



AN ANALYSIS OF FIVE OF THE PROVISIONS OF THE UNITED NATIONS CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS (CISG) THAT ARE MOST AT RISK OF DIVERGENT INTERPRETATION BY TRIBUNALS WITHIN DIVERSE NATIONS AND A BRIEF OVERVIEW OF THE IMPLICATIONS OF SOUTH AFRICA'S CHOICE NOT TO RATIFY THE CONVENTION.

SARISHA PREAMDUTH

211514748

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College of Law and Management Studies

School of Law

Unit of Maritime Law and Maritime Studies

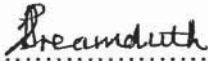
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II. DEDICATION

This dissertation is dedicated to my youngest sister Shari Preamduth for touching my life in a way that no one ever has. I have been richly blessed with a sister like you who has the purest and most innocent soul. This dissertation, apart from other accomplishments in my life is a product of the strength that you give me.

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IV. ABSTRACT

This study provides a critical analysis of the United Nations Convention on Contracts for the International Sale of Goods (CISG) in light of five aspects of the Convention, namely provisions dealing with usage of trade, the need for written contracts, open price terms, the notice requirement for non-conforming goods and force majeure that are most at risk of divergent interpretation by courts and tribunals globally. Such an analysis would also require a brief discussion on the background of the CISG, its objectives as well as the structure and scope of application of the Convention.

The study aims to create awareness of the CISG in South Africa even though it is not a member state of the Convention, considering the wide international acceptance of the Convention and the fact that it has been adopted by many of South Africa's major trading partners. In addition to a critical analysis on the provisions most at risk of divergent interpretation, this study also outlines the advantages and disadvantages of the Convention in order to assess South Africa's current position as a non-member state and the pros and cons of any future ratification of the CISG.

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CHAPTER ONE: INTRODUCTION

1.1. INTRODUCTION

Contracts of international sale are largely regulated by the national law of a particular country that is determined according to the applicable private international law rules, or in accordance with an express choice of law provision included by the parties to a contract, thus exercising party autonomy, which is a widely established contractual principle.¹ In a situation where a contractual dispute arises and it transpires that a choice of law proviso is absent, the determination of the applicable law governing the contract in accordance with the conflict of law rules is further complicated by the fact that the majority of domestic sales laws are not suited to provide for the specific requirements of modern international sales.²

The United Nations Convention on Contracts for the International Sale of Goods (hereafter referred to as the CISG) was developed as a means of dealing with the complexities that arise from the application of domestic laws in the regulation of cross-border sales disputes, by creating a set of uniform substantive rules to regulate the cross-border sale of goods.³

The CISG came into operation on 1 January 1988⁴ and according to the United Nations Commission on International Trade Law (UNCITRAL), as of the year 2017, the CISG has been adopted by 88 States.⁵ This Convention has been identified as a great success in harmonising sales law at an international level.⁶ As set out in its preamble, the principle objective of the Convention is to encourage international trade by eliminating legal barriers in the area of international trade.⁷ The CISG is a product of a build-up of more than fifty years of international attempts to harmonise

¹ S Viejobueno 'Progress through compromise: the 1980 United Nations Convention on Contracts for the International Sale of Goods' (1995) XXVIII *Comparative and International Law Journal of Southern Africa* 200.

² Ibid.

³ Ibid.

⁴ 'United Nations Convention on Contracts for the International Sale of Goods (Vienna, 1980) (CISG) ' available at http://www.uncitral.org/uncitral/en/uncitral_texts/sale_goods/1980CISG.html, accessed on 26 October 2016.

⁵ 'Status United Nations Convention on Contracts for the International Sale of Goods' available at http://www.uncitral.org/uncitral/en/uncitral_texts/sale_goods/1980CISG_status.html, accessed on 26 October 2016.

⁶ H M Flechtner 'United Nations Convention on Contracts for the International Sale of Goods' available at <http://legal.un.org/avl/ha/ccisg/ccisg.html>, accessed on 26 October 2016.

⁷ P Koneru 'The International Interpretation of the UN Convention on Contracts for the International Sale of Goods: An Approach Based on General Principles' (1997) *Minnesota Journal of Global Trade* 105.

international sales law, and various provisions of the CISG reflect the compromises that drafters had to reach following difficult negotiations leading up to the finalisation of the CISG.⁸ The integrity of the CISG and its success in achieving its objective of serving as a widely used and recognised international code of sales law, is dependent on the manner in which the provisions of the Convention are interpreted and applied by domestic courts and other forums that may be called upon to do so.⁹

1.2. STATEMENT OF PURPOSE AND RELEVANCE OF THE STUDY

This study aims to create awareness of the CISG in South Africa considering its wide accession by many influential states, including many of South Africa's major trading partners. This study undertakes a critical analysis of the five aspects of the Convention that are considered to be most at risk of divergent interpretation and application by domestic courts and other forums; it also outlines some of the factors that are for and against South Africa's ratification of the Convention. This study attempts to understand the positive features and failings of the CISG, aimed at the effective application of the CISG, as well as setting the foundation for future research developing the Convention and assessing the possibility of future ratification by South Africa.

1.3. PROBLEM STATEMENT

Risk of divergence in the interpretation and application of the CISG: The importance of uniformity in international trade law cannot be overstated. Without some degree of uniformity, international trade would suffer due to the legal uncertainties and costs spent by importers and exporters in order to familiarise themselves with the diverse laws and commercial practises in different countries. Effective regulation through the means of legal regimes such as the CISG that are enacted by appropriate international bodies, therefore enhances cross-border trading.

⁸ Ibid.

⁹ Ibid.

As stated in its preamble, one of the main objectives of the CISG is to promote international trade by creating uniformity in contracts of sale of goods between the diverse states of the world.¹⁰ In the application of the CISG between two parties, both the parties want some degree of certainty as well as a fair outcome in order to facilitate uniformity in international trade law. Thus, it is highly relevant and important to analyse the way in which the CISG is interpreted and applied by different states, and whether its application creates uniformity, which is a principle objective of the CISG. However, critics argue that the application of certain provisions contained in the CISG causes more uncertainty and confusion than uniformity.¹¹

Five of the most controversial aspects of the CISG that were the subject of great debate and controversy during the negotiation phase of the Convention and that are likely to result in the divergent interpretation and application of the CISG are the provisions relating to:

- Usage of trade
- The need for written contracts
- Open price terms
- The notice requirement for non-conforming goods
- Force majeure

This study undertakes a critical analysis of CISG provisions relating to each of these five aspects regulated under the CISG and how these provisions could be applied differently by states with diverse legal, economic and political interests.

Lack of awareness of the CISG in South Africa: It is interesting to note that South Africa is not a signatory of the CISG, which could possibly be due to its exclusion from international affairs, including the CISG negotiations, due to the apartheid race policies that existed in the country at the time.¹² South Africa's failure to ratify the CISG could also be attributed to the fact that the majority of traders and lawyers in the country, who are not routinely involved with international sales transactions, are unfamiliar with the Convention. However, many of South Africa's trading partners are

¹⁰ F Diedrich 'Maintaining Uniformity in International Uniform Law Via Autonomous Interpretation: Software Contracts and the CISG' (1996) 8 *Pace International Law Review* 303.

¹¹ J E Murray 'The Neglect of CISG: A Workable Solution' (1998) 17 *Journal of Law and Commerce* 367.

¹² S Eiselen 'Adoption of the Vienna Convention for the International Sale of Goods (the CISG) in South Africa' (1996) 2 *South African Law Journal* 1.

signatories to the Convention, which may place South Africa at a disadvantage if it continues to maintain its position not to ratify the CISG.¹³ An analysis of the above-mentioned five controversial provisions of the CISG will assist in determining whether it would be appropriate for South Africa, considering its legal and economic interests, to adopt the Convention; and whether it would prove to be an effective solution in the removal of trade barriers, thereby creating certainty in the international sale of goods both in the country and regionally.

1.4. THE SCOPE AND LIMITATIONS OF THE STUDY

An in-depth analysis of all 101 articles of the Convention is beyond the scope of this study. The scope of this study is limited to a brief discussion on the structure and application of the CISG; a critical analysis of the provisions relating to the five aspects of usage of trade, the need for written contracts, open price terms, the notice requirement for non-conforming goods and force majeure provided for under the CISG and it outlines some of the advantages and disadvantages of South Africa's ratification of the Convention. It is limited to an analysis on CISG provisions pertaining to the key research questions posed in the following sub-paragraph in this chapter of the study.

1.5. KEY RESEARCH QUESTION

This study focuses on provisions dealing with the five aspects (usage of trade; the need for written contracts; open price terms; the notice requirement for non-conforming goods and force majeure) of the CISG that present the greatest risk of divergent interpretation and application of the Convention, thereby posing a threat to its primary objective of creating a uniform law to govern cross-border sales transactions between diverse states.

This research further seeks to determine whether South Africa is advantaged or disadvantaged in maintaining its status quo of not ratifying the CISG by examining its decision in light of the primary objective of the Convention, as well as the above mentioned controversial provisions contained in the Convention.

¹³ Ibid.

The study seeks to answer the following questions:

1. Why and how do each of the above identified controversial provisions pose a high risk of divergent interpretation and application of the CISG?
2. What are the different interests and concerns of developed nations on the one hand and those of developing and socialist nations on the other hand that could lead to the divergent interpretation and application of these provisions by domestic courts and other forums?
3. What compromises were made during the negotiation phase of the Convention in order to pass these provisions through?
4. How do the reservations provided for in the CISG further complicate the application and interpretation of these provisions by States with diverse interests?
5. Briefly outline the reasons for and against South Africa ratifying the CISG.
6. Recommendations on how to enhance awareness of the CISG in South Africa due to its wide acceptance globally and the fact that many of South Africa's trading partners are signatories of the Convention.

1.6. CHAPTER OVERVIEW

Chapter One will introduce the topic of the study; the statement of purpose and relevance of the study; the problem statement; the scope and limitations of the study; key research questions; as well as a brief chapter by chapter overview of the study.

Chapter Two will look at the need for uniformity in the area of international sales law, focusing on the objectives and general principles of the CISG. It will also discuss the historical background to the creation of the CISG and briefly look at previous attempts made to unify sales law on an international scale.

Chapter Three will discuss the structure of the Convention, its sphere of application as well as provisions dealing with reservations in the Convention.

Chapter Four will critically analyse CISG provisions dealing with five of the most controversial aspects of cross-border sales regulated under the Convention, namely,

the provisions dealing with usage of trade, the need for written contracts, open-price terms, the notice requirement for non-conforming goods and force majeure. This chapter will examine the manner in which the above mentioned provisions are applied and interpreted by different States around the world with reference to case law.

Chapter Five will outline the advantages and disadvantages of ratifying the Convention.

Chapter Six concludes with recommendations on how to enhance awareness of the Convention in South Africa despite its choice whether or not to ratify the Convention, due to its possible application through the rules of private international law, as well as its wide acceptance by many states (including many of the country's major trading partners) as a unified international sales law code.

CHAPTER TWO: THE NEED FOR UNIFORMITY IN INTERNATIONAL TRADE LAW THAT RESULTED IN THE EMERGENCE OF THE CISG

2.1. THE NEED FOR UNIFORMITY

The demand for an effective uniform law that regulates the international sale of goods was triggered by the remarkable growth and advancement of international trade over the recent decades resulting in the creation of the CISG which came into effect on 1 January 1988.¹⁴ The CISG provides uniform substantive rules of law that regulate both the formation of contracts, as well as the rights and obligations of the buyer and seller in a contract for the international sale of goods.¹⁵

One of the main goals for the formation of the CISG was the achievement of uniformity and legal certainty by means of creating well-balanced rules to regulate international contracts of sale.¹⁶ Supporters of the CISG were influenced by the prospect of uniformity in the area of international trade law and recognise the Convention as a tool to achieve the development of an international community promoting trade and peaceful co-existence amongst States.¹⁷

Despite the necessity for uniformity in international trade, thereby creating legal certainty, there are a number of obstacles that hinder the achievement of this ideal; the textual non-conformity that results from the six official language versions of the Convention is only part of the bigger problem.¹⁸

A further drawback of the CISG is that it does not make any provision for a superior body that regulates the correct interpretation and application of its rules and reviews the decisions made by domestic courts and arbitral tribunals.¹⁹ Furthermore, due to

¹⁴ M T Murphy 'United Nations Convention on Contracts for the International Sale of Goods: Creating Uniformity in International Sales Law' (1988) 12(4) *Fordham International Law Journal* 727.

¹⁵ Ibid.

¹⁶ Diedrich op cit n 10.

¹⁷ Kastely A H 'Unification and Community: A Rhetorical Analysis of the United Nations Sales Convention Symposium: Reflections on the International Unification of Sales Law' (1988) 8(3) *Northwestern Journal of International Law & Business* 582.

¹⁸ Flechtner H M '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)' (1998) 7 *Journal of Law and Commerce* 187.

