of goods being its secondary concern.[389] Article 4 of the CISG further excludes matters dealing with the validity of the contract and the effect that the contract might have on the property in the goods sold.[390] Article 5 of the CISG stipulates that the CISG will not be applicable to instances when liability on the part of the seller is imputed due to death or personal injury caused by the goods he or she had sold.[391]

Some matters are not expressly excluded from the CISG's scope, but the CISG is, nevertheless, inadequate to address them. These matters are referred to as external gaps (also known as *lacunae praeter legem*),[392] and include varied issues such as capacity of the parties, defects in consent, assumption of debt, etc.[393] When faced with external gaps, the correct approach by the courts and arbitral tribunals would be to find solutions directly outside of the CISG (i.e. the courts would probably refer to a relevant national sales law whereas the arbitral tribunals might have more manoeuvring room, and could potentially opt for a legal instrument such as the

[388] "Annotated Text of CISG Article 3," Pace Law Albert H. Kritzer CISG Database, 2014, http://www.cisg.law.pace.edu/cisg/text/e-text-03.html. "(1) Contracts for the supply of goods to be manufactured or produced are to be considered sales unless the party who orders the goods undertakes to supply a substantial part of the materials necessary for such manufacture or production. (2) This Convention does not apply to contracts in which the preponderant part of the obligations of the party who furnishes the goods consists in the supply of labour or other services."

[389] Ibid.

[390] "Annotated Text of CISG Article 4," (see n. 371).

[391] "Annotated Text of CISG Article 5," (see n. 371).

[392] McMahon, "Differentiating between Internal and External Gaps in the U.N. Convention on Contracts for the International Sale of Goods," 1002 (see chap. 1, n. 54).

[393] Carlo H. Mastellone, "Sales-Related Issues Not Covered by the CISG: Assignment, Set-off, Statute of Limitations, Etc., under Italian Law" (45th UIA Congress - Working Session of the International Sale of Goods Commission, Torino, 2001), https://www.cisg.law.pace.edu/cisg/biblio/mastellone.html.

UNIDROIT Principles or the Principles of European Contract Law (PECL)). [394]

Some matters do fall within the purview of the CISG, but the Convention fails to provide a direct solution (*lacunae intra legem*).[395] When the courts and arbitral tribunals entertain such matters, the correct line of action is to refer to Article 7(2) of the CISG, and seek to keep the matter in question within the ambits of the Convention.[396] This is done by resorting to the principles on which the CISG is based.[397] However, in the absence of such principles, one has no other choice but to make use of the rules of private international law, which then are likely to lead to the application of one of the national laws.[398] Therefore, explicit exclusions, external gaps and internal gaps for whom no appropriate CISG general principle can be located all have one thing in common; they are to be resolved not applying the Convention, but by applying some other set of rules, most probably that contained in one of the national sales laws.

It must be noted, however, that often times it is not easy to establish whether a particular matter constitutes an external gap or an internal gap.[399] Furthermore, the process of determining whether appropriate general principles exist that would enable the court or arbitral tribunal to maintain the matter within the boundaries of the Convention can, and frequently does, produce diametrically opposing views.[400] In other words, the border is often blurred and complex, and thus

[394] McMahon, "Differentiating between Internal and External Gaps in the U.N. Convention on Contracts for the International Sale of Goods," 1003 (see chap. 1, n. 54).

[395] Ibid., 1002.

[396] Ibid; "Annotated Text of CISG Article 7," (see introduction, n. 48).

[397] Ibid.

[398] Ibid.

[399] Ibid., 1003.

[400] Camilla Baasch Andersen, "General Principles of the CISG -- Generally Impenetrable?," in *Sharing International Commercial Law across National Boundaries: Festschrift for Albert H. Kritzer on the Occasion of His Eightieth BirthdayS* (Wildy, Simmonds & Hill Publishing, 2008), 32, http://cisgw3.law.pace.edu/cisg/biblio/

one is not always certain on which side of the border one is treading. Therefore, the manner in which the delineation has been made between matters that are to be governed by the Convention and those that are not has certainly contributed to non-uniformity in the application of the CISG.

There have been attempts in the scholarly realm, and they are still ongoing, to argue that the CISG ought to be interpreted, whenever possible, in a manner that would enable external gaps to fall under its umbrella.[401] For example, Bonell and Felemegas have advocated this approach:

> "It follows that for the interpretation of the CISG in general – not only in the case of ambiguities or obscurities in the text but also in the case of gaps *praeter legem* – 'courts should to the largest possible extent refrain from resorting to the different domestic laws and try to find a solution with the Convention itself.'"[402]

They justify this, unsurprisingly, by endorsing the view that the ultimate goal ought to be the uniform application of the rules put forth by the CISG. In essence, their position is based on the premise that the more matters the CISG encompasses, the less of them will be subject to the national sales law regimes.[403] Thus, non-uniformity that arises by applying different national laws to international sales would be at least partially remedied. This approach is far from being universally accepted. More precisely, it has been criticised on the ground that it is not in line with

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andersen6.html. "In the harsh light of hindsight, these general principles, however nobly envisioned, can be said to be misplaced, as they have proven more trouble than they have solved. […] Even despite the thorough cataloguing in recent scholarship, there is little support in case law to indicate that general principles can help to promote similarity in results as they were intended to do. On the contrary, they can be said to promote non-uniformity because they allow too much flexibility in the application of the CISG." Michael Bridge, "Uniform and Harmonized Sales Law: Choice of Law Issues," in *International Sale of Goods in the Conflict of Laws* (Oxford University Press, 2005), 938. "Extracting uncodified principles from within the body of Vienna Convention [footnote omitted] is a highly subjective exercise […]."

[401] Flechtner, "Uniformity and Politics, 198 (see chap. 1, n. 55).

[402] Ibid., 199; Michael Joachim Bonell, "Article 7," in *Commentary on the International Sales Law: The 1980 Vienna Sales Convention* (Milan: Giuffrè, 1987), 65–94, https://www.cisg.law.pace.edu/cisg/biblio/bonell-bb7.html; Felemegas, "Introduction,", 23 (see chap. 1, n. 141).

[403] Flechtner, "Uniformity and Politics," 195 (see chap. 1, n. 55).

the basic trait of the CISG, which is that it is a treaty of "limited scope and sphere of application".[404] Flechtner fears that the approach propagated by Bonell and Felemegas would turn "the general principles into a kind of gap-filling 'black hole' that, in the name of uniformity, draws in all issues and allows none to escape".[405]

Flechtner's position regarding the issue whether the CISG ought to apply to external gaps seems to be a healthier one. Aiming to artificially expand the CISG's scope of application would not only fail to contribute to the aim of attaining the uniform application of the CISG's rules, but would actually be counterproductive to this end. The reasons for this are twofold.

Firstly, as already noted, the CISG does not provide a clear and intuitive method for gap-filling. Using Art. 7(2), and resorting to general principles in order to resolve issues that the CISG was not designed to address in the first place does not guarantee that these issues will be uniformly resolved under the CISG. It is one thing to push an issue under the CISG's umbrella, and a completely different one to ensure that the final result of this push is uniform.

Secondly, as visible from Flechtner's critique, the general characteristic of the CISG is that it is a treaty of limited application. One needs not tread further than the plain text of the CISG. The CISG explicitly envisages that for certain matters resort to national law is unavoidable. Both Art. 7(2), which determines when the aid of private international law ought to be sought, and explicit exclusions, demonstrate that the CISG is a treaty of limited application. Applying the CISG in discord with this would mean going against its clear and unambiguous text. Therefore, the position propagated by Bonell and Felemegas would, at best, only be able to conquer a small niche as most judges and arbitrators would be reluctant to go against the clear and unambiguous text of the CISG.

[404] Flechtner, "The U.S. Experience with the UCC and the CISG: Some Insights for the Proposed CESL," 21 (see n. 384).

[405] Flechtner, "Uniformity and Politics," 196 (see chap. 1, n. 55).

This small niche would, as a result, be in disharmony with the approach used by the majority, hence causing non-uniform application of the CISG's rules. Between the option to defy the clear text of the CISG and the option to abide by its unambiguous provisions, it is safe to assume that the majority would opt for the latter.

3.2.2 Lack of Uniform Interpretative Methodology

The CISG interpretative methodology is contained in Article 7 of the CISG. However, upon a closer look at this methodology it becomes evident that it does not equip the decision-maker with a sufficiently precise method to interpret the Convention's provisions. More precisely, Article 7 of the CISG "describes the method of interpretation only vaguely and formulates aims of interpretation rather than a precise method […]".[406] There is nothing in the CISG that could guide the decision-maker with sufficient precision in determining the priorities and hierarchies of different methods of interpretation.[407] Some opine that no hierarchy is necessary, and that several methods of interpretation ought to be used in order to confirm the correct interpretation of a particular CISG provision.[408] From this it follows that the CISG lacks a "CISG-specific method of interpretation."[409] This, in turn, has been one of the causes of non-uniform application of the CISG. The national courts have not been receptive to the efforts by the scholarly community to formulate an interpretative methodology specific to the CISG, but "[i]nstead, they predominantly

[406] Ulrich Magnus, "Tracing Methodology in the CISG: Dogmatic Foundations," in *CISG Methodology* (Munich: sellier european law publishers, 2009), 52.

[407] Larry A. DiMatteo and André Janssen, "Interpretive Methodologies in the Interpretation of the CISG," in *International Sales Law: A Global Challenge* (New York: Cambridge University Press, 2014), 79.

[408] Ibid., 88.

[409] Magnus, "Tracing Methodology in the CISG: Dogmatic Foundations," 52 (see n. 406).

apply national interpretative methods to the [Convention.]"[410]

It has to be noted, however, that the scholarly efforts to yield a CISG methodology of interpretation have also not been uniform in their entirety. Nevertheless, some aspects of the CISG interpretative methodology have managed to attain uniformity. More precisely, literal interpretation has managed to establish itself as the starting point of interpreting the CISG's provisions.[411]

However, what happens if the literal interpretation proves inadequate or needs to be supplemented? From this point on, various methods and tools have been offered by the scholarly community. In Schlechtriem's and Schwenzer's seminal *Commentary* several methods of interpretation are put forth, but no attempt is made to establish a hierarchy between them. Among the discussed methods are the *travaux préparatoires*.[412] The diplomatic history of the CISG provides extensive information showcasing the debates and documents of the entire drafting process.[413] One of the most valuable documents that emerged from the drafting process is certainly the Secretariat Commentary presented to UNCITRAL in 1978, two years before the adoption of the final text.[414] This text is closest to what might be considered an official commentary on the

[410] DiMatteo and Janssen, "Interpretive Methodologies in the Interpretation of the CISG," 80 (see n. 407).

[411] Ibid., 53; Kröll, Mistelis, and Viscasillas, *UN Convention on Contracts for the International Sale of Goods (CISG) - Commentary*, 125 (see introduction, n. 44).

[412] Schlechtriem and Schwenzer, *Commentary on the UN Convention on the International Sale of Goods (CISG)*, 130 (see introduction, n. 44).

[413] Honnold, *Documentary History of the Uniform Law for International Sales*, (see chap. 1, n. 73).

[414] "Guide to CISG Article 1 - Secretariat Commentary (Closest Counterpart to an Official Commentary) - Guide to the Use of This Commentary," Pace Law Albert H. Kritzer CISG Database, 2006, https://cisgw3.law.pace.edu/cisg/text/secomm/secomm-01.html. "To the extent it is relevant to the Official Text, the Secretariat Commentary on the 1978 Draft is perhaps the most authoritative source one can cite. It is the closest counterpart to an Official Commentary on the CISG."

CISG.[415] Some, however, are sceptical of the use of legislative history, or *travaux préparatoires* in the process of interpretation of the CISG as it often times is not conclusive.[416] Other methods of interpretation discussed in the Schlechtriem's and Schwenzer's *Commentary* include methods of public international law, comparative law, and uniform projects.[417]

Magnus, in his discussion of the CISG interpretative methodology opines that the wording ought to be the first step in interpreting the Convention.[418] He then proceeds to examine the extent to which contextual interpretation can be used in interpreting the CISG.[419] The contextual interpretation generally refers to "draw[ing] conclusions from the systematic position of a provision in the CISG for the meaning of that provision," and Magnus opines that it can be an important aid in the process of interpreting the Convention.[420] Furthermore, he seems to back the view that legislative history "has regularly less weight for the interpretation than the wording and purpose".[421] Magnus also observes that, according to some authors, purposive interpretation ought to be the most important one.[422] Other methods of interpretation discussed by Magnus include comparative method of interpretation and regional interpretation,[423] and he stresses as well the fact

[415] Ibid.

[416] Joseph M. Lookofsky, *Understanding the CISG: A Compact Guide to the 1980 United Nations Convention on Contracts for International Sale of Goods* (Kluwer Law International, 2008), 32.

[417] Schlechtriem and Schwenzer, *Commentary on the UN Convention on the International Sale of Goods (CISG)*, 131 (see introduction, n. 44).

[418] Magnus, "Tracing Methodology in the CISG: Dogmatic Foundations," 53 (see n. 406).

[419] Ibid., 54.

[420] Ibid.

[421] Ibid., 56.

[422] Ibid.

[423] Ibid., 57.

that, "[e]xcept that the wording is always the fundament and starting point of interpretation neither a strict order nor a clear ranking list exists among the other elements context, legislative history and purpose."[424]

In the *Commentary* edited by Kröll, Mistelis and Viscasillas it is also noted that one ought to start with literal interpretation when applying the CISG.[425] From this point on, there is no attempt to establish the hierarchy of methods of interpretation. Instead, the methods of interpretation and tools aiding the interpretation of the CISG are lumped together in the text, and they include legislative history,[426] the Preamble of the CISG,[427] case law,[428] doctrine,[429] etc.[430] This approach simply echoes what has been pointed out already; that no generally accepted hierarchy exists among the different methods of interpretation vis-à-vis the CISG.

It is important to emphasise that the sequence of use of the interpretative methods is not the only stumbling block. Another major issue stems from the fact that there exist disagreements whether particular methods or tools ought to be used to aid the interpretation of the CISG at all. For instance, the use of the uniform projects such as the UNIDROIT Principles and Principles of European Contract Law to shed light on the CISG is also a practice fraught with controversies.[431]

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[424] Ibid., 58.

[425] Kröll, Mistelis, and Viscasillas, *UN Convention on Contracts for the International Sale of Goods (CISG) – Commentary*, 125 (see introduction, n. 44).

[426] Ibid., 126.

[427] Ibid., 127.

[428] Ibid., 128.

[429] Ibid., 130.

[430] Ibid., 131.

[431] Schlechtriem and Schwenzer, *Commentary on the UN Convention on the International Sale of Goods (CISG)*, 133 (see introduction, n. 44); Flechtner, "Uniformity and Politics," 204 (see chap. 1, n. 55).

On the one hand, some propagate the use of these uniform instruments as useful tools that can aid the interpretation of the CISG.[432] On the other, some are vehemently against this practice, opining that there are no grounds that could justify it.[433] Furthermore, when using certain methods, there exists a danger that an inadvertent contribution to non-uniform application of the CISG might be made. For example, the "[…] use of the UNIDROIT Principles to supplement the CISG in the name of uniformity distorts the meaning of the Convention in a way that, ironically, may well increase non-uniformity in the application of the CISG."[434] Furthermore, when resorting to the comparative method, one ought to be careful to avoid "[t]he inherent danger of this method [that] is to fall back into domestic preconceptions due to limited access of the laws of CISG Contracting States."[435]

Another controversial topic is the role of the Vienna Convention on the Law of Treaties (VLCT) in the interpretation of the CISG. A debate is still ongoing as to what extent this treaty is relevant and applicable to the CISG. Two camps can be discerned in this regard. The first camp argues that the VCLT is only applicable to those bits and pieces of the CISG which are directed at states.[436] Those provisions that aim to regulate the contractual relationship of the parties, opines the first camp, ought to be removed from the scope of the VCLT entirely. The other camp, however, views the VCLT as an appropriate tool to use to interpret even the provisions that apply directly to

[432] Pilar Perales Viscasillas, "Interpretation and Gap-Filling under the CISG: Contrast and Convergence with the UNIDROIT Principles," *Uniform Law Review* 22, no. 1 (2017): 20.

[433] Flechtner, "Uniformity and Politics," 204 (see chap. 1, n. 55).

[434] Ibid., 204.

[435] Schlechtriem and Schwenzer, *Commentary on the UN Convention on the International Sale of Goods (CISG)*, 132 (see introduction, n. 44).

[436] Magnus, "Tracing Methodology in the CISG: Dogmatic Foundations," 47 (see n. 406).

the parties' sales transaction.[437] Magnus, for instance, opines that the VCLT must play a role in the interpretation of the CISG.[438] He is of the view that, because the interpretative methodology under Article 7 is undeveloped and vague, so long this is the case the VCLT ought to be used as a supplement for interpretative questions for which the CISG interpretative methodology provides no answer.[439]

All things considered, it is evident that the lack of uniform interpretative methodology of the CISG is one of the causes of its non-uniform application. While scholars keep on debating what approach ought to be utilised, and what shape exactly the CISG interpretative methodology ought to take, they do agree on one thing; the CISG is yet to develop a coherent and uniform CISG-specific method of interpretation. Expecting this disordered approach to interpretative methodology under the CISG to consistently produce uniform results would, at best, be far-fetched. Thus, one can with confidence label the lack of uniform CISG interpretative methodology as one of the causes of the Convention's non-uniform application.

3.2.3 Official and Unofficial Versions of the CISG

The CISG is not applied by resorting to the English text only. The reality actually lies far from this. The CISG has 6 official versions, with the English text being one of the official versions.[440] Others include the ones drafted in Arabic, Chinese, French, Russian and Spanish.[441]

[437] Ibid.

[438] Ibid., 51.

[439] Ibid.

[440] "Annotated Text of CISG - Testimonium: Authentic Languages of Text," Pace Law Albert H. Kritzer CISG Database, 2010, https://www.cisg.law.pace.edu/cisg/text/authentic.html.

[441] Ibid.

Besides these, there are numerous non-official translations of the CISG.[442] However, although their status is marked as non-official, they are still being applied in national courts of countries in which English, Arabic, Chinese, French, Russian and Spanish are not official or working languages.[443] This, unsurprisingly, has represented a challenge for the uniform application of the CISG.[444]

When translating legal terms, special care must be taken to ensure that the words used to this end mirror the legal meaning of the terms in all the involved languages.[445] This, naturally, is not an easy task. Very frequently words which, on their face, seem to be the corresponding words in another language have additional meaning or different connotations to them in that other language.[446] When this turns out to be the case, the true meaning might get lost in the translation.

The CISG could occasionally produce diverging results as a result of subtle differences between its six official texts. This can be illustrated through Article 71 and Article 72 of the CISG.[447] According to the English version, a party is allowed to suspend performance of his

[442] Flechtner, "The Several Texts of the CISG in a Decentralized System," 192 (see introduction, n. 45).

[443] Ibid., 193. As a practical matter, they will undoubtedly constitute the primary source of Convention provisions for courts, arbitral panels and practitioners that work in a language lacking an official version.

[444] Ibid., 188.

[445] Honnold, *Uniform Law for International Sales under the 1980 United Nations Convention*, 89 (see chap. 2, n. 337). Prof. Honnold discusses how the issue of diverse connotations of legal terms is to be tackled when drafting international instruments: "We have reason to envy those who work in the physical sciences on phenomena that can be photographed and measured, while we must cope with disembodied concepts that have been shaped by diverse historical, economic and cultural conditions, and include concepts that have similar names but different meanings - *des faux amis* [footnote omitted]. The careful international draftsman tries to avoid abstract, disembodied concepts. For example, in the 1980 Sales Convention risk of loss passes to the buyer [']when the goods are handed over to the first carrier[‘] or (if the contract does not involve carriage) when the buyer [']takes over the goods[‘] (Arts. 67(1), 69(1)) - more stable materials than ideas such as [']property[‘] or [']title.[‘] The ideal is to use plain language that refers to things and events for which there are words of common content in the various languages. But this ideal is difficult to realize, and the principles of interpretation in Article 7(1) run counter to reflexes that have been deeply implanted by our education and professional life - the reading of a legal text in the light of the concepts of our domestic legal system, an approach that would violate the requirement that the Convention be interpreted with regard [']to its international character.[‘]" However, the same issues are present when one is seeking to translate a legal document from one language to another.

[446] Ibid.

[447] Flechtner, "The Several Texts of the CISG," 191 (see introduction, n. 45).

obligation if "it becomes apparent that the other party will not perform a substantial part of his obligations […]" while the contract can be avoided if "it is clear that one of the parties will commit a fundamental breach of contract […]".[448] By resorting to the literal interpretation method, this would allow one to argue that that the standard for the suspension of the contract in Article 71 is more lenient than the standard set for avoidance in Article 72.[449] However, one look at the French version of the CISG brings this position into doubt.[450] In the French version, there is no differentiation between the standards for suspension and avoidance in terms of wording.[451] Both Article 71 and 71 require that non-performance and breach be *essentielle* as opposed to the English version differentiating between substantial non-performance and fundamental breach.[452]

The above example illustrates the dangers that exist for the uniform application of the CISG stemming from various texts and translations. Therefore, taking into account the fact that, besides six official versions of the CISG, there are numerous other unofficial translations, one can evidently conclude that this characteristic in the design of the uniform sales law is one more cause of non-uniform application of the CISG.

3.2.4 Increased Reliance on Legal Standards

To reiterate, it has been noted in the previous Chapter that the CISG resorts to open-ended

[448] Ibid; "Annotated Text of CISG Article 71," Pace Law Albert H. Kritzer CISG Database, 2014, http://www.cisg.law.pace.edu/cisg/text/e-text-71.html; "Annotated Text of CISG Article 72," Pace Law Albert H. Kritzer CISG Database, 2014, https://cisgw3.law.pace.edu/cisg/text/e-text-72.html.

[449] Flechtner, "The Several Texts of the CISG," 191 (see introduction, n. 45).

[450] Ibid., 192.

[451] Ibid.

[452] Ibid.

legal standards in no less than thirty one instances, with many of them framed in the concept of reasonableness.[453] For a legal instrument that is relatively short and comprises in total one hundred and one succinct articles, thirty one can indeed be considered a high number. The reason behind this state of affairs is the frequent inability of the drafters to agree on clear-cut rules.[454] The CISG, as already pointed out, is a result of a hard-fought compromise.[455] Often times when the process would hit an impasse, the escape route was to adopt the open-ended legal standards.[456] The difference between a legal rule and a legal standard can be described in the following manner:

> [A] rule may entail an advance determination of what conduct is permissible, leaving only factual issues for the adjudicator: (A rule might prohibit "driving in excess of 55 miles per hour on expressways.") A standard may entail leaving both specification of what conduct is permissible and factual issues for the adjudicator. (A standard might prohibit "driving at an excessive speed on expressways.")[457]

As one can clearly see, at least in theory, rules bring more uniformity than do standards. Rules are more definite, more specific and easier to apply since the adjudicator only has to make sure that a given conduct is, for example, sanctioned by the rule. Standards, on the other hand, leave the adjudicator far more room for manoeuvre in terms of determining whether the conduct falls within the standard's reach.

There is very little guidance in the CISG about what is caught by its open-ended standards.

[453] Gillette and Scott, "The Political Economy of International Sales Law," 474 (see chap. 1, n. 143).

[454] Cuniberti, "Is the CISG Benefiting Anybody?," 1516 (see introduction, n. 41); Jacob S Ziegel, "The Future of the International Sales Convention from a Common Law Perspective," *New Zealand Business Law Quarterly* 6 (2000): 338.

[455] Ibid.

[456] Ibid.

[457] Louis Kaplow, "Rules versus Standards: An Economic Analysis," *Duke Law Journal* 42, no. 3 (1992): 559.

That is, when the CISG mandates that certain actions be done within reasonable time,[458] without unreasonable delay,[459] without causing unreasonable inconvenience,[460] etc., it provides no further guidance on the matter. There is no non-exhaustive list of examples that would provide an idea as to what reasonableness means in practical terms when applied to a given set of facts. This approach may well be acceptable, and often times quite effective, in compact national legal systems where the hierarchy of courts ensures that these standards are given predictable meanings on a case-by-case basis. This is evidenced by the fact that the CISG has served as a model for the reform of domestic sales laws in various jurisdictions.[461] After a point in time, in national legal systems it is possible to predict with a fair amount of certainty how a particular set of facts would be adjudicated under the relevant legal standard. While it would be completely inaccurate to argue that the opposite holds true in terms of the CISG, it has to be acknowledged that a fair share of difficulties has arisen with applying the legal standards in a uniform manner across the CISG jurisdictions.[462] This is understandable as the uniform sales law system does not enjoy the advantage of a precisely defined hierarchy of courts that keeps the meanings assigned to open-ended legal standards under control. In the uniform sales law system, the meanings to legal standards are given in a highly decentralised environment that comprises thousands of courts from numerous jurisdictions and

[458] "Annotated Text of CISG Article 33," Pace Law Albert H. Kritzer CISG Database, 2014, https://cisgw3.law.pace.edu/cisg/text/e-text-33.html.

[459] "Annotated Text of CISG Article 48," Pace Law Albert H. Kritzer CISG Database, 2014, https://cisgw3.law.pace.edu/cisg/text/e-text-48.html.

[460] Ibid.

[461] Lisa Spagnolo, "A Glimpse through the Kaleidoscope: Choices of Law and the CISG (Kaleidoscope Part I)," *Vindabona Journal of International Commercial Law and Arbitration* 13 (2009): 135–53. For a brief enumeration of jurisdictions in which domestic laws were inspired or modelled after the CISG, please see footnote 63 of Spagnolo's article.

[462] For a detailed discussion of case law examples of non-uniform application of the CISG, including those involving the open-ended legal standards, please refer to Chapter II.

various arbitral tribunals. It is to be expected that numerous points of view will be espoused. A telling analogy to this would be a philharmonic orchestra expected to carry out the performance of Carmina Burana without a conductor. The final result simply cannot be entirely harmonious.

In light of the complexities described here, one can only conclude that the open-ended legal standards found in the CISG constitute one of the causes of its non-uniform application.

3.2.5 Reservations

Reservations that the CISG contracting states can make under Articles 92 through to 96 have been labelled as a source of non-uniformity.[463] When a state declares one of these reservations, the CISG will be applied to a certain extent differently in its territory, or the Convention may deviate in its application vis-à-vis parties with a place of business in that particular state.[464] However, while reservations do bring about differing applications of the CISG,

[463] Flechtner, "The Several Texts of the CISG," (see introduction, n. 45)

[464] "Annotated Text of CISG Article 92," Pace Law Albert H. Kritzer CISG Database, 2014, http://www.cisg.law.pace.edu/cisg/text/e-text-92.html. "(1) A Contracting State may declare at the time of signature, ratification, acceptance, approval or accession that it will not be bound by Part II of this Convention or that it will not be bound by Part III of this Convention. (2) A Contracting State which makes a declaration in accordance with the preceding paragraph in respect of Part II or Part III of this Convention is not to be considered a Contracting State within paragraph (1) of article 1 of this Convention in respect of matters governed by the Part to which the declaration applies." "Annotated Text of CISG Article 93," Pace Law Albert H. Kritzer CISG Database, 2014, http://www.cisg.law.pace.edu/cisg/text/e-text-93.html. "(1) If a Contracting State has two or more territorial units in which, according to its constitution, different systems of law are applicable in relation to the matters dealt with in this Convention, it may, at the time of signature, ratification, acceptance, approval or accession, declare that this Convention is to extend to all its territorial units or only to one or more of them, and may amend its declaration by submitting another declaration at any time. (2) These declarations are to be notified to the depositary and are to state expressly the territorial units to which the Convention extends. (3) If, by virtue of a declaration under this article, this Convention extends to one or more but not all of the territorial units of a Contracting State, and if the place of business of a party is located in that State, this place of business, for the purposes of this Convention, is considered not to be in a Contracting State, unless it is in a territorial unit to which the Convention extends. (4) If a Contracting State makes no declaration under paragraph (1) of this article, the Convention is to extend to all territorial units of that State." "Annotated Text of CISG Article 94," Pace Law Albert H. Kritzer CISG Database, 2014, http://www.cisg.law.pace.edu/cisg/text/e-text-94.html. "(1) Two or more Contracting States which have the same or closely related legal rules on matters governed by this Convention may at any time declare that the Convention is not to apply to contracts of sale or to their formation where the parties have their places of business in those States. Such declarations may be made jointly or by reciprocal unilateral declarations. (2) A Contracting State which has the same or closely related legal rules on matters governed by this Convention as one or more non-Contracting States may at any time declare that the Convention is not to apply to contracts of sale or to their formation where the parties have their places of

it must be noted that this type of non-uniformity was originally planned, and was thus enshrined in the text of the Convention. In other words, it is an integral part of the CISG. But even though envisioned from the outset, the reservations nonetheless bring about non-uniform application of the Convention. More precisely, reservations may produce different substantive results involving transactions to which they are applicable as compared to transactions that involve parties from non-reserving jurisdictions.

What is more, the reservations themselves have been subject to varying interpretations. A good illustration of this is the reservation that is allowed under Article 95. According to Article 95, a state may declare that it will not be bound by Article 1(1)(b) which provides that the CISG will apply when the rules of private international law lead to the application of the law of a CISG contracting state.[465] Several conflicting interpretations of Article 95 reservation have surfaced over time.[466] Some scholars and national courts perceive this reservation as a mere tool that prevents the application of the CISG to a sales transaction involving a party from a CISG contracting state and a party from a state that is not signatory to the CISG.[467] The United States and China, among

business in those States. (3) If a State which is the object of a declaration under the preceding paragraph subsequently becomes a Contracting State, the declaration made will, as from the date on which the Convention enters into force in respect of the new Contracting State, have the effect of a declaration made under paragraph (1), provided that the new Contracting State joins in such declaration or makes a reciprocal unilateral declaration." "Annotated Text of CISG Article 95," Pace Law Albert H. Kritzer CISG Database, 2014, http://www.cisg.law.pace.edu/cisg/text/e-text-95.html. "Any State may declare at the time of the deposit of its instrument of ratification, acceptance, approval or accession that it will not be bound by subparagraph (1)(b) of article 1 of this Convention." "Annotated Text of CISG Article 96," Pace Law Albert H. Kritzer CISG Database, 2014, http://www.cisg.law.pace.edu/cisg/text/e-text-96.html. "A Contracting State whose legislation requires contracts of sale to be concluded in or evidenced by writing may at any time make a declaration in accordance with article 12 that any provision of article 11, article 29, or Part II of this Convention, that allows a contract of sale or its modification or termination by agreement or any offer, acceptance, or other indication of intention to be made in any form other than in writing, does not apply where any party has his place of business in that State."

[465] "Annotated Text of CISG Article 95."

[466] Filip De Ly, "Sources of International Sales Law: An Eclectic Model," *Journal of Law and Commerce* 25 (2005): 10.

[467] Ibid.

others, have followed this approach.[468] German courts have taken a different stance. They view the reservation under Article 95 as a mandate to dispense with the application of Article 1(1)(b) entirely when the "Article 95 reservation states are involved."[469] The Dutch approach is also worth mentioning. In Article 2 of the Dutch Implementing CISG Act it is suggested to courts whose states have made use of Article 95 that, when rules of private international law point to Dutch law, these courts ought not to apply the sales provisions of the Dutch Civil Code, but should seek the solutions in the CISG.[470]

Article 96 of the CISG has also divided commentators. Article 96 "permits a declaration excluding [A]rticle 11 - a provision that rejects domestic requirements as to form, often called Statutes of Frauds."[471] Some argue that Article 96 reservation mandates that the writing requirements in force in the reserving state always remain applicable.[472] Others disagree with this approach, arguing that the matter must be settled in conformity with the rules of private international law.[473] If the rules of private international law point to the law of a state that did not make an Article 96 reservation, then the approach put forth by the CISG remains relevant.[474] Hence, reservations, when made by states, not only are one of the causes of the non-uniform

[468] Ibid.

[469] Ibid.

[470] Ibid.

[471] Honnold, *Uniform Law for International Sales under the 1980 United Nations Convention*, 539 (see chap. 2, n. 337).

[472] Kritzer Albert H., *Guide to Practical Applications of the United Nations Convention on Contracts for the International Sale of Goods* (Kluwer Law International, 1994), 118, http://www.cisg.law.pace.edu/cisg/text/e-text-96.html.

[473] Ibid.

[474] Ibid.

application of the Convention, but they add another dimension to the problem; some of the reservations themselves have split the commentators and courts as to have they ought to be applied in practice.

3.2.6 Lack of a Final Authority

As already mentioned, there is no supreme body that stands above the national courts, and is authorised to issue binding decisions under the CISG.[475] This (deliberate) omission can be viewed as one of the causes of non-uniform application of the CISG. Contrast this characteristic in the design of the uniform sales law system to how the national sales laws generally operate. Namely, when a national law in a particular country gets adopted, various interpretations under that law will (most probably) arise. The final authority within that country, usually a supreme court, will have the task of keeping the interpretation and the application of the said law as uniform as possible. Since this final authority is mostly lacking in relation to uniform laws, there is a genuine danger that the uniform laws will be interpreted and applied differently in different countries. The CISG is no exception to this. There is no final CISG authority, meaning that thousands of courts are tasked with keeping the application of the CISG in line with the uniformity requirement. As the CISG is a rather short document that, as previously noted, relies heavily on open-ended legal standards, it is thus even more prone to suffering from non-uniformity in its

[475] Shani Salama, "Pragmatic Responses to Interpretive Impediments: Article 7 of the CISG, an Inter-American Application*," University of Miami Inter-American Law Review* 38, no. 1 (October 1, 2006): 227. "I suggest revisiting the creation of a common adjudicative body to review contested cases beyond the initial country of litigation. A final court should be instituted to ensure uniform results of the interpretation of the CISG. Nils Schmidt-Ahrendts, "CISG and Arbitration," *Belgrade Law Review*, no. III (2011): 221. "However, despite numerous proposals, as of today no judicial body exists which would ensure a uniform interpretation and application of the CISG." Louis Sohn, "Uniform Laws Require Uniform Application: Proposals for an International Tribunal to Interpret Uniform Legal Texts," in *Uniform Commercial Law in the Twenty-First Century: Proceedings of the Congress of the United Nations Commission on International Trade Law* (New York: United Nations, 1992), 50.

application. This is especially evident when complex cases arise under the Convention, and as has been shown in the previous Chapter, courts in different jurisdictions have produced many varying decisions all too often.

As one can see, the uniform sales law system is characterized by the lack of a final authority with the ability to bring binding decisions.[476] However, the CISG system also lacks advisory authority, or at least advisory authority with the official capacity.[477] UNCITRAL, under whose auspices the CISG was adopted, maintains a strictly neutral approach,[478] and its endeavour to contribute to the uniform application of the CISG is mainly twofold: (1) CLOUT database that purports to make available case law made under the CISG and other UNCITRAL legal texts,[479] and (2) publication of the Digest of Case Law on the CISG.[480] The only body that could possibly be characterised as an advisory one is the CISG Advisory Council.[481] But it must be noted that the CISG Advisory Council lacks the official status as it is a private initiative, albeit of well-respected CISG scholars.[482]

Taking into account the complexities of the CISG system, it is then not surprising that many have identified the lack of final authority as one of the causes of non-uniform application of

[476] Ibid.

[477] Joshua D. Karton and Lorraine de Germiny, "Has the CISG Advisory Council Come of Age," *Berkeley Journal of International Law* 27, no. 2 (2009): 451.

[478] Joseph Lookofsky, "Digesting CISG Case Law: How Much Regard Should We Have?," *Vindobona Journal of International Commercial Law and Arbitration*, no. 8 (2004): 190.

[479] "Case Law on UNCITRAL Texts (CLOUT)," UNCITRAL, 2018, http://www.uncitral.org/uncitral/en/case_law.html.

[480] "Digests," (see chap. 1, n. 107).

[481] "Welcome to the CISG Advisory Council (CISG-AC)," CISG Advisory Council, 2008-2018, http://www.cisgac.com/.

[482] Ibid.

the CISG.

3.3 EXTERNAL CAUSES OF NON-UNIFORM APPLICATION OF THE CISG

Certain causes of non-uniform application of the CISG are not intrinsically connected to the design of the CISG system. In other words, they originate outside of it. We will refer to these causes as external causes of non-uniform application. These types of causes, notably, include (1) homeward trend, and (2) costs and incentives. These external causes relate to the traits that those that make use of the CISG system (i.e. parties, lawyers, judges, and arbitrators) possess as human beings, and they have immense potential to adversely impact the attitudes of decision-makers to pursue uniformity endeavour.

3.3.1 Homeward Trend

Ferrari endorses the following definition of homeward trend:

> [T]he homeward trend is akin to the 'natural' 'tendency of those interpreting the CISG to project the domestic law in which the interpreter was trained (and with which he or she is likely most familiar) onto the international provisions of the Convention'. It is, in other words, 'the tendency to think that the words we see [in the text of the CISG] are merely trying, in their awkward way, to state the domestic rule we know so well'.[483]

Probably the best-known example of the homeward trend can be found in the case law of US courts. The starting point of the homeward trend in the US can be traced back to 1995 when the Second Circuit stated that "[c]ase law interpreting analogous provisions of [A]rticle 2 of the UCC may also inform a court where the language of the relevant CISG provisions tracks that of the

[483] Franco Ferrari, "Homeward Trend and Lex Forism Despite Uniform Sales Law," *Vindobona Journal of International Commercial Law & Arbitration* 13, no. 1 (2009): 23.

UCC".[484] Courts of other countries have engaged themselves in this practice as well.[485]

The homeward trend is evidently in discord with Article 7(1) of the CISG in two ways. Firstly, Article 7(1) calls for the autonomous interpretation of the words and concepts found in the CISG.[486] What this means, as explained in Chapter I, is that the words and concepts as found in the CISG are to be given a meaning that is divorced from the meaning that those same words and concepts might have in domestic laws.[487] In other words, the CISG must not be perceived and used through the lenses of national sales laws. The CISG is a separate world that mostly is expected to function on its own. Of course, there will be exceptions such as, for example, words and concepts that were meant to be used in accordance with their pre-existing meanings.[488] Thus, the phrase 'private international law', as put forth in Article 7(2) of the CISG, is not supposed to have an autonomous, CISG-centred meaning, but a meaning that it generally has outside of the CISG context.[489] All in all, it is only in the minority of instances that one will be required to seek a meaning of a CISG term outside of the CISG's environment. All other attempts connecting the words and concepts in the CISG to the homographs found in particular domestic legal systems go against Article 7(1), and thus produce the homeward trend.

Besides undermining its autonomous interpretation, the homeward trend also has a

[484] Bruno Zeller, *CISG and the Unification of International Trade Law*, 103 (see chap. 1, n. 52).

[485] Ibid.

[486] "Annotated Text of CISG Article 7," (see introduction, n. 48).

[487] Ralph Folsom et al., *Principles of International Business Transactions*, 3rd edition (Concise Hornbook Series) (West Academic, 2013), 32.

[488] Ferrari, "Homeward Trend and Lex Forism," 24 (see n. 483); Folsom et al., *Principles of International Business Transactions*, 32 (see n. 487);

[489] Ferrari, "Homeward Trend and Lex Forism" 24 (see n. 483).

negative impact on uniform application of the CISG.[490] This is the second way in which the homeward trend is in discord with Article 7(1) of the CISG. More precisely, since Article 7(1) puts forth the mandate that there be a high level of uniformity in the application of the CISG,[491] the homeward trend clearly goes against this mandate as it brings about a diametrically opposite result.[492] If courts from different countries assign the meanings to words and concepts found in the CISG by taking guidance and inspiration from homographs (or similar concepts) that exist in their respective national laws, then the meaning of the CISG words and concepts will vary across different jurisdictions. The homeward trend could theoretically be reconciled with the uniformity mandate. For instance, it is plausible that a particular CISG concept can be subject to several homeward interpretations, but that, after a point in time, one of those interpretations becomes the standard approach. In that case, the uniformity in application gets eventually achieved while it can hardly be argued that the autonomy in interpretation of the CISG is observed. Nonetheless, this sort of occurrence is unlikely, and the homeward trend is more likely to impact the uniform application of the CISG in a negative than it is to do so in a positive manner.

One can differentiate between two types of the homeward trend. Firstly, one can succumb to the homeward trend inadvertently. Professor Honnold has caught the essence of this type of the homeward trend by noting that

> […] 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 embedded

[490] Franco Ferrari, "Autonomous Interpretation versus Homeward Trend versus Outward Trend in CISG Case Law," *Uniform Law Review* 22, no. 1 (March 1, 2017): 247; Newman, "CISG Sources and Researching the CISG," 40 (see introduction, n. 22).

[491] For a detailed discussion of the meaning of Article 7(1) of the CISG and the concept of uniformity, please refer to Chapter I.

[492] Ferrari, "Autonomous Interpretation versus Homeward Trend," 247 (see n. 490); Newman, "CISG Sources and Researching the CISG," 40 (see introduction, n. 22).

> at the core of their intellectual formation. The mind sees what the mind has means of seeing.[493]

Quite understandably, after a judge encounters a CISG concept for which a homograph (or a similar concept) exists in the legal system in which he or she has been educated in, the instinctive reaction will be to apply the CISG against the backdrop of the corresponding national concept. As a result, the meaning that the homograph (or a similar concept) carries in the domestic law gets transposed to the analogous CISG concept. All this occurs in the absence of the intent to interpret the CISG through the lenses of domestic law. The judge simply resorts to the meaning of the domestic concept because in his or her eyes that is the most natural way to perceive the analogous CISG concept, if not the only way to perceive it.

Secondly, it is also plausible for the homeward trend to arise advertently. Generally accepted definitions of the homeward trend stress the instinctive, or natural tendencies of judges to perceive the CISG concepts through the lenses of domestic law.[494] Therefore, they seem not to encompass instances when a judge automatically assigns a domestic meaning to the CISG concept in spite of knowing that that CISG concept has a different autonomous meaning, or in spite of knowing that there exists such a possibility. One possible explanation for the advertent homeward trend lies in the ever-lasting discord between the forces of harmonisation and unification on one side, and sovereignty and nationalism on the other.[495] Judges are not immune to holding political

[493] Honnold, *Documentary History of the Uniform Law for International Sales*, 1 (see chap. 1, n. 73).

[494] Ibid.