¹⁹ Hackney P 'Is the United Nations Convention on the International Sale of Goods Achieving Uniformity?' (2001) 61(2) *Louisiana Law Review* 475.

the commercial interests of importers and exporters in efficiently and expeditiously resolving contractual disputes, it is highly unlikely that such a superior body causing delays in the resolution of disputes may ever come into existence.²⁰

Bailey submits that critics of the Convention are of the view that the CISG might not actually be a success in light of its objectives, due to the obstacles to uniformity created by the risk of divergent interpretations and application of its provisions.²¹ The CISG also creates a great deal of room for courts to resort to the application of the rules of private international law, should the court be unable to find a provision or general principle within the Convention that regulates a specific aspect of the contract.²² As such, Bailey is of the view that it is not possible for the CISG to accomplish perfect uniformity as long as courts and arbitral tribunals continue to apply and interpret the CISG in a divergent manner.²³

In order to accomplish the objective of creating uniformity in the area of international sales law, the drafters of the Convention included the provisions of Article 7 as a guide to the interpretation of the Convention.²⁴ The provisions of Article 7 are generally accepted and recognised as a governing principle on which the Convention is based. In terms of Article 7(1) of the CISG, interpreters of CISG provisions are directed to take into consideration the “international nature of the CISG, the need to encourage uniformity and the observance of good faith in international trade”.²⁵ Thus Article 7 attempts to ensure uniformity in the interpretation of the Convention by providing that such interpretation must be independent from domestic conceptions of sales law.²⁶ Furthermore, in terms of Article 7(2), issues that are regulated by the CISG, but are not explicitly settled in the CISG are to be dealt with in accordance with the general principles of the CISG and in the absence of any such principles, in

²⁰ Ibid.

²¹ J 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’ (1999) 32 *Cornell International Law Review* 276.

²² Ibid 287.

²³ Ibid.

²⁴ J P Quinn ‘The Interpretation and Application of The United Nations Convention on Contracts for the International Sale of Goods’ (2005)9 *International Trade & Business Law Review* 226.

²⁵ United Nations Convention on Contracts for the International Sale of Goods, Article 7(1).

²⁶ Hackney op cit n 19.

accordance with the law applicable as a result of the rules of private international law.²⁷

Zwart is of the opinion that when interpreting the CISG, courts must consider the interests and methods of interpretation between States of the East, West, Free-market, Socialist, Developing, as well as industrialised nations; and not merely consider the differences between the common and civil law jurisdictions.²⁸ Courts and arbitral tribunals are often tempted to resort to reliance on domestic sales law when interpreting the CISG as this is familiar to them, however in order to achieve uniformity, this should be avoided.²⁹ The proper interpretation of the Convention may also be aided by consulting doctrine, prior international case law and the legislative history of the CISG.³⁰

Supporters of the CISG therefore contend that the CISG makes available to the international community, a good text in terms of which they can debate and find common ground and in doing so attempt to achieve a greater level of uniformity in international sales law. Despite the diversity of the signatories of the CISG, they still believe that the CISG is capable of promoting a useful level of uniformity in international sales law.

2.2. THE EMERGENCE OF THE CISG

Efforts towards creating a set of international uniform substantive rules governing the international sale of goods can be traced back to the work of the International Institute for the Unification of Private Law (hereafter referred to as UNIDROIT), a private institution located in Rome.³¹ UNIDROIT which falls under the umbrella of the League of Nations, commenced specific attempts to create an international convention focused on unifying and harmonising international trade law.³²

In the year 1935 a preliminary text was drafted and distributed among the members of the League of Nations to comment on however this project was disrupted by

²⁷ H Booysen 'The International Sale of Goods' (1992)17 *South African Yearbook of International Law* 78.

²⁸ S G Zwart 'The New International Law of Sales: A Marriage Between Socialist, Third World, Common, and Civil Law Principles' (1988) 13 *North Carolina Journal of International Law and Commercial Regulation*.

²⁹ Op cit n 25 at Article 7(2).

³⁰ Hackney op cit n 19 at 479.

³¹ Kastely op cit n 17 at 579.

³² Bailey op cit n 21 at 274.

World War II in 1939.³³ After the end of World War II efforts to create a uniform law resumed once again and a diplomatic conference was held in 1951 in the Netherlands where a group of European scholars was appointed and authorised by UNIDROIT to draft a Uniform Law that would regulate the international sale of goods. This resulted in the creation of two 1964 Hague treaties, namely: the Uniform Law for the International Sale of Goods (hereafter referred to as ULIS) and the Uniform Law on the Formation of Contracts for the International Sale of Goods (hereafter referred to as ULF).³⁴ ULIS provided for a uniform set of substantive rules which regulated an international sale of goods contract between buyer and seller, whilst ULF regulated the formal rights and obligations of buyers and sellers to an international contract of sale.³⁵

Both treaties were adopted at the Hague conference. However, the majority of countries that adopted these two conventions were European, which was not surprising considering that the drafts were prepared by European scholars and reflected mainly civil law concepts.³⁶ ULIS and ULF entered into force in 1972, however many countries, including the United States of America and other major non-European trading nations refused to adopt these conventions. The unpopularity of the 1964 Hague Conventions stemmed from the fact that many nations considered these to be overly long and complicated, had too wide a scope of application and were primarily a European creation.³⁷

The Global participation of different states is essential for the creation of an internationally recognised convention regulating international trade.³⁸ Accordingly, the United Nations Commission on International Trade Law (hereafter referred to as UNCITRAL) was created by the General Assembly of the United Nations in 1966 to promote the unification and harmonisation of international commercial law, taking into consideration the diverse political, economic and legal interests of the different

³³ Kastely op cit n 17 at 579.

³⁴ N Boghossian 'A Comparative Study of Specific Performance Provisions in the United Nations Convention on Contracts for the International Sale of Goods' (1999-2000) *Pace Review of the Convention on Contracts for the International Sale of Goods* 5.

³⁵ M L Zientz 'A New Uniform Law for the International Sale of Goods: Is it compatible with American Interests?' (1980) 2 *Northwestern Journal of International Law & Business* 132.

³⁶ Boghossian op cit note 34.

³⁷ Bailey op cit n 21 at 274.

³⁸ Boghossian op cit n 34.

nations of the world.³⁹ UNCITRAL was tasked with the responsibility of drafting an international convention governing the formation and substantive rules flowing from such a contract of international sale of goods.⁴⁰ One of UNCITRAL's primary tasks was to form a Working Group to re-examine the 1964 Hague Conventions and attempt to prepare a revised text capable of wider international acceptance than the 1964 Hague Treaties.⁴¹

The efforts of this working group culminated in a diplomatic conference held in Vienna in 1980 that led to the coming into operation of the CISG.⁴² Sixty-two states as well as eight international organisations participated in this diplomatic conference following which the draft Convention was approved on 11 April 1980 after intense negotiations were held and certain adjustments were made to the draft.⁴³ The CISG came into effect on 1 January 1988 after its ratification by ten states which was the required minimum number of signatories.⁴⁴

It was a very difficult task to create a treaty that would be widely accepted by the many nations around the world with divergent political, legal and economic systems, as a result of which negotiations were equally difficult.⁴⁵ The process was made even more challenging by the notions of the various participating states that each of their domestic legal systems were far superior and should therefore take precedence over the legal systems of other states.⁴⁶ Achieving consensus among participating states becomes almost impossible when the various nations from around the world expect an international convention to incorporate their domestic laws even reaching a compromise is challenging under these circumstances.⁴⁷

Vast compromises had to be made in order to create an international convention catering for the diverse interests of many states. However, influential trading nations

³⁹ J S Ziegel 'The Future of the International Sales Convention from a Common Law Perspective' (2000) 6 *New Zealand Business Law Quarterly* 337.

⁴⁰ I Carr & P Stone *International Trade Law* 4ed (2010) 57.

⁴¹ Kastely op cit n 17 at 581.

⁴² Boghossian op cit n 34.

⁴³ Ibid.

⁴⁴ Viejobueno op cit n 1 at 201.

⁴⁵ L A DiMatteo 'The CISG and the Presumption of Enforceability: Unintended Contractual Liability in International Business Dealings' (1997) 22 *Yale Journal of International Law* 122.

⁴⁶ Boghossian op cit n 34.

⁴⁷ Ibid.

were reluctant to give up their powerful bargaining position.⁴⁸ Delegates from the different nations that participated in the negotiation process therefore had to formulate a workable system that could find practical solutions for a whole range of circumstances, avoiding the dominant application and use of a single legal system prevailing in the application of the CISG.⁴⁹ As a result, the CISG evolved into a unique hybrid system incorporating aspects of the civil, socialist and common law legal systems of contract.⁵⁰

⁴⁸ Ibid.

⁴⁹ Ibid.

⁵⁰ DiMatteo op cit n 45.

CHAPTER THREE: THE SCOPE AND APPLICATION OF THE CISG

3.1. INTRODUCTION

The CISG is a widely accepted international convention and is the subject of great legal interest that has attracted the attention of both domestic and international law makers.⁵¹ An understanding of the general principles upon which the Convention is based, its structure and scope of application is therefore of importance to lawyers, traders, courts and arbitral tribunals regularly engaging in international sales law.⁵² Such an understanding aids in determining whether an international contract of sale falls within the ambit of the CISG.⁵³

3.2. BASIC STRUCTURE OF THE CISG

The CISG contains 101 articles and is divided into four main parts. Part 1 is concerned with the scope of application of the CISG and comprises of general provisions that are applicable to the rest of the Convention; Part 2 deals with rules that govern the formation of contracts of sale; Part 3 deals with the rules that govern the seller's and buyer's substantive rights and obligations and Part 4 comprises of the final provisions on adherence to and ratification of the CISG by contracting States, containing the reservations that may be declared by member States of the CISG.⁵⁴

3.3. THE REQUIREMENTS FOR THE APPLICATION OF THE CISG

The Convention applies on a transactional basis and in order for it to apply to a contract of sale, the contract must meet three requirements set out in Article 1(1) of the CISG, namely: (a) the transaction must constitute a sale of goods; (b) the transaction must be international; and (c) the transaction must bear one of two alternative relations to the CISG.⁵⁵ Below is a discussion of each one of the requirements set out in Article 1(1) of the Convention.

⁵¹ J Perovic 'Selected Critical Issues Regarding the Sphere of Application of the CISG' (2011) 181(3) *Belgrade Law Review* 182.

⁵² Ibid.

⁵³ 'A practical guide to the CISG: Negotiations through litigation' available at <http://www.cisg.law.pace.edu/cisg/biblio/butler6-ch2.pdf>, accessed on 30 November 2016.

⁵⁴ R Krieger 'The United Nations Convention on Contracts for the International Sale of Goods: An Assessment of its Impact on International Transactions' (1989) 184 *The South African Law Journal* 184.

⁵⁵ C Hugo 'The United Nations Convention on the International Sale of Goods: Its Scope of Application from a South African Perspective' (1999) 11 *South African Mercantile Law Journal* 4.

(a) Sale of Goods

- Goods

The Convention applies mainly to the sale of goods comprising of tangible objects capable of delivery.⁵⁶ Transactions involving the sale of intellectual property or industrial rights do not fall within the definition of the CISG.⁵⁷ Schlechtriem therefore submits that the sale of real estate does not constitute the sale of 'goods' in terms of the definition of the Convention.⁵⁸ Some assets that are regarded as goods in certain jurisdictions, for example, the sale of electricity, ships, negotiable instruments, shares and stocks are excluded from the definition of 'goods' under Article 2 of the CISG.⁵⁹ Furthermore in terms of Article 2, goods that are purchased for personal, family or household use, that are considered to be consumer goods, do not fall under the scope of the CISG.⁶⁰

Article 3 widens the scope of what constitutes 'goods' under the CISG to include the sale of goods to be manufactured or produced, including raw materials and semi-manufactured goods.

Hugo further advances that it is important for the term 'goods' to be interpreted widely and flexibly, and that academics tend to agree 'goods' refer to tangible movables which are not specifically excluded from the ambit of the Convention.⁶¹ The term 'goods' also include important commodities such as oil and gas.⁶² Despite some problematic questions being avoided by specific exclusions, borderline areas still exist.⁶³ Such borderline case and one of the most controversial topics is attempting to determine whether computer software is included in the definition of 'goods' under the CISG.⁶⁴

⁵⁶ P Schlechtriem 'Requirements of Application and Sphere of Applicability of the CISG' (2005) 36 *Victoria University Wellington Law Review* 786.

⁵⁷ Ibid.

⁵⁸ Ibid.

⁵⁹ Ibid.

⁶⁰ Ibid.

⁶¹ Hugo op cit n 55 at 6.

⁶² Ibid.

⁶³ Ibid.

⁶⁴ Schlechtriem op cit n 56.

According to Mowbray, the three most important categories of computer software that should be considered are; software on a disk, custom-made software and electronic software.⁶⁵

Software on a disk which is furnished and sold on a disk appears akin to any other sale of goods transaction to which the CISG applies as it is a tangible item which is transferred from seller to buyer however, the disk also contains the intangible software program which is separated from the disk after delivery by being downloaded onto the hard drive of the buyer's computer.⁶⁶ It is implied in the *Oberlandesgericht of Koblenz*⁶⁷ decision that both the software programme and the tangible disk containing the programme, falls under the application of the CISG.⁶⁸ Mowbray submits that a number of commentators have supported this approach in the view that computer software is no different to other goods delivered on a disk, similar to books in which the intellectual property is attached to the tangible good.⁶⁹ As such, Mowbray believes that "sufficient consensus has been achieved on this point that there is currently no real controversy in international contract law that the CISG applies to software delivered on a disk".⁷⁰

Secondly, custom-made software is software which is specifically manufactured and developed for a specific purchaser, and according to the UNCITRAL Working group, "The sale of 'custom-made software' would probably have to be excluded from the current sphere of application of the Convention since, according to article 3(2), the 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".⁷¹

⁶⁵ J Mowbray 'The Application of the United Nations Convention on Contracts for the International Sale of Goods to E-Commerce Transactions: The Implications for Asia' (2003) 7 *Vindabona Journal Commercial Law & Arbitration* 126.