[495] Carbonara and Parisi, "The Paradox of Legal Harmonization." 369 (see chap. 2, n. 386); Laszlo Reczei, "Background to the Establishment of UNCITRAL," in *Uniform Commercial Law in the Twenty-First Century: Proceedings of the Congress of the United Nations Commission on International Trade Law* (New York: United Nations, 1995), 7. Reczei notes that, in relation to the establishment of any international civil jurisdiction, the states exhibit fear for their national sovereignty. United Nations: Commission on International Trade Law and United Nations General Assembly, *Report of the United Nations Commission on International Trade Law on the Work of Its Thirty-Eighth Session*: 4-15 July 2005 (United Nations Publications, 2005), 5.

views.[496] Some might take pride in their domestic laws and view them as superior to anything that comes from the international plain; some might view harmonisation and unification efforts as being an unnecessary menace to the sovereignty of their country. Whatever the motives, the advertent homeward trend is a reality, albeit a reality that is not easy to detect. It can hardly be expected that a judge engaging in the advertent homeward trend will put it in black and white in the decision that that is exactly what he or she is doing. Nonetheless, in *Filanto v. Chilewich*, a sentiment can be discerned that could potentially lead to the advertent homeward trend:

> [T]he Uniform Commercial Code, as previously noted does not apply to this case, because the State Department undertook to fix something that was not broken by helping to create the Sale of Goods Convention which varies from the Uniform Commercial Code in many significant ways.[497]

Although in *Filanto v. Chilewich* there are no indications that the advertent homeward trend (or inadvertent) was present, this little ironic remark put forth by the judge is an illustration of a motive that could cause a judge to interpret the CISG in light of the domestic law, or to even circumvent the application of the CISG.

While it is highly unlikely that it will be empirically possible to pinpoint the advertent homeward trend in the CISG case law, this still does not make the distinction between the advertent and the inadvertent homeward trend futile. First of all, both types of the homeward trend are one of the causes of the non-uniform application of the CISG. Secondly, the said distinction is necessary as these two types of the homeward trend cannot be tackled in the same manner. For example, if we assume that the solution for the inadvertent homeward trend lies in the education

[496] Bradley W. Joondeph, "The Many Meanings of 'Politics' in Judicial Decision Making," *UMKC L. Rev.* 77 (2008): 377.

[497] Filanto, S.p.A. v Chilewich International Corp., (see chap. 2, n. 195).

of judges[498], the same cannot be said for the advertent homeward trend. The judges who on purpose strive to impose the meanings from their respective legal systems onto the CISG will not change this practice by being educated in the CISG.

3.3.2 Costs and Incentives

The transacting parties and their lawyers, judges, and arbitrators take into account the costs and incentives that exist, or possibly lack, when they make use of the CISG system.[499] This is so if we make an assumption that they are rational actors who act in their own self-interest.[500] Every step of their use of the CISG system can be perceived through the lenses of costs and incentives that arise in the process. The step in the system that will be analysed here relates to Article 7(1) of the CISG. As already stated, among other things, Article 7(1) requires that, when applying the CISG, regard must be had to the need to promote uniformity in its application.[501] Since Article 7 sets out the CISG interpretative methodology, it is thus directed at the decision-maker, i.e. a judge or an arbitrator.[502] Here an attempt will be made to assess those costs and incentives that are present when a judge or an arbitrator ought to work on promoting the uniformity in the application of the CISG. It will be shown that judges and arbitrators do incur costs when they decide to promote the

[498] Ferrari, "Homeward Trend and Lex Forism," 42 (see n. 483).

[499] Neil Duxbury, *Patterns of American Jurisprudence* (Oxford: Clarendon Press, 1995), 412. Duxbury notes that Posner is of the opinion that judges seek to maximise their utility function. By analogy, it is safe to assume that other entities that participate in international business transactions (e.g parties and their lawyers, arbitrators, etc.) are in pursuit of the same goal.

[500] Alessio M Pacces and Louis T Visscher, "Methodology of Law and Economics," in *Law and Method: Interdisciplinary Research into Law*, Politika 4 (Tübingen: Mohr Siebeck, 2011), 85–107. This is a basic assumption made in the law and economics field.

[501] "Annotated Text of CISG Article 7," (see introduction, n. 48).

[502] Ibid.

uniform application of the CISG, and these costs outweigh the potential benefits.[503] In addition, incentives for them to incur these costs are lacking.[504]

3.3.2.1 Judges

According to Posner, judges, "like other people, seek to maximise a utility function that includes both monetary and non-monetary elements (the latter including leisure, prestige, and power)."[505] In other words, judges, when handing down decisions, will consider if any aspects of their decision-making process go against their self-interest. If they do, judges will seek to take a path that minimises such adverse impact.

An argument has been advanced that, because judges enjoy numerous privileges, including that the bar for their removal from office is set extremely high, they have become immune to considering personal incentives when handing down decisions.[506] This argument usually exempts political and ideological considerations, acknowledging that these might play a role in the judges' decision-making process.[507] However, Posner has challenged this line of reasoning with fair success. According to him, judges take into account personal motives other than political and ideological considerations in their professional endeavours. These motives include promotion possibility, reputation and prestige, and leisure.[508]

[503] Boris Prastalo, "Judges Maximising Their Utility: A Pitfall for the Uniform Interpretation of the CISG," *Vindobona Journal of International Commercial Law and Arbitration* 20, no. 2 (2016), 17-26.

[504] Ibid., 17-26.

[505] Neil Duxbury, *Patterns of American Jurisprudence* (Oxford: Clarendon Press, 1995), 412 (see n. 499); Prastalo, "Judges Maximising Their Utility," 17-26.

[506] Richard A. Posner, "What Do Judges and Justices Maximize? (The Same Thing Everybody Else Does)," *Supreme Court Economic Review* 3 (1993): 1–41; Prastalo, "Judges Maximising Their Utility," 17-26 (see n. 503).

[507] Ibid.

[508] Ibid.

3.3.2.1.1 Promotion possibility

A nexus can be observed between the judges' decision-making process and the possibility of them being promoted to a higher bench. For example, in certain countries, a reversal rate will be a relevant consideration when deciding whom to promote to a higher court.[509] In other words, those judges whose decisions were reversed by higher instances on a smaller number of occasions as compared to their colleagues' will have better chances of reaching the higher bench. Furthermore, the backlog of cases is taken into account in some jurisdictions, and if a judge has a comparatively lower backlog of cases to that of his or her peers, this could be one of the decisive factors in deciding who gets to sit in the higher instance court.[510] Therefore, in countries in which the reversal rate and backlog of cases are officially considered in determining who will move to the higher bench, they constitute an incentive that is a nexus between the judges' decision-making process on one side, and the possibility of promotion on the other. These incentives do not necessarily have to have an official stamp (i.e. be an official factor to be considered when a vacancy is to be filled on a higher bench). They can be of unofficial nature as well. For instance, according to one study, judges in the United States are reluctant to hand out maximum sentences for antitrust violations.[511] This is in stark contrast with the position of the executive branch that would prefer maximum sentences to be given to those who violate antitrust laws.[512] However, it is the executive branch in the United States that is instrumental in deciding who will get to fill a vacancy in the

[509] Urszula Jaremba, *National Judges as EU Law Judges: The Polish Civil Law System* (Leiden: Martinus Nijhoff Publishers, 2014), 219. For example, this is the approach in Poland. Prastalo, "Judges Maximising Their Utility," 17-26 (see n. 503).

[510] Ibid.

[511] Mark Cohen, "The Motives of Judges: Empirical Evidence from Antitrust Sentencing," *International Review of Law and Economics* 12, no. 1 (1992): 19; Prastalo, "Judges Maximising Their Utility," 17-26 (see n. 503).

[512] Cohen, "The Motives of Judges," 17; Prastalo, "Judges Maximising Their Utility," 17-26 (see n. 503).

higher instance court.[513] This state of the affairs has brought the following situation: when there is no open vacancy in higher courts, more lenient sentences will be handed out for antitrust violations.[514] In contrast, as soon as the vacancy is available, some judges who are eligible to fill that vacancy begin courting the executive branch by giving out harsher sentences for antitrust violations.[515] This is a clear illustration of how judges can, and often do, look into their own self-interest when deciding cases.

The mandate that there be a high level of uniform application of the CISG seems not to be aligned with the judges' attempts to secure promotion. More precisely, seeking to ensure that the CISG is applied in a highly uniform manner does very little to increase the judges' chances of getting to the higher bench. CISG cases are relatively infrequent as compared to cases that arise under national laws. As of 26 February 2018, the CISG Database maintained by Pace University contains more than than 3000 CISG cases, including both arbitration and court cases.[516] Taking into account the fact that 89 countries are parties to the CISG as of 26 February 2018, and that the CISG has been in force since 1988, it is evident that the judges do not encounter the CISG on a regular basis in their work.[517] Reporting in total more than 3000 cases over a span of 30 years from dozens of jurisdictions is a clear indication that judges do not apply the CISG as often as they do

[513] Ibid.

[514] Ibid.

[515] Ibid.

[516] "CISG Database Country Case Schedule," Pace Law Albert H. Kritzer CISG Database, 2016, http://www.cisg.law.pace.edu/cisg/text/casecit.html; "New and Updated Material on the CISG (2016)," Pace Law School Institute of International Commercial Law, 2016, http://iicl.law.pace.edu/cisg/page/new-and-updated-material-cisg-2016.

[517] "Status United Nations Convention on Contracts for the International Sale of Goods (Vienna, 1980)," UNCITRAL, 2018, http://www.uncitral.org/uncitral/en/uncitral_texts/sale_goods/1980CISG_status.html; 1. "United Nations Convention on Contracts for the International Sale of Goods (Vienna, 1980) (CISG)," UNCITRAL, 2018, http://www.uncitral.org/uncitral/en/uncitral_texts/sale_goods/1980CISG.html.

domestic laws. In jurisdictions whose official policy is to consider reversal rates and the size of the backlog of cases when deciding who gets promoted to the higher bench, judges have very little incentive to be concerned with the uniform application of the CISG.[518] More precisely, to keep the reversal rates low, judges must ensure that they obtain relevant information that will enable them to bring a decision that will not be overturned by a higher instance court.[519] However, obtaining information regarding the CISG is far more cumbersome than it is to obtain information on domestic law. In order to make sure that the CISG is applied as uniformly as possible, the judge has to make use of the so-called global *jurisconsultorium*, i.e. to look into the case law from other jurisdictions.[520] This can be quite a complicated undertaking as some judges will not speak foreign languages (and thus it will be difficult for them to make use of the global *jurisconsultorium*), some will have difficulties in understanding the essence of the decision coming from a different legal system, some legal issues will require that numerous foreign decisions be consulted, while some foreign decisions may not be widely available.[521] Therefore, as the judges do not face the CISG quite often, and as it can be a cumbersome task to obtain the relevant information on the CISG, one must conclude that the judges are actually disincentivised from pursuing a high level of uniform application of the CISG. Instead of dedicating his or her time and efforts to the CISG case, a judge will better serve his or her self-interest by focusing on domestic cases as these are numerous, and information on them is easily accessible.[522] In other words, a judge might feel that

[518] Prastalo, "Judges Maximising Their Utility," 17-26 (see n. 503).

[519] Ibid.

[520] For a detailed discussion of global *jurisconsultorium*, please refer to Chapter V.

[521] Prastalo, "Judges Maximising Their Utility," 17-26 (see n. 503).

[522] Ibid.

a CISG case will require too much effort with very little impact on the promotion prospects.[523] Hence, a judge will be incentivised to do a bare minimum with the CISG case. Furthermore, spending less time on a CISG case (than it would have been required for ensuring more uniformity) actually contributes slightly to decreasing the backlog of cases.[524] The faster a dispute is resolved, the sooner a judge can move on to the next case. All in all, this all showcases how ensuring a high level of uniform application of the CISG is vastly irrelevant for the judges' efforts to ensure promotion.[525] More precisely, the costs that a judge incurs when he or she seeks to further the aim of uniform application of the CISG outweigh the benefits that stem from such an undertaking.

3.3.2.1.2 Reputation and prestige

Judges, as all human beings, are keen on being held in high esteem for the work they do.[526] However, it would be far-fetched to assume that judges care what the public at large will think about the decisions they write.[527] It may be that high-profile constitutional cases will bring the attention of people in the streets, but this is more of an exception than a rule.[528] The majority of decisions, and even those coming from constitutional courts, are of very technical nature and do not evoke the public's interest. Nevertheless, this does not mean that nobody is interested in what judges are doing. As a matter of fact, there is a group of people that is more than curious to follow

[523] Ibid.

[524] Ibid.

[525] Ibid.

[526] Ibid.

[527] Ibid.

[528] Ibid.

even the most technical court decisions, and that is the scholarly community.[529] They are generally considered to be crème-de-la-crème of the intellectual elite, and thus it is safe to assume that a judge would not be indifferent to his or her decision being heavily criticised by the majority of scholars.[530] The emphasis is on the majority, as it is evidently impossible to be universally accepted and admired in any sphere of life, and the legal profession and academia are no exception.

However, even though judges are weary of being criticised by scholars, it is less than probable that this would encourage them to dedicate more time and effort to the issue of uniform application of the CISG.[531] Firstly, as already pointed out, judges do not encounter the CISG that frequently in their work. Consequently, so long as their non-CISG decisions are appreciated by the majority of scholars, the judges might find it irrelevant that the niche of the CISG scholars is finding a few of their decisions to be unsound.[532] Moreover, the CISG itself is not universally accepted in the scholarly community, with some scholars strongly questioning its usefulness.[533] Therefore, not all scholars who write about the CISG topics nurture the pro-CISG stance. With this in mind, the judges are aware that even if they do not give their best at promoting the uniform application of the CISG (e.g. by examining case law from other jurisdictions), the scholars who write about the CISG will not unanimously criticise their approach.[534] Those sceptical of the CISG will either turn a blind eye to the fact that a judge may not be putting forth his or her best efforts

[529] Ibid.

[530] Ibid.

[531] Ibid.

[532] Ibid.

[533] Cuniberti, "Is the CISG Benefiting Anybody?," 1549 (see introduction, n. 41). "Has the CISG been useful to commercial parties? This Article indicates that the answer is no for the vast majority of parties and that it has at best a very limited use for the others."

[534] Prastalo, "Judges Maximising Their Utility," 17-26 (see n. 503).

to promote the uniform application of the CISG, or they may even give such practice a positive feedback.[535] All in all, enjoying support from the pro-CISG scholars (or receiving backlash from them) is simply not a strong enough incentive to significantly impact the judges in a way so that they would dedicate more attention to the need to promote uniformity in the application of the CISG.

3.3.2.1.3 Leisure

Judges, as all other humans (be they working or non-working), enjoy their leisure time.[536] If they can substitute their working hours with leisure with no adverse consequences whatsoever, then they are in a sense incentivised to do exactly that.[537] This has a negative implication for furthering the uniform application of the CISG.[538] Namely, as demonstrated previously, judges already have incentives to dedicate less time and effort to the uniformity issue than it would be advisable in order to achieve the best possible uniformity result.[539] Not putting forth their maximum effort will have a minimal effect on the judges' reputation and prestige, and will not be a relevant factor for a potential promotion to the higher bench.[540] This seems to suggest that a judge has very little to fear if he or she decides not to promote uniformity in the application of the CISG as required by Article 7. A superficial approach to the uniformity cause will mean that a

[535] Ibid.

[536] Ibid.

[537] Ibid.

[538] Ibid.

[539] Ibid.

[540] Ibid.

judge will end up investing less time and effort as compared to a situation in which the judge does the opposite; i.e. seeks to advance the uniform application of the CISG.[541] If the time thus gained can be used for leisure, a judge is in this way further incentivised to dedicate less time to promoting the uniform application of the CISG and seek personal enjoyment instead.[542]

3.3.2.2 Arbitrators

The existing law and economics literature has established that arbitrators, just like judges, are utility maximisers.[543] Their hidden concern when engaging in arbitration activities, which may well be a primary one, is to ensure that they get appointments as arbitrators in the future as well.[544] It has been suggested that the most optimal way of achieving this is through rendering so-called compromise awards; that is, arbitral awards that in a sense seek middle ground between the parties.[545] If arbitrators want appointments, they have to signal to the parties through their work and reputation that they are the most adequate person for the job. An arbitrator who acquires a reputation of a tough, uncompromising decision-maker is destined for oblivion in the arbitration world.[546] Resolving a dispute through arbitration is not a frugal affair. It requires substantial

[541] Ibid.

[542] Ibid.

[543] Daphna Kapeliuk, "The Repeat Appointment Factor: Exploring Decision Patterns of Elite Investment Arbitrators," Cornell Law Review 96 (2011 2010): 49; Robert D. Cooter, "The Objectives of Private and Public Judges," *Public Choice* 41, no. 1 (1983): 107.

[544] Kapeliuk, "The Repeat Appointment Factor," 49 (see n. 543).

[545] Ibid.; Cooter, "The Objectives of Private and Public Judges," 107 (see n. 543); John J. Barceló III, "Expanded Judicial Review of Awards After Hall Street and in Comparative Perspective," in *Resolving International Conflicts - Liber Amicorum Tibor Várady* (Budapest-New York: Central European University Press, 2009), 8.

[546] Kapeliuk, "The Repeat Appointment Factor," 49 (see n. 543); Richard A. Posner, "Judicial Behavior and Performance an Economic Approach," Fla. St. UL Rev. 32 (2004): 1260.

resources, and the parties, if they would opt for an arbitrator who is reluctant to render compromise awards, would in a sense seek an 'all or nothing' approach. An arbitrator that leans towards compromise decision-making represents almost a guarantee that the party appointing him (or her) will not leave empty-handed.

Furthermore, as arbitrators are mostly nominated by the parties themselves, the relationship that they have amongst themselves is not that of collegiality, but is in a sense of competitive nature.[547] This incentivises the arbitrators to only take into consideration the interests of the parties to the dispute, and to neglect any third-party or common interests.[548] Arbitrators who generally do the latter at the expense of the former risk not to be appointed since the parties would prefer that only their interests be considered. Therefore, "[u]nlike courts and juries, which are more likely to adhere to the law, arbitrators are more likely to split the difference."[549]

When it comes to the uniform application of the CISG, arbitrators will most probably be quite unbothered with this pressing problem. Seeking to promote the mandate of uniformity will contribute very little to their aspiration to serve as arbitrators in the future as well. For instance, let us assume that the arbitral tribunal decides to utilise *jurisconsultorium* in order to resolve a dispute under the CISG. Let us further assume that the arbitral tribunal encounters two vastly different interpretations that are relevant for their case at hand; one which is prevalent and far more convincing, and the second which is only followed by the minority, and has very little backing in the scholarly community. However, if the arbitrators follow the first interpretation, they will end

[547] Kapeliuk, "The Repeat Appointment Factor," 49 (see n. 543); Cooter, "The Objectives of Private and Public Judges," 107 (see n. 543).

[548] Ibid.

[549] Christine M Reilly, "Achieving Knowing and Voluntary Consent in Pre-Dispute Mandatory Arbitration Agreements at the Contracting Stage of Employment," *California Law Review*, 2002, 1211; Kapeliuk, "The Repeat Appointment Factor," 49 (see n. 543).

up with a winner-takes-all result. But if they rely on the second interpretation, then a compromise award will ensue. Choosing the first option would contribute to the uniform application of the CISG. The arbitral tribunal would thus follow the sound interpretation, and avoid providing credibility to the interpretation that is quite unconvincing. At the same time, following the first interpretation would send a signal that the arbitral tribunal is uncompromising, hence negatively affecting the prospects of the arbitrators' future appointments. Furthermore, the first interpretation would in a sense serve the common interest of those who utilise the CISG because uniform application of the Convention is in their general interest, but would, at the same time, severely disadvantage one of the parties to the dispute. The second interpretation would allow for the compromise award to be rendered, but at the expense of the common interest. However, the second interpretation, for the reasons discussed here, will benefit the arbitrators far more than the first one, and will result in a compromise award that will ensure that no party goes home empty-handed. Evidently, the example given here illustrates that in the CISG cases, the arbitrators are far more incentivised to take paths that do not necessarily contribute to the mandate that the Convention be applied as uniformly as possible.

SUMMARY OF CHAPTER III

Chapter III has put forth a comprehensive list of causes of non-uniform application of the CISG. More precisely, it attempted to fill the void in the existing literature as no other work sought to pinpoint the causes of non-uniform application of the CISG. Chapter III noted that they can be divided between two categories. The first category encompassed those causes that stem from the design of the uniform sales system. More precisely, the drafters of the CISG did not only create a Convention, but have yielded a system through which international sales disputes can be resolved.

Those intrinsic characteristics of the CISG system that bring about the non-uniform application of the Convention (referred to here as internal causes) are as follows: (1) exclusion of certain matters from the CISG's scope of application, (2) lack of uniform interpretative methodology, (3) official and unofficial translations of the CISG, (4) increased reliance on legal standards, (5) reservations, and (6) lack of a final authority.

The second category included those causes that are unrelated to how the CISG system was designed. In other words, they would have existed no matter how the CISG system is set. Hence, they were labelled as internal causes; and they are predominantly concerned with the traits that the decision-makers possess as human beings. The internal causes of non-uniform application of the CISG were identified as follows: (1) homeward trend, and (2) costs and incentives.

Next chapter (which is Chapter IV) will seek to determine whether the non-uniform application of the CISG is a harmless anomaly, or whether it constitutes a problem that ought to be tackled.

CHAPTER IV
4. DETRIMENTAL IMPACT OF NON-UNIFORM APPLICATION OF THE CISG

Chapter III enlisted and analysed the causes of non-uniform application of the CISG. In this chapter (Chapter IV), the aim will be to assess whether the said phenomenon of non-uniform application represents a harmless, or even a desirable anomaly, or whether its impact is sufficiently detrimental that it warrants attempts to curb it. After a careful analysis, Chapter IV concludes that, in light of the detriments that non-uniform application of the CISG generates, it would be advisable to take steps to ensure a higher level of uniformity in applying the CISG.

Chapter IV is divided into two sections. Section 4.1 takes a strictly theoretical perspective. It describes the benefits of uniformity that get either negated or seriously compromised when a uniform instrument (in this case the CISG) is not applied in a sufficiently uniform manner. Therefore, non-uniform application is equated with the uniform instrument not living up to its full potential.

Section 4.2 seeks to avoid the paternalistic approach that employing only a theoretical perspective would entail. In other words, relying only on scholarly opinions without assessing the stance of those who are supposed to benefit under the CISG regime would yield condescending and patronising connotations. Section 4.2 escapes the dangers of the paternalistic approach by using the available empirical data to try to determine the positions of businesses regarding the non-uniformity issue. Although no comprehensive data have been collected in this regard on the international level as of yet, it is through analogy and use of the existing surveys and polls that Section 4.2 manages to yield a tentative conclusion that businesses in general are in favour of a higher level of uniform application of uniform law instruments. In addition, Section 4.2 manages

to find a nexus between the frequent exclusion of the CISG by the parties and their lawyers on one hand, and non-uniform application on the other. In combination, these two findings are the second justification in favour of seeking a higher uniformity in the application of the CISG that Chapter IV offers.

In conclusion, this Chapter notes that, in light of the detrimental impacts discussed in Section 4.1, and after the assessment of positions of businesses and their lawyers on the issue of non-uniformity elaborated in Section 4.2, the aim of pursuing a higher degree of uniform application of the CISG is very much worthwhile.

4.1 DILUTION OF GENERAL BENEFITS OF UNIFORMITY DUE TO NON-UNIFORM APPLICATION OF THE CISG – THEORETICAL ANALYSIS

The justification behind the push for adoption of uniform laws at the international level is that uniform laws bring about general benefits that cannot come to fruition with compartmentalisation that the national legal systems create and foster.[550] However, if the CISG is not applied in a sufficiently uniform manner, what ensues is not materialisation of benefits of uniformity, but rather a boomerang effect. The said benefits through the non-uniform application get either negated or severely undermined.[551] In other words, and as pointed out earlier in this thesis, achieving textual uniformity (i.e. adoption of a uniform text) does not in practice correspond

[550] Franco Ferrari, "Uniform Interpretation of the 1980 Uniform Sales Law," *Ga. J. Int'l & Comp. L.* 24 (1994): 185; Roy Goode, "Reflections on the Harmonisation of Commercial Law," *Uniform Law Review* 19, no. 1 (1991): 54; Sandeep Gopalan, "New Trends in the Making of International Commercial Law," *Journal of Law and Commerce* 23 (2004): 123.

[551] Camilla Baasch Andersen, "Furthering the Uniform Application of the CISG: Sources of Law on the Internet," *Pace Int'l L. Rev.* 10 (1998): 404.

to attainment of substantive uniformity (i.e. uniformity in the application of a uniform text).[552] The benefits mentioned here only come to fruition in combination with the latter, and not the former. The ensuing subsections will illustrate this in greater detail.

For the sake of simplicity and readability, the benefits will be divided between two categories: (1) economic benefits and (2) legal benefits of uniformity. While these two groups of benefits will most likely at times overlap, there is one important difference that justifies this categorisation. Namely, the former category is characterised primarily by its aim to bring about economic benefits either for the transacting parties specifically, or to yield them on an even more extensive scale. The latter category encompasses benefits that improve the overall quality of law, and they are of broader scope than economic benefits.

4.1.1 Detrimental Impact on Economic Benefits of Uniformity

The economic benefits of uniformity strive to increase the economic well-being of the parties transacting internationally. More precisely, without the uniform law, many parties, in particular small and medium-sized enterprises, are frequently dissuaded from engaging in the cross-border transactions.[553] Therefore, the parties are better off as compared to the situation in which they are not transacting at all. If, however, they do decide to transact with the non-uniform framework supporting their transaction, the overall economic benefits extracted out of such transaction would be diminished as compared to the transaction done against the backdrop of uniform law.[554] Furthermore, uniform law has the potential to increase the economic welfare

[552] Felemegas, "The United Nations Convention on Contracts for the International Sale of Goods: Article 7 and Uniform Interpretation," (see introduction, n. 41).

[553] "Communication from the Commission to the European Parliament and the Council - A More Coherent European Contract Law - An Action Plan," (see chap. 1, n. 155).

[554] Ibid., 7.

beyond those of the two transacting parties.[555] The effect of the sum of parties transacting internationally as a result of security provided to them by uniform law goes beyond the relevance for the transacting parties only. In other words, there is a spill-over effect as the overall economic welfare gets increased as a consequence of the sum of cross-border transactions spurred by uniform law.

The following benefits will be grouped in the category of economic benefits of uniformity: (1) disincentive for the parties to engage in strategic trickery, (2) reduction of transaction costs, and (3) general contribution to the development of international trade. The following paragraphs of this subsection will illustrate the negative effects that ensue when a uniform instrument is not applied in a sufficiently uniform manner. More precisely, the non-uniform application of a uniform instrument will tend to either reduce or eliminate the economic benefits of uniformity. The said analysis will be carried out against the backdrop of the CISG.

4.1.1.1 More Room to Engage in Strategic Behaviour

A party to a transaction will inevitably try to devise strategies in order to make the transaction as beneficial for him, or her, as possible.[556] This does not necessarily imply that those strategies will be used in bad faith. However, parties do not enter transactions so as to generate a surplus, and then divide that surplus equally amongst themselves.[557] They enter into transactions

[555] "Annotated Text of CISG Preamble," Pace Law Albert H. Kritzer CISG Database, 2002, https://www.cisg.law.pace.edu/cisg/text/preamble.html. The states have expressed the opinion in the CISG Preamble that "the adoption of uniform rules which govern contracts for the international sale of goods and take into account the different social, economic and legal systems would contribute to the removal of legal barriers in international trade and promote the development of international trade."

[556] John Linarelli, "The Economics of Uniform Laws and Uniform Law-Making," *Wayne Law Review* 48 (2002): 1397.

[557] Ibid.

knowing that the surplus will be generated, and they will attempt to find a way to grab as much of it as possible. This behaviour, more often than not, leads to the decrease in total surplus, or rather, generates a lower surplus than that which would have been generated had the parties not engaged in strategic trickery.[558]

To illustrate, differing national laws can be utilised by a party to obtain as much surplus from the transaction as possible. For instance, that party can explore the provisions of differing national laws, and after establishing which laws are more favourable to him, or her, that party can then try to obtain a choice of that particular law to be the governing one in case of a dispute. The same can be said for the choice of forum, or in the absence of that choice, for the phenomenon known as the forum shopping. All these activities generate costs, and hence, increase the costs of the transaction, thereby decreasing the surplus that could have been generated without the strategic trickery. The existence of uniform laws very much limits the room for manoeuvre in this regard, thereby preventing the parties from engaging in a behaviour which leads to the decrease of surplus.[559]

It must be noted that, in case of the CISG, its ability to prevent the parties from engaging in strategic trickery is rather limited as its application can easily be excluded by the parties themselves.[560] However, the Convention does have the potential to exert a positive impact in this regard when the parties do not decide to exclude its application. In other words, if the parties opt that the CISG be the applicable substantive law to their contract, then the said choice by the parties should act as a disincentive for them to engage in strategic trickery. However, in practice, that is

[558] Ibid.

[559] Ibid.

[560] "Annotated Text of CISG Article 6," (see chap. 1, n. 174).

not always the case, this being the consequence of non-uniform application of the CISG.

Let us assume that Party A and Party B are negotiating to enter into a sales contract. Let us also assume that both of them have their places of business in the CISG contracting states, and that both of them prefer that the CISG be the applicable law to their agreement. Therefore, at first glance, one might be led to believe that the two countries share the same law applicable to international sales. However, let us then assume that the judiciaries of the two countries are divided on the interpretation of Article 39 of the CISG.[561] While Party A's country interprets the said Article in a strict manner (as do German courts, for example)[562], thereby allowing for very short periods of time for inspection of the goods by the buyer and notification in case the goods are defective, Party B's country has a diametrically opposite approach. More precisely, Party B's country follows approach that is more similar to that one of France and the US, allowing for longer periods of time for the buyer to inspect the goods and notify the seller in case the delivered goods are defective.[563] With the situation thus described, it is evident that Party A's and Party B's respective countries do share the same text of the law for international sales, but the substance differs significantly.

Supposing that Party A is the buyer, then Party A will have an incentive to seek a more lenient approach under Article 39, with the more lenient approach being the approach of its place of business. In other words, in case there is a dispute concerning the non-conformity of the goods, the buyer will most likely be allowed more time to inspect the goods and notify the seller of the found non-conformity.[564] In contrast, Party B, the seller, will then, correspondingly, be in favour

[561] For a detailed discussion of Articles 39, please refer to Chapter II.

[562] Girsberger, "The Time Limits of Article 39 CISG," 243 (see chap. 2, n. 279).

[563] Schwenzer, Fountoulakis, and Dimsey, International Sales Law, 704 (see chap. 2, n. 276).

[564] Ibid.

of the approach followed by its country, i.e. its own place of business.[565]

There are two possible pathways for Party A and Party B in the hypothetical case at hand. Obviously, both will be inclined to insert a particular forum selection clause, if they do not opt to settle their disputes through arbitration.[566] Party A would be seeking that the courts of its place of business be given jurisdiction over any dispute that may arise out of or in relation to the sales agreement with Party B. Party B would be seeking the opposite; that the forum selection clause be made in favour of the courts of its place of business. In case one of the Parties has a significantly stronger bargaining power, then the outcome is clear; the party with the stronger bargaining power will be able to impose its preferences on the party with the weaker bargaining position.[567] However, a word of caution is due here. Forum selection clauses are not always heeded by courts, thus there is still danger that other courts might disregard it and entertain the case.[568] What this means is that, even if the parties agree on the forum selection clause, one of the parties might still opt to initiate proceedings elsewhere if it knows that some other forum might be more receptive to its claims.

If no party has a visibly stronger bargaining power, then both will be incentivised to engage in strategic behaviour, seeking to bring about the insertion of a forum selection clause favourable only to one side. If they decide not to regulate forum selection contractually, then there is every

[565] Ibid.

[566] Leandra Lederman, "Viva Zapata: Toward a Rational System of Forum-Selection Clause Enforcement in Diversity Cases Notes," *New York University Law Review* 66 (1991): 423.

[567] Ingeborg Schwenzer, "Who Needs a Uniform Contract Law, and Why?," *Villanova Law Review* 58 (2013): 10. "[…] company with overwhelming bargaining power contracts with an economically weaker party. The powerful company usually will be able to impose anything that it wants on its contract partner."

[568] Cindy Noles, "Enforcement of Forum Selection Agreements in Contracts between Unequal Parties," *Ga. J. Int'l & Comp. L.* 11 (1981): 693; Jens Dammann and Henry Hansmann, "Globalizing Commercial Litigation," *Cornell Law Review* 94 (2009 2008): 39; William Michael Reisman, "International Supervision in the Pre-Arbitral Phase," in *Recueil Des Cours, Collected Courses, Tome/Volume 258 (1996)* (The Hague: Brill Nijhoff, 1997), 73.

chance that forum shopping, in case of a dispute, will ensue.[569] All these considerations would have been superfluous had Article 39 been applied consistently across different jurisdictions.

As one can clearly see in this hypothetical illustration, lack of uniform application of a uniform law instrument has an effect of negating the benefits that the uniform law is expected to procure. If the uniform law (in this specific case the CISG) were to be applied with a sufficiently high level of uniformity, then the ability of the parties to engage in strategic behaviour vis-à-vis each other would be significantly diminished in cases where the Convention's would not be excluded contractually. Instead, the non-uniform application essentially gives incentive to the parties to perform strategic trickery. In other words, textual uniformity solely is not sufficient for there to be a disincentive for the parties not to engage in such behaviour. It is only substantive uniformity that can achieve this aim.

4.1.1.2 Reinstatement of Transaction and Dispute-Settlement Costs

The proponents of uniform law cite increased transaction costs that arise because of legal diversity among nation states as the main argument in favour of adoption of uniform law instruments.[570] The parties usually incur these costs in the negotiation stage, an example being soliciting legal services on foreign law required to make the informed decision about the choice of

[569] Franco Ferrari, "'Forum Shopping' Despite International Uniform Contract Law Conventions," *The International and Comparative Law Quarterly* 51, no. 3 (2002): 689–707.

[570] Camilla Baasch Andersen, "A New Challenge for Commercial Practitioners: Making the Most of Shared Laws and Their Jurisconsultorium," *UNSWLJ* 38 (2015): 911; Juana Coetzee, "A Pluralist Approach to the Law of International Sales," *Potchefstroom Electronic Law Journal* 20 (2017): 2; Maren Heidemann, *Methodology of Uniform Contract Law: The UNIDROIT Principles in International Legal Doctrine and Practice* (Springer Science & Business Media, 2007), 38; Luke R. Nottage, "Who's Afraid of the Vienna Sales Convention (CISG)? A New Zealander's View from Australia and Japan," *Victoria University of Wellington Law Review* 36 (2005): 830; Gerhard Wagner, "Transaction Costs, Choice of Law and Uniform Contract Law," in *Modern Law for Global Commerce - Proceedings of the Congress of the United Nations Commission on International Trade Law Held on the Occasion of the Fortieth Session of the Commission* (Vienna: UNCITRAL, 2007), 39.

applicable law. In addition, an argument can be constructed that uniform law would contribute to reduction of dispute-settlement costs.[571] The parties incur these costs when they seek to prove the law before the deciding authority.[572] In combination, these two arguments represent the most persuasive justification for advancing the uniform law cause.

In the absence of uniform laws, every country has its own specific set of laws that will be applied within its territory.[573] For internal commercial transactions, this diversity of laws will not represent a challenge as the transacting parties will normally only have to abide by the internal laws of the place in which they are transacting.[574] In contrast, the minute one engages in cross-border transactions, more than one set of laws comes into the spotlight. The traditional solution in commercial transactions is that only one national law governs the transaction.[575] However, as will be shown below, even then the parties will have to face increased costs.

In the cross-border setting, a coherence in relation to the applicable substantive law is achieved through private international law in two ways.[576] The first way is through the respect for the autonomy of the parties.[577] In other words, the courts and arbitral tribunals will generally heed the choice that the parties had made in relation to the applicable law. The parties typically opt for

[571] Ingeborg Schwenzer and Pascal Hachem, "The CISG - Successes and Pitfalls," *American Journal of Comparative Law* 57 (2009): 464.

[572] Ibid.

[573] Carolyn Hotchkiss, *International Law for Business* (McGraw-Hill, 1994), 25.

[574] Andrea Bonomi, "Mandatory Rules in Private International Law - The Quest for Uniformity of Decisions in a Global Environment," in *Yearbook of Private International Law*, vol. 1 (sellier european law Publ., 1999), 235.

[575] Ibid.

[576] Lord Mance, "The Future of Private International Law," *Journal of Private International Law* 1, no. 2 (2005): 186.

[577] Mo Zhang, "Party Autonomy and Beyond: An International Perspective of Contractual Choice of Law," *Emory International Law Review* 20 (2006): 511.

one of the national laws to govern their transaction.[578] The second way, absent an exercise of party autonomy, involves rules of private international law pointing themselves to the appropriate law. No matter which path is taken to get to the applicable law, both will include substantial costs for either one or both parties involved.

The increased costs in international commercial activities, among other things, generally stem from the need to assess or prove foreign law.[579] One of the essential assessments that needs to be made is regarding the contents of the law of the place of the party with whom one is to engage in the transaction.[580] To do this, more often than not, foreign lawyers need to be consulted about the contents of the law, about the pervasive trends in case law, etc.[581] In case of a dispute, the party (or possibly even both parties if they choose the law of a third country) will have to go a step further in assessment of the foreign law. More precisely, a requirement will arise that the contents of the foreign law be proven in court, or before the arbitral tribunal. Then there is the language barrier as often times obtaining information on foreign law will involve costly translation services.[582] On the whole, it is self-evident that seeking information about foreign law is costly, thereby the final consequence of it is the increase in the total cost of transacting internationally.

[578] Peter Godwin et al., "Negotiating Governing Law and Dispute Resolution Clauses in International Commercial Contracts," Lexology, November 24, 2010, https://www.lexology.com/library/detail.aspx?g=08a4 1896-6b21-47fa-91ed-25f9f4b216ce.

[579] Michael Joachim Bonell and Ole Lando, "Future Prospects of the Unification of Contract Law in Europe and Worldwide - A Dialogue between Michael Joachim Bonell and Ole Lando on the Occasion of the Seminar in Honour of Ole Lando Held in Copenhagen on 29 August 2012," *Uniform Law Review* 18, no. 1 (2013): 28.

[580] Ibid.

[581] Harry M. Flechtner, "The History, Rationale, and 'Enactment Architecture' of the UCC," in *CISG vs. Regional Sales Law Unification with a Focus on the New Common European Sales Law* (Sellier European Law Publishers, 2012).

[582] William P. Johnson, "Turkey's Accession to the CISG: The Significance for Turkey and for Sales Transactions with U.S. Contracting Parties," *Ankara Law Review* 8, no. 1 (2011): 21.

And assessment of the foreign law is generally needed no matter whether the choice of law clause is inserted into the contract, or whether the choice will be left to the rules of private international law.

To illustrate the increased transaction costs that occur in the negotiation stage, let us firstly assume that Party A and Party B want to engage in a cross-border sale of goods. Let us also assume that Party A has a stronger bargaining power than Party B, and is thus able to impose the law of its own place of business, i.e. the law of its own country.[583] Even when this is the case, the inquiry into the law of Party B's country is still desirable. For instance, while the principle of party autonomy is widely accepted and propagated, it is still not universal.[584] Hence, it may occur that courts of Party B's country might not honour the choice of law clause designating the law of Party A's country as the applicable substantive law. Therefore, even if one has stronger bargaining power, this still does not entirely dispense with the need to look into the law of the place from where the other party comes from. The party with the weaker bargaining position will, evidently, be forced to acquaint itself with foreign law.

Secondly, let us now assume that nether Party A nor Party B has a stronger bargaining power. The parties may decide to insert a choice of law clause in their contract. If they decide to do so, then they will either choose one of their countries' respective laws to govern their transaction, or will opt for what they perceive to be a neutral law of a third country. No matter what their final choice is, it will require both parties to do at least some legal investigation. Namely, if the law of Party A's country is chosen as the applicable substantive law, then it will be desirable

[583] Spagnolo, "A Glimpse through the Kaleidoscope: Choices of Law and the CISG (Kaleidoscope Part I)," 150 (see chap. 3, n. 461).

[584] María Mercedes Albornoz, "Choice of Law in International Contracts in Latin American Legal Systems," *Journal of Private International Law* 6, no. 1 (2010): 23; Schwenzer and Hachem, "The CISG - Successes and Pitfalls," 464 (see n. 571).

for Party A to at least determine to what extent courts of Party B's country recognise the principle of party autonomy, while Party B will be required to undertake thorough investigation into the law of Party A's country. The same holds true if the parties opt for law of Party B's country, only the roles would be reverse. Finally, the parties may decide to insert what they perceive to be a neutral choice of law clause, with that in this day and age is often Swiss law.[585] If this approach is taken, then both parties will be required to familiarise themselves with at least this presumably neutral law of a third country.

Thirdly, let us assume that Parties A and B have reached an impasse in their negotiating process, and simply cannot agree on the applicable law. Yet, they decide to proceed with the transaction, hoping that the transaction process will advance smoothly. In the alternative, we could also assume that they simply decided not to bother themselves with choosing the applicable law to govern their transaction. In either way, in case a dispute arises, it is safe to assume that one of their countries' respective laws will apply to the transaction by virtue of the rules of private international law.[586] These rules are far from being predictable, and in many instances decision as to which law applies to a transaction can reasonably go both ways.[587] Consequently, even when no choice of the applicable substantive law was made, it would still be advisable for the parties to look into each other countries' respective laws.

Increased costs also arise if the dispute occurs between the parties (dispute settlement costs). More precisely, litigating or arbitrating a case does not only require assessment of law, but

[585] Schwenzer and Hachem, "The CISG - Successes and Pitfalls," 465 (see n. 571).

[586] Harold J. Berman, "The Uniform Law on International Sale of Goods: A Constructive Critique of Unification of Law," *Law and Contemporary Problems* 30 (1965): 360.

[587] Klaus Peter Berger, *The Creeping Codification of the New Lex Mercatoria* (Kluwer Law International, 2010), 21.

a step further. The parties will have to prove the law before the competent authority.[588] As a result, the costs are even higher as compared to the negotiation stage. To illustrate how these higher dispute settlement costs get incurred, let us assume that the dispute arose between Party A and Party B. If they have chosen the law to govern their transaction, it will most probably be the law of one of their own respective countries, or the law of the country that they deem to be neutral.[589] In case they choose the law of Party A's country to be the governing law of the transaction, then Party B will have a more challenging task than Party A in proving the law before the competent authority. For Party A, this will be a much less cumbersome feat as Party A is closely familiar with the law of its own country. If Party B's law is chosen as the governing law, the parties will then again be in the same position, just with the reverse roles. Their situation will be even more precarious if they opt for what they perceive to be the neutral law of a third country to govern their transaction. If a dispute arises, then both will have to incur higher dispute settlement costs in order to prove what the contents and operation of foreign law are before the competent authority.

There is also a possibility that Parties A and B did not, for whatever reason, choose the applicable law. In that case, if the dispute arises, the deciding authority will likely resort to the rules of private international law to determine which law applies to the transaction.[590] In arbitration, the tribunal will sometimes have the option of *voie directe*, i.e. skipping the application of private international law, and proceeding directly to apply the substantive law.[591] In all probability, the deciding authority will end up with either the substantive law of Party A's or Party

[588] Schwenzer and Hachem, "The CISG - Successes and Pitfalls," 464 (see n. 571).

[589] Ibid.

[590] Joost Blom, "Choice of Law Methods in the Private International Law of Contract," *Canadian Yearbook of International Law* 16 (1978): 230.

[591] Doug Jones, "Choosing the Law or Rules of Law to Govern the Substantive Rights of the Parties," *Singapore Academy of Law Journal* 26 (2014): 914.

B's country. Whatever the outcome, the party for whom the applicable substantive law is foreign will incur higher dispute settlement costs compared to the Party who gets to enjoy the advantage of home law. If the deciding authority, for whatever reason, decides that the law of a third country is the most appropriate one, then both Party A and Party B will be disadvantaged in the sense that the dispute-settlement costs will be higher for both parties.

While the CISG is not a complete sales law in a sense that certain areas are excluded from its coverage (e.g. validity of the contract), it still covers a wide array of issues that arise in relation to an average international sales agreement.[592] Therefore, as compared to situations when it is the national law of either Party A's or Party B's country that is the applicable substantive law to the sales agreement, or when that role is played by a supposedly neutral law of a third country, the CISG offers three important advantages. Firstly, as a consequence of their decision to have the CISG be the applicable substantive law to their agreement, there are significantly smaller portions of foreign law that, in total, need to be assessed. Both Party A and Party B might only need to assess aspects of sales law of each other's respective countries that are not regulated by the CISG itself. This is in stark contrast to the situation when it is either the sales law of Party A's or Party B's country that is chosen to apply, with at least one of the parties being required to assess virtually the entire body of a foreign country's sales law. This, in itself, introduces the second advantage that the CISG offers. Namely, it strikes a relatively fair balance between the parties in terms of the scope of foreign law that needs to be assessed. If the parties do not decide which national law will govern those aspects of their sales agreement that are excluded from the CISG's coverage, they will need to assess approximately the same issues in the laws of each other's countries. If they do make the choice of law in this regard in favour of laws of one of their respective countries, this

[592] Kröll, "Selected Problems Concerning the CISG's Scope of Application," 39 (see chap. 2, n. 192).

will still be, in overall terms, a less burdensome and more balanced choice as compared to any option that involves any national sales law as the applicable substantive law to their contract. Thirdly, as the CISG is considered to be part of the national laws of all the countries that decide to join the CISG, it is much easier to assess its contents or prove it before the deciding authority as compared to the situation when one or both parties have to grapple with foreign law. The CISG is more accessible than the foreign law as the parties will have access to it either in one of the six official versions (in English, French, Spanish, Russian, Arabic, and Chinese), or in other non-official versions (there are non-official versions in virtually all the languages of the adhering countries).[593] It is this accessibility that enables the parties to decrease their transaction costs when transacting internationally.

The advantages listed in the previous paragraph, however, collapse if the CISG is not applied in a sufficiently uniform manner. Namely, if the CISG is to bring down transaction and dispute settlement costs in the domain of international sales, there has to be sufficient consistency in its application across different jurisdictions. Taking the same text, but applying it and interpreting it in a different manner in different states has an effect of reinstating these costs.[594] For if the courts in Party A's country apply and interpret the CISG differently from the courts of Party B's country, this means that Party B will have to assess the case law of Party A's country under the CISG. In essence, this almost equates to assessing the national sales law of Party A's country, thus pushing the costs back up. Therefore, in order to make a viable contribution to the reduction of transaction and dispute settlement costs, there has to be a genuine strive to apply the CISG in a sufficiently uniform manner.

[593] Harry M. Flechtner, "The Several Texts of the CISG," 192 (see introduction, n. 45).

[594] Harry M. Flechtner, "Uniformity and Politics," 194 (see chap. 1, n. 55).

4.1.1.3 Mitigated Contribution to the Development of International Trade

The overall contribution of the uniform law movement is the expected positive impact on the development of trade.[595] The idea is relatively straightforward. As differing national laws form an obstacle to cross-border trade, their elimination and substitution with uniform rules will cause the trade volumes to increase. Therefore, uniform law is not only designed to benefit the two parties who are transacting, but its benefits are expected to go beyond that, and have a significantly wider impact.

In case of the CISG, this is embodied in its Preamble:

> "BEING OF THE OPINION that the adoption of uniform rules which govern contracts for the international sale of goods and take into account the different social, economic and legal systems would contribute to the removal of legal barriers in international trade and promote the development of international trade"

The proposition found in the CISG's Preamble seems to suggest that the states adhering to the Convention believe uniform rules indeed have a positive impact on the volume of international trade. The suggestion made in the Preamble corresponds to what has been discussed previously in this Chapter on the topic of transaction costs. To briefly reiterate, a quintessential argument advanced in favour of uniform law on an international level is that differing national laws increase the costs of cross-border trade, thereby, in essence, acting as a non-physical barrier to trade.[596]

[595] Luca Castellani, "The Contribution of Uniform Trade Law to Economic Development and Regional Integration in East Asia and the Pacific: A View from UNCITRAL," *Dong-A Journal of IBT Law* 8 (2012): 31; Joseph Nadelmann, "The United States and Plans for a Uniform (World) Law on International Sales of Goods," *University of Pennsylvania Law Review* 112 (1964): 709.

[596] Luca G. Castellani, "Introduction: The Role of Uniform Law in the Circulation of Legal Models: The Case of the CISG," in *Contribution a l'etude Du Droit Du Commerce International et Des Modes Alternatifs de Resolution Des Conflits Dans Le Pacifique Sud = Contributions to the Study of International Trade Law and Alternative Dispute Resolution in the South Pacific*, Revue Juridique Polynésienne (Association de Législation Comparée du Pacifique & New Zealand Association for Comparative Law, 2014), 6; Gopalan, "New Trends in the Making of International Commercial Law," 123 (see n. 550).

Uniform instruments such as the CISG are designed to reduce those costs, thus contributing to the removal of legal barriers in cross-border trade.[597] By doing that, they are expected to aid the development of international trade.

The traditional stance is that international trade is beneficial as it is the catalyst behind the economic growth and prosperity.[598] No country in this day and age can resort to autarky and seek self-dependence.[599] The CISG, as the uniform law instrument designed to reduce the legal barriers to international trade, is therefore expected to eventually make a more significant impact than simply enabling the two private parties who are willing to engage in a transaction to do so more easily in the international context. The ultimate goal is to make the CISG useful in the wider context of promoting trade.[600]

However, as already shown, if the CISG is not applied in a sufficiently uniform manner, the parties are again forced to incur higher costs when transacting across borders. In such circumstances, the costs that the CISG was designed to reduce thus get reinstated. Consequently, its positive impact on the development of international trade becomes rather limited. In other words, without a sufficiently high level of uniform application, the CISG cannot be expected to fulfil its full potential to contribute to the development of international trade.

[597] Rolf Knieper, "Celebrating Success by Accession to CISG," *Journal of Law and Commerce* 25 (2005): 478.

[598] Pam Zahonogo, "Trade and Economic Growth in Developing Countries: Evidence from Sub-Saharan Africa," *Journal of African Trade* 3, no. 1–2 (2016): 42; "Benefits of Trade," Office of the United States Trade Representative, https://ustr.gov/about-us/benefits-trade.

[599] William Michael Reisman, "International Arbitration and Sovereignty," *Arbitration International* 18, no. 3 (2014): 233.

[600] "Annotated Text of CISG Preamble," (see n. 555).

4.1.2 Detrimental Impact on Legal Benefits of Uniformity

Legal benefits of uniformity have broader aims in comparison to economic benefits of uniformity. While economic benefits aim to improve the economic welfare of the transacting parties, and possibly extend their economic impact on an even broader scale, legal benefits of uniformity strive to make improvements in the quality of law. In other words, betterments in law in and of itself justify the inclination towards more uniformity. For example, making law operationally more effective, accessible and comprehensible for the transacting parties, their lawyers, judges and arbitrators is a sufficient enough justification for advocating uniform law, provided that uniform law is capable of achieving that. Legal benefits, naturally, may end up having a positive impact on the economic welfare as well. Thus it is important to note that occasionally there may be an overlap between these two categories.

The following benefits have been grouped in the category of legal benefits of uniformity: (1) specialisation in the international context, (2) simplicity, accessibility and neutrality, and (3) legal certainty. The following paragraphs of this subsection will illustrate the negative effects that occur when a uniform instrument is not applied in a sufficiently uniform manner. More precisely, the non-uniform application of a uniform instrument will tend to have an adverse effect on legal benefits of uniformity, thereby undermining or even dismantling them. The said analysis will be carried out against the backdrop of the CISG.

4.1.2.1 Undermining of Specialisation in the International Context

Ribstein and Kobayashi, in discussing the uniform laws in the context of the United States, note that

> [U]niform lawmaking agencies, by concentrating their resources on particular laws, can hire experts in particular fields or in statutory drafting. By contrast,

> state legislators are often part-time generalists who have little incentive to spend time finely crafting legislation in particular areas and lack the resources to hire advisors.[601]

The same observation, by analogy, is plausible for uniform laws on the international level as well. National laws were first and foremost created to deal with activities occurring within their own territories. The legislative process that led to their adoption most probably did not include assessments as to how these laws would operate in the international context. The primary aim of the legislator was to ensure that the said laws were satisfactory for the internal use. As a result, these laws might in certain instances be inadequate or less than an optimal solution for an international commercial transaction.[602]

In contrast, uniform laws generally tend to be a product of careful specialised drafting.[603] National laws do not enjoy this advantage as they, more often than not, are written by full-time generalists.[604] Through this kind of drafting process, two important concerns can be addressed. Firstly, the drafters of a uniform law instrument can take into account the specificities that arise in the international context, and are generally absent in the purely domestic context.[605] For example, in case of the CISG, the drafters made sure that the bar for avoiding the contract was set quite high.

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[601] Larry E. Ribstein and Bruce H. Kobayashi, "An Economic Analysis of Uniform State Laws," *The Journal of Legal Studies* 25, no. 1 (1996): 140.

[602] Schwenzer and Hachem, "The CISG - Successes and Pitfalls," 464 (see n. 571); Walter Mattli and Thomas Dietz, *International Arbitration and Global Governance: Contending Theories and Evidence* (OUP Oxford, 2014), 110.

[603] Troy Keily, "Harmonisation and the United Nations Convention on Contracts for the International Sale of Goods" (see introduction, n. 38); Veneziano, "The Soft Law Approach," 521-528 (see introduction, n. 49); Felemegas, "Introduction," 29 (see chap. 1, n. 141). Felemegas cites Honnold as saying that ""[b]oth the UNIDROIT Principles and the Uniform Sales Law came from the same well, and there was also some identity of drafters, for a number of experts who had worked on the CISG later joined UNIDROIT's working teams."

[604] Ribstein and Kobayashi, "An Economic Analysis of Uniform State Laws," 140 (see n. 601).

[605] Ibid.

As Zeller notes, "[t]he CISG is conscious of the 'tyranny of distance' and the associated costs, and it is therefore not surprising that once goods have been delivered the CISG, only allows avoidance in exceptional circumstances".[606] Secondly, in the international context, parties to transactions often come from different legal systems. These different legal systems have over the course of time developed concepts that considerably differ both from the theoretical and practical perspective. The drafting process of uniform laws allows for a dialogue that can lead to reconciliation of these differences, or to a compromise that includes a mixture of approaches, or it can be that the involved drafters and negotiators agree on the adoption of a concept or approach from a particular legal system.[607] Legislative processes that lead to the adoption of national laws, as compared to uniform laws, do not nurture this kind of drafting procedure for obvious reasons. They are mostly designed with domestic activities in mind. Consequently, an argument has been put forth that legislative processes that lead to the adoption of uniform law instruments have the capability of yielding "better law" as compared to national laws.[608] They do so as they aim to make the law more suitable for the international/cross-border transactions.[609]

However, the 'better law' argument stands on shaky ground if the final product is not applied with a sufficient level of uniformity across different jurisdictions. Namely, with a lack of sufficient level of uniform application, the text itself may be labelled as superior in relation to national laws, even for use in the purely domestic context. This stance is supported by the fact that

[606] Bruno Zeller, *Damages Under the Convention on Contracts for the International Sale of Goods* (Oxford University Press, 2009), 199.

[607] DiMatteo and Ostas, "Comparative Efficiency in International Sales Law," 374 (see n. 186).

[608] Kozuka, "The Economic Implications of Uniformity in Law," 687 (see chap. 3, n. 386); Juana Coetzee, "INCOTERMS as a Form of Standardisation in International Sales Law: An Analysis of the Interplay between Mercantile Custom and Substantive Sales Law with Specific Reference to the Passing of Risk" (Stellenbosch: University of Stellenbosch, 2010), 173.

[609] Kozuka, "The Economic Implications of Uniformity in Law," 687 (see chap. 3, n. 386).

the CISG served either as a direct benchmark or as a source of inspiration for contract law reform in several countries including, for example, Estonia, Russia, China, Germany.[610] However, even if we accept the claim that a superior text is yielded through processes that are typically used to bring about uniform laws, the "better text" notion does not directly translate into 'better law.' 'Better law' is a far more complex and broader notion than 'better text.' More precisely, for a 'better text' to attain the status of a 'better law,' one has to ensure that the appropriate application and enforcement mechanisms are in place. If these are lacking, the text, although sophisticated and advanced, remains, in essence, an underachievement.

In the case of the CISG, the lack of uniformity is what undermines the notion that the CISG is the 'better law' as when compared with its national counterparts. As pointed out, it is certainly plausible to argue that the CISG is the 'better text' when compared to national sales laws. Assuming, for instance, that China and Germany have indeed modelled their certain sales law provisions on the CISG because the general perception in those countries was that the CISG's approach was more efficient, this does not lead to the conclusion that those provisions in the CISG are indeed more efficient in cases where the CISG applies. In China and in Germany, those provisions will be applied by a court system whose hierarchical structure will be able to ensure their uniform and consistent application. In the CISG context, the same text, or at least the same approach, will be applied, but there will be crucial differences in the application processes across different jurisdictions. The CISG, evidently, does not benefit from a hierarchical court structure. Therefore, there will be significant differences in the application process between the CISG provisions as applied under the CISG and as applied under the national laws into which they were transplanted. Consequently, in order to ensure that the CISG is not only the 'better text,' but also

[610] Franco Ferrari, "The CISG and Its Impact on National Legal Systems – General Report," in *The CISG and Its Impact on National Legal Systems* (Munich: Sellier. European Law Publ., 2008), 474.

the 'better law,' it is advisable to establish mechanisms that will ensure a high level of uniform application.

4.1.2.2 Undermining of Simplicity, Accessibility and Neutrality

The uniform law movement has as one of its aims to simplify[611] law on the international level, make it more accessible[612] and neutral[613] in the eyes of the transacting parties. Simplification, accessibility and neutrality of rules applicable to businesses have in themselves intrinsic value. Making law simple and accessible does not only benefit parties who engage in international trade, but also their lawyers, and in case of a dispute, the decision-makers, be they arbitrators or judges. If the applicable rule is effortless to find, and its language is accessible and easily comprehensible, this in itself facilitates interaction between businesses and their lawyers, and in the event that a dispute arises, between the parties to the dispute on one side, and the decision-maker, on the other.

The CISG's endeavour in this regard is mirrored in its format and language. Namely, the CISG, as compared to texts in national laws dealing with the same topic, is a relatively short text, and is fairly easy to navigate. The text of the CISG has been written and adopted in six official languages (English, French, German, Spanish, Russian and Chinese), and has been translated and

[611] Ferrari, "Uniform Interpretation of the 1980 Uniform Sales Law," 195 (see n. 550); Kazuaki Sono, "International Sale of Goods: Dubrovnik Lectures," in *The Vienna Sales Convention: History and Perspective* (Oceania, 1986), 7; "Uniform Law Commission Drafting Rules" (Edition National Conference of Commissioners on Uniform State Laws, 2012), 1, http://www.uniformlaws.org/Shared/Publications/DraftingRules_2012.pdf; Christoph Brunner, *Force Majeure and Hardship Under General Contract Principles: Exemption for Non-Performance in International Arbitration* (Kluwer Law International, 2009), 17.

[612] John Honnold, *Uniform Law for International Sales under the 1980 United Nations Convention* (Kluwer Law International, 2009), 40; Brunner, *Force Majeure and Hardship under General Contract Principles*, 17 (see n. 611); Schwenzer and Hachem, "The CISG - Successes and Pitfalls," 466 (see n. 571); Heidemann, *Methodology of Uniform Contract Law*, 36 (see n. 570).

[613] Loukas Mistelis, "Is Harmonisation a Necessary Evil? The Future of Harmonisation and New Sources of International Trade Law," in *Foundations and Perspectives of International Trade Law* (London: Sweet & Maxwell, 2001), 21; Schwenzer and Hachem, "The CISG - Successes and Pitfalls," 476 (see n. 571).

used by courts and arbitral tribunals in numerous other (unofficial) languages.[614]

The CISG seeks to avoid the unnecessary legalese. Its provisions are drafted by using the everyday language as much as possible, making it relatively comprehensible even to a layman.[615] Evidently, this does not make the legal services in regard to the CISG superfluous, but it enables those who are not trained in law to have a better understanding of their rights and obligations.

Furthermore, the CISG is characterised by neutral language and it employs concepts whose meanings are autonomous vis-à-vis similar concepts that can be found in national sales laws.[616] More precisely, the CISG does not favour any country's legal vocabulary. It is for this reason that the drafters of the CISG have pioneered expressions such as 'avoidance of the contract' and 'fundamental breach.'[617] In other words, the CISG strives to create legal language of international trade distinct from languages used within the national law context. If it uses the same expression as found in a particular national sales law, that expression is not to be interpreted in line with its meaning in that national sales law.[618] It is to be given an autonomous and a truly international meaning.[619]

The CISG's approach to language is telling of its effort to be a neutral law for the parties engaging in cross-border trade.[620] Namely, by seeking to use neutral expressions and concepts that

[614] "Texts of the CISG," Pace Law Albert H. Kritzer CISG Database, 2014, https://www.cisg.law.pace.edu/cisg/text/text.html.

[615] Whittington, "Comment on Professor Schwenzer's Paper," 809 (see chap. 2, n. 211); Ziegel, "The Future of the International Sales Convention from a Common Law Perspective," 339 (see chap. 3, n. 454).

[616] Franco Ferrari, *Contracts for the International Sale of Goods: Applicability and Applications of the 1980 United Nations Convention* (Martinus Nijhoff Publishers, 2011), 12-16.

[617] DiMatteo and Janssen, "Interpretive Methodologies in the Interpretation of the CISG," 97 (see n. 407).

[618] Ferrari, *Contracts for the International Sale of Goods*, 12-16 (see n. 616).

[619] Ibid.

[620] Felemegas, "Introduction", 21.

are independent of any particular country and its legal system, the CISG ensures that both parties are on an equal footing. Its neutrality is further reinforced by language since the CISG, unlike national laws, is available in a wide variety of languages, both official and unofficial ones.[621]

However, the CISG's dedication to simplicity, accessibility and neutrality gets compromised if the CISG is not applied in a sufficiently uniform manner. While the text of the CISG is succinct and user-friendly, this is a double-edged sword. Many concepts used in the CISG (such as reasonable period of time, fundamental breach, and avoidance of contract) are to be given practical meaning through application by courts and arbitral tribunals over time.[622] In accordance with Article 7, courts and arbitral tribunals are expected to look to other jurisdictions and examine how the CISG is applied and interpreted there.[623] If there are no serious divergences in the application of the CISG across different jurisdictions, then the simplicity aspect of the CISG is not undermined. While the decision-makers must look beyond the text and peek into other jurisdictions to ensure that the mandate of Article 7(1) is observed, this would not be problematic from the simplicity aspect if the CISG is applied with sufficient uniformity. It would only be a routine undertaking intended to obtain information in order to confirm a particular interpretation or a line of reasoning. In contrast, if the CISG is not applied uniformly enough, the decision-making authority then must engage in a complex analysis to determine which interpretation or line of reasoning is the most persuasive one. Simplicity of the process, therefore, is taken away when a high level of non-uniform application of the CISG is involved. Together with simplicity,

[621] "Texts of the CISG," (see n. 614).

[622] Paul Amato, "U.N. Convention on Contracts for the International Sale of Goods - The Open Price Term and Uniform Application: An Early Interpretation by the Hungarian Courts," *Journal of Law and Commerce* 13 (1993): 1–29; Darren Peacock, "Avoidance and the Notion of Fundamental Breach Under the CISG: An English Perspective," *International Trade and Business Law Review* 8 (2003): 100.

[623] Ferrari, "Uniform Interpretation of the 1980 Uniform Sales Law," 204 (see n. 550).

accessibility is undermined in the same manner.

Finally, there is a danger that neutrality could also take a back seat with the lack of a sufficiently high level of uniform application of the CISG. As discussed in Chapter III, one of the underlying causes of non-uniform application of the CISG is the phenomenon known as homeward trend. In essence, it refers to a notion that decision-making authorities, and especially courts, often fall into a trap of interpreting the autonomous concepts found in the CISG through the lenses of their domestic laws.[624] Inevitably, when this occurs, the CISG gets applied differently in different jurisdictions. Thus, the homeward trend leads to non-uniform application of the CISG, and the two in combination have the potential to undermine the neutrality that the CISG is seeking to advance and maintain.

4.1.2.3 Undermining of Legal Certainty

One of the quintessential justifications put forth in favour of the adoption of uniform laws is legal certainty.[625] Proponents of uniform laws argue that the conflict of laws rules tend to be exceedingly complex and unpredictable, thus causing uncertainty when being applied.[626] More precisely, lawyers often times are unable to predict with a sufficient level of certainty the manner in which those rules will be applied by courts, and the outcome that they will yield. As a consequence, the proponents of uniform law favour its adoption on international level, in areas of law where this is politically and technically possible, that will do away with the burdensome conflict of laws rules. In other words, dispensing with differing national laws, and replacing them

[624] Ferrari, "Homeward Trend and Lex Forism," 20 (see chap. 3, n. 483).

[625] Cuniberti, "Is the CISG Benefiting Anybody?," 1514 (see introduction, n. 41).

[626] Ibid.

with uniform laws on international level would bring about a higher level of legal certainty.[627]

Legal certainty as a concept is not that easy to define or grasp. Over the course of its existence, it kept on evolving, and today it can be described as a "concept defined by a sum of components whose completeness is never postulated: non-retroactivity, accessibility and intelligibility, normativity and quality of the law, consistency of the law and case law, and the need for transitional measures in order to cope with an instability or unpredictability of the law, etc."[628] Even a superficial examination of this definition indicates that there is a nexus between a lack of uniform application of a uniform law instrument and lack of legal certainty.

Focusing on the CISG, one of the main catalysts for its adoption was precisely the argument based on legal certainty.[629] The argument is entertained at a purely theoretical level, with very few pieces of empirical evidence to back it up.[630] In essence, it is generally accepted by the proponents of uniform law that detailed empirical examination in this regard is unnecessary as it is self-evident that "the applicability of different national laws has the 'obvious consequence' of impairing it, and thus that the CISG must be an improvement".[631] This line of argument, on its face, has merit. After all, when different national laws may be applicable to a sales transaction, complications may arise on two fronts. Firstly, conflicts of laws rules tend to be uncertain and unpredictable, and vary significantly from jurisdiction to jurisdiction.[632] Having one set of uniform rules instead of first

[627] Ibid.

[628] Régis Lanneau, "What Is Legal Certainty? A Theoretical Essay," *SSRN Scholarly Paper* (Rochester, NY: Social Science Research Network, November 30, 2013), 2, https://papers.ssrn.com/abstract=2361630.

[629] Cuniberti, "Is the CISG Benefiting Anybody," 1514-1517 (see introduction, n. 41).

[630] Leandro Tripodi, *Towards a New CISG: The Prospective Convention on the International Sale of Goods and Services* (BRILL, 2015), 20.

[631] Cuniberti, "Is the CISG Benefiting Anybody," 1514-1517 (see introduction, n. 41).

[632] Ibid.

deciding which national law to apply would certainly allow for easier accessibility to law, make the process of applying the law less complex, and would add to the stability of law. After all, if conflict of laws rules are so unpredictable and inconsistent, nothing removes more effectively the unpredictability and inconsistency that they generate than establishing a mechanism that dispenses with them partially, or in their entirety. The CISG, as can be seen from Article 1(1)(b) and Article 7(2), purports to do the former, i.e. decrease the number of instances in which resort to conflict of laws rules will be required. Secondly, complications may arise when one needs to assess the contents of foreign law.[633] As previously discussed, establishing what the provisions of the relevant foreign law are and how they operate in practice can be a cumbersome and costly task. Language barriers, cultural differences, significant differences in the meanings of legal concepts; all these can impair accessibility and intelligibility in relation to the foreign law being examined.[634] As a result, uniform law such as the CISG has the ability to either mitigate these unwanted consequences, or even remedy them completely. Due to its limited scope of application, the CISG purports to achieve the former.

However, the attempts of the CISG to increase legal certainty are undermined if the CISG is not applied in a sufficiently uniform manner. Firstly, as indicated in Art. 7(2) of the CISG, issues which are governed by it but not expressly settled are to be resolved by resorting to the general principles on which the CISG is based. It is in the absence of those principles that the conflict of laws rules can be used to resolve the controversy by applying the relevant national law. Often times there is a fine dividing line between an issue which is governed by the CISG but not expressly

[633] Schwenzer and Hachem, "The CISG - Successes and Pitfalls," 464 (see n. 571).

[634] Ibid.

settled in it, and for which conflict of laws rules need to be used.[635] If and when different courts from different jurisdictions take different positions on the same matter in this regard,[636] then such a result will most definitely have an adverse impact on legal certainty. In other words, not only will the resort to the conflict of laws rules be more frequent than what would be desirable, but there will be a need to assess different approaches to the conflict of laws attitudes in different jurisdictions. All this, evidently, has a negative impact on the CISG's effort to positively influence legal certainty in the domain of international sales.

Secondly, as already discussed, non-uniform application of the CISG, in effect, causes return to the non-uniformity that is in its nature similar to the one that existed prior to the adoption of the uniform text. While the text is the same, the courts might be applying the text in a profoundly different manner. This, in turn, makes it advisable that the diligent parties not only assess the text of the CISG itself, but also the state of the interpretation of the CISG in the country of the other party to the sales contract. Evidently, if the endeavour of the CISG is to increase legal certainty by making improvements in the accessibility and intelligibility of the law, this endeavour is diametrically opposed to the impact that the lack of a sufficiently high level of uniform application of the CISG is producing.

4.2 LACK OF UNIFORM APPLICATION OF THE CISG FROM THE PERSPECTIVE OF BUSINESS ENTITIES

Section 4.1 of this chapter has assessed, from a theoretical perspective, the adverse

[635] McMahon, "Differentiating between Internal and External Gaps in the U.N. Convention on Contracts for the International Sale of Goods," 1003 (see chap. 1, n. 54).

[636] Lookofsky, "Walking the Article 7 (2) Tightrope Between CISG and Domestic Law," 87 (see chap. 1, n. 109).

consequences of non-uniform application of the CISG. Therefore, the examination of non-uniformity was carried out without determining the stance of the stakeholders, i.e. the business community. While the scholarly deliberation is of immense importance, it is not the only factor that needs to be taken into account when assessing the gravity of the non-uniform application of the CISG. At the end of the day, the CISG was designed to serve the interests of business entities that engage in cross-border trade. For this reason, it is advisable to avoid the paternalistic approach, and have their voices heard in this regard as well. The present section seeks to fill this gap by exploring and juxtaposing the surveys and polls that were carried out in relation to the following two issues: (1) whether non-uniformity in the international context represents a barrier to trade, and (2) exclusion of the CISG by the contracting parties.

While the available empirical data do not provide a direct answer these two pressing issues, as will be demonstrated below, they indirectly lead to conclusions in the affirmative: (1) that a substantial number of businesses consider non-uniform application of a uniform instrument as a barrier to cross-border trade, and (2) that there is a nexus between non-uniform application of the CISG and the high exclusion rates.

4.2.1 Availability of Empirical Data

A major obstacle in assessing the position of businesses on the lack of uniform application of the CISG is the simple fact that no comprehensive study, survey, or poll has been carried out on a global scale in this regard.[637] As this kind of undertaking would require immense resources, it is beyond the means of this author to conduct one. Consequently, this thesis will assess the existing studies, surveys and polls. Some of them will be on issues of direct applicability to the questions

[637] Dennis, "Modernizing and Harmonizing International Contract Law," 124 (see chap. 3, n. 382).

posed here. Their results will, evidently, be cited here without any reservation. However, in addition to these, studies, survey and polls will be cited that were carried out in different contexts, but their conclusions through analogy are still relevant for the issues discussed in this section.

4.2.2 Stance of Businesses on Non-Uniformity as a Barrier to Trade

No comprehensive attempt has been made, as of yet, to assess the stance of the business community on a global scale as to whether non-uniformity resulting from differing national laws represents a serious obstacle to international trade.[638] The closest that one can get to such an undertaking is the survey that was conducted within the EU to determine the attitudes of the European businesses towards further harmonisation and unification of private law in Europe.[639] The said survey was commissioned by Clifford Chance, and was carried out in 2005 by Gracechurch Consulting.[640] The survey encompassed 175 firms from eight different EU countries: United Kingdom, France, Spain, Germany, Poland, Hungary, Netherlands, and Italy.[641] It sought to include the views of businesses from different industries, and of different sizes (large, medium and small enterprises).[642]

[638] Ibid.

[639] Schwenzer, "Who Needs a Uniform Contract Law, and Why?," 723 (see n. 567). Schwenzer cites Vogenauer's and Weatherill's article 'The European Community's Competence to Pursue the Harmonisation of Contract Law - an Empirical Contribution to the Debate' to support her stance that viewing differing national laws as an obstacle to trade "has always been true and still holds true nowadays as proven by many recent field studies around the world." However, the said article focuses on one particular survey. i.e. the Clifford Chance survey from 2005.

[640] Stefan Vogenauer and Stephen Weatherill, "The European Community's Competence to Pursue the Harmonisation of Contract Law - an Empirical Contribution to the Debate," in *The Harmonisation of European Contract Law: Implications for European Private Laws, Business and Legal Practice* (Oxford and Portland, Oregon: Hart Publishing, 2006), 119.

[641] Ibid, 117.

[642] Ibid, 118.

4.2.2.1 Relevance of the Clifford Chance Survey on European Contract Law for the CISG

While it would be imprudent to argue that the results of the 2005 Clifford Chance Survey are automatically applicable to global trade in general, there are sufficient similarities between the intra EU trade and international trade to justify the use of the said survey as an informative tool for the global trade as well. In other words, it gives an indication of what the results of a similar survey on a global scale could be. On the whole, the intra-EU trade is, at the end of the day, international trade, albeit it is region-focused. Furthermore, the concerns raised in the survey and posed to the EU enterprises are either identical or quite similar to concerns that were sought to be addressed on a global scale through the adoption of the CISG. More precisely, in the survey, the businesses were asked if they perceive language, differences between legal systems, cultural differences, and cost of foreign legal services, among others, to be impairments to conducting cross-border transactions.[643] As already discussed, these were all pressing concerns that eventually led to the adoption of the CISG. Even more to the point, out of eight countries that were encompassed in the survey, seven of them are CISG contracting states, and the CISG is the default contract law for non-consumer sales transactions that occur between them.[644] This further reinforces the informative applicability of the 2005 Clifford Chance Survey to the issues surrounding the CISG.

4.2.2.2 Methodology of the Clifford Chance Survey on European Contract Law

The 2005 Clifford Chance Survey on European Contract Law was conducted in two

[643] Ibid, 128.

[644] "Status - United Nations Convention on Contracts for the International Sale of Goods (Vienna, 1980)," (see introduction, n. 1).

stages.[645] The first stage was designed in a way so as to obtain information on the participants' level of knowledge, their interests and their concerns.[646] The whole first stage had an informal twist to it, and was carried out in the interview format.[647] The data thus obtained were analysed for the purposes of designing the relevant survey questions for the second stage.[648] It was the second stage that was of vital importance for the whole undertaking. It was quite varied in that it consisted of multiple-choice questions, questions requiring to rate the available answers on a scale between 1 and 10, and both open-ended and closed-ended questions.[649] Moreover, it was also conducted in an interview format.[650]

There were four groups of questions that the 2005 Clifford Chance Survey sought to answer.[651] These were as follows:

(1) Questions aiming to establish the current practices of businesses regarding the cross-border trade;[652]

(2) Questions aiming to establish whether differences found in national contract laws constitute obstacles to cross-border trade;[653]

(3) Questions aiming to establish if the existing EU laws have either improved the situation

[645] Vogenauer and Weatherill, "The European Community's Competence to Pursue the Harmonisation of Contract Law - an Empirical Contribution to the Debate," 119 (see n. 640).

[646] Ibid.

[647] Ibid.

[648] Ibid.

[649] Ibid, 143.

[650] Ibid, 119.

[651] Ibid.

[652] Ibid.

[653] Ibid.

or have made the matters worse;[654]

(4) Questions aiming to establish whether further steps in the EU framework could be taken regarding the cross-border trade.[655]

4.2.2.3 Non-Uniformity in the Clifford Chance Survey and Implications for the CISG

Not all the results and conclusions from the 2005 Clifford Chance Survey will be analysed here as not all of them are of material importance for the CISG. Only those that carry relevance for the following two issues will be discussed: (1) the extent to which the business community perceives the existence of non-uniform national laws as a barrier to cross-border trade, and (2) the extent to which non-uniform application of the implemented uniform instruments is seen by the business community as an undesirable phenomenon. Before discussing the latter, it is important first to determine whether businesses consider legal diversity as being a problematic aspect for carrying out their cross-border activities. If the answer to this question is in the negative, then this would render the discussion on the non-uniform application of the implemented uniform instruments irrelevant. One would simply have to accept that businesses see no problems with having legal diversity in place.

4.2.2.3.1 Non-Uniform National Laws as a Barrier to Cross-Border Trade

The Clifford Chance Survey first raised the question as to whether obstacles to cross-border trade exist in the EU. Out of 175 firms that were surveyed, 14% stated that they do exist to a large

[654] Ibid.

[655] Ibid.

extent while 51% opined that they exist to some extent.[656] In contrast, 22% were of the opinion that the obstacles to cross-border trade do not really exist, and 10% perceived that they do not exist at all.[657] Only 3% of those surveyed answered that they did not know if those sorts of obstacles existed.[658] When one adds the percentages for the two affirmative answers (i.e. to a large extent and to some extent), one can see that 65% of the businesses surveyed found that there were obstacles to cross-border trade between different Member States of the EU.[659]

Naturally, the obstacles to trade are not always of legal nature.[660] This brings us back to the notion put forth in the Introduction to the thesis at hand. More precisely, uniform law instruments, the CISG being a quintessential example, are not omnipotent in a sense that they have the ability to remove all the obstacles to cross-border trade. Instead, they are conceived in a way so that they bring about an improvement in the domain of cross-border transactions, and not perfection. As part of the 2005 Clifford Chance Survey, the following question was posed:

> "How much do the following factors impact on your ability to conduct cross-border transactions? (Please rate on a scale of 1-10, where 1 is no impact and 10 is a high impact)"[661]

The possible answers, in random order, as presented in the source, with the average values assigned to them by the survey participants in the brackets, were as follows: language (4.05), variations between legal systems (5.35), cultural differences (4.37), differences in implementation of EU

[656] Ibid, 126.

[657] Ibid.

[658] Ibid.

[659] Ibid.

[660] Ibid, 128.

[661] Ibid, 144.

directives (5.04), bureaucracy/corruption (4.53), cost of obtaining foreign legal advice (5.16), tax (5.64), and other. [662] These answers seem to paint not too dim of a picture on the EU landscape. On average, businesses in the EU place the listed factors somewhere in the middle of the spectrum, with the legal factors being assigned somewhat higher values. However, these results must be perceived in the European context. More precisely, the EU countries have achieved a high level of economic and political integration,[663] and the EU has been active in harmonising certain aspects of private law by adopting directives. In addition, geographical and cultural proximity of these countries further mitigates the obstacles to the cross-border trade between them. Nevertheless, in spite of these facilitating factors, a substantial number of EU businesses still sees the differences between legal systems as posing obstacles to cross-border trade. In addition, many EU businesses perceive costs associated with obtaining foreign legal advice as another legal obstacle to cross-border trade. On the whole, the results of the Clifford Chance Survey illustrate that a significant number of businesses view the different (i.e. non-uniform) national laws as the barrier to cross-border trade.

What conclusions from the Clifford Chance can be drawn in relation to the broader international context? Unlike in the EU, there is no high degree of economic and political integration on the global level. Furthermore, more often than not, trade in a broader international context, when compared to the international trade between the EU countries, does not benefit from the same geographical and cultural proximity. Based on these considerations alone, it is safe to assume that the values for the factors explored in the Clifford Chance Survey would have been higher had the same survey been carried out in the global arena. Therefore, based on the findings

[662] Ibid, 128.

[663] Armin Cuyvers, "The Road to European Integration," in *East African Community Law* (Brill, 2017), 22.

of the Clifford Chance Survey, one can tentatively conclude that in the broader international context, the businesses would find that obstacles to cross-border trade exist, and that some of these obstacles come in the form of variations between different legal systems and costs that are associated with obtaining foreign legal advice. However, in order to confirm these tentative conclusions, it would be advisable to conduct a similar survey on the global scale as well.

4.2.2.3.2 Non-Uniform Application of Uniform Instruments as a Barrier to Cross-Border Trade

A significant source of discontent for businesses in the EU, as suggested by the Clifford Chance Survey, comes in the form of differences in the implementation of the EU directives. The participants in the said Survey have assigned an average value of 5.04 to this factor when presented to them as a potential factor that impacts their ability to conduct cross-border trade.[664] So far, the EU's preferred way of harmonising the varying aspects of private law across its Member States has been through directives.[665] This legislative instrument is relatively flexible as it mandates the result to be achieved, but it does not specify the means through which that result ought to be attained.[666] Individual EU Members States are therefore accorded substantial freedom in implementing the directives.[667] When these legal instruments are applied in practice, the EU businesses perceive that often times their application varies from jurisdiction to jurisdiction.

15% of those surveyed found that there were very significant differences in the

[664] Vogenauer and Weatherill, "The European Community's Competence to Pursue the Harmonisation of Contract Law - an Empirical Contribution to the Debate," 128 (see n. 640).

[665] Ibid, 107.

[666] Andrea Benecchi, "Why European Countries Do Not Comply with EU Directives?," *Czech Journal of Social Sciences Business and Economics* 1 (2013): 59-71; "Regulations, Directives and Other Acts," europa.eu, 2018, https://europa.eu/european-union/eu-law/legal-acts_en.

[667] Ibid.

implementation of the directives across different jurisdictions whereas 50 % stated that there were significant differences in this regard.[668] In terms of interpretation, 13% of those surveyed opined that there existed very significant differences in the interpretation across the EU Member States whereas 45% found there to be significant differences.[669] Two thirds of EU businesses, however, state that the inconsistencies and differences in the implementation and interpretation of the EU directives does not serve as an effective disincentive from them not to engage in cross-border trade.[670] This leaves us with one third of surveyed businesses that do find the inconsistencies and differences in the implementation and interpretation of the EU directives to be a significant impairment in their ability to conduct cross-border trade.[671]

How are these findings of the Clifford Chance survey relevant for the CISG? While seeking to make the results of the Clifford Chance Survey directly relevant for the CISG would be equivalent to comparing apples to oranges, one can still rely on certain similarities to draw tentative conclusions. Firstly, both the CISG and the relevant directives are aiming to eliminate or lessen legal differences that exist between states. Secondly, the problem of different implementation and interpretation of the EU directives in different Member States resembles the dichotomy of 'substantive uniformity' and 'textual uniformity' that is found in the domain of the CISG. In other words, those who are subjected to laws that are designed to produce the same result everywhere find it frustrating that their application across different jurisdictions tends to roll back the harmonisation/unification efforts:

[668] Vogenauer and Weatherill, "The European Community's Competence to Pursue the Harmonisation of Contract Law - an Empirical Contribution to the Debate," 128 (see n. 640).

[669] Ibid.

[670] Ibid, 128.

[671] Ibid, 129.

> [B]asically, in some countries we have to change our trading patterns because of their interpretation/understanding of directives'. Another [survey participant] claimed that such differences had caused his firm 'to restructure otherwise standard business s models, principally in relation to the acquired rights directive and its different interpretation in France to the rest of Europe.[672]

What the results of the Clifford Chance Survey` illustrate is the irritation of businesses towards the non-uniform application of instruments that were meant to bring about a harmonisation outcome. What can be implied from the Clifford Chance Survey in relation to the CISG is that, had the similar survey been carried out on the global level with the CISG in mind, the businesses that are familiar with the CISG would most probably express their irritation at the fact that the CISG is not applied in a uniform manner. This tentative conclusion does not seek to imply that businesses seek total uniformity in the global arena. It simply suggests that businesses would find that the non-uniform application of the CISG stands as a force that prevents it from being a far more effective tool in facilitating international trade than it currently is. To confirm this, naturally, it would be advisable to carry out a CISG-focused survey on the international level.

The tentative conclusion that the businesses would irk at the non-uniform application of the CISG is further supported by the differences that exist between the international and European context. As already pointed out, the EU benefits from a high level of political and economic integration.[673] To illustrate, the EU has a supreme authority in the form of the Court of Justice of the European Union that has a final word on the interpretation of the EU law instruments. Furthermore, the EU member states have conferred certain competences to the EU (including the power to legislate), and have thus voluntarily limited their sovereignty. No similar level of political

[672] Ibid.

[673] Cuyvers, "The Road to European Integration," 22 (see n. 663).

and economic integration can be found on a global level, and no similar authority exists for the uniform law endeavours such as the CISG. The EU also has an advantage over the broader international level in the sense that its Member States can reap the benefits of cultural, geographical, and even legal proximity and similarity. For example, while there are significant differences in legal systems found in different Member States of the EU, these differences are miniscule compared to those that arise in a broader international context. In spite of this, a significant number of EU businesses (one third of them) still perceive differences that exist in the implementation and application of directives as problematic for conducting cross-border trade.[674] Therefore, in the broader international arena where cultural, geographical and legal differences are far more pronounced, it is highly unlikely that businesses familiar with the CISG would not express at least the same (or a potentially higher) level of discontent regarding the non-uniform application of the CISG.

4.2.3 Non-Uniform Application of the CISG as a Factor in the Parties' Decision to Exclude Its Application

Some have sought to challenge the stance that the CISG represents a successful endeavour to unify sales law in the international context.[675] One of the arguments advanced in this regard is based on the fact that private parties often tend to rely on Article 6 of the CISG which states as follows:

> The parties may exclude the application of this Convention or, subject to article

[674] Ibid.

[675] Cuniberti, "Is the CISG Benefiting Anybody," 1549 (see introduction, n. 41). "Has the CISG been useful to commercial parties? This Article indicates that the answer is no for the vast majority of parties and that it has at best a very limited use for the others."