⁶⁶ Ibid.

⁶⁷ Germany 17 September 1993 Appellate Court Koblenz (*Computer chip case*) available at <http://www.unilex.info/case.cfm?pid=1&do=case&id=64&step=Abstract>, accessed on 30 November 2016.

⁶⁸ Mowbray op cit n 65.

⁶⁹ Ibid.

⁷⁰ Ibid.

⁷¹ Ibid at 127. Referring to Note by the Secretariat for the thirty-eighth session of the UNCITRAL Working Group on Electronic Commerce, UN Doc A/CN.9/WG.IV/WP.91 (2001), at paragraph 27.

And finally electronic software is software that is transferred electronically and not delivered on a disk or another physical object.⁷² Electronic software is transferred via the internet and is considered absolutely intangible therefore it is most likely that the CISG will not apply to the sale of electronic software because intangible goods generally do not fall within the ambit of the CISG.⁷³

- Sales

Article 1(1) of the CISG does not define a 'sale', but a definition may be indirectly construed by considering the provisions dealing with the obligations of the buyer and seller set out in the Convention.⁷⁴ In terms of Article 30, the seller must 'deliver the goods, hand over any documents relating to them, and transfer the property in the goods', and in terms of Article 53, the buyer must 'pay the price for the goods and take delivery of them'. In this regard, it may be viewed that the definition of 'sale' in the Convention corresponds closely with that of most national codes,⁷⁵ including the definition of a contract of sale under South African Law. However, Hugo advances that critics remain divided on the point regarding whether 'price' is required to be in money.⁷⁶ The dominant view on the subject is that the 'price' is to be determined in the form of money and that barter agreements and the exchange of goods for services are generally excluded from the ambit of the CISG.⁷⁷ However, Hugo submits that the CISG could nevertheless be applicable to countertrade dealings involving reciprocal purchases.⁷⁸

In terms of Article 3 of the CISG, the sale of goods that are to be produced or manufactured may also fall within the scope of transactions that are governed by CISG.⁷⁹ However, Schlechtriem advances that Article 3 of the CISG creates some uncertainty in the distinction between sales and service contracts in which goods are to be produced or altered, specifically in a situation where the buyer provides all or a

⁷² Ibid at 129.

⁷³ Ibid.

⁷⁴ Perovic op cit n 51.

⁷⁵ Ibid.

⁷⁶ Hugo op cit n 55.

⁷⁷ Ibid.

⁷⁸ Ibid.

⁷⁹ Ibid at 5.

major part of the supplies.⁸⁰ In this respect, Article 3(1) of the Convention states that such a transaction is “to be regarded a sale unless the purchaser undertakes to provide a substantial part of the materials required for such production or manufacture”.⁸¹ According to Hugo, Article 3(1) “turns mainly on the interpretation of ‘a substantial part’, and to a lesser degree also on the ‘term materials’”.⁸² One could understand it as, if all materials or a substantial part thereof was to be supplied by the purchaser, then the CISG will not apply to that transaction.⁸³

A ‘substantial part’ is commonly understood to mean not essentially the major part but a considerable part will be sufficient to render the Convention inapplicable.⁸⁴ In this regard, Hugo suggests that the value should be the decisive factor, rather than the weight and the volume of the goods supplied.⁸⁵ With regards to the phrase ‘materials’, Hugo submits that many academics are of the view that materials mean either raw materials or semi-finished goods.⁸⁶

However in terms of Article 3(2) of the Convention, the Convention will not apply to a contract in which the ‘preponderant part’ of the obligations of the party who supplies the goods (seller) comprises in the supply of labour or other services.⁸⁷ Hugo submits that a ‘preponderant part’ is clearly more than a ‘substantial part’.⁸⁸ Therefore Article 3 does make provision for mixed/hybrid sale-service contracts to fall within its scope. Determining whether such a contract falls within the scope of the Convention requires a court or arbitral tribunal to apply a predominance test that is if the preponderant part of the transaction involves the supply of goods by the seller then the contract will be governed by the CISG. If on the other hand the preponderant part of the transaction involves the supply of services by the seller, the contract will not fall under the scope of the CISG.

⁸⁰ Schlechtreim op cit n 56.

⁸¹ Ibid.

⁸² Hugo op cit n 55 at 5.

⁸³ Ibid.

⁸⁴ Ibid.

⁸⁵ Ibid.

⁸⁶ Ibid.

⁸⁷ Perovic op cit n 51 at 185.

⁸⁸ Hugo op cit n 55 at 6.

(b) Internationality

The Convention exclusively regulates the international sale of goods i.e. it only applies to cross-border sales. The requirement that needs to be satisfied for a contract of sale to be governed by the CISG is that the parties' places of business must be in different states.⁸⁹ Therefore, if the parties' places of business are in different states, then the Convention will be applicable even if the formation and performance of the contract occurred in a single state.⁹⁰

The 'moment' relevant from when parties are required to have their places of business in different states is not provided for in the Convention however, the time of the conclusion of the contract appears to be the most logical time.⁹¹

Hugo further submits that in order for the CISG to regulate a contract of sale, the fact that the parties have 'places of business' in different states must be evident from either the contract, from any communication between the parties, or from information furnished by the parties before the conclusion or at the conclusion of the contract in accordance with Article 10 of the CISG.⁹² Therefore, the essence of Article 1 in this regard is that the parties to the contract must be aware of the international nature of the sale at the point of the conclusion of the contract.⁹³

The Convention requires that the contracting parties' places of business must be in different States as such the place of business of persons such as an agent or representative of either of the contracting parties is irrelevant.⁹⁴

The Convention does not define the concept 'place of business' however Hugo advises that the term must be interpreted in accordance with the principles on which the Convention is founded, specifically in accordance with Article 7.⁹⁵ Hugo submits that according to Honnold, 'place of business' should be interpreted to mean "a permanent and regular place for the transacting of general business", and as such the term does not comprise of places of temporary use such as a stall at an

⁸⁹ Schlechtreim op cit n 56 at 782.

⁹⁰ Hugo op cit n 55 at 7.

⁹¹ Ibid.

⁹² Ibid at 8.

⁹³ Ibid at 8.

⁹⁴ Op cit n 53.

⁹⁵ Hugo op cit n 55 at 8.

international fair or a hotel suite.⁹⁶ The term need not be interpreted to mean the business's main office however what is important is that a real connection must exist between the party and the place.⁹⁷

Large business enterprises have several 'places of business' in many states around the world, and according to Article 10(a) of the CISG, the applicable place of business is that which has the 'closest relationship to the contract and its performance, having regard to the circumstances known to or contemplated by the parties before or at the conclusion of the contract'.⁹⁸ However, if a party does not have a 'place of business' as referred to above, then Article 10(b) provides that mention must be made of its 'habitual residence'.⁹⁹

(c) The transaction must bear one of two alternative relations to the CISG

In order for the CISG to regulate a contract of sale, the place of business of the contracting parties must be in different states and both States must either be contracting States of the CISG as provided for in Article 1(1)(a) or 'the rules of private international law must lead to the application of the law of a contracting state of the CISG as provided for in Article 1(1)(b). Thus, in a situation where each of the parties' place of business is in a contracting State of the CISG, the Convention may be applied automatically without having regard to the rules of private international law.¹⁰⁰ However, if both parties' places of business are not within contracting States of the CISG, then the rules of private international law become relevant when determining which law is applicable to that contract.¹⁰¹ That is even if the place of business of one of the parties is not within a contracting State of the CISG, if the rules of private international law point to the law of a contracting State of the CISG, then the contract may still be subject to the application of the Convention.

⁹⁶ Ibid. Hugo referring to J Honnold *Uniform Law for International Sales under the 1980 United Nations Convention* 2 ed (1991) 102.

⁹⁷ Ibid at 8.

⁹⁸ Ibid.

⁹⁹ Ibid.

¹⁰⁰ Ibid at 9.

¹⁰¹ Ibid.

The broad scope of application of Article 1(1)(b) was a contentious issue during the negotiation phase of the CISG that resulted in the compromise incorporated in Article 95 of the CISG, which will be discussed hereunder.¹⁰²

3.4. THE EFFECT OF CERTAIN RESERVATIONS OF THE CONVENTION

In an attempt to give the Convention the widest possible reception, the CISG makes provision for certain reservations that are available to member states to declare.¹⁰³ According to Schroeter, the majority of CISG commentators believe that the Convention makes five reservations available namely Articles 92, 93, 94, 95 and 96, and it is only these reservations that are permitted.¹⁰⁴ For the purposes of this study the writer will undertake a brief discussion of each of these reservations hereunder, starting with the Article 95 reservation which is the most important reservation to consider when looking at the scope of application of the Convention.

Article 95 – Qualifying the Reservation under Article 1(1) (b)

In terms of the Article 95 declaration, ‘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’.¹⁰⁵ According to 1(1)(b) ‘This Convention applies to contracts of sale of goods between parties whose places of business are in different States when the rules of private international law lead to the application of the law of a Contracting State’.¹⁰⁶ That is a contracting state of the CISG that has declared this reservation at the time of its ratification of the CISG, is not bound by Article 1(1)(b). This reservation was made by the United States of America (hereafter referred to as USA) upon its ratification of the CISG in 1980. The application of this reservation entails that a court or arbitral tribunal is precluded from applying the CISG to an international contract for the sale of goods involving a party whose place of business is in a contracting state that has made the Article 95 reservation and a party whose place of business is in a non-contracting

¹⁰² Schlechtreim op cit n 56 at 783.

¹⁰³ Hugo op cit n 55 at 10.

¹⁰⁴ U G Schroeter ‘Reservations and the CISG: The Borderland of Uniform International Sales Law and Treaty Law after thirty-five years’ (2015) 41(203) *Brooklyn Journal of International Law* 212.

¹⁰⁵ Op cit n 25 at Article 95.

¹⁰⁶ Op cit n 25 at Article 1(1)(b).

state, even when the relevant private international law rules point towards the application of the CISG to that contract.¹⁰⁷

Article 92 – Reservation as to Application

In terms of Article 92, a Contracting State is allowed at the time of ratification to declare that it will not be regulated by Part II of the Convention which deals with contract formation, or by Part III which is considered as a major part of the Convention that deals with the parties' obligations, their available remedies as well as the passing of risk.¹⁰⁸ Scandinavian countries such as Denmark, Finland, Norway and Sweden have made use of this Article to exclude the application of Part II of the Convention.¹⁰⁹ Something interesting to note though is that no country has excluded Part III of the CISG, as without Part III the Convention would be more or less futile.¹¹⁰

Article 93 – Territorial Reservation

In terms of Article 93 a Contracting State may at the time of ratification or at any moment thereafter facilitate Article 93 to declare that the Convention extend to all of its territorial units, alternatively to one or more of them.¹¹¹ Canada made an Article 93 declaration to make the CISG applicable to all its provinces and territories, Australia made an Article 93 declaration to preclude the CISG from applying to territories such as Christmas Island, Kokos Island, Ashmore Island and Cartier Island.¹¹² Denmark has also made an Article 93 declaration to precluding the CISG from applying to Faeroe Islands and Greenland.¹¹³

Article 94 – Closely Related Legal Rules Reservations

In terms of Article 94, Contracting States which have similar sales laws are permitted to declare an Article 94 reservation which precludes application of the Convention.¹¹⁴ An implied requirement to an Article 94 declaration is that the respective Contracting

¹⁰⁷ K Bell 'The Sphere of Application of the Vienna Convention on Contracts for the International Sale of Goods' (1996) 8 *Pace International Law Review* 247-248.

¹⁰⁸ Op cit n 53.

¹⁰⁹ Hugo op cit n 55 at 10.

¹¹⁰ Ibid.

¹¹¹ Op cit n 53.

¹¹² Hugo op cit n 55 at 11.

¹¹³ Ibid.

¹¹⁴ Op cit n 53.

States have fundamentally similar legal rules on issues which are regulated by the Convention.¹¹⁵ If an Article 94 reservation is made and established then the Convention will not regulate contracts of sale which concern the parties having their place of business in those specified Contracting States.¹¹⁶

Article 96 – Written Requirements Reservation

A State that has declared the Article 96 reservation may ensure that it maintains its formal contractual requirements through the application of Article 12.¹¹⁷ According to Article 12, “Any provision of article 11, article 29 or Part II of this Convention that allows a contract of sale or its modification or termination by agreement or any offer, acceptance or other indication of intention to be made in any form other than in writing does not apply where any party has his place of business in a Contracting State which has made a declaration under article 96 of this Convention. The parties may not derogate from or vary the effect of this article”.¹¹⁸ Contracting States such as Russia and Argentina that have made this reservation retain their domestic formal written requirements for contracts under the Convention as the articles allowing for the informal cancellation or alteration of the contract or any part thereof are not applicable to contracts entered into by parties whose place of business are in such States. The writer will discuss this reservation in more detail in chapter four when discussing the provisions dealing with the ‘need for written contracts’ in the Convention.

3.5. SPECIFIC EXCLUSIONS

Certain sales transactions are expressly excluded in terms of Article 2 of the Convention.¹¹⁹ These exclusions concern ‘the purpose for which the goods are bought, the nature of the sale and the subject matter of the sale’.¹²⁰ In terms of Article 2, six categories of sales are expressly excluded from the scope of the CISG and these categories consist of goods purchased for personal, family or household use (consumer goods), unless the seller was unaware that the goods were intended

¹¹⁵ Ibid.