12, derogate from or vary the effect of any of its provisions.[676]

More precisely, the commercial parties, for whom the CISG was drafted and adopted, have quite frequently stayed away from the CISG by providing in their contracts that the CISG will not be applicable to their transaction. Therefore, despite a high number of ratifications by states, the CISG is yet to be fully embraced by the business community.

Substantial effort has been devoted to examining the contractual exclusion of the CISG by private parties. Mainly, the following two issues have been studied: (1) the exclusion rates, i.e. how frequently the parties opt out of the CISG, and (2) the factors behind the parties' tendencies to opt out of the CISG. As will be shown in the upcoming paragraphs, high exclusion rates still persist, and non-uniform application of the CISG has an important role to play in this regard.

4.2.3.1 Exclusion Rates

The exclusion rates still remain high, and they tend to vary across different jurisdictions. In 2004 and 2005, a survey with the aim of establishing the reasons behind the exclusion of the CISG by the parties was conducted in the United States and Germany.[677] The same survey was then carried out in China two years later.[678] For all three jurisdictions combined, this survey indicated that 64.8% of lawyers exclude the CISG generally or predominantly.[679] In the US, 70.8% of those surveyed stated that they exclude the CISG generally or predominantly while in Germany the corresponding value stood at 72.7%.[680] In China, the exclusion trend seems to be much weaker,

[676] "Annotated Text of CISG Article 6," (see chap. 1, n. 174).

[677] Martin F. Koehler and Guo Yujun, "The Acceptance of the Unified Sales Law (CISG) in Different Legal Systems," *Pace Int'l L. Rev.* 20 (2008): 46.

[678] Ibid.

[679] Ibid. 48.

[680] Ibid.

with only 44.4% showing preference for general or predominant exclusion.[681] In contrast, only 9.3% of those surveyed indicated that they never opted out.[682]

Other surveys have also yielded high exclusion rates. In the US, several surveys have found the following values for typical/general exclusion rate of the CISG: 55%, 61%, and 71%.[683] In Germany, it has been found that 45% of lawyers generally/typically opt out.[684] In Switzerland and Austria, the figures of 41% and 55% have been arrived at through surveys.[685] China is generally considered to be a CISG friendly jurisdiction, with one survey establishing that only 37% of Chinese lawyers tend to typically/predominantly opt out.[686]

In 2009, the so-called Global Sales Law survey was carried out.[687] Its results showcased substantially lower exclusion rates compared to the previous ones, hinting that we have begun witnessing a dropping trend in this regard. Only 13% percent of lawyers stated they always excluded the application of the CISG while 32% occasionally did so.[688] Surprisingly, 55% responded they rarely or never sought to exclude the CISG.[689] These results seek to reflect the position of lawyers at a global level without focusing on particular jurisdictions. However, the

[681] Ibid.

[682] Ibid.

[683] Lisa Spagnolo, *CISG Exclusion and Legal Efficiency* (Kluwer Law International, 2014), 150.

[684] Ibid, 150.

[685] Ibid, 151.

[686] Ibid.

[687] For more information on the project, see Ingeborg Schwenzer, Pascal Hachem, and Christopher Kee, *Global Sales and Contract Law* (OUP Oxford, 2012); "Global Sales Law," Faculty of Law University of Basel, 2008, http://www.globalsaleslaw.org/.

[688] Spagnolo, *CISG Exclusion and Legal Efficiency*, 215 (see n. 683).

[689] Ibid.

same survey is also a source of data on specific jurisdictions. These jurisdiction-based data have also yielded numbers indicating a reduction in exclusion rates, even for jurisdictions such as the United States whose lawyers traditionally exhibited a pro-exclusion stance.[690] The Global Sales Law survey indicated that only 12% of US lawyers always excluded the application of the CISG and 44% did so only sometimes.[691] A whopping 46% stated they rarely or never opted for exclusion of the CISG.[692]

However, it is important to take the results put forth by the Global Sales Law study with a grain of salt. Spagnolo notes that the Global Sales Law study "is the first measure on an international level, so […] we cannot definitively derive a trend in exclusion frequency from it alone."[693] In addition, an empirical study conducted by John F. Coyle reinforces the conclusion that the United States is a jurisdiction with a very high exclusion rate. Namely, Coyle examined hundreds of contracts that are available in the public domain, and has concluded that the US businesses overwhelmingly opt out of the CISG both in cases where the CISG is the default governing law, and where the CISG would not govern even in the absence of a contractual exclusion.[694] Furthermore, Coyle found that the number of contracts in which the CISG is chosen as the applicable law is sharply declining.[695] In light of these findings, Coyle then proceeded to conclude that the exclusion rate put forth in the Global Sales Law survey for the US simply cannot

[690] Ibid, 216.

[691] Ibid.

[692] Ibid.

[693] Ibid, 215.

[694] John Coyle, "The Role of the CISG in U.S. Contract Practice: An Empirical Study," *University of Pennsylvania Journal of International Law* 38, no. 1 (2016): 200.

[695] Ibid, 220.

be reconciled with his empirical study.[696] More precisely, Coyle seems to be indicating that the exclusion rate established by the Global Sales Law Survey for the US is extremely low and does not correspond properly to the reality on the ground. Coyle is not alone in concluding this as many other authors are of the opinion that the CISG is generally excluded by the parties not only in cross-border transactions, but also in transactions which the CISG was not meant to govern.[697]

4.2.3.2 Factors Leading to the Exclusion of the CISG

Several explanations and factors have been advanced to explain why parties so often end up excluding the application of the CISG, and opt for one of the national sales laws instead. Those notably include lack of familiarity, disparity in bargaining power, market sector specificities, and substantive reasons.

4.2.3.2.1 Lack of Familiarity

Familiarity, or rather unfamiliarity, is often cited as one of the main culprits as many lawyers, especially those in common law jurisdictions, tend to be in the dark about the CISG.[698] The spectrum of ignorance varies, ranging from utter lack of knowledge of the CISG's existence to superficial knowledge of the CISG and its provisions.[699] A major contributing factor to the

[696] Ibid, 230.

[697] Cuniberti, "Is the CISG Benefiting Anybody?," 1538 (see introduction, n. 41); Winsor, "The Applicability of the CISG to Govern Sales of Commodity Type Goods," 84 (see chap. 1, n. 179) ; Zeller, *Damages Under the Convention on Contracts for the International Sale of Goods*, 218 (see n. 606); Isabel Cristina Salinas Alcaraz, "The United Nations Convention on Contracts for the International Sale of Goods (ISG) and the Common Law: The Challenge of Interpreting Article 7," *IUSTA* 1, no. 40 (2014), 60.

[698] Spagnolo, *CISG Exclusion and Legal Efficiency*, 152 (see n. 683).

[699] Ibid.

lawyers' unfamiliarity with the CISG stems from the fact that, to reverse the *status quo* of unfamiliarity, information costs need to be incurred.[700] The willingness of lawyers to incur these costs is subject to variation, mostly depending on how high the information costs are, and whether there is a necessity to incur them. If a lawyer has been exposed to the CISG during his tertiary education, for instance, he or she will already have been familiarised to a certain extent with its contents and mode of operation.[701] This makes further familiarisation with the CISG less costly as compared to a lawyer who only has vague knowledge of the CISG's existence, but other than that, knows nothing of its substantive contents. And sometimes it will simply be necessary that the lawyer incurs the information costs and familiarise himself or herself with the CISG.[702] For example, if in the midst of dealing with the client's case, the opposing side begins alleging that the CISG is applicable, the lawyer will in a way be forced to familiarise himself or herself with the CISG.

4.2.3.2.2 Disparity in Bargaining Power

Disparity in bargaining power has also been singled out as a factor that leads to exclusion of the CISG.[703] It has been noted that there is a pervasive tendency on the part of the parties and their lawyers with stronger bargaining position to impose their choice of law on the weaker counterparty.[704] This choice is, however, not always based on a careful analysis of different

[700] Ibid., 155.

[701] Ibid., 156.

[702] Ibid., 158.

[703] Ibid., 166.

[704] Ibid.

national laws.[705] Instead, the choice is mostly made mechanically and superficially.[706] Thus, the party with stronger bargaining position and his or her lawyers will usually insist that the law of their country preferably be the governing law of the contract.[707] The available empirical data shows that disparity in bargaining power is a significant factor that impacts the decision to exclude the application of the CISG (e.g. in Germany and in China, this was the second most cited reason for why the CISG was out of the game as a prospective governing law).[708]

4.2.3.2.3 Market Sector Specificities

In certain market sectors, the parties exercise very little autonomy in regulating their contractual relations.[709] Instead, they use standard form contracts prepared by trade associations and industry bodies.[710] These standard form contracts will usually contain a choice of law clause, and quite often it will not be made in favour of the CISG. A well-known example of an industry which avoids the CISG is, undoubtedly, the commodities trade.[711] While there has been a lot of scholarly debate on whether the CISG is adequate to govern the trade in commodities, the commodities sector has firmly stood ground and avoided introducing the CISG as a governing law.[712] The volatility of the commodities market, coupled with the CISG's high threshold to

[705] Ibid.

[706] Ibid.

[707] Ibid.

[708] Ibid.

[709] Ibid., 173.

[710] Ibid.

[711] Ibid.

[712] Ibid.

terminate the contract (i.e. the CISG seeks to reduce economic waste rather than allowing parties to terminate the contract for breaches that do not reach the stage of 'fundamental breach'), has made it an undesirable choice for the market actors in the commodities sector.[713] Instead, the Federation of Oils, Seeds and Fats Associations (FOSFA) and the Grain and Feed Trade Association (GAFTA), two major trade associations in the commodities trade, have both concluded that the interests of their members will be best served by English law as this has been the preferred and tested choice of law of commodities trade.[714]

4.2.3.2.4 Substantive Reasons

Substantive reasons also play an important role in the exclusion of the CISG. While the CISG has developed quite a strong scholarly backing, there are still substantive concerns that lead lawyers to advise opting out of the CISG. For instance, the homeward trend, divergent interpretations of the same text, and the unpredictable relationship between the CISG and domestic law still represent issues that cause lawyers to be sceptical when dealing with the CISG. In addition, the CISG was not designed to be a be-all-end-all law for the international sales. Some transactions will entail specificities that will justify the exclusion of the CISG.[715]

While it is certain that substantive considerations often play a role in the lawyers' and their clients' decisions to exclude the CISG, their exact impact is not easy to ascertain.[716] The available empirical data in this regard is scarce, and the available surveys suffer from deficiencies.[717] For

[713] Michael Bridge, "A Law for International Sales," *Hong Kong Law Journal* 37 (2007): 18-19.

[714] Spagnolo, *CISG Exclusion and Legal Efficiency*, 173 (see n. 683).

[715] Ibid., 169.

[716] Ibid., 169.

[717] Ibid.

example, the surveys have yielded substantially differing data, and often times one has to engage in detective work as the data on substantive considerations tend to be intertwined with other factors, e.g. unfamiliarity.[718]

There are two surveys that can be used to explore the extent to which substantive issues play a role in the exclusion of the CISG: The first is the survey conducted by Koehler. The reasons for exclusion in this survey were classified in two categories: legal reasons for exclusion, and practical reasons.[719] Legal reasons in Koehler's survey correspond to what is referred to here as substantive reasons or considerations for exclusion. The results showed the dominance of practical reasons for exclusion over legal reasons.[720] 9% of German respondents to the survey indicated that they base their decision to exclude the application of the CISG on legal reasons.[721] As for Chinese and US respondents, 11% and 6% of them respectively decide to exclude on the basis of legal reasons only.[722] However, it must be noted that a notable number of respondents exclude the CISG based on a combination of legal and practical reasons. More precisely, 15% of respondents in Germany, 26% of those in China, and 25% of those in the US answered that both legal and practical reasons play a role in their decision to exclude the application of the CISG.[723] Therefore, according to Koehler's survey, it can be concluded that legal reasons play a role in the decision-making

[718] Ibid.

[719] Martin F. Koehler, "Survey Regarding the Relevance of the United Nations Convention for the International Sale of Goods (CISG) in Legal Practice and the Exclusion of Its Application," *Pace Law Albert H. Kritzer CISG Database*, 2006, https://www.cisg.law.pace.edu/cisg/biblio/koehler.html; Spagnolo, CISG Exclusion and Legal Efficiency, 169 (see n. 683).

[720] Ibid.

[721] Ibid.

[722] Ibid.

[723] Ibid.

process of at least 24% of German, 37% of Chinese, and 31% of US respondents.[724] The second survey exploring the issue of substantive reasons as a factor in the decision to exclude the application of the CISG can be found in Fitzgerald's study. In it, the figure of 22% is put forth.[725]

4.2.3.3 Interplay of Factors Leading to the Exclusion of the CISG

While on their face the figures found by Koehler and Fitzgerald may seem relatively low compared to other non-substantive reasons for exclusion, the reality on the ground is far more complex. The factors playing a role in the exclusion of the CISG cannot be perceived in isolation since there is an obvious interplay between them. Hence, if one is to eliminate the unfamiliarity factor; i.e. if we assume that, all of a sudden, the majority of lawyers are familiar and quite knowledgeable about the CISG, this would not necessarily translate into all of the lawyers who were previously unfamiliar with the CISG to start advising their clients to use the Convention.[726]

If a lawyer is unfamiliar with the CISG, he or she is not only in the dark about the CISG's positive qualities, but also regarding its substantive deficiencies. One cannot expect a lawyer unfamiliar with the CISG and its provisions to exclude it on the basis of genuine substantive concerns. That lawyer would presumably exclude the CISG based on practical considerations; e.g. he or she is already familiar with the domestic sales law whereas becoming familiar with the CISG would require incurring information costs.

The increase in familiarity, therefore, opens up new horizons and presents lawyers with

[724] Koehler, "Survey Regarding the Relevance of the United Nations Convention for the International Sale of Goods (CISG)" (see n. 719); Spagnolo, CISG Exclusion and Legal Efficiency, 170 (see n. 683).

[725] Peter L. Fitzgerald, "International Contracting Practices Survey Project: An Empirical Study of the Value and Utility of the United Nations Convention on the International Sale of Goods (CISG) and the Unidroit Principles of International Commercial Contracts to Practitioners, Jurists, and Legal Academics in the United States," *Journal of Law and Commerce* 27 (2009 2008): 68; Spagnolo, CISG Exclusion and Legal Efficiency, 170.

[726] Spagnolo, CISG Exclusion and Legal Efficiency, 173 (see n. 683).

new grounds for exclusion, most of those new grounds being of substantive nature. This significantly increases the importance of substantive reasons for exclusion of the CISG vis-à-vis practical ones. While the available surveys indicate the dominance of practical, non-substantive reasons for the exclusion of the CISG, tackling those reasons opens the door for lawyers to then closely examine the prospective substantive reasons for exclusion. In other words, tackling unfamiliarity and other non-substantive factors is only the initial step in minimising the number of CISG exclusions. To achieve the best possible result, substantive reasons for the exclusion of the CISG must not be either underestimated or neglected.

4.2.4 Non-Uniform Application of the CISG Vis-à-vis Other Substantive Reasons

Non-uniform application of the CISG belongs in the category of substantive reasons for exclusion of the CISG. However, as other substantive reasons may be relied upon to justify the decision to exclude the CISG, the question arises which of these substantive reasons play a greater role in the lawyers' decision to opt out of the CISG. Not all of them can carry the same weight in the decision-making process whether to exclude the CISG or not. Unfortunately, no survey up until now has attempted to dig this deep, and empirical evidence in this regard is, therefore, lacking. Perhaps a small glimpse into the empirical realm can be done by resorting to the empirical research performed in Hungary in 2015 which aimed to assess the state of the application of the CISG in the country.[727] The CISG is more often than not excluded by the Hungarian lawyers, and the reasons for this are varied.[728] However, it is interesting to note that substantive reasons play an

[727] Glavanits, "CISG and Arbitration in the Hungarian Legal Practice," 48 (see chap. 1, n. 180).

[728] Ibid., 53.

important role, including the non-uniform application of the Convention.[729] One lawyer justified his practice of excluding the CISG in the following manner:

> The main problem of the Convention is the lack of uniform application, which is the result of the phenomenon that the national courts interpret the Convention based on national laws.[730]

Since the underlying issue that the thesis at hand entertains is the issue of non-uniform application of the CISG, it is then only natural to single out the non-uniform application of the CISG from other exclusion factors, and seek to determine its relevance in greater detail. It has been established previously that, while the existing surveys show that the non-substantive exclusion factors play a predominant role in relation to the substantive factors, with the tackling of the former ones, the latter ones' visibility and relevance will increase. This conclusion is evidently relevant for the non-uniform application of the CISG as non-uniformity represents a substantive exclusion factor. More precisely, the importance of the non-uniform application of the CISG as an exclusion factor will grow as lawyers become more knowledgeable about the CISG and its contents.

However, substantive reasons for the exclusion of the CISG can be a variety of things, and it would be quite an immense task to come up with an exhaustive list. Therefore, substantive reasons for the exclusion of the CISG are usually given quite a broad understanding. So long as they have a genuine connection to the CISG's substantive contents, they are to be considered as substantive reasons for exclusion. While seeking to determine the exact interplay of the substantive reasons for exclusion would be an endeavour beyond the capabilities of this author, it is still possible to arrive at certain conclusions through classification of substantive factors.

Namely, substantive reasons for exclusion of the CISG can be put in one of two categories,

[729] Ibid., 54-55.

[730] Ibid., 55.

depending on whether they have a potential to act as a ground for exclusion of general concern, or whether they can only have a limited impact. In other words, some substantive issues such as the non-uniform application of the CISG have a potential to cause if not all, then the majority of those who must choose whether to exclude or not the CISG to choose the latter option. For instance, the fact that the CISG enshrines the fundamental breach concept cannot have this far-reaching impact. While the commodity industry has cited the fundamental breach as a substantive reason why it does not generally use the CISG, this substantive concern of theirs has no potential to cause worry at a general level; i.e. with all those who must make a decision whether or not to exclude the application of the CISG. This particular substantive concern is specific to a particular group. Therefore, one can divide substantive reasons for exclusion of the CISG into the following two categories: (1) substantive reasons of general impact and (2) substantive reasons of limited impact.

Substantive reasons of general impact, due to their wider reach, have a potential to cause a much higher number of the CISG exclusions as compared to the substantive reasons of limited impact. Their initial advantage lies in the fact that a substantially higher number of lawyers will dwell on them (as compared to the number of lawyers that will be influenced by substantive reasons of limited impact) while deciding whether to exclude the CISG or not. Therefore, this places the non-uniform application of the CISG, which is a substantive reason of general impact, ahead of the substantive reasons of limited impact in terms of the numerical potential to cause exclusions. It has to be noted, however, that sheer advantage in numbers does not in and of itself guarantee that a prospective reason will cause a high number of exclusions.

Another important consideration is the gravity of the exclusion factor. Exclusion factors, be they of general or limited impact, are reasons or grounds for potential exclusion of the CISG. They are analysed by lawyers (and perhaps the parties themselves), and then, a decision is brought

whether to exclude the CISG or opt for it to be the governing law. Let us assume that Reason A for exclusion will be analysed by 200 lawyers whereas Reason B will be analysed by 400 lawyers. As can be easily observed, Reason A is numerically inferior to Reason B. However, if upon analysis, 160 lawyers exclude on the basis of Reason A, but only 150 lawyers exclude based on Reason B, then the gravity of Reason A is higher as compared to Reason B. Reason A has an 80% success rate; i.e. 160 out of possible 200. Reason B has a success rate of 37.5%; i.e. 150 out of possible 400. All this leads to the conclusion that the highest contribution to the exclusion rates among substantive reasons of exclusion will have substantive reasons of general impact whose gravity will be such that it will cause a high percentage of lawyers examining them to advise opting out of the CISG.

Can non-uniform application of the CISG be classified as a substantive reason of general impact that causes a high percentage of lawyers to advise opting out? As already pointed out, no precise empirical evidence is available on the impact of non-uniform application of the CISG on the exclusion rates. As a result, no outright answer based on empirical evidence can be given to the question posed in this paragraph. However, available anecdotal evidence and information allow for a speculative conclusion that the non-uniform application of the CISG can indeed be classified as a substantive reason of general impact with a high success rate in causing exclusions of the CISG. Namely, the gravity of the problem of non-uniformity has been discussed in detail in Section 4.1 and Section 4.2 of this Chapter, and it has been shown that the non-uniform application of the CISG is a serious issue that is still waiting to be tackled. This is furthermore evidenced by the fact that no other CISG-related issue has received as much attention as the non-uniform application of the CISG. More precisely, several major undertakings and projects have been started whose aim has been to contribute to uniform application and interpretation of the CISG, prominent examples

being the Pace Law Albert H. Kritzer CISG Database ('CISG Pace Database'), CISG Digest, CISG Advisory Council, etc.[731] All this indicates that the non-uniform application is a grave issue that has the capacity to fuel exclusions of the CISG; i.e. that the preliminary investigation shows that non-uniform application of the CISG can indeed be classified as a substantive reason of general impact that causes a high percentage of lawyers to advise opting out.

SUMMARY OF CHAPTER IV

Chapter IV has examined the detrimental impact of the non-uniform application of the CISG. In Section 4.1, it has been shown that non-uniform application of the CISG has an adverse impact on a wide array of benefits that the CISG was designed to procure. This means that the non-uniform application of the CISG prevents it from reaching its full potential.

In Section 4.2, the stance of the business community has been assessed regarding two issues. Firstly, Section 4.2 sought to extract the position of the business community on barriers to cross-border trade, and also on non-uniform application of the CISG. While the existing surveys in this regard do not address these issues specifically, an effort has been made to make use of them to come to tentative conclusions that should be verified by future surveys. A conclusion has been put forth that, had the surveys specifically addressing these questions been carried out, businesses would find that in the broader international context legal obstacles to cross-border trade indeed exist. Another conclusion at which Section 4.2 has arrived is that those familiar with the CISG would find the non-uniform application of the CISG to be an undesirable phenomenon. However, to confirm these suppositions, it would be advisable to carry out a comprehensive survey at a global level, an undertaking that is beyond the means of this author.

[731] For a detailed discussion of efforts to increase the level of uniformity in the application of the CISG, please refer to Chapter V.

Secondly, Section 4.2 has assessed whether there is a nexus between the high exclusion rates of the CISG on the one hand, and non-uniform application on the other. Section 4.2 first noted that the non-uniform application of the CISG forms a substantive reason for exclusion. Then, it pointed out that, as more and more lawyers become familiar and knowledgeable about the CISG, this will not automatically cause a significant drop in exclusion rates. The lawyers, previously excluding the CISG based on practical considerations, will then become aware of substantive concerns underlying the CISG, and might again proceed with the practice of exclusion, albeit on different grounds. After noting this, Section 4.2 analysed the capacity of the non-uniform application of the CISG as a substantive factor to cause exclusions of the Convention. The conclusion put forth is that, due to the wide-reaching impact and the gravity of the issue of non-uniform application of the CISG, it is to be considered as a substantive reason for exclusion with the capacity to have high success rates in causing exclusions.

In light of the considerations put forth above, it is evident that a high degree of non-uniform application of the CISG is highly detrimental, and thus it would be advisable to rethink the current approach, and take additional steps to curb it. But before considering what the way forward ought to be, this thesis will examine what has been done thus far in combating the phenomenon of non-uniformity in the application of the CISG. The ensuing Chapter (Chapter V) delves into this issue.

CHAPTER V
5. IMPLEMENTED TOOLS FOR THE PROMOTION OF UNIFORM APPLICATION OF THE CISG

Chapter IV has concluded on a note that the non-uniform application of the CISG brings about serious adverse effects, and that, as a result, it is advisable to take measures in order to tackle this phenomenon. In essence, the possibility that the Convention could succumb to non-uniform application of its provisions has been recognised very early on. For instance, Prof. Honnold, has noted the following the same year the CISG went into effect:

> Throughout the work on uniform laws realists have told us: Even if you get uniform laws you won't get uniform results. Those sad-faced realists were dead right -- as right as confirmed bachelors and spinsters who build their lives on the realistic view that there is no perfect spouse. Why are the realists right? We lawyers have to work with blunt, unreliable tools -- words! Why can't we be as fortunate as our colleagues in the sciences who can write laws in formulas and numbers? Digital recordings turn the exquisitely nuanced sounds of a symphony into just two numbers -- zero and one. Perhaps some day we can use this technology in writing law: World-wide trade law on a compact floppy disk.[732]

And ever since the application of the CISG began in practice, writings and suggestions about the issue of uniformity have been rolling one after the other like on a factory track.[733] Some of the proposals have taken shape and have been implemented while some have not been embraced, at least not as of yet. The initiatives seeking to contribute to the uniformity in the application of the Convention will be referred to as the 'tools for the promotion of uniform application of the

[732] Honnold, "The Sales Convention in Action-Uniform International Words: Uniform Application," 207 (see chap. 1, n. 63).

[733] Veneziano, "The Soft Law Approach," 523 (see introduction, n. 49).

CISG' in this thesis. Those that were materialised and are in operation will be termed as 'implemented tools' while those that were suggested but still have not seen the light of day will be referred to as the 'proposed tools.' This Chapter will be concerned with the former while the last Chapter (i.e. Chapter VI) will deal with the latter.

The present Chapter is divided into three sections. Section 5.1 provides an overview of the implemented tools for the promotion of uniform application of the CISG. These include 1) tools that disseminate case law and other CISG-related materials, and 2) CISG Advisory Council. Before discussing them, Section 5.1 notes that all the tools implemented can be considered as falling under the umbrella of the so-called *global jurisconsultorium*. Therefore, the starting point of Section 5.1 is a discussion of the concept of *global jurisconsultorium*.

Section 5.2 shows that the implemented tools thus far have had a rather limited impact. That is, as illustrated in Chapter II, the examples of non-uniformity in the application of the Convention abound. And furthermore, one can scarcely locate instances of the implemented tools being used in the practical application of the Convention. Consequently, Section 5.3 seeks to analyse the implemented tools so as to see if any improvements can be made in their organisation and their mode of operation that would enhance their effectiveness. Firstly, Section 5.3 will lay out 5 benchmarks that, as will be argued, the implemented tools need to satisfy - accessibility, systematic approach, timeliness, credibility, and fair representation of developing/non-Western states. Secondly, Section 5.3 will proceed by assessing the implemented tools against these benchmarks. Lastly, after showing that the implemented tools do not satisfy the benchmarks for the most part, appropriate recommendations for the improvements in their organisation and mode of operation will be made. Before delving into the discussion, it is important to note that this

Chapter relies on an array of empirical (non-static) data that was collected in December 2018. Thus, beyond this date deviations from the data presented here are a possibility.

5.1 OVERVIEW OF THE IMPLEMENTED TOOLS

The tools implemented thus far include 1) two efforts by UNCITRAL (CLOUT and CISG Digest), 2) CISG Pace Database, 3) UNILEX, 4) CISG-Online, and 5) CISG Advisory Council. CLOUT, CISG Digest, CISG Pace Database, UNILEX and CISG-Online all have one important thing in common; they all seek to make available case law on the Convention from various jurisdictions.[734] Besides this common trait, some go a step further, seeking to distribute other CISG-related materials such as scholarly writings or the *travaux préparatoires*. However, their underlying focus on the CISG case law[735] speaks in favour of analysing them collectively. Hence, they will be collectively referred to as the 'tools that disseminate case law and other CISG-related materials.' In contrast, the CISG Advisory Council is a lone wolf in its global endeavours since it is the only initiative that seeks to put forth normative analyses on the Convention. It is interesting to note, however, that all the implemented tools can be considered as falling under the umbrella of the so-called *global jurisconsultorium*. Thus, before providing an overview of the implemented tools, we will focus briefly on the concept of *global jurisconsultorium*.

[734] Please note that there are several other initiatives covering specific jurisdictions. They can be accessed through this link: http://iicl.law.pace.edu/cisg/page/autonomous-network-cisg-websites. However, none of them can really be considered to have a global reach. For example, the Spanish database only includes cases in Spanish from Hispanic countries. The French database only contains decisions from France, and in French language. The Austrian database contains CISG case law from Austria, with only some cases having 'presentations' in English. Many of these databases have not been updated in more than a decade. For instance, the Greek database was last updated in 2001, the Austrian was updated in 2009, and the Israeli one was last updated in 2008. And what is more, some databases, such as the Brazilian one, cannot be accessed as the links are broken, or can be accessed, but then the case law itself cannot be retrieved due to malfunctioning links (e.g. Nordic database). For these reasons, these databases will not be included in the analysis put forth in Chapter V.

[735] CLOUT, UNILEX, CISG Pace Database and CISG-online are databases. CISG Digest, while not being a database, presents holdings of the CISG case law on an article-by-article basis, and cites corresponding CISG cases in the endnotes.

5.1.1 Global Jurisconsultorium

The idea for a CISG *global jurisconsultorium* can be traced back to Honnold. In his view,

> [w]e should expect (and insist) that tribunals construing an international convention will appreciate that they are colleagues of a world-wide body of jurists with a common goal.[736]

Honnold's observations were quickly picked up by other scholars, looking to build upon his ideas. For instance, Rogers and Kritzer, in their journal article titled *A Uniform International Sales Law Terminology* have followed Honnold's logic by arguing that a uniform law requires exchange of ideas across the borders.[737] In doing so, they have coined the term *global jurisconsultorium*, noting that only this sort of approach would be "the proper setting for the analysis of foreign jurisprudence".[738]

Baasch Andersen, in her scholarly endeavours, continued advancing the idea of *global jurisconsultorium*.[739] In one of her works, she put forth the following definition of the term:

> […]a process of consultation which takes place across borders and legal systems with the aim of producing autonomous and uniform interpretations and applications of a given rule of a uniform law.[740]

[736] John O Honnold, "Uniform Laws for International Trade: Early Care and Feeding for Uniform Growth," *Int'l Trade & Bus. LJ* 1 (1995): 8.

[737] Vikki M. Rogers and Albert H. Kritzer, "A Uniform International Sales Law Terminology," in *Festschrift Für Peter Schlechtriem Zum 70. Geburtstag* (Mohr Siebeck, 2003), 223–253.

[738] Ibid., 228.

[739] Andersen, *Uniform Application of the International Sales Law*, 37 (see chap. 1, n. 57).

[740] Camilla Baasch Andersen, "The Global Jurisconsultorium of the CISG Revisited," *Vindobona Journal of International Commercial Law & Arbitration*, no. 1 (2009): 47.

Furthermore, she emphasised the need that the term *global jurisconsultorium* encompass both the exchange of ideas between scholars, and also between the decision-makers and practitioners.[741] Thus, she noted that the general term *jurisconsultorium* can be divided into two groups:

> […] the scholarly jurisconsultorium (the sphere of cooperation and consultation between transnational scholars rather than scholarship from and within a single jurisdiction); and the practical jurisconsultorium (the sphere in which transnational shared case law is used to resolve disputes before domestic courts).[742]

Encouraging scholars to engage in a cross-border exchange of ideas is one thing. With the rise of comparative law, examining other jurisdictions and analysing different approaches to legal problems that exist in various countries has been one of the cornerstones of scholarly work. However, persuading decision-makers who work within the strict constraints of procedural and other rules to do the same when deciding CISG cases is a far more complex matter.

The first step in convincing decision-makers to look into the CISG cases from various jurisdictions and seek inspiration from them is establishing that there exists a legal ground for this activity.[743] One needs not look further than Article 7(1) of the CISG which, as already pointed out in Chapter I, outlines the CISG interpretative methodology.[744] More precisely, it states that, when applying the Convention, regard must be had to its international character and the need to promote uniformity in its application.[745] Expecting that interpretations of the CISG occurring in dozens of jurisdictions will on their own converge without any sort of proactive endeavour to inquire what

[741] Ibid.

[742] Ibid.

[743] Ibid., 165.

[744] "Annotated Text of CISG Article 7," (see introduction, n. 48).

[745] Ibid.

is happening in other jurisdictions is, without any doubt, illusory. Prof. Lookofsky endorses this view, stating that Article 7(1) evidently requires "national courts […] to have (some measure of) 'regard' to the international view".[746]

Baasch Andersen further supports the view that courts ought to look to the CISG case law from other jurisdictions. She seeks to qualify the whole body of the CISG case law as 'shared' case law by observing the following:

> The judges and legal counsel who apply an international uniform convention must recognise that they are sharing it with colleagues in other jurisdictions, and that the development of its jurisprudence is a communal evolution requiring a unique approach which is very different from the one that they take when they apply domestic law. The jurisconsultorium requires that the sources be shared.
>
> There is also a basic argument of comity here. In undertaking to share a uniform legal text like the CISG, contracting States are also undertaking to pursue the goal of uniformity in unison. The legal basis for this duty to share sources of a uniform law when sharing the law itself is derived from comity, and from an understanding that shared international laws are unique, and that their interpretive sources are as diverse as the legal systems which share them.[747]

The implemented tools for the promotion of uniform application of the CISG can all be perceived as falling under the umbrella of the term global *jurisconsultorium* because they all either directly enable it, or seek to encourage it. The tools that disseminate case law and other CISG-related materials directly enable the functioning of the global jurisconsultorium by making widely available the materials necessary for its functioning (i.e. cases, scholarly works, *travaux*

[746] Lookofsky, *Understanding the CISG*, 34 (see chap. 3, n. 416).

[747] Andersen, "The Global Jurisconsultorium of the CISG Revisited," 48 (see n. 740).

préparatoires, etc.). The CISG Advisory Council comprises world-renowned CISG experts who engage in a dialogue on divisive CISG issues and produce normative analyses that they hope will be used by courts and arbitral tribunals.

5.1.2 Tools That Disseminate Case Law and Other CISG-Related Materials

5.1.2.1 Efforts by UNCITRAL

Numerous uniform law texts have been promulgated under the auspices of UNCITRAL. These include, among others, the CISG, the United Nations Convention on the Carriage of Goods by Sea, the UNCITRAL Model Law on International Commercial Arbitration, etc.[748] UNCITRAL has acknowledged that "[t]he uniform interpretation of these instruments is essential to their effective implementation worldwide."[749] However, UNCITRAL mostly played an extremely passive role in this regard.[750] Once the uniform text was drafted and adopted, UNCITRAL's participation in the life of its uniform law texts was minimal.

After becoming aware that differing interpretations of its legal instruments might become, to say the least, problematic, UNCITRAL embarked on a journey to attempt to remedy this situation.[751] UNCITRAL's options were, however, quite limited. UNCITRAL, as a body of the United Nations, is restrained in a sense that, in everything that it does, an appropriate level of

[748] UNCITRAL, *Facts about Clout - Case Law on UNCITRAL Texts* (Austria, 2013), http://www.uncitral.org/pdf/english/clout/brochure/Facts_about_Clout_eng_Ebook.pdf.

[749] Ibid.

[750] Ibid.

[751] United Nations General Assembly, "Case Law on UNVITRAL Texts (CLOUT)" (United Nations Commission on International Trade Law, January 15, 2018), 2/9, https://documents-dds-ny.un.org/doc/UNDOC/GEN/V18/001/11/PDF/V1800111.pdf?OpenElement.

neutrality must be exhibited.[752] Consequently, UNCITRAL chose to focus on disseminating case law rendered under its legal instruments instead of being more actively involved in their interpretation.

When it comes to the CISG, there are two main ways in which UNCITRAL disseminates its case law, thus contributing to the global *jurisconsultorium*: (1) by making available the texts of CISG cases and their abstracts in the CLOUT Database, and (2) by compiling on an article-by-article basis holdings and other important points from the CISG case law in the CISG Digest.

5.1.2.1.1 CLOUT database

In 1988, a so-called CLOUT (an acronym for 'case law on UNCITRAL texts') system was established with the aim of promoting the uniform application of UNCITRAL's texts by collecting judicial decisions and arbitral awards rendered under them.[753] Access to the CLOUT system is made available online and is free of charge. As has been explained by UNCITRAL,

> CLOUT facilitates the widespread distribution of such information, and thus enables and encourages users to take into account the decisions of judges and arbitrators in countries other than their own, thus promoting international awareness of the texts.[754]

The case law collection and preparation of case abstracts is performed either by national correspondents or on a voluntary basis.[755] The national correspondents are designated by the states

[752] Lookofsky, "Walking the Article 7 (2) Tightrope Between CISG and Domestic Law," 88 (see chap. 1, n. 109).

[753] UNCITRAL - *Case Law on UNCITRAL Texts*, (see n. 748).

[754] Ibid.

[755] Ibid.

which have adopted one or more of the UNCITRAL's texts.[756] Their task, naturally, is to follow the development of case law in their countries, and report on the decisions which deal with, or touch upon, the UNCITRAL's texts.[757] In addition to national correspondents, a significant number of contributions come from volunteers.[758] These volunteers include scholars, professors, practitioners, and law students. After they prepare an abstract, it will only be published through CLOUT if the UNCITRAL Secretariat and the appropriate national correspondent give green light.[759]

5.1.2.1.2 CISG Digest

The CISG Digest was first published in 2004.[760] Since then, it has been periodically updated so as to reflect the latest developments in the CISG case law.[761] The most recent update of the CISG Digest was performed was in 2016.[762] The aim of the CISG Digest is rather straightforward; it compiles CISG case law on an article-by-article basis, and in the process, it seeks to determine the pervasive interpretation trends.[763]

The CISG Digest is free of charge and is available in six official UN languages on

[756] Ibid.

[757] Ibid.

[758] Ibid.

[759] Ibid.

[760] "Digests," (see chap. 1, n. 107).

[761] UNCITRAL, *Facts about Clout - Case Law on UNCITRAL Texts,* (see n. 748).

[762] "Digests," (see chap. 1, n. 107).

[763] UNCITRAL, *Facts about Clout - Case Law on UNCITRAL Texts,* (see n. 748).

UNCITRAL's website.[764] While initially perceived as a tool that would make the navigation through the CISG case law from the CLOUT System easy and intuitive, it began to encompass CISG cases published in other databases as well.[765]

5.1.2.2 CISG Pace Database

Pace Law School Institute of International Commercial Law was founded in 1991, and over the course of time, it became recognisable for establishing and maintaining the most extensive CISG database called Albert H. Kritzer CISG Database ('CISG Pace Database').[766] This database has become a go-to source for a wide variety of CISG materials. Its working philosophy has been that "[the] universally-free access to legal information [will] contribute[…] to peaceful cooperation among trading partners and countries".[767]

It is no exaggeration to say that the CISG Pace Database is the most comprehensive database for the materials on the CISG. It tracks the number of states that have adopted the CISG, and it updates the list regularly.[768] It puts forth the texts of the CISG both in the original languages as well as in a large number of other, non-official languages.[769] One can also find a rich and comprehensive collection of *travaux préparatoires* materials there, including the Secretariat

[764] Ibid.

[765] UNCITRAL, *UNCITRAL Digest of Case Law on the United Nations Convention on Contracts for the International Sale of Goods*, ix (see chap. 1, n. 108).

[766] "About the Pace-IICL," Pace Law School Institute of International Commercial Law, n.d., http://iicl.law.pace.edu/iicl/about-pace-iicl.

[767] Ibid.

[768] Ibid.

[769] Ibid.

Commentary on the 1978 Draft of the CISG (touted as the "closest counterpart to an [o]fficial [c]ommentary").[770]

The most significant contribution of the CISG Pace Database is the fact that it contains the most extensive collection of cases on the CISG. As of 2016, there were more than 3000 cases in the CISG Pace Database coming from all corners of the globe.[771] For a limited number of cases from non-English speaking countries full translations are available.[772] Besides case law, the CISG Pace Database represents a small heaven for all those who are curious about the Convention as it boasts an impressive collection of scholarly materials. More precisely, it contains more than 1500 full-text materials, ranging from monographs and books to journal articles.[773] In addition, the CISG Pace Database provides a comprehensive bibliography on international contract law with approximately 10000 entries.[774]

5.1.2.3 UNILEX

UNILEX was created as a result of a joint project between the Italian National Research Council, the University of Rome I - La Sapienza, and the UNIDROIT.[775] Together, they established

[770] Ibid; "Guide to CISG Article 1," (see chap. 3, n. 414).

[771] "CISG Database - Country Case Schedule," (see chap. 3, n. 516). Please note that, for the purposes of the discussion here, the number 3152 will be used as the number of cases in the CISG Pace Database. This is so because on 25 January 2016 a schedule of cases was prepared, breaking down the number of cases per jurisdiction. Thus, this number is the most reliable number at to the exact number of cases in the database on a particular date. This author has not managed to retrieve schedules for later dates.

[772] "About the Pace-IICL," (see n. 766).

[773] Ibid.

[774] Ibid.

[775] "The Sponsors," UNILEX, n.d., http://www.unilex.info/dynasite.cfm?dsmid=13087.

the Centre for Comparative and Foreign Law Studies (hereinafter 'the Centre').[776] The Centre in 1992 began conducting a research project which gradually grew into what we know today as UNILEX, a database containing case law and bibliography on the CISG and the UNIDROIT Principles of International Commercial Contracts (hereinafter the 'UNIDROIT Principles').[777] The UNILEX database comprises case abstracts, texts of the decisions in their original language, a comprehensive bibliography on the CISG and the UNIDROIT Principles, etc.[778]

5.1.2.4 CISG-Online

CISG-Online is a website dedicated to dissemination of the CISG case law and other CISG related materials. It is characterised by a simple interface and an easy-to-use search engine. CISG Online was started by the late Prof. Schlechtriem in 1995 under the auspices of the Albert Ludwig University of Freiburg.[779] Between 2002 and 2017, Prof. Schwenzer was at its helm, and the website was, and still is, operated from the University of Basel.[780] In 2017, Prof. Schroeter of the University of Basel took over the running of CISG-Online.[781]

[776] Ibid.

[777] Ibid.

[778] "About UNILEX," UNILEX, 2002, http://www.unilex.info/dynasite.cfm?dsmid=13085.

[779] "CISG-Online," CISG-online, 2017, http://www.cisg-online.ch/index.cfm?pageID=28.

[780] Ibid.

[781] Ibid.

5.1.3 CISG Advisory Council

The CISG is not equipped with an Official Commentary. To try to overcome this, Pace University and the Centre for Commercial Law Studies at the Queen Mary University have organised themselves and started in 2001 what has come to be known as the CISG Advisory Council.[782] Some of the most distinguished and enthusiastic academics with abundant knowledge on the CISG have been invited to become members of the CISG Advisory Council.[783]

The activities of the CISG Advisory Council have been threefold. Firstly, it has been publishing opinions and declarations on different provisions of the CISG with the aim of increasing the level of uniform interpretation of the said Convention.[784] Unlike UNCITRAL, which is the body of the United Nations, the CISG Advisory Council is a private initiative.[785] Thus, the CISG Advisory Council is not constrained by any sort of requirement that it be neutral and refrain from exhibiting critical perspective.[786] So far, the CISG Advisory Council has rendered seventeen advisory opinions and two declarations.[787]

Secondly, the CISG Advisory Council is an active promoter of the CISG in the general sense, seeking to bring to the attention the advantages that surround the CISG.[788] And thirdly, the

[782] "CISG Advisory Council Opinions," Pace Law Albert H. Kritzer CISG Database, 2015, http://iicl.law.pace.edu/cisg/page/cisg-advisory-council-opinions.

[783] "Council Members," CISG Advisory Council, 2008-2018, https://www.cisgac.com/council-members/.

[784] "Welcome to the CISG Advisory Council (CISG-AC) - Mode of Operation," CISG Advisory Council, 2018, http://www.cisgac.com/.

[785] Welcome to the CISG Advisory Council (CISG-AC) - Scope and Aims," CISG Advisory Council, 2018, http://www.cisgac.com/.

[786] Welcome to the CISG Advisory Council (CISG-AC) - Internationality and Uniformity," CISG Advisory Council, 2018, http://www.cisgac.com/.

[787] "Opinions," CISG Advisory Council, 2018, http://www.cisgac.com/opinions/; "Declarations," CISG Advisory Council, 2008-2018, http://www.cisgac.com/opinions/.

[788] Joshua Karton and Lorraine De Germiny, "Has the CISG Advisory Council Come of Age," *Berkeley Journal of International Law* 27 (2009): 454.

CISG Advisory Council has undertaken to promote a wider acceptance of the CISG, lobbying for countries that have not adopted it to do so.[789] In 2012 the CISG Advisory Council was given observer status at UNCITRAL.[790] This enabled the CISG Advisory Council to be in attendance of the UNCITRAL meetings as well as the meetings of UNCITRAL Working Groups.[791]

5.2 LIMITED IMPACT OF THE IMPLEMENTED TOOLS

The implemented tools for the promotion of uniform application of the CISG have thus far had a rather limited impact. Firstly, as shown in Chapter II, the problem of non-uniform application of the Convention is still pervasive even though the implemented tools have been in place for several decades now. And secondly, if one examines case law on the CISG, one will see that the implemented tools have been rarely referenced by courts and arbitral tribunals, at least explicitly.

5.2.1 Persistence of Non-Uniform Application of the CISG

Examples of non-uniform application of the CISG abound.[792] Commentators would all agree that the CISG suffers from divergent applications of its provisions.[793] What they disagree on, as noted earlier in this thesis, is the practical dimension that the concept of uniformity as put

[789] Joshua Karton and Lorraine De Germiny, "Can the CISG Advisory Council Affect the Homeward Trend?," *Vindobona Journal of International Commercial Law and Arbitration* 13 (2009): 73.

[790] Welcome to the CISG Advisory Council (CISG-AC) - Observer Status at UNCITRAL and UNIDROIT," CISG Advisory Council, 2018, http://www.cisgac.com/.

[791] Ibid.

[792] Andersen, "The Global Jurisconsultorium of the CISG Revisited," 43–70 (see n. 740). "[S]tudies of the CISG show that whilst it is textually uniform, at least to some extent, different contracting states read and apply its text in different ways."

[793] Ibid.

forth in the CISG ought to take.[794] This difference of opinions does not, however, in any way challenge the following truism: As of 2018, the non-uniform application of the CISG continues to be pervasive.

Since the second half of the 1980s concrete initiatives were taken in order to foster a more uniform application of the CISG.[795] Thus, the following question ensues: Did these tools have a significant impact in mitigating the phenomenon of non-uniform application of the Convention? This issue becomes even more pronounced and relevant when one takes into account the fact that 30 years have passed since the implementation of the first tool for the promotion of uniform application of the Convention (the CLOUT est. in 1988).[796] Other tools were set up in the early 1990s (CISG Pace Database traces its origin to 1991 and UNILEX to 1992),[797] mid 1990s (CISG Online est. in 1995)[798] and in the early 2000s (CISG Advisory Council est. in 2001 and CISG Digest first published in 2004).[799] Considering that the most recent tool for the promotion of uniform application of the CISG has had 14 years to make a meaningful impact, and the oldest one has had 30 years thus far to do so, it would certainly not be unreasonable to expect to see palpable results of their endeavours.

How can one assess the impact made by the implemented tools for the promotion of uniform application of the CISG? It would certainly not be possible to compare and contrast the

[794] For a detailed discussion on this matter, please refer to Chapter I.

[795] UNCITRAL, "Case Law on UNCITRAL Texts (CLOUT) - User Guide" (United Nations, 2018), 2/9, https://documents-dds-ny.un.org/doc/UNDOC/GEN/V18/001/11/PDF/V1800111.pdf?OpenElement. CLOUT is the first initiative aiming to contribute to uniform application of UNCITRAL's legal texts, and was established in 1988.

[796] Ibid.

[797] "About the Pace-IICL," (see n. 766); "The Sponsors," (see n. 775).

[798] "CISG-Online," (see n. 779).

[799] "CISG Advisory Council Opinions," (see n. 782); "Digests," (see chap. 1, n. 107).

application of the Convention without the implemented tools to that one that does benefit from these tools. The former situation never existed as the CISG came into effect in 1988, the same year the CLOUT became operational.[800] And soon after other tools for the promotion of uniformity in the application of the Convention were established. Thus, it would be a mere speculation to juxtapose a fictional situation to the one that is actually a reality.

What can be done, however, is to assess the impact made by the implemented tools against their broad aim of promoting the uniform application of the Convention. Are we at a stage where one can say that the CISG has reached a satisfactory level of uniformity in its application? This evidently depends on what constitutes a satisfactory level of uniformity. In Chapter I it was argued that Article 7(1) of the CISG mandates a high level of uniform application that is in this day and age best embodied in the national law standard. To reiterate, the national law standard requires that the CISG ought to be applied on average as uniformly as the national laws that the parties choose when they exclude the application of the Convention.[801] And as shown in Chapter II, the CISG cannot be considered to have thus far attained this level of uniformity. Consequently, when the impact of the implemented tools is assessed against the backdrop, one can only conclude that their impact has been rather limited. The CISG is nowhere near satisfying the national law standard.

Furthermore, it ought to be noted that in most instances, when scholars discuss the Convention and point out divergent applications between different courts and arbitral tribunals, they do not engage themselves into the discussion of what standard of uniformity is mandated by

[800] "Status - United Nations Convention on Contracts for the International Sale of Goods (Vienna, 1980)," (see chap. I, n. 1).

[801] For a discussion on national law standard, please refer to Chapter I.

the CISG.[802] They simply pinpoint differences and note that, in relation to the issue that they discuss in their article or book, the case law is split.[803] Examples of this approach are numerous which, in and of itself, is an indication of the persistence of the non-uniform application of the CISG.

Another place where one gets the same impression of pervasiveness of non-uniformity in the application of the Convention is the CISG Digest. As noted above, the CISG Digest maintains a neutral approach when presenting the CISG case law.[804] It does not seeks to provide any sort of criticism or analysis of the CISG court decisions and arbitral awards, but simply to lay out their holdings and relevant observations on an article-by-article basis. The CISG Digest nowhere states directly that courts and arbitral tribunals have expressed diverging positions under a particular article of the Convention. However, a more subtle method is used in the CISG Digest when varying approaches can be spotted in court decisions and arbitral awards. Namely, the CISG Digest employs the expression 'some courts' when it seeks to indicate that there are other courts that do not share the same view point.[805] For example, for Article 4 of the Convention, the CISG Digest states the following:

[802] Kröll, "Selected Problems Concerning the CISG's Scope of Application," 39 (see chap. 2, n. 192); Lubbe, "Fundamental Breach under the GISG," 444 (see chap. 2, n. 211); Gotanda, "Using the UNIDROIT Principles to Fill Gaps in the CISG," 108 (see chap. 2, n. 2213); Vargas Weil, "Chilean High Courts Evidence a Lack of Familiarity with the CISG by Neglecting Its Application in an International Sale of Goods Case," 143 (see chap. 2, n. 350); Pavić and Đorđević, "The Scope and Sphere of Application of the CISG in the Balkans," 887 (see chap. 2, n. 351).

[803] Ibid.

[804] Lookofsky, "Walking the Article 7 (2) Tightrope Between CISG and Domestic Law," 87 (see chap. 1, n. 109).

[805] UNCITRAL, *UNCITRAL Digest of Case Law on the United Nations Convention on Contracts for the International Sale of Goods* (see chap. 1, n. 108). Please use the option 'Find' either in a browser or in Adobe Acrobat Reader to locate the use of the expression 'some courts' in the CISG Digest.

> Although [A]rticle 4 does not expressly mention the issue as one governed by the Convention, some courts (albeit not all) have concluded that burden of proof questions come within the scope of the Convention.[806]

The same (or similar) approach can be observed dozens of times in the CISG Digest, and it is this frequency that is a clear indication of a widespread presence of non-uniformity in the application of the Convention.

On the whole, in spite of the tools for the promotion of uniform application of the CISG, the varying interpretations still frequently arise under the Convention. More precisely, in contrast to the broad aim of these tools to promote the uniform application of the CISG, the opposite (i.e. non-uniform application) still tends to be the leitmotif surrounding the Convention. This is a strong indication in favour of concluding that the impact of the tools for the promotion of uniform application of the CISG has been rather limited on courts and arbitral tribunals.

5.2.2 Rare Use of the Implemented Tools

The implemented tools for the promotion of uniform application of the CISG have seldom been used by courts and arbitral tribunals. This position is confirmed by browsing through the texts of court decisions and arbitral awards. Namely, (1) courts and arbitral tribunals very rarely reference the materials that these tools contain, and (2) they even more seldomly reference the tools themselves.

As already noted in Chapter I, the vast majority of commentators agree that Article 7(1) of the CISG asks that, when applying the CISG, the courts and arbitral tribunals ought to look to

[806] Ibid., 24.

foreign case law produced under the Convention.[807] Naturally, for this practice to be possible, a tool must be in place that enables access to other jurisdictions' case law. And as seen in Chapter V, not one, but several tools are at the judges' and arbitrators' disposal to obtain foreign CISG case law. However, in practice, judges and arbitrators have rarely referred to foreign CISG cases in their decisions:

> "[D]espite the positive evidence of the rise in the number of CISG jurisconsultorium cases, overall, such cases are few. The statistical figures from 2005 indicated that fewer than 1.1% of reported CISG cases used the jurisconsultorium, while the proportion today is about 1.5%. [footnote omitted] This confirms the position that judicial resort to the jurisconsultorium is the exception rather than the rule."[808]

The same holds true for the CISG Advisory Council. Finding a CISG case that cites an opinion or declaration issued by the CISG Advisory Council is not a frequent occurrence.[809] Therefore, the fact that the materials made available by the implemented tools are very infrequently referenced in the CISG court decisions and arbitral awards indicates that the use of the implemented tools by the judiciary and arbitral tribunals is rare.

The view that the use of the implemented tools in practice is an uncommon occurrence is reinforced by the fact that these tools are even more seldom referenced in the CISG case law.

[807] Schlechtriem and Schwenzer, *Commentary on the UN Convention on the International Sale of Goods (CISG)*, 124 (see introduction, n. 44); Kröll, Mistelis, and Viscasillas, *UN Convention on Contracts for the International Sale of Goods (CISG) – Commentary*, 128 (see introduction, n. 44).

[808] Baasch Andersen, "The CISG in National Courts," 73 (see chap. 1, n. 119).

[809] "Search Cases in the CISG Database," Pace Law Albert H. Kritzer CISG Database, n.d., http://iicl.law.pace.edu/cisg/search/cases. The new version of the CISG Pace Database provides a comprehensive search engine. By searching the term 'CISG,' the search engine returns 4281 cases (search last performed on 20 Dec. 2018). When the term 'CISG Advisory Council' (with the quotation marks) is inserted into the search engine, only 22 results pop up. Karton and de Germiny, "Can the CISG Advisory Council Affect the Homeward Trend?," 83 (see n. 789). "To the authors' knowledge, only courts in Germany and in single instances, courts in the United States and Poland have cited CISG-AC opinions."

Naturally, if an opinion or declaration issued by the CISG Advisory Council is cited in a court decision or arbitral award, then a mere reference to an opinion or declaration is, in and of itself, a reference to the CISG Advisory Council. In contrast, by referring to CISG cases, one cannot automatically assume that the court or arbitral tribunal has made use of the implemented tools that disseminate case law and other CISG-related materials.

Court decisions will sometimes directly state that the CISG cases they are referencing have been obtained through the tools that disseminate case law and other CISG-related materials. For instance, in the case of *Amco Ukrservice et al. v. American Meter Company*, the US court cited UNILEX for the two foreign decisions that it took into account.[810] In *Cherubino Valsangiacomo, S.A. v. American Juice Import, Inc.*, the Spanish court indicated CLOUT as a place from which the decisions it cited could be obtained.[811]

In arbitral awards one can also spot examples of the use of the tools for the dissemination of case law and other CISG-related materials through direct reference. For instance, in the arbitral award dated 15 October 2002, and rendered under the auspices of the Netherlands Arbitration Institute, the arbitral tribunal cited CISG case law from several jurisdictions (e.g. court decisions from Germany, Switzerland and Italy, and arbitral awards rendered under the auspices of the ICC and the Arbitration Institute of the Stockholm Chamber of Commerce).[812] In the process, the arbitral tribunal indicated UNILEX as a database from which the cited court decisions and arbitral awards could be obtained ("see without further references, Landesgericht Berlin, September 15,

[810] Amco Ukrservice & Promriladamco v. American Meter Company, No. Civ. A. 00-2638 (U.S. District Court, Eastern District of Pennsylvania 2004), http://cisgw3.law.pace.edu/cases/040329u1.html.

[811] Cherubino Valsangiacomo, S.A. v. American Juice Import, Inc., (see chap. 1, n. 112).

[812] No. 2319 (Netherlands Arbitration Institute 2002), http://www.unilex.info/case.cfm?pid=1&id=836&do=case.

1994, Unilex database, unpublished in hard copy").[813]

In cases where both the domestic and foreign case law are cited, the tools that disseminate case law and other CISG-related materials are often acknowledged as sources of foreign, but not of domestic cases. For instance, in *Mitias v. Solidea,* an Italian case, the court utilised CISG-online, UNILEX, and the Pace CISG Database to obtain foreign case law under the Convention.[814] It even referenced some country-specific databases such as CISG Austria.[815] In contrast, when putting forth Italian cases, the Italian court did not include a reference to any of the tools that disseminate case law and other CISG-related materials.[816] This is understandable as national case law is generally available through national reporting systems and databases, with courts being accustomed to use these on a day-to-day basis.

Sometimes foreign case law will be cited, but the text of the decision (or an arbitral award) will not indicate the source from where the cited cases were obtained. For example, in *Macromex Srl. v. Globex International Inc.*, an arbitral case conducted under the auspices of the American Arbitration Association (AAA), there is no mention of any database that contains the court decisions and arbitral awards on the CISG.[817] However, the arbitral tribunal does cite the CISG cases that were decided outside of the US by putting forth their unofficial case names.[818] These unofficial case names are a clear indication that the tools that disseminate case law and other CISG-

[813] Ibid.

[814] Mitias v. Solidea S.r.l, No. 2280/2007 (Tribunale di Forli 2008), http://cisgw3.law.pace.edu/cases/081211i3.html.

[815] Ibid.

[816] Ibid.

[817] Macromex Srl. v. Globex International Inc., No. Case No. 50181T 0036406 (International Centre for Dispute Resolution of the American Arbitration Association 2007), http://cisgw3.law.pace.edu/cases/071023a5 .html.

[818] Ibid.

related materials have played a role in enabling the arbitral tribunal to look into the cases it cited. Namely, the unofficial case names are assigned to cases upon their inclusion into the tools that disseminate case law and other CISG-related materials, and they are generally derived from the goods involved in the dispute. For example, the foreign cases referred to in *Macromex Srl. v. Globex International Inc.* are named as follows: *Design of radio phone case*, *Powdered milk case*, *Caviar case*, *Coal case*, and *Canned oranges case*.[819] Therefore, given that these names are a specificity of the tools that disseminate case law and other CISG-related materials, they are, in and of themselves, proof that these tools were, one way or another, instrumental in enabling the tribunal's access to foreign cases, albeit they are not directly referenced.

However, sometimes neither direct nor indirect reference will be observable in a CISG court decision (or an arbitral award) that cites foreign case law produced under the Convention. For example, in *Tessile v. Ixela*, an Italian court referred to a case decided by a Swiss court.[820] In doing so, the Italian court did not indicate the source from where the decision it referenced (*Optical equipment case*) could be obtained.[821] Naturally, the Italian court could have obtained this decision from a tool that disseminates case law and other CISG-related materials. But it is also plausible that the Italian court could have got the decision through some other means. Namely, the geographical, cultural and linguistic proximity (north of Italy is the location of the Italian court whereas the location of the Swiss court is in the southern, Italian-speaking part of the country)

[819] This method is especially helpful for locating cases that are not given any case names in their respective jurisdictions, or at least not the recognisable ones. For cases from jurisdictions such as the US this method of naming cases is not always used as cases there are assigned relatively recognisable and memorable official names based on the names of the parties to the dispute. These official case names are then generally used in the tools that disseminate case law and other CISG-related materials, and not the ones derived from the goods involved in the dispute.

[820] Tessile v. Ixela (Fall.Tessile 21 S.r.l. (Avv. Griffini) v. Ixela S.A. (Avv. con sede in Atene) 1999), http://cisgw3.law.pace.edu/cases/991229i3.html.

[821] Ibid.

leaves open the possibility that an alternative route was taken in obtaining the decision. In contrast, when no such proximities are present (e.g. an Israeli court citing case law from Argentina, Mexico and China), then it would be a logistical nightmare to obtain foreign CISG case law through any other means except by using the tools that disseminate CISG cases.[822] Only language barriers are sufficient proof against this sort of practice.

It must be noted, however, that the tools for the dissemination of case law and other CISG-related materials can be used even when no foreign case law at all gets cited in the court decision or in the arbitral award. As noted by Baasch Andersen, there will be instances where the parties will argue their case under the CISG without citing any particular examples of foreign case law.[823] Nevertheless, their argument will be either grounded in, or copied from, the text of a foreign decision.[824] In other words, the parties, and sometimes even the court on its own (or an arbitral tribunal), will seek guidance in foreign decisions on the CISG, but that will not be made known in either the written pleadings or in the final text of the decision. Baasch Andersen gives an example of the Danish Maritime Commercial Court which in one of its decisions relied heavily on the reasoning put forth by the Dutch and German courts without acknowledging it.[825] And the texts of those cases were probably obtained, one way or the other, through the tools that disseminate the case law and other CISG-related materials, although we cannot know this for certain. However,

[822] Naturally, it is possible occasionally to obtain the relevant CISG case law from secondary materials such as books, but these, in turn, generally use the tools that disseminate case law and other CISG-related materials to gather and organise the cases. So, even if one obtains a CISG case from a book, this in no way undermines the primary role played by the implemented tools in disseminating CISG case law.

[823] Camilla Baasch Andersen, "The Uniform International Sales Law and the Global Jurisconsultorium," *Journal of Law and Commerce* 24 (2004): 177.

[824] Ibid.

[825] Ibid.

there is no proof that the approach taken by the Danish Maritime Commercial Court is widespread or that it greatly surpasses the number of cases in which a direct reference to foreign CISG case law is made.

On the whole, the use of the tools that disseminate case law and other CISG-related materials is still quite a rare occurrence in practice. The examples of courts and arbitral tribunals referring to foreign CISG case law are exceptionally scarce. And when they do so, the courts and arbitral tribunals do not always indicate the source from where they had obtained foreign CISG cases. In other words, while reference to CISG cases is seldom, reference to tools that disseminate case law and other CISG-related materials is even more seldom. In terms of the frequency of use, a similar situation can be observed in relation to the one implemented tool that offers normative analysis – CISG Advisory Council – as very few courts and arbitral tribunals have made use of their opinions and declarations.[826] All this hints that the use of the implemented tools for the promotion of uniform application of the CISG in the practical domain remains quite rare, and their impact is, consequently, limited.

What might be the reasons for this state of affairs? Just like with any complex issue, one can pinpoint a wide number of factors. For example, one could isolate homeward trend as a contributing factor.[827] A judge who interprets and applies the CISG through the lens of the domestic law is highly unlikely to reach for the implemented tools for the promotion of uniform application of the Convention. Or one could find a nexus between the high levels of unfamiliarity with the CISG and the rare use of the implemented tools.[828] That is, those judges and arbitrators

[826] "Search Cases in the CISG Database," (see n. 809).

[827] For a detailed discussion of homeward trend, please refer to Chapter III.

[828] For a brief discussion of the topic of unfamiliarity with the CISG, please refer to Chapter IV.

unfamiliar with the Convention will be, by the same token, unfamiliar with the implemented tools as well. However, these types of factors are detrimental for positive attitudes of judges to look towards the CISG cases, something that this thesis, as indicated in its Introduction, will not seek to address. Instead, an effort will be made in the ensuing section to focus on the implemented tools themselves as they could potentially have characteristics that could discourage the judges and arbitrators from using them.

5.3 ANALYSIS OF THE IMPLEMENTED TOOLS

The analysis of the implemented tools for the promotion of uniform application of the CISG will be twofold. Firstly, a list of desirable characteristics that the implemented tools ought to have will be put forth. And secondly, the implemented tools will be examined to see to what extent they conform to these desirable characteristics (i.e. these characteristics will be viewed as benchmarks against which the implemented tools will be assessed). Eventually, it will be illustrated here that the implemented tools, on the whole, simply do not have the capacity to make an equalised impact throughout the jurisdictions that have adhered to the CISG in their current form.

5.3.1 Benchmarks for the Implemented Tools

It will be argued here that the implemented tools ought to be characterised by the following five traits: (1) accessibility, (2) systematic approach, (3) timeliness, (4) credibility, and (5) fair representation of developing/non-Western countries.

5.3.1.1 Accessibility

The tools for the promotion of uniform application of the CISG ought to be accessible to their end-users.[829] For instance, the tools that disseminate case law and other CISG-related materials ought to ensure accessibility to the CISG materials for those who are in charge of applying it.[830] As already noted earlier in this thesis, Article 7(1) of the CISG which, among other things, states that there is a need to promote uniform application of the Convention, is directed at courts and arbitral tribunals.[831] In other words, if a high level of uniformity in the application of the CISG is to be attained, it is the judges and arbitrators that will have to do the heavy lifting. The conventional wisdom says, as noted previously, that they ought to look towards foreign case law so as to promote uniformity in the Convention's application.[832] However, they will not be able to do that if the foreign case law is not easily accessible for them.

There are two main barriers that impede effective accessibility to foreign CISG case law. Firstly, court decisions in many countries are not easily retrievable. For instance, many court

[829] "Charter of the Autonomous Network of CISG Websites," Pace Law Albert H. Kritzer CISG Database, 2005, https://www.cisg.law.pace.edu/cisg/charter.html. "Uniform accessibility of the CISG, including legal interpretations of the law in the texts of the written decisions of disputes is needed to build security for growing international markets."

[830] Rafal Manko, "The Unification of Private Law in Europe from the Perspective of the Polish Legal Culture," *Yearbook of Polish European Studies* 11 (2007): 130. The importance of effective accessibility to foreign scholarly writings and case law was emphasised in relation to the prospect of unification of private law in Europe. In this article, Manko offers a Polish perspective on the matter: "[T]he issue of translations [i]s a necessary intermediary between the actors of culture of private law in Poland and the texts (case-law, literature) produced by judges and scholars in other European countries. Without a systematic programme of translations of selected texts, the unification of private law in the European Union could be de facto reduced to only certain aspects of legal culture: legislative texts (a uniform European Civil Code) and the case-law of a European court for civil cases (which would be published in all EU languages)."

[831] Schlechtriem and Schwenzer, *Commentary on the UN Convention on the International Sale of Goods (CISG)*, 123 (see introduction, n. 44).

[832] Ibid., 124 (see introduction, n. 44); Kröll, Mistelis, and Viscasillas, *UN Convention on Contracts for the International Sale of Goods (CISG) – Commentary*, 128 (see introduction, n. 44).

decisions are not available online.[833] When they are available on the Web, often times one can only access them through databases for which one needs subscription or some other form of special authorisation.[834] As for arbitral awards, the general view is that they remain confidential, and thus out of reach of the general public.[835] In some instances, however, arbitral awards do get published (often without the names of the parties), but they are only made available through specialised databases like Kluwer Arbitration that require subscription.[836]

Secondly, the language barrier also stands in the way of effective access to foreign CISG case law.[837] As already noted in this thesis, 89 countries have, as of this writing, adhered to the CISG, with their courts deciding the CISG matters in their local languages.[838] In other words, the

[833] Marc van Opijnen et al., "Online Publication of Court Decisions in Europe," *Legal Information Management* 17, no. 3 (2017): 139. "[N]early all constitutional courts within the EU publish all of their decisions. Also, nearly 80% of the high administrative courts and a little over 60% of the supreme courts publish (nearly) all their decisions. The situation for the district courts, the courts of appeal and the administrative courts is quite the opposite: in more than half of the [EU] Member States these courts do not publish decisions at all, or at least no substantial selection."

[834] "Foreign Case Law by Jurisdiction," Georgetown Law Library, 2018, https://guides.ll.georgetown.edu/c.php?g=362128&p=5502996. For example, Georgetown Law Library provides access to several databases for case law from non-US jurisdictions, and many of them require subscription. "Internet Access," Judicial Portal of Bosnia and Herzegovina, 2010, https://www.pravosudje.ba/. One can access court decisions in Bosnia and Herzegovina online, but special authorisation is required. "Odluke Visokog Trgovačkog Suda RH," Sudačka mreža, 2009, http://www.sudacka-mreza.hr/vts-odluke.aspx?Lng=hr. Decisions from the High Commercial Court in Croatia are available through the website called 'Sudačka mreža.' However, the decisions are made available only in Croatian language, and prior registration is necessary for access to be granted.

[835] Leon E. Trakman, "Confidentiality in International Commercial Arbitration," *Arbitration International* 18, no. 1 (2014): 1.

[836] "Kluwer Arbitration," Wolters Kluwer, 2018, http://www.kluwerarbitration.com/. As of 21 December 2018, Kluwer Arbitration has made available 3013 arbitral awards.

[837] Albert Kritzer, "The Convention on Contracts for the International Sale of Goods: Scope, Interpretation and Resources," *Cornell Review of the Convention on Contracts for the International Sale of Goods*, 1995, 168. "The US Supreme Court encourages us to examine foreign interpretations of uniform laws such as the CISG. [footnote omitted] However, many of the cases and commentaries are located in sources that are not familiar to most of us. Also, most of the cases are in languages other than our own, and foreign languages are not taught to the same extent in our country as in others. This has impeded our ability to access foreign case law and commentaries on the CISG. The CISG W3 database is being designed to help respond to this obstacle by providing data on available commentaries and ready access to foreign CISG decisions and English translations of them."

[838] "Status - United Nations Convention on Contracts for the International Sale of Goods (Vienna, 1980)," (see chap. 1, n. 1).

US courts will apply the CISG in English, the French courts will do so in French, the Serbian courts will use Serbian language, Egyptian courts will write in Egyptian Arabic, and so forth. Thus, the language diversity in terms of the CISG case law is rather substantial. Even if the problem of retrieval of foreign CISG case law was to be tackled, there remains an issue of ensuring the understanding of its content. Consequently, in order to ensure that the judges and arbitrators can, in practice, resort to foreign CISG case law, the tools that seek to promote uniform application of the Convention ought to strive to make the said case law accessible both in terms of retrieving it, and it terms of comprehension. More precisely, the CISG cases ought to be made available in a variety of languages through translation. Similar observations can be made in relation to the CISG Advisory Council. In essence, it will maximise its impact if the opinions and declarations it produces are widely accessible for courts and arbitral tribunals.

5.3.1.2 Systematic Approach

Performing an activity systematically ensures a degree of predictability to those who are either targeted, or impacted by it, or both. The importance of ensuring unfettered accessibility to tools for the promotion of uniform application of CISG for those who are expected to use these tools and their output has been discussed above. For instance, the tools that disseminate case law and other CISG-related materials should ideally be tailored so as to reflect the reality on the ground, i.e. that the CISG is applied in many different languages.[839] Practically, this puts translation into the spotlight of the endeavour to collect and disseminate CISG case law.

[839] Flechtner, "The Several Texts of the CISG in a Decentralized System," 193 (see introduction, n. 45); "Texts of the CISG," Pace Law Albert H. Kritzer CISG Database, 2014, http://iicl.law.pace.edu/cisg/page/texts-cisg. The CISG currently has several dozen unofficial versions, including the ones in Albanian, Armenian, Bulgarian, Croatian, Czech, Danish, Dutch, Estonian, Farsi, Finish, Georgian, German, Greek, and many others.

The importance of making CISG case law linguistically accessible is a theoretical conclusion. Therefore, one must ask what the practical intricacies of this inference are. Should all the CISG decisions and arbitral awards that become publicly available be translated in a wide variety of languages, or should this activity encompass specific examples of case law? In case of the former, it would be a formidable, albeit not an impossible task, i.e. to translate all the retrievable examples of CISG case law into languages of states adhering to the CISG.[840] The latter approach would be less voluminous, but it would require criteria to be set out as to which examples of case law ought to be selected for full translation. For instance, cases and arbitral awards that have an element of novelty and those that depart from the established interpretations could be prioritised. In contrast, cases and arbitral awards that follow the conventional viewpoints could simply be reported (together with a short case brief or an abstract) without enclosing full translations. All these matters ought to have a systematic undertone to them. For if they are decided arbitrarily, then one will not be able to obtain a full and clear picture of the state of the global *jurisconsultorium* when resorting to the tools that disseminate case law and other CISG-related materials. Evidently, translation is only one aspect (albeit a very important one) when it comes to these tools, but it serves as a vivid illustration of why it is pivotal that a systematic approach be built into them.

Similar observations can be made in relation to the CISG Advisory Council. How are deliberations in the CISG Advisory Council to be made? How to choose an issue to be the central topic of an opinion or declaration? Which language(s) are to be used by the CISG Advisory Council? How to go about translations into multiple languages of their opinions and declarations? These are just some of the aspects relevant to the CISG Advisory Council that ought to be

[840] "CISG Database - Country Case Schedule," (see chap. 3, n. 516). Up until 25 January 2016, the Pace CISG Database has reported 3152 cases on the Convention. While translating these many cases in a wide variety of languages would be a daunting task, it would certainly not fall in the realm of impossibility.

predetermined and systematically implemented.

5.3.1.3 Timeliness

The activities of the tools for the promotion of uniform application of the CISG ought to be characterised by timeliness. Why is it important that timeliness be a discernible trait of these tools? The answer to this question can be given through the following hypothetical. Let us assume a court in Greece has rendered a CISG decision that deals with an unexplored issue under the Convention. Furthermore, the said decision is characterised by a holding that is supported by a sophisticated reasoning. However, this Greek decision only gets translated into one foreign language vis-à-vis Greek – and that is English – five years down the line. Translation into other languages is even more slow-paced, and it takes several more years. But three years after the Greek court heard the case, a similar issue arose before two other courts – one in Uruguay and one in Gabon. Both of these courts have rendered diametrically opposed decisions compared to their Greek counterpart. And unlike the Greek decision, the reasoning found in the Uruguayan and the Gabonese decisions is flawed. Had the Greek court's decision been made readily available through the tools for the promotion of uniform application of the CISG, the Uruguayan and Gabonese courts would have had the opportunity to examine it, and potentially even follow it.

The hypothetical presented here illustrates just how important it is that the tools for the dissemination of case law and other CISG-related materials be timely in their endeavour. If the dissemination of the CISG case law is slow-paced, then the courts and arbitral tribunals are effectively prevented from resorting to foreign CISG cases that are waiting to be included into the tools. This is especially relevant in relation to cases which have the potential to be described as landmark. That is, if these cases are disseminated in a timely manner, then they can serve as a

foundation – a sort of a starting point – for other courts (and arbitral tribunals) in their handling of similar controversies in the future. If, however, these prospective landmark cases remain confined to obscurity for a long period of time, then other courts (and arbitral tribunals), if they get to entertain similar cases, will have no foundation on which they can build upon. Instead, they will have to begin from scratch. And in this regard, starting anew by several courts in different parts of the world is more likely to lead to diverging decisions than as compared to the situation in which the courts are aware of what their counterparts have done previously in other jurisdictions.

As for the CISG Advisory Council, they will be timely in their activities if they take up divisive issues in their opinions and declarations at the stage when it becomes evident that convergence on those issues will not occur spontaneously in CISG case law. Naturally, the CISG Advisory Council will also perform in a timely manner if they issue an opinion or a declaration regarding an issue that still did not become divisive, but has the potential to reach that level.

5.3.1.4 Credibility

The tools for the promotion of uniform application of the CISG ought to enjoy a status of credibility in the eyes of those that are expected to use them.[841] For if a judge or an arbitrator doubts the trustworthiness and expertise of any tool, it is highly likely that they will decline to use it. For instance, if the tools that seek to disseminate the CISG case law and other CISG-related materials contain translations that are inaccurate and poorly reflect the original writing, then one will undoubtedly be led to question their credibility.

How can the tools for the promotion of uniform application of the CISG build their

[841] Johan Jessen and Anker Helms Jørgensen, "Aggregated Trustworthiness: Redefining Online Credibility through Social Validation," *First Monday* 17, no. 1 (2012), https://firstmonday.org/ojs/index.php/fm/article/view/3731/3132. "Fogg and Tseng argue that from the dozen or more elements that contribute to credibility evaluation, there are just two key dimensions of credibility: trustworthiness and expertise."

credibility? The starting point is to ensure the quality of their work. Thus, if they disseminate the CISG case law and other CISG-related materials, they must ensure that the translations legally and linguistically reflect the original text. If they offer a normative analysis of issues arising under the CISG, this analysis must be sophisticated and legally well-grounded. In other words, the first building block of credibility of the tools for the promotion of uniform application of the CISG must be the expertise.

The second building block should come in the form of a good reputation. More precisely, the tools that seek to contribute to the uniformity endeavour ought to be perceived as trustworthy. For if they are not, in spite of the expertise that characterises their activities, they would still be avoided by courts and arbitral tribunals, and by the parties and their lawyers. Achieving trustworthiness is a process on which several factors may have an impact. An explicit reference to a particular tool by the courts and arbitral tribunals in their judgements and awards will contribute to building a reputation of its trustworthiness. Furthermore, if a tool is designed and maintained by UNCITRAL, a UN body under whose auspices the CISG was adopted, then this automatically will give it an aura of trustworthiness. By the same token, when UNCITRAL refers to other tools or endorses them directly, a similar effect is achieved. And finally, one must not underestimate the influence of scholars in this regard who can make a massive contribution to the overall credibility of tools for the promotion of uniform application of the CISG in their writings by indicated them as a source of the works cited.

5.3.1.5 Fair Representation of Developing/Non-Western States

Global jurisconsultorium, as will be shown the in the ensuing paragraphs, is currently being completely dominated by Western/developed states. Is this a genuine reason for concern? The

historical events leading up to the adoption of the Convention indicate that it should be. Namely, the two predecessor conventions to the CISG – ULIS and ULF – were rather unsuccessful endeavours as compared to the CISG.[842] As mentioned in the Introduction to this thesis, both the ULIS and ULF failed to attract a significant number of states. They entered into force in only 11 countries, primarily European.[843] Other countries viewed them as exclusively European products in whose creation they had no say whatsoever.[844] Furthermore, as both the ULIS and ULF were adopted in 1964[845] – the year when the process of decolonisation was still on-going – expecting a newly formed post-colonial states to suddenly adhere to legal instruments that their former masters were putting on the table would be far-fetched.[846] The eventual destiny of the ULIS and ULF could have been only one – and that is sheer and utter failure.

In relation to the CISG, the mistakes committed by those in charge of drafting the ULIS and ULF were remedied.[847] The drafting process of the CISG was far more open and diverse, with the participation not only of states with the developed market economies, but also of socialist countries and those with lower levels of development.[848] Thus, it is not surprising that the CISG

[842] Sieg Eiselen, "Globalization and Harmonization of International Trade Law," in *Globalization and Private Law: The Way Forward* (Cheltenham: Edward Elgar Publishing, 2010), 102; John Honnold, "International Unification of Private Law," in *United Nations Legal Order*, vol. 2 (Cambridge: Press Syndicate of the University of Cambridge, 1995), 1035.

[843] Eiselen, "Globalization and Harmonization of International Trade Law," 102.

[844] Ibid.; Honnold, "International Unification of Private Law," 1035 (see n. 842).

[845] "Status - Convention Relating to a Uniform Law on the International Sale of Goods (UlLIS) (The Hague, 1964)," UNIDROIT, 2017, https://www.unidroit.org/status-ulis-1964; "Convention Relating to a Uniform Law on the Formation of Contracts for the International Sale of Goods (ULFC)," UNIDROIT, 2017, https://www.unidroit.org/status-ulfc-1964.

[846] Honnold, "International Unification of Private Law," 1036 (see n. 842).

[847] Eiselen, "Globalization and Harmonization of International Trade Law," 102 (see n. 842).

[848] Ibid.

came to be hailed as a success, especially in terms of the number of participating states.[849] While the ULIS and ULF did not manage to attract more than 11 states in total, the CISG, as of this writing, boasts an impressive 89 participating states from all six inhabitable continents.[850] What is more, judging by the steady increase of states adhering to the CISG in recent years, other states might join in the future.[851] The juxtaposition of the success story that is the CISG against the failures of the ULIS and ULF provides us with a telling lesson. That is, if one is keen to see a worldwide participation of states in a uniform law project, then one ought to ensure the participation in the drafting process of as many of them as possible.

However, it must be noted that the development of a uniform law instrument such as the CISG does not stop at the stage of its adoption. And this holds true especially in relation to the CISG that is a relatively succinct document that embodies numerous open-ended standards that are to be developed by courts and to a certain extent arbitral tribunals.[852] If it was crucial to have as diverse a group of states as possible participating in the drafting process, it is only natural to expect the same approach to be taken in the post-adoption stage. This, however, is not the reality on the ground. What is more, it is only a handful of states (primarily Western/developed ones) whose courts have come to play a predominant role in shaping the CISG and its case law.

In order to illustrate the dominance of Western/developed states' case law, it is useful to turn to the CISG decisions that are hailed as being exemplary by the scholarly community. One of

[849] Ingeborg Schwenzer and Pascal Hachem, "The CISG – A Story of Worldwide Success," in *CISG Part II Conference* (Uppsala: Iustus, 2009), 119-140.

[850] "Status - United Nations Convention on Contracts for the International Sale of Goods (Vienna, 1980)," (see chap. 1, n. 1).

[851] Ibid.

[852] Gillette and Scott, "The Political Economy of International Sales Law," 474 (see chap. 1, n. 143).

the most prominent examples is *Rheinland Versicherungen v. Atlarex* handed down by the Italian Tribunale di Vigevano in 2000.[853] In it, references to approximately 40 foreign decisions were made.[854] These decisions all came from a handful of Western countries: United States, Germany, Austria, Switzerland, France, and the Netherlands.[855] Another Italian decision (rendered in 2008) that referred to an abundance of foreign case law on the CISG is *Mitias v. Solidea*.[856] In it, the Italian court followed the same pattern observed already in *Rheinland Versicherungen v. Atlarex* as all the foreign decisions that were cited originated in several Western states: Switzerland, France, Austria, Germany, Spain, and the Netherlands.[857]

Courts from other jurisdictions, when resorting to foreign CISG case law, have not shown the same level of enthusiasm as some of their Italian counterparts. When deciding to refer to case law from other jurisdictions, they tended to cite a substantially lower number of decisions. For instance, in *Amco Ukrservice & Prompriladamco v. American Meter Company* (US case) a reference was made to only two German decisions.[858] The Supreme Court of Poland, in its 2007 decision *Spoldzielnia Pracy 'A' in N. v. GmbH & Co. KG in B.*, cited only one foreign decision; that of the Austrian Supreme Court.[859] In 2003, a Spanish court - Audiencia Provincial de Valencia – cited a few foreign decisions in the case of *Cherubino Valsangiacomo, S.A. v. American Juice*

[853] Rheinland Versicherungen v. S.r.l. Atlarex and Allianz Subalpina S.p.A., (see chap. 2, n. 200).

[854] Franco Ferrari, "Applying the CISG in a Truly Uniform Manner: Tribunale Di Vigevano (Italy), 12 July 2000," *Uniform Law Review Ns* 6 (2001): 208.

[855] Rheinland Versicherungen v. S.r.l. Atlarex and Allianz Subalpina S.p.A., (see chap. 2, n. 200).

[856] Mitias v. Solidea S.r.l., (see n. 814).

[857] Ibid.

[858] Amco Ukrservice & Promriladamco v. American Meter Company, (see n. 810).

[859] Spoldzielnia Pracy "A" in N. v. GmbH & Co. KG in B., No. V CSK 456/06 (Supreme Court of Poland 2007), http://cisgw3.law.pace.edu/cases/070511p1.html.

Import, Inc.[860] Again, the referenced decisions came from Western countries: the Netherlands, Germany, and Switzerland.[861]

The practice of directly referring to foreign case law under the CISG, as noted earlier in this thesis and this Chapter, is not prevalent.[862] The vast majority of courts remain blind as to what is happening regarding the CISG outside their borders.[863] However, in those cases where reference to foreign case law is made, it is indisputable that in the vast majority of instances the Western case law dominates the scenery.

While CISG case law is developed by courts and arbitral tribunals (to a lesser degree), one must not disregard the influence of scholars. For it is them who choose which cases will be included into their scholarly writings and textbooks. The textbooks are especially relevant in this regard as they lay the groundwork for any lawyer's legal training by engraining in their minds basic notions and principles that will be of relevance for the rest of their professional lives. One of the popular textbooks is *International Sales Law – A Guide to the CISG* written by Ingeborg Schwenzer, Christina Fountoulakis and Mariel Dimsey, and published in 2012.[864] At the very pre-introductory remarks, the authors point out that their book is "[w]ritten for international trade lawyers, practitioners and students from common law and civil law countries."[865] Therefore, they aim their book to be of interest to quite a wide audience. The book contains excerpts from

[860] Cherubino Valsangiacomo, S.A. v. American Juice Import, Inc., (see chap. 1, n. 112).

[861] Ibid.

[862] Baasch Andersen, "The CISG in National Courts," 73 (see chap. 1, n. 119).

[863] Ibid.

[864] Schwenzer, Fountoulakis, and Dimsey, International Sales Law, (see chap. 2, n. 276).