¹¹⁶ Ibid.

¹¹⁷ Ibid.

¹¹⁸ Op cit n 25 at Article 12.

¹¹⁹ Hugo op cit n 55 at 12.

¹²⁰ Ibid.

for such use.¹²¹ The purpose of such an exclusion is to avoid issues of conflict between the CISG and mandatory domestic laws and rules which are created to protect consumers.¹²² Other sales which are excluded from the ambit of the Convention by virtue of Article 2 are sales by auction, under authority of law, securities, vessels, or electricity; as well as stocks, shares, investments and negotiable instruments.¹²³

3.6. ASPECTS OF THE CONTRACT SPECIFICALLY EXCLUDED FROM THE AMBIT OF THE CISG.

Article 4 of the Convention limits its scope to the formation of the contract and the rights and obligations of the seller and buyer resulting from such contract any other issue concerning the contract falls outside of the scope of the CISG.¹²⁴

With regard to the CISG regulating the formation of contract, this concerns only the mechanics of offer and acceptance and not the contract's material validity, which is left up to the applicable domestic law.¹²⁵ That is, questions regarding the validity of the contract, any of its terms or usages do not fall within the scope of the Convention in terms of article 4(a).¹²⁶ These questions must be dealt with according to the relevant domestic law.

Determining whether a contract has come into existence for the purposes of the Convention is to be decided by exclusive reference to the Convention, unless a state is not bound by Part II of the CISG in terms of the Article 92 reservation.¹²⁷ With regard to the rights and obligations of parties, these must originate from the contract itself within the ambit of the Convention and not from another source such as delict or enrichment.¹²⁸ Furthermore, in terms of article 5, the CISG does not regulate the

¹²¹ Bell op cit n 107 at 250-251.

¹²² Ibid.

¹²³ Hugo op cit n 55 at 13-14.

¹²⁴ Bell op cit n 107 at 252.

¹²⁵ Hugo op cit n 55 at 13-14.

¹²⁶ Booyesen op cit n 27.

¹²⁷ Hugo op cit n 55 at 13-14.

¹²⁸ Ibid at 14.

liability of the seller for death or personal injury caused by the goods to any person.¹²⁹

3.7. PARTY AUTONOMY

The final decision of whether the CISG is to apply to a contract lies with the parties to the contract and this is recognised as the principle of party autonomy.¹³⁰ Party autonomy is recognised as one of the fundamental principles underlying the Convention.¹³¹ The objective behind the party autonomy principle given effect to in the CISG, is the reassurance of importers and exporters who are generally sceptical of being subject to unfamiliar rules.¹³²

Article 6 of the CISG provides contracting parties whose places of business are in member states of the CISG to elect which law will be applicable to their contract, and in terms of which they may derogate or vary from any part of the Convention, or even choose to exclude the application of the CISG in its entirety.¹³³

It is unclear whether this freedom to contract allowed under the Convention extends to parties whose places of business are not in member states of the CISG, but who nevertheless wish to have the CISG applicable to their contract. Many CISG authors are of the opinion that in such an instance, the CISG would apply to the transaction as contract itself and not as convention in order to avoid the infringement of any mandatory domestic law provisions that may be applicable to the transaction.¹³⁴

¹²⁹ Booyesen op cit n 27.

¹³⁰ Bell op cit n 107 at 254-255.

¹³¹ Ibid.

¹³² Hugo op cit n 55 at 21.

¹³³ Ibid.

¹³⁴ Ibid at 26.

CHAPTER 4: SELECTED PROVISIONS OF THE CISG THAT ARE MOST LIKELY TO CREATE DIVERGENT INTERPRETATION AND APPLICATION

4.1. INTRODUCTION

Compromises that were made in the drafting process of the CISG expose certain conceptual gaps within the Convention that are present due to balancing the varied legal, political and economic interests between developed and developing countries on the one hand, and socialist and capitalist states on the other.¹³⁵ The CISG therefore comes across as an outcome of compromise rather than consensus in achieving its objective of creating uniform rules applicable to contracts involving the cross border sale of goods.

Deliberations leading up to the finalisation of the Convention were marked by tensions resulting from the different interests and approaches to law and policy of the various states involved. For instance, socialist countries give primary importance to the security and foreseeability of contracts as opposed to industrialised nations that have a more flexible approach towards commercial contracts and trade in general.¹³⁶ Stemming from their differences in economic interests and approaches to law, similar disagreements also arose between developed and developing nations.¹³⁷ Traders from developing nations are generally new to international trade and are wary of being subjected to unfamiliar laws regulating their relationship with traders from economically powerful, developed states. They attempted to bargain for more favourable terms due to their weaker economic position compared to developed states.¹³⁸

As outlined in chapter one of this study, the effects of compromises reached in relation to the CISG provisions of usage of trade, the need for written contracts, open price terms, the notice requirement for non-conforming goods and force majeure will be critically examined and discussed in this chapter.

¹³⁵ Vlejobueno op cit n 1 at 202-203.

¹³⁶ A M Garro 'Reconciliation of Legal Traditions in the U.N Convention on Contracts for the International Sale of Goods' (1989) 23 *Pace Institute of International Commercial Law* 11.

¹³⁷ Vlejobueno op cit n 1 at 211.

¹³⁸ Boghossian op cit n 34 at 12.

4.2. Usage of Trade

Negotiations dealing with trade usage led to much debate between socialist and developing countries on the one hand and developed states on the other hand.¹³⁹ Besides factors relating to planned economies for foreseeability and security in contractual dealings, most developing and socialist nations were wary of the unfamiliar international trade usages, customs and practises established primarily by developed nations, reflecting their (developed state's) interests and approach to law and commerce.¹⁴⁰ Developed states on the other hand, place great significance on well-known and observed international trade usages as a means to expand commercial flexibility in order to enhance economic efficiency.¹⁴¹

Socialist countries argued for trade usages to be enforceable only if agreed to by the parties to a sales contract. On the other hand, Developed countries were in favour of trade usages being enforceable even in instances where the parties may have impliedly agreed to the application of such usages and ought to have known of such usages; they argued that this was necessary to ensure commercial flexibility and efficiency in international sales transactions.¹⁴² These opposing views led to the compromises that were reached in Article 9 of the CISG.

In an attempt to address the concerns of developing and socialist states, Article 9(1) of the CISG provides that parties are bound by any usage to which they have agreed to as well as any practises that they have established between themselves. However, Article 9(2) somewhat contradictorily goes on to state that unless the parties had agreed otherwise, they are bound by any usage that they 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. The provisions of Article 9(2) favour the view of developed states that contracting parties are bound by applicable trade usages even if they were unaware of any such usage and had not expressly agreed to it.

¹³⁹ Ibid at 14.

¹⁴⁰ Garro op cit n 136 at 21.

¹⁴¹ Ibid at 22.

¹⁴² Ibid.

Article 9 contains a rather uneasy compromise attempting to balance the conflicting views of developed, developing and socialist states. In order to assess the impact of Article 9, it is important to examine the two opposing approaches to commercial contracts reflected in this provision.¹⁴³ The first being the subjective approach in terms of which a usage can only be applicable and enforced if the parties had agreed to it.¹⁴⁴ Following this approach, usages are part of the contract and parties cannot be bound by any usages that they are unaware of and did not agree to.¹⁴⁵

Following the objective approach on the other hand, if a particular usage has normative authority or represents a legal norm, then such usage is applicable.¹⁴⁶ In terms of this approach, the exercise of usages in contract originates from the mandatory force of the usage itself regardless of the intention of the parties to be bound by such usage thus rendering the usage applicable to the contract even where the parties are unaware of such usage.¹⁴⁷

The application and interpretation of Article 9 as to what constitutes a trade usage or trade practise under the CISG can be found in case law. In one arbitral decision,¹⁴⁸ a German seller and a Spanish buyer concluded an agreement in terms of which the seller was to be the exclusive distributor of German industrial equipment to the Spanish buyer. A number of individual sales contracts were then concluded between the parties. The contractual relationship between the parties was terminated four years later and many contractual disputes were raised in arbitration however the dispute of interest to our discussion was whether there was an obligation on the seller to deliver spare parts in addition to the industrial equipment itself. The sole arbitrator found that since the seller had delivered spare parts in the past, such delivery of spare parts was considered to be a practise established between the parties as defined in Article 9(1) of the CISG. The seller was therefore obliged to

¹⁴³ Ibid at 23.

¹⁴⁴ Ibid.

¹⁴⁵ P X Bout 'Trade Usages: Article 9 of the Convention on Contracts for the International Sale of Goods' available at <https://www.cisg.law.pace.edu/cisg/biblio/bout.html>, accessed on 10 July 2017.

¹⁴⁶ Ibid.

¹⁴⁷ Ibid at 2.

¹⁴⁸ *Industrial Equipment Case*, Court of Arbitration of the International Chamber of Commerce, 23 January 1997, case no. 8611, available at <http://www.unilex.info/case.cfm?pid=1&do=case&id=229&step=Abstract>, accessed on 10 August 2017.

comply with such delivery and to do so within a reasonable time in accordance with Article 33(c) and Article 7(2) of the CISG.

In another matter¹⁴⁹ involving an Austrian seller and a Swiss buyer, the seller sent the buyer a letter of confirmation in relation to the sale of textiles and thereafter issued invoices in respect of this transaction to the buyer. The buyer denied liability and disputed the existence of the sales contract. In this case the court found that the CISG was applicable. The court held that a sales contract had been validly concluded through the letter of confirmation sent to the buyer. The court found that such a manner of concluding a contract was recognised under both Swiss and Austrian domestic laws and the parties may therefore be considered to have implicitly made such a usage applicable to the formation of their contract in terms of Article 9(2). Furthermore, the court found that based on the correspondence between the parties, the conclusion of the contract through a letter of confirmation constituted a practise established between the parties in terms of Article 9(1), thereby awarding the seller the contract price plus interest.

In another case¹⁵⁰ involving a German seller and Austrian buyer, the Court pointed out that even though in terms of Article 4 of the Convention it does not deal with the validity of usages, in terms of Article 9 it does deal with the application of usages. The court stated that in order for a usage to be applicable, it does not necessarily have to be internationally accepted. The court further stated that in order for a usage to be considered widely known and regularly observed in international trade, as set out in Article 9(2) of the CISG, such a usage has to be recognised by the majority of people acting within the trade concerned. The court also stated that a party is required to know or ought to have known of a particular usage in a situation where the party has its place of business in the geographical area where the usage applies, or if the party generally trades within the area wherein the usage is applicable.

The CISG is silent on whether the trade usage or CISG provisions will prevail in a case of conflict between these, and in doing so creates uncertainty in this regard.

¹⁴⁹ Switzerland 21 December 1992 Civil Court Basel (*Textiles case*) available at <http://cisgw3.law.pace.edu/cases/921221s1.html>, accessed on 4 January 2017.

¹⁵⁰ *Wood Case*, Oberster Gerichtshof Court, Austria, case no. 10 Ob 344/99g available at <http://www.unilex.info/case.cfm?id=478>, accessed on 4 January 2017.

However courts and arbitral tribunals have interpreted Article 9 in favour of trade usages.¹⁵¹ Pamboukis notes that the prevailing view in favour of trade usages in conflict with other CISG provisions, within UNCITRAL and the various states involved in the negotiations of the Vienna Convention, was based on one of its founding principles of party autonomy contained in Article 6 of the CISG: “The parties may exclude the application of this Convention or, subject to article 12, derogate from or vary the effect of any of its provisions.”¹⁵²

Pamboukis directs us to case law interpreting Article 9(1) & (2) in favour of trade usages even when in conflict with other CISG provisions.

In a decision¹⁵³ by a German Court a French seller entered into a contract of sale for doors with a German buyer however, the buyer claimed non-conformity of the goods and refused to pay the purchase price. This resulted in the seller bringing a claim against the buyer for the outstanding payment of the purchase price.

The seller was successful in its claim against the buyer. The court held that the buyer had to pay the purchase price, because the buyer had failed to sufficiently specify the non-conformity in accordance with Article 39(1) of the CISG, in addition to failing to inspect the goods in accordance with Article 38(1) of the CISG and forwarding such notice of non-conformity to the seller within a reasonable time.

The court stated that parties are permitted to derogate from the requirements set out in Articles 38 and 39 and instead apply other requirements set out in terms of trade usage. Nevertheless, in this case, the court found that such trade usage was non-existent.

¹⁵¹ C Pamboukis ‘The concept and function of usages in the United Nations Convention on the International Sale of Goods’ (2005) 25(107) *Journal of Law and Commerce* 109.

¹⁵² Ibid.

¹⁵³ Germany 13 January 1993 Appellate Court Saarbrücken (*Doors case*) available at <https://cisgw3.law.pace.edu/cases/930113g1.html> , accessed on 15 October 2017.

In another case¹⁵⁴ before an Argentinean Court for composition prior to bankruptcy, the court had to decide on the validity of interest claims on the purchase price emerging from two sales contracts between an Argentinean buyer and a Spanish seller and the same buyer and a Czech seller. In respect of interest claims on outstanding amounts payable in terms of the first sales contract, the court held that the interest rate of 24% was correct and had been agreed upon by the parties. The court based its finding on the principle of party autonomy, which is a founding principle of the CISG and allows parties a wide discretion in determining the terms of their contracts. With respect to the interest claims on the second contract, interest at a rate of 12% was determined by the court, as this was the rate generally known and recognised in that particular sphere of international trade. According to the court's reasoning, because the CISG fails to determine the interest rate, reference should be made to international trade usages 'which are assigned by the CISG itself at a hierarchical position higher than the very same CISG provisions (Art. 9 CISG)'.