[865] Ibid., i.

numerous CISG cases, and it can be characterised as a casebook. However, in terms of diversity of jurisdictions from which those cases come from, the book is very much Western-focused.[866]

	Country	Number of cases
1.	Australia	1
2.	Austria	16
3.	Belgium	3
4.	Canada	2
5.	Czech Republic	1
6.	England	4
7.	France	4
8.	Germany	47
9.	Hungary	1
10.	Italy	2
11.	Netherlands	2
12.	New Zealand	1
13.	Poland	1
14.	Slovakia	1
15.	Spain	3
16.	Switzerland	15
17.	United States	29

Figure 1[867]

As one can clearly see, the Western/developed states' courts dominate the book *International Sales Law – A Guide to the CISG*. Out of 17 countries represented, only three are non-European: Australia, New Zealand, and the United States. However, these three countries are quintessentially included in what is considered as the Western world.[868] If one takes the developed v. developing divide as a relevant criterion, one will see that the developed countries again are extremely dominant. There are several established attempts to define the term 'developing country' and to formulate relevant lists/rankings. One of them is the *International Monetary Fund's World*

[866] Ibid., xxix.

[867] Ibid.

[868] Samuel P. Huntington, *The Clash of Civilizations and the Remaking of World Order* (New York: Simon & Schuster, 1996), 26.

Economic Outlook Database.[869] If one takes its list of developing countries as a relevant one, only two countries from this list are represented in the court case law found in *International Sales Law – A Guide to the CISG*. These are Hungary and Poland, with one case each.[870] All other 131 court cases were produced by courts in developed countries. Percentage-wise, this translates to 98.5%.

The picture is less bleak if one takes into account the arbitration cases.[871] Out of 30 arbitration cases included in *International Sales Law – A Guide to the CISG*, 2 awards were rendered under the auspices of the Arbitration Court of the Chamber of Commerce and Industry of Budapest (Hungary), 3 under the auspices of China International Economic and Trade Arbitration Commission (CIETAC), 1 under the auspices of the Foreign Trade Court of Arbitration at Serbian Chamber of Commerce, and 6 under the International Court of Commercial Arbitration – Chamber of Commerce and Industry of the Russian Federation.[872] Thus, in terms of arbitral awards, 40% of arbitral awards included in *International Sales Law – A Guide to the CISG* come

[869] *World Economic Outlook: Challenges to Steady Growth* (Washington D.C.: International Monetary Fund, October 2018), 134. Developing countries as per IMF: Afghanistan, Albania, Algeria, Angola, Antigua and Barbuda, Argentina, Armenia, Aruba, Azerbaijan, Bahamas, Bahrain, Bangladesh, Barbados, Belarus, Belize, Benin, Bhutan, Bolivia, Bosnia and Herzegovina, Botswana, Brazil, Brunei, Bulgaria, Burkina Faso, Burundi, Cambodia, Cameroon, Cape Verde, Central African Republic, Chad, Chile, China, Colombia, Comoros, Democratic Republic of the Congo, Republic of the Congo, Costa Rica, Côte d'Ivoire, Djibouti, Dominica, Dominican Republic, Ecuador, Egypt, El Salvador, Equatorial Guinea, Eritrea, Eswatini, Ethiopia, Fiji, Gabon, The Gambia, Georgia, Ghana, Grenada, Guatemala, Guinea, Guinea-Bissau, Guyana, Haiti, Honduras, Hungary, India, Indonesia, Iran, Iraq, Jamaica, Jordan, Kazakhstan, Kenya, Kiribati, Kosovo, Kuwait, Kyrgyzstan, Laos, Lebanon, Lesotho, Liberia, Libya, FYR Macedonia, Madagascar, Malawi, Malaysia, Maldives, Mali, Marshall Islands, Mauritania, Mauritius, Mexico, Federated States of Micronesia, Moldova, Mongolia, Montenegro, Morocco, Mozambique, Myanmar, Namibia, Nauru, Nepal, Nicaragua, Niger, Nigeria, Oman, Pakistan, Palau, Panama, Papua New Guinea, Paraguay, Peru, Philippines, Poland, Qatar, Romania, Russia, Rwanda, Saint Kitts and Nevis, Saint Lucia, Saint Vincent and the Grenadines, Samoa, São Tomé and Príncipe, Saudi Arabia, Senegal, Serbia, Seychelles, Sierra Leone, Solomon Islands, Somalia, South Africa, South Sudan, Sri Lanka, Sudan, Suriname, Syria, Tajikistan, Tanzania, Thailand, Timor-Leste, Togo, Tonga, Trinidad and Tobago, Tunisia, Turkey, Turkmenistan, Tuvalu, Uganda, Ukraine, United Arab Emirates, Uruguay, Uzbekistan, Vanuatu, Venezuela, Vietnam, Yemen, Zambia, and Zimbabwe.

[870] Ibid.

[871] Please note that, for the purposes of this discussion, an arbitral award will be linked to the country in which the arbitral institution under whose auspices the award was rendered is located. This thesis will not seek to enter into the complex debate on nationality of arbitral awards.

[872] Schwenzer, Fountoulakis, and Dimsey, *International Sales Law*, xxix-xl (see chap. 2, n. 276).

from developing countries. Nevertheless, the overall state of affairs (when both arbitration and court cases are perceived together) is heavily tilted in favour of the developed (Western) states. Furthermore, even those that are considered as developing states such as Poland, Hungary and Serbia are European (Poland and Hungary are members of the EU whereas Serbia currently enjoys a full candidate status for membership in the EU).[873] As for Russia, it is considered partly a European state as portion of its territory is located in Eastern Europe, with 77% of its population and two of its most important cities (Moscow and St. Petersburg) being situated in this part.[874]

A similar pattern to the one found in *International Sales Law – A Guide to the CISG* can be observed in another book that is aimed at students, academics, and practitioners, and that is *UN Law on International Sales - The UN Convention on the International Sale of Goods* by Peter Schlechtriem and Petra Butler.[875] Court decisions and arbitral awards from the following countries were included: Argentina, Australia, Austria, Belgium, Canada, China, France, Germany, Hungary, Italy, Mexico, Netherlands, New Zealand, Russia, Spain, Switzerland, United Kingdom, and the United States.[876] Furthermore, cases from the European Court of Justice are discussed in the book.[877] The following table provides a breakdown of cases found in *UN Law on International Sales - The UN Convention on the International Sale of Goods* and the jurisdictions from which they originate:

[873] "Countries," European Union, 2018, https://europa.eu/european-union/about-eu/countries_en.

[874] Sergey Arsentyevich Vodovozov et al., "Russia," *Encyclopædia Britannica*, 2019, https://www.britannica.com/place/Russia. "Russia, country that stretches over a vast expanse of eastern Europe and northern Asia."

[875] Peter Schlechtriem and Petra Butler, *UN Law on International Sales: The UN Convention on the International Sale of Goods* (Berlin: Springer, 2009).

[876] Ibid., xxi.

[877] Ibid.

	Country	Number of court decisions	Number of arbitral awards
1.	Argentina	3	0
2.	Australia	11	0
3.	Austria	25	1
4.	Belgium	3	0
5.	Canada	9	0
6.	China	0	2
7.	European Union	2	0
8.	France	14	6
9.	Germany	92	1
10.	Hungary	3	2
11.	Italy	6	0
12.	Mexico	0	1
13.	Netherlands	2	1
14.	New Zealand	16	0
15.	Russia	0	4
16.	Spain	1	0
17.	Switzerland	18	0
18.	United Kingdom	58	0
19.	United States	23	1

Figure 2[878]

UN Law on International Sales - The UN Convention on the International Sale of Goods, just like *International Sales Law – A Guide to the CISG*, is heavily focused on the CISG case law from Western states. The bulk of the case law cited comes from Europe, North America and Oceania (all from Australia and New Zealand) – 283 court decisions and 16 arbitral awards. In comparison, only 3 court decisions are referenced from outside the geographical area comprising Europe, North America, and Oceania, and those 3 decisions in question have originated from Argentina. As for arbitral awards, 3 in total have been cited outside the said geographical area – 2 that have been rendered under the auspices of a Chinese arbitral institution (CIETAC) and 1 under

[878] Ibid.

the auspices of COMPROMEX (Mexican Committee for the Protection of Foreign Commerce). Thus, the overwhelming dominance of Western case law in *UN Law on International Sales - The UN Convention on the International Sale of Goods* is clearly discernable.

If one uses the developed v. developing countries criterion, one will see that the cited case law in *UN Law on International Sales - The UN Convention on the International Sale of Goods* is numerically heavily skewed in favour of the developed states. Out of 19 jurisdictions represented in the book, only 5 belong to the developing countries' pool as per the *International Monetary Fund's World Economic Outlook Database*: Argentina, China, Hungary, Mexico, and Russia.[879] And out of 305 cases in total listed in the Table of Cases, only 15 come from the jurisdictions that are labelled as developing ones.[880] Percentage-wise, that represents only 4.92%.

Furthermore, it is also interesting to note that *UN Law on International Sales - The UN Convention on the International Sale of Goods* heavily cites case law from the UK (much of it predating the CISG) so as to illustrate the common law notions and principles. However, the attention given to the UK in this regard seems a bit disproportionate since the book, as its title suggests, is primarily concerned with the CISG. The UK case law is the second most cited in the book, with 58 court cases in total being referenced. The only jurisdiction that is in front of the UK in this regard is Germany.

A similar pattern of mostly citing case law from the Western/developed states is discernible in other books as well.[881] Hence, no matter whether one assesses court decisions citing foreign

[879] *World Economic Outlook: Challenges to Steady Growth*, 134 (see n. 869).

[880] Ibid.

[881] Schlechtriem and Schwenzer, *Commentary on the UN Convention on the International Sale of Goods (CISG)*, xxxiv (see introduction, n. 44). See 'Table of cases.' Kröll, Mistelis, and Viscasillas, *UN Convention on Contracts for the International Sale of Goods (CISG) - Commentary*, xiii (see introduction, n. 44). See 'Table of Cases."

CISG case law or whether one glimpses into books intended for students and practitioners, the conclusion is the same; the developed/Western states are the ones developing the CISG case law. The highly dominant jurisdictions in this regard seem to be Germany, the United States, Switzerland, Austria and France. The least represented jurisdictions are African ones, followed by Latin America and Asia. What may be the reason for this state of affairs?

One possible explanation may be that the Western judges and authors tend to focus on the Western case law because of convenience. After all, decisions put forth by the US, UK, Australian and New Zealand judges are easily retrievable and are written in English, the modern *lingua franca*. So, it is only natural that one will reach for those materials that one can understand.

In addition, countries such as Germany, France, the US and the UK have historically played very important role in the evolution and understanding of law in general. The civil codes of France and Germany were important milestones at the time of their adoption, and numerous countries from all around the globe have been influenced by them.[882] The US laws are studied and transposed all over the world, and the US Constitution is part of the syllabus of any class that is serious about teaching constitutional law.[883] And as for the UK, it is a cradle of common law, one of the two dominant legal systems that it 'exported' to areas all over the world during the colonial era.[884]

[882] Višnja Lachner and Roškar Jelena, "Građanske Kodifikacije u Europi s Posebnim Osvrtom Na 19. i 20. Stoljeće" (Zbornik radova znanstvenog skupa "Austrijski građanski zakonik, Tuzla, 2011), https://bib.irb.hr/ prikazi-rad?rad=728539. "Thus, the influence of the French Civil Code expanded to the countries that Napoleon had won, and among them should be included Switzerland and Swiss Zivilgesetzbuch which served as the fundamental base of creation of a new Civil Code of Spain 1942, and the Greek Civil Code from the 1940s. Also, the German civil code influenced […] the legislation of other countries, and here [it] is [important] to point out that it had significantly influenced the construction of the Italian Civil Code (Codice civile) from 1942."

[883] Anthony J Duggan, "UCC Influences on the Development of Australian Commercial Law," *Loy. LAL Rev.* 29 (1995): 991; Jacob S Ziegel, "The American Influence on the Development of Canadian Commercial Law," *Case W. Res. L. Rev.* 26 (1975): 861; Charles Henry Alexandrowicz-Alexander, "American Influence on Constitutional Interpretation in India," *The American Journal of Comparative Law*, 1956, 98.

[884] Monica Kilian, "CISG and the Problem with Common Law Jurisdictions," *J. Transnat'l L. & Pol'y* 10 (2000): 233.

Thus, it is perhaps only natural that the CISG decisions of these countries, and from several other Western ones (i.e. Austria, Switzerland, etc.) will be heeded much more than the decisions from areas such as Eastern Europe, Asia, Africa, and Latin America.

Another explanation could be framed in the possible stereotypical thinking of judges and authors. More precisely, they could be sceptical, whether intentionally or subconsciously, about the sophistication of the decisions from outside the Western/developed world, and thus do not seek to examine them at all. Whatever the correct explanation, the disproportionate dominance of the Western/developed countries and their courts in shaping the CISG case law is unquestionable. While this issue has not provoked any controversies and discussions thus far, the potential for this must not be overlooked. As already noted, if it was imperative to have a wider participation of developing/non-Western/socialist countries in the drafting process of the CISG so as to ensure that these countries would be willing to adhere to the Convention, it is only natural to nurture a similar approach in the post-drafting stage; i.e. in the stage of application of the CISG when the case law is being formulated. While it might seem far-fetched now, it is certainly not inconceivable that this issue could prompt some countries in the future to resort to Article 101(1) of the CISG.[885]

No matter what the reasons are for clear dominance of Western/developed states in shaping the CISG and its case law, the fact of the matter is that this is the current state of affairs. Furthermore, it has the potential to turn into an issue that is of political and divisive nature. While the tools for the promotion of uniform application of the CISG cannot force either scholars or judges to give more attention to case law from developing/non-Western states, what can be done is to ensure that the views coming from these countries are fairly represented by these tools. Thus,

[885] "Annotated Text of CISG Article 101," Pace Law Albert H. Kritzer CISG Database, 2014, https://www.cisg.law.pace.edu/cisg/text/e-text-101.html. A Contracting State may denounce this Convention, or Part II or Part III of the Convention, by a formal notification in writing addressed to the depositary.

the tools that disseminate case law and other CISG-related materials ought to strive to include contents from the corpus of developing/non-Western countries. CISG Advisory Council can do its share by ensuring that its membership encompass scholars from the developing/non-Western world.

Now that the five desirable characteristics for the tools that promote uniform application of the CISG have been laid out, we will proceed to examine to what extent the implemented tools possess them. First the focus will be on tools that disseminate case law and other CISG-related materials.

5.3.2 Assessment of the Tools That Disseminate Case Law and Other CISG-Related Materials Against the Five Benchmarks

The assessment against the five benchmarks enumerated above will be done in accordance with the top-to-bottom approach, i.e. it will go from the benchmark the tools that disseminate case law and other CISG-related materials satisfy the best towards those that have been either partially fulfilled, or not fulfilled at all.

5.3.2.1 Credibility Established

The tools that disseminate CISG case law and other CISG related materials are credible endeavours that have been used by a variety of entities. For instance, they have been used by courts and arbitral tribunals as evidenced in court judgements and arbitral awards.[886] As already pointed

[886] The examples that illustrate the use of UNILEX, CISG Pace Database, and CISG-online in the CISG case law have been put forth earlier in this Chapter: 6.1.2 Rare Use of the Implemented Tools. Depuradora Servimar, S.L. v. G. Alexandridis & CO.O.E.SC, No. 80/2015 (Audiencias Provinciales 2016), https://iicl.law.pace.edu/cisg/case/spain-january-21-2016-audiencias-provinciales-court-appeal-depuradora-servimar-sl-v-g. See UNCITRAL Abstract: "the Court relied on an analysis of various cases in the UNCITRAL Digest to indicate that, in accordance with article 79 of the Convention, the burden of proof of exemption lay on the party claiming exemption."

out, the number of courts and arbitral tribunals referring directly to these tools is indeed extremely low.[887] Nevertheless, the fact that courts from several countries (i.e. United States, the Netherlands, Germany, Poland, Spain, Italy, etc.) and some arbitral tribunals made explicit references to the tools that disseminate case law and other CISG-related materials can only be construed as a signal they perceive these tools to be trustworthy and in possession of relevant expertise.

Besides courts and arbitral tribunals, the scholarly community as well has resorted (and continues to do so) to the tools that disseminate case law and other CISG-related materials, but on a far more extensive scale.[888] The scholars have used them overwhelmingly in their works as a source to obtain both writings of their peers on the CISG and case law from various jurisdictions. Furthermore, a positive perception of the tools that disseminate case law and other CISG-related materials has generally been present in the scholarly literature. For instance, Rogers and Lai have portrayed the Pace CISG Database as

> "one of the most comprehensive databases on international sales law materials, accumulating domestic law materials into one global reporting database. The database currently contains [numerous] cases and arbitral awards, 9,469 bibliography entries in thirty-one languages, and 1,440 full-text CISG articles. To promote the concept of the *global jurisconsultorium* [emphasis added], the Pace Institute of International Commercial Law created the Queen Mary Case Translation Programme: [']The Queen Mary Case Translation Programme is a public service open to the academic and practising legal communities and provides high quality professional translations into English of foreign case law (including arbitral awards) relating to the CISG and UNIDROIT

[887] Ibid.

[888] Schlechtriem and Schwenzer, *Commentary on the UN Convention on the International Sale of Goods (CISG)*, xxxiv-lxxv (see introduction, n. 44). For instance, this influential commentary makes frequent use of the CISG-online. Kröll, Mistelis, and Viscasillas, *UN Convention on Contracts for the International Sale of Goods (CISG) - Commentary*, xiii- (see introduction, n. 44). This commentary makes frequent use of CISG-online and Pace CISG Database.

Principles.[']"[889]

The embrace of the tools that disseminate case law and other CISG-related materials by the scholarly community is a further proof that their general credibility had been established.

Moreover, two of these tools (CISG Digest and CLOUT) have been developed under the UNCITRAL which, in and of itself, gives them an aura of credibility.[890] The CISG was drafted and adopted under the auspices of UNCITRAL, and thus any initiative of this UN body regarding the Convention will intrinsically, and from the very outset, be deemed as credible. This is certainly not the case with private initiatives which might take time to establish themselves and their credibility in the eyes of the courts and arbitral tribunals. However, it ought to be noted that in practice both the CISG Digest and CLOUT have made extensive references to private tools that disseminate case law and other CISG-related materials. These references, in and of themselves, can be construed as UNCITRAL injecting the private tools that disseminate case law and other CISG-related materials with a dose of credibility.[891]

On the whole, the tools that disseminate case law and other CISG-related materials can indeed be considered to have attained the status of credibility. There seem to be no grounds on which one could object to their use by the courts and arbitral tribunals in terms of the substantive quality of their work.

[889] Vikki Rogers and Kaon Lai, "History of the CISG and Its Present Status," in *International Sales Law: A Global Challenge* (New York: Cambridge University Press, 2014), 21.

[890] UNCITRAL, *UNCITRAL Digest of Case Law on the United Nations Convention on Contracts for the International Sale of Goods*, xi (see chap. 1, n. 108); "Case Law on UNCITRAL Texts (CLOUT)," (see chap. 3, n. 479).

[891] UNCITRAL, *UNCITRAL Digest of Case Law on the United Nations Convention on Contracts for the International Sale of Goods*, ix (see chap. 1, n. 108). CLOUT, Global Sales Law, Institute of International Commercial Law - Pace CISG Database and UNILEX are cited as the international "databases mostly cited in this edition of the Digest." "Case Law on UNCITRAL Texts (CLOUT)," (see chap. 3, n. 479).

5.3.2.2 Lack of Language Diversity as a Barrier to Unfettered Access

The CISG, as already mentioned earlier in this thesis, was adopted in six official languages.[892] However, in practice, the CISG is not only applied in six languages, but many more.[893] This is understandable as 89 countries, as of this writing, are CISG participating states.[894] Their language diversity is immense, and their court systems, as is to be expected, function in their local languages. This means that the CISG in many of these courts is applied by resorting to the unofficial translation of its text.[895]

The *global jurisconsultorium*, in its present form, is heavily English-oriented.[896] This is hardly surprising as English has managed to establish itself as *lingua franca* of the world. Nevertheless, English is not the official or working language in many of the jurisdictions that have adhered to the Convention. Thus, when court or arbitral proceedings are conducted in some other language, and the CISG is the applicable substantive law, using the tools that disseminate case law and other CISG-related materials might prove challenging for two reasons.

Firstly, the actors in the proceedings (decision-makers, whether they be arbitrators, judges, or counsel) might not be fluent in English, or familiar with the English legal terminology.[897] When

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[892] "Annotated Text of CISG - Testimonium: Authentic Languages of Text," (see chap. 3, n. 440).

[893] Flechtner, "The Several Texts of the CISG in a Decentralized System," 193 (see introduction, n. 45).

[894] "Status - United Nations Convention on Contracts for the International Sale of Goods (Vienna, 1980)," (see chap. 1, n. 1).

[895] Flechtner, "The Several Texts of the CISG in a Decentralized System," 193 (see introduction, n. 45).

[896] Please note that the three major database (CISG Pace Database, UNILEX, and CISG-online) operate in English. The CLOUT and the CISG Digest, being maintained under the auspices of UNCITRAL, make use of the six official UN languages, one of them being English. A vast majority of CISG scholarly materials available through the CISG Pace Database is in English.

[897] "The World's Largest Ranking of Countries and Regions by English Skills," EF English Proficiency Index, 2019, https://www.ef.com/wwen/epi/. The populations of only 12 countries in the world where English is not the first language rank as having 'very high proficiency' in English. And out of total number of countries encompassed by the study (88), half of them have been put in the categories of 'low proficiency' and 'very low proficiency.'

this is the case, foreign case law on the CISG will not be as accessible to them as for legally trained people who speak English fluently. Secondly, even when the actors in the proceedings are fluent in English, there will still be a need to translate the relevant materials into the language of the proceedings. For instance, if the arbitration agreement provides that the arbitral proceedings be conducted in Polish, the pleadings will evidently have to be submitted in this language. If foreign case law is cited, and its relevant contents are being put forth either verbatim or paraphrased, one needs to ensure that what is written in Polish corresponds in meaning to what is stated in the original text (or at least to the English translation that is available through, for example, CISG Pace Database). While far from being an insurmountable obstacle, it does add to the overall workload.

The language diversity that exists among the CISG participating states is currently not reflected in the tools that disseminate case law and other CISG-related materials. In the CLOUT, the general approach is to prepare and make available case abstracts in the six official UN languages.[898] In addition, the full texts or excerpts of court decisions or arbitral awards are occasionally enclosed in the original language.[899]

The CISG Pace Database operates on a similar basis as well. If the original language of the decision or arbitral award is in English, that original text is generally made available plus it may be accompanied by abstracts, summaries, and editorial remarks.[900] If the original language of the decision or an arbitral award is in a language other than English, then the translation into English may or may not be available, and the same holds true for abstracts, summaries, and editorial remarks; they may or may not be available, and they will generally be in English.[901] Furthermore,

[898] "Case Law on UNCITRAL Texts (CLOUT)," (see chap. 3, n. 479).

[899] Ibid.

[900] "Search Cases in the CISG Database," (see n. 809).

[901] Ibid.

a link may be enclosed that directs the reader to the text in the original language.[902] UNILEX and CISG-online as well endorse a similar approach.[903]

As for the CISG Digest, it is published in the six official UN languages.[904] Therefore, the CISG Digest is not made available in the languages of many of the countries that are parties to the CISG. Just to name a few: Albania, Armenia, Austria, Bosnia and Herzegovina, Germany, Serbia, Croatia, Denmark, the Netherlands, Brazil, Greece, China, Georgia, Iceland, Turkey, etc.[905] An important implication of this is that judges, arbitrators and counsel unfamiliar with English (or with one of the other UN official languages) will either be effectively barred from using the CISG Digest, or its use will be made more difficult.

The dominance of the English language is to an extent balanced as regards the CLOUT and CISG Digest owing to the fact that these two tools are prepared and maintained under the auspices of UNCITRAL. As a legal body of the UN, UNCITRAL conducts its activities in six official UN languages, and this too applies to the CLOUT and CISG Digest.[906] However, it must be noted that the CLOUT contains far less cases than the private initiatives that are CISG Pace Database, UNILEX, and CISG-online. And in the preparation of the CISG Digest, there is heavy reliance on private databases.[907] As these private initiatives are exclusively run in the English language, the

[902] Ibid.

[903] "UNILEX on CISG & UNIDROIT Principles;" "CISG-Online," (see n. 779).

[904] Franco Ferrari, "Remarks on the UNCITRAL Digest's Comments on Article 6 CISG," *JL & Com.* 25 (2005): 13.

[905] "Status - United Nations Convention on Contracts for the International Sale of Goods (Vienna, 1980)," (see chap. 1, n. 1); "The World Factbook - Languages," Central Intelligence Agency, n.d., https://www.cia.gov/library/publications/the-world-factbook/fields/2098.html.

[906] "Case Law on UNCITRAL Texts (CLOUT)," (see chap. 3, n. 479); "Digests," (see chap. 1, n. 107).

[907] UNCITRAL, *UNCITRAL Digest of Case Law on the United Nations Convention on Contracts for the International Sale of Goods*, ix (see chap. 1, n. 108).

conclusion that the tools that disseminate case law and other CISG-related materials are English-dominated overall remains unhindered.

It is interesting to note that, in the international context, international commercial arbitration has taken over the spotlight from litigation as a preferred dispute resolution mechanism.[908] And the most popular language for arbitral proceedings is none other than English.[909] The same, evidently, cannot be said for litigation. So, an argument could be made that the dominance of English is not a handicap for the smooth functioning of global *jurisconsultorium* as we could simply rely on arbitration to lead the way. Unfortunately, this cannot turn into reality, at least not in the foreseeable future. It has to be noted that, while international commercial arbitration has become a mainstream dispute resolution mechanism in the area of international commerce, this does not automatically mean that arbitration will be making a more meaningful impact on the development of a well-functioning global *jurisconsultorium* than litigation. This is so because most of the arbitral awards in the end remain unpublished.[910] And for a global dialogue on the application of the CISG to occur, transparency and availability of materials are essential. For one cannot have dialogue on different interpretations of the Convention if those interpretations are hidden from the eyes of the world. Therefore, as court decisions are generally made public, they will continue to have the upper hand in shaping the global *jurisconsultorium*. It is for this reason that an attempt should be made to make the tools that enable the global *jurisconsultorium*

[908] Tibor Várady, "Arbitration Despite the Parties?," in *Law & Reality: Essays on National and International Procedural Law* (Dordrecht: Martinus Nijhoff Publishers, 1992), 351. "Today, it is an uncontested fact that arbitration is the dominant method of settling international trade disputes [.]"

[909] Stephan Wilske, "Linguistic and Language Issues in International Arbitration ─ Problems, Pitfalls and Paranoia," *Contemporary Asia Arbitration Journal* 9, no. 2 (2016): 163.

[910] "Kluwer Arbitration," (see n. 836). To reiterate, as of 21 December 2018, Kluwer Arbitration has in its database 3031 arbitral awards. Evidently, this is a far cry from the total awards being render, both in the *ad hoc* and in the institutional setting.

(and the materials they contain) available in as many languages as possible. Inclusiveness must be the buzzword in this regard. For those judges and arbitrators (and the legal counsel as well) who are not familiar with the English language can hardly benefit from the global *jurisconsultorium* when making their decisions and awards. And likewise, their contribution to the global *jurisconsultorium* will most likely be limited if they cannot acquaint themselves with the latest developments in case law and different points of view. It is for this reason that the issue of language is vital for increasing the accessibility to the materials and activities offered by the tools that disseminate case law and other CISG-related materials.

5.3.2.3 Deficient Systematic Functioning

The tools that disseminate case law and other CISG-related materials have achieved a tremendous success in that they have reported several thousand CISG court decisions and arbitral awards.[911] As of 25 January 2016, the Pace CISG Database has reported 3152 CISG cases.[912] The CLOUT has reported approximately 1800 cases on UNCITRAL legal texts as of 5 December 2018, with as many as 939 dealing with the CISG.[913] UNILEX, as of 5 December 2018, has managed to collect 1035 cases on the CISG.[914] And as for CISG-online, it also does not fall behind its counterparts as it has also managed to report a sizeable number of cases, 2980 in total as of 9 December 2018.[915] However, in spite of these successes, one ought not to turn a blind eye to the

[911] "UNILEX CISG," UNILEX, n.d., http://www.unilex.info/dynasite.cfm?dssid=2376&dsmid=14315. "[…] provides the list of all the decisions and arbitral awards in chronological order by year."

[912] "CISG Database - Country Case Schedule," (see chap. 3, n. 516).

[913] "Case Law on UNCITRAL Texts (CLOUT)," (see chap. 3, n. 479).

[914] "UNILEX CISG," (see n. 911).

[915] "CISG-Online," (see n. 779).

deficiencies that exist in the systematic approaches of the tools that disseminate case law and other CISG-related materials. Namely, (1) they have apparatuses in place for collecting CISG cases that result in uneven reporting among different countries and leave out an undetermined number of CISG cases from the databases and (2) they lack methodical decision-making regarding the translation of CISG cases.

Out of all the tools that disseminate case law and other CISG-related materials, only UNCITRAL's tool CLOUT has a formal apparatus in place for collecting the CISG case law that manifests itself through National Correspondents:

> National Correspondents form an international network of experts, designated by States that are parties to UNCITRAL conventions or have enacted legislation based on UNCITRAL model laws. They are the backbone of the CLOUT system. They research national case law and prepare the abstracts for publication on CLOUT.[916]

In addition to National Correspondents, CLOUT also invites academics, law students, and practitioners to make their own submissions of case abstracts as volunteers.[917] However, the effectiveness of National Correspondents is brought into question by the fact that all other (private) tools that disseminate case law and other CISG-related materials have managed to report substantially more CISG cases than CLOUT, and have included examples of CISG case law from jurisdictions for which CLOUT reports 0 cases. What is more, in preparing the CISG Digest, a more extensive use is made of the private tools that disseminate case law and other CISG-related materials than CLOUT.

[916] UNCITRAL, *Facts about Clout - Case Law on UNCITRAL Texts*, (see n. 748).

[917] Ibid.

The private tools that disseminate case law and other CISG-related materials have proven themselves to be more effective than CLOUT in spite of the fact that they have no formal apparatus in place for collecting case law from individual states. However, while indeed reporting more cases than CLOUT, one ought not to automatically assume that the private tools that disseminate case law and other CISG-related materials have no systematic deficiencies. More precisely, to collect and disseminate CISG case law, they rely exclusively on an informal apparatus; a network of academics, law students, and practitioners who submit cases on a voluntary basis.[918] Thus, in some jurisdictions there will be more enthusiasm for collecting the CISG cases and making them available through the CISG Pace Database, UNILEX, and CISG-online, while in others the enthusiasm will be lacking. For instance, the University of Belgrade has shown great zeal for locating, translating and making available CISG cases from Serbia through the CISG Pace Database, especially arbitral awards issued under the auspices of Foreign Trade Court of Arbitration attached to the Serbian Chamber of Commerce in Belgrade.[919] Up until 25 January 2016, the CISG Pace Database has reported 71 cases from Serbia.[920] This is a very high number considering the fact that many countries with higher populations and substantially better-performing economies have less CISG cases reported in the CISG Pace Database than Serbia (e.g.

[918] Harry M. 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.," *Northwestern Journal of International Law & Business* 22 (2002): 121–59, https://www.cisg.law.pace.edu/cisg/biblio/flechtner4.html. Editor's note in footnote 73: "In the case of CLOUT, the individuals are appointed national reporters; in the case of the other services, information comes from an informal network of volunteers."

[919] "CISG Database - Country Case Schedule," (see chap. 3, n. 516). Basically for all Serbian cases people affiliated with the University of Belgrade have participated in the translation process. The editors' and translators' affiliations are clearly stated for each case submitted and published by the CISG Pace Database.

[920] Ibid.

up until 25 January 2016, the Czech Republic and Poland have 2 and 10 cases reported in the CISG Pace Database respectively).

While not seeking to take away the successes achieved by the private tools, the problem is that the manner in which they obtain CISG cases can never have an equalised impact on different CISG jurisdictions. A network of volunteers will in some places be stronger, and will thus collect more CISG cases, while in others it will be feeble, and will thus be less productive. The final result is an uneven reporting of CISG cases that can create a distorted image of the state of application of the CISG across different jurisdictions. This state of affairs is even visible when one compares different tools that disseminate case law and other CISG-related materials and the total number of cases reported by them.

Namely, the total number of cases reported by these databases cannot be established by simply adding up the numbers as there is substantial intersection between their activities. Some cases are available through all of them.[921] Certain cases, however, are reported in some databases but not in others.[922] All this can create confusion among the users as they have to use all the databases in order to ensure that a particular case is available, or that there is relevant case law on the topic that is relevant for them. Resorting to simply one tool for the dissemination of case law and other CISG-related materials can never be conclusive.

The highest number of cases can be found in the CISG Pace Database.[923] However, while 3152 is indeed a decent number, one must note that the CISG has been in effect since 1 January

[921] For instance, the *New Zealand mussels case* is available through CISG Pace Database, CLOUT, and UNILEX, and is cited in the CISG Digest.

[922] "UNILEX CISG," (see n. 911). For instance, only two Serbian cases are available through UNILEX.

[923] "CISG Database - Country Case Schedule," (see chap. 3, n. 516).

1988.[924] From 1 January 1988 to 25 January 2016, approximately 28 years have passed. By dividing the total number of cases available through the CISG Pace Database by the number of years the Convention has been in effect, one ends up with 112.57 cases per year. Considering the fact that 89 countries have adhered to the CISG thus far, this number seems rather low.[925] All this shows that the apparatuses set in place for the tools that disseminate case law and other CISG-related materials to collect cases under the Convention are characterised by systematic shortcomings as they tend to bring about uneven collection of CISG cases from different countries and leave out an undetermined number of them from the databases.

Another area where one can spot the unsystematic approach in the tools that disseminate case law and other CISG related materials is the apparent lack of criteria for determining which cases ought to be subject to translation and which not. The exception to this is the CLOUT which focuses not on enclosing full translations of court decisions and arbitral awards, but on disseminating abstracts. As already noted, the cases included in the CLOUT will be accompanied by an abstract, and then the original texts might, or might not be included.[926]

When it comes to private tools that disseminate case law and other CISG-related materials, the situation is far less consistent. The CISG Pace Database and UNILEX take the lead when it comes to putting forth translations of non-English CISG case law into English. Upon closer inspection of these two databases, one can notice that some cases have full translations into English, while others are only partially translated. Additionally, some cases are not translated at all, but abstracts or summaries of those cases are enclosed. For some, however, there are neither

[924] Ibid.; "Status - United Nations Convention on Contracts for the International Sale of Goods (Vienna, 1980)," (see chap. 1, n. 1).

[925] "Status - United Nations Convention on Contracts for the International Sale of Goods (Vienna, 1980)," (see chap. 1, n. 1).

[926] "Case Law on UNCITRAL Texts (CLOUT)," (see chap. 3, n. 479).

translations (full or partial), nor abstracts. Thus, there exists a range within which all the non-English CISG cases fall in the private databases, going from full-blown translations to no translation at all. However, the decision where to place them does not seem to be made methodically, but is simply the one of convenience and availability of volunteers to produce translations.

5.3.2.4 Delayed Dissemination of CISG Case Law

Frequently, several years pass between the date on which the CISG case was decided and the date on which it gets included in one, or all the tools that disseminate case law and other CISG-related materials. While several months is an acceptable time period within which at least the CISG case's existence ought to be acknowledged, the same most certainly cannot be said for a period of several years. This kind of collection and dissemination of CISG cases thus cannot be considered as timely. However, the tools that disseminate case law and other CISG-related materials seem to operate with this exact shortcoming, as shall be illustrated here.

Consider the number of cases reported in the last two years; 2018 and 2017. For 2018, the Pace CISG Database has reported only 6 CISG cases in spite of the fact that in this year the Convention reached a record in the number of participating states.[927] This is a far cry from the average 112.57 cases per year. UNILEX has reported only 1 CISG case while CISG-online has reported 4 of them for 2018.[928] The CLOUT, on the other hand, has reported 0 CISG cases for 2018.[929] For the year 2017, UNILEX has reported 4 CISG cases while CISG-online has reported

[927] "Search Cases in the CISG Database," (see n. 809).

[928] "UNILEX CISG," (see n. 911); "CISG-Online," (see n. 779). Please use the search engine to locate the cases for 2018.

[929] "Case Law on UNCITRAL Texts (CLOUT)," (see chap. 3, n. 479).

68 cases.[930] The CLOUT has reported 6 CISG cases for 2017.[931] As for the Pace CISG Database, the total number of CISG cases reported for 2017 was 76.[932]

For previous years, except for the Convention's early years in effect, the number of cases reported in these databases would reach several dozen cases on average. For instance, for 2005 UNILEX listed 47 CISG cases and CISG-online reported 160 of them.[933] And as for the Pace CISG Database, for a search 'CISG 2005,' the search engine yields 230 results, although several of them were repetitions.[934] Nevertheless, year 2005, in terms of the reporting of the CISG cases by the Pace CISG Database, can only be considered as a success when compared to the average number of 112.57 cases per year.

Year the Cases Were Decided	Number of Cases in CISG-online	
1988	2	
1989	14	
1990	14	
1991	20	
1992	53	
1993	64	
1994	88	
1995	113	
1996	127	
1997	129	
1998	124	
1999	107	
2000	103	
2001	86	
2002	162	
2003	141	
2004	168	
2005	160	
2006	181	
2007	141	
2008	155	
2009	134	
2010	127	
2011	92	
2012	86	
2013	76	
2014	82	
2015	88	
2016	71	
2017	68	
2018	4	
	Total	2980

Figure 3[935]

[930] "UNILEX CISG," (see n. 911); "CISG-Online," (see n. 779).

[931] "Case Law on UNCITRAL Texts (CLOUT)," (see chap. 3, n. 479).

[932] "Search Cases in the CISG Database," (see n. 809).

[933] UNILEX CISG," (see n. 911); "CISG-Online," (see n. 779).

[934] "Search Cases in the CISG Database," (see n. 809).

[935] "CISG-Online," (see n. 779).Please use the search engine to locate the cases per year.

The sharp decline of the reported CISG cases for 2018 (and in recent years altogether) simply cannot be interpreted as a sudden decrease in the number of applications of the Convention. Namely, the CISG cases are frequently not included in these databases the same year they are decided. Sometimes it takes years for them to be included. For instance, the CISG decisions rendered by the courts of Bosnia and Herzegovina were only included in the CISG Pace Database in 2016.[936] This was the first time that one of the tools that disseminate case law and other CISG-related materials took note of the developments in this jurisdiction.

The Bosnian court decisions added in 2016 were rendered between 2010 and 2016.[937] Hence, for the 2010 decision of the High Commercial Court in Banja Luka to be included in the CISG Pace Database, it took six years.[938] Except for the CISG Pace Database, no other tool that disseminates case law and other CISG-related materials is yet to include the court decisions on the Convention from Bosnia and Herzegovina.

The yearly patterns observable in the practice of collecting and disseminating the case law on CISG, and together with the example of Bosnia and Herzegovina, serve to indicate that several years may pass before a CISG case is actually included in one of the databases. Time periods this long, naturally, cannot be considered to be timely. The CISG cases not available through the tools that disseminate case law and other CISG-related materials are equivalent to being non-existent for the global *jurisconsultorium*, and especially so if they have been decided in a language other than English. In other words, a CISG case only appears on the map of the global *jurisconsultorium* if it is included in at least one of the tools that disseminate case law and other CISG-related

[936] "Search Cases in the CISG Database," (see n. 809)." Please use the option to search cases from particular jurisdictions.

[937] Ibid.

[938] Ibid.

materials. If it is not, it is very impractical to find out about its existence, let alone about its contents.

5.3.2.5 Dominance of the Case Law from Developed/Western Countries in the Databases

The tools that disseminate case law and other CISG-related materials have focused most of their attention on Western/developed countries. More precisely, the bulk of the case law reported by these tools comes from these states.[939] For instance, out of 947 CISG court cases reported by UNILEX, 829 come from developed countries.[940] In percentage terms, this amounts to 87.54%. When broken down by region, the numbers indicate the dominance of Europe and North America. Thus, out of total 947 reported CISG court cases by UNILEX, 878 cases are of European or North American origin.[941] Percentage-wise, this amounts to 92.71%. As for arbitral awards, UNILEX has reported 88 thus far, with 30 of them being brought under the auspices of arbitral institutions from developing countries. In percentage terms, this amounts to 62.5 %.

In the CLOUT the numbers are also tilted in favour of the developed/Western nations. Namely, out of all the case law reported through the CLOUT for all the UNCITRAL texts (including the CISG), 1227 cases are from developed nations.[942] In percentage terms, this is 67.42% of cases. European and North American cases make up 60.71% of the total cases in the

[939] *World Economic Outlook: Challenges to Steady Growth*, 134 (see n. 869). Just like in other parts of this Chapter, the IMF list of developed and developing countries will be deemed as the relevant one.

[940] "UNILEX CISG," (see n. 911).

[941] Ibid.; William H. Berentsen and et al., "Europe," *Encyclopædia Britannica*, n.d., https://www.britannica.com/place/Europe; Wilbur Zelinsky, "North America," *Encyclopædia Britannica*, n.d., https://www.britannica.com/place/North-America.

[942] "Case Law on UNCITRAL Texts (CLOUT)," (see chap. 3, n. 479).

CLOUT.[943] However, if one only focuses on the CISG cases in the CLOUT, the dominance of the developed/Western states is even more pronounced. Namely, out of total 939 CISG cases, 683 come from developed countries.[944] Percentage-wise, this is 73.91 % of cases. And from Europe and North America, the CLOUT has presented 777 cases, which is 82.75% of the total body of the CISG case law in the database.[945]

As for the CISG Pace Database, the situation here is somewhat better for the case law from developing nations. More precisely, out of 3152 CISG cases reported by 25 January 2016, 1860 come from developed countries, i.e. 59.01 %.[946] However, if one combines the total case law that is available from European and North American countries, one ends up with 2243 cases.[947] In percentage terms, this amounts to 71.16 % of the total case law reported in the CISG Pace Database by 25 January 2016.

On the whole, one can see that the tools that disseminate case law and other CISG-related materials are very much oriented towards the cases from the developed and Western countries. This, in turn, has contributed to the *global jurisconsultorium* functioning in such manner that it is the developed/Western countries that are primarily developing the case law under the Convention. One could argue that the dominance of the developed/Western countries in the tools that disseminate case law and other CISG-related materials is a reflection of the factual situation on the ground. Some jurisdictions have simply yielded more cases than others. And even within the

[943] Ibid.

[944] Ibid.

[945] Ibid.

[946] "CISG Database - Country Case Schedule," (see chap. 3, n. 516).

[947] Ibid.

developed/Western world there are major differences in the number of cases contained in the databases. For instance, Germany, a country of almost 83 million people, has been a prosperous jurisdiction for the CISG, with the CISG Pace Database reporting 534 German cases in total by 25 January 2016.[948] In contrast, Italy, with a population of approximately 60 million people, has only 61 cases reported in the CISG Pace Database by 25 January 2016.[949]

Naturally, one cannot expect the impossible from the tools that disseminate case law and other CISG-related materials, i.e. that they put forth non-existent CISG case law. If CISG cases have not been produced in particular jurisdictions, then no cases from those jurisdictions can be reported. And if only few cases exist in a certain jurisdiction, then only those ones can be included in the tools that disseminate case law and other CISG-related materials. However, as already noted in this Chapter, the number of cases reported through these tools can by no means be treated as conclusive. It is practically certain that an undeterminable number of CISG cases remain outside of the *global jurisconsultorium*, and it would be safe to assume that at least some of these unreported cases come from developing/non-Western states.