4.3. The need for written contracts

The freedom of form principle contained in Article 11 and given effect to in other provisions of the Convention as well, was the source of much controversy and debate during the negotiation phase of the CISG.¹⁵⁵ These debates stemmed from the fact that the majority of western legal systems have done away with writing as a strict requirement for the valid conclusion of contracts for the sale of movable goods on the grounds that it is impractical and hinders the speed in which international business transactions are concluded.¹⁵⁶ In contrast, many socialist legal systems do not acknowledge the validity of a contract unless it is in writing.¹⁵⁷

¹⁵⁴ Argentina 23 October 1991 National Commercial Court of First Instance, Buenos Aires (*Aguila Refractarios / Conc. preventivo*) available at <http://www.unilex.info/case.cfm?pid=1&do=case&id=178&step=Abstract>, accessed on 15 October 2017.

¹⁵⁵ CISG-AC Opinion No. 15, Reservations under Articles 95 and 96 CISG, Rapporteur: Professor Doctor Ulrich G. Schroeter, University of Mannheim, Germany. Adopted by the CISG Advisory Council following its 18th meeting, in Beijing, China on 21 and 22 October 2013. Available at <http://www.cisg.law.pace.edu/cisg/CISG-AC-op15.html>, accessed on 5 January 2017.

¹⁵⁶ Garro op cit n 136 at 12.

¹⁵⁷ Ibid.

Article 11 provides that a contract of sale need not be in writing and may be evidenced by any means, including witnesses.¹⁵⁸ This informality principle is further given effect to in the provisions of Article 29(1), which provides that a contract may be modified or terminated by the mere agreement of the parties and does not have to be done so in writing.

In 1971, initial recommendations similar to the current provisions of Article 12 and 96 were forwarded to UNCITRAL by the then Union of Soviet Socialist Republic (hereafter referred to as USSR) in response to the provisions of Article 11.¹⁵⁹ Like most socialist states, the USSR was subject to legislation that required terms of a contract to be expressed and signed in writing.¹⁶⁰

Article 12 of the Convention states that any provision of Article 11, 29 or Part II of the CISG that permits a contract of sale, its modification, termination by agreement, offer, acceptance or any indication of intention to be made in any manner other than in writing, is not applicable in the event where any party to the contract has his place of business in a Contracting State that has made an Article 96 declaration under the CISG. Article 12 further provides that neither party may derogate from, nor vary the effect of this provision.

The Article 96 reservation came about as a compromise allowing states that required their agreements to be verified in writing to declare Article 11 inapplicable to the agreement established between the parties.¹⁶¹ The U.S.S.R, now Russia has been a principle supporter of the Article 96 reservation.¹⁶²

The effect of the provisions of Article 96 is extended to Article 29(2), which provides that a written contract that requires any modification or termination by agreement to be in writing, may not be modified or terminated in any way other than in writing. This is illustrated in a case¹⁶³ involving a Bulgarian seller and a Russian buyer that

¹⁵⁸ Op cit n 25 at Article 11.

¹⁵⁹ Op cit n 155.

¹⁶⁰ Ibid.

¹⁶¹ Vlejobueno op cit n 1 at 211.

¹⁶² Op cit n 155.

¹⁶³ Russia 16 February 1998 High Arbitration Court (or Presidium of Supreme Arbitration Court) of the Russian Federation: Information Letter 29 available at <http://www.unilex.info/case.cfm?pid=1&do=case&id=365&step=Abstract>, accessed on 16 September 2017.

concluded a written contract containing a choice of law clause in favour of Russian law. Arbitration proceedings were commenced by the seller against the buyer claiming damages for breach of contract as a result of the buyer's failure to pay the price. The buyer defended the proceedings by submitting that the contract had been modified by the parties telephonically and the price was already paid however the money had been stolen from the foreign bank as evidenced by the penal prosecution pending board.

The court noted that the declaration is made by the former U.S.S.R consistent with Articles 12 and 96 of the CISG maintained by the Russian Federation therefore any provision of Articles 11 and 29 that permit a contract of sale, its modification or termination to be in any form other than writing, does not apply in an instance where one of the parties to the contract has its place of business in the Russian Federation. Based on this ground, the court held that the modification of the contract by the oral agreement between the parties could not be valid.

However, Article 29(2) further goes on to provide that a party may be precluded by his conduct from asserting that any modification to the contract by any means other than in writing are invalid to the extent that the other party has relied on that conduct.

Honnold¹⁶⁴ illustrates the application of this provision by providing us with the following example:

“A written contract called for Seller to manufacture 10,000 units of a product according to specifications that were supplied by Buyer and set forth in the contract. The contract provided: "This contract may only be modified by a writing signed by the parties." Before Seller started production, the parties by telephone agreed on a change in the specifications. Seller produces 2,000 units in accordance with the new specifications; Buyer refused to accept these units on the ground that they did not conform to the specifications in the written contract.”

¹⁶⁴ J O Honnold excerpt from *Uniform Law for International Sales under the 1980 United Nations Convention* 3rd ed (1999) 229-235 available at <https://www.cisg.law.pace.edu/cisg/biblio/ho29.html>, accessed on 15 October 2017.

Honnold submits that due to the provision under Article 29(2), the oral agreement to modify specifications of the product is in itself ineffective.¹⁶⁵ However, the oral agreement of the buyer could be held to amount to “conduct” that would preclude the buyer from enforcing the clause in the contract to the extent to which the seller would have relied on such conduct; and the production of 2000 units by the seller in accordance with the oral agreement could amount to such “reliance”.¹⁶⁶ It is also important to note that the buyer is precluded only to the extent of such reliance and that the buyer should be allowed to insist on original specifications agreed upon with respect to the manufacturing of products for future production.¹⁶⁷

The following states have made the Article 96 reservation that presently applies: Argentina, Armenia, Belarus, Chile, Hungary, Paraguay, the Russian Federation and the Ukraine.¹⁶⁸ Another major trading nation of interest here is the People’s Republic of China (hereafter referred to as the China) that made a declaration similar to that of the Article 96 declaration however, the declaration made by China upon ratification of the CISG does not contain the precise wording of Article 96.¹⁶⁹ The declaration provides that, “The People’s Republic of China does not consider itself bound by sub paragraph (b) of paragraph 1 of article 1 and article 11 as well as the provisions in the Convention relating to the content of article 11”.¹⁷⁰

According to Logan the above-mentioned declaration forwarded by China creates some room for lack of conformity in the interpretation and application of Article 96 of the CISG.¹⁷¹ The reservation forwarded by China seems to require only that contracts of sale ‘be concluded in or evidenced by writing’, as opposed to requiring that every element of contract formation be evidenced in writing as in the case under Articles 12 and 96 of the CISG.¹⁷² Logan submits that the objective behind the

¹⁶⁵ Ibid.

¹⁶⁶ Ibid.

¹⁶⁷ Ibid.

¹⁶⁸ Op cit n 155.

¹⁶⁹ ‘CISG: Table of Contracting States’ available at <http://www.cisg.law.pace.edu/cisg/countries/cntries.html> , accessed on 5 January 2017.

¹⁷⁰ ‘United Nations Convention on Contracts for the International Sale of Goods’ available at http://www.wipo.int/wipolex/en/other_treaties/details_notes.jsp?treaty_id=292 , accessed on 18 September 2017.

¹⁷¹ T N Logan ‘The People’s Republic of China and the United Nations Convention on Contracts for the International Sale of Goods: Formation Questions’ (1988) 53 (74) *China Law Reporter* 63.

¹⁷² Ibid.

variation of the declaration made by China to Article 96 is aimed at narrowing the restrictions on formation of contract favoured by other socialist countries.¹⁷³

In terms of Article 96, a state may make this reservation at any time and is not restricted to doing so only at the time of its signature, ratification or accession of the Convention.¹⁷⁴

Illustrations as to how the provisions of Article 11 are applied and interpreted can be found in case law. In a legal action¹⁷⁵ brought before a Slovakian court by a seller with its place of business in the Czech Republic and a Slovakian buyer, the seller claimed its right to payment based on an oral contract concluded with the buyer, in terms of which the seller claimed that the buyer failed to carry out its contractual obligation to pay for goods delivered to it by the seller. Based on the evidence submitted, the court issued a resolution upon the purchaser, obliging the buyer to respond to the action brought against it within 15 days and to submit evidence proving its case in the event that it objected to the legal action, failing which default judgment may be granted against it. The purchaser failed to respond to the action within the prescribed time. The court found that the CISG was applicable to this contract in terms of Article 1(1) of the Convention as both parties had their place of business in contracting states. Under Article 30 of the Convention, the seller must deliver the goods, hand over any documents relating to them and transfer the property in the goods, as required by the contract and this Convention. Under Article 53 of the Convention, the buyer must pay the price for the goods and take delivery of them as required by the contract and this Convention. The court decided this case with reference to the above mentioned legal provisions and factual circumstances brought to its attention. The seller provided the court with proof of invoices issued to the buyer and the dates on which these invoices were issued as well as the bill of lading issued, evidencing the carriage and delivery of the goods. The court further held that in terms of Article 11, the Convention does not prescribe any formal conditions for the conclusion of a contract and its formation can be evidenced by any means including witnesses. The court found that the contractual relationship

¹⁷³ Ibid.

¹⁷⁴ Op cit n 155.

¹⁷⁵ Slovak Republic, 11 October 2010, District Court in Michalovce, Case no: 22Cb/152/2010 available at <http://cisgw3.law.pace.edu/cases/101011k1.html#cabc>, accessed on 5 January 2017.

between the parties was established by an implied agreement upon a purchase order and actual performance of the contract by delivering the goods as confirmed in the bill of lading, whereby it confirmed agreement on the basic elements of the contract – quality of goods and price – in an implied way. The court therefore found that the seller had fulfilled its obligation under the contract and delivered the goods to the buyer. The buyer did not perform its obligations, as it did not pay the price or prove any payment in the proceedings. Since the buyer did not respond to the resolution of the court which detailed the consequences of its silence, the court decided the case by default judgment. The court accepted the facts of the case as they were claimed by the seller since it considered them reliable and the seller submitted documents to the court that supported its claim the court therefore upheld the action in its entirety in favour of the seller.

In the *Agricultural Products case*,¹⁷⁶ application for an injunction was brought before the Tribunal of Padova by an Austrian seller against an Italian buyer for payment of goods, expenses and interest in respect of agricultural produce. The injunction was granted by the court. Thereafter an objection was filed by the buyer on two grounds, namely: first that the seller had failed to formally request for payment before applying for the injunction; and secondly, the buyer had on its part a claim against the seller which it intended to set off. The Tribunal submitted that in terms of the Convention the seller is not required to request payment in writing before applying to the court for relief. It was further noted that the parties to the contract had concluded their contract orally, and thus consistent with Article 11 of the CISG they need not request payment of such an oral contract in writing before approaching a court.

4.4. OPEN PRICE TERMS

Differing opinions were held by the various states that ratified the CISG with regard to open price terms. Open price terms attracted much objection from socialist states as parties from these states require evidence of adherence of their contracts to their

¹⁷⁶ Italy, 25 February 2004, District Court Padova (Agricultural Products Case), case no: 40552 available at <http://cisgw3.law.pace.edu/cases/040225i3.html>, accessed on 5 January 2017.

government's macroeconomic plans.¹⁷⁷ Developing nations also viewed open price term agreements with hostility due to their weaker bargaining position, stemming from fluctuating prices of raw materials commonly produced in these nations as compared to the constant accumulative costs of manufactured goods commonly produced in developed states.¹⁷⁸

In contrast, the United States of America and other developed countries adopt a more liberal viewpoint in support of open price terms and quantity as a means to allow price and quantity to be decided in accordance with the requirements of the purchaser and in consideration of the seller's output.¹⁷⁹

Due to the differing views among the various states involved in the CISG negotiations, compromises were attained in the form of Articles 14 and 55 of the Convention. These provisions stand in glaring contradiction to other.¹⁸⁰

According to Article 14(1) of the CISG a proposal is considered to be an offer only if it is adequately definite. An offer is adequately definite if it specifies the goods and expressly or impliedly states or makes provision for determining the quantity of the goods and the price thereof. However, in Article 55 the opposite is provided, namely, "where a contract has been validly concluded but does not expressly or implicitly fix or make provision for determining the price, the parties are considered, in the absence of any indication to the contrary, to have impliedly made reference to the price generally charged at the time of the conclusion of the contract for such goods sold under comparable circumstances in the trade concerned".

The application of Article 14 is illustrated in the *Malev case*.¹⁸¹

"The [seller], an American manufacturer of aircraft engines, further to extensive negotiations with the [buyer], a Hungarian manufacturer of Tupolev aircraft, made two alternative offers of different types of aircraft engines

¹⁷⁷ A A Tajudin 'Article 55 on Open-Price Contract: A Wider Interpretation Necessary?' (2014) 3(3) *Journal of Arts and Humanities (JAH)* 40.

¹⁷⁸ Ibid.

¹⁷⁹ Ibid.

¹⁸⁰ Ibid.

¹⁸¹ Hungary 25 September 1992 Supreme Court (*Pratt & Whitney v. Malev*) available at <http://cisgw3.law.pace.edu/cases/920925h1.html#tt>, accessed on 5 January 2017.

without quoting an exact price. The [buyer] chose the type of engine from the ones offered and placed an order. At issue was whether a valid contract was concluded. The court of first instance held that a valid contract had been concluded on the ground that the offer indicated the goods and made provision for determining the quantity and the price. The Supreme Court found that the offer and the acceptance were vague and, as such, ineffective since they failed to explicitly or implicitly fix or make provision for determining the price of the engines ordered (Article 14(1) CISG). The Supreme Court considered that the acceptance was a mere expression of the intentions of the [buyer] to conclude a contract for the purchase of the engines chosen and, as such, the acceptance could not operate as a counter-offer. The Supreme Court therefore overturned the decision of the first instance and held that there was no valid contract concluded.”

A possible application of Article 55 of the Convention can be seen in a contract involving a Swiss buyer and a Dutch seller in terms of which the seller would deliver raw materials to the buyer in order to manufacture certain goods.¹⁸² The agreement was terminated prior to the buyer fulfilling even 10 percent of the order and the raw materials delivered to it were returned to the seller, following which the seller sued the buyer for the purchase price of the entire shipment.¹⁸³ The court found in favour of the seller and ordered the buyer to pay the purchase price for the entire shipment. The court applied Article 55 of the CISG in determining the purchase price of the goods as it had not been fixed by the parties.¹⁸⁴ Gabuardi infers that the court’s application of Article 55 of the CISG possibly acknowledges that a contract may be validly concluded between parties despite the price not being fixed at the time the contract was being entered into.¹⁸⁵

¹⁸² C A Gabuardi ‘Open Price Terms in the CISG, the UCC and Mexican Commercial Law’ (2001) *Pace Law Institute of International Commercial Law*. Gabuardi referring to a Swiss Case: *Bezirksgericht St. Gallen, 3PZ97/18 of 3 July 1997*.

¹⁸³ *Ibid.*

¹⁸⁴ *Ibid.*

¹⁸⁵ *Ibid.*

4.5. THE NOTICE REQUIREMENT FOR NON-CONFORMING GOODS.

Provisions dealing with the regulation of non-conformity of goods were by far the most fiercely debated during the CISG negotiations.¹⁸⁶ Most disagreements relating to the aspect of non-conformity of goods arose from provisions dealing with the time period within which a buyer is required to examine the goods for non-conformities in the event of identifying non-conformities, the manner and timing of the buyer's duty and obligation to communicate such non-conformities to the seller and consequences of the buyer failing to give such notice.¹⁸⁷

Delegates from developing nations are often buyers of manufactured goods such as heavy machinery, and sellers of raw materials. They explained that it is often difficult, expensive and time consuming to identify defects with heavy machinery which often involves bringing in foreign experts to perform tests on complicated machinery that they have imported.¹⁸⁸ They also explained that many important tradesmen in these states are often illiterate in a modern sense and unfamiliar with the rules and practices of international sales. They were therefore not in favour of harsh penalties for inadequate or delayed notice of nonconformities to the seller. These delegates pushed for the penalties applicable for inadequate notice of non-conformity to be limited to a claim for compensation in the amount of the damages that the seller suffers due to the buyer's failure of providing timely notice.¹⁸⁹

On the contrary, delegates from developed nations were of the view that provisions that lessen the penalties applicable when a buyer fails to provide timely notice of non-conformity, afford very little security to the seller.¹⁹⁰ These delegates expressed concerns that permitting an extended time period for notification of non-conforming goods would affect the seller's ability to resell the goods, acquire proof and determine the legitimacy of the buyer's claim.¹⁹¹ These delegates therefore

¹⁸⁶ Garro op cit n 136 at 17.

¹⁸⁷ Ibid.

¹⁸⁸ Ibid.

¹⁸⁹ Vlejobueno op cit n 1 at 220.

¹⁹⁰ Ibid.

¹⁹¹ Ibid at 221.

emphasised the practice of timely notice of non-conformity of goods as they believed that it was necessary, quick and effective in the settlement of disputes.¹⁹²

The divergent views of developed and developing states therefore resulted in the creation of articles 38(1), 39(1) and 44 of the Convention.

According to Article 38(1) of the CISG, “a buyer must examine the goods, or cause them to be examined within as short a period as is practicable in the circumstances”.¹⁹³ Garro submits that the language of article 38(1) appears to recognise that the shortest applicable time in which a buyer from a remote town in a developing country has to examine complicated machinery for non-conformity, may differ from the shortest applicable time for an experienced importer in a developed country to examine other types of goods.¹⁹⁴

In the *Trekking Shoe case*,¹⁹⁵ a contract was concluded between an Italian seller and an Austrian buyer for the sale of trekking shoes. The shoes were delivered directly to a Scandinavian company in partial deliveries, pursuant to the buyer’s order. The buyer was also charged with partial invoices. The buyer alleged non-conformity of goods and failed to pay two invoices. Legal action was then commenced by the seller to recover payment, claiming that neither the buyer nor the Scandinavian consignee had given timely notice of non-conformity. The court of first instance granted judgment in favour of the buyer. The decision of the court of first instance was reversed by the Court of Appeal, which held that the examination period required in terms of Article 38 of the CISG, runs separately for each partial delivery that begins on the arrival of the goods by the third person at the place of delivery. An obligation is placed upon the buyer to examine the goods itself as the middleman, or to arrange for them to be examined by the third person. As to the duration of the period concerned with regards to giving notice of non-conformity in terms of Articles 38 and 39 of the Convention, the court held that a relatively short time needs to be adapted in accordance with the objective and subjective circumstances of the case. The respective period can depend on the size of the buyer’s company, characteristic

¹⁹² Ibid.

¹⁹³ Op cit n 25 at Article 38.

¹⁹⁴ Garro op cit n 136 at 17.

¹⁹⁵ *Trekking Shoe Case*, Austria, 27 August 1999, case no: 1 Ob 223/99x available at <http://www.unilex.info/case.cfm?pid=1&do=case&id=480&step=Abstract>, accessed on 5 January 2017.

features and quantity of the goods, the buyer's personal and business situation and efforts necessary for examination. In an event where no specific circumstances indicate otherwise, a period of about fourteen days is considered to be reasonable for examination. In this given case, the court held that the buyer had failed to give adequate notice to the seller in the given circumstances. Furthermore, in respect of the manner of examination, the court held that in the absence of specific agreement by the parties, trade usages and practises may be used to guide the manner of examination. The court also held that in a case where a large quantity of goods are purchased, the purchaser will have to call in experts to fulfil his obligation of examining the goods.

Pursuant to Article 39(1) of the CISG, in order for a buyer to be able to rely on the contractual remedies for non-conformity of goods, the buyer is required to give the seller adequate notice "specifying the nature of the lack of conformity within a reasonable time after he has discovered the defect with the goods, or ought to have discovered it".¹⁹⁶ Article 39(2) goes on to state that "In any event, the buyer loses the right to rely on a lack of conformity of the goods, if he does not give the seller notice thereof at the latest within a period of two years from the date on which the goods were actually handed over to the buyer, unless this time limit is inconsistent with a contractual period of guarantee."¹⁹⁷

Therefore, Articles 38 and 39(1) need to be read together with regards to the remedies available to a buyer for the non-conformity of goods purchased, because if a buyer fails to furnish timely notice of such nonconformity, then the remedies for breach of contract that are ordinarily available to the buyer under these circumstances, fall away.¹⁹⁸

The application of the provisions in Articles 38 and 39 are illustrated in cases such as *Fallini Stefano v Foodik*,¹⁹⁹ whereby a contract for the sale of cheese had been concluded between an Italian seller and a Dutch buyer. The seller delivered frozen

¹⁹⁶ Op cit n 25 at Article 39.

¹⁹⁷ Ibid.

¹⁹⁸ S Vlejobueno 'Progress through compromise: the 1980 United Nations Convention on Contracts for the International Sale of Goods' (1995) 28(200) *Comp. & Int'l LJ S. Afr* 220.

¹⁹⁹ Netherlands 19 December 1991, District court Roermond (*Fallini Stefano v Foodik*) available at <http://www.unilex.info/case.cfm?pid=1&do=case&id=34&step=Abstract>, on 5 January 2017.

cheese to the buyer. Thereafter, the buyer commenced legal action against the seller, alleging that the seller breached the contract by delivering cheese that contained maggots. The court held that in order for the buyer to have recourse to the remedies for breach of contract in respect of non-conformity of the goods, the buyer must have complied with the requirements of Articles 38 and 39 of the CISG, in terms of which the buyer must examine the goods as soon as practically and reasonably possible and furnish notice of non-conformity within a reasonable time. The court further held that the fact that the cheese had been delivered frozen, did not prevent the buyer from fulfilling its obligation of examining the goods timeously, as the buyer could have examined a small portion of the cheese in order to carry out its obligation under the CISG. The court held that an important factor to be considered when determining whether the buyer has furnished timely notice, is the nature of the goods, and in this case, timely notice was particularly of importance as the goods sold were perishable goods. The court found that the purchaser failed to fulfil its obligation of furnishing timely notice of the presence of maggots in the cheese. The court also held that according to the CISG, the buyer clearly bears the burden of proving that the goods were inspected within a reasonable period.

In the *Ham case*,²⁰⁰ a contract for the sale of ham was concluded between an Italian seller and German buyer. The buyer failed to pay the full price alleging non-conformity in respect of the ham not being sufficiently seasoned. The seller therefore proceeded with legal action, claiming payment for the balance of the purchase price from the buyer. The court held that the buyer had lost the right to rely on remedies for breach of contract in respect of non-conformity of the goods, as a result of its failure to give notice of non-conformity within a reasonable time and in accordance with Article 39 of the Convention. The court stated that as the buyer itself had admitted, the defect with the goods was easily identifiable. Therefore, taking a period of 20 days after delivery of the goods in order to examine the goods and furnish notice of non-conformity was not justifiable. Furthermore, the court held that even in the situation where it became difficult to examine the goods due to the Christmas holidays, the buyer should still have examined the goods no later than 3 days after delivery and should have furnished notice of non-conformity within 3 days thereafter.

²⁰⁰ Germany 21 October 1994 Lower Court Riedlingen (*Ham case*) available at <http://www.unilex.info/case.cfm?pid=1&do=case&id=116&step=Abstract>, accessed on 5 January 2017.

The court therefore awarded the seller the balance of the purchase price. The court further held that the seller was entitled to claim interest on the outstanding purchase price in terms of Article 78 of the Convention.

The compromises reached on the matter of the buyer's obligations in the case of a claim of nonconformity of the goods it purchased, are embodied in Articles 44 and 40 of the CISG.

According to Article 44, a buyer is allowed to subtract the value of the defect from the price of the goods, irrespective of its failure to provide timely notice, provided the buyer had "a reasonable excuse" for its lack of timely notice as required under Article 38(1).²⁰¹ Therefore, if a buyer has "a reasonable excuse" for failing to comply with the requirement of timely notice, the penalty for such failure is restricted to the value of the damages suffered by the seller due to the buyer's noncompliance with Articles 38 and 39 of the Convention.²⁰²

It is therefore pertinent for Article 39 to be read together with Article 38, which requires a purchaser to "examine the goods, or arrange for them to be examined within the shortest period of time that is practical in each given circumstance"; and Article 44 which permits a purchaser to reduce the cost of the goods, alternatively to claim damages if the purchaser "has a reasonable excuse for failure to give the necessary notice of non-conformity".²⁰³

In a Russian arbitral decision,²⁰⁴ a contract of sale of goods to be shipped overseas was entered into by a Russian seller and a USA buyer. Goods in terms of the contract were delivered in two instalments. When the first instalment of goods were inspected at the port of destination, some were found to be defective and were therefore sold to final customers at a substantially lower price. The buyer instituted legal action against the seller, claiming the difference in the purchase price paid by the final customers, as well as compensation for its lost profit. The buyer submitted that it suffered a loss of reputation due to the non-conformity of the first instalment of

²⁰¹ Garro op cit n 136 at 18.

²⁰² Ibid.

²⁰³ E H Patterson 'United Nations Convention on Contracts for the International Sale of Goods: Unification and the Tension Between Compromise and Domination' (1986) 22 *Stanford Journal of International Law* 284.

²⁰⁴ Russia 24 January 2000 Arbitration proceeding 54/1999 available at <http://www.unilex.info/case.cfm?pid=1&do=case&id=841&step=Abstract> accessed on 13 January 2018.

goods, which in turn made it challenging to secure buyers for the second instalment of goods. The Tribunal was satisfied with the agency hired by the buyer to inspect the goods and found that the inspection met the requirements set out in the contract of sale in accordance with Article 8 of the Convention. Furthermore, in considering the aspect of “reasonableness” as set out in Article 8 of the CISG, the Tribunal found that even though the contract had made provision for the buyer to inspect the goods at the port of shipment alternatively, at the port of loading, “the postponement of the inspection of the first instalment of goods till they arrival at the port of destination, was reasonable due to the technical difficulties incurred by the buyer.”²⁰⁵ Consequently, the Tribunal held that the buyer did indeed have a ‘reasonable excuse’, justifying its failure to notify the seller of the defective goods within the time-limit that had been agreed to in the contract of sale. The Tribunal also held that the buyer was entitled to a reduction of the price payable for the goods in accordance with Article 50.