Irrespective of the reasons for the underrepresentation of the developing/non-Western countries in the tools that disseminate case law and other CISG-related materials, three notions can hardly be disputed: (1) the foundation of the global *jurisconsultorium* and its growth are based on the case law primarily from the developed/Western states, (2) the international CISG scholarship vastly revolves around the case law from the developed/Western states, and (3) both the practical global *jurisconsultorium* and the international CISG scholarship mostly obtain cases on the Convention from the tools that disseminate case law and other CISG-related materials. In other

[948] Ibid.; *World Population Prospects* (New York: United Nations, 2017), https://population.un.org/wpp/Publications/Files/WPP2017_KeyFindings.pdf.

[949] Ibid.

words, these tools are the starting point for obtaining relevant materials on the Convention whenever a judge or an arbitrator wishes to engage in the global *jurisconsultorium*, or whether a scholar is seeking to make a scholarly contribution. Since the tools that disseminate case law and other CISG-related materials play such a pivotal role in the life of the Convention, it is far from unreasonable to expect them to be mindful of the dichotomies developed v. developing and Western/non-Western.

5.3.3 Assessment of the CISG Advisory Council Against the Five Benchmarks

The assessment against the five benchmarks enumerated above will be done in accordance with the top-to-bottom approach, i.e. it will go from the benchmark the CISG Advisory Council satisfies the best towards those that have been either partially fulfilled, or not fulfilled at all.

5.3.3.1 Systematic Approach Mostly Present

The activities of the CISG Advisory Council are very much systematic. Their mode of operation is clearly defined:

> [T]he primary purpose of the CISG [Advisory Council] is to issue opinions relating to the interpretation and application of the Convention on request or on its own initiative. Requests may be submitted to the CISG [Advisory Council], in particular, by international organizations, professional associations and adjudication bodies.[950]

Ramberg, a former Chair of the CISG Advisory Council, shed light on the way the topics for the opinions are selected. Basically, the CISG Advisory Council deals with the topics that are

[950] "Welcome to the CISG Advisory Council (CISG-AC)," (see chap. 3, n. 481).

novel and could produce divergent views in the future, and with those that have already proven themselves to be divisive:

> How do we select the topic for our opinions? In many cases there is a request to the Council to give an opinion on a certain matter. The first topic deals with something where not much has been written but which apparently has to be addressed in this modern world where you switch from paper communication to electronic communication. The first opinion thus addresses the interpretation of words such as [‘]dispatch[’], [‘]notice[’], [‘]reaches[’],” [‘]writing[’] and [‘]oral[’] when you communicate electronically. The Rapporteur was my daughter, Christina Ramberg, who is professor of commercial law in Gothenburg.
>
> Then the second opinion was prepared by one of the members of the Council Professor Eric E. Bergsten as Rapporteur. He is the former Secretary General of UNCITRAL and has in such capacity been engaged in the preparation of the CISG. Judging from the reported cases, you could see that a great number concerns two articles (38 and 39) dealing with the notice of claims. Not surprisingly, perhaps, as the most powerful defence a seller could have against the buyer’s claim would be: sorry you are too late![951]

The procedures followed by the CISG Advisory Council are clearly stated in their Bylaws.[952] More precisely, the Bylaws lay out the rules of membership and vacancies, meetings, committees, etc.[953] On the whole, the entire endeavour that is the CISG Advisory Council is characterised by a systematic and clear-cut approach. The only exception would be the translations of their opinions and declarations into languages other than English as there are no indications as

[951] Jan Ramberg, CISG-AC – Offering Worldwide Authoritative Opinions for the Uniform Application and Interpretation of the CISG, 2005, https://www.cisgac.com/about-us/.

[952] “CISG Advisory Council Bylaws,” CISG Advisory Council, 2013, https://www.cisgac.com/cisg-advisory-council-bylaws/.

[953] Ibid.

to why certain languages were preferred over others. It states on the CISG Advisory Council's website that

> [t]he CISG Advisory Council is committed towards the translation of the black letter texts of the various opinions not only into the five other official languages of the CISG, but also a number of other important trading languages like Japanese and German.[954]

What constitutes 'an important trading language' is not further elaborated.

5.3.3.2 Credibility Partially Established

Very few court decisions made reference to the opinions and declarations issued by the CISG Advisory Council. When one enters the words 'CISG Advisory Council' into the search engine of the CISG Pace Database, only 22 results are put forth, all of them being court decisions.[955] However, not all of these court decisions took into account the opinions and declarations of the CISG Advisory Council since some of them appeared in the search results only because of the Editorial Remarks.[956] In other words, it is the Editorial Remarks on the case that referred to the work of the CISG Advisory Council, and not the court itself.[957] In spite of the rare use of the CISG Advisory Council's opinions and declarations by courts, the fact of the matter is that courts in some countries did do exactly that. That is, the courts from the Netherlands, United States, Poland, Germany and Finland seem to have thought that the opinions and declarations of the CISG Advisory Council were fit for judicial consumption.[958]

[954] "Opinions," (see n. 787).

[955] "Search Cases in the CISG Database," (see n. 809).

[956] Ibid.

[957] Ibid.

[958] Ibid.

As for the scholarly realm, there the CISG Advisory Council has enjoyed a relatively warm welcome. For instance, Karton and de Germiny provide a rather positive assessment of the CISG Advisory Council:

> Even without a mandate from UNCITRAL, the Advisory Council can and does hold a singular place in the *global jurisconsultorium* [emphasis added]. Through its opinions, it offers courts and tribunals an additional tool to interpret the CISG. Reference to the CISG-AC opinions is likely to continue to grow as scholars and decision-makers familiarize themselves with these opinions and as the number of opinions itself grows.[959]

Furthermore, in discussing the Convention, several authors referred to the works of the CISG Advisory Council in their writings, and in doing so, they viewed it as an authority on the Convention.[960]

The credibility of the CISG Advisory Council is further augmented by its composition. Namely, the members of the CISG Advisory Council are all renowned CISG experts.[961] Some of the members on the roster include Ingeborg Schwenzer, María Pilar Perales Viscasillas, Joachim Bonell, Harry Flechtner, etc.[962] These scholars are considered to be the titans of the CISG scholarship,[963] and if UNCITRAL were to initiate a body similar to the CISG Advisory Council under its own auspices, it is safe to assume that many of the names on the CISG Advisory Council roster would appear there.

[959] Karton and De Germiny, "Has the CISG Advisory Council Come of Age," 495 (see n. 788).

[960] Ibid., 494.

[961] Veneziano, "The Soft Law Approach," 523 (see introduction, n. 49). Footnote no. 10: "The CISG Advisory Council, an independent commission established in 2001 and composed of well-known experts in the field coming from different jurisdictions[.]

[962] "Council Members," (see n. 783).

[963] Some of the most cited and authoritative commentaries, books, and journal articles on the Convention have been produced by these authors.

On the whole, the reasons in favour of deeming the CISG Advisory Council and its opinions as credible endeavours worthy of attention by courts and arbitral tribunals are quite convincing. However, this stance is counterbalanced by the fact that, ultimately, the CISG Advisory Council is a private body that seeks to put forth authoritative opinions on a convention that was adopted under the auspices of a UN body – UNCITRAL.[964] It has no endorsement of UNCITRAL or of the states that have adopted and ratified the CISG.[965] Therefore, in spite of the fact that evidence of the established credibility of the CISG Advisory Council can be spotted both in court decisions and in scholarly writings, it is still undermined by the sole fact that the authority to issue opinions on the application and interpretation of the Convention is self-bestowed.

5.3.3.3 Timeliness Potentially Undermined through Periods of Inactivity

The activities of the CISG Advisory Council can be considered to have been timely. The CISG Advisory Council came into existence in 2001, 13 years after the CISG went into effect.[966] Understandably, the CISG Advisory Council could not address all the divisive issues that have been accumulated within those 13 years at once. The strategy has been to issue one or two opinions per year.[967] It would be unrealistic to expect the CISG Advisory Council to work at a faster pace as the members need time for deliberation of the controversial issues. In the 17 opinions and 2 declarations put forth thus far, the CISG Advisory Council has sought to tackle some of the most

[964] "Welcome to the CISG Advisory Council (CISG-AC)," (see chap. 3, n. 481).

[965] Christopher Kee and Edgardo Muñoz, "In Defence of the CISG," *Deakin L. Rev.* 14 (2009): 113.

[966] "Welcome to the CISG Advisory Council (CISG-AC)," (see chap. 3, n. 481).

[967] "Opinions," (see n. 787).

divisive topics such as 'Examination of the Goods and Notice of Non-Conformity Articles 38 and 39' and 'Interest under Article 78 CISG.'[968]

However, it ought to be noted that the last opinion issued by the CISG Advisory Council was on 16 October 2015.[969] That is, in more than 3 years the CISG Advisory Council has been idle. Besides this current period of inactivity, the CISG Advisory Council has taken a long break from issuing opinions and declarations once before, and that was between 15 November 2008 and 3 August 2012.[970] For all other years, beginning with 2003 when their first opinion was published, there was at least one opinion issued annually. These long periods of inactivity are potentially undermining the timeliness of the efforts of the CISG Advisory Council. To illustrate, the issue of interest was addressed in the opinion issued in 2013. However, this issue has been controversial long before that. For instance, in an article published in 2000, Corterier identified numerous solutions to the problem of determining the applicable interest rate under Article 78 of the CISG.[971] As pointed out, the CISG Advisory Council did not publish any opinions or declarations between 15 November 2008 and 3 August 2012.[972] Had they been active during this period, the issue of interest could have been entertained earlier than 2013.

[968] Ibid.

[969] Ibid.

[970] Ibid.

[971] Andre Corterier, "A New Approach to Solving the Interest Rate Problem of Art 78 CISG," *Int'l. Trade & Bus. L. Ann.* 5 (2000): 33.

[972] "Opinions," (see n. 787).

5.3.3.4 Lack of Language Diversity as a Barrier to Unfettered Access

The accessibility of the opinions and declarations of the CISG Advisory Council is undermined by the lack of linguistic diversity. Namely, similar to the tools that disseminate case law and other CISG-related materials, English is the dominant language of the CISG Advisory Council.[973] All its opinions and declarations are published in English which is its working language.[974] Then, the works of the CISG Advisory Council may or may not be translated into other languages. The following table shows how many opinions and declarations have received translations, and into which languages:

Language	No. of opinions translated	No. of declarations translated
Chinese	First seven opinions	None
French	All seventeen opinions	Both declarations
German	All seventeen opinions	Both declarations
Japanese	First six opinions	None
Portuguese	First three opinions plus sixth opinion	None
Russian	First five opinions	None
Spanish	All seventeen opinions	Both declarations
Turkish	All seventeen opinions	None

Figure no. 4[975]

As seen from Figure No. 4, all opinions and declarations of the CISG Advisory Council are available in only 4 languages: English, German, French, and Spanish. They are partially available in 5 other languages: Chinese, Japanese, Portuguese, Russian and Turkish. And last but certainly not least, they are not available in the vast majority of the languages of the states that have adhered to the CISG.[976] A major absence is most certainly the Arabic language as it is the

[973] Ingeborg Schwenzer, "The CISG Advisory Council," *Nederlands Tijdschrift Voor Handelsrecht: NTHR*, 2012, 48.

[974] Ibid.

[975] "Opinions," (see n. 787).

[976] "Status - United Nations Convention on Contracts for the International Sale of Goods (Vienna, 1980)," (see chap. 1, n. 1).

language of one of the six authentic versions of the CISG.[977] Some of the other missing languages are those of the following states that have adhered to the CISG: Albania, Armenia, Azerbaijan, Bahrain, Bosnia and Herzegovina, Bulgaria, Croatia, Cyprus, Czechia, Denmark, Egypt, Estonia, Finland, Georgia, Greece, Hungary, Iceland, Iraq, Israel, Italy, Latvia, Lithuania, Mongolia, the Netherlands, and many others.[978]

Thus, the CISG Advisory Council, in its endeavour to contribute to the uniform application of the CISG, is handicapped by the fact that its opinions and declarations are either partially or entirely unavailable in the official languages of approximately half of the states that have adhered to the Convention.[979] In essence, this means that approximately one half of the CISG participating states have an unhindered access to the opinions and declarations of the CISG Advisory Council. In contrast, the other half's accessibility to these materials is lessened by the language barrier. This discrepancy can only mean one thing; the activities of the CISG Advisory Council will not be equally accessible to judges, arbitrators, and parties and their lawyers across different jurisdictions who are well-versed in (a) particular language(s) as compared to those who are not.

5.3.3.5 Dominance of Membership from the Western/Developed States

The CISG Advisory Council has been criticised for the fact that it lacked members from the developing/non-Western states:

> When it comes to the Advisory Council's membership, it too, cannot yet be said to be representative of the broad range of states which have ratified the

[977] "Opinions," (see n. 787).

[978] "Status - United Nations Convention on Contracts for the International Sale of Goods (Vienna, 1980)," (see chap. 1, n. 1).

[979] Ibid.; "The World Factbook – Languages," (see n. 905).

> CISG. While the Advisory Council members (and the rapporteurs who are not members) represent a variety of legal backgrounds, they still come from a handful of economically developed CISG signatory states.[980]

This criticism was levied at the CISG Advisory Council in 2009.[981] Almost ten years down the line, the membership of the CISG Advisory Council still remains focused on the Western/developed world. However, improvements have been made. The following table lists the current members of the CISG Advisory Council and the countries where they come from:

CISG Advisory Council Member	Country
Michael Bridge	United Kingdom
Yeşim Atamer	Turkey
Eric E. Bergsten	United States
Michael Joachim Bonell	Italy
Harry M. Flechtner	United States
Johnny Herre	Sweden
Lauro Gama	Brazil
Alejandro M. Garro	Argentina, United States
Roy Goode	United Kingdom
John Gotanda	United States
Han Shiyuan	China
Pilar Perales Viscasillas	Spain
Ulrich G. Schroeter	Germany
Ingeborg Schwenzer	Germany
Hiroo Sono	Japan
Claude Witz	France
Sieg Eiselen	South Africa

Figure no. 5[982]

As can be seen from Figure no. 5, the CISG has added to its roster members from developing/non-Western countries. Out of 17 members of the CISG Advisory Council, 5 are from developing states (Turkey, Brazil, Argentina, China, South Africa).[983] Thus, 70.59% of the total

[980] Karton and de Germiny, "Can the CISG Advisory Council Affect the Homeward Trend?," 88 (see n. 789).

[981] Ibid.

[982] "Council Members," (see n. 783).

[983] Ibid.; *World Economic Outlook: Challenges to Steady Growth*, 134 (See . 869). Just like in other parts of this Chapter, the IMF list of developed and developing countries will be deemed as the relevant one.

membership is tilted in favour of developed states. And out of 17 members in total, 6 are from non-Western states (Turkey, Brazil, Argentina, China, Japan, South Africa).[984] Percentage-wise, this is 64.70% in favour of the Western states. Therefore, the landscape of the CISG Advisory Council still remains in the grasp of the Western/developed states, although not as much as approximately ten years ago:

> The lack of members from developing countries […] hurts the Advisory Council's credibility as a global interpretive body. Moreover, the presence in the CISG-AC of members from developing countries would make courts in those countries more likely to follow the recommendations of the CISG-AC. The members are keenly aware of this and have sought to add additional members from developing countries. The difficulty has been in finding people from such countries who are both sufficiently fluent in English (which is the lingua franca of Advisory Council meetings) and well-versed in the CISG.[985]

However, it ought to be noted that the CISG Advisory Council still lacks membership from certain parts of the developing world where the Convention has been ratified. For instance, Central, South-Eastern, and Eastern Europe is home to many countries that are either categorised as 'developing' and can be considered non-Western, and practically all of them have adhered to the CISG.[986] However, the CISG Advisory Council does not have a single member from this part of Europe. Furthermore, although Arabic is one of the languages in which one of the six original texts of the CISG was written and adopted, there are no members in the CISG Advisory Council from the Arabic world.[987] And as for Africa, the only member of the CISG Advisory Council is from

[984] Ibid.

[985] Karton and De Germiny, "Has the CISG Advisory Council Come of Age," 493 (see n. 788).

[986] "Status - United Nations Convention on Contracts for the International Sale of Goods (Vienna, 1980)," (see chap. 1, n. 1); *World Economic Outlook: Challenges to Steady Growth*, 134 (see n. 869).

[987] "Council Members," (see n. 783).

South Africa, a country that is not a party to the Convention. None of the African countries that have actually acceded to the CISG are represented in the CISG Advisory Council (all of them being developing/non-Western states).[988] On the whole, while the CISG Advisory Council has sought to improve the representation of developing/non-Western states in its membership, there is still ample room for improvement.

5.3.4 Potential Improvements in the Implemented Tools

After examining the tools that disseminate case law and other CISG-related materials and CISG Advisory Council, the following can be concluded: These tools are mostly not in line with the five recommendable characteristics (i.e. accessibility, systematic approach, timeliness, credibility, and fair representation of developing/non-Western states). Naturally, it is beyond the scope of this thesis to go into technicalities as to how these inadequacies in the implemented tools ought to be remedied. In other words, this thesis cannot develop full-blown projects that could then be used to remedy the deficiencies. However, what can be done is to suggest broad policy aims.

Thus, further development of the tools that disseminate case law and other CISG-related materials ought to take the following matters into account:

- The extent to which language diversity could be expanded;
- The extent to which a more effective collection system could be implemented that would move away from overreliance on volunteers;
- The extent to which a transparent and predictable methodology could be implemented regarding the choice as to which cases get full translations and which do not;

[988] Status - United Nations Convention on Contracts for the International Sale of Goods (Vienna, 1980);" *World Economic Outlook: Challenges to Steady Growth*, 134 (see n. 869).

- The extent to which the amount of time could be decreased between the date when a CISG decision or arbitral award is brought by a national court or an arbitral tribunal (provided that the arbitral award can be retrieved) and the date when it becomes available through the tool(s) that disseminate case law and other CISG-related materials; and
- The extent to which a better representation of the views on the Convention coming from developing/non-Western states could be ensured.

As for the CISG Advisory Council, it would be advisable that, in their future endeavours, this body be mindful of the following matters:

- The extent to which periods of inactivity could be minimised;
- The extent to which the language diversity could be expanded; and
- The extent to which further diversification of their membership could be attained.

For these suggestions to be heeded, it is evident that the implemented tools for the promotion of uniform application of the CISG ought to have access to sufficient resources. At this point in time, however, it is doubtful if they possess enough of them so as to engage in extensive overhaul of their activities. Nevertheless, the suggestions put forth here, coupled with the conclusions regarding the non-uniform application of the CISG from other chapters, could serve for these tools as the basis to seek additional funds (either from governments or from private sources) so as to improve the quality and scope of their work.

SUMMARY OF CHAPTER V

Chapter V has examined the implemented tools for the promotion of uniform application of the CISG. In Section 5.1 an overview of the implemented tools was provided: 1) tools that disseminate case law and other CISG-related materials, and 2) CISG Advisory Council. Section 5.2 observed that the implemented tools have thus far had a rather limited impact in the practical domain. The first indication of this are the pervasive non-uniform applications of the Convention in spite of the implemented tools and their activities. The second indication is the fact that one can only on rare occasions detect instances of these tools being used by courts and arbitral tribunals.

Section 5.3 sought to analyse the implemented tools. This was done against the five benchmarks, i.e. characteristics that, as argued in this Chapter, the implemented tools ought to possess in order to have an equalised impact across the jurisdictions that have adhered to the CISG. In the end, it was shown that the implemented tools for the promotion of uniform application of the CISG fall short, for the most part, of satisfying the five benchmarks, and that substantial improvements ought to be pursued in their organisation, reach, and mode of operation. Next, Chapter VI will analyse the proposed tools.

CHAPTER VI
6. PROPOSED TOOLS FOR THE PROMOTION OF UNIFORM APPLICATION OF THE CISG

Chapter V has examined the implemented tools for the promotion of uniform application of the CISG. Chapter VI turns to the tools that were proposed, but so far, have not seen the light of day. It consists of two sections. Section 6.1 provides a general overview of the proposed tools: 1) final authority, 2) permanent editorial board for the CISG, 3) international committee for the interpretation of the CISG, and 4) international thesaurus. Section 6.2 seeks to analyse them with the aim of determining if any of them ought to be considered for implementation.

6.1 OVERVIEW OF THE PROPOSED TOOLS

6.1.1 Final Authority

There have been suggestions that an international final authority with the power to bring either binding decisions or advisory opinions under the CISG ought to be established. Some have entertained this idea exclusively in relation to the CISG while some have opined that an international tribunal tasked with bringing decisions under various uniform law texts, and thus including the CISG, ought to be established.[989] The idea behind the proposals of this sort is that the final authority tasked with rendering either binding decisions or advisory opinions would

[989] Salama, "Pragmatic Responses to Interpretive Impediments: Article 7 of the CISG, an Inter-American Application." 227 (see chap. 3, n. 475). "The problems of interpretation of the CISG are a function of judges interpreting the Convention through lenses cut by their own legal culture and experiences. Consequently, interpretation impedes the goals of unification and international character of the Convention. Reviewing the rationale of court opinions provides the strongest indication of the process by which domestic laws are imputed. I suggest revisiting the creation of a common adjudicative body to review contested cases beyond the initial country of litigation. A final court should be instituted to ensure uniform results of the interpretation of the CISG." Camilla Baasch Andersen, "Applied Uniformity of a Uniform Commercial Law: Ensuring Functional Harmonisation of Uniform Texts through a Global Jurisconsultorium of the CISG," in *Theory and Practice of Harmonisation* (Cheltenham: Edward Elgar Publishing, 2012), 39.

ensure the highest possible level of uniform application of the CISG.[990] This, naturally, must be accepted as truism as no other tool, be it from the pool of those that were implemented or from the pool of the proposed ones, could compete with the final authority in terms of ensuring a high level of uniformity in the Convention's application.

The proposals for the creation of a CISG final authority have mainly come from the scholarly corpus.[991] It must be noted, however, that those proposals have not sought to suggest a model for the prospective CISG final authority with the power to issue binding decisions. The focus has been on speculating what shape the CISG final authority tasked with issuing non-binding opinions would take.[992] Nevertheless, it is evident that the playing field in this regard is not unlimited. Thus, it is easy to speculate what the potential CISG final authority tasked with issuing binding decisions would look like. The first issue would be the organisation of such an authority.

[990] Schmidt-Ahrendts, "CISG and Arbitration," 221 (see chap. 3, n. 475). "However, despite numerous proposals, as of today no judicial body exists which would ensure a uniform interpretation and application of the CISG."

[991] These proposals are to be found in scholarly writings. There has not been any similar initiative coming from, for example, one of the states that adopted the CISG.

[992] Sohn, "Uniform Laws Require Uniform Interpretation: Proposals for an International Tribunal to Interpret Uniform Legal Texts," 53 (see chap. 3, n. 475). "[I]t would seem desirable to establish a tribunal, parallel to the International Court of Justice, to deal with the problems created by inconsistent interpretations of international agreements containing a variety of uniform laws, codes of conduct and declarations. Such a tribunal might be composed of 17 jurists (judges, lawyers and professors) who are experts on various aspects of private international law, or have had experience in the preparation, application or interpretation of uniform laws or uniform conventional rules. The jurisdiction of the tribunal would be specified in a protocol which would contain an easily amendable list of multilateral conventions, and a State ratifying the protocol would accept the jurisdiction of the tribunal with respect to at least one or, if possible, more conventions, and would be encouraged to make additional acceptances from time to time. Should a dispute arise in a national Court of a State with respect to the interpretation of a convention for which that State has accepted the jurisdiction of the tribunal, the court on request of one of the private parties to the dispute would refer the matter to the international tribunal for an advisory opinion, and the private parties would be allowed to present their views to the tribunal. The interpretation rendered by the international tribunal, though not binding, would be authoritative. It is likely to be applied by the court that requested it, and would be given substantial weight in cases raising the same issue in courts of other States that have accepted or may accept in the future the jurisdiction of the tribunal for the convention in question. In acceding to the protocol, a State may also declare that an interpretation made by the international tribunal will be binding henceforth on all its courts when rendered in a case referred to the tribunal by one of its courts. It might also declare that interpretations made by the international tribunal in cases referred to the tribunal by courts of other States will also bind its courts."

Namely, how many judges would it have, and how would they be elected, and for how long of a term? One thing is certain. Due to the international character of the CISG, it would be desirable that prospective judges of the CISG final authority come from a variety of countries.[993] Both developed and developing countries should be represented, as well as different legal systems. In addition, other types of diversity (e.g. racial and gender diversity) on the CISG bench would also be welcome.[994]

The second issue would be to determine the model according to which the cases would arrive before the CISG final authority tasked to issue binding decisions. There are several possibilities in this regard. Firstly, the parties to the dispute could reach the CISG final authority as of right. In other words, the CISG final authority would have no choice but to take up CISG cases from national courts if one, or both parties, seek review. Secondly, the CISG final authority could review applications, and in a discretionary manner decide which cases it wants to hear. Thirdly, similar to the approach nurtured in the EU (i.e. the manner in which the cases arrive before the Court of Justice of the European Union), national courts, upon encountering a complex CISG question, could refer the matter to the CISG final authority for a preliminary ruling.[995]

[993] This is self-evident as underrepresenting a particular group (e.g. developing countries) in the CISG final authority could lead to backlash against the Convention itself.

[994] Currently, there is a positive trend which seeks to explore the reasons behind the lack of gender and racial diversity in numerous fields of law. In addition, potential solutions to this pressing concern are being analysed. Lucy Greenwood and C Mark Baker, "Getting a Better Balance on International Arbitration Tribunals," *Arbitration International* 28, no. 4 (2012): 653–668. This article focuses on underrepresentation of women in international arbitration. Iyiola Solanke, "Diversity and Independence in the European Court of Justice," *Colum. J. Eur. L.* 15 (2008): 89. This article focuses on the lack of ethnic and racial diversity in the European Court of Justice.

[995] "Preliminary Ruling Proceedings — Recommendations to National Courts," EUR-Lex, 2017, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=LEGISSUM:l14552.

6.1.2 Permanent Editorial Board

Professor Bonell suggested in 1987 that a permanent editorial board, modelled after the Permanent Editorial Board for the Uniform Commercial Code, should be established in order to contribute to ensuring a high level of uniform application of the CISG.[996] Before proceeding with the discussion of Prof. Bonell's proposal, a brief overview of the Permanent Editorial Board for UCC will be provided.

The Permanent Editorial Board for UCC comprises members from two distinct organisations: The National Conference of Commissioners on Uniform State Laws (Uniform Law Commission, or 'ULC') and The American Law Institute ('ALI').[997] ULC was established in 1892.[998] It was devised as an organisation that would, among other things, work on promoting uniform laws among the individual states in the USA.[999] ALI was established approximately three decades later, in 1923.[1000] The principal goal of ALI is to shed light on the ever-evolving and ever-growing body of common law, mainly by issuing so-called restatements of law.[1001] The best-

[996] Michael Joachim Bonell, "A Proposal for the Establishment of a 'Permanent Editorial Board' for the Vienna Sales Convention," in *International Uniform Law in Practice - Acts and Proceedings of the 3rd Congress on Private Law Held by the International Institute for the Unification of Private Law (UNIDROIT), Rome 7-10 September 1987* (Oxford University Press, 1987), 241–244.

[997] "Permanent Editorial Board for Uniform Commercial Code," Uniform Law Commission - The National Conference of Commissioners on Uniform State Laws, 2018, http://www.uniformlaws.org/Committee.aspx?title=Permanent%20Editorial%20Board%20for%20Uniform%20Commercial%20Code.

[998] "About the ULC," Uniform Law Commission - The National Conference of Commissioners on Uniform State Laws, 2018, http://www.uniformlaws.org/Narrative.aspx?title=About%20the%20ULC.

[999] John J. Sampson, "Uniform Family Law and Model Acts," *Family Law Quarterly* 42 (2008): 673.

[1000] "Creation," ALI - The American Law Institute, 2018, https://www.ali.org/about-ali/creation/.

[1001] Jonathan R Macey, "Transformation of the American Law Institute," *Geo. Wash. L. Rev.* 61 (1992): 1216. "The ALI is perhaps the most elite group of lawyers in the United States. Selected from the ranks of distinguished scholars and practitioners, the Institute is best known for drafting "Restatements of the Law" in various areas. These Restatements provide lawyers and judges with carefully formulated descriptions of the law and traditionally have served as authoritative guides for both legal briefs and judicial opinions."

known work ever to come out of the ULC and ALI is their joint project – Uniform Commercial Code ('UCC').[1002]

The UCC is a model law developed to bring together the diverging commercial laws of individual states.[1003] The states can adopt the UCC as is, or they can adopt it with modifications.[1004] Naturally, as the UCC is only a model law, there is no obligation on the part of the states to adopt it. The participation in this project is entirely on a voluntary basis.[1005] However, in spite of the fact that the adoption of the UCC by individual states is not mandatory, it was still adopted by all 50 states, the District of Columbia and the Territories of the United States.[1006] Modifications done by the states, the District and the Territories at the time of the adoption of UCC tended to be minimal.[1007] However, as amendments were needed over time to address novel matters, states began adopting these amendments without any sort of coordination amongst themselves.[1008] Thus, the uniformity aspect of the UCC was being threatened. The answer to this problem came in the form of the Permanent Editorial Board for UCC.[1009] The ULC and ALI created the Permanent

[1002] "Uniform Commercial Code," ALI - The American Law Institute, 2018, https://www.ali.org/projects/show/uniform-commercial-code/.

[1003] Richard A. Mann and Barry S. Roberts, *Smith's and Roberson's Business Law*, 14th International Student Edition (Mason: South-Western Cengage Learning, 2009), 9.

[1004] Ivan L. Preston, "Regulatory Positions toward Advertising Puffery of the Uniform Commercial Code and the Federal Trade Commission," *Journal of Public Policy & Marketing* 16, no. 2 (1997): 336.

[1005] Mann and Roberts, *Smith's and Roberson's Business Law*, 9 (see n. 1003). For example, Louisiana only partially adopted the UCC.

[1006] Ibid.

[1007] Grant Christensen, "Selling Stories or You Can't Own This: Cultural Property as a Form of Collateral in a Second Transaction under the Model Tribal Secured Transactions Act," *Brooklyn Law Review* 80 (2014): 1223.

[1008] William A Schnader, "Why the Commercial Code Should Be Uniform," *Washington and Lee Law Review* 20 (1963): 242.

[1009] Ibid., 243.

Editorial Board for the UCC jointly and gave it the task to examine the amendments to the UCC already adopted, and to study and comment on the proposed amendments that would appear in the future.[1010] Another problem for the UCC was that one of a prospective non-uniform interpretation of its provisions across different states.[1011] The Permanent Editorial Board for UCC was expected to deal with this issue as well. To do this, the Permanent Editorial Board began issuing commentaries aimed at promoting the 'correct' and uniform interpretation of the UCC's provisions.[1012]

Going back to the CISG and proposal put forth by Professor Bonell, the idea was that UNCITRAL should not burden itself with collecting and disseminating CISG cases from various jurisdictions.[1013] Professor Bonell justified this by arguing that this endeavour would simply turn out to be too costly to maintain.[1014] Instead, he suggested that UNCITRAL should take a proactive role in the life of the Convention by promoting that a permanent editorial board be created similar to the one developed for the UCC:

> The Board should be composed only of representatives of States which have actually ratified the Convention, it being understood that smaller States, particularly those belonging to the same geographical region, may well appoint a common representative. Such a composition of the Board would ensure on the one hand that only those States which have actually ratified the convention play an active role in

[1010] Ibid.

[1011] Sean Michael Hannaway, "Jurisprudence and Judicial Treatment of the Comments to the Uniform Commercial Code," *Cornell Law Review* 75 (1989): 969.

[1012] "Report of the Permanent Editorial Board for the Uniform Commercial Code - Application of the Uniform Commercial Code to Selected Issues Relating to Mortgage Notes" (*The American Law Institute and the National Conference of Commissioners on Uniform State Laws*, 2011), ii, http://www.uniformlaws.org/Shared/Committees_Materials/PEBUCC/PEB_Report_111411.pdf.

[1013] Bonell, "A Proposal for the Establishment of a 'Permanent Editorial Board' for the Vienna Sales Convention," 242 (see n. 996).

[1014] Ibid.

its implementation and, on the other, that equal attention be given to each national experience without privileging any country and/or region for political, economic or even purely linguistic reasons.

Each member of the Board should be responsible for gathering judicial decisions and bibliographic material relating to the Convention form his own country or region. The Board as a whole should be concerned with the delicate task of reporting the material thus collected. More precisely it should, first of all, lay down uniform criteria for the manner in which the national caselaw and bibliography has to be submitted (e.g. titles and other key words to be used for the proper classification of the single decisions or writings, structure of the summary of their content, method of citation of the sources, where to find them in the full text etc.). It should then proceed to a comparative analysis of the material collected. The purpose of such a comparison would be to report periodically to the Commission at its annual sessions on the state of application of the Convention. The reports should evidence in particular the existence or otherwise of uniformity in the interpretation of the individual provisions of the Convention as well as the existence of gaps in the provisions which might come to light in actual court practice.

Whether or not the Board should be entrusted with the additional task of rendering – in the form of non-binding advice, interpretations of the Convention either at the request of a court or of one of the parties to a dispute or in responding to questions raised in an abstract and general manner is a question better left open for the time being: a definite answer would obviously very much depend , apart from anything else, on how efficiently the Board would perform its primary duties of collecting and reporting national experience.[1015]

The UNCITRAL decided not to adopt Professor Bonell's proposal and establish a permanent editorial board for the CISG.[1016] Several concerns were raised that contributed to the

[1015] Ibid.

[1016] "Report of the United Nations Commison for International Trade Law on the Work of Its 21st Session" (New York: UNCITRAL, 1988), 16, http://www.uncitral.org/pdf/english/yearbooks/yb-1988-e/vol19-p3-18-e.pdf.

UNCITRAL's decision.[1017] For instance, it was noted that a permanent editorial board for the CISG would be an operational nightmare in light of the high number of states that adhered to the CISG.[1018] Furthermore, from a substantive point of view, it was argued that Professor Bonell's proposal was overly ambitious and premature.[1019] However, the door for the CISG permanent editorial board was not shut completely as the UNCITRAL concluded that the proposal would be reconsidered sometime in the future.[1020] To date, no such body was established under the auspices of UNCITRAL.

6.1.3 International Committee for the Interpretation of the CISG

It has been suggested that an international committee for the interpretation of the CISG be established.[1021] The said committee would be modelled after the efforts undertaken by the International Chamber of Commerce ('ICC') in relation to the Uniform Customs and Practice for Documentary Credits (UCP), a set of rules that aim to govern the letters of credit.[1022] More precisely, the ICC takes a very pro-active approach towards the UCP. The ICC Banking Commission regularly issues opinions regarding the interpretation of the UCP.[1023] The

[1017] Ibid.

[1018] Ibid.

[1019] Ibid.

[1020] Ibid.

[1021] Kröll, Mistelis, and Viscasillas, *UN Convention on Contracts for the International Sale of Goods (CISG) – Commentary*, 131 (see introduction, n. 44).

[1022] Ibid.

[1023] Janet Koven Levit, "Bottom-Up Lawmaking Through a Pluralist Lens: The ICC Banking Commission and the Transnational Regulation of Letters of Credit," *Emory Law Journal* 57 (2007): 1174. "[T]he Banking Commission has issued over 600 advisory [']opinions[‘] in response to on-the-ground, UCP-related questions from bankers, freight forwarders, exporters, and importers."

practitioners from all over the world can submit queries to the ICC Banking Commission regarding the UCP.[1024] The answers found in the opinions of the ICC Banking Commission represent the Commission's official stance in terms of how the UCP Rules ought to be applied and interpreted in practice.[1025] The said opinions have gained immense reputation as they have been relied upon by practitioners world over, and have been cited in court decisions as well.[1026] Furthermore, the ICC Banking Commission Executive Committee also occasionally issues paper-notes that seek to shed light on divisive topics.[1027]

6.1.4 International Thesaurus

A proposal for an international thesaurus came from Vikki Rogers and the late Albert Kritzer in their journal article titled *A Uniform International Sales Law Terminology*.[1028] While reiterating Professor Honnold's observation on indeterminacy of words (quoted in Chapter V) to illustrate the adverse impact they have on uniform interpretation of international sales law, Rogers

[1024] "ICC Banking Commission Opinions 2012-2016," International Chamber of Commerce, 2018, http://store.iccwbo.org/icc-banking-commission-opinions-2012-2016.

[1025] Ibid.

[1026] Ibid.

[1027] Executive Committee of the ICC Banking Commission, "Notes on the Principle of Strict Compliance" (International Chamber of Commerce, 2016), https://cdn.iccwbo.org/content/uploads/sites/3/2016/05/ICC-Banking-Commission-Executive-Committee-Issues-Paper_Notes-On-The-Principle-Of-Strict-Compliance.pdf. "The issue of „strict compliance" has continually surfaced with respect to the examination of documents presented under documentary credits. Over the last couple of years, several discussions have been generated on Internet forums and in trade finance journals in respect of the interpretation and application of this doctrine. This has also been reflected in the challenging discussions behind numerous ICC Official Opinions. With this in mind, the Executive Committee of the Banking Commission tasked David Meynell, Senior Technical Advisor, with drafting a paper to reflect the issues. This paper represents the position of the Executive Committee."

[1028] Rogers and Kritzer, "A Uniform International Sales Law Terminology," 223-253 (see chap. 5, n. 737).

and Kritzer argue that there is also another side of the coin; words also can contribute to the effort to achieve uniform interpretation of uniform sales law.[1029]

Subsequently, they note that the method and structure used to obtain information on international sales law suffer from non-uniformity.[1030] At first glance, this might seem unimportant, but Rogers and Kritzer produce compelling evidence to the contrary. They start with the premise that

> [w]hen persons use the same methodology to access the same information, they also conceptualize the law in the same framework. Thus, the structure for the retrieval of information provides a paradigm for thinking about the law itself. Currently, neither a uniform methodology nor a uniform structure exists for the retrieval of information on international sales law.[1031]

Then, to pinpoint this phenomenon in practice, Rogers and Kritzer resort to the analogy between the current disorganised system of retrieving information in the area of international sales law and the retrieval systems for the US law that existed at the end of the 19th century:

> In both eras, bits and pieces of legal jurisprudence and doctrine are scattered, rather than brought together into a coherent body of information. The search methodology is varied, if existent at all; research results vary from lawyer to lawyer and from jurisdiction to jurisdiction. The time it takes to obtain copies of decisions is long and there are never assurances that the practitioner has accessed all of, and is applying, the most current information. Like their counterparts of a century ago, researchers today are almost guaranteed to miss information, and the credibility of their sources is often open to question.[1032]

[1029] Ibid., 224.

[1030] Ibid.

[1031] Ibid.

[1032] Ibid., 230.

The path to the current state of affairs in the US law began with West's American Digest System, "a comprehensive indexing scheme for state and federal case law".[1033] Before its creation, the US legal system was plagued with a flood of cases that were reported on a blanket basis; i.e. they were reported no matter how significant (or insignificant) they were.[1034] Numerous legal questions were already answered, and these answers were out there, but retrieving them was easier said than done.[1035] This all changed with the introduction of West's American Digest System that "produced a subject breakdown of every possible subject which could be the topic of an issue of law that could be resolved by a judge"...[1036] Probably the main advantage of this system was to be found in its uniformity.[1037] Researchers no longer had to explore the intricacies of methodologies of every new digest that came their way.[1038] As a result, the classification system used by West's American Digest System was as valued as the information that it eventually provided.[1039]

However, the contribution of West's American Digest System was not only limited to enabling a researcher to easily obtain the desired information. Its importance goes well beyond this mechanical feature. More precisely, West's American Digest System made a definitive contribution to the uniformity of the US law.[1040] The way the US law got organised thanks to

[1033] Ibid., 234.

[1034] Ibid., 233.

[1035] Ibid., 234.

[1036] Ibid.; Robert C. Berring, "Collapse of the Structure of the Legal Research Universe: The Imperative of Digital Information," *Washington Law Review* 69 (1994): 19.

[1037] Rogers and Kritzer, "A Uniform International Sales Law Terminology," 234 (see chap. 5, n. 737).

[1038] Ibid.

[1039] Ibid.

[1040] Ibid., 235.

West's American Digest System became an omnipresent feature in the mind-set of every US lawyer:

> How one organized the law became the center of what the law could and did mean. While this was a conscious process […] for West, as time passed, legal scholars forgot that choices had been made and began to see the existing categories as inevitable; thus the gestalt of law was created.[1041]

Rogers and Kritzer suggest that a similar road must be treaded in the area of international sales law.[1042] Their idea is built on a notion put forth by Professor Honnold:

> The development of a homogeneous body of law under the [Sales] Convention depends on the channels for the collection and sharing of judicial decisions and bibliographic material so that experience in each country can be evaluated and followed or rejected in other jurisdictions.[1043]

To this end, Rogers and Kritzer opine that the best way forward would be to create an information-retrieval thesaurus for international sales law.[1044] The said thesaurus would be a "controlled vocabulary containing all the possible subject headings for an index (called 'descriptors') and charting the semantic relationships between the terms." [1045] These relationships can be of three kinds: (1) equivalence relationship, (2) hierarchical relationship, and (3) associative relationship.[1046]

[1041] Ibid.

[1042] Ibid.

[1043] Ibid., 237; John Honnold as quoted in Ralph Amissah, "Revisiting the Autonomous Contract - Transnational Contracting, Trends and Supportive Structures," *UiO Det juridiske fakultet*, 2000, http://www.jus.uio.no/lm/autonomous.contract.2000.amissah/ doc.html.

[1044] Rogers and Kritzer, "A Uniform International Sales Law Terminology," 240 (see chap. 5, n. 737).

[1045] Ibid., 241.

[1046] Ibid., 243-244.

Equivalence relationship would include synonyms, quasi-synonyms, acronyms, variant spellings, etc.[1047] For example, for an entry term 'rescission of contract' the thesaurus would lead to the equivalent term that is used in the CISG, which is 'avoidance of contract'.[1048] As for the hierarchical relationship, it encompasses broader and narrower meanings of descriptors.[1049] Thus, for a descriptor 'damages' the broader term would be 'remedies' while the narrower term would be, for instance, 'consequential damages' or 'exemplary damages'.[1050] And last but not least, associative relationship refers to a semantic relationship that cannot be characterised either as an equivalence relationship or as a hierarchical one, but still enough association between the terms exists that it is advisable that this relationship be made known in the thesaurus.[1051] To illustrate, the descriptor *damages* has an associative relationship with the terms such as *calculation of damages* and *mitigation of damages*.[1052] While neither of these is synonymous nor in a hierarchical relationship with the term *damages*, both are still conceptually associated with it.[1053]

To this date, the international thesaurus as proposed by Rogers and Kritzer has not come into existence in the full form that was advocated in their journal article. While it seems that, for the time being, this idea has been scrapped, one cannot with certainty claim that it will not resurface

[1047] Ibid., 243.