This compromise, embodied in Article 44 of the Convention has been criticised by some scholars who are of the view that it does not provide clarity as to what exactly construes a “reasonable excuse” for failure to give a seller adequate notice of nonconformity of the goods.²⁰⁶ On the other hand, its proponents, view Article 44 as an important provision to avoid a total loss of the buyer’s remedies, which would be unfair in instances where the buyer examines the goods as soon as it could, but the period of time within which the examination takes place, does not strictly meet the standards of the “reasonableness test”; or when the buyer is prevented from examining the goods and notifying the seller of nonconformities sooner due to legal, procedural or commercial difficulties.²⁰⁷ Patterson submits that although this compromise can be correctly described as “unsettling,” it incorporates a fair arrangement of buyers’ and sellers’ competing interests with regard to complicated machinery and irrespective of the existence of any vagueness or ambiguity in the language of the provisions itself, the spirit of compromise represented by the language comes through via the notes on the legislative history of this provision,

²⁰⁵ Ibid.

²⁰⁶ P Schlechtriem ‘Recent Developments in International Sales Law’ (1983) 18 *Israel Law Review* 325.

²⁰⁷ Garro op cit n 136 at 19.

which can be looked to for further guidance on how to interpret and apply this provision.²⁰⁸

Another Article worthy of discussion with regards to non-conformity of goods is Article 40. Article 40 states that “The seller is not entitled to rely on the provisions of articles 38 and 39 if the lack of conformity relates to facts of which he knew or could not have been unaware of and which he did not disclose to the buyer.”

Hence, if the seller fails to disclose non-conformity that it is aware of to the buyer (or which it could not have been unaware of), then the buyer retains its rights against the seller even if it fails to act in accordance with Articles 38 and 39.²⁰⁹ In such an instances, the seller is prevented from relying on Article 38 and 39 of the CISG to escape or lessen its liability for delivering nonconforming goods. This compromise embodied in Article 40 seems to have been reached in an attempt to ease some of the concerns of delegates from developing nations.

A case that deals with Article 40 is the *Laminated Glass Case*²¹⁰. In this case before an Austrian Court, an Austrian seller and a German buyer concluded a contract of sale for laminated glass. The seller delivered the glass to the buyer’s affiliates where the glass was further customised to meet the requirements of customers. During the course of 1998, the process of hardening of resin involved in the lamination of glass, had changed. This information was conveyed by the seller to the buyer’s affiliates. Defects appeared on the glass however, the buyer’s affiliates failed to notify the seller of this within two years or furnish details thereof. The affiliates forwarded their claims to the buyer who then instituted a claim for damages against the seller. The court of first instance held that the damage to the glass was not due to the resin used by the seller but by the finishing process of the buyer’s affiliates and thus rejected the buyer’s claim. The Appellate Court held that any claim for damages is prohibited because no notice of non-conformity was furnished by the buyer to the seller within two years. The Supreme Court rejected the buyer’s claim and held that despite what the buyer had submitted, Article 40 which prohibits a seller from raising

²⁰⁸ Patterson op cit n 203 at 301.

²⁰⁹ Ibid.

²¹⁰ Austria 19 December 2007 Supreme Court (*Laminated glass case*) available at <http://www.unilex.info/case.cfm?pid=1&do=case&id=1302&step=Abstract>, accessed on 13 January 2018.

Articles 38 and 39, could not be invoked in the circumstances as a result of the buyer failing to provide enough evidence that the seller was aware or could not have been unaware of the lack of conformity.

In another case²¹¹ adjudicated on by a French court, a contract of sale for metal parts was entered into by a French buyer and an Italian seller in terms of which the goods were to be resold to the buyer's final customers. In terms of the contract the goods had to be delivered in four parts together with a certificate stating that the metal used was of the quality that was required by the buyer. On delivery of the third instalment of metal the seller failed to furnish the buyer with the required certificate. One of the buyer's final customers, another French company, learned of some defects in the goods and informed the seller. The buyer's final customer instituted action against the buyer, which in turn sued the Italian manufacturer. The Court of First Instance found in favour of the buyer and based its decision on an expert examination which confirmed that some goods were in fact defective. The seller appealed to the Court of Appeal claiming that inspection of the goods in accordance with Article 38 of the CISG had not been conducted by the final customer. The Court of Appeal held that in conformance with Article 40, the seller lost its right to invoke Articles 38 and 39. In coming to its decision, the court noted that because the Italian seller was not merely the seller but also the manufacturer of the metal parts, it could not have possibly been unaware of the defects in the goods because the defects in the goods were due to "an excessive quantity of carbon and a mixture of components during the pouring and casting process of the metal".²¹² According to the court, the Italian manufacturer and seller having full knowledge about the defects in the metal had intentionally failed to supply the buyer with the required certificate upon delivery of the third instalment of goods. In conclusion the Court of Appeal held in favour of the buyer as well as the buyer's final customer, hence acknowledging both their rights in respect of damages. Upon recourse to the Supreme Court by the seller, the lower court's decision was upheld. The Supreme Court rejected the seller's claim with respect to lack of inspection by the buyer's final customer on the

²¹¹ France 4 October 2005 Supreme Court (*Engine parts case*) available at <http://www.unilex.info/case.cfm?pid=1&do=case&id=1324&step=Abstract>, accessed on 13 January 2018.

²¹² *Ibid.*

basis that the link between the buyer and its final customer was a domestic one hence Article 38 of the CISG was not applicable.

4.6. THE FORCE MAJEURE PROVISION

Force majeure is a French term and it is defined as “an event that no human foresight could anticipate or which, if anticipated, is too strong to be controlled”.²¹³ Force majeure clauses are used in contracts for the purposes of allowing parties suspend or terminate its obligations in respect of a contract when circumstances that are beyond their control occur, thus making performance impossible.²¹⁴

Provisions dealing with force majeure were another greatly debated issue in the negotiations leading to the finalisation of the CISG.

During negotiations, most developing countries supported a wider interpretation of force majeure as an excuse for non-performance due to their weaker political and economic status.²¹⁵ On the other hand, developed countries supported a stricter interpretation of force majeure, thereby permitting non-performance only under a restricted number of conditions.²¹⁶

Under the CISG, one party may be liable to the other for damages if the respective party fails to satisfy its contractual duties. However Article 79 provides for instances when a non - performing party may escape liability for breach of contract. The requirements set out in this provision are threefold: firstly, the non-performance must be caused by an impediment that is beyond the non-performing party’s control; secondly, the party could not have been reasonably expected to have accounted for the impediment at the point of concluding the contract; and lastly, the party is unable to circumvent, or overcome the impediment or its consequences.

²¹³ Definition of Force majeure, available at <https://legal-dictionary.thefreedictionary.com/force+majeure>, accessed on 30 November 2017.

²¹⁴ Force Majeure, available at <https://www.contractstandards.com/public/clauses/force-majeure>, accessed on 6 December 2017.

²¹⁵ M Goldman ‘A Comparative Study of the UNIDROIT Principle of International Commercial Contracts and the United Nations Convention on the International Sale of Goods’, available at <http://www.kentlaw.edu/perrit/courses/.../mateo-goldman-Final%Draft.htm>, accessed on 18 July 2017.

²¹⁶ Ibid.

As a result of the divergent views of the many States that were part of the CISG negotiations, Article 79 was drafted as an attempt to reach a compromise among the various states involved.²¹⁷

Additionally, for a party to be eligible to benefit from the Article 79 exception, it is essential for the non-performing party to notify the other party within a reasonable period of the occurrence of “the impediment and its effect on his ability to perform”.²¹⁸ If the non-performance of a party is condoned, then it will not be held liable for damages. However, it is important to note that the right to avoid the agreement on account of a “fundamental breach” may still be retained in accordance with other provisions of the CISG; the other party may also retain supplementary rights such as the right to seek interest, reduce the purchase price and seek restitution, provided for within the Convention.²¹⁹

Once Article 79 is evoked, such excuse may only be relied upon “for the period during which the impediment exists”. What this means is that the Article 79 does not permit a permanent excuse if the impediment is merely temporary.²²⁰ As a result, the non-performing party’s duty to satisfy his contractual obligations may be re-established in the event that the other party had chosen not to avoid the agreement.

In the case of *Scafom International BV v. Lorraine Tubes S.A.S*²²¹, a Belgian Court directed that the “impediment” that is made reference to in Article 79(1) of the Convention may include changed circumstances that renders a party unable to perform its contractual obligations due to economic hardship. It further held that the changed circumstances rendering the party unable to perform its contractual obligations, need not have been reasonably foreseeable at the time the contract was concluded and that such performance consists of an extraordinary and disproportionate obligation under the circumstances.

²¹⁷ B Nagy ‘Unreliable Excuses: How do Differing Persuasive Interpretations of the CISG Article 79 Affect its Goal of Harmony’ (2013) 26 *New York International Law Review* 2.

²¹⁸ J M Bund ‘Force majeure Clauses: Drafting Advice for the CISG Practitioner’ (1998) 17 *Journal of Law and Commerce* 386.

²¹⁹ Ibid.

²²⁰ Ibid at 387.

²²¹ Belgium 19 June 2009 Court of Cassation [Supreme Court] (*Scafom International BV v. Lorraine Tubes S.A.S.*) available at <http://www.unilex.info/case.cfm?pid=1&do=case&id=1457&step=Abstract>, accessed on 30 November 2017.

In the *Tomato Concentrate Case* ²²², a French seller sent a fax in English to a German buyer presenting an offer that consisted of delivery of twenty truckloads of tomato concentrate. The buyer accepted the offer by fax. However, it later discovered that it only received one truck load. The buyer therefore chose to avoid the contract and notified the seller thereof. The seller sued the buyer for payment of the goods as well as additional arrears amounts owed to it. The buyer refused to pay the amounts claimed by the seller and claimed set-off with damages arising due to the seller's breach of contract. The court held that the seller was not exempt from liability for its failure to perform in terms of Article 79 of the Convention. The court noted that heavy rainfalls in France had certainly decreased tomato production and resulted in an increase in the price. However, it did not result in the perishing of all tomato crop. Accordingly, the court found that the seller's performance was still possible, and further that the decrease in crop and increase in the market price of tomatoes were impediments that the seller could have reasonably foreseen. The court awarded damages to the buyer in terms of Article 76(1) to the value of the difference between the contract price and the current price (higher price) of the goods at the time of avoidance of the contract.

In another case, a Chilean seller concluded a contract for the delivery of frozen raspberries with a Belgian buyer.²²³ The contract stated that the buyer must pay with a letter of credit. However, failure to acquire the required letter of credit resulted in the seller being unable to proceed with the shipment of the goods. The buyer asked the seller to hold off on the delivery of the goods and upon entering mediation proceedings with the seller to try and resolve the dispute, it the (buyer) attempted to negotiate a lower price for the goods, alleging a significant drop in the purchase price of the goods within the world markets. The seller, however refused to sell the goods at a reduced price, declared the contract avoided and proceeded to litigate against the buyer in order to recover damages.

The court held "that the significant drop in the market price of the purchased goods after the conclusion of the contract, did not constitute a case of force majeure,

²²² Germany 4 July 1997 Appellate Court Hamburg (*Tomato concentrate case*) available at <http://cisgw3.law.pace.edu/cases/970704g1.html>, accessed on 31 July 2017.

²²³ Belgium 2 May 1995 District Court Hasselt (*Vital Berry Marketing v. Dira-Frost*), available at <http://www.unilex.info/case.cfm?pid=1&do=case&id=263&step=Abstract>, accessed on 31 July 2017.

exempting the buyer for non-performance in terms of Article 79 CISG. Fluctuations in prices are foreseeable events in international trade and far from rendering the performance impossible, they result in an economic loss well included in the normal risk of commercial activities.”²²⁴ Therefore, the seller had a right to avoid the contract in addition to being awarded damages, which included the expenses suffered of having to store undelivered goods and lost profits.²²⁵

Bund submits that the phrase “impediment” was chosen by the drafters of the CISG, as a term to indicate an objective, outside force that hinders performance, thus excusing performance by invoking Article 79 where the impediment renders performance impossible or circumvents the essence of the contract.²²⁶ However, a study of case law dealing with Article 79, reveals that it is invoked frequently as an excuse for non-performance with little success.

²²⁴ Ibid.

²²⁵ Ibid.

²²⁶ Bund op cit n 218.

CHAPTER 5: SOUTH AFRICA AND THE UNITED NATIONS CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS (CISG).

5.1 INTRODUCTION

UNCITRAL records reveal that as of the year 2017, 88 states have ratified the CISG.²²⁷ However, South Africa has not yet ratified the Convention regardless of the fact that many of its principal trading partners are signatories of the CISG and despite calls from academics in favour of its ratification.²²⁸

South Africa's failure to ratify the Convention could be attributed to its exclusion from CISG negotiations due to the apartheid race policies that were effective in the country at the time.²²⁹

The United Nations actively promoted South Africa's exclusion from participation in international affairs, including the CISG negotiations, through international measures aimed at enforcing boycotts against the country and discouraging international trade relationships with the country.²³⁰ However, all of this has changed since 1994 with South Africa's adoption of a new democratic dispensation. South Africa is now a welcome and respected member of the international community.²³¹

Proponents of the CISG are of the opinion that if South Africa, which is regarded as one of the more economically stable countries within Southern Africa, were to ratify the CISG, its major African trading partners would be influenced to follow suit, resulting in greater unity, economic development and stability within the region.²³²

In addition to a critical analysis of the five most controversial aspects of the Convention undertaken in Chapter Four, in this chapter the writer will briefly consider factors that are both for and against South Africa's adoption of the CISG in an attempt to analyse the Country's current position of not ratifying the CISG as well as advantages and disadvantages of future ratification.