[1048] Ibid.

[1049] Ibid.

[1050] Ibid.

[1051] Ibid., 244.

[1052] Ibid.

[1053] Ibid.

sometime in the future. Furthermore, a similar project has been initiated under the Global Sales Law Project led by Prof. Schwenzer, but it too still has not seen the light of day.[1054]

6.2 ANALYSIS OF THE PROPOSED TOOLS

The proposed tools, as the name suggests, were never implemented, so one cannot assess them in the same manner in which the implemented tools were assessed in the previous Chapter. The implemented tools have been in place for many years, which means that their mode of operation and impact can be observed and analysed.[1055] When it comes to the proposed tools, this, for obvious reasons, is not possible. Therefore, the benchmarks used to assess the implemented tools cannot be utilised in the same manner vis-à-vis the proposed tools. More precisely, one cannot determine whether a particular proposed tool is accessible to its end-users or whether it is successful at ensuring fair representation of the developing/non-Western states. This forces us to make the following assumption when speculating on the potential impact of the proposed tools on the uniform application of the CISG, namely that these tools would be implemented so as to reflect the five benchmarks put forth in the previous Chapter (accessibility, systematic approach, timeliness, credibility, and fair representation of developing/non-Western countries).

The proposed tools will be assessed based on the following criteria: (1) the novelty that they bring vis-à-vis the implemented tools, (2) potential interaction with the tools currently in place, and (3) possibility of implementation.

[1054] Germain, Claire M. "Reducing Legal Babelism: CISG Translation Issues." In *International Sales Law: A Global Challenge*. New York: Cambridge University Press, 2014, 59.

[1055] For a detailed discussion of the implemented tools, please refer to Chapter V.

6.2.1 Assessment of the Final Authority

6.2.1.1 Direct Generation of Uniformity in the Application of the CISG – A Novelty Element

The final authority would have the potential to singlehandedly bring about a high level of uniform application of the CISG.[1056] Maintaining uniformity is the task of any apex court, and it would hardly be any different with the CISG final authority.[1057] In other words, the CISG final authority would be able to exert a direct influence over the matter of uniform application. The cases would reach the CISG final authority directly from the national courts, making the latter intrinsically linked to the former. In contrast, there is no mechanism in place that would require the courts to resort to the implemented tools for the promotion of uniform application of the CISG. This practice is dependent on the positive attitude of judges to use these tools so as to look into the CISG case law from other jurisdictions, and possibly into other CISG-related materials. Thus, the novelty that the CISG final authority would bring to the table – the one that cannot be put forth by the implemented tools – is a prescribed and direct interaction between the national courts on the one hand, and the CISG final authority on the other.

The level of uniformity would be the highest if the decisions of the CISG final authority would be binding, with the parties being able to bring their cases to the CISG final authority as of right, and upon exhausting all the available instances within a national jurisdiction. In this way, the CISG final authority would most probably hear the highest number of cases, thus enabling it to put forth its views on the Convention frequently. The level of uniformity would also be high with any other form of the CISG final authority empowered to bring binding decisions under the

[1056] Schmidt-Ahrendts, "CISG and Arbitration," 221 (see chap. 3, n. 475).

[1057] Morten Rasmussen, "The Origins of a Legal Revolution – The Early History of the European Court of Justice," *JEIH Journal of European Integration History* 14, no. 2 (2008): 77. A quintessential example is the European Court of Justice.

Convention. The difference would be that, if the CISG final authority would choose cases it wanted to hear or if cases were sent to it through preliminary reference, it would then most probably entertain far fewer cases. In other words, the mechanisms of discretionary choice and preliminary reference would be put in place to weed out the easy cases or the issues that have been previously decided by the CISG final authority. Thus, the emphasis would be on hard cases and divisive issues that the CISG final authority did not address before.

What if the opinions of the CISG final authority would not be binding, but merely advisory? Naturally, the level of uniform application would not be as high as with the CISG final authority empowered to bring binding decisions. The national courts would be free not to heed the opinions rendered by the CISG final authority. But in spite of this, it would be safe to assume that the level of uniformity would still be improved significantly as long as there is a direct link between the national courts and the CISG final authority. Namely, if the final instance national court in a particular jurisdiction hears a CISG case, and this case, eventually, is sent to the CISG final authority through the mechanism of preliminary reference, then one thing is clear; the opinion of the CISG final authority will be returned to the national court that will then have no choice but to consider it. Compare this, for example, to the opinions of the CISG Advisory Council. As there is no direct link or interaction between the national courts and the CISG Advisory Council, the former are not required in any way whatsoever to give weight to the opinions rendered by the latter. Furthermore, besides being required to consider an advisory opinion of the CISG final authority, the national court, if it wishes to decide in discord with that opinion, will have to justify its position. All this would work as an instrument of pressure that would contribute significantly to the uniformity in the application of the Convention.

6.2.1.2 CISG Final Authority Could Undermine the Need for the Implemented Tools

The CISG final authority could basically render almost all the implemented tools obsolete and unnecessary. There would be no need for the CISG Advisory Council as the CISG final authority would be what its name suggests; a final authority for matters arising under the CISG. The opinions and declarations of the CISG Advisory Council would, thus, carry very little weight. In deciding the CISG matters, national courts would not look towards the works of the CISG Advisory Council, but towards the body of case law rendered by the CISG final authority.

Furthermore, it is questionable to what extent there would be a need to collect and disseminate CISG case law from national jurisdictions. Maintaining uniformity in the application of the Convention would fall on the CISG final authority, thus making it potentially unnecessary for the national courts to engage in the global *jurisconsultorium* so as to satisfy the mandate of Article 7(1) of the CISG. Instead of the databases that disseminate CISG case law from different jurisdictions, it would suffice to have a database with the decisions of the CISG final authority that would be accessible to national courts. However, if the CISG final authority would only seek to deal with the hard CISG cases, then there might still be need for the tools that disseminate case law and other CISG-related materials. Naturally, the CISG final authority would not make it obsolete for the implemented tools to collect and disseminate materials such as scholarly works, CISG *travaux préparatoires*, etc.

6.2.1.3 CISG Final Authority Neither Desirable nor Implementable

While the potential of the CISG final authority to generate a high level of uniformity in the application of the Convention is hard to dispute, other considerations call into question the desirability of this proposed project. Namely, uniformity in and of itself is not the aim of the

Convention. This is clearly discernible from its Preamble where the aims of the Convention are enumerated:

> BEING OF THE OPINION that the adoption of uniform rules which govern contracts for the international sale of goods and take into account the different social, economic and legal systems would contribute to the removal of legal barriers in international trade and promote the development of international trade […][1058]

As is clear from this part of the Preamble, the underlying aim of the CISG is not uniformity *per se*, but uniformity in the service of international trade, i.e. the one that makes a contribution to the removal of legal barriers in international trade and the one that promotes its development. Therefore, uniformity that facilitates international trade is the one aimed by the CISG. A question then must be asked: Are there instances when the attainment of uniform application of the CISG could have negative repercussions for the underlying aims of the Convention? The answer to this question is in the positive, and the establishment of a CISG final authority could bring about exactly this situation.

Namely, the CISG final authority would, in essence, be one additional court instance at the disposal of the parties to consider their case, or a specific legal issue arising out of their case. So, if we assume that all 89 contracting states would accept the jurisdiction of the CISG final authority,[1059] this would mean that, for all of them, the CISG final authority would be the apex court regarding CISG matters. Thus, the workload of this institution could be rather immense. For even if the CISG final authority would choose the cases it wanted to hear, still it would take time to decide whether it wishes to entertain the case or not. And even without this fictional last

[1058] "Annotated Text of CISG Preamble," (see n. 555).

[1059] "Status - United Nations Convention on Contracts for the International Sale of Goods (Vienna, 1980)," (see introduction, n. 1).

instance, it generally takes time for the national courts to produce a binding decision in commercial disputes.[1060] Consequently, the CISG final authority would ensure a high level of uniform application of the Convention, but it would, concurrently, increase the amount of time needed to get a final and binding decision in cases involving the CISG.

However, the conventional wisdom says that the commercial parties in the global arena generally like to see their disputes resolved as economically and as quickly as possible.[1061] The end result of the implementation of the CISG final authority might very well be that the parties would seek to exclude the application of the Convention in favour of one of the national sales laws. For if they choose to have their prospective disputes resolved by national courts applying the national law, then the complications that arise with the CISG final authority would be avoided. The irony is that, by increasing the level of uniformity in the application of the Convention through the CISG final authority, the Convention might end up being less effective at what it was designed to do in the first place, i.e. to contribute to the removal of legal barriers in cross-border trade.

The logistical issues support this stance as well. More precisely, the CISG final authority would need to have a seat somewhere, possibly Vienna as this is where UNCITRAL's offices are

[1060] "The Truth about Civil Cases," Open Justice, 2016, http://open.justice.gov.uk/courts/civil-cases/. Even without the CISG final authority, the commercial cases before the courts take quite a lot of time to be resolved. For example, in England, for a case involving a value of over £ 10,000 it takes on average 59 weeks to get from the submission of the case to court to the end of the trial. "The Wheels of Justice Grind Slow - Europe's Civil Courts," *The Economist*, February 18, 2016, https://www.economist.com/news/europe/21693252-especially-southern-europe-not-exceedingly-fine-wheels-justice-grind-slow. This article from the Economist indicates that in Italy it takes 1,210 days for a typical commercial dispute to be resolved. The jurisdictions that are generally considered as well-performing in this regard (such as Luxembourg and Sweden) still take more than 1 year to resolve a commercial dispute.

[1061] Christopher A Whytock, "Litigation, Arbitration, and the Transnational Shadow of the Law," *Duke Journal of Comparative & International Law* 18 (2007): 449. It is only to be expected that anyone, including business entities, would like to see a dispute concerning them resolved in an economical and timely manner. For example, this reasonable wish has manifested itself in the realm of arbitration. To lure the parties to utilise arbitration in lieu of litigation, it is emphasised that, as a rule of thumb, arbitration is a more economical and speedier dispute resolution method than going to court. Zephania Ubwani, "EACJ Challenged to Bring Business Disputes to End," *The Citizen*, April 10, 2018, https://www.thecitizen.co.tz/News/1840340-4381016-37msiqz/index.html. This article cites the Kenyan Chief Justice as saying: "Business enterprises want disputes resolved as quickly as possible."

located. In other words, for 89 jurisdictions spread across the world,[1062] there would be one venue with the final authority over the Convention. Let as assume that the seat of the CISG final authority would indeed be in Vienna. And then, let us assume that two small-sized businesses are about to engage in a cross-border sales transaction, one with a place of business in Uruguay (buyer), and the other with a place of business in Paraguay (seller). Both countries have adhered to the CISG. If these two parties decide not to exclude the Convention, then, if the dispute arises, they will be faced with a prospect of their dispute being decided thousands of miles away from their places of business, on a whole different continent. The CISG final authority could be set up so as to require the parties to appear in person before it (or perhaps through video link), or it could decide on the controversy only based on written submissions forwarded to it by the national court. In case of the former, it would be highly unlikely that the two small-sized businesses, when concluding a sales contract, would look favourably at the prospect of having their potential disputes decided thousands of miles away from their places of business.[1063] This is especially so if they would be required to travel intercontinentally as substantial costs would be involved in this endeavour. But even without having to be present in Vienna, the parties might as well feel uneasy about the extra costs associated with trying the case before an additional court instance, and about the fact that a court in Europe, far away from them, could be in charge of rendering a binding decision to resolve their dispute. All these considerations could serve as an incentive for the Uruguayan and Paraguayan parties to stay away from the CISG.

[1062] The number is expected to grow.

[1063] The issue of dispute-settlement costs was discussed in detail in Chapter IV. The CISG final authority could, in essence, increase the dispute-settlements costs. This would be contrary to the CISG's aim to bring the costs down in the realm of cross-border sales.

Now, contrast the situation of the Uruguayan and Paraguayan parties with that of the Slovakian buyer and Hungarian seller. For these two parties, it is highly likely that they would not be worried about the venue of the CISG final authority as for both of them Vienna is in their vicinity. They might still be sceptical about the prospect of having to try their case before an additional court instance, but they would most likely not be at unease with Vienna as the forum. Therefore, the perceptions of the parties about the CISG final authority could very well be quite varied across different parts of the globe, creating stronger incentives for the parties to exclude the application of the Convention in some parts, and less stronger in others.

On the whole, the CISG final authority would bring immense complexities for the CISG in general. While it would indeed ensure a very high level of uniformity in the application of the Convention, the speculative concerns raised here indicate that this uniformity would come at too high a price. The parties might even be incentivised to exclude the application of the Convention due to considerations related to the CISG final authority. Therefore, achieving uniformity in this manner could very well be in discord with one of the underlying aims of the CISG, which is to contribute to the development of international trade and removal of legal barriers to such trade. For if the CISG final authority could discourage the parties from using the Convention, its impact in this regard would be reduced.

Furthermore, the possibility to implement the CISG final authority is extremely slim, if not non-existent.[1064] Firstly, even if the formation of the CISG final authority would be officially proposed, it would require a new treaty to be entered into by the CISG participating states. With the high number of countries adhering to the CISG, it would be an almost impossible feat to convince all of them to accept the jurisdiction of the CISG final authority.

[1064] This issue has been partially addressed in Chapter III as well when discussing the design of the uniform sales law system.

But the proposal for the CISG final authority will most certainly not be on the table any time soon. For the states would not only reject it on political grounds, although these would certainly play a major role. The establishment of the CISG final authority would, to a certain degree, limit the sovereignty of the CISG participating states. Any project that seeks to do that would inevitably be a catalyst for a heated political debate. But besides purely political reasons against the establishment of the CISG final authority, practical considerations also speak volumes against such a project. More precisely, the CISG finally authority would require major constitutional and other internal overhauls in many of the CISG participating states:

> We must consider not only the normal managerial tasks for the creation and administration of such a [final authority], but also the fact that most legal systems have established constitutional rules for the application of court precedents and jurisprudence. Not all jurisdictions endow all their courts with the same jurisdictional power. Most countries have specific rules regarding the binding nature of a court decision. Therefore, not only would amendments be needed in each legal system in order for the authority of an international court to be recognised, but also a harmonised and uniform system of interpretational rules and precedents would be necessary within the International Court.[1065]

It is doubtful if any states would be willing to voluntarily make major constitutional and other necessary changes in their internal legal systems in order to ensure that one Convention (out of many) to which they have adhered is applied uniformly.

[1065] Kee and Muñoz, "In Defence of the CISG," 115 (see chap. 5, n. 965).

6.2.2 Assessment of the Permanent Editorial Board

6.2.2.1 Added Credibility under the Wing of UNCITRAL – A Novelty Element

The permanent editorial board for the CISG, without being empowered to issue non-binding advice, would not be a ground-breaking addition to the implemented tools. As already noted, the members of the permanent editorial board would be tasked with collecting the case law in their jurisdictions of origin.[1066] However, UNCITRAL already has in place an apparatus for obtaining cases on its legal instruments from national jurisdictions in the form of national correspondents.[1067] While this apparatus may have omitted to include many cases in the CLOUT,[1068] there always remains a possibility for UNCITRAL to seek improvements in its work. In other words, there are no indications that the system of national correspondents is beyond repair. Another task of the permanent editorial board would be identification of problematic aspects in the application of the CISG.[1069] However, this too is not beyond the reach of the implemented tools. The CISG Advisory Council has identified several divisive areas in the CISG case law and has sought to address them in its opinions.[1070] Furthermore, the scholarly materials that can be obtained from the databases have discussed (and keep on doing so) all the CISG articles and have identified numerous contentious aspects regarding the Convention.[1071]

[1066] Bonell, "A Proposal for the Establishment of a 'Permanent Editorial Board' for the Vienna Sales Convention," 242 (see n. 996).

[1067] UNCITRAL, *Facts about Clout - Case Law on UNCITRAL Texts*, (see chap. 5, n. 748).

[1068] For a detailed discussion of CLOUT, please refer to Chapter V.

[1069] Bonell, "A Proposal for the Establishment of a 'Permanent Editorial Board' for the Vienna Sales Convention," 242 (see n. 996).

[1070] "Opinions," (see chap. 5, n. 787).

[1071] "Bibliography of CISG Materials in English," Pace Law Albert H. Kritzer CISG Database, n.d., http://www.cisg.law.pace.edu/cisg/biblio/biblio-eng.html.

The members of the permanent editorial board for the CISG could further be empowered to issue non-binding opinions regarding the Convention.[1072] The mere fact that they would be putting forth normative views on the CISG would not, in and of itself, be a novel thing. The CISG Advisory Council has been engaging in this activity for years now. However, the non-binding opinions of the permanent editorial board would have an additional ingredient to them; one that is impossible for the CISG Advisory Council to attain. More precisely, the permanent editorial board for the CISG would function under the auspices of UNCITRAL which, in turn, would add to the credibility of its non-binding opinions. In contrast, the CISG Advisory Council is a private initiative whose power to put forth normative views on the Convention, as noted in the previous Chapter, is self-bestowed. The permanent editorial board for the CISG would thus only bring something new to the table if it were to issue non-binding opinions. Its other tasks would be superfluous as they can be met within the framework of the existing global *jurisconsultorium*.

6.2.2.2 Interaction with the Implemented Tools Dependent upon the Competences of the Permanent Editorial Board

If the permanent editorial board for the CISG were to be organised so as to only collect the case law rendered under the Convention and to pinpoint problematic aspects of its application, it would have the capacity to make it unnecessary for the implemented tools to collect case law. For this to occur, the permanent editorial board would have to showcase a high level of effectiveness at finding the CISG cases. If the private tools that disseminate case law would still be more productive than the permanent editorial board, then their activities would still be very much needed. As for the permanent editorial board's analyses of the CISG case law, they could

[1072] Bonell, "A Proposal for the Establishment of a 'Permanent Editorial Board' for the Vienna Sales Convention," 242 (see n. 996).

potentially render even the CISG Digest redundant. In contrast to the CISG Digest, the activities of the permanent editorial board, as per Bonell's idea, would be less neutral and more direct.[1073] Thus, the analytical work of the permanent editorial board would be far superior and more useful than the contents that can be found in the CISG Digest.[1074]

As for the CISG Advisory Council, if the permanent editorial board would be established in such manner so as not to render non-binding advice on the Convention, there would be no intersection between the activities of these two bodies. However, if the opposite were true, and the permanent editorial board would be tasked with issuing non-binding advice, the CISG Advisory Council would be directly affected. Evidently, having two bodies that issue normative opinions on the Convention would be counterproductive as it would only create confusion. Since the permanent editorial board for the CISG, as per Bonell's idea, would be organised under the auspices of UNCITRAL, its opinions would carry far more weight than the ones issued by a private body. In other words, the permanent editorial board for the CISG empowered to issue non-binding advice would make the CISG Advisory Council unnecessary.

6.2.2.3 Establishment of the Permanent Editorial Board Unlikely at This Point in Time

For the foreseeable future, it is unlikely that UNCITRAL would give green light for a permanent editorial board for the CISG to operate under its auspices. As noted earlier, UNCITRAL remains very much in the arms of neutrality:

[1073] Ibid.

[1074] Lookofsky, "Walking the Article 7 (2) Tightrope Between CISG and Domestic Law," 88 (see chap. 1, n. 109).

> UNCITRAL and other UN creations exist in a highly charged diplomatic and political environment. UNCITRAL could not been seen to countenance any criticism of any UNCITRAL member.[1075]

But while UNCITRAL is indeed a body that nurtures neutrality, it has a history of issuing (successful) recommendations regarding the interpretation of multilateral treaties that are to be applied by national courts and arbitral tribunals.[1076] An example would be UNCITRAL's recommendations on the interpretation of the 'writing requirement' under the New York Convention.[1077]

Furthermore, as noted earlier in this Chapter, an official proposal for the establishment of the permanent editorial board for the CISG was already put forward by Bonell. The UNCITRAL declined his proposal, but left open the possibility to reconsider it in the future. Thus, the door for the permanent editorial board for the CISG was not entirely shut by UNCITRAL. All this is an indication that, while it is unlikely that at this point in time the permanent editorial board for the CISG would be established, one ought not to rule out such a possibility in the years to come.

[1075] Kee and Muñoz, "In Defence of the CISG," 114 (see chap. 5, n. 965).

[1076] Margaret L. Moses, *The Principles and Practice of International Commercial Arbitration: Third Edition* (Cambridge: Cambridge University Press, 2008), 23. "In July 2006, UNCITRAL adopted recommendations regarding the interpretation of Articles II(2) and VII(1) of the Convention[.]"*UNCITRAL Secretariat Guide on the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958)* (Vienna: United Nations, 2016), 51 http://www.uncitral.org/pdf/english/texts/arbitration/NY-conv/2016_Guide_on_the_Convention.pdf. "Prior to UNCITRAL addressing the issue, national courts had diverged on whether the more-favourable-rule principle embodied in article VII (1) of the Convention applied to the requirement that an arbitration agreement be "in writing" within the meaning of article II. In 2006, UNCITRAL confirmed that article VII (1) "should be applied to allow any interested party to avail itself of rights it may have, under the law or treaties of the country where an arbitration agreement is sought to be relied upon, to seek recognition of the validity of such an arbitration agreement."[footnote omitted] Since then, national courts have more consistently enforced arbitration agreements pursuant to the less stringent formal requirements available under their national laws or treaties as provided for by article VII with respect to arbitral awards."

[1077] Ibid.

6.2.3 Assessment of the International Committee for the Interpretation of the CISG

6.2.3.1 An Element of Novelty Present Only If the International Committee for the Interpretation of the CISG Would Operate under UNCITRAL

If it were to be organised under UNCITRAL, the international committee for the interpretation of the CISG would introduce the same novelty as the permanent editorial board, but without being as extensive as the latter in its organisation and activities. That is, the fact that it would be organized under the auspices of a UN body that drafted the CISG would substantially add to the credibility of such an endeavor. The international committee for the interpretation of the CISG could also be established as a private initiative, akin to the CISG Advisory Council. However, if this were to be the case, the international committee for the interpretation of the CISG would bring nothing new or ground-breaking. In other words, it would basically be a duplication of the efforts that the CISG Advisory Council is putting forth.

6.2.3.2 Varied Interaction with the Implemented Tools

The international committee for the interpretation of the CISG would need to have a symbiotic relationship with the tools that disseminate case law and other CISG-related materials. That is, effective access to cases would be of pivotal importance for this committee to render non-binding opinions that are relevant and sensitive to the developments in the Convention's case law.

The international committee for the interpretation of the CISG, as already noted, could be organized as a private body. However, there is already a private initiative that, more or less, does the same thing the international committee would do; i.e. the CISG Advisory Council renders non-binding normative analyses on the Convention. Having two private bodies that produce non-binding opinions regarding the CISG would certainly not be a step in the right direction. Rather, it

would cause confusion and discord, especially if these two bodies would happen to issue non-binding opinions with diametrically opposed views on the same topic. Thus, the impact of two private initiatives that formulate normative views on the CISG could actually be detrimental to the endeavour of uniformity.

However, the international committee for the interpretation of the CISG could also be established under UNCITRAL. If that were to happen, then, just like in the case of the permanent editorial board for the CISG that is empowered to put forth non-binding opinions, the CISG Advisory Council would become a redundant component of the global *jurisconsultorium*. As mentioned previously, a private initiative that is the CISG Advisory Council could not compete against a well-functioning body established under the auspices of UNCITRAL. The opinions rendered by the international committee for the interpretation of the CISG that operates under UNCITRAL would carry much more weight and would be far more significant than the ones put forth by the CISG Advisory Council. Thus, with the added credibility of operating under UNCITRAL's wing, the international committee for the interpretation of the CISG would have the potential of making an added impact on the uniformity in the application of the Convention.

6.2.3.3 Establishment of the International Committee for the Interpretation of the CISG Unlikely at This Point in Time

The same arguments put forth above regarding the permanent editorial board for the CISG hold true in relation to the international committee for the interpretation of the Convention. It is unlikely, at least at this point in time, that such a committee would get established under the auspices of UNCITRAL. It is also unlikely that someone would seek to establish it as a private

initiative given that there exists one already (CISG Advisory Council) that puts forth non-binding opinions regarding the Convention.

6.2.4. Assessment of the International Thesaurus

6.2.4.1 Novelty - International Thesaurus as a Tool for Increasing Comprehension of Legal Terms in the International Setting

The international thesaurus would seek to reduce "legal Babelism" surrounding the CISG, to use the expression put forth by Germain.[1078] She opines that "[t]he development of international sales law thesauri is essential in promoting accessibility and uniformity of interpretation."[1079] Christopher Kee and Edgardo Muñoz, who were part of the Global Sales Law Project, explained the mode of operation of the international thesaurus in the following manner:

> The CISG is the perfect Rosetta stone, notwithstanding the various language and conceptual difficulties that we have already outlined and acknowledged above. A fundamental assumption that can be made concerning a convention that has 6 official versions is that each version is intended to mean the same thing. The same is true of other instruments such as the [UNIDROIT Principles] and [Principles of European Contract Law].
>
> Each of these instruments has been analysed to identify the legal concepts it contains. The precise wording used to explain the concept is then extracted in each language. This becomes the controlled vocabulary, through which it is hoped that the language of international sales law will achieve a level of uniformity. Rather than thinking in terms of differing national languages, the project participants are drawing a distinction between the language of International Sales Law and the languages of the domestic sales laws. This

[1078] Germain, "Reducing Legal Babelism: CISG Translation Issues," 51 (see n. 1054).

[1079] Ibid., 58.

> approach does not so much allow the equal treatment of each national language, but rather removes any distinction between them. The English expression of a particular international sales law concept is treated as an exact synonym of the Arabic expression of the same concept. Alternative terms, phrases and expressions used in the variety of legal systems around the world are mapped to the controlled vocabulary, based on their relationship with the legal concept, not the particular term used. The mapping process allows the international and domestic concepts to be distinguished.[1080]

Kee and Muñoz opine that "the Thesaurus will serve as an important tool for uniform interpretation, and will overcome the trials and tribulations of language difficulties."[1081]

The international thesaurus would thus play an important role in two regards. Firstly, it could prove itself to be a major weapon against the homeward trend. As already explained in Chapter III, often times judges and arbitrators (and also the lawyers representing commercial parties) fall into the trap of equating the concepts found in the CISG to the ones that are present in the domestic laws that they are knowledgeable about.[1082] The international thesaurus could effectively alarm them about a particular CISG concept not being interchangeable with a seemingly similar one in the domestic law, prompting them to perform further research in order to establish its truly international meaning.

Secondly, the international thesaurus would be useful for those involved in the translation processes that are related to the Convention. Namely, as demonstrated in the previous Chapter, translation plays a major role in the life of the CISG. The functionality of the global *jurisconsultorium* depends on it. That is, for a German judge to be able to look into the CISG case

[1080] Kee and Muñoz, "In Defence of the CISG," 120 (see chap. 5, n. 965).

[1081] Ibid., 122.

[1082] For a detailed discussion on homeward trend, please refer to Chapter III.

law from Serbia, for instance, the Serbian decisions would have to be translated into a language that the German judge would understand. The chances are slim that the German judge in question will be well-trained in the Serbian language. Naturally, it is a truism that translation can easily go wrong, and especially so when legal texts are getting translated. It is of paramount importance that the corresponding synonyms be used if the translation is to be accurate and reflect what is written in the original. The international thesaurus would significantly facilitate the work of the translators and would ensure higher accuracy in the translation undertakings. On the whole, the international thesaurus has the potential to be a useful ancillary tool in the endeavour to promote uniform application of the CISG.

6.2.4.2 International Thesaurus as a Complimentary Tool to the Tools Implemented Thus Far

The international thesaurus would be a useful ancillary tool in the promotion of uniform application of the Convention. The tools that disseminate case law and other CISG-related materials would benefit immensely from it, especially when it comes to translation, as illustrated previously.

The CISG Advisory Council would also find the international thesaurus to be useful for its activities. Firstly, the CISG Advisory Council references cases from different jurisdictions in its opinions, and indicates the sources form where they were obtained.[1083] More often than not, their opinions in this regard refer to the tools that disseminate case law and other CISG-related materials.[1084] Thus, if the international thesaurus would contribute to the accuracy of translation performed under the tools that disseminate case law and other CISG-related materials, this would

[1083] "Opinions," (see chap. 5, n. 787). The opinions have tables of cases.

[1084] Ibid.

impact positively the quality of work of the CISG Advisory Council. The more accurate the translations, the more relevant opinions the CISG Advisory Council is able to render. Secondly, the CISG Advisory Council could use the international thesaurus directly in its opinions. For instance, one of the potential methods to be used in analysing the Convention is the comparative law method.[1085] In other words, the laws of different jurisdictions are assessed to find a common ground that could then be used as an acceptable interpretation of a particular provision within the CISG.[1086] In employing the comparative law method, the international thesaurus would be of great use as a starting point of the analysis.

6.2.4.3 Establishment of the International Thesaurus Dependent on the Availability of Resources

There exist no impediments for the realization of the international thesaurus, except for the availability of human and other resources. The international thesaurus was planned as a private initiative, which would give those behind the project free reign in designing the international thesaurus as they see fit.

SUMMARY OF CHAPTER VI

This Chapter has examined the tools for the promotion of uniform application of the CISG that have been proposed, but have not been implemented. Section 6.1 has identified these tools and has put forth background information on them. Section 6.2 sought to analyse them in order to determine the following: (1) the extent to which they could bring an element of novelty not

[1085] Schlechtriem and Schwenzer, *Commentary on the UN Convention on the International Sale of Goods (CISG)*, 132 (see introduction, n. 44).

[1086] Ibid.

attainable by the implemented tools, (2) the relationship they would have with the implemented tools, and (3) the possibility of their implementation.

In essence, it was shown that all four proposed tools (CISG final authority, permanent editorial board for the CISG, international committee for the interpretation of the CISG, and international thesaurus) have the potential to contribute to the uniform application of the Convention in a manner that the implemented tools could not. However, at the same time it was demonstrated that the CISG final authority, although it would ensure a high level of uniformity, would hardly be implementable. And what is more, the desirability of this project is questionable as it would have the potential to introduce the complexities into the dispute-settlement process that could incentivise the parties to exclude the application of the Convention *ex ante*.

As for the permanent editorial board and the international committee for the interpretation of the CISG, it was shown that these two prospective initiatives would, for the most part, be duplications of the existing efforts put forth by the implemented tools. The only element of novelty that they could bring to the table would be added credibility if they were to operate under UNCITRAL. More precisely, their non-binding normative advice regarding the interpretation of the CISG would enjoy more credibility than the opinions issued by the CISG Advisory Council as the latter is a private initiative. Naturally, it would be absurd for UNCITRAL to implement two bodies that would be empowered to render non-binding advice on the interpretation of the CISG. Out of the two, it would be more appropriate to opt for the international committee for the interpretation of the CISG. This is so because the permanent editorial board would, in addition to rendering non-binding opinions, would be tasked with additional responsibilities that could potentially be performed within the framework of the already implemented tools. However, this conclusion will have very little practical importance because, as illustrated in the present Chapter,

it is unlikely that UNCITRAL will undertake to form a body such as international committee for the interpretation of the CISG any time soon.

As for the international thesaurus, it would indeed be something new in the realm of the *global jurisconsultorium*. No other tool that is currently implemented has the ability to alert both the decision-makers (judges and arbitrators) and the parties as swiftly as the international thesaurus about the discrepancy in the meaning of the CISG concepts and those found in the national laws. Out of all the proposed tools, the international thesaurus is the only one that could be implemented in the foreseeable future. For it to bring an element of novelty, it suffices for it to be organised as a private initiative. Thus, the only thing needed for its formation are human and other resources.

CONCLUDING REMARKS

The general wisdom says that differing national laws act as a legal barrier to trade, a hurdle of sort that some businesses simply cannot, or are not willing to tackle.[1087] A potential seller X from country A will most likely be unfamiliar with the laws of country B where a potential buyer Y has his place of business. And vice versa will tend to be true as well; the buyer Y will most likely be unfamiliar with the laws of the country A. Thus, the seller X could very well be reluctant to trade with the law of the country B as the governing law of the transaction. And the same holds true for the buyer Y; i.e. he could very well be unwilling to engage in a cross-border sale with the law of the country A as the applicable law to the contract. Therefore, the potential for impasse between the prospective seller X and the prospective buyer Y is indeed a realistic possibility. Naturally, they could still transact against the backdrop of differing national laws, but the transaction costs would be higher as compared to the situation in which the countries A and B would share the same law.[1088]

To the rescue comes the CISG. A uniform sales law at the international level, the CISG is a quintessential example of an endeavour to unify private law. Although the CISG is a uniform legal instrument of limited scope, it still covers the majority of contractual aspects that arise in respect to a cross-border sales transaction.[1089] Thus, by adhering to the CISG, the countries A and B share a common sales law intended to govern international sales. In such a scenario, the seller X and buyer Y will not be perturbed about the differences in their domestic sales laws as they will

[1087] For a detailed discussion about the benefits of uniform law, please refer to Chapter IV.

[1088] Ibid.

[1089] Kröll, "Selected Problems Concerning the CISG's Scope of Application," 39 (see chap. 2, n. 192).

be able to carry out their transaction under a legal instrument that is common to both of their jurisdictions, which is the CISG.

The preceding discussion is a simplified theoretical model that illustrates the advantages that come with the unification of private law. However, as with most theoretical models, they do not necessarily translate into practice with utter precision. Or in the alternative, once they are transposed from the isolated field of theory into the practical realm where innumerable variables could impact their functioning, they end up departing from the expected theoretical operation. The CISG is a case in point. Namely, adopting a uniform text for two or more jurisdictions to share is one thing.[1090] But ensuring that the text is applied in a uniform manner is a completely different challenge.[1091]

THE MANDATE OF UNIFROMITY NOT FULFILLED IN PRACTICE

The drafters of the CISG were very much aware of the possibility that different jurisdictions might ascribe different meanings to the uniform text. Hence, they included Article 7(1) into the Convention which asks that regard be had to the need to promote uniform application of the CISG. Whether this provision is a mandate that needs to be observed when the CISG is applied, or it is a mere consideration to be taken into account in passing by, has been a trigger for contentious debate.[1092] This thesis has argued in Chapter I that it is a mandate based on the plain wording of Article 7(1), *travaux préparatoires*, the relationship between the principle of uniformity and other interpretative principles as enshrined in Article 7(1), and the underlying

[1090] Felemegas, "The United Nations Convention on Contracts for the International Sale of Goods: Article 7 and Uniform Interpretation," (see introduction, n. 41).

[1091] Ibid.

[1092] For a summary of the disagreements among the scholars on this issue, please refer to Chapter I.

nature of the Convention. How is this mandate to be fulfilled in practice? There is an almost consensus among the commentators that the pursuit of uniformity in the application of the Convention is to be done by resorting to the CISG case law from different jurisdictions.[1093] However, in practice, this has been a rare occurrence. That is, it is only in approximately 1.5% of the CISG cases that one can observe references to the case law of other jurisdictions.[1094] Thus, it is not surprising that 30 years after the CISG went into effect the examples of non-uniform application of the Convention abound, as shown in Chapter II of this thesis. And as further shown in Chapter IV, non-uniformity in the application of the CISG cannot be perceived as a harmless anomaly as it has the potential to cause the dilution of the benefits of uniformity and act as a justification for the parties to exclude the Convention.

THE PATH TO UNIFORM APPLICATION

In order to effectively pursue uniformity in the application of the CISG, two essential elements need to be present: (1) a positive attitude of judges and arbitrators in showing a healthy dose of respect for the CISG case law from different jurisdictions,[1095] and (2) tools that would enable them effective access to that case law. If judges and arbitrators exhibit a positive attitude towards the use of the CISG case law from different jurisdictions, but are not able to obtain the necessary cases because of the lack of effective tools, they will not be able to contribute to the uniformity endeavour. Likewise, it would be of little use to have the effective tools in place unless

[1093] Schlechtriem and Schwenzer, *Commentary on the UN Convention on the International Sale of Goods (CISG)*, 124 (see introduction, n. 44); Kröll, Mistelis, and Viscasillas, *UN Convention on Contracts for the International Sale of Goods (CISG) - Commentary*, 128 (see introduction, n. 44).

[1094] Baasch Andersen, "The CISG in National Courts," 73 (see chap. 1, n. 119).

[1095] Flechtner, "The Several Texts of the CISG in a Decentralized System," 215 (see introduction, n. 45).

judges and arbitrators would be willing to use them. In other words, there has to be a synergy between the two elements.

In examining the causes of non-uniformity in the application of the CISG, Chapter III has, among other things, dealt with the human factor. More precisely, it was noted that decision-makers tend to be susceptible to the homeward trend, and that their incentives are not aligned with the pursuit of uniformity. From this, one can conclude that a positive attitude of judges and arbitrators to look into the CISG case law from various jurisdictions will frequently be absent. However, this thesis has not delved into this issue in great detail. The topic of uniform application of the CISG is a vast one, and not every aspect of it can be addressed in one doctoral thesis. For an in-depth analysis of the attitudes of judges and arbitrators towards using CISG case law from various jurisdictions, it would be advisable to take the jurisdiction-by-jurisdiction approach. This is so because with different jurisdictions come different specificities in this regard. Thus, this aspect of the topic of uniform application of the CISG has been left to be entertained more thoroughly in the future. The focus here, instead, has been on the tools that would enable judges and arbitrators to pursue the uniformity endeavour.

THE TOOLS FOR THE PROMOTION OF UNIFORMITY

Several tools for the promotion of uniform application of the CISG have been implemented.[1096] Some have been created and maintained by UNCITRAL (CLOUT and CISG Digest), a body under whose auspices the CISG was adopted. Some, like the CISG Pace Database, are private initiatives. However, it has been shown in Chapter V that these tools in their current form simply cannot support the uniformity endeavour in relation to the CISG. As noted earlier in

[1096] For a detailed discussion of the tools for the promotion of uniform application of the CISG, please refer to Chapter V.

this thesis, the CISG has been adopted by 89 states as of this writing.[1097] They span all inhabitable continents, and are vastly diverse in terms of language, legal systems, etc. In contrast, the majority of the tools for the promotion of uniform application of the CISG do not reflect this diversity. They are either heavily English-oriented, or have enabled access to the CISG materials in a rather limited range of languages, mostly including the official UN languages.[1098] This, in and of itself, constitutes a barrier that impairs accessibility to case law and other CISG-related materials. Furthermore, the tools for the promotion of uniform application of the CISG have exhibited other deficiencies, including lack of timeliness in collecting the CISG case law, absence of the systematic approach that results in some CISG cases being omitted, and underrepresentation of the views from the developing/non-Western states. If these matters are not observed, then the tools will not have an equalised impact across the jurisdictions that have adhered to the Convention. Consequently, Chapter V proceeded to put forth recommendations as to the improvements that could be made in the tools for the promotion of uniform application of the CISG. Chapter VI examined the tools that were proposed, but never implemented, showing that the room to seek improvements in the uniform application by adding more tools is very much limited.

WHAT LEVEL OF UNIFORMITY IS UNIFORM ENOUGH?

In overall terms, what level of uniformity should the CISG attain? In Chapter I different standards of uniformity that have been suggested in the literature were analysed. However, Chapter I concluded that none of them were appropriate. The strict uniformity standard was deemed as

[1097] Status - United Nations Convention on Contracts for the International Sale of Goods (Vienna, 1980)" (see introduction, n. 1).

[1098] For a detailed discussion of the tools for the promotion of uniform application of the CISG, please refer to Chapter V.

unrealistic while others were criticised for being too lenient and vague. Thus, Chapter I proceeded to coin a new standard – national law standard – which places the bar lower than strict uniformity, but higher than other proposed standards. More precisely, according to the national law standard, the CISG ought to be applied on average as uniformly as the national laws that the parties choose when they exclude the application of the Convention. Chapter I justified this standard by analysing the principle of uniformity as enshrined in Article 7(1) of the CISG and by noting that there is a degree of competition between the CISG and national sales laws which, in comparison to the CISG, offer a higher level of uniformity in their application. Chapter IV reinforced this conclusion by illustrating all the adverse effects that appear as a result of non-uniformity in the application of the CISG.

There is another practical argument to be made about setting the target high for the CISG in terms of its uniform application. Namely, if the bar is placed too low, there will be little incentive to seek improvements. There is every reason to think that judges and arbitrators would remain unbothered by the lack of convergence in the CISG case law because a lenient standard of uniformity can always be used to justify results that are at odds with widely accepted interpretations. However, if one accepts the national law standard, then this high threshold will pressurise judges and arbitrators to at least consider the matter of uniformity.

If the suggestions put forth in Chapter V regarding the tools for the promotion of uniformity in the application of the CISG were to be heeded, and if judges' and arbitrators' were to universally exhibit positive attitudes towards resorting to the CISG case law from different jurisdictions, then one would be tempted to ask the following question: Would this state of affairs inevitably lead to the attainment of the national law standard? Evidently, no conclusive answer can be given to this question. However, what can be said with certainty is that the environment for attaining a high

level of uniformity in such a scenario would be far more favourable than the one that is in place currently.

CISG AS A PRAISEWORTHY UNIFORM LAW INSTRUMENT

The analysis undertaken in this doctoral thesis ought not to be perceived as an attempt to undermine the successes of the Convention. In other words, this thesis does not join the ranks of authors who have criticised the usefulness of the CISG. On the contrary, the CISG is rightfully perceived as a successful endeavour towards the unification of private law at the international level. The following speaks in favour of this stance:

- The CISG has attracted an exceptionally high number of participating states;[1099]
- Some countries when reforming their sales laws have used the CISG as a model;[1100]
- Albeit the exclusion rates are high, the CISG is being used in practice, as evidenced by the existence of a respectable body of case law;[1101] and
- After three decades in effect, the Convention remains a fixture for numerous scholars who remain keen as ever to produce CISG scholarship.[1102]

Instead of undermining the successes of the Convention, the aim of this doctoral thesis has been to put forth food for thought that, eventually, could result in the CISG being even more successful than it is currently.

[1099] Status - United Nations Convention on Contracts for the International Sale of Goods (Vienna, 1980)" (see introduction, n. 1).

[1100] Franco Ferrari, "The CISG and Its Impact on National Legal Systems – General Report," 474 (see chap. 4, n. 610).

[1101] "CISG Database - Country Case Schedule," (see chap. 3, n. 516).

[1102] "Bibliography of CISG Materials in English," (see chap. 6, n. 1071).

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