²²⁷ Op cit n 5.

²²⁸ K Lehmann 'The United Nations Convention on Contracts for the International Sale of Good: Should South Africa Accede?' (2006) 18 *South African Mercantile Law Journal* 317.

²²⁹ Eiselen op cit 12.

²³⁰ Ibid.

²³¹ Ibid.

²³² N B Ella 'The Vienna Sales Convention and Africa' (2010) 95(116) *The Asian Business Lawyer* 109.

5.2 FACTORS IN FAVOUR OF RATIFICATION

5.2.1 Simplification of laws and reduction of costs

The costs and complexities involved in the application of the rules of private international law in order to determine the law applicable to contractual disputes between importers and exporters, gave rise to the need to develop mechanisms to simplify such rules.²³³ The development of uniform laws such as the CISG, enables parties operating in member states to choose a single unified law to govern contractual disputes arising in cross-border sales without having to determine which of a myriad of unfamiliar laws would be applicable to their contract.²³⁴ This also reduces the costs incurred by traders having to seek expert advice on unfamiliar foreign laws that may be applicable.

Furthermore, the CISG was uniquely developed to address the needs of contracting parties on an international scale and it reflects the values, commercial practices and trade usages applicable to the diverse nations that were represented in the CISG negotiations.²³⁵

The drafters of the Convention sought to create a fairly simple set of rules to govern complex issues arising out of cross-border sales transactions.²³⁶ These Rules are also easily accessible to traders and are available in more than one language which is further supplemented by a collection of case law and academic commentaries published in online databases such as those developed by UNCITRAL and UNILEX.²³⁷

5.2.2 Unified interpretation and application

From the early stages of the development of the CISG, it was agreed that the success of the Convention would depend on the consistency of its interpretation and application by tribunals and courts in diverse nations. There were grave concerns that the different interpretational methodologies employed by courts and tribunals in different countries would lead to divergent interpretations of the CISG, thereby

²³³ Eiselen op cit n 12 at 14.

²³⁴ Ibid.

²³⁵ SMH Taufiqurrahman 'The significance of accession to the United Nations Convention on Contracts for the International Sale of Goods 1980 for Indonesia' (2012) 2(2) *Juridical Tribune* 67.

²³⁶ Eiselen op cit n 12 at 14.

²³⁷ Ibid at 21.

defeating its primary objective of creating uniformity in the laws applicable to cross-border sales transactions.²³⁸

There are, however, a growing number of reported cases, revealing the efforts of courts and tribunals to positively engage with the Convention and interpret and apply it in a manner that is consistent with decisions from other states.²³⁹ Despite a number of conflicting judgments, CISG supporters maintain that this remains the exception rather than the rule and that conflicting judgments are not uncommon in the realm of law and should not be a cause for concern, unless the divergences are so widespread that no pattern of consistency can emerge.²⁴⁰

The uniform interpretation and application of the Convention is further ensured through various tools that are available, both in the form of general interpretational principles provided for within the Convention, as well as several academic commentaries, court and arbitral tribunal decisions from different states that are available online in a number of languages, thus promoting decisions that are fair and in keeping with the general principles that the Convention is based on.²⁴¹

5.2.3 CISG could be applicable in many situations encountered in cross-border sales.

An important factor to consider in favour of ratification, is that even though South Africa is not a member state of the CISG, the Convention could nevertheless be applicable to cross border sales contracts involving South African importers and exporters through the provisions of Article 1(1)(b) of the CISG, read together with the provisions of Article 6, which provide that where the usual conflict of law rules point to the application of the law of a CISG member state, then the Convention would be applicable in that instance, unless its application is specifically excluded by the contracting parties.²⁴² For example, if a South African trader concludes a contract of sale with a trader from a CISG member state such as Australia, and the parties neglect to include a choice of law clause in the contract, should the rules of private international law point to Australian law as the applicable law in the case of a

²³⁸ Murray op cit n 11.

²³⁹ Eiselen op cit n 12 at 14.

²⁴⁰ Ibid.

²⁴¹ Ibid.

²⁴² Ibid.

contractual dispute between the parties, then the CISG would be applicable to that contract. South African traders must therefore familiarise themselves with the application of the CISG.

5.2.4 The CISG as an improved model law of sale

As the case with most domestic laws, the law of sale in South Africa has largely evolved to meet the needs and complexities of domestic sales, but has not necessarily developed to meet the needs and complexities involved in the cross-border sale of goods.²⁴³ The CISG on the other hand is of fairly new origin and has been specifically developed to deal with the regulation of international sales transactions, taking into account many factors, including international commercial practice and trade usages.²⁴⁴

Proponents of the CISG point out that the use of the Convention as a model law in the revision of sales laws in the Scandinavian countries, further supports its suitability as a sales law code that is up-to-date and equipped to deal with the complexities of modern international trade.²⁴⁵

5.2.5 Success of the CISG

88 states have currently ratified the CISG,²⁴⁶ including many of South Africa's trading partners and a number of very influential nations, thus indicating the global approval of the Convention as a well-suited code of law regulating the cross-border sale of goods. The increasing number of judgments involving the interpretation and application of the CISG further indicates the increasing use of the Convention in cross-border sales transactions. These judgments progressively create a body of law in support of the CISG, also providing guidance for its interpretation and application.

5.2.6 Recognition of party autonomy

Article 6 of the CISG deals with party autonomy, which is a significant principle echoed throughout the provisions of the CISG. It allows contracting parties to vary, modify or exclude most of the provisions of the CISG, or even the Convention in its entirety; thus allowing parties a great deal of contractual freedom. When dealing with

²⁴³ Ibid.

²⁴⁴ Ibid.

²⁴⁵ Ibid at 17.

²⁴⁶ Op cit n 5.

a conflict between the provisions of the Convention and terms of a contract, many reported CISG decisions reveal that courts and tribunals give effect to the terms of the contract over those of the Convention, thereby giving effect to this underlying principle of party autonomy.²⁴⁷ Despite the contractual freedom enjoyed by parties under the CISG, the Convention still plays an important role in filling the gaps where the contracting parties have failed to stipulate on any contractual terms that are regulated under the CISG.²⁴⁸

5.2.7 The role that South Africa plays in the region

Authors such as Eiselen, are of the opinion that South Africa's ratification of the CISG would influence other nations within the continent to follow suit, enabling cross-border sales within the continent to be regulated by a unified sales law, thereby promoting trade and economic advancement within Africa.²⁴⁹ A unified sales law will also allow African traders who are often inexperienced in international commercial transactions to be able to participate in international trade by reducing the complexities of the rules and high costs that are otherwise involved in cross-border sale transactions.²⁵⁰

5.3 FACTORS AGAINST RATIFICATION

5.3.1 Lack of involvement by developing states.

The Convention has been ratified by 88 states thus far. However, what this number fails to indicate is that well over half of CISG member states, include developed states.²⁵¹ Many developing nations such as India and South Africa are not signatories of the Convention, nor were they party to the negotiations behind the creation of the CISG. The lack of participation by developing states in the CISG negotiations may be attributed to their weaker bargaining power due to various economic, political and legal factors. Developing countries in Africa are of the view that it is unlikely that ratifying the Convention will lead to any significant

²⁴⁷ Eiselen op cit n 12 at 17.

²⁴⁸ Ibid.

²⁴⁹ Ella op cit n 233.

²⁵⁰ Ibid.

²⁵¹ Lehmann op cit n 229 at 320.

advancement of international trade within the continent.²⁵² One of the reasons for this underwhelming view of the Convention by developing nations is that many of these countries generally have limited resources with which to import goods as well as resources with which to produce goods for exporting.²⁵³ Lehmann submits that the CISG is not the trade creating tool that it was heralded to be, as it does not supply developing countries with the resources and ability to manufacture more goods for trading.²⁵⁴ Lehman further submits that trade barriers such as high tariffs and import quotas hinder the economic growth in developing nations rather than the lack of uniformity in trade laws.²⁵⁵

5.3.2 Foreign formulations

Some academics are wary of the divergencies and ambiguity in the interpretation and application of CISG provisions as a result of the many language versions that the Convention is available in.²⁵⁶ Other academics are of the opinion that the scope of the CISG is too wide resulting in inaccuracies and uncertainty in the application of the Convention.²⁵⁷ Some academics are also of the view that developing a single set of rules governing cross-border transactions will have the opposite effect of unification of laws and instead result in divergent interpretations and application of the rules in many different nations with vastly diverse interests.²⁵⁸

Those who do not routinely use the Convention may find it difficult to interpret and apply its provisions correctly due to their unfamiliarity with commonly used CISG terminology and phrases such as “avoidance” and “good faith”, thereby further impeding its goal of the unification of laws.²⁵⁹

5.3.3 Uniformity compromised by the “compromise” character of the CISG

The many compromises made in achieving the wide ratification of the Convention has been a topic of great debate and probably always will be. Many academics are of the view that the compromises made during the negotiation phase of the CISG,

²⁵² Ibid at 321.

²⁵³ Ibid.

²⁵⁴ Ibid.

²⁵⁵ Ibid.

²⁵⁶ Ella op cit n 233 at 105.

²⁵⁷ Ibid.

²⁵⁸ Ibid.

²⁵⁹ Ibid.

forced drafters of the Convention to place significance on developing rules that were well received instead of dealing with substantive differences dividing different nations and legal systems thereby appearing to have achieved unification as opposed to achieving true unification.²⁶⁰ It is submitted that these concerns are well founded considering the CISG provisions discussed in chapter 4 of this study that are at risk of divergent interpretation by nations with different legal, economic and political interests.

5.3.4 Stagnant and unchangeable character

A significant challenge with international treaties is that they are likely to remain unchanged and will not progressively develop to meet the changing needs of modern commerce.²⁶¹ The CISG in itself does not contain any provisions dealing with future amendments or updating of the Convention.²⁶² The development and modernisation of such conventions is a near impossible task because despite UNCITRAL's attempts to facilitate discussions on such matters, getting member states to actually agree on amendments or additions to CISG provisions would be a formidable task.²⁶³ Convincing countries to modernise their domestic laws to reflect the provisions and principles contained in model laws such as the CISG is another formidable task and any such attempts by states are carried out with extreme caution.²⁶⁴ Due to this unchangeable character of the Convention, it is argued that the law becomes stagnant and as a result unable to deal with new challenges and issues.²⁶⁵

5.4. CONCLUSION

It is fair to say that a considerable number of disadvantages of ratifying the Convention have been identified in this chapter. However, one should not fail to consider the significant advantages of convenience, reduction of costs, simplification of laws, ease of access and international suitability of a model sales code such as the CISG.

²⁶⁰ Eiselen op cit n 12 at 27.

²⁶¹ Ibid at 29.

²⁶² Ibid.

²⁶³ Ibid.

²⁶⁴ Ibid.

²⁶⁵ Ibid.

CHAPTER 6: CONCLUSION & RECOMMENDATIONS

6.1 Conclusion & recommendations

It is clear from the discussions undertaken in this study that the United Nations Convention on Contracts for the International Sale of Goods (CISG) has not achieved complete uniformity in the international trade law sphere. The divergences in the interpretation and application of the CISG stem from the different interpretational methodologies used in diverse states around the world, especially in the interpretation and application of the five aspects of the CISG discussed in Chapter Four of this study.

Furthermore, the advantages and disadvantages outlined in Chapter Five of this study, reveal a considerable number of drawbacks of the CISG. However, it should be noted that when creating an international body of law of such as the CISG, a certain extent of divergences and shortcomings are expected.

Due to a number of competing interests that were at stake, compromises had to be made in order to balance the different interests of the diverse nations represented at the CISG negotiations. The fact that some 88 states have ratified the CISG suggests that a degree of uniformity is possible in the regulation of laws governing the cross-border sale of goods. The increasing number of CISG cases further serves as evidence of the ability of courts to rise above their own domestic traditions in an attempt to pursue the development of the Convention.

South African courts, lawyers and traders should be mindful of the fact that the CISG could be applicable to contracts involving South African parties through the application of Article 1(1)(b) of the CISG regardless of the fact that South Africa is not a member state of the CISG.

A possible explanation of South Africa's reluctance to ratify the CISG may be attributed to the ignorance and fear of the unfamiliar. Lack of familiarity with the Convention may also influence lawyers to avoid the application of the CISG in cross-border sales transactions for fear of encountering unfamiliar risks and rather seek the refuge of familiar domestic laws.

South African practitioners should attempt not to be overly critical of the unfamiliar and view the CISG as an international Convention that embodies the willingness of nations around the globe to achieve uniformity to a great extent in the realm of cross-border sales transactions.

It is recommended that the only way to avoid the neglect and ignorance of the Convention in South Africa would be through introducing it in the curricula of legal and business studies at a basic tertiary level. Thus, arming future lawyers and traders with the knowledge required to approach the Convention with confidence and not fear. This will accordingly result in courts applying and interpreting the CISG with greater certainty, thereby giving rise to more legal commentary and case law which will develop the CISG.

A key advantage of the CISG is the free availability of the Convention in various languages, in addition to several legal commentaries and over a 1000 decided cases published free of charge on the various online CISG databases. Applying such an internationally recognised and tested model sales law code, dispenses with the need to seek foreign legal expertise at high costs, arising from the application of complicated conflict of law rules.

Ignorance of the Convention is no longer justifiable considering the wealth of CISG material freely available. South African courts, Lawyers and traders should acquire the necessary skills required to make use of such a valuable body of law, thus enabling the country to improve its competitiveness within the international trading community.

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